

Cyberbullying Issues for School Insurers

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The following is educational guidance, not legal guidance. More extensive professional development materials are available at <http://csriu.org>. This includes a 2 hour video presentation entitled Cyberbullying, Cyberthreats & Sexting for school personnel. These materials also include an extensive handout, and two one-page charts of recommended actions to investigate and respond to these situations.

Foundational issues

- ◆ It is not possible to isolate on-campus and off-campus hurtful interactions.
 - Students are posting hurtful materials on non-school sites while off campus. But they can also post to these sites using personal digital devices while on campus or by bypassing the district's filter.
 - They are sending hurtful communications via cell phone texting while on campus. But students are not reporting this because they could get into trouble for using a cell phone on campus. These electronic altercations can lead to real violence.
 - The electronic communications are almost always tied to hurtful in-person interactions while on campus.
 - It will likely not be possible to resolve the harmful situation on campus without also getting the hurtful material that is being sent or posted electronically also under control.
- ◆ It can sometimes be difficult to distinguish between aggressor and target.
 - These situations often involve hurtful acts followed by retaliation.
 - The student who posted hurtful material online while off-campus could be the student who is being tormented by others at school.
 - This also includes staff abuse - students who are being abused by staff are retaliating online. Sometimes they are posting videos that record the abuse.
- ◆ The question of legal authority is often tied to a determination of whether the student can be suspended.
 - Suspensions are often ineffective in resolving interpersonal altercations.
 - They can be even less effective in responding to electronic aggression - because this just leaves the aggressor with lots of unsupervised time to pursue anonymous online retaliation.
 - A whole school approach to creating a positive environment combined with a restorative justice approach to resolving these altercations will be more effective.
- ◆ Many surveys report that students are not reporting these incidents to school personnel or parents.
 - The failure to report presents school safety concerns because this can lead the students to engage in violence at school. Frequently, the student who engages in violence at school is the one who has been targeted online.
 - Also, failure to report and resolve the situation can lead to school failure, avoidance, and even suicide.
 - The reasons students do not report include that they fear overreaction and loss of access, they do not think school officials can respond effectively, and reporting to an adult can often lead to loss of face and retaliation - thus making the problem worse.
 - It is imperative that we focus on improving the effectiveness of the school response, so that students will trust that adults can help. Ongoing district-wide evaluation of the school responses to bullying and cyberbullying should be conducted.

Off-Campus Student Speech Targeting Another Student

- ◆ Substantial case law that school officials can respond to off-campus student speech that has caused, or there are particularized reasons to believe could cause, a substantial disruption on campus or interference with the rights of students to be secure.
 - There is sufficient case law interpreting this standard to know that actual or potential disruption of school activities or violence meets this standard. Meeting this standard will depend on the facts.
 - There is insufficient case law interpreting “interference with students.”
 - But there is one leading case: “The primary function of a public school is to educate its students; conduct that substantially interferes with the mission is, almost by definition, disruptive to the school environment. *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 213 (3d. Cir. 2001). (Written by Judge Alito, now on the Supreme Court - approving policy language that prohibited: “speech that substantially interferes with a student’s educational performance.”)
 - Under *Saxe*, it appears that the significant interference must be grounded in the subjective opinion of the student targeted, as well as an objective third-party perspective.
 - However, a recent decision in a district court in California, *J.C. v. Beverly Hills Unified School District* (CV 08-03824 SVW), the only case that addresses student-on-student off-campus online speech, held that the disruption must be of school activities. But it appears that the court was briefed on the cases related to online speech targeting staff - which would have to have a disruption of school activities - but was not briefed on the *Saxe* language. If this analysis is correct this calls into question all bullying prevention statutes and policies.
 - In sum, there is reason to believe that school officials can officially respond to student off-campus speech if that speech has caused, or there are particularized reasons to predict it will cause, a substantial disruption at school.
 - Which includes substantial disruption of school activities or operations, violence, or significant interference with the right of a student to receive an education and participate in school activities.

Off-Campus Student Speech Targeting Staff

- ◆ It appears that the only time a school can formally respond to speech that targets school staff is if the speech has caused a substantial disruption of school activities. This will be decided based on an assessment of the facts.
 - Sometimes, if there has not been a substantial disruption of school activities, there may be an ability for the staff member to pursue civil damages against the student and his or her parents.

Due Process

- ◆ The Court in *JC* also held that the discipline of a student for off-campus violated due process. The lack of due process was the lack of notice in either the district policy or state statute that students can be disciplined for off-campus speech.
 - No other court has discussed this issue, but as the argument was successfully raised in this case, it can be anticipated it will be raised in other cases.
 - The recommended remedy for this is a clearly stated district policy stating the above standard.
 - Such a policy may also provide some deterrence.

Probable Requirements to Formally Respond to Off-Campus Student Speech

- ◆ Notice.
 - While this requirement may not be required by all courts, it is prudent for districts to ensure that their disciplinary policy provides clear notice to students that the school can discipline students for off-campus speech that causes or threatens a substantial disruption at school or interference with rights of students to be secure.
- ◆ School “nexus.”
 - A nexus between the off-campus online speech and the school community. Speech involves students or staff or is in some other manner connected to the school community.
- ◆ Impact at school.
 - The impact has, or it is reasonably foreseeable it will be, at school. “School” includes school-sponsored field trips, extracurricular activities, sporting events, and transit to and from school or such activities.
- ◆ Impact has occurred or is reasonably foreseeable.
 - School officials must be able to point to a specific and particularized reason why they anticipate a substantial disruption or interference ~ not mere apprehension of the possibility of a disruption. Timing is an issue. Formal response is for the purpose of preventing an imminent foreseeable substantial disruption or interference ~ not after the fact because a disruption could possibly have occurred, but did not.
- ◆ Material and substantial impact.
 - The impact has, or it is reasonably foreseeable it will be, significant. Not anger or annoyance. Not disapproval of the expression of a controversial opinion. Not simply a situation that requires a school official to investigate.
- ◆ Disruption of school or interference with rights of students.
 - The speech has caused, or it is reasonably foreseeable it will, cause. Significant interference with instructional activities, school activities, or school operations. Physical or verbal violent altercations. A hostile environment or substantial interference with a student’s ability to participate in educational programs or school activities.
- ◆ Interference with Student’s Education.
 - Assess interference with student’s education based on the target’s subjective response and a reasonable observer perspective.
- ◆ Causal relationship.
 - The speech has, or it is reasonably foreseeable it will, be the actual cause of the disruption. Not some other factor, such as administrator action.

Complicating Factor

- ◆ In some states, legislation has passed to address cyberbullying - or to add cyberbullying to the bullying prevention statute. An example is the language in Oregon: “Harassment, intimidation or bullying” means any act that substantially interferes with a student’s educational benefits, opportunities or performance, that takes place on or immediately adjacent to district grounds, at any district-sponsored activity, on district-provided transportation or at any official district bus stop, that may be based on, but not limited to, the protected class status of a person, having the effect of: Physically harming a student or damaging a student’s property; Knowingly placing a student in reasonable fear of physical harm to the student or damage to the student’s property; Creating a hostile educational environment including interfering with the psychological well being of the student.
 - The problem is that this appears to create a statutory limitation that would prevent school officials from responding to cyberbullying that occurs off-campus. This also impacts the issue of due process/notice.

- ◆ These kinds of statutory provisions present significant barriers to resolving the problems and could lead to school violence, school failure, and school liability.
 - These provisions are different from what the case law is establishing - that school officials do have the authority to respond if there is a substantial disruption at school. If school administrators do what they think is necessary to resolve a problem that is preventing a student from coming to school or could possibly lead to violence and a civil rights organization disagrees, this is likely to lead to litigation where the civil rights organization will claim that the state statute prevents school officials from taking any action in response to off-campus speech.
 - If students do not feel there are any options available to them to resolve these problems and to make sure the hurtful materials are taken down they may take matters into their own hands and engage in a violent act at school against the aggressor. There have been two school-place murders reported internationally, where the targets of the cyberbullying killed the aggressors.
 - Alternatively, the target could not feel safe coming to school and thus be denied the right to receive an education.
 - Additionally, if school officials take the perspective that the hurtful material is on an off-campus web site that is blocked by the filter, and fails to fully investigate, this could result in a failure to detect that material is being posted while the aggressor is at school either using a personal digital device or bypassing the district filter or that the off-campus harm is combining with on-campus negative interactions that have created a hostile environment. The failure to fully investigate and respond based on the misperception that this is “off-campus, not my job” could be considered “deliberate indifference” and lead to liability.

Responses to Reduce Potential of Liability

- ◆ Restorative justice approaches are safer.
 - Frequently the trigger for litigation is a significant suspension. Restorative justice approaches tend to try to avoid this response.
 - Not only does a restorative justice resolution approach hold greater promise for resolution of the underlying problem, it may help to prevent litigation.
 - Make sure that the issues that the aggressor is dealing with are also addressed. Many times, the aggressor is also facing challenges at school.
 - Enlist the positive involvement of the parents of the aggressor by focusing on how the behavior demonstrated by their child will, if continued, lead to their child’s failure. Focus on a consequence that will remedy the harm and enlist parent support.
- ◆ To prevent or prepare for the potential of litigation, the principal should:
 - Retain documentation of all harmful speech. Use this document to demonstrate concerns to the parent of the aggressor.
 - Interview participants and witnesses and thoroughly document all related on-campus altercations, however minor (mean-mugging) - watching out for the potential that the online speech is in retaliation.
 - Document the harmful impact on the student targeted - statement of student, parents, teachers about impact on class participation, attendance, grades, etc.

Hostile Environment

- ◆ School officials clearly have the responsibility to respond if a hostile environment has been created for a student on-campus if they know of the concern and have the ability to respond.
 - School officials likely have the responsibility to respond to off-campus online speech that has created a hostile environment at school for a protected student, if they know of the concern. While a school official may not be able to control what a student posts online, that

official certainly has the right to control whether or not a student who is known to be intentionally harming another student is allowed to sit in the same classroom with the student being harmed.

- School officials definitely have a responsibility to respond if there are any associated on-campus harmful interactions, which most frequently there are.
- Failure to investigate and intervene because of the misperception that this is “off-campus, not my job” could constitute “deliberate indifference” and lead to liability.

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