Student Discipline for Off-Campus Internet Postings May be Unconstitutional

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The recent action by the New Jersey Legislature to regulate off-campus student internet behavior by school officials is problematic and may in fact be unconstitutional. Although the New Jersey Legislature was well-intended when it passed P.L. 2010 Chapter 122, known as the law on Harassment, Intimidation, and Bullying, the unintended consequences of regulating student behaviors off-campus inadvertently has placed school officials in harm’s way. There is much reason to believe that when the judiciary hears cases relating to the disciplining of students for off-campus behaviors many school districts in New Jersey and possibly nationwide will be admonished for treading on the constitutional free speech rights of young citizens.

There is established case law now that clearly indicates the New Jersey Law on Harassment, Intimidation, and Bullying (H.I.B) reaches too far into the private lives of students. The background on this legislation has a foundation in the New Jersey Supreme Court’s decision in L.W. v. Toms River Regional School District, 189 N.J. 381 (2007). This particular case provides a broad legal basis for holding school districts liable for student-on-student harassment, when such instances are linked to protected classifications such as sexual or affectional orientation, race, ethnicity, gender or disability. Citing the New Jersey Law Against Discrimination school districts are liable when the district knew or should have known of the harassment and failed to take actions reasonably calculated to end the mistreatment and offensive conduct.

The decision in L.W. v. Toms River coupled with the New Jersey Law on H.I.B. sends a signal to school officials that when student misconduct is motivated by bias schools must act to enforce student discipline and may not be deliberately indifferent to violations of H.I.B. New Jersey defines H.I.B. as “any gesture or written, verbal or physical act, or any electronic communication, reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity or expression, or a mental, physical or sensory handicap, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, or on a school bus.” N.J.S.A. 18A:37-14. Case law in New Jersey suggests that school officials have a duty to address conduct away from school grounds under certain conditions and in certain instances, and the New Jersey H.I.B. Law implies that student activities on the internet off school grounds are subject to school oversight.
The standard for when a school district must address conduct away from school grounds is grounded in N.J.A.C. 6A:16-7.6 suggesting that school officials may impose discipline for conduct away from school grounds when “it is reasonably necessary for the student’s physical or emotional safety, security, and well-being, or for reasons relating to the safety, security and well-being of other students, staff or school grounds” when the conduct in question “materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.” The reference to “material and substantial disruption” is linked to a landmark Supreme Court decision in Tinker v. Des Moines Independent School, 393 U.S. 503, 509 (1969). This is an exceptionally high standard that must not be ignored by school officials when considering the application of off-campus student internet behaviors to school discipline.

The New Jersey case guiding the free speech rights of students engaged in cyber-speech, Dwyer v. Oceanport School District, et al. Civ. 03-6005 (SRC), U.S. Dist. N.J. Mar. 31, 2005 (Media Law), defined certain parameters for school enforcement of cyber behavior. Ryan Dwyer, a 14-year old 8th grade student at the Maple Place School in the Oceanport School District created a website from his home on his computer titled “I Hate Maple Place.” The website was posted on the internet and was dedicated to “showing students why their school isn’t what it is cracked up to be.” The courts in Dwyer v. Oceanport S. D. examined the school district’s disciplinary response that resulted in a five-day suspension, elimination from a school activity for one month, and exclusion from the eighth grade class trip for Ryan Dwyer.

The findings that the New Jersey court addressed in Dwyer are compelling as they relate to off-campus student behaviors. First, the court found that the school district violated the First Amendment Rights of Ryan Dwyer in expressing his opinion on the internet. In the opinion of the court the school district failed to demonstrate a “specific and significant fear of disruption, and not just some remote apprehension of disturbance,” citing Dwyer v. Oceanport S. D. (2005). Second, the website did not “materially and substantially” disrupt the school citing Tinker v. Des Moines Independent School (1969). Third, the student who created the website could not be held accountable for postings by others who appeared as guests on the website, citing Section (c) (1) of the Communications Decency Act, 47 U.S.C. 230. The applicable interpretation of the Communications Decency Act states that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of information provided by another information provider.”

These findings in Dwyer v. Oceanport S. D. (2005) by the judiciary appear to contradict the intentions of the New Jersey Law on Harassment, Intimidation, and Bullying. A careful examination by extension of another key New Jersey court action further emphasizes the limits of school officials to discipline students for off-campus behaviors. This time the behaviors were not linked to the internet but the court’s findings provide guidance on the limits of school officials for disciplinary actions relating to off-campus student actions.
The complaint, *G.D.M. and T.A.M. on behalf of B.M.M. v. Ramapo Indian Hills Regional Board of Education*, was filed by parents of a high school senior who was disciplined for off-campus behaviors not related to school. Under the Ramapo Indian Hills Regional School Board’s Policy, students would lose the privilege of participating in such school activities for using alcohol and drugs off-campus after school, and for any “violation of the New Jersey Code of Criminal Justice, and/or applicable municipal codes or ordinances.” Under state administrative regulations, a district may only regulate off-campus conduct that is unrelated to a school event if necessary for the safety, security and well-being of students, staff or school grounds, and if the conduct substantially interferes with the requirements of appropriate discipline in the operation of the school.

The acting New Jersey commissioner’s ruling in 2010 on *B.M.M. v. Ramapo Indian Hills* favored the student over the policy of the school district citing that policies of School Boards may be invalidated when they contain blanket language that seek to regulate conduct that is not in some way linked to the safety or discipline in the school environment. The acting commissioner Rochelle Hendricks, emphasized the distinction between the broad authority of the school district to impose discipline for conduct that occurs in school or at a school event, and the more restricted authority to control conduct that is completely off school grounds, which requires some nexus between the conduct in question and the school environment. Hendricks determined that the Ramapo Indian Hills policy encompassed too many potential conduct violations such as charges for violating any law, municipal code or ordinance. Thus the authority of school districts to regulate and control student behaviors off-campus appears to be limited if not curtailed in the state of New Jersey.

The United States Supreme Court’s *Tinker* decision established the bedrock principal that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”. Under *Tinker* the court further stated, “The prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.” By applying *Tinker* to off-campus behaviors a reasonable conclusion could be made that students’ First Amendment expression rights coexist and are consistent with the whole of the rest of American society. Therefore, it is likely that school officials have no actual legal basis for intruding upon the off-campus actions of students who publish their opinions on the internet.

Is it not ironic that the New Jersey Department of Education ruled in *B.M.M. v Ramapo Indian Hills* that school officials may not discipline students for violations of law, municipal code, or ordinance, yet under New Jersey H.I.B. are compelled to police the internet for student postings and then discipline them for constitutionally protected opinions? Consider the perspective that for a decade the U.S. Circuit Courts have upheld the rights of students for off-campus internet postings over the particular interests of schools nationwide.
Thus it appears likely that the recent New Jersey Law on H.I.B. is on a collision course with the judiciary on this sensitive matter. Unless there is a compelling reason to assume that a “material and substantial disruption” to the school environment is the likely outcome of an internet posting school officials must use extreme caution when proceeding with internet cases involving H.I.B. Until the United States Supreme Court takes up this matter in the future, school officials in New Jersey and elsewhere are entering unchartered and uncertain territory when disciplining students for off-campus behaviors in cyberspace.