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**STUDENT SPEECH AND ELECTRONIC COMMUNICATION:  
CYBER BULLYING AND SCHOOL POLICY****Overview**

The rapid growth and development of electronic communication, plus a near total reliance of today's youth on social media and networking (cyber speech), is rapidly outpacing existing law and policy covering student First Amendment speech and expression. Some experts argue that in this new world of "internet speech," the relevance and general applicability of such "old chestnuts" as Tinker (1969), Fraser (1986), and Hazelwood (1988) may already have been greatly lessened. They argue that while the standards set in place by the United States Supreme Court in these landmark decisions (especially Tinker) are still applied their case hardened application may be waning. Thus, as my colleague Professor Bill Boshier and I have concluded, "...it behooves contemporary public school boards and administrators (with the assistance of legal counsel) to stay current with emerging court decisions as new standards of judicial analysis are created to deal with technology-related first amendment issues." (Vacca and Boshier, 2012)

**Cyber Bullying**

Ironically, while student-on-student peer bullying is not something new it still is not easy to define. For example, how is bullying different from mere childish, immature, inappropriate behavior—especially when bullying can take a variety of forms (e.g., physical contact; verbal threats; gestures and stares; pictures)? One thing is very clear however. Because bullying (persistent, severe, abusive, malicious, painful acts) in any form at any level of school has a devastating impact (academically, socially, emotionally) on the targeted student victim, immediate disciplinary action must be taken against the bully and a formal plan must be implemented to eliminate such behavior in the future.

*Cyber Bullying.* In the current era of electronically enabled social networking, while several positive aspects can be cited, *cyber bullying* has surfaced as a major and disconcerting source of day-to-day disciplinary issues facing local school boards and school administrators. This is especially true where the electronic communication and subsequent webpage postings were created off-school grounds using privately owned electronic devices, but subsequently were made available to a large audience of fellow students enrolled in the

same school as is the “targeted” victim.

As one source defines the term, “[c]yber bullying is the use of technology to harass, threaten, embarrass, or target another person.” (Kids Health from Nemours, 2013) And, as the National Crime Prevention Council tells us, “Cyber bullying is similar to other types of bullying, except it takes place online through text messages sent to cell phones. Cyber bullies can be classmates, online acquaintances, and even anonymous users, most often they do know their victims.” (2013)

Recently, I came across a decision from the United States Court of Appeals for the Fourth Circuit where *cyber bullying* is the issue producer. A West Virginia case, Kowalski v. Berkeley County Schools (4th Cir. 2012) illustrates the judicial analysis currently applied as courts grapple with this rapidly growing and changing body of First Amendment law.

### **Kowalski v. Berkeley County Schools (4th Cir. 2012)**

*Facts:* Decided on July 27, 2011, Kowalski v. Berkeley County Schools (4th Cir. 2012) involves a 12th grade female student (Kowalski) enrolled in a West Virginia public high school (Musselman High School). She was suspended from school for creating and posting (on her home computer) to a MySpace webpage. The situation that spawned the controversy began when (Kowalski) logged onto MySpace and created a webpage with the heading “S.A.S.H.” She said later it was an acronym for “Students against Sluts Herpes.” The webpage stated “No Herpes, We don’t want no herpes.” She also claimed that the purpose of posting the webpage was to make other students aware of sexually transmitted diseases—a “hot topic” at her high school. She then invited approximately 100 students (*i.e.*, on her MySpace “friends” list) to respond. Approximately two dozen students did respond and join the page.

Several postings and comments by other students showed that the webpage was largely dedicated to ridiculing another female student (Shay). For example, a male student (R.P.) posted a comment stating that S.A.S.H. actually stood for “Students against Shay’s Herpes.” He also posted a doctored photograph of himself and a friend holding their noses while displaying a sign that read “Shay has Herpes.” It was later shown that Kowalski responded that she thought the posting was “so funny.” Shortly thereafter Kowalski posted another response to the photograph stating that it was “the best picture [I]’ve seen on Myspace so far!!” Subsequently, another edited photograph of Shay was posted by the same male student (R.P.). One caption read “portrait of a whore.” This was followed by comments made by other students. Several of the comments focused on Shay.

A few hours after the photographs and comments had been posted to the MySpace.com page, Shay’s angry father called the male student (R.P.) who had posted them. The male student then called Kowalski and she unsuccessfully attempted to delete the “S.A.S.H” group and remove the photographs. She also renamed the group “Students Against Angry People.”

The next morning Shay and her parents went to the high school and filed a harassment complaint with a vice principal. They provided the vice principal with a printout of the S.A.S.H. webpage. Shay and her parents then left the high school. Shay did not want to return to classes that day. She said that she felt uncomfortable about sitting in classes with students who had posted comments on the webpage.

*School System Disciplinary Action.* Following receipt of the complaint the high school principal contacted the central office to determine whether the issue was one that should be addressed with school disciplinary action. Hearing back that it was, and following school system policy, the principal launched an investigation—which

included student interviews. In an interview with the male student (R.P.) who had posted the photographs he admitted that he did. However, in an interview with Kowalski, while she admitted creating the S.A.S.H group, she denied posting any photographs or disparaging comments.

Ultimately, school administrators concluded that Kowalski had created a “hate website” in violation of school system policy against “harassment, bullying, and intimidation.” She was suspended from school for 10-days and also issued a 90-day “social suspension.” In addition she was not allowed to participate in cheerleading for the rest of the school year.

While her out-of-school suspension was later reduced to 5-days, the social suspension remained in tact. Kowalski alleged that because of the disciplinary action she “became socially isolated from her peers, and received cold treatment from teachers and administrators...and, that she became depressed and began taking prescription medication for her depression.”

At the beginning of each school year, including her senior year, Kowalski had received a Student Handbook which included a policy against harassment, bullying, and intimidation—covering, among other things, any form of sexual harassment, bullying, and intimidation...in a building or other property owned or operated by the school board.” The school system policy defined harassment, bullying, and/or intimidation as “any intended gesture, or any intentional written, verbal, or physical act.” The policy covered acts the effect of which causes harm to students or staff; are sufficiently inappropriate, severe, persistent, or pervasive; and are threatening, or abusive.

The code of conduct also provided that all students “shall behave in a safe manner that promotes a school environment that is nurturing, orderly, safe, and conducive to learning and personal development...” and be committed to “help create an atmosphere free from bullying, intimidation and harassment...and demonstrate compassion and caring.”

*United States District Court Action.* Kowalski filed suit under 42 U.S.C 1983 in the United States District Court (Northern District of West Virginia, at Martinsburg) where she alleged violations of First Amendment speech; Fourteenth Amendment due process; cruel and unusual punishment under the Eighth Amendment; and equal protection under the Fourteenth Amendment. She also alleged violations of the West Virginia Constitution and filed a state law claim for intentional infliction of emotional distress. In addition to damages she sought a declaratory judgment that the school system’s policy was unconstitutionally overbroad, and an injunction requiring the school to expunge any record of discipline.

*District Court Decision.* The court granted summary judgment to the defendants. In the court’s view, school officials were authorized to punish Kowalski because her webpage was created for the purpose of inviting others to indulge in “hateful and disruptive conduct” which in turn caused “in-school disruption.” The court also dismissed her cruel and unusual punishment claim and her motion for reconsideration. Subsequently she appealed the court’s rulings on free speech and due process under the United States Constitution and her state law claim of intentional and negligent infliction of emotional distress to the United States Court of Appeals for the Fourth Circuit where the question on appeal was as follows: whether Kowalski’s webpage activity fell within the outer boundaries of the high school’s legitimate interest in maintaining order in the school and protecting the well-being and educational rights of its students.

*Fourth Circuit Opinion and Decision.* Heard by a three-judge panel, the appellate court reviewed the lower court’s summary judgment *de novo*. In her appeal Kowalski argued that because her case involved “off-campus,

non-school related speech” school administrators had no power to discipline her. Moreover, she contended that no Supreme Court case has held that a school may punish students “for speech away from school...” However, school officials argued that student off-campus behavior is subject to regulation “insofar as the off-campus behavior creates a foreseeable risk of reaching school property and causing a substantial disruption to the work and discipline of the school.” Doninger v. Niehoff (2nd Cir. 2008) In their view, Kowalski’s created webpage crossed that threshold.

Citing Gitlow v. New York (1925) and quoting directly from Texas v. Johnson (1989) the Fourth Circuit Court reminds us that “government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” As a foundation for its analysis of the issues presented in Kowalski’s appeal and mainly relying on Tinker v. Des Moines (1969), the Fourth Circuit Court restates the following points of established education law: (1) while students retain “significant First Amendment rights in the school context, their rights are not coextensive with adults;” (2) school administrators have “some latitude in regulating student speech to further educational objectives;” (3) school administrators have a “compelling interest” in regulating student behavior, including student harassment and bullying, that “materially and substantially interferes with the requirements of appropriate discipline in the operation of the school or collides with the rights of others; (4) school administrators may restrict student speech that is otherwise “vulgar and rude.” Bethel School District v. Fraser (1986); and (5) school administrators are “free to regulate and punish student speech that encourages the use of illegal drugs.” Morse v. Frederick (2007). However, the Court makes it clear that the Supreme Court in Tinker (1969) cautions school officials that the “a mere desire” to avoid “discomfort and unpleasantness” is an “insufficient basis” to regulate student speech.

The Fourth Circuit then focused directly on bullying as a major concern in schools across the country, and how it can cause victims to become depressed, anxious, and suicidal. As such, stated the Court, schools have a “duty to protect their students from harassment and bullying in the school environment.” School administrators must be able to prevent and punish harassment and bullying “in order to provide a safe school environment conducive to learning.” Based on its analysis of the facts presented, the Fourth Circuit made the following statement: “[w]e are confident that Kowalski’s speech caused interference and disruption described in *Tinker* as being immune from First Amendment protection.” Reiterating several student comments, including the edited photographs posted on the S.A.S.H. webpage, the court opined that “[t]his is not the conduct and speech our educational system is required to tolerate....” Fraser (1986)

Turning next to Kowalski’s main argument that her conduct took place at home after school, the Court stated “indeed she pushed her computer keys at home...but she knew that the electronic responses would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact on the school environment.” As such, said the Court, “[w]e need not resolve, however, whether this was in-school speech and therefore whether *Fraser* could apply because the School District was authorized by *Tinker* to discipline Kowalski, regardless of where her speech originated, because it was materially and substantially disruptive in that it ‘interfered...with the schools’ work [and] collided with the rights of other students to be secure and to be let alone.’” (citing Tinker, 393 U.S. at 508, 513) The Court also points out that other courts have reached similar conclusions regarding the authority to regulate student outside school speech that “eventually makes its way to the school.

Given the “targeted defamatory nature” of the speech in this case, the fact that the targeted student had to miss school in order to avoid further abuse, the potential for continuing and more serious harassment of Shay as well as to other students, and the possible “snowballing result,” “copycat,” or “retaliation” efforts school officials had to do something.

To be sure, said the Court, “it was foreseeable in this case that Kowalski’s conduct would reach the school via computer, smart phones, and other devices, given that most of the ‘S.A.S.H.’ groups members and the target of the group’s harassment were Musselman High School students.” The Court then points out that the “S.A.S.H.” webpage did make its way into the school when the male student who posted the photographs accessed the site from a school computer during and after school hours. In essence “it created a reasonably foreseeable substantial disruption there.”

The Fourth Circuit next took a detailed look at what is said in the Berkeley County Schools Student Code of Conduct and its Harassment, Bullying, and Intimidation Policy. The Code, said the Court, provides explicitly that “a student will not bully/intimidate or harass another student.” And, while the Policy and Code of Conduct state that prohibited conduct “had to be related to the school” the prohibitions “are designed to regulate student behavior that would *affect* the school’s learning environment.” In this case the “Internet-bullying and harassment” could reasonably be expected to interfere with the rights of a student at Musselman High School and disrupt the school’s learning environment. In the words of the Court, “Kowalski was on notice that high school administrators could regulate and punish the conduct at issue here.”

Regarding Kowalski’s claim that she did not receive an adequate opportunity to be heard, the Fourth Circuit concluded that in this case the due process requirements established in Goss v. Lopez (1975) were satisfied. Similarly, her argument that school administrators did not follow their own policies was not demonstrated in the record and also has no legal merit. Regarding her challenges to the district court’s dismissal of her claim for intentional and negligent infliction of emotional distress, the Court found no error in the district court’s analysis. Thus, the lower court was affirmed.

Finally, the Fourth Circuit Court makes the following statement regarding student-on-student harassment and bullying in today’s schools: “Indeed, school administrators *are* becoming increasingly alarmed by the phenomenon, and the events of this case are but one example of such bullying and school administrators’ efforts to contain it. Suffice it to hold here that, where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators’ good faith efforts to address the problem.”

*Decision:* The judgment of the district court is *affirmed*.

### **Policy Implications**

The intent of discussing the Fourth Circuit’s decision in Kowalski is not to suggest that it is in any way a landmark decision. In fact, not all courts treating similar cases have reached the same conclusion. See, for example, Layshock v. Hermitage School District (2011) Rather, the intent of this commentary is to demonstrate that the key factor in upholding a school system’s disciplinary action against a student whose electronically enabled exercise of private speech, created on a privately owned device, and communicated via the Internet, is the establishment of a clear and convincing *nexus* (*i.e.*, *cause* and *effect*) between the student’s *outside* (off-school property) actions and substantial disruption and/or harm *inside* the school house.

Five policy implications gleaned from the Fourth Circuit’s opinion in Kowalski are listed below.

Local school system policy must *define bullying* and make it clear that:

- Bullying behavior will not be tolerated in school, on school buses, and at school sponsored activities (on or off school property), and students who engage in such behavior will be immediately disciplined as specified in the school system's *Student Code of Conduct*.
- Students and staff are encouraged to immediately report incidents of bullying to their school principal.
- The school principal has the authority and duty to immediately investigate such reports and take appropriate action.
- Acts of *cyber bullying* are included in the policy.
- Students whose bullying behaviors are created off school grounds by computer or other electronic device, but the results of which cause substantial disruption of the school learning environment and/or place another student, or staff member in imminent fear of harm (academic, emotional, or physical) will be subject to discipline as specified in the school system's *Student Code of Conduct*.

### **Resources Cited**

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**Note:** The views expressed in this commentary are those of the author.