



Online Bullying: Handling Social Media Offenses that Occur Outside of School

Presented by

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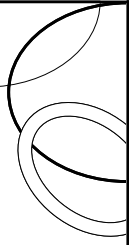


- **Starting at the Beginning...**

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

U.S. Constitution, First Amendment.

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- **Starting at the Beginning...**

Meaning, federal or state governments cannot pass laws or take actions to limit speech.

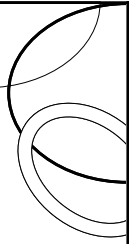
Often misunderstood as an absolute right to say anything without consequence.

Only prohibits government agency action.

Speech can be verbal, written, visual, audiotape, video, electronic communication, social media posting, or any other form of expression.

What about 1st Amendment rights in the context of schools?

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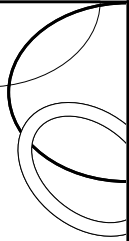
- ***Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 107 LRP 7137, 393 U.S. 503 (1969)**

Primary precedent for the application of the 1st Amendment with respect to students and schools.

Students wore armbands protesting Vietnam War after school prohibited wearing of armbands.

First, the Court established that students have 1st Amendment rights, stating that “it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gates.”

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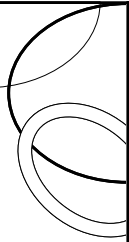
- ***Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 107 LRP 7137, 393 U.S. 503 (1969)**

The Court’s holding was that **limits on student speech could only be proper if it would “materially and substantially interfere” with school operation, activities, and appropriate discipline in the operation of the school or other students’ rights to be secure and left alone.**

Here, however, the speech was neither aggressive nor disruptive, but rather fully passive.

School officials could not reasonably argue there would be disorder or disturbance, and there was in fact none.

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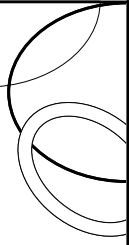


- ***Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 107 LRP 7137, 393 U.S. 503 (1969)**

Note—Thus, students’ rights to speech are subject to limitations by schools (e.g., disciplinary action) when the speech may reasonably lead to material and substantial disruption of school operations or other students’ rights.

A balancing of 1st Amendment with schools’ need to be free from substantial disruption to operations, discipline, or other student’s rights.

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- **Harassing or Bullying Social Media Speech**

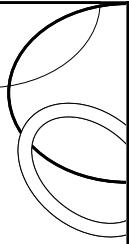
Increasingly, schools are dealing with cyberbullying, or electronic and social media peer-to-peer harassment.

Factor 1—In these cases, the speech is posted off-campus, but may still have substantial impact at school.

Factor 2—This speech tends to target specific fellow students, impacting their *Tinker* right to be “let alone.”

Factor 3—In the modern era, schools are required to make anti-bullying efforts under Texas law.

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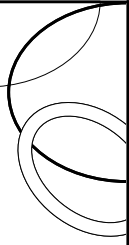


- **Texas Law—TEC §37.0832 (David’s Law)**

Includes “cyberbullying” in existing definition of “bullying”

Cyberbullying—Bullying through use of electronic communication device, cell phone, computer, camera, e-mail, instant messaging, text, social media app, website, or any other internet-based communication tool

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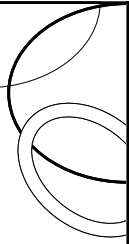


- **Texas Law—TEC §37.0832 (David’s Law)**

Cyberbullying can occur by “delivery” to school property or site of school-related activity, or it occurs school bus

It can also take place **off-campus** if it “interferes with a student’s educational opportunities” or “substantially disrupts the orderly operation of a classroom, school, or school-related activity”

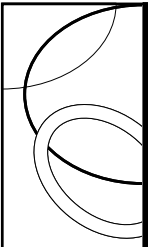
Note the incorporation of the *Tinker* analysis.



- **Texas Law—TEC §37.0832 (David’s Law)**

Notice to parents of victim of bullying by the third business day after a bullying incident (notice also goes to parents of alleged bully).

Discretionary DAEP or expellable offense—bullying that encourages suicide, incites violence against a student through group bullying, or threatens release of “intimate visual material” without consent.

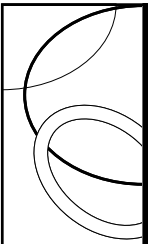


- **Texas Law—TEC §37.0832 (David’s Law)**

Districts must emphasize school climate and healthy relationships among students, and promulgate district-wide bullying prevention and mediation policies.

Note—That the Legislature requires schools in Texas to prioritize peer-to-peer bullying could help schools argue off-campus harassing speech disrupts this priority, now required by state law, and thus should allow for disciplinary response.

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- **Texas Law—More Recent changes to TEC §37.0832**

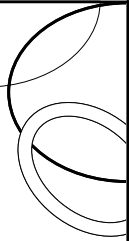
No discipline of victim for defending themselves ((c)(8))

Campus anti-bullying committees ((c-1)(2))

Annual district surveys of bullying climate at school ((c-1)(5))

District “rubrics” to assess bullying incidents and responses ((c-1)(6))

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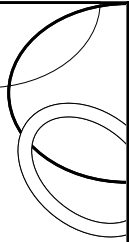
- ***Kowalski v. Berkeley Co. Schs.*, III LRP 51060 (4th Cir. 2011)**

Senior (voted Ms. Congeniality) who created a “slut herpes” web page to harass a particular girl sued for violation of Free Speech after being disciplined.

Student argued her speech took place off campus and was not school-related.

Court disagrees, finding that *Tinker* case balances students’ speech rights with schools’ needs to maintain proper discipline and environment conducive to learning, even when speech is off-campus.

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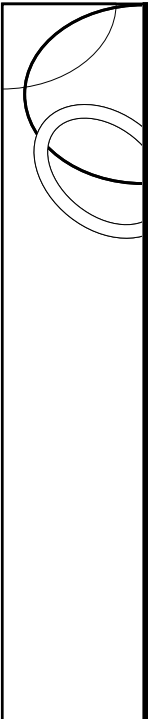
- ***Kowalski v. Berkeley Co. Schs.*, III LRP 51060 (4th Cir. 2011)**

While student “pushed her computer’s keys in her home,” she knew the web page would reach the school and have impact at school (in fact, it was specifically meant to).

Schools have a right to restrict student speech if it materially interferes with proper discipline in the operation of the school.

And, court noted OCR/ED letters indicating bullying as a major concern in schools.

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- ***Kowalski v. Berkeley Co. Schs.*, III LRP 51060 (4th Cir. 2011)**

“School administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning.”

In closing, court strongly admonishes student and her parents, calling her conduct “particularly mean-spirited and hateful” and questioning the lawsuit.

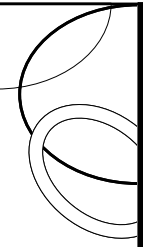


- ***Kowalski v. Berkeley Co. Schs.*, III LRP 51060 (4th Cir. 2011)**

Policy lesson—School anti-harassment policies may need to include notice that certain off-campus “e-conduct” may lead to disciplinary action...

Notice that the court appears to distinguish speech that harasses another student from other forms of speech, such as criticism of school officials, and holds that it may be subject to stricter limitations.

Certainly, speech that worsens the problem of peer-to-peer harassment would be disruptive of school operations and discipline.

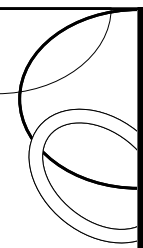


- But also see ***J.C. v. Beverly Hills USD*, 110 LRP 32757 (C.D.Cal. 2010)**

Here, a student posted disparaging and profane video bullying a teen girl, causing administrative response and disciplinary action, five students missed portions of classes, and victim remained fearful of gossip.

Court, however, did not consider this to be “*substantial disruption*” to school environment, holding that administrators dealing with parent complaints and disciplining students was not a substantial disruption, but rather just part of their regular duties.

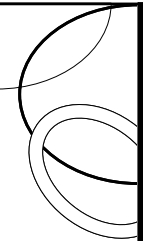
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- But also see ***J.C. v. Beverly Hills USD*, 110 LRP 32757 (C.D.Cal. 2010)**

Note—It is thus apparent that federal courts are not in unison that speech that harasses a particular student is inherently disrupting the school’s aim to prevent peer-to-peer bullying or the school’s aim to maintain discipline.

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- ***A.V. v. Plano Ind. Sch. Dist.*, 122 LRP 5787 (E.D.Tex. 2022)**

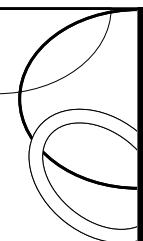
A teen student hosted a weekend sleepover where he physically bullied another student.

Without his knowledge, another student recorded it and shared the video.

After some community uproar, the school disciplined the bullying student under its cyberbullying policy.

His parents responded by filing suit.

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- ***A.V. v. Plano Ind. Sch. Dist.*, 122 LRP 5787 (E.D.Tex. 2022)**

Thus, the Court found the District’s interpretation and application of its policy to be arbitrary, capricious, and unreasonable, thus violating the student’s 14th Amendment property rights without due process.

Note—Under the District’s interpretation any other student that appeared in the video willingly participated in the cyberbullying and likewise could be disciplined.

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- **A.V. v. Plano Ind. Sch. Dist., 122 LRP 5787 (E.D.Tex. 2022)**

Note—Curiously, the Court conceded that neither the student’s DAEP placement nor his resulting exclusion from football implicated a 14th Amendment property interest, as they did not exclude him from education.

But, his preliminary 3-day suspension was applied under the District’s improper interpretation and excluded him from school in violation of the 14th Amendment. (However small, the 3-day suspension was in violation of his constitutional rights).

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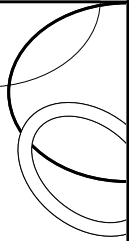
- **Off-Campus e-Speech Disparaging of School Officials**

At times, off-campus e-speech disparages school officials, sometimes in vulgar fashion.

At what point is this type of speech subject to *Tinker* limitations because it forecasts substantial disruption of school operations?

Is the fact that the speech requires school officials to rebut the claims a factor in whether there may be substantial disruption? Is the fact that it may impact their ability to perform their duties?...

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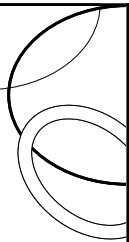
- ***Mahanoy Area Sch. Dist. v. B.I.*, 121 LRP 21955, 141 S.Ct. 2038 (2021)**

While at home and using vulgar language, a high-schooler made Snapchat posts critical of the cheerleading team, coaches, and school, and sent them to her friends.

The school disciplined her and the parent filed a 1st Amendment lawsuit.

The Court held that off-campus speech of a severely harassing nature targeting individuals, making threats of violence, involving school security devices, or pertaining to misuse of computers for classwork could be limited without offending the 1st Amendment.

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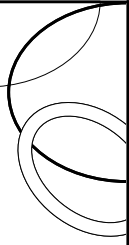
- ***Mahanoy Area Sch. Dist. v. B.I.*, 121 LRP 21955, 141 S.Ct. 2038 (2021)**

Otherwise, however, courts should be more skeptical of schools' efforts to regulate off-campus speech, "for doing so may mean the student cannot engage in that kind of speech at all."

Here, the posts were mere criticism of the team, coaches, and school, not threats or incitement of violence, and they were transmitted only to a few friends.

Schools' interest in teaching good manners did not extend to off-campus conduct.

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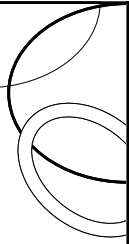
- ***Bell v. Itawamba County Sch. Bd.*, 115 LRP 38803 (5th Cir. 2015)**

While not at school, a high school student posted on Facebook and YouTube a rap song he wrote and performed.

Lyrics alleged that coaches were having sex with students and made threats of violence against them with details of the injuries to be inflicted, the specific weapons to be used, and encouraging others to engage in this violence.

The song predicted violence and warned coaches to “watch their backs.”

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- ***Bell v. Itawamba County Sch. Bd.*, 115 LRP 38803 (5th Cir. 2015)**

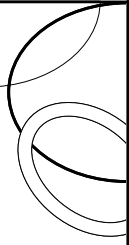
The coaches reported fearing for their safety and changing the way they approached their jobs.

The school disciplined the student, and a lawsuit ensued.

First, the Court noted that *Tinker* held that 1st Amendment rights of students were not absolute, but could be limited in light of the special characteristics of school environments.

If the speech materially and substantially disrupts the work and discipline of the school, the school can limit the speech, as with disciplinary action.

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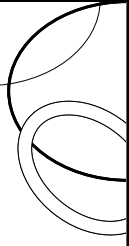
- ***Bell v. Itawamba County Sch. Bd.*, 115 LRP 38803 (5th Cir. 2015)**

The Court held that although the speech did not take place at school, it gave the school a reasonable belief that substantial disruption of school activities would occur.

It held that *Tinker* limitations can apply when student off-campus speech directed at the school is reasonably understood to threaten, harass, and intimidate a teacher.

The advent of technology not available at the time of *Tinker*, together with numerous recent incidents of school violence, led the Court to conclude that the speech had the potential to substantially disrupt or materially interfere with school activities.

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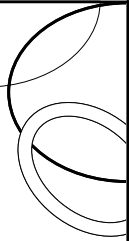
- ***Bell v. Itawamba County Sch. Bd.*, 115 LRP 38803 (5th Cir. 2015)**

Thus, the Court upheld the disciplinary action as not in violation of the student's First Amendment rights.

Note—It took an *en banc* (whole court) review of an original decision going the other way for the 5th Circuit to reach this decision.

This signals that these cases are novel and difficult, and that the law is just catching up with social media practices of students.

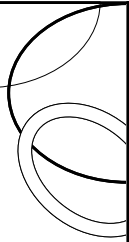
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- ***Bell v. Itawamba County Sch. Bd.*, 115 LRP 38803 (5th Cir. 2015)**

Note—Indeed, in ***Longoria v. San Benito CISD*, 119 LRP 42549 (5th Cir. 2019)**, the Court ruled that school officials were entitled to immunity on a high school cheerleader’s First Amendment claims because the rights in question with respect to student media posts were not “clearly established.”

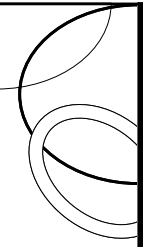
The student had been kicked off the squad for Twitter posts using profanity and sexual innuendo in violation of the local cheerleading constitution.



- ***Bell v. Itawamba County Sch. Bd.*, 115 LRP 38803 (5th Cir. 2015)**

Note—In *Longoria*, the Court noted, moreover, that other circuit courts had held that the extracurricular context may give rise to additional limitations on free speech, because student athletes are subject to more restrictions than the student body at large, as they represent the school.

Ultimately, the Court dismissed the case against the District as well, ruling that the student had not been deprived of a property right by getting kicked off cheerleading, as participation is a “mere expectation.”



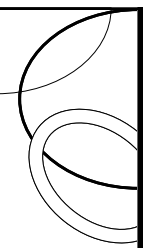
- **McClelland v. Katy ISD, 121 LRP 36269 (S.D.Tex. 2021)**

Similarly, in this case a football team’s captain and quarterback recorded and posted a Snapchat video in which he used a racial slur and threatened a student from a rival school.

When the video post became public, coaches suspended him for two games and stripped him of his captain position.

He sued various individual school officials claiming a violation of his First Amendment rights.

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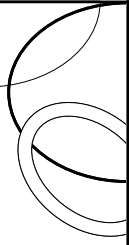


- **McClelland v. Katy ISD, 121 LRP 36269 (S.D.Tex. 2021)**

Based on prior 5th Circuit cases, the Court dismissed the individual claims against officials, finding they were entitled to immunity because the First Amendment rights of student athletes engaging in questionable social media posts were not “clearly established.”

Note—And they still are not....

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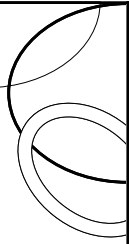
• ***J.S. v. Blue Mountain Sch. Dist.*, III LRP 40374 (3rd Cir. 2011)**

An 8th-grader upset with the principal because of a dress code violation created a fake profile page for him.

The page accused him of having sex in his office, “hitting on students and their parents,” being a sex addict, and called him a “dick,” “fagass,” “small dick,” and said his wife “looks like a man” and his son “looked like a gorilla.”

It also alleged that he was having sex with a school counselor, who was named in the page.

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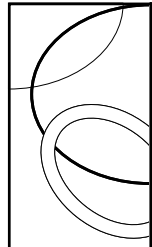
• ***J.S. v. Blue Mountain Sch. Dist.*, III LRP 40374 (3rd Cir. 2011)**

The case was heard by all the Circuit Judges, and concluded that the posting “though indisputably vulgar,” was so juvenile and non-sensical that no reasonable person could take it seriously.

Moreover, the student made the profile private so only her friends could access it, and the posting occurred in the student’s home.

Thus, the disciplinary action against the student violated her 1st Amendment rights.

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- ***J.S. v. Blue Mountain Sch. Dist., 111 LRP 40374 (3rd Cir. 2011)***

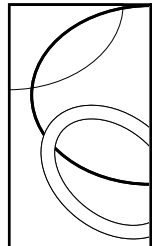
Note—The decision was 8-6, meaning 6 Circuit Judges disagreed.

A dissenting opinion argued the Court was making light of the serious allegations of sexual misconduct against a school administrator, which can cause psychological and career harm, even if not intended.

It added that "it was foreseeable that J.S.'s false accusations and malicious comments would disrupt" the ability of the principal and counselor to perform their jobs.

School resources would be diverted to disproving the allegations, which the student had to have known would become public.

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- ***J.S. v. Blue Mountain Sch. Dist., 111 LRP 40374 (3rd Cir. 2011)***

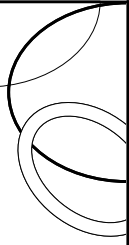
Note—Can a student create such a private posting for their student friends and then argue that they did not know that the posting would reach the school community?...

In the years after 2011, moreover, claims that once seemed ridiculous have become part of mainstream theories.

A close case indeed. The student can now continue to post such missives without fear of disciplinary repercussions. Should the school's litigation costs and efforts figure into the "substantial disruption" analysis?...

A close case indeed, but the Supreme Court denied review.

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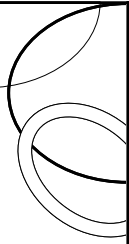


- **Threatening Social Media Speech**

Speech that is threatening or portends school violence may be treated differently by the courts than vulgar, profane, or bullying speech.

This is more the case in our modern era of school mass violence...

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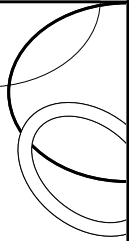
- ***Wynar v. Douglas County Sch. Dist.*, 113 LRP 35121 (9th Cir. 2013)**

While at home, a high school student posted a series of increasingly violent and threatening instant messages and sent them to friends.

He bragged about his weapons, threatened to shoot specific classmates, said he wanted to break the school shooting record, and identified a specific date—the anniversary of the Columbine school massacre.

After friends alerted the school, he was expelled for 90 days.

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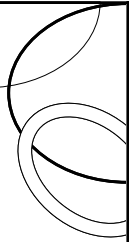
- ***Wynar v. Douglas County Sch. Dist.*, 113 LRP 35121 (9th Cir. 2013)**

He claimed the messages were a “joke.”

Relying on the *Tinker* supreme court opinion, the Court held that schools may discipline *off-campus* speech that might reasonably lead school officials to forecast substantial disruption with school activities.

Here, the threatening messages made it reasonable for the school to predict substantial disruption of school activities.

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- ***Wynar v. Douglas County Sch. Dist.*, 113 LRP 35121 (9th Cir. 2013)**

“The location of the speech can make a difference, but that does not mean that all off-campus speech is beyond the reach of school officials” (this position was later upheld by the 2021 opinion in *Mahanoy*).

The Court noted that several other circuit courts agreed that *Tinker* could apply to off-campus speech (now reinforced by the *Mahanoy* opinion)

Here, the speech had a connection to the school, and the student had to know the messages would reach school officials.

40



- ***Wynar v. Douglas County Sch. Dist.*, 113 LRP 35121 (9th Cir. 2013)**

“When faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*” (i.e., reasonable expectation speech will substantially disrupt school).

Note—Although the 9th Circuit normally interprets constitutional protections broadly, it is obviously not blind to the realities of modern school violence.

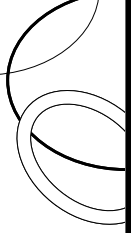
41



Disability-Based Harassment

- An unfortunately persistent source of suffering for students with disabilities at school, as well as legal liability for school districts.
- Why do these claims keep coming? Schools should be well aware of the problem and the legal dangers....
- Let us briefly examine the standards of the Office for Civil Rights (OCR) before we move to the federal courts’ analysis

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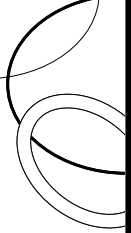
Dear Colleague Letter, 64 IDELR 115 (OCR 2014)

- **OCR Framework for Schools' Legal Obligations:**
 1. **Disability-based** harassment can impact equal educational opportunity and FAPE

Inappropriate response to harassment is a form of discrimination on basis of disability
 2. Harassment on **any** basis can deny students a FAPE under §504 or IDEA and if so, must be remedied (purely FAPE-based claim).

*Harassment includes “cyberbullying.” See *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013).

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Dear Colleague Letter, 64 IDELR 115 (OCR 2014)

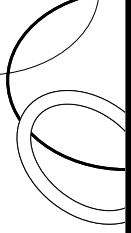
- **Disability-Based Harassment Points:**

If school knows or should know of conduct, it has a duty to investigate

If harassment creates a “**hostile environment**,” school must take action

“**Hostile environment**” means the conduct interferes with a student’s ability to participate in, and benefit from, program activities or opportunities

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Dear Colleague Letter, 64 IDELR 115 (OCR 2014)

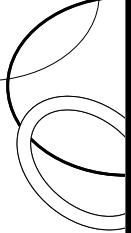
- **Disability-Based Harassment Points:**

“Harassment does not have to include intent to harm, be directed at a specific targeted student, or involve repeated incidents in order to be discriminatory.”

Obvious signs of harassment occurring in public areas are indications that the school is aware of the harassment.

See also Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools, at pgs. 32-33 (OCR 2016).

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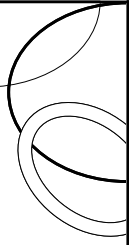
- **Response to Disability-Based Harassment:**

Broad Overview of Required School Actions:

 - End the conduct
 - Eliminate hostile environment
 - Prevent recurrence of conduct
 - Remedy negative effects, if any

Failure to appropriately respond violates §504 (a form of discrimination on the basis of disability)

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- **Other Harassment and Denial of FAPE:**

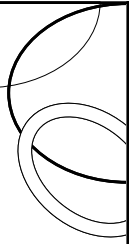
Regardless of reason, harassment can impact education to the point it denies the student a FAPE

See, e.g., *Renee J. v. Houston Ind. Sch. Dist.*, 73 IDELR 168 (5th Cir. 2019) for an example of a case raising bullying as a FAPE-based claim, not a disability harassment claim.

IEP teams/§504 Committees must address any negative effects of bullying through changes in IEPs/§504 Plans

Watch for drops in grades, behaviors, increased absences, outbursts

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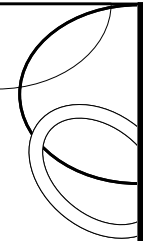
- **Cyber Harassment of Students with Disabilities**

Requires response from campus administration (investigation, findings, response).

May require response from ARD/504 committees (if harassment has impacted education academically, behaviorally, socially, or emotionally).

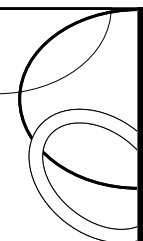
One can argue that §504 and ADA require schools to take action to end disability-based harassment that impacts a student's receipt of FAPE, thus providing another factor weighing for limits on harassing social media speech.

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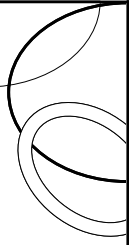
- **Cyber Harassment of Students with Disabilities**
ARD/504 response ideas—counseling, extra supervision, safety plan, buddy system, lunch arrangements, etc...

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- ***Antioch (CA) Unified Sch. Dist., 66 IDELR 191 (OCR 2015)***
After a student with disabilities reported to the school that she was being harassed online anonymously (including being called “stupid”), the school looked into the issue and she was moved to another class, but the AP did not actually interview her.
OCR thus felt that the investigation and response was lacking, as a key aspect of investigation is speaking to the victim, and the response burdened the victim, as she was made to change classes.

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- **Harrison (NY) Cent. Sch. Dist., 120 LRP 40931 (OCR 2020)**

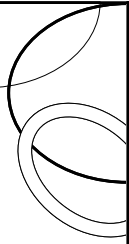
Five fellow students were harassing a student with disabilities online, calling her “sped.”

The victim reported the harassment to the counselor, who in turn informed the AP, who in turn left a message for the parents to contact him.

When the parents did not follow up, the AP dropped the matter.

The school agreed to a voluntary resolution of the complaint.

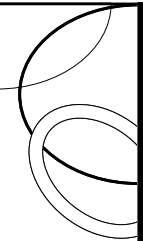
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- **Harrison (NY) Cent. Sch. Dist., 120 LRP 40931 (OCR 2020)**

Note—Certainly, the AP could have otherwise investigated the matter by speaking to the student and following up from there, since once the school has knowledge the duty to investigate arises without the need for parent consent.

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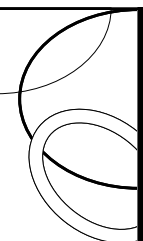


- **Cyber Harassment BY Students with Disabilities**

Requires response from ARD/504 committees from a behavioral standpoint.

FBA, BIP addressing harassing conduct, counseling, behavior/counseling IEP goals.

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- **Takeaways—Schools Can Lawfully Discipline Students for Social Media Speech Off-Campus...**
 - the more the speech is disruptive of school operations and activities
 - the more the speech threatens violence
 - the more the speech targets individual students for bullying or harassment (particularly if victim is disabled)
 - the more the speech impacts the job functions of specific staffpersons or school officials

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