

# Responding to Hurtful Off-Campus Online Student Speech: State Statutes and District Policies

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Two Caucasian students and an African American student got into an argument at school. That evening, while at home, the two Caucasian students established a Facebook Profile dedicated to attacking this student and other African American students. This Profile contains derogatory language about the African American students, with highly offensive, racist images and cartoons. The profile contains links to news articles about an African American man who was drug to his death behind a car. Other students have joined this profile and are posting or agreeing with the derogatory statements. The African American student directly targeted is reportedly distraught and is no longer willing to come to school. Other students are also upset, frightened, and angry--and some are threatening violence against the creators.

**Should the principal of this school have the official authority to respond to this situation, including the authority to suspend the students who created the profile and those who have posted derogatory comments directed at other students?**

## State Statutory Language

Thirteen states have now added language to state bullying prevention statutes providing the authority for school officials to officially respond to student off-campus online speech that has caused a substantial disruption or created a hostile environment for another student at school. Statutory language from New Hampshire provides an excellent example:

RSA 193-F:3 I.(a) "Bullying" means a single significant incident or a pattern of incidents involving a written, verbal, or electronic communication, or a physical act or gesture, or any combination thereof, directed at another pupil which: (1) Physically harms a pupil or damages the pupil's property; (2) Causes emotional distress to a pupil; (3) Interferes with a pupil's educational opportunities; (4) Creates a hostile educational environment; or (5) Substantially disrupts the orderly operation of the school.

193-F:3 II. "Cyberbullying" means conduct defined in paragraph I of this section undertaken through the use of electronic devices.

RSA 193-F:4 I. Bullying or cyberbullying shall occur when an action or communication as defined in RSA 193-F:3: (a) Occurs on, or is delivered to, school property or a school-sponsored activity or event on or off school property; or (b) **Occurs off of school property or outside of a school-sponsored activity or event, if the conduct interferes with a pupil's educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event.**

## Federal Court Decisions

The consistent finding in federal courts when reviewing cases involving hurtful off-campus speech by a student directed at a member of a school has been to support the authority of school officials to officially respond to such speech if it has, or there are good reasons to believe it will, cause a substantial disruption at school or interference with the rights of students to be secure. The reason for this was clearly outlined in a recent fourth Circuit case, *Kowalski v. Berkeley County Schs.* (Fourth Circuit, No. 11-461, 2011)

Thus, the language of *Tinker* supports the conclusion that public schools have a "compelling interest" in regulating speech that interferes with or disrupts the work and discipline of the

school, including discipline for student harassment and bullying. See *DeJohn v. Temple Univ.*, 537 F.3d 301, 319-20 (3d Cir. 2008).

According to a federal government initiative, student-on- student bullying is a "major concern" in schools across the country and can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide. See *StopBullying.gov*, available at [www.stopbullying.gov](http://www.stopbullying.gov) (follow "Recognize the Warning Signs" hyperlink). Just as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use, see *Morse*, 551 U.S. 393, schools have a duty to protect their students from harassment and bullying in the school environment, cf. *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007) ("School Officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place"). Far from being a situation where school authorities "suppress speech on political and social issues based on disagreement with the viewpoint expressed," *Morse*, 551 U.S. at 423 (Alito, J., concurring), school officials must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning.

We are confident that Kowalski's speech caused the interference and disruption described in *Tinker* as being immune from First Amendment protection. (*Id.* at slip 12.)

### **Three Concerns to Address**

Three concerns are frequently raised regarding the inclusion of reference to off-campus student speech in state statutes and district policies. Although closer analysis demonstrates these concerns to be unjustified, it is important they are addressed to alleviate any questions.

*Concern 1: Inclusion of reference to off-campus speech will mean that school officials will also have the responsibility to monitor student's off-campus digital communications.*

It is not technically possible for school officials to do this. Such monitoring would be outside of the scope of their official responsibilities and would constitute a significant invasion of student privacy. The inclusion of a provision similar to the New Hampshire language above in state statutes and district policies would give school officials the authority to respond when they have actual knowledge of an incident and would not create any additional monitoring or supervision responsibilities.

*Concern 2: Providing this authority is a violation of student's free speech rights.*

The use of the language referencing substantial disruption and interference with the rights of students to be secure provides an important limitation on school official intervention. School officials only have the authority to respond if a student's off-campus speech is significantly interfering with the important rights of other students--the right to receive an education and be safe at school. School officials specifically do not have the authority to respond to off-campus student speech for other reasons, such as disapproval of lewd and offensive speech or speech that is contrary to the educational mission of the school. As noted, the federal courts have consistently upheld the authority of school officials to respond to student speech in certain, very limited situations, only when necessary to protect the important rights of other students.

*Concern 3: Providing this authority is an intrusion in parental rights.*

The same limitation described in response to Concern 2 will protect parent rights. School officials do not have the authority to seek to inculcate values when students are off-campus. This is, and will continue to be the responsibility of parents.

### **Due Process and Adequate Notice**

Inclusion of this constitutionally-supported language regarding off-campus speech in state statute and district policies is important to address students' rights to adequate notice about when their actions could lead to a disciplinary consequence. Such inclusion will reduce the arguments over whether school officials have the authority to respond and allow those officials to focus attention on an effective intervention. Further, notice of such authority will be a deterrent to such hurtful actions.

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