

# Los Angeles Lawyer

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## School Administrators' Responsibility Concerning Cyber Bullying

**SCHOOL ADMINISTRATORS** have long been assigned the challenging task of moderating the interaction of children, but their responsibilities historically ended at the "schoolhouse gate."<sup>1</sup> However, in the age of social media, instant messaging, and smart phones, states such as California are requiring schools to extend their reach beyond their walls and into the vast expanse of the virtual world to help promote a safe learning environment and eliminate cyber bullying among students. The rapidly changing landscape of social media has left school administrators, students, lawyers, and even judges struggling to keep up with the state of this unsettled area of law. School administrators are particularly challenged by this edict. While administrators feel a need to investigate and handle issues that may have an impact on the learning environment, they are reaching into the private lives of students regarding conduct that is not related to the learning environment.

California Education Code Section 48900 defines bullying as "any severe or pervasive verbal act or conduct, including communications made in writing or by means of an electronic act...."<sup>2</sup> If these severe or pervasive acts cause a fear of harm, have a "substantially detrimental effect on [the student's] physical or mental health," or a "substantial interference with [the student's] academic performance," the offending student can be suspended or expelled for the actions.<sup>3</sup>

In the past, a school's authority to police this type of conduct was generally confined to the school grounds. The rise of cyber bullying in the past decade has extended a school's responsibility into the electronic world of the student, and "electronic act" includes "creation or transmission originated on or off the school site by means of an electronic device." Schools are now tasked with the responsibility to discipline students for conduct including text messages, photos, and posting on a social network.<sup>4</sup>

The U. S. Supreme Court has not dealt with the issue of cyberbullying, despite several appeals requesting the Court take on the issue. This gap in authority is leaving states to set up a potential conflict between the well-being of some students versus the constitutional rights of others. This conflict is compounded by the absence of guidance or a test for a threshold showing of "pervasiveness" that causes many to believe that offensive speech may be protected unless it substantially interferes with a student's educational goals or performance.<sup>5</sup>

In general, a school may suspend or expel students for bullying conduct that occurs on school grounds or at school events.<sup>6</sup> What happens, however, when the alleged bullying occurs off school grounds and is not related to school activities?

Public education is a fundamental right and the California Sixth District Court of Appeal has ruled that disciplinary action is contingent upon whether the action causes a substantial disruption to schoolwork or school activities.<sup>7</sup> If a school suspends a student

whose actions did not cause substantial disruption, the suspension or expulsion risks violating the free speech protections of the aggrieved student.

Federal circuits are undecided as to how far administrators can reach into students' private lives before it has gone too far. In *J.S. ex rel. Snyder v. Blue Mountain School District*, a student's Myspace profile was the subject of debate.<sup>8</sup> Five members of the eight-judge majority found that *Tinker v. Des Moines Independent Community School District* excludes authority to discipline or regulate off-campus speech.<sup>9</sup> In other words, even if off-campus speech creates

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a "substantial disruption," a school district has no authority to suspend or discipline a student for the conduct.<sup>10</sup> Conversely, the Fourth Circuit has held that some actions are so disruptive that their origin does not matter.<sup>11</sup>

Emerging law has suggested that speech rising to the level of bullying is unprotected thus many states are instructing administrators to undertake disciplinary measures as necessary. School administrators, however, remain skeptical of overreach. Many feel the need to investigate and handle issues that may have an impact on the learning environment. Yet, administrators risk reaching into the private lives of students regarding conduct that is not related to the learning environment. Given current California law, administrators should be encouraged to address cyber bullying when the conduct clearly interferes with school activities and the safety of students. ■

<sup>1</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>2</sup> EDUC. CODE §48900(r)(1).

<sup>3</sup> *Id.*

<sup>4</sup> EDUC. CODE §48900(r)(2)(A).

<sup>5</sup> *Saxe v. State Coll. Area Sch. Dist.*, 240 F. 3d 200, 217 (3rd Cir. 2001).

<sup>6</sup> EDUC. CODE §48900(s); see also *Baker v. Downy City Bd. of Educ.*, 307 F. Supp. 517, 526 (C.D. Cal. 1969).

<sup>7</sup> See *Fremont Union High Sch. Dist. v. Santa Clara County Bd. of Educ.*, 235 Cal. App. 3d 1182, 1186-88 (6th Dist. 1991).

<sup>8</sup> *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F. 3d 915 (3d Cir. 2011).

<sup>9</sup> *Id.* at 926 n.3.

<sup>10</sup> *Id.* at 926-27.

<sup>11</sup> *Kowalski v. Berkeley County Sch.*, 652 F. 3d 565 (4th Cir. 2011).

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