

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

December 31, 2012

SUBJECT: Cyberbullying (Work Order No. 28-LS0256\A)

TO: Representative Mia Costello

FROM: Jean M. Mischel
Legislative Counsel

Enclosed is a bill draft that includes electronic communications in the definition of "harassment, intimidation, and bullying" by a public school student for disciplinary purposes. The issue raises possible free speech challenges and overlaps with current crimes that encompass the concept. An overview of those issues is provided below. In my opinion, however, AS 14.33.250, as amended by the enclosed bill draft, is likely to be upheld if challenged.

1. Current school discipline law pertaining to cyberbullying.

"Cyberbullying" is a term that has been coined to refer to bullying as intimidation or harassment through use of the Internet or telephones. Some states regulate the behavior as an "electronic act." Idaho specifies that an act of harassment, intimidation, or bullying may be committed through the use of a land line or wireless telephone or through the use of data or computer software that is accessed through a computer, computer system, or computer network. A South Carolina statute provides that "harassment, intimidation, or bullying" means "a gesture, an electronic communication, or a written, verbal, physical, or sexual act"

Our current school discipline statutes define harassment, intimidation, or bullying under AS 14.33.250 as

. . . *an intentional written, oral, or physical act*, when the act is undertaken with the intent of threatening, intimidating, harassing, or frightening the student, and

(A) physically harms the student or damages the student's property;

(B) has the effect of substantially interfering with the student's education;

(C) is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or

(D) has the effect of substantially disrupting the orderly operation of the school; [emphasis added].

An "intentional written, oral, or physical act" does not, in my opinion, exclude threats spoken through a telephone or voice messaging system. Similarly, typing a threat as a text message or on a keyboard does not mean it is not written. The statutes as currently written, therefore, arguably already cover cyberbullying. The issue as discussed below, however, may warrant clarification to avoid a free speech challenge for electronic expressions made off-campus in order to provide a jurisdictional link for imposing school discipline.

2. First amendment implications of off-campus conduct.

Providing for school discipline for cyberbullying must necessarily address the obvious issues of whether a school can extend its jurisdictional reach to off-campus activities and the potential for a first amendment challenge.

The United States Supreme Court had occasion in 2007 to review off-campus speech for the purpose of determining whether an Alaska school had jurisdiction to impose disciplinary sanctions on a student and whether the speech was otherwise protected by first amendment free speech principles. In that case, *Morse v. Frederick*, 551 U.S. 393 (2007), a Juneau high school student unfurled a banner conveying what the Court construed as a message encouraging illegal drug use off-campus ("Bong hits 4 Jesus"). Although the communication was not electronic, the case is instructive in how far a court may go to confer school jurisdiction. Because the banner was used during school hours, was not the type of speech that received the highest level of constitutional protection (political speech), and involved teachers and students, the fact that the function was otherwise off-campus and on a public street did not persuade the Court to provide the full breadth of first amendment protections. The Court therefore upheld the disciplinary sanction despite the finding that the content of the speech would have been otherwise protected under the constitution.

In 1969, the Supreme Court in *Tinker v. Des Moines Independent Community School District*, 339 U.S. 503 (1969), established a test for regulating otherwise protected free speech and weighed a student's limited first amendment rights against a school's interest in maintaining order and conveying moral principles through its disciplinary system. The Court then said that

[C]onduct by the student, in class or out of it, which for any reason -- whether it stems from time, place, or type of behavior -- materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of free speech.

Id. at 513.

Circuit Courts of Appeals have applied this test to online, off-campus speech. *See, e.g., Donninger v. Niehoff*, 557 F.3d 41 (2nd Circ. 2008) (offensive blog entry complaining about cancelation of music festival, made off-campus but directed at public and students

to complain about principal, caused substantial disruption and could be regulated by school).

In *Layshock v. Hermitage School District*, 593 F.3d 249 (3d Cir. 2010), the appellate court reviewed the question of whether a school district can punish a student for creating, off-campus, a fictitious online profile off-campus of a school principal using his photo and false answers to various questions. The court found the relationship between the school and the off-campus location of the student's conduct too attenuated to stretch its authority to the student's grandmother's house.

Similarly, in *Evans v. Bayer*, 684 F. Supp. 2d 1365 (S.D. Fla. 2010), a lower court applied the *Tinker* test in a case involving a student who invited complaints about a teacher on her blog made off-campus and after school hours. After rejecting the possibility of applying a test based on the target audience, obviously directed at other high school students, the court held that the blog entry was protected free speech that did not have a foreseeable and substantially disruptive effect on the school. In that case, the court acknowledged that off-campus unprotected speech may be regulated by a school when it was "fighting words" or "words that would . . . inflict injury or tend to incite an immediate breach of the peace." *Id.* at 1377.

In summary, cases suggest that cyberbullying that occurs off-campus may be regulated by a school if it results in the foreseeable and substantial disruption of the school, a breach of the peace, or threatened violence against another student or a school staff member. At the same time, a crime may have been committed and be charged as such.

3. Current criminal law that encompasses cyberbullying.

Whether accomplished through electronic or other methods, bullying is not described as a specific crime under our model penal code structure; rather, it is a common term used to refer to conduct between school students. For that reason, peace officers may be reluctant to investigate bullying as a crime and defer instead to school administrators for disciplinary actions and to the civil courts for damages caused by bullying.

Despite any reluctance to charge bullying as a crime (juvenile or adult), any number of criminal offenses may be implicated by conduct that is included within a harassment, intimidation, or bullying policy required of schools by AS 14.33.200. With the exception of stalking and exploitation, none of the crimes specify that the act may be by electronic means. The failure to reference electronic communications does not mean, however, that the crimes may not be accomplished through electronic communications and still charged as a crime. For example, an action that physically harms a student is an assault.

Threats and other actions may amount to assault in the fourth degree, stalking, or reckless endangerment. The difficulty in proving an assault by electronic means relates to whether a threat was imminent. In addition, a sexual act conveyed electronically could be construed as sexual assault or sexual abuse or exploitation of a minor. Stealing or damaging the property of another is robbery, extortion, theft, or malicious mischief. The

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crimes of disorderly conduct and harassment in the first or second degree may also be implicated by certain activities. For each of the related crimes, all elements of the crime must be met. See, for example, AS 11.61.118 - 11.61.120.

If I may be of further assistance, please advise.

JMM:ljw

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Enclosure