Michigan Legislature Enacts Cyberbullying Legislation

By Mark W. McInerney / Jul 30, 2015

As we previously advised our clients in January 2015, revisions to Michigan's bullying statute require that school districts and public school academies adopt amendments to their bullying policies dealing with the subject of cyberbullying by September 30, 2015. A summary of the amendments and requirements is provided below.

In the waning days of its 2013-2014 session, the State Legislature enacted amendments to the State's bullying statute designed to address the subject of cyberbullying, as well as to add additional reporting requirements. While the new cyberbullying provisions do represent some improvement, the amendments' failure to address school authority over off-campus cyberbullying likely renders them ineffectual.

Matt's Safe School Law (now known as "The Matt Epling Safe School Law"), enacted as Public Act 241 of 2011, required all districts to enact policies that, among other things, prohibited bullying "at school." The term "at school" was defined to include not only school premises, a school vehicle or a school event wherever held, but also conduct using a telecommunications access device or a telecommunications service provider owned by or under the control of the district. Thus, if a student took a district-owned device home and bullied another student with it, that conduct was covered by the ban on bullying, and could therefore be the subject of discipline. Other than in this limited circumstance, however, cyberbullying was not addressed, a notable oversight since a substantial amount of cyberbullying takes place off-campus using privately-owned equipment and internet service. The Act did not authorize school officials to prohibit or punish such conduct.

Public Act 478 of 2014, signed by Governor Snyder on January 13, 2015, and effective March 30, 2015, makes an effort to rectify this omission. The Act requires that, within six months of the effective date of the Act, districts must modify their bullying policies to forbid cyberbullying. "Cyberbullying" is defined as "any electronic communication that is intended or that a reasonable person would know is likely to harm one or more pupils" by substantially interfering with educational opportunities, adversely affecting the ability of a pupil to participate in a school's programs by placing the student in fear of harm or distress, having a substantial detrimental effect on a student's physical or mental health, or causing substantial disruption in the orderly operation of the school. The enacted statute thus substantially improves on the bill as introduced, which left it to individual districts to devise their own definitions of "cyberbullying," which would have resulted in inconsistent, if not chaotic, results.

What Public Act 478 does not do, however, is give schools any direction as to the extent of their jurisdiction over off-campus cyberbullying. As noted, cyberbullying often takes place off-campus, using privately-owned equipment and services. Efforts to restrain off-campus cyberbullying inevitably lead to concerns of freedom of speech under the First Amendment, and schools' ability to regulate that speech diminishes or disappears entirely as its connection to the school environment decreases. Schools have come out on the losing side of most court decisions involving off-campus cyberbullying, generally on the basis that the schools could not demonstrate that the activity created, or was reasonably certain to create, a material or substantial disruption of the school's educational mission. Without demonstrating such a nexus, the schools violate students' First Amendment rights by regulating or disciplining for that conduct. Public Act 478 gives no assistance to schools on this issue, and actually sidesteps it. Schools are placed in the position of either not disciplining off-campus cyberbullying because the discipline would likely be challenged, and challenged successfully, on First Amendment grounds, or disciplining in violation of the First Amendment. In the former situation, schools would be accused by their constituents of not following the law; in the latter, they would be exposed to damages and legal expenses for taking action that is unconstitutional.

Public Act 478 enacts several other, less consequential changes to the overall bullying statute. District bullying policies are now to contain an assurance of confidentiality for those who report an act of bullying, together with procedures to safeguard that confidentiality. Any amendment to district bullying policies, including the required cyberbullying amendment, is to be preceded by a public hearing. And, in a provision noted by the media, incidents of bullying in a district are now to be reported to the State annually using specified forms.

Since the legislation took effect on March 30, 2015, district policy amendments, due within six months thereafter, are accordingly to be completed by September 30, 2015. A copy of the revised policy must be provided to the Department of Education.

If you have questions about the cyberbullying amendment or the bullying statute generally, please contact Mark McInerney at (313) 965-8383, mmcinerney@clarkhill.com, or another member of Clark Hill's Education Law group.

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