Proposed Cyberbullying Bill Places Schools In Jeopardy

By Mark W. McInerney / Oct 15, 2013

As recently reported by the news media, an amendment to Michigan's anti-bullying statute to prohibit "cyberbullying" is making its way quickly through the State Legislature, ostensibly to cure an oversight from the bullying legislation enacted in 2011. A closer look at the bill reveals that while it gives schools responsibilities to prohibit and punish cyberbullying, it provides schools with essentially no guidance on the meaning of that term, and no clear boundaries as to the extent of schools' jurisdiction over cyberbullying.

Public Act 241 of 2011, "Matt's Safe School Law," removed Michigan from the small list of states that lacked anti-bullying legislation. The Act 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. "Bullying" was defined in the act very broadly and specifically.

Commentators noted that Public Act 241 did not address the subject of "cyberbullying," except to the extent it took place using district equipment or the district's internet service. Since most cyberbullying takes place from off-campus using privately-owned equipment and internet service, the Act did not authorize school officials to prohibit or punish such conduct.

A state senator who voted against Public Act 241 solely because it did not address cyberbullying has now proposed SB 74. The bill has two main components, one having to do with state recordkeeping with respect to bullying generally, and one devoted to cyberbullying. With respect to the latter, the bill would require only that the district's policy statement prohibiting bullying " **shall include cyberbullying as a form of bullying and shall define cyberbullying** ." Other than this single sentence, no other provisions of SB 74 address cyberbullying.

In our view, the cyberbullying provision of SB 74 suffers from two distinct and serious flaws. First, in contrast to the thorough definition of "bullying" contained in the original Act, SB 74 does not propose to define "cyberbullying" at all, instead assigning that responsibility entirely to the districts. As a result, the term will inevitably be subject to a host of different definitions, some broad, some narrow, some clear, some not. Common sense dictates that if the Legislature has identified specific conduct it wants schools to prohibit, it should define that conduct in a clear fashion - as was done in Public Act 241. Yet the bill as proposed does not do so.

Second, the bill gives no direction to schools as to the extent of their jurisdiction over off-campus cyberbullying. As noted, most cyberbullying, as that term is commonly understood, takes place off campus, using privately owned equipment and services. Off-campus cyberbullying inevitably leads 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 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 violated their students' First Amendment rights by regulating or disciplining for that conduct. Proposed SB 74 gives no assistance to schools on this issue, and actually sidesteps it. Schools would be 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.

On October 9, SB 74 received unanimous approval from the State Senate Judiciary Committee, and prompt passage by the full Senate is anticipated. Districts concerned about the issues raised above should consider contacting members of the State House of Representatives to suggest that, if cyberbullying legislation is to be enacted, it include a definition of cyberbullying, as well as clear and constitutional instruction to schools on the extent to which they may regulate off-campus cyberbullying.

Should you have questions about this or other school law issues, please contact your Clark Hill education law attorney.

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