



NDSBA
NORTH DAKOTA SCHOOL
BOARDS ASSOCIATION

P.O. Box 7128
Bismarck ND 58507-7128
1-800-932-8791 • (701)255-4127
www.ndsba.org

NDSBA GUIDANCE ON NEW CYBERBULLYING LAW

The ND Legislature passed SB 2181, which expanded the definition of “bullying” set forth in NDCC 15.1-19-17 to include cyberbullying occurring off school property. The current definition only addresses conduct occurring on school property or at school-sponsored events. The new law, which becomes effective on August 1, 2019, expands the definition to cover conduct received or sent by a student through the use of an electronic device while the student is off school property and which places another student in actual and reasonable fear of harm or damage to property of the student, and is so severe, pervasive, or objectively offensive the conduct substantially interferes with the student's educational opportunities or substantially disrupts the orderly operation of the public school. ND law requires the board of a school district to have a policy that prohibits students from engaging in bullying as defined in law. As of August 1st, this will include bullying that occurs on or off of school property.

Like North Dakota, many states have adopted new, tougher anti-bullying legislation that includes addressing cyberbullying. But some confusion exists about what bullying and cyberbullying is, and what it is not. It is important for school districts to explore that landscape, including taking a close look at the circumstances under which a school district can punish students for cyberbullying that takes place off campus, on the student’s own device and on students’ own time – all of which are common features of cyberbullying. The law in this area is still developing and there is some disagreement among the courts as to the bounds of school district authority and reach in these circumstances. In the new law, the North Dakota legislature has included language that requires a substantial connection or nexus to the school in order for conduct to be defined as bullying under the law. School officials will need to analyze the circumstances case-by-case to determine if the conduct at issue meets the definition set forth in law. This will not always be an easy task.

The U.S. Supreme Court has not yet directly addressed the issue of whether schools have the ability to regulate and provide disciplinary measures for off campus conduct or speech; however, many circuit courts have and there has been some disagreement as to when and how schools may regulate such conduct. There are several courts that have analyzed this issue under the Supreme Court’s analysis established in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 593 (1972), which permits regulation when student speech would reasonably lead school officials to forecast substantial

disruption of or material interference with school activities. Some courts have applied this analysis regardless of the geographic origin of the conduct or speech at issue. Still yet, other courts first look at the location of the conduct or speech before applying the *Tinker* analysis and have held that there has to be a certain degree of “nexus” or connection between the conduct and the school environment before regulation is permitted. If the conduct occurred off-campus, it may be entitled to more protection.

The newly expanded anti-bullying law in North Dakota requires that school districts’ anti-bullying policies cover conduct that qualifies as bullying and occurs off school grounds. It does not cover all off-campus conduct, but only conduct that is received or sent by an electronic device from one student to another while off campus that causes the student to be in actual or reasonable fear of personal harm to him/herself or damage to his/her property. In addition, the conduct must either be so severe, pervasive, or objectively offensive the conduct substantially interferes with the student's educational opportunities OR the conduct must substantially disrupt the orderly operation of the school. In other words, in order for schools to be able to regulate off campus cyberbullying, there must be a substantial nexus or connection to the student’s educational opportunities or the operation of the school.

What is clear, however, is that as technology becomes more sophisticated, widespread and instantaneous, it is becoming increasingly difficult for students to avoid school regulation on the basis that the cyberbullying conduct did not occur on school property and, therefore, they cannot be disciplined by the school for it. Rather, when the conduct materially and substantially impacts school operations and the victim, the necessary nexus between the cyberbullying and school district exists for school officials to act without running afoul of the First Amendment.

As of August 1st, all school districts must make the required changes to their bullying policy in compliance with the new law and file their revised policy with the Department of Public Instruction. NDSBA has updated its template bullying policy (ACEA) to include the expanded definition of “bullying” and requirements regarding policy language. In addition, school districts should work with their outside counsel if it is unclear whether an incident of cyberbullying meets the definition and whether the school may regulate the conduct at issue. Please contact NDSBA for additional information.