

A CALIFORNIA ADMINISTRATOR'S GUIDE TO CYBERBULLYING AND OTHER INTERNET MISCONDUCT

The availability and widespread use of the Internet by students has inadvertently spawned a new breed of mischievous behavior and *Ferris Bueller*-type hijinks. This advisory is to alert school administrators to the issues associated with imposing discipline for student misconduct, including cyberbullying, perpetrated through the Internet. These issues involve jurisdictional challenges, due process/fair notice concerns, and free expression issues.

School districts face some significant hurdles when pursuing student discipline for Internet misconduct. Student discipline can be particularly challenging when:

- ▶ The illicit Internet activity occurs outside the jurisdictional scope of a school's discipline powers - such as after school hours, off school grounds, and/or from a privately owned computer utilizing a private Internet connection;
- ▶ The district does not have a well written "acceptable use" policy which gives fair notice that certain activities are prohibited and punishable as required by the due process guarantee in the Fourteenth Amendment to the United States Constitution; or
- ▶ The illicit Internet activity includes a communication protected by the free expression guarantees in the First Amendment, the California Constitution, and/or the Education Code. (Note that even in these circumstances, school administrators may nevertheless respond proactively by choosing a course of action from a range of non-punitive alternatives, some of which are discussed below.)

71% of students use social networking tools at least weekly. 60% talk about education topics when on line.
—NSBA: *Research and Guidelines on Online Social and Educational Networking.*

It is worth remembering that even if an Internet communication cannot be directly charged as misconduct, it may nevertheless be considered if it is related to another charge of misconduct. For instance, an illicit Internet communication may be used to demonstrate why seemingly innocuous conduct on school grounds may in fact be serious misconduct, such as physical intimidation.

An illicit Internet communication may also be used to prove up the secondary factual finding necessary to support an expulsion decision in the case of Education Code section 48915(b) and (e) offenses. Specifically, Internet communications may be used to prove that "other means of correction are not feasible or have repeatedly failed to bring about proper conduct" or that "due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others."

EXAMPLES OF INTERNET MISCONDUCT AND THE RANGE OF RESPONSES AVAILABLE TO ADMINISTRATORS

Some postings on social networking sites (MySpace, Facebook, classrooms and blogs) and some e-mail are so inappropriate that they may call for a proactive response by school administrators. Commonly known as cyberbullying, examples include communications which:

- Express a bona fide threat to the physical safety of students or staff;
- Constitute race, religion, or gender based intimidation of students or staff;
- Include personally abusive epithets which are likely to provoke a violent reaction on or around school grounds;
- Contain ideological commentary which is employed to intimidate other students;
- Are designed to incite unlawful conduct by students and actually create a “clear and present danger” of unlawful acts on school grounds;
- Deploy a fraudulent scheme designed to victimize students;
- Constitute sexual harassment;
- Constitute actionable defamation;
- Consist of “smack talk” that creates a real and substantial risk that the orderly operation of the school will be disrupted; or
- Otherwise create a poor impression of the school in the eyes of the community, such as by incorporating vulgarity, obscenity, or pornography.

Internet activity which does not involve student expression may also necessitate a proactive response. Examples include:

- Deploying invasive software, such as viruses or worms;
- Using encryption or other security measures on school systems to avoid monitoring by the school’s system administrator or school staff;
- Using a teacher’s or another student’s password without permission;
- Attempting to log onto the network as the system administrator;
- Changing files that do not belong to the user;
- Unauthorized downloading of extremely large files;
- Otherwise interfering with normal and proper operation of the school’s computers, network, e-mail system, website, or Internet access;
- Plagiarizing works found on the Internet;
- Creating a false and offensive MySpace or Facebook profile using a teacher’s likeness or identity; or

- Uploading, downloading, transmitting, or storing pornography using school equipment and/or while on the school system.

The range of proactive responses available to school administrators for addressing Internet misconduct typically includes student discipline. For example:

Cyberbullying and other Internet misconduct is typically perpetrated after school and from a home. Imposing discipline is tricky because, in this circumstance, the nexus with school activity is usually tenuous.

- Forfeiture of school computer privileges;
- Suspension;
- Expulsion;
- Involuntary transfer to continuation school (Ed. Code section 48432.5);
- Imposing a community service obligation (Ed. Code section 48900.6).

Non-student discipline responses are also available. These include:

- Issuing a public notice that the school is not affiliated with the expression of certain offensive ideas and disapproves of them;
- Counseling the student;
- Requiring participation in an anger management or drug and alcohol program (Ed. Code section 48900(v));
- Requesting a parent to closely supervise and restrict their child's Internet activities at home;
- Withholding grades, diplomas, or transcripts when property is damaged and restitution has not been made (Ed. Code section 48904(b));
- Asking the system administrator to remove the offending material (email MySpace at schoolcare@myspace.com or call 310/969-7398; email Facebook at advertize@facebook.com);
- Filing for a civil injunction (harassment and identify theft);
- Seeking civil damages against the parents (Ed. Code section 48904(a));
- Seeking a criminal complaint (Gov. Code section 6201 – altering and falsifying a public record; Penal Code section 422 – death threat or great bodily injury; Penal Code section 422.6 – threat based on perception of a person's race, color, or religion; Penal Code section 471 – falsifying records; Penal Code section 530.5(a) – identity theft; federal cybercrime statutes in Title 18 of the United States Code).

Each listed alternative has advantages and limitations. The advantages and shortcomings of the student discipline options are highlighted below.

DISCIPLINING STUDENTS FOR INTERNET MISCONDUCT

A. INTERNET MISCONDUCT EXPRESSLY PROHIBITED BY THE EDUCATION CODE.

Student discipline for misconduct such as deploying worms and viruses or changing another student's files or school files is not particularly problematic. The typical charge is a violation of Education Code section 48900(f), damaging or attempting to damage school or private property. School property includes electronic files and databases. (Ed. Code section 48900(u).) Using the Internet to deploy a fraudulent or criminal scheme designed to victimize students supports a charge of violation of Education Code section 48900(g), attempted larceny.

Remote access long after the end of the school day may create a disciplinary jurisdiction question but should not necessarily preclude prosecution. Jurisdiction exists whenever the misconduct is "related to school activity or attendance" regardless of the time of day the misconduct occurs. (Ed. Code section 48900(s).) Although there is no California case law squarely on point, a malicious attack on the school files or a scheme to victimize fellow students should be sufficiently school related regardless of whether the attack was initiated from a site off school grounds and after the school day.

B. INTERNET MISCONDUCT NOT EXPRESSLY PROHIBITED BY THE EDUCATION CODE.

Activity such as using encryption measures to avoid monitoring, utilizing another's password, accessing as the system administrator, downloading excessively large files, posting demeaning or defamatory information regarding staff or other students, or transmitting/storing pornography can be problematic because these are behaviors which are not expressly prohibited by the Education Code. School administrators do not have the legal authority to discipline students unless the activity is expressly prohibited by the Education Code. (Ed. Code sections 48900 and 48922(b).)

Fortunately, however, Education Code section 48900(k) authorizes discipline where a student has "disrupted school activities or willfully defied the valid authority of . . . school personnel engaged in the performance of their duties." Consequently, a well drafted "acceptable use" policy could bring this sort of illicit activity within the school's disciplinary authority through the operation of section 48900(k). Note that pursuant to AB 420 (effective January 1, 2015), students may not be expelled for violating section 48900(k).

C. ACCEPTABLE USE POLICIES.

An acceptable use policy should make clear to students that engaging in certain activities while on a school related website, otherwise using the school's network or e-mail system, utilizing a school Internet connection, or while using school computers, cameras, or other electronic devices may result in forfeiture of school Internet and computer privileges as well as subject the offender to suspension.

In order to avoid a Fourteenth Amendment/due process-fair notice issue, however, it is important that the acceptable use policy specifically, narrowly, and clearly define each type of activity that may result in disciplinary action. The school must be able to demonstrate that the offending student had prior notice of the conduct to which his/her behavior must conform. (See *Flaherty v. Keystone Oaks Sch. Dist.* (W.D. PA 2003) 246 F.Supp.2nd 698.) Additionally, for each prohibited activity, it should be readily apparent that engaging in the activity would interfere with the operation of the school in a substantial way. (See *Beussink v. Woodland R-IV Sch. Dist.* (E.D. MO 1998) 30 F.Supp. 1175.)

Finally, in order to avoid a potential Fourth Amendment illegal search/privacy issue, the acceptable use policy should make clear that school related Internet activity may, from time to time, be monitored by school staff, and students can have no expectation of privacy. For risk management purposes on the other hand, the policy should also make clear to parents that the scope of the school's supervision is limited to communications transmitted from school computers during school hours, that the school largely relies on individual students complying with the acceptable use policy and on parental oversight of their own child when the child is not physically at school, and that the school will not regularly surf the Internet sites for violations but may monitor sites when alerted to a problem.

Regardless of when or where it is perpetrated, cyberbullying can harm students emotionally. These students may present a physical danger to themselves and others both during and after school activities.

D. ILLICIT COMMUNICATIONS OVER THE INTERNET.

Internet activity which includes profane language, obscene expressions, sexual or other types of harassment, intimidation, outright threats of bodily injury or death, or communications advocating other students to commit unlawful acts on school grounds (aka cyberbullying and cyberstalking) may typically be charged as a violation of either Education Code section 48900(a)(1), threatened to cause physical injury to another person, Education Code section 48900(i), habitual profanity or vulgarity, Education Code section 48900(r), bullying, Education Code section 48900.2, sexual harassment, Education Code section 48900.3, threatened to cause "hate violence," Education Code section 48900.4, harassment, threats, or intimidation, or Education Code section 48900.7, terroristic threats, so long as the communication is outside the ambit of constitutional free expression guarantees.

If the school's acceptable use policy contains prohibitions against such types of communications, those communications may also be prosecuted as violations of Education Code section 48900(k), willful defiance. For example, the Education Code expressly permits schools to impose reasonable time, place, and manner restrictions on free expression. Consequently, a school's student discipline code and acceptable use policy may preclude expression that contains profanity, conveys obscene imagery, or may otherwise be lewd and vulgar. (Ed. Code section 48950.) Such verbiage is typically outside the ambit of constitutional free expression guarantees. (*Bethel Sch. Dist. v. Fraser* (1986) 478 U.S. 675.)

Note that when applying the student discipline code to student expression, or drafting an acceptable use policy which precludes or regulates student expression, particular care must be taken to avoid inadvertently prohibiting communications which may be protected by the free expression guarantees of the First Amendment, the California Constitution, and the Education Code. Additionally, prior to imposing student discipline for a specific illicit communication, free expression issues must be analyzed in the particular light cast by the specific circumstances existing at the time of the communication.

E. BULLYING AND CYBERBULLYING - SECTION 48900(r)

Development of Current Anti-Bullying Provisions in the Education Code: Following the suicide death of Seth Walsh late in 2010, three pieces of anti-bullying legislation were enacted: (1) Seth's Law (AB 9) required school districts to adopt a policy which (a) expressly prohibited harassment/bullying based on disability, gender, nationality, race or ethnicity, religion, agnosticism, atheism, sexual orientation, gender, gender identity or gender expression; and (b) set out a clear process for receiving and investigating complaints of harassment/bullying; (2) AB 1156 revised Section 48900(r) to create the offense of bullying and bullying by an electronic act; (3) AB 1732 further defines the concept of bullying by an electronic act to expressly include: (i) posting to or creating a burn page - that is an internet web site designed to harass or intimidate a pupil; (ii) knowingly creating a credible impersonation of another pupil without his or her permission for the purpose of bullying the pupil; and (iii) creating a false profile of a pupil and posting it on a social network internet website.

Definition of Bullying: Education Code sections 48900(r) and 32261(f) together presently define the misconduct of bullying as:

1. Any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act, including the following conduct:

Sexual Harassment. The unwelcome verbal conduct of a sexual nature that creates an intimidating, hostile, or offensive educational environment (48900.2);

Hate Violence. The threat of force or intimidation designed to interfere with the free enjoyment of any right or privilege secured by federal or state law or constitution and done so because of the target person's or groups' mental disability, physical disability, gender, gender identity, nationality, race or ethnicity, religious beliefs or sexual orientation (48900.3); or

Harassment or Intimidation. The generic harassment, threats or intimidation that is severe enough to create an intimidating or hostile educational environment and invades the rights of others (48900.4).

2. Which has the effect or can reasonably be predicted to have the effect of either:

- placing a reasonable pupil in fear of harm to that pupil's person or property;
- causing a reasonable pupil to experience a substantially detrimental effect on his or her physical or mental health;
- causing a reasonable pupil to experience substantial interference with his or her academic performance; or
- causing a reasonable pupil to experience substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school.

Bullying by Electronic Act or Cyberbullying: Means bullying by (i) transmission of a message, text, sound or image using an electronic device including a cell phone, or (ii) a post on a social network website such as Facebook or MySpace. Prohibited posts include burn pages, faux profiles, and other impersonations.

Types of Misconduct That Is Not Bullying or Harassment:

- Simple acts of teasing and name calling.
- Simple rudeness or generalize rudeness.
- General disruptive behavior.

Conduct in the Nature of Bullying or Harassment That Is Not Misconduct:

- Caustic expression protected by the First Amendment.

F. DISCIPLINARY JURISDICTION - ILLICIT COMMUNICATIONS MADE AFTER SCHOOL AND AT HOME.

For the school to have the legal authority (jurisdiction) to impose discipline, the student misconduct must be school related. (Ed. Code section 48900(s).) In other words, there must be a nexus between the misconduct and school activity. Consequently, student misconduct which occurs after school hours, at a student's home, and utilizing privately owned property is typically (but not always) beyond the school's disciplinary jurisdiction.

The limited scope of a school's jurisdiction does not necessarily preclude it from disciplining a student for illicit Internet communications even though those communications may originate from home, on a non-school computer and Internet connection, and late in the evening or on a weekend. For example:

When responding to cyberbullying school officials may not trample on students' First Amendment rights.

- An Internet communication directed at students or staff which contains sexual harassment is school related if it is severe or pervasive enough so it may be considered by a reasonable person of the same gender as the victim

to create an intimidating, hostile, or offensive educational environment, or if it has had a negative impact on the victim's academic performance. (Ed. Code sections 48900(r) and/or 48900.2.)

- An intimidating or harassing Internet communication directed at students or staff is school related if it is severe or pervasive enough to create an intimidating or hostile educational environment and has the actual and reasonably expected effect of materially disrupting class work, creating substantial disorder, and/or invading the rights of students or staff. (Ed. Code sections 48900(r) and/or 48900.4.)
- An Internet communication containing a terroristic threat is school related if it has the actual and reasonably expected effect of causing students or staff to be in fear for their safety or the safety of their families, or for the protection of school or private property. (Ed. Code section 48900.7.)

G. ILLICIT COMMUNICATIONS AND FREE SPEECH PROTECTION.

Assuming the necessary jurisdiction requirement is satisfied, what types of student expression on the Internet can be prohibited and/or the subject of student discipline, censored, or otherwise punished? The applicable guidelines, unfortunately, are not particularly harmonious or consistent. Whether or not a particular communication may be prohibited and/or punished can be difficult to determine with certainty.

Guidelines codified by the Education Code are:

1. The free expression rights of students in high schools are coextensive with the rights of adults in other settings. In other words, generally, the full range of free expression guarantees which apply to adults in a non-school environment also apply, in their entirety, to communications by high school students, even in the context of a school environment (Ed. Code section 48950(a).)
2. Student expression is subject to reasonable time, place, and manner restrictions. (Education Code section 48950(f).) A school publications code, outlining the responsibilities of student journalists and editors and holding them to professional standards of English and journalism, is an example of such a restriction. (Ed. Code section 48907.)
3. Students may be disciplined for threats, harassment, and intimidation unless such illicit expression is, under the pertinent circumstances, constitutionally protected. (Ed. Code section 48950(d).)
4. Illicit expression, such as obscene, libelous, or slanderous communications, can be prohibited, unless otherwise constitutionally protected. (Ed. Code section 48907.) Perhaps an example would be a political satire or parody directed at a current, controversial event where the accompanying obscenity

or slander is an integral part of and inseparable from the legitimate political commentary contained in the expression.

5. Illicit expression designed to incite students to violate school rules or to commit unlawful acts on school grounds can be prohibited, provided that under the circumstances there is a clear and present danger that students will actually commit unlawful acts on school grounds, violate school regulations, or create a substantial disruption of the orderly operation of the school. (Ed. Code section 48907.)
6. Illicit expression which includes threats of violence motivated by ethnic, racial, religious, gender, disability or homophobic inspired hatred. (Ed. Code sections 48900(r) and/or 48900.3.)

Guidelines are contained in case law as well. Applying case law, however, involves varying degrees of interpretation and extrapolation.

Case law guidelines include:

1. As a general rule, content based restrictions are prohibited. An Internet communication which is solely an expression of an ideological philosophy, a religious belief, or a position on a political or social issue is generally protected expression even when those ideas are communicated in an insensitive or demeaning manner. (*Watts v. United States* (1969) 394 U.S. 705.)

Internet speech, even when crude, juvenile and profane, in all likelihood cannot be disciplined except in limited circumstances.
2. Student expression may not be prohibited or punished, simply because the recipients may be inclined to retaliate in a physical way during school hours on school grounds. A school may not prohibit student expression simply because it presents a controversial idea and opponents are likely to cause some disruption. (*Smith v. Novato Unified School Dist.* (2007) 150 Cal.App.4th 1439.)
3. Student expression may not be restrained solely because of the desire of school administrators to avoid the discomfort and unpleasantness that may accompany an unpopular viewpoint. (*Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (1969) 393 U.S. 503.)
4. In order to restrict student expression that may disrupt school activities, the forecast of disruption must be reasonable and fact based, the disruption forecast must be substantial, and the nature of the disruption must be that it interrupts school activities, intrudes in school affairs, or the rights of others. (*Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (1969) 393 U.S. 503.)

5. Expression of a religious or political belief on a high school campus which is also a psychological attack on a core identifying personal characteristic of other students, such as their race, religion, gender, or sexuality, may be prohibited but it cannot be the subject of a suspension or expulsion. (*Harper v. Poway Unified Sch. Dist.* (9th Cir. 2006) 445 F3d 1166.)
6. Although controversial or offensive ideas and opinions may not be censored, expression which is inconsistent with the pedagogical mission of a school may be prohibited, including expression which is grammatically incorrect, poorly written, inadequately researched, unfairly biased or prejudiced, vulgar, profane, or unsuitable for immature audiences. (*Hazelwood School Dist. v. Kuhlmeier* (1988) 484 U.S. 260.)
7. Student expression at a school event may be restricted if it can be reasonably viewed as promoting illegal drug use. (*Morse v. Frederick* (2007) 127 S.Ct. 2618.)
8. A school may censor actionable defamation. (*Leeb v. DeLong* (1988) 198 Cal.App.3rd 47.)
9. A threat may be prohibited and punished only if it is (1) a direct, unambiguous, specific, and serious expression of the intent to inflict physical harm or death, (2) made by a student with the ability to carry it out, (3) reasonably induces fear of violence in the victim, (4) and is not made in jest, idle talk, or in the nature of a political argument. (*Lovell v. Poway Unified Sch. Dist.* (9th Cir. 1996) 90 F.3d 367.)

10. An offensive political or ideological expression may be prohibited if it utilizes symbolism or imagery, such as a burning cross, which has been historically employed as a virulent form of intimidation and is being used to intimidate students or staff. (*Virginia v. Black* (2003) 538 U.S. 343.)

It is important to remember that when faced with a jurisdictional, due process, or free speech issue that may preclude responding with student discipline, censorship, or another punitive option, alternative non-punitive options should not be ignored. Typically, non-punitive options can serve the need for a proactive response, ensuring student safety and maintaining an educational environment conducive to academic advancement.

H. IMPORTANT CASES INVOLVING CYBERBULLYING

***Rosario v. Clark County Sch. Dist.* (D. Nev. July 3, 2013) 2013 U.S. Dist. LEXIS 93963 – Cyberbullying the school basketball coaches**

Facts: Following the final basketball game of the season, while having dinner at a restaurant with his family, Juliano used the social networking site Twitter to post several derogatory tweets about the coach and other school staff. There was nothing redeeming in the Tweets. Juliano liberally used the words “b*tch,” “f*ck,” and “**ss.” The tweets were racist, violent and hateful. School administrators charged Juliano with cyberbullying and punished him. Juliano's parents sued the school district.

The Court noted that obscene material is not protected by the First Amendment. To be obscene, however, expression must meet each of the following three elements: (i) whether the average person applying contemporary community standards would find that the expression, taken as a whole, appeals to the prurient interest; (ii) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, (iii) whether taken as a whole, the expression lacks serious literary, artistic, political, or scientific value. (*Miller v. California* (1973) 413 U.S. 15, 23, 93 S. Ct. 2607, 37 L. Ed. 2d 419.)

Applying the *Miller* standard, the Court determined that only one of the derogatory tweets was obscene. That tweet expressed the hope that the coach (a male) gets gang raped by 10 black men.

Result: Regarding a school's ability to punish students for off-campus speech on social media websites, the Nevada court cogently summarized the law. School officials have the authority to discipline students for off-campus speech that will foreseeably reach the campus and cause a substantial disruption. That issue had not yet been decided, so the court scheduled the case for trial.

Juliano also asserted that the school violated his privacy rights guaranteed by the Fourth Amendment when school officials searched his private Twitter account. Juliano apparently tweeted using Twitter's privacy setting. When a user utilizes the Twitter privacy setting, he or she intends the message to be heard only by his or her followers and not by the general public. Nevertheless, the court determined that users have no reasonable expectation of

privacy in their Twitter accounts because they know that their followers may advise others of the expression. In this case, one of Juliano's followers brought the tweet to the attention of school administrators and let them use his Twitter account to access the message.

J.C. v. Beverly Hills Unified Sch. Dist., 711 F.Supp.2d 1094, 2010 (C.D. Cal. 2010) – Cyberbullying of fellow student

Facts: A high school student used her cell phone to record a video of her classmates engaged in a conversation at a restaurant after school. The conversation consisted of making derogatory comments about another classmate. The comments were vile, vulgar and defamatory. The victim was called a “slut,” and an “ugly piece of shit.” Later in the evening, the student posted the video to YouTube from her home computer. She then contacted 5 to 10 fellow students and told them to view the video. The video received 90 hits. The next day, the video was discussed by several students while at school. The victim was very upset and crying. She told the school counselor that she did not want to go to class because of the resulting humiliation. The counselor spent 20-25 minutes convincing her to return to class. Forty-five minutes were spent with the victim's mother and school administrators expended time investigating the mother's complaint. The student was suspended for two days.

Result: The school district violated the student's First Amendment free speech rights when it punished her because, in this circumstance, the YouTube video did not cause a substantial disruption of school activities nor could a substantial disruption have been reasonably forecasted by school officials.

J.S. v. Blue Mt. Sch. Dist., 650 F.3d 915, 2011 (3d Cir. Pa. 2011) – Cyberbullying of fellow student

Facts: An 8th grade honor roll student was suspended from school for creating a faux profile mocking the school principal and posting it on MySpace. The profile was created from the student's home using her parent's computer. The profile was exceptionally demeaning, crude, vulgar and defamatory.

Result: The school district violated the student's First Amendment free speech rights when it punished her because the expression did not create a substantial disruption in school and the circumstances could not have led school officials to reasonably forecast a substantial disruption at school.

Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 2011 (3d Cir. Pa. 2011) – Cyberbullying of school principal

Facts: A high school senior was suspended for creating a faux profile parodying the school principal and posting it on MySpace. The school implemented other adverse action as well. He was sent to an alternative education program, banned from extracurricular activities, and not allowed to participate in the graduation ceremony. The profile had been created during non-school hours using his grandmother's computer. It cast the principal

as a drunkard, steroid user and homophobic. The profile was exceptionally demeaning, crude, vulgar and defamatory.

Result: The school district violated the student's First Amendment free speech rights when it punished him because there was an insufficient nexus between the expression and a substantial disruption of the school environment.

Kowalski v. Berkeley County Sch., 652 F.3d 565, 2011 (4th Cir. W. Va. 2011) – Cyberbullying of fellow student

Facts: From her home, a high school senior created and posted to MySpace a burn page titled "Students Against Sluts Herpes." The page was largely dedicated to harassing/bullying a fellow student. It used the concept of preventing sexually transmitted diseases as a thinly veiled platform for defaming and demeaning the victim. Among other things, the victim was accused of having herpes and called a whore. The discussion group interacting and posting comments or, "friends," included two dozen other fellow high school students. The victim understood the attack to be school related and complained to school officials. The student was punished with suspension from school and was banned from attending school-related social activities.

Result: The school district did not violate the student's First Amendment free speech rights when it punished her for creating and posting the burn page designed to attack another student. School administrators have the authority to regulate student expression even if it does not originate at the school, so long as the expression can make its way to the school in a meaningful manner. Because the burn page was defamatory, demeaning and aimed toward a fellow classmate, it created a substantial disorder of the school environment or a substantial disorder could be reasonably forecasted by school officials in this circumstance.

Wynar v. Douglas County Sch. Dist., 2011 U.S. Dist. LEXIS 89261 (D. Nev. Aug. 10, 2011)

Facts: Off campus and after school, a high school student tweeted a friend and fellow student that on April 20 (anniversary of the Columbine massacre), he wanted to shoot and kill several girls at Douglas County High School, shoot a certain named male student and kill 50 other students at random with his SKS assault rifle and 50 round clip, semi-automatic shot gun and pistol. The message was forwarded to another classmate who gave a copy to the school. The student was suspended and expelled.

Result: The school district did not violate the student's First Amendment free speech rights when it punished him because in this circumstance, a substantial disruption can be reasonably forecasted. The student indicated he had access to guns and ammunition, he specifically referenced shooting girls and a male student, he referenced the school by name, he picked the anniversary of the Columbine massacre as the date, and also referenced the Virginia Tech massacre.

TABLE OF OFFENSES: CYBERBULLYING

Cyberbullying is sending or posting harmful material in order to be cruel to others or engaging in other forms of social or emotional cruelty using the Internet or other digital technologies. Cyberbullying includes direct harassment and, also, indirect activities intended to damage the reputation of the individual targeted or cause interference in their relationship with others, such as posting harmful material, impersonating the targeted individual or disseminating personal information.¹

In order for a particular instance of cyberbullying to be the subject of student discipline: (1) All the elements of the Education Code offense must be present including the jurisdictional element; and (2) The expression must be outside the protection of the U.S. and California Constitutions.

	OFFENSE	EDUCATION CODE SECTION
1	A communication threatening to cause physical injury to staff or another student. (Must be connect to school activity or attendance.)	48900(a)(1)
2	Use of profane language or obscene expressions directed at staff or other students. (Must be connected to school activity or attendance.)	48900(i)
3	Communication(s) directed at students or staff which contain sexual harassment and are severe or pervasive enough so as to create an intimidating, hostile, or offensive educational environment or results in a negative impact on the victim's academic performance.	48900.2 and 48900(r)
4	Communication(s) directed at students or staff which is sufficiently intimidating or harassing so as to create an intimidating or hostile educational environment and has the actual and reasonably expected effect of materially disrupting class work, creating substantial disorder, and/or invading the rights of students or staff.	48900.4 and 48900(r)
5	Communication(s) directed at students or staff which include threats of violence motivated by ethnic, racial, religious, gender, disability or homophobic inspired hatred.	48900(r) and/or 48900.3
6	Communication(s) containing a terroristic threat which has the actual and reasonably expected effect of causing students or staff to be in fear for their safety or the safety of their families, or for the protection of school or private property.	48900.7
7	Posting demeaning or defamatory information regarding staff or other students.	48900(k) and/or (r) In conjunction with an Acceptable Use Policy
8	Creating a demeaning faux MySpace or Facebook profile.	48900(k) and/or (r) In conjunction with an Acceptable Use Policy

¹ *Cyberbullying Legislation and School Policies*, Nancy Willard, M.S. J.D., Center for the Safe and Responsible Use of the Internet, 2007.

**TABLE OF OFFENSES:
INTERNET MISCONDUCT OTHER THAN CYBERBULLYING**

Generally, school officials cannot impose student discipline unless the misconduct is expressly prohibited by the Education Code. However, since Education Code section 48900(k) authorizes student discipline in cases where a student has “. . . willfully defied the valid authority of . . . school personnel engaged in the performance of their duties,” an “acceptable use” policy can bring illicit activity, which is not already addressed by the Education Code, within the disciplinary authority of school officials. The student, however, must have had prior notice of the school’s “acceptable use” policy.

	NATURE OF THE OFF CAMPUS/ AFTER SCHOOL MISCONDUCT	APPLICABLE EDUCATION CODE PROVISION FOR PURSUING STUDENT DISCIPLINE
1	Changing another student's files or school files	48900(f) In conjunction with 48900(u)
2	Damaging or attempting to damage school property such as electronic files and databases.	48900(f) In conjunction with 48900(u)
3	Using the Internet to deploy a fraudulent scheme designed to separate students from their money or property.	48900(g)
4	Successfully deploying malware such as a virus.	48900(f) In conjunction with 48900(u)
5	Using encryption measures with school hardware or on a school network to avoid monitoring school officials.	48900(k) In conjunction with Acceptable Use Policy
6	Utilizing a teacher's or another student's password with school hardware or on a school network.	48900(k) In conjunction with an Acceptable Use Policy
7	Accessing a school network as the system administrator.	48900(k) In conjunction with an Acceptable Use Policy
8	Transmitting/storing pornography with school hardware or using a school network .	48900(k) In conjunction with an Acceptable Use Policy