

Cyberbullying and the First Amendment

Overview	This lesson can be used in:	Teaching strategies	National standards for civics and government
Students apply key free speech precedents to cases of cyberbullying.	Government, Civics, Law, and Current Events courses	Role play, small group work	V.B. What are the rights of citizens?: Scope and limits of rights

Outcomes

As a result of this lesson, students will be able to do the following:

- Identify criteria to use in evaluating First Amendment cases related to school discipline for on and off campus student speech.
- Apply Supreme Court decisions to scenarios to determine whether government conduct violated students' rights.
- List several steps to take if students are experience cyberbullying.

Handouts

1. Handout 1: Potential First Amendment Cases
2. Handout 2: Article from the *Connecticut Mirror*
3. Answer Guide: Potential First Amendment Cases

Preparing to teach

Copy handouts. Note that this lesson assumes prior knowledge of three Supreme Court cases: *Tinker v. Des Moines*, *Hazelwood v. Kuhlmeier*, and *Bethel v. Fraser*. Cover that material before teaching this lesson.

Note: you can learn about cyberbullying laws in your state at http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf

Role Play: Dealing with Online Harassment (10 minutes)

- 1) Put students into groups of three, and ask the groups to assign each student in the group a number – 1, 2, or 3 (each group must have at least a 1, a 2, and a 3). All the “1”s will be Student #1, the “2”s will be Student #2, and the “3”s will be the Principal.
- 2) Tell students that they are about to participate in a role-play. You are going to read them a short background scenario, and then they’ll role-play a conversation between the two students and the principal.
- 3) Read the setup to the students: Student #1 was at home this weekend when he/she received about a dozen nasty text messages from Student #2. The messages were insulting, called Student #1 names and made disparaging remarks about his/her family. Student #1 logged on to Facebook and said mean things back. Now both students have come to the principal to complain about the other. Student #1 says #2’s comments were much worse. Student #2 says someone took his/her phone at a party and wrote the mean texts.
- 4) Tell the class that the two students have just arrived at the principal’s office and both demand that he/she discipline the other. They are now going to role-play the conversation between the students and the principal. Have the students begin their role-plays. Allow about 3 minutes for the students to progress through the conversation and then call the class back together.
- 5) Ask for a group to volunteer to describe their conversation to the class. Ask them to explain what the principal said and how the two students reacted. Now, pose this question, and give students one minute to discuss it in their groups of three:
 - What do you think the principal should have done?
- 6) After a minute, call for discussion to halt, and pose the next question:
 - What do you think the principal is allowed to do? Can the principal take action even though the events happened over the weekend and not at school?
- 7) Call on a group or two to provide their feedback on the two questions to the class. Ask if their opinions would change if the scenario had happened at school.
- 8) Ask students: Why might a school not be able to discipline students for something that happens outside school hours and off school property?

The First Amendment in Schools (10 minutes)

- 9) Remind the class that the Supreme Court has ruled that students’ free speech rights in schools are somewhat restricted compared to adults. The Court has held that schools can limit free speech in a few instances.
- 10) Ask for three volunteers to remind the class of the Supreme Court rulings in *Tinker*, *Fraser*, and *Hazelwood*. Write a short summary of the holdings on the board:

- *Tinker*: schools can restrict speech that substantially disrupts the work and discipline of the school or interferes with the rights of other students.
- *Fraser*: schools can restrict speech that is lewd, indecent, or plainly offensive when it is inconsistent with the school’s educational mission.
- *Hazelwood*: schools can restrict speech in school-sponsored expressive activities when the public might believe the school is endorsing the message presented (as long as the school’s actions are reasonably related to legitimate teaching concerns).

Activity: Analyzing Potential Cases (35 minutes)

11) Tell the students that you’ll now examine some scenarios to determine whether discipline from a school violated the students’ First Amendment rights. First, the class will need to create a list of criteria to evaluate the scenarios. Tell the students to imagine that they are lawyers, and Sally, a local student, has just walked into their office to complain about a recent suspension from school due to something she said or wrote. Sally wants to know if the school violated her First Amendment rights.

12) Ask the students to list questions to guide their analysis of Sally’s situation, while you list them on the board. Suggest the first question to ask to get the ball rolling:

- Did the conduct happen at school or not?

Take a few student answers, and guide them towards questions like these:

- Did the incident “substantially disrupt the work and discipline of the school”?
- Was the speech lewd, indecent, or plainly offensive?
- Was the speech part of a school-sponsored activity?
- Was it possible that the school could be perceived as endorsing the message?

Leave the questions up as students work on the next activity.

13) Next, put the students in groups of four and tell them: You are now law firms. Several high school students have approached your law firm because they want to sue their school for First Amendment violations. You must consider their cases, decide whether they have a chance to win, and decide whether you’ll take the case.

14) Distribute **Handout 1: Potential First Amendment Cases**, and tell the students to name their law firm and begin to read and consider the students’ stories and the questions underneath.

15) Allow 15 minutes for this work, though students might not all get through all five scenarios. Choose one or two of the scenarios to review as a class. Call on a “law firm” to share their determination about the chosen scenario, and discuss. Ask if any other “law firms” arrived at different answers, or at the same answer for different reasons.

Teacher notes for this discussion:

- True threats are not protected under the First Amendment, and courts have awarded schools a lot of leeway in this area. If any students are making true threats, the school is able to discipline.
- So far, courts have rarely mentioned or applied the part of *Tinker* that refers to “interfering with the rights of other students.” However, many experts say that bullying or harassment arguably interferes with the rights of other student, so it’s conceivable that courts may begin to allow schools to regulate that speech because it interferes with the rights of others.
- The Supreme Court hasn’t ruled in any student speech cases related to electronic communication. However, some courts and experts have noted that in their *Morse v. Frederick* opinion (in which the Supreme Court ruled that schools can restrict speech that is regarded as encouraging illegal drug use), the majority mentioned that if the speech in the *Fraser* case had occurred in a public forum off campus, it would have been protected.

Debrief (5 minutes)

- 16) Ask the students how they would help a friend who is being bullied via the internet or text message. List responses on the board, and suggest the following if students don’t bring them up:
- Tell an adult – parent, teacher, counselor, etc.
 - Don’t respond
 - Block the person from emailing, texting, or messaging you
 - Report content that violates a web site’s terms of service to the web company (i.e., report abusive content to Facebook)
 - Don’t pass along cyberbullying messages
 - Report to the police if you feel threatened
- 17) Distribute **Handout 2: Article from the Connecticut Mirror**. Tell students that several states have passed laws, or are considering laws, to deal with cyberbullying in schools. This article summarizes a new law in Connecticut. Ask students to read it in preparation for the Cyberbullying Legislative Hearing.

Handout I: Potential First Amendment Cases

Law Firm of _____

You and your partners in the law firm have received calls from the following people. Each is a student who was disciplined by the school, and each feels that the school did not have the authority to discipline them. They've called you because they're interested in suing the schools, and want to know: Do they have a case?

Read the summary of each client's situation, and decide whether you think they can win in court.

1. Kara

Kara, a senior in high school, created a MySpace discussion page at home, and invited about 100 of her friends to join. Over the course of that evening, about two dozen of her fellow Musselman High School students joined the page, and posted photos and comments of a particular student. The photos and comments suggested that this particular student at the school had herpes. They included an edited picture of the girl with red dots drawn over her face. Some comments called the girl a "slut" and "whore." The next day, the girl's parents complained to the school administration. The school officials concluded that Kara had created a "hate website" in violation of the school's anti-bullying policy. They suspended her for 5 days, and banned her from participating in school social events for 90 days.

Do you think that the school violated Kara's First Amendment rights? Why or why not?

Will you take the case?

2. Tim

Tim created an offensive Web site in the school computer lab during study hall. It contained a section on "losers" and the pictures of the boys that Tim claimed were "losers." Tim also accessed his site on school computers to show to other students. The school suspended Tim.

Do you think that the school violated Tim's First Amendment rights? Why or why not?

Will you take the case?

3. Katherine

Katherine was a senior in high school when she created a group on Facebook about her teacher, Sarah Phelps. The group was called “Ms. Sarah Phelps is the worst teacher I’ve ever met” and encouraged others to express their negative feelings of Ms. Phelps. The group was created after school hours from Katherine’s home computer. It was not accessed at school and did not disrupt school activities. The posting was removed after two days. The school principal later learned of the posting and suspended Katherine from school for three days.

Do you think that the school violated Katherine’s First Amendment rights? Why or why not?

Will you take the case?

4. Joe and Sam

Joe and Sam wrote an email that included obscene comments about another boy at school. It also included photos of the boy, which they digitally edited to make them vulgar. They sent the email to about 10 other students from the school, and those 10 forwarded it on to an additional 50. School administrators learned about the email when they found several printed copies of it circulating among students during class. They suspended Joe and Sam for a week, and prohibited them from participating in extracurricular activities.

Do you think that the school violated Joe and Sam’s First Amendment rights? Why or why not?

Will you take the case?

5. Becca

One weekend, Becca sent 12 text messages to Sarah. In the texts, she called Sarah names, told her to “watch her back,” made obscene comments about Sarah, and threatened to start rumors about her. On Monday, Sarah was too upset to come to school. On Tuesday, Sarah’s parents went to the school and complained to the principal. The principal suspended Becca for two days.

Do you think that the school violated Becca’s First Amendment rights? Why or why not?

Will you take the case?

Handout 2: Article from the *Connecticut Mirror*

New Conn. 'Cyberbullying' Law Prompts Free Speech Debate

Jacqueline Rabe Thomas

August 30, 2011

As students head back to school after summer vacation, educators, free-speech advocates, and anti-bullying activists are gearing up for implementation of the state's new "cyberbullying" law that will make online statements subject to academic disciplinary proceedings.

The new law puts school officials in the position of having to pass judgment on off-campus speech with little legal precedent to guide them, some experts say. If they clamp down on online comments, they risk First Amendment challenges. If they're too lenient, they could be deemed responsible if cyberbullying leads to tragedy.

"This is requiring schools to limit and prohibit speech on the grounds that it hurts someone's feelings," said Sandy Staub, the legal director of the American Civil Liberties Union of Connecticut. "We'll see a student's speech limited soon enough with school coming back. And when it does, we'll have to do the other part of our job: litigate."

"Are we infringing their free speech rights? No, because their speech is impacting another student. But I don't know if I'm right or wrong. I am sure that debate will continue," said Cal Heminway, chairman of Granby's Board of Education and the immediate past president of the Connecticut Association of Boards of Education.

Legal experts say so far there is no clear precedent for dealing with online student speech.

Attorneys Amy Corbett Dion and Megan Smith of the law firm of Berchem, Moses & Devlin are advising the boards of education they represent to proceed with caution when disciplining students for what they say online.

"Until there is a ruling from the U.S. Supreme Court, school districts in Connecticut should ... exercise caution about a school's ability to regulate off-campus conduct unless the conduct can reasonably be foreseen to cause substantial disruption," they wrote in an opinion piece in the *Connecticut Law Tribune* earlier this month.

PHOEBE'S LAW

One out of every three online teens report being a victim of potentially menacing activities online, according to a Pew Internet and American Life national survey conducted in 2007.

The Cyberbullying Research Center says at least seven states have passed cyberbullying laws, including Massachusetts, where the suicide of a girl named Phoebe Prince attracted national attention. Connecticut legislators say they modeled this state's law after Massachusetts'. But Staub says Connecticut's law is "overly broad" and gives educators much more authority than the Massachusetts law, which only allows administrators to punish students for electronic communication that creates a "hostile environment" or "substantially disrupts" school.

The Connecticut law includes the same provisions, but also allows school officials to act if a student's online speech "causes physical or emotional harm" to another student or "places such student in reasonable fear of harm" even outside of school. "Let's stop the wave of creating these cyberbullying laws for a few minutes and think about how we can both protect students and speech rights at the same time," Staub said.

State Sen. Andrea L. Stillman, D-Waterford and co-chair of the legislature's Education Committee, said the intent of the law is to create a safe learning environment. "The bill addressed in-school issues," she said. "I don't profess this law is going to solve all school bullying but it certainly creates some inroads."

COURTS SPLIT

The most commonly cited precedent on student free speech law is a U.S. Supreme Court decision issued three decades ago, when the internet was virtually unknown. The high court may soon update that precedent as it is asked to reconcile conflicting lower-court rulings.

"The ground is shifting under our feet on a student's right to free speech," said Frank D. LoMonte, executive director of the Student Press Law Center. "These [cyberbullying] laws really run the gamut as to whether they are constitutional."

The 1969 Supreme Court ruling in *Tinker v. Des Moines* involved three students being disciplined for wearing black armbands to school in protest of the Vietnam War.

In reversing the disciplinary measures against the students, the Supreme Court declared that students don't "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." But the justices did allow administrators to censor speech if it "invades the rights of others" or creates "substantial disorder."

While this ruling has provided guidance for decades on when school officials can intervene in student speech, the advent of Facebook, YouTube, and other digital forums have complicated matters. Federal district and appellate courts have issued conflicting rulings on the question.

In upholding the punishment of a Burlington, Conn., high school student after she called school officials "douchebags" online, the 2nd U.S. Circuit Court of Appeals noted: "The Supreme Court has yet to speak on the scope of a school's authority to regulate expression that... does not occur on school grounds."

"There's definitely been a few court cases that have bubbled up that have been used to over-punish students," LoMonte said. "These decisions have cast significant doubt of what the right standard is for off-campus speech."

From <http://www.ctmirror.org/story/13722/school-bullying>

Answer Guide: Potential First Amendment Cases

1. Kara

Kara, a senior in high school, created a MySpace discussion page at home, and invited about 100 of her friends to join. Over the course of that evening, about two dozen of her fellow Musselman High School students joined the page, and posted photos and comments of a particular student. The photos and comments suggested that this particular student at the school had herpes. They included an edited picture of the girl with red dots drawn over her face. Some comments called the girl a “slut” and “whore.” The next day, the girl’s parents complained to the school administration. The school officials concluded that Kara had created a “hate website” in violation of the school’s anti-bullying policy. They suspended her for 5 days, and banned her from participating in school social events for 90 days.

This scenario is based on a real case, Kowalski v. Berkeley County Schools, which was decided by the Fourth Circuit Court of Appeals. The Court ruled that Kara’s speech “functioned as a platform for Kowalski and her friends to direct verbal attacks towards [a] classmate...” and that the speech “could reasonably be expected to reach the school or impact the school environment.” Most of the people who participated in the discussion group were Musselman High School students. They decided that the targeted, defamatory nature of the speech made it materially and substantially disruptive. It both interfered with the school’s work and collided with the rights of other students to be secure and to be let alone. They also felt that, had the school not intervened, more serious harassment or copycat incidents could have occurred. In October 2011, Kara appealed this case to the U.S. Supreme Court, arguing that courts in different circuits have disagreed about whether off-campus speech can be subjected to school regulations.

2. Tim

Tim created an offensive Web site in the school computer lab during study hall. It contained a section on “losers” and the pictures of the boys that Tim claimed were “losers.” The student also accessed his site on school computers to show to other students. The school suspended Tim.

This scenario is not based on an actual case. Several courts have held that schools do not have authority to discipline students based on off-campus speech. In this case, however, the web site was created at school, with school computers, and shown to other students at school. It is therefore likely that the school would have the authority to discipline Tim without infringing his First Amendment rights.

3. Katherine

Katherine was a senior in high school when she created a group on Facebook about her teacher, Sarah Phelps. The group was called “Ms. Sarah Phelps is the worst teacher I’ve ever met” and encouraged others to express their negative feelings of Phelps. The posting was made after school

hours from Evans' home computer. It was not accessed at school and did not disrupt school activities. The posting was removed after two days. The school principal later learned of the posting and suspended Evans from school for three days.

This scenario is based on the case of Evans v. Bayer (S.D. Fla. February 12, 2010). When Katherine Evans sued the principal in federal court, he asked the court to dismiss the suit. The court allowed the suit to go forward, holding that First Amendment rights are stronger for public school students' off-campus expressions than on-campus expression. Because Evans had made the posting at home, without any on-campus disruption, and without showing it to others during school, the court found that the posting was made off-campus. The court then held that Evans' speech was protected by the First Amendment's right to "freedom of expression." After this ruling, the school then settled with Ms. Evans out of court.

4. Joe and Sam

Joe and Sam wrote an email that included obscene comments about another boy at school. It also included photos of the boy, which they digitally edited to make them vulgar. They sent the email to about 10 other students from the school, and those 10 forwarded it on to an additional 50. School administrators found out about the email when they found several printed copies of it circulating among students during class. They suspended Joe and Sam for a week, and prohibited them from participating in extracurricular activities.

This scenario is not based on an actual case. Joe and Sam's email was obscene and vulgar and circulated at school. That information might lead one to believe that the school could treat it as on-campus speech and regulate it under Tinker and Fraser. One also might argue that the email probably caused substantial disruption at school, if 50 students had seen it and several copies were circulating during class. If Joe and Sam's email accounts belonged to the school (i.e., joe@school.k12.us), then there is a stronger argument that the school can act.

5. Becca

One weekend, Becca sent 12 text messages to Sarah. In the texts, she called Sarah names, told her to "watch her back," made obscene comments about Sarah, and threatened to start rumors about her. On Monday, Sarah's parents went to the school and complained to the principal. The principal suspended Becca for two days.

In this case, the principal probably did not have the authority to suspend Becca. Her conduct took place outside school hours and off school grounds. It didn't involve any school employees, and did not cause a disruption at school. While Becca couldn't be punished by the school, she may be committing civil or criminal harassment, particularly if the abuse and threats continue. Different states have different laws about harassment, and more information is available at <http://criminal.findlaw.com/crimes/a-z/harassment.html>. If Sarah was extremely upset and unable to attend school, it is possible that the school would be able to regulate this speech based on Tinker's "rights of others" language. However, no court has relied on this language yet in upholding a school district's discipline of a student for off-campus online speech.