Position Statement of the
National School Boards Association

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As the national organization representing state associations of school boards and their more than 90,000 local school board members throughout the United States, the National School Boards Association is pleased to be a part of the national conversation on inter-student violence. Collectively, our school board members govern approximately 15,000 local school districts, which serve 46.5 million public school students, or approximately 90 percent of the elementary and secondary students in the nation. NSBA works with and through our state associations to advocate for equity and excellence in public education through school board leadership.

School Boards Are Dedicated To Providing a Safe Learning Environment, and To Preventing and Eliminating Bullying and Harassment in Public Schools.

Inter-student violence -- including bullying and harassment -- in public schools directly impacts NSBA's guiding principal, equity and excellence in public education. As the research on bullying continues to emerge, we are deeply concerned about how bullying affects children. NSBA is a leader in exploring the links between school climate and learning. A school climate survey released in the spring of 2006 by the Urban Student Achievement Task Force of the NSBA Council of Urban Boards of Education (CUBE) shed light on the growing problem. Nearly 32,000 high school students in 108 city schools responded. Although seventy-five percent of respondents said they are not bullied during the school day, 50 percent said they see other students being bullied at least once a month, and nearly half expressed doubt that teachers really can stop the behavior.[1]

Since 2006, numerous research studies on bullying have been released that are cause for concern. A very recent federal study found that 25% of middle school students and 16% of high school students in Massachusetts reported being the targets of bullying at schools.[2] A 2010 study conducted by the Josephson Institute of Ethics of 43,000 high school students found that 43% of respondents reported being bullied in the past year, and 50% reported observing bullying of someone else.[3]

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[1] Perkins, Brian K., *Where We Learn: The CUBE Study of Urban School Climate*, Council of Urban Boards of Education, National School Boards Association, 2006. http://www.nsba.org/Board-Leadership/Governance/KeyWork/Climate-Resources/Where-we-learn_1.pdf.

[2] *Bullying Among Middle School and High School Students — Massachusetts, 2009*, Center for Disease Control and Prevention (April 22, 2011). http://www.cdc.gov/mmwr/pdf/wk/mm6015.pdf.

[3] *Bullying, Violence and High-Risk Behavior*, Josephson Institute Center for Youth Ethics (October 26, 2010). http://charactercounts.org/programs/reportcard/index.html

As the bullying research continues to emerge, and communities are faced with the tragic effects of bullying and abuse, school board members are dedicating themselves to formulating and implementing bullying prevention and intervention programs, updating discipline policies and procedures, and seeking training on the subject. Their overriding concern is to provide safe and bully-free learning environments to the students in their charge. We know of no school board member who does not wish to create a learning environment in which her district's students can thrive: collaborative, safe, and bully-free environments in which students are free to learn.

For these reasons, in April 2011, at its most recent annual meeting of delegates representing school board members from each state in the union, the NSBA Delegate Assembly voted to re-adopt and update NSBA's enduring beliefs and policies addressing bullying, harassment and school climate:

Beliefs & Policies, Article IV, § 2

Maintaining a Safe and Supportive School Climate

NSBA believes that students must have safe and supportive climates and learning environments that support their opportunities to learn and that are free of abuse, violence, bullying, weapons, and harmful substances including alcohol, tobacco, and other drugs. NSBA urges federal, state, and local governments, as well as parents, business, and the community, to cooperate fully with local school boards to eliminate violence, weapons, and harmful substances in schools and to ensure safe, crime-free schools. NSBA urges local school boards to incorporate into their policies and practices approaches that encourage and strengthen positive student attitudes in, and relationship to, school.

Beliefs & Policies, Article IV, § 2.7

Elimination of Violence and Disruptive Behavior

NSBA supports state and local school board efforts to become more proactive in the elimination of violence and disruptive behavior at school, school-sponsored events, during school bus travel and while traveling to and from school. Such behavior includes, but is not limited to physical violence, "bullying," by any means, disrespect of fellow students and school personnel, and other forms of harassment.

Beliefs & Policies, Article IV § 2.10

Harassment

NSBA believes that all public school districts should adopt and enforce policies stating that harassment for any reason, including but not limited to harassment on the basis of race, ethnicity, gender, actual or perceived sexual orientation, gender identity, disability, age, and religion against students or employees will not be tolerated and that appropriate disciplinary measures will be taken against offenders. Such policies should include an effective complaint mechanism.

Districts should institute in-service programs to train all school personnel, including volunteers, to recognize and prevent harassment against employees and

students. Districts should investigate complaints, initiate education programs for students, and institute programs to eliminate harassment.

With these statements of belief guiding our work, NSBA continues to engage school leaders, national policy-makers, researchers and school attorneys with the goal of finding the best way to prevent and address bullying and its deleterious effects on school climate. At NSBA's Council of School Attorneys School Law Seminar in April, 2011, three of the nearly 20 educational sessions addressed the legal standards applicable to bullying and harassment. NSBA is initiating its own anti-bullying program, "Students on Board," in which school boards will engage in meaningful discussions with students about bullying and its impact in the school setting. NSBA staff attorneys speak, write, and talk to the media extensively on the topic. The nation's school boards are concerned, and we are providing national support.

Recent Federal Initiatives on Bullying Prevention and Intervention Have Raised Awareness of the Issue; but NSBA Expresses Caution over Scope.

The Obama Administration's unprecedented initiatives on student bullying and increased attention to civil rights enforcement in general[4] have produced a national conversation on the issue in which NSBA has been a willing and enthusiastic participant. In August 2010, NSBA Executive Director Anne Bryant attended the first White House Summit on bullying. After further communication with the Administration on the issue, in March 2011, NSBA's then-president Earl Rickman attended the White House Conference on bullying prevention. NSBA legal and executive staff continues to remain in direct communication with Kevin Jennings, the Department of Education's (ED) Assistant Deputy Secretary for Safe and Drug-Free Schools, on policies regarding safe schools.

As part of an ongoing dialogue with federal officials, NSBA has discussed with the Department the enforcement position taken by its Office for Civil Rights (OCR) regarding incidents of bullying in schools that may rise to the level of harassment under the applicable civil rights laws. After OCR issued its "Dear Colleague" letter in October, 2010 (DCL),[5] we wrote to ED General Counsel Charlie Rose, outlining our concerns regarding the approach it sets out.[6]

NSBA's primary concern with the current OCR enforcement approach is that it may be too broad. The current enforcement position, although using the same standards OCR has espoused in guidance for 20 years, broadens the scope of possible civil rights violations for which school officials may be held accountable. The tone of the 2010 DCL is significantly different from that of past guidance. Instead of a relatively hands-off approach such as that taken in its 2001 Sexual Harassment Guidance, in which OCR outlined the enforcement standard and suggested: "As long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its

[4] Diament, Michelle, "Education Department to Step Up Enforcement of Disability Rights," *Disability Scoop*, March 8, 2010. http://www.disabilityscoop.com/2010/03/08/doe-civil-rights/7251/.

[5] Letter from Russlynn Ali, U.S. Dept. of Educ. Assistant Secretary of Civil Rights, to Colleagues: Harassment and Bullying (Oct. 26, 2010) (hereinafter "Dear Colleague Letter" or "DCL"). http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html.

[6] Letter from Francisco M. Negrón, Jr., National School Boards Association, to Charlie Rose, Department of Education (December 7, 2010). http://www.nsba.org/SchoolLaw/COSA/Updates/NSBA-letter-to-Ed-12-07-10.pdf.

responsibility under the Title IX regulations,"[7] the new letter lays out a multitude of "examples of how a school's failure to recognize student misconduct as discriminatory harassment violates students' civil rights"[8] and lists a plethora of actions that may need to be taken to remedy each. In one example, students harassed a gay student with slurs and sexual comments, in person and on social networking sites. The victim dropped out of drama club to avoid further harassment. Because the student self-identified as gay, the school presumed the conduct did not fall under a federal civil rights law (which prohibits discrimination based on race/color/national origin, sex, or disability – but not sexual orientation). The DCL takes the position that the district here failed to recognize the pattern of behavior as a form of sex discrimination under Title IX. The comments, it asserts, showed that the student was being harassed for failing to conform to traditional characteristics associated with masculinity. The DCL then explains that Title IX requires the district to investigate and remedy the sexual harassment that overlaps with the conduct based on sexual orientation.[9] OCR offers several more examples in which conduct was taken as bullying or harassment based on categories not explicitly protected by civil rights statutes, but OCR opines that the district should have been aware and should have responded more expansively to the climate created by the harassment.[10]

By providing in the DCL an expansive position and multiple examples of conduct that constitutes harassment protected by civil rights laws, OCR is creating an expectation that school officials are to respond to each and every offensive incident as if it were a civil rights violation. This standard may needlessly drain school resources and attention from the more crucial task of fostering an appropriate climate while minimizing the professional discretion of local educators to craft workable, individualized solutions.

Specifically, in the DCL, OCR warns school officials that some student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under one or more of the federal anti-discrimination laws enforced by the agency. OCR then lays out its enforcement position, followed by the factual scenarios described above. This enforcement standard differs from the standard used by courts to award money damages, as set forth in the Supreme Court's 1999 decision in *Davis v. Monroe County Board of Education*. [11]

Whereas in *Davis*, the Court ruled that schools could be held liable under Title IX for student-on-student sexual harassment when the school had *actual knowledge* of the harassment but was *deliberately indifferent* to it,[12] the DCL advises that school officials could be responsible if they *reasonably should have known* about an incident of harassment. Additionally, the DCL says harassment creates a hostile environment, and therefore is a violation of the law, if it is *severe, pervasive or persistent*, rather than *Davis's* cumulative standard requiring that it be *severe, pervasive, and objectively offensive*. The DCL says the harassment must only *interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school*, rather than *Davis'* requirement that the harassment *effectively bar* access to an *educational opportunity or benefit*.

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[7] Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties, U.S. Department of Education Office for Civil Rights (January 19, 2001). http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

[8] Dear Colleague Letter, *supra* note 5, at 4.

[9] *Id*. at 7-8.

[10] *Id.* at 4-9.

[11] 526 U.S. 629 (1999).

[12] *Id.*

As noted in our response to the DCL, while it is indeed crucial that school officials respond to incidents of bullying and harassment, nuanced legal distinctions can create confusion that detracts from an understanding of the requirements of the law and could have the unwelcome effect of chilling educators' actions for fear of legal liability under federal civil rights laws. Put simply, it is too much to ask of school administrators that they treat each incident of teasing and bullying as if it were a federal civil rights case in the making. From a legal perspective, OCR has opted to adopt a stricter agency enforcement standard, even though the liability standard under federal laws handed down in *Davis* very clearly limits a school district's legal obligations: "[T]he recipient [of federal funds] must merely respond to known peer harassment in a manner that is not clearly unreasonable."[13] [14] And, from a practical perspective, it is unworkable for school administrators to deal with what may be routine issues of student discipline from a federal civil rights perspective rather than an educational one meant to correct misbehavior and teach appropriate conduct.

a. "Federalizing" bullying incidents sweeps much inappropriate adolescent behavior under the civil rights umbrella.

Responding to bullying in public schools solely through a civil rights lens will tend to federalize every instance of bullying and harassment by causing school leaders to over-identify every incident of teasing and name-calling as possible harassment. What school leaders need, instead of an overly heightened awareness of potential liability and an overly broad definition of bullying, is recognized discretion to exercise professional judgment about the situations on the ground.

Teachers and administrators who work with students every day know that children through high school age who are still developing their judgment of appropriate interactions with others frequently engage in rude and offensive behavior to one another that would not be acceptable among adults. Even if the patently offensive words of students appear to implicate a protected class at first glance, when viewed under a totality of circumstances, a reasonable educator may conclude the utterances are more incidental, albeit inappropriate and offensive, than evincing a pattern of discrimination. Thus, even though the behavior is clearly inappropriate and unacceptable in the school environment for which the offending student may rightfully be disciplined, it does not necessarily rise to the level of creating a hostile environment under federal civil rights laws.

For instance, many adolescent students may use epithets that superficially refer to sexual orientation indiscriminately. While the words are, again, offensive and derogatory, they may be uttered with an adolescent immaturity that may or may not be understood by either the speaker or the audience to implicate automatically a person's gender identity or characteristics in a manner that violates federal civil rights legislation intended to prevent discrimination on the basis of gender. A federal district court in Michigan recently made just such a finding, after the Court of Appeals for the Sixth Circuit had returned the case to it and a jury had awarded an $800,000 verdict to the student subjected to taunting and abuse that had been framed as sexual harassment. Said the court: "Although the Court finds the harassment in this case deplorable and is

[13] 526 U.S. at 648-49.

[14] OCR responded to our concerns in correspondence dated March 25, 2011 in which it noted that the enforcement position taken in the DCL is just that – an enforcement position. It does not purport to be the liability standard that a civil rights plaintiff would have to meet in order to obtain money damages in federal court.

sympathetic to students who are subjected to such behavior, the harassment directed at Plaintiff was typical of middle school and high school behavior."[15] The court noted the Supreme Court's statement in *Davis*:

> "Children may regularly interact in a manner that would be unacceptable among adults. See, *e.g.*, Brief for National School Boards Association et al. as *Amici Curiae* . . . Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among children, however, ***even where these comments target differences in gender.*** Rather, in the context of student-on-student harassment, damages are available only where the behavior is *so severe, pervasive and objectively offensive* it denies its victims the equal access to education that Title IX is designed to protect." (Emphasis supplied.)[16]

The court's rationale here challenges the DCL's prescription that bullying when gender related implicates a federal civil right. Such an approach, the court appears to suggest, is considerably too blunt an instrument to address the problem of bullying. Schools do not need the specter of protracted litigation, money damages, or federal enforcement to inform their choices about school safety. They need clear guidance based on research, training, and readily available resources to help them identify and respond to problems on the ground in reasonable, direct and immediate ways.

b. Federal civil rights laws were designed as vehicles to redress past wrongs -- a completely different purpose from that of educators fostering a nurturing educational environment.

The Michigan district court's remarks echo the purpose of federal civil rights legislation– to be a vehicle for the redress of past wrongs. The laws were designed to allow groups traditionally and clearly impugned, maligned, and subjected to discrimination a way to receive redress in court.[17] Federal civil rights violations are now well-established causes of action used

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[15] *Patterson v. Hudson Area Schools*, 724 F.Supp.2d 682, 693 (E.D. Mich. 2010).

[16] *Id.* at 693, citing *Davis*, 526 U.S. at 651-52.

[17] Title VI (1964)
No person in the United States shall, on the ground of *race, color, or national origin*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. §2000d. (Emphasis supplied.)

Title IX (1972)
No person in the United States shall, on the basis of *sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. 20 U.S.C. §1681(a). (Emphasis supplied.)

Section 504 (1973)

frequently by plaintiffs in suits based on peer bullying to obtain money damages. Attorney's fees may be granted to the prevailing party by the court.

This back-end approach contrasts sharply with the front-end focus of educators to protect students and to provide a safe learning environment. A bullying incident is best addressed by local entities taking into account the characteristics and priorities of the community. School boards across the country are doing this right now, and have been for the past several years. State legislatures and educational agencies are passing laws and model policies to direct the school boards' policy formation.

At latest count, 45 states had passed an anti-bullying statute. The vast majority of these statutes require local school boards to address bullying through policy, with the participation of the community.[18] Many, such as Florida's statute, indicate that the policy must apply to all students, but that specific categories may be listed, such as Florida's:

> The school district bullying and harassment policy shall afford all students the same protection regardless of their status under the law. The school district may establish separate discrimination policies that include categories of students.[19]

With the adoption of far-reaching statutes in Massachusetts (2010) and New Jersey (2011), there is a trend toward increasing state-wide safeguards in the bullying context. Some reach beyond the school campus and present as yet unresolved legal questions implicating the U.S. Constitution's privacy and free speech rights of students. The Massachusetts law for instance, was one of the first to address off-campus behavior that may affect the school environment:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his *disability*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. 29 U.S.C. §794(a). (Emphasis supplied.)

Americans with Disabilities Act (1990)
Subject to the provisions of this subchapter, no *qualified individual with a disability* shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. 12132. (Emphasis supplied.)

[18] See., *e.g.,* Florida's statute,

By December 1, 2008, each school district shall adopt a policy prohibiting bullying and harassment of any student or employee of a public K-12 educational institution. Each school district's policy shall be in substantial conformity with the Department of Education's model policy mandated in subsection (5). The school district bullying and harassment policy shall afford all students the same protection regardless of their status under the law. The school district may establish separate discrimination policies that include categories of students. *The school district shall involve students, parents, teachers, administrators, school staff, school volunteers, community representatives, and local law enforcement agencies in the process of adopting the policy*. The school district policy must be implemented in a manner that is ongoing throughout the school year and integrated with a school's curriculum, a school's discipline policies, and other violence prevention efforts. . . . (Emphasis supplied.)

F.S.A. §1006.147(4).

[19] *Id.*

> "Bullying", the repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim's property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school. For the purposes of this section, bullying shall include cyber-bullying.[20]

Others, such as the New Jersey "Anti-Bullying Bill of Rights Act," list numerous procedural and reporting requirements for school administrators, educators, and school personnel including school board members, with short timelines for reporting instances of bullying, investigations, and mandatory board member and staff training for identifying and responding to the different kinds of harassment.[21]

c. "Federalizing" the bullying response may put school officials in an untenable position: Safeguarding all possible federal civil rights while not overstepping competing rights such as student Free Speech.

Courts recognize the challenges educators face in balancing student rights and safety. As a result, many courts support the discretion of school officials to address bullying and harassment in ways that align with the pedagogical goals of the school and the individual needs of the students involved. *Fitzgerald v. Barnstable School Committee*,[22] in which the Supreme Court determined that a plaintiff may bring a Section 1983 action for constitutional violations in addition to a Title IX claim, highlights the dilemma facing administrators. In that case, after finding no evidence of wrong doing, the principal suggested that the alleged victim of sexual misconduct by another student be transferred to another bus, but the parents asked the alleged perpetrator to be transferred, or that a monitor be placed on the bus. The Superintendent did not implement the parents' requests. The U.S. Court of Appeals for the First Circuit found that the parents' Title IX claim lacked merit because the response of the school committee and the Superintendent to the reported harassment had been objectively reasonable.[23] Significantly, ED's position stands in marked contrast to the court's decision, suggesting in the DCL that the principal's actions might not be permissible under the OCR enforcement standards; it urges any separation of the alleged target from the alleged harasser should be designed to minimize the burden on the target's education program.[24]

Cyberbullying, or bullying through electronic channels including email, chat and text, presents another arena in which federal civil rights are bound to clash. If schools are to be held accountable for all bullying behavior that may constitute harassment under federal civil rights laws, including that which takes place in cyberspace but makes its way onto campus overtly or by effect, schools will understandably feel the need to patrol electronic communications by

[20] M.G.L.A. 71 §37O(a).
[21] New Jersey P.L. 2010. Chapter 122, approved Jan. 5, 2011.
[22] 129 S.Ct. 788 (2009).
[23] *Id.* at 792-793.
[24] Dear Colleague Letter, *supra* note 5, at 3.

students. But, taking on this burden may be an act of futility, for how can a school patrol private internet sites with any measure of effectiveness? And, yet the "should have known" standard would suggest that schools must police such venues to avoid liability under the OCR enforcement standard. The current confusion among courts as to what off-campus behavior can be regulated by schools, combined with the OCR enforcement position, results in an untenable expectation that schools police off-campus online behavior while ultimately facing liability for conduct over which they have no control.

NSBA Is Concerned That "Federalizing" Bullying May Chill Educators' Ability To Resolve A Situation For Fear of Litigation or Agency Action.

Although OCR has stated that it is not actively investigating school districts absent specific complaints about harassment, further expansion of a definition of "bullying" to implicate federal civil rights laws may give educators pause before implementing appropriate action. In other words, "federalizing" bullying may chill the ability of educators to respond in otherwise appropriate ways for fear of agency action or litigation. Specifically, educators should be free to use whatever tools exist in their professional arsenal to address any conflict between students, including bullying. This could mean using the lowest level of intervention necessary. But, if every instance implicates a federal right, educators will have no choice but to take formal steps in even the most mundane of cases to avoid agency liability and prepare for a legal defense.[25] Such an insalubrious approach places form over function, restricting the educator's ability to use discretion and to respond effectively with the fewest resources necessary to resolve a conflict.[26]

Federal Agency Action on Bullying Should Help Schools Resolve Tensions Between Federal Rights.

The law on civil rights is constantly evolving as courts grapple with competing interests. And yet, public school administrators are expected to be educational experts, and to keep abreast of competing interests in the law and nuanced decisions from the courts.

The bullying context presents some unique challenges for the First Amendment free speech rights of students. It is accepted that school districts have a limited ability to discipline students for speech that occurs both on-campus and off-campus. Where the line of school

[25] The Dear Colleague letter presents a factual example suggesting that formal procedures may be required. In the example a female high school student, new to the school, is called sexually-charged names by other students after her brief romance with a student. A teacher and a coach witnessed the name-calling, but identified it as "hazing" that new students frequently experience. OCR says that the school employees failed to recognize that the "hazing" was sexual harassment. The school, according to OCR, did not comply with its Title IX obligations when it failed to investigate or remedy the harassment. "Schools may use informal mechanisms for addressing harassment," says the DCL, "but only if the parties agree to do so on a voluntary basis. Had the school addressed the harassment consistent with Title IX, the school would have, for example, conducted a thorough investigation and taken interim measures to separate the students from the accused harassers." Dear Colleague letter, *supra* note 5 at 6-7.

[26] Also, school boards, under the advice of counsel, often include OCR's enforcement standard in their local policies. Although the liability standard for money damages is much higher, boards may still be sued based on failure to meet the standards *in their own policies*. Although the ultimate legal standard remains the same – actual knowledge of harassment based on a protected category, and deliberate indifference – the policy becomes a piece of evidence showing what the district *should have done.* If the OCR standard is what a district may be expected to meet if it is ever investigated for civil rights violations, the Department of Education should codify that standard in policy through rule promulgation.

district authority is drawn in a given situation, however, depends on many considerations; and courts disagree about where to draw it.

Under Supreme Court precedent, school districts may discipline students within the limitations of the First Amendment for on-campus, non-school sponsored speech in the following instances only: if the speech is likely to cause a "substantial disruption of or material interference with school activities,"[27] or the speech collides with "the rights of other students to be secure and to be let alone;"[28] if the speech is "sexually explicit, indecent, or lewd;"[29] or if it "can reasonably be regarded as encouraging illegal drug use."[30] While no Supreme Court case has discussed a "true threat" in a school setting, it is relatively well-accepted that schools may also discipline students who make them.[31] Even so, as Justice (then Judge) Alito wrote in an opinion he authored as a judge on the U.S. Court of Appeals for the Third Circuit, harassing speech in a school setting (or elsewhere) is not categorically denied First Amendment protection.[32] Likely for that reason, most state legislatures have been careful to limit their definitions of bullying and harassment in state statutes to include only speech for which the Supreme Court allows school districts to discipline students.[33]

Bullying and harassment that takes place over the internet or through other electronic communication often occurs entirely off-campus, but may have varying effects on-campus. None of the Supreme Court cases discussing disciplining students for speech contemplate whether school districts can discipline students for off-campus non-school related speech. Only one federal circuit to date has definitely ruled whether and when a school district may discipline students for off-campus, internet speech.[34]

In the absence of clear guidance from the courts, the OCR approach appears to ask schools to regulate speech it deems to constitute bullying and harassment, only to risk suit by the parents of the disciplined students. At best, it is a quandary for educators, who are not jurists.

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[27] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969).
[28] *Id.* at 508.
[29] *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 684 (1986).
[30] *Morse v. Frederick*, 551 U.S. 393, 397 (2007).
[31] See *Watts v. United States*, 394 U.S. 705 (1969).
[32] *Saxe v. State College Area School Districts*, 240 F.3d 200, 210 (3d Cir. 2001)(holding that a school district's anti-harassment policy was unconstitutionally overbroad).
[33] See, *e.g.*, RCWA 28A.300.285(2) (Washington):

"Harassment, intimidation, or bullying" means any intentional electronic, written, verbal or physical act, including but not limited to one shown to be motivated by any characteristic [listed in criminal harassment statute], or other distinguishing characteristics, when the . . . act:

(a) Physically harms a student or damages the student's property; or
(b) Has the effect of substantially interfering with a student's education; or
(c) Is so severe, persistent or pervasive that it creates an intimidating or threatening educational environment; or
(d) Has the effect of substantially disrupting the orderly operation of the school.

[34] See *Wisniewski v. Board of Education of the Weedsport Center School District*, 494 F.3d 34 (2d Cir. 2007) (applying *Tinker*'s substantial disruption test to off-campus speech that was "reasonably foreseeable" to come on-campus). The Third Circuit will also rule on this issue shortly. *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010), *rehearing en banc granted, opinion vacated* (Apr. 9, 2010) (involving off-campus internet offensive speech by student directed at school administrator; decided in favor of the district who disciplined the student); *Layshock v. Hermitage School District*, 593 F.3d 249 (3d Cir. 2010), *rehearing en banc granted, opinion vacated* (Apr. 9, 2010) (involving off-campus internet offensive speech by student directed at school administrator; decided in favor of the student who was disciplined by the district).

At worst, it is a mire that will expose good faith educators and schools to liability from one side or the other.

For instance, in the absence of clear indicia of a hostile environment (such as graffiti, fights or notice) it is not clear whether a school can limit a student's speech around a sincerely held political or religious belief, such as the phrase "Homosexuality is a Sin" with a Bible verse citation or "Support the Defense of Marriage Act" written on a t-shirt a student wears to school. If schools try to regulate this type of speech before-the-fact, they may be subject to an over-breadth challenge.[35] If they allow it, OCR suggests, the district may be allowing a hostile environment to continue.

Conclusion

Bullying and harassment are not acceptable within our schools. For this reason, NSBA continues to support the national call for research, data, and guidance to eradicate them and foster nurturing learning atmospheres. But, any real solutions can only work if our national leaders partner with the school leaders, educators, and communities that will ultimately implement real world strategies to defeat the scourge of bullying. We continue to urge those in policy-making positions to consider the broad implications of "federalizing" the response to bullying by viewing these behaviors solely through the lens of federal civil rights legislation. Local school leaders and educators must be our boots-on-the-ground to identify and implement solutions. They are the experts, uniquely qualified to make the kind of judgment calls that follow school board policies developed with their communities that will make the effort against bullying a success. We look forward to the continued collaboration in this important area.

[35] See *Saxe, supra* note 32; *Zamecnik v. Indian Prairie Sch. Dist. #204*, 2011 WL 692059 (7th Cir. Mar. 1, 2011) (students entitled to a permanent injunction prohibiting school district from banning them from wearing "Be Happy, Not Gay" t-shirt).