



# Cyber-Bullying Study Committee Report

## Dissent by ACLU-Vermont

The American Civil Liberties Union of Vermont disagrees with the changes to statutes proposed by the study committee.

Our disagreement is based on three grounds:

1. Disciplining children for misconduct is the responsibility of parents. The responsibility for discipline when a child is in school, or at a school-sponsored event, is temporarily given to schools as a necessary transfer of authority to maintain school order. Outside of school, however, parents expect -- and the law recognizes -- parents' authority.
2. Schools are often the battleground of rights. In the case of hostile speech termed "harassment" or "bullying," the conflict pits one student's right of free expression against another student's right to access educational opportunities. When the hostile speech occurs at school, schools have authority to intervene and sanction the offending student. Even these situations, however, raise tricky questions. What is hostile speech? How is the effect of the offending speech evaluated? Is the speech's effect on the "target" student so severe that the school can act to limit the offending student's free speech rights, as well as suspend his/her right to access educational opportunities? If the hostile speech occurs out-of-school but a connection to school is asserted, these questions become even trickier.
3. Any effort to have schools police the speech of children outside of school is certain to run into legal challenges. That's because schools' authority to discipline a child for out-of-school misconduct has not been addressed by the U.S. Supreme Court. The law is unsettled. In the cases brought to the lower courts, different federal circuits have reached different conclusions concerning schools' authority. If for no other reason than this vacuum of clarity, a challenge to new out-of-school misconduct statutes is inevitable. Any challenge through the federal courts will be lengthy and costly.

During the committee's discussions, we offered alternative statutory language to address what we felt were constitutional infirmities created by the committee's recommendations. We based our alternative on U.S. Supreme Court decisions involving student free speech and discipline cases. (By contrast, the standards used in the committee's recommended statutory language come from employment law.). Specifically, we looked to the seminal student free speech/discipline

case, *Tinker vs. Des Moines School District* (1969). The main thrust of the *Tinker* decision establishes that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” But the decision goes on to lay out two areas where schools can restrict student speech: when the speech threatens the welfare or safety of the school, and when the speech prevents other students from accessing educational opportunities.

Accordingly, we suggested not revising the bullying and harassment laws but instead amending only the current Vermont statute on school discipline (16 V.S.A. § 11) to read as follows:

(a) A superintendent or principal may, pursuant to policies adopted by the school board that are consistent with state board rules, suspend a pupil for up to 10 school days or, with the approval of the board of the school district, expel a pupil for up to the remainder of the school year or up to 90 school days, whichever is longer, for misconduct on school property, on a school bus or at a school-sponsored activity when the misconduct makes the continued presence of the pupil harmful to the welfare of the school, or for misconduct not on school property, on a school bus or at a school-sponsored activity where direct harm to the welfare of the school can be demonstrated or where the misconduct can be shown to pose a clear and substantial interference with another pupil’s right to access educational programs. The pupil’s parent(s) or guardian shall be notified of any disciplinary action to be taken for out-of-school misconduct and shall be given the opportunity to meet with school administrators to discuss the anticipated action.

Nothing contained in this section shall prevent a superintendent or principal, subject to subsequent due process procedures, from removing immediately from a school a pupil who poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process of the school, or from expelling a pupil who brings a weapon to school pursuant to section 1166 of this title.

(b) Principals, superintendents and school boards are authorized and encouraged to provide alternative education services or programs to students during any period of suspension or expulsion authorized under this section. Discipline for out-of-school misconduct imposed under this section shall be done in conjunction with any appropriate non-school agencies as part of a comprehensive community approach to misconduct that includes involvement by the pupil’s parent(s) or guardian. The school will at all times respect the rights of pupils accused of misconduct, whether the misconduct occurs in or out of school.

We believe this language is based on a sounder legal footing than what the committee developed. However, the committee rejected it in favor of language that we view as more subjective and more open to challenge.

We also wish to point out that there is already a criminal statute on the books (13 VSA § 1027, “Disturbing peace by use of telephone or other electronic communications”) that allows prosecution of “A person who, with intent to terrify, intimidate, threaten, harass or annoy, makes contact by means of a telephonic or other electronic communication with another...” The committee heard testimony describing situations that clearly fell within the scope of this statute.

However, law enforcement told the committee that adequate police and prosecutorial resources are not available to provide enforcement. This situation is discouraging, but it begs the question of the resources schools will need for fair, effective enforcement of any new school discipline authority in this area

Schools are being asked to do more and more things that in the past have been handled by others. Increasingly, schools have become regulators of last resort. This places a heavy burden on school administrators as they are forced to navigate difficult, sensitive areas -- areas where legal expertise is needed and the exercise of administrators' extended authority is challenging.