

TO: Senate Education Committee
FROM: American Civil Liberties Union of Ohio
DATE: December 6, 2011
RE: HB 116 & SB 127 School Bullying Interested Party Testimony

Senators:

The American Civil Liberties Union of Ohio (“ACLU of Ohio”) is the Ohio Affiliate of the national ACLU, with hundreds of thousands of members nationwide and over 30,000 members and supporters across Ohio. The ACLU and ACLU of Ohio are non-profit, non-partisan membership organizations devoted to protecting basic civil rights and civil liberties for all Americans and all Ohioans.

The ACLU of Ohio strongly believes that our state anti-bullying laws are wholly inadequate to protect students from bullying in school and need to be strengthened. However, lawmakers must not enact anti-bullying legislation that would encroach upon students’ constitutional rights.

It is our understanding that this Committee is considering several anti-bullying bills that may eventually be combined. For the sake of efficiency, the ACLU of Ohio offers the following interested party testimony on the various elements that have been proposed in the different bills, rather than addressing each bill separately.

A. Ohio’s anti-bullying law, codified at RC 3313.666 and 3313.67, is inadequate and needs to be strengthened.

Ohio’s anti-bullying statute merely requires that each school district have an anti-bullying policy, but it is devoid of any implementation requirements or enforcement mechanisms that would provide meaningful protection.

As we have seen in countless cases around the state – from Chillicothe to Mentor – simply requiring schools to have a policy is not enough. A policy without adequate implementation and follow through is akin to having no policy at all. Bullying will continue until we enact stronger protections.

The ACLU of Ohio supports legislative efforts that make the following changes:

1. Enumerate protections.

It is imperative that the bullying law include a list of protected characteristics – such as race, ethnicity, national origin, sex, sexual orientation, gender identity and expression, religion, age, and disability.

Without a clear list of protected categories, schools may be unsure what kinds of behavior cross the line into prohibited bullying. Having a clear list makes it easier for schools to implement and enforce a policy.

Enumeration also protects students. If a school can claim they did not know or were not required to address a particular type of bullying, then the student is left unprotected.

A ready example can be found in the case of Z.H., a high school freshman in Union-Scioto Schools in Chillicothe. Earlier this year, Z.H. was viciously attacked and beaten in school. The assault was captured on a student's cell phone and shows the attacker lying in wait for Z.H. to enter the classroom. This was not the first time, nor the last time, that Z.H. was subjected to anti-gay bullying in school. Z.H.'s mother tried for over a year to talk to the school principal to no avail. The mother reports that on one occasion, the principal said her son should behave "less gay."

Schools such as Z.H.'s may be liable for damages if sued under applicable federal civil rights statutes, such as Title VI that prohibits discrimination based on race and ethnicity or Title IX that prohibits discrimination based on sex. The U.S. Supreme Court has ruled that schools may be liable under these laws for failing to address student-on-student harassment in school. *See Davis v. Monroe County Board of Educ.*, 526 U.S. 629 (1999). If Ohio were to clearly enumerate protected groups and implement stronger bullying prevention, it would help insulate schools from legal liability for failure to act.

2. Require in-service training for faculty and administrators.

As we have seen from the failings of our current law, simply having a policy is not enough. Schools need to actually follow the policy for it to be meaningful.

To that end, school staff should be provided with training as to how to identify bullying behavior, how to effectively intervene when harassment is taking place, and strategies to prevent continued bullying. Staff should also be trained about the school's specific policies and procedures for how to document and address any incidents of bullying. If teachers are left to guess at what to do, then it is far more likely that policies will not be properly followed.

3. Require student instruction.

Training should not be limited to only faculty and staff; students should be included too. Students should be provided age-appropriate instruction on what constitutes bullying, why it is wrong, and what action they should take if they encounter someone being bullied. Students should be made aware of the school's anti-bullying policy, the procedures for reporting bullying, and what consequences students may face for engaging in bullying behavior.

In the case of Z.H., referenced above, it was apparent that the other students did not fully appreciate the consequences of what they were doing. Z.H.'s attacker was ultimately found guilty of a juvenile count of misdemeanor assault and sentenced to 90 days detention. Both Z.H.'s attacker and the student who posted the video were also subject to discipline by the school. For something like this to happen, many people failed these students.

4. Require parental notification and encourage involvement.

Parents need to be involved in the process.

Several of the proposed bills require schools to notify parents of anti-bullying policies and the procedures for investigating and responding to reported incidents of bullying.

Schools should engage parents by letting them know if their student is bullying or being bullied, so that parents can address any problems in the home.

5. Enact enforcement mechanisms that include both state oversight and penalties and provide a private cause of action.

A frequent complaint of the current state law is that it has no teeth. Schools are not held accountable for failing to have or follow an anti-bullying policy, the Ohio Department of Education has no authority to force compliance by wayward schools, and parents have no way to force schools to address reported bullying and harassment.

Adding a clear enforcement mechanism solves these problems.

- Oversight by ODE could help ensure that schools adopt policies, follow them, investigate and report on bullying incidents in school. ODE oversight should include authority to enforce penalties on non-compliant districts.
- The statute should also provide for a private cause of action, for when a school willfully turns a blind eye to known harassment. In the case of Z.H. and others, schools were on notice of ongoing and escalating bullying that occurred over years, ultimately leading to tragic results. These families should not be left without recourse when the school's deliberate indifference caused serious harm.

B. Legislation may not intrude on the constitutional rights of parents and students by imposing discipline for speech or conduct outside of school, but there are other constitutionally permissible ways to address electronic bullying.

We urge the legislature to exercise caution and be mindful of constitutional limits in addressing so called "cyber-bullying."

1. Constitutional limitations on discipline for out-of-school speech

SB 127 and others have proposed that schools be authorized to punish electronic bullying, including bullying that occurs wholly outside of school. Doing so, however, raises serious constitutional concerns.

Schools may be tempted to exceed their legal authority in order to discipline students for behavior that occurs outside of school or that may be protected speech. This may be especially tempting when technology is involved. However, the law establishes clear boundaries as to what conduct is within the school's disciplinary reach.

- Schools may place restrictions on cell phone and computer usage during school time, on school property, and utilizing school resources. For example, a school can reasonably require that cell phones be turned off during class. *See Coy v. Bd. of Educ. N. Canton City Schools*, 205 F.Supp.2d 791 (N.D. Ohio 2002).
- Schools may discipline students for speech that disrupts school. Courts have required that the speech substantially interferes with school activity to justify discipline. Fear that speech *may* be disruptive, speech that leads to discussion, heated debate, or speech that a school official dislikes is not justification for stifling student speech. *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969); *Nixon v N.Local Sch. Dist. Bd. of Educ.*, 383 F.Supp.2d 965 (N.D. Ohio 2005).
- Generally, schools are not permitted to discipline students for online activity or speech that occurs entirely outside of the school setting. The only exception is for "true threats" (a threat of violence directed to a named person) made against someone else in the school. When this occurs, the school may discipline the student making the threat according to the school's policy or state or local law. *See J.S. v. Bethlehem Sch. Dist.*, 569 Pa. 638 (Pa. 2002); *Watts v. U.S.*, 394 U.S. 705 (1969).

A pair of recent cases from Pennsylvania illustrates this point. On June 13, 2011, the U.S. Appeals Court for the Third Circuit, sitting *en banc*, ruled on *Layshock v. Hermitage School District* and *J.S. v. Blue Mountain School District*. The Third Circuit made clear that schools cannot punish students for out-of-school speech that does not create a substantial and material disruption inside the school. In both cases, the students had been punished for online speech made on their home computers.

2. Alternatives for addressing cyber-bullying within constitutional limits

However, schools are free to address cyber-bullying within constitutional limits. While technology presents new ways to communicate, it does not inherently change behaviors associated with intimidation and harassment. Bullying by electronic means is still bullying. In other words, the focus should be on the bullying and harassing behavior and not on the means by which it is communicated.

Schools should develop a comprehensive approach to address bullying and harassment. Discipline can and should be part of the plan, but it should not be the schools' only response to bullying behavior. Schools should compliment disciplinary policies with other methods to eliminate bullying.

- School staff should be provided with training as to how to identify bullying behavior, how to effectively intervene when harassment is taking place, and strategies to prevent continued bullying.
- Schools are required by state law to have policies in place that set forth a process to report, investigate, and address bullying. Schools should make sure that staff, students and parents are aware of the process and encouraged to follow the process. School administrators should do their part to thoroughly investigate and respond to reports of bullying or harassment.
- Schools should take advantage of the full range of options to combat the growing bullying epidemic, including but not limited to:
 - Engage parents by letting them know if a student is bullying or being bullied, so that parents can address any problems in the home.
 - Integrate instructions for students on what constitutes bullying, why it is wrong, and what action they should take if they encounter someone being bullied.
 - Have students involved in bullying meet with the school's counselor or psychologist to address the bullying.

In short, discipline cannot and should not be the only answer to bullying. If schools enact comprehensive policies that include teacher training, student instruction, and parental involvement, that will help address bullying that occurs in school or out of school. Furthermore, strengthening and clarifying state law requirements and enforcement will give schools a clear roadmap of their responsibilities while providing families with avenues of redress if a school fails to act.