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***Cyber-bullying:
Legal Responsibilities and
Operational Considerations***

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Cyber-bullying: Legal Responsibilities & Operational Considerations

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What is Cyber-bullying?

- Schools and parents need to be prepared to respond to student cyber-bullying.
- Cyber-bullying has been defined by educator Bill Belsey as the use of information and communication technologies, such as e-mail, cell phone and pager text messages, instant messaging, defamatory personal web sites and defamatory online personal polling web sites, to support deliberate, repeated and hostile behaviour by an individual or group, that is intended to harm others. Mr. Belsey is the creator of the website www.cyberbullying.ca

Why is it Bullying?

- Establishment of power and control over the victim through:
 - Intimidation
 - Humiliation
 - Social exclusion
 - Damage to reputation

Differences from other forms of bullying

- Anonymity
 - It is often difficult to identify the bully
 - Perpetrator feels empowered and protected from accountability
 - Perpetrators often do not take ownership for their actions
 - Perpetrators do not fear being punished
 - Perpetrator detached from the impact of their behaviour
- Cyber-bullies can communicate hurtful messages to a very wide audience
- Continuous – can happen at any time in various settings
- Republication extends victimization

Effect on Victim

- Academic Performance
- Mental Health
- Self Esteem
- Social Outcast
- Helplessness
- Some students won't complain for fear that adults may overreact and the student will lose their computer privileges

Legal Implications: Questions

- What is the educator's standard of care?
- What steps can school officials take to protect a student from cyberbullying?
- To what extent is cyber-bullying outside the legal reach of schools and school boards.
- Can a principal discipline a student for conduct that takes place outside of school on home computers or mobile phones?

Legal Implications: Outline

A. Statutory:

- *Education Act*
- *Human Rights Code*
- *Charter of Human Rights and Freedoms*
- *Criminal Code*

B. Common Law:

- Negligence
- Defamation

Duties of Schools - Statutory

- Boards are responsible through the Principal for establishing and maintaining a safe supervision system for pupils
- Principals' duties under the *Education Act* and Reg. 298:
 - Safe schools: Expulsions/Suspensions
 - Maintain proper order and discipline
 - Pay assiduous attention to the health and comfort of pupils
 - Organize and manage the school
 - Provide for supervision of pupils during the time in which the school building and property are open to the pupil
 - Report promptly any neglect of duty or infraction of the school rules by a pupil to the parent or guardian

Human Rights Code

- Every person has the right to **equal treatment** with respect to **services** without discrimination **because of** race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability (Section 1).
- Education is a service.
- Section 1 does not reference harassment specifically unlike other sections of the Code i.e. employment

Guidelines on Accessible Education, Ontario Human Rights Commission

- *Human Rights Code* applies where harassment creates a poisoned school environment
- Duties of educators and schools:
 - To maintain a safe, positive, non-discriminatory learning environment
 - To take steps to educate students about human rights
 - To implement strategies to prevent discrimination and harassment
 - To take immediate remedial action once made aware of harassing conduct

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Guidelines on Accessible Education, Ontario Human Rights Commission

Sanctions may be imposed where:

- Education providers harass a student
- Education providers know or ought to know that a student is being harassed and do not take effective remedial steps
- Access to education is impaired by poisoned educational setting

Jubran Case

North Vancouver School District No. 44 v. Jubran, [2005] B.C.J. No. 733 (C.A.)

- Student subjected to insults and harassment of a homophobic nature discriminated against by the Board on the ground of sexual orientation
- Board liable for discriminatory conduct of students because it had a duty to maintain a non-discriminatory educational environment
- Schools have duty to educate students about human rights and implement principles to prevent harassment and discrimination
- Board had failed to discharge its duty to accommodate to the point of undue hardship

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Jubran Case

School administration aware of bullying:

- Met with victim and parents more than once
- Investigated reported incidents
- Disciplined students involved
- Principal hired consultant to train staff
- Board provided awareness resource package and workshop and discussed Code of Conduct

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Jubran Case

The Board failed to respond in an effective way:

- Steps taken by staff only after complaint filed
- Ineffective disciplinary approach pursued
- Board strategy to address harassment and discrimination established after Jubran graduated

“In the end, the School Board had implemented policies and procedures that could reasonably be required to create a discrimination-free school environment; its failure was in not doing so during the time Mr. Jubran could have had some relief.”

Freedom of Expression

Charter of Rights and Freedoms

- Section 2(b) provides that everyone has the fundamental freedom of thought, belief, opinion and expression ...
- Any limit to the right of freedom of expression must be demonstrably justified in a free and democratic society
- Reasonable limits on freedom of expression include:
 - Cannot propagate hate against an identifiable group
 - Cannot defame other people

Criminal Code

Criminal Liability

Under the *Criminal Code*, it is a crime to communicate repeatedly with someone if your communication causes them to fear for their own safety or the safety of others.

The offence of threatening death or bodily harm is set out in section 264.1 (1)(a) of the *Criminal Code*, which reads:

“Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat (a) to cause death or bodily harm to any person;”

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Criminal Code

- Bodily harm is defined as “any hurt or injury to a person that interferes with the health or comfort of the person that is more than merely transient or trifling in nature.”
- Bodily harm includes psychological as well as physical hurt or injury.
- The threat need not be directed at a particular person, but simply an identifiable group.

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Criminal Code

Furthermore, the *Criminal Code* contains provisions intended to prevent harm caused to racial, ethnic and religious groups by hate propaganda or the promotion of hatred.

The Supreme Court of Canada has said that a threat is a “tool of intimidation” which is designed to instil a sense of fear in its recipient. It has asserted that the aim and purpose of the *Criminal Code* offences is to protect against fear and intimidation.

Bill C-15 – Legislation being considered to address cyber-bullying as it is recognized that existing laws may not clearly apply.

Police should be contacted immediately if the victim fears for their safety

An Educator's Duty of Care – Common Law

- The common law establishes that school authorities have a special duty of care towards students in their charge
- School boards and employees are held to the standard of care of a reasonably prudent or careful parent in the circumstances

Myers v. Peel County Board of Education (1981), 123 S.C.R. (3d) 1

- “In order to teach, school officials must provide an atmosphere that encourages learning.”

R. v. M.R.M., [1998] 3 S.C.R. 393 at para. 35

- “[A] school board has a duty to maintain a positive school environment for all persons served by it.”

Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825 at para. 42

Negligence

- Elements:
 - A nexus between the school's conduct and the student's injury
 - The breach of a legal duty was the proximate cause of the Plaintiff's injury
 - Schools will not be liable for an unforeseeable event or for unforeseeable intervening events
 - Boards can be liable in negligence through vicarious liability
 - School official must have been found to have acted with deliberate indifference
 - School engaged in intentional or reckless conduct which shocks the conscience
 - Schools not required to constantly supervise students

Defamation

- Statement tends to harm or discredit the reputation of a person
- Libel – written
- Slander – verbal
- Unique characteristics of cyber-bullying defamation:
 - Anonymous
 - Widely disseminated
 - Easily republished

Defamation: Legal Defences

1. Justification:

- Statement true
- Complete defence, even if malicious

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Defamation: Legal Defences

2. Fair Comment:

- An opinion based on facts that are true
- Made honestly and fairly, without malice
- Concerns a matter of public interest

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Defamation: Legal Defences

3. Qualified Privilege:

- Persons who made the statement has an interest or duty to communicate the information
- Recipients have a corresponding duty to receive the communication
- Information need not be true

Qualified privilege defeated where:

- Dominant purpose is actual or express malice; or
- Statement is not reasonably appropriate in the circumstances

Defamation and Freedom of Expression Considerations

- Freedom of expression is a fundamental right but is not absolute
- Courts have recognized limits to freedom of expression by students and staff in an educational environment
- Legal advice should be sought as various interests have to be balanced

Cyber-bullying Strategies and Prevention

- The keys to prevention are:
 - Awareness
 - Education
 - Early intervention

Acceptable Use Policies

- Written computer and Internet acceptable use policies should define what activities are permitted and forbidden.
- Policies should prohibit harassment, threats or intimidation using information technologies.
- There should be clear consequences for failure to comply with policy.
- Acceptable use policies should ideally be signed by both parents and students.
- Students should be encouraged not to give out or share their personal information number, e-mail address or passwords with others.

Victims Should

- Not respond to cyber-bullying
- Inform parent(s) or guardian(s)
- Inform school
- Inform internet service provider
- Save as much information as possible

Reporting Protocols and Considerations

- Schools should clearly identify for students the person(s) to whom complaints should be raised (i.e. principal or vice-principal).
- The student and parents should inform the police where the conduct involves a criminal offence, such as a physical threat.
- Students and parents should be informed that they can report an e-mail threat or harassment to their own Internet service provider.
- However, it can be difficult to get Internet service providers and mobile telecommunications service providers to respond and deal with a student's complaint about being cyberbullied.

Investigations: Processes

Where a school administrator is informed about an incident or has reason to believe that cyber-bullying involving a student has taken place, he/she should conduct a full and thorough investigation. Such investigation should include:

- Meeting with the victim(s) and his/her parents to obtain the background of events.
- Determining whether this was an isolated incident or an ongoing incident.
- Asking the student to prepare a written statement of the events that have transpired.
- Requesting copies of all relevant e-mails with full headers confirming dates and times and/or the name of the chat room and date, time and description of the chat.
- Exploring the identity of the alleged harasser if anonymous. Are certain phrases in the e-mail used by people that the student knows?
- Asking the student if he/she knows or suspects there are other victims.
- Interviewing any witnesses to the incident or other students copied on e-mails.
- Interviewing the alleged harasser.

Investigations: Outcomes

- School officials must come to a conclusion about what actually occurred and who was at fault.
- Is there reliable evidence of a disturbance in the school community, the creation of a poisonous environment or conduct injurious to the moral tone of the school?
- School officials assess whether the incident represents a contravention of school board policy.
- The principal will have to determine whether the incident is appropriate for suspension or expulsion and any mitigating factors.
- Each case will be assessed based on its individual facts and circumstances. However, in order to impose school discipline, there must be sufficient evidence that the cyber-bullying was initiated by an identifiable student(s).
- School officials must assess whether there is a sufficient link to the school to impose school discipline if the investigation concerns cyber-bullying which took place off school premises and outside of the operations of the school.
- Canadian courts have held that a school official has the right to impose school discipline for conduct that occurs off school property, where there is a sufficient nexus or connection to the school.