

November 15, 2016

Dear School Superintendents and Charter School Leaders:

In light of recent news reports from other states regarding epithets and other degrading statements made toward students based on their race, national origin, religion, sexual orientation, and gender identity, the Delaware Department of Justice wishes to remind Delaware public schools of their broad authority to prevent and sanction such behavior. Delaware public schools have the authority to prevent and punish hateful speech directed at students if that speech is potentially disruptive of school activities, even if that speech originates off campus.

Every school district and charter school in Delaware is required to have a policy that prohibits school bullying.<sup>1</sup> With respect to speech directed at other students, bullying is broadly defined under Delaware law to include any written or verbal act that a reasonable person under the circumstances should know will place another student in reasonable fear of substantial harm to his emotional or physical well-being, or create a hostile, threatening, humiliating, or abusive educational environment due to the pervasiveness or persistence of the speech. With respect to postings on social media, even if those postings originate off campus, such postings are prohibited under the state's uniform cyberbullying policy if they are directed at an identifiable student or group of students, and either (1) interfere with a student's physical well-being, (2) are threatening or intimidating, or (3) are so severe, persistent, or pervasive that they are reasonably likely to limit a student's ability to participate in or benefit from the school's educational programs. Communications are considered to be directed at identifiable students if they are posted in a medium that the person posting knows is available to a broad audience within the school community, for example Facebook or Twitter.<sup>2</sup>

These statutory and regulatory provisions should give school districts sufficient authority to sanction most incidents involving epithets or other injurious statements that are directed at specific students or groups of students. Generally speaking, the threshold test for a school's restriction of speech of this type is that the motivation must be the prevention of a disruption in the educational environment,

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<sup>1</sup> 14 Del.C. § 4112D

<sup>2</sup> Delaware Department of Education Regulation 624

rather than “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>3</sup>

Just a month ago, the United States District Court for the District of New Jersey affirmed that, under the First Amendment law applicable to schools in Pennsylvania, Delaware, and New Jersey, schools are permitted to punish students for off-campus statements on social media if the statements create a well-founded expectation of disruption in the school.<sup>4</sup> This is consistent with First Amendment challenges to school discipline actions based on social media postings in other parts of the country.<sup>5</sup>

In many cases, the Delaware Department of Justice will provide legal services free of charge to school districts and charter schools that enforce the state’s cyberbullying policy in good faith and are challenged for their enforcement of the policies. Specifically, if the school or district makes the state or an agency a party to the legal challenge, the Department’s representation would be consistent with the Rules of Professional Conduct, and the policy was enforced in good faith and in the public interest, DOJ will represent a district or charter school that requests such representation.<sup>6</sup>

Sincerely,

Matthew Denn  
Attorney General

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<sup>3</sup> J.S. ex. Rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 926 (3d. Cir. 2011)

<sup>4</sup> Dunkley v. Board of Education of the Greater Egg Harbor Regional High School District, 2016 WL 6134518 (D.N.J. 2016).

<sup>5</sup> See, e.g., Kowalski v. Berkeley Ct. Sch., 652 F.3d 565 (4<sup>th</sup> Cir. 2011).

<sup>6</sup> 29 Del.C. § 2515(c)