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Sydney Smith

Pacific McGeorge School of Law

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Education

Cyberbullying in Schools: Chapter 157 Updates the Law on Suspension for Online Conduct

Sydney Smith

Code Section Affected

Education Code § 48900 (amended).
AB 1732 (Campos); 2012 STAT. Ch. 157.

I. INTRODUCTION

On May 2, 2012, a Palm Desert High School student climbed to the roof of his school and threatened suicide.¹ As school and law enforcement officials negotiated with the teen, some of his classmates took photos of the ordeal to share online.² Others complained that the suicidal boy was delaying their lunch period, posting remarks like “just jump already . . . im [sic] hungry” on popular social networking websites like Twitter and Facebook.³

Commentators say the problem of online bullying, or “cyberbullying,” is becoming an epidemic.⁴ Media outlets across the nation have increasingly reported on the connections between teen suicide and the creation of false profiles⁵ and “burn pages,”⁶ which are webpages “dedicated to the person being

1. Kate McGinty & Michelle Mitchell, *Kids Face Sanctions for Posts During Suicide Threat*, DESERT SUN, May 3, 2012.

2. *Id.*

3. *Id.*

4. Hannah Dreier, *Policing Cyberbullying: Unanimous Assembly OKs Measure to Expand Schools' Disciplinary Power Online*, SAN JOSE MERCURY NEWS, Apr. 17, 2012, at B1; *see also* NAT'L ASS'N OF ATTORNEYS GEN., TASK FORCE ON SCH. & CAMPUS SAFETY, REPORT AND RECOMMENDATION 3, 4 (2007), available at http://www.doj.state.or.us/hot_topics/pdf/naag_campus_safety_task_force_report.pdf (on file with the *McGeorge Law Review*) (warning of the need to address the growing problem of bullying through the use of technology and social networking sites); *see also* CTR. FOR DISEASE CONTROL & PREVENTION, STATE AND LOCAL YOUTH RISK BEHAVIOR SURVEY 6, 7 (2011), available at http://www.cdc.gov/healthyyouth/yrbs/pdf/questionnaire/2011_hs_questionnaire.pdf (on file with the *McGeorge Law Review*) (adding a question about cyberbullying to the biannual youth risk behavior survey for the first time). *See generally* Data Memo by Amanda Lenhart, Pew Internet & Am. Life Project, Re: Cyber Bullying and Teens (June 27, 2007), available at <http://www.pewinternet.org/Reports/2007/Cyberbullying/1-Findings.aspx> (on file with the *McGeorge Law Review*) (summarizing the rising prevalence of cyber bullying in American schools).

5. *See, e.g.*, Christopher Maag, *A Hoax Turned Fatal Draws Anger But No Charges*, N.Y. TIMES, Nov. 28, 2007, at A23 (reporting on a thirteen-year-old Missouri girl who committed suicide after a friend's mother created a fictitious profile impersonating a sixteen-year-old boy, befriended the girl online, dumped her, and posted cruel messages about her on social media websites).

6. Dreier, *supra* note 4; *see also* Kamala D. Harris, *Digital Citizenship Must Be Taught to Halt Bullying*, SAN JOSE MERCURY NEWS, Oct. 16, 2011, at A14 (editorial from the California Attorney General discussing a Massachusetts girl who committed suicide due to online bullying and a California girl who was traumatized by

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bullied [where] everyone . . . writes hurtful, demeaning things about those students.”⁷ The growing popularity of “burn pages” is connected to the 2004 cult film “Mean Girls,” in which a group of high school girls write hurtful gossip about their classmates in a notebook called a “burn book,” one of whom ultimately distributes copies of the book to the student body.⁸ Assembly Member Nora Campos introduced Chapter 157 in order to direct legislative attention toward the new and different ways that students today are engaging in bullying.⁹

II. LEGAL BACKGROUND

California’s legislature has recently enacted laws that address the growing ways social media websites can be used to bully students.¹⁰ California’s original cyberbullying laws were written in 2006, “before social networking had become an integral part of teen life.”¹¹ Lawmakers have begun to respond to the recent rise in popularity of cyberbullying, as well as its tragic impacts, by enacting legislation that targets bullying through social media and the Internet.¹² Last year, new legislation amended the definition of “bullying” to include “any severe or pervasive physical or verbal act or conduct, including communications made . . . by means of an electronic act.”¹³ Shortly after, the legislature expanded the definition of bullying via electronic act to include “a post on a social network Internet Web site.”¹⁴ Lawmakers cite to the expansive and pervasive nature of cyberbullying¹⁵ and the constant evolution of cyberbullying methods¹⁶ as reasons to enact wider-reaching legislation that addresses cyberbullying in schools.¹⁷

harassment on a burn page).

7. Shawn S. Lealos, *California Passes New Laws to Fight Cyberbullying*, EXAMINER (Apr. 16, 2012), <http://www.examiner.com/article/california-passes-new-laws-to-fight-cyberbullying> (on file with the *McGeorge Law Review*).

8. Dreier, *supra* note 4.

9. Lealos, *supra* note 7 (quoting Assembly Member Nora Campos: “People today are bullying in a very different way . . . I want to make sure that there are no loopholes.”).

10. See, e.g., CAL. EDUC. CODE § 48900(r)(1) (West Supp. 2012) (changing the definition of bullying to include electronic acts); *id.* § 32261(g) (adding “a post on a social network Internet Web site” to the definition of bullying via an electronic act).

11. Dreier, *supra* note 4.

12. *Cyber-Bullying Now Grounds for Expulsion at CA Schools*, EDUC. NEWS (July 12, 2011), www.educationnews.org/ednews_today/158615.html (on file with the *McGeorge Law Review*).

13. EDUC. § 48900(r)(1). Prior to this legislation, an electronic act within the meaning of “bullying” did not include transmission on a social network site. *Cyber-bullying Now Grounds for Expulsion at CA Schools*, *supra* note 12.

14. EDUC. § 48900(r)(2).

15. Press Release, Office of Congresswoman Linda Sanchez, Linda Sanchez Applauds Passage of Cyberbullying Legislation (Apr. 18, 2012), *available at* http://lindasanchez.house.gov/index.php?option=com_content&task=view&id=712&Itemid=57 (on file with the *McGeorge Law Review*) (quoting Congressional Representative Linda Sanchez of California: “Bullying doesn’t just take place in the schoolyard anymore. It’s happening in the virtual world and our children can now be bullied any hour of the day or night—even in their own homes. [Chapter 157] is an important step in making California schools safer.”).

A. Existing Law on Cyberbullying

California law prohibits the suspension or recommendation for expulsion of a student from school unless the student commits any of various specified acts,¹⁸ including, but not limited to, “[e]ngag[ing] in an act of bullying.”¹⁹ Bullying is defined as “any severe or pervasive physical or verbal act or conduct, including communications made in writing or [through] an electronic act,” directed toward one or more students.²⁰ An act that is considered bullying under the statutory definition either “has or reasonably can be predicted to have the effect”²¹ of “placing a reasonable pupil in fear of harm . . . [to their] person or property”²² or “causing a reasonable pupil to experience a substantially detrimental effect on his or her mental health,”²³ academic performance,²⁴ or “ability to participate in or benefit from the services, activities, or privileges provided by a school.”²⁵ The definition of electronic act under existing law includes the transmission of “a message, text, sound, or image,”²⁶ as well as “a post on a social network Internet Web site.”²⁷

Schools may also suspend or expel a student for engaging in “harassment, threats, or intimidation, directed either towards school personnel or towards students.”²⁸ This conduct must be “severe or pervasive enough to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of either school personnel or students by creating an intimidating or hostile educational environment.”²⁹

16. Dreier, *supra* note 4 (reporting Assembly Member Nora Campos’s decision to continue updating the list of bullying offenses “because young people use [the Internet] more than adults, sometimes we don’t get current information as quick as we should.”).

17. See Tanya Roscorla, *California Clarifies Cyberbullying Law to Include Social Networks*, CTR. FOR DIGITAL EDUC. (July 18, 2011), <http://www.centerdigitaled.com/policy/California-Clarifies-Cyberbullying-Law.html> (on file with the *McGeorge Law Review*) (commenting on the need to constantly address the changes in technology in California law’s provisions on bullying).

18. EDUC. § 48900.

19. *Id.* § 48900(r).

20. *Id.* § 48900(r)(1).

21. *Id.*

22. *Id.* § 48900(r)(1)(A).

23. *Id.* § 48900(r)(1)(B).

24. *Id.* § 48900(r)(1)(C).

25. *Id.* § 48900(r)(1)(D).

26. *Id.* § 48900(r)(2).

27. *Id.* § 48900(r)(2).

28. *Id.* § 48900.4 (West 2006).

29. *Id.*

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B. Suspension and Federal Constitutional Concerns

Schools may suspend or expel students for acts that relate to school activities or attendance.³⁰ These include acts performed while the student is on school grounds,³¹ during lunch, on or off campus,³² while going to and from school,³³ or while attending a school-sponsored activity.³⁴ Because public instruction is a fundamental right, a due process hearing is required before suspending or expelling a student.³⁵ Although this due process requirement is not “inflexible and universally applicable,” a student threatened with deprivation of the right to public instruction at public expense is entitled to notice of the grounds of removal and an opportunity to be heard that is “appropriate to the nature of the case.”³⁶

The California Sixth District Court of Appeal has ruled that disciplinary action is contingent upon whether the action causes a substantial disruption to schoolwork or school activities.³⁷ If a school suspends a student whose actions did not cause substantial disruption, in certain contexts the suspension or expulsion could constitute a violation of the Federal Constitution’s First Amendment protections of freedom of speech.³⁸

In *Tinker v. Des Moines Independent Community School District*, three students were suspended for wearing black armbands to school to protest the Vietnam War after principals of the Des Moines schools adopted a policy of suspending students for such conduct.³⁹ The United States Supreme Court held that the First Amendment applied to minors in public schools,⁴⁰ and administrators who regulated speech would have to demonstrate constitutionally

30. *Id.* § 48900(s); *see also* *Baker v. Downy City Bd. of Educ.*, 307 F. Supp. 517, 526 (C.D. Cal. 1969) (holding that when the bounds of decency are violated in publications distributed to high school students, whether on campus or off campus, the offenders become subject to discipline).

31. EDUC. § 48900(s)(1).

32. *Id.* § 48900(s)(3).

33. *Id.* § 48900(s)(2).

34. *Id.* § 48900(s)(4).

35. *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

36. *Abella v. Riverside Unified Sch. Dist.*, 65 Cal. App. 3d 153, 169, 135 Cal. Rptr. 177, 187 (4th Dist. 1976).

37. *See Fremont Union High Sch. Dist. v. Santa Clara Cnty. Bd. of Educ.*, 235 Cal. App. 3d 1182, 1186–88, 386 Cal. Rptr. 915, 917–18 (6th Dist. 1991) (holding that a student could be expelled after using a stun gun during an altercation with another student during school hours on a campus that the expelled student did not attend because “related to school attendance” does not mean the act must be related to the school the student was attending or their own school activity because the act’s connection to school attendance or school activity is the determinative aspect; thus, there is no rational basis for differentiating among acts that occur on a student’s own campus and acts that occur on the campus of another student).

38. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (establishing the “*Tinker* test” for whether a school’s disciplinary actions violate students’ first amendment rights).

39. *Id.* at 504.

40. *Id.* at 506 (reasoning that students and teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”).

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valid reasons for doing so.⁴¹ Following *Tinker*, schools may forbid conduct that would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”⁴² If the student’s act does not reach this level of disruption, the student’s activity is constitutionally protected.⁴³

III. CHAPTER 157

Chapter 157 allows schools to suspend or expel students who participate in bullying through electronic acts.⁴⁴ Electronic acts include posting on a social networking site by participating in a “burn page,”⁴⁵ “[c]reating a credible impersonation of another actual person,”⁴⁶ or “[c]reating a false profile.”⁴⁷ A “burn page” is “an Internet Web site created for the purposes of”⁴⁸ putting a reasonable student in fear of harm to their person or property⁴⁹ or “causing a reasonable student to experience substantial interference with his or her physical or mental health,⁵⁰ . . . academic performance,⁵¹ . . . [or] ability to benefit from [school] services, activities or privileges.”⁵² Chapter 157 defines a “credible impersonation” as “knowingly and without consent” impersonating a student “for the purpose of bullying . . . such that another pupil would reasonably believe, or has reasonably believed, that the pupil was or is the person who was impersonated.”⁵³ A “false profile” is “a profile of a fictitious pupil or a profile using the likeness or attributes of an actual pupil other than the pupil who created the false profile.”⁵⁴ Chapter 157 also states, “an electronic act shall not constitute pervasive conduct,” as required by the definition of bullying, “solely on the basis

41. *Id.* at 509 (requiring school officials to justify the prohibition of a particular expression of opinion by showing “that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”).

42. *Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)) (internal quotation marks omitted).

43. *Id.* at 514 (holding that the actions of the suspended Des Moines students in wearing armbands protesting the Vietnam war did not cause a material and substantial interference and the activity thus represented constitutionally protected symbolic speech).

44. CAL. EDUC. CODE § 48900(r) (amended by Chapter 157); ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 1732, at 1 (Mar. 28, 2012).

45. EDUC. § 48900(r)(2)(A)(ii)(I) (amended by Chapter 157).

46. *Id.* § 48900(r)(2)(A)(ii)(II) (amended by Chapter 157).

47. *Id.* § 48900(r)(2)(A)(ii)(III) (amended by Chapter 157).

48. *Id.* § 48900(r)(2)(A)(ii)(I) (amended by Chapter 157).

49. *Id.* § 48900(r)(1), (r)(1)(A) (amended by Chapter 157).

50. *Id.* § 48900(r)(1)(B) (amended by Chapter 157).

51. *Id.* § 48900(r)(1)(C) (amended by Chapter 157).

52. *Id.* § 48900(r)(1)(D) (amended by Chapter 157).

53. *Id.* § 48900(r)(2)(A)(ii)(II) (amended by Chapter 157).

54. *Id.* § 48900(r)(2)(A)(ii)(III) (amended by Chapter 157).

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that it was been transmitted on the Internet or is currently posted on the Internet.”⁵⁵

IV. ANALYSIS

Chapter 157 was enacted to adapt California law to new cyberbullying technology.⁵⁶ Burn pages, credible impersonations, and false profiles are arguably already covered by the existing definitions of electronic acts.⁵⁷ Chapter 157 clarifies the Education Code’s definition of cyberbullying rather than adding additional offenses.⁵⁸ According to the author, Chapter 157 is necessary because it “clarifies acts for school administrators who are trying to effectively identify and understand this ever evolving world of social media.”⁵⁹

Proponents of Chapter 157 consider the regulation of cyberbullying a necessary part of ongoing efforts to protect students.⁶⁰ In an editorial for the *San Jose Mercury News*, California Attorney General Kamala D. Harris stated that “[t]eenagers who are cyberbullied are more likely to struggle with depression and substance abuse . . . [and] are at a higher risk offline to be victims of sexual harassment and physical assault.”⁶¹ Commentators underline the necessity of comprehensive anti-cyberbullying legislation, pointing to increased youth access to the Internet; the appeal of not being punished for online intimidation; and the difficulty of punishing online, off-campus conduct.⁶²

In contrast, opponents of Chapter 157 see the increased regulation of cyberbullying as unnecessary and detrimental to school safety and order.⁶³ According to the Public Counsel Law Center, “[i]t is of great significance not to add to this list of suspension grounds or make stylized specifications of existing

55. *Id.* § 48900(r)(2)(B) (amended by Chapter 157).

56. Roscorla, *supra* note 17 (quoting Assembly Member Campos, author of Chapter 157: “as technology changes, and as times change, we need to change with it, and that means the law has to change”).

57. *See* EDUC. § 48900(r)(2) (West Supp. 2012) (authorizing schools to suspend or expel pupils for bullying through an electronic act meaning the “transmission of a communication including, but not limited to, a message, text, sound, or image, or a post on a social network Internet Web site, by means of an electronic device”).

58. SENATE FLOOR, ANALYSIS OF AB 1732, at 6 (June 14, 2012).

59. SENATE COMMITTEE ON EDUCATION, ANALYSIS OF AB 1732, at 4 (June 12, 2012) (quoting Assembly Member Campos) (internal quotation marks omitted).

60. *See* Dreier, *supra* note 4 (quoting Assembly Member Charles Calderon on the Assembly floor: “Words kill, and we’ve seen examples of that.”).

61. Harris, *supra* note 6.

62. Andrea Midd, *Should Off-Campus Cyberbullying Be Grounds for Suspension? The Supreme Court May Weigh in Soon*, BULLYING EDUC. (Jan. 27, 2012), <http://www.bullyingeducation.org/2012/01/27/should-off-campus-cyberbullying-be-grounds-for-suspension-the-supreme-court-may-weigh-in-soon/> (on file with the *McGeorge Law Review*).

63. *See* ASSEMBLY COMMITTEE ON EDUCATION, ANALYSIS OF AB 1732, at 3 (Mar. 27, 2012) (quoting the Public Counsel Law Center as opposing the bill because it is already included in the categories of offenses for which students can be suspended).

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offenses, especially since there is no evidence that suspension results in improved behavior.”⁶⁴ Rather than reducing student misbehavior and improving safety and academic performance, the Public Counsel Law Center believes that it will add to a punitive disciplinary system that they claim results in a higher rate of classroom disruption.⁶⁵

Current law provides that pupils cannot be suspended or expelled unless acts committed interfere with the school environment or pupil performance.⁶⁶ Civil rights groups like the ACLU have questioned school administrators’ ability to make determinations regarding which conduct is subject to suspension.⁶⁷

Earlier this year, the United States Supreme Court declined to hear two cases⁶⁸ involving the suspension of two students for online, off-campus speech.⁶⁹ In the first case, *J.S. ex rel. Snyder v. Blue Mountain School District (Snyder)*, the Third Circuit held that a middle school student, who made an online profile depicting her principal as a sex addict and a pedophile, did not substantially disrupt school activity under the holding of *Tinker*.⁷⁰ The school district in *Snyder* attempted to apply an exception to the *Tinker* test allowing suspension of students if the conduct involves lewd, offensive, or vulgar speech.⁷¹ The Third Circuit rejected this argument, reasoning that this exception does not apply to off-campus speech.⁷²

In a companion case, *Layshock v. Hermitage School District*, the Third Circuit overturned the suspension of a high school student who created a false profile on Myspace impersonating his principal while using a computer at his grandmother’s house.⁷³ The Third Circuit rejected any claims by the school district about a nexus between the parody and a substantial disruption of the school environment.⁷⁴

64. *Id.*

65. *Id.* at 3; see also Sarah Carr, *Do ‘Zero Tolerance’ School Discipline Policies Go Too Far?*, TIME (May 22, 2012), <http://www.time.com/time/nation/article/0,8599,2115402,00.html> (on file with the *McGeorge Law Review*) (exploring the negative effects of discretionary suspensions, ranging from isolated feelings among suspended students to being held back a grade).

66. CAL. EDUC. CODE § 48900(s) (West Supp. 2012).

67. See Corey G. Johnson, *SF School Sparks Online Free-Speech Battle*, CAL. WATCH (Apr. 11, 2011), www.californiawatch.org/dailyreport/sf-school-sparks-online-free-speech-battle-15721 (on file with the *McGeorge Law Review*) (quoting ACLU attorney Linda Lyle: “Speech does not become ‘disruptive’ just because a teacher doesn’t like it or finds it offensive.”).

68. The two cases were combined on appeal. *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (Jan. 17, 2012); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (Jan. 17, 2012).

69. *Layshock*, 650 F.3d at 219.

70. 650 F.3d at 929–30.

71. *Id.* at 931–32.

72. *Id.* (citing *Morse v. Frederick*, 551 U.S. 393 (2007)).

73. 650 F.3d 205.

74. *Id.* at 214–16 (affirming the district court’s finding that the disruption caused by the online profile was minimal because no classes were cancelled and no widespread disorder occurred, there were other fake

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Following these cases, commentators have criticized legislation that provides wide latitude to school administrators to punish online, off-campus conduct.⁷⁵ Responding to the Third Circuit decisions in *Snyder* and *Layshock*, Adam Cohen, a lawyer and lecturer at Yale Law School, stated, “there clearly can be student Facebook or MySpace speech that goes too far—for example, serious threats that really do disrupt educational activities.”⁷⁶ However, this is not always the case for students subjected to disciplinary action for cyberbullying.⁷⁷ According to Mr. Cohen, “[w]hen speech is merely offensive, and taking place outside of school hours and property, principals and teachers should ignore it—and think of it as the price we pay for living in a free country.”⁷⁸

In response to opposition,⁷⁹ legislators included language in Chapter 157 that prohibits school administrators from considering online acts as “pervasive conduct,” as required for punishment of bullying, solely because the content exists online.⁸⁰ This language addresses the wide degree of discretion given to administrators who suspend students for online, off-campus conduct.⁸¹ While Chapter 157 may not add any new offenses to the list of conduct subject to suspension, it still raises concerns for those who want to limit government involvement in student expression.⁸²

profiles of the teacher on the Internet created by other students, and there was no proof that any discussions were prompted by the profile itself rather than the administration’s investigations).

75. See Chelsea Keenan, *The State of Cyberbullying*, 32 STUDENT PRESS L. CTR. REP. MAG. 20 (2011), available at http://www.splc.org/news/report_detail.asp?edition=54&id=1582 (on file with the *McGeorge Law Review*) (surveying the variety of cyberbullying legislation, proposed or in effect, across the nation and the free speech implications of legislative action in this area).

76. Adam Cohen, *Why Students Have the Right to Mock Teachers Online*, TIME (June 20, 2011), <http://www.time.com/time/nation/article/0,8599,2078636,00.html> (on file with the *McGeorge Law Review*).

77. See Carmen Gentile, *Free Speech or Cyberbullying?*, N.Y. TIMES (Feb. 8, 2009), <http://www.nytimes.com/2009/02/08/world/americas/08iht-08cyberbully.20008426.html> (on file with the *McGeorge Law Review*) (reporting on a high school senior who was suspended for writing complaints online about her English teacher’s failure to assist with her homework assignments).

78. Cohen, *supra* note 76.

79. Compare ASSEMBLY COMMITTEE ON EDUCATION, ANALYSIS OF AB 1732, at 3 (Mar. 27, 2012) (including the Public Law Center as being in opposition to Chapter 157 and objecting to the addition of punitive disciplinary offenses to the education code), with SENATE FLOOR, ANALYSIS OF AB 1732, at 6 (June 21, 2012) (showing that the Public Council Law Center was no longer in opposition to AB 1732 (signed into law as Chapter 157) after the legislature added language limiting administrators’ discretion in considering online conduct to be pervasive as required by law to suspend a student for bullying).

80. CAL. EDUC. CODE § 48900(r)(2)(B) (amended by Chapter 157).

81. See ASSEMBLY COMMITTEE ON EDUCATION, ANALYSIS OF AB 1732, at 3 (Mar. 27, 2012) (including analysis of an amendment to AB 1732 that prohibits online acts from qualifying as pervasive conduct solely on the basis of transmission over the Internet or being currently posted on the Internet).

82. See Becky Yeh, *AB 1732 Toeing Fine Line*, ONENESSNOW (Apr. 20, 2012), <http://onenessnow.com/culture/2012/04/19/ab-1732-toeing-fine-line> (on file with the *McGeorge Law Review*) (quoting the president of Americans For Truth About Homosexuality as supporting efforts to address cyberbullying, but expressing concerns that such action will encroach upon “students’ right to share the gospel and to share their moral beliefs”).

V. CONCLUSION

Assembly Member Campos authored Chapter 157 to “clarify[] acts for school administrators who are trying to effectively identify and understand [the] ever evolving world of social media.”⁸³ Bullying through electronic acts like cell phone messages and online activity is already codified in California education law as an offense subject to suspension or expulsion;⁸⁴ therefore, Chapter 157 clarifies the law rather than adding to it.⁸⁵

Civil rights groups have responded to examples of suspensions for cyberbullying with criticism of the discretion given to administrators in punishing online conduct.⁸⁶ Legislators have restricted administrators’ discretion to punish students for cyberbullying by adding language to Chapter 157 that instructs schools not to consider cyberbullying “pervasive conduct,” as required by the statutory definition of bullying, simply because the conduct was transmitted through the Internet.⁸⁷ Even with such limiting language, suspension for cyberbullying could be considered a violation of free speech protections if the conduct is not considered a material disruption of school activities.⁸⁸

Ultimately, the effect of Chapter 157 will depend on how school administrators utilize its provision.⁸⁹ Following the attempted-suicide and resulting offensive online comments at Palm Desert High School, a district administrator spoke directly to the large role discretion plays in punishment of cyberbullying.⁹⁰ At a minimum, Chapter 157 attempts to provide more structure to this discretion given to California public schools by addressing the growth of cyberbullying among young people.⁹¹

83. SENATE FLOOR, ANALYSIS OF AB 1732, at 6 (June 21, 2012).

84. EDUC. § 48900(r)(1)–(2) (West Supp. 2012).

85. SENATE FLOOR, ANALYSIS OF AB 1732, at 6 (June 21, 2012).

86. Johnson, *supra* note 67.

87. EDUC. § 48900(r)(2)(B) (amended by Chapter 157).

88. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (establishing the “*Tinker* test” for whether a school’s disciplinary actions violate student’s first amendment rights).

89. SENATE FLOOR, ANALYSIS OF AB 1732, at 6 (June 21, 2012) (quoting the author of Chapter 157 as introducing the legislation to guide administrators in their determinations of online conduct subject to suspension).

90. Michelle Mitchell, *Principal Punishes Some over Cyber-Taunts*, DESERT SUN, May 4, 2012 (quoting a Desert Sands Unified administrator as stating “[d]iscipline [for the students who engaged in cyberbullying] would vary depending on the extent of the bullying”).

91. See Lealos, *supra* note 7 (quoting Chapter 157 author Nora Campos as saying, “people today are bullying in a very different way I want to make sure that there are no loopholes,” and “because young people use it more than adults, sometimes we don’t get current information as quick as we should.”); SENATE FLOOR, ANALYSIS OF AB 1732, at 6 (June 21, 2012) (quoting the author of Chapter 157 as introducing the legislation to guide administrators in their determinations of online conduct subject to suspension).