

Distinguishing Between Bullying and Protected First Amendment Speech: Arkansas Specific Laws



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Earlier this week, the Mitchell Williams [education law blog](#) reported on a school that recently was found to have run afoul of the First Amendment when they suspended a student for bullying. First Amendment issues in the school context are frequently litigated around the country, and staying on top of these decisions is important. Additionally, it is important to understand the state specific laws that address cyberbullying and how those laws interface with the First Amendment. This blog post will highlight some of those state laws applicable in Arkansas and discuss their Constitutional import.

Cyberbullying is a Crime in Arkansas.

First Amendment rights are not absolute, and the State of Arkansas has made the decision to criminalize some online speech. Although prosecution is rare, what can take 10 seconds to type online could result in significant criminal penalties. As schools are no doubt aware but should be reminded, cyberbullying in Arkansas is a crime, as is conduct that meets the statutory definition of “unlawful computerized communications” or “harassing communications.” What parents or students may regard as a passing comment online written at home while in an emotional state can have serious criminal consequences.

Obligations of School Districts.

Arkansas public schools have many obligations as codified in the Arkansas code, one of which is to adopt policies to prevent bullying. This law imposes upon schools the obligation to have cyberbullying policies that reach conduct outside of the school walls, including the home. In fact, the Arkansas laws “shall apply to an electronic act whether or not the electronic act originated on school property or with school equipment.” While many areas of the Arkansas cyberbullying law are potentially difficult to balance with the First Amendment, this particular balancing act is one of the most challenging. School officials must of course comply with the policies implemented by their schools acting in accordance with this Arkansas requirement, however all actions should be run through the lens of the First Amendment. School policies, even well intentioned ones, can cross the line into the unconstitutional if they are implemented in a way that impedes a student’s rights to free speech. Whether this Arkansas requirement is unconstitutional under the First Amendment is an open question likely to spark litigation.

Arkansas Laws in Light of the First Amendment.

All of the Arkansas specific laws referenced in this post were enacted and passed by the Arkansas government. However, in the event of any conflict between the Arkansas laws and the First Amendment, the First Amendment controls. In recognition of this well recognized legal principle, the Arkansas anti-bullying law states that it is not intended to unconstitutionally interfere with the First Amendment. But

that disclaimer does not necessarily mean that the Arkansas law is sound. In fact, several other states have had their cyberbullying laws struck because those state laws interfered with the First Amendment. There is a dearth of Arkansas case law challenging the constitutionality of the Arkansas law, but that is a possibility of which schools must be aware. All of that to say, making an effort to understand and follow the First Amendment is critical. Just following the Arkansas laws is not enough. If the Arkansas laws ever do come into conflict with the First Amendment that is when an attorney should be consulted. Litigation that develops around this area will be complex constitutional litigation that can become costly and last for years with multiple appeals. Such cases are not the typical straightforward disputes that schools typically see. Navigating this complexity should be managed carefully upfront.

Legal References:

Ark. Code Ann. § 5-71-217

Ark. Code Ann. § 5-41-108

Ark. Code Ann. § 5-71-209

Ark. Code Ann. § 6-18-514