STRINGENT ANTI-BULLYING LAWS REQUIRE SCHOOL ADMINISTRATORS TO TAKE ACTION AGAINST INSTANCES OF CYBERBULLYING

Jennifer A. Mezzina
Luke J. Stedrak
Seton Hall University

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Updated statistics and recommendations for administrators expand upon our previous paper.
INTRODUCTION

On September 22, 2010, 18-year old Rutgers University student Tyler Clementi ended his life by leaping off of the George Washington Bridge, just three days after his roommate, Dharun Ravi, used a webcam to broadcast Clementi engaging in an intimate act with another male.\(^1\) Ravi posted about the incident on Twitter, inviting iChat users to video message him to watch the event.\(^2\) Clementi’s suicide made national headlines, and New Jersey legislators worked quickly to enact the New Jersey Anti-Bullying Bill of Rights Act.\(^3\) On September 1, 2011, less than a year after Clementi’s suicide, the new legislation took effect.\(^5\)

The Anti-Bullying Bill of Rights Act requires school leaders to take action against harassment, intimidation and bullying (HIB), which is defined as:

…any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that: a. a reasonable person should know, under the

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\(^2\) Ibid.


\(^5\) Guido, “No Constitutional Right to Be a Bully: The First Amendment Principle of Content Neutrality and Regulating Bullying in Public Schools, 374-375.
circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property; b. has the effect of insulting or demeaning any student or group of students; or c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.\(^6\)

New Jersey’s anti-bullying law enables school officials to discipline students for acts of bullying that happen online. While New Jersey has arguably one of the most stringent anti-bullying laws in the country,\(^7\)\(^8\)\(^9\) it is not the only state with anti-bullying laws that include the term cyberbullying or electronic communication. According to Hinduja & Patchin, of the forty-nine states that have passed anti-bullying laws, forty-eight of those states include the term cyberbullying or electronic harassment in that law.\(^10\)

Thirteen state anti-bullying laws specifically allow school officials to discipline students for off campus behavior.\(^11\)

Despite the inclusion of cyberbullying or electronic harassment in anti-bullying laws across the nation, school leaders are often unsure how to handle cases of cyberbullying. This is because cyberbullying often happens outside of school, and school officials are uncertain of their jurisdiction. Contradictory appellate court decisions have created both confusion as well as uncertainty among school leaders. When appellate courts hear cases of cyberbullying, judges look to \textit{Tinker V. Des Moines}\(^12\) decision in which the United States Supreme Court ruled that school officials did not have the authority suspend students for wearing armbands to protest the Vietnam War as the students’ display of free speech did not create a material or substantial interference in school activities.\(^13\) Furthermore, the Supreme Court found that there was no evidence that would have “reasonably led school authorities to forecast substantial interference of or


\(^8\) Zhao, "New Jersey's Anti-Bullying Law, Toughest in Country, Garners Praise and Criticism."


\(^11\) Ibid.

\(^12\) \textit{Tinker V. Des Moines Independent Community School Dist}, 393 US 503 (1969)

\(^13\) Ibid.
material interference with school activities.” When considering cyberbullying cases, appellate courts conduct a substantial-effects test, meaning that they consider whether the instance of cyberbullying has created a substantial interference in the orderly operation of the school, and whether or not a school officials could reasonably forecast a substantial interference. The appellate courts have different interpretations of what constitutes a substantial interference, and often, when considering cases, the judges only consider the first aspect of *Tinker*, whether or not a substantial interference has already occurred rather than also considering whether one could be forecasted.

Although there are conflicting decisions in the lower courts, school administrators have an obligation to take action to protect the victims of cyberbullying and discipline the virtual bullies. School administrators should act under the best interest of the students involved, and take action against all forms of bullying, including cyberbullying. All states should look to New Jersey’s Anti-Bullying Bill of Rights Act as a model for creating their own anti-bullying laws.

**What is Cyberbullying?**

Cyberbullying is much like regular bullying, except a cyberbully is able to bully a targeted person from a remote location. With technology, bullies are now able to reach their victims outside of the school building, across towns, counties, state lines and even countries. Cyberbullying is particularly dangerous as the bully can choose to be anonymous, hiding behind a screen name, cell phone, or email address. A cyberbullying attack can easily go viral as a large number of people can easily use technology to participate in it or find out about it. According to Hinduja and Patchin, when a cyberbullying attack goes viral, “[t]he perception, then, is that absolutely everyone is in on the joke.” Sufferers can no longer shut their doors to escape the torment, as bullies are able to reach their victims every minute of everyday through use of cell phones, social media and the Internet. According to Stomp Out Bullying, approximately up to 43% of students have been bullied online and 1 in 4 students have been bullied online more than once.

**Cyberbullying and Schools**

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14 Ibid.


16 Ibid.

17 Ibid.

In the past, school leaders were only required to discipline students for acts of face-to-face bullying. Today, students have increased access to the Internet and mobile devices during the school day; therefore, school leaders are compelled to protect students from cyberbullying. Many state anti-bullying policies allow school officials to discipline students for cyberbullying; however, when disciplining a student for cyberbullying, school leaders must be able to prove that the cyberbullying will cause “substantial interference with school discipline or the rights of others.” The Supreme Court’s refusal to hear cases involving cyberbullying, coupled with conflicting appellate court rulings leave school leaders unsure of what actions constitute a substantial interference. Although school administrators want to protect students from all instances of bullying, they are often unsure of their jurisdiction in cyberbullying cases.

Increased access to devices leads to increased instances of cyberbullying

Across the nation, students have increased access to smartphones, tablets, and personal electronic devices. A 2013 study found that approximately 78% of teenagers, age 12-17 own a cell phone, and 37% of teenagers own a smartphone, as compared to just 23% in 2011. Additionally, 93% of teens in that age group have access to a computer at home. Roughly 80% of teenagers used social media networking sites in 2013, and 24% of teenagers used Twitter in some way in 2013 as compared to 8% in 2009. Not only do students have their own personal devices, but a large number of schools today are providing students with laptops or tablets. Approximately 33% of high school students and 31% of elementary and middle school students have access to school-issued mobile devices during the school day. Not only are teenagers interacting with one another


23 Ibid.


virtually on social media networking sites, but they are also connecting through online classes as well. A study published by Project Tomorrow found that 41% of high school principals offer online classes in math, science, history, and English/language arts.26 Only 17% of high school principals do not offer any form of online classes to their students.27

This widespread use of personal electronic devices has advanced a cyberbullying epidemic. Hinduja and Patchin found that approximately 20% of students, ages 11-18, were cyberbullied in 2010.26 Approximately the same percentage of students indicated that they had acted as a cyberbully,29 and 10% of students admitted to being both victims and perpetrators.30

Conflicting Messages From the Courts

In Kowalski V. Berkeley County Schools, 132 S. Ct. 1095 (2012), the court acknowledged the dilemma that school leaders face when dealing with cases of cyberbullying:

Today, largely as a result of the Internet, school officials have much greater access to the out-of-school speech of students. This, in turn, has caused school officials to discipline students more frequently for off-campus, after-school speech that those officials dislike or of which they disapprove. The courts of appeals widely disagree about whether and when punishing that off-campus student speech is constitutionally permissible.31

The language in most state anti-bullying laws is derived from the Tinker decision, that a student has the freedom to express his or her opinion “as long as it does not materially or substantially disrupt or interfere with the educational process.”32 33 Since the Supreme Court refuses to hear cases of cyberbullying, lower courts are left to define


27 Ibid.


29 Ibid.

30 Ibid., 21-22.


what constitutes a substantial interference in the learning environment. Court interpretations of substantial interference have differed, regardless of whether the case involves two students, a student and a teacher, or a student and a school administrator. The following cases illustrate the lower court’s inability to agree upon what constitutes a substantial interference in the school environment.

In Emmett V. Kent, a student that created a mock school website filled with the obituaries of his friends. The sardonic website was inspired by a school project in a creative writing class in which students had to write their own obituary. The student’s website included a feature allowing visitors of the site to vote on which student would “die” next, thus determining who the next fake obituary would be written for. The principal of Kentlake High School suspended Emmett after a local news station ran a story about the student’s website, claiming that it contained a “hit list.” Chief Judge Coughener overturned the suspension, stating that there was no evidence to indicate that the plaintiff intended to harass, intimidate or bully anyone and cited the decision in Burch V. Barker that non-school-sponsored speech cannot be censored “on the basis of undifferentiated fears of possible disturbances or embarrassment to school officials.” In the decision, Chief Judge Coughener specified that since the speech occurred off-school grounds, the school did not have the right to discipline the student for his actions. According to Coughener, “[a]lthough the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school's supervision or control.” The court only considered the first prong of Tinker, finding that the website did not create a substantial interference in the orderly operation of the school. The court did not consider the second aspect of Tinker, whether a substantial interference could be reasonably forecasted.

In Js V. Bethlehem, the courts upheld the suspension of a student that created a website that contained violent threats towards staff members of the school and sought donations to hire a hit man to kill a teacher. In 2000, Commonwealth Court of Pennsylvania heard the case and declared that “a reasonable person could be both physically and emotionally disturbed after viewing a web-site that contained a picture of her severed head dripping with blood, a picture of her face morphing into Adolph Hitler, and a solicitation, whether serious or otherwise, for funds to cover the cost of a hit man.”

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35 Ibid.

36 Ibid.

37 Ibid.

38 Ibid.

39 Ibid.


42 Js V. Bethlehem Area School Dist, 757 A. 2d 412 (2000),
In Wisniewski V. Board of Education, the courts upheld the suspension of a student that created the blood-spattered icon of a teacher with a gun firing at his head and the words “Kill Mr. Vandermolen.”\textsuperscript{43} The icon was shared with the student’s classmates via AOL instant messenger off school property for approximately three weeks.\textsuperscript{44} Although criminal charges were not filed because the police found no real threat posed toward the student’s teacher, the superintendent suspended the student and the court upheld the disciplinary action.\textsuperscript{45} Even though the icon was created and transmitted off school grounds, the court found that it was conceivable that the school administration and the teacher would eventually see it.\textsuperscript{46} Using the Tinker test, the court found that once in the hands of school staff and administrators, the disturbing image would “foreseeably create a risk of substantial disruption within the school environment.”\textsuperscript{47}

In Layshock V. Hermitage School District, the third circuit court overturned the suspension of a student that created an offensive MySpace profile for the school principal since the website was created off campus during non school hours, as “the First Amendment prohibits the school from reaching beyond the school yard to impose what otherwise may be appropriate discipline.”\textsuperscript{48} Furthermore, the court found that the fake MySpace page did not “disturb the school environment.”\textsuperscript{49} The parody page contained answers to survey questions, such as: “Birthday: too drunk to remember;” “In the past month have you smoked: big blunt;” “In the past month have you gone skinny dipping: Big lake, not big dick.”\textsuperscript{50}

Although the website became extremely popular among the student body and inspired additional students to create mock profiles of the principal, the court found that the site did not substantially interfere with the school environment.\textsuperscript{51} Additionally, while the website was not created on school property, it was accessed on school grounds by both the plaintiff as well as other students.\textsuperscript{52} Even though the court acknowledged, “it has been well established that ... the ‘schoolhouse gate’ is not constructed of solely the brick and mortar surrounding the school yard,” it ultimately found that the plaintiff’s

\footnotesize{http://caselaw.findlaw.com/pa-commonwealth-court/1035337.html.}


\textsuperscript{44} Ibid.

\textsuperscript{45} Ibid.

\textsuperscript{46} Ibid.

\textsuperscript{47} Ibid.

\textsuperscript{48} Layshock Ex Rel. Layshock V. Hermitage School Dist, 650 F. 3d 205 (2011).

\textsuperscript{49} Ibid.

\textsuperscript{50} Ibid.

\textsuperscript{51} Ibid.

\textsuperscript{52} Ibid.
behavior was beyond the school’s reach.\textsuperscript{53} The court applied the first part of the Tinker test, determining that the website did not create a substantial disruption in the school.

Although the courts overturned the suspension of the student in Layshock, the court upheld the suspension of a student in a similar case. In Kowalski V. Berkeley County Schools, a student created a MySpace page alleging that a fellow student had a sexually transmitted disease.\textsuperscript{54} Kowalski invited friends to join the page and contribute to the discussion.\textsuperscript{55} The page was created off campus and not discussed during school; however, the principal suspended Kowalski because she violated the school’s harassment policy.\textsuperscript{56} The court found that the school had jurisdiction to suspend Kowalski stating that “Tinker applies to off campus speech that is not directed at the school because of the speculative possibility – not supported by any record evidence- that it might cause “copycat” behavior on school grounds.”\textsuperscript{57}

The conflicting applications of Tinker make it difficult for school administrators to know when students can be disciplined for their online speech. Despite the conflicting court decisions, school leaders need to take action to protect victims of cyberbullying. As the public has been made aware of cyberbullying through high profile cases such as that of Tyler Clementi, state anti-bullying laws have been modified to include the terms cyberbullying or electronic harassment.

\textit{School leaders have a responsibility to act}

Despite the conflicting messages from the courts, school leaders cannot shy away from their responsibility to discipline cyberbullies, particularly if students are allowed or required to bring devices to school such as laptops, tablets, and cell phones.

According to the Feinberg & Robey, school leaders should take the following steps to curtail cyberbullying within their schools:

- Incorporate cyberbullying into School Policies
- Determine how cyberbullying is currently impacting their student population
- Increase student, parent and teacher awareness of cyberbullying
- Teach students to use Social Media and Internet sites responsibly
- Support victims of cyberbullying and counsel perpetrators as well
- Work with legal counsel to understand anti-bullying laws
- Protect both teachers and students from instances of cyberbullying\textsuperscript{58}

\textsuperscript{53} Ibid.

\textsuperscript{54} \textit{Kowalski v. Berkeley County Schools}, 652 F.3d 565 (4th Cir. 2011).

\textsuperscript{55} Ibid.

\textsuperscript{56} Ibid.

\textsuperscript{57} Ibid.

School administrators must have a clear understanding of their state’s anti-bullying laws and be able to communicate those laws to staff, parents and students. Additionally, school administrators should stay abreast of court decisions involving cyberbullying in their state, as well as across the nation to better understand how courts are interpreting the language in anti-bullying laws.

**Reception of New Jersey’s Anti-Bullying Act**

What sets New Jersey’s Anti-Bullying Act apart from other state anti-bullying laws is that it requires public school districts implement an extensive anti-bullying policy. The new law also gives school officials more authority in handling cases of bullying, including instances that occur off school grounds.

Although New Jersey’s Anti-Bullying Bill of Rights Act has been generally well-received, critics of the new law feel that the definition of bullying is overbroad and following the law could violate students’ freedoms. According to Nash, the language in New Jersey’s Anti-Bullying Act is “on its face overbroad because it extends into the realm of constitutionally protected off-campus student speech, and does not provide any language, which limits the regulation’s scope.” According to John W. Whitehead, president of The Rutherford Institute, a civil liberties organization:

> While we all want our schools to be safe, nurturing environments for our children, anti-bullying statutes—well-meaning as they may start out—are Orwellian in nature and inevitably run afoul of the Constitution’s protections for free speech and expression.

Others argue that the law is so stringent that it imposes a financial and administrative burden for school districts. According to Richard G. Bozza, executive director of the New Jersey Association of School Administrators, the law “has gone well overboard. Now we have to police the community 24 hours a day. Where are the people and resources to this?”

Proponents of the Anti-Bullying Bill of Rights Act argue that the definition of bullying is not overbroad, and that it “makes clear that whether a school is looking at an

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59 Zhao, “New Jersey's Anti-Bullying Law, Toughest in Country, Garners Praise and Criticism.”

60 Guido, "No Constitutional Right to Be a Bully: The First Amendment Principle of Content Neutrality and Regulating Bullying in Public Schools," 376.

61 Nash, “New Jersey’s Anti-Bullying Fix: A Solution or the Creation of an Even Greater First Amendment Problem,” 1061-1062.


incident or a pattern, the bullying must reach such a level that it interferes with the rights of a student." According to New Jersey Assemblywoman Valerie Huttle, the definition of bullying “is strong enough to give districts the power to enforce the law.” Supporters of the act deem that it is a necessary law designed to allow school educators and administrators to protect their students from bullying. Furthermore, the Anti-Bullying Law includes language from Tinker; therefore, school districts are only able to punish unprotected speech that has the potential to substantially interfere with the learning environment or the rights of others. What sets New Jersey’s Anti-Bullying Bill of Rights Act apart from other state anti-bullying laws is the strong message that it sends. According to Cohen, the act “unambiguously puts the state, school officials and law enforcement on the side of victims – and it puts bullies on notice.”

New Jersey’s new Anti-Bullying Law is necessary as students are able to connect and interact with each other in ways that they never could before. School leaders have an obligation to ensure that school is a safe environment for students. In order to accomplish this, school leaders need to have the authority to discipline students for acts of cyberbullying when they interfere with victims’ ability to learn. The new state law does not require school administrators to police the Internet looking for instances of cyberbullying; rather, it requires them to take action when acts of cyberbullying are brought to their attention.

**CONCLUSION**

School leaders have an obligation provide a safe environment for students. The definition of a schoolyard is changing, as students are often connecting with one another virtually to collaborate on school assignments. Additionally, an increasing number of students have access to technology during the school day. When cyberbullying occurs, it is not important whether it the incident happens from a home computer or from a text during the school day; if the bullying substantially interferes with the rights of others and the learning environment, school administrators must take action. Many state antibullying laws include cyberbullying or electronic harassment in their definition of bullying and a significant number of states permit school leaders to discipline students for off-campus behavior.

States should consider New Jersey’s Anti-Bullying Bill of Rights as a guide when revising their own anti-bullying policies, and allow school administrators to discipline students for virtual speech that violates the rights of others or interferes with the learning

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65 Ibid.

66 Ibid., 385.


68 Ibid.
environment. All school systems should be required to develop a comprehensive anti-bullying plan, as New Jersey schools are, in order to protect victims of bullying. Until the Supreme Court hears a cyberbullying case, the lower courts will remain left to interpret the language in anti-bullying laws. School administrators should stay abreast of cyberbullying court decisions within their state, as well as across the nation, to see how the laws are being interpreted. Administrators must continue to act in the best interest of their students, regardless of the conflicting messages from the courts.

REFERENCES


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