ANTI-BULLYING LAWS AND THE FIRST AMENDMENT

Sections of this paper have been previously published in JEPPA.

Updated statistics, state laws, and recommendations for administrators expand upon our previous paper.

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Introduction

As an increasing number of students have access to technology both at home as well as during the school day, cyberbullying has become an inescapable problem in K-12 public schools. Although all fifty states have anti-bullying laws, and many states include “cyberbullying” or “electronic harassment” in their definition of bullying, school administrators are often uncertain of their authority to discipline students for bullying that occurs online or off school grounds. As the Supreme Court has yet to hear cases of cyberbullying and there is no federal law addressing cyberbullying, administrators are often unsure of how to handle cyberbullying among students. Furthermore, appellate court decisions have been contradictory, creating even more confusion about cyberbullying among K-12 public school practitioners.

The first amendment has a critical role in K-12 public schools; it maintains a separation of church and state, ensures that students have access to information, and protects the speech of teachers and students. According to the decision in Tinker v. Des Moines (1969), in which the suspension of students for wearing armbands in school in protest of the Vietnam War was overturned, “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.”

Although students retain their first amendment rights in K-12 public schools, there are greater limitations imposed in a school setting. According to the Supreme Court, “[t]he undoubted freedom to advocate unpopular and controversial views in

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schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."^2

While ground-breaking Supreme Court rulings involving the first amendment and public schools define the first amendment as applied to K-12 public school settings, it is still not clear to administrators when student speech should be afforded constitutional protection and when it is within their authority to discipline students for their speech in regards to cyberbullying. As students have greater access to mobile devices during the school day and a greater number of students are communicating online via social media, cyberbullying became a pervasive problem in public schools.\(^3\)\(^4\) Since the Supreme Court has not yet considered cases of cyberbullying, and appellate court decision in cyberbullying cases are inconsistent, K-12 school administrators remain unsure of the extent and limitations of the first amendment as it applies to cyberbullying.

**Increased Access to Technology**

As students have greater access to mobile devices during the school day and a greater number of students are communicating online via social media, cyberbullying has


become a pervasive problem in public schools.⁵ ⁶ According to Lenhart et al. (2015), an estimated 73% of teens had access to a smartphone, 87% of teens had access to a desktop or laptop computer, and 58% of teens had access to a tablet in 2015. The study also found that social media use is widespread among teenagers; 71% of teens ages 13-17 reported using Facebook, 52% used Instagram, 41% used Snapchat, 33% used Twitter, 33% used Google+, 24% used Vine, and 14% used Tumblr, and 11% reported using another social media network.⁷

Not only do students have increased access to electronic devices, but also school districts are often providing students with access to electronic devices throughout the school day. According to a 2013 study conducted by non-partisan think-tank Project Tomorrow, 31% of students in grades 3-5, 31% of students in grades 6-8, and 33% of students in grades 9-12 had access to a school provided tablet in 2013. Of the students that had access to school issued devices, 75% of students in grades 3-5, 58% of students in grades 6-8, and 64% of students in grades 9-12 were permitted to take the device home.⁸ As an increasing number of students have access to mobile devices during the school day, school districts have an even greater responsibility to protect students from cyberbullying. Despite the existence of anti-bullying laws that included the terms

⁵ Mezzina & Stedrak, supra note 3.
⁶ Fenn, supra note 4.
“cyberbullying” or “electronic harassment,” school administrators do not have a clear understanding of the extent of their authority to discipline students for instances of cyberbullying due to contradictory court decisions.

State Anti-Bullying Laws

Anti-Bullying Laws and the First Amendment

Bullying is a widely controversial first amendment policy issue that legislators, school administrators, and educators face cross the nation. According to the U.S. Department of Education (2015), 22 percent of students aged 12-18 were bullied during the school year in 2013.\(^9\) According to Stuart-Cassel et al (2011), “bullying in schools has become widely viewed as an urgent social, health, and education concern that has moved to the forefront of public debate on school legislation and policy.” The focus on school-aged bullying “intensified […] as a catalyzed reaction to school violence that is often linked explicitly of by inference to bullying.”\(^10\) In the wake of the Columbine High School massacre of 1999, in which two high school students opened fire on students and teachers at Columbine High School in Littleton Colorado, state legislators developed anti-bullying laws to protect students from the harmful effects of bullying.\(^11,12,13,14\)


\(^12\) Farley Andersen, Pacifism in a Dog-Eat-Dog World: Potential Solutions to School Bullying, 64 Mercer L. Rev. 753 (2012).
**Definition of Bullying.** According to Cornell & Limber (2015), “[b]ullying is such a broad and omnibus concept that there is potential for confusion and controversy over its meaning, severity, and relation with other constructs.” Cornell & Limber (2015), asserted that the conventional definition of bullying includes three major components: “(1) intentional aggression, (2) a power imbalance between aggressor and victim, and (3) repetition of the aggressive behavior.” The U.S. Department of Health and Human Services (n.d), defined bullying as “unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance. The behavior is repeated, or has the potential to be repeated, over time.”

The inclusion of the language “real or perceived” and “has the potential to be repeated, over time” in the U.S. Department of Health and Human Services’ definition of bullying, resulted in an unclear, vague definition. As bullying is a broad concept that is difficult to define, “law and policy about bullying remain fragmented and inconsistent.” Furthermore, there was no federal law that addressed bullying.

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13 Stuart-Cassel et al, *supra* note 10


15 Cornell & Limber, *supra* note 11

16 Ibid


18 Cornell & Limber, *supra* note 11

19 Ibid.
History of State Anti-Bullying Legislation. Without federal anti-bullying legislation, state legislators developed their own anti-bullying laws, which included their own definition of bullying.\(^{20}\) Georgia was the first state to enact an anti-bullying law, which “required schools to implement character education programs that explicitly addressed bullying prevention.”\(^{21}\) According to Stuart-Cassell, Bell, & Springer (2011), since Georgia passed its anti-bullying law in 1999:

“there has been a wave of new legislation at the state level to define acts of bullying in the school context and to establish school or district policies that prohibit bullying behavior.”

Between 1999 and 2010, state legislators enacted 120 bills to address bullying in schools.\(^{22}\) By January 2016, all 50 states and the District of Columbia enacted anti-bullying laws and 49 states and the District of Columbia required schools to develop an anti-bullying policy.\(^{23}\) Under state anti-bullying laws, school administrators had both the authority as well as the responsibility to discipline students for instances of bullying.

By 2016, the majority of state anti-bullying laws included the terms “electronic harassment” and/or “cyberbullying”. Some states also included “off-campus behaviors” in their definition of bullying as well (Hinduja & Patchin, 2016). The inclusion of “electronic harassment,” “cyberbullying,” and “off-campus behaviors” was controversial.


\(^{21}\) Stuart-Cassel et al, supra note 10

\(^{22}\) Ibid.

\(^{23}\) Hinduja & Patchin, supra note 20
as it gave school administrators the authority and responsibility to discipline students for speech that occurred outside of school.

**Inclusion of Cyberbullying in Anti-Bullying Statutes.** In response to high-profile cyberbullying cases, such as that of 13-year old Megan Meier in 2006 or 18-year old Rutgers University student Tyler Clementi, in which students died by suicide after being the victims of online bullying, the majority of states included the terms cyberbullying or electronic harassment in their anti-bullying laws. According to the U.S. Department of Health and Human Services, (n.d.):

> Cyberbullying is bullying that takes place using electronic technology.

> Electronic technology includes devices and equipment such as cell phones, computers, and tablets as well as communication tools including social media sites, text messages, chat, and websites.”

By January 2016, 23 states included the term “cyberbullying” or “cyber-bullying,” in their anti-bullying law; 48 states and the District of Columbia included the term “electronic harassment” in their anti-bullying law; and 14 states and the District of Columbia included “off-campus behavior” in the anti-bullying law.24

State anti-bullying laws gave school administrators the latitude to discipline students for acts of bullying that occurred on or off campus. Just as school officials had the authority to discipline students for off-campus speech in Morse v. Frederick (2007), state anti-bullying laws gave school officials the authority to discipline students for instances of cyberbullying, which could occur off school grounds.25

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The inclusion of “cyberbullying,” “electronic harassment,” and “off-campus behavior” in state anti-bullying laws is controversial. Critics assert that some anti-bullying laws that included cyberbullying were overbroad and developed as a “knee-jerk reaction” to national tragedies.26 Opponents assert that the inclusion of cyberbullying, electronic harassment, and off-campus behavior is a violation of students’ first amendment rights.27 Hayward (2011) declared that:

[anti-cyberbullying laws are the greatest threat to student free speech because they seek to censor it everywhere and anytime it occurs, using “substantial disruption” of school activities as justification and often based only on mere suspicion of potential disruption. Although the school environment has special characteristics, they do not justify the regulation of vast areas of student speech unless a “substantial disruption” of school activities can be demonstrated.28

Despite the potential harm to victims of cyberbullying, opponents of state anti-bullying legislation that regulated cyberbullying, electronic harassment, and off-campus behavior asserted that state legislation was too broad and gave school officials too much control over student speech. According to Belnap (2011), “[t]hough there is a compelling need to protect children from the insidious harm inflicted through cyberbullying, many statutes and local school policies permitting broad limitations on individual speech are not the least restrictive means through which such an interest is met.”29


28 Ibid.

According to King (2010), although necessary, some state cyberbullying laws tread on students’ first amendment rights.\textsuperscript{30} Policymakers needed to be mindful of and policy first amendment rights when designing anti-bullying laws to ensure that the laws did not infringe upon them.\textsuperscript{31}

Proponents of the inclusion of “cyberbullying,” “electronic harassment,” and “off campus behavior in state anti-bullying laws argued that the laws were necessary to protect the educational process and school climate and that state anti-bullying laws were not a violation of students’ first amendment rights.\textsuperscript{32} Cyberbullying was pervasive and while instances of cyberbullying may have occurred off campus, it had the potential to “disrupt the learning environment and/or directly affect students in that environment.”\textsuperscript{33} School administrators had the authority to discipline students for speech that would have otherwise been protected under the First Amendment. According to Calvoz, et. al (2013), “the Supreme Court has recognized that in dealing with school children, school administrators may prohibit and punish conduct that, in any other context done by any other citizen, would be afforded constitutional protection.”\textsuperscript{34} According to Sumrall

\textsuperscript{30} King, \textit{supra} note 20

\textsuperscript{31} Ibid.


\textsuperscript{33} Ibid.

\textsuperscript{34} Ibid.
(2015), because cyberbullying has the potential to be more harmful than traditional face-to-face bullying there should be a federal law to criminalize cyberbullying.\(^{35}\)

**Current Status of State Anti-Bullying Legislation**

Today, all 50 states and the District of Columbia have anti-bullying legislation in place. 48 states and the District of Columbia include “cyberbullying” or “online harassment” in their anti-bullying legislation.\(^{36}\) Furthermore, 49 states and the District of Columbia require schools to create a policy to address bullying.\(^{37}\) The definitions of bullying vary from state-to-state and not all states include “off-campus behavior” in their anti-bullying laws; therefore, there is still confusion among administrators as to their authority to address cases of cyberbullying.

For example, New Jersey’s anti-bullying act, which is arguably the most stringent in the nation, defines “harassment, intimidation, and bullying” as follows:

> [A]ny 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 […], 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 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;


\(^{36}\) Hinduja & Patchin, *supra* note 20

\(^{37}\) Ibid.
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 (“Anti-Bullying Bill of Rights Act,” 2010).  

New Jersey includes “electronic communication” in the definition of bullying. Bullying was defined as a single incident or series of incidents. “Off school grounds” is also included in the definition of bullying; therefore, school administrators are authorized to discipline students for online bullying that occurs on or off campus. Under the “Anti-Bullying Bill of Rights Act,” school districts are required to adopt an anti-bullying policy for handling instances of bullying. Furthermore, New Jersey’s “Anti-Bullying Bill of Rights Act” imposes both a school and criminal sanction for bullying.

In contrast, Alaska’s anti-bullying law does not include “cyberbullying” or “electronic harassment” in its definition of bullying. Like New Jersey’s anti-bullying law, Alaska’s anti-bullying law requires school districts to develop a school policy to prohibit harassment, intimidation and bullying. Alaska’s anti-bullying law imposes a school sanction for bullying, but does not include a criminal sanction. “Harassment, intimidation, and bullying” is defined in Alaska’s anti-bullying law as follows:

[A]n intentional written, oral, or physical act, when the act is undertaken with the intent of threatening, intimidating, harassing, or frightening the student, and
a. physically harms the student or damages the student’s property;
b. has the effect of substantially interfering with the student’s education;
c. is so severe, persistent, or pervasive, that it creates an intimidating or threatening educational environment; or

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Only face-to-face or physical bullying is included in Alaska’s state anti-bullying law. There is no mention of cyberbullying or bullying by means of electronic communication included in the definition; therefore, schools did not have to include cyberbullying in their school anti-bullying policies. Although Alaska’s anti-bullying policy did not explicitly specify that bullying could be a “single incident or series of incidents” as New Jersey’s anti-bullying policy did, it defined bullying as an “act” which encompasses a one time or repeated event.

While all 50 states have anti-bullying laws, the definition of bullying is not universal. Until the federal government creates an anti-bullying law, how cases of bullying and cyberbullying vary from state to state. Although school administrators in some states are specifically given the ability to discipline students for instances of cyberbullying or bullying that occur “off school grounds,” school administrators are still uncertain of their authority to handle cyberbullying cases that transpire off campus. Despite the existence of state anti-bullying laws, appellate courts do not agree on the extent of the authority that school officials have to discipline students for instances of cyberbullying, particularly when they happen off school grounds.

**Contradictory Appellate Court Decisions**

Increased technology use in school and contradictory court interpretations of students’ freedom of speech create confusion among school administrators. According to Fenn (2011):

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While deciding how to discipline bullies has always been a tough task for educators, rapidly evolving technology has made these decisions even more difficult, as a student's actions off campus can increasingly affect activity on campus. A school administrator may choose to act aggressively to help the student being harassed electronically, in which case she risks being sued for impeding the harassing student's First Amendment rights. On the other hand, the school administrator may act cautiously in light of First Amendment concerns, in which case she may risk being sued by the victim or her parents for allowing further harm to occur.  

As the Supreme Court has not yet heard cases of cyberbullying, school administrators and appellate courts rely on prior appellate court decisions when handling cases of cyberbullying and schools.  

While the majority of states include cyberbullying, electronic harassment, and/or off-campus behavior in their anti-bullying laws, school leaders are still unsure of their authority to handle cases of cyberbullying. As education is considered a states' issue, the United States Supreme Court refuses to hear cases of cyberbullying; therefore, school officials, attorneys, and judges can only rely on the precedent of lower court decisions when considering cases of cyberbullying. In Kowalski v. Berkeley County Schools (2011), the court explained the predicament that school leaders faced when determining how to address cases of cyberbullying in schools:

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

40 Fenn, supra note 4

41 Sumrall, supra note 35

42 Mezzina & Stedrak, supra note 3
when punishing that off-campus student speech is constitutionally permissible.\textsuperscript{43}

When considering cases of cyberbullying, appellate courts conduct a substantial-effects test, based upon the Supreme Court’s decision in \textit{Tinker v. Des Moines Independent Community School District} (1969) to determine “whether or not the instance of cyberbullying […] created a substantial interference in the orderly operation of the school and whether or not school officials could reasonably forecast a substantial interference.”\textsuperscript{44} Appellate courts have different interpretations of what constitutes a substantial interference in the school, and not all courts consider the second aspect of \textit{Tinker}, whether or not a substantial interference could be reasonably forecasted.\textsuperscript{45}

In \textit{Emmett v. Kent School District} (2000), 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.\textsuperscript{46} 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

\textsuperscript{43} \textit{Kowalski v. Berkeley County Schools}, 652 F.3d 565 (4th Cir. 2011).

\textsuperscript{44} \textit{Tinker v. Des Moines Independent Community School Dist.}, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

\textsuperscript{45} Mezzina & Stedrak \textit{supra} note 3.

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 another case involving off-campus speech, the courts sided in favor of the school district, finding that the student-created website substantially interfered with the educational process. In J.S. v. Bethlehem Area School District (2002), the courts upheld the suspension of a student that created a website that contained violent threats towards

47 Ibid.
48 Ibid.
49 Ibid.
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.”

In Wisniewski V. Board of Education of Weedsport Central School District (2007), 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.” The icon was shared with the student’s classmates via AOL instant messenger off school property for approximately three weeks. 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.

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. Using the Tinker test, the court found that once in the hands of school

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52 Js V. Bethlehem Area School Dist, 757 A. 2d 412 (2000),
54 Ibid.
staff and administrators, the disturbing image would “foreseeably create a risk of substantial disruption within the school environment.”

In *Layshock ex rel. Layshock v. Hermitage School District* (2011), 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.” Furthermore, the court found that the fake MySpace page did not “disturb the school environment.” 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.”

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. 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. Even though the court acknowledged, “it has been well established that ... the ‘schoolhouse gate’ is not constructed of solely the brick

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55 Ibid.

56 *Layshock Ex Rel. Layshock V. Hermitage School Dist*, 650 F. 3d 205 (2011)

57 Ibid.

58 Ibid.

59 Ibid.
and mortar surrounding the school yard,” it ultimately found that the plaintiff’\’s behavior was beyond the school’\’s reach.\(^{60}\)

The court applied the first part of the Tinker test, determining that the website did not create a substantial disruption in the school; however, if the court had considered the second part of the Tinker test, whether a reasonable person could foresee a substantial disruption, perhaps the outcome would be different. Although the courts overturned the suspension of the student in \textit{Layshock}, the court upheld the suspension of a student in a similar case.

In \textit{Kowalski v. Berkeley County Schools} (2011), a student created a MySpace page alleging that a fellow student had a sexually transmitted disease. Kowalski invited friends to join the page and contribute to the discussion.\(^{61}\) The page was created off campus and not discussed during school; however, the principal suspended Kowalski because she violated the school’\’s harassment policy.\(^{62}\) 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.”\(^{63}\)

\textit{Layshock ex rel Layshock v. Hermitage School District} (2011) and \textit{Kowalski v. Berkeley County Schools} (2011) were similar cases in that the school districts disciplined students for actions that occurred online and off school grounds. The appellate courts

\(^{60}\) Ibid.

\(^{61}\) \textit{Kowalski V. Berkeley County Schools}, 132 S. Ct. 1095 (2012).

\(^{62}\) Ibid.

\(^{63}\) Ibid.
had different interpretations of what constituted a substantial interference in the school, as well as whether or not a substantial disruption was reasonably foreseeable. The varying interpretations of the substantial-effects test in cyberbullying cases were problematic because school administrators did not have a clear understanding of their authority to discipline students for student bullying that occurred via electronic device.

**Conclusion**

As students have greater access to technology during the school day, and an increasing number of school districts are providing students with electronic devices, it is imperative that school administrators protect students from instances of cyberbullying. Since the Supreme Court has yet to consider a case involving cyberbullying, school administrators are uncertain of their authority to discipline students. Furthermore, the language in anti-bullying laws is not consistent from state to state.

School administrators should design anti-bullying policies in accordance with their state anti-bullying law. When considering cases of cyberbullying, school administrators should conduct their own substantial-effects test to determine if the instance of cyberbullying has created a substantial interference in the school or if the instance could create a foreseeable disruption in the school.

While state anti-bullying laws compel school administrators to take action against cyberbullies, several decisions in lower courts have sided in favor of the students’ first amendment rights. Cyberbullying can have detrimental impacts on its targets, and as a result, school administrators need to be granted authority to discipline students that bully classmates off school grounds. 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 off-campus speech that violates the rights of others or interferes with the learning environment.
Bibliography


