Fordham Law Review

Volume 81 | Issue 5 Article 17

2013

A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in a Sticky Situation?

Matthew Fenn

NOTES

A WEB OF LIABILITY: DOES NEW CYBERBULLYING LEGISLATION PUT PUBLIC SCHOOLS IN A STICKY SITUATION?

*Matthew Fenn**

Bullying has long been a concern for students, parents, and schools. However, the explosion of communication technology has transformed the nature of bullying, allowing "cyberbullies" to extend their reach far beyond the physical schoolyard. This development creates uncertainty for schools, legislatures, and courts in assessing when and where schools should be permitted to regulate student behavior.

The growing number of tragic cyberbullying incidents, as well as national media coverage, has forced legislatures to take action. This has manifested itself in a number of different statutory forms and approaches. The most aggressive legislation appears to impose new duties on school districts and individual schools to police and prevent cyberbullying. Increased liability will likely accompany these new duties. This could be problematic since courts have been protective of students' off-campus free speech rights when schools have acted aggressively to combat cyberbullying.

This Note argues that the potential for new liability that schools may face, while perhaps appropriate, will put schools in a "lose-lose" situation. Schools that choose to act in accordance with new legislation will undoubtedly face legal challenges by cyberbullies, claiming violations of free speech rights. Schools that hesitate to act may face liability for failing to fulfill their new statutory duties to protect victims of cyberbullying. In order to balance these competing interests, courts should apply existing legal standards more deferentially to allow schools to combat cyberbullying effectively while also respecting the First Amendment.

* J.D. Candidate, 2014, Fordham University School of Law; B.A., 2007, Washington University in St. Louis. Thank you to Professor George W. Conk for his support and guidance, and thank you to my family and friends for their tireless love, encouragement, and patience.

TABLE OF CONTENTS

INTRODUCTION

In May 2011, administrators at a Georgia middle school were confronted with a difficult situation.[1] Parents of a student reported that their daughter received nasty glances and harsh comments from her peers when she arrived at school one day.[2] She didn't know why until she logged onto Facebook.[3] She discovered a fake Facebook profile with her name and information and a doctored profile picture.[4] The profile said she smoked marijuana, spoke a language called "Retardish," and made it look as though she made frequent sexual and racist posts on other Facebook users' profiles.[5] Though the student was clearly upset, the administrators felt compelled to tell the student and her parents there was little they could do because the Facebook bullying occurred off campus.[6] Police said the same.[7]

Across the country in California, school administrators were forced to tackle a similarly sticky situation on a different, burgeoning form of social media.[8] A group of students had gone to a local restaurant after school and recorded a four and a half minute video on a cell phone, calling another student a "slut," talking about "boners," and saying the girl was "the ugliest piece of shit [they'd] ever seen in [their lives]."[9] The recorder of the video posted it to YouTube.com later that evening and sent messages to classmates, telling them to watch it.[10] She also contacted the subject of the

1. *See* Gregg Bluestein & Dorie Turner, *School Cyberbullying Victims Fight Back in Lawsuits*, HUFFINGTON POST (Apr. 26, 2012, 7:27 PM), http://www.huffingtonpost.com/2012/04/26/school-cyberbullying-vict_n_1457918.html.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *See* J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1098 (C.D. Cal. 2010).
9. *Id.*
10. *Id.*

video and told her the same.[11] By the end of the night, the video had 90 "hits," or visits.[12] When the student-victim arrived with her mother at school the next morning, her peers were already abuzz with conversation about the video.[13] In contrast to the Georgia scenario, school administrators decided to investigate their disciplinary options.[14] Their attorney advised that the recorder-publisher of the video could be suspended.[15] Administrators suspended the student for two days, but a court found that this violated the student's First Amendment rights.[16]

Another vicious scenario is only starting to fill court dockets but is increasingly confronting school administrators.[17] In 2005, Kara Kowalski, a high school senior, created a group webpage on MySpace.com from her home computer.[18] She titled the webpage "S.A.S.H.," which she claimed stood for "Students Against Sluts Herpes," but which another student stated was an acronym for "Students Against Shay's Herpes."[19] Shay was another of Kowalski's classmates.[20] Kowalski invited about 100 of her MySpace contacts to join the group, and roughly two dozen of her classmates joined.[21] Ray Parsons, the first of Kowalski's friends to join the group, posted several photos to the webpage.[22] The first was a picture of Parsons and a friend holding their noses and displaying a sign that said, "Shay Has Herpes."[23] Another was a photograph of Shay that Parsons edited, drawing red dots on her face to simulate herpes and drawing a sign near her pelvic region that said, "Warning: Enter at your own risk."[24] A third picture was posted, a photograph of Shay displaying the caption "portrait of a whore."[25] Several other classmates responded to the pictures with their own posts, laughing or ridiculing Shay.[26] When Shay's father found out about the website, he contacted Kowalski, Parsons, and the school.[27] The school board informed the principal that discipline was appropriate, and the principal began an investigation into who created the website, joined the group, or posted disparaging pictures and remarks.[28] School administrators found that Kowalski, in creating the group website, had violated the school policy against "harassment, bullying, and intimidation," and she was

11. *Id.*
12. *Id.*
13. *Id.* at 1098–99.
14. *Id.*
15. *Id.* at 1099.
16. *Id.* at 1122.
17. *See* Bluestein & Turner, *supra* note 1.
18. Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 567 (4th Cir. 2011).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 568.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*

suspended for five school days with a ninety-day "social suspension" prohibiting her from participating in any extracurricular activities.[29] Kowalski brought suit against the school for violating her First Amendment rights.[30] Almost four years later, the Fourth Circuit ultimately found the school's actions permissible.[31]

Sometimes administrators avoid court but are left with a far more problematic and tragic result of electronic bullying—a student's suicide.[32] In late 2009, Phoebe Prince's family moved from Ireland to suburban Massachusetts, and she enrolled as a freshman in the local high school.[33] She began dating a popular boy in the senior class.[34] Soon thereafter, she started receiving demeaning text messages throughout the day and, when she turned on her computer, groups of her peers were harassing her on social networking sites.[35] Some school administrators and teachers learned of the problem but ultimately did not take action.[36] Months later, tormented and depressed, Prince hanged herself, leaving those in her community wondering what could have been done to prevent this tragic loss.[37]

Teachers and school administrators face dilemmas such as these with increasing frequency every day.[38] 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.[39] 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.[40] On the other hand, the school administrator may act cautiously in light of First Amendment concerns, in which case she may

---

29. *Id.* at 568–69.
30. *Id.* at 570.
31. *Id.* at 567.
32. *See, e.g.*, Erick Eckholm & Katie Zezima, *9 Teenagers Are Charged After Suicide of Classmate*, N.Y. TIMES, Mar. 30, 2010, at A14; *see also* Jessica P. Meredith, Note, *Combating Cyberbullying: Emphasizing Education over Criminalization*, 63 FED. COMM. L.J. 311, 312–16 (2010) (describing three particularly high-profile cases of cyberbullying that ended in suicide and gained national attention).
33. *See* Eckholm & Zezima, *supra* note 32.
34. *See id.*
35. *See id.*
36. *See id.*
37. *See id.*
38. *See* Karla Schultz, *Free To Be Mean? What Are the First Amendment Rights of Bullies?*, LEADERSHIP INSIDER, Aug. 2011, at 3.
39. *See generally* Justin W. Patchin & Sameer Hinduja, *Bullies Move Beyond the Schoolyard: A Preliminary Look at Cyberbullying*, 4 YOUTH VIOLENCE & JUV. JUST. 148, 154–55 (2006).
40. *See* Schultz, *supra* note 38, at 3–4; *see also* Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction To Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 271 (2008) (describing the current trend of courts liberally granting First Amendment protection to off-campus speech, even if it is vulgar, cruel, sexually explicit, or threatening).

risk being sued by the victim or her parents for allowing further harm to occur.[41]

State legislatures have almost universally reacted to this growing problem by either revising old bullying statutes or enacting new legislation.[42] In crafting or amending their bullying and cyberbullying laws, many states have potentially imposed new duties on schools, administrators, and teachers to monitor and police cyberbullying.[43] The Supreme Court has yet to rule on a school's ability to regulate students' off-campus speech, and lower courts have produced a morass of conflicting standards and results.[44] This leaves educators in a confusing and precarious situation when it comes to making increasingly common disciplinary decisions.[45]

This Note examines recent cyberbullying legislation in concert with current cyberbullying jurisprudence, both of which have combined to make school officials feel as if they are in a "lose-lose" situation.[46] Part I explores traditional bullying and a school's duty to regulate it, and then examines the unique social and legal challenges that arise in cases of cyberbullying. Part II compares state legislatures' expansive responses to cyberbullying to courts' somewhat restrictive treatment of off-campus student speech. Part III argues that courts should hold schools responsible for legislatively imposed duties to police cyberbullying but posits that, in order to avoid trapping schools in a web of liability, courts should also be more deferential when examining disciplinary actions taken to counteract cyberbullying.

I. BULLYING: FROM THE SCHOOLYARD TO THE INTERNET

This part contrasts the social and legal implications of traditional bullying and modern cyberbullying. Part I.A traces the social history of bullying and outlines bullying legislation resulting from a change in national attitudes toward the subject. Part I.B examines the legal expectations of public schools in regulating traditional bullying and the standards for liability they may face for failing to police on-campus bullying properly. Part I.C describes the rise of cyberbullying and the

41. *See* Schultz, *supra* note 38, at 4; *see also* Sonja Trainor, *School Bullying Poses Legal Issues for School Boards*, LEADERSHIP INSIDER, Aug. 2011, at 1 (noting the increase in complaints filed against school districts in the wake of bullying); *infra* Part II.A.3.

42. *See infra* Part II.A.1–2.

43. *See infra* Part II.A.3.

44. *See infra* Part II.B.1.

45. *See* Justin W. Patchin, *Cyberbullying Laws and School Policy: A Blessing or a Curse?*, CYBERBULLYING RES. CENTER (Sept. 28, 2010, 4:23 PM), http://cyberbullying.us/blog/cyberbullying-laws-and-school-policy-a-blessing-or-curse.html ("[S]chool administrators are in a precarious position because they see many examples in the media where schools have been sued because they took action against a student when they shouldn't have or they failed to take action when they were supposed to. Schools need help determining where the legal line is.").

46. *See id.*; *see also* Schultz, *supra* note 38.

unique practical and legal challenges it presents for schools and legislators in comparison to traditional bullying. Lastly, Part I.D chronicles Supreme Court cases that have addressed student speech off campus.

A. Bullying: An Age-Old Problem Becomes a New National Emergency

This section looks at traditional forms of bullying to lay out the proper context to understand cyberbullying. It then sets out a definition of traditional bullying and examines the historical manifestations of bullying in schools and the prevailing attitudes of the past. Next, it explores the current state of bullying in schools and traces a shift in the national consciousness. Finally, this section surveys the landscape of state bullying laws that resulted from this national attention.

1. Traditional Bullying: A Historical Perspective

Bullying is an age-old, common form of violence among youth that traditionally manifests itself at school, on the way to or from school, or in public places such as playgrounds or bus stops.[47] Several common thematic threads run through the many varied definitions of bullying. First, bullying typically includes an element of harassment, where one individual or group targets another individual or group with unprovoked aggression.[48] Second, bullying generally grows more insidious and violent over time.[49] Third, bullying often involves either an actual or perceived power differential between the attacker and the victim.[50]

Bullying is certainly not a new problem. Even a cursory look at ancient fairy tales such as *Cinderella* or classic literature like *The Lord of the Flies* reveals the timeless concern of harassers who leverage actual or perceived power to push others around repeatedly.[51] Nor is bullying a new occurrence in the school setting.[52] While prevalence data varies widely depending on the scope and nature of the study, most research in the past

47. *See* Patchin & Hinduja, *supra* note 39, at 148. Patchin and Hinduja note that, while traditional bullying can take place in any physical setting, it often occurs in or around school. *Id.*

48. *See id.* at 150.

49. *See id.*

50. *See id.* Patchin and Hinduja note that many characteristics can contribute to this uneven power dynamic—popularity, physical strength or stature, social competence, quick wit, extroversion, confidence, intelligence, age, sex, race, ethnicity, and socioeconomic status are some of the more common contributors. *Id.* They also point out, though, that studies examining which characteristics are the best predictors of who becomes a bully have been inconclusive. *Id.*

51. *See generally* WILLIAM GOLDING, THE LORD OF THE FLIES 1 (1954); Jacob Grimm & Wilhelm Grimm, *Cinderella*, *in* FAIRY TALES FROM THE BROTHERS GRIMM 116, 116–17 (Philip Pullman trans., Viking Penguin 2012) (1812).

52. *See* Bonnie Bell Carter & Vicky G. Spencer, *The Fear Factor: Bullying and Students with Disabilities*, 21 INT'L J. SPECIAL EDUC. 11, 11–12 (2006) (describing America's history of bullying in addition to documenting bullying statistics from other nations' pasts); *see also* Patchin & Hinduja, *supra* note 39, at 148.

few decades has concluded that between 10 to 20 percent of students are victims of traditional forms of bullying.[53]

Twenty to thirty years ago, however, the national attitude toward bullying was significantly different.[54] It was regarded as a typical experience of one's childhood or a "rite of passage" to be endured by every adolescent.[55] Bullying was misunderstood not only by parents and educators, but by academics and researchers, as well.[56] Consequently, little action was taken to address or manage it effectively, both in the classroom and elsewhere.[57]

2. A Shift in the National Consciousness

Over the last two decades, social attitudes toward bullying have continued to change.[58] Some scholars pinpoint the tragic shooting massacre at Columbine High School in Littleton, Colorado, as a turning point, as it was widely reported that classmates ostracized the shooters.[59] More broadly, many researchers look to a rash of violent and highly publicized incidents at schools across the country in which aggressors reported being bullied or outcast beforehand.[60] In the wake of these tragedies, bullying was thrust into the national spotlight and began to be viewed as a substantially dangerous, pervasive problem.[61] Thus, there has been

---

53. *See* Carter & Spencer, *supra* note 52, at 11–12.

54. *See id.* at 11.

55. *See id.* While attitudes toward bullying have largely changed, this antiquated view still manifests itself in the responses of some educators. *See, e.g.*, L.W. *ex rel.* L.G. v. Toms River Reg'l Sch. Bd. of Educ., 915 A.2d 535, 541 (N.J. 2007) (noting that, in response to a student's complaints of severe, pervasive harassment, a guidance counselor told the student to "toughen up and turn the other cheek").

56. *See* Carter & Spencer, *supra* note 52, at 11.

57. *See id.*

58. *See id.* at 12; Patchin & Hinduja, *supra* note 39, at 151.

59. *See* Patchin & Hinduja, *supra* note 39, at 151; *see also* Erb, *supra* note 40, at 257–59 (comparing the effect of the Columbine shooting on the national consciousness surrounding bullying to that of the attacks of September 11, 2001, and America's approach to terrorism).

60. *See* Carter & Spencer, *supra* note 52, at 12; Patchin & Hinduja, *supra* note 39, at 151 (pointing to school violence research of thirty-seven incidents from 1974 to 2000, which showed that out of the forty-one "attackers" involved, twenty-nine, or 71 percent, reported feeling bullied, persecuted, or injured before the attack). In particular, many point to the case of Megan Meier, a teenager who was bullied online until she committed suicide—it was later revealed that the mother of her classmate was the aggressor. *See, e.g.*, Darryn Cathryn Beckstrom, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat to Students' Free Speech Rights*, 33 VT. L. REV. 283, 283–84 (2008); Meredith, *supra* note 32, at 312–16; Jonathan Turley, *How To Punish a Cyber-Bully*, L.A. TIMES, Nov. 21, 2007, at A25.

61. *See supra* note 60 and accompanying text; *see also* A.O. Scott, *Behind Every Harassed Child? A Whole Lot of Clueless Adults*, N.Y. TIMES, Mar. 30, 2012, at C10 (explaining how the release of a highly acclaimed documentary, *Bully*, exemplifies the "emergence of a movement" and a "shift in consciousness" with respect to bullying); *Bullying Prevention*, AD COUNCIL, http://www.adcouncil.org/Our-Work/Current-Work/Safety/Bullying-Prevention (last visited Mar. 19, 2013) (describing the campaign to create a series of national television and print ads promoting awareness of bullying).

increased pressure on both lawmakers and school officials to tackle the issue.[62]

In light of this newfound attention, researchers have increasingly focused on the effects of bullying.[63] Studies have conclusively shown that bullying victims often exhibit suicidal ideation, eating disorders, chronic illness, depression, difficulty concentrating, and avoidance behavior.[64] This may lead the victim to exhibit violent outbursts or criminal behavior.[65] At other times, the victim withdraws and avoids social interaction and, specifically, school and classmates.[66] As a result, the academic performance of victims decreases significantly.[67] Furthermore, these effects seldom go away when bullying ends, often hurting the victim's developmental trajectory and continuing to affect the victim well into adulthood.[68] This research has made schools a more obvious stakeholder in curbing bullying and has added to the pressure on schools to address the issue.[69]

3. A National Boom in Bullying Legislation

The national spotlight on tragic incidents of bullying and subsequent research on its effects had a direct impact on policymakers and state legislatures across the country.[70] As of December 2012, forty-nine out of

---

62. *See infra* Part I.A.3.

63. *See, e.g.*, Carter & Spencer, *supra* note 52, at 12; Patchin & Hinduja, *supra* note 39, at 151.

64. *See* Carter & Spencer, *supra* note 52, at 12; Patchin & Hinduja, *supra* note 39, at 151.

65. *See* Patchin & Hinduja, *supra* note 39, at 151.

66. Carter & Spencer, *supra* note 52, at 12; Patchin & Hinduja, *supra* note 39, at 151.

67. *See* Carter & Spencer, *supra* note 52, at 12.

68. *See* Patchin & Hinduja, *supra* note 39, at 151; *see also* Jennifer Senior, *Why You Truly Never Leave High School*, N.Y. MAG. (Jan. 20, 2013), http://nymag.com/news/features/high-school-2013-1/ (examining findings by psychologists on the impact that adolescent experiences have on human behavior into adulthood).

69. *See, e.g.*, *infra* note 70 and accompanying text.

70. *See, e.g.*, N.J. STAT. ANN. § 18A:37-13.1 (West Supp. 2012) ("The Legislature finds and declares that . . . [a] 2009 study by the United States Departments of Justice and Education, 'Indicators of School Crime and Safety,' reported that 32% of students aged 12 through 18 were bullied in the previous school year. The study reported that 25% of the responding public schools indicated that bullying was a daily or weekly problem . . . . A 2009 study by the United States Centers for Disease Control and Prevention, 'Youth Risk Behavior Surveillance,' reported that the percentage of students bullied in New Jersey is 1 percentage point higher than the national median . . . . In 2010, the chronic persistence of school bullying has led to student suicides across the country, including in New Jersey . . . . School districts and their students, parents, teachers, principals, other school staff, and board of education members would benefit by the establishment of clearer standards on what constitutes harassment, intimidation, and bullying, and clearer standards on how to prevent, report, investigate, and respond to incidents of harassment, intimidation, and bullying . . . . It is the intent of the Legislature in enacting this legislation to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises[.]"); N.Y. EDUC. LAW § 10 (McKinney Supp. 2013) ("The legislature finds that students' ability to learn and to meet high academic standards, and a school's ability to educate its students, are compromised by incidents of discrimination or harassment including

fifty states had adopted some type of antibullying legislation aimed at either suggesting or mandating action on the part of public schools.[71] Only Montana has not statutorily addressed the issue in any respect.[72]

In states that have affirmative bullying legislation, the language and breadth of coverage vary widely from state to state.[73] Some states have mandated that schools or school districts put policies in place but have not specifically delineated what these policies must include.[74] Other states have given policymaking authority to school districts with clearly defined areas of coverage that must be included with respect to antibullying.[75] A third group of states has enacted "zero tolerance" laws that prohibit defined categories of behavior and charge school boards with determining corresponding levels of punishment.[76] Lastly, some state statutes have mandated additional school responsibilities, such as reporting requirements, character education for students, and staff training programs.[77]

Additionally, the U.S. Department of Education has articulated a renewed dedication to help eradicate bullying.[78] The Department also

---

bullying, taunting or intimidation. It is hereby declared to be the policy of the state to afford all students in public schools an environment free of discrimination and harassment. The purpose of this article is to foster civility in public schools and to prevent and prohibit conduct which is inconsistent with a school's educational mission.").

71. *See* Samir Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RES. CENTER (Nov. 2012), http://cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf.

72. *See id.* Victims of schoolyard bullying in Montana must look to other bases for a cause of action, such as federal law or common law negligence in tort. *See generally* Anne M. Payne, *Establishing Liability of a Public School District for Injuries or Damage to a Student Resulting from Bullying or Other Nonsexual Harassment by Another Student*, 105 AM. JUR. 3D *Proof of Facts* 93, 117–23 (2009) (discussing other avenues for bullying victims to bring claims).

73. *See generally* Hinduja & Patchin, *supra* note 71.

74. *See, e.g.*, COLO. REV. STAT. § 22-32-109.1(2)(a)(K) (2012) (mandating that school districts create a "safe school plan" that incorporates a "specific policy concerning bullying prevention and education"); N.M. STAT. ANN. § 22-2-21 (LexisNexis Supp. 2011) ("The department [of education] shall establish guidelines for bullying prevention policies to be promulgated by local school boards. Every local school board shall promulgate a bullying prevention policy program by August 2011. Every public school shall implement a bullying prevention program by August 2012.").

75. *See, e.g.*, R.I. GEN. LAWS § 16-21-34 (Supp. 2012) (outlining areas to be addressed by the department of education in implementing a policy).

76. *See, e.g.*, CAL. EDUC. CODE § 234.1 (West Supp. 2013) (requiring school districts to adopt a policy prohibiting bullying); MASS. ANN. LAWS ch. 71, § 37O (LexisNexis Supp. 2012) (same). *See generally* Philip T.K. Daniel, *Bullying and Cyberbullying in Schools: An Analysis of Student Free Expression, Zero Tolerance Policies, and State Anti-harassment Legislation*, 268 EDUC. L. REP. 619, 635–38 (2011). Daniel notes that while these are specific in the sense that they delineate what schools must prohibit, they are controversial because they give schools authority to discipline a broad range of conduct. *Id.*

77. *See, e.g.*, N.J. STAT. ANN. § 18A:37-15 (West Supp. 2012) (mandating all three); *see also, e.g.*, GA. CODE ANN. § 20-2-145 (2012) (requiring that public schools establish a character education program); MASS. ANN. LAWS ch. 71, § 37O (establishing reporting requirements).

78. *See* Letter from Arne Duncan, Sec'y, U.S. Dep't of Educ., to Colleagues (Dec. 16, 2010), *available at* http://www2.ed.gov/policy/gen/guid/secletter/101215.html ("Recent incidents of bullying have demonstrated its potentially devastating effects on students,

recently "reminded" educators that the federal government interprets several previously enacted federal statutes to be triggered by instances of bullying.[79] For instance, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin;[80] Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex;[81] and section 504 of the Rehabilitation Act of 1978[82] and Title II of the Americans with Disabilities Act of 1990[83] prohibit discrimination on the basis of disability. Thus, if the bullying at issue is based on any of these protected classes, a federal civil rights statute may be implicated.[84]

B. A Public School's Duty To Regulate On-Campus Bullying

The previous section addressed a shift in the national attitude toward bullying and the resulting legislative boom. This section examines the circumstances in which schools may be responsible for policing bullying activity. In cases where a victim of on-campus bullying by another student wishes to hold a school district or its employees liable, the victim must show negligence on the part of the school.[85] This section considers the elements of negligence in the context of a school facing liability for harm resulting from bullying. It then addresses a public school's potential immunity from suit and looks at how a school might breach its duty if one is owed. Lastly, this section considers how the action or inaction of a school "causes" the injury or harm in a case of bullying.

1. Duty To Protect Students

In order for any actor to be liable for harm, it must owe a duty to the person harmed.[86] At its essence, "duty" is an obligation to conform to a particular standard of conduct in relation to another.[87] In a negligence case, the duty question is often framed as whether the defendant is under any particular obligation to act or refrain from acting for the benefit of the

schools, and communities and have spurred a sense of urgency among State and local educators and policymakers to take action to combat bullying. The U.S. Department of Education . . . shares this sense of urgency and is taking steps to help school officials effectively reduce bullying in our Nation's schools.").

79. Letter from Russlynn Ali, Asst. Sec'y, Office of Civil Rights, U.S. Dep't of Educ., to Colleagues (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

80. 42 U.S.C. § 2000d (2006).

81. 20 U.S.C. § 1681 (2006).

82. 29 U.S.C. § 794 (2006).

83. 42 U.S.C. § 12131.

84. *See* Letter from Russlynn Ali, *supra* note 79.

85. *See, e.g.*, M.W. v. Panama Buena Vista Union Sch. Dist., 1 Cal. Rptr. 3d 673, 679–81 (Ct. App. 2003); Mirand v. City of N.Y., 84 N.Y.2d 44, 49–51 (1994). All elements of negligence must typically be proven even if the victim brings suit under a state or federal statute. *See* Silano v. Bd. of Educ., 52 Conn. Supp. 42, 63–64 (Super. Ct. 2011).

86. *See generally* W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 53 (5th ed. 1984).

87. *See id.* at 356.

plaintiff.[88] In a school bullying case, the question becomes whether the school had a legal responsibility to protect a particular student from bullying.[89] A person or entity may have a duty imposed by statute or implied in common law.[90] As both statutes and common law are always evolving, the concept of duty evolves as well.[91] Thus, a school's legal duty to protect its students from bullying will change along with common law and state and federal statutes.

As a general rule, one does not owe a duty to protect another from the conduct of a third party in the absence of some special relationship between either the defendant and the person at risk or the defendant and the third party.[92] This is equally true for government entities and employees acting for the benefit of the public under the public duty doctrine.[93] The public duty doctrine states that a municipality and its agents act for the benefit of the general public rather than specific individuals; thus, the municipality and its agents owe a duty of care to the public at large but not necessarily to specific individuals in the absence of a special relationship.[94]

Like duty, a special relationship can either be created statutorily or derived from common law principles.[95] In the context of a government actor, the question of whether a statute creates a duty to the public or to

88. *See id.*

89. *See Silano*, 52 Conn. Supp. at 52–53; Burns v. Gagnon, 727 S.E.2d 634, 641–43 (Va. 2012).

90. *See* DAN B. DOBBS, THE LAW OF TORTS § 133, at 311–12 (2000).

91. *See* KEETON, *supra* note 86, at 359 ("[A]s our ideas of human relations change the law as to duties changes with them.").

92. *See Burns*, 727 S.E.2d at 641–42; M.W. v. Panama Buena Vista Union Sch. Dist., 1 Cal. Rptr. 3d 673, 679 (Ct. App. 2003). *See generally* DOBBS, *supra* note 90, § 227, at 579 ("[T]he orthodox view is that the defendant is free to watch an unsighted person step in front of a car, even if, with no inconvenience or danger to himself, the defendant could have called out a warning. The defendant, it is said, has no duty to act affirmatively for the benefit of others in the absence of some special relationship.").

93. *See* 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 76 (2012); DOBBS, *supra* note 90, § 271; *see also Burns*, 727 S.E.2d at 642 (drawing a distinction between a duty owed to the "citizenry at large" and a special duty owed to a specific, identifiable person).

94. *See supra* note 93 and accompanying text. Dobbs points out that a number of states have either explicitly or implicitly distanced themselves from the public duty doctrine. DOBBS, *supra* note 90, § 271, at 725–26 n.23 (citing court decisions from Alaska, Arizona, Colorado, Florida, Louisiana, Massachusetts, Nebraska, New Mexico, Oregon, and Wisconsin).

95. *See* 57 AM. JUR. 2D, *supra* note 93, § 85 (outlining a number of factors that courts consider when determining the existence of a special relationship). *Compare Panama Buena Vista Union Sch. Dist.*, 1 Cal. Rptr. 3d at 679–80 (holding that a common law special relationship is formed between a school district and its students, partly because of the compulsory nature of education, but also because of the unquestionable right of all students to an environment fit for learning), *and Burns*, 727 S.E.2d at 641–43 (finding a that a special relationship exists at common law between a principal and a student because the school has custody of the student while at school), *with* Silano v. Bd. of Educ., 52 Conn. Supp. 42, 53 (Super. Ct. 2011) (explaining that, in the school context, a duty is not owed "to the public" but must be statutorily imposed to the individual student).

specific individuals is often a matter of statutory construction.[96] This is an inherently context-specific exercise with the outcome depending on the facts of the case presented, the specific language of any statutes that may support a claim, and the general common law principles in a given jurisdiction.[97] For a school, this means that its duty to protect students from bullying depends largely on its state's law and the specific facts of the instance of bullying.[98]

Another divisive duty question is its scope. In other words, if the rule of law is that one must not injure his neighbor, a natural question might be, who counts as a "neighbor?"[99] This question prompted the famous debate between then–Chief Judge Cardozo and Judge Andrews in *Palsgraf v. Long Island Railroad*, in which Cardozo held that one only owes a duty of care to a reasonably foreseeable plaintiff.[100] This approach has been criticized because it may put judges in the position of deciding fact-specific questions better left for a jury on the other elements of negligence, and it may allow judges to make policy determinations better left to the legislature.[101] Nonetheless, in most states today, courts determine whether the defendant owed a duty of care to the plaintiff by asking whether the risk, the injury, or the person injured were reasonably foreseeable.[102] Thus, in the context of school bullying, a school must typically be on notice of the risk, the

96. *See* 57 AM. JUR. 2D, *supra* note 93, §§ 75–76; DOBBS, *supra* note 90, § 142, at 333 ("Courts do not adopt a statutory standard or rule to govern tort cases if they believe the statute creates only a 'public duty.' Put differently, violation of a statute that creates a public duty only and not a duty to individuals is not negligence per se."). *Compare* Dornfried v. Berlin Bd. of Educ., No. CV064011497S, 2008 WL 5220639, at *9–10 (Conn. Super. Ct. Sept. 26, 2008) (looking to legislative intent to determine that Connecticut's antibullying statute was enacted primarily to impose reporting and information gathering requirements on schools and did not create a duty to individual students), *with* L.W. *ex rel.* L.G. v. Toms River Reg'l Sch. Bd. of Educ., 915 A.2d 535, 546–47 (N.J. 2007) (reading the New Jersey Law Against Discrimination to impose a duty on schools to reasonably address an individual student's repeated complaints of discriminatory bullying). Dobbs argues that when courts declare that statutory duties flow only to the public and not to individuals, they are usually stating a judicially preferred rule and not a real construction of the statute. DOBBS, *supra* note 90, § 142, at 333–34 ("The results may be correct in many cases, but the arguments are sometimes dubious.").

97. *See* 57 AM. JUR. 2D, *supra* note 93, § 85.

98. *See id.*

99. *See* Donoghue v. Stevenson, [1932] A.C. 562 (H.L.) 580 (appeal taken from Scot.); KEETON, *supra* note 86, § 53, at 358–59.

100. 162 N.E. 99 (N.Y. 1928); *see also* Dobbs, *supra* note 90, § 230, at 584–85.

101. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. j (2005). *See generally* W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739 (2005).

102. *See* Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1258 n.47 (2009); *see also* Jasperson v. Anoka-Hennepin Indep. Sch. Dist. No. 11, No. A06-1904, 2007 WL 3153456, at *4 (Minn. Ct. App. Oct. 30, 2007) (explaining that, in Minnesota, schools owe a common law duty to protect children but only to protect against conduct that is foreseeable and could have been prevented with ordinary care); Wood v. Watervliet City Sch. Dist., 30 A.D.3d 663, 663–64 (N.Y. App. Div. 2006) (positing that the foreseeability of one student harming another generally requires either actual or constructive notice of prior similar conduct).

potential for injury, or the particular student being bullied, for a court to find that a duty existed.[103]

In sum, whether or not a school owes a duty to prevent the harm in question may depend on the specific facts of the case presented, the statutory bases for the plaintiff's claim, and any common law principles of duty in the jurisdiction where suit is brought. Thus, when a school administrator confronts an instance of bullying, state law and the context of the situation largely dictate how he may respond.

2. The Sovereign Immunity Defense

Even if a bullying victim can establish that a school has a statutory or common law duty to him or her, the school may be immune from suit under the doctrine of sovereign immunity.[104] This doctrine states that school districts, public school officers, administrators, principals, superintendents, teachers, and employees are generally entitled to immunity from personal liability in tort for discretionary acts or omissions in the course of their employment, so long as their conduct was not willful or malicious.[105] States follow this rule either statutorily[106] or at common law,[107] with varying approaches discussed below.

One important difference among states is when exactly the presumption of sovereign immunity arises. Perhaps the most extreme approach is Georgia's, where a state agency may only waive sovereign immunity by an act of the legislature, and the Georgia Tort Claims Act expressly precludes school districts and other "local authorities" from such a waiver.[108] Under this standard, a government entity cannot face liability in tort unless the plaintiff can show that the state actor was willful or malicious, or that the

---

103. *See, e.g.*, *Jasperson*, 2007 WL 3153456, at *4–5; *Wood*, 30 A.D.3d at 663–64.

104. *See, e.g.*, Albers v. Breen, 806 N.E.2d 667, 674 (Ill. App. Ct. 2004); *see also* KEETON, *supra* note 86, § 131, at 1032. Some scholars question whether immunity and "no duty" really are two different inquiries since they have the same result in negligence actions—dismissal of the claim. *See* DOBBS, *supra* note 90, § 225, at 575–76.

105. *See* 57 AM. JUR. 2D, *supra* note 93, § 27; *see also, e.g.*, Silano v. Bd. of Educ., 52 Conn. Supp. 42, 52 (Super. Ct. 2011); *Jasperson*, 2007 WL 3153456, at *6.

106. *See, e.g.*, *Albers*, 806 N.E.2d at 673–74 (sovereign immunity established by Illinois's Tort Immunity Act); Moore v. Hous. Cnty. Bd. of Educ., 358 S.W.3d 612, 615–16 (Tenn. Ct. App. 2011) (sovereign immunity established by Tennessee Governmental Tort Liability Act).

107. *See, e.g.*, *Silano*, 52 Conn. Supp. at 52; *see also* Burns v. Gagnon, 727 S.E.2d 634, 646 (Va. 2012) (explaining that Virginia recognizes both statutory and common law forms of sovereign immunity).

108. GA. CODE ANN. §§ 50-21-22(5), 23(a) (2012); *see, e.g.*, Chisolm v. Tippens, 658 S.E.2d 147, 151 (Ga. Ct. App. 2008) (interpreting the Georgia Tort Claims Act to restrict any waiver of sovereign immunity by a school district). Massachusetts has a similar, although slightly less hard-line, approach. The Massachusetts Tort Claims Act provides for waiver of sovereign immunity in limited circumstances but retains immunity for public employees failing to act or prevent harmful acts of third parties unless the condition or situation was originally caused by the public employee; this usually requires an "affirmative act." *See* Parsons v. Town of Tewksbury, 26 Mass. L. Rptr. 555, at *3 (Super. Ct. 2010).

actions were not discretionary.[109] The most common approach is a grant of sovereign immunity as long as the state legislature has not expressly denied immunity for the act in question.[110] Under this standard, a plaintiff must be able to point to a statutory or constitutional violation that creates a private right of action against state actors.[111] A third approach is based in common law and essentially presumes sovereign immunity, barring any of three exceptions: (1) if conduct is malicious, wanton, or intended to injure; (2) if a statute provides for a private cause of action for failing to enforce a specific law; or (3) if failure to act would be likely to subject an identifiable person to imminent harm.[112]

Sovereign immunity typically only exempts a state actor from suit if his or her actions were discretionary, as opposed to a decision that merely implements preexisting policies and regulations.[113] Whether a defendant may assert a sovereign immunity defense, then, will depend on the specificity of the jurisdiction's statutory and regulatory scheme.[114] Thus, as statutes and school district policies become more specific about what procedures must be followed either to prevent or respond to bullying, the less likely it is that an educator's actions are discretionary and the less likely that the educator is immune from suit.[115]

---

109. *See Chisolm*, 658 S.E.2d at 151; *see also infra* notes 113–15 and accompanying text.

110. *See, e.g.*, *Albers*, 806 N.E.2d at 673–74 (explaining that Illinois's Tort Immunity Act grants broad immunity and, in order to bypass immunity, the legislature must statutorily make an exception to the Tort Immunity Act); Doe *ex rel.* Subia v. Kan. City, Mo. Sch. Dist., 372 S.W.3d 43, 51 (Mo. Ct. App. 2012) (interpreting the Missouri Human Rights Act to explicitly impose liability).

111. *See Albers*, 806 N.E.2d at 673–74; *Doe ex rel. Subia*, 372 S.W.3d at 51.

112. *Silano*, 52 Conn. Supp. at 56–58 (interpreting a statute governing school buses to explicitly deny sovereign immunity, falling under the second recognized exception).

113. *See* Comuntzis v. Pinellas Cnty. Sch. Bd., 508 So. 2d 750, 751–53 (Fla. Dist. Ct. App. 1987) (explaining, in a failure to supervise case, that a school's decision about where to place supervisors within the school is discretionary, but a failure to place any supervising teachers anywhere in the school is not); Moore v. Hous. Cnty. Bd. of Educ., 358 S.W.3d 612, 615–17 (Tenn. Ct. App. 2011) (providing examples of a nursing home that fails to follow preexisting guidelines for a patient with a history of violence or a school failing to implement an early dismissal policy); *see also* Florence v. L.P., Nos. 2010 CA 000003 MR, 2010 CA 000004 MR, 2012 WL 162699, at *2–4 (Ky. Ct. App. Jan. 20, 2012). *See generally* 57 AM. JUR. 2D, *supra* note 93, §§ 75, 76 ("A legal duty sufficient to render government activity merely ministerial for purposes of tort liability may not involve broad discretion but instead must reflect prior legislative determinations of policy, leaving only particular aspects of implementation to the state's agents or employees. Thus, where a political entity adopts a specific mandatory set of guidelines for its officers to use with respect to particular activities or functions, leaving no discretion to the officers, a grant of discretionary-function immunity does not apply. A mandatory guideline leaves little to no room for individual decision-making, exercise of judgment, or use of skill." (citations omitted)).

114. *Compare Albers*, 806 N.E.2d at 675 (explaining that the way a principal handles an incidence of bullying is usually discretionary since a principal must make a policy decision by balancing competing interests, such as confidentiality of information and the appropriate level of punishment), *with Moore*, 358 S.W.3d at 617–18 (finding that a school's failure to follow a clearly laid out points system to determine the degree of discipline was not a discretionary act and, therefore, sovereign immunity did not apply).

115. *See supra* notes 113–14 and accompanying text.

3. Breach of Duty

If a plaintiff can establish that the defendant owed a duty of care and has no immunity from suit, a breach of duty must next be established.[116] A breach occurs where the defendant fails to conform to the required standard of care.[117] For example, if the defendant owes a duty of reasonable care, he breaches that standard by engaging in conduct that is unreasonably risky.[118]

The standard of ordinary or reasonable care is a default rule, applied in the absence of more specific standards of care addressed to the parties or the particular situation.[119] This standard is generally articulated as the duty to exercise the care that would be exercised by a reasonable and prudent person under the same or similar circumstances to avoid or minimize the risk of harm to others.[120]

Statutes may impose a different, more specific kind of duty, however, and, as a result, the defendant may be evaluated by a different standard of care.[121] Under these statutes, some courts allow the plaintiff to prove breach merely by showing that the statute was violated, while others use the statutory violation as evidence of breach.[122] A statute may impose special liability on a school for duties that go beyond what common law negligence principles might require.[123] It might also overcome a general grant of qualified immunity.[124] Sometimes, a court is confronted with a statute that has yet to be interpreted with respect to whether or not it creates a private right of action, overrides sovereign immunity, and potentially creates a broader conception of duty or higher standard of care than traditional negligence.[125] In such a case, the court will attempt to discern the intent of the legislature.[126] While state statutes often include explicit provisions

116. *See generally* DOBBS, *supra* note 90, § 115, at 270; KEETON, *supra* note 86, § 30, at 164.

117. *See supra* note 116 and accompanying text.

118. *See* DOBBS, *supra* note 90, § 115, at 270.

119. *See id.* at 277.

120. *See id.*

121. *See id.* at 311–12.

122. *See id.* at 312–17.

123. *See* Doe *ex rel.* Subia v. Kan. City, Mo. Sch. Dist., 372 S.W.3d 43, 51 (Mo. Ct. App. 2012); *see also* Silano v. Bd. of Educ., 52 Conn. Supp. 42, 53 (Super. Ct. 2011).

124. *See, e.g.*, *Silano*, 52 Conn. Supp. at 56; *cf.* Parsons v. Town of Tewksbury, 26 Mass. L. Rptr. 555, at *5–6 (Super. Ct. 2010) (suggesting that a claim under the constitution of Massachusetts would overcome sovereign immunity under the Massachusetts Tort Claims Act since a state cannot legislatively deprive its citizens of constitutional rights).

125. *See, e.g.*, L.W. *ex rel.* L.G. v. Toms River Reg'l Sch. Bd. of Educ., 915 A.2d 535, 546–47 (N.J. 2007) (holding that New Jersey's Law Against Discrimination permits a private action against a school district for failing to reasonably address a continuing pattern of discrimination). *But see, e.g.*, Chisolm v. Tippens, 658 S.E.2d 147, 152 (Ga. Ct. App. 2008) (holding that violation of a penal statute does not automatically create a private cause of action).

126. *See Doe ex rel. Subia*, 372 S.W.3d at 47 (explaining that determining the intent of the legislature is the primary goal of statutory construction).

regarding liability,[127] a court may also determine that liability was implicitly intended by the legislature.[128]

4. Causation in the School Bullying Context

Before liability for any harm suffered can attach to a particular actor, it must be determined that that actor "caused" the harm.[129] An act or omission is not the legal cause of harm if the harm would have occurred without it.[130] Since injuries and accidents often result from a complicated series of events and "causes," this can be difficult to determine.[131] Philosophically, the consequences of one's actions go on into eternity and, thus, figuring out if a person "caused" the injury in question and should be legally responsible is essentially a line-drawing policy exercise with which courts and juries have struggled and continue to struggle.[132]

As such, courts have formulated different tests to determine causation.[133] The two most common are the but-for test, which asks if the harm would not have occurred "but for" the defendant's conduct, and the substantial-factor test, which asks if a defendant's conduct was a material element and

127. *See* Dornfried v. Berlin Bd. of Educ., No. CV064011497S, 2008 WL 5220639, at *9 (Conn. Super. Ct. Sept. 26, 2008) ("The weight of [Connecticut] authority holds that when the legislature intends to create a new cause of action it does so explicitly in the statute itself."); *see also Silano*, 52 Conn. Supp. at 56 (holding that a state "schoolbus statute" explicitly denied the sovereign immunity defense); *Doe ex rel. Subia*, 372 S.W.3d at 51 (holding that an antidiscrimination statute explicitly imposed liability for both direct and indirect discrimination).

128. *See, e.g.*, *Toms River Reg'l Sch. Bd. of Educ.*, 915 A.2d at 546–47 (finding that the New Jersey Law Against Discrimination created a private cause of action after looking at the language of the act and, primarily, its "remedial" purpose); *cf. Dornfried*, 2008 WL 5220639, at *9–10 (holding that the Connecticut antibullying statute did not create a private cause of action against public schools because the legislative history showed an aversion to exposing public schools to suit). *See generally* 57 AM. JUR. 2D, *supra* note 93, § 75.

129. *See* KEETON, *supra* note 86, at 263. *But see* JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 209 (2004) (explaining that "[e]ven when a careless act causes injury, liability often will not attach if the injury comes about in an entirely haphazard or otherwise attenuated manner").

130. *See* KEETON, *supra* note 86, at 265.

131. *See* GOLDBERG, SEBOK & ZIPURSKY, *supra* note 129, at 210; *see also* KEETON, *supra* note 86, at 263–64.

132. *See* GOLDBERG, SEBOK & ZIPURSKY, *supra* note 129, at 212 (giving the example of parents who give birth to child *X* in some attenuated, nonblaming sense "causing" a future car accident between *X* and *Y*). The complications of line drawing in causation and its relationship to duty and foreseeability are fascinating but are outside the scope of this Note. For more, see Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928) (exemplifying the larger debate over the proper roles of foreseeability, duty, and causation in determining liability). *Compare In re* Polemis, [1921] 3 K.B. 560, 571–72, 577 (finding that the unforeseeability of workers' carelessness causing a wood plank to fall and ignite an explosion did not exempt the workers from liability since the plank falling "directly caused" the explosion), *with* Overseas Tankership (U.K.) Ltd. v. Morts Dock & Eng'g Co. (The Wagon Mound), [1961] A.C. 388, 393–98 (P.C.) (Austl.) (concluding that *Polemis* should no longer be good law because it would be unjust to hold an actor liable for consequences that were unforeseeable).

133. *See* KEETON, *supra* note 86, at 265–68.

a "substantial factor" in bringing about the harm.[134] The two tests almost always yield the same result, except in the rare instance where one or more actions, each of which would cause the harm suffered in its entirety, simultaneously cause the harm.[135]

In cases where a student is bullied and the school or its personnel are sued, the causation question often turns on whether the injury suffered was foreseeable by the school and on how much the school's act or omission contributed to the harm.[136] Foreseeability is often measured by whether or not school employees knew or should have known that the harm the student suffered would occur. Thus, if a school administrator has actual knowledge that severe bullying of a student has been occurring in school and fails to take reasonable steps to address it, some courts will allow a jury to determine whether and how much this inaction "caused" the harm.[137]

C. The Rise of Cyberbullying and Its Unique Regulatory Challenges

While thus far this Note has primarily focused on traditional bullying and the liability problems it presents for schools, the same basic principles of liability apply for cyberbullying. Cyberbullying, as a problem in its own right, is explored in the next section before turning to recently enacted cyberbullying legislation and schools' duty to police cyberbullying.[138]

The past several decades have seen an explosion of modern communication technology.[139] In 2007, an estimated 45 million children

---

134. *See id.*

135. *See id.* at 266–68. The most commonly cited example of this occurrence is from *Cook v. Minneapolis, St. P. & S. S. M. Ry. Co.*, where two fires from two different sources combined to burn the plaintiff's property, each of which might have accomplished this alone. *See Cook*, 74 N.W. 561, 561 (Wis. 1898).

136. *See, e.g.*, M.W. v. Panama Buena Vista Union Sch. Dist., 1 Cal. Rptr. 3d 673, 681 (Ct. App. 2003) (explaining that foreseeability does not focus on the particular aggressor but rather the foreseeable risk of a particular type of harm—sometimes, the court will weigh the risk of the harm and the activity or burden needed to prevent the harm); Jasperson v. Anoka-Hennepin Indep. Sch. Dist. No. 11, No. A06-1904, 2007 WL 3153456, at *5–7 (Minn. Ct. App. Oct. 30, 2007) (finding that the causation element of negligence was not proven because the bullied student's suicide was not foreseeable, and it was not clear that the nonexistence of a school bullying policy was a legal cause of the harm); *see also* Moore v. Hous. Cnty. Bd. of Educ., 358 S.W.3d 612, 619 (Tenn. Ct. App. 2011) ("It isn't necessary to predict the exact mechanism of the injury or even its extent if the general mechanism of injury is reasonably foreseeable. So the Houston County Board of Education is negligent.").

137. *See, e.g.*, L.W. *ex rel.* L.G. v. Toms River Reg'l Sch. Bd. of Educ., 915 A.2d 535, 549–51 (N.J. 2007) (finding that while a school cannot protect against all instances of peer harassment, it must take reasonable measures, and the factfinders must determine the reasonableness of the school's response in light of the totality of the circumstances); Burns v. Gagnon, 727 S.E.2d 634, 641–42, 647 (Va. 2012) (finding that, where an assistant principal had notice that a physical confrontation would occur that day but did not act, the question of negligence could be sent to the jury); *see also* Bell v. Ayio, 731 So. 2d 893, 895, 903 (La. Ct. App. 1999) (upholding a jury's determination that where a bus driver kicked two fighting students off the bus and left them unsupervised to continue fighting, the driver was 15 percent liable for the resulting injuries).

138. *See infra* Part II.A.1–3.

139. *See* Patchin & Hinduja, *supra* note 39, at 148; *see also* Jamie Wolf, Note, *The Playground Bully Has Gone Digital: The Dangers of Cyberbullying, the First Amendment*

between the ages of ten and seventeen used the internet daily.[140] In 2010, an estimated 50.1 percent of children between ten and eighteen used Facebook regularly during a given week, and 40.7 percent used instant messaging programs.[141] Cell phones are even more pervasive—in 2010, 83 percent of adolescents between ten and eighteen used cell phones regularly.[142] In the school context, this means that students increasingly interact with each other off campus, and these interactions have implications for the performance and operation of the school.[143]

While technologies such as cell phones and social media have undeniable benefits, they have also allowed bullies to "extend the reach of their aggression" beyond traditional physical settings to become "cyberbullies."[144] Justin W. Patchin and Sameer Hinduja, two recognized experts in the study of cyberbullying, define cyberbullying as "when someone repeatedly harasses, mistreats, or makes fun of another person online or while using cell phones or other electronic devices."[145] Because of technology's pervasiveness and ease of use, along with other factors discussed below, the number of cyberbullying incidents has risen disproportionately when compared to instances of traditional bullying.[146]

While traditional bullying and cyberbullying are both serious issues, cyberbullying can present more complicated social and regulatory problems. Importantly, it can take place from anywhere and at any time.[147] This ubiquity yields several problematic results. First, cyberbullying is almost inescapable—victims are often tormented through cell phones, the internet, and by other electronic forms that render them accessible at all times and places.[148] As internet safety expert and privacy lawyer Parry Aftab stated, "The schoolyard bullies beat you up and then go home. . . .

Implications, and the Necessary Responses, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 575 (2012).

140. Kirk R. Williams & Nancy G. Guerra, *Prevalence and Predictors of Internet Bullying*, 41 J. ADOLESCENT HEALTH S14, S15 (2007).

141. *See* Justin W. Patchin & Sameer Hinduja, *Teens Use of Technology: Weekly Activities (10 to 18-Year-Olds)*, CYBERBULLYING RES. CENTER (2010), http://www.cyberbullying.us/2010_charts/teen_tech_use_2010.jpg.

142. *See id.*

143. *See infra* note 274 and accompanying text.

144. Patchin & Hinduja, *supra* note 39, at 148; *see also* Wolf, *supra* note 139.

145. Justin W. Patchin & Sameer Hinduja, *Research*, CYBERBULLYING RES. CENTER, http://www.cyberbullying.us/research.php (last visited Mar. 19, 2013).

146. *See* Williams & Guerra, *supra* note 140, at S15; *see also* Jamison Barr & Emmy Lugus, *Digital Threats on Campus: Examining the Duty of Colleges To Protect Their Social Networking Students*, 33 W. NEW ENG. L. REV. 757, 765–66 (2011) (highlighting the spread of technological bullying by noting that "cyberbullying" and "cyberstalking" have become part of the American lexicon); *cf.* Patchin & Hinduja, *supra* note 39, at 152 (pointing out that, while there has been a "transmutation" in traditional bullying, the general frequency of cyberbullying is still unclear due to a general lack of research).

147. *See* Patchin & Hinduja, *supra* note 39, at 154–55.

148. *Id.* at 155.

The cyberbullies beat you up at home, at grandma's house, whereever [sic] you're connected to technology."[149]

Second, and perhaps most important in the legal context, there is little supervision or oversight of the electronic forms used to cyberbully.[150] This lack of oversight coupled with little accountability means that cyberbullies can remain largely anonymous and disregard consequences, creating a scenario where a person who is not normally confrontational can behave as such without readily exposing his or her identity.[151] The anonymity, disconnect from consequences, and lack of any formal boundaries or oversight can tempt adolescents who are normally respectful in face-to-face interactions to engage in highly negative technological discourse.[152] There is even evidence that adolescents become desensitized as digital forms of communication become more popular and come to view this negative form of discourse as normal.[153]

Additionally, cyberbullying has the potential to garner a wider audience and can do so within mere minutes.[154] Moreover, as information spreads on the internet, it often becomes permanent—a fact that many adolescents do not realize when posting something online.[155] Practically speaking, these factors mean potentially more widespread and longer-lasting harm to the victim.[156]

All these factors are cause for concern, and they can be particularly problematic for educators; although cyberbullying starts out in the virtual world, it often has psychologically devastating and socially detrimental consequences in the physical world.[157] It can create a hostile school environment where students do not feel comfortable or safe, and there is no

149. Yunji De Nies, Susan Donaldson James & Sarah Netter, *Mean Girls: Cyberbullying Blamed for Teen Suicides*, ABC GOOD MORNING AM. (Jan. 28, 2010), http://abcnews.go.com/GMA/Parenting/girls-teen-suicide-calls-attention-cyberbullying/story?id=9685026 (quoting Parry Aftab).

150. *See* Patchin & Hinduja, *supra* note 39, at 154; Shaheen Shariff & Dianne L. Hoff, *Cyber Bullying: Clarifying Legal Boundaries for School Supervision in Cyberspace*, 1 INT'L J. CYBER CRIMINOLOGY 76, 78–83 (2007). While outside the scope of this Note, many scholars have argued for greater Internet Service Provider (ISP) accountability. *See, e.g.*, *id.* at 78 ("American legislation . . . protects technology corporations at the expense of victims of cyber-targeting, defamation and harassment."); *see also* Charlotte Chang, Note, *Internet Safety Survey: Who Will Protect the Children?*, 25 BERKELEY TECH. L.J. 501, 521–23 (2010).

151. *See* Patchin & Hinduja, *supra* note 39, at 154.

152. *See* Shariff & Hoff, *supra* note 150, at 83 ("Young people in cyber-space lose their inhibitions in the absence of no central power, clear institutional or familial boundaries, or hierarchical structures.").

153. *See* Barr & Lugus, *supra* note 146, at 768.

154. *See* Patchin & Hinduja, *supra* note 39, at 154–55; *see also* Barr & Lugus, *supra* note 146, at 762–67 (examining several instances of college students being either physically or reputationally damaged by information going viral).

155. *See* Barr & Lugus, *supra* note 146, at 761–62.

156. *See, e.g.*, *id.* at 767 (providing an anecdote about one college "gossip" website that could spread rumors to over 500 colleges).

157. *See* Shariff & Hoff, *supra* note 150, at 83.

longer equal opportunity to learn.[158] Additionally, bullying in the virtual world often results in physical confrontation, which tends to take place in school.[159] Schools are enormous stakeholders in maintaining order in the school environment, teaching students acceptable ways of interacting, and providing students with an optimal learning environment.[160] For all these reasons, not to mention a fundamental desire to protect students, a school may wish to regulate off-campus speech.[161]

D. The U.S. Supreme Court and Student Speech

A school's desire to regulate its students' speech is often in tension with the First Amendment, but never more so than in a case of off-campus speech. While the U.S. Supreme Court has never heard a case involving school regulation of off-campus, non-school-related speech, courts look to four seminal cases for student speech jurisprudence, explored in this section. First, this section examines the touchstone of student free speech rights, *Tinker v. Des Moines Independent Community School District*.[162] It then looks at the Supreme Court's standard for exceptionally vulgar speech in *Bethel School District No. 403 v. Fraser*[163] and the Court's handling of school-endorsed speech in *Hazelwood School District v. Kuhlmeier*.[164] Lastly, it assesses off-campus speech at a school-sponsored event in *Morse v. Frederick*.[165]

1. *Tinker v. Des Moines Independent Community School District*

In *Tinker*, a group of adults and high school students met and decided to voice their objections to the war in Vietnam by wearing black armbands.[166] The principals of the Des Moines schools learned of this plan and adopted a policy that students would be asked to remove their armbands, and failure to do so would result in suspension.[167] Three students, John Tinker, Christopher Eckhardt, and Mary Beth Eckhardt, wore their armbands to school and were suspended.[168] They subsequently brought a claim against the school asserting that the disciplinary action violated their First Amendment rights.[169]

158. *See id.* at 84.
159. *See id.*; *see also* Beckstrom, *supra* note 60, at 286–87 (detailing examples from focus group studies of cyberbullying that results in tangible effects in the physical school environment).
160. *See infra* note 178 and accompanying text.
161. *See id.* at 79–84.
162. 393 U.S. 503 (1969).
163. 478 U.S. 675 (1986).
164. 484 U.S. 260 (1988).
165. 551 U.S. 393 (2007).
166. 393 U.S. at 504.
167. *Id.*
168. *Id.*
169. *Id.* at 504–05.

The Court first reasoned that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[170] On the other hand, it also explained that conduct by a student that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech"[171] and that school administrators have a justified interest in seeking to prevent this type of expression.[172] Attempting to balance these competing interests, the Court set forth a standard that has endured: student speech may not be restricted unless it is reasonably foreseeable that this speech could cause a material and substantial disruption at school.[173] The students' speech in *Tinker* did not rise to this level.[174]

2. *Bethel School District No. 403 v. Fraser*

In *Bethel*, a high school student in Pierce County, Washington, named Fraser delivered a speech nominating a peer for student government in which he used an "elaborate, graphic, and explicit sexual metaphor."[175] The next morning, Fraser was suspended for having violated a Bethel High School disciplinary rule stating, "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."[176] After these disciplinary measures were upheld in administrative proceedings, Fraser brought a claim alleging a First Amendment violation.[177]

Upholding the school's response, the Court explained, "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[178] It explained that the constitutional rights of students in schools are not "coextensive" with those of adults elsewhere.[179] It concluded by holding that the First Amendment does not prevent school officials from restricting vulgar and lewd speech in school that would undermine a school's educational mission.[180]

---

170. *Id.* at 506.
171. *Id.* at 513.
172. *Id.* at 507–08.
173. *Id.* at 514.
174. *Id.*
175. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677–78 (1986).
176. *Id.* at 678.
177. *Id.* at 678–79.
178. *Id.* at 681; *see also id.* at 683 ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. . . . The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.").
179. *Id.* at 682.
180. *Id.* at 685.

3. *Hazelwood School District v. Kuhlmeier*

Kuhlmeier involved student speech in the context of a high school newspaper.[181] The newspaper was funded mostly by the school board, and it was customary for the editor to send proofs to the principal before publication.[182] On one occasion, the principal thought two stories should not be published—one story detailed the experiences of three students who were pregnant, and one was about being a child of divorced parents and contained personal quotes from students.[183] The principal informed the editor that either the school would print the issue without the pages on which the stories appeared or there would be no issue at all.[184]

The Court distinguished this case from *Tinker* on the grounds that *Tinker* dealt with a school's tolerance of student speech, whereas *Kuhlmeier* dealt with a school's promotion of student speech.[185] This distinction was rooted in the facts that the vehicle of expression was a school newspaper, published as part of the school curriculum and largely controlled by the school, and designed as part of the students' training.[186] Ultimately, the Court held that educators do not violate the First Amendment by exercising editorial control over school-sponsored speech so long as the editing is reasonably related to pedagogical concerns.[187]

4. *Morse v. Frederick*

In *Morse*, a high school student arrived at a school-sponsored trip to watch the Olympic torch parade and unfurled a large banner that read, "BONG HiTS 4 JESUS."[188] Upon noticing the banner, the principal instructed the surrounding students to take the banner down, but Joseph Frederick refused.[189] Consequently, Principal Morse called Frederick into her office and suspended him for ten days under the school district's policy that students may not advocate for the use of illegal drugs.[190] The school superintendent upheld the decision but limited the suspension to eight days.[191]

The Court first emphasized that this was school speech despite the fact that it took place off campus; the speech took place during school hours, at a school-sponsored activity, and among teachers and students.[192] It did acknowledge, however, that there is some "uncertainty at the outer

181. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).
182. *Id.* at 262–63.
183. *Id.* at 263.
184. *Id.* at 264.
185. *Id.* at 270–71 (also finding that a school newspaper is not, in fact, a "public forum").
186. *Id.*
187. *Id.* at 273.
188. Morse v. Frederick, 551 U.S. 393, 397 (2007).
189. *Id.* at 398.
190. *Id.*
191. *Id.* at 398–99.
192. *Id.* at 400–01.

boundaries as to when courts should apply school speech precedents."[193] Next, the Court attempted to glean some coherent standard from *Fraser* and *Kuhlmeier* in the wake of *Tinker*.[194] The majority drew two basic principles from the school speech line of cases: (1) that students do not have the same free speech rights in school as adults have outside of school; and (2) that the *Tinker* mode of analysis is not absolute.[195] Ultimately, the Court found that a principal does not violate the First Amendment by restricting speech that is reasonably viewed as promoting illegal drug use.[196]

II. LEGISLATURES AND COURTS DISAGREE ON HOW TO REGULATE CYBERBULLYING

As the number of cyberbullying incidents in schools has increased, state legislatures have enacted more aggressive legislation and generally seem to be expanding the scope of schools' regulatory authority off campus.[197] On the other hand, courts have been protective of students' First Amendment rights when attempting to apply minimal Supreme Court and circuit court precedent to novel technological situations in the cyberbullying context.[198] Part II.A examines the range of state legislative responses to the emerging cyberbullying problem in schools and details the new responsibilities that schools may face under these laws. Part II.B surveys how lower courts have applied existing legal precedent to schools' off-campus regulatory authority. Part II.C synthesizes the two previous parts, highlighting a situation where schools may face liability from both cyberbullies and victims no matter what type of responsive action they take.

193. *Id.* at 401.

194. *Id.* at 403–06.

195. *Id.* at 404–05. The majority places great weight on the student's free speech rights being limited as a result of being in the school environment. *Id.* Additionally, it clearly does not think highly of the analytical framework employed in *Fraser*. *Id.* ("Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*." (citation omitted)).

196. *Id.* at 409–10. The Court declined to adopt the school's view that Frederick's speech was "offensive" and therefore fell under the *Fraser* exception, and instead strongly emphasized the government and school's important interest in curbing drug use. *Id.* at 407–10.

197. *See* Beckstrom, *supra* note 60, at 283–86 (adding that state legislation is "disparate in its sensitivity toward students' free speech rights"); *see also, e.g.*, N.J. STAT. ANN. § 18A:37-13.1 (West Supp. 2012).

198. *See* Trainor, *supra* note 41; Erb, *supra* note 40, at 271 (noting that courts have generally been protective of free speech even if it is vulgar, cruel, sexually explicit, or threatening); *see also* Amy Benfer, *Cyber Slammed*, SALON (July 3, 2001), http://www.salon.com/2001/07/03/cyber_bullies/ (observing that even the most vulgar and abhorrent off-campus speech has been seen as "out of the legal reach" of schools and courts).

A. State Legislative Responses to Cyberbullying and Potential New Duties for Schools

This section looks at various states' efforts to combat cyberbullying through legislation. It depicts the collective response of lawmakers to cyberbullying. This section next outlines the various approaches states have taken in giving schools authority to regulate off-campus speech. Finally, it examines recent legislation to assess what new responsibilities it may impose on school districts and schools.

1. A Rush To Codify Cyberbullying

Similar to traditional bullying, several violent incidents of cyberbullying in the last decade grabbed national headlines and prompted a public outcry for government action.[199] Despite the debate within the judiciary over the appropriate reach of school authority,[200] several states have pushed ahead with aggressive anticyberbullying legislation.[201] Other states have either left their statutory schemes alone or made an attempt to slightly modify the existing framework.[202] In addition, the federal government unsuccessfully attempted to pass legislation that would strengthen efforts to combat cyberbullying and make standards more cohesive across states.[203] The state legislatures, though, have proven to be true "laboratories for experimentation,"[204] resulting in a complex, varied spectrum of state statutory schemes.[205]

2. Legislative Approaches To Incorporate Cyberbullying into State Statutes

One group of states has either no cyberbullying legislation or very limited electronic bullying language. Three states—Alaska, Montana, and Wisconsin—have not incorporated electronic means of bullying into school

199. *See supra* notes 58–62 and accompanying text.
200. *See infra* Part II.B.
201. *See infra* Part II.A.2.
202. *See infra* Part II.A.2.
203. *See* Meredith, *supra* note 32, at 326–31, 334–37 (discussing the federal Megan Meier Cyberbullying Prevention Act, which did not pass, and several other pieces of proposed legislation which focused more on educating students about internet safety as opposed to regulating cyberbullying); *see also* Chang, *supra* note 150, at 523–24 (questioning the constitutionality of the Megan Meier Cyberbullying Prevention Act and describing it as "untenable and potentially constitutionally vague"); *cf. FCC Taking on Cyberbullying in Schools*, FOXNEWS.COM (Oct. 29, 2010), http://www.foxnews.com/tech/2010/10/29/fcc-taking-cyberbullying-schools/ (discussing the FCC's plan to mandate internet safety education, including cyberbullying, for schools that receive internet access subsidies).
204. United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).
205. *See* Beckstrom, *supra* note 60, at 291–96. For a comprehensive survey of all states' bullying and cyberbullying laws as of January 2013 categorized by features, see Hinduja & Patchin, *supra* note 71.

bullying or harassment laws in any way.[206] This approach is unusual, however, as many states incorporate at least *some* form of electronic bullying into state laws, even if a school's authority to regulate is limited to cyberbullying that occurs on school property or is perpetrated with school property—for example, on the school's internet network or computers.[207]

A second category of states has passed more expansive legislation.[208] States in this category have explicitly made an effort to incorporate off-campus cyberbullying into a school's regulatory ambit.[209] Many of these states implement the "reasonably foreseeable to cause a substantial and material disruption at school" language from *Tinker* directly into their

206. *See* ALASKA STAT. § 14.33.250 (2012); MONT. CODE ANN. § 20-1-101 (2011); WIS. STAT. ANN. § 118.46 (West Supp. 2012). *See generally* Hinduja & Patchin, *supra* note 71. Montana, of course, has no school bullying laws at all. MONT. CODE ANN. § 20-1-101.

207. *See, e.g.*, ALA. CODE §§ 16-28B-4(a), 16-28B-3(2) (LexisNexis 2012) (prohibiting harassment defined as a "continuous pattern of intentional behavior that takes place on school property, on a school bus, or at a school-sponsored function including, but not limited to, written, *electronic*, verbal, or physical acts that are reasonably perceived as being motivated by any characteristic of a student, or by the association of a student with an individual who has a particular characteristic" (emphasis added)); N.C. GEN. STAT. § 115C-407.15 (2011) (prohibiting bullying, defined as "any pattern of gestures or written, *electronic*, or verbal communications, or any physical act or any threatening communication, that takes place on school property, at any school-sponsored function, or on a school bus" (emphasis added)); *see also, e.g.*, ARIZ. REV. STAT. ANN. § 15-341(A)(37) (Supp. 2012); CAL. EDUC. CODE § 48900(r)–(s) (West Supp. 2013); COLO. REV. STAT. § 22-32-109.1(1)(b) (2012); DEL. CODE ANN. tit. 14, § 4112D (Supp. 2012); FLA. STAT. ANN. § 1006.147 (West Supp. 2013); GA. CODE ANN. § 20-2-751.4(a) (2012); IDAHO CODE ANN. § 18-917A (Supp. 2011); 105 ILL. COMP. STAT. ANN. 5/27-23.7 (West 2012); IND. CODE ANN. § 20-33-8-13.5 (LexisNexis 2007); IOWA CODE ANN. § 280.28 (West 2012); KAN. STAT. ANN. § 72-8256 (Supp. 2011); KY. REV. STAT. ANN. § 525.070(1)(f) (LexisNexis 2008); ME. REV. STAT. ANN. tit. 20-A, § 6554 (Supp. 2012); MICH. COMP. LAWS ANN. § 380.1310b (West Supp. 2012); MINN. STAT. ANN. § 121A.0695 (West Supp. 2012); MISS. CODE ANN. § 37-11-67 (West Supp. 2011); MO. ANN. STAT. § 160.775 (West Supp. 2013); NEB. REV. STAT. § 79-2,137 (2008); NEV. REV. STAT. ANN. § 388.135 (LexisNexis Supp. 2009); N.D. CENT. CODE ANN. § 15.1-19-17 (Supp. 2011); OHIO REV. CODE ANN. § 3313.666 (LexisNexis Supp. 2012); OKLA. STAT. ANN. tit. 70, § 24-100.3 (Supp. 2013); OR. REV. STAT. ANN. § 339.351 (West Supp. 2012); 24 PA. CONS. STAT. ANN. § 13-1303.1-A (West Supp. 2012); R.I. GEN. LAWS §§ 16-21-33, -34 (2012); S.C. CODE ANN. §§ 59-63-120, -140 (Supp. 2011); TEX. EDUC. CODE ANN. § 37.0832 (West Supp. 2012); UTAH CODE ANN. § 53A-11a-301 (LexisNexis 2010); VA. CODE ANN. § 22.1-279.6 (2011); WASH. REV. CODE ANN. § 28A.300.285 (West 2011); W. VA. CODE ANN. § 18-2C-3 (LexisNexis 2012); WYO. STAT. ANN. § 21-4-312 (2011). *See generally* Hinduja & Patchin, *supra* note 71 (finding thirty-four states that have incorporated electronic bullying or harassment into state law but limit regulatory authority to a school's campus or property).

208. *See generally* Hinduja & Patchin, *supra* note 71 (documenting ten states and the District of Columbia that have included off-campus activity in some form or another in bullying or cyberbullying laws).

209. *See* ARK. CODE ANN. § 6-18-514 (Supp. 2011); CONN. GEN. STAT. ANN. § 10-222d (West Supp. 2012); MASS. ANN. LAWS ch. 71, § 37O (LexisNexis Supp. 2012); N.H. REV. STAT. ANN. § 193-F:4 (LexisNexis 2011); N.J. STAT. ANN. § 18A:37-14 (West Supp. 2012); N.Y. EDUC. LAW § 11(7) (McKinney Supp. 2012) (effective July 1, 2013); S.D. CODIFIED LAWS § 13-32-15 (2002 & Supp. 2012); TENN. CODE ANN. § 49-6-1015 (West 2012); VT. STAT. ANN. tit. 16, § 11(32) (Supp. 2012); D.C. MUN. REGS. tit. 5-B § B2599 (2012) ("bullying" and "harassment"); *see also* Hinduja & Patchin, *supra* note 71.

bullying or cyberbullying statutes.[210] The direction that legislatures have given school districts varies—some states merely direct that school districts create a cyberbullying policy,[211] while others detail precisely what electronic activity is prohibited and how school employees must report and discipline cyberbullies.[212]

Many states have also mandated additional requirements on the part of either schools or school districts. One common feature of new bullying and cyberbullying statutes is a "character education" program, whereby schools must educate students about the dangers of cyberbullying.[213] Another common requirement is mandated professional development for teachers and administrators on how to recognize cyberbullying, its effects, and the appropriate action to take.[214] Additionally, many states have recently imposed reporting requirements, mandating that administrators report bullying instances to the school district for greater informational transparency.[215] While there are a handful of other statutory requirements from state to state, these are the most common.

3. New Responsibilities for School Districts and Personnel

Depending on the state and statutory language, school districts, schools, and school employees may be charged with various new responsibilities,

---

210. *See supra* note 209 and accompanying text.

211. *See, e.g.*, VT. STAT. ANN. tit. 16, § 570.

212. *See, e.g.*, MASS. ANN. LAWS ch. 71, § 37O(g) (imposing a mandatory reporting requirement for school staff and delineating the reporting procedure).

213. *See, e.g.*, 105 ILL. COMP. STAT. ANN. 5/27-13.3 (requiring schools to implement an internet safety component in their curricula by the 2009–10 school year and "recommending" topics such as "[s]afe and responsible use of social networking websites, chat rooms, electronic mail, bulletin boards, instant messaging, and other means of communication on the Internet" and "[r]ecognizing and reporting online harassment and cyber-bullying"); MASS. ANN. LAWS ch. 71, § 37O(c) ("Each school . . . shall provide age-appropriate instruction on bullying prevention in each grade that is incorporated into the curriculum of the school district or school. The curriculum shall be evidence-based.").

214. *See* MASS. ANN. LAWS ch. 71, § 37O(d) (mandating each school district to "develop" and "adhere to" a plan "for ongoing professional development to build the skills of all staff members, including, but not limited to, educators, administrators, school nurses, cafeteria workers, custodians, bus drivers, athletic coaches, advisors to extracurricular activities and paraprofessionals, to prevent, identify and respond to bullying. The content of such professional development shall include, but not be limited to: (i) developmentally appropriate strategies to prevent bullying incidents; (ii) developmentally appropriate strategies for immediate, effective interventions to stop bullying incidents; (iii) information regarding the complex interaction and power differential that can take place between and among a perpetrator, victim and witnesses to the bullying; (iv) research findings on bullying, including information about specific categories of students who have been shown to be particularly at risk for bullying in the school environment; (v) information on the incidence and nature of cyber-bullying; and (vi) internet safety issues as they relate to cyber-bullying"). Similarly to character education programs, some states mandate that state and local school boards develop workshops or programs for employees but do not yet mandate their implementation in schools. *See, e.g.*, GA. CODE ANN. § 20-2-145(b) (2012).

215. *See, e.g.*, N.H. REV. STAT. ANN. § 193-F:4(f)–(h) (LexisNexis 2011).

legal or otherwise.[216] For some schools, this will mean making sure there is a cyberbullying policy in place.[217] For teachers and administrators, it may mean keeping accurate records of cyberbullying incidents and reporting this data.[218] Still others will be required to develop and implement educational programs for school staff and students.[219]

The new, unresolved issue that remains, however, is whether schools will be charged with a legal duty to implement these measures in order to protect students from cyberbullying by other students.[220] While some courts have engaged in lengthy statutory interpretation of older bullying and harassment laws,[221] the wave of new legislation to combat cyberbullying has, for the most part, been untouched by courts.[222] This is because all of the courts that have decided cyberbullying cases have done so in the context of a plaintiff bringing a claim that a school violated his or her free speech rights through its cyberbullying discipline.[223] A student or parent has yet to

---

216. *See* Beckstrom, *supra* note 60, at 311 (pointing out that school responsibility and authority vary widely from state to state in the wake of new legislation). *Compare* MASS. ANN. LAWS ch. 71, § 37O(c)–(d) (requiring schools to implement bullying character education programming for students and professional development for school staff), *with* VT. STAT. ANN. tit. 16, § 570 (mandating that school districts create antibullying policies).

217. *See, e.g.*, VT. STAT. ANN. tit. 16, § 570.

218. *See, e.g.*, N.H. REV. STAT. ANN. § 193-F:4.

219. *See, e.g.*, 105 ILL. COMP. STAT. ANN. 5/27-13.3 (West 2012); MASS. ANN. LAWS ch. 71, § 37O(c)–(d).

220. *See* Trainor, *supra* note 41, at 1 ("Most agree that, as U.S. Secretary of Education Arne Duncan and President Obama point out, [bullying] is not an acceptable rite of passage for children. What remains unclear is the extent to which schools and their officials should be held accountable for the harm that bullying causes, and to what degree the First Amendment allows school districts to regulate what students say to one another."); *see also* Beckstrom, *supra* note 60, at 309–11 (arguing that cyberbullying legislation has only magnified schools' confusion about their duties to protect students); Séamus P. Boyce & Andrew A. Manna, *School Liability for Bullying and Harassment*, LEADERSHIP INSIDER, Aug. 2011, at 1–3 (noting that while peer harassment liability is "not new," courts may become less likely to award qualified immunity to schools and staff as bullying statutes become more detailed in their procedural requirements, thereby making educators' responses less discretionary); *cf.* Barr & Lugus, *supra* note 146, at 771 (noting that while courts have imposed legal duties on colleges in cases such as fraternity hazing, sexual assaults by third parties, and university-sponsored safe ride programs, they have yet to consider a college's duty to monitor social networking among students).

221. *See, e.g.*, Dornfried v. Berlin Bd. of Educ., No. CV064011497S, 2008 WL 5220639, at *9–10 (Conn. Super. Ct. Sept. 26, 2008) (interpreting Connecticut's antibullying statute and determining that it does not create a private right of action and, therefore, a school does not owe a legal duty to the individual student); L.W. *ex rel.* L.G. v. Toms River Reg'l Sch. Bd. of Educ., 915 A.2d 535, 546–47 (N.J. 2007) (interpreting the New Jersey Law Against Discrimination to impose a duty on schools to reasonably address an individual student's repeated complaints of discriminatory bullying); *see also* Moore v. Hous. Cnty. Bd. of Educ., 358 S.W.3d 612, 617–18 (Tenn. Ct. App. 2011) (interpreting antibullying statute to determine whether an administrator's actions were discretionary).

222. *See supra* note 220 and accompanying text.

223. *See* Darcy K. Lane, Note, *Taking the Lead on Cyberbullying: Why Schools Can and Should Protect Students Online*, 96 IOWA L. REV. 1791, 1794 (2011) (observing that most case law regarding off-campus cyber-speech results from a First Amendment challenge to school discipline after a student targets a teacher or administrator). Lane also emphasizes the important differences between a student targeting a faculty member and a student

bring a claim under a new cyberbullying law stating that a school failed to protect that student from electronic bullying, so it is unclear whether these statutes will be interpreted to impose new legal duties on schools.[224] Nevertheless, it would be no surprise to see suits of this type brought in the near future; several scholars note the rise of legal complaints against schools in the last decade due to increased awareness of bullying.[225]

Additionally, there are indications that courts might be willing to find that a school has a legal duty to protect students from cyberbullying in some states. To engage in some statutory interpretation, the language of certain states' antibullying statutes may imply an individual's right to bring suit and that liability may attach to a school employee's failure to act on knowledge that cyberbullying is occurring or has occurred.[226] Additionally, several states explicitly grant immunity from liability to school officials who report or respond to instances of cyberbullying, implying that those

---

targeting another student. *Id.* at 1809–11. *But see* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 567–69 (4th Cir. 2011) (involving a group of students bullying another student on MySpace.com); J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1098–99 (C.D. Cal. 2010) (involving students gossiping and demeaning another student on camera and posting the video to YouTube.com); Coy *ex rel.* Coy v. Bd. of Educ., 205 F. Supp. 2d 791, 795–96 (N.D. Ohio 2002) (involving a student creating a website entitled "losers" with pictures of three classmates and a few insulting sentences about each).

224. *See supra* note 220 and accompanying text.

225. *See* Trainor, *supra* note 41, at 1 (finding that between June 2010 and June 2011, there were at least eighteen different bullying actions against school districts either filed or decided, and these were only the cases that received press coverage and were probably just the "tip of the iceberg"); *see also* Boyce & Manna, *supra* note 220, at 1, 3 (pointing out that although claims against schools under antibullying laws have not been very successful, "we do not see the effort waning").

226. *See, e.g.*, ARK. CODE ANN. § 6-18-514(d) (Supp. 2011) (stating that "[a] school principal or his or her designee who receives a credible report or complaint of bullying *shall* promptly investigate the complaint or report and make a record of the investigation and any action taken as a result of the investigation," where "bullying" includes off-campus, electronic activity (emphasis added)); TENN. CODE ANN. § 49-6-1016(d) (West 2012) (same, but requiring either actual physical harm or threat of physical harm); *cf.* N.J. STAT. ANN. § 18A:37-16(d) (West Supp. 2012) ("A school administrator who receives a report of harassment, intimidation, or bullying from a district employee, and fails to initiate or conduct an investigation, or who should have known of an incident of harassment, intimidation, or bullying and fails to take sufficient action to minimize or eliminate the harassment, intimidation, or bullying, may be subject to *disciplinary action*." (emphasis added)); N.Y. EDUC. LAW §§ 3023, 3813 (McKinney Supp. 2012) (mandating that school districts indemnify local school employees from civil liability, and mandating that such employee must be served with notice of a tort claim before such a claim can be brought); S.D. CODIFIED LAWS § 13-32-17 (Supp. 2012) (limiting claims based on this section to those against employees in "substantial noncompliance" with district policy). *But see* D.C. CODE § 2-1535.08 (LexisNexis 2011) ("This subchapter does not create a new private right of action or provide a statutory basis for a claim for damages against the District of Columbia or its employees."); MASS. ANN. LAWS ch. 71, § 37O(i) (LexisNexis Supp. 2012) ("Nothing in this section shall supersede or replace existing rights or remedies under any other general or special law, nor shall this section create a private right of action."); N.H. REV. STAT. ANN. § 193-F:9 (LexisNexis 2011) ("[N]or shall this chapter create a private right of action for enforcement of this chapter against any school district or chartered public school, or the state."). *See generally supra* Part I.B.1.

who do not could be sued.[227] While these are not definitive indicators of liability, courts may point to these grants in interpreting new antibullying provisions to imply a legal duty.[228] Last, some have asserted that courts are becoming more sympathetic to plaintiffs' claims for failure to protect from bullying,[229] and it is possible that this could extend to cyberbullying.

B. Lower Courts' Application of Student Free Speech Precedent in Off-Campus Student Speech Cases

This section surveys the student free speech landscape after *Tinker* and its progeny. It examines what standards lower courts have applied to students' off-campus speech and highlights a general trend across courts to protect students' free speech rights off campus.

1. Courts Are Unclear on What Standard To Apply and How To Apply It

In the wake of *Morse*, courts are left with essentially four different precedents for schools attempting to regulate student speech.[230] None of these Supreme Court cases dealt with off-campus, non-school-sponsored speech, however, and the Supreme Court has never addressed the issue.[231] In fact, the Supreme Court has denied several petitions for certiorari,

227. *See, e.g.*, ARK. CODE ANN. § 6-18-514(g) (2007 & Supp. 2011) ("A school employee who has reported violations under the school district's policy shall be immune from any tort liability that may arise from the failure to remedy the reported incident."); CONN. GEN. STAT. ANN. § 10-222*l*(a)–(c) (West Supp. 2012) ("No claim for damages shall be made against a school employee . . . who reports, investigates and responds to bullying . . . if such school employee was acting in good faith in the discharge of his or her duties or within the scope of his or her employment. . . . No claim for damages shall be made against a local or regional board of education that implements the safe school climate plan . . . and reports, investigates and responds to bullying . . . if such local or regional board of education was acting in good faith in the discharge of its duties."); N.H. REV. STAT. ANN. § 193-F:7 (same); N.J. STAT. ANN. § 18A:37-16 (same); N.Y. EDUC. LAW § 16 (McKinney 2007 & Supp. 2012) (same); S.D. CODIFIED LAWS § 13-32-17 (same). *But see* TENN. CODE ANN. § 49-6-1018 (West 2012) ("encouraging," not mandating, the reporting of known instances of bullying and granting immunity for such reporting).

228. *See generally supra* Part I.B.1.

229. *See* Trainor, *supra* note 41 (using the opinion in *T.K. v. N.Y.C. Department of Education*, 779 F. Supp. 2d 289 (E.D.N.Y. 2011), as an indication that courts might be lowering standards to find schools liable for failing to remedy pervasive bullying); *see also* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 572 (4th Cir. 2011) (reasoning that schools have a duty to protect their students from harassment and bullying in the school environment).

230. *See supra* Part I.D.

231. Amici Curiae Brief of Nat'l Sch. Bds. Ass'n, et al. in Support of Petitioners at 4–5, Blue Mountain Sch. Dist. v. Snyder, 132 S. Ct. 1097 (2012) (No. 11-502), 2011 WL 5254664; *see also* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 942 (3d Cir. 2011) (en banc) (Fisher, J., dissenting) ("In fact, the Supreme Court has never addressed whether students have the right to make off-campus speech that targets school officials with malicious, obscene, and vulgar accusations."), *cert. denied*, 132 S. Ct. 1097 (2012); Mickey Lee Jett, Note, *The Reach of the Schoolhouse Gate: The Fate of* Tinker *in the Age of Digital Social Media*, 61 CATH. U. L. REV. 895, 896–97 (2012) (advocating for the Supreme Court to certify a cyberbullying case in order to articulate a new legal standard).

including two just this past year.[232] Thus, when presented with a potential free speech violation, courts must assess which precedent the instant case is governed by.[233]

At its essence, the analytical starting point for lower courts has been as follows: "(1) vulgar, lewd, obscene and plainly offensive [on-campus] speech is governed by *Fraser*;[234] (2) school-sponsored speech is governed by *Hazelwood*;[235] and (3) speech that falls into neither of these categories is governed by *Tinker*."[236] In most off-campus student speech cases, courts have applied the *Tinker* substantial-effects test.[237] Under this test, a court will look to whether it is reasonably foreseeable that the student's off-campus speech could cause a material and substantial disruption at school.[238] Nevertheless, significant confusion has caused some courts to use either a different standard[239] or several standards all at once.[240]

---

232. *See* Lyle Denniston, *Government Prayer Cases Passed Up (FINAL UPDATE)*, SCOTUSBLOG (Jan. 17, 2012, 1:18 PM), http://www.scotusblog.com/2012/01/government-prayer-cases-passed-up/ (discussing the denial of certiorari to *Kowalski v. Berkeley County Schools* from the Fourth Circuit and *Blue Mountain School District v. J.S. ex rel. Snyder* from the Third Circuit).

233. *See, e.g.*, J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1100–04 (C.D. Cal. 2010) (engaging in an extensive analysis of Supreme Court precedent and how lower courts have applied these cases to school regulation of off-campus student speech).

234. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); *see also supra* Part I.D.2.

235. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); *see also supra* Part I.D.3.

236. LaVine v. Blaine Sch. Dist., 257 F.3d 981, 988–89 (9th Cir. 2001); *Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d at 1103 (quoting *LaVine*); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); *see also supra* Part I.D.1.

237. *See, e.g.*, Cuff v. Valley Cent. Sch. Dist., 677 F.3d 109, 113 (2d Cir. 2012); Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 571–75 (4th Cir. 2011); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 926–33 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); *see also Tinker*, 393 U.S. at 513.

238. *See supra* note 237 and accompanying text.

239. *See, e.g.*, Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 616 (5th Cir. 2004) (employing the "true threat" test, where speech is not protected by the First Amendment if it is "a serious expression of an intent to cause a present or future harm" (internal quotations omitted)); Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 625–26 (8th Cir. 2002) (also utilizing the true threat analysis for off-campus student speech). For the original articulation of the true threat doctrine, see Watts v. United States, 394 U.S. 705 (1969). *See also* Wisniewski v. Bd. of Educ., 494 F.3d 34, 38 (2d Cir. 2007) ("Although some courts have assessed a student's statements concerning the killing of a school official or a fellow student against the [*Watts* true threat standard], we think that school officials have significantly broader authority to sanction student speech than the *Watts* standard allows. With respect to school officials' authority to discipline a student's expression reasonably understood as urging violent conduct, we think the appropriate First Amendment standard is the [*Tinker* standard]." (citations omitted)).

240. *See Porter*, 393 F.3d at 614 ("Uncertain as to the appropriate legal standard . . . , the district court employed three different approaches . . . ."); *see also* Reply Brief at 1, Kowalski v. Berkeley Cnty. Sch., 132 S. Ct. 1095 (2012) (No. 11-461), 2011 WL 6859435 ("Over a dozen scholarly articles in the last few years have discussed the lower courts' confusion and the need for guidance from [the Supreme Court].").

In off-campus speech cases, the difficulty has not ended with figuring out what standard to apply—for those courts that have employed the *Tinker* substantial-effects test, what constitutes a "substantial effect" and how to determine if off-campus speech is reasonably foreseeable to create one has proven to be both difficult and divisive.[241] As the court noted in *J.C. ex rel. R.C. v. Beverly Hills Unified School District*,

> The substantial disruption inquiry is highly fact-intensive. Perhaps for that reason, existing case law has not provided clear guidelines as to when a substantial disruption is reasonably foreseeable. There is, for example, no magic number of students or classrooms that must be affected by the speech. One court has held that a substantial disruption requires something more than "a mild distraction or curiosity created by the speech" but need not rise to the level of "complete chaos." Not surprisingly, however, the gulf between those two concepts swallows the vast majority of factual scenarios.[242]

As a result, courts applying the exact same standard have come to opposite conclusions even in strikingly similar cases.[243]

2. A General Judicial Trend Toward Protecting Students' First Amendment Rights

Both scholars and judges alike have noted the inconsistency of lower courts' student speech jurisprudence.[244] In contrast, others have asserted that courts have generally favored protecting students' First Amendment rights and have been very cautious about expanding the scope of schools'

---

241. *See, e.g.*, *Blue Mountain Sch. Dist.*, 650 F.3d at 931 (where a divided en banc panel held, eight to six, that a student's creation of a fake website profile with crude content and vulgar language did not meet the substantial-effects test); *see also Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d at 1104–07, 1112–15 (discussing different courts' treatment of the origin of the speech, the "sufficient nexus" between the school and the speech, and compiling a long list of factors which could be considered in the substantial-effect analysis).

242. *Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d at 1111 (quoting J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 868 (Pa. 2002)).

243. *Compare id.* at 1108, 1117–22 (finding a First Amendment violation where a school disciplined a student for posting and circulating a mocking, derisive YouTube.com video about another student), *with* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 573–74 (4th Cir. 2011) (declining to find a First Amendment violation and finding "confidently" that a student's creation of a MySpace.com group to mock and spread rumors about another student caused a substantial disruption). Conflicting results are true of student-teacher harassment, as well. *Compare* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 208–16 (3d Cir. 2011) (en banc) (finding no substantial disruption and, thus, a First Amendment violation where a high school senior created a fake website profile for his principal and three other students later did the same in increasingly vulgar and offensive fashion), *with Wisniewski*, 494 F.3d at 36, 39–40 (finding a middle school's discipline of a student did not violate his First Amendment rights where the student created an AOL Instant Messenger icon of a cartoon pistol firing a bullet at a cartoon of his English teacher because it was reasonably foreseeable to cause a substantial disruption).

244. *See Layshock*, 650 F.3d at 220–22 (Jordan, J., concurring); *see also Blue Mountain Sch. Dist.*, 650 F.3d at 943–52 (Fisher, J., dissenting), *cert. denied*, 132 S. Ct. 1097 (2012); *Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d at 1102–07; Beckstrom, *supra* note 60, at 302; Jett, *supra* note 231, at 917–19.

regulatory authority.[245] At least one court and one scholar have discussed the high evidentiary standard and level of difficulty of offering "proof" that a school environment might be disturbed if speech had been left unregulated.[246] Due to the difficulty of proving hypothetical disruption in the future, as well as the division over what constitutes a substantial disruption, schools have generally failed to justify their off-campus regulation.[247]

C. Schools and Educators Are Receiving Mixed Messages About Their Proper Role in Policing Cyberbullying

To a school district superintendent, principal, teacher, or any other educator, the current legal landscape of cyberbullying could be highly confusing.[248] When educators in schools respond to conflict, they consciously and subconsciously draw from a multitude of sources, such as personal and social values, concern for students, and the rules and expectations of the school system in their districts and individual schools.[249] When school districts craft policies, they also draw from a

245. *See* Beckstrom, *supra* note 60, at 309 (asserting that the plain language of the *Tinker* standard might give schools broader regulatory authority than courts have been willing to grant); Trainor, *supra* note 41 (asserting that courts are "putting the brakes on extreme disciplinary measures taken by districts against harassers or bullies"); Erb, *supra* note 40, at 271 (describing the current trend of liberally granting First Amendment protection to off-campus speech, even if it is vulgar, cruel, sexually explicit, and threatening); *see also, e.g.*, *Layshock*, 650 F.3d at 216 ("It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities."); *Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d at 1119 ("For the *Tinker* test to have any reasonable limits, the word 'substantial' must equate to something more than the ordinary personality conflicts among middle school students that may leave one student feeling hurt or insecure.").

246. *See* Lowery v. Euverard, 497 F.3d 584, 594 (6th Cir. 2007); Erb, *supra* note 40, at 272. *Compare* O.Z. v. Bd. of Trs., No. CV 08-5671 ODW (AJWx), 2008 WL 4396895, at *2–3 (C.D. Cal. Sept. 9, 2008) (upholding school disciplinary action and explaining that a school need not show a substantial disruption actually occurred or was certain to occur, only that it was reasonably foreseeable), *with* Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455–56 (W.D. Pa. 2001) (finding a First Amendment violation where the school could not prove that an actual disruption occurred or where the student had caused a substantial disruption in the past).

247. *See, e.g.*, *Layshock*, 650 F.3d at 215–19; *Blue Mountain Sch. Dist.*, 650 F.3d at 930–33; *Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d at 1119–21; Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 2d 698, 703–05 (W.D. Pa. 2003); Coy *ex rel.* Coy v. Bd. of Educ., 205 F. Supp. 2d 791, 800–01 (N.D. Ohio 2002); *Killion*, 136 F. Supp. 2d at 454–56. *But see, e.g.*, Cuff v. Valley Cent. Sch. Dist., 677 F.3d 109, 113–15 (2d Cir. 2012); *Kowalski*, 652 F.3d at 573–74; *Wisniewski*, 494 F.3d at 39–40; LaVine v. Blaine Sch. Dist., 257 F.3d 981, 990–91 (9th Cir. 2001); *O.Z.*, 2008 WL 4396895, at *2–4.

248. *See* Schultz, *supra* note 38, at 4; Patchin, *supra* note 45; *see also* Barr & Lugus, *supra* note 146, at 772–73 (articulating the same concerns for administrators at institutions of higher education); *infra* Part III.A.

249. *See* Edwin C. Dardin, *The Law and Its Influence on Public School Districts: An Overview*, CENTER FOR PUB. EDUC. (Apr. 5, 2006), http://www.centerforpubliceducation.org/Main-Menu/Public-education/The-law-and-its-influence-on-public-school-districts-An-overview; *see also* Donna K. Crawford & Richard J. Bodine, *Conflict Resolution Education:*

variety of similar sources: social expectations, state and federal law, and judicial precedent.[250] When these sources send mixed messages, it renders the already difficult decisions of educators far more challenging.[251]

In the case of cyberbullying, state and federal lawmakers seem to be telling school officials that they have a duty to protect students from cyberbullies, even if the bullying occurs off campus.[252] While only nine states and the District of Columbia have laws that include off-campus cyberbullying, bullying laws in general are fairly new, and these cyberbullying measures have all been passed in the last few years.[253] Two other states—Nebraska and Georgia—have proposed legislation to include off-campus cyberbullying in state law.[254] This appears to be a general trend among states.[255] Federal lawmakers, while unable to push a federal cyberbullying bill through Congress, have issued interpretive guidelines indicating that schools may have a duty to police off-campus cyberbullying.[256] Furthermore, significant social sentiment may indicate a desire to see schools more involved in regulating both bullying and cyberbullying more aggressively.[257] When cyberbullying does occur among students with injurious consequences, "Why didn't the school do anything?" is a common response.[258]

On the other hand, lower courts have been protective of off-campus student speech, even when it is lewd, vulgar, mean, and degrading.[259] In doing so, these courts are telling school district officials and school administrators to rein in disciplinary efforts even if they are aware of potential harm to students.[260] Despite a desire to curb bullying and cyberbullying, there is still overwhelming agreement that a line must be drawn somewhere—schools surely cannot regulate all of their students' activity, no matter what it is or where it takes place.[261] To many, the

---

Preparing Youth for the Future, NAT'L CRIM. JUST. REFERENCE SERVICE (June 2001), https://www.ncjrs.gov/html/ojjdp/jjjournal_2001_6/jj3.html.

250. *See* Dardin, *supra* note 249.

251. *See* Schultz, *supra* note 38, at 4; Patchin, *supra* note 45; *see also infra* Part III.A.

252. *See supra* Part II.A.3.

253. *See supra* Parts I.A.3, II.A.1–2.

254. *See* Hinduja & Patchin, *supra* note 71.

255. *See supra* Part II.A.1.

256. *See* Letter from Russlynn Ali, *supra* note 79 (articulating a school's duty to address "harassment incidents about which it knows or reasonably should have known" through investigation, and explicitly referencing the use of electronics, the internet, and activity taking place outside of school).

257. *See, e.g.*, Eckholm & Zezima, *supra* note 32 ("It was particularly alarming, the district attorney said, that some teachers, administrators and other staff members at the school were aware of the harassment but did not stop it."). Parents of bullying victims often approach school administrators for help, as well. *See supra* notes 1–27 and accompanying text.

258. *See supra* note 257 and accompanying text.

259. *See supra* Part II.B.2.

260. *See supra* notes 245–48 and accompanying text.

261. *See* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (en banc) (articulating the dangers of allowing schools to have unbridled off-campus authority); *see also* Lowery v. Euverard, 497 F.3d 584, 588 (6th Cir. 2007) ("[W]hile public schools are not

thought of "the government" extending its regulatory reach into student speech that originates in the home is crossing a constitutional line.[262]

III. PREVENTING SCHOOLS FROM GETTING STUCK IN THE MIDDLE: HARMONIZING STATE CYBERBULLYING LEGISLATION AND JUDICIAL PRECEDENT

The unresolved questions are, if schools do have a duty to protect their students from off-campus cyberbullying, is there a way that they can do this while still respecting other students' constitutional right to free speech? What will happen if schools continue to get mixed messages about how aggressively they should regulate, or how concerned they should be about liability? Part III of this Note attempts to reconcile this apparent conflict. Part III.A predicts that continued mixed messaging will paralyze schools and prevent them from effectively addressing cyberbullying. Part III.B argues that schools should be held accountable for policing cyberbullying but that this requires a greater degree of judicial deference to schools.

A. Conflicting Legislative and Judicial Messages Could Functionally Paralyze Schools

This section argues that schools could be prevented from taking any action to curb cyberbullying since they are getting conflicting messages and incentives. It asserts that the combination of new cyberbullying laws and courts' protection of cyberbullies' off-campus speech rights could expose schools to liability from both victims and aggressors. This Note predicts that these mixed incentives could paralyze schools confronted with cyberbullying.

1. Schools May Face Potential Liability from Both Cyberbullying Victims and Cyberbullies

In order for schools to face third-party liability for cyberbullying harm to students, courts would have to find a legal duty on the school's part to protect those students.[263] Courts are often hesitant to find that a government actor owes a duty to a specific individual as opposed to the public at large.[264] Nonetheless, as state bullying and cyberbullying statutes become more explicit and expansive, they may create both social expectations and legal duties for schools to take action when they become

run as democracies, neither are they run as Stalinist regimes. Students do have First Amendment rights, and school officials do not have unfettered authority to regulate student speech.").

262. *See supra* note 261 and accompanying text. *But see* Erb, *supra* note 40, at 280–81 (taking umbrage with characterizing schools as "the government," as schools have traditionally been seen as "mediating" institutions and an "extension of family life and parental interests").

263. *See supra* Parts I.B.1, II.A.3.

264. *See supra* notes 92–97 and accompanying text.

aware that a student has been cyberbullied.[265] Some states have articulated the liability implications of new bullying laws explicitly in statutes themselves, some have hinted at liability in statutory language, and others have said nothing.[266] As these statutes are new, and because victims of cyberbullying have only begun to bring suits against school personnel and school districts for their injuries,[267] only time will tell if courts allow victims of cyberbullying to bring these claims against schools.[268]

Additionally, in states where a legal duty is imposed on schools to regulate cyberbullying, school districts and educators are less likely to be granted sovereign and qualified immunity for discretionary actions.[269] As the preventive and responsive measures to cyberbullying in schools becomes more tightly delineated through statutes and school district policies, the manner in which administrators and teachers handle cyberbullying will become less discretionary and more procedural.[270] Consequently, immunity will be unavailable because the educator merely failed to follow appropriate procedure on how to handle a case of cyberbullying and did not make a "policy" decision.[271]

Holding schools responsible for policing harmful cyberbullying and imposing liability when they fail to do so is not problematic per se. Our legal system often encourages certain behavior (and discourages others) by imposing liability.[272] The problem is that schools must be able to combat the harm that results from off-campus cyberbullying if they are to be held responsible for it.[273] This necessarily requires disciplining students for speech that "originates" in homes or other places remote from the schoolhouse.[274] Courts have often been protective of student speech even if

---

265. *See supra* notes 113–15, 226–29 and accompanying text.

266. *See supra* notes 226–29 and accompanying text.

267. *See supra* note 225 and accompanying text; *see also* Shariff & Hoff, *supra* note 150, at 85 ("While school administrators and teachers argue that they cannot possibly be expected to supervise students on home computers, parents are increasingly beginning to sue schools . . . for failing to protect their children.").

268. *See supra* note 225 and accompanying text.

269. *See supra* notes 113–14 and accompanying text.

270. *See supra* notes 113–14, 226–29 and accompanying text.

271. *See supra* notes 113–14, 226–29 and accompanying text.

272. *See* KEETON, *supra* note 86, at 25 ("When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.").

273. *See* Jasperson v. Anoka-Hennepin Indep. Sch. Dist. No. 11, No. A06-1904, 2007 WL 3153456, at *4–5 (Minn. Ct. App. Oct. 30, 2007) (assessing a school's ability to prevent the harm in question when making a duty determination); Mirand v. City of N.Y., 84 N.Y.2d 44, 49–50 (1994) (discussing a school's control over foreseeable events in making a duty determination); *see also* KEETON, *supra* note 86, at 24–25 (discussing the role of a defendant's capacity to avoid or prevent harm as a factor in imposing liability).

274. *See* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 573 (4th Cir. 2011) (characterizing the question of the "location" of the speech as "metaphysical," explaining that though the bully "pushed her computer's keys" at home, the speech was sure to make its way to the school environment); *see also* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 220–21 (3d Cir. 2011) (Jordan, J., concurring) ("For better or worse, wireless internet access,

it is crude, vulgar, or damaging.[275] As a result, these courts have found schools in violation of the First Amendment.[276] Even if there is no monetary liability because of immunity or the judgment is small, these cases can be highly publicized and send schools the message that they may not only be dragged through arduous litigation for policing cyberbullying too vigorously, but they may well lose in the end.[277]

2. Potential Liability to Both the Victim and the Bully, Paired with Mixed Messages, Could Lead to Confusion and Paralysis

If schools face liability from victims of cyberbullying when they do not act aggressively to combat it, and liability from off-campus bullies should courts find that schools have violated cyberbullies' First Amendment rights, they will be stuck in a "lose-lose" situation.[278] The current advice to school leaders seems to be "don't do nothing, don't do too much."[279] Since legal liability provides a powerful incentive in either case,[280] school officials are pushed in both directions—action and inaction—and end up frozen in an utter state of confusion.[281]

B. A Proposed Balance: Holding Schools Accountable for Protecting Students with Greater Judicial Deference

This Note attempts to reconcile the apparent conflicting messages that legislatures and courts are sending to schools dealing with cyberbullying. It asserts that schools should be held accountable for protecting their students from cyberbullying if state statutes impose such a duty. It also posits that if schools have a duty to affirmatively protect students from cyberbullying, courts must be more deferential when applying *Tinker*'s substantial-effects test.

---

smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.").

275. *See supra* notes 40, 245 and accompanying text.

276. *See supra* note 247 and accompanying text.

277. *See, e.g.*, J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1121–22, 1124–26 (C.D. Cal. 2010) (finding a First Amendment violation but also finding that individual defendants were entitled to qualified immunity); *see also supra* note 45 and accompanying text.

278. *See* Schultz, *supra* note 38, at 3 (asserting that, since federal courts have begun sending the message that antibullying measures may impinge on students' First Amendment rights, school districts are "finding themselves in the lose-lose situation of potentially being sued both by the victim *and* the perpetrator of harassing or bullying conduct"); *see also supra* note 46 and accompanying text.

279. *See* Schultz, *supra* note 38, at 4.

280. *See supra* note 272 and accompanying text.

281. *See supra* notes 45–46 and accompanying text.

1. Schools Should Be Held Accountable for Ensuring Students' Safety by Regulating Off-Campus Speech

The current trend in state law is to broaden school regulatory authority to off-campus cyberbullying consistent with the language of *Tinker*.[282] In states that have passed aggressive bullying and cyberbullying legislation of this nature, courts should interpret these statutes to hold schools responsible for their duty to protect students from harm, even if the bullying originates off campus, unless the statute provides otherwise.[283] The legislation reflects a determination that schools are often best positioned to regulate such conduct despite the fact that it occurs away from the schoolhouse.[284] The bullying and cyberbullying legislative boom also mirrors a broader social desire to see schools more aggressively involved in ensuring their students' safety.[285]

If courts interpret these new laws to impose a duty on schools to police cyberbullying activity, it will be the first step in sending a consistent message to educators; the public, legislatures, and courts will begin to be on the same page about how a school official should react when confronted with an instance of cyberbullying.[286] To liberate schools from a confusing

---

282. *See supra* Part II.A.2.

283. *See supra* Part II.A.3; *cf.* Frank LoMonte, *School Districts Chafing at Cyberbullying Liability Should Have Heeded the "Spider-Man Rule*," STUDENT PRESS L. CENTER (Dec. 23, 2010), http://www.splc.org/wordpress/?p=1355 ("Expanded liability is the reward that schools should have known they would reap when they began asserting control over students' off-campus conduct. . . . If schools wish to redefine themselves as the 'good behavior police,' then they must be prepared to assume the consequences as well as the benefits."). While there are many policy and constitutional arguments for and against the expansion of school regulatory authority over off-campus student speech, this Note does not attempt to determine the best or most practical solution to the cyberbullying problem. Instead, it asserts that if state legislatures intend to impose a duty to protect students from such activity by statute, then courts should hold schools to this duty. However, there are many diverse scholarly opinions on the best solution to the cyberbullying problem. *See* Beckstrom, *supra* note 60, at 311 (arguing that, because of the confusing case law and disparate results, a school's authority should be limited to its campus unless the speech constitutes a threat); Shariff & Hoff, *supra* note 150, at 79, 88–107 (arguing for greater school authority because parents are often too busy to notice cyberbullying and schools should honor their "mandate as educational leaders" by "teach[ing] students the boundaries of socially acceptable behavior" and preparing them for life in a democratic society); Erb, *supra* note 40, at 275–82 (arguing for greater school authority since schools are "mediating institutions" and should not be treated as typical government actors); Scott Farbish, Note, *Sending the Principal to the Warden's Office: Holding School Officials Criminally Liable for Failing To Report Cyberbullying*, 18 CARDOZO J.L. & GENDER 109, 122–29 (2011) (arguing that schools are in a unique position to monitor cyberbullying and should be criminally penalized for failing to do so); Lane, *supra* note 223, at 1802–05 (arguing for greater deference from courts, pointing out the "practical realities of the ways schools interact with their students," and noting "the lack of effective remedies available to victims"); Turley, *supra* note 60 (arguing that the most problematic aspect of cyberbullying is not necessarily the lack of oversight but the lack of options for relief for victims and the culprits not facing public scrutiny or stigma).

284. *See supra* notes 252–59 and accompanying text.

285. *See supra* Parts I.A.2–3, II.A.1.

286. *See supra* Part II.C.

web of liability entanglement, however, courts must also change the way they apply *Tinker* to new instances of cyberbullying, an idea explored in the next section.

2. Greater Judicial Deference: A Less Stringent Reading of *Tinker*'s Substantial-Effects Test

If new state laws do impose a legal duty on schools to regulate cyberbullying, then courts should apply *Tinker*'s substantial-effects test with greater deference to schools.[287]

Courts have already been hesitant to find that off-campus student speech will foreseeably and substantially effect the learning environment.[288] Additionally, although schools are often able to come forward with significant evidence that cyberbullying has affected a particular student's ability to learn, measuring and obtaining evidence of broader school-wide disruption or hypothetical future disruption can be very challenging.[289]

Lower courts should take a more individual and deferential reading of "substantial effect" by incorporating the effect on the person who has been bullied and not just the school environment as a whole, as well as allowing the school latitude in forecasting potential outcomes of the off-campus speech.[290] This reading of *Tinker* allows schools to focus on preventing harm to students as individuals if harm is likely to occur, rather than worrying about whether the effect on the school environment as a whole is "substantial enough" to warrant intervention.[291] As the First Amendment does not protect students' right to interfere substantially with the learning of other students,[292] this approach would allow schools to fulfill their duty to protect students from cyberbullying while respecting free speech rights off campus.

CONCLUSION

With the development and growing ubiquity of communication technology, cyberbullying has emerged as a pervasive national problem similar to, but in many ways more complicated and invidious than, traditional bullying. Lawmakers in many states have attempted to counteract cyberbullying by expanding schools' regulatory authority off campus and into the home. Indeed, states' aggressive new legislation has

287. *See, e.g.*, Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 572–74 (4th Cir. 2011); Wisniewski v. Bd. of Educ., 494 F.3d 34, 38–40 (2d Cir. 2007); *see also, e.g.*, J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 948 (3d Cir. 2011) (en banc) (Fisher, J., dissenting) ("School administrators, not judges, are best positioned to assess the potential for harm in cases like this one, and we should be loath to substitute our judgment for theirs."), *cert. denied*, 132 S. Ct. 1097 (2012). *See generally supra* Part II.B.2.

288. *See supra* Part II.B.2.

289. *See supra* notes 246–48 and accompanying text.

290. *See e.g.*, *Kowalski*, 652 F.3d at 572–74; *Wisniewski*, 494 F.3d at 38–40.

291. *See supra* Part II.B.1; *see also supra* notes 241–48 and accompanying text.

292. *See supra* notes 171–72 and accompanying text.

created a sense that schools may have a legal duty to protect their students from cyberbullies, even if the speech originates off campus. This is problematic because courts have generally protected students' freedom of speech off campus.

The current legal landscape could result in paralysis, with school officials wanting to avoid liability for failing to protect students from cyberbullies but also wishing to avoid violating cyberbullies' First Amendment rights. If schools are to take on greater responsibility, they must be given greater latitude to act outside of the physical schoolhouse. Courts' applications of *Tinker*'s substantial-effects test have been inconsistent, and interpretations of what constitutes a "substantial effect" have been too narrow. If courts take a more deferential reading of "substantial effect" at the level of the individual student, schools could uphold their duties to protect students from cyberbullying while respecting students' off-campus freedom of speech.