

CYBERBULLYING

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Bullying has always been a problem in schools. Today, with new technology being readily available to young students, bullying has taken on a new face. A person is now able to be a bully from a computer or cell phone in front of many people with the click of a button. Rumors are no longer spread by word of mouth or by notes passed in class; they are spread via text message and internet websites. The victim is not only humiliated by his classmates, but by anyone who can access a Facebook page, see a YouTube video, receive an email or text message. These acts by bullies can have serious consequences on a young person's emotional and physical well-being. The legislatures and media have already made us aware that cyberbullying is wrong. However, there does not seem to be an adequate way of policing it. The courts have made attempts to find ways to interpret law to protect students from cyberbullies, but the opinions of different courts vary from state to state not giving schools clear guidance on how to police cyberbullying. With no real effective policy in place to stop cyberbullying, the problem is getting worse every day. The fact that this is taking place over social media such as the internet and cellular phones, poses new issues such as where the bullying is actually taking place and whether or not the bullying has anything to do with the school. These issues need to be resolved so that every student can receive an education in an environment where he does not have to be scared of being bullied or humiliated.

WHAT IS CYBER BULLYING?

The term "cyberbullying" is commonly used to describe acts of children harassing and threatening each other online.¹ More specifically it is the "willful and repeated harm inflicted

¹ See What Is Cyberbullying Exactly?, Stop Cyberbullying.org, http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html (last visited May 14, 2011).

through the use of computers, cell phones, and other electronic devices.”² Therefore, cyberbullying occurs any time a child torments, threatens, harasses, humiliates, or embarrasses another child using the aforementioned electronic devices.³ Examples of cyberbullying are when a teen uses their cell phone to send mass text messages to spread rumors about another student or when a student uses a social network to write a post at the expense of another student.

A study was conducted by Sameer Hinduja and Justin Patchin to evaluate how many students had actually been victims of cyberbullying.⁴ In 2010, 4,400 students from ages 11-18 were randomly selected to participate in the study. When describing what cyberbullying was to the students they said it is when someone “repeatedly makes fun of another person online or repeatedly picks on another person through email or text message or when someone posts something online about another person that they don’t like.”⁵ After hearing this definition: 20% (approximately 880 of the 4,400) of the students selected stated they had been a victim of cyberbullying; about 20% also said that they had been “cyberbullies” at one point; and 10% stated that they were both the victim and the bully at one point or another.⁶

In another article published in the Journal of Adolescent Health, it was reported there was a 50 percent increase in online harassment of youth from 2000 to 2005.⁷ According to a 2007 study conducted by the Pew Internet and American Life Project, one-third of teenagers reported being victims of online harassment.⁸ Moreover, another study showed between fifty and seventy-five percent of teens have been bullied online, while only ten percent have reported this

² Hinduja Ph.D, Sameer and Justin W. Patchin, Ph.D. *Cyberbullying: Identification, Prevention, and Response*, Cyberbullying Research Center. <http://www.cyberbullying.us/> (Last visited May 14, 2011).

³ Marano at 56.

⁴ Hinduja at 1.

⁵ *Id.*

⁶ *Id.*

⁷ David-Ferdon, Corrine & Marci Feldman Hertz, *Electronic Media, Violence and Adolescents: An Emerging Public Health Problem*, 41 J. Adolescent Health S1, S5 (2007)

⁸ Lenhart, Amanda. *Memorandum on Cyberbullying and Online Teens to Pew Internet & American Life Project* (June 27, 2007)

problem to an adult.⁹

ISSUES WITH TRYING TO STOP CYBERBULLYING

Cyberbullying is very different from traditional bullying. The major difference is the anonymity that is available to the cyberbully through anonymous email addresses or screen names. A victim of cyberbullying often does not know who their bully is or why they are being targeted.¹⁰ This makes it complicated for any sort of enforcement to take place because the school would be intervening in actions that happened away from the school.¹¹ Additionally, law enforcement may not see any reason to get involved because there is no threat of physical harm.¹²

The next major issue is that whatever the cyberbully has said or posted on the internet is available to a large number of people.¹³ The problem here is that the victim is no longer humiliated just in front of his classmates, but theoretically could be embarrassed in front of anyone with access to the website, email, or text messaging. Along with being available to many people at a time, it is easy for one person to see the embarrassing information and then “copy and paste” the information to pass it along to more people or post it on another website. Therefore, even if you are able to stop the original cyberbully, it is possible that another person is already reposting the information.

Every year more and more students are interacting with their classmates and friends using computers and/or cellular phones. With every new generation becoming more familiar with how

⁹ Burrichter, Christopher S., CYBERBULLYING 2.0: A “SCHOOLHOUSE PROBLEM” GROWS UP, DePaul Law Review, Fall 2010.

¹⁰ Hinduja Ph.D, Sameer and Justin W. Patchin, Ph.D. *Cyberbullying: Identification, Prevention, and Response*, Cyberbullying Research Center. <http://www.cyberbullying.us/> (Last visited May 14, 2011).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

to use the technology, there are more students becoming more familiar with how to use it maliciously. Along, with the availability of technology, there is the issue that it is easier for a bully to be cruel from a distant location where he does not see the immediate response from the victim. Technology has made it easier for someone to be a bully because it offers the bully anonymity, tools to address a larger audience and the luxury of doing it from a distant location.

Furthermore, the effects of cyberbullying linger because hurtful posts can remain online indefinitely, forcing victims to relive the pain every time they come across them on the internet.¹⁴ Therefore, it is an experience different from when someone is bullied in a traditional way, where it is face to face and has a point where the bullying begins and ends. With cyberbullying, the victim is continually bullied without the bully making any future efforts.

The problem is not only with the students who do the bullying, but the public's reaction to it. Many people do not see the harm associated with cyberbullying.¹⁵ Hinduja and Patchin attribute this to the fact that there is no immediate physical danger as with traditional bullying by saying there are "more serious forms of aggression to worry about."¹⁶ This is combined with the fact that many children are better with computers than their parents.¹⁷ Therefore, a parent most times would have no way of knowing that their child is engaging in cyberbullying behavior or how they could stop it.

Cyberbullying can cause serious psychological harm, including depression, low self-esteem, anxiety, alienation, and, in extreme situations, suicidal intentions.¹⁸ In severe cases, like that of Megan Meier in 2007, cyberbullying may even serve as a motivation for suicide. Megan,

¹⁴ Shariff, Shaheen. *Cyberbullying: Issues and Solutions for the School, the Classroom and the Home* 45, tbl.3.1 (2008)

¹⁵ Hinduja at 2.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Megan Meier Cyberbullying Prevention Act, H.R. 6123, 110th Cong. (2008)

a thirteen-year-old middle-school student, engaged in an online relationship with Josh Evans, a fellow student, through a networking website called MySpace.¹⁹ It started as a flirtatious exchange, but then Evans began to send Megan, who suffered from clinical depression, cruel and insulting messages.²⁰ Megan's mother found her hanging in her closet by her neck from a belt the day of Josh's final posting: "The world would be a better place without you."²¹

Similarly, thirteen-year-old Ryan Halligan took his own life after relentless bullying through online "instant messages" over a period of three months by classmates accusing him of being gay in 2005.²² Still, for other cyberbullying victims the road to recovery can be long, painful, and expensive. A third example from 2006 is Kylie Kennie who went through years of professional counseling and changed schools twice to deal with the psychological effects of being cyberbullied through a website entitled "Kill Kylie Incorporated" that middle-school classmates created "to show people how gay Kylie Kenney is."²³

LEGISLATIVE ACTIONS

State governments have started implementing statutes that require school districts to adopt anti-bullying policies and programs in an effort to curb school violence and the negative impacts of bullying. Many of these mandates are adopted by state legislatures due to the growing amount of research on "(1) the prevalence of bullying in K-12 schools, (2) the likelihood of school bullies to develop more serious socio-emotional problems with the passage of time, and (3) the impact of bullying on its victims and school climate in general."²⁴ Most state statutes

¹⁹ Maag, Christopher. *A Hoax Turned Fatal Draws Anger But No Charges*, N.Y. Times, Nov. 28, 2007

²⁰ *Id.*

²¹ *Id.*

²² Pappas, Leslie A., High-tech Harassment is Hitting Teens Hard, Phila. Inquirer, Jan. 2, 2005, at A1.

²³ Struglinsky, Suzanne. Schoolyard Bullying Has Gone High-Tech, Deseret News, Aug. 18, 2006.

²⁴ Kerkhof, Emily K. *Myspace, yourspace, ourspace: Student Cyberspeech, Bullying, and Their Impact on School Discipline*, University of Illinois Law Review, 2009.

requiring the adoption of an anti-bullying policy define bullying and require the state department of education to provide a model policy for school districts to use as a template.²⁵ Some states even impose reporting requirements for the number of bullying incidents reported to school administrators and condition the receipt of state funds on the implementation of an appropriate policy.²⁶

Many states have recently incorporated cyberbullying into their state bullying legislation. In these states, public schools are usually required to enforce traditional bullying punishments when students are using electronic communications to bully each other.²⁷ Some states require that schools report this bullying to local law enforcement, and various other states have made cyberbullying a crime.²⁸

In *Cyberbullying 2.0: A "Schoolhouse Problem,"* the author, Christopher Burrichter believes that "due to the recent increase in internet accessibility, especially through difficult-to-monitor wireless internet and mobile phone web browsers, neither school- nor state-based regulations adequately combat cyberbullying."²⁹ Burrichter believes that the present regulations ignore important issues, including internet anonymity, harassment by non-students, state jurisdictional questions, internet jurisdictional questions, and Supreme Court decisions that have not expressly allowed schools to punish off-campus student speech.³⁰

²⁵ *Id.*

²⁶ *Id.*

²⁷ Cyberbullying, National Conference of State Legislatures, <http://beta.ncsl.org/default.aspx?tabid=12903> (last visited May 14, 2011).

²⁸ *Burrichter* at 147-8.

²⁹ *Burrichter* at 148.

³⁰ *Id.*

WHEN CAN SCHOOLS GET INVOLVED?

Courts generally identify two pertinent factors affecting the constitutionality of disciplining student speech: (1) where the speech occurred and (2) whether the speech caused a material and substantial disruption of school activities.³¹

The Internet complicates the first factor of where the speech occurred because once information has been posted on a web site, people can access it anywhere.³² While schools may punish bullies while the students are on campus, the Supreme Court has not granted schools complete discretion to punish off-campus student speech.³³ If a student engages in speech at school, the school has greater authority to discipline, but if a student engages in speech off-campus, the school has less authority. The problem is cyberbullying is usually done off-campus on the bully's home computer.³⁴

Courts have addressed the extent of the school's power to punish a student for expression he or she posted to the internet while at school. Many schools have implemented technology or internet-based policies that prohibit using such resources for non-educational purposes and schools can reasonably discipline students for violations of that policy.³⁵

Unfortunately, courts struggle when determining where speech occurred because students can wholly create speech while not at school, but students can access the speech at school, making the effects of the speech realized at school.³⁶ When a student posts material on the internet, the student has limited control over who views the material or where they view the

³¹ Kerkhof, Emily K. *Myspace, yourspace, ourspace: Student Cyberspeech, Bullying, and Their Impact on School Discipline*, University of Illinois Law Review, 2009.

³² Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, *BYU Educ. & L.J.* 123, 131. 2000.

³³ *Morse v. Frederick*, 551 U.S. 393, 401 (2007).

³⁴ Hinduja Ph.D, Sameer and Justin W. Patchin, Ph.D. *Cyberbullying: Identification, Prevention, and Response*, Cyberbullying Research Center. <http://www.cyberbullying.us/> (Last visited May 14, 2011).

³⁵ *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 706 (W.D. Pa. 2003)

³⁶ *Kerkhof* at 1633.

material.³⁷ Therefore, the determination of where the speech occurred in these types of situations significantly impacts a school administrator's ability to impose discipline.

Courts have not delineated a uniform, appropriate analysis for speech created outside of school boundaries.³⁸ However, one approach the courts use is to require school administrators to establish a reasonable nexus between the student's speech and school activities.³⁹

The second factor the court considers is whether or not the speech established a material and substantial disruption. The application of the material and substantial disruption standard, also known as the *Tinker* standard,⁴⁰ poses the question of what constitutes a material and substantial disruption in the internet context. There seems to be three different approaches the courts use to decide how to apply the *Tinker* standard. First, some courts appear to apply this standard when determining whether the speech occurred on-campus or off-campus.⁴¹ Second, others apply this test only after deciding where the speech took place.⁴² Lastly, other courts suggest that it does not matter where the speech occurred, as long as the “material and substantial” standard can be established.⁴³ Every court seems to agree that the *Tinker* standard should be applied in some part of the court's analysis one way or the other.

WHAT SHOULD BE DONE?

Until the Supreme Court provides clear rules on the ability of schools to regulate online speech, legislators should tailor cyberbullying laws carefully to avoid violating the First Amendment. Eventually, the Supreme Court should address online student speech and give

³⁷ Thomas E. Wheeler II, *Lessons From The Lord of the Flies: Protecting Students from Internet Threats and Cyber Hate Speech*, 10 J. Internet L. 3, 6 2006.

³⁸ Kerkhoff at 1634.

³⁹ *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002).

⁴⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

⁴¹ *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998)

⁴² *J.S. ex rel. Snyder v. Blue Mtn. Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, at 5 (M.D. Pa. Sept. 11, 2008)

⁴³ *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446 (W.D. Pa. 2001)

legislators and schools the clear direction they need to respond appropriately to cyberbullying. The First Amendment is such a sensitive issue that depending on which way the court decides, legislation could be found unconstitutional. Since the courts seem to be divided on how to apply *Tinker* and most states have not enacted sufficient laws to reduce cyberbullying, schools should be given latitude to investigate cyberbullying incidents among their students and the ability to punish student cyberbullies. By punishing cyberbullies now, the schools can deter future students from finding any appeal in cyberbullying their classmates.

Karly Zande stresses the need for the courts to adopt case law with clear-cut rules to apply to cyberbullying in her law review article titled *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying*.⁴⁴ In particular, the article stresses that in order for there to be a clear-cut rule, the definition of cyberbullying must be limited to incidents between two students, or in other words minors because if it is between anybody, but two students then it would call for separate tests.⁴⁵ If it is between an adult and a minor or two adults, there are other causes of action such as defamation and becomes a situation other than bullying.⁴⁶

It is necessary that the new rules address off-campus bullying because of the nature of the internet. As discussed earlier, a bully can post something from the comfort of his own home about another student and have no idea when or where the victim will become aware of it. The reason schools should be involved is because the victims bring the effects back to school with them, where the acts can be exaggerated by the physical presence of the cyberbully.⁴⁷

⁴⁴ Zande, Karly, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying*, Barry Law Review, Fall 2009.

⁴⁵ Zande at 147.

⁴⁶ *Id.*

⁴⁷ *Frontline: Growing Up Online* (PBS television broadcast Jan. 22, 2008)

Since cyberbullying usually happens off-campus, limiting cyberbullying laws to incidents occurring on school campuses would seriously undercut their effectiveness in addressing the problem.⁴⁸ If schools cannot regulate online expression created off-campus, these laws allow many cyberbullies to dodge punishment and provide little comfort to their victims.⁴⁹

Zande believes the schools will be able to regulate and punish student cyberbullies by using the two prongs of the *Tinker* Test.⁵⁰ *Tinker* only addressed incidents that occurred on-campus, but if *Tinker* could be expanded to include the conduct of a bully off-campus, it would help curtail cyberbullies. Cyberbullying causes the “material and substantial disruption” required by *Tinker*. For example, the victim, students or even the bully may use the classroom time to discuss or exacerbate the cyberbullying instead of doing schoolwork. More importantly, it disrupts the school by making the victim feel insecure or in most extreme circumstances scared or depressed at school, thus harming a student’s academic potential.

Since the “material and substantial disruption” prong of *Tinker* is fact-specific it would be difficult to make a bright-line rule.⁵¹ Instead, a multifactor analysis may be more appropriate in this context.⁵² Factors the courts should weigh are (a) whether the online content was created at school or using school resources; (b) whether the content was viewed on campus; (c) the extent to which students discussed the content on campus; (d) the measures taken by the school in response to the incident; and (e) the appropriateness of the school’s reaction.⁵³

The school should be able to step in and restrain the cyberbullying at an early stage because it has an interest in the safety of its students. Cyberbullying affects the victim’s self-

⁴⁸ King, Allison Virginia. *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, Vanderbilt Law Review, April 2010.

⁴⁹ King at 872.

⁵⁰ Zande at 133.

⁵¹ King at 876.

⁵² *Id.*

⁵³ *Id.*

esteem, security, and ability to continue existing relationships, thus interfering with the student's learning process.

Nevertheless, legislators should avoid the temptation to enact legislation that would create unintended consequences that restrict the freedom of expression. However, *Tinker* tells us that student speech rights can be restricted if they "substantially interfere with the work of the school or impinge upon the rights of other students."⁵⁴ By satisfying the two prongs of the *Tinker* test, it is inherent that another student's rights are being impinged upon and therefore a student's speech rights can be restricted.

PARENTS' ROLE

Parents must educate their children about appropriate online behaviors. Hinduja and Patchin attempt to lay out guidelines for parent's to use to keep their children using the internet appropriately,⁵⁵ but there really is no formulaic way to approach this situation. The most important thing a parent can do is to make their child aware of the consequences of their action.

It is important for the child to realize that if he is acting maliciously on the internet at the expense of another child it is important for the parent to make their child, the bully, realize the pain they are causing.⁵⁶ A child is not usually able to realize the many consequences of their action. A good approach seems to be one that involves the "Golden Rule" meaning do unto others as you would have them do unto you. In other words, it is important to make the bully realize what it would be like to be in the victim's shoes.

Parents should also have some way to monitor their child's internet use. This is difficult because the internet is accessible from so many different places, such as schools and libraries.

⁵⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

⁵⁵ Hinduja at 3.

⁵⁶ *Id.*

Also, most severe bullying is reported to occur around the time of puberty between the sixth and ninth grades.⁵⁷ These are ages where the child realizes they want privacy and having parents pry into everything a child does on the internet could have a counter-effect on the child's behavior.

CONCLUSION

No matter if the courts choose to redefine *Tinker*, what is needed is a crystal clear guideline that schools and courts can apply to internet speech. So long as the school can show, under the *Tinker* test, the cyberbullying caused a material and substantial disruption in the school setting and infringed on the rights of another student, the school should be able to punish the cyberbully regardless of the physical location where it occurred. Thus, a modified *Tinker* test is the best test the courts can adopt to protect student victims of cyberbullying. However, courts must find a balance between a productive and safe educational environment, while not inhibiting free speech. For schools to effectively address cyberbullying, they need to have the ability to regulate online student speech in certain instances, without imposing unreasonable restrictions on internet expression. In conclusion, courts, legislators, schools, and parents need to work collectively on an effective approach to cyberbullying where students can be adequately protected from harassment to ensure the best learning environment, while not inhibiting free speech.

⁵⁷ Hazler, Richard J. *Breaking the Cycles of Violence: Interventions for Bullying and Victimization*, 1996.