The Real Harm of Bullying & the Court’s Failure to Protect Victims

Rebecca Blabolil
Education Law & Policy
Spring 2012
Introduction

With every teen suicide linked to cyber-bullying comes a public outcry for schools and the legislature to institute policies and laws to protect the nation’s youth from dangerous and cruel school predators. In September 2011, Kameron Jacobson, a fourteen year old New York boy, killed himself after enduring what his parents described as “on-going ridicule and torment” on the social networking website, Facebook. The children created a Facebook page which specifically directed to ridicule the young boy about their perceptions of his sexual orientation. 1

In the wake of the tragedy, Kameron’s parents started the Kindness Above Malice Foundation (KAM) to support children who confront bullying in their communities and their schools. 2 The Jacobsons, like other parents who have lost children to bullycide, they also became loud advocates for state and federal legislation addressing bullying and cyberbullying in schools. 3

While tragedies like this raise awareness about the dangers of bullying, they also create a forum for detractors to point to these circumstances as “isolated incidents” which were brought on not just by bullying but by other factors in the children’s lives – such as depression that span prior to the first act of bullying. For instance, in the bullying case which resulted in the suicide of Phoebe Prince in 2009, the media asked over and over “does the answer of who’s to blame change if you knew she had tried to kill herself before the epithets, was on medication for depression, and was struggling with her parents’ separation?” 4 The argument follows that these

---

4 Newsweek, From Lockers to Lockup http://www.thedailybeast.com/newsweek/2010/10/04/phoebe-prince-should-bullying-be-a-
isolated incidents, while tragic, should not be the basis of legislation or school policy which has the potential effect of chilling first amendment protected speech. Proponents of this belief argue that instead of “enforcing silence” that schools should encourage more speech. They follow first amendment scholars like Charles Haynes’s belief that, “students can’t learn how to be responsible citizens if schools become more like prisons. Schools must be laboratories for democracy where students learn to exercise their rights with responsibility.”

The discourse on both sides of this argument which focuses on the few bullying related suicides fails to account for the true harm that bullying creates, harm that the states not only have an interest in preventing, but also a duty to stop.

The Adolescent Brain: the Real Injury Caused by Bullying

Adolescence is a difficult time for a child by any measure, suddenly their bones are growing faster than their muscles, their bodies begin to produce and release torrents of unfamiliar hormones into their systems, they are discovering how their bodies function, how the “social order” works and where their place is in all of that, but something even more important is happening: their brains are growing at a rapid pace producing far more gray matter than they need.

Over the past twenty-five years scientists and researchers have learned a great deal about the development of the human brain through the use of magnetic resonance imaging (MRI)

---


5 Camern Snook, Oregon’s “Bully Bill”: Are We Needlessly Repressing Student Speech in the Name of School Safety?, 38 WMTLR 657, 721 (2002).
6 Snook at 721.
technology. Prior to that period, scientists believed that by the age of six a child’s brain framework had been nearly fully developed. While it remains true that approximately 95% of the brains structure is formed by that time, the brain goes through a second period of over-production of brain cells and connections (synapses) in the frontal cortex and the corpus callosum just before puberty. (Id.) The prefrontal cortex of the brain is responsible for memory, organization, planning, and mood modulation. Once developed, this portion of the brain, scientists say, is responsible for “sober second thought.” A fiber system that relays information between the hemispheres of the brain called the corpus callosum, influences language learning and associative thinking.

The way that the brain operates during this period is to over-produce brain cells and connections and then during a second phase, which begins during adolescence, it begins to “prune” back or “trim” the excess brain material. (Id.) According to the lead researcher Dr. Jay Giedd the pruning phase is absolutely critical in brain development and will affect a teen for the rest of his or her life. The brain cells quite literally fight it out for survival. Dr. Giedd describes this phase as the “use it or lose it” period, meaning that the cells that are engaged during this period of development will be the ones that survive. In an interview with FRONTLINE, Dr. Giedd explained, “If a teen is doing music or sports or academics, those are the cells and connections that will be hardwired. If they're lying on the couch or playing video games or MTV, those are the cells and connections that are going to survive.” In other words, during this period, the things, the behavior, the lessons you learn stick.

——

Well established research has shown a direct link between bullying victimization and mental health with decreased student achievement. However, research on brain development and adolescence also suggests that bullying may have a lifelong neurological impact. In other words, based upon Dr. Giedd’s “use it or lose it” principle, one can anticipate that a victim of bullying is engaging certain brain cells associated with negative experiences. Moreover, because victims of bullying often become pre-occupied with avoiding abuse, they withdraw from learning and from social interaction. Their hardwiring is deleteriously impacted and their growth is stunted as a result.

The research of adolescent brain development and bullying does not end with the deductive application of Dr. Giedd’s research; in fact, independent research on the bullied brain has revealed additional damage to brain development. According to the research, bullying doesn’t just lead to depression and a higher rate of suicide; it actually leads to reduced electrical connectivity within the brain and the reduction of new neurons. The research, which was published in the December 2010 edition of the American Journal of Psychiatry by renowned neuroscientist Martin Teicher has shown that the neurological damage of bullying on an adolescent is identical to that caused by physical and sexual abuse in childhood. Furthermore, his research has shown that “peer abuse” during the ages of 11 – 14 had the most dramatic impact on brain functioning and adult outcomes. (Id.)

---


9 Teicher MH; Samson JA; Sheu Y-S; Polcari A; McGreenery CE: Hurtful words: association of exposure to peer verbal abuse with elevated psychiatric symptom scores and corpus callosum abnormalities. Am J Psychiatry 167:1464—1471
The overwhelming result of the research indicated that physical abuse and peer driven verbal bullying have equally negative impact on the brain - in other words – the old adage, “sticks and stones may break my bones, but words will never hurt me,” could not be further from the truth. The study included 848 young people with no history of exposure to domestic violence, sexual abuse, or parental physical abuse but who had all been exposed to varied degrees of taunting, ridicule, criticism, shouting, and bad language from their peers. (Id.) Those subjects who reported bullying by their peers had observable abnormalities in the corpus callosum, one of the parts of the brain experiencing hyper-growth and trimming during adolescence. The corpus callosum is a thick bundle of fibers that connect the right and left hemispheres of the brain and is vital for visual and audio processing and is crucial to the development and clarity of memory. The scans showed that the fibers had less myelin, the coating that speeds up communication between the cells. In the brain, speed matters, and the reduced communication time has a neurocognitive impact which may impact bully victim’s ability to learn and retain information.

In another study on the effects of bullying on the developing brain, Tracy Vaillancourt, a psychologist at the University of Ottawa, discovered that bullying can alter levels of cortical in its victims. Cortical is a hormone produced during times of stress. An overabundance of cortical has been shown to suppress the immune system and to destroy the neurons in the hippocampus resulting in long term memory problems.

10 Teicher MH; Samson JA; Sheu Y-S; Polcari A; McGreenery CE: Hurtful words: association of exposure to peer verbal abuse with elevated psychiatric symptom scores and corpus callosum abnormalities. Am J Psychiatry 167:1464—1471
The lessons that this research uncovers is that bullying does not just lead to psychological torment, but it leaves an indelible imprint on a teen’s brain when the timing coincides with the point of greatest development. The problem is not just psychological – it’s medical – it can be measured by brain scans and reduced functioning. As new forms of peer victimization emerge, such as cyber-bullying, the platform for peer bullying drastically increases in scale and potency. Adolescents can now harass and humiliate their peers from afar and create “viral” attacks that last much longer than a single incident of name calling or public humiliation on the playground. As the bully’s reach increases and as we learn more about the medical and neurological impact on victims the legal discourse needs to shift from protecting students’ first amendment rights to protecting the health and minds of the youth who are harmed.

**Bullying & School Law:**

As schools have started to recognize the need to implement anti-bullying and anti-cyber-bullying policies they have confronted obstacles created by judicial decisions that impose protections of students’ first amendment rights – obstacles that have stymied the implementation of effective bullying policies and have left victims unprotected. The first case dealing with adolescents, communications, and schools was Tinker v. Des Moines decided by the Supreme Court in 1969. In that case the court considered whether or not students wearing black armbands in protest of the Vietnam War constituted protected and allowable speech in a school setting. The Court held that unless the speech materially and substantially interfered with school operations and the rights of others, it was protected by the First Amendment.\(^1\)\(^2\) The Court also reiterated that students do not abandon their First Amendment rights at the schoolhouse door and that the

\(^1\) Tinker v. Des Moines, 393 U.S. 503, 503 (1969).
controversial nature of the speech was not enough to suggest that it was disruptive. In that case, the Court held that wearing black armbands was “silent, passive expression” that did not involve substantial interruption.

Tinker has become the standard by which most courts evaluate whether a student’s free speech has been violated. The courts are married to testing whether or not speech, on or off-campus, creates a disruption on campus. This test and its application fail to take into account the harm done on an individualized basis to its victim – harm we are now learning is both psychological and neurological with long lasting effects.

Since Tinker, the Supreme Court has decided three important cases which affect the Tinker standard. The first was Bethel School District v. Fraser, where the court held that there was no First Amendment protection for lewd, vulgar, or “patently offensive” speech that occurred at school. Next, in Hazelwood, the Court opined that the school could regulate student speech in the school’s newspaper that was a part of a journalism class. Stating that the school, in exercising editorial control, did not offend students’ First Amendment rights. Finally, in Morse, the court held that schools could regulate student speech at off-campus school-sponsored events where the speech condoned drug use.

The application of the “materially and sustainably” disruptive test leaves courts without precedent to protect young adolescents who are impacted by bullying, especially when the bullying occurs “off campus.” Applying the Tinker standard in Evans v. Bayer the Federal District Court held that a student who was suspended for creating a Facebook group called “Ms.

---

13 Tinker, 393 U.S. at 506.
14 Id.
17 Morse v. Frederick, 551 U.S. 393 (2007)
Sarah Phelps is the worst teacher I’ve ever met,” after school hours had his First Amendment rights violated. The court held that the principal had overstepped his bounds by suspending Evans because his post did not disrupt school activities, occur on school property, or undermine the fundamental values of the school’s mission.

Similarly, in J.C. v. Beverly Hills Unified School District, the Federal District Court ruled in favor of J.C., a student who posted a video of her and her friends ridiculing C.C., a classmate. The video contained derogatory, sexual, and defamatory statements about a 13-year old girl. At school, J.C. and her friends encouraged other classmates to watch the video and the video was accessed on school grounds. When C.C. learned about the video, she and her mother alerted the school’s administration. C.C. was sent to the school counselor where she cried and stated that she did not want to go to class because she was “humiliated” and she had “hurt feelings.”

The court looked closely at two factors: could off-site campus speech be regulated, and if yes, under what circumstances. The court found that without question off-campus speech can be regulated. The court said, “under the majority rule, and the rule established by the Ninth Circuit in LaVine, the geographic origin of the speech is not material; Tinker applies to both on-campus and off-campus speech.” The court went on to say that YouTube has sufficient connection to the school’s campus and that it was reasonably foreseeable that the video would make it to

20 J.C. at 1099
21 Id.
23 J.C. at 1108.
24 Id.
campus, particularly given that the girls were promoting the video to friends at school.\textsuperscript{25} The court then turned to the circumstances under which off-campus speech can be regulated and returned to the requirement that the speech must have either caused a “substantial disruption” in the school community or that it is “foreseeable that a substantial disruption would result.” Here, the court held, J.C. and her friend’s cruel video did not cause a substantial disruption.

Relying on Tinker, the court held that student discussions of the video at school was not enough to cause a substantial disruption although, one can hardly doubt that the discussion continued to impact the target of the video – young C.C. The court went on to reject the application of Fraser, finding that the remarks were neither “vulgar, plainly offensive nor indecent.”\textsuperscript{26} Apparently, the court did not believe that students calling C.C. “a slut,” “spoiled,” and an “ugly piece of shit,”\textsuperscript{27} elevated the speech to an unprotected class of obscene speech, and have apparently forgotten the fragile state of the adolescent mind. Thus, with the fact that C.C. only missed a half-day of school, plus the determination that there was no “substantial impact on the classroom” the school could not discipline J.C. and her friends for their protected speech.\textsuperscript{28}

The court was asked to consider the age and vulnerability of the young children involved in the case. The school argued that it should be granted deference “to decide how to best protect the emotional well-being of its young students.”\textsuperscript{29} The court conceded that it agreed, but then went on to say, that despite the fact that C.C. was “upset, even hysterical, about the YouTube video,” that the school’s actions were overreaching because they failed to show a substantial

---

\textsuperscript{25} Id.
\textsuperscript{26} J.C. at 1110.
\textsuperscript{27} J.C. at 1098
\textsuperscript{29} J.C. at 1122.
disruption to school activities.\textsuperscript{30} The school went on to argue that it has the right to regulate speech which “impinges upon the rights of others” and, in fact, that schools have an obligation to “protect students from psychological assaults that cause them to question their self-worth.”\textsuperscript{31} The court flat out rejected this argument saying that “schools cannot exercise their obligations in a manner that infringes upon other student’s First Amendment rights,” and that the court was aware of no precedent that allowed student speech to be quelled because it “may cause some emotional harm to a student.”

\textbf{The Court Has Fallen Short in Protecting Students}

The application of Tinker to bullying and cyber-bullying cases acts to protect the speech of bullies while patently rejecting the school’s and state’s interest in protecting children from harmful abuse with long term effects. The science of bullying’s impact on its victims is emerging, but it’s solid. The research shows that bulling behavior peaks in middle school – the years when children’s brains are in a rapid state of development and growth setting their path to their adult selves. It shows that victims of bullying often feel lonely, humiliated, insecure and school phobic. Additionally, bullying has increased rates of truancy, drug abuse, depression, and poor grades.\textsuperscript{32} Moreover, the medical research shows that children’s brain are in a state of rapid development – the “use it or lose it” era of brain development and that peer bullying has similar effects on a child’s neurological development as physical or sexual abuse. The courts have chosen to ignore the impact of this speech on the individual, instead, looking only to its impact on the non-victims – “the classroom” of students may be distracted by an individual’s victimization.

\textsuperscript{30} Id.
\textsuperscript{31} J.C. at 1123.
\textsuperscript{32} Mary Sue Bakus, Missing the Teachable Moment and Undermining the Future of the First Amendment – TISNF!, 60 CWRLR 153, 2009.
This hardly seems logical – would the court similarly find that a student who visibly injures another student is not punishable unless the rest of the classroom was substantially impacted by the assault? No. The courts have established that schools owe students a duty of care and, in particular, a duty to supervise ensuring students no harm while under their care.\textsuperscript{33} The court seems to discern between injuries – one which causes a bruise that could disappear in days is punishable and yet, the other injury that causes humiliation, psychological trauma and potential neurological damage escapes punishment.

This outcome seems difficult to understand particularly since the courts have repeatedly held that students do not enjoy the same level of constitutional protection as their adult counterparts when the school or state have an interest in protecting the student or other student’s wellbeing. In New Jersey v. T.L.O. the Supreme Court ruled that schools could infringe upon students Fourth Amendment rights against illegal search and seizure. The Court found that a school may search a student’s personal property without probable cause if it was operating under a “reasonable suspicion” and the scope of the search “was reasonably related in scope to the circumstances that justified the interference in the first place.”\textsuperscript{34} The Court later extended schools’ right to infringe upon students’ Fourth Amendment rights to allow searches where no suspicion existed in the context of students who wish to engage in school-sponsored extracurricular activities. In Vernonia School District the Supreme Court enforced the school’s right to drug test athletes to “prevent student athletes from doing drugs, to protect their health and safety, and to provide drug users with assistance programs.”\textsuperscript{35} The Court found the school’s purpose of deterring drug use and reducing the risk of immediate physical harm associated with

\textsuperscript{34} New Jersey v. T.L.O., 469 U.S. 325 (1985).
drug use and participation in sports very compelling.\textsuperscript{36} Thus, when students’ health and safety are at risk, the Supreme Court has been willing – if not permissive – in allowing school policies that seriously and immediately impact students’ constitutional rights. The impact of bullying on students’ health and safety is just as a significant threat, if not more significant, given the large body of research showing the harmful consequences of on-going bullying on a student’s health and welfare. The Constitution does not weigh one constitutional right against another and says that one right is deserving of greater protection; thus, if the court is willing to find that a student’s Fourth Amendment rights can be impinged to ensure his safety, the same court should be willing to curtail another student’s First Amendment right if the result is shielding children from real and identifiable harm.

**Conclusion:**

Bullying and cyber-bullying amongst adolescents is a threat to children’s health, safety, and ability to effectively learn and develop, which the court needs to acknowledge so that schools and legislatures can institute meaningful school policies and legislation. The court either needs to abandon its application of Tinker in the context of bully-related communications or the court must revisit the “substantial disruption” to the school community rule to encompass “substantial disruption to an individual harm.” Once the court recognizes and allows the premise that substantial harm perpetrated against an individual can actually bring harm upon the whole community, the court then will be in a position to protect our nation’s vulnerable citizens: its children.

\textsuperscript{36} Id.