

BULLYING AND FREE SPEECH: CAN SCHOOLS DEFINE BULLYING AND SURVIVE A FIRST AMENDMENT CHALLENGE?

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INTRODUCTION

Public schools strive to create and sustain a safe learning environment for their students. Given that student-on-student bullying is occurring more frequently on and off-campus, school authorities are seeking ways to address this problem through the creation of anti-bullying policies. However, this becomes a complex matter when a school's definition of bullying has the possibility of infringing on a students' First Amendment speech rights. In today's legal environment, creating a definition of bullying that is both effective and constitutional is difficult to do.¹

The purpose of this Note is to set forth guidelines for defining bullying and cyberbullying in primary and secondary schools that I argue do not limit the First Amendment speech rights of students, but still protects the safety of all children. The first part of this Note explores the phenomenon of bullying and cyberbullying in schools, and the tension between the school's responsibility to provide a safe learning environment and the duty to respect students' First Amendment rights. The second half, and main part of this Note, sets forth guidelines for defining bullying by examining legal precedent and reviewing numerous state statutes so that these guidelines satisfy constitutional requirements.

II. THE PHENOMENON OF BULLYING AND CYBERBULLYING IN SCHOOLS

¹ Robert Winters, *Knocking the Cyberbullying Offline: Using Constitutionally- Policy to*

The presence of bullying in schools has been around for generations, slowly evolving from the traditional schoolyard bullying to the ever more ubiquitous phenomenon of cyberbullying. The definition of bullying adopted by psychologists is “repeated physical, verbal or psychological abuse of victims by perpetrators who intend to cause harm” involving a power imbalance.² The behavior can be overt, involving physical behaviors, or covert, with emotional-social interactions.³ In addition, as communication via electronic means has become the norm today for many students, bullying has evolved into another problem known as cyberbullying -- where students use cell phones, social media sites, chat rooms, and other forms of technology to expand bullying into the virtual world.⁴

According to national surveys, 70 percent of middle school and high school students have experienced bullying at some point.⁵ Six out of 10 American teenagers witness bullying at school once a day.⁶ In addition, each day 160,000 students miss school for fear of being bullied.⁷ Students who are targets of repeated bullying behavior experience extreme fear and stress of going to school, fear of using the bathroom, fear of riding the bus to and from school, physical symptoms, as well as the diminished ability to

² Sandra Graham, *Bullying: A Module for Teachers*, AMERICAN PSYCHOLOGICAL ASSOCIATION (2013), <http://www.apa.org/education/k12/bullying.aspx>

³ *Bullying Info and Facts*, PACER’S NATIONAL BULLYING PREVENTION CENTER (2012), <http://www.pacer.org/bullying/resources/info-facts.asp>

⁴ Richard Donegan, *Bullying and Cyberbullying: History, Statistics, Law Prevention*, THE ELON JOURNAL OF UNDERGRADUATE RESEARCH IN COMMUNICATIONS VOL. 3, No. 1 (Spring 2013), <https://www.elon.edu/docs/e-web/academics/communications/research/vol3no1/04DoneganEJSpring12.pdf>

⁵ Graham, *supra* note 2.

⁶ *Bullying and Harassment*, NATIONAL EDUCATION ASSOCIATION (2012), <http://www.nea.org/home/19535.htm>

⁷ *Bullying Statistics/ Cyber Bullying Statistics/ School Bullying Statistics*, NATIONAL ASSOCIATION OF AFRICAN AMERICAN STUDIES (Based on 2004 survey), <http://naaas.org/statistics.pdf>

learn.⁸ Research indicates victims of chronic bullying are more likely to develop depression or think about suicide, while bullies are more likely to be convicted of criminal charges.⁹ Actual harms of bullying include: psychological and physical illness, increased disruptions to learning, absenteeism, dropouts, healthcare costs,¹⁰ substance abuse, suicide, weapons in school, crime, and tragedies such as the Columbine school shooting.¹¹ Cyberbullying increases the effect of these harms because where traditional bullying is perpetrated primarily in the school and allows the victim to find shelter in the safety of their home, modern technology allows the victimization to continue around the clock.¹²

The public's perception of bullying behavior has continued to change with the rise of highly publicized tragic bullying incidents occurring in schools around the nation.¹³ The intense national scrutiny on these horrific incidents of bullying, as well as subsequent research on the harms of bullying, has prompted policymakers and state legislatures to pass anti-bullying statutes.¹⁴ As of April 2013, 49 states have enacted legislation

⁸ *Supra* note 6.

⁹ Harvard Mental Health Letter, *School Bullying has long long-lasting events*, HARVARD HEALTH PUBLICATIONS – HARVARD MEDICAL SCHOOL (Sept. 2009),

http://www.health.harvard.edu/press_releases/school-bullying-has-long-lasting-effects

¹⁰ Brady Coleman, *Pragmatism's Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence*, 8 EMPLOYEE RTS. & EMP. POL'Y J. 239, 265 (2004).

¹¹ *Effects of Bullying*, STOPBULLYING.GOV – U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://www.stopbullying.gov/at-risk/effects/>

¹² Honourable Mobina S.B. Jaffer, Honourable Patrick Brazeau, *Cyberbullying Hurts: Respect for Rights in the Digital Age*, CANADA STANDING SENATE COMMITTEE ON HUMAN RIGHTS 1,6 (Dec. 2012),

<http://www.parl.gc.ca/Content/SEN/Committee/411/ridr/rep/rep09dec12-e.pdf>

¹³ Matthew Fenn, *A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in A Sticky Situation?*, 81 FORDHAM L. REV. 2729, 2736 (2013)

¹⁴ *Id.* at 2737.

requiring school districts to adopt policies regarding bullying.¹⁵ 47 of these states mandate schools to develop policies including electronic forms of bullying.¹⁶

The challenge for school districts then becomes to develop an anti-bullying policy that provides an effective definition of bullying and cyberbullying. However, crafting a definition of bullying raises complex constitutional problems, specifically regulating speech that may potentially infringe on the First Amendment rights of students. Indeed, schools have a strong interest in maintaining order in the school environment, informing students of acceptable ways to interact with one another, and providing students with an optimal learning environment.¹⁷ A core mission of public schools is to prepare students to become engaged, ethical citizens in our society.¹⁸ One way to accomplish this is to create a safe learning environment that teaches respect for students' free speech rights protected by the Constitution and state law, while at the same time ensuring that student speech does not substantially disrupt the learning environment nor devolve into bullying.¹⁹

However, these two principles come at odds in many instances. For example, at what point does wearing a shirt that displays the Confederate flag turn into bullying?

¹⁵ Sameer Hinduja, Justin Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RESEARCH CENTER (April 2013), http://cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf

¹⁶ Id.

¹⁷ Fenn, *supra* note 13 at 2749.

¹⁸ American Jewish Committee and Religious Freedom Education Project/First Amendment Center, *Harassment, Bullying, and Free Expression: Guidelines for Free and Safe Public Schools*, RELIGIOUS FREEDOM EDUCATION PROJECT/ FIRST AMENDMENT CENTER 1, <http://www.nsba.org/Newsroom/Spotlight-On/Harassment-Bullying-and-Free-Expression-Guidelines-for-Free-and-Safe-Public-Schools.pdf>

¹⁹ Id.

Some students will view it as an expression of Southern pride.²⁰ Others, including students of African-American descent, will view it as supporting slavery or racial segregation.²¹ Or consider the case of Dylan Klebold and Eric Harris, both who produced graphic, violent stories involving weapons for assignments for their classes at Columbine High School, as well as created films depicting themselves shooting their classmates.²² Would their expressions fall under First Amendment protection or under the definition of bullying? Some could consider it as creative expression whereas others could consider it as speech threatening other students. And what if a student creates a Facebook page at her home called “Highschool Hoes” and posts pictures of nine other students with lewd captions beneath each?²³ Does this type of conduct fall under “bullying” as defined by the school? These types of situations convey the importance of school districts needing a comprehensive definition of bullying so it strikes a balance between First Amendment protected student speech and the safety of students.

II. GUIDELINES TO DEFINE BULLYING

The U.S. Supreme Court has recognized that students have the right under the First Amendment to express religious, social, and political opinions in public schools, even if they may be controversial views.²⁴ Under the guidance of U.S. Supreme Court

²⁰ Id. at 5.

²¹ *Supra* note 18 at 5.

²² Andrew Gumbel, *Dylan Klebold, 17. Eric Harris, 18. The misfits who killed for kicks*, THE INDEPENDENT (April 22, 1999), <http://www.independent.co.uk/news/dylan-klebold-17--eric-harris-18-the-misfits-who-killed-for-kicks-1088734.html>

²³ Chris Gordon, *Student Charged in Facebook Cyber Bullying Case*, NBC WASHINGTON (Mar. 22, 2011), <http://www.nbcwashington.com/news/local/Student-Charged-in-Facebook-Cyber-Bullying-Case-118394349.html>

²⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 736, 21 L. Ed. 2d 731 (1969).

decisions, recent Appellate Court opinions concerning school policies on bullying and harassment, as well as reviewing numerous state law definitions of “bullying”, I have devised guidelines for defining bullying and cyberbullying that I contend strikes the correct balance between providing a safe school environment for students and protecting free speech.

1) *Cannot be unconstitutionally vague or overly broad.* A definition of bullying that includes protected speech, or is so vague that students are unable to understand when they cross the line into “bullying” speech, is unconstitutional and therefore unable to be enforced by school districts.²⁵ Examples of such definitions are those that use terms such as: “emotional distress”, “offensive”, “annoying”, “uncomfortable”, “alarming”, and/or “belittles an individual”. These terms are open to a great deal of interpretation due to their vagueness. What counts as an “offensive” act or as an “uncomfortable” act? Many of these terms discipline the alleged bully based on how the victim “feels” or “perceives” the act without any inquiry into whether the reaction was objectively reasonable.²⁶

In addition, these terms may encompass protected speech if not made more precise. For example, in *DeJohn v. Temple University*, the 3rd Circuit Court of Appeals held that Temple University’s anti-harassment policy was overbroad and subjective because of its use of terms such as “hostile”, “offensive”, “gender-motivated” without any qualifying language.²⁷ The use of those terms “could conceivably be applied to cover any speech of a ‘gender motivated’ nature ‘the content of which offends someone.’

²⁵ U.S. Const. amend. V; U.S. Const. amend. XIV, Martha McCarthy, *Anti-Harrassment Policies in Public Schools: How Vulnerable Are They?*, 31 J.L. & EDUC. 52(2002).

²⁶ *Anti-Bullying Policy Yardstick*, ALLIANCE DEFENDING FREEDOM FOR FAITH, FOR JUSTICE, <http://media.citizenlink.com/truetolerance/AntiBullyingPolicyYardstick.pdf>

²⁷ *DeJohn v. Temple Univ.*, 537 F.3d 301, 317 (3d Cir. 2008).

This could include ‘core’ political and religious speech, such as gender politics and sexual morality.”²⁸

2) *Must be broad enough.* The definition of bullying must be broad enough so it addresses the current realities of bullying.²⁹ No longer is bullying thought of as simply having a student push another student at the playground. Narrow definitions of bullying that only include physical assault or a serious threat of assault will fail to protect students because they exclude other types of non-violent bullying behavior such as cyber-bullying, harassment, etc.³⁰ School districts need to have a clear understanding of what types of behaviors bullying encompasses and draft a definition that addresses those behaviors, while still protecting the First Amendment rights of students. An example of a definition that may be considered narrow is Utah’s definition of bullying. Utah defines bullying as:

“intentionally or knowingly committing an act that:

- (i) (A) endangers the physical health or safety of a school employee or student;
(B) involves any brutality of a physical nature such as whipping, beating, branding, calisthenics, bruising, electric shocking, placing of a harmful substance on the body, or exposure to the elements;
(C) involves consumption of any food, liquor, drug, or other substance;
(D) involves other physical activity that endangers the physical health and safety of a school employee or student; or
(E) involves physically obstructing a school employee's or student's freedom to move; and
- (ii) is done for the purpose of placing a school employee or student in fear of:
 - (A) physical harm to the school employee or student; or
 - (B) harm to property of the school employee or student.³¹

²⁸ Id. ; Nate Kellum, *3rd Circuit Upholds Ruling Against Temple University “speech code”*, ALLIANCE DEFENDING FREEDOM FOR FAITH. FOR JUSTICE (Aug. 04, 2008), <http://www.adfmedia.org/News/PRDetail/2318?search=1>

²⁹ John Dayton and Anne Dupre, *A Child’s Right to Human Dignity: Reforming Anti-Bullying Laws in the U.S. and other Nations* 1,16 , <http://0-5.uga.edu/seminar/Bullying%20Law%20Review%20Ireland%202009.pdf>

³⁰ Id.

³¹ See UTAH CODE ANN. § 53A-11a-102(1)(a) (LexisNexis 2009).

At first glance, it seems that Utah has addressed many types of bullying behaviors. However, Utah's law is formulated to deal with hazing, only a component of bullying. Thus, this type of narrow definition fails to meaningfully address what bullying actually encompasses.³²

3) *Focuses on speech traditionally not protected in schools by the First Amendment.* The Supreme Court recognizes “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”³³ Four Supreme Court cases have limited the First Amendment rights of students in public schools.³⁴ Schools may regulate speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others,”³⁵ is “vulgar, lewd, obscene, or plainly offensive;”³⁶ promotes illegal drug use;³⁷ or is likely to be perceived to “bear the imprimatur of the school.”³⁸ These restrictions do not infringe on a students’ First Amendment rights and therefore should be mentioned in a bullying definition. However, it is important to note that these categories have qualifying language in order to avoid being declared unconstitutionally vague or overbroad. For example, the Arkansas legislature defines “substantial disruption” to mean “without

³² R. Kent Piacenti, *Toward A Meaningful Response to the Problem of Anti-Gay Bullying in American Public Schools*, 19 Va. J. Soc. Pol’y & L. 58, 81 (2011).

³³ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

³⁴ Winters, *supra* note 1.

³⁵ *Tinker*, 393 U.S. at 513.

³⁶ *Bethel Sch. Dist. No. 403*, 478 U.S. at 682.; *Chandler v. McMinnville School Dist.*, 978 F.2d 524 (9th Cir. 1992)

³⁷ *Morse v. Frederick*, 551 U.S. 393, 409, 127 S. Ct. 2618, 2629, 168 L. Ed. 2d 290 (2007).

³⁸ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271, 108 S. Ct. 562, 570, 98 L. Ed. 2d 592 (1988); Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 Wake Forest L. Rev. 641, 661 (2011).

limitation that any one or more of the following occur as a result of the bullying: (i) necessary cessation of instruction or educational activities; (ii) inability of students or educational staff to focus on learning or function as an educational unit because of a hostile environment; (iii) severe or repetitive disciplinary measures are needed in the classroom or during educational activities; or exhibition of other behaviors by students or educational staff that substantially interferes with the learning environment.”³⁹ Arkansas has created a precise definition of “substantial disruption” so to avoid being vague or overbroad.

In addition to the Court’s speech limits referenced above, the First Amendment also provides no protection to “true threats” in any setting.⁴⁰ Although the Supreme Court has not explicitly defined the meaning of “true threat”, most lower courts have interpreted it to mean whether a reasonable person would expect the recipient of the speech to feel threatened by harm.⁴¹ In reference to the school environment, courts have held that, “in light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other students.”⁴² Thus, school districts should include “true threat” within their definition, as it does not infringe on free speech rights.

4) *Must be objective.* A good definition of bullying focuses on the acts or words said by the alleged bully,⁴³ and evaluates those acts or words under the totality of the circumstances under a reasonable speaker standard. Definitions of bullying should not

³⁹ Ark. Code § 6-18-514; Sameer Hinduja, *Bullying Beyond the Schoolyard: Preventing and Responding to Cyberbullying* 1, 118 (Aug. 2008)

⁴⁰ *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 1547, 155 L. Ed. 2d 535 (2003).

⁴¹ Winters, *supra* note 1.

⁴² *Lovell ex rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996).

⁴³ *Supra* note 26.

stop a school's inquiry at how the victim perceives the bully's acts or words or how they "feel", but continue to inquire whether the reaction was objectively reasonable.⁴⁴ This would protect speech that overly sensitive students would conclude as bullying, such as the statement "You suck at tennis" while preparing for a competitive tennis match. A reasonable person would probably not conclude that statement to be bullying when looked within the totality of circumstances.

Furthermore, the Ninth Circuit Court of Appeals in *Sarah Lovell v. Poway Unified School District* agrees with this approach. The court stated statements are to be judged by an objective standard that focuses on the speaker.⁴⁵ "The test is whether a reasonable person uttering a communication would foresee that the listener would interpret the statement as a serious expression of intent to harm."⁴⁶ In addition, the Ninth Circuit asserted that statements "should be considered in light of their entire factual context."⁴⁷

For example, Delaware uses the reasonable speaker standard in their definition as such: "intentional written, electronic, verbal or physical act against student, volunteer or employee *that a reasonable person should know will have effect of*: (1) placing in *reasonable fear* of substantial harm to emotional or physical well-being or substantial damage to property; (2) creating hostile, threatening, humiliating, or abusive educational environment due to pervasiveness or persistence of actions or due to power differential; (3) interfering with a student's safe school environment necessary to facilitate

⁴⁴ Id.

⁴⁵ Kathleen Conn, *Student Threats and Violence in Schools*, BULLYING AND HARASSMENT: A LEGAL GUIDE FOR EDUCATORS (2004), <http://www.ascd.org/publications/books/104147/chapters/student-threats-and-violence-in-schools.aspx>

⁴⁶ Id.

⁴⁷ *Lovell By & Through Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996).

educational performance, opportunities or benefits; or (4) perpetuating bullying by inciting.”⁴⁸

5) *Includes “intent” or “purpose”*. An important component of a good definition of bullying looks at the “intent” or “purpose” of the speech. This means that the act be done willfully, knowingly, or with deliberation to hurt, harm, humiliate, etc.⁴⁹ A student’s behavior without any intention of harm towards another student is simply speech rather than bullying speech. For example, children with Asberger’s Syndrome can sometimes behave in a controlling and aggressive manner in order to cope with the anxieties they face in social situations.⁵⁰ Under a definition of bullying without any mention of intent, their behavior is “bullying”. But once their behavior is analyzed under a definition of bullying including intent, their behavior is no longer recognized as bullying because the intent to harm is absent. One way of incorporating this into a bullying definition is to look at Georgia’s definition of bullying: “an act which occurs on school property, on school vehicles, at designated school bus stops, or at school functions or activities, or by use of data/software accessed through computer/system/network, or other school electronic technology that is a: (1) *willful attempt or threat to inflict injury* on another person when accompanied by apparent present ability to do so; (2) *intentional display* of force such as would give victim reason to fear/expect imminent bodily harm; or (3) *intentional written/verbal or physical act* which reasonable person would perceive as intended to threaten, harass, or intimidate...”⁵¹

⁴⁸ Del. Code Ann. tit. 14, § 4112D (West).

⁴⁹ *Supra* note 3.

⁵⁰ *Lists of Bullying Behavior*, THE LEARN TO BE BUDDIES SERIES (Feb. 3, 2010); <http://learn2bebuddies.wordpress.com/2010/02/03/is-all-aggression-bullying/>

⁵¹ Ga. Code Ann. § 20-2-751.4 (West).

6) *Does not prohibit expression of religious, philosophical, or political views.*

Student speech that conveys ideas involving religious, philosophical, or political views should not fall under the definition of bullying because they are in large part, protected by the First Amendment.⁵² This was first recognized in *Tinker v. Des Moines* where several students decided to wear armbands at school in order to show their opposition to the Vietnam War.⁵³ In ruling in favor of the students, the Court stated “when there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.”⁵⁴ In addition, students may engage in speech that does not “collide with the rights of others.”⁵⁵ It remains though that student speech that conveys an idea can be highly controversial and walk a thin line between protected speech and bullying speech. For example, one student may wear a shirt that says “Gay? Fine by me” whereas another student may wear a “Be Happy, Not Gay” t-shirt.⁵⁶ Both students may view each other’s messages as bullying and demand the school censor the speech.⁵⁷ However, only when there is a showing of substantial disruption or a violation of another student’s legal rights, may a school censor the speech.⁵⁸ Examining once again Georgia’s definition of bullying, Georgia’s definition

⁵² American Jewish Committee and Religious Freedom Education Project/First Amendment Center, *supra* note 18.

⁵³ *Tinker*, 393 U.S. at 504.

⁵⁴ *Id.* at 509.

⁵⁵ *Id.* at 513.

⁵⁶ American Jewish Committee and Religious Freedom Education Project/First Amendment Center, *supra* note 18.

⁵⁷ Charles C. Haynes, *Combat bullying, but protect religious and political speech*, FIRST AMENDMENT CENTER (June 1, 2012), <http://www.firstamendmentcenter.org/combat-bullying-but-protect-religious-and-political-speech>

⁵⁸ *Tinker*, 393 U.S. at 509.

states: “an act...that: (A) causes *substantial* physical harm or visible bodily harm; (B) has effect of *substantially interfering* with student’s education; (C) is *so severe, persistent or pervasive that it creates intimidating or threatening* educational environment; or (D) had effect of *substantially disrupting* orderly operation of the school.”⁵⁹ Similar to Georgia’s definition of bullying, it is vital that schools include the language from *Tinker* in order to restrict certain types of political, philosophical, and religious speech and not be in violation of the First Amendment.

7) *Includes electronic devices.* A good definition of bullying also includes a definition of “cyberbullying,” a form of bullying that is conducted via cyberspace and requires the use of technology.⁶⁰ It is imperative school districts include the use of electronic communication devices in their definition of bullying because the consequences of cyberbullying are often more permanent than traditional bullying.⁶¹ Victims of cyberbullying are often unable to escape the torment because cyberbullies, through the use of electronic devices, are able to reach their victims at all times.⁶²

However, attempting to regulate speech made via an electronic device treads a delicate territory where school districts are potentially regulating off-campus speech. Courts have made it clear that schools have the authority to regulate speech that occurs on-campus, or at school-sanctioned events that are the equivalent to being on-campus.⁶³ Therefore, schools should feel confident in defining cyberbullying speech when it

⁵⁹ Ga. Code Ann. § 20-2-751.4 (West).

⁶⁰ *BULLYING AND CYBERBULLYING IN SCHOOLS: AN ANALYSIS OF STUDENT FREE EXPRESSION, ZERO TOLERANCE POLICIES, AND STATE ANTI-HARRASMENT LEGISLATION* 620, 623, 2011 WL 3556523 (Aug. 18, 2011).

⁶¹ *Id.* at 624.

⁶² *Id.*

⁶³ *Hazelwood*, 484 U.S. at 270; *Morse*, 551 U.S. at 401

originates on-campus either through the school's resources or the student's personal technology.⁶⁴ Nevertheless, the waters are much murkier when it comes to regulating off-campus speech that bullies others.⁶⁵ Courts are unable to come to a consensus whether (and when) schools have jurisdiction to regulate off-campus speech. Despite this, a definition of cyberbullying can be crafted using the reasoning from a number of cases.

Some courts use a "foreseeability" standard, meaning if it was foreseeable the student speech would reach the campus, the school can regulate it.⁶⁶ Other courts have used the "sufficient nexus" test, where schools can regulate off-campus speech that has been directed at a school-specific audience,⁶⁷ or the speech has been brought onto the campus.⁶⁸ Thus, schools should use both the "foreseeability" and "sufficient nexus" language within their definition of cyberbullying, and it will most likely survive a constitutional challenge from being constitutionally overbroad.⁶⁹ After incorporating this jurisdictional language in their definition, schools should then apply the same guidelines mentioned throughout the Note when defining cyberbullying speech, as they do to traditional bullying speech, in order to not violate the First Amendment speech rights of students.

⁶⁴ Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 Wake Forest L. Rev. 641, 658 (2011).

⁶⁵ Goodno, *supra* note 64 at 658.

⁶⁶ Goodno, *supra* note 64 at 659; Wisniewski, *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 37 (2d Cir. 2007).; *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010).

⁶⁷ Goodno, *supra* note 64 at 660; *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 569 Pa. 638, 645, 807 A.2d 847 (2002); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

⁶⁸ Goodno, *supra* note 64 at 660; *Bethlehem*, 807 A.2d at 865.

⁶⁹ Goodno, *supra* note 64 at 662.

8) *Protects the safety of all children.* Although schools under federal law have an obligation to ban student-on-student harassment on the basis of race, color, national origin,⁷⁰ sex,⁷¹ religion or disability,⁷² school officials should also be mindful that bullying can occur to anyone. Quite often bullying is not motivated by the categories mentioned above, but instead occurs within a relatively homogenous group and often involves a power imbalance between peers.⁷³ The definition of bullying should not be limited to an exclusive set of personal characteristics, but rather protect the safety of all children.⁷⁴

CONCLUSION

Though we can all presumably agree that bullying is wrong and harmful to students, bullying can be difficult to define within the context of First Amendment speech rights. It is essential that bullying definitions be written carefully and precisely to guarantee that they do not limit the First Amendment rights of students. The guidelines to define bullying provided within this Note establish the right balance between protecting the free speech of students and maintaining a safe school environment for all students.

⁷⁰ 42 U.S.C.A. § 2000d (West).

⁷¹ 20 U.S.C.A. § 1681 (West) .

⁷² 42 U.S.C.A. § 12132 (West).; American Jewish Committee and Religious Freedom Education Project/First Amendment Center, *supra* note 18 at 3.

⁷³ *MODEL ANTI-BULLYING LEGISLATION: PROMOTING STUDENT SAFETY, CIVILITY, AND ACHIEVEMENT THROUGH LAW AND POLICY REFORM* 1, 27, 2011 WL 6026134 (Nov. 24, 2011).

⁷⁴ *Id.*