

## Introduction

Bullying has unfortunately become a standard part of school culture and is not new within the educational landscape.<sup>1</sup> Technological advancement in the form of the internet and its various social media platforms has created a new venue for bullying by making it possible for students to bully one another in the virtual world twenty-four hours, seven days a week.<sup>2</sup> This phenomenon has been dubbed ‘cyberbullying’ and often leads to negative consequences for the victims in the real world.

The National Crime Victimization Survey (NCVS) estimated that over two million students between the surveyed ages of twelve to eighteen years old were victims of cyberbullying in the 2010-2011 school year.<sup>3</sup> This was a total of nine percent of the student population, an increase from six percent in 2009. Fast-forward to 2014 and that statistic jumped to over nineteen percent of high school students who reported being bullied in school with over fourteen percent who reported that they had been bullied online.<sup>4</sup>

Teachers and school administrators have been given broad discretion to handle traditional bullying i.e., harassment, intimidation, and even assault that occurs within schools. However, when the conduct occurs off school grounds and electronically, it becomes more difficult for schools to address and regulate the conduct. Unfortunately, there is no national law or policy that

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<sup>1</sup> Erica Goode, ‘School Bullying Is Common, Mostly by Boys, Study Finds’, The New York Times. April 2001, available at <http://www.nytimes.com/2001/04/25/us/school-bullying-is-common-mostly-by-boys-study-finds.html>

<sup>2</sup> See StopBullying.org, available at <http://www.stopbullying.gov/cyberbullying/what-is-it/>

<sup>3</sup> See U.S. Department of Education: Results From the 2011 School Crime Supplement to the National Crime Victimization Survey. August 2013, available at <http://nces.ed.gov/pubs2013/2013329.pdf>

<sup>4</sup> Centers for Disease Control and Prevention. June 2014. Youth risk behavior surveillance- United States, 2013. Morbidity and Mortality Weekly Review, v. 63, available at <http://www.cdc.gov/mmwr/pdf/ss/ss6304.pdf>

exist regarding cyber bullying, including no case precedent with an analytical framework for the courts to use when addressing cases that involve cyber-bullying.

The question becomes whether the Supreme Court of the United States should use its case precedence surrounding student's first amendment rights within the school setting and extend these rulings to cases where a student is accused of cyber-bullying another to consider whether their actions are protected under the first amendment right to freedom of speech.

### Discussion

Cyber-Bullying involves the federal question of whether or not a student's online speech that has been identified as cyber-bullying is protected under the first amendment right to freedom of speech. Students who bring claims alleging deprivation of their first amendment rights under 42 U.S. Code Section 1983 should be subjected to the same standard of review, regardless of local jurisdiction.<sup>5</sup>

### Cyber-Bullying Statistics

Cyber bullying has become a national issue not only due to the federal question at issue but also do to the alarming statistics.

Over ninety-three percent of teenagers go online.<sup>6</sup> Nine out of ten teenagers within the United States are active on social media with as much as seventy-six percent of students using sites such as Instagram and forty-five percent of teenage students using Facebook.<sup>7</sup>

Given the number of teenagers' online and accessing social media, a new venue has been created for speech and expression. Just as speech and expression in the physical world, speech,

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<sup>5</sup> Cornell University School of Law Legal Information Institute, available at <http://www.law.cornell.edu/uscode/text/42/1983>

<sup>6</sup> <http://facebook-parental-controls-review.toptenreviews.com/30-statistics-about-teens-and-social-networking.html>

<sup>7</sup> See <http://www.cbsnews.com/news/kids-social-media-survey-instagram-twitter-facebook/>

expression, and conduct in the cyber world can reach the level of harassment and bullying.

### Cyber Bullying

Merriam Webster's Dictionary defines Cyber bullying as the electronic posting of mean-spirited messages about a person (as a student) often done anonymously.<sup>8</sup> The internet and its various social media platforms allow bullies to post electronically twenty-four hours a day, seven days a week with anonymity.<sup>9</sup> There are numerous social media platforms a bully can choose from such as Facebook, Instagram, Myspace, Tumblr, and Twitter. Social media platforms have their own distinctive way of allowing students to interact within cyber communities. For example, twitter allows students to send out short messages and phrases under a 140 characters or less. Instagram allows students to post pictures and insert tags to share the content with their friends. Alternatively, sites such as Facebook and Myspace allow users to create pages, with Facebook placing emphasis on the individual user and Myspace placing emphasis on entertainment artist and their respective pages.

A prime example of cyber bullying is the story of Megan Meier. Megan's story was one of the first nationally recognized cases of cyber bullying. Megan was a thirteen year old from St. Charles, Missouri.<sup>10</sup> Someone whom she believed to be a sixteen-year old boy named Josh on the social media platform Myspace in 2006 befriended Megan.<sup>11</sup> After the two became friends over an eight-week period, Megan began to feel more confident regarding her looks, as she had

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<sup>8</sup> Webster's Online Dictionary, available at <http://www.merriam-webster.com/dictionary/cyberbullying>

<sup>9</sup> See Randy Taran's, 'Cyberbullying Apps-Why Are We Allowing Anonymous Cruelty'? available at [http://www.huffingtonpost.com/randy-taran/cyberbullying-apps\\_b\\_3941599.html](http://www.huffingtonpost.com/randy-taran/cyberbullying-apps_b_3941599.html)

<sup>10</sup> See Megan Meier Foundation website <http://www.meganmeierfoundation.org/megans-story.html>

<sup>11</sup> Id.

battled depression due to her weight.<sup>12</sup>

However on October 15, 2006, Megan received a message from Josh stating that he did not want to be friends with her anymore.<sup>13</sup> The next day she saw a survey posted online by Josh that called her fat and a slut.<sup>14</sup> He also sent a message stating she was a bad person, that everyone at school knew she was bad person, and to have a “shitty rest of [her] life.”<sup>15</sup> Megan committed suicide the same day.<sup>16</sup>

The most disturbing part of this story is that Josh was not a real sixteen year old boy, but was the parents of a girl whom Megan had ended a friendship with prior to their creation of the fake Josh profile.<sup>17</sup> The parents admitted to making the page but faced no criminal liability for their actions. Missouri placed anti-bullying legislation into place.<sup>18</sup>

### State Legislation

#### Missouri Anti-Bullying Legislation

1. Every district shall adopt an anti-bullying policy by September 1, 2007.
2. [Bullying] means intimidation or harassment that causes a reasonable student to fear for his or her physical safety or property. Bullying may consist of physical actions, including gestures, or oral, cyberbullying, electronic, or written communication, and any threat of retaliation for reporting of such acts.

Missouri School Code §160.775

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<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id.

## Illinois “Cyber Bullying” Legislation

1. [Cyber bullying] is bullying “through the use of technology or any electronic communication, including . . . any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted . . . by a wire, radio, electromagnetic system, photo electronic system, or photo optical system, including . . . [email], internet communications, instant messages, or [fax] communications.
2. [Cyber-bullying] includes the creation of a webpage or weblog in which the creator assumes the identity of another person or the knowing impersonation of another person as the author of posted content or messages if the creation or impersonation creates any of the effects . . . of [bullying].
3. [Cyber bullying] also includes the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons if the distribution or posting creates any of the effects . . . of [bullying].

## Illinois School Code § 5-27 Cyber Bullying

As demonstrated by both the Missouri and Illinois legislatures, some states have done an amazing job at defining bullying and specifically creating legislation to combat it. However, cyber-bullying cases often involve the federal question of whether the cyber speech conducted by the bully was protected under the first amendment right to free speech. The existence of a federal question in cases involving cyberbullying, give weight to the argument that this is a national issue that requires national legislation or case precedent from the Court.

To date, the response from the federal government has been in the form of a dear colleague letter sent out by the U.S. Department of Education's Civil Rights office stating their support for the efforts of local state department and local school districts in reducing bullying in schools as bullying " fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential."<sup>19</sup>

### Potential SCOTUS Framework

A student accused of cyber bullying against another student is most likely to assert freedom of speech as an affirmative defense regarding their conduct.<sup>20</sup> There are four seminal cases regarding freedom of speech and expression pertaining to public student's first amendment rights in the school setting.

First, there was the landmark case of *Tinker v. Des Moines Independent Community School District*.<sup>21</sup> In *Tinker*, students wore black armbands to school to protest the Vietnam war, despite a newly enacted school policy prohibiting the conduct.<sup>22</sup> They were suspended from school and filed a claim under §1983 asserting that the disciplinary action taken against them violated their constitutional right to free speech.<sup>23</sup>

In *Tinker*, the Court held that the constitution did not permit the school to deny the students' form of expression as the school could not demonstrate any facts, which might

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<sup>19</sup> <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>

<sup>20</sup> See Aaron Shorts, 'Cyberbullies Get First Amendment Protection'. July 2014, available at <http://nypost.com/2014/07/01/cyberbullies-get-first-amendment-protection-from-court/>. Article critical of NY Court of Appeals decision to strike down anti bullying legislation that was scene as overly broad as it failed to consider first amendment rights.

<sup>21</sup> *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

<sup>22</sup> See *Tinker* at 504. School enacted policy specifically after learning of planned protest.

<sup>23</sup> Id.

reasonably have led school authorities to forecast substantial disruption to the school and no disturbances occurred. The court famously asserted that, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>24</sup>

Second, there was *Bethel School District No. 403 v. Fraser*.<sup>25</sup> In *Bethel*, Matthew Fraser gave a speech nominating his friend for a student association position that was filled with sexual innuendos such as, “I know a man who is firm - he's firm in his pants, he's firm in his shirt, his character is firm - but most of all, his belief in you the students of Bethel, is firm.”<sup>26</sup> The school deemed his speech inappropriate and suspended him.<sup>27</sup>

In *Bethel*, the Court held that the school did not violate Fraser’s constitutional first amendment right as the “purpose of public education in America is to teach fundamental values. . . [that] must . . . include consideration of the political sensibilities of other [students].”<sup>28</sup>

The Court recognized that First Amendment rights of students in the public schools “are not automatically coextensive with the rights of adults in other settings.”<sup>29</sup> Although student and teacher do not abandon their constitutional rights at the schoolhouse gate, those rights must be “applied in light of the special characteristics of the school environment.”<sup>30</sup> When applied in the light of the “special characteristics of the school environment,” it was determined the school had a right to “disassociate itself” from speech that was sexual in nature.<sup>31</sup> The Court determined

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<sup>24</sup> *Id.* at 506.

<sup>25</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677 (1986)

<sup>26</sup> *Id.* at 687.

<sup>27</sup> *Id.* at 689.

<sup>28</sup> *Id.* at 681.

<sup>29</sup> *Id.* at 682.

<sup>30</sup> *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)

<sup>31</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)

that a school did not have to tolerate student speech that is “inconsistent with its basic educational mission and is “merely sexual in nature and may cause disruption to the school environment.” The disassociation from the speech by the school would demonstrate to others that such vulgarity is “wholly inconsistent with the ‘fundamental values’ of public school education.”<sup>32</sup>

Third, there was *Hazelwood School District v. Kuhlmeier*. In *Hazelwood*, the school principal removed two articles from the school-sponsored newspaper as he believed some of the material to be inappropriate for younger students and subjects of the articles (the parents of a divorce story) did not consent to the article.<sup>33</sup>

The Court held that speech in a school newspaper is not public, as the school does not have the characteristics of all of the attributes of streets, parks, and other traditional public forums.<sup>34</sup> It was deemed a school sponsored activity and therefore the school had the right to censor it unlike the personal expressions of students in *Tinker* that were deemed permissible under the first amendment.<sup>35</sup>

Fourth, in *Morse v. Frederick* a school principal removed a fourteen foot banner displayed by student Joseph Frederick at a school sponsored outing (Olympic torch relay) that stated, “BONG HiTS 4 JESUS.”<sup>36</sup>

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<sup>32</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685-86 (1986)

<sup>33</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263 (1988)

<sup>34</sup> *Id.* at 267

<sup>35</sup> *Id.* at 271

<sup>36</sup> *Morse v. Frederick*, 551 U.S. 393, 397 (2007)



The Court held a principal may restrict speech at a school event that can be reasonably interpreted to be in support of illegal drug use.<sup>37</sup> The Court reasoned the school had a right to prevent the promotion of drug use and to discourage drug use.<sup>38</sup>

### Using Current Case Precedent

The Court could adopt its current analytical framework from its first amendment cases involving students right to free speech to set case precedent for cyber bullying cases.

Specifically, the court could establish:

- 1) That speech made within cyber communities is in-school speech or;
- 2) That first amendment speech is not protected under the first amendment if it invades the rights of others.

Designating the speech or conduct that occurs as a result of cyber-bullying as in-school speech would allow the Court to use the first analytical prong it established in Tinker where the court assesses whether conduct caused a material and substantial interference within the school.

63.5% of LGBTQ youth stated they felt unsafe at school because of their sexual orientation<sup>39</sup> and 31.8 percent had missed school at least one entire day of school in the past month because they felt unsafe or uncomfortable.<sup>40</sup> The Court could assess factors such as

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<sup>37</sup> Id. at 403.

<sup>38</sup> Id. at 409.

<sup>39</sup> Joseph G. Kosciw et. al., 'The 2011 National School Climate Survey: The experiences of lesbian, gay, bisexual and transgender youth in our nation's schools.' 2012, available at <http://www.glsen.org/sites/default/files/2011%20National%20School%20Climate%20Survey%20Full%20Report.pdf>

<sup>40</sup> Id.

student attendance and student productivity when evaluating whether cyber bullying caused a material and substantial interference within the school. First, schools receive federal funds that are rewarded based on compliance with various federal mandates and students attendance. Therefore, a school has an interest in insuring its students are regularly attending school. Second, a student's failure to regularly attend school is reported as developing poor educational outcomes including poor grades.<sup>41</sup> The school as a academic institution has an interest in ensuring its students receives an adequate education.

Alternatively, the Court could use the second prong of Tinker that assess whether or not the speech was an invasion of the rights of others. This prong was iterated in Tinker but was not used, as the substantial harm factor was sufficient in determining the students speech was protected under the first amendment, as the school could not have reasonably foreseen the protest causing harm and no harm occurred.<sup>42</sup>

This would allow the court to use factors such as the health of the student and potential to cause self-harm as a result of cyber-bullying. This could serve as a valuable analytical framework given that students who experienced bullying were at an increased risk for depression, anxiety, sleep difficulties, and poor school adjustment.<sup>43</sup> Additionally they were at an increased risk for substance use, academic problems, and violence later in adolescence and

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<sup>41</sup> See. Vaughan Byrnes and Robert Balfanz, 'Chronic Absenteeism: Summarizing What We Know From Nationally Available Data.' May 2012, available at [https://ct.global.ssl.fastly.net/media/W1siZiIsIjIwMTQvMDgvMTUvMjE1dnkya3BzOF9GSU5BTENocm9uaWNBYnNlbnRlZWlzbVJlcG9ydF9NYXkxNi5wZGYiXV0/FINALChronicAbsenteeismReport\\_May16.pdf.pdf?sha=ffcb3d2b](https://ct.global.ssl.fastly.net/media/W1siZiIsIjIwMTQvMDgvMTUvMjE1dnkya3BzOF9GSU5BTENocm9uaWNBYnNlbnRlZWlzbVJlcG9ydF9NYXkxNi5wZGYiXV0/FINALChronicAbsenteeismReport_May16.pdf.pdf?sha=ffcb3d2b)

<sup>42</sup> Martha McCarthy, Cyberbullying Laws and First Amendment Rulings: Can They Be Reconciled?, 83 Miss. L.J. 805, 828 (2014)

<sup>43</sup> See article cited *supra* note 4.

adulthood.<sup>44</sup> Furthermore, students who were bullied were twice as likely as their non-bullied peers to experience negative health effects such as headaches and stomachaches.<sup>45</sup> Moreover, it has been determined that there is a strong association between bullying and suicide-related behaviors mediated by factors such as depression and del delinquency.<sup>46</sup> For example, bullied teens were twice as more likely to report suicidal thoughts and three times more likely to report an attempt at suicide than youth who reported not being bullied.<sup>47</sup>

### Conclusion

Due to the presence of the federal question of whether a student's mean spirited message about another student made within cyber communities is considered protected speech under the first amendment is present in cyber bullying cases, there is a need for national case precedent to address this question and to provide an analytical framework for lower courts to use.

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<sup>44</sup> Id.

<sup>45</sup> Gianiuca Gini and Tiziann Pozzoli, 'Bullied Children and Psychosomatic Problems: A Meta-analysis. September 2013, available at <http://pediatrics.aappublications.org/content/early/2013/09/11/peds.2013-0614>

<sup>46</sup> Marci Hertz and James Wright, 'Bullying and suicide: A public health approach. Journal of Adolescent Health, 53. July 2013, available at [http://www.ncdsv.org/images/JAH\\_Bullying-and-Suicide-a-public-health-approach\\_7-2013.pdf](http://www.ncdsv.org/images/JAH_Bullying-and-Suicide-a-public-health-approach_7-2013.pdf)

<sup>47</sup> Dorothy Espelage and Melissa Holt, 'Suicidal Ideation and School Bullying Experiences After Controlling for Depression and Delinquency,' Journal of Adolescent Health, v 53. 2013, available at [http://www.ncdsv.org/images/JAH\\_Suicidal-ideation-and-school-bullying\\_7-2013.pdf](http://www.ncdsv.org/images/JAH_Suicidal-ideation-and-school-bullying_7-2013.pdf)