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CYBER-BULLYING: OBSTACLES AND SOLUTIONS FOR TEACHERS AND ADMINISTRATORS TO STOP CYBER-BULLYING

Seth Greenspan

“Never be bullied into silence. Never allow yourself to be made a victim. Accept no one’s definition of your life, but define yourself.”

–Harvey S. Firestone

INTRODUCTION

Donnie, an 8-year-old girl, was switched from a private to a public school. That switch changed her life forever. Donnie was bullied extensively for the first 2 days and by her own account stated, “the first 2 days were the worst of her life.”¹ While standing in line in the cafeteria two boys continued bullying her. She wanted to defend herself but knew it was wrong. However, she could not stand it anymore so she took matters into her own hands. She pushed one of the boys and kicked the other. She was sent to the principal’s office and disciplined for her retaliation. But what are the consequences for the bullies? Can the public school suspend and/or discipline the bullies? Of course, there is no question that public schools are well within their rights to discipline the bullies for actions that occur on school campus.²

On the other hand, Teresa, a junior high public school student is being tormented and bullied constantly in school. Teresa is too shy to speak up and not as brave as Donnie to lash out against the bullies. Teresa longs for each and every school day to be over, to return to the comfort of her own home. She returns home

¹ Pacer’s National Bullying Prevention Center, *Stories*, available at <http://www.pacer.org/bullying/stories/> (last visited Dec. 12, 2012).

² *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 (2d Cir. 1979). The court explained: Our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.

to find that the bullying persists – she is also being cyber-bullied.³ Do the administrators and educators at the public school have any recourse against the cyber-bullies (assuming they are students at the school)? What legal actions can be taken against Teresa’s abusers?

Cyber-bullying is a relatively new semblance of bullying that has emerged over the past two decades. Cyber-bullying is so widespread that it has become the bullying method of choice.⁴ The evolution and expansion of the Internet and online communities such as YouTube, Gchat, Facebook etc., has given bullies access to even more avenues to bully their peers. No longer do we live in a world where children and adolescents are merely bullied in schoolyards or in classroom settings. The home is no longer a safe haven. Bullying is all around us.

Cyber-bullies typically hide behind the mask of anonymity.⁵ They may lack face-to-face contact with the individuals being persecuted and they may not know the level of duress that is produced by their misconduct. Therefore, they are unlikely to experience feelings of regret, sympathy, or compassion toward the victim as some face-to-face bullies potentially feel. Thus, there is an even bigger need to combat cyber-bullying and the best place to start is at school.

³ Pacer’s National Bullying Prevention Center, *Stories*, available at <http://www.pacer.org/bullying/stories/> (last visited Dec. 12, 2012).

⁴ Puresight Online Safety, *The Dangers of Cyberbullying*, available at <http://puresight.com/Cyberbullying/the-dangers-of-cyber-bullying.html> (last visited Dec. 12, 2012).

⁵ Education Resources Information Center, *When Teens Turn Cyberbullies*, available at http://www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=EJ741205&ERICExtSearch_SearchType_0=no&accno=EJ741205 (last visited Dec. 12, 2012).

Cyber-bullying is a devastating challenge which all public schools face.⁶ “Nearly one in three teens say they’ve been victimized via the Internet or cell phones.”⁷ A school is a place where children are educated, learn life lessons and should feel comfortable attending. Although cyber-bullying happens both on school grounds and outside schools grounds, “a teacher's role - or a school's role - is still fuzzy in many places. What legal rights or responsibilities do they have to silence bullies, especially when they operate from home?”⁸ Schools want to help combat cyber-bullying⁹ but often the policies, if enacted, are too vague and schools are not properly guide.¹⁰ Schools need to be aware of their legal rights and responsibilities.¹¹

This paper will discuss the differences between traditional bullying and cyber-bullying, and the corresponding statutes states have begun to enact to combat bullying. Secondly, this paper will discuss the constitutional issues posed to public schools in adopting a cyber-bullying policy, namely First Amendment and Due Process issues. In conjunction with the constitutional issues, the paper will address policy issues in enacting a cyber-bullying policy, and will propose model cyber-bullying provisions to be included in a policy for public schools.

⁶ Mary Ellen Flannery, *Top Eight Challenges Teachers Face This School Year*, available at <http://neatoday.org/2010/09/13/top-eight-challenges-teachers-face-this-school-year> (last visited Dec. 12, 2012).

⁷ Id.

⁸ Id.

⁹ Jan Hoffman, *Online Bullies Pull Schools Into the Fray*, N.Y. Times, June 27, 2010, http://www.nytimes.com/2010/06/28/style/28bully.html?_r=1&sq=hoffman&st=cse&scp=3&pagewanted=all. The author notes: Many principals hesitate to act because school discipline codes or state laws do not define cyberbullying.

¹⁰ Cdnogen, *Research Post: School Officials Handle Cyber Bullying*, StudentWebStuff.com, <http://www.studentwebstuff.com/mis/showthread.php?t=8123> (last visited, Dec. 12, 2012).

¹¹ Id.

I. CYBER-BULLYING: CURRENT ISSUES AND STATUTES

“Cyber-bullying is the willful and repeated use of cell phones, computers, and other electronic communication devices to harass and threaten others. Instant messaging, chat rooms, e-mails, and messages posted on websites are the most common methods of this new twist of bullying. Cyber-bullies can quickly spread messages and images to a vast audience, while remaining anonymous, often making them difficult to trace.”¹² Cyber-bullying has a detrimental impact on lives of children and adolescents. Students being cyber-bullied report feeling depressed, angry, sad, and frustrated.¹³ On a more extreme note, cyber-bullied students report of having suicidal thoughts.¹⁴ Many students who are cyber-bullied within the comforts of their own homes are afraid or embarrassed to go back to school.

There are vast differences between cyber-bullying and traditional bullying. Besides for their differences, cyber bullying is even more devastating for a number of reasons. First, cyber-bullying offenders remain anonymous. “The cyber-bully can cloak his or her identity behind a computer or cell phone using anonymous email addresses or pseudonymous screen names.”¹⁵ This ‘mask’ does not allow for the bullies to see the harm and emotional distress they are causing. Second, cyber-bullying is viral – large numbers of people can be involved and the harm is even more widespread. For example, Tyler Clementi, a Rutgers University student was

¹² National Conference of State Legislatures, *Cyberbullying*, available at <http://www.ncsl.org/issues-research/educ/cyberbullying.aspx> (last visited, Dec. 12, 2012).

¹³ Cyberbullying: Identification, Prevention, and Response, Sameer Hinduja, Ph.D. and Justin W. Patchin, Ph.D., page 1

¹⁴ Cyberbullying Research Summary: Cyberbullying and Suicide, Sameer Hinduja, Ph.D. and Justin W. Patchin, Ph.D.

¹⁵ Cyberbullying: Identification, Prevention, and Response, Sameer Hinduja, Ph.D. and Justin W. Patchin, Ph.D., page 2

taped while engaged in a consensual sexual encounter with another man in his dorm room.¹⁶ Dharun Ravi, Tyler's roommate and person responsible for taping the encounter, invited others to watch and discuss what he saw online. The video went viral which soon thereafter led to Tyler committing suicide.¹⁷ Lastly, children and adolescents are more technically savvy than their adult counterparts and while parents and teachers are doing their jobs preventing traditional bullying, they lack the technological knowhow to keep track of what teens are doing online.¹⁸

Given the differences between traditional bullying and cyber-bullying, the current anti-bullying statutes that have been enacted amongst the States are lacking. Although Montana is the only state yet to enact an anti-bullying law¹⁹, laws enacted by the other states do not adequately provide teachers and administrators guidance on how to enforce and regulate. Further, of the states that have enacted anti-bullying laws, many of them are only geared towards traditional bullying and do not address cyber-bullying.²⁰

New York's anti-bullying law reads:

Such comprehensive district-wide safety plan shall be developed by the district-wide school safety team and shall include at a minimum:
j. Strategies for improving communication among students and between students and staff and reporting of potentially violent incidents, such as the establishment of youth-run programs, peer mediation, conflict resolution, creating a forum or designating a

16 Ashley Hayes, Prosecutor to appeal 30-day sentence in Rutgers gay bullying case, CNN, May 21, 2012, <http://www.cnn.com/2012/05/21/justice/new-jersey-rutgers-sentencing/index.html>

17 Linsey Davis & Emily Friedman, NJ Gov. Wonders How Rutgers 'Spies' Can Sleep at Night After Clementi's Suicide, ABC News (Sept. 30, 2010), <http://abcnews.go.com/US/suicide-rutgers-university-freshman-tyler-clementi-stuns-veteran/story?id=11763784>.

¹⁸ Id.

¹⁹ *Infra* Figure 1

²⁰ Id.

mentor for students concerned with **bullying** or violence and establishing anonymous reporting mechanisms for school violence.²¹

The pertinent information to take away from this enacted law is that New York's anti-bullying statute fails to mention cyber-bullying or electronic harassment – which encompasses cyber-bullying. To combat the problem, the problem must first be addressed. We see from here that statutes such as New York's are lacking and must be changed.

Comparing New York's statute with that of New Jersey's, a more comprehensive and encompassing statute, which reads:

- a. A school district's policy on prohibiting harassment, intimidation or bullying shall be amended, if necessary, to reflect the provisions of **"Electronic communication."**
- b. In the event that a school district's policy on prohibiting harassment, intimidation or bullying does not accord with the provisions of subsection A, the district's existing policy prohibiting harassment, intimidation or bullying shall be deemed to include an **"electronic communication"** as defined.²²

We see from here that New Jersey has taken the appropriate steps to halt cyber-bullying, but having the statute is not the end all and be all.

Many state anti-bullying statutes direct state educational agencies to, among other things: report on incidents of bullying, provide training, develop curriculum and standards for training, and develop teacher preparation program standards on identification and prevention.²³ While a statute requiring schools to enact policies to combat and prevent electronic communication and/or cyber-bullying, that is not

²¹ New York N.Y. Educ. Law § 2801-a (McKinney 2009)

²² New Jersey N.J. Stat. Ann. §§ 18A:37-13, -15 (West 2011)

²³State Educational Agency: Model Anti-Bullying Policies and Other Resources, July 2011

sufficient. There is also a need for a model policy that schools can follow.²⁴ In light of the usefulness of a model, only a number of the states that have enacted anti-bullying statutes have also drafted a model policy for schools to follow.²⁵ This exacerbates and compounds the problem.

Although extremely helpful, having a model policy is not the ultimate means to the end. The policy must be comprehensive and inclusive. The ten states that have model policies fail to give schools proper guidance on how to deal with cyber-bullying. Some states fail to mention cyber-bullying or electronic communication in their policies.²⁶ Even the states that have created model policies including cyber-bullying and electronic communication,²⁷ leave teachers and administrators up in the air as how to apply the definition as to not potentially create First Amendment issues. Hence, while model policies have been drafted and more and more states have enacted statutes to combat cyber-bullying, the question still remains: how can public school officials legally implement policies to deal with cyber-bullying without violating First Amendment and Due Process rights of students?

II. FIRST AMENDMENT AND DUE PROCESS ISSUES IN CYBER-BULLYING POLICIES

The First Amendment to the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; ***or abridging the freedom of speech***, or of the press; or the right of the people peaceably to

²⁴ State Educational Agency: Model Anti-Bullying Policies and Other Resources, July 2011

²⁵ These states include California, Delaware, Florida, Iowa, Oklahoma, Nebraska, New Jersey, Rhode Island, South Carolina, and Washington

²⁶ Sample Policy for Bullying Prevention, Cal. Dep't of Educ., *available at* <http://www.cde.ca.gov/lr/ss/se/samplepolicy.asp> (last updated July. 3, 2012);

²⁷ Delaware's Model Bully Prevention Policy, www.doe.k12.de.us/.../bully%20prevention%20policy%20template.pdf

assemble, and to petition the Government for a redress of grievances.²⁸

In order to adopt a model cyber-bullying policy, First Amendment issues must be at the forefront of drafter's minds and pens. It has long been held that "students in the public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."²⁹ "Freedom of speech and freedom of the press, which are protected by the First Amendment are among the fundamental personal rights."³⁰ This right undoubtedly protects the speech of students,³¹ even while on a schools campus, however, students' rights must be "applied in light of the special characteristics of the school environment."³² Striking a balance between maintaining students rights to Free Speech and public schools' objectives to maintain order is a difficult task but one that can be accomplished. To determine whether a cyber-bullying is constitutional, schools must know whether or not the speech violates students' rights to Free Speech. Unfortunately with regards to off-campus speech (cyber-bullying), the Supreme Court has not reached a conclusion and, evidenced by the Second Circuit and Third Circuit split, lower courts are divided over this very issue.³³

The best-known case discussing student's protection of Free Speech at school

28 USCA Const Amend. I

²⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)

³⁰ *Chaplinsky v. State of New Hampshire*, Supreme Court of the United States. March 9, 1942 315 U.S. 568 62 S.Ct. 766

³¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)

³² *Id.*

³³ Compare *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011), (holding that the school could not discipline a student for speech created off-campus) with *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 40 (2d Cir. 2007) (holding that the school can regulate student speech created off-campus where it was reasonably foreseeable that it would reach the school campus).

is *Tinker v. Des Moines Independent Community School District*. The case, spotlighted on the Vietnam War, involved students and parents, from Des Moines, who ultimately decided the best way to publicize their objections to the hostilities in Vietnam and support a truce, was to wear black armbands and fast periodically during the holiday season, through New Years day.³⁴ The principals of the Des Moines schools found out about the objections to the war and quickly adopted a *new* policy at Des Moines public schools, outlawing armbands being worn to school.³⁵ The punishment for wearing an armband to school was suspension.³⁶ Although aware of the schools policy regarding these armbands, a number of students, including John Tinker, wore their black armbands to school and immediately were sent home and suspended from school.³⁷

The court in *Tinker* opined that the wearing of the armbands was ‘pure speech’ – speech that is “entitled to comprehensive protection under the First Amendment.”³⁸ It further stated that this ‘pure speech’ was “entirely divorced from actually or potentially disruptive conduct” on school grounds.³⁹ Although the newly enacted policy of the school was broken, the students were simply expressing their views *peacefully* and in no way was their expression – and therefore speech – disruptive. They went to school, sat in classes, talked amongst friends and acted as any orderly student would on a day-to-day basis at school. The only difference was that they were wearing a **black armband** and for that they were suspended and not

³⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

allowed to return until the armband was removed. In no way did the armbands disrupt school activities nor did the armbands exude un-school-like demeanor. The court stated that this case in no way related to similar cases where schools regulated clothing types, length of skirts or hairstyles,⁴⁰ all of which were within the schools authority to regulate.

The Supreme Court in *Tinker* recognized that speech while on school grounds differed from normal run of the mill speech and that schools needed to have some authority to regulate the speech of their students. Without such authority, schools would get disorderly and there would be potential for complete pandemonium. However, the court also acknowledged that this authority is not endless. *Tinker* shed no light on the main issue at hand - speech that originates off-campus. The court extended schools authority, holding that schools can regulate speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”⁴¹

A. ON-CAMPUS VS. OFF-CAMPUS SPEECH

Given the need for schools to have a certain amount of control over students’ speech, difficulty arises and schools are concerned over whether or not their current or potential cyber-bullying policies violate the First Amendment and whether or not they can regulate off-campus cyber-bullying. Schools must first

⁴⁰ Id. at 507-8. See *Ferrell v. Dallas Independent School District*, 392 F.2d 697 (C.A.5th Cir. 1968) and *Pugsley v. Sellmeyer*, 158 Ark. 247, 250 S.W. 538, 30 A.L.R. 1212 (1923)

⁴¹ Id. at 513

assess where the speech originated.⁴² It is uncontroverted that speech initiated on-campus is well within the schools authority to regulate.⁴³ The more difficult issue is speech initiated off-campus.

There are a number of lower court cases, which have dealt with the issue of when public schools have jurisdiction over a student's speech when the speech occurs off-campus. However, there is no uniformity in the decisions, causing even more confusion.

In determining whether or not speech originates on-campus, courts have used two different tests. The first test some of the courts use is the "reasonably foreseeable" test. In these instances, schools can regulate off-campus speech if it is "a reasonably foreseeable risk that the speech would materially and substantially disrupt the work and discipline of the school."⁴⁴ In *Wisniewski*, a students' creation and transmission of the IM icon - a small drawing of a pistol firing a bullet at a person's head, above which were dots representing splattered blood⁴⁵ - occurred away from school property on his parents home computer. Though the speech at issue in this case clearly originated off-campus, the court nevertheless concluded that this speech was not protected because of the reasonably foreseeable risk that it would materially disrupt the work and discipline of the school.⁴⁶

The second test the courts use is the "sufficient nexus" test. Here the courts look to see whether or not there is a sufficient nexus between the speech and the

⁴² See *J.S. ex rel. H.S. v. Bethlehem Area School Dist.* 569 Pa. 638, 665 where the court lays down a foundation to determine the constitutional analysis of a students freedom of speech. The court explains that first a "location analysis" must be done followed by a "type of speech analysis."

⁴³ *Supra* Introduction

⁴⁴ *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2d Cir. 2007)

⁴⁵ *Id.* at 36

⁴⁶ *Id.* at 38

school.⁴⁷ The Supreme Court of Pennsylvania, in *J.S. v. Bethlehem*, used this reasoning to determine that an off-campus student created site, entitled “Teacher Sux,” which consisted of a number of web pages that made derogatory, profane, offensive and threatening comments, primarily about the student's algebra teacher, contained a “sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus.”⁴⁸ Coming to this conclusion, the court opined that the speech was not a protected speech and the school had the authority to discipline and take action against the student, as if the speech originated on-campus.

The court in *Bethlehem* applied a broader application of the “sufficient nexus” test, however, there are other lower courts that have been more hesitant and have applied a more narrow understanding of the “sufficient nexus” test.⁴⁹ The court in *Evans*, was reluctant to apply such a broad application of the test to a student who created a group on Facebook called “Ms. Sarah Phelps is the worst teacher I've ever met.”⁵⁰ The purpose of the group was for students to voice their opinions and comments about a teacher.⁵¹ The posting made from the students home computer and after school hours and did not contain threats of violence. Further, the postings did not disrupt school activities. Although there seems to be a sufficient nexus between the student’s speech and school, the court was unwilling to extend such a broad application and held that this off-camps speech was protected. Therefore, the

⁴⁷ *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1372 (S.D. Fla. 2010); *Beverly Hills*, 711 F. Supp. 2d at 1107; *J.S. v. Bethlehem Area School District*, 807 A.2d 847, 864 (2002)

⁴⁸ *J.S. v. Bethlehem Area School District*, 807 A.2d 847, 865 (2002)

⁴⁹ *Evans v. Bayer*, 684 F. Supp. 2d 1365 (S.D. Fla. 2010)

⁵⁰ *Id.* at 1370

⁵¹ *Id.*

school had no authority to regulate and/or discipline the speech.⁵²

Given the uncertainty of courts on how to apply the various tests, and in what instances to apply these tests, when a school adopts a model cyber-bullying policy, they should prudent to include both the foreseeability aspects and the sufficient nexus application of off-campus speech.⁵³

A1. OFF CAMPUS SPEECH – CIRCUIT SPLIT

To further complicate the issue of when off-campus speech can or cannot be regulated by schools, the 2nd Circuit and 3rd Circuit are split over this very issue.⁵⁴ *J.S. v. Blue Mountain*, a 3rd Circuit case was centered on a student who created from her home computer, an Internet profile of the principal.⁵⁵ The profile, on MySpace, contained his photograph misappropriated from school district website and profanity-laced statements insinuating that he was sex addict and pedophile.⁵⁶

The 3rd Circuits decision was heavily focused on the ‘reasonable foreseeability’ of the speech disrupting school activities. At oral arguments, the school district specifically conceded that, “[the student’s] speech did not cause a substantial disruption in the school.”⁵⁷ Along with the concession, the court relied on an important factor in that no student was able to access the MySpace account

⁵² Id.

⁵³ See *J.C. ex rel. R.C. v. Beverly Hills Unified School Dist.*, 711 F. Supp. 2d 1094 (2010) where the court used analyzed a student’s speech in terms of whether the speech was foreseeable to materially and substantially disrupt as well as whether there was a sufficient nexus between the speech and school activity.

⁵⁴ Compare *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915(3d Cir. 2011) with *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 40 (2d Cir. 2007)

⁵⁵ *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011)

⁵⁶ Id.

⁵⁷ Id. at 928

created from school computers, as MySpace was a blocked website.⁵⁸ The court further noted that the only printout version of the profile that was ever brought onto the school campus as the one that was expressly requested by the principal himself.⁵⁹ Because of the forgoing facts, the court held that “the School District could have reasonably forecasted a substantial disruption of or material interference with the school as a result of the profile [created by the student]. Under *Tinker*, therefore, the School District violated [the students] First Amendment free speech rights when [the student] was suspended for creating the profile.”⁶⁰

On the other hand, the 2nd Circuit in *Wisniewski* held that off campus speech can be regulated by school officials where the speech was reasonably foreseeable to reach the school campus.⁶¹ *Wisniewski*, was a case about a student using AOL instant messenger who had an IM icon with a small drawing of a pistol firing a bullet at a person's head, above which were dots representing splattered blood and beneath the drawing appeared the words “Kill Mr. VanderMolen,”⁶² the students English teacher. The student then transmitted messages to other students, who then informed the teacher of the icon.⁶³

The 2nd Circuit concluded that this ‘speech’ “crossed the boundary of protected speech and constituted student conduct that posed a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would “materially and substantially disrupt the work and discipline of the

⁵⁸ Id. at 929

⁵⁹ Id.

⁶⁰ Id. at 931

⁶¹ *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 40 (2d Cir. 2007)

⁶² Id. at 37

⁶³ Id.

school.”⁶⁴ Here the court, just like the 3rd Circuit focused on the ‘reasonable foreseeability’ of the speech reaching the school and disrupting school activities, however the 2nd Circuit found that the speech was not protected while the 3rd Circuit found that it was.

Given the uncertainty of the Court of Appeals, evidenced by the circuit split, this issue is ripe for the Supreme Court to hear. Given the nature of the speech in both *Blue Mountain* and *Wisniewski*, the Court should likely hold that speech of this caliber, which is aimed at a school official and contains vulgar and offensive material, is not protected speech. Although both of the circuits used the same reasoning to come to opposite conclusions, the 3rd Circuit likely erred in holding that the creation of the MySpace profile was not protected speech. Just as in *Wisniewski*, where the 2nd Circuit found that a students IM icon, which if had not been brought to the teachers attention would have never been known, was found to be unprotected and therefore speech the school could regulate, so too the profile which contained vulgar and rude comments about a schools principal is reasonably foreseeable to disrupt the school. The Supreme Court will likely hold that any speech aimed at teachers or administrators of schools which contain lewd, vulgar and indecent comments or depictions about those individuals is speech that is reasonably foreseeable to reach school grounds and therefore, even though the speech originated off campus, is speech that schools may regulate.

B. PROTECTED VS. UNPROTECTED SPEECH

Once the school has determined where the speech originated, there is yet

⁶⁴ Id. at 38-9

another question schools must ask, and yet another substantive matter that is essential for schools to include in their model cyber-bullying policies – what type of speech has occurred? Although this may seem obscure, the courts are again split as to what type of speech can be regulated. As *Tinker* so perfectly stated, students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁶⁵ However, there are certain types of speech, which students are not protected under their First Amendment rights.

The first category of unprotected speech is “true threats.”⁶⁶ For example, a student that creates a Facebook page entitled “Kill Professor Smith,” would be considered a true threat to that teacher, and this type of speech is not protected under the First Amendment. The court in *Lovell* explained “school officials are justified in taking very seriously student threats against faculty or other students.”⁶⁷ Given the high risk of certain threats against teachers and other student, serious and true threats are not protected speech and a model cyber-bullying policy need not clearly explain what a true threat is. A ‘true threat’ is easily spotted and a school will “know it when they see it.”⁶⁸

Although this category of speech seems pretty cut and dry, there are cases, such as one recently decided in a California state appeals court, which apply a deeper analysis to true threats. In May 2011 a juvenile confronted his teacher after

⁶⁵ *Tinker*, 393 U.S. at 506

⁶⁶ See *Watts v. United States*, 394 U.S. 705, 707-08 (1969) ; see also *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2d Cir. 2007)

⁶⁷ *Lovell ex rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996)

⁶⁸ *Jacobellis v. State of Ohio*, 378 U.S. 184, 196 (1964) where Justice Stewart, concurring, explained that he would not “attempt further to define the kinds of material [he] understood to be embraced within [pornography], but that he ‘knows it when he sees it’.”

she sent him to the principal's office.⁶⁹ After leaving the office, he pounded on the teacher's door, yelling: "Let me in you mother f— bitch. How could you do this to me?"⁷⁰ He also allegedly threatened the school principal who had spoken to him about his behavior in class. He allegedly left the official's office and said, "I'm going to f— them up."⁷¹ For this conduct, the student was charged with violating California Penal Code 71, which states:

Every person who, with intent to cause, attempts to cause, or causes, any officer or employee of any public or private educational institution or any public officer or employee to do, or refrain from doing, any act in the performance of his duties, by means of a threat ... is guilty of a public offense.⁷²

The appeals court focused on the context of the incident and noted that the student pounded on the teacher's door for two minutes, yelled at the teacher, displayed angry facial expressions and intimidating body language.⁷³ The court concluded his "physically aggressive behavior and belligerent statements in combination more than sufficiently established"⁷⁴ that he uttered a true threat.⁷⁵ The court also said a true threat was spoken to the principal when the student

⁶⁹ Speech Analysis, In true threat cases, context matters, available at <http://www.firstamendmentcenter.org/in-true-threat-cases-context-matters> (Last visited, Jan 2, 2012)

⁷⁰ Id.

⁷¹ Id.

⁷² West's Ann.Cal.Penal Code § 71

⁷³ Speech Analysis, In true threat cases, context matters, available at <http://www.firstamendmentcenter.org/in-true-threat-cases-context-matters> (Last visited, Jan 2, 2012)

⁷⁴ 2012 WL 5938072, Cal.App. 1 Dist., Nov. 28, 2012

⁷⁵ Speech Analysis, In true threat cases, context matters, available at <http://www.firstamendmentcenter.org/in-true-threat-cases-context-matters> (Last visited, Jan 2, 2012)

“ignored her efforts to block his progress toward the classrooms, and his aggressive conduct – in the classrooms themselves – directly interfered with [the principals] performance of her duties and implicitly threatened continued interference if she persisted in the performance of her disciplinary duties.”⁷⁶

This decision of the California appeals court shows that a true-threat analysis must be analyzed within its context. What is considered a true threat in one case can certainly be considered protected speech in another. This in turn raises the issue of the extent a true threat is really a true threat and at what points teachers are truly threatened by students’ expressions and speech. Although there is no clear cut line of what constitutes true-threats, as this California cases implies, the analysis is a tricky one and one that must always be put in context.

The second category of speech is speech that bears the connection to a school.⁷⁷ The Supreme Courts decision in *Hazelwood* shed light on the issue of when speech that bears a connection to the school can or cannot be regulated by the school. The court in *Hazelwood* was faced with a situation where the principal excised two pages of a student newspaper containing articles on teen pregnancy and the impact of divorce on students at the school.⁷⁸ The paper was produced by the school and funded by the school, although the student contributors and editors wrote articles as part of a journalism class.⁷⁹ As part of the schools policy, the

⁷⁶ 2012 WL 5938072, Cal.App. 1 Dist., Nov. 28 , 2012

⁷⁶ Speech Analysis, In true threat cases, context matters

⁷⁷ *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988)

⁷⁸ *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988)

⁷⁹ *Id.*

teacher of the journalism class submitted all articles to the principal for approval.⁸⁰ The principal objected to the two articles, one on teen pregnancy and one on divorce. His reasons, as explained by the court, were that “the pregnant students, although not named, might be identified from the text, and because he believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students,”⁸¹ and the divorce article mentioned a student by name who had complained of her father’s conduct and he believed that “the student's parents should have been given an opportunity to respond to the remarks or to consent to their publication.”⁸² The principal felt that there was no time to make the necessary changes before the paper went to press and therefore made the ultimate decision to excise those two articles.⁸³

The court concluded that the school was intended as a supervised learning experience for journalism students and therefore the school had authority to excise the pages they felt were not “reasonably related to legitimate pedagogical concerns.”⁸⁴ Therefore, any speech that in some way is connected to the school, whether it is speech in a school sponsored newspaper disseminated to the students or speech, which occurred at an off-campus school function, the school has the right and authority to regulate and condemn the speech. The court also noted that school officials did not deviate from their normal practices and policies and therefore the school was able to regulate the contents of the newspaper in any reasonable

⁸⁰ Id.

⁸¹ Id.

⁸² Id.

⁸³ Id. at 263

⁸⁴ Id. at 271

manner.⁸⁵

A more recent decision, *Fleming*, from the Tenth Circuit, citing *Hazelwood*, stated that “[speech which] students, parents, and members of the public might reasonably perceive to bear the ‘imprimatur of the school’ constitute school-sponsored speech, over which the school may exercise control, so long as its actions are reasonably related to legitimate pedagogical concerns [of the school].”⁸⁶ *Fleming*, a post-Columbine school shooting case, was centered on a project organized by two teachers in which students and anyone affiliated with the school were given the option of painting tiles to be hung in the school as a way to reconstruct and become comfortable with the school post-shooting.⁸⁷ Monies for the project were raised privately and were to be used by the two supervising teachers at their own discretion, although the area administrator gave strict guidelines of what could and could not be painted onto the tiles.⁸⁸

The project was then expanded beyond students to include first responders, community members, parents etc. and they were not given written copies of the guidelines.⁸⁹ These new members of the tile painting project wishes to paint certain things - the names of their children and religious symbols⁹⁰- but were informed that these symbols were outside the guidelines. Only later were the strict guidelines relaxed and the painters were then allowed put their children’s names or dates on the tiles, but were still not allowed to place religious symbols or anything obscene

⁸⁵ Id. at 269-71

⁸⁶ *Fleming v. Jefferson County School Dist. R-1*, 298 F.3d 918 (10th Cir. 2002)

⁸⁷ Id. at 920-1

⁸⁸ Id. at 921

⁸⁹ Id.

⁹⁰ Id.

or offensive on the tiles.⁹¹ Suit was brought alleging that students and other participants in the tile painting's free speech had been violated.⁹²

The court in *Fleming* noted that the *Hazelwood* decision did "not give schools unbridled discretion over school-sponsored speech."⁹³ The court explained that speech, which bears the imprimatur of the school, is broad and not restricted to speech or activities conducted as part of the school curriculum.⁹⁴ In terms of the imprimatur of the school, the court reasoned that the tiles were to become a lasting part of the school and therefore schools officials had the authority to regulate what was painted on the tiles.⁹⁵ As well, the purpose of reacquainting the students with the school and participating in community healing falls under the broad umbrella of schools pedagogical purposes.⁹⁶

It is evident from this line of cases that speech connected to a school, reasonably related to school activity, or related to school curriculum is not protected speech. For these reasons, school officials have the right to control and regulate these types of speeches First Amendment rights are not at issue.

The last type of speech that can be regulated is a more extensive type of speech. This type of speech was brought down under what is known as the "Tinker standard." The Court in *Tinker* set out a two-part test to determine when schools can regulate student speech. This two-part test reads as follows:

⁹¹ Id.

⁹² Id. at 922

⁹³ Id. at 934

⁹⁴ Id. at 926 where the court cites the lower courts opinion in that only school speech of activities with the school curriculum are considered unprotected speech and therefore subject to school discipline

⁹⁵ Id. at 931

⁹⁶ Id.

Conduct by the student, in class or out of it, which for any reason--whether it stems from time, place, or type of behavior that ***materially disrupts*** classwork or involves ***substantial disorder or invasion of the rights of others*** is, of course, not immunized by the constitutional guarantee of freedom of speech.⁹⁷

B1. MATERIALLY DISRUPTIVE SPEECH

Most courts that use the Tinker test in determining whether a speech is protected or not, apply the first prong – materially disruptive speech – more readily and conduct their analysis as such. However, the application of the first prong, as discussed below, has led to many different outcomes.

Comparing *Layshock ex rel. Layschock v. Hermitage School District* with *J.S. ex rel. H.S. v. Bethlehem Area Sch. District*, we see the evidence of the uneven outcomes of applying the “materially disruptive” prong of Tinker. Both of these cases involved a student a school creating a faux profile of an administrator at their respective schools on MySpace. The court in *Layshock* held that the school district did not have authority to punish student for expressive conduct outside of school that district considered lewd and offensive.⁹⁸ On the other hand, the court in *Bethlehem* came to the opposite conclusion holding that speech expressed by student on MySpace, was “on-campus” speech that implicated unique First Amendment concerns regarding the school environment and given the website's disruption of the entire school community, expelling the student did not violate his First Amendment rights.⁹⁹ These are just two examples of cases that have out with different conclusions are very similar sets of facts, showing that the application of the first prong of the

⁹⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)

⁹⁸ *Layshock ex rel. Layschock v. Hermitage School Dist.*, 650 F.3d 205 (3rd Cir. 2011)

⁹⁹ *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 569 Pa. 638, 666

Tinker test is no easy task.

There is also the additional problem of what “materially disruptive” means and how far the reach of “materially disruptive” will run. As we see in the case of *Doninger v. Niehoff*, where teachers and administrators were called away from school activities and meetings to respond to and deal with a student’s blog post,¹⁰⁰ the court held a materially disruptive speech occurred because the administrators were forced to interrupt their regular activities to respond to the problem. However, the court was hesitant to find a materially disruptive speech where an administrator was not disrupted from her regular activities when dealing with the consequences of a student video posting on YouTube.¹⁰¹ It is clear from the line of cases that the speech must be a real disturbance and not some minor inconvenience for administrators to deal with.¹⁰²

Needless to say, a cyber-bullying policy at a school should include provisions stating that a student’s First Amendment rights do not protect materially disruptive speech, whether it is on-campus or off-campus speech.

B2. SUBSTANTIAL DISORDER OR INVASION OF THE RIGHTS OF OTHERS

Courts have been reluctant to find a speech outside the realm of speech protected by the First Amendment by finding it violates the second prong of the Tinker test – speech that “impinges upon the rights of other students.”¹⁰³ Though the courts have yet to seriously apply the second prong it is not something, which should not be thrown to the wayside. Thus, speech that violates or impinges upon

¹⁰⁰*Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008)

¹⁰¹J.C ex rel. R.C. v. Beverly Hills unified School Dist., 711 F. Supp. 2d 1094, 1117

¹⁰²See J.S. ex rel. Snyder v. Blue Mountain School Dist., 650 F.3d 915 (3rd Cir. 2011)

¹⁰³ Tinker, 393 U.S. at 509

students right is a speech, which is not protected and schools would have the authority to regulate that speech.

C. SUMMATION OF FIRST AMENDMENT ISSUES IN RELATION TO CYBER-BULLYING

Schools adopting a model cyber-bullying policy must take into account First Amendment issues. Schools must assess where the speech occurred – on-campus or off-campus. On campus speech is undoubtedly within the rights of teachers and administrators to take action. The trickier question is that of off-campus speech. If the off-campus speech occurs at a school function, the school can regulate. Off-campus speech which either poses a ‘true threat,’ is materially disruptive to school discipline, or impinges upon other student’s rights, can be regulated by school educators.

These last three examples of speech are especially important in the world of cyber-bullying. Cyber-bullying more often than not occurs outside of the school campus, yet has a detrimental impact of students and teachers who are the victims. Many times the speech caused by the cyber-bully negatively impacts classroom activity and this is why schools are well within their rights to control these categories of speech. To truly combat the problem and avoid all constitutional issues, model cyber-bullying policies must include all aspects of the First Amendment analysis posed above. In this way the policy will be protected from First Amendment claims brought by students and administrators will know WHEN they are within their rights to take action against cyber-bullies.

III. DUE PROCESS ISSUES

Due process requires a cyber-bullying policy to address two issues. A policy must give students and parents proper notice of the policy and secondly, a policy may be challenged as being too vague, as seen in the *Layshock* case.¹⁰⁴

A. NON-VAGUE

The first to adopting a model cyber-bullying policy, which is not vague, is to have a strong definition.¹⁰⁵ The definition will notify school administrators, students, and teachers exactly what is unacceptable. The definition should not be overbroad, or vague – it must not punish constitutionally protected speech.¹⁰⁶

The key to a adopting a strong definition is to make sure each and every term is defined. Many courts have struck down policies or certain provisions of policies for lack of or lack of a clear definition.¹⁰⁷ A model definition of cyber-bullying should read as follows:

“Electronic communication” or “cyber-bullying” means any communication through an electronic device including but not limited to a telephone, cellular phone, computer or pager, which communication includes but is not limited to E-Mail, instant messaging, text messages, blogs, mobile phones, pagers, online games, and Web sites intended to:

- (i) Physically harm a student or damages the student's property; or
- (ii) Substantially interfere with a student's educational opportunities; or

¹⁰⁴ *Layshock ex rel. Layshock v. Hermitage School Dist.*, 650 F.3d 205 (3rd Cir. 2011)

¹⁰⁵ Anti-Defamation League, *Cyberbullying Prevention Law – An ADL Model Statute*, available at http://www.adl.org/main_internet/Cyberbullying_Prevention_Law.htm?Multi_page_sections=sHeading_3 (last visited, Dec. 12, 2012)

¹⁰⁶ *Id.*

¹⁰⁷ *Sypniewski v. Warren Hills Regional Bd. Of Educ.*, 307 F.3d 243, 261-5 (policy was not overbroad except for the section where the term “ill will” was not defined); See also, *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 458-59 (W.D. Pa. 2001) (policy did not contain a definition of “abuse” and was therefore overbroad).

- (iii) (Be so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or
- (iv) Substantially disrupt the orderly operation of the school.¹⁰⁸

This model language contains a clear and concise definition of cyber-bullying and also contains the provisions associated with the First Amendment analysis.¹⁰⁹

B. NOTICE

A cyber-bullying policy must also give parents and student notice of the policy. The details of the policy must be accurately conveyed to the students and parents in advance, so that they receive actual notice of the policy. To ensure proper notice the policy should be publicized in the school conduct code.¹¹⁰ “The notice will send a message to students, teachers and parents that the school is taking this issue seriously and does not accept inappropriate conduct. The notice will also serve to instruct students, parents, and school staff how to identify, respond to and report incidents of bullying.”¹¹¹

Another safety mechanism to ensure parents and students receive notice is that the school should require a signed confirmation of receipt and understanding letter from both students and parents, stating their awareness of the effective policy. Combining these two effective means for giving notice, a school's policy will not be challenged under any Due Process issues.

108 Anti-Defamation League, *Cyberbullying Prevention Law – An ADL Model Statute*, available at http://www.adl.org/main_internet/Cyberbullying_Prevention_Law.htm?Multi_page_sections=sHeading_3 (last visited, Dec. 12, 2012)

109 *Id.* Section II

110 Anti-Defamation League, *Cyberbullying Prevention Law – An ADL Model Statute*, available at http://www.adl.org/main_internet/Cyberbullying_Prevention_Law.htm?Multi_page_sections=sHeading_3 (last visited, Dec. 12, 2012)

111 *Id.*

IV. CONCLUSION

Given the viral nature and threat of cyber-bullying, schools must adopt policies, which combat the problem at its heart. For years, teachers, administrators and all educators have been in the dark as how to respond and discipline those students who have been abusing others via cyber-bullying. Were they allowed to do anything? The student posted something to the computer from their home. Is that within their confines to control?

The analysis above and the steps laid out for what should be included within a cyber-bullying policy, teachers and educators will no longer feel that they have no where to turn or there is nothing that they can do. A model cyber-bullying policy should be comprehensive and inclusive. The policy should cover all aspects of potential First Amendment challenges as well as Due Process challenges. By adopting such a policy schools will be able to halt cyber-bullying in their own schools which will lead to less students dreading coming to school and better and safer environment for our children to learn in.

FIGURE 1

| | Bullying law | Update or law proposed | Include "cyberbullying"¹ | Include electronic harassment | Criminal sanction | School sanction | Requires School Policy | Include off campus behaviors?² |
|----------------|--------------|------------------------|--------------------------|-------------------------------|-------------------|-----------------|------------------------|--------------------------------|
| Alabama | YES | proposed | NO | YES | NO | NO | YES | NO |
| Alaska | YES | proposed | NO | NO | NO | YES | YES | NO |
| Arizona | YES | NO | NO | YES | NO | YES | YES | NO |
| Arkansas | YES | NO | YES | YES | YES | YES | YES | YES |
| California | YES | NO | YES | YES | NO | YES | YES | NO |
| Colorado | YES³ | NO | NO | YES | proposed | YES | YES | NO |
| Connecticut | YES | NO | YES | YES | NO | YES | YES | YES |
| Delaware | YES | NO | NO | YES | NO | YES | YES | NO |
| Florida | YES | NO | NO | YES | NO | YES | YES | NO |
| Georgia | YES | proposed | proposed | YES | NO | YES | YES | proposed |
| Hawaii | YES | NO | YES | YES | proposed | YES | YES | NO |
| Idaho | YES | NO | NO | YES | YES | YES | YES | NO |
| Illinois | YES | NO | proposed | YES | NO | YES | YES | NO |
| Indiana | YES | proposed | NO | proposed | NO | YES | YES | NO |
| Iowa | YES | NO | NO | YES | NO | YES | YES | NO |
| Kansas | YES | NO | YES | YES | NO | YES | YES | NO |
| Kentucky | YES | proposed | proposed | YES | YES | YES | YES | NO |
| Louisiana | YES | NO | YES | YES | YES | YES | YES | YES |
| Maine | YES | proposed | proposed | proposed | NO | YES | YES | NO |
| Maryland | YES | NO | NO | YES | NO | YES | YES | NO |
| Massachusetts | YES | NO | YES | YES | NO | YES | YES | YES |
| Michigan | YES | NO | NO | YES | proposed | NO | YES | NO |
| Minnesota | YES | proposed | NO | YES | NO | YES | YES | NO |
| Mississippi | YES | NO | NO | YES | YES | YES | YES | NO |
| Missouri | YES | NO | YES | YES | YES | YES | YES | NO |
| Montana | NO | NO | NO | NO | YES | NO | NO | NO |
| Nebraska | YES | proposed | proposed | YES | NO | YES | YES | proposed |
| Nevada | YES | NO | YES | YES | YES | NO | YES | NO |
| New Hampshire | YES | proposed | YES | YES | NO | NO | YES | YES |
| New Jersey | YES | NO | NO | YES | NO | YES | YES | YES |
| New Mexico | YES | NO | NO | YES | NO | YES | YES | NO |
| New York | YES | NO | YES | YES | proposed | YES | YES | YES |
| North Carolina | YES | NO | YES | YES | YES | YES | YES | NO |
| North Dakota | YES | NO | NO | YES | YES | YES | YES | NO |
| Ohio | YES | NO | NO | YES | NO | YES | YES | NO |
| Oklahoma | YES | NO | NO | YES | NO | NO | YES | NO |
| Oregon | YES | NO | YES | YES | NO | YES | YES | NO |
| Pennsylvania | YES | NO | NO | YES | NO | YES | YES | NO |
| Rhode Island | YES | NO | NO | YES | NO | NO | YES | NO |
| South Carolina | YES | NO | NO | YES | NO | YES | YES | NO |
| South Dakota | YES | NO | NO | YES | NO | YES | YES | YES |
| Tennessee | YES | NO | YES | YES | YES | YES | YES | YES |
| Texas | YES | NO | NO | YES | NO | YES | YES | NO |
| Utah | YES | NO | YES | YES | NO | YES | YES | NO |
| Vermont | YES | NO | NO | YES | NO | YES | YES | YES |
| Virginia | YES | NO | NO | YES | NO | YES | YES | NO |
| Washington | YES | NO | YES | YES | NO | YES | YES | NO |
| West Virginia | YES | NO | NO | YES | NO | YES | YES | NO |
| Wisconsin | YES | NO | NO | NO | YES | YES | YES | NO |
| Wyoming | YES | NO | NO | YES | NO | YES | YES | NO |
| STATE TOTALS | 49 | 11 | 16 | 47 | 12 | 43 | 49 | 16 |
| FEDERAL | NO | 2009 | proposed | proposed | proposed | NO | NO | NO |
| Washington DC | YES | NO | NO | YES | NO | YES | YES | YES |

¹¹² State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies, Sameer Hinduja, Ph.D. and Justin W. Patchin, Ph.D.