NOTES

"HOSTILE LEARNING ENVIRONMENT:" DEVELOPING STUDENT SPEECH REGULATION BY APPLYING THE HOSTILE WORK ENVIRONMENT ANALYSIS TO CYBERBULLYING

*By Carla DiBlasio**

INTRODUCTION

Lindsey is a sixteen-year-old sophomore who logs onto her Facebook[1] page once she gets home from school. Lindsey updates her status and writes on her Facebook wall, "Amy is a fat cow. Don't ever talk to that cow, just tell her MOO." Katie is a fourteen-year-old eighth grade student at the same school. She decides to update her Facebook status after school and writes, "In case you didn't already know it, I'm the S*#%. Everyone else should go to hell." Are these instances where Lindsey and Katie are protected by their First Amendment free speech rights? Or, may their public school district punish them for their cyber speech?

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[1] Facebook is a social networking website that is operated and privately owned by Facebook, Inc. In addition to other functions, users may create a personal profile, add other users as friends, exchange messages, and join common interest groups. As of December 2011, Facebook has more than 845 million active users, which is about one person for every eight in the world. See Facebook Fact Sheet, at http://www.facebook.com/press/info.php?factsheet.

As the use of social media, and the attendant cyberbullying, becomes increasingly prevalent, high school officials will struggle to determine if they can sanction their students for making similar comments without infringing their students' free speech rights.[2] Unfortunately, the Supreme Court cases that deal with student free speech rights leave lower courts and school districts ill-equipped to cope with the ever-increasing problem of off-campus speech in the form of cyberbullying.

This Note explores the scope of a student's right to free "cyber speech" on social networking websites. Part I defines cyberbullying and illustrates that it is an emerging problem confronting today's schools. Part II examines the Supreme Court cases dealing with student free speech rights, known as the "*Tinker* Tetralogy," and discusses why that precedent has a limited application to cyberbullying. Part III explains that a new test is needed so that schools and courts alike can effectively protect victims of cyberbullying, while still protecting student speech that does not target victims. Part IV explains that the hostile work environment analysis used in Title VII employment discrimination cases and the sexual harassment analysis used in Title IX education cases provide a useful starting point for a new cyberbullying test. Part V outlines this Note's proposed test, which incorporates the four-factor analysis set forth in Title VII's hostile work environment claims and draws on similarities between the workplace and the classroom. Part VI explains how the test is applied and illustrates that this test operates like a sliding scale and is flexible enough to deal with the constant evolution of cyberspace and cyberbulling.

Ultimately, this test will enable schools to discern the level of perniciousness of the cyber speech to determine whether the speech rises to the level of "cyberbullying," such that school action is justified and, indeed, required. In other words, this test helps schools and courts discover the point at which a student's right to free speech transgresses a student's right to be protected from cyberbullying and a hostile learning environment. It is at this point that a school has the duty to limit the cyberbully's speech and protect the victim of cyberbullying.[3]

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[2] *Teens and Cyberbullying: An Executive Summary on a Report on Research*, NATIONAL CRIME PREVENTION COUNCIL (Feb. 28, 2007), http://www.ncpc.org/resources/files/pdf/bullying/Teens%20and%20Cyberbullying%20Research%20Study.pdf (Teens aged 13 to 17 are a growing online population. Their access to these electronic communication tools is present in many settings: at home, at school, at friends' houses, and even at public libraries and WiFi sites).

[3] The school's duty to intervene assumes that the school has actual knowledge of the speech.

I. CYBERBULLYING: A GROWING PROBLEM

Cyberbullying is online abuse that involves juveniles and students.[4] Cyberbullying is increasingly prevalent in today's schools and involves nearly half of U.S. teens.[5] The incidence of cyberbullying is higher among females than males and is most rampant among fifteen- and sixteen-year-olds.[6] While there are multiple definitions of the term, cyberbullying is typically described as intentional harm inflicted through electronic media.[7] Cyberbullying involves tormenting, threatening, harassing, humiliating, embarrassing or otherwise targeting a victim.[8] It is often motivated by prejudice and hate; indeed, some of the most serious cases are the result of bias towards the victim's race, religion, national origin, gender identity, or sexual orientation.[9]

Cyberbullying is a new form of harassment taking place within new forms of Internet-based technology.[10] It is instantaneous and its reach is potentially unlimited.[11] Anyone can join in with the simple

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[4] Jacqueline D. Lipton, *Combating Cyber-Victimization*, BERKELEY TECH. L.J. 1103, 1108 (2011). However, it is possible that in any given instance of cyberbullying, at least one of the parties may not be a youth. *Id.* at 1108-09.

[5] NATIONAL CRIME PREVENTION COUNCIL, *supra* note 2 (detailing that more than four in ten teens, ages thirteen to seventeen, report that they have experienced some form of cyberbullying in the last year). *See also Bullying/Cyberbullying Prevention Law: Model Statute and Advocacy Toolkit*, ANTI-DEFAMATION LEAGUE (Apr. 2009), http://www.adl.org/civil_rights/Anti-Bullying%20Law%20Toolkit_2009.pdf; Interview with Jill Rembrandt, Associate Project Director of the Anti-Defamation League in the Ohio, Kentucky and Allegheny Region (Feb. 2011).

[6] NATIONAL CRIME PREVENTION COUNCIL, *supra* note 2.

[7] *Id.*

[8] Lipton, *supra* note 4 at 1109.

[9] ANTI-DEFAMATION LEAGUE , *supra*, note 5, at 1. This supports the application of Title VII because Title VII is intended to protect against discrimination based on "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2011).

[10] According to the Associate Project Director of the Anti-Defamation League in the Ohio, Kentucky and Allegheny Region, there are at least thirty-five different websites where cyberbullying frequently takes place. Interview with Jill Rembrandt, *supra* note 5. Furthermore, cyberbullying and Internet harassment are pervasive threats. *See* ANTI-DEFAMATION LEAGUE, *supra* note 5, at 1, 4-5 (noting that in a 2007 survey of thirteen- to seventeen-year-olds, thirty-five percent of those surveyed reported being harassed over the internet within the last year).

[11] ANTI-DEFAMATION LEAGUE, *supra* note 5, at 1.

click of a mouse.[12] Messages and pictures on the Internet are potentially more disruptive than messages sent by traditional media because the Internet provides for the widespread distribution of information to an unlimited audience in a very short amount of time.[13] As a result, the impact on the victim can be more severe, and, its effects more profound.

The impact of cyberbullying is well documented. Studies show that "difficulty making friends, loneliness, low self-esteem, depression, poor academic achievement, truancy and suicide are all associated with being bullied."[14] Teenage victims report experiencing a wide array of emotions—ranging from anger to embarrassment to fear—as a result of cyberbullying.[15] Students need special protection from cyberbullying because online abuse quite simply affects children more drastically than adults.[16]

Public outcry over cyberbullying skyrocketed in recent years as major media outlets broadcasted stories about the tragic suicides of teenagers who endured cyberbullying. Take, for example, Tyler Clementi, a freshman at Rutgers University.[17] After learning that his roommate secretly filmed and broadcasted a video of a sexual encounter he had with another male student, Tyler posted the following

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[12] *See, e.g.*, ANTI-DEFAMATION LEAGUE, *supra* note 5, at 1 (outlining how cyberbullying "can rapidly swell as . . . others join in on 'the fun' "); Marlene Sandstrom, *More Insidious Harassment*, N.Y. TIMES, Sept. 30, 2010, http://www.nytimes.com/roomfordebate/2010/09/30/cyberbullying-and-a-students-suicide/more-insidious-harassment (describing the "insidious" nature of cyberbullying); Drew Jackson, *How is Cyberbullying Different than Traditional Bullying*, CYBERBULLYING (Apr. 18, 2005), http://www.slais.ubc.ca/courses/libr500/04-05-wt2/www/D_Jackson/traditional.htm (describing how a bully can send an email "to their entire class or school with a few clicks").

[13] *See* Doninger v. Niehoff, 594 F. Supp. 2d 211, 223 (D. Conn. 2009) ("An email can be sent to dozens or hundreds of other students by hitting 'send.' A blog entry . . . can be instantaneously viewed by students, teachers, and administrators alike. Off-campus speech can become on-campus speech with the click of a mouse.").

[14] ANTI-DEFAMATION LEAGUE, *supra* note 5, at 1. S*ee also* Lipton, *supra* note 4, at 1104-05 (explaining some instances of online abuse result in severe emotional distress and sometimes physical violence or death).

[15] *See* NATIONAL CRIME PREVENTION COUNCIL, *supra* note 2.Over half of cyberbully victims report feeling angry (56%); one-third report feeling hurt (33%); a third report being embarrassed (32%), and one in eight said they felt scared (13%).

[16] Lipton, *supra* note 4, at 1105-06 (discussing how cyberbullying disproportionately affects disempowered groups).

[17] Emily Friedman, *Victim of Secret Dorm Sex Tape Posts Facebook Goodbye, Jumps to His Death*, ABC NEWS Sept. 29, 2010, http://abcnews.go.com/US/victim-secret-dorm-sex-tape-commits-suicide/story?id=11758716.

statement on his Facebook wall: "Jumping off the gw bridge sorry."[18] Shortly thereafter, he did.[19]

Or, take the tragic tale of Megan Meier. After creating a Myspace account, Megan became online friends with "Josh Evans,"[20] a fake local sixteen year-old boy created by a classmate and her mother.[21] Megan and "Josh" quickly established an online relationship, but the friendship turned sour about a month later. "Josh" claimed he no longer wanted to be friends with Megan after hearing rumors about her, and he told Megan that the world would be better off without her.[22] Soon thereafter, several other students joined in and posted in electronic bulletins that "Megan Meir is a slut" and "Megan Meier is fat."[23] Devastated by the online abuse, Megan wrote that Josh was "the kind of boy a girl would kill herself over."[24] Megan hung herself in her bedroom closet a few hours later.[25]

II. THE *TINKER* TETRALOGY[26] HAS LIMITED APPLICATION

In order to address cyberbullying, it is important to assess what is "protected" versus "unprotected" speech under the First Amendment.[27] Categories of unprotected speech include: true threats,[28]

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[18] Friedman, *supra* note 17.

[19] *Id.*

[20] In reality, there was no Josh Evans. Rather, one of Megan's former friends and her mother created the "Josh Evans" profile on Myspace after the friendship between the two girls turned sour. *Parents: Cyberbullying Led to Teen's Suicide*, ABC NEWS: GOOD MORNING AMERICA (Nov. 19, 2007), http://abcnews.go.com/GMA/Story?id=3882520.

[21] ABC NEWS: GOOD MORNING AMERICA, *supra* note 20; *see also* Gordon Tokumatsu & Jonathan Lloyd, *MySpace Case: "You're the Kind of Boy a Girl Would Kill Herself Over,"*, NBCBAY AREA (Jan. 26, 2009), http://www.nbcbayarea.com/news/local/Woman-Testifies-About-Final-Message-Sent-to-Teen.html.

[22] Tokumatsu, *supra* note 21.

[23] ABC NEWS: GOOD MORNING AMERICA, *supra* note 20.

[24] Tokumatsu, *supra* note 21.

[25] *Id.*

[26] The *Tinker* Tetralogy refers to four U.S. Supreme Court cases, beginning with Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). Three additional U.S. Supreme Court cases complete the *Tinker* tetralogy. Morse v. Frederick, 551 U.S. 393 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). *See* Benjamin L. Ellison, *More Connection, Less Protection? Off-Campus Speech with On-Campus Impact*, 85 NOTRE DAME L. REV. 809, 819 n.67 (2010) ("With the addition of *Morse*, the *Tinker* trilogy becomes a tetralogy, from the Greek prefix *tetra-* meaning 'four.'")

[27] The First Amendment states, in part, "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I.

fighting words,[29] incitement,[30] and obscenity.[31] Courts further label some speech as unprotected because they consider it "without value, not advancing political discussion, unnecessary in form to communicate ideas, or a combination of these."[32] Schools may punish on-campus speech falling into these unprotected categories, and in addition, may even restrict speech that goes beyond these categories.[33]

U.S. Supreme Court precedent over the past 40 years establishes that public school students retain the First Amendment right to free speech while at school.[34] That right, however, is more limited than speech rights in a public forum because schools retain an interest in maintaining an orderly and productive learning environment.[35] Rather, "[t]he constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings."[36]

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[28] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982)("The first amendment does not protect violence."); Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam) (noting that true threats are not constitutionally protected speech).

[29] Chaplinsky v. New Hampshire, 315 U.S. 568, 573-74 (1942)(classifying speech directed at another and likely to provoke a violent response as unprotected).

[30] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (classifying speech that incites imminent lawless action as unprotected).

[31] Roth v. United States, 354 U.S. 476, 485 (1957) (stating that "obscenity is not within the area of constitutionally protected speech").

[32] *Chaplinsky*, 315 U.S. at 572 (articulating that some speech is "clearly outweighed by the social interest in order and morality").

[33] Ellison, *supra* note 26, at 812 (The *Tinker* Tetralogy "establish[es] that a student's constitutional right to freedom of expression gives way to the school's interests in education, order, and discipline if the expression is substantially disruptive, plainly offensive, perceived to be school sponsored expression, or understood to advocate illegal drug use.").

[34] *See, e.g.*, J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 926 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012).

[35] Conditions in the school environment potentially justify constraining student speech since:

[S]tudents and teachers cannot easily disassociate themselves from expressions directed towards them on school property and during school hours, because disciplinary problems in such a populated and concentrated setting seriously sap the educational processes, and because high school teachers and administrators have the vital responsibility of compressing a variety of subjects and activities into a relatively confined period of time and space . . . .

Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 968-69 (5th Cir. 1972). *See also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512-13 (1969); *Layshock*, 496 F. Supp. 2d at 595. Such discussion provides further support of the position adopted in this Note, such that schools have the duty to step in and limit speech when it creates a hostile learning environment.

[36] Morse v. Frederick, 551 U.S. 393, 396-97 (2007) (quoting Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)). *See also Morse,* 551 U.S. at 406 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995)) ("[T] he nature of those rights is what is appropriate for children in school."). *See also* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) ("It is evident that the school setting re-

Students' rights must be analyzed "in light of the special characteristics of the school environment."[37] As a result, student speech rights under the First Amendment have developed separately from the more general First Amendment free-speech jurisprudence.[38] *Tinker* is the Supreme Court's first attempt to define students' free speech rights in schools. *Tinker* and three subsequent student speech cases, collectively known as the *Tinker* tetralogy, address instances involving students' free speech rights.

A. The Starting Line: The *Tinker* Standard

Tinker dealt with a small group of high school and middle school students who wore black armbands to school to protest the Vietnam War. The school issued a warning that students wearing armbands on school grounds would face suspension.[39] Several students wore armbands anyway and the school suspended them in accordance with school policy.[40] The students subsequently brought a civil action against the school for infringing on their First Amendment rights.[41] The district court upheld the school sanction as reasonable in order to ensure school discipline.[42] The Eighth Circuit—hearing the case en banc—was evenly divided, so the lower court's decision was affirmed without opinion.[43] The Supreme Court accepted certiorari.[44]

The Supreme Court began its opinion by famously stating: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[45] Yet, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[46]

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quires some easing of the restrictions to which searches by public authorities are ordinarily subject."); *Vernonia*, 515 U.S. at 656 ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere . . . .").

[37] *Morse,* 551 U.S. at 397 (quoting *Tinker*, 393 U.S. at 506).

[38] *See infra* notes 39-89 and accompanying text.

[39] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

[40] *Id.*

[41] *Id.*

[42] *Id.* at 504-05.

[43] *Id.*at 505.

[44] *Id.*

[45] *Id.* at 506.

[46] *Id.* at 507

Thus, the Court observed that in order to limit a student's expression, the State[47] must show that the prohibition of a particular expression was caused by something more than the desire to avoid the discomfort associated with an unpopular viewpoint.[48] The Court did not find that students wearing armbands would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,"[49] nor did the Court find that there was any reasonable forecast of such disturbance.[50] Accordingly, the school's disciplinary actions violated the students' First Amendment rights.[51]

B. The *Tinker* Tetralogy & the Narrowing Scope of Protected Student Speech

While *Tinker* purportedly offered broad protection of student free speech rights by requiring a material and substantial disruption before school interference was justified, the Supreme Court considerably narrowed that protection in three subsequent cases. The three landmark cases did not overrule *Tinker,* but they explained that a school has the authority to limit student speech beyond the substantial interference criteria set forth in *Tinker.* In *Bethel School District No. 403 v. Fraser,*[52] *Hazelwood School District v. Kuhlmeier,*[53] and *Morse v. Frederick,*[54] the Supreme Court examined when speech constitutes a substantial disruption and when controversial speech occurs under the auspices of a school-sponsored activity.

1. *Fraser*: No Protection for Crude Speech

In 1983, Bethel School District suspended Matthew Fraser before his high school graduation because he used several graphic sexual comments and metaphors in a speech nominating a classmate for a student-elected office at a school assembly.[55] Fraser was disciplined

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[47] The "State" being referred to by the Court is the "State in the person of school officials." *Id.* at 509.

[48] *Id.* at 509.

[49] *Id.* (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[50] *Id.* at 514.

[51] "In the absence of a specific showing of constitutionality valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Tinker,* 393 U.S. at 511.

[52] 478 U.S. 675 (1986)

[53] 484 U.S. 260 (1987)

[54] 551 U.S. 393 (2007).

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Fraser's entire speech was:

for violating a school rule prohibiting "[c]onduct which materially and substantially interferes with the educational process . . . including the use of obscene, profane language or gestures."[56] Deferring to school officials, the Court upheld Fraser's sanction. The Court explained that the school remains a place where order, discipline, and inculcation of values must be maintained.[57]

The Supreme Court noted that many students, especially girls and younger listeners, were likely shocked and offended by the speech.[58] The Court proclaimed that "schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct . . . ."[59]

Under *Fraser,* schools have broader rights to determine what is appropriate behavior and speech.[60] Subsequent rulings make clear that the holding in *Fraser* relied on a different mode of analysis than *Tinker.*[61] *Fraser* did not rely on the substantial disruption test prescribed by *Tinker*; rather, the decision in *Fraser* rested on the "vulgar,"

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. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts--he drives hard, pushing and pushing until finally--he succeeds. Jeff is a man who will go to the very end--even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president--he'll never come between you and the best our high school can be. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677-78 (1986).

[56] *Id.* at 678.

[57] *Id.* at 681 ("[Public] education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.") (alteration in original) (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

[58] *Id.* at 683-84 ("The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.").

[59] *Id.* at 683.

[60] *Id.* at 682 ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.") (citing New Jersey v. T.L.O., 469 U.S. 325, 340-42 (1985). Years later, the *Morse* Court explained that Fraser's First Amendment rights were circumscribed "in light of the special characteristics of the school environment." Morse v. Frederick 551 U.S. 393, 405 (2007) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

[61] *Morse,* 551 U.S. at 405 ("*Fraser* established that *Tinker's* analysis is not absolute. Whatever approach *Fraser* employed, it was not the 'substantial disruption' analysis prescribed by *Tinker.*").

"lewd," and "plainly offensive" character of the speech and its negative impact on school's educational environment.[62]

2. *Hazelwood*: Control Over Pedagogical Concerns

In *Hazelwood*, students involved in a high school journalism class filed suit alleging violation of their freedom of speech rights after their school principal did not allow publication of articles dealing with divorce and teen pregnancy in the school newspaper.[63] The principal asserted that the material was inappropriate for younger students and compromised students' privacy, even though the articles used fictitious names.[64] Relying on the test from *Tinker*, the court of appeals found no evidence of a material disruption to class work or school discipline.[65] Subsequently, the Supreme Court reversed, holding that schools have broad discretion to limit student speech in school-sponsored activities.[66]

The Court noted that the school exercised a significant amount of control over its student newspapers and therefore concluded that the newspaper was part of the school's curriculum.[67] The students were under the supervision of a teacher and the paper was funded entirely by the school.[68] The Supreme Court upheld the school's actions because "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored activities as long as their actions are reasonably related to legitimate pedagogical concerns."[69]

3. *Morse*: No Protection for Speech Related to Illegal Drug Use

Prior to the 2002 Olympics in Salt Lake City, Utah, a high school student, Joseph Frederick, displayed a fourteen-foot banner proclaiming "BONG HiTS 4 JESUS" across the street from his high school

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[62] *Fraser*, 478 U.S. at 683-84. *See also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 n.4 (1988).

[63] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262-63 (1988).

[64] *Id.* at 263. The article dealing with pregnancy discussed sexual activities and birth control, whereas the article dealing with divorce contained sensitive details of the subject student's home life. *Id.*

[65] Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368, 1375 (1986), *rev'd*, 484 U.S. 260 (1988).

[66] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

[67] *Id.* at 263, 268.

[68] *Id.*

[69] *Id.* at 273.

during the Olympic Torch Relay that passed through his hometown in Alaska.[70] Frederick's principal was concerned that bystanders might interpret the banner as advocating illegal drug use, so he confiscated the banner and suspended Frederick.[71]

Although the students were gathered off-campus and across the street from the school, the Court considered the rally a school-sponsored event because school officials were interspersed among the students and monitored the students at the rally.[72] To buttress the holding, the Court cited statistical evidence about the serious drug problem among the Nation's youth.[73] Accordingly, the Court concluded that schools may take steps to "safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."[74] Thus, the school did not violate Frederick's constitutional rights because schools have an acute interest in deterring student drug use.[75]

One frustrating aspect of the *Tinker* tetralogy is that the Court has not yet provided a workable test for determining the extent of a school's authority over off-campus student speech.[76] Even so, the *Morse* decision dealing with off-campus speech provides the closest indication of how the Court might analyze cyber speech, which similarly occurs off-campus.[77]

C. The Limitations of the *Tinker* Tetralogy

The *Tinker* tetralogy sets forth a number of factors to consider when analyzing whether a school can restrict student speech. The

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[70] Morse v. Frederick, 551 U.S. 393, 396-97 (2007).

[71] *Id.* at 398.

[72] *Id.* at 400-01. Additionally, the rally took place during school hours, the school band and cheerleaders performed, and Frederick's banner was oriented so students could view it. *Id.* at 401.

[73] *Id.* at 408 ("Drug abuse can cause severe and permanent damage to the health and well-being of young people . . . . The problem remains serious today. About half of American 12th graders have used an illicit drug, as have more than a third of 10th graders and about one-fifth of 8th graders. . . . Some 25% of high schoolers say they have been offered, sold, or given an illegal drug on school property within the past year.") (citations omitted).

[74] *Id.*at 397.

[75] *Id.* at 397.

[76] *Id.* at 401.

[77] *See Morse*, 551 U.S. 393. The Court did not decide this issue in *Morse*, and subsequently declined to clarify the issue. Blue Mountain Sch. Dist. v. J.S. , 132 S. Ct. 1097 (2012) (denying certiorari); Kowalski v. Berkeley Cnty. Sch., 132 S. Ct. 1095 (2012) (denying certiorari); Wisniewski v. Bd. of Educ., 128 S. Ct. 1741 (2008) (denying certiorari).

general framework provided by the *Tinker* tetralogy considers whether the speech: a) poses a substantial disruption;[78] b) is lewd or offensive to the young audience in the school setting;[79] c) takes place during a school-sponsored activity or is connected to a pedagogical purpose;[80] or d) promotes negative behavior such as illegal drug use.[81] The application of these factors has led to some inconsistencies among lower courts analyzing student cyber-speech cases.[82] Indeed, in *Morse*, Justice Breyer described the lack of clear guidance given to courts about the regulation of student speech:

> In some instances, it is appropriate to decide a constitutional issue in order to provide "guidance" for the future. But I cannot find much guidance in today's decision. . . . Beyond "steps" that prohibit the unfurling of banners at school outings, the Court does not explain just what those "restrict[ions]" or those "steps" might be.[83]

Justice Thomas also warned about such ambiguity in the Court's present view on student speech:

> [W]e continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates

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[78] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

[79] *See* Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

[80] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

[81] *See* Morse v. Frederick, 551 U.S. 393, 397 (2007).

[82] *See generally* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 936 (3d Cir. 2011) (Smith, J., concurring) (advocating that *Tinker* does not apply to off-campus speech "and that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large."); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 258 (3d Cir. 2010) (adopting a multi-factored "nexus test" requiring the school to demonstrate a sufficient nexus between the student's speech and a substantial disruption of the school environment); Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 765 (9th Cir. 2006) ("[There are] three categories of speech that school officials may constitutionally regulate, each of which is governed by different Supreme Court precedent: (1) vulgar, lewd, obscene and plainly offensive speech is governed by [*Fraser*]; (2) school-sponsored speech is governed by *Hazelwood*; and (3) speech that falls into neither of these categories is governed by *Tinker*."); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 988-89 (9th Cir. 2001) (same); Thomas v. Bd. of Educ., 607 F.2d 1043, 1050 (2d Cir. 1979) (finding *Tinker* and it's progeny inapplicable because "all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate."); J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1119-21 (C.D. Cal. 2010) (using a hybrid test examining whether there was a reasonably foreseeable risk of future substantial disruption).

[83] *Morse*, 551 U.S. at 428 (Breyer, J., concurring in part and dissenting in part) (alteration in original).

> and when it does not. I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not—a standard continuously developed through litigation against local schools and their administrators.[84]

Providing even greater uncertainty is the fact that cyberbullying presents a new category of "cyber speech" that takes place in a forum never fully addressed by the Supreme Court.[85] Indeed, it is not even clear whether speech existing in cyber space may be considered speech within the schoolhouse gates since that determination remains subject to a highly fact-based analysis.[86] Many circuit courts directly apply the *Tinker* substantial disruption test without considering whether the speech took place on or off campus.[87] The Third Circuit explained, "we hold that off-campus speech that causes or reasonably threatens to cause a substantial disruption . . . with a school need not satisfy any geographical technicality in order to be regulated pursuant to *Tinker*."[88] Yet some circuit courts, primarily the Second Circuit, have considered the location of the speech as an important threshold issue that courts must resolve before applying any student speech analysis derived from Supreme Court precedent.[89]

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[84] *Id.* at 418-19 (Thomas, J., concurring).

[85] *See, e.g.*, *Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d at 1102-03 ("The Supreme Court has yet to address the factual situation at hand—whether a school can regulate student speech or expression that occurs outside the school gates, and is not connected to a school-sponsored event, but that subsequently makes its ways onto campus, either by the speaker or by other means.").

[86] *See e.g.*, J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865, 869 (Pa. 2002) (The Supreme Court of Pennsylvania analyzed whether a student's website—which was allegedly violent and derogatory about school officials—was on-campus or off-campus speech. The court concluded that there was a "sufficient nexus" between the website and the school campus to warrant application of the substantial disruption test from *Tinker* because J.S. had accessed the website during class and informed other students about it. Moreover, school officials were the subject of the website.).

[87] LaVine v. Blaine Sch. Dist., 257 F.3d 981, 983, 992 (9th Cir. 2000) (applying the substantial disruption test to a violent poem written at home and brought into school, without regard to the location where the speech originated); Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 964, 970 (5th Cir. 1972) (applying *Tinker* where student-created underground newspapers were created and distributed entirely off-campus but turned up on campus). *See also* Boucher v. Sch. Bd., 134 F.3d 821, 827-28 (7th Cir. 1998) (analyzing an underground newspaper distributed at school).

[88] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 301 (3d Cir. 2010).

[89] *See e.g.,* Doninger v. Niehoff, 527 F.3d 41, 50 (2d. Cir. 2008) (A student, Avery, sent an email to students and parents and posted a message on her personal blog criticizing the school for cancelling a school event and encouraging recipients to

Cyberbullying presents a host of modern challenges that have not yet been raised in the student speech cases considered by the Supreme Court. Cyberbullying is harassment directed at a particular victim rather than expression of a political belief. Cyberbullying does not involve generalized sexual innuendos, school newspaper articles about fictitious people, or a vague statement alluding to illegal drug use. Cyberbullying does not typically take place on school grounds or during school-sponsored activities. Rather, cyber speech occurs over email, on a student's Facebook wall, in a "tweet," and in countless electronic bulletin boards and chat rooms. Courts must modernize the *Tinker* tetralogy's method of analysis to deal with the very real problem that cyber speech poses to schools today. As discussed below, courts need additional interpretative tools to address the unique category of cyber speech.

III. THE NEED FOR A NEW TEST: CYBERBULLYING REQUIRES PROTECTION OF STUDENT VICTIMS

A. Cyberbullying is Targeted Abuse

Cyberbullying is verbal assault. It is directed at specific, identifiable victims. A school's decision to prohibit speech that rises to the level of cyberbullying is, as *Tinker* requires, "caused by something more than a mere desire to avoid discomfort . . . [associated with] an unpopular viewpoint."[90] It is caused by the desire to protect victims from harassment and humiliation,[91] thereby promoting a productive learning environment.

In order to effectively address cyberbullying in schools, courts and school officials need to shift their focus away from looking solely for a material and substantial interference within the operation of the *school*. Instead, the focus should be on identifying a material and substantial interference in the educational environment of the targeted *victim*. The school's main goal in addressing cyberbullying should be protecting the victim. If the school successfully protects students from

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contact school officials. The Court explained it was reasonably foreseeable that Avery's message would reach the school campus because the message was designed to reach campus by encouraging readers to contact the school). *See also* Wisniewski v. Weedsport Cent. Sch. Dist. Bd. of Educ., 494 F.3d 34, 39-40 (2d Cir. 2007) (considering the nexus between a student's AOL Instant Messaging and the school's campus and holding that it must be shown that it was reasonably foreseeable that a violent icon contained within an Instant Message would reach the school property).

[90] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

[91] *See supra* notes 4-25 and accompanying text (highlighting the possible bad results of unchecked cyberbullying).

cyberbullying, the educational environment should, in turn, improve for all students.

In order to effectively quarantine cyberbullying, any proposed test must promote a reasonably expedient process for determining when school intervention is justified. This Note's proposed test diverges from the *Tinker* tetralogy's focus on disruption to the school as a whole and instead focuses on the individual victim's learning environment. This new approach incentivizes school officials into take prompt, corrective action, rather than sitting idly by as cyberbullying continues to escalate.

Because this proposed test focuses on the victim's individual learning environment, Title VII's hostile working environment standard, which also focuses on the individual, provides an apt analogy and, thus, a useful starting point. As explained below, the hostile work environment analysis translates well into this Note's proposed hostile learning environment test.

B. Children Need More Protection than Adults.

A child should be protected from a hostile learning environment, just as adults are protected from hostile working environments. Because children are more vulnerable and susceptible to online harassment than adults, this Note argues that a child's learning environment deserves greater protection than an adult's working environment. This is not a novel idea. Minors have traditionally received more protection on the Internet than adults. In recent years, Congress passed legislation protecting children from various online threats, including the Children's Online Privacy Protection Act ("COPPA")[92] and the Internet Safety Act contained in Title VII of the Adam Walsh Child Protection and Safety Act of 2006.[93]

Cyberbullying poses greater risks for minors than adults. Studies have found that one-third to one-half of adolescents struggle with low self-esteem, especially in early adolescence.[94] Additionally, "the aver-

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[92] Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-6506 (2000) (protecting online personal information from children under thirteen years of age collected or stored by persons or entities under U.S. jurisdiction).

[93] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, 120 Stat. 587 (codified as amended in scattered sections of 18 & 42 U.S.C.) (protecting children from sexual predators on the Internet, child exploitation online, and words or images harmful to children on the Internet).

[94] Act for Youth Upstate Center of Excellence: Cornell University, University of Rochester & New York State Center for School Safety, *Research Facts and Findings: Adolescent Self-Esteem* (June 2003), http://www.actforyouth.net/resources/rf/rf_slfestm_0603.pdf.

age adolescent is less responsible [during decision-making], more myopic, and less temperate than the average adult."[95] "Children and adolescents often desperately seek the affirmation and approval by their peers," and they commonly experience "emotional, psychological, and behavioral ill effects" when they perceive themselves to be socially rejected.[96] Cyberbullying is anecdotally and empirically linked to maladaptive emotional, psychological, developmental, and behavioral consequences, including delinquency and school violence.[97]

C. The Current Law is Failing Our Youth

In response to this new form of bullying and its potentially drastic consequences, roughly 30 states have included electronic forms of harassment in their anti-bullying statutes.[98] In 2008, the House of Representatives introduced the Megan Meier Cyber Bullying Prevention Act,[99] but the proposed federal legislation failed to pass because its language[100] was unclear and overly broad.[101] Twenty states have

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[95] Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents may be less Culpable than Adults*, 18 BEHAV. SCI. & L., 741, 757 (2000).

[96] Sameer Hinduja & Justin W. Patchin, *Offline Consequences of Online Victimization: School Violence and Delinquency,* 6(3) J. SCH. VIOLENCE 89, 95 (2007).

[97] *Id.* at 103, 108 (After compiling data from over 1,300 Internet-using adolescents, the authors noted "the emotional and psychological costs of cyberbullying victimization and empirically linked cyberbullying victimization with offline delinquent and deviant behavior").

[98] Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RESEARCH CENTER (July 2010), http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws_20100701.pdf; *see also* BULLY POLICE USA, http://www.bullypolice.org/ (last updated Jan. 2012).

[99] Megan Meier Cyberbullying Prevention Act, H.R. 6123, 110th Cong. (2d Sess. 2008). The Act was ultimately referred to the House Subcommittee on Crime, Terrorism, and Homeland Security on July 28, 2008, where it remains. *Bill Summary & Status: 110th Congress (2007 - 2008), H.R.6123*, LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.06123: (last visited Feb. 29, 2012).

[100] "Whoever transmits in interstate or foreign commerce any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior, shall be fined under this title or imprisoned not more than two years, or both." H.R. 6123 § 3.

[101] *See* Steven Kotler, *Cyberbullying Bill Could Ensnare Free Speech Rights*, FOXNEWS.COM (May 14, 2009), http://www.foxnews.com/politics/2009/05/14/cyberbullying-ensnare-free-speech-

enacted statutes containing provisions that require school districts to adopt anti-cyberbullying policies.[102] However, many of these statutes "do not adequately guide schools regarding when they have jurisdiction over students' online activity."[103] In order to effectively address cyberbullying in schools, school officials need clarity on the boundaries of their authority over cyber speech occurring off school grounds.

IV. DEVELOPING A TEST FROM AN EXCELLENT STARTING POINT: TITLE VII AND TITLE IX

A. Title VII: Hostile Work Environment Translates into Hostile School Environment

Title VII of the Civil Rights Act of 1964 covers discrimination by an employer against "any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."[104] Hostile work environment law was initially developed under Title VII to address sexual harassment cases.[105] Under the hostile work environment analysis, Title VII is violated "[w]hen a workplace is so permeated with 'discriminatory intimidation, ridicule, and insult'[106] that is

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rights/ (noting that the bill could seemingly apply in many contexts for which it was not intended).

[102] *See* John O. Hayward, *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85, 95 (2011) (citing ARK. CODE ANN. § 6-18-514(e) (West 2011); CAL. EDUC. CODE § 32261 (West 2012); DEL. CODE ANN. tit. 14, § 4112D(b)(2) (West 2011); FLA. STAT. ANN. § 1006.147(4) (West 2012); GA. CODE ANN. § 20-2-751.4(b)(1) (West 2011); IOWA CODE ANN. § 280.28(3) (West 2011); KAN. STAT. ANN. § 72-8256(b) (West 2011); MD. CODE ANN., Educ. § 7-424.1(b)(1) (West 2011); MASS. GEN. LAWS ANN. ch. 71, § 37O(d) (West 2011); MINN. STAT. ANN. § 121A.0695 (West 2012); MO. ANN. STAT. § 160.775 (West 2011); NEB. REV. STAT. ANN. § 79-2,137(3) (West 2011); N.H. REV. STAT. ANN. § 193-F:4(II) (2011); N.J. STAT. ANN. § 18A:37-15 (West 2011); OKLA. STAT. ANN. tit. 70, § 24-100.4 (West 2011); OR. REV. STAT. ANN. § 339.356 (West 2011); 24 PA. CONS. STAT. ANN. § 13.1303.1-A (West 2011); R.I. GEN. LAWS ANN. § 16-21-24 (West 2011); S.C. CODE ANN. § 59-63-140(2011); WASH. REV. CODE ANN. § 28A.300.285(2) (West 2011)).

[103] Harriet A. Hoder, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction Over Students' Online Activity*, 50 B.C. L. REV. 1563, 1566 (2009).

[104] Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 703, 78 Stat. 255 (1964) (current version at 42 U.S.C.A. § 2000e-2(a)(1) (West 2012)).

[105] *See generally* Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268 (2001).

[106] Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986)).

'sufficiently severe or pervasive to alter conditions of victim's employment and create an abusive working environment.'"[107]

Hostile work environment case law presents a well-accepted and well-defined standard that is useful in addressing issues of free speech in cyberbullying cases. Adults seek protection from unwelcome harassment and bullying that interferes with their work environment. Likewise, students should be free from unwelcome harassment and bullying that interferes with their learning environment. Though cyberbullying may not dovetail precisely with the discrimination prohibited by Title VII hostile work environment law, cyberbullying is often just as pernicious as the discrimination addressed in Title VII and it presents a definite form of harm that is developmentally harmful to minors. Cyberbully laws and Title VII share an interest in protecting individuals from discriminatory or abusive conduct.

The Supreme Court has enumerated a list of factors to consider when determining whether a workplace is sufficiently hostile to support a harassment claim under Title VII: a) the frequency of the discriminatory conduct;[108] b) the severity of the conduct; c) the nature of the conduct and whether it was unwelcome; and d) whether the conduct unreasonably interferes with the employee's work performance.[109]

These factors have parallels in the school environment. Although an employer's ability to sanction an employee for harassment in the workplace is different from a school's authority to sanction a student for cyberbullying, the underlying premise—protecting an individual—remains the same.[110] An employee will perform better and advance more easily if the employee can work in an environment that is free of harassment and discrimination. Similarly, a student will perform and learn better in a school environment that is free of bullying.

For example, a worker who feels discriminated against may not contribute as readily to a discussion in a meeting; likewise, a student

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[107] *Id.* (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

[108] The frequency of the discriminatory conduct is also referred to as "pervasiveness."

[109] *Harris*, 510 U.S. at 23 (listing factors that help determine whether the workplace is sufficiently hostile or abusive to support a sexual harassment claim under Title VII); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998).

[110] Title VII protects against discrimination with respect to compensation, terms, conditions, or privileges of employment because of an individual's race, color, religion, sex, or national origin. 42 U.S.C.A. § 2000e-2(a)(1). Protection from cyberbullying closely tracks the intended result of Title VII because many victims of cyberbullying are singled out for the same reasons. *See supra* note 9 and accompanying text.

who feels discriminated against may be less likely to raise his hand in class. An employee may decide to call off work to avoid harassment, just as a student may be reluctant to attend school so as to avoid suffering humiliation. Even when cyberbullying occurs entirely outside school grounds, empirical data confirms that children feel the repercussions of cyberbullying at school.[111] Thus, the rationale for applying Title VII's framework should apply regardless of where the speech is made.

B. The Supreme Court Already Incorporated the Hostile Work Environment Analysis in Determining School Liability under Title IX.

Congress passed Title IX of the Education Amendments in 1972 to eliminate discrimination on the basis of sex in any education program or activity receiving federal financial assistance in order to help women gain access to the same educational opportunities as their male counterparts.[112] Title IX states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[113] There was uncertainty regarding whether Title IX was intended to cover sexual harassment[114] until the late 1990s when the Supreme Court decided that Title IX covered teacher-on-student sexual harassment in *Gebser*[115] and student-on-student harassment in *Davis*.[116]

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[111] Hinduja & Patchin, *supra* note 98, at 91-92 (surveying over 1,300 adolescent Internet-users, with 31.9% adolescents experiencing repercussions of victimization from cyberbullying at school and 26.5% adolescents experiencing repercussions of victimization from cyberbullying at home).

[112] *See* 34 C.F.R. § 106 (1975) ("[T]itle IX . . . is designed to eliminate . . . discrimination on the basis of sex in any education program or activity receiving Federal financial assistance."); Susan H. Kosse, *Student Designed Home Web Pages: Does Title IX or the First Amendment Apply?*, 43 ARIZ. L. REV. 905, 916 (2001).

[113] 20 U.S.C. § 1681(a).

[114] See Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 664 (1999) (Kennedy, J., dissenting) ("When Title IX was enacted in 1972, the concept of 'sexual harassment' as gender discrimination had not been recognized or considered by the courts.").

[115] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 281 (1998) ("[A] school district can be held liable in damages in cases involving a teacher's sexual harassment of a student . . . .").

[116] Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999) (holding schools "liable for their deliberate indifference to known acts of peer sexual harassment").

In *Gebser*, the Court laid out a two-part standard for analyzing school liability under Title IX: a) an official with authority to address the problem must have actual knowledge of the harassment;[117] and b) the official must fail to adequately respond, either with "deliberate indifference" or by making an official decision not to correct the violation.[118] In *Gebser*, an eighth grade student claimed her male teacher made sexually suggestive comments to her,[119] fondled her breasts, and engaged in sexual intercourse with her.[120] The Court refused to find the school liable under Title IX for sexual harassment because the school did not have actual knowledge of the teacher's sexual remarks and acts with the student.[121]

Instead of teacher-on-student sexual harassment, *Davis* involved student-on-student harassment.[122] Davis, a fifth grade girl, was subjected to continual verbal and physical harassment by a classmate who repeatedly attempted to rub her genital area and breasts and said, "I want to feel your boobs," or "I want to get in bed with you."[123] Davis's mother complained to the school, but the school took no action to stop the harassment.[124] Subsequently, Davis's mother sued the school district under Title IX for having allowed the known harassment to continue.[125]

The District Court and the Eleventh Circuit dismissed Davis's claim on the ground that student-on-student harassment does not provide a private cause of action under the statute.[126] In reversing the Eleventh Circuit's holding, the Supreme Court explained that although the harasser could not be held liable under Title IX, an entity receiving federal funds could be liable under Title IX for its own misconduct.[127] Thus, a school district's failure to respond to student-on-student harassment in its schools may give rise to a private suit for money damages under Title IX.[128] The Court reasoned, "[h]aving previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can like-

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[117] Gesber, 524 U.S. at 290.
[118] *Id.*
[119] *Id.* at 277-78.
[120] *Id.* at 278.
[121] *Id.* at 291-93.
[122] *Davis*, 526 U.S. at 633.
[123] *Id.*
[124] *Id.* at 633-34.
[125] *Id.* at 635-36.
[126] *Id.*
[127] *Id.* at 639-40.
[128] *Id.* at 640.

wise rise to the level of discrimination actionable under the statute."[129] The Court suggested that it was possible the school created a hostile environment for Davis by failing to take disciplinary actions against the student harasser.[130] However, "[public schools] are properly held liable in damages only where they are deliberately indifferent to sexual harassment . . . ."[131]

In *Davis*, the Court defined sexual harassment as a form of sex discrimination similar to Title VII. The Court cited a Title VII hostile work environment case while outlining the standard for sexual harassment among students: "a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[132] The Court cited yet another Title VII hostile work environment case to explain: "[w]hether gender-oriented conduct rises to the level of actionable 'harassment' thus 'depends on a constellation of surrounding circumstances, expectations, and relationships.'"[133]

Yet, a student can be cyberbullied for many reasons beyond the protected classes embodied in Title VII and Title IX. To effectively address the wide array of cyberbullying abuse, this proposed test must reach beyond the factual scenarios that fall under Title VII and Title IX. Moreover, it is harder to prove a claim of student-on-student harassment than a claim of teacher-on-student harassment under Title IX.[134] This offers yet another example of why the stringent standard in Title IX, which requires "deliberate indifference to sexual harassment," would often fall short of protecting students from cyberbullying.[135]

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[129] *Id.* at 650 (citations omitted).

[130] *Id.* at 639 ("The complaint alleges that LaShonda had suffered during the months of harassment," which manifested in the form of a drop in grades and even the discovery of a purported "suicide note.").

[131] *Davis*, 526 U.S. at 650.

[132] *Id.* at 651 (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

[133] *Id.* (citing Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82 (1998)). *See also Davis*, 526 U.S. at 651 (noting that whether conduct constitutes harassment depends on several factors, "including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.").

[134] *Davis*, 526 U.S. at 653 ("Peer harassment, in particular, is less likely to [qualify as a breach of Title IX] than is teacher-student harassment.").

[135] *Davis*, 526 U.S. at 650. See also *Davis,* 526 U.S. at 648-49 (explaining that schools are not required to "remedy" peer harassment, but "must merely respond to known peer harassment in a manner that is not clearly unreasonable.").

V. APPLYING THE FOUR FACTORS FROM A HOSTILE WORK ENVIRONMENT TO A HOSTILE EDUCATION ENVIRONMENT

To extend protection to student cyberbullying victims, this Note proposes a test that employs Title VII's hostile work environment analysis using a sliding scale approach. The proposed test advances and modernizes the existing student free-speech analysis in order to provide better guidance to schools and courts when analyzing cyber speech. Unlike the *Tinker* tetralogy, this test is specifically designed for only one classification of speech: cyber speech.[136] This Note treats all cyber speech as occurring off-campus because it is impractical for schools to determine whether cyber speech occurs during school or a school-sponsored activity.[137]

Cyberbullying cases are fact-intensive inquiries and thus a bright-line test will prove unworkable.[138] A multifactor analysis is more appropriate. The following four factors, which are borrowed from hostile work environment law, will aid schools and courts in determining whether or not a student's cyber speech rises to the level of cyberbullying: a) pervasiveness; b) severity; c) unwelcomeness; and d) interference with the educational environment.

This four-factor test employs objective and subjective analysis. The first two factors involve an objective inquiry: namely, whether a reasonable person would consider the harassment to be severe or pervasive. The third and fourth factors are subjective and look to whether the plaintiff was actually offended and affected.[139] This objective-subjective standard takes a "middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[140] The objective factors elimi-

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[136] This test only covers speech communicated through the Internet. Yet, cyber speech could take numerous forms, including text, video, images, audio, or a combination thereof.

[137] Students can access portable cell phones, iPads, or laptops during any hour of the day. A student can access the Internet at the school computer lab or school library. It would be unduly burdensome to pinpoint an alleged cyber bully's exact location on a given day or hour to determine whether he was at school or participating in a school-sponsored activity at the time the cyber speech posted on the Internet.

[138] Consider the repercussions of an offensive "tweet" that is published to hundreds of people, to the same post in a small Facebook group that's accessible to only 10-15 people, to the same post sent as a private message between two people.

[139] Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993) (stating that where an environment "would reasonably be perceived, *and is perceived*, as hostile or abusive," a Title VII claim is potentially available) (emphasis added).

[140] *Id.* at 21.

nate eggshell plaintiffs, while the subjective factors ensure that each plaintiff was actually affected by the online abuse.

A. Objective Factors: Pervasiveness and Severity Factors Applied to School Settings.

1. Pervasiveness

The pervasiveness factor requires schools to consider the frequency of the offensive speech. The more frequent the speech, the more likely it is to be sanctionable. Unlike most Title VII claims, which are based on discrete acts of discrimination, a hostile work environment claim is based on the cumulative effect of several acts.[141]

Similarly, a single comment may not be enough for school officials to intervene. However, if the same or similar statements are made numerous times and, consequently, invade the victim's educational environment, it may require school intervention. For example, Sam writes on Alex's Facebook wall, "you're such a tool." That single statement may not rise to the level of requiring school intervention. Yet if Sam habitually calls Alex a "dumbass," "moron," or "jerk" through various channels of social networking, the school may have to take action to prohibit Sam's speech.

2. Severity

a. Threat of Physical Harm

In addition to judging the pervasiveness of the speech, this test also requires that a school or court look at the severity of the cyber conduct. In order to gauge the level of severity of another's speech, it must be determined if the speech is "physically threatening or humiliating."[142]

The school is always permitted to intervene if there is a threat of physical violence. A threat of violence is sanctionable *per se*, as speech that inherently alters a student's learning conditions. A physical threat of violence should be fairly easy to recognize, but there is always a risk the recipient may mistake a joke or sarcastic comment as

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[141] Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002) ("A hostile work environment claim is composed of a series of separate acts that collectively constitute one unlawful employment practice.") (citation omitted).

[142] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993). *See also* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998) (noting that "male-on-male horseplay" is beyond the purview of Title VII).

a physical threat.[143] One of the problematic issues surrounding cyber speech is that it often precludes the recipient from hearing the intonation in the speaker's voice or from observing the speaker's non-verbal cues. This increases the risk of misinterpreting the speaker's intended message. This Note's proposed test addresses that concern by requiring an objective analysis. This prevents an innocuous statement from being perceived as a physical threat because the test requires that a reasonable person in the plaintiff's position would have interpreted the speech as a physical threat.

b. Discriminatory Speech

"[N]o single act can more quickly alter the conditions of employment and create an abusive working environment than the use of [a] racial epithet . . . ."[144] Similarly, discriminatory speech based on race, color, religion, sex, or national origin alters students' learning conditions and is considered highly severe; thus, such speech will almost always require school officials to interfere.[145] "[Public schools] must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[146] Children must learn that discrimination based on race, color, religion, sex, or national origin is not tolerated by society.

Keep in mind that the speech must be directed at an identifiable person or group in order to satisfy the proposed test's objective and subjective elements. Moreover, context matters. For example, if a Caucasian student makes a general racial slur about blacks and there are only four African American students in the class, then a reasonable person might conclude that the racial slur was targeting the African American students. Yet if an African American student makes a

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[143] For example, people often use the expression, "I am going to kill you" very loosely in order to communicate their innocent frustration, sarcasm, or humor.

[144] Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993) (citations omitted) (internal quotation marks omitted).

[145] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 703, 78 Stat. 255 (1964) (current version at 42 U.S.C.A. § 2000e-2(a)(1) (West 2012)). Although Title VII does not cover discrimination based on sexual orientation, this Note includes sexual orientation discrimination, as well as discrimination based on disability, in the category of highly severe speech. Given recent incidents of cyberbullying targeting homosexual students, schools ought to provide sensitivity to the subject by categorizing it as *per se* severe speech. *See supra* notes 18-20, and accompanying text. Furthermore, we may adopt the same disability discrimination principles from the Americans with Disabilities Act of 1990. 42 U.S.C.A. § 12101-12213 (West 2011).

[146] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

racial slur about blacks, then the speech is more ambiguous because the speaker is targeting his own race. A reasonable person might conclude the second statement is not as severe under the circumstances.

c. Humiliation

If the speech does not rise to the level of a physical threat or prohibited discrimination, the school or court should next determine whether the speech is "humiliating" so as to satisfy the severity prong. Whether speech is humiliating turns on the content of the speech and the manner in which it is communicated. If the speech deals with very sensitive or private information,[147] schools and courts should view the speech as more severe because the revelation of private information has great potential for humiliation. Likewise, if the speaker decides to broadcast or write an offensive remark in a public forum, that speech could be more humiliating for the victim than if it was only communicated to a few individuals.

Speech is objectively severe if a reasonable person would understand it to be "vulgar," "lewd," or if the character of the speech is "plainly offensive."[148] Swear words, vulgarities, and sexually explicit speech like the speech in *Fraser* would qualify as more severe speech.

Similar to an employee who complains about a coworker's harassment, a student who directly complains to a school official about cyberbullying is demonstrating that the bully's speech is negatively interfering with his or her educational environment. Additional evidence may include a drop in grades due to distractions caused by cyberbullying, decreased attendance due to the fear of violence or humiliation, or feelings of anxiety and depression that interfere with the victim's learning.[149]

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[147] *E.g. supra* notes 18-25, and accompanying text. Tyler Clementi's private relations with another male student were broadcasted on the Internet.

[148] *Fraser,* 478 U.S. at 683 ("The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students – indeed to any mature person.").

[149] The victim's friends and family may also provide corroborative testimony about the victim's experiences. Importantly, the subjective element of this test is more likely to be satisfied if a student can show a bully's cyber speech negatively affected his or her learning environment in school.

B. Subjective Factors: the Unwelcome Factor and Interference Factor Applied to School Settings.

1. Unwelcome Speech

Sexual conduct becomes unlawful within the hostile work environment context only when it is unwelcome.[150] The challenged conduct must be unwelcome "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."[151]

a. The Cyberbully's Playful Joking

The Equal Employment Opportunity Commission (EEOC) acknowledges that sexual attraction may often play a role in day-to-day social exchanges between employees, stating that "'the distinction between invited, uninvited-but-welcome, offensive-but-tolerated, and flatly rejected' sexual advances may well be difficult to discern."[152] Similarly, it may be difficult to decipher when speech amongst students is unwelcome because students often joke around in an innocent playful manner. What appears to be a joke may be unwelcome by the recipient. This is just one example illustrating that the inquiry is extremely fact-intensive and requires a flexible test.

In determining whether the speech was unwelcome, a victim's admission is preferred, but there may also be strong circumstantial evidence of unwelcomeness from friends, teachers, parents, and counselors. Some victims may be too embarrassed to admit they were af-

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[150] *See* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) (requiring unwelcomeness analysis); 29 C.F.R. § 1604.11(a) (2011) (referring to "[u]nwelcome sexual advances"); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC No. 915.002, ENFORCEMENT GUIDANCE ON *HARRIS V. FORKLIFT SYS., INC.* (1994), 1994 WL 1747814, at *5 ("It is well-settled that a charging party's claim will fail if the allegedly offensive conduct is found to be 'welcome.'").

[151] EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC NO. 915.002, ENFORCEMENT GUIDANCE ON *HARRIS V. FORKLIFT SYS., INC.* (1994), 1994 WL 1747814, at *6; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NO. N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990). 1990 WL 1104701, at *4 (quoting Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982)).

[152] EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NO. N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990). 1990 WL 1104701, at *4 (quoting Barnes v. Costle, 561 F.2d 983, 999 (D.C. Cir. 1977) (MacKinnon, J., concurring)); 29 C.F.R. § 1604.11(b) (2012) (recommending a review of the "totality of the circumstances").

fected by a cyberbully's speech.[153] A parent may inform the school that their child was sobbing after encountering cyberbullying. A teacher may notify the school that the victim has not been attending class, while a friend may explain that the victim was cutting that particular class in order to avoid the cyberbully. A school counselor may describe how distraught the student was while discussing the cyberbullying incident.[154] It should be noted that because this factor is subjective and focuses on the victim, a cyberbully's insistence that he or she was only joking and meant no harm is entirely irrelevant.[155]

b. The Victim's Prior Playful Joking

In hostile work environment law, the victim's "[o]ccasional use of sexually explicit language does not necessarily negate a claim that the sexual conduct was unwelcome."[156] The EEOC explains, "[a]lthough a charging party's use of sexual terms or off-color jokes may suggest that sexual comments by others in that situation were not unwelcome, more extreme and abusive or persistent comments [may] not be excused."[157] Thus, a plaintiff's "use of foul language or sexual innuendo in a consensual setting does not waive 'her legal protections against unwelcome harassment.'"[158]

For the same reasons, a student victim's use of foul language or horseplay has little probative value and does not necessarily detract from the possibility that the harassment directed at the victim was unwelcome speech. This invites the question: what if two students are harassing each other and creating a hostile educational environment for one another? School officials should treat these as two distinct

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[153] A social outcast may feel even more isolated and upset after admitting the speech deeply affected him or her.

[154] Schools must do their best to avoid misattributing the student's behavior as responses to cyberbullying when the behavior may be the result of outside factors. The school will have greater assurance that the negative behavior is an indicator of cyberbullying if the behavior is proximate to a potential cyberbullying encounter. Negative behavior that occurs days after a victim discovers the cyberbully's speech should not necessarily be construed as a reaction to the speech.

[155] The cyberbully's joking behavior only matters if the victim welcomed the speech as a joke. School officials may consider the ostensibly joking behavior during the objective portion of this test, where schools must determine whether a reasonable person would find the "joke" to be severe or pervasive harassment.

[156] EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NO. N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990). 1990 WL 1104701, at *6.

[157] *Id.*

[158] Swentek v. USAIR, Inc., 830 F.2d 552, 557 (4th Cir. 1987) (quoting Katz v. Dole, 709 F.2d 251, 254 n.3 (4th Cir. 1983)).

occurrences of bullying and two separate hostile environments. In other words, hostile cyber speech between two parties that is severe or pervasive enough to alter the conditions of each party's educational environment does not diminish the school's right to intervene and limit both parties' speech.[159]

Notably, this approach does not excuse a student who goes overboard in standing up for herself. For example, suppose Josh constantly bullies George on his Facebook page. George finally works up the courage to respond to Josh on Facebook, but he unleashes so much built-up anger that he makes a severe threat. George's actions may be subject to school sanctions under this test just as Josh's incessant bullying of George may be cause for the school to intervene. George's status as the first victim does not insulate him from being classified as a cyberbully. This approach ensures fair and consistent treatment of all parties involved. This policy encourages conflict resolution when responding to a student's offensive speech, and it helps to prevent one student's cyberbullying from escalating into a nasty brawl over the Internet. To avoid these types of cases, schools need to educate students about how to properly respond to cyberbullying.[160]

c. Reporting the Incident

According to hostile work environment law, the charging party's claim will be considerably strengthened if there is a contemporaneous complaint or protest.[161] For a complaint to be "contemporaneous," it should be made while the harassment is ongoing or shortly after it has ceased.[162] However, "[w]hile a complaint or protest is helpful to a charging party's case, it is not a necessary element of the claim."[163]

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[159] Given that each party acted as a cyberbully and a victim, school officials may consider mandating group counseling between the parties rather than punishing them both. Yet, if each party exhibited very severe and pervasive cyberbullying, then the school may consider punishing both students.

[160] School officials must make it clear that being a victim of cyberbullying does not give you the right to cyberbully someone else. Yet students will only understand they will be held accountable for inappropriate responses to cyberbullying if schools incorporate these policies into their rules, handbook definition of cyberbullying, and classroom curriculum.

[161] EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NO. N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990). 1990 WL 1104701, at *5 ("When there is some indication of welcomeness or when the credibility of the parties is at issue, the charging party's claim will be considerably strengthened if she made a contemporaneous complaint or protest.").

[162] *Id.* at *5 n.7.

[163] *Id.* at *5.

Furthermore, the EEOC recognizes that fear may explain a delay in opposing or reporting the conduct.[164] If the victim failed to promptly complain, the investigator must ascertain why and determine whether the victim's conduct is consistent with his or her allegations.[165] Moreover, the significance of whether the victim complained contemporaneously varies depending upon "the nature of the sexual advances and the context in which the alleged incidents occurred."[166] When confronted with conflicting evidence as to welcomeness, the EEOC looks at "the record as a whole and the totality of circumstances," and evaluates each situation on a case-by-case basis.[167]

Similarly, students may more easily demonstrate that the speech was unwelcome if they make a contemporaneous complaint about it to school officials while the harassment is ongoing or shortly after it has ceased.[168] Like an employee who is afraid to report harassment, a student may choose not to inform school officials about the bullying because he or she is frightened the bully might retaliate.[169] Similar to the employment context, the failure to report a cyberbullying incident does not destroy the student's assertion that the bully's conduct was unwelcome. A contemporaneous complaint to school officials merely strengthens the student's claim that the speech was unwelcome.

2. Interference with the Victim's Education

In order to support a hostile work environment claim under Title VII, the harassment must unreasonably interfere with the employee's

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[164] *Id.*

[165] *Id.*

[166] *Id.* (quoting 29 C.F.R. § 1604.11(b) (2012)).

[167] *Id.* at *5 (quoting 29 C.F.R. § 1604.11(b) (2012)).

[168] Interestingly, a student enduring harassment on Facebook has the option to "report" the conduct to Facebook. A student may support her position that the speech was unwelcome by demonstrating to the school that he or she reported it on Facebook. Facebook officials have the discretion to remove the bully from Facebook by deleting her Facebook page and denying the bully the ability to register again with the same email address. Nonetheless, the bully may register under another email address and create another page. The victim may still be frightened that the bully will retaliate with more severe and pervasive bullying once the bully loses her Facebook account. *See Safety Center*, FACEBOOK.COM, http://www.facebook.com/safety/groups/teens/ (last visited Mar. 1, 2012) (instructing teens how to report abusive content on Facebook).

[169] One study "found that almost one-third (32%) of cyberbullying victims removed themselves from the online venue in which the cyberbullying occurred, while one in five (20%) felt forced to stay offline completely for a period of time. . . . While most cyberbullying victims were comfortable talking about their victimization to a friend (56.6%), fewer than 9% of victims informed a teacher or an adult." Hinduja & Patchin, *supra* note 98, at 95 (citation omitted).

work performance.[170] Hostile work environment law only forbids behavior that is so offensive that it alters the conditions of the victim's employment.[171] Similarly, under the Title IX analysis, "a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[172]

Under this test, the cyberbullying must also interfere with the victim's educational environment. In other words, the cyber speech must be so severe and pervasive that it actually altered the student's learning conditions or greatly undermines the victim's educational experience.[173]

The most obvious example is physical exclusion: a victim who endures such severe and pervasive cyberbullying that it physically deprives the victim of access to school facilities or resources.[174] Consider a student who receives so many constant threats in the form of text messages, emails, and Facebook posts that he feels completely immobilized by fear and becomes too scared to attend class or eat lunch in the school cafeteria.[175] Other examples of interference with a student's educational environment include: a drop in grades; the inability to learn or complete assignments due to severe anxiety associated with the cyberbullying; the inability to work with peers because of their involvement in the cyberbullying; skipping sports practice for fear of confronting the bullies in the locker room; not participating in class discussions because the student fears harassment or humiliation; or retaliation due to the victim's reporting of cyberbullying to school officials.

It is not difficult to satisfy this factor, since most cyberbullying will likely pose some sort of distraction at school. Some disruptions

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[170] See Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993). This interference requirement is similar to *Tinker*'s substantial and material interference test. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969). However, the test in *Tinker* may be satisfied by a general interruption of the operation of the school, which may be wholly unrelated to the victim of harassment.

[171] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) ("[I]t forbids only behavior so objectively offensive as to alter the conditions of the victim's employment.").

[172] Davis *ex rel.* Lashonda D. v. Monroe Cty. Bd. Of Educ., 526 U.S. 629, 651 (1999).

[173] *Id.* at 650.

[174] *Id.* at 650-51 (describing a hypothetical "in which male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource").

[175] *Id.* at 650.

are more serious than others. Schools must weigh the seriousness of the interference with the other factors to determine whether or not they should intervene. A highly severe and pervasive account of cyberbullying coupled with a victim who only experiences minor distractions at school may still warrant the school's prohibition of the cyberbully's speech. Practically speaking, school officials may be more inclined to limit a student's speech and protect a victim if there is a serious interference with the victim's education—e.g. the victim missed school for a week. Nevertheless, the objective factors of this test prevent schools from limiting a student's cyber speech based solely on the complaints of an oversensitive child. A school may never limit a student's cyber speech without some level of both severity and pervasiveness.

VI. HOW THE TEST OPERATES

A. Knowledge Triggers the School's Duty to Protect the Student Victim

As discussed above, this test serves as a tool to identify when school officials are able to sanction a cyberbully for his or her cyber speech. The school must have some knowledge of the incident before it is responsible for taking action to limit the cyberbully's speech. The school's knowledge, however, need not come from the victim. School officials may learn about the incident through another student, a parent, friend, teacher, or guidance counselor. Once the school has knowledge of the alleged cyberbullying, the school has the duty to investigate the incident and, if necessary, take action to protect the victim. This does not mean that the school must automatically suspend or otherwise punish the cyberbully. While sanctions are certainly one way of protecting the victim, school counselors ought to employ mediation and conflict resolution to prevent further cyberbullying.

B. This Test Operates Like a Sliding Scale

When confronted with a hostile work environment charge, courts and EEOC investigators look at the record as a whole and the totality of circumstances, evaluating each situation on a case-by-case basis.[176]

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[176] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993) ("[W]hether an environment is hostile or abusive can be determined only by looking at all the circumstances.") (internal quotation marks omitted). *See also* 29 C.F.R. § 1604.11(b) (2012);); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC NO. 915.002, ENFORCEMENT GUIDANCE ON *HARRIS V. FORKLIFT SYS., INC.* (1994), 1994 WL 1747814,

The Court explained that this approach is not, and by its nature cannot be, a mathematically precise test.[177] It is a flexible standard that operates like a sliding scale.[178] For example, the required level of severity "varies inversely with the pervasiveness or frequency of the conduct."[179] Each of the four factors, however, must be met. If appropriate under the circumstances, weak evidence of one element may be offset by particularly strong evidence of another.

Similarly, school officials should use these four factors[180] like a sliding scale to gauge their ability to intervene and restrict a student's speech. The school should look to the totality of the circumstances to ensure that all four factors of this Note's proposed test are satisfied. For example, if the speech is very severe and very pervasive, but the attempted victim remains unaffected, there are no grounds for the school to intervene and sanction the cyberbully.

C. Application

To illustrate how the proposed test operates, recall the hypotheticals presented at the outset of this Note. Lindsey, a high school sophomore, logs onto her Facebook page from home. Stressed from a long day at school, Lindsey updates her status and writes, "Amy is a fat cow. Don't ever talk to her again, just tell her MOO." Katie is a fourteen year-old eighth grade student at the same school who decides to update her Facebook status after school hours and writes, "In case you didn't already know it, I'm the S*#%. Everyone else should go to hell." Is Lindsey's or Katie's speech protected by the First Amendment? Or, may school officials punish them for their cyber speech?

Example 1: Lindsey says, "Amy is a fat cow. Don't ever talk to that cow, just tell her MOO."

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at *4 (instructing investigators to examine, among other things, the nature of the conduct, whether it was verbal or physical, the context in which it was physically threatening or humiliating, whether it was unwelcome, and whether it unreasonably interfered with an employee's work performance).

[177] *Harris*, 510 U.S. at 22.

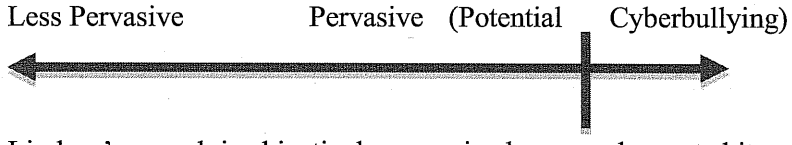
[178] EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NO. N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990). 1990 WL 1104701, at *9-10 (explaining that the more severe the harassment is, the less need there is to show the harassment was frequent).

[179] Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) (citing King v. Bd. of Regents of Univ. of Wis. Sys., 898 F.2d 533, 537 (7th Cir. 1990).

[180] The factors are: a) pervasiveness; b) severity; c) unwelcomeness; and d) interference with the educational environment.

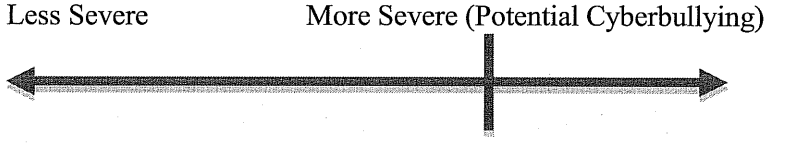
Upon investigating the incident, school officials discover that Lindsey sent Amy three text messages the same evening saying, "Moo!" School officials also find out that Amy experienced harassment at school the next day as everyone was yelling "Moo" at her in the hallways in between classes and during lunch. Amy's friend later reported that she had not seen Amy at their lunch table in almost a week. School officials meet with Amy and she explains that she has been hiding in the bathroom in order to avoid confronting Lindsey and other harassers in the lunchroom. She also explains that she has been so fraught with shame and humiliation about Lindsey's words that she has become more self-conscious about her weight and recently stopped eating lunch. Amy continues to explain that it has been hard for her to pay attention in class because she gets very hungry from not eating lunch and because she is nervous people will "Moo" during class.

1) Pervasiveness



Lindsey's speech is objectively pervasive because she posted it on her Facebook wall, where all of her friends (and Amy) could view the speech. Note that the speech would be considered less pervasive if Lindsey communicated it privately rather than in a public forum. Additionally, it is considered even more pervasive because the speech was repeated in three subsequent text messages.

2) Severity



Lindsey's speech is objectively severe because it is a form of humiliation directed at a physical characteristic of Amy: her weight. School officials should consider cyber speech about physical characteristics that carry a public stigma as more severe. In particular, body

weight is objectively severe due to the fact that eating disorders are most likely to develop during the teenage years.[181]

The speech would be considered more severe if it included a threat of physical harm, discrimination, or vulgarities such as swear words or inappropriate sexual innuendos. Even without those, however, Lindsey's speech is sufficiently severe, especially considering it incited other students to harass Amy.

3) Unwelcomeness

Here, Amy averred to school officials that Lindsey's speech was unwelcome. Even if she had not, however, the circumstantial evidence of unwelcomeness is very strong. Amy stopped eating lunch and hid in the bathroom during her break. Amy's friend's statements further corroborate Amy's emotional distress.

4) Interference in the victim's educational environment

Lindsey's speech altered Amy's educational environment. Amy complained of an inability to focus in class due to extreme anxiety. Moreover, Amy experienced physical exclusion as she was unable to walk around school or eat lunch for fear of her classmates teasing her.

All four factors strongly support the creation of a hostile learning environment. In this example, Lindsey's speech rises to the level of cyberbullying, which triggers the school's duty to intervene and restrict Lindsey's speech in order to protect Amy. Accordingly, school

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[181] H. W. Hoek, *Incidence, prevalence and mortality of anorexia and other eating disorders.* 19 CURRENT OPINION IN PSYCHIATRY, 389-394 (2007) (Among young women, the prevalence of anorexia and bulimia is estimated to be 0.3% and 1.0% respectively. Prevalence rates of anorexia and bulimia appear to increase during the transition from adolescence to young adulthood.).

officials may sanction Lindsey for her cyber speech without violating Lindsay's First Amendment rights.[182]

Example 2: Katie says, "In case you didn't already know it, I'm the S*#%. Everyone else should go to hell."

In contrast to Example 1, Katie's cyber speech does not rise to the level of cyberbullying. Katie's speech is offensive due to her use of obscenities, yet it is not sufficiently severe because it does not discriminate on the basis of race, religion, sex, gender, national origin, ethnicity, or sexual orientation. The lack of either a threat of physical harm, sexual harassment, or use of inappropriate sexual innuendos further illustrates that Katie's speech is not objectively severe.

The pervasive nature of Katie's speech creates a stronger case for cyberbullying. Katie's speech is pervasive because it was on her Facebook wall for the general public to view. The facts here assume that Katie does not have restrictive privacy settings applied to her account, which may confine her speech to a smaller number of people. Such privacy settings would reduce the pervasiveness of her speech.

Despite Katie's pervasive use of obscenities, the school cannot sanction Katie because her speech did not target any particular person or group.[183] Katie directed her speech at everyone in general but nobody in particular. Without an identifiable victim, there is simply no evidence to substantiate the subjective factors of unwelcomeness and interference. Under these facts, it is improper for the school to sanction Katie for cyberbullying.

While schools have a duty to protect students and promote values of civility,[184] it is not the role of school officials to police every obscene phrase that students utter online.[185] Without an identifiable victim, there can be no subjective interference with anyone's learning environment. Consequently, the school may not interfere.

Instead, if Katie had stated, "In case you didn't already know it, I'm the S*#%. All the other cheerleaders should go to hell," then the school officials should proceed with an analysis under the test proposed by this Note, the difference being that now Katie's speech is

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[182] If Lindsey sued the school district for violating her First Amendment rights under these circumstances, the court would analyze Lindsey's claim under this proposed four-factor test.

[183] Of course, if the speech constituted a real threat directed at students, such as the possibility of a school shooting, then it would warrant the intervention of school officials.

[184] See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

[185] Even though school officials may not punish Katie, they may reach out to her by offering her an opportunity to speak with a school guidance counselor.

directed toward an identifiable group of victims: cheerleaders. Even though the speech is targeted at a group of students, the speech must be unwelcome and interfere with at least one individual out of such group in order to constitute cyberbullying.

It bears repeating that school districts must carefully balance all four factors of this proposed test. Indeed, the crux of this test is the requirement that schools weigh each factor equally. Only then can we protect the victims of cyberbullying while upholding students' freedom of speech.

CONCLUSION

The four-factor sliding scale test proposed in this Note is a practical method for resolving the unique problem of cyberbullying facing schools today. This test provides enough flexibility to apply to different scenarios within the ever-expanding social network scene, while also ensuring consistent application within school communities and lower courts. Furthermore, the test incorporates well-accepted and well-defined principles from Title VII and Title IX while preserving the policy underpinnings of the *Tinker* tetralogy.

Most importantly, this test is designed to protect the victim by providing an avenue of recourse before the damage from cyberbullying becomes irreparable. Indeed, as the *Harris* Court made clear, "Title VII comes into play before the harassing conduct leads to a nervous breakdown."[186] The same is true of this proposed test. The cases of Megan Meier and Tyler Clementi[187] are tragic reminders of what can happen when a cyberbully's psychological torment proceeds unchecked. This test serves as a preventive tool. It empowers students and schools alike to take action before the victim becomes tomorrow's next tragic headline.

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[186] Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993).

[187] *See supra* Part I.