

# HOW PUBLIC SCHOOLS CAN CONSTITUTIONALLY HALT CYBERBULLYING:

## A MODEL CYBERBULLYING POLICY THAT CONSIDERS FIRST AMENDMENT, DUE PROCESS, AND FOURTH AMENDMENT CHALLENGES

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### INTRODUCTION

Schoolyard bullying has been around for generations, but recently it has taken on a new, menacing face—cyberbullying. Now adolescents use technology to deliberately and repeatedly bully, harass, hassle, and threaten peers. No longer does the bullying end once the school day ends. With the use of technology, groups of bullies can relentlessly and anonymously attack twenty-four hours a day for the whole world to witness. There is simply no escape. Cyberbullying follows victims from their schools to their homes to their personal computer screens, with fresh injuries inflicted every time a new person clicks on an Internet site to witness or join in the bullying. Adolescents use Internet sites like YouTube, or social networking sites like Facebook and MySpace, to repeatedly mock others by creating web pages, videos, and profiles. Adolescents use their cell phones to take photos anytime and anywhere (including bathrooms)<sup>1</sup> and then instantaneously post them online for others to rate, tag, discuss, and pass along.<sup>2</sup>

Cyberbullying is one of the top challenges facing public schools.<sup>3</sup>

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1. Cindy Long, *Silencing Cyberbullies*, NEATODAY (May 2008), <http://www.nea.org/home/4104.htm>. The article notes that in one cyberbullying incident “a ‘popular girl’ placed her digital camera under a bathroom partition to capture an ‘unpopular’ girl in a compromising position.” *Id.*

2. See, e.g., Sameer Hinduja & Justin W. Patchin, *Cyberbullying: Identification, Prevention, and Response*, CYBERBULLYING RESEARCH CENTER, [http://www.cyberbullying.us/Cyberbullying\\_Identification\\_Prevention\\_Response\\_Fact\\_Sheet.pdf](http://www.cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf) (last visited Sept. 16, 2011).

3. Mary Ellen Flannery, *Top Eight Challenges Teachers Face This School*

There are many recurring legal problems confronting public schools. By way of example, assume there are two public middle school children, Joe and Jane. Joe punches Jane on the school's property between classes. The school is well within its rights to suspend Joe.<sup>4</sup> Assume instead that Joe punches Jane off of school grounds, after school ends, and as the children are walking home. Because the assault took place off of school property and after hours, the school does not have jurisdiction to punish Joe; rather, it is a matter for the parents and law enforcement.<sup>5</sup>

Assume instead that Joe creates an animated video game of Jane from his personal home computer at night. In the game, Joe shows himself and other students punching Jane. Joe posts the game on the Internet and it is quickly passed along to over one hundred other students at the same school, many of whom join in the virtual punching of Jane. Some students log on to the site while at school, using their personal smart phones and laptops, and other students log onto the site after school at home using their personal computers. Jane is terrified to go to school.

Can the school punish Joe or any of the other students? In this hypothetical, Joe created the website off-campus and after school hours, so how is it different, if at all, from Joe physically punching Jane off-campus and after school hours? Is Joe's website protected by free speech? Can the school search Joe's and the other students' personal cell phones or laptop computers to see if and when the website was accessed? How does the public school respond, if at all, to this situation without trampling the constitutional and legal rights of the students?

Neither the legislatures nor the courts have been able to give

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*Year*, NEATODAY (Sept. 13, 2010), <http://neatoday.org/2010/09/13/top-eight-challenges-teachers-face-this-school-year/> (“[N]early one in three teens say they’ve been victimized via the Internet or cell phones. A teacher’s role—or a school’s role—is still fuzzy in many places. What legal rights or responsibilities do they have to silence bullies, especially when they operate from home?”).

4. See, e.g., *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 (2d Cir. 1979). The court explained:

When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.

*Id.*

5. See *id.*; see also *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 705 (W.D. Pa. 2003) (finding a school policy constitutionally overbroad where the policy lacked language to limit the school’s authority “to discipline expressions that occur on school premises or at school related activities, thus providing unrestricted power to school officials”).

public schools clear and consistent guidance on how to answer these questions. Indeed, in a recent Third Circuit opinion, the court was deeply divided on how to decide such issues.<sup>6</sup> There is also a circuit split on these issues making it ripe for the Supreme Court of the United States to resolve.<sup>7</sup> Cyberbullying raises issues that require a fine balance between protecting the constitutional rights of public school students while also creating a safe learning environment.

The purpose of this Article is to set forth a comprehensive model cyberbullying policy for primary and secondary public schools that meets educational goals and considers constitutional challenges. This first Part of this Article explores the current problems caused by cyberbullying and why these problems are unique from off-line bullying. Because of the unique problems caused by cyberbullying, some state legislatures are beginning to enact specific laws to address cyberbullying. The current statutes are summarized in Appendix A of this Article. Those statutes, however, provide little to no direction on how public schools should create cyberbullying policies that are constitutional while also meeting statutory requirements. Thus, Appendix B of this Article sets forth a model cyberbullying policy for public schools.

The second and main Part of this Article considers three constitutional challenges public schools face in adopting a cyberbullying policy. First, public schools wrestle with how to define “cyberbullying” without violating the students’ First Amendment rights to free speech. The crux of the problem concerns speech that students make off of school grounds but that impacts other students at school (for example, creating a website at home, which is then accessed at school, that harasses another student). This Part sets forth a novel way of approaching the conflicting legal precedents by separately considering jurisdictional and substantive issues. The second constitutional challenge is composing a cyberbullying policy that does not violate due process rights or that is written in language that is unconstitutionally vague or overbroad. The third constitutional challenge is formulating a way for school officials to

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6. See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010), *vacated, reh’g granted en banc*, No. 08-4138, 2010 U.S. App. LEXIS 7342, at \*1 (3d Cir. Apr. 9, 2010), *rev’d en banc*, No. 08-4138, 2011 WL 2305973, at \*1 (3d Cir. June 13, 2011). In this case, the court was deciding whether a school could discipline a student for creating, on a home computer, a vulgar and fake MySpace page of the school’s principal. *Snyder*, 2011 WL 2305973, at \*1. Finding that the school could not discipline the student, the en banc court was fractured—seven judges joined the majority, five judges concurred and six judges dissented. *Id.* at \*8, \*18, \*22.

7. Compare *id.* at \*27 (Fisher, J., dissenting) (stating that “[o]ur decision today causes a split with the Second Circuit”), with *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007) (holding that the school can regulate student speech created off-campus where it was reasonably foreseeable that it would reach the school campus).

know when they can search students' personal electronic devices without violating the Fourth Amendment.

The final Part of this Article addresses pedagogical concerns such as reporting requirements, disciplinary matters, and educating students, parents, and school officials about cyberbullying. All of these topics should be considered in order to construct a comprehensive cyberbullying policy. The model cyberbullying policy for public schools set forth in Appendix B of this Article adopts language that attempts to combat cyberbullying while complying with constitutional requirements and meeting educational goals.

### I. CURRENT PROBLEMS

Cyberbullying is a major problem causing significant harm.<sup>8</sup> There is no dispute that students today use e-mail, messaging, texting, and social networking sites on almost an hourly basis to stay in touch with one another.<sup>9</sup> In one survey of thirteen- to seventeen-year-olds, thirty-five percent reported being the targets of Internet harassment including "rude or nasty comments, rumors, and threatening or aggressive messages."<sup>10</sup> As one teenage victim

8. A proposed bill that would make cyberbullying a federal crime sets forth the following findings of fact:

Congress finds the following: . . .

(4) Online victimizations are associated with emotional distress and other psychological problems, including depression.

(5) Cyberbullying can cause psychological harm, including depression; negatively impact academic performance, safety, and the well-being of children in school; force children to change schools; and in some cases lead to extreme violent behavior, including murder and suicide.

(6) Sixty percent of mental health professionals who responded to the Survey of Internet Mental Health Issues report having treated at least one patient with a problematic Internet experience in the previous five years; 54 percent of these clients were 18 years of age or younger.

Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2010).

9. "Most teens text daily." Amanda Lenhart, *Teens, Cell Phones and Texting: Text Messaging Becomes Centerpiece Communication*, PEW INTERNET & AM. LIFE PROJECT, <http://pewresearch.org/pubs/1572/teens-cell-phones-text-messages> (last visited Sept. 19, 2011) (noting that teenagers' use of cell phones and texting has increased from 45% to 75% since 2004, and that 72% of teens are texters); Jill Tucker, *Social Networking Has Hidden Dangers For Teens*, S.F. CHRONICLE (Aug. 9, 2009, 08:31 PM), available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/08/10/BA9T1954T7.DTL#ixzz1J3WA1cEI> ("While teens are spending more and more time on social networking sites like Facebook and MySpace—with 22 percent saying they check their sites more than 10 times a day—they don't seem to be aware of the long-term personal havoc they could create with a click of a button."); see also *id.* (explaining "51 [percent of teens] check their sites more than once a day").

10. *Bullying/Cyberbullying Prevention Law: Model Statute and Advocacy Toolkit*, ANTI-DEFAMATION LEAGUE, 5 (Apr. 1, 2009), [http://www.adl.org/civil\\_rights/Anti-Bullying%20Law%20Toolkit\\_2009.pdf](http://www.adl.org/civil_rights/Anti-Bullying%20Law%20Toolkit_2009.pdf); see also *Bullying*,

stated: "It makes me hurt both physically and mentally. It scares me and takes away all my confidence to make me feel sick and worthless."<sup>11</sup> Indeed, in March of 2011, the White House held a special conference that specifically focused on bullying prevention where the President concluded that cyberbullying is a serious problem facing the United States.<sup>12</sup> Cyberbullying is linked to "low self-esteem, family problems, academic problems, school violence, and delinquent behavior . . . [and] suicidal thoughts."<sup>13</sup> Studies have shown that, of adolescents who have contemplated suicide, "cyberbullying victims were almost twice as likely to have attempted suicide compared to youth who had not experienced cyberbullying."<sup>14</sup>

**RECENT CASES:** There have been far too many recent cyberbullying cases that have ended in such tragedy. One case involved Tyler Clementi, a Rutgers University freshman, who leaped to his death after his roommate secretly taped and posted online a video of Clementi having a "sexual encounter" with another young man.<sup>15</sup> Perhaps even more troubling are those cases that involve young school-age children, both in middle school and high school. Such cases sadly illustrate how a child's vulnerabilities are escalated by the use of the wider forum of technology. There were the three middle school boys who invited fellow students to "kick a ginger" on a specific day which led to the attacks on at least seven

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BERKSHIRE DIST. ATTORNEY'S OFFICE, [http://www.mass.gov/?pageID=berterminal&L=3&L0=Home&L1=Crime+Awareness+%26+Prevention&L2=Parents+%26+Youth&sid=Dber&b=terminalcontent&f=parents\\_youth\\_bullying&csid=Dber](http://www.mass.gov/?pageID=berterminal&L=3&L0=Home&L1=Crime+Awareness+%26+Prevention&L2=Parents+%26+Youth&sid=Dber&b=terminalcontent&f=parents_youth_bullying&csid=Dber) (last visited Aug. 31, 2011). The article explained:

Bullying is the most common form of violence. Some 3.7 million youth engage in it, and more than 3.2 million are victims of bullying annually.

An estimated 160,000 children miss school every day out of fear of attack or intimidation by other students . . .

72% of teens report 'at least one incident' of bullying online (name calling, insults via IM or social networking sites).

90% did NOT report the incident to an adult.

*Id.*

11. Hinduja & Patchin, *supra* note 2, at 1.

12. See Jenny Walker, *White House Conference on Bullying Prevention*, CYBERBULLYINGNEWS.COM (Mar. 10, 2011), <http://www.cyberbullyingnews.com/2011/03/white-house-conference-on-bullying-prevention-watch-live-today/>.

13. Randy Taran, *Cyberbullying: Strategies to Take Back Your Power*, HUFFINGTON POST (Jan. 17, 2011, 12:12 PM), [http://huffingtonpost.com/randy-taran/cyberbullying-10-ways-to\\_b\\_807005.html](http://huffingtonpost.com/randy-taran/cyberbullying-10-ways-to_b_807005.html).

14. Sameer Hinduja & Justin W. Patchin, *Cyberbullying Research Summary: Cyberbullying and Suicide*, CYBERBULLYING RESEARCH CENTER (2010), [http://www.cyberbullying.us/cyberbullying\\_and\\_suicide\\_research\\_fact\\_sheet.pdf](http://www.cyberbullying.us/cyberbullying_and_suicide_research_fact_sheet.pdf).

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

red-haired middle school children.<sup>16</sup> There were middle school boys who created a video game on a website where “they virtually ‘beat up’ one of their classmates on a regular basis and invited others to join them in the beatings.”<sup>17</sup> There were other middle school children who created a website where “middle school girls were pictured on a ‘Hot or Not’ list that was e-mailed around to be voted on.”<sup>18</sup>

There was thirteen-year-old Megan Meier, who committed suicide after being cyberbullied by a classmate’s parent who adopted a false identity on MySpace as a boy, wooed her, and then viciously turned against her and posted that “[t]he world would be a better place without [her].”<sup>19</sup> There was the fourteen-year-old boy who sent death threats on Facebook to two other classmates he believed were interested in his girlfriend.<sup>20</sup> There were the three Louisiana high school students who were arrested for cyberstalking after they created competing websites with the posting of insults and graphically violent poems.<sup>21</sup> There were two Florida girls, aged fifteen and sixteen, who were arrested for creating a fake Facebook page in another classmate’s name and posting a picture of the girl’s face on a “nude prepubescent girl’s body” with other disturbing images and statements.<sup>22</sup>

There was also Phoebe Prince, who was relentlessly cyberbullied by the students at her high school for three months before she hung herself.<sup>23</sup> Classmates posted multiple threads on Facebook about how Phoebe was an “Irish slut” and a “poser.”<sup>24</sup> Ultimately, six teenagers were criminally charged—including two boys charged with statutory rape of a minor—after the group of teenagers taunted, threatened, shoved, and sent demeaning text

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16. Victoria Kim & Richard Winton, *School Holds Tolerance Seminar as 3 Boys Are Arrested in ‘Ginger’ Attacks*, L.A. TIMES, Nov. 30, 2009, <http://articles.latimes.com/2009/nov/30/local/la-me-ginger-attacks1-2009dec01>.

17. Long, *supra* note 1.

18. *Id.*

19. Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y. TIMES, Nov. 28, 2007, [http://www.nytimes.com/2007/11/28/us/28hoax.html?\\_r=2&oref=slogin](http://www.nytimes.com/2007/11/28/us/28hoax.html?_r=2&oref=slogin).

20. Michelle Kim, *Boy, 14, Arrested for Cyber-Bullying 12-Year-Olds*, NBC N.Y., Mar. 14, 2011, <http://www.nbcnewyork.com/news/local/117966829.html>.

21. *Students Arrested for Cyber Bullying*, WAFB LA.’S NEWS CHANNEL, <http://www.wafb.com/global/story.asp?s=2774728&> (last visited Aug. 29, 2011).

22. Jason Beahm, *Teen Cyberbullying Arrest: Fake Facebook Page*, FINDLAW BLOGS (Jan. 21, 2011, 12:15 PM), <http://blogs.findlaw.com/blotter/2011/01/teen-cyberbullying-arrest-fake-facebook-page.html>.

23. Russell Goldman, *Teens Indicted After Allegedly Taunting Girl Who Hanged Herself*, ABC NEWS (Mar. 29, 2010), <http://abcnews.go.com/Technology/TheLaw/teens-charged-bullying-mass-girl-kill/story?id=10231357>.

24. Emily Bazelon, *What Really Happened to Phoebe Prince? The Untold Story of Her Suicide and the Role of the Kids Who Have Been Criminally Charged For It*, SLATE (July 20, 2010, 10:13 PM), <http://www.slate.com/id/2260952/entry/2260953>.

messages to Phoebe.<sup>25</sup> One of the most troubling aspects of Phoebe's case is that the school administrators were well aware of the cyberbullying<sup>26</sup> and, yet, the school did not take any action.<sup>27</sup> "How long can the school department ignore the increasing rate of bullying before reality sets in?" two students asked in a school newspaper article.<sup>28</sup>

**PUBLIC SCHOOLS WITHOUT GUIDANCE:** For school-age children, incidents of cyberbullying are often ignored.<sup>29</sup> Schools are ill-equipped to deal with cyberbullying.<sup>30</sup> Indeed, such failures open up school districts to lawsuits.<sup>31</sup> For example, a student's family sued a

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25. Erik Eckholm & Katie Zezima, *6 Teenagers Are Charged After Classmate's Suicide*, N.Y. TIMES, Mar. 29, 2010, <http://www.nytimes.com/2010/03/30/us/30bully.html>.

26. Bazelon, *supra* note 24.

27. *Id.*

28. Frank LoMonte, *States Should Protect Student Journalists*, PHILLY.COM (Aug. 11, 2010), [http://articles.philly.com/2010-08-11/news/24971988\\_1\\_student-journalism-student-reporters-number-of-school-systems](http://articles.philly.com/2010-08-11/news/24971988_1_student-journalism-student-reporters-number-of-school-systems).

29. Hinduja & Patchin, *supra* note 2, at 2. This study determined that: Parents often say that they don't have the technical skills to keep up with their kids' online behavior; teachers are afraid to intervene in behaviors that often occur away from school; and law enforcement is hesitant to get involved unless there is clear evidence of a crime or a significant threat to someone's physical safety.

*Id.*

30. Rick Nauert, *Social Workers Struggle to Deal with Cyber Bullying*, PSYCHCENTRAL (Jan. 11, 2011), <http://psychcentral.com/news/2011/01/11/social-workers-struggle-to-deal-with-cyber-bullying/22507.html> ("Although cyber bullying is growing in prevalence, new research suggests nearly half of elementary, middle and high school social workers feel ill-equipped to deal with such victimization."). The article explains:

In a survey of nearly 400 school social workers at the elementary, middle and high school levels who were members of the Midwest School Social Work Council, the researchers found that while all respondents felt that cyber bullying can cause psychological harm, including suicide, about 45 percent felt they were not equipped to handle cyber bullying, even though they recognized it as a problem.

Further, only about 20 percent thought their school had an effective cyber bullying policy.

"If there's no policy in place to guide them, staffers are flying solo in this area, and that can be a liability," said Singer.

*Id.*

31. If a school does not take active steps to prohibit student harassment, they face possible civil liability, under both federal and state laws, from students who have been harassed by their peers. *See, e.g.*, 20 U.S.C. § 1681(a) (2010) ("No person . . . 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."); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1238 (10th Cir. 1999) (finding that a school district could be held liable under Title IX for having actual knowledge of student-on-student harassment and failing to take active steps to prevent it); *Williams v. Port Huron Area Sch. Dist. Bd. of Educ.*, No. 06-14556, 2010 WL

New York school district for failing to protect their homosexual son from cyberbullying.<sup>32</sup> There is no question that schools must be more proactive about stopping students from cyberbullying.<sup>33</sup> But the blame does not lie completely with the schools. Many schools want to help but do not know where the boundaries of discipline begin and where they end. "Schools are finding themselves at a loss, particularly because of vague laws,"<sup>34</sup> or because there are no laws or policies at all, to instruct them on how to address cyberbullying. When can a school legally punish a student for speech that occurs off-campus? To what extent can schools search students' personal computers and cell phones for evidence of cyberbullying without running afoul of the students' constitutional rights?

These are the questions haunting the school districts. School administrators know that there is a problem, but they do not know to what extent they are allowed to be a part of the solution. Across the nation, principals have responded to student-on-student cyberbullying in "dramatically different ways."<sup>35</sup> One principal of a

1286306, at \*1 (E.D. Mich. Mar. 30, 2010) (holding that a school district was liable for student-on-student harassment under the "deliberate indifference" standard of Title VI and Title IX claims, when students were harassed based on their race); *L.W. v. Toms River Reg'l Schs. Bd. of Educ.*, 915 A.2d 535, 535 (N.J. 2007) (ruling that the New Jersey discrimination law extended a duty to schools to prevent students from being sexually harassed by fellow students); Susan H. Kosse, *Student Designed Home Web Pages: Does Title IX or the First Amendment Apply?*, 43 ARIZ. L. REV. 905, 905-19 (2001) (explaining the schools' dilemma in regulating student web pages in violation of the First Amendment but also subjecting themselves to liability under Title IX for failing to prevent sexual harassment).

32. Eckholm & Zezima, *supra* note 25.

33. Jan Hoffman, *Online Bullies Pull Schools Into the Fray*, N.Y. TIMES, June 27, 2010, [http://www.nytimes.com/2010/06/28/style/28bully.html?\\_r=1&sq=hoffman&st=cse&scp=3&pagewanted=all](http://www.nytimes.com/2010/06/28/style/28bully.html?_r=1&sq=hoffman&st=cse&scp=3&pagewanted=all). The author notes:

Many principals hesitate to act because school discipline codes or state laws do not define cyberbullying. But Bernard James, an education law scholar at Pepperdine University, said that administrators interpreted statutes too narrowly: "Educators are empowered to maintain safe schools," Professor James said. "The timidity of educators in this context of emerging technology is working to the advantage of bullies."

*Id.*

34. Cdnogen, *Research Post: School Officials Handle Cyber Bullying*, STUDENTWEBSTUFF.COM (Oct. 1, 2009, 10:45 AM), <http://www.studentwebstuff.com/mis/showthread.php?t=8123>. The article notes:

It is time to address cyber bullying in detail, so that educational institutions can be well aware of their legal rights and responsibilities. This requires clearly defining the scope of cyber bullying and early detection of activities. From these, schools should be able to better assess and decrease the number of cases through prevention strategies.

*Id.*

35. Hoffman, *supra* note 33.

middle school shared his frustration about student cyberbullying incidents: "All we are doing is reacting, . . . . We can't seem to get ahead of the curve."<sup>36</sup> Another middle school principal said that for schools it is a lose-lose situation: "I have parents who thank me for getting involved [with cyberbullying incidents] . . . and parents who say '[i]t didn't happen on school property, stay out of my life.'"<sup>37</sup>

**COURTS IN CONFLICT:** Courts are conflicted in how to deal with cyberbullying and they fail to clearly specify whether (and when) a school has jurisdiction to regulate off-campus speech that bullies others.<sup>38</sup> The Supreme Court has yet to rule on this issue and lower courts are all over the board.<sup>39</sup> For example, one district court found that a school could not discipline a student who created a webpage entitled "Satan's web page," in which he listed names of students under the heading "people I wish would die."<sup>40</sup> Although the student admitted he may have used school computers, the court held that the school's disciplinary measures violated the student's First Amendment rights because there was "[no] proof of disruption to the school on-campus activity."<sup>41</sup> In contrast, the Supreme Court of Pennsylvania upheld as constitutional the expulsion of a student who created a website called "Teacher Sux," in which the student made derogatory comments about a teacher—including why the teacher should die.<sup>42</sup>

The Third Circuit's recent decisions are illustrative of the unclear law concerning cyberbullying. Very recently, in June 2011, the Third Circuit revisited en banc two of its recent opinions concerning cyberbullying. In one case, the court initially upheld as constitutional a school's disciplinary action of a student who created a fake, offensive MySpace page of a principal—but that decision was reversed by a deeply fractured en banc court.<sup>43</sup> The other en banc opinion held that a school's disciplinary action was unconstitutional for very similar behavior.<sup>44</sup> The law in the area of schools

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36. *Id.* (internal quotation marks omitted).

37. *Id.*

38. *See infra* Part II.A.

39. *See infra* Part II.A.

40. *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 781–82 (E.D. Mich. 2002). The student added a disclaimer to his page, "[D]on't go killing people and stuff." *Id.* at 782. Although unintended, the webpage was circulated to other students at the school. *Id.* at 786.

41. *Id.*

42. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 851 (Pa. 2002).

43. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010), *vacated, reh'g granted en banc*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010), *rev'd en banc*, No. 08-4138, 2011 WL 2305973 (3d Cir. June 13, 2011). Seven judges joined the majority, five judges concurred, and six judges dissented. *See id.* at \*8, \*18, \*22.

44. *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587 (W.D. Pa. 2006),

regulating cyberbullying is unmistakably in flux, which leaves schools without clear guidance as to how to address the problem.

### A. *Bullying versus Cyberbullying*

It is apparent that neither the courts nor the schools are clear on how legally to deal with the rampant problem of cyberbullying. What makes the legal framework for cyberbullying so difficult? The answer, as set forth in this Subpart, is that cyberbullying differs from off-line bullying such that current laws and school policies are often inadequate to deal with this new forum for bullying.

Cyberbullying, for the purposes of this Article, is distinguishable from off-line bullying by the use of electronic technology to deliberately and repeatedly harass or intimidate fellow students. Off-line bullying, done face-to-face, has long been a problem in our school system.<sup>45</sup> While schools and state legislatures have historically taken some steps to curtail schoolyard bullying,<sup>46</sup> these steps are insufficient to address cyberbullying because the scope of cyberbullying is much more immense than off-line bullying. New technology has not only allowed for new outlets to bully—it has changed the face of bullying. Cyberbullying presents new problems that “old-fashioned” antibullying laws and policies cannot address for at least six reasons.

First, cyberbullying, unlike off-line bullying, is ubiquitous. Harassing statements and comments made on the Internet can be

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*aff'd*, 593 F.3d 249 (3d Cir. 2010), *vacated, reh'g granted en banc*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010), *aff'd on reh'g*, No. 07-4465, 2011 WL 2305970 (3d Cir. June 13, 2011) (en banc).

45. See, e.g., Mitsuri Taki, *Relations Among Bullying, Stresses, and Stressors*, in HANDBOOK OF BULLYING IN SCHOOLS: AN INTERNATIONAL PERSPECTIVE 151, 151 (Shane R. Jimerson, Susan M. Swearer, & Dorothy L. Espelage eds., 2010) (describing research findings on the causes and effects of bullying from as far back as the 1970s); Ben Crow, *The '80s Bully Megacut: Shoves, Wedgies, Putdowns, and Punches*, THE HUFFINGTON POST (May 14, 2010), [http://www.huffingtonpost.com/2010/05/14/the-80s-bully-megacut-sho\\_n\\_575350.html](http://www.huffingtonpost.com/2010/05/14/the-80s-bully-megacut-sho_n_575350.html) (describing the typical bully in the 1980s).

46. See *infra* Part I.B (surveying the current state laws concerning bullying and cyberbullying). The Arizona law regulating bullying in schools gives an example of the typical language used in antibullying statutes. See *infra* Part I.B. The statute provides: “The Governing Board shall . . . [p]rescribe and enforce policies and procedures to prohibit pupils from harassing, intimidating and bullying other pupils on school grounds, on school property, on school buses, at school bus stops and at school sponsored events and activities.” ARIZ. REV. STAT. § 15-341(A)(37) (2011). See also IDAHO CODE ANN. § 33-512(6) (2006) (stating that each district shall have the duty to “prescribe rules for the disciplining of unruly or insubordinate pupils, including rules on student harassment, intimidation and bullying”); ME. REV. STAT. tit. 20-A, § 1001(15)(H) (2009) (mandating that school boards shall “[e]stablish policies and procedures to address bullying, harassment and sexual harassment”); NEB. REV. STAT. § 79-2,137 (2008) (establishing that each district shall establish a policy on bullying and finding that “[b]ullying disrupts a school’s ability to educate students”).

made on- and off-campus, day and night.<sup>47</sup> The victim's perception, and perhaps the reality, is that an entire school, neighborhood, and community can be involved in the bullying.<sup>48</sup> With a few keystrokes, the bullying statements can be "circulated far and wide in an instant."<sup>49</sup> Therefore, antibullying policies that only address on-campus bullying cannot sufficiently address cyberbullying, yet courts and school officials are confused as to how and to what extent schools can regulate off-campus speech.

Second, cyberbullying allows for much greater anonymity than off-line bullying.<sup>50</sup> Bullies can easily take on fake Internet identities or even take on the identities of other students so that "victims often do not know who the bully is, or why they are being targeted."<sup>51</sup> As one fifteen-year-old explained: "I get mean messages on Formspring,<sup>[52]</sup> with people telling me I'm fat and ugly and stupid. I

47. ANTI-DEFAMATION LEAGUE, *supra* note 10, at 1 (explaining that for victims of cyberbullying "there is no refuge and victimization can be relentless"); see also David Kravets, *Cyberbullying Bill Gets Chilly Reception*, THREATLEVEL (Sept. 30, 2009, 6:37 PM), [http://www.wired.com/threatlevel/2009/09/cyberbullyingbill/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+wired27b+%28Blog+-+27B+Stroke+6+%28Threat+Level%29%29](http://www.wired.com/threatlevel/2009/09/cyberbullyingbill/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+wired27b+%28Blog+-+27B+Stroke+6+%28Threat+Level%29%29). The article quotes Rep. Linda Sanchez (D-CA) explaining: "Bullying has gone electronic . . . This literally means kids can be bullied at any hour of the day or the night, or even in the victims' own home." *Id.* (internal quotation marks omitted). Representative Sanchez proposed the "Megan Meier Cyberbullying Prevention Act," which would make cyberbullying a federal offense. H.R. 1966, 111th Cong. (2010).

48. Hinduja & Patchin, *supra* note 2, at 2.

49. ANTI-DEFAMATION LEAGUE, *supra* note 10, at 1.

50. Mike Hardcastle, *What is Cyberbullying? Bullying Comes Home*, ABOUT.COM TEENADVICE, <http://teenadvice.about.com/od/schoolviolence/a/cyberbullying1.htm> (last visited Aug. 31, 2011). The article states:

Bullying has been around forever but cyberbullying is different because it lets a bully remain anonymous. It is easier to bully in cyberspace than it is to bully face to face. With cyberbullying a bully can pick on people with much less risk of being caught . . .

The detachment afforded by cyberspace makes bullies out of people who would never become involved in a real life incident. The Internet makes bullying more convenient and since the victim's reaction remains unseen people who wouldn't normally bully don't take it as seriously.

*Id.*

51. Hinduja & Patchin, *supra* note 2, at 2. See also H.R. 1966, 111th Cong. (2010) ("Congress finds . . . [e]lectronic communications provide anonymity to the perpetrator and the potential for widespread public distribution, potentially making them severely dangerous and cruel to youth.").

52. FORMSPRING, <http://www.formspring.me/> (last visited Aug. 29, 2011). Formspring is a question-and-answer-based social website which allows its users to anonymously set up a profile page, from which anyone can ask them questions. See generally *id.* The questions and their given responses are then published on the user's profile page, including links to social networking sites such as Facebook and Twitter. The site's anonymity has been criticized for generating hateful comments because it allows minors to ask questions and give

don't know what I ever did to anyone. I wish it wasn't anonymous."<sup>53</sup> Because of anonymity, cyberbullies may not fit the profile of the typical bully.<sup>54</sup> For example, three Louisiana students were recently arrested for cyberbullying, despite the fact that they were all honor students.<sup>55</sup> Anonymity, therefore, not only creates problems for school officials who are investigating cyberbullying (school officials may be at a loss as to what would entail constitutional searches in their investigations) but also may impact which remedies for cyberbullying are most effective.

Third, cyberbullying gives bullies physical distance from their victims while at the same time allowing for a greater audience—which may encourage even more bullying.<sup>56</sup> The audience mentality allows for others to “join in on ‘the fun’” who may not have done so in a physical confrontation.<sup>57</sup> Moreover, audience members can easily perpetuate the bullying by adding online comments or by simply forwarding messages and links to others.<sup>58</sup> Off-line bullying policies fail to address how cyberbullying quickly involves numerous parties.

Fourth, children are often more technologically adept than adults. Children use and explore new technologies every day,<sup>59</sup>

responses related to sexual experiences and preferences for all the public to see, share, and comment on. Tamar Lewin, *Teenage Insults, Scrawled on Web, Not on Walls*, N.Y. TIMES, May 5, 2010, <http://www.nytimes.com/2010/05/06/us/06formspring.html>.

53. Hinduja & Patchin, *supra* note 2, at 4; *see also* ANTI-DEFAMATION LEAGUE, *supra* note 10, at 1 (explaining that cyberbullying may be more harmful than traditional bullying because of the invasive and pervasive nature of the communication and because messages are circulated far and wide and there is no refuge—it is ubiquitous).

54. Hardcastle, *supra* note 50 (“Bullies are natural instigators and in cyberspace bullies can enlist the participation of other students who may be unwilling to bully in the real world. Kids who stand around doing nothing in a real life bullying incident often become active participants in online harassment.”).

55. *Students Arrested for Cyber Bullying*, *supra* note 21 (“All of the students involved are honor students.”).

56. *See, e.g.*, Long, *supra* note 1. The article states:

Unlike the schoolyard bully of yesteryear, the cyberbully can hide behind online anonymity and attack around the clock, invading the privacy of a teen's home. With young people spending most of their free time online or texting their friends, digital bullies not only have ready access to victims, but also an audience—because without witnesses, virtual bullying loses its punch.

*Id.*

57. ANTI-DEFAMATION LEAGUE, *supra* note 10, at 1.

58. *How Is Cyberbullying Different to Other Forms of Bullying?*, TEACHTODAY, <http://www.teachtoday.eu/en/Teacher-advice/Cyberbullying/How-is-cyberbullying-different-to-other-forms-of-bullying.aspx> (last visited Aug. 29, 2011) (explaining that “bystanders can become perpetrators if they pass on emails or text/picture messages or take part in an online discussion”).

59. *See, e.g.*, H.R. 1966, 111th Cong. (2009) (“Congress finds the following:

while teachers and parents remain oblivious.<sup>60</sup> This allows for undetected and unregulated outlets for bullying.

Finally, cyberbullying, unlike off-line bullying, is permanent and “usually irrevocable,”<sup>61</sup> trailing its victims from childhood to adulthood. Not only does cyberbullying follow students from school to their homes, but harassing statements can be accessed and relived over and over again, even years later. As one commentator aptly put it: “The Web never stops and it never forgets.”<sup>62</sup> Because of the possible life-long impact of cyberbullying, it is crucial that school officials are equipped with the legal and necessary tools to try to prevent it.

It is largely because of these differences between cyberbullying and off-line bullying that many current antibullying statutes and school policies are inadequate. As the next Subpart addresses, even states with antibullying statutes have gaps that do not cover all aspects of cyberbullying.

### B. Current Statutes and Policies

Appendix A of this Article sets forth a chart analyzing the current state and federal antibullying laws as well as proposed bills. Overall, on the positive side, a large majority of state legislatures have enacted antibullying laws. However, some of these state laws fail to address cyberbullying, and even those laws that have tried to do so often give inadequate guidance to public school administrators on how to enforce the law without violating students’ constitutional and legal rights.

Specifically, the District of Columbia and forty-five states have enacted general antibullying laws (mainly targeting off-line bullying).<sup>63</sup> Only Hawaii, Michigan, Montana, North Dakota and South Dakota lack such statutes.<sup>64</sup> Hawaii<sup>65</sup> and Michigan,<sup>66</sup> along

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(1) Four out of five of United States children aged 2 to 17 live in a home where either they or their parents access the Internet. (2) Youth who create Internet content and use social networking sites are more likely to be targets of cyberbullying.”).

60. Sameer & Patchin, *supra* note 2 (explaining that parents and teachers may not be able to keep track or even know what to do if cyberbullying is discovered).

61. ANTI-DEFAMATION LEAGUE, *supra* note 10, at 1.

62. Rick Rojas, *When Students’ Controversial Words Go Viral, What Is the University’s Role?*, L.A. TIMES (Mar. 27, 2011), <http://www.latimes.com/news/local/la-me-college-speech-20110327,0,2970965.story> (reporting on the recent story where a college student posted a YouTube video, in which she complained and mocked Asian students, leading to death threats against her and her subsequent voluntary withdrawal from school).

63. See *infra* Appendix A.

64. See *infra* Appendix A.

65. S.B. 2094, 25th Leg. Reg. Sess. (Haw. 2010).

66. Matt’s Safe School Law, H.B. 4162, 95th Leg. Reg. Sess. (Mich. 2007); H.B. 4580, 96th Leg. Reg. Sess. (Mich. 2010).

with the federal government,<sup>67</sup> have proposed antibullying laws, which are currently pending. While forty-three states require public schools to have a policy regarding bullying,<sup>68</sup> only a minority of those states have model school policies.<sup>69</sup>

The gaps in these laws become even more evident when looking at how cyberbullying is specifically addressed. Again, the good news is that some states attempt to address the cyberbullying problem in antibullying statutes. Six states expressly prohibit “cyberbullying,”<sup>70</sup> and twenty-eight states prohibit “electronic harassment,”<sup>71</sup> which likely encompasses most aspects of cyberbullying.

The problem is that, of those states with antibullying statutes, only ten states have model policies.<sup>72</sup> Those ten model policies fail to fully and adequately give school officials guidance on how to deal with the unique aspects of cyberbullying, further compounding the problem.<sup>73</sup> For example, neither “cyberbullying” nor “electronic harassment” is even mentioned in the California Department of Education’s “Sample Policy for Bullying Prevention.”<sup>74</sup> Likewise,

67. S. 3739, 111th Cong. (2010). This proposed bill, if passed, would amend the Safe and Drug-Free Schools and Communities Act to allow federal funding for schools that have bullying prevention programs. *See also* Megan Meir Cyberbullying Prevention Act, H.R. 1966, 111th Congress (2009). This proposed bill, if passed, would make it a federal crime to cyberstalk.

68. *See infra* Appendix A.

69. Eighteen states have model school policies, including Alaska, California, Colorado, Delaware, Florida, Iowa, Maine, Michigan, Nebraska, New Jersey, Ohio, Oklahoma, Rhode Island, South Carolina, Vermont, Washington, Wisconsin, and West Virginia. *See infra* Appendix A.

70. ARIZ. STAT. ANN. § 15-341 (37) (2011); KAN. STAT. ANN. 72-8256 (2009); MASS. GEN. LAWS ch. 71, § 370 (2011); NEV. REV. STAT. § 388.133 (2010); N.H. REV. STAT. ANN. § 193-F:4 (2011); OR. REV. STAT. § 339.356 (2010).

71. ALA. CODE § 16-28B-5 (2011); ALASKA STAT. § 14.33.200 (2011); CAL. EDUC. CODE § 32282 (West 2011); FLA. STAT. § 1006.147 (2010); GA. CODE ANN. § 20-2-751.4 (2011); IDAHO CODE ANN. § 18-917A (2011); 105 ILL. COMP. STAT. 5/27-23.7 (2010); IND. CODE § 20-33-8-0.2 (2010); IOWA CODE § 280.28 (2010); KAN. STAT. ANN. 72-8256 (2009); MD. CODE ANN., EDUC. § 7-424 (West 2010); MINN. STAT. § 121A.0695 (2010); MISS. CODE ANN. § 37-11-67 (2010); NEV. REV. STAT. § 388.122 (2010); N.H. REV. STAT. ANN. § 193-F:4 (2011); N.J. STAT. ANN. § 18A:37-14 (West 2011); N.M. CODE R. § 6.12.7 (LexisNexis 2010); N.C. GEN. STAT. § 115C-407.15 (2010); OKLA. STAT. tit. 70, § 24-100.4 (2011); OR. REV. STAT. § 339.351 (2010) (Definitions); 24 PA. CONS. STAT. § 13-1303.1-A (2010); R.I. GEN. LAWS § 16-21-26 (2011); S.C. CODE ANN. § 59-63-140 (2010); VA. CODE ANN. § 22.1-279.6 (2011); WASH. REV. CODE § 28A.300.285 (2010); WYO. STAT. ANN. § 21-4-314 (2011).

72. Those ten states are California, Delaware, Florida, Iowa, Oklahoma, Nebraska, New Jersey, Rhode Island, South Carolina, and Washington. *See infra* Appendix A.

73. *See supra* Part I.A.

74. *Sample Policy for Bullying Prevention*, CAL. DEPT OF EDUC., <http://www.cde.ca.gov/lss/se/samplepolicy.asp> (last updated Oct. 25, 2010).

the model antibullying policies for Oklahoma and Rhode Island<sup>75</sup> also fail to include any reference to cyberbullying. Indeed, Colorado's model policy readily identifies its own gaps: "the [school] district should consult with its own legal counsel to determine appropriate language."<sup>76</sup> Such model policies give little guidance to school administrators about how to deal with cyberbullying.

Even those state legislatures that have created model school policies referencing "cyberbullying" fall short. For example, the Delaware, Florida, Ohio, and South Carolina<sup>77</sup> model school policies define cyberbullying, but fail to give public school officials any guidance on how to apply the definition so as not to run afoul of free speech and other constitutional and legal protections.

Thus, while state legislatures, for the most part, are taking great strides by including cyberbullying in their antibullying legislation, there has been little to no guidance on how public school officials can legally implement policies to deal with cyberbullying. The remainder of this Article attempts to set forth a constitutional model cyberbullying policy that public schools can adopt and put into action.

## II. A CONSTITUTIONAL CYBERBULLYING POLICY FOR PRIMARY AND SECONDARY PUBLIC SCHOOLS: CONSIDERING FIRST AMENDMENT, DUE PROCESS, AND FOURTH AMENDMENT CHALLENGES

It is imperative to note at the outset that students' civil rights must be protected. Indeed, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the

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75. *Safe Schools Guide: Selected Strategies and Resources*, OKLA. DEP'T OF EDUC. (2005), <http://www.sde.state.ok.us/Schools/SafeHealthy/pdf/SafeSchlGuide.pdf>; *Guidance on Developing Required Policies on Bullying*, RHODE ISLAND DEP'T OF EDUC., [http://www.ride.ri.gov/psi/docs/child\\_family/substance/bullying%20guidance%20and%20modelpolicy%2011-21-03.pdf](http://www.ride.ri.gov/psi/docs/child_family/substance/bullying%20guidance%20and%20modelpolicy%2011-21-03.pdf) (last visited Aug. 29, 2011).

76. *Colorado Association of School Boards Sample Policy on Bullying Prevention and Education*, CENTER FOR THE STUDY AND PREVENTION OF VIOLENCE (2001), [http://www.colorado.edu/cspv/safeschools/bullying\\_casbpolicy.html](http://www.colorado.edu/cspv/safeschools/bullying_casbpolicy.html).

77. *Delaware's Model Bully Prevention Policy*, DELAWARE DEP'T OF EDUC., [http://www.doe.k12.de.us/infosuites/students\\_family/climate/files/Bully%20Prevention%20Policy%20Template.pdf](http://www.doe.k12.de.us/infosuites/students_family/climate/files/Bully%20Prevention%20Policy%20Template.pdf) (last visited Aug. 29, 2011); *Model Policy Against Bullying and Harassment*, FLA. DEP'T OF EDUC. (July 31, 2008), [www.fl DOE.org/safeschools/doc/modelpolicy.doc](http://www.fl DOE.org/safeschools/doc/modelpolicy.doc); *Anti-Harassment, Anti-Intimidation and Anti-Bullying Policy*, OHIO DEP'T OF EDUC. ADM'R, <http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEDetail.aspx?page=3&TopicRelationID=1287&ContentID=29364&Content=109573> (last updated Aug. 4, 2011) (providing a variety of resources including an overview of the Model Policy); *South Carolina—Self Control Addressing Bullying in Our Schools: A Bullying Prevention Model*, S.C. DEP'T OF EDUC. 31–36, <http://www.itv.sctv.org/guides/sc2v2.pdf> (last visited Sept. 24, 2011).

community of American schools.”<sup>78</sup> As one judge explained:

In order to maintain a thriving democracy, students cannot be unreasonably encumbered in their freedom to express moral, political, and social ideals and beliefs. The classroom is peculiarly the “marketplace of ideas.” The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, (rather) than through any kind of authoritative selection.” . . . Schools should foster an environment of learning that is vital to the functioning of a democratic system and the maturation of a civic body.<sup>79</sup>

The exercise of students’ civil rights in public school, however, has to be “applied in light of the special characteristics of the school environment.”<sup>80</sup> The constitutional rights of public school students “are not automatically coextensive with the rights of adults in other settings.”<sup>81</sup> Thus, in addressing the First Amendment, Due Process, and Fourth Amendment issues related to cyberbullying in public schools, there must be a balance between safeguarding students’ constitutional rights and allowing public school officials to maintain a safe and thriving learning environment.<sup>82</sup> This Part of the Article attempts to set forth an analysis that strikes this balance.

#### A. *First Amendment Issues: Defining “Cyberbullying”*

It is well established that the First Amendment right to freedom of speech extends to students in public schools.<sup>83</sup> As the United States Supreme Court declared over forty years ago, public school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>84</sup> However, the Supreme Court also recognized the need for schools to be able to exercise a certain amount of authority over the speech of their students to retain order and control of the educational environment.<sup>85</sup> One of the main concerns is that school

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78. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

79. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 08-4138, 2011 WL 2305973, at \*23 (3d Cir. June 13, 2011) (Fisher, J., dissenting) (citations omitted) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

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

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

82. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (pointing out that students’ First Amendment rights in public schools must be applied in light of the special characteristics of the school’s environment, and that a school does not need to tolerate student speech that is inconsistent with the school’s educational mission—even if the government would not be able to censor similar speech outside the school).

83. *See e.g., Tinker*, 393 U.S. at 506.

84. *Id.*

85. *Id.* at 507 (“[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials,

cyberbullying policies will run afoul of the First Amendment and interfere with students' rights to free speech.<sup>86</sup> Therefore, to address whether or not a specific cyberbullying policy is constitutional, the extent to which student speech is protected by the First Amendment must be carefully examined. There is no Supreme Court case squarely on point.<sup>87</sup> The split in lower courts' decisions shows that the law is ambiguous.<sup>88</sup> Even the Supreme Court has expressed confusion over how precedents apply to the burgeoning issues involving student free speech, stating that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents."<sup>89</sup>

This Subpart sets forth a novel First Amendment constitutional framework to consider when analyzing public school cyberbullying policies. The two-prong framework involves both a jurisdictional and

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consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.").

86. See *Morse v. Frederick*, 551 U.S. 393, 418 (2007) (Thomas, J., concurring) ("I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don't."); Tova Wolking, Comment, *School Administrators as Cyber Censors: Cyber Speech and First Amendment Rights*, 23 BERKELEY TECH. L.J. 1507, 1529 (2008) ("The chilling effect of punishing student speech merely because it is unpleasant or disagreeable threatens the foundations of democracy... It follows that discouraging students from engaging in discourse and critical thinking, even if it is juvenile or silly, is antithetical to a healthy democracy.").

87. There are four seminal Supreme Court cases concerning student free speech. *Morse*, 551 U.S. at 397 (holding that schools may regulate student speech that promotes illegal drug use and that takes place during a school-sponsored event); *Hazelwood*, 484 U.S. at 271 (holding that schools can regulate student speech which may be perceived to "bear the imprimatur of the school," such as a school-sponsored newspaper); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (holding that lewd, vulgar, or plainly offensive speech that takes place on-campus is punishable); *Tinker*, 393 U.S. at 513 (holding that schools can regulate speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others").

88. Compare *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010), *rev'd en banc*, No. 08-4138, 2011 WL 2305973, at \*12 (3d Cir. June 13, 2011) (holding that the school could not discipline a student for speech created off-campus) with *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 40 (2d Cir. 2007) (holding that the school can regulate student speech created off-campus where it was reasonably foreseeable that it would reach the school campus). See also *infra* Part II.A(1)-(2); David Kravets, *Cyberbullying Bill Gets Chilly Reception*, WIRED.COM (Sept. 30, 2009), [http://www.wired.com/threatlevel/2009/09/cyberbullyingbill/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+wired27b+%28Blog+-+27B+Stroke+6+%28Threat+Level%29%29](http://www.wired.com/threatlevel/2009/09/cyberbullyingbill/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+wired27b+%28Blog+-+27B+Stroke+6+%28Threat+Level%29%29). This article explains how Representative Sanchez proposed legislation, the "Megan Meier Cyberbullying Prevention Act," which would make cyberbullying a federal offense. *Id.* The legislation was criticized as being "unconstitutionally vague" and a "breach of free speech." *Id.*

89. *Morse*, 551 U.S. at 401.

substantive inquiry:<sup>90</sup> (1) The school must first decide whether it has jurisdiction over the speech. The legal standard differs depending on whether the speech originated on- or off-campus (the harder cyberbullying cases usually involve speech originating off-campus);<sup>91</sup> if the school has proper jurisdiction, then (2) the school must determine whether, as a matter of substantive law, it can indeed regulate the speech. This second inquiry will fall into two subcategories: (i) whether the school is able to categorically regulate the speech; and if not, then (ii) under the “*Tinker* standard,”<sup>92</sup> whether the speech materially disrupts class work or substantially impinges on the rights of others.<sup>93</sup>

### 1. *Jurisdictional Matters*

**SPEECH ORIGINATING ON-CAMPUS:** There is Supreme Court precedent dictating that schools have jurisdiction to regulate speech that originates on school campuses,<sup>94</sup> or at school-sanctioned activities that are equivalent to being on the school campus.<sup>95</sup> Therefore, in the cyberbullying context, it appears to be within the school’s jurisdiction to regulate speech that originates on-campus whether the student uses the school’s resources or the student uses his or her own personal technology while on-campus.

**SPEECH ORIGINATING OFF-CAMPUS:** The Supreme Court has not ruled on whether schools have jurisdiction over student speech that

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90. Although courts do not systematically address these two inquires, as this Part will lay out, a survey of student speech precedent lends itself to this framework.

91. See ANTI-DEFAMATION LEAGUE, *supra* note 10, at 5–6. The authors point out:

As a significant amount of cyberbullying is created on computers, cell phones and other devices that are not owned by the school, or are not located on school property, but still affect the school environment and the welfare of the students, it is important to ensure that schools are given adequate legal framework to address the issue.

*Id.*

92. *Tinker*, 393 U.S. at 513. See *infra* Part II.A(2) (discussing the *Tinker* standard fully).

93. While this Part of the Article analyzes how public schools might have the right to regulate some off-campus speech, other scholars have argued that “*Tinker* Stopped Itself at the Schoolhouse Gate.” Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 140 (2003).

94. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988) (holding that schools can regulate student speech in school-sponsored newspapers); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (holding that lewd offensive speech given at a school assembly is punishable).

95. *Morse*, 551 U.S. at 401, 408 (explaining that a student “cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not in school” and promote illegal drug use) (internal quotations omitted).

originates off-campus or is not related to a school-sponsored activity. There are, however, a number of cases that deal with this issue, some of which involve the Internet.<sup>96</sup> Unfortunately, the holdings in these cases are inconsistent.<sup>97</sup>

The cases can be grouped into three general categories. First, in a few cases, the courts skip the jurisdictional question all together.<sup>98</sup> However, the Third Circuit reversed a district court decision in which the jurisdictional question was not addressed.<sup>99</sup> Thus, it would behoove one, especially given that most cyberbullying originates off-campus, to thoroughly address the jurisdictional issue before attempting to regulate any off-campus speech.<sup>100</sup>

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96. One scholar argues that Internet-speech cases might be most like underground newspaper cases. Wolking, *supra* note 86, at 1516–19. *See also, e.g.,* Thomas v. Bd. of Educ., 607 F.2d 1043, 1049 (2d Cir. 1979) (holding that schools could not punish students who distributed the newspaper off-campus, and only minimally associated the newspaper to the school by keeping copies in a teacher's office for storage).

97. *Compare* Doninger v. Niehoff, 527 F.3d 41, 43–44 (2d Cir. 2008) (ruling that the school had authority to take away a student's right to participate in student government when the student posted online comments that substantially disrupted the school), Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007) (holding that the school can regulate student speech where it was reasonably foreseeable that it would reach the school campus), *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 869 (Pa. 2002) (finding that the school can regulate speech originating off-campus, but directed at the school), and *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 459 (W.D. Pa. 2001) (allowing a school to regulate speech where the school disciplined a student for creating, and sharing with his friends via email, a website which was insulting and degrading to one of the teachers), *with* Beussink *ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (finding that the decision to discipline a student for off-campus speech was unacceptable because it was based on the principal's emotional reaction and not any real fear that the speech would cause material disruption), *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1190 (W.D. Wash. 2000) (holding that because the speech was created off-campus, there was not enough of a connection to the school for the school to have jurisdiction over the speech), and *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1118 (C.D. Cal. 2010) (finding that the student speech originating off-campus did not substantially disrupt school activity and so the school had no authority to punish the student for that speech).

98. *See, e.g.,* LaVine v. Blaine Sch. Dist., 257 F.3d 981, 991 (9th Cir. 2000) (finding school discipline constitutional, without any jurisdictional analysis, where the student wrote a violent poem off-campus but showed it to his teacher).

99. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010), *vacated, rev'd en banc*, No. 08–4138, 2011 WL 2305973, at \*10 (3d Cir. June 13, 2011) (overturning the district court's decision that stated *Tinker* did "not govern this case because no 'substantial and material disruption' occurred").

100. *See, e.g., Beverly Hills*, 711 F. Supp. 2d at 1104 (conducting a jurisdictional analysis despite concluding that in the Ninth Circuit "the substantial weight of authority indicates that geographic boundaries generally carry little weight in the student-speech analysis").

Second, some courts require that it must be “foreseeable” that the speech would reach the campus for the school to regulate it. If it was “foreseeable” that the speech would reach campus, then it can be regarded as “on-campus” speech and the school would have jurisdiction over it.<sup>101</sup>

Third, some courts have ruled that there must be a “sufficient nexus” between the speech and the school before a school has the jurisdiction to punish the student speech.<sup>102</sup> However, courts are split as to what constitutes this “sufficient nexus.” Some courts have broadly applied the rule finding the connection is established if the speech is directed at a school-specific audience;<sup>103</sup> or if the speech has been brought on to the campus, even if it was not the student in question who did so.<sup>104</sup> Other courts, however, have narrowly applied the rule and found no substantial nexus between the speech and the school because the student speech, “did not attempt to engage other students in any on-campus behavior.”<sup>105</sup>

Given that cyberbullying easily spreads (Internet links and text messages can easily be forwarded to numerous people with the click of a button), courts should adopt the broad application of the “sufficient nexus” test. For purposes of a cyberbullying policy, schools should consider using both the “foreseeability” and the

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101. See, e.g., *Wisniewski*, 494 F.3d at 38–40 (finding that the *Tinker* standard applied because it was reasonably foreseeable that the student speech would reach campus and because it did, in fact, reach the school campus).

102. See *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1372 (S.D. Fla. 2010); *Beverly Hills*, 711 F. Supp. 2d at 1107; *Bethlehem*, 807 A.2d at 864 (holding that the threshold question is whether there was a sufficient nexus between the speech and the school campus).

103. *Bethlehem*, 807 A.2d at 847 (finding that there was a sufficient nexus between the speech and the school where a student created a website off-campus which was subsequently viewed by students on-campus); see also *Wolking*, *supra* note 86 (explaining courts’ decisions regarding off-campus speech). However, while the intended audience may be a factor in deciding whether or not there was a sufficient nexus, it may not be enough on its own. See *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (“Although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school’s supervision of control.”).

104. *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (“Further, because the Bozzuto list was brought on-campus, albeit by an unknown person, *Tinker* applies.”); see also *Bethlehem*, 807 A.2d at 865 (holding that “where speech that is aimed at a specific school and/or its personnel is brought into the school campus or accessed at the school by its originator, the speech will be considered on-campus speech.”).

105. *Evans*, 684 F. Supp. 2d at 1375. In *Blue Mountain*, Judge Chagares, in his dissent, points out that one factor in deciding a school’s jurisdictional reach is whether the student made the Internet site private or public. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 300 (3d Cir. 2010) (J. Chagares, dissenting), *vacated, reh’g granted en banc*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010), *rev’d en banc*, No. 08-4138, 2011 WL 2305973 (3d Cir. June 13, 2011).

“sufficient nexus” language.<sup>106</sup> Such a jurisdictional requirement will also likely protect a cyberbullying policy from a challenge that the policy is constitutionally overbroad.<sup>107</sup> These legal standards are incorporated in the Model Cyberbullying Policy in Appendix B of this Article.

## 2. *Substantive Matters*

Once the school’s jurisdiction has been established, the next inquiry is whether the school can regulate the speech without violating the First Amendment. Based on precedent, schools can do so in two instances: (i) if the speech is categorically prohibited, or (ii) if the *Tinker* standard is met. Each of these rules will be taken in turn.

**CATEGORICALLY PROHIBITED SPEECH:** Schools can wholly regulate two categories of speech, and a cyberbullying policy should address both.<sup>108</sup> First, under *Hazelwood*, schools can regulate speech that “bear[s] the imprimatur of the school.”<sup>109</sup> Thus, for example, if a cyberbully uses the school’s emblem on an Internet message intended to harass another student, the school can discipline the cyberbully regardless of whether the speech originated on- or off-campus.

Second, it is widely accepted that, even under the broadest reading of the First Amendment, “true threats” are not protected.<sup>110</sup> Though the threshold for determining whether a statement is a “true threat” is fairly high, courts have held that, “[i]n light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other

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106. Some courts have looked at both whether it was “foreseeable” that the speech would reach campus and whether there was a “sufficient nexus.” For example, after considering the many various rulings concerning student off-campus speech, the court in *Beverly Hills* analyzed both whether the conduct was foreseeable and whether there was a substantial nexus between the speech and the school. *Beverly Hills*, 711 F. Supp. 2d at 1108.

107. Compare *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 705–06 (W.D. Pa. 2003) (holding school policy constitutionally overbroad where there were no “geographical limitations”), with *Layshock*, 496 F. Supp. 2d at 605 (upholding constitutionality of school policy over overbroad claim because policy set forth “geographical limitations”).

108. See *infra* Appendix B (setting forth a proposed Model Cyberbullying Policy for Public Schools).

109. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (allowing the school to delete school newspaper articles discussing teen pregnancy and divorce from school-sponsored newspaper).

110. See *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (holding that a “true threat” is not protected by the First Amendment); see also *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38 (2d Cir. 2007) (stating that schools have broader authority over student speech than allowed by the “true threats” standard in *Watts*).

students.”<sup>111</sup> Any school cyberbullying policy that requires punishment for a student who makes a “true threat” against a teacher or another student will be constitutional.

Courts, however, often do not decide whether particular speech reaches the level of a true threat because they often do not have to. If a court finds that the speech can be regulated by the *Tinker* standard (requiring a lower threshold), then the school’s actions will be constitutionally justified regardless of whether the speech constituted a true threat.<sup>112</sup> This leads to the second type of speech that schools can regulate—student speech which satisfies the *Tinker* standard. This second type of speech is addressed in the next Subpart of this Article.<sup>113</sup>

STUDENT SPEECH THAT CAN BE REGULATED UNDER THE *TINKER* STANDARD: In the 1969 seminal case *Tinker v. Des Moines*, the Supreme Court held that it was unconstitutional for a high school to suspend students for wearing black armbands in silent protest of the Vietnam War.<sup>114</sup> The Court recognized that a school had authority to control student speech but that “it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>115</sup> The Court set out a two-part standard for when schools could constitutionally regulate student speech: “[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—

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

112. *See, e.g., LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2000) (upholding, under the *Tinker* standard, the school’s emergency expulsion of a student who showed a teacher a poem, which the student had written while at home, that described the graphic killing of the student’s classmates).

113. It could be argued that under *Fraser* a school might have a third category of speech it can wholly regulate, namely lewd, vulgar, or plainly offensive speech. In *Fraser*, a student gave an “elaborate, graphic, and explicit sexual metaphor” in a speech he gave at a school assembly. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 675 (1986). The Court held that, as part of a school’s duty to teach “the essential lessons of civil, mature conduct,” the school could discipline the student. *Id.* at 683. In later interpreting *Fraser*, the Court, however, seems to limit its holding to speech that occurs only on-campus. *See Hazelwood*, 484 U.S. at 266–67 (noting that under *Fraser* “the government could not censor similar speech *outside the school*”) (emphasis added); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 08-4138, 2011 WL 2305973, at \*12 (3d Cir. June 13, 2011) (en banc) (“*Fraser’s* ‘lewdness’ standard cannot be extended to justify a school’s punishment of J.S. for use of profane language outside the school, during non-school hours.”); *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 213 (3d Cir. 2001) (“According to *Fraser*, then, there is no First Amendment Protection for . . . plainly offensive speech *in school*.”) (emphasis added).

114. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

115. *Id.* at 509.

materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”<sup>116</sup> Therefore, under the *Tinker* standard, schools can regulate student speech that either (i) materially disrupts the operation of the school, or (ii) substantially impinges upon the rights of others.<sup>117</sup>

Schools, therefore, should incorporate the language of the

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116. *Id.* at 513. Many courts that have analyzed the issue of off-campus student speech have applied the *Tinker* “material disruption” standard. *See, e.g., J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1110 (C.D. Cal. 2010); *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001); *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1178 (E.D. Mo. 1998). Often courts have taken the phrase “in class or out of it,” to mean that *Tinker* gave schools the right to regulate off-campus speech. *Beverly Hills*, 711 F. Supp. 2d at 1103. Note that the Third Circuit has left open the issue of whether *Tinker* should apply to off-campus speech at all. *See Blue Mountain*, 2011 WL 2305973, at \*7 (“The Supreme Court established a basic framework for assessing student free speech claims in *Tinker*, and we will assume, without deciding, that *Tinker* applies to J.S.’s speech in this case.”) (emphasis added). In *Blue Mountain*, the concurrence observed:

I write separately to address a question that the majority opinion expressly leaves open: whether *Tinker* applies to off-campus speech in the first place. I would hold that it does not, 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.

*Id.* at \*16 (Smith, J., concurring).

However, as set forth in this Part of the Article, except for the concurrence in *Blue Mountain*, scholars and other courts have collectively assumed, as did the majority in *Blue Mountain*, that the *Tinker* standard applies to all public school student speech whether originating on- or off-campus. In addressing *Blue Mountain*, and a similar en banc Third Circuit case, Judge Jordan explains:

Our Court today issues en banc decisions in two cases with similar fact patterns. In both the case presently before us and in *J.S. v. Blue Mountain School District* . . . we are asked whether school administrators can, consistent with the First Amendment, discipline students for speech that occurs off campus. Unlike the fractured decision in *J.S.*, we have reached a united resolution in this case, but there remains an issue of high importance on which we are evidently not agreed and which I note now, lest there be any misperception that it has been resolved by either *J.S.* or our decision here. The issue is whether the Supreme Court’s decision in [*Tinker*] can be applicable to off-campus speech. I believe it can, and no ruling coming out today is to the contrary.

*Layshock v. Hermitage Sch. Dist.*, No. 07–4465, 2011 WL 2305970, at \*12 (3d Cir. June 13, 2011) (en banc) (Jordan, J., concurring) (footnote omitted).

117. Furthermore, schools do not have to wait until the disruption has occurred. Schools can proactively regulate student speech that “might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities.” *Tinker*, 393 U.S. at 514. *See, e.g., Saxe*, 240 F.3d at 212 (explaining that if students in the past flew a Confederate flag causing material disruption, it would be reasonable for the school to believe there would be a material disruption if the Confederate flag was again displayed).

*Tinker* two-part standard into their cyberbullying policy.<sup>118</sup> There is, however, some ambiguity in its application. Courts have unevenly applied the first *Tinker* standard (that schools can regulate student speech that causes “material disruption”).<sup>119</sup> Courts tend to consider speech as having materially disrupted school activities if administrators are forced to interrupt their regular duties to deal with the disruption.<sup>120</sup> The disruption must be a real disturbance and something more than a “buzz” about the speech.<sup>121</sup> However, when the speech is violent, threatening, or sexually explicit, courts have often found that there was a material disruption.<sup>122</sup> Moreover, courts have also found that schools may discipline students for speech where “a forecast of substantial and material disruption was reasonable.”<sup>123</sup>

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118. See *infra* Appendix B.

119. For example, in both *Layshock* and *Bethlehem* the issues revolved around whether a material disruption was caused by a fake MySpace profile of school officials. Although both cases applied the “material disruption” *Tinker* standard, they came to opposite holdings. Compare *Layshock*, 2011 WL 2305970, at \*1, with *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 868 (Pa. 2002).

120. See *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008) (holding that two administrators were disrupted when called away from scheduled meetings and school activities to deal with the influx of phone calls from the community that were in response to a student’s blog post). But see *Beverly Hills*, 711 F. Supp. 2d at 1117 (stating that an administrator who was charged with student discipline was not disrupted from her regular activities when dealing with the consequences of a student video posting on YouTube).

121. *Killion*, 136 F. Supp. 2d at 456 (“We cannot accept, without more, that the childish and boorish antics of a minor could impair the administrators’ abilities to discipline students and maintain control.”). See also *Blue Mountain*, 2011 WL 2305973, at \*10 (finding no substantial disruption occurred where “beyond general rumbblings” there was only “a few minutes of talking in class, and some officials rearrang[ed] their schedules . . . in dealing with the [fake, vulgar MySpace] profile [of the school principal]”).

122. In *Emmett*, the court reasoned that the suspension of a student who had created a derogatory comment about a teacher was improper in part because the speech did not contain any threats. *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).

123. *Blue Mountain*, 2011 WL 2305973, at \*10. In this case, the court noted many cases where courts have held that a forecast of substantial and material disruption was reasonable. *Id.* See, e.g., *Doninger v. Niehoff*, 527 F.3d 41, 50–51 (2d Cir. 2008) (holding that punishment was justified, under *Tinker*, where a student’s derogatory blog about the school was “purposely designed by [the student]” to “encourage others to contact the administration,” and where the blog contained “at best misleading and at worst false information” that the school “need[ed] to correct”); *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007) (holding that punishment was justified, under *Tinker*, where students circulated a petition to fellow football players calling for the ouster of their football coach, causing the school to have to call a team meeting to ensure “team unity,” and where not doing so “would have been a grave disservice to the other players on the team”); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989–90 (9th Cir. 2000) (holding that the school district did not violate a student’s First Amendment rights when it expelled him on an emergency basis in order to

Notably, *Tinker* is different than most cyberbullying cases because *Tinker* involved political speech. Arguably, then, the threshold for establishing a “material disruption” may be lower for purely hurtful speech.<sup>124</sup> As one scholar noted, “cyberbullying incidents that occur at school—or that originate off-campus but ultimately result in a substantial disruption of the learning environment—are well within the school’s legal authority to intervene.”<sup>125</sup>

Though *Tinker* clearly set out a two-prong standard under which a school may regulate student speech, the trend has been for courts to focus on the first prong (regulating speech that causes a material disruption). Courts have, for the most part, ignored the possibility of the second prong (regulating speech that substantially impinges on the rights of others).<sup>126</sup> Although many courts have not yet embraced this second prong of *Tinker*, the prong may cover many instances of cyberbullying. For example, if a cyberbully

prevent “potential violence on campus” after the student showed a poem entitled “Last Words” to his English teacher, which was “filled with imagery of violent death and suicide” and could “be interpreted as a portent of future violence, of the shooting of . . . fellow students”).

124. Recent cases show a trend of finding that hurtful speech can cause a material disruption. For example, in *Emmett*, the student speech was artistic in nature: the website was created as a satire of the school’s homepage and on it were ironic mock obituaries of the student’s friends. *Emmett*, 92 F. Supp. 2d at 1090. The court, noting that the student speech was much closer to political satire than violent threats, did not allow the school to discipline the student. *Id.* Contrastingly, in *Wisniewski*, the court noted that the student speech was not a sophisticated satire of school administrators but merely a violent depiction of the death of a teacher on a student’s icon for instant messaging. Accordingly, the court found that the speech was threatening and violent and posed a real threat of material disruption to the school. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35–39 (2d Cir. 2007). These two cases illustrate that courts are more likely to find that a student’s speech is not subject to school discipline if it is political or artistic in nature. See also *Bethlehem*, 807 A.2d at 865–66 (distinguishing bullying speech with the type of political speech addressed by *Tinker*).

125. Hinduja & Patchin, *supra* note 2.

126. The court in *Beverly Hills* stated:

[L]ower [c]ourts have not often applied the ‘rights of other’ prong from *Tinker* . . . the Court is not aware of any authority . . . that extends the *Tinker* rights of others prong so far as to hold that a school may regulate any speech that may cause some emotional harm to a student. This Court declines to be the first.

*J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1122–23 (C.D. Cal. 2010). However, the Third Circuit has suggested that the *Tinker* right-of-others prong could be used to justify a school’s antiharassment policy. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (noting that while the precise scope of the rights-of-others prong is unclear, it might be applicable to a school’s defense of its policy). The Eighth Circuit, however, has chosen only to apply the second prong of *Tinker* in cases where the student conduct could “result in tort liability.” *Bystrom ex rel. Bystrom v. Fridley High Sch.*, 822 F.2d 747, 752 (8th Cir. 1987).

harasses a victim to the point at which the victim misses school or suffers emotional distress, then a school could arguably discipline the cyberbully on the grounds that the student substantially impinged on the rights of another student.

In sum, by combining precedent (although ambiguous at times) a school should be able to draft a cyberbullying policy that would survive First Amendment free speech challenges. First, the policy should establish that the school will regulate any student speech within its jurisdiction, which includes (i) all speech originating on-campus and (ii) speech originating off-campus if it was “foreseeable” that the speech would reach campus or if there is a “sufficient nexus” between the off-campus speech and the school. Once jurisdiction is established, then the cyberbullying policy should set forth that the school can (i) wholly regulate speech that “bear[s] the imprimatur of the school” or contains “true threats,” or (ii) regulate speech that “materially disrupts” school operations or “substantially impinge[s] on the rights” of others at the school.<sup>127</sup>

### *B. Due Process Issues: Creating a Nonvague Policy with Proper Notice Requirements*

In addition to First Amendment challenges, school policies may also be challenged as unconstitutionally vague.<sup>128</sup> A regulation is unconstitutionally vague, and thus a violation of due process, if it does not give “fair notice of the regulation’s reach” and requires students “to guess as to the contours of its proscriptions.”<sup>129</sup> Thus, there are two possible vagueness challenges to school cyberbullying policies: the policy is (1) vague as to the definition of what constitutes cyberbullying, or (2) fails to give proper notice of the regulation. Each of these issues will be taken in turn.

#### *1. Nonvague Explanation of “Cyberbullying”*

Specificity of terms is especially important when a regulation, such as a public school cyberbullying policy, is a “content-based regulation of speech.”<sup>130</sup> Although a school has “a certain degree of flexibility in its disciplinary procedures,” its regulations may still be found to be unconstitutionally vague or overbroad.<sup>131</sup> The most common reason for a court to sustain a vague or overbroad challenge of a school policy is when specific terms within the policy are not

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127. See *infra* Appendix B.

128. See, e.g., *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 604–06 (W.D. Pa. 2006) (cyberbullying case where plaintiff challenged school’s discipline of a student on grounds that the school policy was vague).

129. *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 266 (3d Cir. 2002) (internal quotation marks omitted).

130. *Id.* at 266 (citing *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997)).

131. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986).

defined.<sup>132</sup> Therefore, a cyberbullying policy should set forth a clear definition of “cyberbullying.”

As discussed more fully in Part II.A above, this definition should include language as set forth in *Hazelwood*, *Watts*, and *Tinker*.<sup>133</sup> For example, a cyberbullying policy can prohibit the use of electronic devices to make an electronic communication that is meant to: (1) be a “true threat” against a student or school administrator;<sup>134</sup> (2) “materially disrupt” school operations;<sup>135</sup> or (3) substantially “impinge on the rights” of others at the school.<sup>136</sup> This third prohibition of “impinging on others” could include: creating “reasonable fear of harm to the student’s person or property;”<sup>137</sup> creating “a substantially detrimental effect on the student’s physical or mental health;”<sup>138</sup> “substantially interfering with a student’s academic performance . . . [or] interfering with the student’s ability to participate in or benefit from the services, activities, or privileges provided by a school;”<sup>139</sup> or being “so severe, persistent, or pervasive” so as to cause “substantial emotional distress.”<sup>140</sup>

The United States Supreme Court has found that for antidiscrimination statutes, “[e]numeration is the essential device used to make the duty not to discriminate concrete and to provide

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132. See, e.g., *Sypniewski*, 307 F.3d at 261–65 (finding that the school harassment policy was not overbroad except for the section which allowed for punishing students acting with “ill will,” where the term “ill will” was not defined); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215–17 (3d. Cir. 2001) (finding discipline stemming from school policy unconstitutional because policy’s terms were overbroad and vague); *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 458–59 (W.D. Pa. 2001) (holding that because the policy did not contain a definition of “abuse” and because it did not provide further specifications or limitations, it was overbroad).

133. See *infra* Appendix B.

134. See *Watts v. United States*, 394 U.S. 705, 707–08 (1969).

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

136. *Id.* at 509.

137. *Anti-Bullying/Anti-Harassment Policies*, IOWA DEPT OF EDUC., [http://educateiowa.gov/index.php?option=com\\_content&view=article&id=1154:anti-bullyinganti-harassment-policies&catid=411:legal-lessons&Itemid=2656](http://educateiowa.gov/index.php?option=com_content&view=article&id=1154:anti-bullyinganti-harassment-policies&catid=411:legal-lessons&Itemid=2656) (last visited Aug. 29, 2011).

138. *Id.*

139. *Id.* Policies enacted in Iowa, Maine, and Vermont, as well as Michigan’s pending policy, have similar language in their model policies. *Maine School Management Association Sample Policy*, ME. DEPT OF EDUC., <http://www.maine.gov/education/management.htm> (last visited Aug. 29, 2011); *Model Bullying Prevention Plan*, VT. DEPT OF EDUC., [http://education.vermont.gov/new/pdffdoc/pgm\\_safeschools/pubs/bullying\\_prevention\\_04.pdf](http://education.vermont.gov/new/pdffdoc/pgm_safeschools/pubs/bullying_prevention_04.pdf) (last visited Aug. 29, 2011); *Model Anti-Bullying Act*, MICH. STATE BD. OF EDUC., [http://www.michigan.gov/documents/mde/SBE\\_Model\\_AntiBullying\\_Policy\\_Revised\\_9.8\\_172355\\_7.pdf](http://www.michigan.gov/documents/mde/SBE_Model_AntiBullying_Policy_Revised_9.8_172355_7.pdf) (last visited Aug. 29, 2011).

140. ANTI-DEFAMATION LEAGUE, *supra* note 10, at 11–12; *Model Policy Against Bullying and Harassment*, FLA. DEPT OF EDUC., 8 (July 31, 2008), [www.fldoe.org/safeschools/doc/modelpolicy.doc](http://www.fldoe.org/safeschools/doc/modelpolicy.doc).

guidance for those who must comply.”<sup>141</sup> Thus, another way to make the term “cyberbullying” less vague is to set forth a prohibition of cyberbullying based on enumerated characteristics, such as those describing traditionally protected groups or identity-based groups.<sup>142</sup> For example, in its definition of cyberbullying, the policy should prohibit cyberbullying on the basis of race, color, national origin, gender, religion, disability, sexual orientation, or gender identity to remove any doubt that cyberbullying is prohibited regarding any of these characteristics.<sup>143</sup> As one study showed, schools that have policies with enumerated categories report less bullying than schools that do not.<sup>144</sup> Policies should be drafted so that inclusion of enumerated categories does not affect protection for students who do not fall into any of them.<sup>145</sup>

## 2. *Providing Proper Notice*

To make certain that students’ due process rights are not violated, cyberbullying policies must give students and parents notice of the details of the policy. There are three considerations to ensure proper notice is given. First, the cyberbullying policy must clearly set forth what conduct is forbidden. For example, one student raised a successful due process challenge to discipline stemming from a violation of the school’s cyberbullying policy because the policy failed to “put students on notice that off-campus speech or conduct which cause[d] a disruption to school activities may subject them to discipline.”<sup>146</sup> The court explained such notice

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141. *Romer v. Evans*, 517 U.S. 620, 628 (1996).

142. *See, e.g., Latest Hate Crime Statistics*, FBI (Nov. 22, 2010), [http://www.fbi.gov/news/stories/2010/november/hate\\_112210/hate\\_112210](http://www.fbi.gov/news/stories/2010/november/hate_112210/hate_112210) (listing statistics for specific groups covered by hate crime laws).

143. *See, e.g., Safe Schools Improvement Act of 2010*, S. 3739, 111th Cong., § 2(g)(1) (2010); ANTI-DEFAMATION LEAGUE, *supra* note 10, at 11 (setting forth a model bullying statute prohibiting bullying based on enumerated grounds); *Model Policy Against Bullying and Harassment*, *supra* note 140, at 2 (stating that school districts may add “additional specific categories of students to which bullying and harassment is prohibited in excess of what is listed” such as sex, race, color, religion, national origin, age, disability, etc.).

144. HARRIS INTERACTIVE, *FROM TEASING TO TORMENT: SCHOOL CLIMATE IN AMERICA 9* (2005), available at [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/499-1.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/499-1.pdf).

145. For example, the cyberbullying policy can simply state that students are prohibited from cyberbullying other students “including, *but not limited to* [list enumerated categories].” ANTI-DEFAMATION LEAGUE, *supra* note 10, at 11 (emphasis added).

146. *J.C. v. Beverly Hills Unified Sch. Dist.*, No. CV 08-3824 SVW, at \*14 (C.D. Cal. 2009), available at [www.lawyersusaonline.com/wp-files/pdfs/jc-beverly-hills.pdf](http://www.lawyersusaonline.com/wp-files/pdfs/jc-beverly-hills.pdf) (order granting plaintiff’s summary adjudication motion on third cause of action). In *Beverly Hills*, a case extensively cited in Part II.A *supra*, the published portion of the court’s opinion only ruled on the first two causes of action concerning the First Amendment issue and qualified immunity. *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1097

was necessary so that students could “modify their conduct in conformity with the school rules.”<sup>147</sup> Therefore, a cyberbullying policy should clearly set forth the what, who, and when. In other words, the policy should not only define what constitutes “cyberbullying” and against whom it is prohibited (such as enumerated groups of individuals), but it must also explain *when* the school can exercise jurisdictional authority over the conduct.<sup>148</sup>

Second, the school must ensure that students and parents receive actual notice of the cyberbullying policy. Students’ due process rights are implicated if they do not have adequate and actual notice of a school’s policy regarding punishment for certain acts. To meet the actual notice requirement, one scholar suggests that schools should be required to create cyberbullying policies that require parents to receive copies of the school’s cyberbullying policy, along with information on how to prevent cyberbullying and what to do if their child is being cyberbullied.<sup>149</sup> Florida’s model bullying policy does just that; it suggests that the student handbook include the bullying policy, that school officials should inform all students and parents in writing of the bullying policy at the beginning of each school year, and that there should be an annual process for discussing the policy with students in a student assembly.<sup>150</sup> Another way schools can fulfill the actual notice requirement is to implement an “acceptable use policy” for the use of the school’s

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(C.D. Cal. 2010) (“An order regarding Plaintiff’s due process claim, the Third Cause of Action, will follow shortly.”). For plaintiff’s third cause of action, that the school cyberbullying policy violated due process, the court wrote a separate, unpublished order. See *J.C. v. Beverly Hills Unified Sch. Dist.*, No. CV 08-3824 SVW, at \*14 (C.D. Cal. 2009), available at [www.lawyersusaonline.com/wp-files/pdfs/jc-v-beverly-hills.pdf](http://www.lawyersusaonline.com/wp-files/pdfs/jc-v-beverly-hills.pdf).

147. *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, No. CV 08-3824 SVW, at \*14 (C.D. Cal. 2009), available at [www.lawyersusaonline.com/wp-files/pdfs/jc-v-beverly-hills.pdf](http://www.lawyersusaonline.com/wp-files/pdfs/jc-v-beverly-hills.pdf).

148. For example, New Hampshire’s bullying prevention statute allows for the school to take action if bullying or cyberbullying “[o]ccurs off of school property or outside of a school-sponsored activity or event, if the conduct interferes with a pupil’s educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event.” N.H. REV. STAT. ANN. § 193-F:4 (2011). See also ANTI-DEFAMATION LEAGUE, *supra* note 10, at 13 (adopting similar language).

149. Darryn Cathryn Beckstrom, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat to Students’ Free Speech Rights*, 33 VT. L. REV. 283, 315 (2008).

150. *Model Policy Against Bullying and Harassment*, *supra* note 140, at 8 (also suggesting that posters, signs, or other reminders of the policy be displayed around the school and on the school’s buses). The Anti-Defamation League maintains that the cyberbullying policy should be broadly publicized throughout the school, and given to the students’ parents via the conduct code, student handbook on school bulletin boards, and on the school website. See ANTI-DEFAMATION LEAGUE, *supra* note 10, at 7 (explaining that this “notice will send a message to students, teachers, and parents that the school is taking this issue seriously and does not accept inappropriate conduct”).

technology resources, which establishes that school technology cannot be used to cyberbully another student. The “acceptable use policy” should be in the form of a contract, which parents and students must sign before students are able to use the school’s technology resources.<sup>151</sup>

Third, as some state statutes already require, a valid cyberbullying policy should also include a procedure for immediately notifying parents if the school discovers that their child is involved in a cyberbullying incident. Eleven state statutes require schools to notify the parents of both the victim and the cyberbully.<sup>152</sup> The West Virginia statute requires schools to notify parents of *any* student involved in a cyberbullying incident.<sup>153</sup> Some scholars suggest that schools should notify the alleged cyberbully’s parents prior to any investigation.<sup>154</sup> After the investigation, the cyberbully and his parents should be notified of the potential consequences to which they may be subjected.<sup>155</sup>

### C. *The Fourth Amendment Issues: Allowing for Reasonable Searches and Seizures*

The Fourth Amendment raises additional concerns in cyberbullying cases. Once an incident of alleged cyberbullying is reported to school officials, how can the school investigate the allegations without violating the Fourth Amendment’s prohibition of unreasonable searches and seizures?<sup>156</sup> To put the issue in context, consider the illustrative hypothetical set forth in the Introduction of

151. The Anti-Defamation League drafted a model acceptable use policy, adapted from a U.S. Department of Justice model policy. See ANTI-DEFAMATION LEAGUE, *supra* note 10, at 21–22. Scholars also suggest that schools display signs or posters in the school’s computer lab, to remind students of the acceptable “use policy.” Sameer Hinduja & Justin W. Patchin, *Preventing Cyberbullying: Top Ten Tips for Educators*, CYBERBULLYING RESEARCH CENTER (2009), [www.cyberbullying.us/Top\\_Ten\\_Tips\\_Educators\\_Cyberbullying\\_Prevention.pdf](http://www.cyberbullying.us/Top_Ten_Tips_Educators_Cyberbullying_Prevention.pdf) (recommending that a “use policy” be drafted in contract form).

152. CONN. GEN. STAT. § 10-222d (2010); DEL. CODE ANN. tit. 14, § 4112D (b)(2)(j) (2011); FLA. STAT. § 1006.147 (2010); GA. CODE ANN. § 20-2-751.4 (2011); MASS. GEN. LAWS ch. 71 § 37O(d)(viii) (2011); N.H. REV. STAT. ANN. § 193-F:4 (2011); N.Y. EDUC. LAW § 2801-a (McKinney 2009); OHIO REV. CODE ANN. § 3313.666 (West 2011); TEX. EDUC. CODE ANN. § 37.001(a)(6) (West 2009); UTAH CODE ANN. 1953 § 53A-11a-301 (West 2011); W. VA. CODE ANN. § 18-2C-3 (2011).

153. W. VA. CODE ANN. § 18-2C-3(b)(5) (2011).

154. See, e.g., Sameer Hinduja & Justin W. Patchin, *Sexting: A Brief Guide for Educators and Parents*, CYBERBULLYING RESEARCH CENTER, 3 (2010), [http://www.cyberbullying.us/Sexting\\_Fact\\_Sheet.pdf](http://www.cyberbullying.us/Sexting_Fact_Sheet.pdf) [hereinafter *Sexting*].

155. Cal. Sch. Bd. Ass’n, *Cyberbullying: Policy Considerations for Boards, GOVERNANCE AND POLICY SERVICES: POLICY BRIEFS*, 5 (July 2007), [www.csba.org/Services/Services/PolicyServices/~/\\_media/Files/Services/PolicyServices/SamplePolicies/Cyberbullying.ashx](http://www.csba.org/Services/Services/PolicyServices/~/_media/Files/Services/PolicyServices/SamplePolicies/Cyberbullying.ashx).

156. U.S. CONST. amend. IV; *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985) (holding that the Fourth Amendment’s “prohibition on unreasonable searches and seizures applies to searches conducted by public school officials”).

this Article: Joe and Jane are middle school students. Jane's parents discover that Joe has posted on the Internet an animated game depicting himself and other students punching Jane. Joe has forwarded a link to the game to many of his school friends, who have in turn forwarded it to other students. During school hours, while on-campus, numerous students, including Joe, have logged onto the website and participated in the game. Jane's parents report the website to school officials.

Can school officials search Joe's cell phone and personal laptop computer to see if he did indeed create the website? Can school officials search other students' personal electronic devices to see if they accessed the website? If the school decides to search Joe's cell phone, can school officials also search the cell phone for other instances of cyberbullying or violations of school rules? All of these questions pose novel issues under the Fourth Amendment. There are no Supreme Court cases on point. Moreover, those states that have drafted model bullying policies also fail to address these issues.<sup>157</sup> Schools, therefore, are once again left without any guidance. The discussion below aims to answer these questions.

### 1. *The T.L.O. Legal Standard*

The controlling authority on the Fourth Amendment application to schools is the 1985 Supreme Court case *New Jersey v. T.L.O.*<sup>158</sup> This case involved a teacher who found high school students smoking in the bathroom in violation of school rules.<sup>159</sup> School officials searched one student's purse for cigarettes.<sup>160</sup> After finding cigarettes, the school official continued to search the purse and subsequently found drug paraphernalia.<sup>161</sup> The student sought to suppress the evidence found in the purse as a violation of the Fourth Amendment.<sup>162</sup> The Supreme Court first determined that, under the Fourth Amendment, students have a legitimate expectation of privacy in the private property they bring to school.<sup>163</sup> The students' interest, however, must be balanced against the interest of school

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157. See *supra* Part I.B. None of the states with model bullying policies address the scope of reasonable searches. See *infra* Appendix A. Indeed, state legislatures are unclear how the Fourth Amendment applies to reported cyberbullying incidents. For example, in November 2010, a member of the Virginia House of Delegates asked the Attorney General of Virginia to look at the question of whether school officials may search students' cellular phones and laptops when a student reports another student is violating the school's bullying policy. Advisory Op., No 10-105, 2010 WL 4909931, at \*2 (Va. Att'y Gen. Nov. 24, 2010) (“[r]ecognizing that no court has considered the matter”).

158. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

159. *Id.* at 328.

160. *Id.*

161. *Id.*

162. *Id.* at 329.

163. *Id.* at 338.

officials “in maintaining discipline in the classroom and on school grounds.”<sup>164</sup>

The Court established a two-step inquiry for determining when it is reasonable for a public school official to search students’ personal property.<sup>165</sup> First, the search must be justified at inception, meaning there must be “reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”<sup>166</sup> Second, the scope of the search must be “reasonably related to the objective of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”<sup>167</sup> Based on this two-prong test, the Court in *T.L.O.* held the search of the student’s purse did not violate the Fourth Amendment because it was based on an individualized suspicion that she had violated the school rules (first that she was smoking and second that she was using illegal drugs) and was not overly intrusive.<sup>168</sup> Notably, under *T.L.O.*, once a reasonable suspicion of wrongdoing exists, a search of a student’s personal belongings does not require the student’s consent or the consent of his parents.<sup>169</sup>

Although courts have not specifically dealt with the Fourth Amendment’s role in cyberbullying, two cases have applied the *T.L.O.* test to the possession and use of cell phones in violation of school rules. In *Klump v. Nazareth Area School District*, the school had a policy prohibiting use or display of cell phones during school hours.<sup>170</sup> The student, Klump, violated the rule when his cell phone fell out of his pocket during class.<sup>171</sup> After his teacher confiscated his phone, the teacher, along with the principal, then used the phone to call nine other students listed in Klump’s phone directory

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164. *Id.* at 339. In determining a balance between the two interests, the Supreme Court stated that “[i]t is evident that the school setting requires some easing of restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment . . . [as it would] unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the school.” *Id.* at 340.

165. *Id.* at 341.

166. *Id.* at 342. Note that the Court declined to rule on whether “individualized suspicion is an essential element of the reasonableness standard . . . adopt[ed] for searches by school authorities.” *Id.* at 342 n.8.

167. *Id.* at 342. The Court explained that the reasonableness standard saves teachers and administrators from being responsible for understanding the legal definition and “niceties” of probable cause while also ensuring that the students’ right to privacy is not invaded any further than is necessary. *Id.* at 343.

168. *Id.* at 347.

169. *Id.* at 341–42.

170. *Klump v. Nazareth Area Sch. Dist.*, 425 F. Supp. 2d 622, 627 (E.D. Penn. 2006).

171. *Id.* at 630.

to determine if they were violating school policy.<sup>172</sup> They also accessed Klump's text messages and e-mail, and had an instant messaging conversation with Klump's younger brother without identifying themselves.<sup>173</sup> The school officials asserted that they found a drug-related text message while searching the phone.<sup>174</sup> The court held the search was unreasonable.<sup>175</sup> While the teacher was justified in seizing the cell phone because it violated the school policy, the search of the phone failed the first part of the *T.L.O.* test because it was not justified at inception.<sup>176</sup> The teacher and principal had no reason to suspect that Klump was violating any other school policy other than the possession of the cell phone, thus, seizure alone would have been acceptable. Notably, there were no facts suggesting that Klump had *used* his cell phone while on-campus.<sup>177</sup> Instead the school authorities were impermissibly searching the phone "as a tool to catch other students' violations."<sup>178</sup>

In the second cell phone case on point, *J.W. v. Desoto County School District*, the school district also had a policy prohibiting students from possessing or using cell phones at school.<sup>179</sup> Student R.W. was caught violating this policy when he opened his cell phone to retrieve a text message during class.<sup>180</sup> The teacher took R.W.'s phone, opened it, and viewed personal photos stored on it.<sup>181</sup> R.W. was ordered into the principal's office where the principal and police sergeant also opened the phone and examined the photographs.<sup>182</sup> One photo showed another student holding a B.B. gun.<sup>183</sup> Based on that photo, R.W. was expelled for having gang pictures.<sup>184</sup> The court applied the *T.L.O.* test and upheld both the seizure and search of the phone.<sup>185</sup> The court explained that upon witnessing a student violating the rule, it was reasonable for a school official to seek to determine to what end the student was improperly using the phone.<sup>186</sup> The court noted the student could have been using his cell phone at school to cheat or communicate with another student who would also be subject to discipline.<sup>187</sup>

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172. *Id.*

173. *Id.*

174. *Id.* at 631.

175. *Id.* at 645–46.

176. *Id.* at 640–41.

177. *Id.* at 640.

178. *Id.*

179. *J.W. v. Desoto Cnty. Sch. Dist.*, No. 2:09-cv-00155-MPM-DAS, 2010 WL 4394059, at \*1–2 (N.D. Miss. 2010).

180. *Id.* at \*1.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at \*2.

185. *Id.* at \*4.

186. *Id.*

187. *Id.*

The court in *Desoto* distinguished *Klump* by explaining that in *Klump* the student unintentionally violated the school policy (the phone fell out of his pocket) and the school officials used that accident as a pretext for a “fishing expedition.”<sup>188</sup> In contrast, here R.W. knowingly violated the rules by bringing the phone on school grounds and then using it.<sup>189</sup> Moreover, as opposed to the “fishing expedition” that occurred in *Klump* (misleadingly calling other students and responding to text messages and emails using a student’s electronic identity),<sup>190</sup> in R.W.’s case the search by the school officials was limited to a search of the phone.<sup>191</sup>

INCORPORATING THE T.L.O. STANDARD INTO A CYBERBULLYING POLICY: THE SEARCH MUST (1) HAVE “REASONABLE GROUNDS,” AND (2) BE LIMITED IN “SCOPE.” Cyberbullying policies should incorporate the two-prong test articulated in *T.L.O.*<sup>192</sup> First, the policy should indicate that school officials<sup>193</sup> can search a student’s personal electronic device for evidence of cyberbullying only when there are “reasonable grounds” that the search will lead to evidence of cyberbullying by that person (presumably a violation of a school rule). The policy should also make clear that, unlike in *Klump*, school officials should not be allowed to misleadingly use the search as a ploy to try to catch other students violating the rules.

As *Klump* and *Desoto* illustrate, what constitutes “reasonable grounds” will be a fact-specific inquiry.<sup>194</sup> For example, applying the first prong of the *T.L.O.* standard to the illustrative hypothetical set forth at the beginning of this Part of the Article, if Joe, or any other student, was impermissibly *using* (not just possessing)<sup>195</sup> his

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188. *Id.* at \*5.

189. *Id.*

190. *Klump vs. Nazareth Area Sch. Dist.* 425 F. Supp. 2d 622, 630 (E.D. Penn. 2006).

191. *Desoto*, 2010 WL 4394059, at \*5.

192. *See, e.g., infra* Appendix B.

193. Schools may be concerned that a search conducted by a school resource officer, a police officer trained in the Fourth Amendment and employed by the city on assignment to the school, may be governed by a heightened probable-cause standard. However, one court has held that the reasonable suspicion standard that applies to school officials also applies to the school resource officer. *See In re William V.*, 4 Cal. Rptr. 3d 695, 699 (Cal. Ct. App. 2003). In *William*, the court reasoned that the balance of the importance of the educational environment with the privacy interest of the students determined in *T.L.O.* is the same whether the search is being done by a school official or a school resource officer. *Id.* *But see* Advisory Op., No 10-105, 2010 WL 4909931, at \*3 n.15 (Va. Att’y Gen. Nov. 24, 2010) (“It should be noted that, if the search is being conducted by a school security officer, it may be governed by the heightened probable-cause standard.”).

194. *Klump*, 425 F. Supp. 2d at 640.

195. In *Desoto*, the school official was allowed to search a cell phone the student had used while on-campus, whereas in *Klump* mere possession (not use) of a cell phone, in violation of school rules, would only allow seizure and not a

electronic device at school, then there would be reasonable grounds to search it to determine to what ends the student was improperly using the electronic device. The analysis, however, is slightly more complex if the only fact before school officials is a call from Jane's parents reporting alleged cyberbullying (or an allegation of cyberbullying only from Jane). Then school officials would have to consider factors such as the perceived credibility of the person making the report<sup>196</sup> and whether the electronic record (e.g., a history of postings or visits to a website, emails, or bullying text messages on a cell phone) is likely to still be accessible.

A school's cyberbullying policy should also include language incorporating the second prong of the *T.L.O.* standard, namely a search of a student's electronic device should be limited in scope.<sup>197</sup> If there is suspicion of only a cyberbullying text message, or accessing a website as in the hypothetical set forth above involving Joe, then photographs stored on the electronic device should be left alone. As the Court stated in *T.L.O.*, teachers and school administrators should use their "common sense" in determining the appropriate scope of the search.<sup>198</sup> Generally, call logs and text logs will be within the scope of the search to determine who else may have received or sent the bullying message, or may have accessed or posted on the bullying website.<sup>199</sup> However, as addressed in *Klump*, school officials should not misleadingly or anonymously contact students on these logs to dupe them into admitting further violation of school rules.<sup>200</sup>

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search. *Compare Desoto*, 2010 WL 4394059, at \*5, with *Klump*, 425 F. Supp. 2d at 640.

196. If the victim or student reporting the bullying is willing, schools should initiate an interview to determine the nature of the bullying, the name of the participants, the location and the manner in which the information is being sent, and the distance that the images or messages have spread. See Nancy Willard, *Educator's Guide to Cyberbullying, Cyberthreats & Sexting*, CTR. FOR SAFE AND RESPONSIBLE USE OF THE INTERNET, 9 (2005), <http://www.cyberbully.org/cyberbully/documents/educatorsguide.pdf>. Policies should mandate all evidence be preserved. *Id.* at 8. This requires that any messages received by the victim (cell phone text messages and voicemails) should not be deleted, emails should be saved and printed, and posts should be printed before removal is requested. *Id.* Additionally, any information found through the school district's investigation should be saved and documented. *Id.* One state's department of education has endorsed a policy that requires perpetrators, victims, witnesses, teachers, and staff members to be interviewed. *Policy for Prohibiting Bullying, Harassment and Intimidation*, GA. DEP'T OF EDUC., 6 (Sept. 9, 2010), [http://www.toombs.k12.ga.us/system/policies/bullying\\_policy.pdf](http://www.toombs.k12.ga.us/system/policies/bullying_policy.pdf) (last updated Mar. 31, 2011).

197. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

198. *Id.* at 343.

199. See, e.g., *Sexting*, *supra* note 154, at 3.

200. *Klump*, 425 F. Supp. 2d at 640.

## 2. *Special Legal Concerns for Sexting*

Sexting is the sending or receiving of sexually explicit messages, images, or videos between cell phones, or posting them on the Internet (such as on Facebook or MySpace).<sup>201</sup> Unfortunately, sexting is becoming all too popular among high school and middle school students.<sup>202</sup> These messages are often sent because of romantic interests but can quickly turn into an unforgiving and relentless form of cyberbullying.<sup>203</sup> Because many child pornography laws prohibit the distribution of child pornography without exception, minors who sext each other can be, and indeed have been, criminally prosecuted.<sup>204</sup> The possibility of criminal legal liability can also confront school officials. There are currently no statutory exceptions allowing for school officials to possess or distribute nude images of minors;<sup>205</sup> therefore, school officials who are investigating allegations of cyberbullying that involve sexting could be subject to state and federal criminal felony charges.<sup>206</sup> One Pennsylvania school board is currently under criminal investigation

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201. *Sexting*, *supra* note 154, at 1.

202. *Id.* The study explains:

[T]he National Campaign to Prevent Teen and Unplanned Pregnancy released data from late September and early October of 2008 which identified that 19% of teens (aged 13 to 19) had sent a sexually-suggestive picture or video of themselves to someone via email, cell phone, or through another form of online interaction, while 31% had received a nude or semi-nude picture from someone else.

*Id.*

203. *See, e.g.*, Jan Hoffman, *A Girl's Nude Photo, and Altered Lives*, N.Y. TIMES, Mar. 26, 2011, [http://www.nytimes.com/2011/03/27/us/27sexting.html?\\_r=1&partner=rss&emc=rss&pagewanted=all](http://www.nytimes.com/2011/03/27/us/27sexting.html?_r=1&partner=rss&emc=rss&pagewanted=all) (explaining how a middle school girl sent a nude photo of herself to another middle school student, a soon-to-be ex-boyfriend, who then forwarded it to another young girl, who then forwarded the photo to all contacts in her cell phone). The article explains: "In less than 24 hours, the effect was as if Margarite, 14, had sauntered naked down the hallways of the four middle schools [in her town] . . . Hundreds, possibly thousands, of students had received her photo and forwarded it." *Id.*

204. *See, e.g., id.* The county prosecutor decided against charging Margarite, the middle-school girl who had sexted a nude photo of herself to a classmate. *Id.* But the prosecutor did "charge three students with dissemination of child pornography, a Class C felony, because they had set off the viral outbreak" by forwarding the nude photo to others. *Id.* *See also* A.H. v. State, 949 So. 2d 234, 235 (Fla. Ct. App. 2007). In *A.H.*, a sixteen-year-old girl was criminally prosecuted for sending nude pictures of herself to her seventeen-year-old boyfriend. *Id.* The boy was also criminally charged with producing, directing, and promoting child pornography. *Id.* *See also* Riva Richmond, *Sexting May Place Teens at Legal Risk*, N.Y. TIMES (Mar. 26, 2009, 12:00 PM), <http://gadgetwise.blogs.nytimes.com/2009/03/26/sexting-may-place-teens-at-legal-risk/>.

205. *See, e.g.*, 18 U.S.C.A. § 2252A (West 2010) (prohibiting under federal criminal law the distribution of child pornography with no exception for school officials investigating sexting or cyberbullying).

206. *Sexting*, *supra* note 154, at 3.

for improper conduct and disseminating child pornography when it was alleged that phones displaying pornographic images and video clips involving minor students were passed around and viewed by more school employees than necessary to investigate the incident.<sup>207</sup>

Moreover, courts have yet to address the possible civil liability of school officials who uncover and examine nude photos of students. The American Civil Liberties Union (“ACLU”) recently pursued a private suit against a Pennsylvania district attorney (after privately settling with the school district) when explicit photos on a female student’s cell phone were discovered by the principal and turned over to the district attorney.<sup>208</sup> In this case, a teacher confiscated a female student’s cell phone when the student used it during class.<sup>209</sup> The teacher turned the phone over to the principal who informed the student that he had found sexually explicit photos and turned them over to law enforcement.<sup>210</sup> The cell phone contained photos of the female student in various states of nudity intended to be seen only by the student’s boyfriend and herself.<sup>211</sup> The ACLU alleges the student’s phone was illegally searched.<sup>212</sup> Courts have historically been stricter in enforcing the Fourth Amendment when student nudity is involved.<sup>213</sup>

Thus, for a school district and its officials to avoid criminal or civil legal liability, if a cyberbullying investigation leads to the uncovering of images of nude minors, those images should never be distributed or shown to other school officials.<sup>214</sup> The school official should promptly contact law enforcement and turn the material over to authorities without distributing it. While school officials can discuss the nature of the material with each other for investigative and disciplinary purposes, cyberbullying policies should strictly

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207. Joe Elias & Daniel Victor, *Sequenita High School Officials Being Investigated for Handling of Images in ‘Sexting’ Case*, THE PATRIOT NEWS (Apr. 15, 2010), [http://www.pennlive.com/midstate/index.ssf/2010/04/susquenita\\_high\\_school\\_officia.html](http://www.pennlive.com/midstate/index.ssf/2010/04/susquenita_high_school_officia.html).

208. Am. Civ. Liberties Union of Pa., *ACLU of PA Sues School District for Illegally Searching Student’s Cell Phone: School Turned Over Girl’s Private Nude Photos to Law Enforcement* (May 20, 2010), <http://www.aclupa.org/pressroom/acluofpasuessooldistrict.htm>.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *See, e.g.*, *Beard v. Whitmore Lake Sch. Dist.*, 402 F. 3d 598, 603 (6th Cir. 2005) (holding students’ constitutional rights were violated after school officials strip searched students to search for stolen money). The court explained: “Students . . . have a significant privacy interest in their unclothed bodies.” *Id.* at 604.

214. *Sexting, supra* note 154, at 3 (“[I]t should be made very clear that administrators and educators should never forward, copy, transmit, download . . . or show any non-law enforcement personnel any evidence collected from [a] personal digital device . . . after the initial discovery . . . at any other time during the investigation.”).

prohibit the dissemination or showing of any nude images of children to anyone other than law enforcement.<sup>215</sup>

### III. A COMPREHENSIVE CYBERBULLYING POLICY: INCLUDING LEGALLY VALID “POLICY CONSIDERATIONS”

While cyberbullying is a new and dangerous type of bullying that raises many novel and complex constitutional issues, the sole purpose of a cyberbullying policy—to halt cyberbullying—should not be forgotten. There are at least three other guidelines that schools should consider in order to create a comprehensive cyberbullying policy: (1) how to set forth procedures that properly respond to and report cyberbullying incidents; (2) how to adopt legally valid and proportionate remedies once a cyberbullying incident has occurred; and (3) how to educate students, parents, and school officials about the vices of cyberbullying.<sup>216</sup> This Part of the Article will address these additional issues by incorporating the best elements of already existing statutory requirements along with some refinements to ensure that the model cyberbullying policy in Appendix B of this Article is not only constitutional, but also comprehensive.<sup>217</sup>

#### A. *Procedures for Responding to and Reporting Cyberbullying Incidents*

As discussed in a previous Subpart of this Article, a school must provide notice of its cyberbullying policy to students and parents in order to survive constitutional challenges.<sup>218</sup> This notice should also include information on how to identify, respond to, and report cyberbullying incidents.<sup>219</sup> Because of the often sensitive nature of cyberbullying (particularly if it involves sexting), the reporting provision should specifically identify the school official<sup>220</sup> who will be a “safe contact” person for students who wish to report incidents of

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215. See *infra* Appendix B.

216. See, e.g., ANTI-DEFAMATION LEAGUE, *supra* note 10, at 4–7. Although this is a model statute for state legislatures to enact, instead of a cyberbullying policy for schools to adopt, this model statute gives guidance because it suggests that school bullying policies should address reporting, remedies, and education. *Id.*

217. See *supra* Parts II.A–C.

218. See *supra* Part II.B.

219. See, e.g., N.J. STAT. ANN. § 18A:37-15(b)(5) (West 2011) (requiring schools to have a bullying policy with “a procedure for reporting an act of harassment, intimidation or bullying”).

220. See ANTI-DEFAMATION LEAGUE, *supra* note 10, at 14, § B(3)(b)(ii); Lisa Madigan, *Cyberbullying: A Student Perspective*, 8 [http://www.illinoisattorneygeneral.gov/children/cyberbullying\\_focus\\_report0610.pdf](http://www.illinoisattorneygeneral.gov/children/cyberbullying_focus_report0610.pdf) (last visited Aug. 29, 2011); Susan P. Limber & Marlene Snyder, *What Works—and Doesn’t Work—in Bullying Prevention and Intervention*, THE STATE EDUC. STANDARD 24, 27 (July 2006), <http://www.yaleruddcenter.org/resources/upload/docs/what/bias/NASBEbullyingarticle.pdf>.

cyberbullying.<sup>221</sup>

In addition, because some students have “indicated that when they reported cyberbullying incidents to teachers, these conversations were not confidential and in some instances resulted in additional retaliatory harassment,”<sup>222</sup> the reporting provision should allow for anonymous and confidential reporting.<sup>223</sup> This could be implemented in a number of ways, such as an anonymous online form on the school’s website or an anonymous drop box inside the school. However, because the reliability and credibility of an anonymous report cannot be ascertained, school officials should neither take disciplinary action<sup>224</sup> nor search a student’s personal electronic devices solely based on an anonymous tip.<sup>225</sup> Nevertheless, based on an anonymous tip, school officials could research the Internet on their own (to see if certain websites exist) or interview students and parents.

Finally, the reporting provision of a cyberbullying policy should put students and parents on notice that school officials may report cyberbullying incidents to law enforcement depending on the criminal nature, gravity, or repetition of the offense.<sup>226</sup> Fines and imprisonment for criminal behavior are possibilities.<sup>227</sup>

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221. Dianne L. Hoff & Sidney N. Mitchell, *Cyberbullying: Causes, Effects, and Remedies*, 47 J. EDUC. ADMIN. 652, 663 (2009).

222. Madigan, *supra* note 220, at 9.

223. See, e.g., N.J. STAT. ANN. § 18A:37-15(b)(5) (West 2011) (allowing “a person to report an act of harassment, intimidation or bullying anonymously”).

224. See *id.* (prohibiting “formal disciplinary action solely on the basis of an anonymous report”).

225. As set forth in Part II.C, a school official must have “reasonable grounds” based on a specific fact inquiry before conducting a search of a student’s personal property. *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985). It is doubtful that anonymous reports alone would satisfy this requirement since school officials would be unable to determine the credibility of the reports.

226. See, e.g., UTAH CODE ANN. § 53A-11a-301(2)(e) (West 2011) (requiring schools to have “procedures for promptly reporting to law enforcement all acts of bullying, hazing, or retaliation that constitute criminal activity”); see also *Cyberbullying: Policy Considerations for Boards*, *supra* note 155, at 5 (“[California school] responses might include . . . contacting law enforcement if the behavior involves [a possible crime]. The student perpetrator and his or her parents should be informed of the potential consequences to which they may be subjected, including potential civil law liabilities.”).

227. See, e.g., Megan Meir Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009) (proposing that “whoever . . . use[s] electronic means to support severe, repeated, and hostile behavior, shall be fined under this title or imprisoned not more than two years, or both); S.B. 2094, S. 25th Leg., Reg. Sess. (Haw. 2010) (“If any child of school age engages in bullying or cyberbullying, the child, and the father, mother, or legal guardian, shall be fined not more than \$100 for each separate offense.”); Jared’s Law, H.B. 750, 58th Leg., Reg. Sess. (Idaho 2006) (“A student who personally violates any provision of this section shall be guilty of an infraction.”).

### B. Proportionate Remedies for Cyberbullying Incidents

Schools have many options in how to respond to cyberbullying. Such options include suspending, expelling, or counseling the student as well as contacting the appropriate authorities.<sup>228</sup> While certain state statutes mandate specific remedies,<sup>229</sup> a majority of states leave it to schools to create remedies and punishments for cyberbullying.<sup>230</sup> Courts generally defer to the school's judgment of what level of punishment is appropriate.<sup>231</sup> The court may weigh public policy interests in determining whether the punishment is too harsh, but unless the facts fall heavily on the side of harm to the student, courts will accept the form of punishment that a school chooses.<sup>232</sup> As one court stated, "we are mindful that '[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.'"<sup>233</sup> Because of the vastly different ways schools can respond to cyberbullying, some have called for uniform policies.<sup>234</sup>

Schools may, for example, adopt a tiered approach to consequential remedies, which would allow schools to take into

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228. *Cyberbullying: Policy Considerations for Boards*, *supra* note 155, at 5 ("Existing school rules pertaining to student discipline may be used in the event that a student is found to have engaged in cyberbullying, or the district may decide that other actions are needed on a case-by-case basis.").

229. *See, e.g.*, GA. CODE ANN. § 20-2-751.5(d) (2011) ("[I]t is preferable to reassign disruptive students to alternative educational settings rather than to suspend or expel such students from school.").

230. *See, e.g.*, KAN. STAT. ANN. 72-8205(e)(1) (2011) ("The board may transact all school district business and adopt policies that the board deems appropriate to perform its constitutional duty to maintain, develop and operate local public schools.").

231. *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007) (citing *Wood v. Strickland*, 420 U.S. 308, 326 (1975)) (recognizing that it is not the place of federal courts to set aside school administrators' decisions on such matters as the extent of a student's punishment, but not directly ruling on whether the extent of the punishment was constitutional). *But see* *Doninger v. Niehoff*, 527 F.3d 41, 53 (2d Cir. 2008) (suggesting that if the student's punishment had been more extreme than prohibiting her participation in student council, that punishment may have been in violation of her constitutional rights).

232. *See, e.g.*, *O.Z. ex rel. v. Bd. of Trs. of the Long Beach Unified Sch. Dist.*, 2008 U.S. Dist. LEXIS 110409, at \*17 (C.D. Cal. Sept. 9, 2008) (holding that a school has an interest in being able to transfer a student who has shown violent tendencies toward a teacher).

233. *Wisniewski*, 494 F.3d at 40 (alteration in original) (quoting *Strickland*, 420 U.S. at 326).

234. *RI Task Force Takes on Cyberbullying, Sexting*, BOSTON GLOBE (Mar. 15, 2011), [http://www.boston.com/news/local/rhode\\_island/articles/2011/03/15/ri\\_task\\_force\\_readies\\_new\\_policy\\_for\\_cyberbullying/](http://www.boston.com/news/local/rhode_island/articles/2011/03/15/ri_task_force_readies_new_policy_for_cyberbullying/) ("One proposal from the task force would create a statewide education policy on cyberbullying for schools . . . A single, statewide policy would help teachers know what to do when they hear a student is being bullied . . .").

consideration the nature of the offense and the age of the student. For a first time or minor offense, schools can mandate the cyberbully attend mandatory counseling and education sessions. For a second or more serious offense, schools can prohibit students from participating in school activities such as sports or student government. Prohibiting a student from participation in a school-sponsored activity is often ideal because, while it might be a stern punishment, it will not have the serious detrimental effect on the student's academic record that school suspension would have. Additionally, to avoid tragic school shootings like what occurred at Columbine High School,<sup>235</sup> it is particularly important for schools to discipline cyberbullies who are involved in student activities and purportedly serve as role models to other students. For a serious incident of cyberbullying that includes violent speech, school suspension or expulsion may be warranted.<sup>236</sup> In such cases, there may also be civil and criminal liability outside the school's jurisdiction.<sup>237</sup>

In addition to consequential remedies, cyberbullying policies should also include preventive remedies. A false accusation of cyberbullying might trigger retaliation, which would then lead to actual cyberbullying. Thus, when considering preventive remedies, schools should also prohibit retaliation or false accusations against a target or witness of cyberbullying.<sup>238</sup> In addition to delineating prohibited conduct, the cyberbullying policy should also indicate the types of behavior the school wishes to promote.<sup>239</sup> For instance, the

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235. Lorraine Adams & Dale Russakoff, *Dissecting Columbine's Cult of the Athlete*, WASHINGTON POST, June 12, 1999, <http://www.washingtonpost.com/wp-srv/national/daily/june99/columbine12.htm> (explaining schools should not give the appearance that popular student athletes receive special treatment because of their abilities or social status).

236. See, e.g., *Doninger*, 527 F.3d at 54; *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 868 (Pa. 2002); *O.Z.*, 2008 U.S. Dist. LEXIS 110409, at \*13; *Cyberbullying: Policy Considerations for Boards*, *supra* note 155, at 5 (authorizing the suspension or expulsion of a student who engages in harassment or bullying by electronic means).

237. See Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 275 (2008).

238. See, e.g., N.J. STAT. ANN. § 18A:37-15(b)(9) (West 2011) (allowing for "consequences and appropriate remedial action for a person found to have falsely accused another as a means of retaliation or as a means of harassment, intimidation or bullying"); *Model Policy Against Bullying and Harassment*, *supra* note 140, at 1 (explaining that a school policy against bullying and harassment should include a statement that "bullying" and "harassment" include "[r]etaliatiion against a student or school employee by another student or school employee for asserting or alleging an act of bullying or harassment" and also that "[r]eporting an act of bullying or harassment that is not made in good faith is considered retaliation").

239. See *Model Policy Against Bullying and Harassment*, *supra* note 140, at 2-3; see also Limber & Snyder, *supra* note 220, at 24, 27 (explaining how one

policy should reflect that schools expect students to be “good citizens—not passive bystanders—[and to report incidents] if they are aware of bullying or students who appear troubled.”<sup>240</sup> Finally, after an incident of cyberbullying, schools should provide post-care counseling to both the cyberbully and victim<sup>241</sup> and, when necessary, “file a complaint with the Internet site or service to have the material removed.”<sup>242</sup>

### C. *Educating Students, Parents, and School Officials*

Because cyberbullying is a new phenomenon, it takes time, unfortunately, for the law to catch up to the problem. Thus, it is imperative that a comprehensive cyberbullying policy provide for educational opportunities whenever possible. As the Florida Department of Education has explained, education about bullying is an important tool that can help “change the social climate of the school and the social norms with regards to bullying.”<sup>243</sup>

Florida law mandates that schools develop “a procedure for providing instruction to students, parents, teachers, school administrators, counseling staff, and school volunteers on identifying, preventing, and responding to bullying or harassment.”<sup>244</sup> The law, however, provides little guidance as to what those programs should include.<sup>245</sup> Student training and

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antibullying program recommends that schools adopt four straight-forward rules about bullying: “we will not bully others; we will try to help students who are bullied; we will make it a point to include students who are easily left out; if we know someone is being bullied, we will tell an adult at school and an adult at home”).

240. Limber & Snyder, *supra* note 220, at 27.

241. See, e.g., FLA. STAT. § 1006.147 (4)(j) (2008) (requiring school bullying policies provide “a procedure to refer victims and perpetrators of bullying or harassment for counseling”); *Cyberbullying: Policy Considerations for Boards*, *supra* note 155, at 5 (“[T]he district should consider ways it can provide support to the victim through counseling or referral to mental health services.”).

242. See, e.g., *Santa Barbara School Districts Board Policy*, 4, <http://www.sbsdk12.org/board/policies/5000/BP5131.pdf> (last updated Dec. 14, 2010) (“If the [cyberbully] is using a social networking site or service that has terms of use that prohibit posting of harmful material, the Superintendent or designee also may file a complaint with the Internet site or service to have the material removed.”).

243. *Model Policy Against Bullying and Harassment*, *supra* note 140, at 8.

244. FLA. STAT. § 1006.147(4)(l) (2010) (requiring “a procedure for providing instruction to students, parents, teachers, school administrators, counseling staff, and school volunteers on identifying, preventing, and responding to bullying or harassment”).

245. The Model Cyberbullying Policy in Appendix B of this Article gives an example of an educational program. Like Florida, Illinois also requires schools to implement antibullying training. 105 ILL. COMP. STAT. 5/27-13.3 (2010). Although Illinois does not provide a model cyberbullying policy, the Illinois Attorney General’s Office has prepared a webinar and training modules to give some guidance to schools. The educational material includes statistics, anecdotes, and discussion of cyberbullying and sexting. The training modules

education should start at a young age, since instances of cyberbullying have been reported by students as young as ten.<sup>246</sup> An educational program for students should train students on: (1) the meaning of cyberbullying and the need to refrain from engaging in it—even if meant as a joke—since there are possible repercussions within the school or even within the justice system;<sup>247</sup> (2) how to be an ally to peers who are being bullied;<sup>248</sup> and (3) how to protect themselves from being cyberbullied.<sup>249</sup> Schools should consider allowing students to play an active role in developing the school's cyberbullying educational programs.<sup>250</sup>

In addition to providing educational opportunities for students, schools should also train parents and school officials. Maryland law, for example, mandates such training.<sup>251</sup> Part of the training program for school officials should include training specific faculty members to be “safe contacts” to whom students may report incidents of cyberbullying.<sup>252</sup> Parents may be in the best position to prevent their children from “abusing available technology, or putting themselves at risk of being cyberbullied.”<sup>253</sup> Parents should be educated in how to identify and prevent incidents of cyberbullying.<sup>254</sup> Schools can educate and train parents by various methods including meetings and assemblies at the school, newsletters from the school or district, half-time programs at school sports events, and parent workshops.<sup>255</sup> Parents should also be

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are modified to be grade-appropriate for elementary school, middle school, and high school. See Office of the Ill. Att'y Gen., *Attorney General's Internet Safety Training Modules* (2010), [www.isbe.state.il.us/curriculum/ppt/internet\\_safety\\_webinar.ppt](http://www.isbe.state.il.us/curriculum/ppt/internet_safety_webinar.ppt) (last visited Sept. 20, 2011).

246. Hoff & Mitchell, *supra* note 221, at 663 (setting forth a study that students reported incidents of cyberbullying occurring when they were as young as ten years old and up through their high-school years).

247. Willard, *supra* note 196, at 7. See also Hinduja & Patchin, *supra* note 151, at 1 (stating that certain cyberbullying behaviors are encompassed in existing criminal legislation, such as: harassment, stalking, felonious assault, certain acts of hate or bias).

248. Hoff & Mitchell, *supra* note 221, at 663; see also Limber & Snyder, *supra* note 220, at 27 (stating that students should be taught to be good citizens, rather than passive bystanders, when they witness bullying).

249. Willard, *supra* note 196, at 6.

250. Hoff & Mitchell, *supra* note 221, at 663 (explaining that student input would be valuable because “they are the group who understands this phenomenon best”). See also Madigan, *supra* note 220, at 8 (explaining how students suggested peer-to-peer mentoring and mediation programs).

251. MD. CODE ANN., EDUC. § 7-424.1(g)(1) (West 2010) (requiring schools to develop an antibullying educational program for “staff, volunteers, and parents”).

252. See *Model Policy Against Bullying and Harassment*, *supra* note 140, at 4; Hoff & Mitchell, *supra* note 221, at 663.

253. Madigan, *supra* note 220, at 8.

254. See *id.*; ANTI-DEFAMATION LEAGUE, *supra* note 10, at 15.

255. See *Model Policy Against Bullying and Harassment*, *supra* note 140, at 8.

educated on the consequences of cyberbullying to send a clear message that schools will not tolerate cyberbullying.<sup>256</sup>

#### CONCLUSION

Cyberbullying presents a danger to schoolchildren. Because cyberbullying involves the Internet and the use of cell phones, it is more pervasive, relentless, and cruel than off-line bullying. There is simply no escape for victims of cyberbullying. Indeed, cyberbullying follows a victim from their school to their home, and possibly to their adult life. Legislatures and public schools are taking measures to combat cyberbullying. However, with this new medium for bullying comes many new and challenging legal issues.

These new issues can be resolved. A cyberbullying policy that carefully adopts language to deal with a public school's jurisdiction over off-campus speech that either materially disrupts school activities or impinges on another student's rights should address First Amendment concerns. A cyberbullying policy that sets forth clear definitions of terms and gives proper notice to students and parents should ensure that due process is met. And finally, a cyberbullying policy that establishes a reasonable process by which school officials can conduct searches of students' personal electronic devices when investigating cyberbullying claims should address Fourth Amendment issues. The model cyberbullying policy set forth in Appendix B attempts to do just that—to provide a step in the right direction so that public schools can ensure a safe environment without trampling students' constitutional and legal rights.

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256. Willard, *supra* note 196, at 10.

APPENDIX A  
CHART OF CURRENT STATE AND FEDERAL  
ANTIBULLYING STATUTES

State Antibullying Statute	Statute requires schools to enact bullying policy?	Statute specifically includes the terms “cyberbullying” or “electronic harassment”?	Model Antibullying School Policy provided?	Statute requires notice be given to parents?
Alabama ALA. CODE §§ 16-28B-1 to -9 (2011) <sup>257</sup>	Yes <sup>258</sup>	Yes <sup>259</sup>	No	No
Alaska ALASKA STAT. §§ 14.33.200- 250 (2011)	Yes <sup>260</sup>	No	Yes <sup>261</sup>	No
Arizona ARIZ. REV. STAT. ANN. § 15-341(37) (2011)	Yes <sup>262</sup>	No	No	No
Arkansas ARK. CODE ANN. § 6-18- 514 (2010)	Yes <sup>263</sup>	Yes <sup>264</sup>	No	No
California CAL. EDUC. CODE §§ 32282, 32261 (West 2011)	Yes <sup>265</sup>	Yes <sup>266</sup>	Yes <sup>267</sup>	No

257. Also referred to as the Student Harassment Prevention Act.

258. ALA. CODE § 16-28B-6 (2011).

259. *Id.* § 16-28B-3 (defining harassment as not limited to, written electronic, verbal or physical acts).

260. ALASKA STAT. § 14.33.200(a) (2011).

261. *Sample Issues and Areas to Consider When Developing Local Policies for Harassment, Intimidation, and Bullying*, ALASKA DEP'T. OF EDUC. AND EARLY DEV., [http://eed.state.ak.us/tls/SchoolSafety/Docs/Sample\\_Issues\\_and\\_Areas.pdf](http://eed.state.ak.us/tls/SchoolSafety/Docs/Sample_Issues_and_Areas.pdf) (last visited Sept. 20, 2011).

262. ARIZ. REV. STAT. ANN. § 15-341(37) (2011).

263. ARK. CODE ANN. § 6-18-514 (a)(2) (2010).

264. *Id.* § 6-18-514 (a)(3)(B) (defining “Electronic Act”).

265. CAL. EDUC. CODE § 32282(a)(1)(E) (West 2011).

266. *Id.* § 32261(d) (bullying includes acts committed personally or by means of an electronic act).

State Antibullying Statute	Statute requires schools to enact bullying policy?	Statute specifically includes the terms “cyberbullying” or “electronic harassment”?	Model Antibullying School Policy provided?	Statute requires notice be given to parents?
Colorado COLO. REV. STAT. ANN § 22-32-109.1 (2010)	Yes <sup>268</sup>	No	Yes <sup>269</sup>	No
Connecticut CONN. GEN. STAT. § 10- 222d (2010)	Yes <sup>270</sup>	No	No	Yes <sup>271</sup>
District of Columbia D.C. MUN. REGS. tit. 5, § 2405.5 (2011)	No <sup>272</sup>	No <sup>273</sup>	No <sup>274</sup>	No
Delaware DEL. CODE ANN. tit. 14, § 4112D (2011)	Yes <sup>275</sup>	Yes <sup>276</sup>	Yes <sup>277</sup>	Yes <sup>278</sup>

267. *Sample Policy for Bullying Prevention*, CAL. DEP'T OF EDUC., (2010), available at <http://www.cde.ca.gov/ls/ss/se/samplepolicy.asp>.

268. COLO. REV. STAT. ANN § 22-32-109.1(2)(a) (West 2010).

269. *Colorado Association of School Boards Sample Policy on Bullying Prevention and Education*, CTR. FOR THE STUDY AND PREVENTION OF VIOLENCE, (2001), [http://www.colorado.edu/cspv/safeschools/bullying\\_casbpolicy.html](http://www.colorado.edu/cspv/safeschools/bullying_casbpolicy.html).

270. CONN. GEN. STAT. § 10-222d (2010).

271. *Id.* § 10-222d(7) (2010) (requiring each school to notify parents or guardians of both the students who commit any verified acts of bullying and the students against whom such acts were directed).

272. The District of Columbia is considering a proposed bill that would require schools to implement antibullying policies, including bullying using “electronic communications.” The bill also proposes that a model policy be developed. Council of D.C., *Bullying Prevention Act of 2010*, B18-0770 (D.C. 2010) available at <http://www.dccouncil.washington.dc.us/images/00001/20100506090826.pdf>.

273. *Id.*

274. *Id.*

275. DEL. CODE ANN. tit. 14, § 4112D(b)(1) (2011).

276. *Id.* 14 § 4112D(a) (bullying includes electronic acts).

277. *Delaware's Model Bully Prevention Policy*, DEL. DEP'T OF EDUC., [http://www.doe.k12.de.us/infosuites/students\\_family/climate/files/Bully%20Prevention%20Policy%20Template.pdf](http://www.doe.k12.de.us/infosuites/students_family/climate/files/Bully%20Prevention%20Policy%20Template.pdf) (last visited Sept. 19, 2011).

278. DEL. CODE ANN. tit. 14, § 4112D(b)(2)(j) (2011) (requiring notification of a parent, guardian, relative caregivers, or legal guardian of any target of

State Antibullying Statute	Statute requires schools to enact bullying policy?	Statute specifically includes the terms "cyberbullying" or "electronic harassment"?	Model Antibullying School Policy provided?	Statute requires notice be given to parents?
Florida FLA. STAT. § 1006.147 (2010)	Yes <sup>279</sup>	Yes <sup>280</sup>	Yes <sup>281</sup>	Yes <sup>282</sup>
Georgia GA. CODE ANN. § 20-2-751.4 (2011)	Yes <sup>283</sup>	Yes <sup>284</sup>	No	Yes <sup>285</sup>
Hawaii <sup>286</sup> Proposed but not passed <sup>287</sup>				
Idaho IDAHO CODE ANN. §§ 18-917A, 33-512 (2011)	Yes <sup>288</sup>	Yes <sup>289</sup>	No	No

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bullying or person who bullies another).

279. FLA. STAT. § 1006.147(2) (2010).

280. *Id.* § 1006.147(3)(b) (defining harassment to include use of data or computer software).

281. *Model Policy Against Bullying and Harassment, supra* note 140.

282. FLA. STAT. § 1006.147(4)(i) (2010) (requiring a procedure for immediate notification to the parents of a victim and the parents of the perpetrator of an act).

283. GA. CODE ANN. § 20-2-751.4(b)(1) (2011).

284. *Id.* § 20-2-751.4(a) (stating that bullying includes use of data or software that is accessed through a computer, computer system, computer network or other electronic technology of local school system).

285. *Id.* § 20-2-751.4(b)(3) (requiring that a method be developed "to notify the parent, guardian, or other person who has control or charge of a student upon a finding . . . that such student has committed an offense of bullying or is a victim of bullying").

286. *But see* HAW. REV. STAT. ANN. § 302A-1002 (2009) (requiring schools to report crime-related incidents, but no mention of bullying or cyberbullying).

287. S.B. 2094, 25th Leg., Reg. Sess. (Haw. 2010).

288. IDAHO CODE ANN. § 33-512(6) (2011).

289. *Id.* § 18-917A(2)(b) ("[H]arassment . . . may also be committed through use of a land line, care phone, or wireless telephone, or through the use of data or computer software that is accessed through a computer, computer system or computer network.").

State Antibullying Statute	Statute requires schools to enact bullying policy?	Statute specifically includes the terms "cyberbullying" or "electronic harassment"?	Model Antibullying School Policy provided?	Statute requires notice be given to parents?
Illinois 105 ILL. COMP. STAT. 5/27- 23.7 (2010)	Yes <sup>290</sup>	Yes <sup>291</sup>	No	No
Indiana IND. CODE § 20-33-8-0.2 (2010)	Yes <sup>292</sup>	No	No	No
Iowa IOWA CODE § 280.28 (2010)	Yes <sup>293</sup>	Yes <sup>294</sup>	Yes <sup>295</sup>	No
Kansas KAN. STAT. ANN. 72-8256 (2011)	Yes <sup>296</sup>	Yes <sup>297</sup>	No	No
Kentucky KY REV. STAT. ANN. §§ 158.148, .440 (West 2010)	Yes <sup>298</sup>	No	No	No
Louisiana LA REV. STAT. ANN § 17:416.13 (2011)	Yes <sup>299</sup>	Yes <sup>300</sup>	No	No

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290. 105 ILL. COMP. STAT. 5/27-23.7(d) (2010).

291. *Id.* at 5/27-23.7(b).

292. IND. CODE § 20-33-8-12(1) (2011).

293. IOWA CODE § 280.28 (3) (2011).

294. *Id.* § 280.28 (2)(a) (2011).

295. *Anti-Bullying/Anti-Harassment Policies*, *supra* note 137.

296. KAN. STAT. ANN. § 72-8256(b) (2009).

297. KAN. STAT. ANN. § 72-8256(a)(1)(B) (2009).

298. KY. REV. STAT. ANN. § 158.148(1) (West 2011).

299. LA. REV. STAT. ANN § 17:416.13(B)(1) (2011).

300. *Id.* § 17:416.13(C)(2) (defining "cyberbullying").

State Antibullying Statute	Statute requires schools to enact bullying policy?	Statute specifically includes the terms “cyberbullying” or “electronic harassment”?	Model Antibullying School Policy provided?	Statute requires notice be given to parents?
Maine ME REV. STAT. ANN. tit. 20, § 1001(15(H)) (2010)	Yes <sup>301</sup>	No	Yes <sup>302</sup>	No
Maryland MD. CODE ANN., EDUC. §§ 7-424, - 434.1 (West 2010)	Yes <sup>303</sup>	Yes <sup>304</sup>	No	No
Massachusetts MASS. GEN. LAWS 71 § 37O (2011)	Yes <sup>305</sup>	Yes <sup>306</sup>	No	Yes <sup>307</sup>
Michigan proposed but not passed <sup>308</sup>			Yes <sup>309</sup>	
Minnesota MINN. STAT. § 121A.0695 (2010)	Yes <sup>310</sup>	Yes <sup>311</sup>	No	No

301. ME. REV. STAT. ANN. tit. 20, § 1001(15)(H) (2010).

302. *Maine School Management Association Sample Policy*, *supra* note 139.

303. MD. CODE ANN., EDUC. § 7-424.1(C)(1) (West 2010).

304. *Id.* § 7-424.1(a)(2) (stating that bullying, harassment or intimidation includes an intentional electronic communication).

305. MASS. GEN. LAWS ch. 71 § 37O(c) (2011).

306. *Id.* § 37O(a).

307. *Id.* § 37O(d)(viii) (setting forth procedures for notifying parents or guardians of a victim and perpetrator).

308. *Matt's Safe School Law*, *supra* note 66.

309. *Model Anti-Bullying Act*, *supra* note 139. While this policy is not mandated by law, it was developed by the Michigan Department of Education based on the antibullying bills pending in the Michigan state legislature. See *Matt's Safe School Law*, *supra* note 66.

310. MINN. STAT. § 121A.0695 (2010).

311. *Id.*

State Antibullying Statute	Statute requires schools to enact bullying policy?	Statute specifically includes the terms "cyberbullying" or "electronic harassment"?	Model Antibullying School Policy provided?	Statute requires notice be given to parents?
Mississippi MISS. CODE. ANN. § 37-11- 67 (2010)	Yes <sup>312</sup>	Yes <sup>313</sup>	No	No
Missouri MO. REV. STAT. § 160.775 (2011)	Yes <sup>314</sup>	Yes <sup>315</sup>	No	No
Montana (No Statute)	No	No	No	No
Nebraska NEB. REV. STAT. §§ 79-2, 137 (2010)	Yes <sup>316</sup>	Yes <sup>317</sup>	Yes <sup>318</sup>	No
Nevada NEV. REV. STAT. §§ 388.122 to .123, .133 (2010)	Yes <sup>319</sup>	Yes <sup>320</sup>	No	No
New Hampshire N.H. REV. STAT. ANN. §§ 193-F:1 to -6 (2011)	Yes <sup>321</sup>	Yes <sup>322</sup>	No	Yes <sup>323</sup>

312. MISS. CODE. ANN. § 37-11-67(2) (2010).

313. *Id.* § 37-11-67(1).

314. MO. REV. STAT. § 160.775(1) (2011).

315. *Id.* § 160.775(2).

316. NEB. REV. STAT. §§ 79-2, 137(3) (2010).

317. *Id.* § 79-2, 137(2).

318. *Considerations for Policy Development*, NEB. DEPT OF EDUC., [http://www.education.ne.gov/safety/Bullying\\_Prevention/Bullying\\_Prevention\\_Policy\\_Dev.html](http://www.education.ne.gov/safety/Bullying_Prevention/Bullying_Prevention_Policy_Dev.html) (last visited Sept. 20, 2011).

319. NEV. REV. STAT. § 388.133 (2010).

320. *Id.* at § 388.123.

321. N.H. REV. STAT. ANN. § 193-F:4(II) (2011).

322. *Id.* §§ 193-F:3(II), (III).

323. *Id.* § 193-F:4(II)(h) (describing a procedure for notification within forty-eight hours of the reported incident to both the parents or guardian of victim

State Antibullying Statute	Statute requires schools to enact bullying policy?	Statute specifically includes the terms "cyberbullying" or "electronic harassment"?	Model Antibullying School Policy provided?	Statute requires notice be given to parents?
New Jersey N.J. STAT. ANN. §§ 18A:37-13, -15 (West 2011)	Yes <sup>324</sup>	Yes <sup>325</sup>	Yes <sup>326</sup>	No
New Mexico N.M. CODE R. § 6.12.7 (Weil 2010)	Yes <sup>327</sup>	Yes <sup>328</sup>	No	No
New York N.Y. EDUC. LAW § 2801-a (McKinney 2009)	Yes <sup>329</sup>	No	No	Yes <sup>330</sup>
North Carolina N.C. GEN. STAT. § 115C-407.15 (2010)	Yes <sup>331</sup>	Yes <sup>332</sup>	No	No
North Dakota (No Statute)	No	No	No	No

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and the parents or guardian of the perpetrator of bullying or cyberbullying).

324. N.J. STAT. ANN. § 18A:37-15(a) (West 2011).

325. *Id.* § 18A:37-14 (defining electronic communication).

326. *Model Policy and Guidance for Prohibiting Harassment, Intimidation and Bullying on School Property, at School-Sponsored Functions and on School Buses*, STATE OF N.J. DEPT OF EDUC., <http://www.state.nj.us/education/parents/bully.pdf> (last updated Apr. 2011).

327. N.M. CODE R. § 6.12.7.8(B) (LexisNexis 2010).

328. *Id.* § 6.12.7.7(A).

329. N.Y. EDUC. LAW § 2801-a(1) (McKinney 2000) (requiring school safety plan).

330. *Id.* § 2801-a(2)(e) (requiring policies for contacting parents, guardians and persons in parental relation to students in the event of a violent incident).

331. N.C. Gen. Stat. § 115C-407.16 (2010).

332. *Id.* § 115C-407.15(a) (defining bullying to include electronic communication).

State Antibullying Statute	Statute requires schools to enact bullying policy?	Statute specifically includes the terms "cyberbullying" or "electronic harassment"?	Model Antbullying School Policy provided?	Statute requires notice be given to parents?
Ohio OHIO REV. CODE ANN. § 3313.666 (West 2011)	Yes <sup>333</sup>	No	Yes <sup>334</sup>	Yes <sup>335</sup>
Oklahoma OKLA. STAT. tit. 70, § 24- 100.4 (2011)	Yes <sup>336</sup>	Yes <sup>337</sup>	Yes <sup>338</sup>	No
Oregon OR. REV. STAT. §§ 339.351 and 339.356 (2010)	Yes <sup>339</sup>	Yes <sup>340</sup>	No	No
Pennsylvania 24 PA. CONS. STAT. § 13- 1303.1-A (2010)	Yes <sup>341</sup>	Yes <sup>342</sup>	No	No
Rhode Island R.I. GEN. LAWS § 16-21- 26 (2011)	Yes <sup>343</sup>	Yes <sup>344</sup>	Yes <sup>345</sup>	No

333. OHIO REV. CODE ANN. § 3313.666(B) (West 2011).

334. *Anti-Harassment, Anti-Intimidation or Anti-Bullying Model Policy*, OHIO DEP'T OF EDUC. ADM'R, <http://education.ohio.gov/GD/Templates/Pages/ODE/ODEDetail.aspx?Page=3&TopicRelationID=435&Content=106473> (last modified June 3, 2011).

335. OHIO REV. CODE ANN. § 3313.666(B)(5) (West 2011) (requiring parents or guardians of any student involved in incident be notified and have access to any written reports pertaining to the incident).

336. OKLA. STAT. tit. 70, § 24-100.4(A) (2011).

337. *Id.* (prohibiting bullying by electronic communication specifically).

338. *Safe Schools Guide*, OKLA. DEP'T OF EDUC., 75 (2005), <http://www.sde.state.ok.us/Schools/SafeHealthy/pdf/SafeSchlGuide.pdf>.

339. OR. REV. STAT. § 339.356(1) (2010).

340. *Id.* § 339.351(1) (defining cyberbullying).

341. 24 PA. CONS. STAT. § 13-1303.1-A(a) (2010).

342. *Id.* § 13-1303.1-A(e) (stating that bullying includes intentional electronic acts).

343. R.I. GEN. LAWS § 16-21-26(b) (2011).

344. *Id.* § 16-21-26(a)(3) (defining electronic communications).

State Antibullying Statute	Statute requires schools to enact bullying policy?	Statute specifically includes the terms “cyberbullying” or “electronic harassment”?	Model Antibullying School Policy provided?	Statute requires notice be given to parents?
South Carolina S.C. CODE ANN. §§ 59-63- 140, -120 (2010)	Yes <sup>346</sup>	Yes <sup>347</sup>	Yes <sup>348</sup>	No
South Dakota (No Statute)	No	No	No	No
Tennessee TENN. CODE ANN. §§ 49-6- 1015 to -1016 (2011)	Yes <sup>349</sup>	No	No	No
Texas TEX. EDUC. CODE ANN. § 37.001 (West 2009)	Yes <sup>350</sup>	No	No	Yes <sup>351</sup>
Utah UTAH CODE ANN. § 53A- 11A-301 (West 2011)	Yes <sup>352</sup>	No	No	Yes <sup>353</sup>
Vermont VT. STAT. ANN. tit. 16, § 565 (2011)	Yes <sup>354</sup>	No	Yes <sup>355</sup>	No

345. *Guidance on Developing Required Policies Against Bullying*, [http://www.ride.ri.gov/psi/docs/child\\_family/substance/bullying%20guidance%20and%20modelpolicy%2011-21-03.pdf](http://www.ride.ri.gov/psi/docs/child_family/substance/bullying%20guidance%20and%20modelpolicy%2011-21-03.pdf) (last visited Sept. 16, 2011).

346. S.C. CODE ANN. § 59-63-140(A) (2010).

347. *Id.* § 59-63-120(1) (stating that harassment, intimidation, and bullying includes electronic communication).

348. *South Carolina—Self Control Addressing Bullying in Our Schools: A Bullying Prevention Model*, S.C. DEPT OF EDUC. 31–36, <http://www.itv.scetv.org/guides/sc2v2.pdf> (last visited Sept. 24, 2011).

349. TENN. CODE ANN. § 49-6-1016(a) (2011).

350. TEX. EDUC. CODE ANN. § 37.001(a) (West 2009).

351. *Id.* § 37.001(a)(6).

352. UTAH CODE ANN. § 53A-11a-301(1) (West 2011).

353. *Id.* § 53A-11a-301(3)(j).

State Antibullying Statute	Statute requires schools to enact bullying policy?	Statute specifically includes the terms "cyberbullying" or "electronic harassment"?	Model Antibullying School Policy provided?	Statute requires notice be given to parents?
Virginia VA. CODE ANN. § 22.1- 279.6 (2011)	Yes <sup>356</sup>	Yes <sup>357</sup>	No	No
Washington WASH. REV. CODE § 28A.300.285 (2010)	Yes <sup>358</sup>	Yes <sup>359</sup>	Yes <sup>360</sup>	No
West Virginia W. VA. CODE ANN. § 18-2C-3 (West 2011)	Yes <sup>361</sup>	No	Yes <sup>362</sup>	Yes <sup>363</sup>
Wisconsin WIS. STAT. § 118.46 (2010)	Yes <sup>364</sup>	No	Yes <sup>365</sup>	No
Wyoming WYO. STAT. ANN. §§ 21-4- 312, -314 (2011)	Yes <sup>366</sup>	Yes <sup>367</sup>	No	No

354. Vt. Stat. Ann. tit. 16, § 565 (2011).

355. *Model Bullying Prevention Plan*, *supra* note 139.

356. VA. CODE ANN. § 22.1-279.6(A) (2011).

357. *Id.* (explaining that model policies should address the use of electronic means for purposes of bullying, harassment, and intimidation).

358. WASH. REV. CODE § 28A.300.285(1) (2010).

359. *Id.* at § 28A.300.285(2).

360. *Prohibition of Harassment, Intimidation and Bullying*, STATE OF WASH. OFFICE OF SUPERINTENDENT OF PUB. INSTRUCTION (Apr. 2008), <http://www.k12.wa.us/SafetyCenter/Guidance/pubdocs/Anti-BullyingPolicyFinal.pdf>.

361. W. VA. CODE ANN. § 18-2C-3(a) (West 2011).

362. *Student Code of Conduct*, W. VA. DEPT OF EDUC. (July 1, 2003), <http://wvde.state.wv.us/policies/p4373.html>.

363. W. VA. CODE ANN. § 18-2C-3 (b)(5) (West 2011).

364. WIS. STAT. § 118.46(1)(a) (2010).

365. *Bullying Prevention Policy Guidelines*, DEPT OF PUB. INSTRUCTION (Mar. 2007), <http://www.dpi.state.wi.us/sspw/pdf/bullyingguide.pdf>.

366. WYO. STAT. ANN. § 21-4-314(a) (2011).

367. *Id.* § 21-4-312.

State Antibullying Statute	Statute requires schools to enact bullying policy?	Statute specifically includes the terms “cyberbullying” or “electronic harassment”?	Model Antibullying School Policy provided?	Statute requires notice be given to parents?
Federal Antibullying Statute				
Federal Laws Proposed, but not passed <sup>368</sup>		Proposed, but not passed <sup>369</sup>		

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368. Safe School Improvement Act of 2010, S. 3739, 111th Cong. (2010) (allowing for federal funding for schools that have bullying prevention programs). *See also* Megan Meir Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2010).

369. Megan Meir Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2010).

## APPENDIX B

MODEL CYBERBULLYING POLICY FOR PUBLIC SCHOOLS<sup>370</sup>

It is the policy of this school that all students and school employees enjoy a safe and secure educational setting. The school prohibits cyberbullying, as defined herein. Nothing in this policy is intended to infringe on the constitutional rights of students or school employees.

## 1. DEFINITIONS

- (a) The term “cyberbullying”<sup>371</sup>
- (i) means the use of any electronic communication, by individuals or groups, to
    - (1) make a true threat against a student or school employee;<sup>372</sup>
    - (2) materially disrupt school operations;<sup>373</sup> or
    - (3) substantially impinge on the rights of another student such as, but not limited to: creating reasonable fear of harm to the student’s person or property; creating a substantially detrimental effect on the student’s physical or mental health; substantially interfering with a student’s academic performance or interfering with the student’s ability to participate in or benefit from the services, activities, or privileges provided by the school; or being so severe, persistent, or pervasive as to cause severe emotional distress.<sup>374</sup>
  - (ii) includes conduct that is based on, but not limited to, a student’s actual or perceived<sup>375</sup> race, color, national origin, gender, religion, disability, sexual orientation or gender identity, distinguishing physical or personal characteristic, socioeconomic status, or association with

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370. This Model Cyberbullying Policy is limited only to cyberbullying. In addition to cyberbullying, schools should adopt policies that are inclusive of off-line bullying and harassment (both of which are beyond the scope of this Article). This Policy is based on Part III of this Article and also the pending Safe Schools Improvement Act of 2010, the “Florida Department of Education Model Policy Against Bullying and Harassment,” and the Anti-Defamation League “Model Statute.” See Safe School Improvement Act of 2010, S. 3739, 111th Cong. (2010); *Model Policy Against Bullying and Harassment*, *supra* note 140; ANTI-DEFAMATION LEAGUE, *supra* note 10.

371. See *supra* Part II.A(2) of this Article.

372. See *supra* Parts II.A(2)-B(1) of this Article.

373. See *supra* Parts II.A(2)-B(1) of this Article.

374. See *supra* Parts II.A(2)-B(1) of this Article.

375. See *supra* Part II.B(1) of this Article.

- any person identified in section 1(a)(ii).
- (b) As used in this policy, the term “electronic communications” means communications through any electronic device, including, but not limited to, computers, telephones, mobile phones, pagers, and any type of communication, including, but not limited to, emails, instant messages, text messages, picture messages, and websites.<sup>376</sup>
2. SCHOOL JURISDICTION<sup>377</sup>
- (a) No student shall be subjected to cyberbullying by an electronic communication that bears the imprimatur of the school regardless of whether such electronic communication originated on or off the school’s campus.
- (b) The school shall have jurisdiction to prohibit cyberbullying that originates on the school’s campus if the electronic communication was made using the school’s technological resources or the electronic communication was made on the school’s campus using the student’s own personal technological resources.
- (c) The school shall have jurisdiction to prohibit cyberbullying that originates off the school’s campus if:<sup>378</sup>
- (i) it was reasonably foreseeable that the electronic communication would reach the school’s campus; or
  - (ii) there is a sufficient nexus between the electronic communication and the school which includes, but is not limited to, speech that is directed at a school-specific audience, or the speech was brought onto or accessed on the school campus, even if it was not the student in question who did so.
3. NOTICE<sup>379</sup>
- (a) Parents shall receive written notice of this cyberbullying policy at the beginning of each school year.
- (b) There shall be an annual process for discussing this policy with students in a student assembly.
- (c) For access to the school’s technological resources, including but not limited to email and Internet access, students and parents shall review, sign, and return the school’s acceptable use policy which prohibits the use of the school’s technological resources for cyberbullying.<sup>380</sup>

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376. See *supra* Part II.B(1) of this Article.

377. See *supra* Part II.A(1) of this Article.

378. See *supra* Part II.A of this Article.

379. See *supra* Part II.B(2) of this Article.

380. The Anti-Defamation League drafted a model acceptable use policy,

- (d) This policy, along with the school's acceptable use policy as described in section 3(c), shall be prominently posted at school on student bulletin boards and in computer labs, and on the school's website.

#### 4. INVESTIGATIONS

- (a) Parents shall be notified as soon as practicable if their child is involved in a school investigation concerning cyberbullying.<sup>381</sup>
- (b) School officials may search and seize a student's personal electronic device, including but not limited to cell phones and computers, if:<sup>382</sup>
  - (i) the student is using the electronic device at school in violation of school rules; or
  - (ii) the school official
    - (1) has reasonable grounds for suspecting the search will turn up evidence that the student has violated or is violating either the law or the school rules; and
    - (2) the search is limited in scope by being reasonably related to the objective of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.
- (c) Reasonable grounds, as set forth in section 4(b)(ii)(1), will not be established solely on anonymous reports.<sup>383</sup>
- (d) If the cyberbullying victim or student reporting the cyberbullying is willing, the school shall initiate an interview to determine the nature of the bullying, the name of the participants, where and how the information was being sent, and how far the images or messages have spread.<sup>384</sup>
- (e) Any evidence of cyberbullying discovered during an investigation should be preserved. Such actions may include, but are not limited to, saving the victim's cell phone, text, or email messages; and printing or copying posts or other electronic communications available on websites before removing them.<sup>385</sup>
- (f) If, during the course of a cyberbullying investigation, images of nude minors are discovered, those images should not be distributed or shown to other school officials. The school official who discovered the image should promptly contact

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adapted from a U.S. Department of Justice model policy. ANTI-DEFAMATION LEAGUE, *supra* note 10, at 21.

381. See *supra* Part II.B(2) of this Article.

382. See *supra* Part II.C(1) of this Article.

383. See *supra* Part II.C(1) of this Article.

384. See *supra* Part II.C(1) of this Article.

385. See *supra* Part II.C(1) of this Article.

law enforcement.<sup>386</sup>

#### 5. REPORTING<sup>387</sup>

- (a) Specific faculty members [insert names here] will be the main contacts for students who wish to report incidents of cyberbullying. Students, parents, and other school officials may also contact the principal to report incidents of cyberbullying.
- (b) Anonymous and confidential reports of cyberbullying incidents are allowed, but they will not provide the sole basis for a search of a student's personal electronic device or for disciplinary action.
- (c) School officials may report incidents of cyberbullying to law enforcement depending on the criminal nature of the offense, or the gravity and repetition of the offense.

#### 6. REMEDIES<sup>388</sup>

- (a) An individual student whose behavior is found to be in violation of this policy will be subject to discipline. In determining the disciplinary action, the school will take into consideration the nature of the offense, the age of the student, and the following:
  - (i) For a first-time or minor cyberbullying offense, the school may mandate that the student attend mandatory counseling and education sessions.
  - (ii) For a second or more serious cyberbullying offense, the school may prohibit the student from participating in school activities or events.
  - (iii) For a serious incident of cyberbullying, the school may suspend or expel the student.
- (b) No student shall retaliate or make false accusations against a target or witness of cyberbullying.
- (c) Whenever practicable, the school shall provide counseling to all students involved in a cyberbullying incident.
- (d) Whenever practicable, the school shall file a complaint with Internet sites or services containing cyberbullying material to have the material removed.

#### 7. EDUCATION<sup>389</sup>

- (a) The school shall provide an annual educational program for

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386. See *supra* Part II.C(2) of this Article.

387. See *supra* Part III(A) of this Article.

388. See *supra* Part III(B) of this Article.

389. See *supra* Part III(C) of this Article.

students, parents, and school officials. This education program shall train individuals:

- (i) on the meaning of and prohibition against cyberbullying, including the provisions of this policy;
  - (ii) how students can report cyberbullying incidents;
  - (iii) how students can be an ally to peers who are being cyberbullied; and
  - (iv) how students can protect themselves from being cyberbullied.
- (b) The school shall encourage students to play an active role in developing the school's cyberbullying educational programs.