Pushed Too Far:
The Evolving Legal Implications
of School Bullying
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Editors’ Introduction

This issue marks the end of a transformative and productive year for the Journal. Following on the redesign of both our print edition and website, we will be launching a web-based publication Extra Legal in June 2013 to serve as a platform for both students and legal practitioners to showcase their legal scholarship in relevant, shorter pieces.

We took an unprecedented move for our organization and hosted two symposia this year. In October 2012, we partnered with the Alliance for Experiential Learning in the Law to co-host the inaugural symposium on experiential legal education entitled Experience the Future, which reached members of the academy throughout the United States and Canada. Volume 5, Number 2 will showcase many of the articles presented at the conference, with an expected publication date of Fall 2013.

The second symposium took place in March 2013 and was entitled Employed or Just Working? Rethinking Employment Relationships in the Global Economy. The event explored the limits of traditional employment relationships and addressed how law confers the status of “employee” on some workers and “independent contractor” on others, forcing many others outside the protections of our legal system altogether. The issue related to this event will be published in 2014.

This issue, however, is the culmination of a yearlong effort to further scholarly discourse on school bullying and the attendant legal issues. In March 2012, the Journal hosted its fourth annual symposium, entitled Pushed Too Far: The Evolving Legal Implications of School Bullying. The symposium brought practitioners, government officials, members of the legal academy, and students together for a daylong discussion on bullying, hazing, and the recent wave of legislation aimed at curbing this disturbing trend. A full introduction by Professor David M. Phillips to the articles and student note generated from the symposium follows.

The Journal also recently welcomed two new faculty advisors, Professors Daniel Givelber and Daniel Schaffer. Alongside Professors Michael Meltsner, David Phillips, and Sonia Rolland, Professors Givelber and Schaffer offered assistance and advice throughout the year, and we are truly grateful for their help.
Days before this issue was to be delivered to the printer, the entire Northeastern community was saddened to learn that Professor Schaffer had passed away. He was a beloved member of the faculty since 1970. The impact of his work already reaches the highest levels of the legal profession and will carry on for generations more. We will miss him. In appreciation for both Professor Schaffer’s work as the Journal’s advisor and his more than four decades of service to our Law School, we dedicate this issue to him.

The editorial board is grateful for everyone who had a hand in the production of this issue, but particularly we would like to thank our staff. They doubled their efforts this year, without complaint, and no major increase in their numbers. Unlike many law schools, staff members receive no academic credit for their tireless work throughout our turbulent school years.

As this editorial board’s tenure comes to a close, we are happy with the foundation we have laid for future Journal leaders. We know that they will maintain the Journal’s dedication to social justice and the public interest.

Editorial Board
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Introduction:
Bullying and Hazing as Institutional and Societal Problems

David M. Phillips*

This issue of the Northeastern University Law Journal includes articles related to bullying and follows a national symposium held at the law school on March 30, 2012 about bullying and a related practice, hazing. Definitions of these acts differ, but a common definition of bullying is “a repeated pattern of aggressive behavior that involves an imbalance of power and that purposefully inflicts harm on the bullying victim.”\(^1\) Hazing, its relative, has been defined as “any activity expected of someone joining a group (or to maintain full status in a group) that humiliates, degrades or risks emotional and/or physical harm . . . .”\(^2\)

The questions we might ask about bullying and hazing are numerous. To what extent does, and should, law play a role in deterring and/or providing recompense for the victims of bullying or hazing? If law does play a role, what form does and should it take – statutory law, administrative law, case law (primarily torts), or other law? For those who perpetrate these acts, should only civil liability be imposed or should statutes criminalize the conduct? Are there competing social values or interests that limit either civil liability or give caution to the imposition of criminal sanctions? To what degree has legislation directed towards bullying or hazing actually been effective in reducing their incidence? To what extent does responsibility for these acts extend beyond the primary perpetrators to the institutions in which, or related to which, acts of bullying or hazing occur? The articles in this symposium try to respond to at least some of these questions.

* Professor, Northeastern University School of Law. I would like to especially thank D. Nathaniel Malcolm for his research assistance writing this introduction.


Before getting to particulars, however, we should consider why bullying and hazing are of such huge importance, not only to the victims of such behavior, but also to others. The immediate and long-term consequences of bullying and hazing on their victims – psychological harm, physical harm, and sometimes even death – themselves justify the attention that these practices have recently engendered. Because, in most jurisdictions, bullying or hazing can result in criminal liability, their perpetrators face consequences that most probably never anticipated. They too are harmed, although in a very different way from their immediate victims. The perpetrators, in the case of bullying, are primarily minors, and, in the case of hazing, either minors or young adults. The acts they commit are quite intentional, but given the ages at which bullying and hazing are most common, it is probable that many of the acts are inadequately

3 Stuart-Cassel, et al., supra note 1, at 3 (citing a variety of research sources, stating that “students who are bullied . . . show increased anxiety levels and psychosomatic symptoms[,] . . . experience higher rates of eating disorders and aggressive-impulsive behavior problems[,] and are . . . at greater risk of developing poor self-esteem, depression, suicidal ideations, and suicide attempts.”; see also Connie Anderson, IAN Research Report: Bullying and Children with ASD, INTERACTIVE AUTISM NETWORK (March 26, 2012), http://www.iancommunity.org/cs/ian_research_reports/ian_research_report_bullying; William Jackson, Hazing/Bullying: Duality of Physical Violence, ARLINGTON FIRST COAST NEWS (March 19, 2012, 2:12 PM), http://arlington.firstcoastnews.com/news/community-spirit/75593-hazingbullying-duality-physical-violence.


6 See, e.g., N.C. GEN. STAT. ANN. § 115C-407.18 (West 2012); N.Y. PENAL LAW §§ 120.16, 120.17 (McKinney 2012); CAL PENAL CODE § 245.6 (West 2012); Fla. STAT. ANN. §§ 1006.63, 1006.135 (West 2012). Interestingly, substantially all civil actions have been brought against school boards, schools districts, school administrators and the like, see, e.g., Estate of Brown v. Ogletree, 2012 WL 591190 (S.D. Tex. 2012) (action against president of school district’s board of trustees), but even most of these have been unsuccessful. At least one court has denied a tort action for bullying brought against the perpetrator’s parents, See Finkel v. Dauber, 906 N.Y.S.2d 699, 703 (N.Y. Sup. Ct., 2010) (action against parents of cyberbullier).

7 See Jackson, supra note 3; see also High School Hazing, STOPHAZING.ORG (May 4, 2013, 11:46 AM), http://www.stophazing.org/high_school_hazing/index.
considered, if they are rationally considered at all. Yet, studies have shown that perpetrators, particularly those who engage in bullying, frequently go on to become criminals of other sorts.\textsuperscript{8} The institutions in which, or related to which, these acts occur – most especially schools, colleges and universities – also suffer. Sometimes they bear civil liability for the acts,\textsuperscript{9} but, whether or not they do, reputational harm results.\textsuperscript{10} Even more, institutions suffer from the substantial deterioration or even destruction of the atmosphere of inclusion and safe learning that they seek to foster.\textsuperscript{11} The shame that results from realizing that such acts can occur in “our community,” or, conversely, the tolerance that some communities exhibit towards such behavior, particularly hazing, says much about the moral fiber of a particular community. I would argue that American society as a whole also suffers when we become aware of these practices.


\textsuperscript{11} See Jackson, supra note 3.
Indeed, bullying and hazing – especially the way we react, or do not react, to these practices – implicate some of the deepest values of our society. Are we an inclusive or exclusive society? Do we truly value diversity? Even more fundamentally, are we humane in the most basic moral and ethical sense of treating others as we would want to be treated? Bullying can be practiced by members of any group against anyone, but research has confirmed that members of certain groups – for example, lesbians, gays, bisexuals, transgenders – experience a higher risk of becoming targets. And hazing particularly occurs in the context of entry into exclusive societies, whether they are Greek societies on college or university campuses or informal groups in high school settings. There are “ins” and there are “outs,” and the desire to be accepted into the group makes victims of hazing less resistant to the psychological and physical risks of some hazing practices.

While both bullying and hazing implicate the aforementioned values, especially humaneness, openness, and acceptance of diversity, some differences between the two practices do exist. Laws dealing with these subjects illustrate some of these differences. In the case of bullying, the value of protecting its victims or possible victims must be balanced, at times, against the asserted free speech rights and/or privacy rights of its perpetrators. To this we must ask: just how far do abstract but extraordinarily important rights go in possibly excusing conduct that, even minimally, has an adverse psychological impact on its victim? Do First Amendment rights even apply to conduct that intentionally or knowingly will cause harm to specific individuals? In the case of hazing, its defenders often speak in positive terms of resultant feelings of camaraderie and kinship. But do these ends really require extreme acts of hardship, embarrassment, and possibly the

risking of one’s life? And, if so, of what value are the associations
that require hazing as the price of entry?

As of this writing, all states, excepting Montana, have stat-
utes that address bullying.\textsuperscript{16} This expanse of state legislation is
quite remarkable, given that Georgia, the first state to enact bully-
ing legislation, only did so in 1999.\textsuperscript{17} But these state statutes differ
substantially, in part due to different policy preferences, for exam-
ple, with respect to the extent to which educational policy should
be decided on a statewide, district-wide or school-by-school basis.
Quite probably, the speed with which anti-bullying legislation has
been passed, and then amended – sometimes repeatedly – accounts
for some of the statutory differences among the states.

Bias might also account for some of the statutory difference,
however. Statutes in only a minority of states enumerate the char-
acteristics of groups especially susceptible to bullying.\textsuperscript{18} Since LGBT
youth are particularly susceptible to bullying, one can at least spec-
ulate that a failure to identify in the relevant statutory provision
those persons particularly susceptible to acts of bullying reflects
either the homophobia of its drafters or their fears of an adverse
reaction from certain of their constituents. For example, Texas’ new
bullying statute,\textsuperscript{19} which became effective June 17, 2011, broadens
the definition of bullying to include electronic bullying, requires
school districts to adopt and implement policies that both deter and
deal with incidents of bullying, allows victims to use reasonable self-
defense without punishment, and gives school boards additional
discretion to transfer those engaged in bullying away from the rele-
vant classroom, among its provisions.\textsuperscript{20} It does not, however, require
school districts to enumerate specific categories of victims that are

\textsuperscript{16} See Stuart-Cassel, et al., \textit{supra} note 1, at 15-16 (stating that as of April
2011, forty-six states have adopted anti-bullying legislation). Since April 2011,
Michigan, South Dakota, and Hawaii have passed anti-bullying legislation.
Mich. Comp. Laws Ann. § 380.1310b (West); S.D. Codified Laws §
http://www.capitol.hawaii.gov/session2011/bills/HB688_SD2_.HTM.

\textsuperscript{17} Stuart-Cassel, et al., \textit{supra} note 1, at xi. While Georgia’s law on bullying
has since been amended multiple times, the original provisions form part of

\textsuperscript{18} See Stuart-Cassel et al., \textit{supra} note 1, at 28-29.

\textsuperscript{19} See Tex. Educ. Code Ann. §§ 25.0342, 37.0832 (West 2011). These and
other new bullying statutes were created by the session law Bullying In Public

\textsuperscript{20} See id.
particularly susceptible to bullying.\textsuperscript{21} Texas school districts, other than those in Dallas and Forth Worth, have not done so, allegedly to avoid explicitly acknowledging the nexus between bullying and bias against members of vulnerable groups.\textsuperscript{22}

The United States Department of Education has identified sixteen different components that anti-bullying legislation should optimally encompass,\textsuperscript{23} including a purpose statement,\textsuperscript{24} a statement of scope,\textsuperscript{25} specification of prohibited conduct,\textsuperscript{26} enumeration of specific characteristics,\textsuperscript{27} development and implementation of local educational district policies, various components of those district policies,\textsuperscript{28} and training of relevant parties – such as teachers – on preventing, identifying, and responding to bullying.\textsuperscript{29} The Department’s

\textsuperscript{21} \textit{Id.}
\textsuperscript{23} See App. A to \textit{Stuart-Cassel, et al.}, supra note 1, at 87 (U.S. Dep’t Educ. Dear Colleague Letter Summarizing Examples of Department Key Components of State Bullying Laws (Dec. 16, 2010)).
\textsuperscript{24} \textit{Id.} at 89 (whether the legislation “[o]utlines the range of detrimental effects bullying has on students, . . . [, and] declares that any form . . . is unacceptable, and that every incident needs to be taken seriously . . . .”).
\textsuperscript{25} \textit{Id.} (for example, does the legislation cover more than on school or campus activity?).
\textsuperscript{26} \textit{Id.} at 90 (for example, does the legislation give a specific definition that includes cyberbullying?).
\textsuperscript{27} \textit{Id.} at 90-91 (for example, does it both “[m]ake clear that bullying does not have to be based on any particular characteristic[,]” as well as [e]xplain . . . that bullying may include, but is not limited to, acts based on actual or perceived characteristics of students who have historically been targets . . . .”).
\textsuperscript{28} \textit{Id.} at 91-92 (these optimal components are identified as follows: definitions, a mechanism for reporting bullying, investigating and responding to bullying, written records, sanctions, and referrals to counselors or mental health professionals).
\textsuperscript{29} \textit{Id.} at 93. A part of the Massachusetts bullying statute is given as one of two examples: “\textbf{Massachusetts}: 2010 Mass. Adv. Legis. Serv. Ch. No. 92.3(d)-2010: “The plan . . . shall include a provision for ongoing professional development to build the skills of all staff members, including, but not limited to, educators, administrators, school nurses, cafeteria workers, custodians, bus drivers, athletic coaches, advisors to extracurricular activities and paraprofessionals, to prevent, identify and respond to bullying.” The remainder of the sixteen components are a review of local policies (“a provision for the state to review local policies on a regular basis to ensure . . . [statutory goals] are met”), a communication plan (“a plan for notifying students, students’ families, and
breakdown reminds us of what every first year law student should understand, to wit, that “law” that addresses a subject like bullying includes not only statutory law, but regulations of various governmental authorities (in this case, different departments within a state government or district government), case law, and even the actual practices of principals, teachers, bus drivers and the like who either observe or must respond to bullying incidents. In any event, taking account for the moment of only statutory law, a comprehensive 2011 study of state bullying law and policies prepared for the Department of Education\(^{30}\) reported on the very considerable differences among the states. As of April 2011, only two states – Maryland\(^{31}\) and New Jersey\(^{32}\) – included within their statutes all sixteen components that the Department identified as optimal. The statutes of a few states did not even particularize the acts that constitute bullying,\(^{33}\) and only a majority of those that did particularize included cyberbullying – what has emerged as the fastest growing and perhaps most pernicious form of bullying – among the particularizations.\(^{34}\) And when account is taken of educational policies within the states, either on a statewide level (state departments of education) or on a more local level (usually school district policies), the extent of differences in legal approach becomes more manifest.

Four of the symposium articles concern the actions by school administrators to prevent and/or deal with bullying. The authors of the first three address the very significant dilemmas that school staff of policies related to bullying, including the consequences for engaging in bullying . . . ”) and transparency and monitoring (“includes a provision for . . . [school districts] to report annually to the state on the number of reported bullying incidents, and any responsive actions taken.”). See Letter from Arne Duncan U.S. Sec’y Educ. to U.S. Dep’t Educ. Colleagues (Dec. 16, 2010) in STUART-CASSEL, ET AL., supra note 1, app. A, at 93.

\(^{30}\) STUART-CASSEL, ET AL., supra note 1.  
\(^{33}\) STUART-CASSEL, supra note 1, at 25. (stating that Arizona, Minnesota and Wisconsin did not specifically identify the behavior that constituted bullying).  
\(^{34}\) As of April 2011, only 36 states included cyberbullying in the statute. Id. at 27.
administrators and teachers confront when trying to deal with acts of bullying: the threat of suit for violation of a student’s rights if the school takes certain actions to prevent bullying or take action against a student accused of such, and the threat of suit by parents of a child who is the victim of bullying if the school fails to take such action.

Tracey Schneider’s article, *FERPA: When is Bullying Considered a Health and Safety Emergency*, deals with the conflict between preventing the harm resulting from bullying and the privacy rights of the student accused of such conduct. School officials, she relates, often find themselves inhibited by the information disclosure provisions of the Family Educational Rights and Privacy Act (FERPA). But she details the evolution in interpretation of the statute’s health and safety emergency exception — almost always in response to certain events or tragedies — and argues that bullying, especially because it has sometimes resulted in suicides, should fall within that exception and allow for limited disclosure of information to avert tragedy. She not only suggests a broader interpretation of FERPA, but outlines practical considerations that school officials can take into account when making the decision whether disclosure is justified.

In *Cyberbullying: When is it “School Speech” and When is it Beyond the School’s Reach?*, Susan Bendlin tackles the newest context confronting school officials, bullying in cyberspace. Especially in the cyberspace context, it is the asserted free speech rights of the student engaged in bullying (and an after-the-fact suit based upon infringement of such) which may present an obstacle to the effort of school administrators to confront acts of bullying and protect the rights of the victim. She presents the history of Supreme Court decisions that differentiate between speech on school premises or in a school-supervised setting and speech made out of school. In the former contexts, school officials can act, for example, by suspending a student, but, in the latter setting, the student’s free speech rights trump and the school official may be subjecting herself to legal action based upon the student’s First Amendment rights. Bendlin notes that the Court

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refused certiorari in three cases that might have further clarified when school officials may or may not act. Bendlin’s conclusion is that courts should decide each case on a “totality of circumstances” test. Does that resolution, however, satisfactorily offer guidance to school officials confronted with the risk of real harm to the victim of bullying, on the one hand, or the risk of suit, on the other? The prospect of limited immunity for school officials that she offers may be small solace to the school administrators. And one can question whether her comfort with the on-school – out of school line, in the digital world of the 21st century, really reflects the balance we want as a society between the value we place on free speech and the necessity to safeguard the minds and bodies of our youth in order to provide safe and inclusive learning environments.

Kathleen Conn, in T.K and J.C.: Guidance for Schools Dealing with Bullying and Cyberbulling, deals with the same dilemma school administrators face – the threat of suit for violation of the perpetrator’s first amendment rights if the school takes action and the threat of suit by parents of a child who is the victim of bullying if the school fails to take protective action – through the lens of two United States District Court decisions, J.C. ex rel. R.C. v. Beverly Hills Unified School District,36 and T.K. v. New York City Department of Education.37 The J.C. case is a cyberbullying case, where both perpetrator and victim are teenagers, while the T.K. case concerns the in-school, face-to-face bullying of a 12-year old girl with disabilities. Conn painstakingly details the facts and analyses of both decisions. She also praises the judges in both cases for their well-reasoned opinions, in which they quite intentionally seek to guide both school administrators faced with similar dilemmas and, like other well-reasoned judicial decisions, other courts faced with similar factual situations. The decision in the T.K. case is especially significant because its author, Judge Jack Weinstein38, has been one of the most distinguished federal jurists for the past half-century. Although Conn does not state such, the J.C. decision again illustrates that we often pay a price for the First Amendment rights we cherish: legal rights and ethical or moral responsibility may differ or even conflict. Because of its setting and other facts, the T.K. case did not call for a distinction between law and ethical result.

36 711 F. Supp.2d 1094 (C.D. Cal. 2010).
School districts may face liability from another source. Marc Terry and Amanda Marie Baer, in *Teacher-on-Student Bullying: Is Your Massachusetts School District Ready for This Test?*, explore the underside of the school bullying problem, teacher bullying of students, which they report as more pervasive than most would think. They analyze the potential liability school districts may face when its teachers bully students and suggests pragmatic steps a school district could take to reduce the incidence of such conduct and to limit its exposure to liability in the event a student brought suit against the district.

Natalie Higgins, in *Bullying is the New Harassment, But Are Our Students Any More Protected?*, details the particular incidents that served as catalysts for the Massachusetts anti-bullying legislation. Importantly, and departing from the predominant case law focus of other articles, she also explores the legislative process behind that statute. After doing so, Higgins makes several salient points, including the fact that many if not most instances of bullying also constitute sexual or LGBT harassment, both of which, to various degrees, are already the subject of both state and federal legislation. She therefore inquires whether the anti-bullying legislation adds to the protection available to the victims of bullying. Noting that the problem is institutional if not societal, she responds to her own question by emphasizing law’s effect as an agent of change of societal values. That is, legislation, even if somewhat repetitive of other law, can help to foster a more inclusive society.

Turning primarily from the elementary, junior high, and high school setting to the college campus, we confront hazing, a practice condemned publicly by universities but often condoned or tolerated silently. Forty-four states have laws relating to hazing, but, like the statutes applicable to bullying, these laws sometimes differ in their definitions of the conduct, the parties who bear some responsibility for its occurrence, and the potential legal consequences – including criminal liability – for those who engage in it. The definition of hazing in the Massachusetts statute is somewhat typical in its substance: “any conduct or method of initiation into any student organization . . . which willfully or recklessly endangers the physical or mental health of any student or other person.”

39 See *Hazing Defined*, supra note 2.


41 Id.
beating, branding, forced calisthenics, exposure to the weather, forced consumption of any food, liquor, beverage, drug or other substance, or any other brutal treatment or forced physical activity which is likely to adversely affect the physical health of any such student or other person, or which subjects such student or other person to extreme mental stress, including extended deprivation of sleep or rest or extended isolation.” 42 Other statutes may give a general definition that bears similarity to the Massachusetts definition, but lack the detailed particularizations. 43 Or, certain state statutes do particularize the conduct, but the specific identification of prohibited conduct or actions vary from that of Massachusetts. 44

State statutes also vary in terms of the possible criminal penalty that attaches to hazing. In California, for example, hazing that does not result in bodily injury to the victim is a misdemeanor punishable by a fine or jail time not to exceed one year. 45 If serious bodily injury results from the hazing, the offense constitutes a misdemeanor or a felony and is punishable by imprisonment of up to three years in jail. 46 Although hazing is generally defined as a misdemeanor in West Virginia, hazing-related conduct that would “otherwise be deemed a felony” under the state’s criminal code is treated as such. 47

Let us focus once more on moral responsibility and its relationship to legal responsibility. Moral responsibility for hazing, like

42 Id.
43 E.g., N.Y. Penal Law § 120.16 (McKinney 2012).
44 E.g., Mich. Comp. Laws Serv. § 750.411t(7)(b) (LexisNexis 2012) (includes electronic shocking, or an activity that “causes, or requires an individual to perform a duty or task that involves the commission of a crime or an act of hazing”); N.J. Stat. Ann. § 2C:40-3 (West 2012) (includes a broad definition of hazing whereby any event associated with initiation into an organization that risks bodily injury, other than athletic competition, constitutes hazing); Ohio Rev. Code Ann. § 2307.44 (West 2012) (Institutions can be held civilly liable “if the hazing involves students in a primary, secondary, or post-secondary school, university, college, or any other educational institution, an action may also be brought against any administrator, employee, or faculty member of the school, university, college, or other educational institution who knew or reasonably should have known of the hazing and who did not make reasonable attempts to prevent it and against the school, university, college, or other educational institution.”).
45 Cal. Penal Code § 245.6 (West 2012).
46 Id. § 245.6(d) (citing Cal. Penal Code § 1170(h)); see also, Fla. Stat. Ann. § 1006.63 (West 2011) (defining hazing as both a felony or misdemeanor contingent on the harm inflicted on the victim).
moral responsibility for bullying, extends beyond its immediate perpetrators. One can legitimately perceive all of the following, perhaps in descending order, of bearing some responsibility for hazing: the chapter of the Greek society in which the particular acts took place, the national Greek society with which that chapter is affiliated, the university in which the acts take place, university alumni who insist on the retention of Greek societies in which hazing regularly takes place, and even arguably the accrediting organizations of universities that have or have not made the degree to which hazing occurs at a particular institution a factor in the accreditation process. It is unlikely that criminal or civil liability will attach to any of these parties beyond the immediate actors, the Greek chapter or other society in which a student has suffered physical harm or, in occasional instances, the university which knows of harmful conduct but fails to act. However, the absence or low risk of legal responsibility should not translate into inaction.

The solutions for hazing and bullying extend beyond civil liability or its criminalization. The primary goal must be deterrence, not after the fact recompense to victims or punishment of the perpetrators. Legal sanctions only have a wide behavioral, that is, deterrent, effect, if the class of persons who engage in conduct are both conscious of the adverse legal consequences and quite risk averse in light of them. Yet the class of actors who engage in bullying and hazing – usually children or relatively young adults – evince in a wide variety of areas a propensity for underestimating risk.\(^4^8\) That is why a great part of the solution must be institutional. Serious educational efforts

\(^4^8\) Studies even indicate that the propensity for risk among teenagers compared with adults may be a function of brain development. More specifically, an adult brain can identify and focus on the negative effects of risky behavior and consequently reject engagement in such behavior, whereas the adolescent brain is more apt to focus upon the immediate, personal pleasures sought. **Eric Wargo, Adolescents and Risk: Helping Young People Make Better Choices,** 1-2 (2007) available at http://www.human.cornell.edu/hd/outreach-extension/upload/reyna-rrt.pdf. Consequently, statistics indicate that adolescents between the ages of 16 and 20 are twice as likely to be involved in a car accident as those aged 20 or 50. Valerie F. Reyna & Frank Farley, **Risk and Rationality in Adolescent Decision Making: Implications for Theory, Practice, and Public Policy,** 7 Psychol. Sci. in the Pub. Int., 8 (2006) available at http://www.human.cornell.edu/hd/reyna/upload/2006-Reyna_Farley_RiskAndRationalityArt.pdf. Adolescents are also more likely than adults to engage in risky sexual behavior, which has contributed to the high incidence of STD infections among adolescents. **Id.** Furthermore, compulsive behaviors
minimally should include education of students about prohibited practices, the serious consequences of such conduct to the actors, and strategies that students can employ to avoid being victims of either bullying or hazing. And these efforts should be no less strenuous that those that attend to such acts as plagiarism or cheating.

Beyond efforts that directly address avoidance or deterrence of bullying and hazing, educational institutions have a particular obligation to create alternatives to these conducts. For example, in the case of hazing, if its defenders speak of the bonds of kinship that exist in those clubs and societies where hazing has become the key to admission, surely universities can provide alternatives on campus that equally produce bonding among students. Collaborative learning experiences have proved to do so in certain environments, with the advantage that, to a greater extent than Greek organizations, they generate bonds across racial and/or religious lines. Student activities that serve the public interest can create bonds among students participating in such activities. Joint scholarly pursuits aside from what is generally known as collaborative learning – for example, scholarly journals run by students or student run newspapers – can also serve the same function. A university can generate active social environments that reduce the need or even the desirability for an active Greek life on campus.

Finally, law can influence, but not necessarily by itself, produce cultural change. To a great degree, support for anti-bullying and anti-hazing initiatives and programs has only been reactive of specific, horrific events. Indeed, Columbine served as the catalyst for passage of much anti-bullying legislation nationwide.49 Legislation is critical, of course. Equally necessary, however, is greater and deeper understanding of the fact that diversity, respect for difference and inclusiveness of those who are different all serve to enrich our society.

and habits such as heavy drinking and gambling have been shown to take root during adolescence. Id.

FERPA: When Is Bullying Considered a Health and Safety Emergency?

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I. Introduction

The Federal Educational Rights and Privacy Act (FERPA) was originally enacted more than twenty-five years ago. Unfortunately, over the years, some of FERPA’s provisions have not stayed current with the health and safety emergencies that educational institutions face today. While educational institutions continually strive to be more proactive in avoiding such devastating events, they often find themselves inhibited by the information disclosure provisions of FERPA. Although FERPA contains a “health or safety emergency” exception to the consent to disclosure requirements, the exception language does not provide a clear definition of “health and safety emergency.” Educational institutions are presented with the predicament of releasing information that they believe will help avoid an emergency and protect students, and in doing so, face of a possible FERPA violation.

The 2009 FERPA regulatory amendments and subsequent guidance issued by the United States Department of Education (USDOE) have provided some guidance and, perhaps more important, some flexibility. In fact, the guidance specifically states that:

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[t]his is a flexible standard under which the Department defers to school administrators so that they may bring appropriate resources to bear on the situation, provided that there is a rational basis for the educational agency’s or institution’s decisions about the nature of the emergency and the appropriate parties to whom the information should be disclosed.\(^4\)

However, even this guidance, in its delegation of deference to educational officials, utilizes terminology that is ambiguous. Thus, despite the increased flexibility of the guidance, many questions remain unanswered.

Perhaps the most devastating impact of this ambiguity is its effect on an educational institution’s reaction to bullying incidents. While bullying has become a widespread problem faced by students and educational institutions throughout the country, to date, the FPCO has not clearly identified bullying as a health and safety emergency. This has limited an educational institution’s decision-making ability when deciding whether or not to release student information in an effort to protect bullying victims.

This paper will address the limitations that FERPA places on educational institutions with regard to disclosure of confidential student information in health and safety emergencies, including bullying. It will begin with a discussion of the recent FERPA regulatory amendments, as well as the recent guidance offered by the Family Policy Compliance Office (FPCO)\(^5\), and how they have helped to provide some clarity and direction for educational institutions. Thereafter, it will discuss different factual scenarios that may constitute a health or safety emergency. It will include a legal analysis as to the factors that will be involved in this determination, both from existing FERPA case law as well as case law from other areas of law that seek to define an “emergency.” These factual scenarios will enable readers

\(^4\) FPCO 2010 GUIDANCE, supra note 3, at 4.

\(^5\) The Family Policy Compliance Office of the United States Department of Education is the agency charged with providing guidance to the FERPA interpretation and implementation [hereinafter FPCO].
to understand the ways that an educational institution can navigate these complex issues and avoid FERPA violations in today’s educational environment. Further, these scenarios will illustrate how educational institutions can establish bullying incidents as health and safety emergencies thus allowing the institution to release information in order to protect bullying victims.

II. The FERPA Health And Safety Emergency Exception

To begin to develop an understanding of the health and safety emergency exception and its application to the types of emergencies that educational institutions are likely to face in today’s educational environment, it is necessary to take an in-depth look at the health and safety emergency exception and the resulting guidance that has developed over the years. While the exception was provided in the original enactment of the FERPA regulations in 1974, its language has changed significantly over the years, leading to confusion over the intended purpose and interpretation of such changes. It was not until educational institutions across the country experienced significant tragedies, including school shootings and health pandemics, that the health and safety exception became the subject of any FPCO guidance that would help to alleviate the confusion. Further, it was not until the 2008 amendments that the health and safety language appeared in its current form. It is through the history of the amendments to this regulation, and the more recent FPCO guidance of 2010 and 2011, that we really begin to extract the information and tools necessary to face today’s potential health and safety emergencies.


7 Brown, 106 F.3d at 1132.

A. The Health and Safety Exception - Prior to 2008

The health and safety emergency exception has undergone significant changes from its inception in the 1974 version of FERPA to its current language and interpretation. The original 1974 version of the regulation provided for set criteria to determine whether a particular situation constituted a health or safety emergency. The criteria included

(1) The seriousness of the threat to the health or safety of the student or other individuals;
(2) The need for the information to meet the emergency;
(3) Whether the parties to whom the information is disclosed are in a position to deal with the emergency; and
(4) The extent to which time is of the essence in dealing with the emergency.\(^9\)

However, the subsequent amendments removed the criteria, leaving educational institutions to wonder how to interpret the removal, and, more importantly, when to apply the exception. The amended 1988 version of the exception provided only:

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.
(b) Paragraph (a) of this section shall be strictly construed.\(^10\)

The 1988 version of the regulation itself was bare and uninformative, only instructing educational institutions to strictly apply the exception.\(^11\)

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\(^11\) Not only was this strict construction language in the regulation itself, it can also be found in the legislative history. Congress’ intent that the applicability of this exception be limited is reflected in the Joint Statement in Explanation of Buckley/Pell Amendment. 120 Cong. Rec. S39.863 (Dec. 13, 1974).
The removal of the 1974 criteria only created more ambiguity as to when the exception may be applied. While the strict application language seemed to suggest a narrowing of the exception, an explanatory statement from the Secretary of Education at the time of the amendment and language removal suggested otherwise. The Secretary of Education explained that he:

based his decision to remove the nonstatutory criteria from the regulations on his belief that educational agencies and institutions are capable of making those determinations without the need for Federal regulation.\(^{12}\)

Therefore, educational institutions were left with conflicting instruction on how to interpret this amendment. Unfortunately, the FPCO did not provide sufficient guidance until 2002, in response to the September 11, 2001 terrorist attacks. Following this tragedy, the United States Department of Education deemed it time to provide some explanatory guidance.\(^{13}\) The guidance served to underscore the strict application language, stating that even in its strict interpretation, the exception would certainly allow for the release of information in a terrorist attack as necessary to “avert or diffuse serious threats.”

Although only addressing the strict construction of the health and safety emergency exception, the guidance did introduce new terminology that defined what it means to be “in connection with an emergency.” The guidance provided that any release must be “narrowly tailored considering the immediacy, magnitude, and specificity of information concerning the emergency.”\(^{14}\) Therefore, after the 2002 guidance, educational institutions were still instructed to strictly construe this exception. However, the 2002 guidelines listed immediacy, magnitude and specificity of the threat, as factors to

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14 Id. at 3.
consider when deciding whether a release of information would be necessary and appropriate.

B. The Health and Safety Exception - 2008 Through Today

Much like they had in 2002, the United States Department of Education determined in 2007 that significant changes to FERPA were necessary. However, the Department of Education elected to make statutory amendments instead of issuing explanatory guidance. This realization came in response to the growing number of tragic events in schools, including the 2007 shootings at Virginia Tech.\(^\text{15}\) This time careful and particular attention was paid to the health and safety exception. While the main provision remained the same, additional interpreting language was added in the 2008 amendments:

\[
\text{(c) In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.}\(^\text{16}\)
\]

This amendment marked a complete and total change to the interpretation and construction of the health and safety exception. Prior to this amendment, educational institutions were instructed


\(^{16}\) 34 C.F.R. § 99.36 (2009).
towards strict interpretation.\textsuperscript{17} However, with the 2008 amendment, the strict interpretation language was specifically removed and educational institutions were being told to find the “rational basis” for the emergency. Once they did, their judgment would not be substituted or overruled by that of the Department of Education. The Section-by-Section Analysis of the final rule by the Department further explained this marked departure from the original required strict interpretation, explaining that “the Secretary determined that greater flexibility and deference should be afforded to the administrators so that they can bring appropriate resources to bear on circumstances that threaten the health or safety of individuals.”\textsuperscript{18}

Not only did the 2008 amendments mark a change in the strictness of the construction, it also codified the language used in the 2002 FPCO guidance. Educational institutions were instructed to look for “an articulable and significant threat to the health or safety of a student or other individuals.”\textsuperscript{19} While perhaps those terms themselves needed additional definition, institutions now had some codified factors through which it could make its health and safety emergency determination.

Finally, the 2008 amendments clarified the definition of “appropriate party” to include “parents of an eligible student.” While this was explained as a clarification rather than a definition expansion,\textsuperscript{20} it still served to provide additional explanation of this previously vague exception. It also added to the resources educational institutions could use to break through the roadblocks preventing disclosure and aid in the prevention of health and safety emergencies.

In the years since the 2008 amendments, the FPCO has been more proactive about issuing guidance to assist educational institutions in defining and interpreting this exception. FPCO issued two

\begin{enumerate}
\item Family Educational Rights and Privacy, \textit{supra} note 15, at 15,589.
\item \textit{Id.}
\item 34 C.F.R. § 99.36.
\item Family Educational Rights and Privacy, \textit{supra} note 15, at 15,577-78. The Department explains that the change will clarify for post-secondary institutions when parents can be notified, notwithstanding any other FERPA provision, specifically the provisions otherwise limiting post-secondary parental notification except when a student is a dependent for tax purposes; when a student is under 21 and the law or institutional policy regarding alcohol or controlled dangerous substances is being violated; or when information is based on the education official’s personal knowledge or observation of that student.
\end{enumerate}
additional guidance documents in a very short period of time, with one in 2010\textsuperscript{21} and another in 2011.\textsuperscript{22} Each has provided additional explanatory information to this very important health and safety emergency exception.

Taking the lead from the 2008 amendments, the FPCO 2010 guidance identified and highlighted the new language of the exception regarding the “totality of the circumstances” surrounding the particular health and safety emergency.\textsuperscript{23} The FPCO explained that an educational institution’s determination should be made on a case-by-case basis. In addition, while it was suggested in explanation of the 2008 amendments,\textsuperscript{24} the 2010 guidance states that this standard is a “flexible standard.”\textsuperscript{25}

The shooting in Tucson, Arizona in January, 2011, prompted the FPCO to issue yet another guidance document outlining the parameters of the health and safety exception.\textsuperscript{26} This time, the guidance did not stop at just explaining the flexible standard for the health and safety exception; instead it provides a comprehensive analysis of the interaction of this exception and related exceptions for addressing emergencies at educational institutions.

The 2011 guidance begins to provide definition of what it means to be “in connection with an emergency” and what it means to have an “articulable and significant threat,” defining these phrases with examples.\textsuperscript{27} Specifically, the FPCO indicated that being “in connection with an emergency . . . means that it must be related to an actual, impending, or imminent emergency, such as a natural disaster, a terrorist attack, a campus shooting, or the outbreak of an epidemic

\textsuperscript{21} FPCO 2010 guidance, supra note 3.
\textsuperscript{23} FPCO 2010 guidance, supra note 3, at 4.
\textsuperscript{24} Family Educational Rights and Privacy, supra note 15, at 15,589.
\textsuperscript{25} FPCO 2010 guidance, supra, note 3 at 4.
\textsuperscript{26} FPCO June 2011 Guidance, supra note 22, at 1 (referencing the January, 2011 shooting of Congresswoman Gabrielle Giffords and others at a Tuscon, Arizona political event). While this tragedy, much like the September 11\textsuperscript{th} tragedy, did not take place in the school environment, such events raise awareness and increase proactive efforts to understand the application to the school environment.
\textsuperscript{27} Id. at 3.
disease.” As to the phrase “articulable and significant threat,” the FPCO defined that phrase by explaining

that if a school official can explain why, based on all of the information then available, the official reasonably believes, for instance, that a student poses a significant threat, such as a threat of substantial bodily harm to any person, including the student, the school official may disclose personally identifiable information from education records without consent to any person whose knowledge of the information will assist in protecting a person from threat.

To date, this is certainly the most detailed, as well as the most broad and inclusive explanation that the FPCO has provided about the health and safety emergency. However, the FPCO was still cautious to instruct educational institutions not to take this exception too far. The 2011 guidance makes it clear that it is not an emergency if the likelihood of the occurrence is unknown. Further, the guidance explains that even if the educational institution was correct in determining that an emergency exists, they should be cautioned that the release of the information is not intended to be a “blanket release” and should typically be limited to law enforcement, public health officials, medical professionals and parents. Additionally, the release must be limited to the period of the emergency only.

The 2011 guidance reflects the FPCO’s efforts to establish a comprehensive approach for the educational institution to prepare for health and safety emergencies, rather than only reacting to them. The guidance certainly addresses the interpretation of the health and safety emergency exception, itself. However, in addition, it discusses the interaction of the health and safety emergency exception with other exceptions.

First, the FPCO reminded educational institutions that certain information does not fall within the definition of an educational record under FERPA. Therefore, the FERPA disclosure restrictions
would not apply. This would exempt information within an educational official’s personal knowledge or observation, law enforcement unit records, and medical and psychological treatment records if they are “made, maintained, and used only in connection with treatment of the student and disclosed only to those medical professionals providing the treatment.”

Next, the FPCO reminded educational institutions of the other disclosure exceptions, which would not require the establishment of the health and safety emergency. This would include the post-secondary institution’s release of disciplinary records indicating the final result of a disciplinary proceeding of the alleged perpetrator of a crime of violence or non-forcible sex offense to the alleged victim. It would also include that same institution’s release of the referenced records to anyone, not just the victim, if the student committed a violation of the institution’s rules or policies.

Finally, the FPCO reminded educational institutions that the Department of Education encourages the use of threat assessment teams. These teams would be able to assist the institutions in determining whether a health or safety emergency exists. It is within these teams that institutions should be sharing information with educational institution officials who have “legitimate educational interests” in analyzing and evaluating the situation and determining whether a situation is “chronic or escalating.” The FPCO even notes that these individuals do not have to be institutional employees; they can

33 Id. at 4 (citing 34 C.F.R. § 99.31).
34 Id. at 5 (citing 34 C.F.R. § 99.8(b)(1) and (b)(2) and explaining that law enforcement unit records are records that are “(1) created by a law enforcement unit; (2) created for a law enforcement purpose; and (3) maintained by the law enforcement unit” but are not “(1) records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit (such as a principal or dean) or (2) records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.”).
35 Id. at 10 (citing 34 C.F.R. § 99.3 and noting that in order to maintain the treatment record status, the record must not be used for any purpose other than the student’s treatment; if so, the records are considered education records and must meet the FERPA disclosure requirements or other exceptions).
36 Id. at 7 (citing 34 C.F.R. § 99.31(a)(13)).
37 Id. (citing 34 C.F.R. § 99.31(a)(14)).
38 Id. at 11.
39 Id. (citing 34 C.F.R. § 99.31(a)(1)(i)(B)).
even be local law enforcement, so long as they are under the direct control of the institution.\textsuperscript{40}

Therefore, it is clear that the 2011 FPCO guidance establishes the most comprehensive explanation for the health and safety emergency exception as well as its related exceptions, to date. However, it does so by providing clear instruction in response to situations that educational institutions have already faced. Further guidance and amendments to FERPA cannot continue to rely on prior tragedies as context for statutory amendments. Educational institutions must be proactive in anticipating situations and how to respond to disclosure issues to prevent these tragedies from taking place.

Further, educational institutions must use the language of the exception itself and the FPCO guidance as a starting point to establish a toolkit to prevent possible tragedies and emergencies. The first step to being proactive requires the educational institution to address ambiguities in the statute and explanatory guidance. Questions that must be addressed include: What actually constitutes a “rational basis” for believing a health and safety emergency exists? Under what circumstances does action become “necessary” under the “totality of the circumstances?” When does an emergency become “imminent,” “impending,” or “actual?” Since the language of the exception and the FPCO guidance do not provide these necessary answers, institutions must look to other areas of law in order to establish the most effective approach for preventing future tragedies.

III. Looking Beyond The Health And Safety Emergency Exception For Guidance

The most effective way to find answers to these questions is to observe how the health and safety exception has been applied to real factual situations, i.e., through a well-developed body of case law. Unfortunately, the FERPA statute and corresponding regulations do not have the extensive body of case law necessary for thorough interpretation and, therefore, resolution to the unanswered questions. However, the few cases that have been decided under FERPA help to provide some initial direction to answering these questions in situations that educational institutions have already encountered. In addition, the FPCO response to inquiry by educational institutions

\textsuperscript{40} Id.
has provided additional substance to the interpretation of the health and safety emergency exception.

Looking beyond the FERPA case law, other areas of legal analysis have a substantial body of case law and guidance that will help to answer these questions and develop a proactive approach. Specifically, the cases defining a “true threat” under the First Amendment provide examples of the factors to consider in evaluating a possible emergency situation. The First Amendment line of cases uses the same language as the FPCO guidance and, therefore, can assist in the health and safety emergency interpretation.41

When read and analyzed together, rather than separate and distinct legal analysis tools, the case law and additional guidance tools will help answer the remaining questions. These tools can be summarized in order to provide defining rules as to what constitutes a health and safety emergency.

A. In Order To Determine Whether An Educational Institution Has A “Rational Basis” For The Determination That A Health And Safety Emergency Exists, The Institution Must Look To The Magnitude Of The Potential Emergency And The Specificity Of The Information Provided.

1. Magnitude

It is likely that most educational institutions would know an emergency of high magnitude when confronted with one. Of course this would include the campus shooter and terrorism situations that have already been faced. However, it is the less obvious situations that present a concern. Educational institutions must, therefore, analyze existing cases to be proactive in identifying other potential health and safety emergencies.

The first case that can provide such direction is Riscia v. Dumas,42 a FERPA case, which addresses the requirement to act where there is no physical threat of harm. In Riscia, a middle school student was

41 Id. at 4; see also Watts v. United States, 394 U.S. 705 (1969); D.J.M. v. Hannibal Pub. Sch. Dist. #60, 647 F.3d 754, (8th Cir. 2011); Riehm v. Engelking, 538 F.3d 952 (8th Cir. 2008); Porter v. Ascension Parish Sch. Bd., 393 F.3d 608 (5th Cir. 2004).
42 466 F. Supp. 2d 434 (D. Conn. 2006).
being harassed by approximately fifty students. The harassment consisted of derogatory name calling but did not include physical assaults or physical threats. In return, the student created a “hit list” in his geometry book which included the name of a female student that he may have wanted to punch, but not kill. A school janitor found the geometry book and shared it with the principal. The principal disciplined the student and informed other office staff in order to effectuate the student discipline. The principal also informed the female student on the “hit list” that she was on a list of disliked students, although never specifically referring to the list as a “hit list.”

The student and his parents claimed that student’s substantive due process rights were violated when the educational institution failed to prevent the bullying and harassment and when educational institution officials invaded the student’s privacy by releasing his educational records in violation of FERPA. The court first addressed the failure to prevent the bullying and harassment claim and determined that name calling, verbal harassment, without more, does not give rise to an institution’s obligation to step in to protect the victim’s safety. The court then analyzed the student’s invasion of privacy claim, based upon a FERPA release of student information. The court determined that the release of the discipline information to the

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43 Id. at 437.
44 Id.
45 Id.
46 Id.
47 Id. at 437-38.
48 Id.
49 Id. at 442.
50 Id. at 440 (noting, however, that ideally the educational institution would take action to stop the “bullying”).
51 Id. at 442. Citing Gonzaga University v. Doe, 536 U.S. 273, 287 (2002), the court noted that an invasion of privacy claim cannot be used to circumvent FERPA’s prohibition on individual rights of action against educational institutions. However, the court went on to analyze the case under FERPA’s disclosure provisions. In addition, the court did not address the disclosure of the “hit list” information, instead finding that information protected as not being an educational record since it was on the cover of a geometry book. In a slightly different factual situation, this could easily give rise to a discussion over the release of the “hit list” as disclosure under the health and safety emergency. If the court was so quick to find the disclosure of discipline necessary to protect student safety, it would seem likely that the court would also cover the release of “hit list” information as clearly within the health and safety emergency exception.
secretaries was permissible based upon the concerns over the safety of the educational institution’s students and the need to maintain student discipline.\textsuperscript{52} Therefore, in light of \textit{Riscia}, educational institutions can be assured that no emergency of high magnitude exists without at least a threat of physical harm; emotional harm and verbal taunting are not enough.

Of course, that rule alone is not sufficient to define all emergency situations. Recent FPCO guidance and case law take that rule one step further to indicate that a physical threat of harm does not only pertain to the threat of harm to others but also the threat of harm to oneself.

Numerous letters from FPCO indicate “that a student’s suicidal statements, coupled with unsafe conduct and threats against another student, constitute a ‘health or safety emergency’ under FERPA."\textsuperscript{53} In addition, court rulings have analyzed threats of self-harm, coupled with threats of harm to others, in the context of First Amendment considerations.\textsuperscript{54}

In \textit{D.J.M. v. Hannibal Public School District #60},\textsuperscript{55} a high school student, D.J.M., sent instant messages to C.M. on his home computer stating that he was going to get a gun and kill certain students.\textsuperscript{56} After describing his plans to kill other students, D.J.M. told C.M. he was going to also kill himself.\textsuperscript{57} C.M. reported the behavior to the school principal.\textsuperscript{58} After consulting with the superintendent, the principal contacted the police.\textsuperscript{59} D.J.M. claimed that his First Amendment right to free speech had been violated.\textsuperscript{60} Both the district court and the

\textsuperscript{52} \textit{Id.}
\textsuperscript{53} Letter to Baise, \textit{supra} note 6, at 7; U.S. DEP’T OF EDUC. FAMILY POLICY COMPLIANCE OFFICE, \textit{LETTER TO J. CHRIS TOE, PH.D., PRESIDENT, STRAYER UNIVERSITY}, at 7 (March 11, 2005) [hereinafter FPCO LETTER TO STRAYER].
\textsuperscript{54} See \textit{D.J.M. v. Hannibal Pub. Sch. Dist. #60}, 647 F.3d 754, 763-64 (8th Cir. 2011); \textit{see also} Cox v. Warwick Valley Central Sch. Dist., No 10-3633, 2011 U.S. App. LEXIS 17094 (2nd Cir. 2011) (upholding a educational institution’s report to child welfare authorities when the parents failed to intervene in a case involving a student who, among other things, wrote an essay describing his desire to shoot himself in the head in front of his friends).
\textsuperscript{55} 647 F.3d at 754.
\textsuperscript{56} \textit{Id.} at 757-58.
\textsuperscript{57} \textit{Id.} at 758.
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.} at 759.
court of appeals found that D.J.M. was not entitled to First Amend-
ment protection because his speech constituted a “true threat” and a
“serious expression of an intent to harm or cause injury . . . .”61 While
the facts of the case, and therefore the resulting decision, were not
limited to simply an intent to harm oneself, the court was careful to
point to the fact that D.J.M. had also expressed an intent to harm
himself as part of its “true threat” reasoning.62

2. Specificity of the Information Provided

Another factor in determining whether there exists a “rational
basis” for determining that an emergency exists is the specificity of
the information provided.63 Looking again at D.J.M., not only was the
court’s holding based upon the threat of physical harm, but the hold-
ing was also based upon the specificity of D.J.M.’s threats.64 In his
instant messages to C.M., D.J.M. specified the type of gun he would
use to kill himself and the other students.65 Further, he listed a num-
ber of specific individuals that he planned to shoot, even indicating
the order of his shootings, and stating that a particular student would
“be the first to die.”66 The specific nature of this information had a
direct impact on the court’s decision that D.J.M.’s speech “could be
reasonably understood as a true threat.”67

Perhaps the best and most disturbing example of the weight of
information specificity in the “rational basis” determination is Riehm
v. Engelking,68 which the court relied on in D.J.M.69 In Riehm, a high
school student wrote an essay detailing, with specific detail, a mur-
der-suicide similar to that of the one at Columbine High School in
Littleton, Colorado.70 The essay described how the student was going
to kill his English teacher, using a title which the court believed mir-
rored a reference to the movie “Bowling for Columbine,” a movie the

61 Id. at 759-62.
62 Id. at 761.
63 Id. at 763; See Riehm v. Engelking, 538 F.3d 952 (8th Cir. 2008).
64 D.J.M., 647 F.3d 754.
65 Id. at 763.
66 Id.
67 Id.
68 538 F.3d 952.
69 D.J.M., 647 F.3d at 763.
70 Riehm, 538 F.3d at 958.
students had just watched in their English class.\textsuperscript{71} The essay described in detail the steps that the student would take to effectuate the murder, the scene of the murder, and the exact movements of the body as the bullet hit his teacher.\textsuperscript{72} Finally, the essay described how the student anticipated he would feel, outlining specific emotions, after the shooting was over.\textsuperscript{73} The student’s teacher took the essay to the school principal and the principal disciplined the student and immediately contacted law enforcement.\textsuperscript{74} The student sued, claiming his First Amendment right to free speech had been violated.\textsuperscript{75}

The court quickly found that the student’s essay constituted a “true threat” and was therefore not entitled to First Amendment protection.\textsuperscript{76} In discussing the impact of the specificity of the essay in its reasoning, the court stated

[the student] describes the murder of his teacher in gruesome detail . . . . He then describes the shooter’s suicide. This lengthy essay describing an obsession with weapons and gore, a hatred for his English teacher with a similar name who had been critical of his prior essays, a surprise attack at a high school, and the details of his teacher’s murder and the narrator’s suicide lead to the inescapable conclusion that it was a serious threat directed at his teacher.\textsuperscript{77}

The court clearly found the length and detail of the essay, which discussed all aspects of the disturbing event and identified a specific target, compelling in the analysis of whether or not something constitutes a true threat of physical harm.\textsuperscript{78}

B. In Order To Determine Whether An Action Is “Necessary”

\textsuperscript{71} Id. at 959.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 960.
\textsuperscript{75} Id. at 961.
\textsuperscript{76} Id. at 963-64.
\textsuperscript{77} Id. at 964.
\textsuperscript{78} It must also be noted that \textit{Riehm} also involved a threat of physical harm to others and to oneself. \textit{Riehm}, 538 F.3d at 964. Therefore, the facts also lend to the discussion of the magnitude of a situation as it impacts the “rational basis” determination summarized herein. \textit{See supra} pp. 13-15.
Given the “Totality Of The Circumstances,” the Institution Must Look To The Entire Context Of The Situation, Including The Expression Of Intent To Others And The Reaction Of Listeners.

When the FPCO introduced the concept of the totality of the circumstances in order to determine whether a health and safety emergency exists, it allowed institutions to consider a broad range of factors. While this concept is beneficial in theory, the practical benefit comes from evaluating existing cases to provide specific detail as to the totality of the circumstances consideration.

In conducting a totality of the circumstances analysis, the court will also look to the context of the situation as a whole as its overarching consideration. In *Brown v. City of Oneonta*, the court defined an “emergency” as “an unforeseen combination of circumstances or the resulting state that calls for immediate action.” Regardless of the fact that the *Brown* court took a simplistic approach using a dictionary definition, the underlying premise is the same. It is necessary to consider the “combination of circumstances” in defining the existence of an emergency.

Later courts expanded on that approach with more detail. In *D.J.M.*, the court outlined these contextual factors, taking direction from *Watts v. United States* and *United States v. Dinwiddie*. The court explained:

The [*Watts*] Court looked to three factors in holding that the statement was not a true threat: its context, its “expressly conditional nature,” and the reaction of listeners. In *Dinwiddie*, we discussed additional factors: “whether the threat was communicated directly to its victim, whether the maker of the threat had made similar statements to the victim in the past, and whether the victim had reason to believe

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81 *Id.* at 1131 (citing Webster’s Third New International Dictionary of the English Language 741 (unabridged ed. 1981)).

82 D.J.M., 647 F.3d at 760-61.
that the maker of the threat had a propensity to engage in violence.” (citations omitted).\textsuperscript{83}

The \textit{D.J.M.} court then used the \textit{Watts/Dinwiddie} factors as a basis for its factual discussion. As to the context factor, the court began by noting D.J.M.’s “goth appearance or style which may have set him apart from some classmates”\textsuperscript{84} as well as noting his history of violence, or lack thereof.\textsuperscript{85} While the noted differences in D.J.M.’s appearance did not have a direct involvement in the establishment of the health and safety emergency (i.e., there is no indication that D.J.M. was bullied based upon his goth appearance), the court’s inclusion of this fact in its analysis would certainly indicate the court relied upon same as impacting the context of the situation.

As to the factors of expression of intent to others and the reaction of the listeners, the \textit{D.J.M.} court pointed to a variety of relevant considerations. First, the court paid careful attention to D.J.M.’s indication that he had access to a weapon.\textsuperscript{86} The court points out that one of the instant message conversations between C.M. and D.J.M. discussed the fact that D.J.M.’s had previously mentioned that he had a friend who owned a gun and went on to describe the type of gun that it was.\textsuperscript{87} This weapon discussion was part of the same conversation as D.J.M.’s indication of which individuals in educational institution he would shoot and which ones he would let live.\textsuperscript{88} The court clearly considered this access to a weapon as playing directly into the context of the threatening emergency situation.\textsuperscript{89}

Next, the court pointed to the seriousness of the comments and the intent as evidenced in same. Specifically, the court noted the “hate filled” comments that D.J.M. used to describe the individuals that “would go” or “would be the first to die.”\textsuperscript{90} In addition, the court explained that C.M. described D.J.M.’s comments as “something serious,” and that nobody who became aware of D.J.M.’s comments,

\begin{footnotes}
\item D.J.M., 647 F.3d at 763-64 (citing Watts v. United States, 394 U.S. at 708 and United States v. Dinwiddie, 76 F.3d at 925); \textit{See also} Doe v. Pulaski, 306 F.3d 616, 623 (8th Cir. 2002).
\item Id.
\item Id. at 758.
\item Id.
\item Id. at 762.
\item Id. at 764.
\end{footnotes}
including adults and law enforcement, thought that D.J.M. was joking.  

Lastly, the court noted D.J.M.’s own expression of his intent, explaining that he had admitted that he was depressed and that he wanted his school “to be known for something.” The court was not persuaded by D.J.M.’s arguments that the threat was not communicated to the intended victim, but instead to a third party.

Taking all of these contextual factors together, the court determined, without question, that a “reasonable recipient would have interpreted [D.J.M.’s statements] as a serious expression of an intent to harm or cause injury to another.” This analysis illustrates how the courts will consider all relevant factors as part of the totality of the circumstances determination.

C. In Order To Determine When A Health And Safety Emergency Becomes “Imminent,” “Impending” Or “Actual,” The Institution Must Look To Temporal Proximity.

If there is one consistent and recurring theme throughout all FPCO guidance as well as interpreting case law, it is that in order for an educational institution to say a health and safety emergency exists, there must be a close temporal proximity to the threatening language and the actual threatened event.

In a letter to J. Chris Toe, Ph.D., and President of Strayer University, the FPCO explained that:

only if the school has made a case-by-case determination that there is a present and imminent threat or danger to the student or that information from education records is needed to avert or diffuse serious threats to the safety or health of a student . . . .

The FPCO went on to explain that the FERPA health and safety emergency exception “requires an immediate need for information

91 Id. at 763.
92 Id. at 762.
93 Id.
94 Id.
in order to avert or diffuse serious threats to the safety or health of a student or other individuals.”96 In making these explanatory statements, the FPCO found that a dispute between a university employee and a student that was not reported to the police until the following day did not constitute a health and safety emergency authorizing disclosure of information.97 Specifically, the FPCO was concerned that in a true health and safety emergency where the individual felt truly threatened, the information would have been reported to the police immediately.98

Not only has the FPCO sought to underscore the importance of the immediacy requirement of the health and safety emergency exception, courts have also pointed to this factor as a determining factor in deciding whether an action constitutes an emergency or a true threat. In *Porter v. Ascension Parish School Board*,99 a fourteen year old student drew a picture of his school under siege by a gasoline tanker truck, a missile launcher, helicopter and various armed individuals.100 However, the picture remained in the student’s bedroom, in a closet, without being shared with anyone for two years.101 It was not until the student’s younger brother inadvertently took the drawing pad from his brother’s closet into school that someone noticed the drawing.102 In finding that the student’s drawing was not a true threat, the court repeatedly pointed to the two year passage of time as a reason why this could not constitute a true threat.103

The analysis provided by these cases, regardless of whether the legal analysis is based upon the First Amendment or FERPA, provide valuable rules and factual determinations that build upon the language of the exception and the FPCO guidance to further define a health and safety emergency. With the definition of a health and safety emergency clarified, educational institutions can now begin to develop a proactive approach to today’s potential health and safety emergencies.

96 *Id.* at 7-8.
97 *Id.* at 8.
98 *Id.*
99 393 F.3d 608 (5th Cir. 2004).
100 *Id.* at 611.
101 *Id.*
102 *Id.* at 612.
103 *Id.* at 617-618.
IV. The Health And Safety Emergency Exception Today

It would be imprudent to end the analysis of the health and safety emergency exception without discussing the development of the FPCO interpretive guidance and the impact of the same in actually guiding institutional action. Educational institutions rely on agency guidance and must continue to do so proactively in order to fact current challenges.

A. How Should Institutions Be Interpreting The Health And Safety Emergency Exception In 2011?

Many commentators, and even some politicians, have analyzed the FERPA health and safety emergency exception in the wake of school shootings and other similar tragedies. Some have called for reform to provide detailed and specific criteria, within the regulation itself, to provide direction to educational institutions as to when they can enforce this exception.104 Others, however, have called for reform that would increase the flexibility given to educational institutions in determining situations that would constitute an emergency.105 Likewise, courts have also specifically pointed to the impact of past school tragedies as a factor that must be considered in reviewing the actions of educational institutions. In Doe v. Pulaski, the court found it “untenable in the wake of Columbine and Jonesboro that any reasonable school official who came into possession of [the student’s] letter would not have taken some action based on its violent and disturbing content.”106 This sentiment of not only giving discretion to educational officials to act, but requiring that they act, has been reinforced by the courts in decisions since Pulaski.107

104 Kelley Kalchthaler, Wake-Up Call: Striking a Balance Between Privacy Rights and Institutional Liability in the Student Suicide Crisis, 29 REV. LITIG. 895, 921-22 (Summer 2010).
106 Doe v. Pulaski, 306 F.3d 616, 626 n.4 (8th Cir. 2002).
Despite these calls for reform, whether by commentators, legislators or judicial opinion; the only revision to the language of the health and safety emergency exception regulation was the 2008 elimination of the strict interpretation direction.\footnote{108}{See supra Part IIA, pp. 18-25.} The exception has not been revised to further define a health and safety emergency, nor has it reverted back to its original 1974 form, which included such a definition.\footnote{109}{See supra Part II, pp. 18-20.}

This fact should not, however, leave educational institutions with the belief that these highly publicized calls for reform have not gone unnoticed. While the language of the regulation has not changed, the FPCO has clearly evidenced a willingness to provide guidance to educational institutions.\footnote{110}{See supra Part IIB, pp. 20-25.} In its guidance documents the FPCO has clearly stated the purpose of the document has been the result of an unfortunate series of tragedies that educational institutions have faced over the past two decades.\footnote{111}{Id.} With each guidance document, the FPCO has underscored the discretion and flexibility that it intends to provide to institutions in making these determinations.\footnote{112}{Id.} These documents are evidence of a clear understanding that educational institutions are desperately seeking increased flexibility and discretion to prevent tragedy and a willingness to provide that discretion.

Perhaps, instead, the fact that the regulation language itself has not been changed to include a detailed definition evidences an intention to follow the direction of the 1988 Secretary of Education’s explanatory note that institutions are capable and therefore should be permitted to make these determinations without the need for specific direction.\footnote{113}{See Family Educational Rights and Privacy, supra note 12 and accompanying text.} This would certainly be consistent with the guidance issued by the FPCO. Further, it would be consistent with the idea that to further define an “emergency” would have the effect of limiting, not expanding discretion. Such a definition could not keep up with the practical, and unfortunately, rapidly escalating nature of emergencies that educational institutions face.
Regardless of the reason, the fact remains that the FERPA health and safety emergency exception does not include a specific definition of a health and safety emergency for educational institutions to follow. Therefore, educational institutions must be proactive in attempting to identify situations that raise the potential for a health and safety emergency in order to avoid the tragedies that are yet to come.

B. Bullying

A large contributor to the difficulties facing educational institutions is the changing nature of the potential tragedy. Just when educational institutions have guidance from FPCO and the courts as to how to properly determine the existence of a health and safety emergency situation with a threat of extreme violence, such as a school shootings, terrorist activities, and sex offenders on campus, the threats of potential harm become more obscured and harder to identify, yet just as serious.

Such a situation is the rampant, widespread existence of bullying throughout educational institutions of all levels, elementary, secondary and post-secondary alike. Bullying can certainly pres-

114 FPCO Anti-Terrorism Guidance, supra, note 13 (referencing Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act), Pub. Law No. 107-56, 115 Stat. 272 (2001)).


ent a situation that would clearly not constitute a health and safety emergency, such as a singular incident of one student making fun of another student, regardless of the reason. However, bullying can just as easily present a situation that more closely approaches and even crosses the line into a health and safety emergency. Of course, this is true in the more apparent situations like bullying as a factor in mass school shootings.\(^{117}\) However, this is also true in lesser apparent incidents, such as the singular bullying incidents. A single incident of verbal tormenting could also include a threat of physical harm (e.g., one student threatening to beat up the other student). Further, the singular incidents could become a pattern of daily bullying and tormenting until the victim expresses an intent to, or even does, commit suicide.

 Courts certainly recognize the dilemma facing educational institutions in trying to differentiate between the broad range of situations. In *Cox v. Warwick Valley Central School District*,\(^{118}\) the court recognized that

in their various roles, school administrators must distinguish empty boasts from serious threats, rough-housing from bullying, and an active imagination from a dangerous impulse. Making such distinctions often requires an investigation, and the investigation may result in discipline, but the investigation itself is not disciplinary—it is precautionary and protective.\(^{119}\)

The *Cox* court clearly considers that educational officials must consider bullying in the context of potentially dangerous situations. While the court does not go so far as to explicitly state it, it would logically follow that education officials must also consider bullying in the context of a potential health and safety emergency.

Recent events bring to light the true danger of these situations. In January, 2010, Pheobe Prince, a student at a Massachusetts high school took her own life.\(^{120}\) Her parents claimed her tragic suicide

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\(^{117}\) See Booth, et al., *supra* note 116.

\(^{118}\) 654 F.3d 267 (2d. Cir. 2011).

\(^{119}\) Id. at 274.

was a result of bullying that she experienced in school. Additionally, in September, 2010, Tyler Clementi, a student at Rutgers University, took his own life allegedly as a result of a bullying incident involving his roommate.\(^{121}\)

In both of these situations, there was a claim, after the tragic events, that the educational institution knew of the bullying and could have or should have done something to prevent it.\(^{122}\) Similar allegations are often made in the wake of school shootings as well.\(^{123}\) While it is well-recognized that FERPA does not create a duty of disclosure,\(^{124}\) it is presumed that if an education institution knows of the potential for an emergency in advance of the same and believes they had even the discretion to disclose information to prevent such an emergency, that they would take preventative action. Assuming the validity of that presumption, it must therefore be concluded that educational institutions hesitate in determining when it is permissible to share information in a potentially threatening, potential emergency situation. In fact, some commentators have suggested that because of the permissive, rather than mandatory, nature of disclosure under the FERPA health and safety emergency exception, many education officials would err on the side of non-disclosure.\(^{125}\) However, if educational institutions have any chance of being proactive in preventing future, less apparent tragedies, like the harm to oneself or others as a result of bullying, there must be advance consideration of these issues in the context of escalating bullying situations.

### 1. Additional Guidance From Suicide Cases

Although a school shooting and a bullying/self-harm case is seemingly similar in that they both trigger a physical threat of harm,

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122 See Canning et al., supra note 120. The author does not make this notation to suggest any legal responsibility whatsoever on either the South Hadley School District or on Rutgers University and recognizes that legal aspects of these cases may still be pending in court. The author only references these allegations to challenge the reader to consider how such claims can trigger the FERPA health and safety emergency exception discussion.


124 Jain v. State of Iowa, 617 N.W.2d 293 (Iowa 2000).

125 Ward, supra note 123, at 419, n.107.
in the bullying/self-harm cases, the threat is often harder to detect. Students are not always as willing to come forward when they are the victim of bullying. Further, even when they do, the facts surrounding the bullying events do not always immediately give rise to a threat of self-harm. Therefore, the factors developed in analyzing the true threat cases require a slightly different analysis. While the results of the litigation involving the recent bullying/suicide cases described above have not yet reached final conclusion, cases analyzing threats of suicide, regardless of the underlying reason for the suicide, can help provide guidance for analyzing the boundaries of disclosure under the health and safety emergency exception in cases of self-harm.

In *Armijo v. Wagon Mound Public Schools*, a special education student with psychological and emotional problems, including impulsivity and depression told a school aide that “maybe [he’d] be better off dead” and that “[he was] just going to shoot [him]self.” Despite the fact that the aide and the student’s counselor knew he had access to firearms, no action was taken at that time. Instead, two months later, after an altercation with another student and a threat of physical harm to a teacher, the student was suspended. However, instead of calling the student’s parents, the school officials drove the student to his home and left him there unattended. While the school did contact law enforcement, they did it with the purpose of not allowing the student to return to school, not with the purpose of helping the student. The student later committed suicide while in his home, alone.

In analyzing the school district’s actions, albeit under the state created danger theory, the court noted that liability lies within the “state actor’s culpable knowledge . . .” in “knowing [the student’s] vulnerability and risks of being left alone at home . . .” and actions “in conscious disregard of the risk of suicide . . .” The court’s analysis instructs education officials and institutions to act upon actual knowledge of vulnerability, actual threats of specific self-harm, and

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126 159 F.3d 1253 (10th Cir. 1998).
127 *Id.* at 1256.
128 *Id.*
129 *Id.* at 1257.
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.* at 1264.
situations in which a student has means to follow through on his/her threat of self-harm.

In *Eisel v. Board of Education of Montgomery County, Maryland*, a middle school student threatened suicide in front of her friends and classmates. The student’s friends told school counselors but the counselors did not disclose the information to the student’s parents. The parents sued under a state law duty to disclose the information. In finding the school liable, the court relied upon the fact that the school officials had direct evidence of the student’s intent. In fact, the court stated that the foreseeability was the “most important variable in the duty calculus.” The foreseeability was not diminished by the student’s denial of intent to counselors. The court underscored the public policy consideration of preventing suicide. The court noted the simplicity of prevention in the form of disclosure to the parents must be weighed against the severity of the risk, in this case, the death of a child.

In *Schiezler v. Ferrum College*, a student at Ferrum College, suffering from depression, told his girlfriend that he intended to commit suicide by hanging himself with his belt, and she relayed the information to campus officials. Campus officials found the student in his room with self-inflicted bruises on his head. Thereafter, they met with the student and the student indicated that he would not hurt himself. Over the next few days, the student wrote a “goodbye” letter to his friend, indicating that he would always love his girlfriend and a final note indicating that “only God can help [him] now.” The student ultimately committed suicide in his dormitory room in the

135 Id. at 449.
136 Id.
137 Id. at 448.
138 Id. at 452.
139 Id.
140 Id. at 453.
141 Id. Such public policy determinations would likely play into the flexibility provided under the health and safety exception under FERPA.
142 Id. at 455.
144 Id.
145 Id. at 605.
146 Id. at 609.
147 Id. at 605.
manner that he had threatened. The court found Ferrum College liable for their failure to prevent the suicide. The court found that the suicide was foreseeable where the school officials knew of the student’s emotional problems and where the school knew of previous acts of lesser self-inflicted harm. Further, the court also based liability on the finding that the college had notification of imminent probability of harm via the girlfriend’s report.

By way of comparison, in Mahoney v. Allegheny College, a student was diagnosed with depression and attending counseling at the college. His counselor determined that he was a high risk for suicide; however, did not immediately notify the Dean. When she eventually did notify the Dean, she did not recommend notifying the student’s parents. Several days later, the student committed suicide. In finding that the educational institution was not liable for failing to prevent the suicide, the court noted the lack of foreseeability. Specifically, the court indicated that the education officials did not have any knowledge of a threat of self-harm and only knew of the underlying depression.

It is apparent from these cases that the self-harm cases will turn on the issue of foreseeability. This would include the specificity of the threat, the fact that there is direct evidence of the threat being shared with others, as well as the imminent nature of the threat. In addition, these cases make it clear that educational institutions must always consider the totality of the circumstances, including the student’s means of following through on the threat and the likelihood that simple disclosure will prevent the harm.

148 Id.
149 Id. at 609.
150 Id. at 609-10.
151 Id.
153 Id. at *3.
154 Id. at *5.
155 Id. at *13.
156 Id. at *2.
157 Id. at *22-23.
158 Id. at *23.
2. *In What Bullying Situations Will the FERPA Health and Safety Emergency Situation Allow for Information Disclosure?*

Analyzing these cases in conjunction with the health and safety emergency exception language as well as its implementing guidance and case law discussed herein can provide educational institutions with some direction in cases involving bullying/suicide.

First and foremost, educational institutions must determine that there has been a threat of physical harm to oneself or to oneself and others. It is the physical harm that triggers the need to consider whether a health and safety emergency exists. In the bullying fact pattern, this could include the victim of prolong bullying’s threat to harm the aggressor and/or the threat of suicide.

Thereafter, educational institutions will be permitted to look at the totality of the circumstances surrounding the threat of physical harm. Inquiries can include, among other things, the duration and extent of the bullying, the intent and mental state of the victim, and the access to the means to actually inflict the harm. Take for example the facts of *Armijo*, the student had emotional disabilities and known access to means to inflict harm to himself or others. In such situations, there is evidence that the health and safety emergency would be triggered and disclosure would be permitted.

Finally, educational institutions will need to consider the foreseeable and nature of the threat of harm. This can include the specificity of the information as well as the imminent nature of the threat. This is perhaps the most difficult in a bullying, self-harm situation. All too often individuals will threaten self-harm but not follow through. In fact, many victims of bullying have admitted considering self-harm but have not acted upon those thoughts. Educational institutions should consider this issue on a case-by-case determination and analyze the information to determine whether the student indicates a plan for imminent self-harm. In *Eisel*, the threat of self-harm was determined to be foreseeable and imminent when the information was shared with classmates. In *Schiezler*, the threat of self-harm

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was determined to be foreseeable when specific information about the method of the self-harm was shared with a classmate. In addition, the threat was foreseeable and imminent where the student wrote a series of “goodbye” letters.  

3. What is the Extent and Nature of Permitted Disclosure Under the FERPA Health and Safety Emergency Exception?

Educational institutions must not forget that even after the determination that a health and safety emergency exists, the disclosure must still be tailored to individuals that are in a position to prevent the harm. Failure to appropriately tailor the disclosure will still lead to a FERPA violation. Therefore, as part of the proactive approach, institutions must consider the nature and extent of the permitted disclosure under different emergency situations.

As a reminder, the actual language of the health and safety emergency exception as well as its implementing FPCO guidance states that if the educational institution determines that the exception applies, then:

the school official may disclose personally identifiable information from education records without consent to any person whose knowledge of the information will assist in protecting a person from threat.  

In the context of bullying and potential self-harm as the emergency, the extent of the disclosure is, again, not as clear as it may be in a school shooting emergency. In the latter, the obvious disclosure is to law enforcement. However, that may not be the case in the context of bullying/self-harm. In the bullying context, the permissible limits of disclosure would likely be outside medical professionals and the student’s parent/guardian. If the educational institution extends

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161 This can and should involve a school counselor’s assistance in making the determination, remembering that this would not violate FERPA as the school counselor would be a school official with a legitimate educational interest in knowing the information.


163 See id.; see also FPCO June 2011 Guidance, supra note 22, at 3-4.

disclosure beyond those boundaries, it may have a more difficult time arguing that they had a rational basis for the extent of the disclosure.

However, post-secondary institutions must also consider the boundaries of disclosure to the student’s roommate. While disclosure to the roommate should not be the rule, there are certainly situations where an educational institution might find such disclosure appropriate. Take the facts of Jain v. State of Iowa165 for example. In Jain, the student’s threat of suicide would have an impact on the roommates as his means of threatened suicide, and eventually of actual suicide, was via carbon monoxide poisoning while in his own dorm room where the roommate also lived.166 Such a situation could also constitute a threat of physical harm to individuals living with, or even near, the student. Therefore, if the threat of self-harm also includes a threat of physical harm to others or a means of self-harm that would necessarily lead to physical harm to others, educational institutions may consider it appropriate to extend notifications. Failure to do so may lead to claims of breach of duty to protect the roommate from such harm.

Finally, FPCO guidance has made it clear that the health and safety emergency exception is not triggered if the disclosure of information is not an educational record.167 Specifically, FPCO notes that personal observations are not educational records.168 In the bullying context, the verbalization of a threat may likely come from the student themselves to the educational official. In such situations, disclosure to appropriate parties will be permissible. However, edu-


165 617 N.W.2d 293 (Iowa 2000).
166 Id. at 296.
167 FPCO June 2011 Guidance, supra note 22, at 3-4.
168 Id. at 4.
cational institutions should be cautioned when the student verbalizes the threat to another student and then it is reported to the educational official or when the information is recorded in an email, at which point it may be deemed an educational record, again triggering the disclosure exceptions.¹⁶⁹

V. Conclusion

Despite the fact that the health and safety emergency exception has been developed over the past several years and has been interpreted to give educational institutions discretion in defining what constitutes a health and safety emergency, questions about the exception’s practical application still remain unanswered. While these questions remain unanswered, educational institutions continue to face potential emergency situations and continue to be unsure of when disclosure of student information is permissible to prevent the emergency. In today’s educational environment, such situations are not only situations where there is an obvious emergency, such as a school shooting. Unfortunately, in educational institutions today, such situations also include less obvious emergency situations like bullying, which could potentially lead to suicide.

In an effort to be proactive and answer these questions to prevent a school tragedy, rather than in response to one, educational institutions must look to other areas of law. These other areas would include the true threat cases under the First Amendment as well as the existing educational institution suicide cases. Through these cases, educational institutions can develop factors for identifying potential health and safety emergency situations, including cases of bullying that could lead to suicide. This will allow the institutions to know when disclosure is permissible in order to prevent the emergency from actually happening.

¹⁶⁹ Id.
Cyberbullying: When is it “School Speech” And When is it Beyond the School’s Reach?

Susan S. Bendlin*

“It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child’s home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities.”

I. Overview

What responsibility do public school officials have to control off-campus internet speech that bullies other students? The answer—viewed through a constitutional lens—is none. Cyberbullying is a complex and tragic problem, but it is not necessarily the school’s problem to solve. The special considerations that exist in the school setting (such as the need to educate and protect students) justify a school’s regulation of speech only when it occurs on campus and during school-supervised activities. Outside of the school environment, those special considerations do not exist. Therefore, if bullying occurs outside the ambit of the school, there is no constitutional authority that supports a school’s exercise of its disciplinary arm.

The Supreme Court’s decisions in Tinker v. Des Moines Independent Community School District and three subsequent “school speech” cases describe the circumstances under which a school has the authority to regulate a student’s speech. In Tinker, the Supreme Court declared it permissible for schools to regulate students’ on-campus speech if the speech “materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school,” if the

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school can reasonably forecast that the speech will do so, or if the speech impinges on the rights of another. The Supreme Court has denied three petitions for writs of certiorari in recent months on the issue of the applicability of *Tinker* to off-campus internet speech. This article suggests that the better question to ask, rather than whether *Tinker* extends to off-campus internet speech, is simply “what is on-campus internet speech?” When can cyberbullying be characterized as school-supervised speech?

These tricky questions boil down to factual analyses of the character of speech in individual cases. A totality of the circumstances test should be used to determine if internet speech is school speech. Determining where internet speech occurs is almost as thorny an issue as determining when life begins. It is appropriate for the Supreme Court to task fact finders with sorting out whether a particular message is properly characterized as school speech. Where it is, *Tinker* and the other school speech cases apply and there is no unsettled legal question. Where it is not, the school should not reach outside its sphere to regulate otherwise protected speech.

School officials are uncertain how to respond to vicious and inappropriate internet speech. School administrators aware of cyberbullying activities must effectively balance the protection of bullied victims with the free speech rights of other students. On campus, it is a difficult task. Off campus, it is simply not the responsibility of school officials. School officials should not discipline bullies for off-campus internet speech, no matter how horrific and inappropriate the message. Those school administrators who do discipline students for posting bullying comments may face the wrath of the punished students’ parents. However, qualified immunity may shield individual school officials from suits for money damages in such instances.

This article will elaborate on three primary points. Part II of this article explores off-campus internet speech and the inability of public school officials to suppress the speech or discipline the stu-

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dent without violating his or her First Amendment rights. Part III suggests that although it can be difficult to define where internet speech occurs, it is a question of fact that should be decided using a totality of the circumstances test. Finally, Part IV examines the possibility that school administrators who allegedly violate a student’s First Amendment rights may be shielded from liability by the doctrine of qualified immunity.

II. First Amendment Limitations On The Public School’s Regulation Of Students’ Internet Speech

Public school officials cannot suppress off-campus internet speech. It is outside their purview. If a court determines that the speech occurred off campus, the student’s First Amendment rights protect him or her from being disciplined by public school administrators, even for insulting and vulgar internet messages. The school’s power to regulate students’ speech comes from special considerations that are only present in the school setting, such as the school’s role in protecting and educating its students in an appropriate learning environment. The Supreme Court has declared that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Schools lack the absolute authority to repress students’ speech because “[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.” The only time when a school can abridge a student’s fundamental free speech right is when the speech is made in a school-supervised setting and meets one of the special exceptions, or tests, set out in the Supreme Court’s four major school speech cases.

4 The presumption is in favor of freedom of speech. Only if those “special considerations” that have to do with maintaining a productive and orderly educational environment are implicated can a school regulate students’ speech. See Tinker, 393 U.S. at 505–06. Outside the school setting, those special considerations simply do not exist, and there is no justification for a school’s intervention in off-campus speech.

5 Id. at 506.

6 Id. at 511.

7 Id. at 503; Morse v. Frederick, 551 U.S. 393 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
In the first of the well-known school speech opinions, *Tinker v. Des Moines Independent Community School District*, the Supreme Court held that a public school can permissibly regulate students’ on-campus speech if the speech “materi- ally and substantially” disrupts school activities, if the school can reasonably forecast that it will do so, or if the speech impinges on the rights of another. In *Tinker*, the Court overturned a school’s refusal to permit students to wear armbands in protest of the Vietnam War, stating that the expression of antiwar views was done peacefully and that it did not cause a substantial and material disruption of school activities.

The Supreme Court emphasized the importance of the educational process and announced a test for when schools can regulate students’ speech:

> [t]he principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions . . . if he does so without ‘materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others. But conduct by the student, in class or out of it, which . . . 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.

The three post-*Tinker* school speech cases illustrate that schools can also restrict some student speech that does not materially disrupt school activities. The underlying concern in the next case, *Bethel*—

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8 *Tinker*, 393 U.S. at 509, 513.
9 *Id.* at 514.
10 *Id.* at 512–13 (citations omitted).
11 In all three post-*Tinker* cases, the Supreme Court upheld the school’s decision to discipline the student and regulate the speech. This regulatory authority was described in *Morse* and *Bethel*: “[S]chool boards have the authority to
el School District No. 403 v. Fraser, was that “[a] high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.” The Supreme Court found that the school district did not violate a student’s First Amendment rights when it disciplined him for delivering a school elections speech loaded with sexual imagery in reference to an opposing candidate when the speech was delivered during a school assembly. The school’s duty to protect the youngsters entrusted to its care justified the suppression of speech deemed too lewd and vulgar for sensitive young listeners.

In the third school speech case, Hazelwood School District v. Kuhlmeier, the issue was whether the school district acted reasonably by suppressing an article in the student newspaper that divulged details about pregnant students or whether the students’ right to free expression protected their editorial control over the newspaper’s contents. Holding in favor of the school district, the Supreme Court declared that “[e]ducators are entitled to exercise greater control over” forms of student expression, such as the newspaper, that would “bear the imprimatur of the school.” Characterizing the school newspaper “as part of the school curriculum,” the Court permitted school officials to regulate its speech because their objectives were “reasonably related to legitimate pedagogical concerns.” The Court also indicated that the school administrators had a special interest in school-sponsored activities.

The Supreme Court concluded in its most recent school speech decision, Morse v. Frederick, that school officials did not violate a student’s First Amendment rights by confiscating his banner reading

determine ‘what manner of speech in the classroom or in school assembly is inappropriate.” Morse, 551 U.S. at 404 (quoting Bethel, 478 U.S. at 683). Additionally, a school can regulate speech if the message is perceived to be school-sponsored and contrary to the school’s curriculum and mission. Hazelwood, 484 U.S. 260. Schools may also suppress students’ on-campus speech if it is vulgar and obscene or if it promotes illegal drug use. Bethel, 478 U.S. 675 (obscene speech); Morse, 551 U.S. 393 (speech promoting illegal drug use).

12 Bethel, 478 U.S. at 685.
13 Id.
14 Id. at 683–84.
15 484 U.S. at 264–66.
16 Id. at 271.
17 Id. at 271–73.
18 Id. at 271.
“BONG HiTS 4 JESUS” and suspending him from school.\textsuperscript{19} The Morse Court carefully tied the school’s act of suppressing the banner to its responsibility to educate its students about the particularly dangerous, harmful, and criminal activity of illegal drug use.\textsuperscript{20} The Court held that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”\textsuperscript{21} The Supreme Court rejected the student’s claim that because his banner was displayed off-campus, his speech was outside the school’s reach.\textsuperscript{22} Instead, the Court characterized the student’s expression as school speech even though it did not occur on the school grounds. The student’s banner—unfurled on a public sidewalk during the Olympic torch parade—was displayed across the street from the school, during school hours, at a school-approved event, and in the presence of other students, teachers, and the school principal.\textsuperscript{23} Thus, the expression did occur during a school-supervised activity and was subject to the school’s regulation.

In short, the Supreme Court has held that schools may regulate several types of student speech when that speech occurs on campus or at school-sponsored events because of the special nature of the school setting. These four cases illustrate that “school speech” is that which is made by students in a school-supervised setting even if the expression was not made physically and literally on campus.\textsuperscript{24} It is this notion of the school-supervised setting that should be the first step of analysis in every case. When internet speech is generated off campus, however, the characterization of that expression becomes a tricky fact-based exercise. The pervasive use of social networking media by students has further complicated the question of whether the Tinker test should apply to off-campus internet speech that causes

\textsuperscript{19} 551 U.S. 393, 403 (2007).
\textsuperscript{20} Id. at 407–08. The “special characteristics of the school environment, and the governmental interest in stopping student drug abuse allow schools to restrict student expression that they reasonably regard as promoting such abuse.” Id. at 408 (internal quotations and citations omitted).
\textsuperscript{21} Id. at 397.
\textsuperscript{22} Id. at 400–01.
\textsuperscript{23} Id. at 397, 400–01.
\textsuperscript{24} Schools are allowed to regulate student speech when the speech occurs on campus (as in Tinker and Bethel) or in a school-sponsored publication bearing “the imprimatur of the school” (as in Hazelwood) or during school hours at a school-approved event attended by the school’s students (as in Morse).
a substantial disruption on campus. The first question to ask, however, is simply “where did the internet speech actually occur?”

III. A Question Of Fact: What Is Off-Campus Internet Speech?

How does one characterize internet speech when it circulates widely instead of perching neatly in one geographic location? The courts have not framed the issue this broadly, but have narrowed the issue by asking whether *Tinker* applies to internet speech that is created off campus. In so doing, litigants and courts may be glossing over a critically important factual inquiry as to the locus of the speech, and may instead be assuming that simply because it originated off campus, it cannot be considered “school speech.”

Litigants, too, have framed the question this way. See, e.g., Brief for Petitioner at i, Blue Mtn. Sch. Dist. v. J.S. ex rel. Snyder, 132 S. Ct. 1097 (2012) (mem.), *denying cert. to* 650 F.3d 915 (3d Cir. 2011) (No. 11-502), 2011 WL 5014761 at *i (“The questions presented are: 1. Whether and how *Tinker* applies to online student speech that originates off campus and targets a member of the school community, [and] 2. Whether and how *Fraser* applies to lewd and vulgar online student speech that originates off campus and targets a member of the school community.”). The second question is beyond the scope of this article, and this author would interpret the Supreme Court’s statement in *Morse* as having already resolved the second issue by declaring that Fraser’s lewd and vulgar speech would have been protected under the First Amendment had he delivered it off-campus. *See Morse*, 551 U.S. at 405.

The Fourth Circuit did not overlook this question in *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012), calling it a “metaphysical question” as to where Kara’s speech was made. *Id.* at 573. The Court, however, did not actually answer the question, stating instead, “[w]e need not resolve, however, whether this was in-school speech . . . because the School District was authorized by *Tinker* to discipline Kowalski, regardless of where her speech originated, because the speech was materially and substantially disruptive . . .” *Id.* (citing *Tinker*, 393 U.S. at 508, 513). This logic is flawed in that it assumes that *Tinker* could apply to any speech that substantially disrupts the school even though the Supreme Court has never even hinted that *Tinker* pertains to any speech other than on-campus speech. By applying *Tinker* without first determining whether Kara’s message could be deemed school speech, the Fourth Circuit failed to anchor its reasoning properly from the outset. *Id.* at 568. In terms of answering the metaphysical question, speech communication theorists have suggested that speech is more than a mere utterance. For there to be speech, there must be not only a speaker, there must be a recipient (or listener), and there must be actual receipt of the message. *See Stephen E. Lucas, The Art of Public Speaking* 28 (8th ed. 2004) (explaining that “[t]he speech communication process as a whole includes seven elements: speaker, message, channel, listener, feedback, inter-
As mentioned, during its October 2011 term, the Supreme Court denied three petitions for writs of certiorari where the question presented was whether *Tinker* should apply to students’ “off-campus internet speech.” Some commentators expected that the high court would clarify whether school officials can constitutionally regulate students’ off-campus speech at all, or whether school officials can do so if they first establish that there was a disruptive effect on campus, or whether it is sufficient for schools to “reasonably foresee” a substantial or material disruption based on the off-campus communication so as to properly regulate under the *Tinker* standard. The Supreme Court, however, has not taken up these questions.


In keeping with its usual practice, the Supreme Court issued no explanatory opinions in its denials of the three petitions for writs of certiorari, leaving legal scholars and others to speculate as to the reasons.
A. Three Scenarios, Three Circuits, Three Petitions—Thrice Denied

Three petitions were filed; all three were denied. The underlying factual scenarios are summarized below.

1. Doninger v. Niehoff in the Second Circuit

This case involved two types of speech: a student’s internet speech and her on-campus expression of wearing a controversial t-shirt. High school junior Avery Doninger and her fellow Student Council members became upset when a school event called Jamfest could not be held as originally scheduled, and they used the high school’s computer lab to send an email message urging students, parents, and friends to contact the school in protest.\(^{30}\) That night at home, Doninger created a blog post incorporating her earlier email message and urging people again to contact the “douchebags” in the school administration’s office and “piss her off more.”\(^{31}\) As punishment for the blog post, Principal Niehoff forbade Doninger from running for Senior Class Secretary.\(^{32}\) When the day of the election arrived, Doninger and several of her supporters attempted to wear homemade “Team Avery” t-shirts to the election assembly, but were not allowed to wear them.\(^{33}\) Avery’s mother filed suit, alleging that the school administration’s actions violated her daughter’s First Amendment rights.\(^{34}\)

Applying the \textit{Tinker} “substantial and material disruption test,” the Second Circuit stated that it was “objectively reasonable for school administrators to conclude that Doninger’s posting was potentially disruptive to the degree required by \textit{Tinker}” so as to justify their disciplinary actions.\(^{35}\) With regard to the t-shirts, the court indicated that “Niehoff may not have known with certainty that permitting the t-shirts into the assembly would cause students to disrupt those [election] speeches,” but nonetheless concluded that her assessment

\(^{31}\) \textit{Id.} at 340–41.
\(^{32}\) \textit{Id.} at 342.
\(^{33}\) \textit{Id.} at 343.
\(^{34}\) \textit{Id.} at 343–44.
\(^{35}\) \textit{Id.} at 348–49.
of the disruption was reasonable even if a jury could have reached the opposite determination.\textsuperscript{36} The Second Circuit ruled in favor of granting qualified immunity to the school officials for their actions.\textsuperscript{37}

2. Blue Mountain School District v. J.S. ex rel. Snyder  
\textit{(consolidated with} Hermitage School District v. Layshock) 
\textit{in the Third Circuit}

These two similar cases involved students disciplined for creating fake MySpace profiles of their school principals.\textsuperscript{38} In J.S. \textit{ex rel. Snyder v. Blue Mountain School District}, J.S. and her friend K.L. used the Snyders’ computer at home on a Sunday evening to create a bogus MySpace profile of their school principal, describing his general interests as: “detention, being a tight ass, riding the fraintrain, spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, hitting on students and their parents.”\textsuperscript{39} The profile also stated, “HELLO CHILDREN[.].] yes. it’s your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL.”\textsuperscript{40} The next day, J.S. made the profile “private” and granted access only to about twenty-two of her fellow students.\textsuperscript{41} Because the School District’s computers blocked access to MySpace on campus, no one was able to view the online profile at school, but the principal heard about the profile and requested that a print-out be brought to him.\textsuperscript{42} After seeing the fake profile, the principal suspended J.S.\textsuperscript{43}

The Snyders sued the school district, alleging among other things that the suspension violated J.S.’s First Amendment rights.\textsuperscript{44} The District Court granted summary judgment in favor of the School District on this claim, and the Snyders appealed.\textsuperscript{45} The Third Circuit wrestled

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{36} Id. at 355.
\item \textsuperscript{37} Id. at 339. See discussion infra Part IV.
\item \textsuperscript{39} Snyder, 650 F.3d at 920.
\item \textsuperscript{40} Id. at 921.
\item \textsuperscript{41} Id.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id. at 922.
\item \textsuperscript{44} Id. at 923.
\item \textsuperscript{45} Id. at 923–24.
\end{itemize}
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with whether the case should be decided under the *Tinker* standard, ultimately using the *Tinker* analysis without expressly holding that it was applicable to off-campus speech. The Blue Mountain School District contended that it could reasonably forecast that substantial disruption would occur, thus satisfying the *Tinker* test. The Third Circuit concluded, however, that the Blue Mountain School District’s forecast of a disruption was not reasonable, noting that on-campus access to MySpace was restricted and, moreover, the MySpace profile was so obviously a joke that no one would take it seriously enough to cause a substantial disruption of school activities.

The other Third Circuit case, consolidated with *J.S.*, was *Layshock ex rel. Layshock v. Hermitage School District*, which involved another student who created a fake MySpace profile of his school principal. Using his grandmother’s computer at her house, Justin Layshock made the profile by copying the principal’s photograph from the

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46 In *J.S.*, eight of the fourteen judges sitting *en banc* joined the majority opinion written by Judge Chagares. Joining in the majority were Chief Judge McKee and Judges Sloviter, Ambro, Fuentes, Smith, Hardiman, and Grennaway, Jr. The majority dodged the ultimate issue stating: “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 (social networking) speech in this case.” *Id.* at 926 (emphasis added). Interestingly, five of those eight judges also joined in a separate concurrence written by Judge Smith, stating: “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 936 (Smith, J., concurring) (emphasis added). Finally, the remaining six of the fourteen judges dissented because they disagreed with the majority’s application of the rule to the facts, but they agreed with “the apparent adoption of the rule that off-campus speech can rise to the level of a substantial disruption.” *Id.* at 941 (Fisher, J., dissenting, joined by Scirica, Rendell, Barry, Jordan, and Vanaskie, JJ.). In short, five judges on the Third Circuit believe that *Tinker* does not apply to off-campus speech, three think that the prudent approach is to apply it, and six believe that it should apply.

47 *Id.* at 928; see *Tinker*, 393 U.S. at 513. This interpretation of the “forecast” prong of *Tinker* is consistent with other circuits’ opinions cited by the *Snyder* Court, including Doninger v. Niehoff (*Doninger II*), 527 F.3d 41, 53 (2d Cir. 2008); Lowery v. Euverard, 497 F.3d 584, 591–92 (6th Cir. 2007); and LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001).

48 “[T]he profile, though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did.” *Snyder*, 650 F.3d at 929.

school district’s website and posting false comments about the principal’s activities. He used a theme of “big”—listing things such as “big steroid freak,” “big whore,” “big fag,” “number of drugs I have taken: big,” and so forth. As punishment, the school suspended him for ten days. Justin’s parents brought an action alleging that his free speech rights had been violated by the school district, and the district court granted summary judgment in favor of the Layshocks. The Third Circuit affirmed. In holding that Justin’s act of obtaining the principal’s photograph from the school district’s website did not amount to entering school grounds, the court characterized the fake profile as “off-campus” speech and thus, outside the scope of the school’s authority.

3. Kowalski v. Berkeley County Schools in the Fourth Circuit

Kara Kowalski, a high school senior, was at home when she created a MySpace webpage aimed at humiliating a classmate. The page, called S.A.S.H. (“Students Against Sluts Herpes”), accused the other girl of being a slut and having herpes. One of Kowalski’s friends accessed the page while at school, where he added photographs and posted comments using the targeted girl’s name, Shay. Other students also commented. The victim’s parents complained to the school principal and Shay left school that day because she felt uncomfortable around her classmates. As punishment for violating the school’s policy against harassment and bullying, Kowalski was banned from being on the cheerleading squad, barred from certain school events, and suspended for five days.

50 Id. at 207–08.
51 Id. at 208.
52 Id. at 209.
53 Id. at 210–11.
54 Id. at 219. Since there was no disruption of school activities, the *en banc* panel did not have to decide whether *Tinker* would actually have applied to this particular instance of off-campus speech.
55 Id.
57 Id.
58 Id. at 568.
59 Id.
60 Id.
61 Id. at 569. (the original ten-day suspension was reduced to five days).
The Kowalskis sued the school district on several grounds, including free speech violations. The district court granted summary judgment in favor of the school and the Fourth Circuit affirmed, stating that the school permissibly disciplined Kowalski because she orchestrated an internet attack on a classmate and “did so in a manner that was sufficiently connected to the school environment as to implicate the School District’s recognized authority to discipline speech which ‘materially and substantially interferes with the . . . operation of the school.”

B. The Threshold Question: Was it School Speech? A Factual Determination Should be Made Using a Totality of the Circumstances Test

One good reason for the Supreme Court to have declined to review the decisions in these cases is that the real issue was not a question of law. The fundamental issue boils down to a question of fact—was the student’s internet communication “school speech?” The finder of fact is in the best position to evaluate and characterize the internet speech as either on-campus or off-campus. The factual determinations have become exceedingly complicated due to technological advances. If the speech is determined to be school-supervised speech (or “on-campus” speech), then the relevant legal tests for regulating the speech are already defined and do not need

62 Id. at 570.
63 Id. at 567.
64 Under Supreme Court Rule 10, “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Sup. Ct. R. 10. To be clear, in these petitions the asserted error was not a challenge to the lower court’s factual findings. Rather, it was couched as a question of law. In actuality, however, the underlying source of confusion stems from the factual characterization of internet messages as being off-campus and not “school speech.” The law is clear; the Tinker test is well-established. The misunderstanding comes from the failure to make a correct initial factual determination about where the speech occurs.
65 See Doninger v. Niehoff (Doninger III), 594 F. Supp. 2d 211, 223 (D. Conn. 2009) (“Today, students are connected to each other through email, instant messaging, blogs, social networking sites, and text messages. An email can be sent to dozens or hundreds of other students by hitting ‘send.’ A blog entry posted on a site such as livejournal.com can be instantaneously viewed by students, teachers, and administrators alike. Off-campus speech can become on-campus speech with the click of a mouse.”).
to be readdressed by the Supreme Court. Conversely, if the student’s internet speech is characterized as off-campus communication, the rule is equally clear that the school’s authority does not extend to such speech. In short, the essential determination is a factual question about the nature of the speech in each individual case; it is not a question of law.

School speech—and particularly internet speech—cannot be narrowly defined by reference to purely geographical boundaries. Reference to physical dividing lines between on-campus and off-campus is an outdated way of characterizing speech. The Fourth Circuit said in Kowalski that surely the metaphysical question of where speech is made cannot be determined by reference to where the computer keys were first pressed. The Third Circuit has also stated, “[f]or better or worse, wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.”

Additionally, Judge Smith of the Third Circuit wrote in his concurrence in J.S. that the determination “cannot turn solely on where the speaker was sitting when the speech was originally uttered” because “such a standard would fail to accommodate the somewhat ‘everywhere at once’ nature of the internet.”

School officials may ask, then, how to determine whether a student’s internet speech is on-campus speech. The appellate courts have applied a variety of legal tests. The Supreme Court, however,
has already provided a framework for deciding whether the off-campus speech is actually “school speech.”\textsuperscript{70} It is noteworthy that the Supreme Court itself abandoned the strict use of geographical boundaries in characterizing the school speech in Morse.\textsuperscript{71} In Morse, the Court recited a litany of facts in determining that Frederick’s display of his banner on a public sidewalk—not on school grounds—was nonetheless “school speech.”\textsuperscript{72} The Supreme Court carefully listed the facts that it relied on in deciding that the display of the banner was school speech even though it was located outside of the schoolhouse gates.\textsuperscript{73} The Court noted that the event occurred during normal school hours; was sanctioned by Principal Morse as an approved class trip; teachers and administrators were interspersed among the students and charged with supervising them; and Frederick stood across the street from the school and aimed his banner toward the school.\textsuperscript{74} Taking all these facts together, the Court held that Frederick’s expression was school speech.\textsuperscript{75} In short, if one looks at the Supreme Court’s analysis in the 2007 Morse decision, it becomes apparent that it is appropriate to apply a totality of the circumstances test.\textsuperscript{76}

\textsuperscript{70} Morse v. Frederick, 551 U.S. 393, 400–01 (2007).
\textsuperscript{71} Id.
\textsuperscript{72} During the Olympic torch parade, Frederick, a student, displayed a banner saying “Bong HiTS 4 Jesus.” Id. at 397. The principal made him take it down, and the student argued that the school violated his First Amendment rights by suppressing his speech when it did not occur on campus. Id. at 400–01.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 401.
\textsuperscript{76} A totality of the circumstances test has been applied in several types of legal analysis, including constitutional questions. An example in the Fourth Amendment area is Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (“The question whether a consent to a search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.”) (emphasis added). Lower courts have followed the same test in other Fourth Amendment cases. See, e.g., United States v. Harrison, 639 F.3d 1273, 1278 (10th Cir. 2011). In the field of employment discrimination, the Supreme Court has also applied a totality of the circumstances test, stating that “whether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances.” Harris v.
Without using the exact terminology of “totality of the circumstances,” some federal courts have nonetheless been taking that approach in school speech cases. In each of the cases where the Supreme Court has denied a petition for writ of certiorari, school officials had examined the circumstances to determine whether the internet speech could be characterized as school speech. When the answer was “yes,” the speech was permissibly regulated by the school officials, and when it was “no,” the court determined that it was a violation of the student’s rights to discipline him or her for the speech.

For example, the Third Circuit, in concluding that J.S.’s internet speech was not school speech, recited a list of facts leading to that conclusion:

J.S. created the [MySpace] profile as a joke, and she took steps to make it ‘private’ so that access was limited to her and her friends. Although the profile contained [the principal’s] picture from the school’s website, the profile did not identify him by name, school, or location. . . . Also, the School District’s computers block access to MySpace, so no Blue Mountain student was ever able to view the profile from school. And, the only printout of the profile that was ever brought to school was one that was brought at the [principal’s] express request.”77

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In his concurrence, Judge Smith implicitly reinforced this totality of the circumstances application, stating that:

In any event, this case does not require us to precisely define the boundary between on- and off-campus speech, since it is perfectly clear that J.S.’s speech took place off campus. J.S. created the Myspace profile at home on a Sunday evening; she did not send the profile to any school employees; and she had no reason to know that it would make its way onto campus. In fact, she took steps to limit dissemination of the profile, and the Myspace website is blocked on school computers. If ever speech occurred outside of the school setting, J.S.’s did so.78

In the other Third Circuit case, the en banc court looked at the fact that Justin Layshock created the fake MySpace profile at his grandmother’s house and he used her computer during non-school hours.79 Although the school argued that his mock profile began as “school speech” since he copied the principal’s photograph from the official school website,80 the appellate court rejected that view, concluding, “[w]e need only hold that Justin’s use of the District’s website does not constitute entering the school, and that the District is not empowered to punish his out of school expressive conduct . . .”81

The Fourth Circuit in Kowalski listed several facts about the MySpace page that Kara Kowalski had created at home in the evening and found that her speech was sufficiently connected to the school to justify the school official’s regulation of it.82 The court’s approach,

78 Id. at 940 (Smith, J., concurring).
80 Id. at 214 (quoting the School District’s brief for the argument that Justin’s “‘speech’ initially began on-campus [because] Justin entered school property, the School District web site, and misappropriated a picture of the Principal.”).
81 Id. at 219.
82 It is troubling that the court avoided the threshold question as to where the speech occurred and jumped into an analysis of the Tinker test, stating “[w]e need not resolve, however, whether this was in-school speech and therefore whether Fraser could apply because the School District was authorized by Tinker to discipline Kowalski, regardless of where her speech originated, because the speech was materially and substantially disruptive in that it ‘interfer[ed] . . . with the schools’ work [and] colli[ded] with the rights of other students to
though not labeled as such, amounted to a totality of the circumstances test.\textsuperscript{83} The pertinent facts, as recited by the court, were that Kara knew that the electronic response could . . . reach the school or impact the school environment. She also knew that [a] dialogue would . . . take place among [her fellow students] . . . and that the fallout from her conduct and the speech . . . would be felt in the school itself. Indeed, the [MySpace] group’s name was “Students Against Sluts Herpes” and a vast majority of its members were students . . . \textsuperscript{84}

Also, the victim “and her parents took the attack as having been made in the school context, as they went to the high school to lodge their complaint.”\textsuperscript{85}

Another example of the totality of the circumstances approach is found in the Second Circuit’s review of the facts surrounding Avery Doninger’s blog post, which was created at home, at night, using a website unaffiliated with the high school.\textsuperscript{86} The blog post did not even come to the attention of the school administration until two weeks after it was created.\textsuperscript{87} It was treated as off-campus speech, but Doninger was disciplined nonetheless for failing to demonstrate good citizenship and for violating the handbook’s policies governing class

be secure and to be let alone.”” \textit{Kowalski}, 652 F.3d at 573–74 (quoting \textit{Tinker}, 393 U.S. at 508, 513).

\textsuperscript{83} The Fourth Circuit did not describe the approach as a totality of the circumstances test, but that is how the court analyzed the speech at issue. Unfortunately, the court avoided deciding whether the facts rendered the expression “school speech.” Instead, the court rushed into an application of \textit{Tinker}. A more grounded approach would have been predicated on first determining, as a factual matter, whether Kowalski’s speech was on-campus or off-campus for purposes of applying the relevant legal test.

\textsuperscript{84} \textit{Id.}

\textsuperscript{85} \textit{Id.} (stating also that “the creation of the ‘S.A.S.H.’ group forced Shay N. to miss school in order to avoid further abuse.”). The court continued, “Moreover, had the school not intervened, the potential for continuing and more serious harassment of Shay N. as well as other students was real. Experience suggests that unpunished misbehavior can have a snowballing effect, in some cases resulting in ‘copycat’ efforts by other students or in retaliation for the initial harassment.” \textit{Id.}


\textsuperscript{87} \textit{Id.} at 342.
officers. Interestingly, no one argued that the blog post itself was “school speech” even though it incorporated the earlier email that Doninger and three friends had written on campus in the school’s computer lab during the school day, in violation of the high school’s email policy. That mass email also included specific references to the school, such as the telephone number of the district’s office, and expressly urged people to contact the office.

In summary, even though the findings were not always expressly stated, these federal courts were examining the facts and subtly making determinations as to whether the internet speech was “school speech.” Courts should follow this approach more systematically and explicitly by stating that the threshold question of fact is whether the internet speech is school speech. That determination should be made using a totality of the circumstances test. The important point is that as soon as it is determined whether the cyberbullying speech falls within the school’s purview, the limits on a school official’s authority can be more easily assessed. If a student’s cyberspeech is characterized as school speech, there is no need for more guidance from the Supreme Court as there are already four tests applicable to different types of school speech. Cyberspeech will likely fit into the existing categories depending on its content, its aim, and the school’s interests in regulating it. The school can then apply the correct test from *Tinker, Bethel, Hazelwood, or Morse* depending on how it is properly characterized.

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88. *Id.* As punishment, she had to “apologize to [Superintendent] Schwartz, show the blog post to her mother, and withdraw her candidacy for Senior Class Secretary.” *Id.*

89. *Id.* at 339–40.

90. *Id.* Principal Niehoff expressed disappointment that Avery had republished the mass email containing misinformation about the cancellation of Jamfest, but did not claim that the republication was, itself, school speech. *Id.*

91. For example, lewd and vulgar speech would fall under the *Fraser* standard. If the speech appears to advocate illegal drug use, *Morse* would govern. *Hazelwood* would apply when the speech bears the imprimatur of the school, appears to be school-sponsored, or when the speech interferes with the school’s educational mission. *Tinker*, as previously stated, would apply to speech that materially or substantially disrupts school activities, can be foreseen to cause such disruption, or impinges on the rights of another.
C. Other Possible Considerations Underlying the Supreme Court’s Decision Not to Grant Certiorari

There are undoubtedly other reasons why the Supreme Court did not grant certiorari in these cases. It is possible that the circuit courts of appeal have already reached the right result by permitting school authorities to punish students who post internet messages when those messages either have already caused or will foreseeably cause a material and substantial disruption at school. Although the circuits have applied the *Tinker* test in varying ways and expressed uncertainty over the applicability of *Tinker* in each case, they still managed to apply the *Tinker* standard. This author disagrees with that approach because it includes off-campus speech and fails to address the underlying problem: there are no special considerations outside the school setting to justify a school’s infringement of a student’s First Amendment rights. Nonetheless, it is conceivable that this extension of *Tinker* is an acceptable result and there is no urgent need for judicial review.

Another plausible explanation as to why the Supreme Court has not opted to resolve the confusion is that the appellate courts’ decisions may satisfactorily reflect current political and societal values. The current administration has made the curtailment of cyberbullying a priority. President Barrack Obama encouraged the creation of the Department of Health and Human Services’ antibullying website and has drawn national attention to the issue. The desired result of these political actions is to suppress hate speech, bullying speech, and pernicious forms of cyberbullying by one student against another or by students against school administrators. An environment that is conducive to learning does not include bullying. Schools are best

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92 Due to the large number of petitions, the Supreme Court can only address a fraction of the issues presented each year. Some court-watchers anticipated that the Supreme Court would review one of these cases last year.

93 See, e.g., J.S. ex rel. Snyder v. Blue Mtn. Sch. Dist., 650 F.3d 915, 926 (3d Cir. 2011), cert. denied, 132 S. Ct. 1097 (2012) (“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.”)

able to fulfill their educational missions if both students and administrators are untroubled and undistracted by menacing messages. At the extreme end of the spectrum, some may argue that even if First Amendment rights are being trampled, there is a perceived countervailing benefit in allowing school districts to take a harsh stance against cyberbulliers.

Moreover, the nasty speech that some students have engaged in is not the type of speech that anyone would be eager to support or promote. The focus, however, should not be on the content of the speech, but rather, on the student’s right to make such comments, however rude they may be. Therefore, the analysis should turn on whether the speech would have been protected had it not been deemed to affect the school environment. Various types of speech such as fighting words, true threats, and some obscenity and pornography are not entitled to constitutional protection. A school official could regulate those types of speech without violating the First Amendment because such speech would not be protected in the first instance. Most of the students’ messages fall short of these exceptional categories, and most of the speech at issue would be protected if made outside the school context.

An example of undesirable speech is found in *J.S. ex rel. Snyder*, 650 F.3d at 921, where J.S. posted on MySpace that her principal had a “small dick”, that he enjoyed sex with children, and that he liked to ride the “fraintain” (an obvious reference to his wife, whose last name was Frain). Similarly, the MySpace page in *Kowalski*, 652 F.3d at 568 involved photographs of a fellow female student with captions indicating that she was a slut and that she had herpes, an allegation that was not true.

Virginia v. Black, 538 U.S. 343, 359 (2003) (quoting Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (stating that “true threats include those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals”); *see also* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 393-94 (1992) (stating that “fighting words” that communicate ideas in a threatening manner are not protected speech but a cross burning ordinance that singles out only certain “messages of racial, gender, or religious intolerance” cannot be constitutionally valid because it “handicap[s] the expression of ideas”); United States v. Williams, 553 U.S. 285, 299 (2008) (holding that “offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment”); Osborne v. Ohio, 495 U.S. 103, 111 (1990) (holding that a state may constitutionally proscribe the possession and viewing of child pornography”).

A thorough discussion of true threats and other unprotected speech is outside the scope of this article.
Although the premise of this article is that schools simply cannot constitutionally regulate speech outside the scope of school-supervised activities, some would say that the judgment call is best left to school administrators.\textsuperscript{98} Justice Breyer foresaw this issue, writing in\textit{Morse} that “[s]tudents will test the limits of acceptable behavior in myriad ways better known to schoolteachers than to judges; school officials need a degree of flexible authority to respond to disciplinary challenges; and the law has always considered the relationship between teachers and students special.”\textsuperscript{99}

School officials are searching for ways to make their campuses safer and to punish cyberbullying that affects their students.\textsuperscript{100}

\textsuperscript{98} Deference to school officials’ judgment is a theme reflected in some Supreme Court school cases, as was noted in the Petition for Writ of Certiorari filed on October 18, 2011 in\textit{Snyder}, where attorneys representing the school district wrote: “To second-guess and hamstring school officials like this [by not supporting the school official’s actions] vitiates the recognition by this Court, from\textit{Tinker} forward, that school officials must retain sufficient authority to keep order, and that courts should respect the reasonable educational judgments of school officials.” Petition for Writ of Certiorari,\textit{Blue Mountain Sch. Dist. v. Snyder}, 132 S. Ct. 1097 (2012) (No. 11-502) (citing \textit{Tinker} v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 507, 514 (1969) and \textit{New Jersey v. T.L.O.}, 469 U.S. 325, 339 (1985)).

\textsuperscript{99} Morse\textit{ v. Frederick}, 551 U.S. 393, 428 (2007) (Breyer, J., concurring in part and dissenting in part). Justice Breyer continued, “[y]et no one wishes to substitute courts for school boards, or to turn the judge’s chambers into the principal’s office.” \textit{Id.} This expression of support for the discretionary judgment of school officials may also be an underlying reason why the Supreme Court did not grant any of the three petitions for writs of certiorari this term.

\textsuperscript{100} Recent school violence and the much-publicized suicides resulting from internet bullying have also drawn national attention to the problem. One of many tragic examples is Jamey Rodemeyer, a 14-year old who fell victim to gay insults online after he told friends he was bisexual. \textit{See} Sarah Anne Hughes, \textit{Jamey Rodemeyer, Bullied Teen Who Made ‘It Gets Better’ Video Commits Suicide, Washington Post, BlogPost} (Sept. 21, 2011, 9:27 AM), http://www.washingtonpost.com/blogs/blogpost/post/jamey-rodemeyer-bullied-teen-who-made-it-gets-better-video-commits-suicide/2011/09/21/gIQAVVzkkK_blog.html. One anonymous internet poster even said that everyone would be happier if Jamey would just kill himself. \textit{Id.} Jamey reached out, also using the internet, and posted a YouTube video called “It Gets Better.” \textit{Id.} Sadly, the help of family members, guidance counselors, and therapists was not enough. \textit{Id.} Jamey took his own life in 2011. \textit{Id.} Another bullied teen, J.D. Lane, opened fire in February 2012 at Chardon High School in Ohio. Michael McLaughlin, \textit{T.J. Lane, Chardon High School Shooting Suspect, Was Described As Outcast, The Huffington Post}, (Feb. 29, 2012, 7:01 PM), http://www.huffingtonpost.com/2012/02/28/tj-lane-chardon-high-school-suspect_n_1306511.html. At 7:30 AM in the cafeteria, the shooter aimed at a table of boys, including one
School administrators are shouldering a huge burden in this regard.\textsuperscript{101} One federal court has observed that “teachers and administrators in today’s world are expected to undertake greater responsibilities than what the one-room schoolhouse teacher shouldered. Educators serve as surrogate parents, psychologists, social workers, and security guards, above and beyond their normal teaching responsibilities.”\textsuperscript{102} In a school where the written policies require intervention in bullying or cyberbullying incidents, the role of the school administrator becomes almost impossible to fulfill because there is no clear way to reconcile the conflicting demands of the various directives, statutes, policies, and the First Amendment.

If a school official decides that a student’s internet speech is “school speech” based on the totality of the circumstances, and that official disciplines the student who posted the message, then the parents of that student may sue alleging a violation of the student’s First Amendment rights. Given that this area of the law is confusing and unclear, a school administrator who violates a student’s free speech rights may be shielded from a suit for money damages by the doctrine of qualified immunity.

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who was dating the shooter’s prior girlfriend. \textit{Id.} Three students died. \textit{Id.} The shooter, who was shy and targeted by bullies, was from a troubled and violent family. \textit{Id.}

\textsuperscript{101} The U. S. Department of Education issued two “Dear Colleague” letters reminding public school administrators of their obligation to address bullying, cyberbullying, and sexual harassment. \textsc{Russlynn Ali, U.S. Dep’t of Educ., Dear Colleague Letter: Harassment and Bullying (2010), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf [hereinafter Ali 2010]; Russlynn Ali, U.S. Dep’t of Educ., Dear Colleague Letter: Sexual Violence (2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter Ali 2011]. The primary point of the October 26, 2010 letter was to alert school officials that some misconduct – in addition to violating a school’s antibullying policy – might also violate federal antidiscrimination laws. \textit{Ali 2010, supra} at 1. The letter was sent to public schools in the United States and indicated that a “school is responsible for addressing harassment incidents about which it knows or reasonably should have known.” \textit{Id.} at 2. The second letter, issued April 4, 2011, stated that if a student files a complaint with the school, then “[s]chools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school’s education program or activity.” \textit{Ali 2011, supra} at 4.

\textsuperscript{102} \textit{Doe ex rel. Doe v. Pulaski Cnty. Special Sch. Dist.}, 306 F.3d 616, 635 (8th Cir. 2002) (en banc).
IV. A School Official Who Disciplines A Cyberbullier May Be Shielded From Liability By The Doctrine Of Qualified Immunity.

Many state officials—in their individual capacities—are immune from liability for money damages for their official actions based on the doctrine of qualified immunity. Qualified immunity traditionally involved two inquiries: (1) whether the facts show that the actions of the [school] official violated a constitutional right; and (2) whether that right was clearly established at the time of the official’s alleged misconduct. In *Saucier v. Katz*, the Supreme Court had declared that the first inquiry had to be addressed first, but in 2009, the Court abolished mandatory sequencing and held that courts may address the two prongs of the test in either order.

The Court emphasized in *Pearson v. Callahan* that “qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” In April 2012, the Supreme Court held that qualified immunity would even shield a private lawyer who worked for the government on a particular assignment.

In fact, the Court affirmed the viability and importance of the doctrine of qualified immunity four times in the October 2011 term, deciding in four significant cases that those who do the work of the government are entitled to protection from lawsuits if they act reasonably. Qualified immunity “gives government officials breathing room to make reasonable but mistaken judgments,” and “protects

105 Pearson v. Callahan, 555 U.S. 223, 236 (2009) (“Adherence to *Saucier’s* two-step protocol departs from the general rule of constitutional avoidance and runs counter to the ‘older, wiser judicial counsel not to pass on questions of constitutionality . . .’”).
106 Id. at 231.
108 See id. (holding that a private attorney who performed an investigation for the government was entitled to qualified immunity); Messerschmidt v. Millender, 132 S. Ct. 1235, 1244–45 (2012) (holding that police detectives who relied on an overbroad search warrant that had been approved by a magistrate were shielded by qualified immunity); Ryburn v. Huff, 132 S. Ct. 987, 992 (2012) (holding that police officers who entered a house without a warrant acted reasonably under the circumstances and were entitled to qualified immunity); Reichle v. Howards, 132 S. Ct. 2088 (2012) (holding that when an arrest was
‘all but the plainly incompetent or those who knowingly violate the law.’”

In 2007, Justice Breyer had urged the majority to apply the doctrine of qualified immunity in *Morse*, stating, “[i]n order to avoid resolving the fractious underlying constitutional question, we need only decide a different question that this case presents, the question of ‘qualified immunity.’” Pointing out that the Supreme Court’s decision would have been unanimous if based on the question of qualified immunity (since even the dissent in *Morse* conceded that Principal Morse should not be held liable for confiscating Frederick’s banner), Justice Breyer emphasized the “longstanding principle that courts should ‘not . . . pass on questions of constitutionality . . . unless such adjudication is unavoidable.’”

A discussion of qualified immunity in the school speech context can be found in the most recent Second Circuit opinion in *Doninger v. Niehoff*. That court addressed whether the principal and superintendent were entitled to qualified immunity for allegedly violating student Avery Doninger’s First Amendment rights in two instances: first, by preventing her from running for Senior Class Secretary as punishment for a blog post; and second, by preventing her and other students from wearing “Team Avery” t-shirts at the election assembly.

The Second Circuit turned first to the off-campus blog post and discussed whether the school officials had violated a clearly established constitutional right (the second prong of the *Saucier* test). In deciding that the right was not clearly established, the court stated, “Doninger has identified no case—and we are aware of none—that

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110 *Morse v. Frederick*, 551 U.S. 393, 428 (2007) (Breyer, J., concurring in part and dissenting in part). It should be noted that the majority proceeded to decide the First Amendment issue. *Id.* at 410.

111 *Id.* at 431 (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)).


113 *Id.* at 346, 351.

114 In *Pearson v. Callahan*, 555 U.S. 223, 242 (2009), the Court held that the prongs can be addressed in any order, so a court is not required to examine the first prong before turning to the second one. See also *Saucier v. Katz*, 533 U.S. 194, 205 (2001).
enunciates her supposedly bright-line principle strictly limiting the regulation of off-campus speech to *Tinker*-style circumstances or otherwise demonstrating a clearly established rule applicable to the specific circumstances of this case.\(^\text{115}\) Moreover, the court indicated that the absence of a clearly established right was reinforced by the uncertainty as to whether *Fraser* applies “to plainly offensive off-campus speech.”\(^\text{116}\) This statement, left unexplained, seems contrary to the Supreme Court’s explicit statement that Fraser’s lewd and vulgar speech, if made off campus in a public arena, would have been protected speech.\(^\text{117}\) Nonetheless, based on uncertainty as to whether *Tinker* and *Fraser* apply to speech such as the blog post, the Second Circuit indicated that the school officials, Niehoff and Schwartz, did not violate a right that was “clearly established,” and were entitled to qualified immunity for their act of disciplining Avery for her blog post.\(^\text{118}\)

The Second Circuit’s determination that the right was not “clearly established” was dispositive.\(^\text{119}\) The court could have relied simply on its conclusion that the regulation of online speech is a confusing area, unaddressed by the Supreme Court, and even if the actions of Niehoff and Schwartz amounted to mistakes, those mistakes were reasonable because the law is unclear. However, the court went on to apply the *Tinker* “substantial and material disruption standard” to the off-campus blog post. The court concluded that it was “objective-

\(^\text{115}\) Doninger IV, 642 F.3d at 347–48. This author agrees that the applicability of *Tinker* to off-campus speech has become murky and unclear, but contends that *Tinker* applies only to speech that is characterized as school-supervised speech. Rather than launching immediately into an analysis of whether disruption was foreseeable, as the Second Circuit did, the first inquiry should have been whether the speech itself fell within the school’s purview.

\(^\text{116}\) Id. at 348.

\(^\text{117}\) Morse v. Frederick, 551 U.S. 393, 405 (2007) (stating that “[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected”).

\(^\text{118}\) Doninger IV, 642 F.3d at 351.

\(^\text{119}\) Case Note, First Amendment – Student Speech – Second Circuit Holds that Qualified Immunity Shields School Officials Who Discipline Students for Their Online Speech – Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011), cert. denied, No. 11-113, 2011 WL 3204853 (U.S. Oct. 31, 2011), 125 HARV. L. REV. 811, 815–16 (2012) (stating that the Second Circuit addressed only the second prong, and that it would have sufficed to have stated that “no Supreme Court or Second Circuit cases were close to being on point . . . [t]herefore, the law was not clearly established,” but that the court “waded into a detailed discussion of First Amendment doctrine . . . ”).
ly reasonable” for the school officials to have foreseen disruption of the school’s functions based on, for example, Avery’s plea for others to contact the “douchebags” in the office and “piss [them] off.” 120 Therefore, the court reinforced its conclusion that qualified immunity was proper because, even if the school officials were mistaken, they acted reasonably and should be protected from suit. 121

As to the second allegation in Doninger, that the officials violated her First Amendment right by preventing her from wearing a “Team Avery” t-shirt at the school assembly, the Second Circuit again concluded that the school administrators were shielded by qualified immunity. 122 The court stated, “[w]e again focus on the second prong of the qualified immunity inquiry—whether, assuming that Doninger had a right to wear her t-shirt at the assembly, this right was clearly established.” 123 There was no question as to whether the expression occurred on campus; it was during a school assembly. The question was whether Avery’s constitutional right to express herself by wearing the shirt was clearly established. 124 The court analyzed whether the wearing of the t-shirts would foreseeably cause material and substantial disruption under the Tinker standard. The court opined that even if Principal Niehoff misjudged the amount of disruption or misunderstood the legal standard, it was a reasonable mistake—“the very sort of mistake for which the qualified immunity doctrine exists to shield officials against unwarranted liability.” 125

That aspect of the Doninger decision underscores the point that a school official can reach an incorrect conclusion but still be protected from suit if his or her decision or action was reasonable. If reasonable school administrators could disagree about whether it is constitutionally permissible to discipline a student in a given situation, then there is no “bright line”—there is no clearly established

120 Doninger IV, 642 F.3d at 348.
121 Id. at 350–51.
122 Id. at 351.
123 Id. at 353.
124 Id. at 354 (stating that “the mode of analysis set forth in Tinker is not absolute” and the Supreme Court has not ruled out “the possibility that some such hitherto unrecognized grounds of regulation may exist”). The court, while indicating that Fraser, Hazelwood, and Morse would not apply to this factual scenario, speculated as to whether Tinker necessarily applies to all other types of school speech. Id. Put differently, the query was whether various types of school speech could be regulated under any new or yet-to-be announced rule.
125 Id. at 355.
right. The test is not a subjective inquiry into what that particular school official thought at the time; rather, it is an objective standard as to whether reasonable school officials could disagree.\textsuperscript{126} Qualified immunity protects government officials when they make reasonable mistakes about the legality of their actions, and applies regardless of whether the error is “a mistake of law, a mistake of fact, or a mistake based on mixed questions or law and fact.”\textsuperscript{127}

Offering qualified immunity in these situations does not, however, resolve the dilemma faced by school officials.\textsuperscript{128} Compassionate and competent administrators struggle to make the correct choices in tough situations, and the mere notion that they may be absolved from having to pay money damages is small comfort.

The courts’ resolution of whether qualified immunity applies can also be time-consuming, thereby sapping the resources of the school district and the individual while the litigation proceeds.\textsuperscript{129} In Doninger, for example, Principal Niehoff disciplined Avery Doninger in the spring of 2007, and Avery’s mother filed suit for injunctive relief shortly thereafter, claiming that the principal had violated Avery’s First Amendment rights.\textsuperscript{130} The federal district court acknowledged

\begin{itemize}
  \item \textsuperscript{126} Id. at 345-46.
  \item \textsuperscript{127} Pearson v. Callahan, 555 U.S. 223, 231 (2009).
  \item \textsuperscript{128} Id. (stating that qualified immunity protects government officials from liability for civil damages while it “balances two important interests—the need to hold public officials accountable while they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”).
  \item \textsuperscript{129} Doninger III, 594 F. Supp. 2d 211, 220 (D. Conn. 2009) (“It is ‘an immunity from suit rather than a mere defense to liability’” and “[a]s a result, the Supreme Court and the Second Circuit ‘repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.’” (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) and Hunter v. Bryant, 502 U.S. 224, 227 (1991))).
  \item \textsuperscript{130} Doninger’s initial complaint was filed in Connecticut Superior Court, but defendants had it removed to the United States District Court for the District of Connecticut, which denied Doninger’s motion for a preliminary injunction asking the court to void the election results and require a new student council election. Doninger I, 514 F. Supp. 2d 199 (D. Conn. 2007). Doninger appealed, and the Second Circuit affirmed the denial. Doninger II, 527 F.3d 41, 54 (2d Cir. 2008). When Avery reached the age of majority, she was substituted for her mother as a plaintiff, but since the need for an injunction had been mooted by her graduation from high school, she pursued her claim for money damages. Both parties filed motions for summary judgment, and the federal district court denied Doninger’s motion and granted the school officials’ motion in part, but denied it in part. Doninger III, 594 F. Supp. 2d 211 (D. Conn. 2009). The
that it was important to resolve immunity issues quickly, stating that “qualified immunity is ‘an entitlement not to stand trial or face the other burdens of litigation.’”

Nonetheless, three years elapsed before the Second Circuit concluded that Principal Niehoff and Superintendent Schwartz were entitled to qualified immunity and could not be held liable for money damages.

In short, qualified immunity may protect school officials who discipline students for their cyberbullying speech, but it is not a satisfactory solution to the school administrator’s plight. It does not prevent aggrieved parents from initiating suits, nor does it protect school districts from the time-consuming and expensive preparation for litigation that they will face. The doctrine shields the individual only from money damages, does not apply to suits for declaratory or injunctive relief, and can take years before the court issues a definitive ruling.

V. Conclusion

Cyberbullying is all too often connected to tragedies that end up in the headlines. School administrators are called upon to police bullying and to maintain discipline during school-supervised activities, but the problem of cyberbullying extends far beyond the purview of public school officials. Only if the internet speech is determined to be “school speech” (based on a factual assessment of the totality of the circumstances) can school officials become actively involved in suppressing the messages and disciplining the speakers. Otherwise, it is up to other stakeholders such as parents, police, internet service providers, social workers, churches, psychologists, support groups, and legislators to create positive change and effective solutions. Nonetheless, if a school official, acting reasonably, mistakenly violates a student’s First Amendment rights, that administrator may

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132 Doninger IV, 642 F.3d at 338.
ultimately be shielded from litigation by qualified immunity. Such immunity from suit for money damages is not a satisfactory solution to the conflicting pressures that school administrators face, but it is a small piece of a remedy to a much larger problem.
T.K. and J.C.: Guidance for Schools Dealing with Bullying and Cyberbullying

Kathleen Conn*

Bullying and cyberbullying continue to be major areas of concern in U.S. K–12 public schools.\(^1\) Administrators, teachers, and school aides indicate that they are not unwilling to deal with the issues; the reality is that they simply do not know what to do.\(^2\) Recent litigation has put them in a “damned if you do, damned if you don’t” situation. Administrators who impose discipline on a bully or cyberbully to protect his or her target risk judicial censure if the bully’s parent takes the issue to court. On the other hand, failing to take action

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2 With respect to bullying prevention, the National Education Association in 2011 reported that although 93% of its over three million members perceived bullying to be a moderate to major problem in their schools, only 54% had been trained in how to implement their school’s anti-bullying policies. Catherine P. Bradshaw, Tracy Evian Waasdorp, Lindsey M. O’Brennan & Michaela Gulemetova, Nat’l Educ. Ass’n, Findings from the National Education Association’s Nationwide Study of Bullying: Teachers’ and Education Support Professionals’ Perspectives viii (2011), available at http://www.nea.org/assets/img/content/Findings_from_NEAs_Nationwide_Study_of_Bullying.pdf; see also Ken Seeley, Martin L. Tombari, Laurie J. Bennett & Jason B. Dunkle, Nat’l Ctr. for Sch. Engagement, Peer Victimization in Schools: A Set of Quantitative and Qualitative Studies of the Connections Among Peer Victimization, School Engagement, Truancy, School Achievement, and Other Outcomes 258 (July 2009), available at http://www.schoolengagement.org/TruancypreventionRegistry/Admin/Resources/Resources/PearVictimizationinSchoolsAsetofQualitativeandQuantitativeStudies.pdf.
may also result in judicial censure for deliberate indifference to a student’s harassment.

In an interesting and likely fortuitous confluence of judicial analysis about a pervasive problem in K–12 public schools, two federal district courts independently included in their rulings exhaustive treatises on student-on-student bullying, giving administrators a guide to taking action against bullies of both regular education and special education students. The two courts were widely separated by geography, with one decision from the U.S. District Court for the Central District of California and the other from the U.S. District Court for the Eastern District of New York. The decisions rendered were separated in time by almost a year. Neither decision was appealed, nor a motion made for reconsideration in either case.

Part I of this commentary examines the two decisions, comparing and contrasting their factual details and their rulings. Part II analyzes the relevance of the courts’ rationales to the facts of their respective cases and compares and contrasts the courts’ discussions of the problems of, and appropriate school districts’ responses to, bullying, including technology-facilitated bullying, or “cyberbullying.” Part III discusses the significance of each bullying treatise as a guide for public school administrators’ actions in cases of student-on-student bullying and cyberbullying, as well as for persuasive precedent for future judicial analysis.

I. The J.C. and T.K. Decisions

A. The J.C. Decision

J.C., the perpetrator of record in *J.C. v. Beverly Hills Unified School District*, was a high school female student especially fond of video-recording her friends and teachers. School officials had disciplined her for secretly videotaping her teachers in class. One afternoon after school, as she and three girlfriends were “hanging out” at a

5 The California decision was issued on May 6, 2010, and the New York decision on April 25, 2011. *Id.* at 289.
6 711 F. Supp. 2d at 1098–99.
7 *Id.* at 1099.
local restaurant, J.C. recorded a short, approximately five-minute, video recording of her friends talking about a classmate, C.C., in very unflattering and vulgar terms laced with profanity.\textsuperscript{8} J.C.’s friend R.S. called C.C. a “slut,” “spoiled,” and the “ugliest piece of s--- I’ve ever seen in my life,” while J.C. encouraged her off-camera to “continue with the Carina rant.”\textsuperscript{9} When J.C. got home, she uploaded the video to YouTube from her home computer, and then called C.C. to tell her about the posting.\textsuperscript{10} C.C. told J.C. that the video was “mean,” but, at her mother’s suggestion, told J.C. to keep it posted. C.C.’s mother wanted the posting preserved so she could take a copy to school the next day to show to school officials.\textsuperscript{11}

C.C.’s mother met with the school’s administrative principal, Cherryne Lue-Sang, who viewed the video on a school computer and then called J.C. to the office to write a statement.\textsuperscript{12} Lue-sang and School Counselor Janice Hart directed J.C. to remove the video from YouTube.\textsuperscript{13} School officials subsequently suspended J.C. from school for two days.\textsuperscript{14} R.S.’s father was contacted and removed R.S. from school for the rest of the day.\textsuperscript{15} The parties had no evidence that any student accessed YouTube at school that day; the only viewings on campus, to the parties’ knowledge, occurred during the school officials’ investigation.\textsuperscript{16} J.C. subsequently brought suit, alleging that school officials violated her First Amendment rights by disciplining her for expressive conduct originating outside school.\textsuperscript{17}

After a lengthy discussion of a public school’s right to discipline a student for off-campus speech and expression, the court ultimately applied the “substantial disruption to school activities” standard from the Supreme Court’s decision in \textit{Tinker v. Des Moines Independent Community School District},\textsuperscript{18} and decided that no reasonable jury could conclude that J.C.’s YouTube video caused the requisite disruption.\textsuperscript{19}

\begin{itemize}
  \item \textsuperscript{8} \textit{Id.} at 1098.
  \item \textsuperscript{9} \textit{Id.}
  \item \textsuperscript{10} \textit{Id.} YouTube is a video-sharing website created in 2005 where users can upload, view, and/or share digital videos.
  \item \textsuperscript{11} \textit{Id.} at 1098.
  \item \textsuperscript{12} \textit{Id.} at 1098–99.
  \item \textsuperscript{13} \textit{Id.} at 1099.
  \item \textsuperscript{14} \textit{Id.}
  \item \textsuperscript{15} \textit{Id.}
  \item \textsuperscript{16} \textit{Id.}
  \item \textsuperscript{17} \textit{Id.} at 1100.
  \item \textsuperscript{18} \textit{Tinker v. Des Moines Indep. Cmty. Sch. Dist.}, 393 U.S. 503, 514 (1969).
  \item \textsuperscript{19} \textit{J.C.}, 711 F. Supp. 2d at 1117.
\end{itemize}
The court also found that school administrators could not reasonably foresee a risk of substantial disruption at school due to J.C.’s expression. In addition, applying the seldom-utilized Tinker prong of the school’s right to regulate student speech that interferes with “the school’s work or [collides] with the rights of other students to be secure and be let alone,” the court noted that the rights of others language in Tinker was unclear, and not a substantial part of the Supreme Court’s ruling or of the rulings of lower courts. Therefore, finding no authority under Tinker to discipline J.C., the court granted J.C.’s motion for summary judgment on her First Amendment claims. However, noting both the absence of Supreme Court guidance on matters of discipline for students’ off-campus speech and that the Supreme Court itself acknowledged the “uncertainty as to the boundaries of the school speech precedents,” the court granted qualified immunity to all school defendants.

B. The T.K. Decision

Like J.C., L.K. was also a female student, but she was twelve years old, a middle school student. While J.C. was the perpetrator of cyberbullying, L.K.’s parent, T.K. alleged that L.K. was the target of in-school, face-to-face bullying by her classmates. L.K. was also a student with a disability who had been identified originally as a child with autism, but had recently been reclassified as learning disabled. Her parents brought suit against her school district, alleging that the school officials’ failure to stop the bullying deprived L.K. of a free appropriate education (FAPE) guaranteed by the Individuals with Disabilities Education Act (IDEA), and that her parents were denied

20 Id. at 1121.
21 Id. at 1122 (quoting Tinker, 393 U.S. at 508).
22 Id. at 1123.
23 Id. at 1125.
25 Id. at 1126.
27 Id. at 296. L.K.’s bullying by other students was both physical and psychological, apparently perpetrated by both boys and girls.
the opportunity to fully participate in determining L.K.’s Individualized Educational Program (IEP), a right also guaranteed by IDEA.29

L.K.’s 2007–2008 IEP provided that L.K. was included in a Collaborative Team Teaching (CTT)30 classroom with a one-on-one aide. She also received speech therapy, occupational therapy, and physical therapy.31 When the time arrived to develop L.K.’s 2008–2009 IEP, L.K.’s parents asked for all relevant evaluation data concerning their daughter. However, they received only one sheet of paper.32 At the IEP meeting, with L.K.’s parents participating, the Committee of Special Education (CSE) recommended maintaining all therapy services, and continued placement in the same CTT-type classroom, but without the one-on-one aide.33

At the IEP meeting, L.K.’s parents tried to discuss the bullying L.K. was experiencing, but the principal would not countenance the discussion, saying it was “not the appropriate time” to discuss bullying; but that they would get to it later. No future meeting was scheduled, nor did one take place.34 It was later revealed that prior to the IEP meeting, L.K.’s parents had placed a deposit to secure a place for her at the private Summit School.35 Ultimately the parents rejected the 2008–2009 IEP and enrolled L.K. at the Summit School. After several levels of due process hearings, all of which were decided in favor of the school district, L.K.’s parents filed a lawsuit, alleging that they were denied meaningful participation in the development of L.K.’s IEP and, therefore, that L.K.’s proposed placement was procedurally and substantively inappropriate. They also sought tuition reimbursement for L.K.’s 2008–2009 year at the Summit School.36

The primary complaint L.K.’s parents made on her behalf was that personnel at L.K.’s assigned school took no action to prevent her

29 T.K., 779 F. Supp. 2d at 294. IDEA provides that parents be included as part of the IEP team. 20 U.S.C. § 1414(d)(1)(B)(i).
30 The CTT classroom included students identified as learning disabled and students who did not require special education and related services. T.K., 779 F. Supp. 2d at 294.
31 Id. at 294–95.
32 Id. at 295.
33 Id.
34 Id.
36 Id. at 293.
from being bullied by other students and that L.K.’s opportunity for an appropriate education was therefore seriously reduced. Stating that during the 2007–2008 school year, L.K. complained to her parents daily about being bullied at school, L.K.’s father alleged that his daughter was made “emotionally unavailable to learn.” The parents also alleged that their repeated attempts to address the bullying issue with the school principal were rebuffed.

L.K.’s one-on-one aides gave testimony to the constant bullying L.K. experienced, stating that the other students ostracized and ridiculed her. One of L.K’s aides described the situation as a “hostile environment,” and the other reported pushing, tripping, backing away, and ignoring behaviors directed at L.K. by the other students. When L.K. was tripped and fell, one aide reported, her teacher would get upset with her, not with the students who tripped her. Other negative behaviors directed at L.K. included students refusing to touch her papers during peer grading assignments, a student chasing L.K. with ketchup represented to be blood, and a prank telephone call made to L.K.’s home, which her parents reported to school authorities. School officials generated no incident reports about any of these occurrences, leading the court to note that the absence of records raised questions as to whether school officials were on actual notice of the bullying, or whether they were deliberately indifferent.

The court ultimately decided that the parents had provided sufficient evidence that L.K. was “isolated” and “the victim of harassment” and that a fact finder could conclude on the strength of the record that L.K. was the victim of bullying. The court also stated that, during the administrative review, the Independent Hearing

37 Id. at 295.
38 Id.
39 L.K. had two one-on-one aides who alternated weekdays of employment, so that one aide was with L.K. every day in the classroom during the 2007–2008 school year. Id. at 295–96.
40 Id. at 296.
41 Id.
42 Id.
43 Id. at 296–97.
44 Id. at 297.
45 Id. at 317–18.
Officer had erred in finding that bullying went to placement and not to the adequacy of a program.\textsuperscript{46}

While L.K.’s parents stated that L.K. withdrew emotionally and did not want to go to school, the school district attempted to dispute this assertion by showing that L.K. continued to make academic progress.\textsuperscript{47} However, the court stated, “A student is not required to prove that she was denied all educational benefit. She may not be deprived of her entire educational benefit, but still may suffer adverse educational effects as a result of bullying.”\textsuperscript{48} The court continued,

The law recognizes that a student can grow academically, but still be denied the educational benefit that is guaranteed by IDEA. Where bullying reaches a level where a student is substantially restricted in learning opportunities she has been deprived of a FAPE. Whether bullying rose to this level is a question for the fact finder.\textsuperscript{49}

Therefore, the court denied the school district’s motion for summary judgment on this count, emphasizing that “[t]he IDEA gives a court broad authority to grant appropriate relief.”\textsuperscript{50} However, on the issue of whether L.K.’s IEP was predetermined, the court stated that meaningful discussion between the CSE and the parents had taken place at the IEP meeting, and sided with the school district, granting their motion for summary judgment as to this count.\textsuperscript{51}

\section*{II. Discussion of the Courts’ Rationales in J.C. and T.K.}

\textbf{A. The Court’s Rationale in J.C.}

\textit{1. The Relevance of the Geographic Origin of Student Speech}

J.C. argued that school officials violated her First Amendment rights by disciplining her for the video she recorded and posted on

\begin{itemize}
\item \textsuperscript{46} \textit{Id.} at 317.
\item \textsuperscript{47} \textit{Id.} at 318.
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} \textit{Id.} at 319 (citing Forest Grove Sch. Dist. v. T.A., 557 U.S. 230 (2009)).
\item \textsuperscript{51} \textit{Id.} (noting parenthetically the 81-page transcript of the discussion that took place at L.K.’s IEP meeting).\
\end{itemize}
YouTube because her expressive conduct occurred “entirely outside school.” The court framed the first issue as the need to determine the scope of a school’s authority to regulate student speech originating off campus, but having an effect on campus. District Judge Stephen V. Wilson first reviewed the seminal Supreme Court decisions on student speech in public schools: Tinker v. Des Moines Independent Community School District, Bethel School District v. Fraser, and Hazelwood School District v. Kuhlmeier. Finally, the court reviewed the more recent Morse v. Frederick decision, noting that Morse was a narrow ruling strictly limited to the fact pattern in the case.

Before beginning a review of lower court decisions pertaining to students’ off-campus speech, the district judge noted that the Supreme Court had to date failed to address off-campus speech, i.e., speech unrelated to a school assembly, but making its way onto campus by

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53 Id.
54 393 U.S. 503 (1969) (upholding right of students to wear black armbands in silent, passive opposition to the war in Vietnam; stating that students do not shed First Amendment rights at schoolhouse gate; and holding that public schools may regulate student speech only if it causes a material and substantial disruption of school activities, creates a reasonable fear of such disruption, or collides with rights of other students).
55 478 U.S. 675 (1986) (upholding discipline of student who gave an inappropriate speech at a school assembly; stating that a school may regulate in-school student speech that is vulgar, lewd, or patently offensive speech; and distinguishing the rights of students in public schools from the rights of adults in other settings).
56 484 U.S. 260 (1988) (upholding right of principal to censor student-authored articles in school newspaper produced as part of school’s journalism class, stating that schools can regulate student speech others in community perceive as bearing on school’s imprimatur).
57 551 U.S. 393 (2007) (upholding discipline of student who displayed banner with the words “BONG HITS 4 JESUS” at an assembly, allowing school to restrict student speech at an assembly if speech could reasonably be viewed as promoting illegal drug use).
58 J.C., 711 F. Supp. 2d at 1102. In a footnote, the court noted the difficulty of arriving at their decision in the instant case because of the divergent applications of Tinker in the lower courts. The court agreed with Justice Thomas’ lament in Morse that courts continue to distance themselves from Tinker, but did not clarify when the Tinker standard operates and when it does not. It quoted Justice Thomas as saying, “I am afraid that our jurisprudence now says that students have a right to speak, except when they don’t.” Id. at 1102 n.3 (quoting Morse, 551 U.S. at 418–19) (Thomas, J. concurring).
one means or another.\textsuperscript{59} The court then proceeded to present a litany of federal district court and appellate court decisions from various circuits, all applying the \textit{Tinker} “material and substantial disruption” standard with different results in various scenarios of off-campus student speech, without consideration of the geographic origin of the speech.\textsuperscript{60} The court stated that if the off-campus speech was not lewd and vulgar and, therefore, covered by \textit{Fraser}, or school-sponsored like the newspaper in \textit{Hazelwood}, the speech must be governed by \textit{Tinker}.\textsuperscript{61} Regardless of the geographic origin of the speech or expressive conduct, the court continued, if \textit{Tinker} applies and the off-campus speech or expressive conduct creates a foreseeable risk of substantial disruption in the school, “the substantial weight of authority” holds that school discipline is appropriate.\textsuperscript{62}

However, the court noted that, if geography were considered to be relevant, the way to proceed in analyzing the off-campus speech or expression would be to first decide whether a \textit{nexus} existed between the off-campus speech and the school, before applying \textit{Tinker}.\textsuperscript{63} The Second Circuit, the court noted, took this approach in analyzing two cases of students’ school-related Internet communications. Finding the required nexus in both cases, based on the foreseeability of the Internet postings reaching the school, the Second Circuit applied \textit{Tin-}

\textsuperscript{59} \textit{Id.} at 1102–03.


\textsuperscript{61} The court did not mention the \textit{Morse} decision at this point in the discussion.

\textsuperscript{62} \textit{J.C.}, 711 F. Supp. 2d at 1104.

\textsuperscript{63} \textit{Id.} at 1104 (citing Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007) (student created an instant messaging icon showing a bullet passing through the head of his English teacher Mr. Vander-Molen, with the words “Kill Mr. Vander-Molen”)).
ker and upheld the school districts’ discipline of the student authors.\textsuperscript{64} The J.C. court also noted that the Pennsylvania Supreme Court, after noting that geography was the “first inquiry” relevant to the level of protection due to a student’s online speech, found that a nexus between the student’s online postings and the school justified the court’s application of the \textit{Tinker} standard and, consequently, the school’s discipline of the student author.\textsuperscript{65}

Therefore, summarizing the position of the J.C. court, courts need not consider the geographical origin of student speech as wholly dispositive. The holding of the J.C. court is that, where application of the Fraser or Hazelwood precedents is inappropriate, a court may apply the \textit{Tinker} test, i.e., examining whether the student speech caused material and substantial disruption or reasonable foreseeability of the same, without considering the geographical origin of the speech. The only caveat, the court stated, is that if a court considers geography relevant, the first step must be to establish a nexus between the student speech and the school.\textsuperscript{66}

With this background, the J.C. court proceeded to rule that the geographical origin of J.C.’s YouTube posting was irrelevant.\textsuperscript{67} However, the court stated, even if geography were relevant, a sufficient nexus existed between J.C.’s video and the school because the recording made its way to campus, even if not directly brought by J.C. herself.\textsuperscript{68} The nature of the video itself and J.C.’s deliberate actions in contacting classmates to encourage them to view the video made it foreseeable that the video would reach the school.\textsuperscript{69}

\begin{thebibliography}{99}
\bibitem{64} \textit{Id.} at 1104–05 (citing Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007) and Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008) (student sent mass email to parents urging protest of school event cancellation and also blogged her criticism of school officials’ actions)).
\bibitem{65} \textit{Id.} at 1105 (citing J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002) (student created web page showing decapitated algebra teacher with blood spurting from her head and a request to each viewer to send him $20 so he could hire a hit man to kill her)).
\bibitem{66} \textit{Id.} at 1107.
\bibitem{67} \textit{Id.} at 1108.
\bibitem{68} \textit{Id.}
\bibitem{69} \textit{Id.} at 1008–09.
\end{thebibliography}
2. Meeting the Material and Substantial Disruption Test of Tinker

Since the court determined that Fraser, Hazelwood, and even Morse, did not apply, it concluded that the material and substantial disruption standard of Tinker must govern. In discussing whether J.C.’s video met the requisite disruption standard, the J.C. court set out specific elements of analysis. First, noting the difficulty of determining when a disruption satisfies the material and substantial standard, the court stated that a showing of disruption of classroom activities, beyond mere discussion of the speech at issue, was necessary. The court quoted Tinker, where the mere fact that the students’ armbands caused classmates to comment and poke fun at the wearers “neither interrupted school activities nor sought to intrude in the school affairs or the lives of others.”

Second, the court stated that foreseeability of substantial disruption could be predicated on a student’s violent or threatening speech, especially: (1) if additional factors were involved, e.g., if the student had a prior disciplinary record or history of suicidal ideation or domestic violence, or if a teacher threatened by the speech was so upset she was unable to return to the classroom; or (2) if the speech were especially violent or graphically depicted specific school-related violence.

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70 Id. at 1109 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266–67 (1988)). The J.C. court specifically noted that, although the YouTube posting contained lewd, vulgar, and offensive language, Fraser applied only to in-school speech.
71 Id. at 1110.
72 The utility of these elements for guiding public school administrators’ actions in student speech cases will be discussed infra Part III.
73 J.C., 711 F. Supp. 2d at 1111–12.
75 Id. at 1112 (citing LaVine v. Blaine Sch. Dist., 257 F.3d 981 (2001) (student’s poem explicitly described a mass shooting at school)).
76 Id. at 1112–13 (citing J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002) (graphic image of teacher’s decapitation)).
77 Id. at 1113 (citing O.Z. v. Bd. of Trustees of Long Beach Unified Sch. Dist., 2008 WL 4396895 (C.D. Cal. Sept. 9, 2008) (graphic depiction of teacher’s murder)).
Third, the court discussed the possibility of finding substantial disruption if school administrators are pulled away from their ordinary jobs to deal with the effects of a student’s speech,78 but noted that the school administrator’s responses, standing alone, cannot be the cause of the substantial disruption.79

Finally, the court noted that the school’s disciplinary decision must be based on evidence or facts that indicate a foreseeable risk of disruption, not simply an emotional response based on undifferentiated fears or disapproval of the content of the student’s speech.80 The court gave an example of a factual situation where the alleged fear of substantial disruption was not sufficient to sustain its reasonableness,81 describing the situation where school officials refused permission for a group of students to place posters around school advertising a pro-conservative club they had created because the posters contained links to a national affiliate’s website showing violent and disturbing images.82 School officials subsequently censored all student posters.83 The court in this case ruled that the school officials’ action was unjustified, stating that the mere risk of disruption, without more, cannot justify infringement of student speech rights.84 On the other hand, the court noted, prior racial incidents or gang violence may be sufficient to transform what otherwise would have been undifferentiated fears of disruption into reasons for prohibiting student expression.85 For example, where students wearing t-shirts emblazoned with the Confederate flag had caused prior

78 Id. at 1114 (citing Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008) (principal allegedly missed a meeting and had to deal with many parent calls)).
79 Id. at 1114 n.9, 1115 (citing Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield, 134 F.3d 821 (7th Cir. 1998) (technology experts called in to restore school computer system and to change passwords); Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007) (actual disruption to school operations was minimal, and students’ distractions were caused by actions of the administrators themselves)).
80 Id. at 1115 (citing Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (principal testified he was upset by student’s speech); Killican v. Franklin Reg’l Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001) (two teachers were upset by the Top 10 list); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001) (offense caused by content of an individual’s speech is not sufficient to prohibit it)).
81 Id. at 1116.
82 Id. (citing Bowler v. Town of Hudson, 514 F. Supp. 2d 168 (D. Mass. 2007)).
83 Id.
84 Id.
85 Id.
racial unrest at school, school officials were justified in banning such shirts. However, prohibiting the wearing of merely suspected gang symbols, e.g., rosary beads, without evidence that they were related in any way to actual gang activity, violated students’ First Amendment rights.

In the end, the J.C. court decided that the disruption caused by J.C.’s video was de minimus and that no reasonable jury could find that her YouTube posting caused material and substantial disruption at J.C.’s school, or even a reasonable fear of such disruption. At most, the court continued, the posting required that school officials deal with an upset parent and a student who refused to go to class, as well as a handful of students who may have missed some undetermined part or parts of some classes on one school day after the posting while the school investigated the incident.

J.C.’s video was not violent; C.C. was not in danger of physical harm; C.C.’s reaction to the video posting did not cause a school disruption. The court stated that a school cannot cast a wide net over student speech that merely upsets another student. The court continued:

Instead, the record demonstrates that Hart [the school counselor] and Lue-Sang [the administrative principal] took steps to investigate the nature of the conflict between J.C. and C.C., to counsel C.C. when she was upset, and to decide, along with Warren’s [the principal’s] input, whether to impose discipline. That is what school administrators do.

Therefore, school administrators were not pulled away from their ordinary activities. A mere personality conflict, or the fact that several students were pulled out of class for brief periods of time to respond to investigative questions, did not amount to a material and substantial disruption of school activities sufficient to satisfy the

86 Id. (citing West v. Derby Unified Sch. Dist., 206 F.3d 1358 (10th Cir. 2000)).
87 Id. at 1117 (citing Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659 (S.D. Tex. 1997)).
88 Id.
89 Id.
90 Id. at 1117–18.
91 Id.
92 Id. at 1118 (emphasis added).
The administrative principal argued that the video might have caused students to gossip and to pass notes in class, but the court dismissed this fear as too attenuated and speculative. The court also stated that without any past history of violence, fear of future violence caused by the video was unreasonable.

3. The Second Prong of Tinker

The final point in the court’s analysis of the school’s response to J.C.’s YouTube posting was an examination of the “rights of others” prong of Tinker. Stating that the precise nature of this element of Tinker was unclear, the court distinguished a Ninth Circuit decision upholding a school district’s discipline of a student for wearing a t-shirt condemning homosexuality, stating that schools cannot protect the values of one student while infringing the First Amendment rights of another. The J.C. court declined to be the first court that protected a student from psychological harm at the expense of violating a Constitutional right. Therefore, the court granted J.C.’s motion for summary judgment; the school district’s discipline violated her First Amendment right to freedom of speech.

B. The Court’s Rationale in T.K.

1. Bullying as a Problem in U.S. Schools

Writing for the court, Senior District Judge Jack B. Weinstein began his analysis of facts that would lead to his decision by taking judicial notice of the “striking” and pervasive problem of bullying in

93 Id. at 1119.
94 Id. at 1119–20.
95 Id. at 1120–21.
96 Id. at 1122; Tinker, 393 U.S. at 513.
97 Id. at 1122 (citing Harper v. Poway Unified Sch. Dist., 445 F.3d 1116 (9th Cir. 2006) (forcefully describing shirt’s message as “a verbal assault on the basis of a core identifying characteristic,” sexual orientation)).
98 Id. at 1123.
99 Id.
100 Id. at 1124–26. The court, however, granted qualified immunity to school officials because the right J.C. alleged was not clearly established (citing Saucier v. Katz, 533 U.S. 194, 199–200 (2001) (the second step) and Pearson v. Callahan, 129 S. Ct. 808, 818 (2009)).
American schools.\textsuperscript{101} The court characterized bullying as the most common type of violence in schools today.\textsuperscript{102} Describing bullying as typified by a real or perceived imbalance of power and repeated negative acts by the aggressor against the target,\textsuperscript{103} the court noted the three forms of school bullying: physical, verbal, and psychological.\textsuperscript{104}

After a lengthy discussion of the research on the prevalence of bullying, especially in elementary schools, the court noted the research on cyberbullying and its emotional toll on the targets of the anonymous perpetrators.\textsuperscript{105} A review of state efforts to curb bullying, an attempt to distinguish bullying from horseplay, and a discussion of the gender differences of bullies followed.\textsuperscript{106} Noting that students who are “different” are often the selected targets of bullying, the court nevertheless noted that the “climate of the school” and the “aura of the school with respect to bullying” has more to do with whether or not bullying will escalate.\textsuperscript{107} Moving to a discussion of the bullying of students with disabilities, the court noted that research has shown that students with disabilities are disproportionately bullied, often as a result of their disability, but also for characteristics unrelated to their disability.\textsuperscript{108} The court also noted that some states, such as

\begin{itemize}
\item \textsuperscript{101} T.K. v. N.Y.C. Dep’t of Educ., 779 F. Supp. 2d 289, 297 (E.D.N.Y. 2011) (citing Joseph L. Wright, Medical Dir. Of Advocacy and Cmty. Affairs, Children’s Nat’l Med. Ctr., Address at American Medical Association Educational Forum on Adolescent Health, Youth Bullying 23 (May 3, 2002), available at http://www.ama-assn.org/ama1/pub/upload/mm/39/youthbullying.pdf (stating that if bullying were a medical condition, such as an infectious pediatric disease, the CDC would characterize it as an epidemic)).
\item \textsuperscript{102} Id. (citing \textit{Gayle Macklem, Bullying & Teasing: Social Power in Children’s Groups} 42–47 (2003)).
\item \textsuperscript{103} Id. at 298 (quoting Dan Olweus, \textit{Bully at School: What We Know and What We Can Do} 1 (1993)).
\item \textsuperscript{104} Id. (citing Nels Ericson, U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention, FS–200127, Addressing the Problem of Juvenile Bullying 1 (2001), https://www.ncjrs.gov/pdffiles1/ojjdp/fs200127.pdf).
\item \textsuperscript{106} Id. at 300–01.
\item \textsuperscript{107} Id. at 301–02.
\item \textsuperscript{108} Id. at 303 (citing John Young, Ari Ne’eman & Sara Gelser, \textit{Bullying and Students with Disabilities}, White House Conference on Bullying Prevention 73, 74 (Mar. 10, 2011), http://www.stopbullying.gov/references/white_house_conference/index.html).
\end{itemize}
Massachusetts, have recognized that students with learning disabilities are at greater risk of being bullied and that IEPs should take this into account.\textsuperscript{109}

The court noted that bullying brings with it a host of other problems, including impaired concentration and poor academic performance, exacerbated by lack of friends, loneliness, and isolation attendant upon the bullying.\textsuperscript{110} Although District Judge Weinstein did not mention L.K. at this point in his opinion, this careful review of the research on school bullying and its effects on children, particularly children with disabilities, set the stage for his framing of “the central question raised by this case . . . [as] what actions, if any, a school is required to take to stop bullying of disabled students.”\textsuperscript{111}

2. Students’ Rights Under IDEA

The court noted that the \textit{Deshaney v. Winnebago County Department of Social Services}\textsuperscript{112} decision generally excuses the state from any obligation to provide aid to individuals in danger from actions of non-state actors, but recognized “the right of students to be secure in school and [that] schools have a duty to prevent students from harassment under IDEA and Title IX.”\textsuperscript{113} In particular, the court reiterated that IDEA guarantees each student a FAPE,\textsuperscript{114} which must be provided according to a student’s IEP.\textsuperscript{115} In crafting a student’s IEP, the court continued, the CSE in a New York public school is required to consider four factors: (1) academic achievement and learning characteristics; (2) social development; (3) physical development; and (4) managerial or behavioral needs, as well as IDEA’s strong preference for inclusion of students with disabilities in settings with peers without disabilities.\textsuperscript{116}

\textsuperscript{109} \textit{Id.} at 303–04.
\textsuperscript{110} \textit{Id.} at 304–05.
\textsuperscript{111} \textit{Id.} at 307.
\textsuperscript{112} 489 U.S. 189, 195 (1989) (refusing to recognize duty of state to protect individuals from harm at the hands of non-state actor except in limited circumstances where a special relationship, such as state custody, inured).
\textsuperscript{113} \textit{T.K.}, 779 F. Supp. 2d at 307–08.
\textsuperscript{114} \textit{Id.} at 309 (citing Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982)).
\textsuperscript{115} \textit{Id.} at 309.
\textsuperscript{116} \textit{Id.} at 309–10 (noting also that parents have a right to be involved in IEP development).
After reviewing the two-tier administrative hearing process and the rights of the parents to bring suit in federal district court after exhaustion of administrative remedies, the court reviewed the decisions of the Independent Hearing Officer (IHO) and the State Reviewing Officer (SRO) who presided in the due process appeals process of L.K.’s parents. The court noted that the SRO’s decision only mentioned in passing the allegations of the bullying of L.K.; instead, it focused on L.K.’s academic progress. The SRO’s conclusion was that bullying did not deprive L.K. of a FAPE, although, as the court stated, “no specific test appears to have been used in arriving at this conclusion.”

Judge Weinstein acknowledged that whether bullying could be grounds for finding a deprivation of a FAPE was an “open question” in the Second Circuit, but stated that several decisions, one in the Second Circuit and several in other Circuits, suggested that it may be. He took issue with the way courts approach bullying as “incident based,” rather than from a school culture perspective. Instead of focusing on the facts of a given bullying incident, Weinstein suggested that courts focus on what school officials have done to ensure that “bullying is unacceptable to everyone in the school.” Because appellate courts had not agreed on a uniform test to decide whether bullying could be a basis for denial of a FAPE, he believed the court should examine causes of action potentially arising as allegations of violations of Title IX, substantive due process, and equal protection.
Judge Weinstein acknowledged, however, that plaintiffs must surmount a high bar in seeking to hold school districts liable for violating Title IX in cases of peer-on-peer sexual harassment.124 Two district courts have modified the Title IX standard to apply to situations where students with disabilities were harassed in school, transforming the element of harassment based on gender to require that the student be harassed on account of her disability.125 Judge Weinstein stated that the principles of Title IX apply to L.K.’s case, but only if modified to comport with IDEA, and suggested that reliance on guidance documents from the U.S. Department of Education would be instructive.126

With respect to proving school district liability by alleging a Section 1983 due process violation for school officials’ failure to protect a student from bullying, the court noted that a Section 1983 cause of action is not only blocked because of the absence of the DeShaney special relationship127 between a school and a student, but also because IDEA provides the appropriate and exclusive remedy for deprivation of a FAPE.128 Alleging an equal protection violation would engender the same concerns about IDEA as an exclusive remedy for the deprivation of a FAPE, and would also put the bullied student’s complaint into the more-difficult-to-prove realm of constitutional violations.129

The appropriate question in judging school liability for failure to protect students with disabilities from bullying, the court concluded, is to ask “whether school personnel was [sic] deliberately indifferent

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124 See Davis v. Monroe Cnty., 526 U.S. 629, 640–53 (1999) (to establish Title IX liability of the school district a plaintiff must show: (1) the institution receives federal funding; (2) the district had actual knowledge of the gender-based harassment; (3) the district was deliberately indifferent to the knowledge; and (4) that the harassment was so severe, pervasive, and objectively offensive as to deprive the plaintiff of access to an educational benefit or opportunity).


126 Id. at 316 (citing U.S. Dep’t of Educ., Office of Civil Rights, Dear Colleague Letter: Bullying and Harassment, at 2 (Oct. 26, 2010), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague201010.pdf)). The Dear Colleague letter enunciates a different knowledge standard from the Davis requirement of “actual knowledge” of the harassment, stating that school district must take action if they “knew or should have known” of the harassment.


128 T.K., 779 F. Supp. 2d at 315.

129 Id. at 316.
to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in her educational opportunities.” The court described the steps a school must take when bullying affects the educational opportunities of a special education student, stating that the school must: (1) investigate if the harassment reported actually occurred, and (2) take appropriate steps to prevent it in the future. The court went on to say that:

These duties of a school exist even if the misconduct is covered by its anti-bullying policy, and regardless of whether the student has complained, asked the school to take action, or identified the harassment as a form of discrimination. [Citations omitted.] It is not necessary to show that the bullying prevented all opportunity for an appropriate education, but only that it is likely to affect the opportunity of the student for an appropriate education. The bullying need not be a reaction to or be related to a particular disability.

The court found that T.K. had provided evidence of each element of the test.

III. Lessons from J.C. and T.K.

The J.C. and T.K. decisions taken together provide a comprehensive treatise on bullying, summarizing the research of psychologists, health professionals, and educators; they also synthesize this information with judicial advice and guidance for administrators who are unsure of their authority to discipline bullies who prey on other students on and off campus. The J.C. court decided in the context of cyberbullying between and among regular education students; the T.K. court ruled in the context of a special education student relentlessly bullied by peers in school. These decisions cover a range of situations that hurt students, frustrate parents, and challenge pub-

\[130\] Id.
\[131\] Id. at 316–17.
\[132\] Id. at 317 (emphasis added).
\[133\] Id.
lic school administrators and teachers whose training likely did not prepare them to deal with these issues proactively.\textsuperscript{134}

A. Lessons for the Public School Community

1. \textit{Lessons from the J.C. Decision}

The \textit{J.C.} court’s message for school administrators is relatively straightforward. Knee-jerk reactions to bullying must be squelched; deliberate, rational responses are required.\textsuperscript{135} If neither lewd speech in school, censorship of a school publication, nor illegal drugs is involved, the \textit{Tinker} standard of material and substantial disruption, or reasonable fear of such disruption, applies.\textsuperscript{136} While the \textit{Tinker} standard applies to on-campus as well as to off-campus student speech or expressive conduct, the application is not automatic. Investigation of allegations of bullying and/or cyberbullying must precede administrative action. This inquiry is “highly fact-intensive” and therefore, specific factual evidence of a material and substantial disruption of classroom activities as a result of bullying or cyberbullying, or a reasonably foreseeable expectation of such disruption, must be demonstrated.\textsuperscript{137} If the speech originated off campus, an evidence-based \textit{nexus} between the student speech and the disruption may be necessary.\textsuperscript{138} Administrative action cannot be the cause of the disruption;\textsuperscript{139} neither will mere student “buzz” or gossip be sufficient.\textsuperscript{140} The disruption must be at the classroom level, or \textit{significantly} interfere with administrators’ performance of the myriad tasks that are usual and customary for their job descriptions.\textsuperscript{141}

A court decision handed down soon after \textit{J.C.} bore out the value of the court’s discussion of the necessity of showing a nexus between a student’s off-campus speech and the school. In the Third Circuit’s

\textsuperscript{134} See \textit{supra} note 2 (supporting argument that administrators and teachers alike have received inadequate training to effectively implement anti-bullying policies).


\textsuperscript{136} \textit{Id.} at 1103.

\textsuperscript{137} \textit{Id.} at 1111-12.

\textsuperscript{138} \textit{Id.} at 1105.

\textsuperscript{139} \textit{Id.} at 1114.

\textsuperscript{140} \textit{Id.} at 1112.

\textsuperscript{141} \textit{Id.} at 1117.
en banc decision in Layshock v. Hermitage School District, the court found that the proffered nexus between the student’s action and the disruption to the school environment or activities was insufficient to support the school’s disciplinary action against the student. The school district claimed a nexus between the student’s off-campus expression and the school because the student had copied the school principal’s photograph from the school district website and pasted the image on the imposter MySpace profile of the principal he created.

The school district argued in the district court that the act of misappropriating the photograph constituted an entry onto school property, and therefore the student’s speech began on campus. The en banc court agreed with the district court that this “nexus” was “unpersuasive.” Entering the district website, the Third Circuit noted, was not akin to a trespass the student would have committed “had he broken into the principal’s office or a teacher’s desk.” Moreover, the court continued, the school district had not alleged that the profile created substantial disruption in the school, but rather that it was lewd and punishable under the Fraser standard, as speech originating in school. However, absent a nexus between the student’s off-campus speech and the school, the Third Circuit ruled that Fraser does not allow a school district to punish a student because of his expressive conduct outside of the school.

The lesson for school administrators, expressed in both J.C. and Layshock, is that a clear and convincing nexus between a student’s off-campus speech or expressive conduct and the school environment must be established before even considering the possibility of imposing school disciplinary action. If a nexus between the off-campus speech and the school is established, and the Tinker requirement that the student’s speech or expressive conduct created a material and substantial disruption of school activities, or a reasonable...

142 650 F.3d 205 (3d Cir. 2011).
143 Id.
144 Id. at 216.
145 Id. at 214.
146 Id. at 214–15.
147 Id. at 215.
148 Id. at 216–17.
149 Id. at 219 (citing Morse v. Frederick, 551 U.S. 393, 404 (2007)).
150 See J.C., 711 F. Supp. 2d at 1104–05, 1107 (discussing nexus requirement).
expectation of such disruption, is satisfied,\textsuperscript{151} then school officials can consider appropriate disciplinary action.\textsuperscript{152} If the facts are so clearly established that the student’s speech or expressive conduct can be said to originate on campus, e.g. if an actual physical trespass and/or theft facilitated the student speech or expressive conduct, then the standards of \textit{Fraser}, \textit{Hazelwood}, or \textit{Morse} may apply, depending on the content and/or form of the speech or expressive conduct.\textsuperscript{153}

Another \textit{en banc} decision of the Third Circuit rendered the same day as the \textit{Layshock} decision, \textit{J.S. v. Blue Mountain School District},\textsuperscript{154} demonstrates the value of another admonition of the \textit{J.C.} court. In \textit{J.C.}, the court cautioned that school officials will not be able to show that a student’s off-campus speech caused them to reasonably forecast material and substantial disruption of school activities if the alleged “disruption” is: (1) minimal, and/or (2) actually caused by a school official’s actions.\textsuperscript{155} In the \textit{J.S.} decision, the Third Circuit applied this test and ruled that the school district failed to justify its suspension of a female middle school student for her off-campus creation of an imposter MySpace profile of her principal.\textsuperscript{156}

As in the \textit{Layshock} case, a ruling by a three-judge panel of the Third Circuit preceded the \textit{en banc} decision in \textit{J.S.}\textsuperscript{157} In that three-judge panel hearing, the school district argued that a disruption occurred during school hours when an unnamed student, not J.S., brought an imposter MySpace profile of the principal to his attention at school.\textsuperscript{158} The school district alleged that as a result of the profile, the following disruption of school activities occurred: (1) two teachers had to quiet their classes when students tried to discuss the profile; (2) a guidance counselor had to change her schedule to accommodate an administrator called to sit in on a meeting with J.S. and her parents; and (3) two students decorated J.S.’s locker when she returned to school after her suspension, and a group of students

\textsuperscript{151} Id. at 1107.
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 1100–02.
\textsuperscript{155} \textit{J.C.}, 711 F. Supp. 2d at 1115, 1120.
\textsuperscript{156} \textit{J.S. II}, 650 F.3d at 926, 936.
\textsuperscript{157} \textit{J.S. ex rel. Snyder v. Blue Mtn. Sch. Dist.} (\textit{J.S. I}), 593 F.3d 286 (3d Cir. 2010), \textit{reh’g en banc granted}, \textit{opinion vacated} (Apr. 9, 2010).
\textsuperscript{158} \textit{J.S. I}, 593 F.3d at 293–94.
congregated around the locker at that time. The principal severely reprimanded the two girls who had decorated J.S.’s locker and called their parents to a meeting in his office. The principal also testified that he had noticed “deterioration in discipline” at the school after the creation of the profile and that he suffered stress-related health problems as a result of the profile.

After vacating the three-judge panel decision, the Third Circuit ruled that the profile could not have led school authorities to forecast substantial disruption, despite the principal’s “unfortunate humiliation,” absent the principal’s reaction. The principal, the court ruled, “exacerbated rather than contained the disruption in the school” by overreacting to the profile, and, presumably, by overreacting to the locker decorations.

The defendants in J.C. alleged disruption caused by J.C.’s video, which was very similar to the alleged disruption in J.S., namely that school personnel were forced to take time to investigate the issue and to rearrange their schedules. The J.C. court rejected this alleged disruption on the grounds that investigating potential disciplinary issues is what school administrators do in the course of their daily duties, and accommodating schedules to changing circumstances is commonplace for school personnel, including guidance counselors. Moreover, the Blue Mountain principal’s overreaction to the locker decorations was unwarranted and nonsensical. Female students, especially middle school girls, decorate lockers to acknowledge students’ birthdays or sports teams’ game days, to personalize their spaces, and for a host of other harmless, non-disruptive purposes. Neither the minor stir accompanying J.S.’s return to school after her suspension nor the aftermath of J.C.’s video posting rose to the level of substantial disruption required by Tinker.

159 Id.
160 Id. at 294.
161 Id.
162 J.S. II, 650 F.3d at 930.
163 Id. at 931.
164 Id. (emphasis in original).
165 J.C., 711 F. Supp. 2d at 1118–19.
166 Id.
2. **Lessons from the T.K. Decision**

The *T.K.* decision, rather than providing advice in dealing with the First Amendment implications of students’ off-campus speech, gives guidance to educators in dealing with face-to-face bullying of an especially vulnerable class of students, students with disabilities.

Before reaching the special education issues, the court encapsulated the research on bullying. First, the court noted that bullying is endemic and epidemic in American schools.\(^{168}\) Retroactive studies by the U.S. Secret Service established that bullying was involved in two-thirds of the numerous school shootings America has experienced, starting with the Columbine massacre in 1999.\(^{169}\) Teen suicides after bullying and cyberbullying are on the rise.\(^{170}\) Bullying displays certain gender differences. Boys are more prone to use physical means to bully, while girls are more apt to use psychological means or shunning.\(^{171}\) Certain students are more likely to become targets of bullying because they are “different” in some way, and school climate is a large contributor to the problem.\(^{172}\) Parents also play a role. Child bullies are more likely to emerge from families in which they are exposed to physical abuse, neglect, domestic violence, inconsistent discipline, and other negative environmental factors.\(^{173}\)

Students with disabilities are disproportionately bullied for various reasons, many of which are directly linked to the specific nature of the child’s disability. Students with learning disabilities and emotional disorders, for example, may lack social awareness, which makes them more vulnerable.\(^{174}\) Other students with disabilities may experience difficulty making friends, and their loneliness and isolation make them easy targets.\(^{175}\) The court also noted that all children involved in bullying are victims in some way: bullies typically have health problems, increased substance abuse, and later criminality; bully targets carry lifelong emotional scars, shame, and feelings of inferiority; wit-

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169 *Id.* at 297–98.
170 *Id.* at 298.
171 *Id.* at 301–02.
172 *Id.*
173 *Id.* at 302.
174 *Id.* at 303.
175 *Id.*
ness to the bullying, the bystanders, can feel powerless or even be excessively fearful themselves.\textsuperscript{176}

The take-away from the \textit{T. K.} decision is that children with disabilities need their schools' help, regardless of the source of their vulnerability to bullying. IDEA guarantees a FAPE for each child with a disability, memorialized in the student's IEP.\textsuperscript{177} Court decisions holding that bullying of a student constitutes a denial of a FAPE are rare, but not completely absent from the judicial record.\textsuperscript{178} Several circuits, including at least one notable decision in the Second Circuit, as well as decisions in the Third, Seventh, and Ninth Circuits, have determined that bullying could constitute a denial of a FAPE.\textsuperscript{179} However, the \textit{T. K.} decision is the only court of appeals case to suggest that liability \textit{could} be based on disability, whereas two district court decisions have held that bullying \textit{must} be on account of the child's disability.\textsuperscript{180} The \textit{T. K.} decision holds that: (1) the bullying need not prevent all opportunity for an appropriate education, but must be likely to affect the bullied student's opportunity for such an education; and (2) the bullying need not be a reaction to, or even related to, the student's particular disability.\textsuperscript{181}

These powerful statements taken together put a heavy responsibility on school personnel to address all degrees of harassment of students with disabilities. Under the reasoning of the \textit{T. K.} decision, school officials must investigate all reports of bullying and harassment of students with disabilities and take prompt and appropriate action in response to their findings, regardless of whether the bullying or harassment is related to the nature of the student's disability.\textsuperscript{182} The "knew or should have known" standard of knowledge applies.\textsuperscript{183} However, since bullying can occur at any time and anywhere during

\begin{itemize}
\item \textsuperscript{176} \textit{Id.} at 304–06.
\item \textsuperscript{177} \textit{Id.} at 309. The content of an IEP specifies what constitutes a FAPE for a child with a disability. 20 U.S.C. § 1414(d)(1)–(6) (2012).
\item \textsuperscript{178} \textit{T.K.}, 779 F. Supp. 2d at 312–13.
\item \textsuperscript{179} \textit{Id.} at 312, 314–15 (citing Smith v. Guilford Bd. of Educ., 226 Fed. App'x. 58 (2d Cir. 2007); M.L. v. Fed. Way Sch. Dist., 394 F.3d 634 (9th Cir. 2005); Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194 (3d Cir. 2004); Charlie F. ex rel. Neil F. v. Bd. of Educ., 98 F.3d 989 (7th Cir. 1996)).
\item \textsuperscript{181} \textit{Id.} at 317.
\item \textsuperscript{182} \textit{Id.}
\item \textsuperscript{183} \textit{Id.} at 316.
\end{itemize}
the school day, school administrators and special education teachers are not the only ones responsible for being alert to signs of bullying and harassment. All teachers, school aides, and other school staff must watch for signs of bullying in any area or activity of the school.

While the T.K. decision primarily addresses bullying of students with disabilities, the vigilance requirement from the T.K. decision benefits all students. A staff that must be vigilant to protect students from bullying will only sustain such a responsibility if it adopts a culture of caring for all students, a school “aura” that communicates that bullying will not be tolerated.184

B. Lessons for the Judiciary

What educators learn from the J.C. and T.K. decisions may mean fewer parents besieging the courts, seeking “punishment” of schools for not protecting their students from bullying. However, when faced with lawsuits of this nature, district judges can refer to the legal analyses of J.C. and T.K. and lessen the chances that their decisions will be reversed.

The J.C. court’s guidance for cases of inappropriate speech or expression by students on campus or at a school-sponsored event or activity comprises an ordered set of analytical steps. First, determine if the student expression is on-campus, lewd, and offensive speech. If so, Fraser likely governs, especially if the speech is delivered to a captive audience of younger or impressionable students. School officials may therefore regulate the speech;185 Second, determine if the speech is likely to be viewed by a reasonable observer as bearing the *imprima-tur* of the school, as, for example, a newspaper or brochure produced in a class or school-sponsored club, or if the cost of the publication is borne by the school. If so, Hazelwood applies, and school officials can likely regulate the student expression.186 Third, determine if the speech at issue advocates, condones, or supports illegal drug use. If so, Morse applies, and school officials can likely

184 Id. at 301–02.
186 Id. at 1102 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1984)).
regulate that student speech.\textsuperscript{187} The more difficult, but not insurmountable, situations arise when none of these relatively “bright line” circumstances apply. The \textit{Tinker} standard of material and substantial disruption of school operations, or the reasonably foreseeable risk of material and substantial disruption, is the analytical baseline.

If a \textit{Tinker} analysis is the appropriate alternative, the \textit{J.C.} court cites a long list of court decisions that support the action of school officials in applying the material and substantial disruption test without considering the geographic origin of the speech or expression.\textsuperscript{188} School officials must investigate the magnitude and character of the disruption to school operations and activities. The disruption must be more than students gossiping, commenting, or expressing their feelings toward the content of the speech.\textsuperscript{189} It must not simply require that school officials re-order their usual and customary duties and/or activities, or spend time conferencing with parents or counseling students, or even “putting out fires.” This is what school officials do; it is part of their ordinary job description.\textsuperscript{190}

The \textit{J.C.} decision gives three avenues to satisfy the \textit{Tinker} standard of a “material and substantial” school disruption.\textsuperscript{191} First, the disruption must significantly disrupt classroom instruction and activities.\textsuperscript{192} A teacher may be unable to continue instruction, and a substitute may be required to cover the classes.\textsuperscript{193} Second, where a student’s speech appears threatening or violent, the speaker’s prior life history or record of violent behavior is relevant, and suggests that a forecast of material and substantial disruption can be sustained. The student may have been involved with a domestic dispute, expressed

\begin{flushright}
\textsuperscript{187} \textit{Id.} (citing Morse v. Frederick, 551 U.S. 393, 408 (2007)).
\textsuperscript{189} \textit{Id.} at 1111.
\textsuperscript{190} \textit{Id.} at 1117.
\textsuperscript{191} \textit{Id.} at 1111–15.
\textsuperscript{192} \textit{Id.} at 1111–12.
\textsuperscript{193} \textit{Id.} at 1112–13 (citing J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002)).
\end{flushright}
suicidal ideation, or had a disciplinary record of fights or assaults on campus.\textsuperscript{194} Third, school personnel must be pulled away from their customary and usual jobs to a meaningful degree, not simply briefly inconvenienced.\textsuperscript{195} Computers may be infected with a virus and technology-mediated classes cancelled, or school information technology staff may be required to spend hours to days changing passwords or verifying that hackers have not destroyed school records.\textsuperscript{196}

If, on the other hand, the student speech originates off campus, \textit{Tinker} likely still applies. However, some courts, notably courts in the Second Circuit, require establishment of a nexus between the student speech and expression and the school if the speech or expression originates off campus.\textsuperscript{197} Such a nexus can be shown where it is “reasonably foreseeable” that the student’s speech or expression will reach the school campus.\textsuperscript{198} Whether on campus or off campus, if the student speech threatens violence, even conditionally, school officials may reasonably anticipate substantial disruption.\textsuperscript{199} Therefore, off-campus speech that threatens violence may be regulated for the safety of the school community.\textsuperscript{200}

The \textit{J.C.} decision provides a path for examining student speech and expression directed at school officials, teachers, other school personnel, and peers. Although \textit{J.C.} focused her inappropriate video on only one student, the wider applicability of the \textit{Tinker} analysis has been affirmed by many court decisions.\textsuperscript{201} On the other hand, the more narrowly focused \textit{T.K.} decision holds that when bullying deprives a student with a disability of a FAPE, IDEA protects that student and provides redress for all bullying, whether based on the student’s disability or not. This ruling may prove to be less generally supported by sister courts, despite having not been overruled in New York District Courts to date.\textsuperscript{202} Its message resonates with that of the

\begin{thebibliography}{99}
\bibitem{194} \textit{Id.} at 1112–13.
\bibitem{195} \textit{Id.} at 1114.
\bibitem{196} \textit{Id.}
\bibitem{197} \textit{Id.} at 1104–05 (citing Wisniewski v. Bd. Educ. Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007) and Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008)).
\bibitem{198} \textit{Id.} at 1107.
\bibitem{199} \textit{Id.} at 1112–13.
\bibitem{200} \textit{Id.}
\bibitem{201} \textit{See, e.g.}, J.S. \textit{ex rel.} H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 864–69 (applying \textit{Tinker} analysis to students’ off-campus speech).
\end{thebibliography}
U.S. Department of Education Dear Colleague letters issued over the past two years. Protecting all children from the harms caused by bullies is a charge that the Department of Education imposes on every school official and teacher, regardless of whether students are bullied because they are weak, unathletic, wear glasses, or because they do not fit gender stereotypes or are perceived as gay or lesbian. Limiting the protection of students with disabilities to bullying on the basis of their disability is contrary to the spirit of the Dear Colleague letters, which affirms that IDEA protects a special education student from bullying whenever the bullying causes a deprivation of a FAPE, whether based on the student’s disabling condition or not.

IV. Conclusion

“The consensus among physicians and social scientists, educators and youth development organizations, civil rights advocates and law enforcement is that bullying is neither inevitable nor normal.” And yet, bullying continues to be pervasive in American schools, where children spend five to six hours of their days together, five days a week for over half of each year. Schools must play a part in curbing the spread of bullying. Hopefully, the J.C. and T.K. decisions will guide school officials and other school personnel to recognize bullying, to understand the broad scope of their legal authority to


204 See id., supra note 203.

205 See id.; see also David Ellis Ferster, Deliberately Different: Bullying as a Denial of a Free Appropriate Public Education Under the Individuals with Disabilities Education Act, 43 GA. L. REV. 191 (2008).

regulate bullying and harassment that originates both on and off cam-

pus, and to accept their responsibilities to protect those targeted by
bullies. The J.C. and T.K. decisions also provide the judiciary with
clear prescriptions for analyzing claims by parents alleging schools’
failures to protect their children from bullying. Working together,
schools, parents, and courts may help to see as inevitable an end,
rather than an escalation, to bullying, and to restore normalcy to the
lives of schoolchildren.
Teacher-on-Student Bullying: Is Your Massachusetts School District Ready for This Test?

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I. Introduction

While student-on-student bullying has rightfully received considerable attention in the media and in legal literature over recent years, the issue of teacher-on-student bullying has remained largely unexplored. Shockingly, forty-five percent of teachers have admitted to bullying at least one student. 1 Given the prevalence of teacher-on-student bullying and the implications such conduct has on students, teachers, other staff members, and school officials, an examination of teacher-on-student bullying is warranted. While teacher-on-student bullying is multifaceted, the purposes of this article are to explore the liability school districts may face when their teachers bully students, to set forth pragmatic steps school districts can take to reduce the incidence of teacher-on-student bullying, and to limit their exposure to liability if a student brings suit against the school district.

Part I of the article establishes the context for the article and provides background into teacher-on-student bullying by setting forth working definitions for teacher-on-student bullying, providing statistics regarding the prevalence of teacher-on-student bullying and illuminating the causes and effects of such behavior. Part II provides an in-depth discussion of the various theories of liability a student may assert against a school district when a teacher has bullied the student, including: (a) claims under Section 1983 for civil rights violations; (b) claims under Title IX, Title VI, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973, when the bullying is based on the student’s gender, race, color, age, national origin, or disability.

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national origin, or disability; (c) claims for negligent hiring or negligent retention of the bullying teacher; (d) contract claims asserting violation of a school district policy or code; (e) vicarious liability for the teacher’s torts; (f) common carrier liability; and (g) in loco parentis. Part III examines the ability of school districts to avoid liability under the theory of sovereign immunity. Finally, Part IV sets forth specific, pragmatic steps a school district should take to avoid teacher-on-student bullying and reduce its liability in the event an incident of teacher-on-student bullying occurs and leads to an action against the school district.

II. Background

A. Defining “Teacher-on-Student” Bullying

Before engaging in an analysis of the legal ramifications of teacher-on-student bullying, it is important to understand what is meant by the term. While definitions abound with respect to student-on-student bullying, as it has been statutorily defined in almost every state,² few efforts to define teacher-on-student bullying have been

² In Massachusetts, “bullying” has been statutorily defined as “the repeated use by one or more students of a written, verbal or electronic expression or physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim’s property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at the school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school.” Mass. Gen. Laws ch. 71, § 37O(a) (2010). Michigan, the most recent state to pass anti-bullying legislation, defines bullying as: “any written, verbal, or physical act, or any electronic communication, by a pupil directed at 1 or more other pupils that is intended or that a reasonable person would know is likely to harm 1 or more pupils either directly or indirectly by doing any of the following: (i) Substantially interfering with educational opportunities, benefits, or programs of 1 or more pupils; (ii) Substantially and adversely affecting the ability of a pupil to participate in or benefit from the school district’s or public school’s educational programs or activities by placing the pupil in reasonable fear of physical harm; (iii) Having an actual and substantial detrimental effect on a pupil’s physical or mental health or causing substantial emotional distress; (iv) Causing substantial disruption in, or substantial interference with, the orderly operation of the school.” Mich. Comp. Laws § 380.1310B (2012). New Jersey’s anti-bullying law, which has been lauded as one of the toughest anti-bullying laws in the country, defines “bullying” as “any gesture or written, verbal or physical act . . . that is reasonably perceived as being
made. Three commentators have offered working definitions of teacher-on-student bullying. One author suggests that a “bullying teacher” is one “who uses his/her power to punish, manipulate, or disparage a student beyond what would be a reasonable disciplinary procedure.”\(^3\) Another defines “bullying by teachers” as “a pattern of conduct, rooted in a power differential that threatens, harms, humiliates, induces fear, or causes students substantial emotional distress and serves no legitimate academic or ethical purpose.”\(^4\) A third author has noted that bullying is based on “physical size and strength, power, position, authority, superior knowledge and competence—all of which teachers possess naturally as part of their responsibility.”\(^5\)

B. Prevalence of Teacher-on-Student Bullying

The student-on-student bullying epidemic has garnered significant public attention over recent years. In response, state legislatures have enacted anti-bullying statutes, schools have adopted anti-bullying policies and have harshly punished bullying students, watchdog organizations dedicated to the alleviation of student-on-student bullying have been created, and parents and students have filed lawsuits against bullies, teachers, and school districts in response to harm suffered by students at the hands of their bullying peers. While student-on-student bullying has taken center stage in the public discourse, the equally, if not more, disturbing issue of teacher-on-student bullying has gone virtually unaddressed.

\(^3\) Twemlow, *supra* note 1, at 191.


The lack of public attention to teacher-on-student bullying is not indicative of its prevalence, as incidents of teacher-on-student bullying occur with an alarming regularity. In one of the only two studies to evaluate teacher-on-student bullying, Stuart Twemlow found in 1997 that forty-five percent of teachers admitted to having bullied at least one student. The number of public reports of teacher-on-student bullying confirms the pervasiveness of such bullying in today’s schools across the county.

C. Effects of Teacher-on-Student Bullying

The ramifications of teacher-on-student bullying on all individuals within a school system are extensive and substantial. As teachers are role models with overwhelming power, authority, and influence in school, teacher-on-student bullying may, in fact, be more system-
atically detrimental than the more notorious student-on-student bullying.\textsuperscript{8} Teacher-on-student bullying dramatically impacts the bullied-student’s mental health and school performance, and may result in increased anxiety, loneliness and self-esteem issues, poor academic achievement, peer rejection, and school avoidance.\textsuperscript{9} Beyond the impact teacher-on-student bullying has on its victim(s), bullying behavior exhibited by a teacher can have a negative effective on the entire school environment, as the work environment for a majority of teachers and administrative staff is made hostile and non-bullying teachers and staff members commonly engage in “avoidant, by-standing role[s] for fear of retaliation from unions, colleagues, and conflicting loyalties.”\textsuperscript{10} The ability of one teacher, let alone a group of similarly-minded teachers, to so drastically and extensively impact the victim(s) of the teacher’s bullying behavior as well as other students, teachers, and administrative support staff is significant.

D. Causes of Teacher-on-Student Bullying

Just as there is no single cause of student-on-student bullying, there is no single explanation for all incidents of teacher-on-student bullying. Bullying by teachers, however, has been found to occur in four common situations. First, teacher-on-student bullying commonly occurs when teachers have learned that “bullying, without naming it as such, is an acceptable form of student control and classroom management.”\textsuperscript{11} Second, some use bullying techniques because they were exceptional students and do not understand why some struggling students resort to recalcitrant behavior when they are “embarrassed, bored, or fearful of showing their self-perceived incompetence.”\textsuperscript{12} Such teachers are easily frustrated with uncooperative students because they themselves never used certain behavioral mechanisms and, therefore, do not believe such behaviors are appropriate responses to a student’s frustration.\textsuperscript{13} Third, teachers who resort to bullying behavior were often victims of bullying when they were students, in their own classrooms by their current students, or

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\item \textsuperscript{8} Page, \textit{supra} note 5.
\item \textsuperscript{9} Twemlow, \textit{supra} note 1, at 195.
\item \textsuperscript{10} \textit{Id.} at 196.
\item \textsuperscript{11} Page, \textit{supra} note 5.
\item \textsuperscript{12} \textit{Id.}
\item \textsuperscript{13} \textit{Id.}
\end{itemize}
outside of school by other individuals.\textsuperscript{14} Student-on-teacher bullying does occur and teachers may often try to dominate their students out of a fear of being hurt or bullied in their own classrooms.\textsuperscript{15}

Finally, teacher-on-student bullying largely goes unpunished, which allows bullying teachers to remain secure in their positions and implicitly signals to other teachers that bullying behavior is an acceptable method of classroom management.\textsuperscript{16} It is remarkable that an overwhelming majority—eighty-nine percent—of bullying teachers are veteran teachers with five or more years of teaching experience.\textsuperscript{17} Further, the most common form of official action in response to a teacher-on-student bullying incident is to simply “talk to” the teacher.\textsuperscript{18} This limited action by school administrators perpetuates the teacher-on-student bullying problem as it often fails to identify and correct the bullying behavior of teachers and sends the message to others that such behavior is an accepted form of student and classroom management.\textsuperscript{19}

The theme running through the commonly identified causes of teacher-on-student bullying is the issue of inadequate training of bullying teachers with respect to the myriad of ways to manage their classrooms and deal with recalcitrant students. By failing to identify, address, and punish bullying behavior exhibited by teachers, such behavior is accepted and perpetuates the “faulty assumptions and erroneous beliefs about negative motivation, reluctant learners, and the underlying causes of students’ hostile, anti-learning, and anti-teacher attitude.”\textsuperscript{20} What most bullying teachers likely do not realize is the extent to which their bullying behavior may create a liability.

\textsuperscript{14} Twemlow, \textit{supra} note 1, at 193.
\textsuperscript{15} Id. at 195.
\textsuperscript{16} McEvoy, \textit{supra} note 4, at 146 (noting that the prevalence of bullying teachers’ veteran status may have less to do with the personality of the teachers and more to do with the fact that it is more difficult to remove veteran teachers because of the unwillingness of school principals to act and whose “reluctance to act is fueled by a long history of inaction.”).
\textsuperscript{17} Id. at 144.
\textsuperscript{18} Id. at 145.
\textsuperscript{19} Id. at 147.
\textsuperscript{20} Page, \textit{supra} note 5.
III. Potential Liability for Teacher-on-Student Bullying

To date, no reported case specifically analyzes school district liability for teacher-on-student bullying. Civil suits brought by students against school districts for other inappropriate conduct by the teachers, however, are instructive with respect to school district liability. Over the years, students have attempted to bring claims against school districts for their teachers’ conduct under a variety of theories.

A. Civil Rights Violations

Students have pursued claims against school districts for the actions of teachers for the invasion of their civil rights under 42 U.S.C. § 1983. Section 1983:

[S]upplies a private right of action against a person who, under the color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, in equity, or other proper proceeding for redress.\(^{21}\)

Federal constitutional rights incorporated under the Fourteenth Amendment and rights created by federal statute, such as Title IX and Title VI, are actionable under section 1983.\(^{22}\) Students also assert claims against school districts under the Equal Protection Clause of the Fourteenth Amendment. For example, students, if they are a member of a protected class, may allege that their right to be treated equally to similarly situated students under the Equal Protection Clause was violated by school officials when the student was subjected to inappropriate conduct by the teacher on the basis of the students’ protected status.\(^{23}\)

\(^{23}\) See Nabozny v. Podlesny, 92 F.3d 446, 459 (7th Cir. 1996); Julie Sacks, Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bully-
While section 1983 states, “persons acting under the color of law” are subject to suit, the United States Supreme Court has held that municipalities, including school districts, are subsumed in the term “persons.” School districts, therefore, “can be sued directly under section 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by” school officials. In addition, school districts may be held liable for the actions of individual school officials if the alleged constitutional deprivation was made “pursuant to [the school district’s] ‘custom’ even though such custom has not received formal approval through the body’s official decisionmaking channels.” A school district, however, “cannot be held liable under § 1983 on a respondeat superior theory . . . [instead, liability is imposed] when execution of a government’s policy or custom, whether made by lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . .”

To succeed on a claim against a school district on a claim of teacher-on-student bullying under § 1983, a student must (1) identify the constitutional right or federal law allegedly infringed; and (2) demonstrate how the school district’s action or inaction was “affirmatively linked” to the behavior that caused the violation such that the school district’s action or inaction could be characterized as “supervisory encouragement, condonation or acquiescence or gross negligence amounting to deliberate indifference.” Alternatively, lia-

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25 Id.
26 Id.
27 Id. at 694.

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*Innocent Policies*, 72 ALB. L. REV. 147, 179 (2009). Students have also claimed that their Substantive Due Process Right to be free from illegitimate invasions of personal security have been violated by a teacher's inappropriate conduct. See Nabozny, 92 F.3d at 459; Scruggs v. Meriden Bd. of Educ., No. 3:03-CV-2224, 2007 WL 2318851, at *11 (D. Conn. Aug. 10, 2007); Sacks, *supra*, at 182. In general, students have a difficult time establishing a Substantive Due Process violation because school districts do not have a duty to protect students from the tortious acts of private third parties, so students do not have a right to be protected from bullying. See DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs., 489 U.S. 189, 195–96 (1989); Sacks, *supra*, at 182.
bility may be established if a student can demonstrate that the failure of school officials to investigate or respond to incidents of teacher-on-student bullying was a departure from its own practice or policy of disciplining teacher bullies.\textsuperscript{29}

With respect to the first requirement, the federal rights students frequently cite are noted above, i.e., Title IX, Title VI and the Equal Protection Clause. Turning to the second requirement, a student must demonstrate that the school district had a custom or policy that led to the violation of the student’s rights. A school district may avoid a finding that it had a policy or custom of allowing teachers to bully students by promulgating and enforcing a district-wide policy against teacher-on-student bullying.

\subsection*{B. Bullying Based on Gender, Race, Color, National Origin or Disability}

Students also seek to hold school districts liable if the teacher’s bullying had a discriminatory “hook.” In particular, several federal laws, including Title IX, Title VI, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973 may be implicated in incidents of bullying based on a student’s gender, race, color, national origin, or disability.\textsuperscript{30} Such federal statutes are implicated because bullying “shares core attributes with more recognized abuses of power such as sexual harassment, stalking, and hate crimes, each of which is, in fact, a form of bullying. In analytic terms, sexual harassment is bullying with overt sexual overtones; a hate crime is bullying with target selection based on race, sexual orientation, or other immutable characteristics; and stalking is bullying with the explicit or implicit threat of physical harm.”\textsuperscript{31}

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\item See Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1134–35 (9th Cir. 2003); Nabozny v. Podlesny, 92 F.3d 446, 459 (7th Cir. 1996); Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869, 875–76 (N.D. Ohio 2003); see also-Sacks, \textit{supra} note 23, at 178.
\item Students may also assert claims under the laws of their state which address civil rights. \textit{See Mass. Gen. Laws} ch. 265, § 37 (2009).
\item McEvoy, \textit{supra} note 4, at 143.
\end{itemize}
\end{footnotesize}
1. Bullying Based on Gender, Race, Color, or National Origin

Title IX of the Education Amendments of 1972 was intended to “combat discrimination based on sex in educational institutions receiving federal funding.”\(^{32}\) Title IX provides that 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.”\(^{33}\) Title VI, which forbids racial discrimination in public schools, provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or authority receiving Federal financial assistance.”\(^{34}\) Since Title IX and Title VI employ identical language, courts apply the same framework to analyze claims brought under the statutes.\(^{35}\)

Discriminatory bullying in violation of Title IX and Title VI occurs when bullying based on race, color, national origin, or sex is “sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.”\(^{36}\) Prevailing on a Title IX or Title VI claim first requires a student to make a threshold showing that he or she was subjected to bullying on the basis of race, color, national origin, or sex which was sufficiently severe or pervasive to create an abusive educational environment.\(^{37}\)

While a teacher’s bullying of a student may constitute discrimination under Title IX or Title VI, a school district will only be liable for damages arising from the misconduct of the school in handling the bullying.\(^{38}\) Therefore, in addition to demonstrating the teacher’s conduct constituted discriminatory bullying, to succeed on a claim against the school district the student must demonstrate that a school


official: (1) had knowledge of the allegedly discriminatory conduct; and (2) failed to take reasonably objective remedial measures, which amounted to deliberate indifference to the discriminatory conduct, as appraised by the totality of the circumstances.\textsuperscript{39} Further, in \textit{Gebser v. Lago Vista Independent School District}, the Supreme Court explained that the school official who had notice but failed to act must be one who “has authority to address the alleged [wrongdoing] and to institute corrective measures on the [school district’s] behalf.”\textsuperscript{40}

With respect to the requirement that a school official had knowledge of the allegedly discriminatory conduct, the Supreme Court, in \textit{Gebser}, made clear that actual notice is required.\textsuperscript{41} While “actual notice requires more than a simple report of inappropriate conduct by a teacher . . . the actual notice standard does not set the bar so high that a school district is not put on notice until it receives a clearly credible report . . . from the plaintiff-student.”\textsuperscript{42} The determination of whether the school district had “actual notice” is a fact-based analysis.\textsuperscript{43}

“Deliberate indifference” likewise involves a fact-intensive inquiry. A school official acts with deliberate indifference if they either fail to act or act “in a way which could not have reasonably been expected to remedy the violation . . . [that] amounts to an official decision not to end” the wrongful conduct.\textsuperscript{44} Stated differently, a school official acts with deliberate indifference if his or her response is clearly unreasonable in light of the known circumstances.\textsuperscript{45} The deliber-

\begin{footnotes}
\item[40] 524 U.S. at 290.
\item[41] \textit{Id.} at 277.
\item[43] See \textit{Johnson v. Galen Health Inst., Inc.}, 267 F. Supp. 2d 679, 688 (W.D. Ky. 2003) (finding that the actual notice requirement is satisfied when “an appropriate official has actual knowledge of a substantial risk of abuse to students based on prior complaints by other students”); \textit{see also} \textit{Doe v. Green}, 298 F. Supp. 2d 1025, 1033–34 (D. Nev. 2004) (“Prior complaints made the same student also provide actual notice, even if the conduct complained of was not identical to the conduct which the [student] alleges should have been remedied.”); \textit{D’Agostino}, 367 F. Supp. 2d at 166 (stating “a complaint from parents or students charging only that . . . the teacher had made inappropriate comments during class . . . was plainly insufficient” to provide actual notice).
\end{footnotes}
ate indifference “standard is not one of mere reasonableness, such as in negligence cases;” instead, it is the “conscious or reckless disregard of the consequences of ones acts or omissions.” Courts generally gauge the reasonableness of a school official’s response to inappropriate conduct by considering whether the official imposed “consequences reasonably calculated to deter known bullies from repeating offenses.” Proof of deliberate indifference, standing alone, does not establish liability. The student must demonstrate an “affirmative link” between the official’s conduct and the challenged conduct. The affirmative link “need not take the form of knowing sanction, but may include tacit approval of, acquiescence in, or purposeful disregard of, rights-violating conduct.”

School districts can take steps to avoid liability under Title IX and Title VI. First, school districts should establish procedures for teachers and school officials to follow when they have notice of allegedly discriminatory bullying. Second, school districts should review the policy and procedures with teachers, emphasizing the need for them to err on the side of over-reporting. Third, school districts must take reasonable action in response to inappropriate conduct, which typically includes conducting a reasonable investigation and, when appropriate, may include discipline or other corrective action.

2. Bullying Based on Disability

Students may also pursue claims against school districts on the theory of disability-based bullying. Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 prohibit schools that receive federal funding from discriminating against students with qualifying disabilities. Disability bullying under Title II and Section 504 is “intimidation or abusive behavior toward a

46 Id. at 1132.
47 See, e.g., Green, 298 F. Supp. 2d at 1035 (quoting Henkle v. Gregory, 150 F. Supp. 2d 1067 (D. Nev. 2001)).
49 See White, 855 N.E.2d at 1132.
50 See id.
51 Camilo-Robles v. Toledo, 151 F.3d 1, 7 (1st Cir. 1998).
52 See Elizabeth M. Jaffe, Bullying in Public Schools, 62 Mercer L. Rev. 407, 438 (2011).
student based on disability that creates a hostile environment by interfering with or denying a student’s participation in or receipt of benefits, services, or opportunities” in the student’s education.\textsuperscript{54} Bullying based on a student’s disability may also constitute a denial of the student’s right to a Free and Appropriate Public Education (FAPE) under the Individuals with Disabilities Education Act (IDEA), Title II, and Section 504.\textsuperscript{55}

The elements of a student’s claim against a school district for disability-based bullying are not yet clear. To date, only four federal courts have held that school districts may be liable under these statutes for failing to adequately respond to disability-based bullying. The Eighth Circuit required the student to demonstrate the school district acted in “bad faith” or with “gross misjudgment.”\textsuperscript{56} Three district courts, however, applied the Title IX and Title VI standards and required the student to demonstrate the school district acted with deliberate indifference when the school’s response was “clearly unreasonable in light of the known circumstances.”\textsuperscript{57}

To avoid liability under Title II and Section 504, school districts are encouraged to follow the same recommendations outlined above with respect to Title IX and Title VI liability.

C. Negligent Hiring and Retention

The sister theories of negligent hiring and negligent retention are two theories that should give school districts pause. “The doctrine of negligent hiring provides that an employer whose employees are brought into contact with members of the public in the course of the employer’s business has a duty to exercise reasonable care in the selection and retention of its employees.”\textsuperscript{58} Negligent hiring occurs when a particular unfitness of an applicant creates a danger


\textsuperscript{55} \textit{Id.}

\textsuperscript{56} M.P. v. Indep. Sch. Dist. No. 721, 439 F.3d 865, 867 (8th Cir. 2006).


of harm to a third person that the employer knew, or should have known, when it hired and placed the applicant in employment where the applicant could injure others. Negligent retention occurs when, “during the course of employment, the employer becomes aware or should have become aware of problems with the employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment.”

To establish a prima facie claim of negligent hiring or retention, the student must show: (1) the school district had a duty to exercise reasonable care in hiring or retaining teachers; (2) the school breached that duty by hiring or retaining a teacher who the school district knew was incompetent; and (3) the school’s hiring or retention of the teacher was a proximate cause of the student’s injury. The term “incompetent” does not mean the teacher was not properly educating students, but instead requires a showing that the teacher “poses a threat of physical or emotional harm.”

The first requirement – that the school district had a duty to exercise reasonable care in hiring or retaining teachers – is easily satisfied. In Massachusetts, it is established that a school district “must use due care to avoid the selection or retention of [a teacher] whom he knows or should know is a person unworthy by habits, temperament, or nature, to deal with the persons invited to the premises by the employer.” In general, the duty to investigate candidates includes the duty to attempt to review the candidate’s prior employment, verify his credentials, and contact and evaluate the candidate’s

60 Foster, 526 N.E.2d at 1311 (quoting Garcia v. Duffy, 492 So.2d 435, 438–39 (Fla. Dist. Ct. App. 1986)).
62 See Fallon, 500 N.E.2d at 103–04; Robert Michael Ey, Cause of Action Against School Board for Negligent Hiring or Retention of Teacher, 18 CAUSES OF ACTION 555, § 6 (2010).
63 Incompetence may be established by showing, for example, sexual molestation of students, physical assault against a student, involvement in criminal activity affecting students, or unsatisfactory supervision of students. See, e.g., Beck, supra note 61, at 147 n. 43; see generally Doe v. Durtschi, 716 P.2d 1238 (Idaho 1986).
64 Foster, 526 N.E.2d at 1310–11; C.S. Patrinelis, Annotation, Liability of Employer, Other Than Carrier, For a Personal Assault Upon Customer, 34 A.L.R.2d 372 (1954).
Some jurisdictions, such as Massachusetts, have created a higher duty of care by statute by requiring school districts to conduct criminal background checks prior to hiring a new teacher. While Chapter 72, Section 38R of the Massachusetts General Laws requires school districts to conduct a criminal background check of teacher-applicants, school districts in Massachusetts are not required to conduct any further background checks. Importantly, if, in the course of conducting a pre-employment investigation, the school district discovers information that may alert the school district to the teacher’s incompetence, the school district will likely be required to conduct a further inquiry before extending an offer. Similarly, if the school district obtains information about a current employee, it may be exposing itself to liability if it makes no further inquiry.

Turning to the second requirement, a student must demonstrate the school district breached its duty to exercise reasonable care by hiring or retaining a teacher who it knew or should have known was incompetent. Unlike § 1983 claims, actual notice is not required and a student may satisfy this burden by demonstrating that the school district had constructive notice, i.e., a reasonable investigation would have alerted the school district to the teacher’s incompetence. Regarding negligent hiring, it may be possible to show the school district had notice of the teacher’s incompetence on the basis of information in the teacher’s prior employment history or personnel file or, as has become more common, a general background search. Regarding negligent retention, it may be possible to show the school district had constructive notice based on prior incidents involving the teacher, or the school district should have learned of the teacher’s incompetence through standard evaluation procedures, including direct observation of the teacher’s performance.

65 See Ey, supra note 62, § 4.
67 See Ey, supra note 62, § 4; Vanelli v. Reynolds Sch. Dist., 667 F.2d 773 (9th Cir. 1982) (stating that a school district had a duty to make further inquiries into the teacher-candidate’s qualifications when the evaluation of the candidate’s prior employment records showed a discharge from a teaching position which occurred before the end of the school year).
Finally, a student must demonstrate the school district’s hiring or retention of the teacher was a proximate cause of the student’s injury. To satisfy this requirement, the student must establish it was foreseeable that the hiring or retaining of the teacher would lead to injuries such as those sustained by the student.\(^{72}\) This is typically demonstrated by a showing that the risk about which the school district had notice was the type of conduct that injured the student. For example, if a teacher is incompetent because they are likely to commit a physical assault, a court would likely find that it was reasonably foreseeable that a physical assault would occur and a student who was the victim of a physical assault by the teacher would, therefore, likely satisfy the causation requirement.\(^{73}\)

There are affirmative steps a school district should take to avoid liability for negligent hiring or negligent retention. School districts should conduct a full background check, rather than just a criminal background check, on teacher candidates before offering a candidate a position.\(^{74}\) When a pre-employment investigation reveals adverse information regarding a candidate, the school district should request more information from the teacher and other sources, as applicable, about the issue before making a determination as to whether the issue mitigates against the hiring of the candidate.\(^{75}\) Further, to prove it conducted a thorough pre-employment investigation, the school district should maintain records demonstrating it examined

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73 See Durtschi, 716 P.2d at 1243–44; cf. Kimpton v. New Lisbon Sch. Dist., 405 N.W.2d 740, 746 (Wis. Ct. App. 1987) (finding that the school district’s knowledge of the teacher’s drinking problem would not reasonably indicate to the school district that the teacher was likely to engage in a sexual relationship with the student). Importantly, the fact that a student’s injuries were the result of a third party does not necessarily absolve the school district of liability if the teacher’s actions were the foreseeable result of the school district’s negligent hiring or retention. See Durtschi, 716 P.2d at 1244 (finding that the teacher’s actions did not constitute a supervening force because the very risk which made the school district’s actions negligent, the likelihood of the teacher to commit and assault and battery, was the very act that occurred).
74 Notably, some states which require that school districts conduct criminal history checks of teacher-candidates prior to offering a teacher-candidate a position expressly allow school districts to extend a conditional offer of employment to a selected teacher-candidate with the final offer of employment subject to a successfully completed criminal history records check. See N.H. REV. STAT. ANN. § 189:13-a (2010).
75 See Ey, supra note 62, § 11.
the teacher’s prior employment record, verified the teacher’s credentials, and verified and evaluated the teacher’s references.\textsuperscript{76}

Similarly, a school district must make reasonable inquiry into information suggesting the incompetence of one of its teachers. If the information is deemed credible, the school district must take reasonable corrective measures, monitor the issue, and take further action, if necessary. Regardless of whether the information is deemed credible, the school district should maintain a record of its inquiry to show that it fulfilled its duty to inquire and, if applicable, to address the incompetency.

D. Breach of Contract

To date, although there are few reported cases of students asserting a breach of contract claim against a school district for the school district’s failure to adhere to and abide by the school district’s student code, such a theory appears viable based upon an analysis of analogous cases. In particular, students may assert that the school district’s code or policies are contracts entered into with the school district.\textsuperscript{77} If the school code sets forth certain rights to be free from bullying, and the school district allegedly breaches that “right” by failing to protect the student against bullying, the student arguably has a claim against the school district for breach of contract.

E. Miscellaneous Theories

Several other theories of liability have been tried, but given little credence by the courts. Readers, nonetheless, should be aware of these theories.

1. Vicarious Liability

Students have attempted to bring claims against school districts for the conduct of their teachers under the common law theory of vicarious liability. In general, the theory of vicarious liability imputes liability on the employer for the actions of its employees. Under Mas-

\textsuperscript{76} Id.; Brandt v. Bd. of Coop. Educ. Servs., 820 F.2d 41 (2d Cir. 1987).
\textsuperscript{77} See Foreman v. Tex. A&M Univ. Sys. Health Sci. Ctr., No 3:08-CV-1469-L, 2008 WL 4949267, at *1 (N.D. Tex. Nov. 12, 2008) (explaining that the student alleged that the school policies constitute a contract and that the school’s deviation from the policies was a breach of the contract).
sachusetts law, a school district may be held vicariously liable for the
torts of a teacher-employee only if the torts were performed by the
teacher “while [the teacher was] acting within the course and scope
of [the teacher’s] employment.”78 Conduct is found to be within a
teacher’s “scope of employment” if the conduct: (1) is of the kind
the teacher is employed to perform; (2) occurs substantially with
in authorized time and space limits; and (3) is motivated, at least in
part, by a purpose to serve the school district.79

In the majority of cases, school districts have successfully avoid-
ed vicarious liability for the torts of their teacher-employees because
students are unable to establish that the teacher’s inappropriate con-
duct was within the scope of the teacher’s employment.80 In particular,
students have difficulty establishing that the teacher’s inappropriate
conduct is the kind of conduct the teacher was employed to per-
form.81 Further, courts readily hold that intentional tortious acts are
not within an employee’s scope of employment.82 Moreover, even if a
student satisfies this prong of the vicarious liability analysis, the stu-
dent will likely not be able to demonstrate the teacher’s inappropriate
conduct was motivated by a purpose to serve the school.83 Finally, if
the teacher’s conduct was part of her exercise of authority conferred
by the school district, a court will likely find the inappropriate behav-
ior “could advance no conceivable purpose of” the school district.84

While a school district will likely avoid vicarious liability by the
direct application of vicarious liability principles to incidents of teach-
er-on-student bullying, a school district may bolster its protection
against vicarious liability by clearly stating that bullying conduct by

78 See, e.g., Worcester Ins. Co. v. Fells Acres Day Sch., Inc., 558 N.E.2d 958, 966
79 See, e.g., id. at 967 (quoting Wang Labs., Inc. v. Bus. Incentives, Inc., 501 N.E.2d
1163 (Mass. 1986)).
80 See, e.g., Beck, supra note 61, at 143.
81 Worcester Ins. Co., 558 N.E.2d at 967.
Indus., Inc., 378 S.E.2d 232, 235 (N.C. Ct. App. 1989); Robinson v. McAlhaney,
198 S.E. 647, 650 (N.C. 1938)).
84 Cf., Medlin, 398 S.E.2d 460; Doe v. Green, 298 F. Supp. 2d 1025, 1038 (D. Nev.
2004). In Medlin, while a teacher exercised the authority conferred upon him
by the school district when he summoned a student to his office to discuss
an academic problem, the teacher’s sexual assault of the student advanced
a “completely personal objective” and was therefore “beyond the course and
scope of employment as a matter of law.” 398 S.E.2d at 464.
teachers, as defined by the school district, will not be tolerated. Such a pronouncement should defeat any argument that teachers were employed to perform bullying behavior or that the teacher’s conduct was motivated by a desire to serve the school system in any way.

2. Common Carrier

It has been argued that school districts are liable for the negligence or willful wrongs of their teachers under a common carrier theory of liability. Under common law, common carriers and innkeepers are under “an obligation ‘to use a very high degree of care to prevent injuries that might be caused by the willful misconduct of others,’” and are subsequently held liable for the negligence and willful wrongs of their employees.\(^{85}\) Thus far, this theory has been rejected each time it has been raised in Massachusetts by a student seeking to extend common carrier liability to school districts.

3. In Loco Parentis

Attempts by students to hold school districts liable for the conduct of the teachers under the theory of in loco parentis have categorically failed. Courts across jurisdictions, including the First Circuit Court of Appeals, have held that school officials do not act in the place of the parent because “school children are not captives of the school authorities and the basic responsibility for their care remains with their parents.”\(^ {86}\) Further, the Supreme Court stated that it does not “of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional ‘duty to protect.’”\(^ {87}\)

Thus, unless application of the in loco parentis theory of liability dramatically changes, it appears this is not a viable foundation upon which to base a student’s claim of liability for the bullying behavior of a teacher.


\(^{86}\) Hasenfus v. LaJennesse, 175 F.3d 68, 71 (1st Cir. 1999).

IV. Limitations on Liability - Sovereign Immunity and the Massachusetts Tort Claims Act

Under the common law doctrine of sovereign immunity, states are immune from tort liability unless they have assumed such liability by a constitutional provision or legislative enactment. Pursuant to the doctrine, all public bodies, agencies, or authorities in charge of or conducting public schools, including school districts, enjoy immunity on the theory that such bodies act as agents or instrumentalities of the state in the furtherance of its educational system. A state legislature, in the absence of a constitutional prohibition, has the power to waive a state’s and, therefore, a school district’s sovereign immunity. A number of state legislatures have, to varying degrees, exercised this power and altered the doctrine of sovereign immunity for tort liability in connection with public schools.

In 1978, the Massachusetts Legislature abrogated the doctrine of sovereign immunity by passing the Massachusetts Tort Claims Act (“MTCA”). The MTCA permits recovery against school districts for injuries caused by the negligent or wrongful acts or omissions of any employee while acting within the scope of their employment.

Under the MTCA, for a school district to be found liable, the offending employee must have been acting within the scope of her employment. Identical to the “scope of employment” analysis in the section on vicarious liability, to determine if the individual was acting within the scope of her employment, courts consider “whether the conduct in question is of the kind the employee is hired to perform, whether it occurs within authorized time and space limits, and whether it is motivated, at least in part, by a purpose to serve the employer.” A school district may attempt to avoid liability by argu-

91 See Korpela, supra note 89, § 20.
94 Id.
ing that a teacher’s bullying conduct was outside the scope of her employment and subsequently outside the purview of the MTCA.\textsuperscript{96} However, when a student seeks to hold a school district liable for the negligent actions of school officials, not for the conduct of the bullying teacher, a court will likely find that the officials’ allegedly negligent actions, such as a failure to investigate allegations of bullying, are within the scope of their employment and subject to the MTCA.\textsuperscript{97}

Importantly, the statute specifically excepts from liability ten categories of claims, three of which are particularly relevant when analyzing a school district’s liability for teacher-on-student bullying. In particular, the MTCA excepts claims (a) based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty; (b) arising out of an intentional tort; and (c) based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the school district.\textsuperscript{98}

With respect to the first relevant exception, known as the Discretionary Function Rule, school districts are immune from liability for any claim based upon the exercise or performance or failure to exercise or perform a discretionary function.\textsuperscript{99} The Supreme Judicial Court of Massachusetts has explained that not every discretionary decision is entitled to immunity.\textsuperscript{100} Instead, immunity extends only to “discretionary conduct that involves policy making or planning”\textsuperscript{101} or “social, political, or economic policy considerations.”\textsuperscript{102} Under the narrow Discretionary Function Rule, therefore, school districts are immune only when the decision which caused the injury has a “high degree of discretion and judgment involving weighing alternatives and making choices with respect to public planning and policy,” not when the decision entails “carrying out previously established policies or plans.”\textsuperscript{103} A school district will not be immune from suit under

\textsuperscript{97} See id.
\textsuperscript{99} Id. § 10(b).
\textsuperscript{100} Harry Stoller & Co. v. Lowell, 587 N.E.2d 780 (Mass. 1992).
\textsuperscript{101} Id. at 783.
the MTCA if the decision at issue related to following and enforcing, or failing to follow and enforce, a school policy or procedure because a student can argue that such decisions, or failures, amount to negligence in connection with an operational or ministerial function. While an analysis of whether this exception provides immunity for a school district is fact-intensive, given the prevalence of bullying policies and procedures promulgated by school districts, it is likely that a student asserting a claim based on a teacher-on-student bullying incident can put forth a viable argument that decisions involved related to following and enforcing such procedures and policies and were not discretionary.

Turning to the second relevant exception, claims arising out of an intentional tort are precluded by the MTCA. In Massachusetts, this exemption is interpreted narrowly and will not apply if the “true focus of the case” is the school district’s negligence. A school district, therefore, cannot successfully assert this exception when a student brings a claim under a negligence theory, such as a claim for negligent hiring or retention. In addition, the school district will not be shielded from liability if it knew, or should have known, that the teacher was likely to commit an intentional tort of the type that caused the student’s injuries because, in such cases, the school district’s negligent response is the “focus of the case.” This exception, therefore, will not shield a school district from a number of claims available to a student who was subjected to teacher-on-student bullying, even though the conduct of the teacher may be considered an intentional tort.

Finally, the third relevant exception exempts school districts from liability based on their act, or failure to act, to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person provided the conduct is not originally caused by the school district. In Kent v. Common-
wealth, the Supreme Judicial Court of Massachusetts construed the “original cause” provision to require an affirmative act that materially contributes to the creation of the “condition or situation” resulting in the harm. While this exception appears to exempt school districts from teacher-on-student bullying, the protection is not absolute. For example, in Barret v. Wachusett Regional School District, the court found that the school principal’s affirmative act of nominating a school employee to supervise a group of fifth grade students during an overnight program was an “original cause” of the employee’s assault on a student during the program, thereby rendering this exception inapplicable. Notably, courts in Massachusetts have held that a school district’s decisions involved in a claim for negligent hiring involve affirmative acts which are an original cause of the student’s harm. In addition, the third exemption itself contains an exemption, as it does not bar claims based on explicit and specific assurances of safety or assistance made to the direct victim or member of his family. Therefore, if a school official made an affirmative decision which can be linked as an original cause to the harm caused by a third person, the school district will not be shielded from liability.

In sum, while the doctrine of sovereign immunity protects school districts from claims asserted against it for teacher-on-student bul-

109 771 N.E.2d 770, 775 (Mass. 2002); see Bonnie W. v. Commonwealth, 643 N.E.2d 424 (Mass. 1994) (finding that the recommendation of a convicted rapist for a position of employment in a trailer park where he would have access to keys of all units within the park was a materially contributing act to a sexual assault); Gennari v. Reading Pub. Schs., 933 N.E.2d 1027 (Mass. App. Ct. 2011) (finding the principal’s decision to hold recess in a concrete courtyard was a materially contributing act to a student-victim’s injury when another student pushed the victim, causing him to fall and strike his head on a concrete bench).

110 10 Mass. L. Rept. 594 (Mass. Super. 1999); see also Doe ex rel. Doe v. Nashoba Reg’l Sch. Dist., 20 Mass. L. Rptr. 131 (Mass. Super. 2005) (finding that a school district was unable to assert immunity under § 10(j) when a student was sexually assaulted by another student and the school responded by promoting the perpetrator of the sexual assault to a higher grade because while the school district was not the cause of the sexual assault the school district’s intervention was an “independent, intervening act” which placed the student in a worse position than he was before the intervention).


lying, the abrogation of the doctrine in Massachusetts in 1978 with the passage of the MTCA and the narrow construction of exceptions to the MTCA worked to expose school districts to liability, especially for claims alleging negligence on behalf of the school district in connection with teacher-on-student bullying.

V. Recommendations for School Districts to Avoid Liability

Having reviewed multiple theories of liability asserted by students against school districts for the conduct of teachers reveals there are three crucial steps school districts should take to reduce incidents of teacher-on-student bullying in their district and avoid liability for teacher-on-student bullying incidents in the event they do occur.

Most importantly, school districts must create standards regarding teacher-on-student bullying. In particular, school districts must define teacher-on-student bullying, establish mechanisms to report teacher-on-student bullying, set forth procedures to be followed to investigate incidents of teacher-on-student bullying, and outline the disciplinary and other corrective measures that will be taken against teachers when they are found to have bullied a student.

With respect to the definition of teacher-on-student bullying, a reasonable starting point would be to apply a similar definition to teacher-on-student bullying conduct as the school district applies to student-on-student bullying. In regards to the reporting mechanisms, clearly stated and simple reporting procedures should encourage students, teachers, and school staff to report incidents of teacher-on-student bullying. While students should be encouraged to bring allegations of bullying to the proper school administrators, it is critical they be allowed to make their initial complaint to any staff member with whom they feel comfortable talking. It is then incum-
Conclusion

In conclusion, the teacher-on-student bullying issue cannot be ignored. Teacher-on-student bullying occurs with an alarming frequency across the country and has potentially far-reaching ramifications for the entire school system. Teacher-on-student bullying also exposes school districts to liability under the various causes of actions victims may assert against the school district, as detailed in Part II of this article. Given the prevalence of teacher-on-student bullying, it is likely that such bullying takes place in each and every school district. Therefore, school districts are wise to take immediate, affirmative steps to prevent teacher-on-student bullying and reduce the school district's exposure to liability in the event such bullying does occur.

School districts are also wise to set forth specific procedures school officials will follow when an incident of teacher-on-student bullying is alleged. Such procedures should state that an investigation will be conducted when appropriate and that the results of that investigation will be shared with the complainant. If such procedures are in place and complied with, school districts may be able to avoid a finding that school officials were deliberately indifferent to known incidents of bullying, which is crucial in defense of a claim brought under § 1983, Title IX, Title VI, the ADA or Section 504.

A statement that discipline and other corrective measures may be imposed need not be exhaustive, but should set forth potential consequences up to and including termination, additional classroom management training, anger management, additional mentoring, or other similar steps. Again, establishing and following such disciplinary procedures aids school districts in avoiding a finding that the school district was deliberately indifferent.

School districts are also wise to train their teachers and other employees on teacher-on-student bullying. Such training should help teachers and school officials identify incidents of such bullying, both in themselves and in others. As stated in the first section, teachers often do not recognize that the mechanisms they employ to control their classrooms may constitute bullying. If teachers are made aware that certain mechanisms are not acceptable and are trained in other, more effective control and disciplinary measures, school districts will make significant progress in alleviating teacher-on-student bullying and avoiding the underlying source of liability. In addition, training sessions should educate teachers on the school district’s bullying standards and reporting, investigating, and disciplinary procedures so teachers may adequately respond if an incident of teacher-on-student bullying comes to their attention.

In addition, it is critical that school districts conduct comprehensive background checks with respect to all new hires. Such background checks should include criminal history checks, verification of employment history, and personal and professional reference checks. To better enable school districts to obtain honest evaluations, they should require candidates sign an authorization and release that protects both the requesting school district and the referring school district from liability if the candidate is not offered a position.
Bullying is the New Harassment, But Are Our Students Any More Protected?

Natalie Higgins*

“It is as if ‘bullying’ became the euphemism for other behaviors that school officials did not want to name, like racism, homophobia, sexism, or hate crimes.” 1

I. Introduction

The first wave of anti-bullying laws began shortly after the Columbine shootings in the late 1990s and early 2000s. In 2009 and 2010, Massachusetts experienced its own tragedies that sparked the push for anti-bullying legislation: the suicides of two minors, Carl Walker-Hoover and Phoebe Prince. While the new anti-bullying statute may have sparked important conversations in our community about peer-to-peer behaviors, it hardly holds schools accountable for any failure to intervene in future situations similar to those experienced by Carl Walker-Hoover and Phoebe Prince. Part I of this article will examine the push for anti-bullying legislation, considering the rhetoric and rationale used, particularly through the lens of the movement in Massachusetts. I argue that both Carl and Phoebe’s treatment at the hands of their peers was more than bullying; their treatment was a form of sexual harassment, 2 which is prohibited by federal

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2 Eric Metcalf, What is Sexual Harassment?, WEBMD, http://teens.webmd.com/features/what-is-sexual-harassment (last visited May 22, 2013) (Sexual harassment includes name calling, unwanted touching, unwanted behaviors, pressure from authority figures, and hassling. “Insults related to a person’s sexuality are a form of sexual harassment. This includes calling someone a ‘slut,’ ‘gay,’ or a ‘fag.’”).
and state law. Part II examines the new anti-bullying legislation in Massachusetts, as well as relevant state and federal laws that potentially provide students protection from sexual harassment. Finally, Part III explores how to align anti-bullying and anti-harassment legislation by filling in gaps in the legal remedies currently available to students, how to ensure that students suffering from bullying or harassment understand those legal remedies available to them, and how to implement anti-bullying laws through community education and legislative advocacy.

II. The Rhetoric and Rationale Behind Anti-Bullying Legislation: Playing on Emotions

Local tragedy has propelled most of the anti-bullying legislation that has been proposed and enacted. Actually, the first true anti-bullying laws emerged in the aftermath of the Columbine shootings.\(^3\) The history of anti-bullying legislation in Massachusetts, where state officials repeatedly used the tragic stories of Carl Walker-Hoover and Phoebe Prince in their efforts to advance anti-bullying legislation, is no different.\(^4\) However, both of their stories seem to warrant a label much stronger than bullying. Certain media outlets recognized this,}

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occasionally labeling their treatment as sexual harassment. These narratives were also coupled with statistics regarding bullying and harassment to show the prevalence of both within schools. However, there was a continuing characterization of the “bully” as an individual actor, which fails to address the wider cultural problems that lead to harassing behavior based on characteristics such as race, gender, and sexuality. Soon after these stories emerged, anti-bullying legislation was proposed, passed, and signed into law, apparently without any thought given to the legal remedies already available to students of the Commonwealth or to the broader consequences of anti-bullying legislation. Most importantly, the labeling of behavior as “bullying” de-genders the discussion of incidents of sexual harassment, potentially undermining the utilization and effectiveness of anti-harassment laws.

A. The Narratives: Carl Walker-Hoover and Phoebe Prince

Carl Walker-Hoover, of Springfield, Massachusetts, was only eleven years old when he committed suicide on April 6, 2009. This came after months of enduring anti-gay taunts, even though Carl did
not identify as gay. 10 Fellow students repeatedly called him feminine and teased him about the way he dressed. 11 Just before Carl took his life, the behavior escalated, when “a female student had threatened to beat him up and kill him.” 12

Many of the initial news articles and radio broadcasts noted that Carl was the victim of anti-gay bullying. 13 ABC News even noted that “[w]hile Carl did not identify himself as gay, his mother says his case illustrates how anti-gay harassment has become a huge part of the overall bullying problem, whether the targets are gay or not.” 14 Carl was being taunted daily, being called “girlie,” “gay,” and “fag.” 15 The harassment Carl endured, while fitting within the statutory definition of bullying, 16 was part of the much more severe issue of homophobia in our schools. 17

Less than one year later, on January 14, 2010, Phoebe Prince, a fifteen-year-old in South Hadley, Massachusetts, took her own life after enduring months of sexual harassment by her peers. 18

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11 Anderson Cooper 360 Degrees (CNN television broadcast Apr. 17, 2009); Spaulding, The Advocate interviews, supra note 10.
12 Anderson Cooper 360 Degrees, supra note 11.
16 See Part III. A infra page 142.
17 See Testimony of Nan Stein, supra note 7; Spaulding, The Advocate interviews, supra note 10.
ers reported that Phoebe was “stalked and harassed constantly from September until she killed herself on January 14, 2010.” According to one student, “a group of mean girls wouldn’t leave her alone. And she couldn’t take the abuse.” Further, the Boston Globe reported that “[Phoebe] was a freshman and she had a brief fling with a senior, a football player, and for this she became the target of the Mean Girls, who decided then and there that Phoebe didn’t know her place and that Phoebe would pay.”

Unfortunately, the harassment of Phoebe did not end with her death. There were reports of a malicious Facebook page set up which “contained disturbing images and comments relating to Phoebe’s death.” Despite the unavailability of anti-bullying laws, Phoebe’s harassers were charged with numerous crimes ranging from criminal harassment to statutory rape. Five students pleaded guilty to criminal harassment and were sentenced to community service and probation.

Both Carl and Phoebe experienced severe sexual harassment at the hands of their peers, but the question remains whether the anti-bullying law would have afforded either of them any additional protection.

B. Use of Statistics to Contextualize the Impact of Bullying and Harassment

Advocates often use statistics in support of new legislation, and the push for anti-bullying legislation in the Commonwealth was no

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23 Id. (“Six teens – four girls and two boys – face charges including statutory rape, assault, violation of civil rights resulting in injury, criminal harassment, disturbance of a school assembly, and stalking.”).
24 Huus, supra note 19.
different. The following statistics are representative of those cited in the media coverage of the campaign in Massachusetts.\textsuperscript{25} In a 2009 nationwide survey, about 20\% of high school students reported being bullied on school property in the twelve months preceding the survey.\textsuperscript{26} During the 2007–2008 school year, 25\% of public schools reported that bullying among students occurred on a daily or weekly basis.\textsuperscript{27} A higher percentage of middle schools reported daily or weekly occurrences of bullying compared to elementary and high schools.\textsuperscript{28} According to another study of grades six through ten, as many as 13\% reported bullying others, and 11\% said they were victims of bullies.\textsuperscript{29}

Compare the statistics used to advance the anti-bullying legislation with the following study about sexual harassment experienced by middle and high school students. A 2001 survey conducted by the American Association of University Women found sexual harassment to be “widespread” in schools.\textsuperscript{30} According to the study, 83\% of female student respondents and 79\% of male student respondents within grades seven through twelve reported having “been sexually harassed at school in ways that interfered with their lives.”\textsuperscript{31} The same survey found that 44\% of female students and 20\% of male students “fear being sexually harassed during the school day.”\textsuperscript{32}

\textsuperscript{25} See Huus, supra note 19 (“[B]ullying is pretty prevalent … about 30 percent are involved as a bully or as a target …”); Zonkel, supra note 5 (“A recent California Healthy Kids Survey by the California Department of Education found that more than 245,000 students statewide are harassed because they are gay or lesbian or perceived to be.”)


\textsuperscript{28} Id. at 114.

\textsuperscript{29} Tonja Nansel et al., Bullying behaviors among U.S. youth: Prevalence and association with psychosocial adjustment, 285(16) JAMA 2094, 2094 (2001).


\textsuperscript{31} Id.

\textsuperscript{32} Id. at 25.
There have been similar studies addressing homophobia in schools. The Gay, Lesbian and Straight Education Network’s (GLSEN) 2011 National School Climate survey of LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer) students found that more than 71% of them heard homophobic slurs at school and more than one-third reported being physically harassed or assaulted.33 Further, “half of all bullying in elementary and middle schools involves the use of gay slurs.”34 This type of bullying, termed by some as “sexual bullying,” is considered a subset of sexual harassment.35 According to another GLSEN survey from 2005, the second most common motive for harassing adolescent students is sexual orientation.36

Additionally, when you pull together all of the forms of sexual harassment, the statistics can be rather startling. Fifty-two percent of students report hearing homophobic remarks often, while 51% report hearing sexist remarks often.37 Ultimately, these statistics reflect a school climate that is not safe for those identifying or perceived to be either female or LGBTQ.

C. Characterization of the “Bully” as an Individual Actor

There has also been a strong focus, by advocates of the legislation as well as the media, on the bully as an individual actor, rather than a product of the culture of the school or larger community.38

Labeling the harassment as bullying, the media has focused on state laws and school policies to prevent bullying among students. For example, the media attention surrounding

35 Id.
37 Id. at 11.
Prince’s death included hours of coverage on the problem of bullying in schools from national media sources. . . . While the media largely focused on Prince’s suicide as a result of bullying, some commentators have suggested that the taunts and harassment were based on sex, and, as such, litigation against the school district under the federal anti-sexual discrimination statute Title IX may be appropriate. 39

By naming the already illegal behaviors as “bullying” and creating an alternate legal structure to deal with these students’ actions, there is a strong de-emphasis of the culture and climate of a school that can lead to harassment. Further, the law seems to “deflect the school’s legal responsibility for creating a safe and equitable learning environment” by placing the focus on individual behaviors and actions, rather than the general hostile environment. 40 In reality, the anti-bullying movement has only substituted a broader term for already-illegal behavior addressed by a number of state and federal laws, including laws addressing fair educational practices (e.g., Title IX of the Federal Education Amendments of 1972), criminal harassment laws, and hate crime laws. 41 In some states, the new laws only address bullying behavior, ignoring harassment and therefore causing “the gendered dimension of bullying, let alone that of harassment, [to become] extinct.” 42

D. Legislative Rationale for Anti-Bullying Initiatives

By November 2009, eleven anti-bullying bills were under consideration in Massachusetts. 43 On November 17, 2009, at the initial hearing to consider the proposed bills, nearly three hundred people filled the hearing room in the State House. 44 Some legislators called for a “bill with teeth” that mandated reporting and imposed conse-

39 Id.
40 Stein, supra note 1, at 789.
41 See Federal and State Laws Affording Protection from Harassment, Part III, infra.
42 Stein, supra note 1, at 791.
44 Id.
quences for those school employees that failed to report incidents of bullying.\(^{45}\) Others criticized the delay in passing a law, noting that thirty-eight other states had already enacted anti-bullying laws, while some called for more comprehensive bills that included the rehabilitation of bullies.\(^{46}\) The hearing included testimony from survivors of bullying as well as general community members.\(^{47}\) One attendee testified that, while “bullying is pervasive, controllable, and affects everyone,” there is an “established positive correlation between effective bullying prevention and student academic achievement.”\(^{48}\) There was some tension between gay rights activists and “family rights” groups, the former stating that schools did not take seriously bullying related to sexual orientation and gender expression, and the latter stating there was no need to address issues of discrimination and that the anti-bullying legislation was a “homosexual activist cause.”\(^{49}\)

The media was also very vocal in reporting these discussions. Some of the criticism from the media focused on the need for swift action to fill obvious gaps, while others focused on legal protections already available to victims of bullying. During the discussion of these proposed bills, some media outlets noted that this type of harassment could already constitute a crime in Massachusetts.\(^{50}\) Moreover, a writer for the *Boston Herald* noted that the current bills “don’t inspire confidence,” calling them “[p]retty toothless” because they prohibited only on-campus bullying, mandated anti-bullying policies that were already widely contained in Student Codes of Conducts, or merely required schools to document bullying incidents.\(^{51}\) In the end, the final bill did include mandatory reporting, leading reporters and advocates to describe it as “a toughened version with training requirements for school personnel to combat an epidemic of student harassment.”\(^{52}\) Part III will explore where along the spectrum of “toothless” or “tough” the bullying statute lies.

\(^{45}\) *Id.*  
\(^{46}\) *Id.*  
\(^{47}\) *Id.*  
\(^{48}\) *Id.*  
\(^{49}\) *Id.*  
\(^{51}\) Make it meaningful, *supra* note 50.  
III. Massachusetts Anti-Bullying Law and Current Anti-Harassment Protections

In 2010, Massachusetts joined the majority of states in bullying prevention by codifying anti-bullying legislation. This section explores the statute itself, its potential impact on schools, and a number of federal and state statutes that already provide protections from many of the behaviors that make up bullying. While the following statutes do not represent an exhaustive list of the remedies available to victims of bullying, they are illustrative of the types of remedies available to students experiencing harassment or bullying.

A. 2010 Mass. Ch. 92, An Act Relative to Bullying in Schools

The Massachusetts legislature began debating anti-bullying legislation in March 2010, after the suicides of Carl Walker-Hoover and Phoebe Prince. The Massachusetts Governor signed the final bill, entitled “An Act Relative to Bullying in Schools,” into law just two months later in May 2010. The House approved the bill by a 148-0 vote after only three hours of in-session debate. The statute defines bullying as:

[T]he repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim’s property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or

53 See Victoria Stuart-Cassel, supra note 3, at 18 (“As of April 2011, Hawaii, Michigan, Montana, and South Dakota were the only remaining U.S. states that had not enacted legislation targeting bullying in their public school systems.”).
54 Anti-Bullying Hearing, supra note 43.
the orderly operation of a school. For the purposes of this section, bullying shall include cyber-bullying.\textsuperscript{57}

The statute uses very broad and inclusive language to capture a wide variety of behaviors within the definition of bullying. However, the statute makes no mention of identity-based harassment.\textsuperscript{58} Nevertheless, most forms of sexual harassment would fit within this definition, even if not specifically outlined within the text.

Despite these shortfalls, advocates did have a major victory in the fact that the prohibited bullying is not limited to school grounds or school-sponsored activities, but also includes situations where the “bullying creates a hostile environment at school for the victim, infringes on the rights of the victim at school or materially and substantially disrupts the education process or the orderly operation of a school.”\textsuperscript{59} This leaves open the possibility that school administrators can still address new forms of cyber-harassment, whether or not students used the technology on school grounds.

Additionally, each educational institution must incorporate an age-appropriate, evidence-based, bullying prevention programming into its existing curriculum.\textsuperscript{60} The law also mandates each school to develop a plan, with input from the school community and general community, to address bullying prevention and intervention.\textsuperscript{61} The plan must include the following factors:

- (i) descriptions of and statements prohibiting bullying, cyber-bullying and retaliation;
- (ii) clear procedures for students, staff, parents, guardians and others to report bullying or retaliation;
- (iii) a provision that reports of bullying or retaliation may be made anonymously; provided, however, that no disciplinary action shall be taken against a student solely on the basis of an anonymous report;
- (iv) clear procedures for promptly responding to and investigating reports of bullying or

\textsuperscript{57} Mass. Gen. Laws ch. 71, § 37O(a) (2010).
\textsuperscript{58} Id. § 37O.
\textsuperscript{59} Id. § 37O(b).
\textsuperscript{60} Id. § 37O(c).
\textsuperscript{61} Id. § 37O(d).
the range of disciplinary actions that may be taken against a perpetrator for bullying or retaliation; provided, however, that the disciplinary actions shall balance the need for accountability with the need to teach appropriate behavior;

(vi) clear procedures for restoring a sense of safety for a victim and assessing that victim’s needs for protection;

(vii) strategies for protecting from bullying or retaliation a person who reports bullying, provides information during an investigation of bullying or witnesses or has reliable information about an act of bullying;

(viii) procedures consistent with state and federal law for promptly notifying the parents or guardians of a victim and a perpetrator; provided, further, that the parents or guardians of a victim shall also be notified of the action taken to prevent any further acts of bullying or retaliation; and provided, further, that the procedures shall provide for immediate notification pursuant to regulations promulgated under this subsection by the principal or person who holds a comparable role to the local law enforcement agency when criminal charges may be pursued against the perpetrator;

(ix) a provision that a student who knowingly makes a false accusation of bullying or retaliation shall be subject to disciplinary action; and

(x) a strategy for providing counseling or referral to appropriate services for perpetrators and victims and for appropriate family members of said students.62

The administration must distribute the plan to all staff, students, and parents, as well as posted on the educational institution’s web

62 Id.
site. Further, the plan must also include professional development for both faculty and staff.

The statute leaves the responsibility of implementation and oversight to the principal, or a similar entity, and requires that all incidents that fit the definition of bullying be reported to this person. The principal then determines whether the incident mandates notice to law enforcement, disciplinary action, notification to the parents or guardians of the perpetrator, and/or notification to the victim of the steps taken to prevent future bullying or retaliation.

Note that the law does not prevent a school from enacting policies that protect students from discrimination or harassment based on “a person’s membership in a legally protected category under local, state or federal law” or “supersede or replace existing rights or remedies under any other general or special law.” However, the statute also expressly prohibits the creation of a private right of action. The decision to not create a private right of action within the new anti-bullying legislation arguably leaves a major gap in enforcement. Some have noted that this encourages schools to downplay bullying because perpetrators, rather than victims, have access to legal redress to serious disciplinary actions, such as expulsion, through their constitutional due process rights.

B. Federal and State Laws Affording Protection from Harassment

Prior to the passage of the anti-bullying legislation, there were already a number of state and federal laws that afforded protection

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63 Id. § 37O(e)(1)-(3).
64 Id. § 37O(d).
65 Id. § 37O(f)-(g).
66 Id. § 37O(g).
67 Id. § 37O(d), (i).
68 Id. § 37O(i).
69 Wendy Murphy, Sexual Harassment and Title IX: What’s Bullying Got To Do With It?, 37 New Eng. J. on Crim. & Civ. Confinement 305, 312-13 (2011) (“although the law requires schools to take specific steps in response to reports of bullying, the statute lacks meaningful enforcement options, and, as such, may prove ineffective . . . the legislature codified no sanctions or mechanisms for enforcement if the required steps are not taken.”).
70 Id. at 315 (“[A] bully has a constitutional right to be protected from suspension or expulsion without due process.”) (citing Goss v. Lopez, 419 U.S. 565, 581 (1975)).
to the general and student populations from various forms of harassment and bullying.\textsuperscript{71} As noted above, these laws provide different forms of legal protection to victims of sexual harassment, like Carl Walker-Hoover and Phoebe Prince.

1. \textit{Title IX of the Federal Education Amendments of 1972}

Title IX may be best known for its impact on high school and collegiate athletics; however, it plays a major role in protecting students from sexual harassment.\textsuperscript{72} It states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”\textsuperscript{73} Under Title IX regulations, the U.S. Office for Civil Rights (OCR) defines sexual harassment as “verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or student, which is unwelcome, hostile, or intimidating.”\textsuperscript{74} Guidance documents underscore the application of Title IX to situations of sexual harassment.\textsuperscript{75}

Additionally, a number of Supreme Court decisions have interpreted Title IX in the context of peer-to-peer harassment in school environments. In 1999, in \textit{Davis v. Monroe County Board of Education}, the Supreme Court held that schools are liable for student-to-student sexual harassment if they were aware of the harassment and failed to stop it.\textsuperscript{76} One decade later, \textit{Fitzgerald v. Barnstable School Committee} created the potential for parents to sue the school district and administrators through both Title IX and Section 1983 on equal protection grounds.\textsuperscript{77} The case law, along with the OCR Guidance, has the potential to hold school administrations accountable for their


\textsuperscript{73} 20 U.S.C. § 1681(a) (2012).

\textsuperscript{74} Nondiscrimination on The Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106 (2000); see also “Dear Colleague” Letter 2010, supra note 72, at 2.

\textsuperscript{75} See “Dear Colleague” Letter 2010, supra note 72, at 6-7.

\textsuperscript{76} 526 U.S. 629, 646-47 (1999).

\textsuperscript{77} 555 U.S. 246, 258 (2009); see also Supreme Court Decision Protects Remedies for Gender Discrimination in Public Schools, Nat’l Women’s Law Ctr., (Jan. 21,
failure to intervene in peer-to-peer sexual harassment and bullying, unlike the Massachusetts anti-bullying statute.

2. **Federal Hate Crimes Act**

Furthermore, there have been a number of recent amendments to the federal Hate Crimes Act to afford protections from gender- and sexuality-based hate crimes. Although the Violent Crime Control and Law Enforcement Act extended protection from hate crimes based on gender through the United States Sentencing Commission, it only applied to federal crimes. The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, passed in 2009, removed the prerequisite that the victim be engaged in a federally protected activity and extended protection to crimes motivated by actual or perceived gender, sexual orientation, gender identity, or disability. The latest amendments, under the Obama Administration, prohibit any person from causing or attempting to cause bodily harm based on actual or perceived gender or sexual orientation, among other protected classes. Students can bring complaints through the U.S. Attorney’s Office, and add additional protections to students like Carl and Phoebe who experience harassment, bullying, and/or threats based on their protected identities.

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78 Hate Crime Act, 18 U.S.C. § 249 (2012); see also Tanney, *supra* note 38, at 25 (“[T]he Fitzgerald decision suggests that the Court may have opened the door for parents and students to raise Title IX claims against teachers and administrators in their individual capacities via Section 1983.”).


There are also a number of state laws that provide legal remedies to victims of sexual harassment and bullying. For example, Chapter 151C of the Massachusetts General Laws addresses fair educational practices in Massachusetts schools.\(^8^4\) It defines sexual harassment as:

\[
\text{[A]ny sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when:— (i) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of the provision of the benefits, privileges or placement services or as a basis for the evaluation of academic achievement; or (ii) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual’s education by creating an intimidating, hostile, humiliating or sexually offensive educational environment.}\(^8^5\)
\]

The statute provides that it is an unfair educational practice for an educational institution to “sexually harass students in any program or course of study in any educational institution.”\(^8^6\) Complaints can be brought through the Massachusetts Commission Against Discrimination (MCAD).\(^8^7\) Previous MCAD decisions have held that the harassment of a gay student is sexual harassment forbidden by Chapter 151C.\(^8^8\) While the prior case law has only addressed administrators harassing students, there is potential for peer-to-peer harassment to qualify, since the statute only requires that the administration be involved.\(^8^9\) In Carl and Phoebe’s cases, it could be

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\(^8^5\) Id. § 1.
\(^8^6\) Id. § 2(g).
\(^8^9\) See Rinsky v. Trs. of Boston Univ., No. 10cv10779-NG, 2010 U.S. Dist. LEXIS 136876, at *1 (D. Mass. Dec. 27, 2010) (college student filed suit against her internship supervisor, town of Brookline, Boston University Master’s Program, and her Boston University supervisors, alleging she was being forced
argued that since the administrations were aware of the behavior and did nothing to prevent the sexual harassment, they thereby contributed to the hostile environment.

Although Chapter 76, Section 5 of the Massachusetts General Laws deals primarily with school attendance, the regulations that accompany it mandate that “[a]ll public schools shall strive to prevent harassment or discrimination based upon students’ race, color, sex, gender identity, religion, national origin or sexual orientation, and all public schools shall respond promptly to such discrimination or harassment when they have knowledge of its occurrence.” This extends the available protection by covering actions by both the administration and students. The importance of education in Massachusetts has led to legislation such as this, addressing some students’ fear of being bullied or harassed in school, although there is little case law addressing sexual harassment. However, previous decisions have held it is essential that the harassment was the result of sex discrimination.

Chapter 269, Section 14A of the Massachusetts General Laws addresses harassing calls made with a telephone or other form of electronic communication, stating:

> Whoever telephones another person or contacts another person by electronic communication, or causes a person to be telephoned or contacted by electronic communication, repeatedly, for the sole purpose of harassing, annoying or

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93 See Doe v. Dubeck, 2006 WL 1704261, at *4 (D. Mass. June 19, 2006) (“The complaint does assert abuse concerning alleged improper sexual exposure, but plaintiffs never link such abuse to a discriminatory motive based on John Doe’s gender. Bare assertions of sex discrimination unsupported by any factual allegations in the complaint are insufficient to withstand a motion to dismiss.”).
molesting the person or the person’s family, whether or not conversation ensues, or whoever telephones or contacts a person repeatedly by electronic communication and uses indecent or obscene language to the person, shall be punished by a fine of not more than $500 or by imprisonment for not more than 3 months, or by both such a fine and imprisonment.\textsuperscript{94}

Since the prevalence of cyberbullying and cyber-harassment that occurs between students has been increasing with the availability of internet and the popularity of social media, laws such as this one are likely to become even more important and more widely used in the years to come.\textsuperscript{95} However, at this moment, there are no published Massachusetts cases have dealt with a juvenile harassing another peer.

In cases involving more outwardly violent harassment, such as that suffered by Carl Walker-Hoover,\textsuperscript{96} Massachusetts has a statute that more generally addresses threats.\textsuperscript{97} Chapter 275, Section 2 of the Massachusetts General Laws states: “[i]f complaint is made . . . that a person has threatened to commit a crime against the person or property of another, [the] court . . . shall examine the complainant and any witnesses who may be produced, on oath, reduce the complaint to writing and cause it to be subscribed by the complainant.” Thus any student that is threatened in the course of harassment, including threats of assault and battery, might find relief under this statute.\textsuperscript{98}

\begin{small}
\textsuperscript{96} See Anderson Cooper 360 Degrees, supra note 11 (“[A] female student had threatened to beat him up and kill him.”).
\textsuperscript{97} Mass. Gen. Laws ch. 275, § 2 (1902).
\textsuperscript{98} Commonwealth v. Kearns, 471 N.E.2d 433, 438 (Mass. 2007) (While the judge was not convinced on the facts of this particular case, where the defendants had communicated the plans to attack their high school amongst themselves, he noted the potential relevance of Mass. Gen. Laws ch. 275, § 2, if the Commonwealth had shown the defendants had ever communicated a threat to a targeted victim.).
\end{small}
There have been a number of cases addressing threats made by juveniles where courts have found a violation of Chapter 275, Section 2.\(^99\)

Next, a number of subsections of Chapter 265 of the Massachusetts General Laws, which deals with “Crimes Against the Person,” have implications for sexual harassment. Section 43A lays out the definitions and penalties of criminal harassment.\(^100\) The statute defines criminal harassment as:

> Whoever willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress, shall be guilty of the crime of criminal harassment and shall be punished by imprisonment in a house of correction for not more than 2 ½ years or by a fine of not more than $1,000, or by both such fine and imprisonment. The conduct or acts described in this paragraph shall include, but not be limited to, conduct or acts conducted by mail or by use of a telephonic or telecommunication device or electronic communication device. . . .\(^101\)

Therefore, many of the experiences of students who are harassed or bullied do rise to the definition of criminal harassment, including the newer forms of cyber bullying. Section 37 deals specifically with violations of civil rights and related punishments.\(^102\) This sections states:

> No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the commonwealth or by the constitution or laws of the United States . . . .\(^103\)

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101. Id. § 43A(a).


103. Id.
Therefore, in Massachusetts, LGBTQ-identifying persons have a right not to be attacked because of their sexual orientation, as it is a protected right under Massachusetts law.\textsuperscript{104} Lastly, Section 39 deals with crimes motivated by gender identity and sexual orientation, through a narrower focus than the previous section.\textsuperscript{105} It specifically addresses crimes of assault and battery against persons or property motivated by such person’s gender identity or sexual orientation.\textsuperscript{106} Given that a majority of LGBTQ-identifying students experience harassment at school, and a majority of the general student population experience sexual harassment, this legislation could be vital in protecting students from both of these types of harassment.\textsuperscript{107}

Lastly, on May 10, 2010, “An Act Relative to Harassment Prevention Orders” (codified as Chapter 258E of the Massachusetts General Laws) became effective, affording victims of sexual assault, stalking, and harassment legal protections.\textsuperscript{108} The legislation includes three definitions of harassment:

(i) 3 or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property . . . ;

(ii) an act that:

(A) by force, threat or duress causes another to involuntarily engage in sexual relations; or

(B) constitutes a violation of section 13B [indecent assault and battery (“A&B”) on a child], 13F [indecent A&B on a mentally retarded person], 13H [indecent A&B], 22 [rape], 22A [forcible rape of a child], 23 [statutory rape], 24 [assault with intent to rape], 24B [assault with intent to rape a child], 26C [enticement of a child], 43 [criminal stalking] or 43A [Criminal harassment] of chapter 265 or section 3 of chapter 272 [drugging for sexual intercourse].\textsuperscript{109}

\textsuperscript{106} Id.
\textsuperscript{107} See Kosciw et al., supra note 33; see Hostile Hallways, supra note 30.
Chapter 258E also allows for four types of judicial orders against the defendant: (1) not to harass or abuse the plaintiff; (2) not to contact the plaintiff; (3) to stay away from the plaintiff’s home or workplace and/or (4) to pay for losses directly resulting from the conduct of the defendant.\footnote{Id. § 3(a).} As noted above, many acts of bullying fulfill the definition of criminal harassment, which would fulfill the third definition of harassment under Chapter 258E. Further, harassment based on gender or sexuality easily fits into the first definition outlined in this statute. While the primary advocates for this legislation were sexual violence prevention organizations,\footnote{See David Abel, Restraining-order filings unbound; As cases surge, court officials question Mass. law expansion, THE BOSTON GLOBE (Apr. 12, 2011) (Victim Rights Law Center was founded as the first law center in the nation dedicated solely to serving the legal needs of sexual assault victims within the civil context); 258E: An Act Relative to Harassment Prevention Orders, New England Learning Center for Women In Transition, (Aug. 2, 2010), http://www.nelcwit.org/258E%20info.pdf (NELCWIT serves Franklin County and the North Quabbin region of western Massachusetts, offering safety planning, advocacy, and support to anyone who has survived domestic or sexual abuse, and prevention education for its community).} it also has the potential to provide protection for students experiencing ongoing or severe harassment. However, at this time, there are no published decisions that have utilized a Harassment Prevention Order in this manner.

IV. Making Anti-Bullying and Anti-Harassment Laws Support Each Other

Anti-bullying and anti-harassment work do not have to be at odds with each other. There are a number of available methods with which to align the current anti-bullying legislation with anti-harassment legislation. It is up to the administration to provide education to the students, teachers, and the larger community if these laws are to be understood and taken seriously. The bullying prevention and intervention plans mandated under the new anti-bullying law are two means of educating, although each would be more effective if the curriculum included discussions of harassment and additional laws in place to protect students in conjunction with the new anti-bullying legislation. This section examines the current school practices, how anti-bullying and anti-harassment education could work together,
and legislation that could lead to more effective harassment and bullying prevention.

A. Current School Practices

The following section examines the anti-bullying plans of the three most populated school districts in Massachusetts (Boston, Springfield, and Worcester),\textsuperscript{112} as well as the student codes of conduct and anti-harassment policies available on their respective websites.

1. Boston Public Schools

Boston Public Schools (BPS) worked with the City of Boston to create an Anti-Bullying Hotline for the city, under the theory that students and families may be more inclined to report instances of bullying anonymously.\textsuperscript{113} The BPS website includes a number of prevention and intervention activities for parents and the larger community, created in conjunction with the Bullying Prevention and Research Institute.\textsuperscript{114} While the guide for parents is entitled \textit{Bullying Prevention: A Guide for School Personnel and Parents}, the definition of bullying could encompass gender or sexual identity harassment.\textsuperscript{115} There are also three district-wide educational programs that address bullying prevention specifically.\textsuperscript{116} It is important to note that BPS has a Campaign to End Sexual Harassment, partnering with the Hyde Square Task Force, showing its commitment to address more wide

\textsuperscript{112} \textit{Massachusetts Ten Largest School Districts}, \texttt{Alliance for Excellent Education}, http://www.all4ed.org/about_the_crisis/schools/state_and_local_info/Massachusetts/10_largest_districts (last visited May 22, 2013).

\textsuperscript{113} \textit{Anti-Bullying Resources}, \texttt{Boston Public Schools}, http://www.bostonpublicschools.org/antibullying (last visited May 22, 2013).

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} \textit{Bullying Prevention: A Guide for School Personnel and Parents}, \texttt{Boston Public Schools}, http://www.bostonpublicschools.org/files/general_brochure_web_11-4-11a.pdf (last visited May 22, 2013) (“Bullying is a form of emotional or physical abuse that has three defining characteristics: (1) Deliberate: A bully’s intention is to hurt someone, (2) Repeated: A bully often targets the same victim again and again, (3) Power imbalanced: A bully chooses victims he or she perceives as vulnerable. Bullying is different from conflict, fights or disagreements.”).

\textsuperscript{116} \textit{Anti-Bullying Resources}, supra note 113.
spread issues than bullying itself. The program encourages “young women and their allies to identify harassment and take action in their community to stop it.” The BPS Office of Equity also operates an Anti-Harassment Hotline, similar to the Anti-Bullying Hotline.

Finally, the BPS Code of Conduct addresses both bullying and harassment prevention. Moreover, it states “[i]n accordance with the United States Constitution and applicable federal and state laws and regulations, students have the right to participate fully in classroom instruction and extracurricular activities regardless of race, color, ethnicity, national origin, religion, sex, sexual orientation, handicap, disability, or age.” It is the responsibility of BPS students to “[r] espect the diversity of staff and students in the Boston Public Schools with regard to race, color, ethnicity, national origin, religion, sex, marriage, pregnancy, parenthood, sexual orientation, primary language, handicap, special needs, age, and economic class.” Harassment and bullying are both offenses that could result in discipline.

2. Springfield Public Schools

The Springfield Public Schools (SPS) has a number of publications available on its website dealing with anti-harassment and anti-bullying policies. The SPS Anti-Harassment Policy states: “In the education context, harassment by administrators, teachers, certified and support personnel, students, vendors, and other individuals at school or at school-sponsored events based on a student’s race, color, sex, gender identity, religion, national origin or sexual orien-

2 Id.
3 Id.
4 Boston Public Schools Code of Conduct, Boston Public Schools, (Sept. 2010), http://www.bostonpublicschools.org/files/bps/Code%20of%20Conduct.pdf (“The Boston Public Schools strives to develop and to implement programs and approaches to learning and discipline that will . . . assure students that they can learn in a non-disruptive atmosphere and can be treated in a fair, consistent, and nondiscriminatory manner.”).
5 Id. at 5.
6 Id. at 7.
7 Id. at 15-18.
tation is unlawful and is strictly prohibited.” The Bullying Policy states: “Bullying is a major distraction from learning and both the target and the perpetrator suffer significant negative consequences when engaged in this type of anti-social behavior.” Further, the policy is set forth “for the identification and reporting of bullying for the overall goal of the protection of students and their ability to learn in a safe environment.” The policy borrows the definition of bullying from Chapter 71, Section 37O of the Massachusetts General Laws, which, as mentioned previously, easily encompasses harassment based on gender or sexual identity. The SPS Code of Conduct provides definitions and disciplinary actions for cases of harassment, sexual harassment, violations of civil rights, and bullying. The Student-Parent Handbook also similarly addresses issues of both harassment and bullying.

3. Worcester Public Schools

Like Boston Public Schools, Worcester Public Schools (WPS) developed an Anonymous Bullying Reporting Hotline. WPS also developed bullying prevention curriculum with health educators for each education level, and the middle and high school levels include prevention goals broader than bullying alone. The WPS Anti-Bullying Plan defines bullying as an “act of intentionally causing harm

10 Bullying Policy, SPRINGFIELD PUB. SCH., 1 (May 13, 2010), http://www.sps.springfield.ma.us/webContent/Policies/BullyingPolicy.pdf.
11 Id.
12 Id.
to others through verbal harassment, physical assault, or other more subtle methods of coercion, such as manipulation.” 17 The plan also includes cyberbullying, which it defines as “an unwelcome electronic act where a student feels coerced, intimidated, harassed or threatened and, under the circumstances, may cause: 1) physical or emotional harm to a student, or 2) disruptive or hostile school environment.” 18

WPS also works with the larger community in its bullying prevention, joining forces with the Worcester Juvenile Court and a number of additional community partners to create the B.R.A.C.E. Program (Bullying Remediation and Court Education), which provides anti-bullying education and court diversion workshops for students and their caregivers. 19

Finally, the WPS Policies Handbook covers both harassment and bullying. 20 According to the WPS Policies Handbook, acts of bullying could result in legal charges (Criminal Harassment, 21 Harassing or Annoying Phone Calls, 22 Threats, 23 Civil Rights Violations 24). WPS is attempting to bridge the gap between harassment and bullying by explaining how bullying behavior violates a number of laws.

18  Id.
22  Id.
B. Current Legislative Initiatives

While the anti-bullying legislation has started important community conversations, there are still major gaps that need to be addressed in protecting our youth from harassment and bullying. Community education and proposed legislation at the state and federal levels can begin to fill these gaps. With the passage of Title IX and the subsequent guidance materials, there has been a growing focus on the prevention of sexual harassment in secondary schools and institutions of higher education. There is also a more nascent push for specific anti-homophobia education to address many of the same school climate issues that lead to sexual harassment. These are currently being advanced by large national non-profits such as the Human Rights Campaign and the Gay, Lesbian Straight Education Network (GLSEN), as well as communities themselves like Los Angeles, California.

Advocates are advancing a number of initiatives on a national level. First, the Safe Schools Improvement Act (SSIA) would “amend the Elementary and Secondary Education Act to require schools and districts receiving federal funds to adopt codes of conduct specifically prohibiting bullying and harassment, including on the basis of sexual orientation and gender identity.” Further, the SSIA would mandate state reporting, which would allow the Department of Education to


collect data on bullying and harassment, which would be reported to Congress in a biennial report.\textsuperscript{30} National laws, such as the SSIA, are extremely important, because it sets a base level of rights for students across all of the states. The SSIA also will create a collection of data on bullying and harassment, which will help in the tailoring of future legislation to address specific issues that may still remain after the implementation of the SSIA.

The Student Non-Discrimination Act (SNDA), modeled after Title IX’s protections against gender-based harassment, prohibits “public schools from discriminating against any student on the basis of actual or perceived sexual orientation or gender identity.”\textsuperscript{31} In addition, the SNDA extends protections to allies of LGBTQ-identifying or LGBTQ-perceived individuals.\textsuperscript{32} Victims would be able to pursue a legal remedy through a judicial proceeding, and the SNDA further protects them from retaliation.\textsuperscript{33} Finally, the SNDA would allow federal authorities to address discrimination made unlawful by the bill.\textsuperscript{34} Title IX has proven very instrumental in protecting female students from harassment on school campuses, so it seems rational to create a parallel scheme to protect the rights of LGBTQ students.

Finally, the Tyler Clementi Higher Education Anti-Harassment Act seeks to tie federal student aid to the prohibition of harassment and the creation of anti-harassment programs at institutions of higher education.\textsuperscript{35} The bill creates a competitive grant program through the Department of Education, in which the same institutions can “apply for funding to initiate, expand or improve programs that prevent the harassment of students; provide counseling to victims or perpetrators; or educate or train students, faculty and staff about ways to prevent or address harassment.”\textsuperscript{36} Specifically, the legislation requires the creation of policies that:

\begin{itemize}
\item \textsuperscript{30} Id.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id.
\item \textsuperscript{36} Id.
\end{itemize}
prohibit harassment of enrolled students by other students, faculty, and staff based on actual or perceived race, color, national origin, sex, disability, sexual orientation, gender identity or religion and requires colleges to distribute their anti-harassment policy to all students and employees, including prospective students and employees upon request.\textsuperscript{37}

The bill focuses on the prevention of cyberbullying as well.\textsuperscript{38} Unfortunately, bullying and harassment does not end once high school ends, and the Tyler Clementi Higher Education Anti-Harassment Act will help to further a supportive and inclusive environment within the system of higher education. Further, as these national initiatives become law, they will help to advance the same supportive and inclusive environment within the larger community, as the students become leaders themselves in their own communities.

Successful initiatives and ideas are not limited to the national arena. In fact, “[t]here is a growing consensus among early-education experts . . . that unless young people are taught at an early age how to recognize and control aggressive and disruptive impulses, the effectiveness of such legislative action is akin to winking in the dark.”\textsuperscript{39} Consider “Project 10,” a district-wide program in Los Angeles that provides “sensitivity training on sexual-orientation issues and how to recognize and prevent discrimination, bullying and harassment of students to more than 35,000 teachers and administrators.”\textsuperscript{40} Further, California is one of only ten states that protect students from bullying based on sexual orientation and one of five states that protect students’ gender identity or expression.\textsuperscript{41} Other communities can learn from programs like “Project 10” in creating their own anti-harassment initiatives.

While there is no current statewide program in Massachusetts, “The Safe Schools Program for Gay & Lesbian Students” was founded

\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{40} Zonkel, \textit{supra} note 5.
\textsuperscript{41} Id.
in 1993 through a partnership between the Department of Elementary and Secondary Education and the Governor’s Commission on Gay and Lesbian Youth. The Program provided grants “to districts to assist in developing violence prevention programs to enhance school safety for gay and lesbian students consistent with the Student Anti-Discrimination Law and the Board of Education’s Recommendations on the Support and Safety of Gay and Lesbian Students.” Currently, the Massachusetts Department of Elementary and Secondary Education makes a number of recommendations to school districts regarding effective anti-homophobia programs.

The Gay, Lesbian Straight Education Network (GLSEN) notes that “when proper services are provided, such as anti-harassment policies that protect LGBTQ students, they serve as protective factors against both at-school victimization and subsequent health risk behaviors.” GLSEN identifies three guidelines for school districts to help LGBTQ youth overcome barriers in their schools: (1) “[e]stablish strict anti-harassment policies that include sexual orientation and gender identity/expression;” (2) “[p]rovide education at every level (students, staff, and faculty) to increase awareness about the issues and myths surrounding orientation and gender identity/expression;” and (3) make student counseling and community resources available for LBGT youth “to receive mental health services and support.”

V. Conclusion

The stories of Carl Walker-Hoover and Phoebe Prince, along with the many more young people who are tormented by their peers, should inspire more conversations and legislation to combat the types

43 Id.
45 Scott Poland, LGBT students need support at school: homophobia in districts is widespread—and can have tragic results, Dist. Admin., (Jan. 1, 2010 12:00 AM), available at http://www.districtadministration.com/article/lgbt-students-need-support-school.
46 Id.
of environments that lead to this behavior. However, the Massachusetts anti-bullying statute may not provide the kind of pressure on school districts for which advocates had hoped. Without any mechanism to hold schools accountable for the persistent obliviousness of the peer-to-peer harassment on campus, there can be no expectation of change. Furthermore, there are a number of laws that can also provide protections, through fines or prison sentences, which may change the behavior of the individual actors.

Community education and the further refinement of anti-harassment initiatives have the potential to foster school environments in which students will not feel unsafe and threatened, as Carl Walker-Hoover and Phoebe Prince most likely felt when making the decision to take their own lives. Despite the limited nature of the new anti-bullying legislation, it has shown the community’s interest in protecting youth from bullying and harassment.

Schools have already begun to provide education to their staff and students to combat the hostile environments that have become so pervasive. Nevertheless, it is vital to combine the bullying prevention efforts with additional education regarding the forms of harassment and the additional legal remedies afforded victims of harassment. These small steps will together add up to create momentum and significant progress in the fight against harassment and bullying.