

Cyber-Bullying The Legislative Response



NW3C Research Brief

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Over the past few years, high profile cases of cyber-bullying have prompted many states and schools to consider appropriate responses to the problem. This research brief will discuss the definition of cyber-bullying, the current progress of cyber-bullying legislation and the challenges lawmakers face concerning our freedom of speech.

Following the recent increase in media attention on cyber-bullying, many groups have been calling for stricter laws, guidelines, and policies. Although many states have updated their laws to account for some form of cyber victimization, challenges still exist. While this topic and the legislation surrounding it are still evolving, this brief will discuss how cyber-bullying has been defined, why legislation has been created, the current cyber-bullying laws, and how these new laws affect our freedom of speech.

What Is Cyber-Bullying?

Cyber-bullying has no universally accepted definition. In general, however, most definitions involve the traditional concepts of bullying and applying them to analogous behaviors that take place online or via instant messaging on cell phones. Blogs and web sites that cater specifically to those issues that most appeal to a youthful audience and that afford a platform from which to harass, attack and humiliate are beginning to emerge, offering new opportunities for those who would engage in crimes over the Internet.

“The angst and ire of teenagers is finding new, sometimes dangerous expression online—precipitating threats, fights, and a scourge of harassment that parents and schools feel powerless to stop. The inside story of how experts at Facebook, computer scientists at MIT, and even members of the hacker collective *Anonymous* are hunting for solutions to an increasingly tricky problem.”¹

While many states have added the term “cyber-bullying” to their anti-bullying statute, choosing to leave it undefined, some states have specifically defined cyber-bullying.

¹ How to stop Cyberbullying, The Atlantic Magazine, March 2013 http://www.theatlantic.com/magazine/archive/2013/03/how-to-stop-bullies/309217/?single_page=true Retrieved April 9, 2013

The state of Nevada explicitly defines cyber-bullying as “bullying through the use of electronic communication.”² Nevada further defines “bullying” as an intentional act by a student to another student repeatedly which is highly offensive to a reasonable person and is intended to cause and actually causes the student to suffer harm or serious emotional distress and “electronic communication” as the communication of any written, verbal or pictorial information through the use of an electronic device.³ The state of Massachusetts expands on the topic by defining cyber-bullying as “bullying through the use of technology *or* any electronic communication.”⁴ While New Hampshire does not define electronic devices, it defines cyber-bullying as “bullying through the use of electronic devices.”⁵ Unlike Massachusetts and New Hampshire, which only assess forms of bullying in their definitions, Oregon includes the use of any electronic device *to intimidate, harass, or bully* in their cyber-bullying definition.⁶

While some states have carefully defined cyber-bullying, others have chosen to leave the term undefined. Leaving it undefined can be valuable. For instance, when a statute doesn’t define the meaning of a term, it is left to the jury to decide its meaning when it’s used during a trial. By leaving it up to the people to decide, the term can become what the common man believes it to be at that time. On the other hand, leaving this term undefined leaves people with less guidance as to what behaviors are against the law, making it harder to know in advance if one’s actions may carry legal sanctions.

For the purposes of this article, as an all-inclusive definition, when the term “cyber-bullying” is used, it means any malicious act of communication online. Please note that this definition may not be the definition of cyber-bullying that is used in your state or school.

New Legislation Created

Traditionally, schools have always had policies prohibiting bullying. Although in many cases the school’s existing policies may be seen as sufficient to handle issues of cyber-bullying, the trend seems to be that state legislatures wish to see some consistency in the way schools address the problem. As of November 2010, seventeen states have adopted legislation requiring schools to have cyber-bullying policies.⁷ Other states include bullying through online communications within their definition of cyber-bullying found in their anti-bullying statutes.⁸ Many states are also adding instances of online harassment to their anti-harassment statutes, or creating a new statute solely for online harassment.

Although there have always been forms of bullying between people of all ages, the internet has provided a new venue for these acts. Lawmakers could not have envisioned the use of the internet and today’s high tech

² Nev. Rev. Stat. Ann. §388.123 (West 2010).

³ Nev. Rev. Stat. Ann. §388.122 (West 2010); Nev. Rev. Stat. Ann. §388.124.

⁴ Mass. Gen. Laws Ann. ch.71 §370 (West 2010).

⁵ N.H. Rev. Stat. Ann. §192-F:2, F:3-5 (West 2010).

⁶ OR. Rev. Ann. §339.351 (West 2010).

⁷ See Ark. Code Ann. §6-18-514 (West 2010); Cal. Educ. Code §§32260; 32262 (West 2010); G.A. Code Ann. §20-2-751.4 (West 2010); Idaho Code Ann. Sec 18-917A (West 2010); Ill. Comp. Stat. Ann. §5/27-13.3 (West 2010); Iowa Code Ann. §280.28 (West 2010); Kan. Stat. Ann. § 72-8256 (West 2010); KY. Rev. Stat. Ann. §525.080 (West 2010); MD. Code Ann. Crim. Law §7-424 (West 2010); Mass. Gen. Laws Ann. ch.71 §370 (West 2010); Miss. Code Ann. ch.508 §1 (West 2010); Nev. Rev. Stat. Ann. §338.121-139 (West 2010); N.H. Rev. Stat. Ann. §192-F:2, F:3-5 (West 2010); N.C. Gen. Stat. §14-458.1 (West 2010); OR. Rev. Ann. §339.351 (West 2010); S.C. Code Ann. §59-63-110 (West 2010); WYO Stat. Ann. §§21-4-311; 21-4-315 (West 2010).

⁸ See, Alaska Stat. §11.61.120 (West 2010); Ariz. Rev. Stat. §13-2921 (West 2010); Col. Rev. Stat. §18-9-111 (West 2010); Haw. Rev. Stat. Ann. §711-1106 (West 2010); KY. Rev. Stat. Ann. §525.080 (West 2010); Mass. Gen. Laws Ann. ch.71 §370 (West 2010); Neb. Rev. State. Ann. §79-2,137 (West 2010); Okla. Stat. Ann. §70-24-100.4 (West 2010); TN Code Ann. §39-17-308 (West 2010); Utah Code Ann. §76-9-201 (West 2010); VA Code Stat. §18.2-152.7:1 (West 2010); Wash. Rev. Code Ann. §28A.300.285 (West 2010).

communication devices when bullying and harassment legislation was originally adopted. Statutes that were created to deal with in-person harassment or bullying may not always apply to analogous online behaviors.

Another reason new legislation has been created concerning cyber-bullying is that there have been a few documented and well publicized cases within the last decade where teens have committed suicide in part due to instances of cyber-bullying. For example, Missouri updated its harassment law in response to the suicide of Megan Meier. Thirteen year old Megan Meier committed suicide believing her “Myspace” boyfriend sent her messages telling her that the world would be better off without her, when really it was another classmate’s mother who was pretending to be her boyfriend.⁹ After the story of Megan Meier spread, Missouri quickly updated its existing harassment law to more clearly cover bullying via the internet. The updated version of the law now covers any act done to frighten, intimidate or emotionally distress another person, cause that person to be frightened, intimidated, or emotionally distressed, with that person’s response to the act being of average sensibilities considering the age of that person.¹⁰ The updated law also removes the requirement for illegal harassment to be either written or over the telephone.¹¹ These changes help clarify the law applicable to harassment from computers, text messages, and other electronic devices. It also increases the sanction for harassment from a misdemeanor to a felony if committed by a person twenty-one years of age or older against a person seventeen years of age or younger.¹² Megan’s hometown of Dardenne Prairie, Missouri passed a law making cyber harassment a misdemeanor.¹³ There was also a federal law introduced in reaction to Megan Meier’s story named “The Megan Meier Cyberbullying Prevention Act.”¹⁴ Other states have also responded to similar events with legislation named the victim, Megan Meier. Massachusetts passed a bill¹⁵ known as “Phoebe’s Law” after Phoebe Prince, a fifteen year old girl who committed suicide after being bullied in school and on the social media site “Facebook”. The new Massachusetts anti-bullying law has required all schools to develop anti-bullying prevention plans, included bullying on the internet in its definition of bullying, and required school employees to report all instances of bullying. Vermont also passed an anti-bullying law after the tragic suicide of Ryan Halligan, a thirteen year old who was bullied online. After Ryan’s death, his father lobbied for laws to be passed in Vermont to improve how schools address bullying. The “Act toward Bullying Prevention” was passed by the Vermont Legislature shortly after Ryan’s death.¹⁶

While most of the eighteen states that have adopted legislation against cyber-bullying rely to some degree on administrative school policies against student- on -student cyber-bullying, there are some states that have addressed cyber-bullying with criminal sanctions. By adopting cyber-bullying initiatives as part of, or in addition to school discipline statutes, state legislatures seem to be cognizant of the fact that the problem may be unique to the school-age population. The problem seems to gravitate toward the younger portion of our population. “Smartphone ownership among teens has grown substantially; tablets are also taking hold, as close

⁹ Sameer Hinduja and Justin W. Patchin, “Bullying beyond the school yard: preventing and responding to cyberbullying” (2009). Retrieved from http://books.google.com/books?hl=en&lr=&id=SU5RTJcOk68C&oi=fnd&pg=PR1&dq=cyberbullying&ots=Dq9xHMJleu&sig=1dj6YFi_tgstqWsiolqP3Lc301A#v=onepage&q&f=false on December 14, 2012.

¹⁰ MO Rev. Stat. §565.090 (1)(6) (West 2011).

¹¹ MO Rev. Stat. §565.090 (West 2011), Harassment

¹² MO Rev. Stat. §565.090 (2)(1) (West 2011).

¹³ See DARDENNE PRAIRIE, MO., MUNICIPAL CODE § 201.030 (2007);

¹⁴ “The Megan Meier Cyberbullying Prevention Act” Retrieved from (<http://www.gpo.gov/fdsys/pkg/BILLS-111hr1966ih/pdf/BILLS-111hr1966ih.pdf>): on April 8, 2013.

¹⁵ “Phoebe’s law” Retrieved from <http://www.malegislature.gov/Bills/186/Senate/S2323> on March 16, 2013.

¹⁶ “Bullying Prevention Policy Law” Retrieved from <http://www.rvanpatrickhalligan.org/documents/BillH629HEDComPassedVersion042204.htm> on March 16, 2013.

to one in four teens say they have one of these devices. Taken together, teens have more ways than ever to stay connected throughout the day – and night”¹⁷

The best avenue for punishment of cyber-bullying, however, remains unclear. Some legislatures may choose to give schools the authority to address cyber-bullying because schools are in a better position to educate the cyber bully as to appropriate online and social behavior, as well as to determine and oversee appropriate punishment. This flexibility allows school districts to create policies that coincide with the unique nature of the community and the particular level of cyber-bullying each individual school district faces. Where a student complains of being victimized by a cyber-bully but the ultimate damage seems limited to hurt feelings, it may be more appropriate for the school to hold the perpetrator accountable for violation of school policy and take remedial actions to educate the perpetrator and possibly use the situation as an example from which others in the system can benefit. In this case, the reaction of the school may better fit the offense addressing the proscribed behavior while sparing the perpetrator a criminal mark on their record. Other jurisdictions may choose to impose criminal sanctions on those who violate specific statutes against cyber-bullying depending on the specific circumstances surrounding a particularly grievous situation such as the highly publicized suicides that have resulted from cyber-bullying.

The Spectrum of Laws Addressing Cyber-Bullying

While the federal government has not enacted specific cyber-bullying legislation, there are several federal laws that are related to cyber-bullying. One of these is Section 875 of the U.S. Code, which criminalizes the sending of “any threat to injure the person of another” through any means of communication.¹⁸ Many cases of Cyber-bullying may also be prosecuted under The Telephone Harassment Act. This act criminalizes the use of anonymous communications, including those on the internet “with intent to annoy, abuse, threaten or harass.”¹⁹ However, it applies only to direct communications between the person behind the communication and the victim, such as an email between two people, and not a public blog post written by one person about another person.

Of the seventeen states²⁰ that have adopted legislation specifically against cyber-bullying, two of those states, Nevada and North Carolina, have imposed criminal charges on those found guilty of their cyber-bullying statute.²¹ Also, many states without explicit cyber-bullying criminal laws may already have laws that incorporate certain aspects of cyber-bullying into criminal laws that are already in place. For example, many states have a criminal statute for threats, some of which include online threats in the definition.²² Many states also include harassment online within their criminal harassment statutes.²³ The Illinois criminal statute for electronic harassment includes the “transmitting an electronic communication or knowingly inducing a person

¹⁷ PEW Research Center, [Teens and Technology 2013](http://www.pewInternet.org/~media/Files/Reports/2013/PIP_TeensandTechnology2013.pdf) http://www.pewInternet.org/~media/Files/Reports/2013/PIP_TeensandTechnology2013.pdf Retrieved March 1, 2013

¹⁸ 18 U.S.C. § 875 (2003), Criminal Offenses

¹⁹ 47 U.S.C. § 223 (2003), Obscene or Harassing Communications.

²⁰ See footnote 8

²¹ See Nev. Rev. Stat. Ann. § 392.915 (West 2010) (Threatening to cause bodily harm or death to a pupil or school employee by means of electronic communication); N.C. Gen. Stat. § 14-458.1 (West 2010) (With intent to intimidate or torment a minor, build a fake profile or website; pose as a minor in an internet chat room, an electronic mail message, or an instant message; follow a minor online or into an internet chat room; or post or encourage others to post on the internet a private, personal or sexual information pertaining to a minor).

²² See VA Code Ann. § 18.2-60 (West 2011); 13 V.S.A. § 1061 (West 2011); GA Stat Ann. § 53a-182b (West 2011).

²³ See Alaska Stat. § 11.61.120 (West 2010); Ariz. Rev. Stat. § 13-2921 (West 2010); Ill. Comp. Stat. Ann. § 135/1-3 (West 2010); KY. Rev. Stat. Ann. § 525.080 (West 2010); Mass. Gen. Laws ch. 265 § 43A (West 2010); TN Code Ann. § 39-17-308 (West 2010); Utah Code Ann. § 76-9-201 (West 2010); VA Code Stat. § 18.2-152.7:1 (West 2010).

to transmit an electronic communication for the purpose of harassing another person who is under 13 years of age.”²⁴ Further, the state of Kentucky includes student electronic harassment within their criminal statute for electronic harassment.²⁵ While not every state has a specific cyber-bullying criminal statute, most states have criminal statutes such as harassment or criminal threats that could encompass many instances of cyber-bullying.

What About Your Right To Free Speech?

Cyber-bullying legislation presents a challenge for lawmakers because it implicates the freedom of speech. While the Constitution affords every person the right to free speech²⁶, that right is not absolute. The Supreme Court has recognized that certain speech, including fighting words²⁷ and true threats,²⁸ are generally not protected by the First Amendment. One Court explained that the ‘fighting words’ concept has two aspects, one involves the quality of the words themselves and the other concerns the circumstances under which the words are used.²⁹

The fighting words doctrine is “narrowly confined”³⁰ to situations involving face to face insults which, it is feared, will provoke a reasonable person to violence. Therefore, instances of student-on-student cyber-bullying may be protected by the First Amendment because they cannot qualify as ‘fighting words’ since they are not face to face insults. For example, the court held in *Layshock v. Hermitage School Dist.* that a student’s “MySpace” internet page is not outside of the protections of the First Amendment under the fighting words doctrine because there is simply no in-person confrontation in cyberspace such that physical violence is likely to be instigated.³¹

However, there is emerging case law holding that e-mails containing personally abusive epithets can constitute fighting words. In August 2009, for instance, the Maryland Court of Special Appeals-the state's intermediate appellate court-in *Davidson v. Seneca Crossing Section II Homeowner's Association, Inc.*³² considered a case involving a series of e-mails which included personally abusive words. The Court held that “it is clear from the record and the findings of fact that much of appellant's behavior consisted of the use of “fighting words” which [were] inherently likely to provoke violent reaction.”³³ As the situation continues to evolve, the courts will no doubt be called upon to further clarify up the considerable ambiguity surrounding this issue.

“True threats” encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals.³⁴ The Courts however, set forth no particular definition or description of a true threat that distinguishes an unprotected threat from protected speech. Therefore, lower courts have been left to decide when a statement triggers the government's interest in preventing the disruption and fear of violence associated with a threat. All courts that

²⁴ Ill. Comp. Stat. Ann. §135/ 3.1(West 2010).

²⁵ KY. Rev. Stat. Ann. §525.080 1(c) (West 2010).

²⁶ U.S. Const. Amend. I (“Congress shall make no law respecting as establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech...”); see also U.S. Const. amend. XIV, §1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.”).

²⁷ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

²⁸ *Watts v. United States*, 394 U.S. 705, 707 (1969).

²⁹ *Connecticut v. Hoskins*, 401 A.2d 619, 621 (Conn. Super. Ct. 1978).

³⁰ John F. Wirenius, *The Road Not Taken: The Curse of Chaplinsky*, 24 Cap. U. L. Rev. 331, 362 (1995).

³¹ *Layshock v. Hermitage School Dist.* 496 F.Supp.2d 587

³² *Davidson v. Seneca Crossing Section II Homeowner's Association, Inc.*, 979 A.2d 260 (Md. Ct. Spec. App. 2009).

³³ *Davidson*, 979 A.2d at 283 (quoting *Dziekonski v. Maryland*, 732 A.2d 367, 372 (Md. 1999)).

³⁴ *Watts v. United States*, supra, at 708, 89 S.Ct. 1399(1969).

have addressed “true threats” have consistently adopted an objective test that focuses on whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm.³⁵ However, courts are divided in determining from whose viewpoint the statement should be interpreted. Some ask whether a reasonable person standing in the shoes of the speaker would foresee that the recipient would perceive the statement as a threat, whereas others ask how a reasonable person standing in the recipient's shoes would view the alleged threat.³⁶

While current cyber-bullying legislation varies in its treatment of student Internet speech, especially that of off-campus student Internet speech, there are guiding principles that are typically followed. A majority of states that have created legislation regarding cyber-bullying requires school districts to enact cyber-bullying policies. Some of these policies include not only instances of cyber-bullying that occur on school grounds, but also instances of cyber-bullying that take place off school grounds. The states of Arkansas and Massachusetts specifically allow school districts to discipline students for off-campus cyber-bullying,³⁷ while the states of Delaware and New Jersey allow school districts to discipline students for off-campus bullying, including electronic bullying.³⁸ The states of California, Iowa, Nebraska, and South Carolina specifically require the cyber-bullying to have occurred on school property, at a school function or a school-sponsored event, or on a school bus.³⁹ Other states with similar cyber-bullying legislation require schools to develop cyber-bullying policies, but do not mention whether the school district has the authority to regulate cyber-bullying that occurs off school grounds.⁴⁰

Although the Supreme Court has yet to rule on a case of student Internet speech, lower courts and legislatures have applied Supreme Court precedent governing offline speech to online speech⁴¹. The Supreme Court decided in *Tinker vs. Des Moines School District* that First Amendment rights must be “applied in light of the special characteristics of the school” and that undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.⁴² Under the *Tinker* standard, student speech may be suppressed if it amounts to a substantial or material disruption or invades the rights of other students.⁴³

A number of the states incorporate *Tinker* by including the phrase “substantial disruption to the orderly operation of the school,” or words to that effect, in their cyber-bullying statutes.⁴⁴ There is no precise test for what defines a “substantial disruption,” but a state court has reasoned that there must be more than some mild distraction or curiosity created by the speech, while “complete chaos is not required.”⁴⁵

³⁵ *United States v. Fulmer*, 108 F.3d 1486, 1490-91 (1st Cir.1997) (describing the differing circuit approaches to ascertaining a true threat).

³⁶ Compare *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1075 (9th Cir.2002) (en banc), with *United States v. Malik*, 16 F.3d 45, 49 (2d Cir.), cert. denied, 513 U.S. 968, 115 S.Ct. 435, 130 L.Ed.2d 347 (1994).

³⁷ Ark. Code Ann. §6-18-514 (West 2010); Mass. Gen. Laws Ann. ch.71 §370 (West 2010).

³⁸ Del. Code. Ann. tit.14, § 4112D(f) (West 2010); N.J. Stat. Ann. §33-4 (West 2010).

³⁹ Cal.Educ. Code Ann. §48900 (West 2010); Iowa Code §280.23 (West 2010); S.C. Code Ann. 59-63-120;140 (West 2010); Neb. Rev. Stat. Ann. §79-2,137 (West 2010).

⁴⁰ See Cal. Educ. Code Sec. §§32260; 32262 (West 2010); OR. Rev. Stat. Ann. §339.356 (West 2010);

⁴¹ See *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 603-04 (2007) (recognizing the Supreme Court has not articulated a standard to judge off-campus speech).

⁴² *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 507 (1969).

⁴³ *Id.* at 509,513.

⁴⁴ See, e.g., Ark. Code Ann. §6-18-514(a)(3)(A) (West 2010) (prohibiting “[an] electronic ... act ... that causes or creates a clear and present danger of ... substantial disruption of the orderly operation of the school or educational environment”); Mass. Gen. Laws Ann. ch.71 § 370 (West 2010) (prohibiting “bullying that 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”); S.C. Code Ann. §59-63-120(1)(b) (West 2010); Wash. Rev. Code Ann. §28A.300.285(2)(d) (West 2010) (prohibiting an act that “[h]as the effect of substantially disrupting the orderly operation of the school”).

⁴⁵ *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 869 (Pa 2002).

However, the concern with this approach is that the regulation of student speech online that occurs off school grounds may give schools the ability to monitor and control student conduct in what was previously a private concern. Further, expansive theories of a school's educational mission could allow the school to decide to monitor even student personal conversations. The Supreme Court likely did not intend to give schools the go-ahead to monitor all interpersonal communication between students. The majority in *Tinker* stated Constitutional freedoms are "... not confined to the supervised and ordained discussion which takes place in the classroom, but extends to such activities as personal intercommunication among the students."⁴⁶ On the other hand, student speech that occurs off school grounds can still affect the productivity of the school. The Court in *Tinker* made clear that student speech that materially disrupts a school's ability to carry out its educational mission will not be protected by free speech by stating "... conduct by the student, in class or out of it, which for any reason -- whether it stems from time, place, or type of behavior -- materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."⁴⁷

The use of electronic communications and the Internet by adults and minors have made cyber-bullying an issue reaching people of various ages. Cyber-bullying legislation and policies have varied in their definitions of cyber-bullying, the ages of people it includes, when it can be criminalized, and when schools can intervene in student speech.

To become more educated on the status of cyber-bullying legislation in your state and policies relating to cyber-bullying in schools, the following website is available: <http://www.ncsl.org/default.aspx?tabid=20753>.

For information for parents about child safety online can be located at: <http://www.netismartz.org/Parents>

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⁴⁶ *Tinker v. Des Moines Sch. Dist.*, 393 U.S. at 513.

⁴⁷ *Id.* note 61 at 513.