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## Note

# The Fight Against Oppression in the Digital Age: Restructuring Minnesota's Cyberbullying Law to Get with the Battle

Bryan Morben\*

## INTRODUCTION

Thirty-nine—the number of kids aged ten to nineteen that committed suicide in Minnesota, according to a 2007 Minnesota Department of Health study.<sup>1</sup> Bullying is a common factor in a large number of the teen suicides that take place each year.<sup>2</sup> But bullying in today's world is not like it was ten years ago. The rapidly increasing use of technology, especially social media, is providing a new medium for bullying.<sup>3</sup> This relatively new phenomenon, dubbed “cyberbullying,” has also created many challenges for officials trying to respond.<sup>4</sup> One of the

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\* JD Candidate, 2014, University of Minnesota Law School. The author would like to give thanks to the editors and staff members of MJLST who put a lot of hard work into the final version of this Note, to Mr. Michael Bradley of Bradley & Guzzetta who graciously reviewed drafts and provided valuable feedback and suggestions, and to Sasha Lee who supplied constant encouragement and support.

1. *Suicide Trends in Minnesota*, MINN. DEP'T HEALTH, <http://www.health.state.mn.us/divs/cfh/connect/index.cfm?article=suicideprevention.suicidetrend> (last visited July 29, 2013).

2. See, e.g., Elizabeth Baier, *Bullying Is Common Factor in Suicide Deaths of Two Teens in Southeastern Minn.*, MPR NEWS (May 10, 2012), <http://minnesota.publicradio.org/display/web/2012/05/10/bullying-common-factor-suicide-deaths/> (“Thirteen-year-old Rachel Ehmke . . . committed suicide April 29 [2012] after she faced bullying at school . . . 17-year-old Jay ‘Corey’ Jones jumped off a bridge [on May 6, 2012]. Friends and family [of Jones] say bullying played a role in his death.”).

3. Renee L. Servance, Comment, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1218 (2003).

4. *Id.*

major issues schools are trying to deal with is punishing the bullies when the conduct takes place outside of the schoolyard.<sup>5</sup>

Schools that have tried to discipline students whose cyberbullying occurs off-campus have had difficulties when challenged in the courts.<sup>6</sup> As a result, many states have turned to legislation to resolve these issues.<sup>7</sup> Forty-nine states have anti-bullying laws, and forty-seven of those include electronic harassment.<sup>8</sup> Only eighteen, however, specifically include “cyberbullying.”<sup>9</sup> Minnesota’s bullying statute does include “electronic forms” of bullying,<sup>10</sup> but otherwise does comparatively little to deal with the problem of cyberbullying.<sup>11</sup>

This Note will explore some of the difficulties in dealing with cyberbullying, the importance of finding a better solution, and how Minnesota’s current cyberbullying law can be drastically improved by analyzing pending legislation. Part I will examine exactly what cyberbullying is and how it differs from traditional bullying. In addition, Part I provides an overview of how cyberbullying is currently being dealt with nationally. Part II will analyze the problems with Minnesota’s existing approach and propose additional requirements that

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5. See generally Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257 (2008) (discussing the need for school districts to have more discretion to punish off-campus cyberbullying).

6. One major problem may be that school districts lack clear guidance on how to address cyberbullying and then discipline under the wrong standard. See, e.g., *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207 (3d Cir. 2011) (finding that “the school district’s response to [bullying] transcended the protection of free expression guaranteed by the First Amendment”); *Mahaffey ex rel. Mahaffey*, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002); *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998). But see, e.g., *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 567 (4th Cir. 2011); *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 40 (2d Cir. 2007) (finding that “the First Amendment claims against the School Board and the Superintendent were properly dismissed”).

7. See generally SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RESEARCH CTR., STATE CYBERBULLYING LAWS: A BRIEF REVIEW OF STATE CYBERBULLYING LAWS AND POLICIES (2013) [hereinafter STATE CYBERBULLYING LAWS], available at [http://www.cyberbullying.us/Bullying\\_and\\_Cyberbullying\\_Laws.pdf](http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf).

8. *Id.* at 1.

9. *Id.*

10. MINN. STAT. § 121A.0695 (2012).

11. See Judy Kuczynski, *Bully Police USA*, BULLYPOLICE.ORG, [http://www.bullypolice.org/mn\\_law.html](http://www.bullypolice.org/mn_law.html) (last visited July 29, 2013).

the legislature should incorporate into a new law. This Note concludes that Minnesota's cyberbullying law is in dire need of restructuring and suggests that Minnesota adopt new legislation that encompasses the key components set out by the Department of Education to help keep the state's youth safe and free from harmful harassment.

## I. BACKGROUND

### A. WHAT IS CYBERBULLYING?

Cyberbullying may be defined as “the use of the Internet or other digital communication devices to insult or threaten someone.”<sup>12</sup> Cyberbullying can be conducted through a number of media, including emails, instant messaging text or pictures, and posts on social networking sites, web pages, and blogs.<sup>13</sup> “Examples of cyberbullying include mean text messages or emails, rumors sent by email or posted on social networking sites, and embarrassing pictures, videos, websites, or fake profiles.”<sup>14</sup> Cyberbullies most often know their victims and are usually classmates, but they can also be online acquaintances or even anonymous users.<sup>15</sup>

#### 1. How Does Cyberbullying Differ from Traditional Bullying?

There are many important differences between cyberbullying and traditional bullying, i.e., face-to-face bullying in school.<sup>16</sup> One of the major differences is that cyberbullying can happen anywhere, at any time.<sup>17</sup> It can occur twenty-four hours a day, seven days a week, and it can reach the victims even when they are alone at home.<sup>18</sup> Traditional bullying is

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12. Jaana Juvonen & Elisheva F. Gross, *Extending the School Grounds?—Bullying Experiences in Cyberspace*, 78 J. SCH. HEALTH 496, 497 (2008).

13. Chris Webster, *What Is Cyberbullying?*, CYBERBULLYING.INFO, [http://www.cyberbullying.info/resources/downloads/ChrisWebster\\_WhatIsCyberbullying.pdf](http://www.cyberbullying.info/resources/downloads/ChrisWebster_WhatIsCyberbullying.pdf) (last visited July 29, 2013).

14. U.S. Dep't of Health & Human Servs., *What Is Cyberbullying?*, STOPBULLYING.GOV, <http://www.stopbullying.gov/cyberbullying/what-is-it/index.html#whycyberbullying> (last visited July 29, 2013).

15. *What Is Cyberbullying?*, NAT'L CRIME PREVENTION COUNCIL, <http://www.ncpc.org/topics/cyberbullying/what-is-cyberbullying> (last visited July 29, 2013) [hereinafter NAT'L CRIME PREVENTION COUNCIL].

16. See U.S. Dep't of Health & Human Servs., *supra* note 14.

17. *Id.*

18. *Id.*

generally limited to school-time hours when the bullies have access to their victims.<sup>19</sup> Another big difference is the anonymity of cyberbullying.<sup>20</sup> Cyberbullying messages and images can be posted anonymously and distributed quickly to a wide audience, which can make it difficult to trace the source.<sup>21</sup> This lack of identification can leave the victim feeling more powerless and unable to avoid the bully, in contrast to traditional bullying where a bully might be avoided.<sup>22</sup> The anonymity that cyberbullying provides also brings with it a sense of dis-inhibition; it gives the bully “courage” to engage in behavior that he or she might not otherwise engage in face-to-face.<sup>23</sup> Finally, the reach of cyberbullying is much more extensive than traditional bullying.<sup>24</sup> A text message or picture can be forwarded throughout the entire school, and postings online can be viewed by even more people.<sup>25</sup> It only takes seconds for these types of messages to be disseminated to thousands, and deleting the inappropriate or harassing information can be nearly impossible once it is posted or sent.<sup>26</sup>

## 2. How Common Is Cyberbullying?

According to a Cyberbullying Research Center report, “[e]stimates of the number of youth who experience cyberbullying vary widely (ranging from 10–40% or more), depending on the age of the group studied and how cyberbullying is formally defined.”<sup>27</sup> The report, emphasizing

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19. Hazelden Found., *What Is Cyber Bullying?*, VIOLENCEPREVENTIONWORKS.ORG, [http://www.violencepreventionworks.org/public/cyber\\_bullying.page](http://www.violencepreventionworks.org/public/cyber_bullying.page) (last visited July 29, 2013).

20. *Id.*

21. *Id.*

22. *See id.* (arguing that unlike traditional bullying, victims of cyberbullying cannot even get away to the safety of their own homes or bedrooms).

23. *Id.* (arguing that this “anonymity [is what] allows some individuals to bully at all”).

24. NAT’L CRIME PREVENTION COUNCIL, *supra* note 15.

25. *Id.* (“It can be far reaching. Kids can send emails making fun of someone to their entire class or school with a few clicks, or post them on a website for the whole world to see.”).

26. U.S. Dep’t of Health & Human Servs., *supra* note 14.

27. SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RESEARCH CTR., CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE 1 (2010), available at [http://www.cyberbullying.us/Cyberbullying\\_Identification\\_Prevention\\_Response\\_Fact\\_Sheet.pdf](http://www.cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf).

that the definition of cyberbullying had to include repeated conduct, found that “about 20% of the over 4400 randomly-selected 11–18 year-old students in 2010 indicated they had been a victim at some point in their life.”<sup>28</sup> The study also showed that about the “same number admitted to cyberbullying others,” and about ten percent had been both a victim as well as an offender.<sup>29</sup> While “traditional bullying is still more common than cyberbullying,” the two “are closely related: those who are bullied at school are bullied online,”<sup>30</sup> and the inverse also seems likely to be true.

The study above only represents students that have been repeatedly cyberbullied.<sup>31</sup> In actuality, it only takes one time to be a victim. Around half of teenage online users have been cyberbullied at least once.<sup>32</sup> The lack of reporting is a major factor in the varying statistics on the prevalence of cyberbullying.<sup>33</sup> Most reports show that ninety percent of victims will not inform a parent or trusted adult of their abuse.<sup>34</sup> Additionally, one in three teens has experienced online threats.<sup>35</sup> According to a June 2011 Consumer Reports survey, “[o]ne million children were harassed, threatened, or subjected to other forms of cyberbullying on [Facebook] in the past year.”<sup>36</sup>

The prevalence of cyberbullying is only increasing as the use and capabilities of technology advance.<sup>37</sup> Nearly 70% of

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28. *Id.*

29. *Id.*

30. Justin W. Patchin, *Remarks to the Minnesota Task Force on the Prevention of Bullying*, CYBERBULLYING RES. CENTER (May 22, 2012), <http://cyberbullying.us/remarks-to-the-minnesota-task-force-on-the-prevention-of-bullying>.

31. HINDUJA & PATCHIN, *supra* note 27, at 1.

32. *Cyber Bullying Statistics*, BULLYING STATISTICS, <http://www.bullyingstatistics.org/content/cyber-bullying-statistics.html> (last visited July 30, 2013).

33. *See id.* (“Fewer than 1 in 5 cyber bullying incidents are reported to law enforcement.”).

34. *Id.*

35. *Id.*

36. *That Facebook Friend Might Be 10 Years Old, and Other Troubling News*, CONSUMER REP., <http://www.consumerreports.org/cro/magazine-archive/2011/june/electronics-computers/state-of-the-net/facebook-concerns/index.htm> (last visited Oct. 20, 2013).

37. Brian Wiseman, *Cyberbullying in Schools: A Research Study on School Policies and Procedures* 8 (May 1, 2011) (unpublished Ph.D.

teens own their own computer or smartphone; over 95% of teens are online; and 80% of those teens use social networking sites to communicate with peers, with 93% of teen social media users using Facebook.<sup>38</sup> As cyberbullying becomes more common, more needs to be done to respond to and prevent further abuse.

### 3. What Effects Does Cyberbullying Have?

Cyberbullying can be harmful to children in a number of ways, including negatively impacting their health, education, and social lives.<sup>39</sup> House Bill 1966, or the “Megan Meier Cyberbullying Prevention Act,” named after a young girl who committed suicide after being cyberbullied on MySpace,<sup>40</sup> states that “[c]yberbullying can cause psychological harm, including depression; negatively impact academic performance, safety, and the well-being of children in school; force children to change schools; and in some cases lead to extreme violent behavior, including murder and suicide.”<sup>41</sup> One representative testified, “[b]ullying leads to things like poor school performance, absences from school, or even dropping out of school altogether.”<sup>42</sup> Victims of cyberbullying can also suffer short-term effects including anxiety and fear, as well as long-term effects including depression, low self-esteem, and compromised educational opportunities.<sup>43</sup>

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dissertation, University of Nevada, Las Vegas), *available at* <http://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1912&context=thesesdissertations> (“As the quantity and popularity of social networking continues to soar, so do the opportunities for the misuse of technology. Because of this, cyberbullying is a phenomenon that is drastically increasing in prevalence.”).

38. *Internet and Social Networking Usage Among Teens*, END TO CYBER BULLYING ORG., <http://www.endcyberbullying.org/cyber-bullying-statistics/internet-and-social-networking-usage-among-teens/> (last visited July 30, 2013).

39. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. § 2(5) (2009).

40. Ryanick Paige, *The Megan Meier Cyberbullying Prevention Act*, YAHOO!VOICES (June 11, 2009), <http://voices.yahoo.com/the-megan-meier-cyberbullying-prevention-act-3471297.html?cat=17>.

41. H.R. 1966 § 2(5).

42. *Cyberbullying and Other Online Safety Issues for Children: Hearing on H.R. 1966 and H.R. 3630 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 22 (2009) (statement of Rep. Linda T. Sánchez).

43. *See id.*; H.R. 1966 § 2(4)–(5).

Cyberbullying can have a negative impact not only on the victims, but also on the bullies.<sup>44</sup> The offenders can suffer maladaptive social interactions, increased criminality, dysfunctional relationships, and alcohol and substance abuse.<sup>45</sup> If left untreated, depression, emotional distress, and anxiety can carry into adulthood.<sup>46</sup>

When crafting potential solutions to deal with cyberbullying, these effects and their future consequences must be kept in mind. In addition, certain responses to cyberbullying face many other limitations.<sup>47</sup> For example, students' free speech and other constitutional rights are extremely susceptible to infringement. Courts have been very cautious to avoid violating those rights.<sup>48</sup>

## B. JUDICIAL RESPONSES TO CYBERBULLYING

### 1. U.S. Supreme Court Precedent Related to Student Speech

Schools have been battling to keep student speech in check for a long time.<sup>49</sup> Whether the speech occurs in or out of school,

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44. Deborah Carpenter & Christopher J. Ferguson, *Impact of Cyber Bullying*, NETPLACES, <http://www.netplaces.com/dealing-with-bullies/cyberbullying/impact-of-cyber-bullying.htm> (last visited July 30, 2013).

45. *Id.*

46. Mary E. Muscari, *Sticks and Stones: The NP's Role with Bullies and Victims*, 16 J. PEDIATRIC HEALTH CARE 22, 24 (2002) (stating that childhood bullies often develop "serious antisocial and criminal behavior in adulthood" and "[t]hey typically drop out of school, have trouble holding jobs, and fail at maintaining positive close relationships").

47. *See* Erb, *supra* note 5, at 259 ("Judges often use traditional legal doctrines that leave students... without the protection of either the educational or law enforcement community. Consequently, the use of cyberbullying as a new means of harassing one's peers has fallen into a virtual 'no-man's-land' of legal liability.").

48. *Id.* at 260 ("[S]chools are limited in their ability to punish off-campus cyberbullying incidents because courts have continually granted such speech First Amendment protection.").

49. *See, e.g.*, *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). *Barnette* was the first Supreme Court case recognizing student free speech rights. *Cyberbullying: Supreme Court Student Speech Cases*, UNIV. N.C. SCH. L., <http://www.unc.edu/courses/2010spring/law/357c/001/Cyberbully/supreme-court-student-speech-cases.html> (last visited Sept. 10, 2013). Students successfully challenged a school rule requiring all students to salute the American flag or face expulsion. *Barnette*, 319 U.S. at 642 ("[T]he action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect



many students that are disciplined by the school for their speech have challenged their penalties in court.<sup>50</sup> The most popular and widely applied standard for limiting student speech was announced by the United States Supreme Court in *Tinker v. Des Moines Independent Community School District*.<sup>51</sup> The *Tinker* Court held that student speech that “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school” is not protected by the Constitution.<sup>52</sup> This test applies to behavior affecting school discipline, class work, and, most important in terms of cyberbullying, the rights of others inside or outside of school.<sup>53</sup> Finally, in order to meet the “material and substantial disruption” standard, a school must show a reasonable factual basis for foreseeing a substantial disruption or a material interference with school-related matters or the invasion of the rights of others.<sup>54</sup>

Three other Supreme Court cases prescribe narrow rules relating to the restriction of student speech.<sup>55</sup> But these other cases have little or no relation to off-campus cyberbullying

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and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”).

50. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 396–98 (2007) (discussing a student who was suspended for ten days for bringing a banner stating “BONG HiTS 4 JESUS” at an off-campus, school-approved activity); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677–78 (1986) (involving a student who was punished for giving a speech in front of 600 students that contained an “elaborate, graphic, and explicit sexual metaphor”).

51. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1968) (discussing a school that suspended eight students who wore and refused to take off black armbands at school in protest of the Vietnam War).

52. *Id.* at 513.

53. *Id.*

54. *Id.* at 514. The Court found that the armbands were a silent and passive expression of opinion that did not intrude upon the rights of the school or of others, caused no threats of violence on campus, and there was no indication of any disruption inside the classrooms or the school, and therefore, the students should not have been suspended. *Id.* at 508.

55. *Morse*, 551 U.S. at 397 (holding that on-campus student speech that promoted the use of illegal drugs was not protected under the Constitution); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (“[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”); *Fraser*, 478 U.S. at 685 (holding that on-campus lewd, graphic sexual speech by a student is not protected by the Constitution).

speech.<sup>56</sup> Lower courts have thus had little guidance when trying to apply this precedent to the novel cases where the student speech at issue is happening online and away from campus.<sup>57</sup>

## 2. Application of *Tinker* to Cyberbullying Cases

Courts today generally use the *Tinker* test, with some additional nuances, to analyze specific cases of cyberbullying that affect students in the public school system.<sup>58</sup> The first factor courts examine is whether Internet speech originating on personal computers is “on-campus” or “off-campus” speech.<sup>59</sup> If the court does find a sufficient nexus between the speech and the school campus, it will then examine whether the speech substantially or materially disrupted the learning environment.<sup>60</sup> If the Internet speech actually disrupted or foreseeably could have disrupted the school’s learning environment, the administration’s disciplinary measures will most likely be upheld.<sup>61</sup>

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56. *What Can Schools Do to Combat Cyber-bullying Without Running Afoul of the First Amendment?*, FOX, ROTHSCHILD LLP (Mar. 2010), <http://www.foxrothschild.com/newspubs/newspubsArticle.aspx?id=14125> (“Notably, however, [*Tinker*, *Fraser*, *Morse*, and *Hazelwood*] dealt with on-campus speech, and one—the *Fraser* case—dealt with sexually explicit speech at a school assembly. The issue now confronting the courts is whether and how these tests apply to off-campus speech—usually online speech—that makes its way onto campus.”).

57. *Cf. id.* (explaining that “lower courts will apply one or more” of the tests enumerated in *Tinker*, *Fraser*, *Morse*, and *Hazelwood* to online speech, “rather than create a new test”).

58. Erb, *supra* note 5, at 261. For a much more detailed analysis, see Erb, *supra* note 5, at 257, 263–72.

59. *Id.* at 263 n.49 (“Several courts have considered the question of whether off-campus emails or website postings constitute on-campus or off-campus speech but have come to different conclusions.”).

60. *Id.* at 266 (“In determining the magnitude of the disruption, courts will consider factors such as: the reaction of the students and teachers to the speech, whether any students or teachers had to take time off from school because of the speech, whether teachers were incapable of controlling their classes because of the speech, whether classes were cancelled, and how quickly the administration responded to the speech.” (footnotes omitted)); see *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1968).

61. Erb, *supra* note 5, at 266.

When courts have applied this test, however, the results have been less than satisfying for school administrations.<sup>62</sup> Many cases have interpreted the “substantial disruption” benchmark of *Tinker* in a way that sets the bar incredibly high to uphold school district disciplinary measures taken against cyberbullies.<sup>63</sup> In *Mahaffey v. Aldrich*, for example, a student created a web page that contained a list of students he wished would die, and included a “mission” for all those reading the website to “[s]tab someone for no reason[,] then set them on fire[,] throw them off a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face.”<sup>64</sup> The school district determined that the web site content violated the school’s internet and intimidation policies and disciplined him.<sup>65</sup> The Michigan district court, however, found the school district’s disciplinary measures unconstitutional and that they could not be upheld under the *Tinker* standard since there was “no evidence that the web site interfered with the work of the school or that any other student’s rights were impinged.”<sup>66</sup>

The *Mahaffey* case is a good example of how difficult it has been for schools to fight cyberbullying in the court system. Furthermore, the courthouse has also been inadequate for the victims seeking redress either civilly or criminally under existing legal remedies.<sup>67</sup> Because of the inadequacies of

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62. *Id.* at 265 (stating that the majority of courts applying the *Tinker* test “have found that Internet speech created off-campus cannot be subject to the jurisdiction of school disciplinary action”).

63. *Id.* at 267–68; *see, e.g.*, *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177, 1182 (E.D. Mo. 1998) (finding that a student website criticizing the school and using vulgar language did not satisfy the *Tinker* test); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 781–82, 790 (E.D. Mich. 2002) (finding that a student website that promoted satanic and violent messages did not satisfy the *Tinker* test).

64. *Mahaffey*, 236 F. Supp. 2d at 782.

65. *Id.*

66. *Id.* at 784.

67. Erb, *supra* note 5, at 275–80. The primary problem with criminal law as a remedy is that a lot of cyberbullying behavior doesn’t fit under current criminal law. *Id.* at 275. Most states would only be able to charge the cyberbullies with harassment or stalking, both of which usually require a higher threshold of culpability as well as a mens rea requirement. *Id.* at 275–76. Similarly, civil remedies are also insufficient in many cases. *Id.* at 277. Many comments made about teachers or administration on the internet do not specifically impute their capabilities as a teacher; rather, they “contain vulgar comments, violent parodies, or sexually explicit references.” *Id.* In

current laws in addressing cyberbullying, many states have turned to adopting new legislation or modifying the current laws.<sup>68</sup> When taking this approach, legislators must still be aware of these court standards when drafting these new laws. In other words, they must draft laws that adopt, or at least work around, judicial rules such as the *Tinker* test, or face the same fate of a judicially stricken law.

### C. LEGISLATIVE RESPONSES TO CYBERBULLYING

“In 2007, only five state laws . . . explicitly addressed bullying through electronic communications.”<sup>69</sup> As of July 2013, forty-seven states now have bullying laws that include electronic harassment, but only eighteen of those include “cyberbullying.”<sup>70</sup> Forty-nine of the states require a school policy on bullying, and unfortunately, that is about all the law does for most.<sup>71</sup> Only eleven of the laws include off-campus behaviors.<sup>72</sup> Experts note that “[t]he lack of a statutory reference to provisions that would address off-campus speech that has had a significant disruption at school reflects a lack of understanding about the legal standard.”<sup>73</sup>

This lack of understanding is one major reason why state legislation is necessary in order to provide better prevention and responses to cyberbullying. A clear cyberbullying statute mandates policies that might not be implemented otherwise because of a school’s fear of infringing on students’ constitutional rights.<sup>74</sup> Most school policies do not mention off-

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these situations, actions for defamation have rarely been successful. *Id.* at 277. Students have been afforded even less protection because “they do not have professional reputations in the community that can be slandered.” *Id.* at 278–79. Moreover, civil suits can be long and expensive. *Id.* at 279.

68. See HINDUJA & PATCHIN, *supra* note 7, at 1.

69. ROBIN M. KOWALSKI, SUSAN P. LIMBER & PATRICIA W. AGATSTON, *CYBERBULLYING: BULLYING IN THE DIGITAL AGE* 188 (2d ed. 2012) (stating that those states are “Arkansas, Idaho, Iowa, South Carolina, and Washington”).

70. HINDUJA & PATCHIN, *supra* note 7, at 1.

71. *Id.*

72. *Id.*

73. KOWALSKI ET AL., *supra* note 69, at 198.

74. Cf. Justin W. Patchin, *Do We Need Cyberbullying Legislation?*, CYBERBULLYING RES. CENTER (Aug. 6, 2009), <http://cyberbullying.us/do-we-need-cyberbullying-legislation/> (arguing that school administrators are looking for specific guidance for how to deal with cyberbullying and that legislation is one potential vehicle to do that).

campus speech or how the school would respond to such incidents; they do not mention the “substantial disruption” standard; and they do not discuss prevention, investigation, or the roles of specific school officials.<sup>75</sup>

Another important reason to enact cyberbullying legislation is to ensure uniformity of policies among various schools in a state. An investigation of school districts in Minnesota showed a “wide-ranging patchwork” of cyberbullying policies.<sup>76</sup> While three-quarters of districts and charters use a model policy provided by the Minnesota School Boards Association, other districts have as little as one paragraph.<sup>77</sup>

A third advantage of effective legislation is that it will bring the issue of cyberbullying to the attention of educators, parents, students, and other community members and educate them about how to prevent and respond to these situations.<sup>78</sup> Appropriate legislation will provide clear guidelines regarding how these actors should respond to certain situations.<sup>79</sup> And finally, the legislative process and the role politics plays encourages discussion and collaboration on different ideas.<sup>80</sup>

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Many cyberbullying laws, for example, simply direct school districts to deal with cyberbullying by updating their bullying/harassment policies. But they stop short of specifically guiding them about what elements ought to be included. Merely appending “and by electronic means” is clearly not enough. Almost all policies that I have seen in schools that I have worked with have taken this approach.

*Id.*

75. *Id.*

76. Tom Weber, *Breaking the Law? One-Third of Districts Don't Include Cyber-bullying in Policies*, MPR NEWS (May 17, 2011), <http://minnesota.publicradio.org/display/web/2011/05/15/cyber-bullying/>.

77. *Id.*

78. See Susan M. Swearer, Susan P. Limber & Rebecca Alley, *Developing and Implementing an Effective Anti-Bullying Policy*, in SUSAN M. SWEARER ET AL., BULLYING PREVENTION AND INTERVENTION: REALISTIC STRATEGIES FOR SCHOOLS 39, 39 (2009).

79. See Sameer Hinduja & Justin W. Patchin, *Fact Sheet: Cyberbullying Identification, Prevention, and Response*, CYBERBULLYING RES. CENTER, [http://www.cyberbullying.us/cyberbullying\\_identification\\_prevention\\_response.php](http://www.cyberbullying.us/cyberbullying_identification_prevention_response.php) (last visited Sept. 16, 2013) (“Parents often say that they don’t have the technical skills to keep up with their kids’ online behavior; teachers are afraid to intervene in behaviors that often occur away from school; and law enforcement is hesitant to get involved unless there is clear evidence of a crime or a significant threat to someone’s physical safety. As a result, cyberbullying incidents often slip through the cracks.”).

80. Joo-Cheong Tham, *The Benefits of Deliberation in the Political Process*, THE CONVERSATION (May 2, 2012, 10:12 AM),

The biggest criticism of cyberbullying legislation is that it will “chill” student free speech.<sup>81</sup> Some scholars make the argument that cyberbullying legislation will give school officials limitless discretion to push their own agendas rather than protect bullying victims.<sup>82</sup> Furthermore, critics argue that cyberbullying statutes that reach off-campus conduct will prevent students from writing about controversial topics from the privacy of their own homes because of repercussions that may occur based on the way people react at school.<sup>83</sup>

A big problem with many cyberbullying statutes is that they are vague, overbroad, or ban speech based on its content or viewpoint.<sup>84</sup> Laws that violate these basic constitutional doctrines are patently unconstitutional.<sup>85</sup> And some cyberbullying statutes are guilty of violating these doctrines.<sup>86</sup> For example, a statute that seeks to prohibit “intimidating speech” would certainly be vague since it is unclear and subjective as to what conduct qualifies as “intimidating.” Or a statute that banned “any unwelcome verbal conduct that offends another individual” would be facially overbroad as it would ban certain protected speech as well.<sup>87</sup> These issues are problems with many cyberbullying statutes today, but legislators can more effectively write the statutes to curb

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<http://theconversation.com/the-benefits-of-deliberation-in-the-political-process-6784>.

81. See, e.g., John O. Hayward, *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85, 92 (2011).

82. *Id.* at 91.

83. *Id.* at 91.

84. See *id.* at 118–22 (arguing that these types of statutes violate the First Amendment).

85. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395–96 (1992) (invalidating an ordinance prohibiting symbols that tend to arouse racial anger or alarm as viewpoint discrimination because it prohibited fighting words by bigots but not against them); *Gooding v. Wilson*, 405 U.S. 518, 519, 528 (1972) (invalidating a conviction of an antiwar demonstrator under a statute prohibiting the use of “opprobrious words or abusive language, tending to cause a breach of the peace” as overbroad); *Coates v. City of Cincinnati*, 402 U.S. 611, 620–21 (1971) (invalidating an ordinance that made it illegal for persons to assemble on a sidewalk and conduct themselves in a “manner annoying to other persons” on vagueness grounds).

86. See, e.g., *R.A.V.*, 505 U.S. at 395–96; *Gooding*, 405 U.S. at 528; *Coates*, 402 U.S. at 620–21.

87. Cf. *Gooding*, 405 U.S. at 527 (holding that statute swept in too much protected speech along with unprotected fighting words).

violating students' free speech while still protecting the victims better.<sup>88</sup>

The U.S. Department of Education (the Department) released a report in 2011 analyzing state bullying laws and policies.<sup>89</sup> The report lists and discusses eleven key components that are important to, and a part of the best, state bullying legislation.<sup>90</sup> These key components can be used to construct cyberbullying statutes that effectively avoid the problems raised by opponents of legislation.<sup>91</sup> As shown above, cyberbullying is an increasing threat to our nation's youth and their right to an uninhibited education. With such a high judicial bar to remedies in the courtroom, improved state legislation is the best answer.

#### D. U.S. DEPARTMENT OF EDUCATION'S KEY COMPONENTS

As previously mentioned, the Department released a report titled "Anti-Bullying Policies: Examples of Provisions in State Laws" in an effort to provide guidance on drafting appropriate state laws and policies.<sup>92</sup> "The Department identified [key policy] components based on their presence in at least two current state statutes and their potential to inform implementation at the state and local levels."<sup>93</sup> Discussion of the eleven key components of effective antibullying laws follows.

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88. Moreover, while it is a very fine line, we need to be more careful about the type of speech we are trying to protect as "free." Erb, *supra* note 5, at 283. Many students today are not protesting wars like in *Tinker*, but rather making very rude and vulgar comments about classmates and teachers, which may cross the line of obscenity or other unprotected speech. *Id.* ("Many times in cyberbullying cases, lawyers and judges get caught up in constitutional legalese and forget that they are dealing with the narrow issue of hateful and harassing speech from one child to another.").

89. VICTORIA STUART-CASSEL ET AL., ANALYSIS OF STATE BULLYING LAWS AND POLICIES (2011), available at <http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf>.

90. See *id.* at 21–35; see also *Key Components in State Anti-Bullying Laws*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/key-components/index.html> (last visited July 30, 2013).

91. See *Key Components in State Anti-Bullying Laws*, *supra* note 90 (enumerating "11 key components that may be useful to those who are creating or improving anti-bullying laws or policies in their states").

92. STUART-CASSEL ET AL., *supra* note 89, at 5.

93. *Id.*



## 1. Purpose Statement

A purpose statement “outlines the range of detrimental effects bullying has on students, including impacts on student learning, school safety, student engagement, and the school environment.”<sup>94</sup> It also “communicate[s] the importance of enacting the law” and “conveys explicit prohibitions against bullying and related behaviors.”<sup>95</sup> Oklahoma’s statute provides a good example:

The Legislature finds that bullying has a negative effect on the social environment of schools, creates a climate of fear among students, inhibits their ability to learn, and leads to other antisocial behavior. Bullying behavior has been linked to other forms of antisocial behavior, such as vandalism, shoplifting, skipping and dropping out of school, fighting, and the use of drugs and alcohol . . . Successful programs to recognize, prevent, and effectively intervene in bullying behavior have been developed and replicated in schools across the country. These schools send the message that bullying behavior is not tolerated and, as a result, have improved safety and created a more inclusive learning environment.<sup>96</sup>

Fifteen states have included purpose statements into specific statutes in their education codes to indicate the importance of the antibullying laws and help outline the legislative intent behind the laws.<sup>97</sup> “The most common themes [of these statements] emphasized the civil rights of students to be free from bullying and harassment, the need for safety and security of the school environment, the importance of positive school climate to support learning and achievement, or the detrimental effects of school bullying.”<sup>98</sup>

## 2. Statement of the Scope

The statement of the scope is “one of the most common components of state bullying legislation.”<sup>99</sup> The typical scope of

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94. *Key Components in State Anti-Bullying Laws*, *supra* note 90; see also STUART-CASSEL ET AL., *supra* note 89, at 22.

95. STUART-CASSEL ET AL., *supra* note 89, at 22.

96. OKLA. STAT. ANN. Tit. 70, § 24-100.3 (West 2005 & Supp. 2013). For additional examples of purpose statements, see 105 ILL. COMP. STAT. ANN. 5/27-23.7.a (West 2012); IOWA CODE ANN. § 280.28.1 (West 2011); N.J. STAT. ANN. § 18A:37.13 (West 2013); OR. REV. STAT. ANN. § 339.353 (West Supp. 2013); TENN. CODE ANN. § 49-6-4501 (2013).

97. STUART-CASSEL ET AL., *supra* note 89, at 22.

98. *Id.*

99. *Id.* at 23.



laws includes conduct that occurs on school grounds, at all school-sponsored activities or events (regardless of the location), on school buses or similarly provided transportation, or through school-owned technology.<sup>100</sup> As of July 2013, however, only eleven states include off-campus behavior within the scope of their cyberbullying laws.<sup>101</sup>

Massachusetts provides a great example of language found in legislation that incorporates the *Tinker* standard<sup>102</sup> and extends the scope to off-campus bullying acts.<sup>103</sup>

The law states that bullying is prohibited at any location, activity, or function that is not school-related, or using technology or devices that are not owned by the school “if 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.”<sup>104</sup>

School jurisdiction over off-campus conduct is particularly relevant to cyberbullying and is the area where school officials are most confused.<sup>105</sup>

Other examples of state laws that address off-campus conduct, specifically related to cyberbullying, include Arkansas’s statute that prohibits bullying by an electronic act “whether or not the electronic act originated on school property or with school equipment, if the electronic act is directed specifically at students or school personnel and maliciously intended for the purpose of disrupting school and has a high likelihood of succeeding in that purpose.”<sup>106</sup> To help minimize challenges to the statute, drafters may want to clarify that the

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100. *Key Components in State Anti-Bullying Laws*, *supra* note 90.

101. HINDUJA & PATCHIN, *supra* note 7, at 1.

102. MASS. GEN. LAWS ch. 71, § 37O(a) (2010) (prohibiting acts on- or off-campus that create a hostile environment at school).

103. *Id.* § 37O(b) (“Bullying shall be prohibited . . . at a location, activity, function or program that is not school-related . . .”).

104. STUART-CASSEL ET AL., *supra* note 89, at 24; *see* MASS. GEN. LAWS ch. 71, § 37O(b)(ii).

105. *See* Patchin, *supra* note 74 (suggesting that school administrators need guidance for dealing with cyberbullying); *see also* STUART-CASSEL ET AL., *supra* note 89, at 24 (“Experts argue . . . the need for schools to develop provisions for responding to any off-campus speech and behavior that results in ‘substantial disruption of the learning environment.’”).

106. STUART-CASSEL ET AL., *supra* note 89, at 24; *see* ARK. CODE § 6-18-514(e)(2)(B)(ii)(b) (2011).

policy is not meant to prohibit student expression protected under the First Amendment.<sup>107</sup>

### 3. Specified Prohibited Conduct

This component focuses on providing a specific definition of bullying and cyberbullying and including a non-exhaustive list of actions and conduct that meet the definitions.<sup>108</sup> “Experts argue that the way bullying is defined in law has important implications for how behavior is viewed within the school community and the extent to which school personnel and other students recognize and respond to bullying situations.”<sup>109</sup> By not providing clear definitions of bullying and other prohibited conduct, school personnel can have difficulty identifying and enforcing antibullying laws and policies, as well as do so inconsistently.<sup>110</sup> The statute should also be consistent with other federal, state, and local laws. An example of a statute enumerating prohibited conduct is Florida’s law, which says:

“Bullying” includes cyberbullying and means systematically and chronically inflicting physical hurt or psychological distress on one or more students and may involve: 1. Teasing; 2. Social exclusion; 3. Threat; 4. Intimidation; 5. Stalking; 6. Physical violence; 7. Theft; 8. Sexual, religious, or racial harassment; 9. Public humiliation; or 10. Destruction of property.<sup>111</sup>

Even though Florida’s law is a good example of one that lists specific prohibited conduct, including a specific definition of “cyberbullying” is critical, and it is something that the statute does not do. “The growth in cyberbullying behavior and the challenges it poses to schools has resulted in more states amending legislation to address cyberbullying among

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107. Swearer, Limber & Alley, *supra* note 78, at 42; *see also* STUART-CASSEL ET AL., *supra* note 89, at 24 (“These first amendment concerns are reflected in nine states’ statutes that each contains specific assurances that enforcement of school bullying policies shall not infringe upon a student’s right to free speech or expression.”).

108. STUART-CASSEL ET AL., *supra* note 89, at 6, 25.

109. *Id.*; *see also* Swearer, Limber & Alley, *supra* note 78, at 39 (“Well-written anti-bullying policies can lay the foundation for clear communication about expectations for appropriate behavior and consequences for bullying behaviors.”).

110. STUART-CASSEL ET AL., *supra* note 89, at 25; Swearer, Limber & Alley, *supra* note 78, at 41.

111. FLA. STAT. ANN. § 1006.147(3)(a) (West 2013).

students.”<sup>112</sup> Kansas’s statute is one example that includes a cyberbullying definition: “Cyberbullying’ means bullying by use of any electronic communication device through means including, but not limited to, e-mail, instant messaging, text messages, blogs, mobile phones, pagers, online games and websites.”<sup>113</sup> An even better statute would be one that combined the features of both Florida’s law and Kansas’s law.

#### 4. Enumeration of Specific Characteristics

“The enumeration of specific characteristics refers to the language in bullying legislation that conveys explicit legal protections for certain groups or classes of individuals, or for anyone bullied based on personal characteristics, such as physical appearance or sexual orientation.”<sup>114</sup> The laws most commonly reference groups that are covered under other federal antidiscrimination legislation, such as Title VII or the Americans with Disabilities Act, which include race, national origin, religion, sex or gender, and disability.<sup>115</sup>

While the use of enumerated characteristics in bullying legislation has been slightly controversial, good legislation will make clear that bullying does not have to be based on any particular characteristic.<sup>116</sup> Florida’s law, for example,

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112. STUART-CASSEL ET AL., *supra* note 89, at 27; *see also* HINDUJA & PATCHIN, *supra* note 7, at 1 (listing that eighteen states now specifically include “cyberbullying” in their statutes, while forty-seven states include “electronic harassment” or similar references); STUART-CASSEL ET AL., *supra* note 89, at 27 exhibit 9 (expressing that a number of states prohibit cyberbullying, yet do not define it).

113. KAN. STAT. ANN. § 72-8256(a)(2) (Supp. 2012).

114. STUART-CASSEL ET AL., *supra* note 89, at 27 (“Enumeration can be used in bullying legislation to limit the legal definition of bullying to acts that are motivated by characteristics, or it can be used more symbolically to communicate that discrimination against certain groups will not be tolerated.”).

115. *Id.* at 28–29 (“Other characteristics that appear in state laws include ethnicity, gender identity or expression, family status, physical appearance, weight, marital status, socioeconomic status, age, academic status, and association with protected groups or individuals, regardless of whether the target is a group member.”).

116. *See id.* at 29 (“Proponents in favor of inclusion argue that naming groups provides a clear directive to schools about the need to safeguard populations that are most vulnerable to bullying, without affecting protections for other students . . . . Other experts advise against the inclusion of protected classes in legislation, arguing that bullying should be defined solely based on behavior and not on the characteristics of students who are bullied. They also

explicitly prohibits harassment based on sex, religion, or race,<sup>117</sup> but it also requires that each school district's bullying policy "afford all students the same protection regardless of their status under the law,"<sup>118</sup> while allowing districts to "establish separate discrimination policies that include categories of students."<sup>119</sup> The U.S. Supreme Court has supported the use of enumeration of groups in law by arguing that it provides an "essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply."<sup>120</sup>

## 5. Development and Implementation of LEA Policies

Every state except Montana requires school districts to develop and implement local education agency (LEA) policies to respond to bullying in schools.<sup>121</sup> "Statutes typically require districts to create and adopt school policies according to established deadlines and some set expectations for states to review policies to ensure compliance."<sup>122</sup> Most state laws prescribe a variety of minimum components that must be covered in district policies.<sup>123</sup> A number of other states require

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argue that the highly politicized nature of the enumeration discussion often lengthens debate within state legislatures over which classes should or should not be protected in laws, delaying their enactment.").

117. FLA. STAT. ANN. § 1006.147(3)(a)(8) (West 2013).

118. *Id.* § 1006.147(4).

119. *Cf.* N.C. GEN. STAT. § 115C-407.15(a)(2) (2011) ("Bullying or harassing behavior includes, but is not limited to, acts reasonably perceived as being motivated by any actual or perceived differentiating characteristic, such as race, color, religion, ancestry, national origin, gender, socioeconomic status, academic status, gender identity, physical appearance, sexual orientation, or mental, physical, developmental, or sensory disability, or by association with a person who has or is perceived to have one or more of these characteristics."); WASH. REV. CODE ANN. § 28A.300.285(2) (West 2011) ("Nothing in this section requires the affected student to actually possess a characteristic that is a basis for the . . . bullying.").

120. *Romer v. Evans*, 517 U.S. 620, 628 (1996) (striking down a Colorado State Constitutional Amendment, which forbade the state and its agencies from enacting, adopting, or enforcing any laws or policies giving special legal protections to homosexuals, as a violation of the Equal Protection Clause).

121. *See* HINDUJA & PATCHIN, *supra* note 7, at 1.

122. STUART-CASSEL ET AL., *supra* note 89, at 29.

123. *Id.* at 30 ("Twenty-six states, for example, contain a designated section of statute that lists these policy provisions. Nine states require or encourage districts to develop content based on components of model policies created by state departments of education or school board associations.").

the development and adoption of bullying policies, but do not mandate any specific policy components.<sup>124</sup>

Nearly half of the states have also included “an additional provision requiring or encouraging local districts to develop policies through a collaborative process involving interested stakeholders.”<sup>125</sup> See, for example, Maryland’s law:

[1] Each county board shall establish a policy prohibiting bullying, harassment, or intimidation . . . [3] A county board shall develop the policy in consultation with representatives of the following groups: (i) Parents or guardians of students; (ii) School employees and administrators; (iii) School volunteers; (iv) Students; and (v) Members of the community.<sup>126</sup>

This type of collaboration is extremely beneficial to all the parties involved because it helps drive an open discussion about what types of policies are most needed for that specific state.<sup>127</sup> It also helps parents feel more involved and responsible,<sup>128</sup> which in turn helps increase the effectiveness and implementation of the policies and the statute as a whole.<sup>129</sup>

## 6. Components of LEA Policies

This “component” actually consists of six subcomponents that include “definitions of bullying, reporting, investigations and response, written records, sanctions, and mental health referrals.”<sup>130</sup> The definition of bullying should be consistent

124. *Id.* at 31.

125. *Id.* (“The types of stakeholders identified in laws parents or guardians, students, volunteers, school personnel, community representatives, and members of local law enforcement. Policy experts have suggested that this type of collaborative process promotes agreement about behavioral norms and expectations, ensures that community values are reflected in district policies, and promotes policy awareness throughout the school community.”); see also Bradford C. Lerman, *Addressing Bullying: Policy and Practice*, PRINCIPAL LEADERSHIP, Sept. 2010, at 34, 36, available at [http://www.nassp.org/Content/158/PLSept10\\_lerman1.pdf](http://www.nassp.org/Content/158/PLSept10_lerman1.pdf).

126. MD. CODE EDUC. § 7-424.1(c) (2010).

127. See *Key Components in State Anti-Bullying Laws*, *supra* note 90 (noting that the component helps LEAs “best address local conditions”).

128. *Cf.* MD. CODE EDUC. § 7-424.1(c) (2010) (including “[p]arents or guardians of students” in the list of those who should be involved in the consulting process).

129. *Cf.* *Key Components in State Anti-Bullying Laws*, *supra* note 90.

130. STUART-CASSEL ET AL., *supra* note 89, at 36.

with the definitions specified in state law, and as mentioned earlier, it should be sure to include cyberbullying.<sup>131</sup> Reporting

includes a procedure for students, students' families, staff, and others to report incidents of bullying, including a process to submit such information anonymously and with protection from retaliation. The procedure identifies and provides contact information for the appropriate school personnel responsible for receiving the report and investigating the incident.<sup>132</sup>

It also requires school personnel to report bullying incidents to a designated official.<sup>133</sup>

The investigation and response subcomponent generally includes a basic command that policies provide procedures for investigating reports of prohibited conduct.<sup>134</sup> Other states provide much more detailed expectations for investigations in policies.<sup>135</sup> Both methods are potentially effective, and states should decide on a case-by-case basis what would be most effective for them.

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131. See *id.* at 36, 91. For an example of one such statute, see OR. REV. STAT. ANN. § 339.356(2) (West Supp. 2013) ("School districts must include in the policy . . . (b) Definitions of 'harassment,' 'intimidation,' or 'bullying,' and of 'cyberbullying' that are consistent with [this statute].").

132. STUART-CASSEL ET AL., *supra* note 89, at 91; *Key Components in State Anti-Bullying Laws*, *supra* note 90; see also, e.g., GA. CODE ANN. § 20-2-751.4(c) (2012) ("Such . . . policy shall include: . . . (5) A procedure for a teacher or other school employee, student, parent, guardian, or other person who has control or charge of a student, either anonymously or in such person's name, at such person's option, to report or otherwise provide information on bullying activity; (6) A statement prohibiting retaliation following a report of bullying . . .").

133. STUART-CASSEL ET AL., *supra* note 89, at 91; *Key Components in State Anti-Bullying Laws*, *supra* note 90; see also, e.g., WIS. STAT. ANN. § 118.46(1)(a) (West Supp. 2012) ("The [policy on bullying] shall include all of the following: . . . (6) A requirement that school district officials and employees report incidents of bullying and identify the persons to whom the reports must be made.").

134. STUART-CASSEL ET AL., *supra* note 89, at 37 ("As an example, Delaware statutes contain a requirement that 'each school have a procedure for the administration to promptly investigate in a timely manner and determine whether bullying has occurred.'"); see DEL. CODE ANN. tit. 14, § 4112D(b)(2)(f) (Supp. 2012).

135. STUART-CASSEL ET AL., *supra* note 89, at 37–39 (expressing that some states specify that the policies must include immediate intervention strategies for protecting the victim from additional bullying or retaliation, and include notification to parents of the victim, or reported victim, of bullying and the parents of the alleged perpetrator, and, if appropriate, notification to law enforcement officials); see, e.g., MASS. GEN. LAWS ch. 71, § 370(g) (2010).

Policies should also require schools to maintain written records of all bullying incidents and the steps taken to address them.<sup>136</sup> “Researchers suggest that use of written reports and documentation are important for creating a record of bullying situations that can help monitor problems and how they are resolved.”<sup>137</sup> This type of monitoring may help reduce the total number of incidents over time since it can help locate where the problems are and what have been effective solutions in the past.

“Most state statutes reflect a traditional approach to intervening in bullying situations involving investigation and use of disciplinary sanctions or consequences to correct misconduct.”<sup>138</sup> Typically, the policies include “a detailed description of a graduated range of consequences and sanctions for bullying.”<sup>139</sup> This subcomponent, however, is one of the biggest problems related to cyberbullying.<sup>140</sup> As discussed previously, the statute should incorporate the *Tinker* standard for sanctions related to off-campus conduct. In order for the sanctions to pass judicial scrutiny, the off-campus conduct must meet the “substantial disruption” threshold.<sup>141</sup> By incorporating the standard directly into the statute, schools

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136. STUART-CASSEL ET AL., *supra* note 89, at 92; *Key Components in State Anti-Bullying Laws*, *supra* note 90. See generally CAL. EDUC. CODE § 234.1 (West, Supp. 2013) (“The department shall assess whether local educational agencies have done all of the following: . . . (e) Maintained documentation of complaints and their resolution for a minimum of one review cycle.”).

137. STUART-CASSEL ET AL., *supra* note 89, at 38.

138. *Id.*; see also Kathleen P. Allen, A Bullying Intervention System: Reducing Risk and Creating Support for Aggressive Students, 54 PREVENTING SCHOOL FAILURE 199, 206 (2010), available at [http://www.gearyschools.org/pages/uploaded\\_files/A%20Bullying%20Intervention%20System.pdf](http://www.gearyschools.org/pages/uploaded_files/A%20Bullying%20Intervention%20System.pdf).

139. STUART-CASSEL ET AL., *supra* note 89, at 92; *Key Components in State Anti-Bullying Laws*, *supra* note 90; see also, e.g., ALA. CODE § 16-28B-5 (LexisNexis 2012) (“The model policy, at a minimum, shall contain all of the following components: . . . [4] A series of graduated consequences for any student who commits an act of intimidation, harassment, violence or threats of violence. Punishment shall conform with applicable federal and state disability, antidiscrimination, and education laws and school discipline policies.”).

140. That is, schools are confused about when they can sanction off-campus conduct. See, e.g., Justin W. Patchin, *Do We Need Cyberbullying Legislation?*, CYBERBULLYING RES. CENTER (Aug. 6, 2009), <http://cyberbullying.us/do-we-need-cyberbullying-legislation/>.

141. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1968).



will likely understand better when off-campus conduct is sanctionable.

Finally, “[r]esearchers and practitioners have argued the importance of providing support for victims of bullying, including protections from continuing harm and mental health services.”<sup>142</sup> As of 2011, “[t]hirteen states have specific provisions that either require or encourage districts to respond to the mental health needs of victims.”<sup>143</sup> Like most of the other components, states vary widely with stringency of the requirements that are imposed.<sup>144</sup>

## 7. Review of Local Policies

According to the Department’s study, twenty states require districts to submit policies to a designated state agency for review.<sup>145</sup> The remaining states still require that districts develop local policies, but do not have any formal review procedures.<sup>146</sup> Several states require a formal review of policies at the state or county level, and some even threaten sanctions for districts that do not comply with the requirements of the law.<sup>147</sup> Prescribing a plan for formal review of local policies ensures maximum compliance with the purposes of a state

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142. STUART-CASSEL ET AL., *supra* note 89, at 39; *see also* Lerman, *supra* note 125.

143. STUART-CASSEL ET AL., *supra* note 89, at 39; *see generally* OKLA. STAT. tit. 70, § 24-100.4(A)(4) (2009) (stating that policies shall include a procedure whereby “a school may recommend that available community mental health care options be provided to the student, if appropriate”).

144. *See* STUART-CASSEL ET AL., *supra* note 89, at 39. *Compare* DEL. CODE tit. 14, § 4112D(b)(2)(a) (2012) (requiring “a procedure for communication between school staff members and medical professionals who are involved in treating students for bullying issues,” but not conveying any clear expectation that schools actually provide or link students to these services), *with* N.J. STAT. § 18A:37-15(b)(7) (2012) (requiring policies to articulate a range of possible responses to any identified incident of bullying, harassment, or intimidation, which “shall include an appropriate combination of services that are available within the district such as counseling, support services, intervention services, and other programs”).

145. STUART-CASSEL ET AL., *supra* note 89, at 31.

146. *Id.* at 31–32.

147. *Id.* at 32; *see, e.g.*, DEL. CODE tit. 14, § 4112D(b) (2012) (making state funding provided to districts through the Comprehensive School Discipline Improvement Program contingent upon state approval of each district’s bullying prevention policy); *see also* 105 ILL. COMP. STAT. 5/27-23.7(d) (2010) (“The policy must be updated every 2 years and filed with the State Board of Education after being updated. The State Board of Education shall monitor the implementation of policies created under [this subsection of the statute].”).



statute and helps catch any potential violations of students' constitutional freedoms before they are infringed. This component is a necessary compliment to requiring the development of the policies in the first place.<sup>148</sup>

## 8. Communication Plan

Clear communication of policies is essential to ensure that all members of the school community have a shared understanding of how bullying is defined, are knowledgeable about their personal responsibilities related to bullying in schools (e.g., expected conduct, requirements for reporting), and are aware of the consequences for violating school guidelines.<sup>149</sup>

Over four-fifths of state statutes set expectations for communication and publication of local policies.<sup>150</sup> These requirements vary broadly from simple orders to distribute policies to persons of interest (e.g., students, parents, and school personnel) to detailed requirements regarding the communication of policies.<sup>151</sup> Arkansas's statute provides a clear example of this component:

(2) The policies shall: . . . (F) Require that notice of what constitutes bullying, that bullying is prohibited, and the consequences of engaging in bullying be conspicuously posted in every classroom, cafeteria, restroom, gymnasium, auditorium, and school bus in the district; and (G) Require that copies of the notice . . . be provided to parents, students, school volunteers, and employees.<sup>152</sup>

This component also helps guard against vagueness in the statute, which can ultimately lead to facial invalidation by the courts.<sup>153</sup> But communicating the policies, expectations, and responsibilities under the statute to the members of the school

148. See STUART-CASSEL ET AL., *supra* note 89, at 6 (stating that after developing local policies, a review of those policies can "ensure the goals of state statute are met").

149. *Id.* at 32; see also Lerman, *supra* note 125.

150. STUART-CASSEL ET AL., *supra* note 89, at 32.

151. *Id.* ("Examples include requirements to post policies on websites or in visible locations on school campuses, publicize policies in student and employee handbooks . . . and actively discuss policies with school personnel to ensure consistent application and enforcement."); see also *Key Components in State Anti-Bullying Laws*, *supra* note 90 (noting that an ideal policy "includes a plan for notifying students, students' families, and staff of policies related to bullying, including the consequences for engaging in bullying").

152. ARK. CODE ANN. § 6-18-514(e) (Supp. 2013).

153. *Cf.*, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611, 620–21 (1971) (invalidating ordinance that made it illegal for persons to assemble on a sidewalk and conduct themselves in a "manner annoying to other persons" on vagueness grounds).

community is not enough by itself. This component also goes hand-in-hand with the next component, training and education.

#### 9. Training and Preventative Education

This component typically requires districts to provide professional training of school staff (including aides, administrative staff, and even bus drivers) to allow them to better identify, address, and prevent future bullying incidents.<sup>154</sup> States also encourage bullying education or awareness programs for students and other school activities to improve awareness and create a more supportive atmosphere that is free from harassment.<sup>155</sup> For an example regarding training of staff, see South Carolina's law: "Information regarding a local school district policy against harassment, intimidation, or bullying must be incorporated into a school employee training program. Training also should be provided to school volunteers who have significant contact with students."<sup>156</sup> South Carolina also is one of the states that encourage bullying prevention programming: "Schools and school districts are encouraged to establish bullying prevention programs and other initiatives involving school staff, students, administrators, volunteers, parents, law enforcement, and community members."<sup>157</sup> Such training programs can be vital to the effective enforcement of the policies required by statutes.<sup>158</sup> Even if a statute requires certain actions to be taken in response to an incident of off-campus cyberbullying, the requirement will have a hollow ring if those responsible for

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154. STUART-CASSEL ET AL., *supra* note 89, at 6, 33.

155. *Id.* at 33 ("For school personnel training, state laws typically mandate or encourage professional development as a component of school district bullying policies. For prevention, state laws either require or encourage school districts to implement prevention programs directly, often as a component of district policy, or transfer control over prevention policy to locally established committees and task forces.").

156. S.C. CODE ANN. § 59-63-140(E) (Supp. 2012).

157. *Id. But cf.* STUART-CASSEL ET AL., *supra* note 89, at 34 (stating that a major issue with mandated bullying prevention programs is identifying sources of funding, and only a few states actually include language that does so).

158. *See* STUART-CASSEL ET AL., *supra* note 89, at 34 (asserting that training and prevention programs establish better expectations and shift cultural norms related to bullying).

enforcing the policies do not recognize when an incident may or may not be sanctionable.<sup>159</sup>

## 10. Transparency and Monitoring

“Transparency and monitoring” refers to requiring “school districts to compile and report data involving incidents of bullying behavior on their school campuses.”<sup>160</sup> Reports should generally include “the number of reported bullying incidents and any responsive actions taken.”<sup>161</sup> About one-third of states include this component in their laws.<sup>162</sup> “A few states also mandate that state boards compile district data into formal reports that are posted publicly or reported to the state legislature.”<sup>163</sup> For example, Maryland’s law says:

- (b)(1) The Department shall require a county board to report incidents of bullying, harassment, or intimidation against students attending a public school under the jurisdiction of the county board.
- (2) An incident of bullying, harassment, or intimidation may be reported by: (i) A student; (ii) The parent, guardian, or close adult relative of a student; or (iii) A school staff member.<sup>164</sup>

Transparency and monitoring not only enables the community to become aware of how serious the problem of bullying and cyberbullying is, but it also allows detection of patterns of behavior, which leads to more targeted and effective solutions. Knowledge and awareness of the problem is crucial to adopting useful and needed policies in all the other components.

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159. This component is also key to avoiding some of the criticisms of cyberbullying legislation, such as the fear of punishing protected speech. Effective training will allow school personnel to understand things like what the *Tinker* standard means, what conduct requires appropriate responses, and what appropriate responses entail.

160. STUART-CASSEL ET AL., *supra* note 89, at 34.

161. *Id.* at 93.

162. *Id.* at 34.

163. *Id.*

164. MD. CODE ANN. EDUC. § 7-424 (LexisNexis 2008). For examples of public reporting requirements, see IOWA CODE § 280.28(7) (2008) (“The board of directors of a school district and the authorities in charge of each nonpublic school . . . shall report data collected . . . as specified by the department, to the local community.”); OHIO REV. CODE ANN. § 3313.666 (11) (LexisNexis 2013) (“[T]he district administration . . . [shall] provide . . . a written summary of all reported incidents and post the summary on its web site.”).

## 11. Statement of Rights to Other Legal Recourse

The final Department component for effective bullying legislation should be a simple “statement that the policy does not preclude victims from seeking other legal remedies.”<sup>165</sup> This component makes sure that bullying victims are aware that other legal remedies are available to them under other areas of state and federal law.<sup>166</sup> These actions may be brought against the schools themselves for failing to protect the students from foreseeable risks of bullying and when harassment gets to be extremely severe.<sup>167</sup> A good example is Oregon’s statute, specifying that “[this statute] may not be interpreted to prevent a victim of harassment, intimidation or bullying or a victim of cyberbullying from seeking redress under any other available law, whether civil or criminal.”<sup>168</sup>

This component is a mechanism that helps cyberbullying legislation become one more resource for bullying victims. Provisions under this component help guide bullying victims and their families to additional areas where remedies may be sought. The component also ties together the other components and a state’s bullying statute as a whole by ensuring parties that the statute is not their exclusive source of justice.<sup>169</sup> As we will see below, Minnesota’s current statute does a poor job of utilizing the Department’s components, resulting in a virtually worthless cyberbullying law.

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165. STUART-CASSEL ET AL., *supra* note 89, at 94; *Key Components in State Anti-Bullying Laws*, *supra* note 92.

166. See Erb, *supra* note 5, at 275–80. The statement should be included even if other legal remedies are not very effective against the bullies themselves.

167. STUART-CASSEL ET AL., *supra* note 89, at 35 (“The ruling of the United States Supreme Court in the case of *Davis v. Monroe County Board of Education* established the precedent that schools receiving federal funds could be held liable for damages in peer harassment cases. School[s] may be liable if the harassment is proven to be so ‘severe, pervasive[,] and objectively offensive’ that it deprives the victim of access to educational opportunities or benefits, and if the school had actual knowledge of the harassment but was ‘deliberately indifferent’ to it.”).

168. OR. REV. STAT. ANN. § 339.364 (West Supp. 2013); see STUART-CASSEL ET AL., *supra* note 89, at 36.

169. STUART-CASSEL ET AL., *supra* note 89, at 36.

## II. ANALYSIS

The Department's key components can be used to write new cyberbullying laws or modify existing ones to effectively protect victims from needless abuse<sup>170</sup> and prevent substantial encroachment upon other students' own constitutional rights.<sup>171</sup> States, including Minnesota, should include these components when targeting cyberbullying through the legislative process. Part A will examine Minnesota's current "cyberbullying" statute<sup>172</sup> in relation to the Department's key components and other state laws. Part B will analyze and describe why the latest bill that was introduced, but failed to pass,<sup>173</sup> in the Minnesota Legislature should be reintroduced and adopted.

A. MINNESOTA'S CURRENT CYBERBULLYING LAW: MINN. STAT. § 121A.0695

Minnesota is considered to have one of the nation's weakest antibullying laws.<sup>174</sup> The Bully Police, an organization that rates states' antibullying laws and advocates for victims, graded Minnesota's law at a measly C-, the lowest grade in the nation.<sup>175</sup> In fact, the statute in its entirety is only thirty-seven words long and provides that "[e]ach school board shall adopt a written policy prohibiting intimidation and bullying of any student. The policy shall address intimidation and bullying in all forms, including, but not limited to, electronic forms and forms involving Internet use."<sup>176</sup> The law is inadequate

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170. *Key Components in State Anti-Bullying Laws*, *supra* note 90 (asserting that creating procedures for Local Educational Agencies to increase the investigation and response to reports of bullying will aid in "protecting the victim from additional bullying or retaliation").

171. STUART-CASSEL ET AL., *supra* note 89, at 24 (noting that first amendment concerns have been minimized by limiting the scope of cyberbullying laws).

172. MINN. STAT. § 121A.0695 (2012).

173. Patrick Thornton, *Bullying Bill Among '13 Session Casualties*, MINN. LAW., May 27, 2013, at 1.

174. See Patchin, *supra* note 30; Justin Kwong, *Minnesota's Lax Cyber-Bullying Laws*, VIRTUAL NAVIGATOR (May 16, 2011), <http://virtualnavigator.wordpress.com/2011/05/16/minnesotas-lax-cyber-bullying-laws/> ("Unfortunately, we here in Minnesota have one of the weakest and most ambiguous state laws with respect to bullying.").

175. Kuczynski, *supra* note 11 (arguing that "[w]ell, Minnesota has a law, [but] not much of one . . .").

176. MINN. STAT. § 121A.0695 (2012).

because, as seen below, it fails to adopt almost all of the Department's recommendations and gives no guidance to the school boards that have to enforce it.

It is obvious from looking at the current statute that Minnesota's law does not incorporate most of the Department's key components.<sup>177</sup> First, it clearly does not have any sort of introduction or preamble.<sup>178</sup> It does have somewhat of a purpose statement or scope.<sup>179</sup> In the second of two sentences, the law directs school board policies to "address intimidation and bullying in all forms, including, but not limited to, electronic forms and forms involving Internet use."<sup>180</sup> Therefore, the statute does cover cyberbullying even if it does not explicitly refer to it as cyberbullying.<sup>181</sup> The law, however, does not specify prohibited conduct other than "intimidation" and "bullying."<sup>182</sup> Nor does the law define either of those terms or cyberbullying.<sup>183</sup> The statute also does not enumerate specific characteristics of students that have historically been targets of bullying.<sup>184</sup>

The first sentence of the law requires each school board to adopt a written policy.<sup>185</sup> This mandate does technically meet the "development and implementation of LEA policies" component. But the law puts all the discretion and responsibility in the hands of the individual school districts. It

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177. See STUART-CASSEL ET AL., *supra* note 89, at 41 (observing that Minnesota's law only includes a purpose and a district policy requirement).

178. MINN. STAT. § 121A.0695 (2012).

179. *Id.*

180. *Id.*

181. See Patchin, *supra* note 30.

182. See MINN. STAT. § 121A.0695 (2012).

183. See *id.* Over forty states include definitions of prohibited conduct that may or may not be adopted into local district policies. STUART-CASSEL ET AL., *supra* note 89, at 25. Minnesota is one of only three states that "include prohibitions against bullying in their state statutes without specifically defining the behavior that is prohibited." *Id.* Not including definitions "would be the equivalent of having a speeding law that simply says 'speeding is wrong' without actually saying what speeding is and how fast constitutes speeding." Tom Weber, *MPR News Investigation: Minnesota Lacks Strong Bullying Law, State Oversight*, MPRNEWS (May 16, 2011), <http://minnesota.publicradio.org/display/web/2011/05/15/minnesota-weak-bullying/> (quoting Kevin Jennings, an assistant deputy secretary in the U.S. Department of Education).

184. See MINN. STAT. § 121A.0695 (2012). The law does specify that the school policies should apply to "any student." *Id.*

185. See *id.*

does not establish any deadlines for developing or updating the policies.<sup>186</sup> And most importantly, it gives no guidance whatsoever to the districts for what components must or should be included in the policies.<sup>187</sup>

Another one of the more troubling faults of the Minnesota law is that it does not provide for review of the LEA policies. Minnesota Public Radio did a six-month investigation of school district policies and found that one-third of the districts do not include cyberbullying in their policies.<sup>188</sup> No one is checking whether districts and charter schools actually have the required bullying policies in place.<sup>189</sup> School administrators are left wondering, “[w]hat’s our responsibility and what’s not our responsibility?”<sup>190</sup>

Finally, the Minnesota statute does not provide for a communication plan, training and preventative education, transparency and monitoring of policies, nor a statement of the right to other legal remedies.<sup>191</sup> Over four-fifths of states set out clear communication requirements in their laws, but Minnesota is not one of them.<sup>192</sup> Training and education programs are extremely important to effectively respond to and prevent cyberbullying, but yet again, Minnesota has given no direction.<sup>193</sup> The statute also does not provide adequate reporting guidelines for districts.<sup>194</sup>

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186. *See id.*

187. *See id.*; STUART-CASSEL ET AL., *supra* note 89, at 31 (noting that two states, Nebraska and Minnesota, “set minimum requirements for districts to develop policy documents, but do not set legal requirements for their content, placing full discretion over policy development at the local level.”). None of the six subcomponents of LEA policies (definitions, reporting procedures, investigating and responding procedures, records, sanctions, or referrals) are included in the statute.

188. Weber, *supra* note 76.

189. *Id.* (“State officials acknowledged they don’t check to make sure school districts have bullying policies, in part, because no law requires them to.”). This lack of oversight on behalf of the state has caused an incredible amount of variation among district policies. While about three-quarters of districts follow a decent model policy that the Minnesota School Boards Association drafted, many other districts have policies that are as little as one paragraph. *Id.*

190. *Id.* (quoting New Ulm superintendent Harold Remme).

191. *See* MINN. STAT. § 121A.0695 (2012).

192. *See* STUART-CASSEL ET AL., *supra* note 89, at 32–33.

193. *See id.* at 34 (“Research has demonstrated that school personnel are often unaware of how to respond to bullying thereby necessitating training.”); *see also* Allen, *supra* note 138, at 199 (“Research has also indicated that



The current Minnesota statute fails to equip schools with the legal tools necessary to stop cyberbullying in this state. Many parents, legislators, and experts agree that it is time to update the law.<sup>195</sup> Minnesota's Commissioner of Education, Brenda Cassellius, agreed that the law needs to be updated.<sup>196</sup> A Minnesota task force convened by Governor Mark Dayton in early 2012 urged state lawmakers to repeal the state's current law and replace it with a stronger one.<sup>197</sup> Our students and schools can wait no longer.

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teachers are limited in their knowledge of how to respond to bullying. Without specific guidance on what to do and how to do it, knowledge of bullying by itself is unsatisfactory."). Training and education programs are even more important regarding cyberbullying since it is a more recent issue and includes more difficult challenges for responding, especially to off-campus conduct. Furthermore, districts are much less likely to adopt these types of programs voluntarily because of the lack of funding. See STUART-CASSEL ET AL., *supra* note 89, at 34.

194. See MINN. STAT. § 121A.0695 (2012); cf. Tom Weber, *Part 3: School Boards Sought Weaker Law*, MPRNEWS (May 16, 2011), <http://minnesota.publicradio.org/display/web/2011/05/15/bullying-part3/> ("Both researchers and the federal government say measureable data are crucial to knowing the extent of bullying in your school or state."). Apparently, "Minnesota does require schools to report disciplinary incidents involving fighting, vandalism, and weapons at school . . . but state officials only track incidents of bullying and cyberbullying that lead to at least a day's suspension." *Id.* "[This] threshold makes the disciplinary reports inadequate for measuring bullying because most bullying is handled with less-severe discipline." *Id.* Forest Lake, one school in a Minnesota district that has been tracking data on bullying, has seen behavior referrals drop from thirty-nine a few years ago to only seventeen in 2010. *Id.*

195. See Weber, *supra* note 194. A relative of a young girl who committed suicide in western Minnesota in 2011 said, "[b]ullying policies are so inadequate now and out of date . . . These kids are getting attacked from all angles when it comes to bullying, and you can't just assume when the school day ends, all that trouble is closed for the day." *Id.*

196. *Id.* ("This is just simply protecting our children . . . Bullying is not a partisan issue; every single parent in the community wants their child to be safe. To me, this should have been done a while ago." (quoting the state's education commissioner, Brenda Cassellius)).

197. Governor's Task Force on the Prevention of School Bullying, *Safe and Supportive Minnesota Schools Prevention of School Bullying Task Force Report* (Aug. 1, 2012), [http://mn.gov/mdhr/public\\_affairs/documents/Bullying\\_Task\\_Force\\_Final\\_Report.pdf](http://mn.gov/mdhr/public_affairs/documents/Bullying_Task_Force_Final_Report.pdf) [hereinafter *MN Task Force Report*]. The Task Force stressed that its recommendations were urgent and should be implemented at the earliest possible opportunity. *Id.* at 2, 3.



## B. RESTRUCTURING MINNESOTA'S CYBERBULLYING LAW

In April 2012, legislators answered the Task Force's call. Both the House and Senate introduced companion bills that completely redrafted Minnesota's antibullying law.<sup>198</sup> Unfortunately, the bills did not go far before the legislative session adjourned, and they effectively died.<sup>199</sup> The year 2013 marked the beginning of a new biennium and a new legislative session, and new bills in both the House and Senate were introduced on the subject of antibullying.<sup>200</sup> Yet again, these bills failed to get past the first committee in each house.<sup>201</sup>

The supporters of these bills refused to quit. In the end of February 2013, the bills were redrafted once more and entitled "The Safe and Supportive Minnesota Schools Act."<sup>202</sup> Finally, the House File saw some action. The bill went through six engrossments and passed the House by a vote of 72-57.<sup>203</sup> It then was introduced and read in the Senate where it was amended further.<sup>204</sup> Like before, the bill would meet its unfortunate end. The Senate voted to "la[y] it on the table" right before adjourning for the session, which effectively killed it another time.<sup>205</sup>

Legislative supporters vowed to bring it back again next session, but "critics countered that there are problems with the bill and unless it is changed by 2014 their objections will remain."<sup>206</sup> The Author believes that H.F. 826 is not only a major improvement over Minnesota's current antibullying law (although almost anything would be), but also the best of the three bills introduced so far. As will be discussed below, the bill meets all but one of the Department's key components.

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198. See H.F. 3004, 87th Leg., 2d Reg. Sess. (Minn. 2012); S.F. 2601, 87th Leg., 2d Reg. Sess. (Minn. 2012).

199. See H.F. 192, 88th Leg., 1st Reg. Sess. (Minn. 2013); S.F. 170, 88th Leg., 1st Reg. Sess. (Minn. 2013).

200. See Minn. H.F. 192; Minn. S.F. 170.

201. See H.F. 826, 88th Leg., 1st Reg. Sess. (Minn. 2013); S.F. 783, 88th Leg., 1st Reg. Sess. (Minn. 2013).

202. Minn. H.F. 826; Minn. S.F. 783.

203. See *Status of HF 826 in the House for the 88th Legislature (2013-2014)*, MINN. STATE LEGISLATURE, <https://www.revisor.mn.gov/bills/bill.php?f=HF826&y=2013&ssn=0&b=house> (last visited Aug. 2, 2013).

204. See *id.*

205. *Id.*

206. Thornton, *supra* note 173, at 1.

Moreover, the bill authors drafted it in a way that is workable, and much of the criticism is unfounded.

#### 1. H.F. 826 Satisfies the Department's Key Components and the Minnesota Task Force's Recommendations

H.F. 826 does a great job of incorporating all but one of the key components suggested by the Department and the Minnesota antibullying task force. The bill also connects the components in a way that makes them even more effective in combatting bullying and cyberbullying. For example, the bill requires summary data on incidents of school bullying and the remedial responses to such incidents to be reported, but it also requires the education commissioner to use that summary data to inform the work of a newly created "school climate center" and assist districts and schools in improving students' educational outcomes.<sup>207</sup> These interconnections between the different key components in this bill would help make Minnesota's anti-bullying law one of the strongest in the nation, instead of one of the weakest.

The only component that H.F. 826 does not include is a purpose statement. The other ten components are all included in the bill. For example, it lays out a scope and application that will include both traditional bullying and cyberbullying, as well as conduct on- and off-campus.<sup>208</sup> In addition, "[d]istricts and schools, in consultation with students, parents, and the community, shall adopt, implement, and annually review and revise" an antibullying policy that best fits their local needs, as long as it meets certain minimum requirements, or they can adopt the state model policy also required under the bill.<sup>209</sup> Furthermore, the bill includes a detailed specification of prohibited conduct, with complete definitions of bullying, cyberbullying, and remedial response.<sup>210</sup> These specific

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207. H.F. 826 § 2, subdiv. 1(a) (2013) (6th Engrossment).

208. See H.F. 826 § 3, subdiv. 1. The bill specifically makes the section applicable to: (i) conduct at school and school functions and activities and on school transportation; (ii) the use of electronic technology and communication at school, school functions, on school transportation, and on school computers, networks, forums, and mailing lists; and (iii) off campus use of electronic technology and communications if the use materially disrupts student learning or the school environment. *Id.* § 3, subdiv. 1.

209. *Id.* § 3, subdiv. 2(a).

210. *Id.* § 3, subdiv. 3. "Bullying," for example, is defined to mean "intimidating, threatening, abusive, or harassing conduct that is objectively

definitions are objective and can be easily understood and interpreted by school boards, school administrators and staff, students, and the community. Finally, the bill also incorporates the remaining key components recommended by the Department and the Task Force.<sup>211</sup>

But House File 826 goes above and beyond incorporating the Department's key components. In addition, it establishes two new entities that will help support the implementation of the new law. First, the "school climate council" is a multi-leadership council composed of different commissioners, school association representatives, local law enforcement members, and others.<sup>212</sup> The council will provide leadership in developing and disseminating a model policy for schools, establish norms and standards related to prohibited conduct, and develop and disseminate resources and training to help schools and communities address prohibited conduct and other issues.<sup>213</sup> Second, the Minnesota education commissioner is to establish the "school climate center" to work collaboratively with state agencies, schools, communities, individuals, and organizations to "determine how best to use available resources."<sup>214</sup> Some of the center's services include evidence-based policy review and development, data gathering and interpretation, education and skill building, and administrative and financial support to schools.<sup>215</sup> The council and center will be able to provide

offensive" and either: (i) "causes physical harm to a student or a student's property" or causes reasonable fear of such harm; (ii) "materially and substantially interferes with a student's educational opportunities or performance;" (iii) violates Minnesota common law; or (iv) "materially and substantially disrupts the work and discipline of the school." *Id.* § 3, subdiv. 3(b). But one change that would make this definition even better is to make clear that bullying is not limited to those four situations. *See Key Components in State Anti-Bullying Laws, supra* note 90 (noting that the definition of bullying should include a nonexclusive list of specific behaviors); *MN Task Force Report, supra* note 197, at 12.

211. *See* H.F. 826 § 3, subdiv. 1 (enumerating of specific characteristics of bullying); *id.* § 3, subdiv. 2(a) (describing development and implementation of LEA policies through a collaborative process and annual review of policies); *id.* § 3, subdiv. 4 (noting local policy components and education); *id.* § 3, subdiv. 2(b)(4)–(7), subdiv. 2(c) (describing a communication plan); *id.* § 3, subdiv. 4(a)(10), (12) (discussing transparency and monitoring requirements); *id.* § 3, subdiv. 7 (stating rights to other legal recourse).

212. *Id.* § 13, subdiv. 1.

213. *Id.* § 13, subdiv. 2.

214. *Id.* § 14(a).

215. *Id.* § 14(b).

additional guidance and resources to ensure full understanding and compliance with the intentions of the bill.

## 2. Most Criticism of the Bill Is Unsupported

Keeping children safe and free from bullying and cyberbullying is not a partisan issue. Unfortunately, there are still many people opposed to passing a stronger law in Minnesota. An attorney who represented the Anoka-Hennepin School District in a recent lawsuit alleging that the district failed to respond adequately to persistent harassment in its schools said that the bill still needs some changes.<sup>216</sup> First, the training and reporting that the bill requires would cost a lot of money, leading some to argue that “[m]any districts viewed the bill as an unfunded mandate.”<sup>217</sup> And second, school boards want more power to determine their own needs and develop their own policies.<sup>218</sup> These arguments regarding why H.F. 826 cannot pass, however, are easily countered.

While some of the provisions of the bill would require expenditures by districts and schools, “[t]he bill made grants available to help pay for the necessary upgrades.”<sup>219</sup> Also, “there are further ways to reduce the implementation cost by sharing resources, and training, among neighboring districts.”<sup>220</sup> The school climate center established by the bill would also take some revenue to get off the ground, but its ultimate purpose is to help the districts and use resources more efficiently.

In response to the districts wanting more independence in developing policies, the bill does just that. It gives districts the freedom either to adopt their own policies meeting the minimum requirements set out in the bill, or simply comply with the required state model policy.<sup>221</sup> The free-for-all currently employed by the state by mandating only that districts must adopt a policy, without giving any guidance, has clearly failed. “A school-by-school approach, without a common

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216. See Thornton, *supra* note 173, at 14.

217. *Id.*

218. *Id.* (“For a tiny school district, does their bullying policy have to look exactly the same as Minneapolis or St. Paul? Should it?” (quoting Jeanette Bazis of Greene Espel)).

219. *Id.*

220. *Id.*

221. See H.F. 826 § 3, subdiv. 2(a).

understanding of what is expected, will continue to bring us piecemeal results that will not serve the entire state well.”<sup>222</sup> H.F. 826 relies on data-gathering and a proactive approach to stopping bullying, as opposed to responding to it after the fact.<sup>223</sup> Therefore, the bill strikes a balance between just requiring any policy and requiring one specific policy.

Yet another opponent of the bill, Katherine Kersten, testified before the Education Policy Committee, claiming that it “raises so many problematic issues it makes your head spin.”<sup>224</sup> Here are four main arguments Kersten makes: First, she argued that bullying is not such a “pervasive and escalating problem” because “recent surveys by the U.S. Department of Justice make clear that incidents of bullying have dropped markedly across the country in the last ten years.”<sup>225</sup> Second, she states that the bill “does not treat students equally” but “[i]nstead, it singles out certain ‘protected classes’ . . . for special attention and favored treatment,” leaving “traditional” victims of bullying, such as “nerds,” as invisible.<sup>226</sup> Third, H.F. 826 provides an unworkable, vague, and overbroad definition of bullying.<sup>227</sup> And this overbroad definition would, in turn, lead to over-reporting of minor disputes by teachers and staff.<sup>228</sup> Finally, schools would be compelled to police cyberbullying on a 24/7/365-basis, including students’ comments on Facebook at home.<sup>229</sup>

Kersten’s concerns, however, also miss the mark. Despite providing no citation or specific data regarding the nationwide drop in bullying incidence over the last decade, she grossly

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222. Thornton, *supra* note 173, at 14 (quoting Celeste Culberth).

223. *Id.*

224. Katherine Kersten, *Kersten Testimony on the MN “Anti-Bullying” Bill—February 28, 2013*, CENTER AM. EXPERIMENT (Mar. 9, 2013), <http://www.americanexperiment.org/publications/commentaries/kersten-testimony-on-the-mn-anti-bullying-bill-february-28-2013>.

225. *Id.*

226. *Id.*

227. *Id.* She then gave two extreme and exaggerated examples. According to her, if a “sixth-grader calls another a ‘loser’ on the bus, he becomes guilty of bullying” and the bus driver is “legally compelled to report it.” *Id.* Or “if one girl overhears another girl telling others not to vote for her as class secretary, under the law she can claim to be a victim of bullying, because the comment caused her emotional harm and upset her so much that she bombed a quiz.” *Id.*

228. *Id.*

229. *Id.*

misunderstood why this drop happened. Since 2007, forty-two states have amended their bullying laws to make them tougher and include conduct like cyberbullying.<sup>230</sup> Thus, this remarkable decrease in bullying did not happen magically, but rather because states have enacted legislation like H.F. 826.

Next, the bill does enumerate a large list of characteristics at which harassing conduct may not be directed.<sup>231</sup> But this does not single out these groups or individuals as “favored” and leave “traditional” victims invisible, as Kersten suggests. To the contrary, this enumerated list was chosen as one of the Department’s key components because experts have agreed that these characteristics *are* the traditional victims.<sup>232</sup> Furthermore, the list expressly states that it is “not limited to” the characteristics listed.<sup>233</sup> But even if it was, Kersten’s traditional “nerd” would probably still be specifically protected under H.F. 826’s list.<sup>234</sup> Finally, the Supreme Court has supported this legislative practice,<sup>235</sup> and civil rights organizations “have found positive effects within school environments when policies contain these explicit protections . . . .”<sup>236</sup>

Third, Kersten calls the bill’s definition of bullying unworkable, vague, and overbroad.<sup>237</sup> Again, she could not be more wrong. At the time of Kersten’s testimony, the bill was still in its introductory form.<sup>238</sup> But the definition of bullying used in that version of the bill was nearly identical to the one proposed by the Task Force, which researched definitions from

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230. See *supra* notes 69–70 and accompanying text.

231. H.F. 826 § 3, subd. 3(d).

232. See STUART-CASSEL ET AL., *supra* note 89, at 29 (“[N]aming groups provides a clear directive to schools about the need to safeguard populations that are most vulnerable to bullying, without affecting protections for other students.”).

233. H.F. 826 § 3, subd. 3(d).

234. See *id.* (including conduct directed at a student’s actual or perceived physical appearance and academic status).

235. See *supra* note 120 and accompanying text.

236. STUART-CASSEL ET AL., *supra* note 89, at 29 (“[S]tudies have shown that there is lower prevalence of bullying behavior and increased propensity to report threats or bullying acts against LGBT students when specific protections are covered under school bullying policies.”).

237. Kersten, *supra* note 224.

238. See H.F. 826, 88th Leg., 1st Reg. Sess. (Minn. 2013) (Introduction Engrossment).

other state statutes and policies, and professional literature.<sup>239</sup> Regardless, the definition in the Sixth Engrossment is hardly vague and overbroad. The conduct has to be objectively offensive *and* fit into one of the four categories such as causes physical harm to a student or “materially and substantially disrupts the work and discipline of the school.”<sup>240</sup> Simply calling another student a “loser” does not meet the requirements in this definition. Nor would bombing a quiz after hearing another girl tell others not to vote for you for class secretary make you a victim. This conduct would probably qualify as free speech, with which the bill expressly prohibits interfering.<sup>241</sup> Kersten grossly exaggerated the reach of the bill. Furthermore, teachers and staff would be expected to be trained and educated, which would help them in determining what conduct is actually prohibited and how to respond.<sup>242</sup> Consequently, there would not be a problem of over-reporting “run-of-the-mill slights,” and prohibited conduct that is reported would not cause a stigma on a child for his school career.<sup>243</sup>

Last, schools would not be required to monitor students’ internet (or other technology) use at all times. Obviously, that would not be possible. Rather, the bill gives districts the ability to respond to off-campus cyberbullying.<sup>244</sup> H.F. 826 appropriately incorporates the *Tinker* material and substantial disruption standard.<sup>245</sup> Therefore, schools would be able to intervene if conduct at home became a big enough problem at school; but nowhere does the bill mandate administrators to screen every potentially mean Facebook post by students.

In all, the skeptical points made by the bill’s opponents are easily countered. But these critics have few answers for experts like the Department and the Task Force, who suggested most of the provisions of H.F. 826 based on years of research, public

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239. *MN Task Force Report*, *supra* note 197, at 8.

240. H.F. 826 § 3, subdiv. 3(b).

241. *See id.* § 3, subdiv. 7(3) (“This section does not interfere with a person’s rights of free speech and expression under the First Amendment of the United States Constitution.”).

242. *See id.* § 3, subdiv. 4(b).

243. Kersten, *supra* note 224; *see id.* § 3, subdiv. 2(b)(3) (stating that policies shall “emphasize remedial responses over punitive measures”).

244. *See* H.F. 826 § 3, subdiv. 3(b)(4), (c).

245. *Id.*

testimony, and involvement with the students, educators, parents, and community members. Moreover, the pros of the bill and the ultimate goal of protecting the children outweigh any potential cons like administrative burdens.

### III. CONCLUSION

Earlier, this Note looked at what cyberbullying is, what problems it is causing in the schools and the lives of students, and why other remedies have not been successful. Minnesota amended its bullying statute back in 2007 to include “electronic forms” of bullying in an attempt to deal with the increasing cyberbullying problem.<sup>246</sup> This attempt has done little, except cause more confusion for local schools that are supposed to adopt their own policies.

The U.S. Department of Education studied the bullying statutes of every state that had one in 2011.<sup>247</sup> The Department introduced eleven key components that it found were part of most state legislation and that experts agreed were important to effective laws against bullying and cyberbullying.<sup>248</sup> The latest bill to go through the Minnesota Legislature, H.F. 826, would completely reconstruct the Minnesota bullying statute and would provide much more guidance and instruction to local schools that want to create a safer learning environment for all. The author hopes this Note creates more awareness of the need for an updated cyberbullying law in Minnesota and helps raise the support needed to effect this change.

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246. See MINN. STAT. § 121A.0695 (2012).

247. See STUART-CASSEL ET AL., *supra* note 89, at ix–x.

248. See *id.*



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