

NOTE

CYBERBULLYING BEYOND THE SCHOOL-GATE: DOES EVERY STUDENT DESERVE A NATIONAL STANDARD OF PROTECTION?

I. INTRODUCTION

“The world would be a better place without you.”¹ “Megan Meier is Fat.”² Those are the words that thirteen-year-old Megan Meier read on her computer the day she chose to end her life after months of torment from online bullies.³ Cyberbullying is a real and prevalent issue among today’s youth, and sadly, Megan is not the only victim of its harsh consequences, as students across the United States are victimized daily by their peers because of cyberbullying.⁴

Forty-nine states currently have anti-bullying laws that allow or require school administrations⁵ to intervene and discipline students who initiate bullying at school.⁶ However, modern-day bullying can go beyond the school-gate.⁷ Today’s grade school generation has an undoubtedly wide array of access to Internet communication through

1. *Megan’s Story*, MEGAN MEIER FOUND., <http://www.meganmeierfoundation.org/megans-story.html> (last visited Aug. 1, 2017).

2. *Id.*

3. *Id.*; see also TOM JACOBS, *TEEN CYBERBULLYING INVESTIGATED: WHERE DO YOUR RIGHTS END AND CONSEQUENCES BEGIN?* 157-58 (Free Spirit Publishing Inc. 2010) (discussing the events that led to Megan Meier’s tragic suicide).

4. SHAHEEN SHARIFF, *CONFRONTING CYBER-BULLYING: WHAT SCHOOLS NEED TO KNOW TO CONTROL MISCONDUCT AND AVOID LEGAL CONSEQUENCES* 38 (2009) (discussing the consequences of the day-to-day victimization of students); see also Justin W. Patchin & Sameer Hinduja, *Summary of Our Cyberbullying Research (2004–2016)*, CYBERBULLYING RES. CTR. (Nov. 26, 2016), <http://cyberbullying.org/summary-of-our-cyberbullying-research> (explaining that the average cyberbullying victimization rate of students from 2007 through 2016 was 28%).

5. For the purposes of this Note, the school administrations discussed pertain to public schools, grades kindergarten through twelve.

6. *Bullying Laws Across America*, CYBERBULLYING RES. CTR., <http://cyberbullying.org/bullying-laws> (last visited Aug. 1, 2017) (illustrating that all states have an education code requiring schools to have an on-campus anti-bullying policy, with the exception of Montana).

7. See SHARIFF, *supra* note 4, at 101-03; Richard Donegan, *Bullying and Cyberbullying: History, Statistics, Law, Prevention, and Analysis*, ELON J. UNDERGRADUATE RES. & COMM., Spring 2012, at 33-34.

social media, mobile texting, computer chat rooms, and a variety of other digital sources.⁸ Bullies use these forms of communication to target their victims—a means coined “cyberbullying.”⁹ The principal reason that cyberbullying has such powerful potential to cause harm is because students have access to these digital sources at all times, including outside of school grounds and supervision, which leads to constant bullying of victims that can cause even more harmful, and sometimes more fatal, effects than traditional bullying.¹⁰ The consequences of cyberbullying have proven to be so pervasive, that they have caught national media attention and provoked state legislative action in recent years.¹¹

Despite national attention, there is currently no federal law that requires school administrations to implement bullying disciplinary policies at all—including cyberbullying disciplinary policies.¹² Therefore, state and local legislators are the sole deciders of school bullying policies.¹³ Although almost every state has implemented anti-bullying legislation that allows school administrations to initiate disciplinary proceedings against students who engage in bullying on school grounds, the majority of states do not have anti-bullying

8. SHARIFF, *supra* note 4, at 3, 41 (“The rapid advancement of cellular phones and Internet technologies has opened up new and infinite spaces that young people can explore with fluid boundaries that are difficult to monitor or supervise.”); Sameer Hinduja & Justin W. Patchin &, *2015 Cyberbullying Data*, CYBERBULLYING RES. CTR. (May 1, 2015), <http://cyberbullying.org/2015-data> (discussing technology utilized by adolescents).

9. See VANESSA ROGERS, *CYBERBULLYING: ACTIVITIES TO HELP CHILDREN AND TEENS TO STAY SAFE IN A TEXTING, TWITTERING, AND SOCIAL NETWORKING WORLD 14-17* (Jessica Kingsley Publishers 2010).

10. ROBIN M. KOWALSKI ET AL., *CYBERBULLYING IN THE DIGITAL AGE* 82, 113-17 (2d ed. 2012); SHARIFF, *supra* note 4, at 5 (“What frightens educators and policy makers is that cyberbullying similarly puts students on a virtual island with no supervision and few rules.”).

11. Douglas E. Abrams, *Recognizing the Public Schools’ Authority to Discipline Students’ Off-Campus Cyberbullying of Classmates*, 37 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 181, 185-86 (2011) (emphasizing that several national institutions have identified school cyberbullying as a “public health concern”); Gail McCallion & Jody Feder, *Student Bullying: Overview of Research, Federal Initiatives, and Legal Issues*, in *STUDENT BULLYING: FEDERAL PERSPECTIVES AND REFERENCE MATERIALS 9* (Benson Haynes ed., 2014) (discussing that 120 bills or amendments to existing bullying legislation have been introduced between 1999 and 2010); Matthew Fenn, Note, *A Web of Liability: Does New Cyberbullying Legislation Put Schools in a Sticky Situation?*, 81 *FORDHAM L. REV.* 2729, 2753 (2013) (“[S]everal violent incidents of cyberbullying in the last decade grabbed national headlines and prompted a public outcry for government action.”).

12. See McCallion & Feder, *supra* note 11, at 15; *Federal Laws*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/federal/> (last updated Mar. 31, 2014).

13. See VICTORIA STUART-CASSEL ET AL., *ANALYSIS OF STATE BULLYING LAWS AND POLICIES*, U.S. DEP’T OF EDUC. 16-19 (2011), <https://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf> (discussing the legislative history of states and local governments implementing bullying policies).

legislation allowing schools to intervene when the bullying originates off-campus.¹⁴

The majority of off-campus bullying takes the form of cyberbullying, typically from home computers and private cell phones.¹⁵ The line where schools can intervene in such situations becomes murky because of the ambiguous standard regarding whether they are impinging on students' First Amendment free speech rights in such situations.¹⁶ There is established precedent that First Amendment free speech rights are not absolute, and students are subject to limitations on their speech in school settings.¹⁷ However, the ambiguous standard regarding off-campus speech has resulted in multiple lawsuits when schools do intervene and discipline cyberbullies since, in these cases, the cyberbully almost always challenges the disciplinary action on First Amendment freedom of speech grounds.¹⁸ Because of the rapid growth in technology use among today's youth, courts have only recently begun to grapple with the constitutional issues regarding off-campus cyberbullying.¹⁹

Absent a federal cyberbullying law, the majority of courts have looked to Supreme Court precedent in forming standards to decide where schools can intervene in cases of off-campus student speech.²⁰ This lack of legislative guidance leaves the courts to render decisions on a case-by-case basis with respect to whether schools should implement off-campus cyberbullying policies, as well as the standards they should follow.²¹ However, even the Supreme Court itself has concluded that local policies and the schools are the best equipped to discipline students.²² Furthermore, as between the states that have implemented legislation requiring schools to form policies addressing off-campus cyberbullying, those standards vary, and key legislative components of

14. *Bullying Laws Across America*, *supra* note 6.

15. KOWALSKI ET AL., *supra* note 10, at 70-77, 83-84 (“[M]ost cyberbullying happens not on school but off school grounds.”); *see also* McCallion & Feder, *supra* note 11, at 11 (discussing that cyberbullying frequently occurs off school grounds).

16. Fenn, *supra* note 11, at 2753, 2758-60.

17. Allison M. Smith, *Protection of Children Online: Federal and State Laws Addressing Cyberstalking, Cyberharrasment, and Cyberbullying*, in *STUDENT BULLYING: FEDERAL PERSPECTIVES AND REFERENCE MATERIALS* 68, 70-71 (Benson Haynes ed., 2014).

18. *See, e.g.*, Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 383 (5th Cir. 2015); J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1100 (C.D. Cal. 2010).

19. *See* Smith, *supra* note 17, at 71-74 (discussing court decisions involving the question of whether speech off school grounds may be disciplined by schools).

20. *Id.* (discussing courts applying Supreme Court precedent in deciding off-campus speech questions); Karly Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103, 122 (2009).

21. *See* Zande, *supra* note 20, at 119-24.

22. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

cyberbullying may differ, leaving students across the United States subject to different standards of protection.²³

This Note argues the necessity of a federal law entitled the “Bullying Reform Act,” which would require public schools of grades kindergarten through twelve to implement bullying policies that allow for school administrations to discipline students who engage in cyberbullying on- and off-campus—in order to nullify the disparity of standards among the states and offer greater and equal protection for victims of cyberbullying.²⁴ It further suggests that this law can be adopted by the states by amending the Every Student Succeeds Act (“ESSA”),²⁵ to create incentives for state legislators and educational agencies to adopt anti-cyberbullying disciplinary policies in order for schools to receive certain Title I grants.²⁶ A carefully crafted law can find the balance between federalism and traditional local control over educational policy.²⁷

Part II provides an overview of cyberbullying and its consequences, and discusses the development of student free speech rights and the subsequent establishment of anti-bullying laws.²⁸ Part III demonstrates that a lack of federal law creates disparities among the states regarding the standards of off-campus school cyberbullying policies.²⁹ Part IV argues that if there is a national law setting minimum standards on when school administrations can intervene, many lawsuits will be avoided, and ultimately, victims of cyberbullying can be helped before the consequences become severe.³⁰

II. CYBERBULLYING AND THE DEVELOPING LAW: A BRIEF OVERVIEW

Cyberbullying among younger generations is a consequence of the new and fast-paced growth of cyber technology over the last decade.³¹ As a result, much off-campus cyberbullying legislation has not been able to keep pace, and state legislators have only recently been adding disciplinary authority pertaining to off-campus cyberbullies to their school education policies.³² Subpart A defines cyberbullying and

23. McCallion & Feder, *supra* note 11, at 9-10.

24. *See infra* Part IV.

25. Pub. L. No. 114-95, 129 Stat. 1802 (codified predominantly in scattered sections of 20 U.S.C.).

26. *See infra* Part IV.B.2.

27. *See infra* Part IV.A.

28. *See infra* Part II.

29. *See infra* Part III.

30. *See infra* Part IV.

31. *See* Donegan, *supra* note 7, at 34-35.

32. *See id.* at 38; *Bullying Laws Across America*, *supra* note 6 (illustrating that state laws

discusses the consequences it has had from kindergarten through grade twelve students in the last decade and why the impact on its victims is psychologically severe.³³ Subpart B analyzes the development of student free speech rights, highlighting the standard that the majority of courts presently use in deciding off-campus speech issues.³⁴ Subpart C discusses the reaction of legislatures and the courts to this tainting phenomenon and illustrates the disparities in school cyberbullying policies among the states.³⁵

A. *Cyberbullying and Its Impact*

To fully grasp the significance of a federal law addressing off-campus cyberbullying, it is imperative to understand the nature of on-campus cyberbullying versus off-campus cyberbullying and the severe consequences off-campus cyberbullying has had on students across the United States.³⁶ Subpart 1 defines cyberbullying and points to the aspects that legislators look for in defining it within the terms of their disciplinary policies.³⁷ Subpart 2 examines statistics on the amount of students who are impacted by cyberbullying and explores the psychological impact cyberbullying has on victims, including recent cases that have spurred a national shock and cry for new legislation to address the issue.³⁸

1. Cyberbullying Defined

Younger generations use various forms of social media as a principal means of interacting with their peers.³⁹ Consequently, cyberbullies have a variety of ways to target their victims, including text messages, picture or video clips, mobile phone calls, emails, chat rooms, social media sites (for example, Instagram and Facebook), and traditional websites.⁴⁰ Cyberbullies will use these sources to bully their

including off-campus cyberbullying have been updated from 2010 through 2015).

33. See *infra* Part II.A.

34. See *infra* Part II.B.

35. See *infra* Part II.C.

36. See KOWALSKI ET AL., *supra* note 10, at 82-85 (discussing the differences between cyberbullying and other forms of bullying); Donegan, *supra* note 7, at 34 (discussing the difference in cruelty between traditional bullying and cyberbullying); *supra* note 4 and accompanying text.

37. See *infra* Part II.A.1.

38. See *infra* Part II.A.2.

39. SHARIFF, *supra* note 4, at 102-03 (explaining that social network mediums have become “essentials” in the life of adolescents). For a study on middle school students and their use of social media, see Hinduja & Patchin, *supra* note 8.

40. ROGERS, *supra* note 9, at 14-17.

peers on an ongoing basis over a period of time.⁴¹ Forms of cyberbullying are non-exhaustive, but some of the most common forms include messages with abusive or aggressive language, harassment, lies and rumors, and impersonation.⁴² Cyberbullying is also defined as to occur between minors, which is why governments typically leave the disciplining of cyberbullying to families and schools.⁴³ Cyberbullies have an advantage over traditional bullies because they can keep distance between themselves and their victims.⁴⁴ This “distancing effect” allows the cyberbully to act anonymously and avoid directly witnessing the reaction triggered in the victim, which often leads the cyberbully to “say and do crueler things compared to what is typical in a traditional face-to-face bullying situation.”⁴⁵ In sum, cyberbullying can be defined as “willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices.”⁴⁶ Several state educational codes addressing cyberbullying use a similar definition and the previously mentioned elements to guide school administrations in identifying cyberbullying and forming their disciplinary policies.⁴⁷

A significant issue to further understand is the difference between on- and off-campus cyberbullying, because it relates to how school administrations can form their anti-bullying policies.⁴⁸ On-campus cyberbullying occurs when a student uses digital means that originate on school grounds or under school supervision.⁴⁹ For example, on-campus

41. THERESE HARASYMIW, *CYBERBULLYING AND THE LAW* 7 (2013); *see also* SHARIFF, *supra* note 4, at 41 (“The term ‘cyber-bullying’ describes forms of bullying that use technology.”).

42. *See* KOWALSKI ET AL., *supra* note 10, at 61-70; ROGERS, *supra* note 9, at 17-18.

43. HARASYMIW, *supra* note 41, at 5.

44. Donegan, *supra* note 7, at 34; *see also* ROGERS, *supra* note 9, at 13.

45. Donegan, *supra* note 7, at 34; *see also* *Cyberbullying: Cruel Intentions* (ABC News television broadcast 2006) (conducting a cyberbullying experiment where teens reported that “[i]t’s really hard to remember what you’re saying is actually coming out, and that the other person is really seeing it”).

46. *What Is Cyberbullying?*, CYBERBULLYING RES. CTR. (Dec. 23, 2014), <http://www.cyberbullying.org/what-is-cyberbullying>.

47. *See, e.g.*, CONN. GEN. STAT. § 10-222d(2) (2015) (defining cyberbullying as “any act of bullying through the use of the Internet, interactive and digital technologies, cellular mobile telephone or other mobile electronic devices or any electronic communications”); MASS GEN. LAWS. ch. 71, § 37O (2014) (“Cyber-bullying shall also include (i) the creation of a web page or blog in which the creator assumes the identity of another person or (ii) the knowing impersonation of another person as the author of posted content or messages . . .”).

48. *See* Alison Virginia King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 858-62 (2010) (discussing how state legislatures define cyberbullying determines schools’ limits in cyberbullying disciplinary action).

49. Justin P. Markey, *Enough Tinkering with Students’ Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 149 (2007) (explaining that the Supreme Court considers this activity as on-campus speech).

cyberbullying can occur where a student torments another by using a school computer, sending a threatening text at school, or sharing a lewd video at a school-supervised event.⁵⁰ Off-campus cyberbullying occurs where a student uses digital means to torment another remotely, such as by using a home computer or cell phone.⁵¹

2. Consequences

The current statistics of cyberbullying reveal alarming results in the number of students that have fallen victim to its effects.⁵² According to a study conducted by the Cyberbullying Research Center from 2007 through 2016, approximately 28% percent of students across the United States have been victims of cyberbullying in their lifetime, and about 16% of students have admitted to cyberbullying others.⁵³ In 2015, 34% of students from one Midwestern middle school reported being victims of cyberbullying, and 21% of those students have experienced it more than once.⁵⁴ Additionally, nationally representative studies of students in grades kindergarten through twelve have consistently shown that students who report being current victims of cyberbullying have been increasing since 2010 and reached their highest rates in 2016.⁵⁵

The results provide insight into just how many students across the U.S. are experiencing the effects of cyberbullying.⁵⁶ In many cases, cyberbullying has lasting effects on its victims, arguably more so than traditional bullying.⁵⁷ When a bully projects abusive words on the

50. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 927 (3d Cir. 2011) (noting the Supreme Court found that speech which “was supervised by teachers and administrators from the school” was considered on-campus); *KOWALSKI ET AL.*, *supra* note 10, at 159 (discussing that texting at schools constitutes on-campus cyberbullying).

51. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 383 (5th Cir. 2015) (defining off-campus speech as “[a]way from school or a school function and without using school resources”); *Abrams*, *supra* note 11, at 190.

52. Patchin & Hinduja, *supra* note 4.

53. *Id.*

54. Hinduja & Patchin, *supra* note 8.

55. See U.S. DEP’T OF HEALTH & HUM. SERVS.: CTR. FOR DISEASE CONTROL & PREVENTION, YOUTH RISK BEHAVIOR SURVEILLANCE—UNITED STATES, 2015, at 4, 10 (2016), http://www.cdc.gov/healthyyouth/data/yrbs/pdf/2015/ss6506_updated.pdf (concluding that the rate of students reporting as current victims of cyberbullying has increased between the years 2011 and 2015 to 15.5% of students nationwide); Justin W. Patchin, *Cyberbullying Victimization*, CYBERBULLYING RES. CTR. (Nov. 26, 2016), <http://cyberbullying.org/2016-cyberbullying-data> (concluding from a nationally-representative sample that at the end of 2016, cyberbullying rates have increased to 16.9%).

56. See Patchin & Hinduja, *supra* note 4. The Cyberbullying Research Center has been collecting data from middle and high school students since 2002 and has surveyed more than 15,000 students from middle and high schools from across the United States in twelve unique projects. See *id.*

57. Paul R. Smokowski et al., *The Differential Impacts of Episodic, Chronic, and Cumulative*

Internet, those words are there for other classmates, or anyone, to view and can remain on the Internet indefinitely.⁵⁸ This impact inflicts lasting emotional, rather than physical, pain on a victim, which can certainly prove to have longer-lasting effects.⁵⁹ Victims of cyberbullying often report feelings of “anger, sadness, powerlessness, fear, and low self-esteem” and are at an increased risk of using alcohol and drugs, underperforming in school, and feeling anxious and depressed.⁶⁰ It becomes harder for victims to overcome these feelings of shame because they are unable to find a place of security due to the frequent access of technology by their cyberbullies.⁶¹

The consequences of cyberbullying are not limited to numbers and research reports, as real victims and instigators have courageously come forward to express their experiences.⁶² Paige Michael, a high school teen, expressed that she “didn’t eat for [] two months” because she “felt so ugly” after her best friends betrayed her by making hurtful comments online.⁶³ Another teen girl reported that she would shake and throw-up before school after viewing a website that was created just to post abusive comments specifically about her.⁶⁴ Other students reported taking provocative pictures of classmates at a party and posting it on porn sites.⁶⁵

In the most severe cases of cyberbullying, many of which have caught national attention, teens have chosen to devastatingly take their own lives when they are unable to escape the emotional pain.⁶⁶ Ryan Halligan, a thirteen-year-old middle school student from Essex Junction, Vermont, was tormented online by the same classmate and his friends from the fifth to the eighth grade before he tragically took his own life.⁶⁷

Physical Bullying and Cyberbullying: The Effects of Victimization on School Experiences, Social Support, and Mental Health of Rural Adolescents, in PERSPECTIVES ON BULLYING: RESEARCH ON CHILDHOOD, WORKPLACE, AND CYBERBULLYING 99, 100 (Roland D. Maiuro ed., 2015).

58. Caleb McCoy et al., *Cyberbullying*, in HANDBOOK ON BULLYING: PREVALENCE, PSYCHOLOGICAL IMPACTS AND INTERVENTION STRATEGIES 41, 42 (Phoebe Triggs ed., 2014).

59. *Id.*

60. Smokowski et al., *supra* note 57, at 100; *see also* SHARIFF, *supra* note 4, at 37 (discussing that bullying victims have poorer overall mental and physical health than those not involved in bullying).

61. *See* ROGERS, *supra* note 9, at 13; *see also* SHARIFF, *supra* note 4, at 43 (quoting cyberbullying victim David Knight: “It doesn’t go away when you come home from school. It made me feel even more trapped”).

62. *See, e.g., Cyberbullying: Cruel Intentions*, *supra* note 45.

63. *Id.*

64. *Id.*

65. *Id.*

66. HARASYMIW, *supra* note 41, at 5.

67. *Ryan’s Story*, RYANPATRICKHALLIGAN.ORG, <http://www.ryanpatrickhalligan.org> (last visited Aug. 1, 2017).

Ryan's cyberbullies would taunt him with "ryan patrick gay" slurs all over his social media sites.⁶⁸ In the summer before eighth grade, one of the girls in Ryan's class pretended to like him online and forwarded their instant messages to the rest of the class for a laugh.⁶⁹ When Ryan returned to school that fall, she "dumped" him.⁷⁰ Ryan's father stated: "The biggest mistake was buying him a computer."⁷¹

Phoebe Prince, an Irish immigrant and fifteen-year-old high school freshman from South Hadley, Massachusetts, was bullied online for months before she found no other option but to hang herself.⁷² After Phoebe had a brief relationship with the high school football captain, girls in her class began posting comments such as "Irish Slut" and "ho" on her Facebook and Myspace pages, and she received daily threatening texts, even after changing her cell phone number.⁷³ On the day that Phoebe chose to end her life, she was followed home by her tormentors and had an empty can thrown at her.⁷⁴ Perhaps the most disturbing part of Phoebe's story is that the school administration had known about her struggle with bullying, yet never followed up with an investigation or took any disciplinary action against her tormentors regarding the off-campus cyberbullying.⁷⁵ Bullying had not been legislatively defined, and there was no guidance in the state for school disciplinary action for off-campus cyberbullying.⁷⁶

In their study involving the correlation between cyberbullying and suicide, Doctors Sameer Hinduja and Justin W. Patchin, both renowned cyberbullying researchers, have stated the results clearly: "Without question, the nature of adolescent peer aggression has evolved due to the proliferation of information and technology. There have been several high-profile cases involving teenagers taking their own lives in part because of being harassed and mistreated over the Internet . . ."⁷⁷

68. *Ryan Halligan Loses His Life to Taunts, Rumors, and Cyberbullying*, NOBULLYING.COM (Dec. 22, 2015), <https://nobullying.com/ryan-halligan>.

69. *Ryan's Story*, *supra* note 67.

70. *Id.*

71. *See Cyberbullying: Cruel Intentions*, *supra* note 45.

72. Kari Huus, *Bullied Girl's Suicide Has Ongoing Impact*, NBC NEWS (Dec. 28, 2011, 5:50 PM), http://usnews.nbcnews.com/_news/2011/12/28/9781587-bullied-girls-suicide-has-ongoing-impact.

73. *See* Alyssa Giacobbe, *Who Failed Phoebe Prince?*, BOS. MAG. (June 2010), <http://www.bostonmagazine.com/2010/05/phoebe-prince>.

74. *Id.*

75. *See id.*; Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy that Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641, 647 (2011).

76. Giacobbe, *supra* note 73.

77. Sameer Hinduja & Justin W. Patchin, *Cyberbullying and Suicide*, CYBERBULLYING RES. CTR. (July 1, 2010), <http://cyberbullying.org/cyberbullying-research-summary-cyberbullying-and->

Additionally, it was highlighted that cyberbullying victims are almost twice as likely to have attempted suicide compared with youth who have not experienced cyberbullying.⁷⁸ One expert cyberbullying expert from Brigham Young University has summarized its effects: “The damage control is insurmountable for anybody.”⁷⁹

B. Development of Student Free Speech Rights

Given the consequences previously illustrated, it is imperative to understand that students retain First Amendment free speech rights, and that it is the very reason why it is so challenging for schools to know whether to discipline cyberbullies in cases like Ryan Halligan’s or Phoebe Prince’s.⁸⁰ Students challenging school administrations’ disciplinary actions on First Amendment free speech⁸¹ grounds is not a new phenomenon.⁸² The issue of student free speech in schools was significant during the brink of the Vietnam War in the 1960s.⁸³ Even before that era, the Supreme Court recognized students’ rights to free speech and set precedent which remains the standard in today’s courts.⁸⁴ Subpart 1 points out the Court’s recognition of students’ free speech rights.⁸⁵ Subpart 2 discusses the development of those rights and demonstrates how the “*Tinker* Doctrine” has become the standard that many courts use in deciding school disciplinary free speech and off-campus cyberbullying issues.⁸⁶

1. *West Virginia State Board of Education v. Barnette*

In the early twentieth century, the Supreme Court was primarily concerned with economic regulation, and therefore civil rights and liberties were not a dominant area of litigation.⁸⁷ Precedent for the question concerning what degree of free speech rights students retained

suicide.

78. *Id.*

79. *Cyberbullying: Cruel Intentions*, *supra* note 45.

80. See SHARIFF, *supra* note 4, at 109-13 (discussing the mixed court rulings on the extent of school responsibilities or expectations when students engage in forms of off-campus cyberbullying).

81. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

82. See *infra* Part II.B.1.

83. See Leonard M. Niehoff, *The Student’s Right to Freedom of Speech: How Much Is Left at the Schoolhouse Gate?*, 75 MICH. B.J. 1150, 1150 (1996).

84. See generally *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that students retain their free speech rights inside of public schools).

85. See *infra* Part II.B.1.

86. See *infra* Part II.B.2.

87. Gregory L. Peterson et al., *Recollections of West Virginia State Board of Education v. Barnette*, 81 ST. JOHN’S L. REV. 755, 759 (2007).

inside public schools had not yet been addressed prior to 1943.⁸⁸ During World War II, American nationalism was high, and it became mandatory in public schools for the student body to pledge allegiance and salute the American flag.⁸⁹

In one public grade school in West Virginia, a group of Jehovah's Witnesses⁹⁰ refused to pledge allegiance to the Flag and were subsequently expelled by the school administration.⁹¹ The students filed a complaint alleging that the disciplinary action of the school was an unconstitutional denial of freedom of speech.⁹² The Court ultimately held that the school went beyond its constitutional limits by disciplining the students.⁹³ The Court further reasoned that censorship or suppression of expression is only tolerated by the Constitution when it "presents a clear and present danger of action of a kind the State is empowered to present and punish."⁹⁴

This precedent is significant to present off-campus cyberbullying disciplinary actions for two compelling reasons.⁹⁵ First, it established that students retain their First Amendment free speech rights even when they are under school authority.⁹⁶ Therefore, this provides an indication that when schools use their authority to form disciplinary action policies for off-campus cyberbullying, they will need to be aware of their constitutional limitations, as the Supreme Court has made clear that individual freedom is strongly preferred.⁹⁷

Second, the Court applied the "clear and present danger test" when measuring the necessity of the disciplinary action taken by the school

88. See *Barnette*, 319 U.S. at 630, 635 (explaining that a previous case involving a similar issue was decided on religious grounds).

89. *Id.* at 626 ("The [West Virginia] Board of Education on January 9, 1942, adopted a resolution . . . ordering that the salute to the flag become 'a regular part of the program of activities in the public schools,' that all teachers and pupils 'shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly.'").

90. See Peterson et al., *supra* note 87 at 759-60 (discussing that Jehovah's Witnesses were a religious group that believed "the salute to the [American] flag was a form of idolatry, which amounted to the worship of a graven image as prohibited by the scriptures").

91. *Barnette*, 319 U.S. at 626-30.

92. *Id.* at 630.

93. *Id.* at 642.

94. *Id.* at 633, 639 ("[F]reedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.").

95. See *infra* Part IV (applying these reasons to a federal legislative solution for school cyberbullying disciplinary action).

96. See *supra* notes 90-93 and accompanying text.

97. *Barnette*, 319 U.S. at 636-37 (emphasizing that "[to enforce constitutional rights] is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity").

board.⁹⁸ This is significant because the Court applied the same standard that state authorities used to suppress the expression of speech throughout the general population to students.⁹⁹ Although, as the next Subpart discusses, the clear and present danger test is no longer the standard applicable to students, the *Barnette* precedent reiterates the point that since the writing of the Constitution there must be measureable standards set where an authoritative body may intervene without violating First Amendment rights.¹⁰⁰

2. The *Tinker* Doctrine

Amidst the Vietnam War in the 1960s, civil liberties and freedom of speech in schools were tested yet again.¹⁰¹ *Tinker v. Des Moines Independent Community School District*¹⁰² was brought as a complaint by high school students who were expelled after they wore black armbands to school in symbolic protest of the Vietnam War.¹⁰³ The Supreme Court famously held that students “do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” and that the First Amendment protects public school students’ rights to express political and social views.¹⁰⁴ The Court further set forth the disciplinary standard as follows:

A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so

98. See *supra* note 94 and accompanying text.

99. See Raul R. Calvoz et al., *Cyberbullying and Free Speech: Striking an Age-Appropriate Balance*, 61 CLEV. ST. L. REV. 357, 367-68 (2013) (discussing that, at the time *Barnette* was decided, the clear and present danger test was the applicable standard to freedom of speech suppression in general). The standard has since been changed by the Supreme Court in *Dennis v. United States*: “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” 341 U.S. 494, 508-10 (1951) (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950)); see also Calvoz et al., *supra*, at 368-69. Interestingly, the Supreme Court in *Tinker* did not apply the modified free speech standard from *Dennis* set for the general population and instead applied a different standard for students. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-13 (1969).

100. See *Tinker*, 393 U.S. at 507 (holding that although students retain their first amendment rights in school, they are still subject to school authority); HARASYMIW, *supra* note 41, at 10.

101. Tom Morain, *Students’ Right to Freedom of Speech, the Tinker Case*, IOWA PATHWAYS, http://www.iptv.org/iowapathways/mypath.cfm?ounid=ob_000355 (last visited Aug. 1, 2017) (“Some Americans [including students] opposed sending American soldiers to Vietnam. In their opinion, the war cost too many American lives and too much money.”).

102. 393 U.S. 503 (1969).

103. *Id.* at 504-05 (noting that the armbands were considered speech).

104. *Id.* at 506, 513-14.

without “materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school” and without colliding with the rights of others.¹⁰⁵

This holding, commonly cited as the *Tinker* Doctrine, has become extremely significant as it distinguishes the free speech rights of students from the general standard, contrary to the reasoning illustrated in *Barnette*.¹⁰⁶ It is evident that the Court valued this “substantial disruption test” over other standards in holding that a student’s conduct must “substantially interfere” with the operation of the school in order to become subject to disciplinary proceedings.¹⁰⁷ Therefore, this indicated that students’ free speech rights are held to a different standard when measuring the appropriateness of school disciplinary intervention.¹⁰⁸

The outcome of *Tinker* thus provides school administrations with an unambiguous guideline for implementing disciplinary action over speech into their policies: (1) the conduct of the student must materially and substantially interfere with the operation of the school’s disciplinary goals; or (2) the conduct of the student must interfere with the rights of others in the school.¹⁰⁹ Additionally, it is worth noting that this guideline indicates the school administration must be aware of the conduct in order for it to take disciplinary action.¹¹⁰

Although it appears to be a clear guideline for disciplining student speech in general, the issue remains as to whether the *Tinker* Doctrine applies to off-campus speech.¹¹¹ Yet, in recent years, the *Tinker* Doctrine has developed to be the test that the majority of courts have used in cyberbullying cases across the nation that are brought on grounds of free speech violations—on- and off-campus.¹¹²

105. *Id.* at 512-13.

106. *See id.* at 509 (applying the material and substantial interference test). The Court did not apply the suppression of free speech standard that applies to the general population and state authority as it did in *Barnette*. *Id.*

107. *See* Calvoz et al., *supra* note 99, at 370-73 (stating that the district court in *Tinker* applied the *Dennis* free speech standard and the Supreme Court in *Tinker* thus changed this standard and adopted a new test to apply towards students).

108. *See id.* at 373.

109. *Tinker*, 393 U.S. at 512; *see also* Calvoz et al., *supra* note 99, at 374 (explaining that the Court protects free speech only if it does not meet those two elements).

110. *Tinker*, 393 U.S. at 514 (indicating that there must be facts on the record to lead school authorities to determine a substantial disruption).

111. *See* SHARIFF, *supra* note 4, at 116-18 (discussing the possible applications of the material and substantial disruption test derived from *Tinker*).

112. Calvoz et al., *supra* note 99, at 380-82. For further discussion on cyberbullying court decisions, *see infra* Part III.

C. State and Federal Legislative Reaction to Cyberbullying

Because of the national recognition and outcries that have occurred as a result of recent high-profile cyberbullying cases, Congress has undoubtedly recognized the issue as a pressing one, but has proceeded with caution because of students' defined free speech rights.¹¹³ In recent years, there have been demands that federal lawmakers respond to the high incidence of cyberbullying.¹¹⁴ However, those demands have not yet been met.¹¹⁵ State legislators and school administrations have thus been left with the discretion to implement cyberbullying laws that pertain to off-campus speech.¹¹⁶ Subpart 1 discusses Congress's reaction to the ongoing issue of off-campus cyberbullying and what current options the federal government retains.¹¹⁷ Subpart 2 analyzes the states' implementation of anti-cyberbullying laws and the impact it has had on school policies.¹¹⁸

1. Federal Cyberbullying Legislation

As cyberbullying has become a more recognized national problem, there is no question that Congress has taken the issue into account and has labeled it as a "serious issue" with "no easy solution."¹¹⁹ Congress enacted the Protecting Children in the 21st Century Act¹²⁰ in 2008, which requires schools to raise awareness of cyberbullying so that students can identify the behavior and learn how they can best respond to it.¹²¹ As of August 2017, no federal law makes it a mandatory policy for state school districts to intervene in cases of cyberbullying, including its on- and off-campus forms.¹²²

113. See *Cyberbullying and Other Online Safety Issues for Children: Hearing on H.R. 1966 and H.R. 3630 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 1-3 (2009) [hereinafter *Hearing on Cyberbullying and Other Online Safety Issues for Children*] (statement of Robert C. Scott, Chairman, S. Comm. on Crime, Terrorism, and Homeland Sec.).

114. HARASYMIW, *supra* note 41, at 12.

115. *Id.*; *Federal Laws*, *supra* note 12.

116. See HARASYMIW, *supra* note 41, at 18; Donegan, *supra* note 7, at 38.

117. See *infra* Part II.C.1.

118. See *infra* Part II.C.2.

119. See *Hearing on Cyberbullying and Other Online Safety Issues for Children*, *supra* note 113, at 3 (statement of Robert C. Scott, Chairman, S. Comm. on Crime, Terrorism, and Homeland Sec.).

120. Pub. L. No. 110-385, 122 Stat. 4102 (2008) (codified as amended at 15 U.S.C. §§ 6551–6555 (2012)).

121. See 15 U.S.C. § 6552 (2012); see also HARASYMIW, *supra* note 41, at 12 (discussing the Protecting Children in the 21st Century Act).

122. See McCallion & Feder, *supra* note 11, at 15; *Federal Laws*, *supra* note 12.

The federal government does provide model policies to provide states with guidance, direction, and recommended standards to help local school systems create their own district and school policies or administrative regulations.¹²³ However, it is important to note that the scope of this guidance refers to “conduct that occurs on the school campus, at school-sponsored activities or events (regardless of the location), on school-provided transportation, or through school-owned technology or that otherwise creates a significant disruption to the school environment.”¹²⁴

There have been several attempts to pass cyberbullying legislation at the federal level by means of criminalizing cyberbullying, such as the proposed Megan Meier Cyberbullying Prevention Act.¹²⁵ Congress has expressed its cautionary view in passing such laws by stating that it would be considered “overcriminalization” in committing students to federal felonies for being “mean” online.¹²⁶ Thus, as federal law currently stands, there are guidelines for states to follow while crafting their traditional bullying policies, but there is no requirement, incentive, or even a specific suggestion that states to adopt legislation requiring schools to have disciplinary policies addressing off-campus cyberbullying.¹²⁷

2. State Cyberbullying Legislation

Because most education policy is traditionally decided at the state and local levels, coupled with a lack of national law, the states have been left to their own discretion in deciding whether to implement cyberbullying disciplinary policies.¹²⁸ It took the unfortunate tragedy of several high-profile cyberbullying cases and advocating for victims to motivate state legislators to act.¹²⁹

123. *Key Components in State Anti-Bullying Laws*, STOPBULLYING.GOV (last updated Mar. 31, 2014), <http://www.stopbullying.gov/laws/key-components/index.html>.

124. *Id.*

125. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. § 881 (2009). The proposed Act would make cyberbullying a crime punishable by up to two years in prison. *Id.* It was introduced to the House of Representatives in 2009 and no further action has been taken since. HARASYMIW, *supra* note 41, at 15-16.

126. *See Hearing on Cyberbullying and Other Online Safety Issues for Children*, *supra* note 113, at 19-21, 56.

127. *See* McCallion & Feder, *supra* note 11, at 23-28 (illustrating possible federal initiatives to address bullying); *Federal Laws*, *supra* note 12; *Key Components in State Anti-Bullying Laws*, *supra* note 123.

128. *Laws & Guidance*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/policy/landing.jhtml> (last visited Aug. 1, 2017); *see also* HARASYMIW, *supra* note 41, at 18 (noting that the majority of state legislatures have addressed online bullying in recent years).

129. HARASYMIW, *supra* note 41, at 18; Donegan, *supra* note 7, at 37; King, *supra* note 48, at 857.

Presently, forty-nine states have an anti-bullying law that require schools to have a policy of appropriately disciplining students engaging in on-campus forms of bullying.¹³⁰ Forty-five of those states include school sanctions as disciplinary measures for cyberbullying in their policies.¹³¹ However, only fifteen states have enacted laws where school administrations can discipline and stop students from cyberbullying off-campus.¹³² Connecticut provides an example of a state cyberbullying law that requires schools to include within their policies disciplinary action in cases where cyberbullying has occurred off-campus and the school has knowledge of such activity.¹³³ The provision expressly states:

Each local and regional board of education shall develop and implement a safe school climate plan to address the existence of bullying and teen dating violence in its schools. Such plan shall . . . prohibit bullying . . . outside of the school setting if such bullying (i) creates a hostile environment at school for the student against whom such bullying was directed, or (ii) infringes on the rights of the student against whom such bullying was directed at school, or (iii) substantially disrupts the education process or the orderly operation of a school.¹³⁴

Several additional states that have implemented disciplinary policies addressing off-campus cyberbullying have similar elements.¹³⁵ It is recognizable that current state statutes that require school policies to address off-campus cyberbullying have codified *Tinker*'s substantial disruption standard.¹³⁶ Therefore, it follows that state legislatures are frequently looking at federal precedent in determining what the standard should be for schools in implementing disciplinary policies.¹³⁷ As it

130. See *Bullying Laws Across America*, *supra* note 6.

131. *Id.*

132. *Id.*

133. CONN. GEN. STAT. § 10-222d (2015).

134. *Id.* (defining “outside of the school setting” as “a location, activity or program that is not school related, or through the use of an electronic device or a mobile electronic device that is not owned, leased or used by a local or regional board of education”).

135. See, e.g., CAL. EDUCATION CODE § 48900 (West Supp. 2017) (providing that bullying includes an “electronic act” that “originated on or off the schoolsite” and is grounds for suspension or expulsion if the bullying caused a “reasonable pupil to experience substantial interference with his or her academic performance” or “ability to participate in or benefit from the services, activities, or privileges provided by a school”); N.Y. EDUCATION LAW § 11 (McKinney Supp. 2017) (“[B]ullying” shall mean the creation of a hostile environment by conduct or by threats, intimidation or abuse, including cyberbullying, that . . . occurs off school property and creates or would foreseeably create a risk of substantial disruption within the school environment . . .”).

136. *Bullying Laws Across America*, *supra* note 6.

137. See, e.g., N.Y. EDUCATION LAW § 10 (McKinney Supp. 2017) (providing the legislative intent was “to prevent and prohibit conduct which is inconsistent with a school’s educational mission”). The holding in *Tinker* was based on finding a substantial disruption within the operation

currently stands, a minority of states have adopted some form of the *Tinker* standard and codified it pertaining to on-campus school cyberbullying policies, while the majority of states have yet to adopt any policy at all requiring schools to intervene in cases of off-campus cyberbullying.¹³⁸

III. CURRENT PROBLEMS AMONG THE STATES IMPLEMENTING OFF-CAMPUS CYBERBULLYING DISCIPLINARY INTERVENTION

Even with national attention over the harmful consequences of cyberbullying, there continues to be cases where victimized students are severely impacted, and their bullies do not receive any amount of discipline for their actions because of an absence of school policy.¹³⁹ The lack of a national standard requiring schools to intervene in off-campus cyberbullying results in varying interpretations among the states regarding how far a school can go in offering its protection to a victim of off-campus cyberbullying.¹⁴⁰ As previously discussed, the majority of states do not have an anti-cyberbullying law that requires schools to intervene when the cyberbullying originates off-campus.¹⁴¹ This has resulted in myriad lawsuits frequently brought on First Amendment free speech grounds when schools do intervene and discipline a cyberbully, leaving the following issue open to continuous controversy: Can schools intervene in cases of student cyberbullying where the cyber speech originates off-campus?¹⁴² Subpart A analyzes the reasoning behind recent court decisions that determined whether schools could intervene in off-campus cyber speech.¹⁴³ Subpart B subsequently discusses the similarities and differences among the court decisions and how a lack of a national law continues to stir the controversy.¹⁴⁴

of the school. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509, 513 (1969).

138. See *Bullying Laws Across America*, *supra* note 6.

139. See Goodno, *supra* note 75, at 647-49.

140. *Id.* at 653-55.

141. See *supra* notes 130-32 and accompanying text.

142. See, e.g., *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 383 (5th Cir. 2015); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1098-100 (C.D. Cal. 2010); see also HARASYMIW, *supra* note 41, at 25 (discussing the question: “[c]an schools regulate cyber speech at home?”).

143. See *infra* Part III.A.

144. See *infra* Part III.B.

A. *Did Schools Go Too Far?*

A school's authority to intervene in cyberbullying cases depends on the school's anti-cyberbullying policies determined by the state and whether the action takes place on- or off-campus grounds.¹⁴⁵ Where there is a lack of state legislation requiring a school to have an anti-cyberbullying policy for speech that originates off-campus, the issue is often left for the courts to decide.¹⁴⁶ Several courts have found that schools went too far in disciplining a cyberbully where the action occurred off-campus.¹⁴⁷

For example, in *J.S. ex rel. Snyder v. Blue Mountain School District*,¹⁴⁸ a middle school student from Pennsylvania was suspended for creating a Facebook profile of her principal containing lewd, vulgar, and sexually explicit speech from her home computer.¹⁴⁹ The Third Circuit held on appeal that the student's speech had not been turned into on-campus speech, and thus, it was outside of school officials' purview unless it was "reasonably foreseeable that [the student's] speech would create a substantial disruption or material interference in school."¹⁵⁰ It is important to point out that at the time the incident occurred, Pennsylvania did have legislation requiring schools to have a bullying policy pertaining to off-campus speech and thus the court did not determine the disciplinary action was unconstitutional based on the school's policy, but rather because there was no substantial disruption.¹⁵¹

Similar reasoning was used in *J.C. ex. rel. R.C. v. Beverly Hills Unified School District*,¹⁵² where a student challenged her school's disciplinary action against her for posting a video of her friends online—created off-campus—using derogatory terms targeted at another classmate.¹⁵³ The court held that (1) the fact that the student's conduct took place entirely outside of the school did not preclude the school from disciplining the student; and (2) there was no substantial disruption, or

145. HARASYMIW, *supra* note 41, at 31.

146. See Goodno, *supra* note 75, at 658-61 (discussing that the Supreme Court has not yet heard a case on the issue of off-campus cyberbullying and thus the issue is left for the lower courts to decide).

147. See, e.g., King, *supra* note 48, at 871.

148. 650 F.3d 915 (3d Cir. 2011).

149. *Id.* at 920-22.

150. *Id.* at 929-30.

151. See *id.* at 933 ("Neither the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school."). In 2008, the law in Pennsylvania expanded to require schools to have an anti-bullying policy which targets off-campus cyberbullying. See 24 PA. STAT. AND CONS. STAT. ANN. § 13-1303.1-A (West 2017).

152. 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

153. *Id.* at 1098-100.

reasonably foreseeable risk of substantial disruption, of school activities as a result of the video and thus, discipline of the student violated the First Amendment.¹⁵⁴

The U.S. District Court for the Northern District of Indiana analogously held that “a student cannot be punished with a ban from extracurricular activities for non-disruptive [off-campus] speech.”¹⁵⁵ The U.S. District Court for the District of Oregon ruled unlawful the suspension of a student following threatening posts on Facebook from his home computer by holding that the student’s comments did not fit within its exception to First Amendment protections because there could be no rational finding that the comments “caused a material and substantial disruption with appropriate school discipline.”¹⁵⁶

Conversely, several courts have upheld schools’ disciplinary actions where the speech originated off-campus.¹⁵⁷ In *Kowalski v. Berkeley County Schools*,¹⁵⁸ a high school student who was suspended for creating and posting to a webpage that ridiculed a fellow student brought an action against the school district and school officials, alleging that the suspension violated her free speech rights under the First Amendment.¹⁵⁹ The court held that the school was authorized by *Tinker* to discipline the student, regardless of where her speech originated, because the speech was materially and substantially disruptive in that it “interfer[ed] . . . with the schools’ work [and] colli[d] with the rights of other students to be secure and to be let alone.”¹⁶⁰

Similarly, the Second Circuit upheld a school’s disciplinary actions in a case involving a student setting as his America Online (“AOL”) Instant Messenger icon as a small drawing of a pistol firing a bullet at a person’s head, above which were dots representing splattered blood with the words “Kill Mr. VanderMolen,” who was the student’s English teacher at the time.¹⁶¹ The court held that the student could be

154. *Id.* at 1102-08, 1117.

155. *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 772, 779-80 (N.D. Ind. 2011) (holding that provocative pictures posted on Facebook did not constitute a substantial disruption of school activities).

156. *Burge ex rel. Burge v. Colton Sch. Dist.* 53, 100 F. Supp. 3d 1057, 1060-63 (D. Or. 2015).

157. *See Goodno, supra* note 75, at 664. For cases supporting schools’ disciplinary actions of off-campus speech, see *infra* notes 158-61 and accompanying text.

158. 652 F.3d 565 (4th Cir. 2011).

159. *Id.* at 567.

160. *Id.* at 573-74 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)). “We are confident that Kowalski’s speech caused the interference and disruption described in *Tinker* as being immune from First Amendment protection.” *Id.* at 572.

161. *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 35-39 (2d Cir. 2007).

disciplined for off-campus speech because the activity was foreseen to reasonably disrupt schoolwork and discipline.¹⁶²

What becomes evident from these cases is that, where there is an absence of state law allowing schools to intervene in situations of off-campus cyberbullying, there remains the opportunity for students to challenge disciplinary action, and the court becomes the sole arbiter of the standard that a particular school should follow.¹⁶³ Clearly, this results in conflicting decisions among the courts because they will interpret the *Tinker* standard as they see fit.¹⁶⁴ Illustratively, the *Kowalski* Court reasoned that the off-campus speech created a material and substantial disruption of school activities because the victim actually had to miss school in order to avoid further abuse.¹⁶⁵ Yet, the *Beverly Hills* Court determined that students who posted an offensive video of a classmate, resulting in her feeling ashamed to the point of missing class in the morning (along with five other students involved missing undetermined portions of their classes), did not meet substantial disruption under *Tinker*—and deserved no disciplinary action at all.¹⁶⁶ Thus, the Courts are left as the only interpreters of the standards which apply in schools which arguably leaves students with unequal protection regarding off-campus cyberbullying.¹⁶⁷

B. *Lingering Insufficiencies*

Although courts have applied other standards,¹⁶⁸ it is evident that the majority use some form of the rule set forth in *Tinker*, where there must be a material and substantial disruption of school activities to warrant intervention by school authorities in off-campus speech.¹⁶⁹ As

162. *Id.* at 38-39.

163. *See, e.g., J.S. ex. rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926 n.3 (3d Cir. 2011) (noting that appellant's argument that school official's authority is limited to school grounds will not be addressed). At the time the case was decided, Pennsylvania law did not require schools to intervene in cases of off-campus cyberbullying. *See supra* note 151. Therefore, the court did not set precedent for whether a school policy addressing off-campus cyberbullying is just constitutional, but decided the case based on whether there was a substantial disruption with school activities in this particular circumstance. *Snyder*, 650 F.3d at 929.

164. *See J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1111 (C.D. Cal. 2010) (“[E]xisting case law has not provided clear guidelines as to when a substantial disruption is reasonably foreseeable.”); *see also HARASYMIW, supra* note 41, at 25-26; Goodno, *supra* note 75, at 658-59, 664.

165. *Kowalski*, 652 F.3d at 574.

166. *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1117-19. The court made this determination “although the time line is not entirely clear.” *Id.*

167. *See Goodno, supra* note 75, at 649; Zande, *supra* note 20, at 120-21.

168. *See Zande, supra* note 20, at 121 (discussing a court's omission of *Tinker* and applying a “true threat” analysis).

169. *See id.* at 122.

illustrated in the previous Subpart, applying *Tinker* does not necessarily provide a uniform standard for school policy addressing off-campus speech because the test is applied to particular facts in a given case.¹⁷⁰

Additionally, although persuasive, guidelines from the courts in a specific case do not make it mandatory for school administrations to include off-campus intervention or the material and substantial guideline from *Tinker* in their policies.¹⁷¹ Furthermore, absent state legislation, federal court decisions that decide whether a school properly intervened in an off-campus cyberbullying case can conflict with school policies already set in place, which leaves schools in confusion regarding their constitutional liability in certain situations.¹⁷² These reasons demonstrate the need for a uniform standard among school policies—leaving it to the courts may not necessarily be the best answer.¹⁷³ The Supreme Court itself has stated this principle clearly: “[T]he education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”¹⁷⁴

Moreover, where a court is the sole authority determining policy, victims of off-campus cyberbullying with ambiguous protection afforded by their schools may have to be dragged through painstaking court cases, filled with “publicity, expense, and unpleasantness,” in order to determine if the school’s action or inaction was proper.¹⁷⁵ By the time a court case has been settled, the harm to both the victim and the cyberbully involved may be irreparable.¹⁷⁶

Even where an instance of cyberbullying is not challenged in court because the school had clear authority given by the state to discipline a student, the authority given to schools among the states varies, resulting in still different standards of protection.¹⁷⁷ Additionally, many of the

170. See *supra* notes 164-67 and accompanying text.

171. See Elizabeth M. Jaffe & Robert J. D’Agostino, *Bullying in Public Schools: The Intersection Between the Student’s Free Speech Rights and the School’s Duty to Protect*, 62 MERCER L. REV. 407, 432-33 (2010) (discussing a student speech case where, although restricting the content of a student’s speech was permissible, the final decision in restricting it is up to the school officials).

172. Goodno, *supra* note 75, at 656-57; Jaffe & D’Agostino, *supra* note 171, at 415; McCallion & Feder, *supra* note 11, at 11.

173. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-73 (1988).

174. *Id.* at 273.

175. Abrams, *supra* note 11, at 187 (quoting Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 94 (1996)) (discussing the hardships resulting from a lawsuit between a student and his or her school).

176. KOWALSKI ET AL., *supra* note 10, at 198-99 (discussing the harm students have already incurred by the time a lawsuit is decided).

177. McCallion & Feder, *supra* note 11, at 9-10 (explaining that in a study regarding eleven common key components in state laws addressing cyberbullying, the components were significantly varied in their level of detail and scope).

states that have enacted anti-cyberbullying legislation have failed to include many of the key components of anti-bullying legislation that the U.S. Department of Education highlighted.¹⁷⁸

In sum, students in schools across America are subject to different standards of cyberbullying protection depending on their home state.¹⁷⁹ A student in Connecticut can report or show signs to her school administrator that she has been a victim of off-campus cyberbullying, which can warrant an investigation and disciplinary action for the tormentor if the bullying was proven to be substantial.¹⁸⁰ Yet, a student in Missouri who has endured constant cyberbullying has no guaranteed protection by his or her school, and the school is left with murky instructions of when it should help the student, or is not given a definitive answer until the case goes to court, which at that point the consequences may be irreparable.¹⁸¹ Even between the states that have enacted legislation requiring off-campus cyberbullying policies within schools, the standards are unevenly balanced.¹⁸² Thus, the next Part of this Note argues that a federal law that clearly defines *Tinker* and provides incentives for states to adopt off-campus cyberbullying policies will give students an equal standard of protection.¹⁸³

IV. CODIFYING *TINKER* IS THE ANSWER FOR A NATIONAL STANDARD OF PROTECTION

Both the federal and state governments have recognized that cyberbullying affects students' rights to a safe and prosperous learning environment.¹⁸⁴ Research has confirmed that bully victimization is directly associated with lower levels of educational achievement.¹⁸⁵ Education in America plays a strong role in students' future success, not only in terms of future economic success, but also in psychological

178. *Id.* at 2 (“[M]any of these laws do not contain all of the key components of anti-bullying legislation that the U.S. Department of Education identified as important . . .”).

179. *See* Zande, *supra* note 20, at 123-24.

180. *See* CONN. GEN. STAT. § 10-222d(b) (2015).

181. MO. REV. STAT. § 160.775 (2016) (limiting the prohibition of cyberbullying to occurring “on school property, at any school function, or on a school bus”).

182. *See supra* notes 177-78 and accompanying text.

183. *See infra* Part IV.

184. *See Effects of Bullying*, STOPBULLYING.GOV, <https://www.stopbullying.gov/at-risk/effects/index.html> (last visited Aug. 1, 2017); *Senate Passes Landmark ‘Dignity for All Student’s Act’*, N.Y. STATE SENATE (June 23, 2010), <https://www.nysenate.gov/newsroom/press-releases/providing-all-students-safe-learning-environment>.

185. Ann Marie Popp et al., *Gender, Bullying Victimization, and Education in PERSPECTIVES ON BULLYING, RESEARCH ON CHILDHOOD, WORKPLACE, AND CYBERBULLYING* 1, 8-11 (Roland D. Maiuro ed., 2015).

development.¹⁸⁶ Therefore, schools have one of the most significant societal roles in developing and protecting the cultural values in adolescents and in our society.¹⁸⁷ As discussed previously, the courts are not the primary protectors of students.¹⁸⁸ Additionally, criminalizing cyberbullying is not necessarily the answer, as legislators and courts have consistently struck down these types of statutes for “overcriminalizing” the nation’s youth and subjecting students to extreme penalties.¹⁸⁹ Therefore, federal legislative action that would implement a law requiring school policies to include disciplinary action in situations of off-campus cyberbullying would create a unified standard of protection in which all administrations and students can feel confident.¹⁹⁰

It is equally imperative that the law is structured to articulate a standard that still protects students’ First Amendment free speech rights, as they surely do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁹¹ Codifying *Tinker* into school policies would provide a unified and constitutionally accepted free speech standard that the majority of courts have already been relying on since the Supreme Court decision was rendered.¹⁹² Subpart A addresses the hurdle of whether the federal government can impose off-campus cyberbullying policies on schools in the first place.¹⁹³ Subpart B argues the benefits of codifying the *Tinker* Doctrine and the need for specific unified standards of authoritative school

186. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (discussing the significance of a child’s education in U.S. society); M. LEE MANNING, DEVELOPMENTALLY APPROPRIATE MIDDLE LEVEL SCHOOLS 12, 36 (1993) (discussing the importance of educators in students’ psychological development).

187. Abrams, *supra* note 11, at 184 (“Unlike other instruments of the State, schools are entrusted with a unique role in our society—to mold our children into responsible and wise adult citizens.” (quoting *In re Douglas D.*, 626 N.W.2d 725, 742 (Wis. 2001))).

188. See *supra* notes 171-74 and accompanying text.

189. See *State v. Bishop*, 787 S.E.2d 814, 816-17, 820-21 (N.C. 2016) (finding a North Carolina cyberbullying statute that criminalized posting on the Internet information pertaining to a minor with the intent to torment or intimidate that minor was unconstitutionally broad, overcriminalized, and in violation of free speech protections); *People v. Marquan*, 19 N.E.3d 480, 485-86 (N.Y. 2014) (striking down an Albany County, New York law criminalizing cyberbullying on the grounds that it is overbroad and the “provision would criminalize a broad spectrum of speech outside the popular understanding of cyberbullying”); *Hearing on Cyberbullying and Other Online Safety Issues for Children*, *supra* note 113, at 3 (statement of Robert C. Scott, Chairman, S. Comm. on Crime, Terrorism, and Homeland Sec.).

190. King, *supra* note 48, at 848-49, 875-76.

191. See U.S. CONST. amend. I; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

192. See Calvoz et al., *supra* note 99, at 382; King, *supra* note 48, at 877.

193. See *infra* Part IV.A.

intervention.¹⁹⁴ Subpart C briefly discusses the issue of school liability that legislative action would impose.¹⁹⁵

*A. Can the Federal Government Leap the Hurdle over
Traditional Local Control?*

Before analyzing the benefit of a federal law, the following question should be answered: Can the federal government implement school policies without grossly interfering with the political tradition that states and local governments are the best positioned to make determinations about education?¹⁹⁶ The answer is likely yes, but under the right circumstances.¹⁹⁷ The U.S. Department of Education notes that it plays a limited role in education and most policy is decided at the state and local levels.¹⁹⁸ However, recently, the federal government has enacted several laws focusing on student performance and sanctioning schools when students fail to meet certain levels of performance.¹⁹⁹ Because cyberbullying has had such fast-paced drastic effects on America's youth and is directly related to school performance, it is arguable that the federal government's role in providing a minimum standard for state cyberbullying codes will be accepted as promoting unity on the issue, so long as the law leaves states and localities the ability to provide for their local necessities.²⁰⁰ Subpart 1 explains the traditional limited role of the federal government in educational policies and how it has been developing a stronger role in certain areas.²⁰¹ Subpart 2 highlights circumstances where the federal government's role has been accepted to expand and how cyberbullying can fit into this framework.²⁰²

194. See *infra* Part IV.B.

195. See *infra* Part IV.C.

196. See Benjamin Michael Superfine, *Stimulating School Reform: The American Recovery and Reinvestment Act and the Shifting Federal Role in Education*, 76 MO. L. REV. 81, 86-87 (2011) ("Education in the United States has traditionally been considered a function of state and local governments . . .").

197. See *infra* Part IV.A.2.

198. *Laws & Guidance*, *supra* note 128; *The Federal Role in Education*, U.S. DEPT. OF EDUC. (July 21, 2016), <http://www2.ed.gov/about/overview/fed/role.html>.

199. Superfine, *supra* note 196, at 88-90.

200. *Id.* at 90-91 (discussing that a federal law can allow the states significant flexibility to set their own standards).

201. See *infra* Part IV.A.1.

202. See *infra* Part IV.A.2.

1. The Federal Government's Expanding Role in Education Policies

As a result of the Tenth Amendment, states have traditionally had the legal authority to govern education throughout the United States.²⁰³ This has been politically consistent over time because of the understanding that local governments and schools know the particular needs of their communities.²⁰⁴ Perhaps the most significant change in the federal government's traditionally limited role came about after the landmark case, *Brown v. Board of Education*,²⁰⁵ where the Supreme Court held that segregation of public schools denies minority children equal educational opportunities.²⁰⁶ Since that decision was rendered, the federal government began to take an active role in civil rights pertaining to education.²⁰⁷ This is evidenced by the provision within the Civil Rights Act of 1964²⁰⁸ which articulated that educational rights apply to all students.²⁰⁹ A few decades later, the federal government recognized that educational reform was essential for future development of the nation's students and shifted from equality to quality, by beginning to implement curriculum and testing standards within the classroom that schools needed to meet.²¹⁰

The federal government created incentives for states to meet these standards by withholding funding under Title I of the Elementary and Secondary Education Act of 1965 ("ESEA"),²¹¹ unless states meet certain federal standards.²¹² The federal government can do this because

203. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States . . ."); Superfine, *supra* note 196, at 86 (noting that the majority of states have education clauses in their constitutions, while the Federal Constitution does not).

204. See Superfine, *supra* note 196, at 86-87, 96; see also Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 130-31 (2006) (discussing the impulse for local control over education).

205. 347 U.S. 483 (1954).

206. *Id.* at 493.

207. See Heise, *supra* note 204, at 132; Superfine, *supra* note 196, at 87.

208. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000c, 2000c(1)-(9) (2012)).

209. *Id.*

210. Superfine, *supra* note 196, at 88-89.

211. See Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in 20 U.S.C.). Title I asserts the basic requirements that qualifying school districts must adhere to in order to receive certain federal funding. See generally Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802, 1814-1913 (2015). Title I is reaffirmed every five years, its most recent affirmation being in 2015, under the Every Student Succeeds Act. See *Elementary and Secondary Education Act of 1965*, VA. COMMONWEALTH U., <http://socialwelfare.library.vcu.edu/programs/education/elementary-and-secondary-education-act-of-1965> (last visited Aug. 1, 2017).

212. See, e.g., Superfine, *supra* note 196, at 89-90 (discussing the requirements to receive federal funding enacted under Title I of the NCLB in 2002).

of Supreme Court precedent holding that the federal government can condition certain funding so long as it is not coercive in nature, meaning that the states recognize that they have a choice in the matter.²¹³ In 2002, the federal government built on the ESEA by amending Title I and passing the No Child Left Behind Act of 2001 (“NCLB”),²¹⁴ taking its most active role yet in the educational policies of schools.²¹⁵ The passing of NCLB resulted in every state developing the required federal standards, which shaped educational policy throughout the United States.²¹⁶ By placing even greater conditions on schools’ receipt of federal funding, NCLB required schools to focus on proficiency and educational achievement, and enacted sanctions and restructure of schools if federal standards were not met.²¹⁷

In 2015, the Obama Administration eased the federal control of educational programs and replaced NCLB with the ESSA²¹⁸ as a result of the high amount of criticism that states did not have enough of a voice in their own school policies.²¹⁹ As some federal mandates have remained, however, much of the program requirements regarding academic achievement have been left to the states.²²⁰ The Obama Administration expressed that a “one-size fits all approach” does not represent the “joint responsibility” of education.²²¹

2. How the Expanded Federal Role Can Include Cyberbullying

Cyberbullying has proven to have a direct effect on educational achievement, and its widespread occurrence has been a major concern for legislators in recent years.²²² As stated previously, the legislative history pertaining to the federal implementation of school policies shows that the federal government can incentivize states to adopt its policies regarding educational achievement, but states have emphasized that they want to retain a substantial amount of state power to fulfill local need

213. See *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987) (“[I]f Congress desires to condition the States’ receipt of federal funds, it ‘must do so unambiguously . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.’”).

214. Pub. L. No. 107-110, 115 Stat. 1425, *repealed in part by* Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802.

215. See Heise, *supra* note 204, at 134-35.

216. See *id.* at 141-43, 149.

217. See *id.* at 134-35, 141-42.

218. Pub. L. No. 114-95, 129 Stat. 1802.

219. See Julie Hirschfield Davis, *Revamping of No Child School Act is Signed*, N.Y. TIMES, Dec. 10, 2015, at A22.

220. *Id.*

221. *Id.*

222. See *supra* notes 61, 119, 182 and accompanying text.

within their educational policies.²²³ Some analysts suggest that the federal government should take on a supportive type role by providing guidelines as to how school policies should be administered but allow states extensive flexibility to craft the policies to local thresholds, since this is important to avoid federal overreach.²²⁴

Although the federal government currently provides anti-bullying policies, these guidelines do not address off-campus cyberbullying, and therefore need to be tailored to reflect off-campus intervention.²²⁵ Further, codifying the requirement of having an off-campus cyberbullying policy, such as by attaching it as a conditional funding requirement to an educational reform act, can provide greater incentives among states to adopt the requirements.²²⁶ Additionally, implementing anti-bullying policies with federal minimum standards cannot be self-executed by the federal government alone.²²⁷ There are several levels of administration, which mostly occur at the local level.²²⁸ Providing states with the flexibility to fill school disciplinary policies with their own necessities is extremely significant for states to have the incentive to adopt a national cyberbullying policy.²²⁹ Thus, finding a balance that will meet federal minimum standards, without exceeding the boundary of traditional local control over education, is imperative for finding a national standard of protection for cyberbullying victims.²³⁰

B. *The Tinker Doctrine as a Unified Standard*

The *Tinker* Doctrine has been a long-standing precedent of student speech rights.²³¹ The substantial disruption test derived from *Tinker* acts as the guideline in the majority of court decisions addressing off-campus student speech and cyberbullying issues.²³² Furthermore, the states that have enacted legislation requiring schools to develop disciplinary policies

223. See *supra* Part IV.A.1.

224. See, e.g., Heise, *supra* note 204, at 143 (highlighting that one of the “hallmarks” of the NCLB was that it allowed for states to retain the ability to create their own local thresholds for student achievement).

225. See *Key Components in State Anti-Bullying Laws*, *supra* note 123.

226. Heise, *supra* note 204, at 149 (pointing out that, under the NCLB, Title I was not a federal mandate, but nonetheless every state adopted its programs to receive federal funding).

227. Superfine, *supra* note 196, at 93.

228. *Id.* at 86, 94-96.

229. Heise, *supra* note 204, at 143 (emphasizing that giving states flexibility in a federal law serves as an important source of federal political strength).

230. *Id.* at 142 (“Some scholars view NCLB as an illustration of ‘cooperative federalism’ where the federal government uses funds as the carrot to induce states and local schools to implement national policies.”).

231. Markey, *supra* note 49, at 133.

232. Zande, *supra* note 20, at 122.

for off-campus cyberbullying have essentially codified the substantial disruption test as a standard in determining when schools have the authority to intervene in such cases.²³³ Requiring states to adopt a clearly defined substantial disruption test derived from *Tinker* as a minimum standard in their schools' anti-bullying policies, while leaving states the flexibility in how to administer their policies, such as training school employees and educating students on the issue, can potentially capture the balance suggested in the previous section.²³⁴ Subpart 1 analyzes the state statutes that have codified *Tinker* and the benefits that *Tinker* gives to school policies.²³⁵ Subpart 2 argues that a federal act requiring a school disciplinary policy for off-campus cyberbullying that includes certain key components will help diminish any disparities in protections among the states.²³⁶ Subpart 3 suggests implementing additional policy requirements taken from the federal bullying guidelines, which would give states local control.²³⁷

1. Adopting *Tinker*

As previously illustrated, the only mandatory grounds for policy-setting within schools is via state or local legislative enactment requiring the schools within the state or locality to adopt a particular policy.²³⁸ Therefore, if the federal government requires the substantial disruption test in *Tinker* as a necessary requirement in school anti-bullying policies, including on- and off-campus policies, and states subsequently adopt the federal standards, then *Tinker* will be drafted into the states' education codes.²³⁹ As previously discussed, several states have already adopted the *Tinker* standard in their anti-bullying posture.²⁴⁰ The Connecticut anti-bullying statute articulates that cyberbullying may be addressed and disciplined if it "substantially disrupts the education process or the orderly operation of a school."²⁴¹ In drafting this statute, the Connecticut legislature essentially took the test the Supreme Court provided in *Tinker* and codified it into the state education code.²⁴² Other states that have

233. See *supra* note 136 and accompanying text.

234. See *supra* Part IV.A.2.

235. See *infra* Part IV.B.1.

236. See *infra* Part IV.B.2.

237. See *infra* Part IV.B.3.

238. See *Bullying Laws Across America*, *supra* note 6.

239. *Id.*

240. See *supra* Part II.C.2.

241. CONN. GEN. STAT. § 10-222d (2015).

242. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969); see also *Key Components in State Anti-Bullying Laws*, *supra* note 123 (illustrating that Connecticut is one of the states that have codified the substantial disruption standard).

enacted anti-bullying statutes provide a similar *Tinker* standard for schools to follow when determining whether they can intervene in off-campus cyberbullying.²⁴³ For example, the Arkansas anti-bullying statute provides that Arkansas schools shall adopt policies that prohibit bullying “[b]y an electronic act that results in the substantial disruption of the orderly operation of the school or educational environment.” Moreover, the statute “appl[ies] to 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.”²⁴⁴

Notably, all fifteen states that include an off-campus cyberbullying policy have restated *Tinker* in some form.²⁴⁵ Thus, codifying *Tinker* seems to be a common practice among local educational policies, as it is the accepted standard among all of the states that have implemented off-campus cyberbullying legislation.²⁴⁶ Therefore, a federal law with *Tinker* as the minimum standard will only be reiterating what several of the states have already adopted.²⁴⁷ Additionally, school policies already using a substantial disruption test in their on-campus cyberbullying policies will not have to stray far from their current practices because they will essentially have the same test to apply to on-campus bullying and off-campus cyberbullying: that it created a material and substantial disruption within the school or violated another student’s rights.²⁴⁸

As indicated by the statutes in the fifteen states that have adopted off-campus cyberbullying policies, school administrations will need to have knowledge that the cyberbullying has created a substantial disruption within the school in order for them to intervene in the situation, but where the speech originated will be irrelevant.²⁴⁹ Thus, the

243. See, e.g., TENN. CODE. ANN. § 49-6-4506 to -4503 (2017) (allowing disciplinary action off-campus cyberbullying when “it is directed specifically at a student or students and has the effect of creating a hostile educational environment or otherwise creating a substantial disruption to the education environment or learning process”); VT. STAT. ANN. tit. 16, § 11, 570c (2016) (requiring a bullying prevention policy, including off-campus bullying where the misconduct “can be shown to pose a clear and substantial interference with another student’s equal access to educational programs”).

244. ARK. CODE. ANN. § 6-18-514 (2016).

245. See *Bullying Laws Across America*, *supra* note 6.

246. *Id.*

247. *Id.*

248. See, e.g., MO. REV. STAT. § 160.775 (2016) (applying the substantial disruption standard to on-campus bullying); see also Zande, *supra* note 20, at 133 (suggesting the location should not matter in terms of applying the substantial disruption test).

249. See, e.g., ARK. CODE. ANN. § 6-18-514 (providing that a school employee must report the

Tinker standard provides a clear guideline to schools in deciphering between intervening in cases of cyberbullying off-campus and protecting students' free speech rights.²⁵⁰

2. *Tinker* and Unity

Because there are only fifteen states that have enacted an off-campus cyberbullying policy, there is no telling how long, or if even at all, the rest of the states will take to adopt such a policy.²⁵¹ Therefore, with a federal law guiding the policy, the adoption of off-campus cyberbullying policies among the remaining states has the potential to be enacted much faster.²⁵² Using *Tinker* as a standard for schools to have authority to intervene in off-campus student speech remains consistent with the already strongly supported Supreme Court precedent.²⁵³ Additionally, this minimum standard guided by the federal government remains consistent with the federal role in education.²⁵⁴

As seen among previous court decisions, the issue that remains is interpreting the *Tinker* test in a way that creates a uniform standard.²⁵⁵ Courts have varying interpretations of what constitutes a substantial disruption.²⁵⁶ Additionally, the state statutes that have codified *Tinker* differ in defining the *Tinker* standard, or do not define substantial disruption at all.²⁵⁷ Therefore, federal legislation interpreting what constitutes a substantial disruption under *Tinker* will provide schools with clarity regarding when they can intervene in off-campus cyberbullying and ensure that certain components of the test are adopted.²⁵⁸ This is particularly significant because it would create a uniform standard among the remaining thirty-five states that have yet to adopt an off-campus cyberbullying policy, while fixing any

cyberbullying to the principal after receiving reliable information); CONN. GEN. STAT. § 10-222d (2015) (providing that school officials must investigate after receiving a report of cyberbullying).

250. See Zande, *supra* note 20, at 134.

251. See *supra* notes 130-32 and accompanying text.

252. See, e.g., Heise, *supra* note 204, at 149 (noting that the NCLB resulted in every state adopting the federal policies in just a few years after its enactment).

253. Markey, *supra* note 49, at 139.

254. See *The Federal Role in Education*, *supra* note 198 (describing the role of the federal government as a "means of filling gaps in State and local support for education when critical national needs arise").

255. See *supra* Part III.A (distinguishing the different court interpretations of a substantial disruption under *Tinker*).

256. Goodno, *supra* note 75, at 664.

257. Compare ARK. CODE. ANN. § 6-18-514 (2016), with N.Y. EDUCATION LAW § 11 (McKinney Supp. 2013).

258. See Gregory Ainsley, Comment, *Cyberbullying: The New Gender Harrassment and How Legislatures Can Protect Free Speech While Ensuring that Laws Keep Pace with Technological Advances*, 26 WISC. J.L. GENDER & SOC'Y 313, 335 (2011).

inconsistencies, as necessary, among states that have adopted such policies.²⁵⁹ Further, clearer standards can lead school administrations to be less fearful of lawsuits brought on grounds of suppressing students' free speech and be more confident in the disciplinary action they take to protect cyberbullying victims.²⁶⁰ Therefore, because of unchallenged and long-standing Supreme Court precedent, codifying *Tinker* and providing a clear definition of a substantial disruption, according to Congress's policy of student success, can likely be the answer in finding the balance between protecting cyberbullying victims and students' free speech rights simultaneously—in a unified manner across the states.²⁶¹

To ensure this standard is adopted by the states, it is suggested that Congress use a non-coercive form of incentivizing state legislators and schools to adopt off-campus anti-cyberbullying policies, under a Bully Reform Act, similar to how it implemented NCLB.²⁶² This can be attained by amending Title I under the current ESSA—which replaced NCLB—to provide that certain federal grants will be provided to state educational agencies that adopt bullying policies that include allowing school administrations to intervene in cases of off-campus cyberbullying where there is a substantial disruption of school policy, as should be further defined in the law.²⁶³ In the alternative, the law can withhold certain funds if the policies are not adopted, so long as it is not coercive in nature.²⁶⁴ Because bullying is directly associated with academic achievement,²⁶⁵ it is suggested that this amendment can be added as a subsection to section 6311 of the ESSA, requiring schools to adopt these policies as programs in support of academic achievement.²⁶⁶ To avoid the issue of state criticism associated with NCLB, the following Subpart suggests additional policy requirements that the law should include to enable states to craft policies according to local educational needs.²⁶⁷

259. Goodno, *supra* note 75, at 663-66.

260. Zande, *supra* note 20, at 130.

261. *Id.* at 130-31; *Every Student Succeeds Act*, U.S. DEPT. EDUC., <https://www.ed.gov/essa?src=ft> (last visited Aug. 1, 2017) (noting that the 114th Congress's policy behind adopting the Every Student Succeeds Act "focused on the clear goal of fully preparing all students for success in college and careers").

262. *See supra* notes 211-17 and accompanying text.

263. *See* 20 U.S.C. §§ 6311-6578 (2012).

264. *See supra* note 262.

265. *See supra* notes 185-86 and accompanying text.

266. *See* § 6311 (requiring schools to adopt programs for academic achievement).

267. *See Every Student Succeeds Act, supra* note 261 (explaining that the Obama Administration amended NCLB because its prescriptive requirements became increasingly unworkable for state schools and educators); *infra* Part IV.B.3.

3. Additional Policy Requirements

Besides having a constitutional standard that allows schools to discipline students for off-campus cyberbullying speech, there must also be additional elements in the federal law that will withstand constitutional challenge.²⁶⁸ If states would additionally adopt certain key components under the new federal law as part of their cyberbullying program requirements, this would further add to unity and an equal standard of protection for students in all states.²⁶⁹ Moreover, because school districts within different states are located in different communities, as long as the minimum key components are included, the states will still be able to customize their laws, much like they do now.²⁷⁰

The federal government has provided multiple key components among state bullying policies that it has deemed significant to include in legislation.²⁷¹ For example, a purpose statement, as found in the Tennessee bullying law, is necessary to determine that the legislature intends to prevent bullying and that the school is given the legal authority to do so.²⁷² A statement of scope is necessary to give schools disciplinary authority for off-campus cyberbullying.²⁷³ The federal government should require the scope to include disciplinary authority for cyberbullying on- *and* off-campus and include the appropriate standard of *Tinker* that schools can look to in order to begin disciplinary actions.²⁷⁴ Statutes should also specify prohibited conduct where cyberbullying is defined.²⁷⁵ The federal government can provide a minimum standard defining cyberbullying, as it does in its current bullying guidelines, but tailored to off-campus cyberbullying.²⁷⁶

Another key component the federal government suggests and that should be included in the standard that states adopt for anti-bullying is

268. Brittany Layne Stringer, Comment, *Cyberbullying: Louisiana's Solution to Confronting the Latest Strain of Juvenile Aggression*, 72 LA. L. REV. 1129, 1156 (2012).

269. McCallion & Feder, *supra* note 11, at 9 (illustrating the considerable variation among state cyberbullying laws).

270. HARASYMIW, *supra* note 41, at 18 (noting that through legislation, schools can mold their policies to the needs of their particular student bodies).

271. See *Key Components in State Anti-Bullying Laws*, *supra* note 123.

272. See, e.g., TENN. CODE ANN. § 49-6-4501 (2016) (“A safe and civil environment is necessary for students to learn and achieve high academic standards . . . cyber-bullying, like other disruptive or violent behavior, is conduct that disrupts a student’s ability to learn and a school’s ability to educate its students in a safe environment . . .”); *Key Components in State Anti-Bullying Laws*, *supra* note 123.

273. *Key Components in State Anti-Bullying Laws*, *supra* note 123.

274. *Id.*

275. *See id.*

276. *See id.* (explaining that the definition of bullying includes “intentional efforts to harm one or more individuals, may be direct or indirect, is not limited to behaviors that cause physical harm, and may be verbal (including oral and written language) or non-verbal”).

the development and implementation of Local Educational Agency (“LEA”) policies.²⁷⁷ This key component “[d]irects every LEA to develop and implement a policy prohibiting bullying, through a collaborative process with all interested stakeholders, including school administrators, staff, students, students’ families, and the community, in order to best address local conditions.”²⁷⁸ Through the LEA, local governments will have the flexibility to administer off-campus cyberbullying policies that will cater to the needs of their individual communities.²⁷⁹ LEA policies should include: (1) definitions of cyberbullying that are consistent with state legislation, (2) procedures for students and faculty to report and investigate bullying, (3) safeguards of written records, (4) determinations of sanctions for students who engage in cyberbullying, and (5) procedures referring the victim and perpetrator to get any help they may need.²⁸⁰

Finally, statutes should include a component for training and preventive education, where the local schools determine the best policies for preventing, identifying, and responding to cyberbullying.²⁸¹ These key components will serve as an outline in implementing the *Tinker* standard into local school policies.²⁸² They are additionally a strong guideline for states to follow, as the components are taken straight from actual state anti-bullying statutes.²⁸³ The guidelines would simply have to be fine-tuned to include off-campus cyberbullying.²⁸⁴

These components further support the notion that cyberbullying cannot be stopped at the federal, state, or local level alone.²⁸⁵ Rather, preventing cyberbullying requires the cooperation of all three levels.²⁸⁶ Former Secretary of Education Arne Duncan encouraged: “Though laws are only a part of the cure for bullying, the adoption, publication, and enforcement of a clear and effective anti-bullying policy sends a message that all incidents of bullying must be addressed immediately and effectively, and that such behavior will not be tolerated.”²⁸⁷ Therefore, a federal law codifying *Tinker* and requiring states to adopt

277. *Id.*

278. *Id.*

279. *See id.*

280. *Id.* (discussing the components of LEA policies).

281. *See id.*

282. *See id.*

283. *See id.* (providing citations to state anti-bullying laws as examples of federally accepted guidelines).

284. *See* Stringer, *supra* note 268, at 1156-58 (explaining how to tailor key).

285. *See* Arne Duncan, *Key Policy Letters from the Education Secretary and Deputy Secretary*, U.S. DEP’T. OF EDUC. (Dec. 16, 2010), <https://www2.ed.gov/policy/gen/guid/secletter/101215.html>.

286. *Id.*

287. *Id.*

and key components according to local needs, can arguably lead to the legislative balance between federal and local governments needed to minimize the number of cyberbullying victims on a national scale.²⁸⁸

C. *The Issue of School Liability*

In the case where there is no statute authorizing schools to discipline students for off-campus cyberbullying, school administrations are often hesitant to act out of fear of being held in violation of the Constitution and regulating with authority that is too broad.²⁸⁹ However, where there is a newly enacted cyberbullying statute allowing the schools to intervene in off-campus speech, the impact on school administrations is not to be ignored because implementing a mandatory policy for schools will render school administrations liable in the case where they have knowledge of any cyberbullying and fail to intervene accordingly.²⁹⁰

Although new liability is incurred, the benefits of helping cyberbullying victims arguably outweigh the liability imposed on schools.²⁹¹ As demonstrated in the case of Phoebe Prince, where school officials are not obliged under law to take disciplinary action when they have knowledge of cyberbullying, the result can be a helpless victim and tragic consequences.²⁹² Further, some courts have determined that, even without a statute obligating schools to intervene, there is a chance schools still may be held liable if they had knowledge of the cyberbullying.²⁹³ Additionally, lawsuits brought on First Amendment grounds will likely decrease once a federal law is established because it will not be questionable whether the school should have intervened, and schools will likely save money in the long run.²⁹⁴

Because of the liability that will be created by the adoption of the federal law, it is suggested that schools create stringent policies under their LEA competencies that will help the school take the appropriate

288. See *supra* Part IV.A.1 (referencing recent legislative history regarding education policy responds better where there is a balance between federal and local power).

289. Christopher A. Sickles, Note, *Bridging the Liability Gap: How Kowalski's Interpretation of Reasonable Foreseeability Limits School Liability for Inaction in Cases of Cyberbullying*, 21 WM. & MARY BILL RTS. J. 241, 259-60 (2012); Zande, *supra* note 20, at 130.

290. See SHARIFF, *supra* note 4, at 92-93 (highlighting that negligent supervision in cyberbullying occurrences by school officials can lead to tort liability); Sickles, *supra* note 289, at 262-66 (listing tort claims that may be brought against a school on off-campus bullying grounds).

291. See Sickles, *supra* note 289, at 260 (showing benefits of regulating off-campus speech).

292. See *supra* notes 72-76 and accompanying text.

293. See Sickles, *supra* note 289, at 263-64.

294. *Id.* at 268-71 (demonstrating that giving schools a proactive approach in addressing off-campus cyberbullying under the substantial disruption test in *Tinker* will limit school liability).

measures as soon as an incident of off-campus cyberbullying is reported.²⁹⁵ A federal law that includes a clear *Tinker* standard in off-campus cyberbullying situations will give schools the legal clarity they need regarding the question of whether they will incur liability, and to what extent, in off-campus cyberbullying situations.²⁹⁶ Although it is nearly impossible that liability will be completely removed, schools can feel more confident with a uniform rule.²⁹⁷

V. CONCLUSION

Incidents of cyberbullying across the United States have unquestionably increased in the last decade following the fast-paced growth in the use of technology among today's younger generation.²⁹⁸ The tragic consequences of cyberbullying, along with the impairment of educational and social achievement, have grasped the attention of communities and legislators throughout the nation.²⁹⁹ Legislators and schools want to be proactive in the effort to prevent cyberbullying.³⁰⁰ However, the protection of free speech under the First Amendment is a long-standing fundamental right in the U.S. for all citizens, including students, and cannot be proscribed.³⁰¹ Legislators have been seeking the best solution to "determine how Congress can best move forward to prevent further tragedies."³⁰² The courts are not the ideal answer since their decisions addressing off-campus intervention of students' speech are often on a case-by-case basis and subject to different standards amongst jurisdictions.³⁰³ Legislation criminalizing cyberbullying has been frequently proposed as the answer, but none has yet to be congressionally or constitutionally accepted due to their vague or "over-

295. See *Key Components in State Anti-Bullying Laws*, *supra* note 123 (explaining that under LEA policies, schools have the ability to create their own administrative procedures).

296. See Zande, *supra* note 20, at 133-36.

297. *Id.* at 129.

298. See Donegan, *supra* note 7, at 34-35.

299. See *supra* note 11.

300. See *Ensuring Student Cyber Safety; Hearing Before the Subcomm. on Healthy Facilities and Cmty's., Comm. on Educ. and Labor*, 111th Cong. 1-2, 4 (2010) [hereinafter *Hearing on Ensuring Student Cyber Safety*] (statements of Carolyn McCarthy, Comm. Chairwoman, Subcomm. on Health Facilities and Cmty's. & Hon. Todd Russell Platts, Ranking Minority Member, Subcomm. on Healthy Facilities and Cmty's.); *Hearing on Cyberbullying and Other Online Safety Issues for Children*, *supra* note 113, at 1-3 (statement of Robert C. Scott, Chairman, Subcomm. on Crime, Terrorism, and Homeland Sec.).

301. See, e.g., *People v. Marquan*, 19 N.E.3d 480, 485-86 (N.Y. 2014) (striking down a cyberbullying statute for being too broad).

302. *Hearing on Ensuring Student Cyber Safety*, *supra* note 300, at 2 (statement of Carolyn McCarthy, Committee Chairwoman, Subcomm. on Healthy Facilities and Cmty's.).

303. See *supra* Part III.B.

criminalizing” nature.³⁰⁴ State legislation mandating schools to adopt policies allowing their administrations to discipline students who engage in off-campus cyberbullying is becoming more widely accepted.³⁰⁵ However, only fifteen states have enacted such legislation, leaving students in the majority of states across the nation unable to seek help from their schools, which play one of the most significant roles in their development.³⁰⁶ Thus, a viable answer is a federal education law which would empower schools to allow administrations to intervene in cases of off-campus cyberbullying, while also defining the *Tinker* standard clearly to create an unambiguous guideline.³⁰⁷ If the federal law creates an incentive for states to adopt the policies, and ultimately codify them, by amending Title I to the ESSA, schools throughout the nation will be able to implement policies addressing off-campus cyberbullying more quickly and there will be an increased sense of unity.³⁰⁸ This Bully Reform Act can create the needed balance between federalism and the traditional local control over education through the key components that the federal law can provide, which would give states and local governments the ability to craft their policies to local needs.³⁰⁹ Every student deserves the confidence that his or her school can help in situations of cyberbullying, and provide him or her with a safe learning environment and the ability to achieve his or her highest potential.³¹⁰ A national standard of protection can provide that confidence.³¹¹

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304. *Hearing on Cyberbullying and Other Online Safety Issues for Children*, *supra* note 113, at 3 (statement of Robert C. Scott, Chairman, Subcomm. on Crime, Terrorism, and Homeland Sec.).

305. *See Bullying Laws Across America*, *supra* note 6; *supra* note 187.

306. *See id.*

307. *See Zande*, *supra* note 20, at 130-31.

308. *See supra* Part IV.A.1-2.

309. *See supra* Part IV.B.3.

310. *See Sickles*, *supra* note 289, at 260-61.

311. *See supra* Part IV.

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