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CRAFTING LEGISLATION TO PREVENT CYBERBULLYING: THE USE OF EDUCATION, REPORTING, AND THRESHOLD REQUIREMENTS

Bethan Noonan*

I. INTRODUCTION

“I can’t do it anymore,”1 was the last text message Phoebe Prince sent before she walked home from school, and hung herself in the stairwell of her apartment complex in South Hadley, Massachusetts on January 14, 2010.2 Throughout the last months of her life, Prince experienced a “relentless campaign”3 of traditional bullying through numerous face to face confrontations in school, as well as cyberbullying outside of school through persistent text messages and Facebook posts.4 Since September 2010, nine teenagers have taken their lives because of cyberbullying, demonstrating a new public health issue facing many adolescents and young adults.5 At least one jurisdiction defines cyber-

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3. See Bennet, supra note 1, at 2.


Crafting Legislation to Prevent Cyberbullying

bullying in the school context as “bullying by use of any electronic communication device through means including, but not limited to, e-mail, instant messaging, text messages, blogs, mobile phones, pagers, online games and websites.” With four out of every five children having access to the Internet, and over eighty percent of teenagers owning a cell phone, the cyberbully is slowly taking the place of the traditional bully.

With each publicized case of cyberbullying, parents and schools are pushing for states to enact anti-cyberbullying legislation, or amend existing legislation to include cyberbullying. Some states have decided not to enact cyberbullying laws. Other states classify cyberbullying as harassment or a class B misdemeanor. Existing cyberbullying legislation varies greatly

glens.org/cgi-bin/iowa/all/news/record/2400.html (naming four students who have committed suicide); see also, Melissa Bell, Suicide of Gay Teenagers; Four Dead in Three Weeks, WASH. POST (Sept. 30, 2010), http://voices.washingtonpost.com/blog-post/2010/09/suicide_of_gay_teenagers_four.html (naming an additional four teenagers who have committed suicide).

6. KAN. STAT. ANN. § 72-8256 (2008). Whereas in the Meghan Meier Cyberbullying Prevention Act which would have applied to both students and adults alike, cyberbullying is defined as “any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior.” Meghan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. §§ 1, 881(a) (2009).

7. Meghan Meier Cyberbullying Prevention Act, supra note 6, §1.


10. Id. Colorado has no official anti bullying law. Id.


12. See 105 ILL. COMP. STAT. 135/1-2 (2008) (defining harassment through electronic communications, including “making any obscene comment, request,
on school requirements for education, reporting, and training for staff. The majority of cyberbullying legislation gives schools wide discretion in determining when, if at all, administrators can intervene. The methods that each state uses to deal with cyberbullying, coupled with the wide discretion given to schools to handle the problem, leave many children free to cyberbully and their victims unable to escape.

This Note argues that in order to protect victims of cyberbullying, states must enact new legislation or update existing anti-bullying statutes to include cyberbullying for elementary, middle, and high school students. State statutes should require schools to educate students about cyberbullying, require professional development for school personnel, include school and state level reporting procedures, and use the substantial disruption standard set forth in the Supreme Court case Tinker v. Des Moines Independent Community School District to set a threshold for when schools can, and should, intervene in a possible cyberbullying case. This Note first defines and compares cyberbullying to traditional bullying, and discusses the effects of cyberbullying on children and teenagers. This Note then uses Supreme Court precedent to analyze the limitations upon states seeking to enact cyberbullying legislation, focusing on the balance between a student’s right to speech and the school’s power to control student speech. Next, this Note examines how different jurisdictions have applied Supreme Court precedent to online student speech and what this means for cyberbullying enforcement. Finally, this Note compares current cyberbullying statutes and concludes that in order for states to protect teenagers from cyberbullying, state statutes must mandate increased education for students and teachers, concrete reporting procedures to capture the prevalence of cyberbullying, and include a threshold requirement for when schools can intervene in cyberbullying.

suggestion or proposal with an intent to offend,” and “threatening injury to the person or to the property of the person to whom the electronic communication is directed or to any of his family or household members.”). Violation of the provisions of the statute will result in a class B misdemeanor. Id. Class B misdemeanors in Illinois are punishable by up to six months in jail and a fine of up to $1500. Id.

13. See Hinduja & Patchin, supra note 9 (providing a brief description of state level requirements for bullying, cyberbullying, and electronic harassment as well as states that have no law).

14. Id. There are thirty states which have electronic harassment statues and thirteen states with updates or pending laws. Id. Electronic harassment is discussed in this paper in the context of cyberbullying. Id.

II. WHAT IS CYBERBULLYING?

Cyberbullying is broadly defined as "the use of the Internet or other digital communication devices to insult or threaten someone." Cyberbullying can be conducted through a number of media, including emails, instant messaging text or pictures, and posts on social networking sites, web pages, and blogs. The most common forms of cyberbullying are cyber stalking, harassment, denigration, flaming, impersonation, and outing. Cyber stalking is analogous to traditional stalking, but occurs through the use of electronic devices, such as email or instant messaging to send the victim unsolicited emails or messages that may or may not be threatening in nature. Cyber harassment is the repeated sending of offensive and hurtful messages to the same individual. Denigration includes the posting of inaccurate, derogatory information about a victim on a larger forum to be viewed by more people, or digitally altering a photo and disseminating it to others. Flaming is a back and forth argument online.

21. Id. Cyber stalking may include “direct email, remailers (third party emails), spamming, instant messaging, chat rooms, bulletin boards, third party/proxy (enlisting third party harassment), computer stalking (manipulating victim’s computer), website tributes, beeper codes (sending threatening codes via beeper), personal data manipulation, and blackmail.” Id.
22. What is Cyber Bullying?, supra note 18. Examples of cyber stalking include false accusations, monitoring, making threats, identity theft, damage to data or equipment, the solicitation of minors for sex, or gathering information in order to harass. Id.
23. Id.
which may or may not be viewed by others, that includes offensive or vulgar language.\textsuperscript{24} Impersonation occurs when the cyberbully pretends to be the victim while talking to friends or strangers.\textsuperscript{25} Outing occurs when a cyberbully tricks a victim into revealing personal secrets to the cyberbully online so that the cyberbully can forward this information to a larger network of people.\textsuperscript{26} As new forms of social networking become available everyday cyber bullies may find new ways to distinguish cyberbullying from traditional bullying.

A. How Does Cyberbullying Differ from Traditional Bullying?

There are many differences between traditional face to face bullying (hereinafter referred to as “traditional bullying”) and cyberbullying. For example, cyberbullying allows bullying to take place outside of school and on the weekends.\textsuperscript{27} Traditional bullying normally occurs in school, during school hours or immediately after school, when children are more likely to be interacting with one another.\textsuperscript{28} Conversely, cyberbullying can occur at any time due to the accessibility of the Internet and cell phones.\textsuperscript{29} Additionally, cyberbulling offers a level of anonymity that is not available in traditional bullying.\textsuperscript{30} The anonymity gives the cyberbully the confidence to commit mean or hurtful cyber acts (such as the acts mentioned above) that he or she would not possess in a traditional bullying situation.\textsuperscript{31}

In contrast to traditional bullying, which is concentrated in one class or school, cyber bulling typically deals with information placed on the Internet,

\begin{itemize}
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} What is Cyber Bullying?, supra note 18.
\item \textsuperscript{28} Id. See also, Sameer Hinduja & Justin W. Patchin, Cyberbullying Fact Sheet: What you need to know about online aggression, CYBERBULLYING RESEARCH CTR., http://www.cyberbullying.us/cyberbullying_fact_sheet.pdf; What is Cyberbullying?, NAT'L CRIME PREVENTION COUNCIL, http://www.ncpc.org/topics/cyberbullying/what-is-cyberbullying (last visited Apr. 6, 2011).
\item \textsuperscript{29} What is Cyberbullying?, supra note 18.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id.
\end{itemize}
which is widespread. Cyber bullies also have the advantage of choosing many different media through which to bully, such as email, texting, and social networking sites such as Facebook and MySpace, which allow them to reach a wider audience. Neighboring schools and students can quickly learn about harmful jokes against another student. The wide dissemination of information allows millions of people to become bystanders to cyberbullying. These bystanders can, in turn, alert others to the information found on Facebook or MySpace, for example, or forward vicious texts or hurtful videos and pictures, making the cyberbullying viral. The many forms that cyberbullying can take, and the many places in which cyberbullying can occur, make it apparent that cyberbullying is not only prevalent among youths today, but will also continue to be a problem in the future.

B. Prevalence of Cyberbullying

Although a lack of reliable reporting prevents a comprehensive understanding of cyberbullying, the statistics that are available demonstrate a growing problem affecting American school-aged youth. Statistics indicate that among ten to eighteen-year-olds, around forty-three percent report being victims of cyberbullying, while four to twenty-one percent of the same age group are perpetrators of cyberbullying. Cyberbullying is most prevalent between ages fourteen and seventeen and the majority of

32. What is Cyberbullying?, supra note 18; see also, Hinduja & Patchin, supra note 28; Nat'1 Crime Prevention Council, supra note 28.

33. What is Cyberbullying?, supra note 18.


36. David-Ferdon & Hertz, supra note 8, at S2.
cyberbullying involves girls. Lack of reporting is a major factor in the varying statistics on the prevalence of cyberbullying. A study of 824 teens showed that only eleven percent talked to their parents about incidents of cyberbullying and twenty-nine percent of teens took no action regarding the cyberbullying. The main reason teens failed to report cyberbullying is that they were afraid they would have their Internet privileges revoked. Furthermore, many teens report that they would rather try to handle cyberbullying by themselves, by signing off the Internet, deactivating their accounts on a site, or by ignoring or blocking any persistent or hurtful messages, rather than tell anyone about the cyberbullying. Many teens feel that they cannot talk to their parents about cyberbullying and that the adults at school cannot help them. With such hesitance to report, it is difficult to capture the prevalence of cyberbullying and, consequently, difficult to help students who may be victims.

C. Effects of Cyberbullying

Cyberbullying has harmful educational, social, and health related effects. The majority of these effects are most prevalent in middle school students, who are still developing and whose self-worth is largely dictated by peer perception. Although the most extreme consequence of cyberbullying is suicide, as in the case of Prince, cyberbullying has many other harmful effects. Cyberbullying can hinder a victim's ability to attend school and academically achieve. Children who are cyber bullied exhibit heightened levels of stress and anxiety when leaving their homes and attending school.


38. NAT’L CRIME PREVENTION COUNCIL, supra note 35.


41. Id.


43. What is Cyber Bullying?, supra note 18.
Victims report being scared to attend school. In light of this fear, victims of cyberbullying may exhibit increased absences, poor school performance, and may eventually drop out of school. Cyberbullying also affects in-school interactions among peers. Statistics show that sixty-eight to ninety-seven percent of cyberbullying victims also experience offline aggression through traditional bullying, and twenty-four to seventy-six percent of youths experience offline physical victimization. Cyberbullying affects a child's ability to make and keep friends. The anonymity associated with modern technology lessens a child's ability to identify a real friend and to read important social cues. Moreover, the anonymity of cyberbullying leaves children afraid and unsure of whom to trust when they attend school.

Victims of cyberbullying exhibit signs of emotional distress, depression, anxiety, and increased thoughts of suicide. Cyberbullying victims complain of headaches and stomach aches more frequently than children that are not cyber bullied. Children who report incidents of cyberbullying describe feeling “isolated, dehumanized, [and] helpless at the time of


46. David-Ferdon & Hertz, supra note 8, at S3.

47. Id.

48. Hoffman, supra note 42.

49. Id.

50. Id.

51. See Mary E. Muscari, Sticks and Stones: The NP's Role with Bullies and Victims, 16 J. PEDIATRIC HEALTH CARE 22, 24 (2002).

A recent study found that perpetrators are also at an increased risk of suicide. Cyber bullies have also been shown to have low self-esteem, are stressed, and may have trouble making friends, all of which are risk factors for suicide. Thus, the implementation of necessary intervention methods depends on the early identification of children who are suffering from depression, whether they are the cyberbully or the victim. If left untreated, depression, emotional distress, and anxiety can carry into adulthood.

As a growing phenomenon among teenagers, the lasting effects of cyberbullying have yet to be determined, but should not be ignored. When drafting and enacting cyberbullying statutes, legislators must consider the impact the legislation might have on teenagers' academic experience and their health. In doing so, legislatures need to consider what should be restricted in order to lessen the effects of cyberbullying. Legislators need to balance the protection of their states' students without overreaching into students' rights. Furthermore, legislation is limited in what it can restrict, given a student's right to free speech as set forth in the Constitution and interpreted by the Supreme Court.


55. *See Bullies like their victims are also at risk, Raising Troubled Kids* (Apr. 1, 2009), http://raisingtroubledkids.wordpress.com/2009/04/01/bullies_like_their_victims_are_also_at_risk/; *see also Bullying-Suicide Link Explored in New Study by Researchers at Yale, Yale Bull.* (July 16, 2008), http://opac.yale.edu/news/article.aspx?id=5913.


57. *See Muscari, supra* note 51, at 24. Muscari's research focuses on victims of traditional bullying but many researchers now believe that cyberbullying victims display many of the same depression symptoms of traditional bullying victims. *Id.*
III. SUPREME COURT PRECEDENT ON STUDENT SPEECH

The Supreme Court has ruled on four student speech cases, none of which dealt directly with online student speech or cyberbullying. In each case, the Court narrowly held on the issue at hand. Consequently, the Court has carved out four distinct rules with respect to student speech on and off campus. Of the precedents set forth in the four cases, the standard announced in Tinker v. Des Moines Independent Community School District is most widely applied to both on and off campus speech. As such, the Tinker standard warrants a further discussion as it is the most widely used standard applied at the lower court level to online student speech.

A. Tinker v. Des Moines Independent Community School District: Student Speech That Materially and Substantially Interferes With the School is Not Protected

In Tinker, a principal became aware that several students planned to wear black armbands, in protest of the Vietnam War, to school. Preemptively, the school enacted a policy preventing students from wearing the armbands and called for suspension of students who wore and refused to remove the...
armbands. When eight students wore armbands protesting the war, they were suspended.

In Tinker, the Supreme Court held that student speech that "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school is not protected by the Constitution." The Court stated that this test would apply to behavior affecting school discipline, class work, and the rights of others inside or outside of school. In order to meet the material and substantial disruption standard, a school must show a reasonable factual basis for foreseeing a substantial disruption of a material interference with school-related matters or the invasion of the rights of others.

The Court found that the armbands were a silent and passive expression of opinion that did not intrude upon the rights of the school or of others, caused no threats of violence on campus, and there was no indication of any disruption inside the classrooms or the school. Furthermore, the school failed to show that a "substantial disruption" of the order and discipline of the school or invasion of the rights of others had occurred, and that the school should not have suspended the students. Rather, the Court found that the school's policy was enacted to avoid controversy. The Court held that student expression cannot be prohibited as a "mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint." The Court stressed the importance of school as a place where students should be able to express their opinions and communicate with fellow students, even if their opinions are controversial. However, the

62. Id.
63. Id.
64. Id. at 509, 513-14.
65. Id. at 513.
66. Id. at 514.
68. Id. at 514.
69. Id. at 510.
70. Id. at 509.
71. Id. at 512, 513.
constitutional protection ends when their opinions materially or substantially disrupt the school or invade the rights of others.\textsuperscript{72} Not every member of the Court agreed with the application of \textit{Tinker}'s substantial disruption standard. In his dissenting opinion, Justice Black believed that the school had the power to enact and enforce the armband policy.\textsuperscript{73} Justice Black focused on the fact that the armbands diverted students' attention away from lessons, exactly what the administration had foreshadowed when it enacted the armband policy.\textsuperscript{74} Justice Black believed that it would be a "myth to say that any person has a Constitutional right to say what he pleases, where he pleases, and when he pleases," and that the majority's opinion made this myth a reality when students enter the schoolhouse.\textsuperscript{75}

\textbf{B. Student Speech Cases}

Today, the substantial disruption test has become the hallmark of student speech cases because of its application to student speech inside and outside of school. However, the Court has also created three other rules relating to student speech. These holdings are narrow in their application, to the form of student speech and the location of the student speech presented in each case. In \textit{Bethel School District v. Fraser}, the Court moved away from the substantial disruption standard set forth in \textit{Tinker} to establish its own standard on lewd and offensive student speech.\textsuperscript{76} The Court found that off-campus speech that elicited an "elaborate, graphic, and explicit sexual metaphor" relating to another student was not protected by the Constitution.\textsuperscript{77} In \textit{Hazelwood School District v. Kuhmeier}, the Court again

\begin{enumerate}
\item \textit{Id.} at 513.
\item \textit{Id.} at 518 (Black, J., dissenting).
\item \textit{Id.} at 522 (Black, J., dissenting).
\item Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 696 (1986).
\item \textit{Id.} at 678. In \textit{Fraser}, a student was suspended after he delivered an explicit speech at a school-wide assembly, after several teachers advised him the speech was inappropriate. The school suspended the student under a school disciplinary rule. \textit{Id.} The Court's analysis was twofold. First, the Court focused on the role and purpose of the American school system as not only promoting the education of students but also addressing the need to teach civility and sensibility towards other students. \textit{Id.} at 683-84. In light of these purposes, the Court found that the school was justified in suspending the student because it is a school's role to be role models and guide students to participate in the larger society. \textit{Id.} at 683. Second, the Court believed schools have the right to
\end{enumerate}
distinguished its holding from *Tinker*, finding that a principal who removed pages from the school’s newspaper did not violate students’ First Amendment rights. The Court reasoned that the principal was acting to protect the privacy of students mentioned in the objectionable article, and the school was not required to promote student speech that goes against legitimate pedagogical concerns. The most recent student speech case the Supreme Court ruled on was *Morse v. Frederick.* In *Morse*, the court held

78. Hazelwood Sch. Dist. v. Kuhmeier, 484 U.S. 260, 270 (1988). In *Hazelwood*, students challenged the principal’s decision to delete two pages of the student-run newspaper. *Id.* at 262. The two deleted pages contained editorials on certain students’ experiences with teen pregnancy and the impact of divorce on students at the school. *Id.* The teen pregnancy article discussed the sexual history of the girls and their use or nonuse of birth control. *Id.* at 274. The principal believed that the content of the article did not protect the privacy of the students and contained inappropriate subject matter not suitable for younger students. *Id.* Using the *Fraser* analysis, the Court held that a school is allowed to “disassociate itself” from work that does not promote the standards of the school. *Id.* at 271. The Court noted that, under the First Amendment, a school is not prohibited from editing student-created work when its actions are “reasonably related to legitimate pedagogical concerns.” Hazelwood Sch. Dist. v. Kuhmeier, 484 U.S. 260, 273 (1988). In contrast, if the editorial process did not have a valid reason for editing, this would require the Court to protect students’ Constitutional rights. *Id.* The legitimate pedagogical concerns the principal identified in the case allowed the school to delete the pages and not encroach upon the First Amendment rights of the students. *Id.* at 274. The Court believed that the issue in the case was distinguishable from *Tinker* because *Tinker* decided whether a school must tolerate particular student speech, whereas in *Kuhmeier*, the question was whether a school must affirmatively promote student speech. *Id.* at 270.

79. Morse v. Frederick, 551 U.S. 393, 393 (2007). In *Morse*, a student was suspended when he unfurled a large banner that stated, “BONG HiTS 4 JESUS.” *Id.* at 397-98. Immediately, the principal demanded that the student take down the banner because it was in violation of an established school policy prohibiting the promotion of illegal drug use. *Id.* at 398. The Court believed that the principal’s actions were reasonable in light of the surrounding circumstances: the banner was presented at a school-sponsored event, it could be viewed by a majority of students, and it promoted the use of illegal drugs. *Id.* Therefore, the Court held the school had not violated the student’s right to free speech under the First Amendment. *Id.* at 410.
specifically on the issue of the promotion of illegal drug use on school grounds. The Court found that a student-created banner, which promoted the use of illegal drugs and was displayed at a school-sponsored event, was not protected under the First Amendment. The Court held that the school had a duty to deter students from illegal drug use and to educate students on the dangers of illegal drug use, and this duty supersedes the students’ freedom of speech, particularly when that speech promotes an illegal activity.

Student speech cases that involve the Internet show that many courts apply the Tinker standard. A number of Supreme Court cases held that although "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," each case of student speech must be "applied in light of the special characteristics of the school environment." Accordingly, lower courts use these standards in light of circumstances that have evolved with the Internet and cyberbullying. While the three additional rules set forth by the Court post-Tinker provide alternative approaches to student speech cases, those that involve the Internet have applied the Tinker standard.

IV. LOWER COURTS’ INTERPRETATIONS OF SUPREME COURT PRECEDENT AS THEY APPLY TO ONLINE STUDENT SPEECH

Student speech cases at the lower court level involve student-against-teacher Internet speech and the application of a school policy designed to limit a student’s speech online. The courts in these cases have used Tinker

80. Id. at 396.

81. Id. at 397.

82. Morse v. Frederick, 551 U.S. 393, 408-09 (2007).


85. Tinker, 393 U.S. at 506.

86. Id.

87. See Doninger, 527 F.3d at 43; Wiseniewski, 494 F.3d at 38.
to determine whether the online student speech has materially or substantially disrupted the school and therefore is not constitutionally protected. Furthermore, courts have used *Tinker* to give schools the power to intervene if it is foreseeable that a substantial disruption would occur in response to the online student speech. Although not all lower court cases are consistent, many have helped to define "substantial disruption" and "foreseeability" to broaden the application of the *Tinker* standard to online student speech. The lower courts' interpretations are important because they lay out a foundation for how future cyberbullying policies may be evaluated.

### A. What is a Substantial Disruption?

When applying *Tinker*, lower courts consider the facts and circumstances of each case individually to determine whether the school met the substantial disruption test when it took action against online student speech. In *J.S. v. Bethlehem Area School District*, the Pennsylvania Supreme Court applied the *Tinker* rule when a student created a website at home targeting his principal and math teacher. The website was entitled "Teacher Sux" and made profane and sexual references to the student's math teacher and principal. The webpage also stated, "Why Should She Die?" prompting users to read a list of reasons the student's math teacher should die and to donate to help pay for a hit man. The student told classmates about the website and showed the website to a student at the school. Subsequently, a

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88. *See Doninger*, 527 F.3d at 43; *Wiseniewski*, 494 F.3d at 38.

89. *See Doninger*, 527 F.3d at 43; *Wiseniewski*, 494 F.3d at 38.

90. Compare *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 251 (3d. Cir. 2010), with *Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 293-94 (3d. Cir. 2010). In these two cases the Third Circuit on the same day handed down contradictory opinions concerning online student speech directed toward school administrators. The contradictory opinions led to a hearing *en banc* to cure the internal split. Vacated by, Rehearing, *en banc*, granted by *Snyder v. Blue Mt. Sch. Dist.*, 2010 U.S. App. LEXIS 7342 (3d Cir. April 9, 2010).


92. *Id.*

93. *Id.* at 851-52.

94. *Id.* at 852.
Crafting Legislation to Prevent Cyberbullying

The court used both Fraser and Tinker in its analysis, but concluded that, by using only Fraser, it could not uphold the school's discipline and needed to look at the disruption caused by the "Teacher Sux" website. Using the Tinker substantial disruption standard, the court held that the student's website caused an actual and substantial disruption of the school. The court found that the direct mental and physical effects on the math teacher, causing her to take a leave of absence, and the subsequent effects on students' education caused disorder and substantially interfered with the work of the school. The court also cited the number of students who were emotionally affected, showing signs of anxiety and fear for their safety. In light of this, parents also became involved, due to the risk of their child's safety. Together, the court agreed these factors, all stemming from the creation of the website that was aimed at the school, were sufficient to satisfy the Tinker substantial disruption test and that, in disciplining the student the school had not violated the student's free speech under the Constitution.

95. Id.
96. Id.
98. Id. at 868.
99. Id. at 869.
100. Id.
101. Id.
102. Id.
B. When is the Substantial Disruption Reasonably Foreseeable?

Lower courts have also interpreted the Tinker rule to mean that a school need not wait until a substantial disruption occurs, but can interfere proactively when it reasonably foresees a substantial disruption in the school stemming from online student speech. In Wiseniewski v. Board of Education of Weedsport Central School District, a student’s AOL Instant Messaging icon portrayed a stick-figure picture of his teacher splattered with blood and the caption “Kill Mr. VanderMolen.”\(^{104}\) The Second Circuit applied the Tinker rule, and held that it was reasonably foreseeable that an Instant Messaging icon created by a student at home would come to the attention of the teachers and school administrators.\(^{105}\) The court considered relevant the facts that fifteen of the students at the school had seen the icon, that the icon had been circulating around the school for three weeks, and that the icon was violent in nature.\(^{106}\) The court further found that once the icon came to the attention of more teachers and students, it would create a foreseeable risk of substantial disruption within the school.\(^{107}\) In light of this, the court held that the school had met the foreseeable substantial disruption test and was justified in intervening and suspending the student while not encroaching on his freedom of speech under the First Amendment.\(^ {108}\)

In Doninger v. Niehoff, a high school student on the school government, unhappy with the cancellation of a student rally, created an email at the school’s computer lab asking fellow students and community members to contact the superintendent to request the rally be reinstated and “to forward the email ‘to as many people as you can.’”\(^ {109}\) Due to the email, the superintendent received numerous phone calls that interrupted her day. The principal confronted the student about the email expressing her disappointment in the student’s actions. She also stressed that students are expected to work cooperatively with the administration and asked her to send out a corrective email.\(^ {110}\) After this confrontation, the student went

\(^{104}\) Wiseniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 39 (2d Cir. 2007).

\(^{105}\) Id. at 38.

\(^{106}\) Id. at 36-39.

\(^{107}\) Id. at 39-40.

\(^{108}\) Id.

\(^{109}\) Doninger v. Niehoff, 527 F.3d 41, 44 (2d Cir. 2008).

\(^{110}\) Id. at 45.
home and created a blog post that contained the original email that she sent to the “douche bags in central” and again asked people to contact the superintendent.111 Many students read and then posted offensive comments to the blog about the superintendent.112 When this came to the attention of the administration, the student was disqualified from running for Senior Class Secretary.113

Applying the Tinker rule, the Second Circuit held that a school should not wait until a disruption occurs, but rather schools have “an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place.”114 To support the holding, the court noted that the email and blog were created purposely and eventually made their way onto campus.115 After being sent to the student body, students became “riled up” about the email and the blog.116 The court concluded that the school had the power to prevent any “foreseeable risk of substantial disruption to the work and discipline of the school,” which included disciplining the student.117

In addressing the problem of online student speech, courts defer to the Tinker substantial disruption rule. The courts look to whether online student speech has caused a substantial disruption,118 or whether the substantial disruption was reasonably foreseeable.119 When one of these two standards is met, a school has the power to intervene in response to the student online speech and discipline the student without the possibility of violating the student’s right to free speech.120 When no substantial disruption is found or

111. Id. at 44.
112. Id.
113. Id.
114. Id. at 51.
115. Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008).
116. Id.
117. Id. at 53.
118. See id. at 43; Wiseniewski v. Bd. of Educ. of Weedsport Central Sch. Dist., 494 F.3d 34, 38 (2d Cir. 2007).
119. Doninger, 527 F.3d at 43; Wiseniewski, 494 F.3d at 38.
120. Doninger, 527 F.3d at 43; Wiseniewski, 494 F.3d at 38.
a substantial disruption was not reasonably foreseeable, a school is not allowed to intervene and cannot discipline the student. Therefore, in order for any school to discipline students regarding cyberbullying, it is imperative that the school must first reasonably foresee or experience a substantial disruption. Without this, a court may find that a school was not protecting its students, but instead was stifling the free speech of their students.

V. HOW STATE LEGISLATURES RESPOND TO CYBERBULLYING

Currently, forty-four states have anti-bullying legislation, thirty of which include electronic harassment in their definition of bullying. Twenty-five states have enacted specific cyberbullying legislation. Seven states classify cyberbullying as a crime and twelve states have amended their anti-bullying policy to include cyberbullying or bullying through electronic means. Cyberbullying legislation across the country varies in terms of

121. Doninger, 527 F.3d at 43; Wiseniewski, 494 F.3d at 38.

122. Hinduja & Patchin, supra note 9.

123. Id.


what policies schools are required to implement. The following section -
analyzes three currently enacted cyberbullying statutes and their ability to
counter the complexities of cyberbullying by educating students and
teachers, by requiring reporting at the school and state level, and by applying
the Tinker standard as a threshold for determining when schools can
intervene in suspected cases of cyberbullying without infringing upon a
student’s right to free speech.

A. Nevada: Anti-Bullying Law and Safe and Respectful Learning
Environment Policy

Under Nevada’s anti-bullying law, cyberbullying is defined as “bullying
through the use of electronic communication.”126 A student can be charged
with a misdemeanor, or even gross misdemeanor, when “through the use of
any means of oral, written or electronic communication, including, without
limitation, through the use of cyber-bullying, knowingly threaten[s] to cause
bodily harm or death to a pupil . . .”127 If the threat causes “any pupil or
employee of a school district or charter school who is the subject of the
threat to be intimidated, harassed, frightened, alarmed or distressed; panic or
civil unrest, or interferences with the operation of a public school,”128 the

126. NEV. REV. STAT. ANN. § 388.123 (West 2010). Electronic communication
“means the communication of any written, verbal or pictorial information through the use
of an electronic device, including, without limitation, a telephone, a cellular phone, a
computer or any similar means of communication.” NEV. REV. STAT. ANN. § 388.124
(West 2010).

127. NEV. REV. STAT. ANN. § 392.915 (West 2010).

128. See id. A person shall not, through the use of any means of oral, written or electronic
communication, including, without limitation, through the use of cyber-
bullying, knowingly threaten to cause bodily harm or death to a pupil or
employee of a school district or charter school with the intent to: (a) Intimidate,
harass, frighten, alarm or distress a pupil or employee of a school district or
charter school; (b) Cause panic or civil unrest; or (c) Interfere with the operation
of a public school, including, without limitation, a charter school. 2. Unless a
greater penalty is provided by specific statute, a person who violates the
cyberbully is guilty of a gross misdemeanor, a charge that may impose a larger fine and possible incarceration.\footnote{129}

In addition to its cyberbullying statute, Nevada also has a Safe and Respectful Learning Environment policy.\footnote{130} Under this policy, Nevada’s Education Department is required to prescribe a “regulation for all school districts and public schools to provide a safe and respectful learning environment that is free of bullying, cyber-bullying, harassment and intimidation.”\footnote{131} The Department requires that all schools create their own anti-cyberbullying policies.\footnote{132} The policy must include a program for training school personnel to educate students about cyberbullying.\footnote{133} The provisions of subsection 1 is guilty of: (a) A misdemeanor, unless the provisions of paragraph (b) apply to the circumstances. (b) A gross misdemeanor, if the threat causes: (1) Any pupil or employee of a school district or charter school who is the subject of the threat to be intimidated, harassed, frightened, alarmed or distressed; (2) Panic or civil unrest; or (3) Interference with the operation of a public school, including, without limitation, a charter school.

\textit{Id.}

\footnote{129}{\textit{See id.} Under Nevada law, every crime punishable by a fine of not more than $1,000, or by imprisonment in a county jail for not more than six months, is a misdemeanor. Every other crime is a gross misdemeanor. \textsc{Nev. Rev. Stat. Ann. }\S\ 388.124 (West 2010).}

\footnote{130}{\textit{Id.}}

\footnote{131}{\textit{Id.}}

\footnote{132}{\textit{Id.}}

\footnote{133}{\textsc{Nev. Rev. Stat. Ann. }\S\ 388.133 (West 2010).}

The Department shall, in consultation with the boards of trustees of school districts, educational personnel, local associations and organizations of parents whose children are enrolled in public schools throughout this State, and individual parents and legal guardians whose children are enrolled in public schools throughout this State, prescribe by regulation a policy for all school districts and public schools to provide a safe and respectful learning environment that is free of bullying, cyber-bullying, harassment and intimidation. The policy must include, without limitation: (a) Requirements and methods for reporting violations of NRS 388.135; and (b) A policy for use by school districts to train administrators, principals, teachers and all other personnel employed by the board of trustees of a school district. The policy must include, without limitation: (1) Training in the appropriate methods to facilitate positive human relations among pupils without the use of bullying, cyber-bullying, harassment and intimidation so that pupils may realize their full
training provides teachers with "[m]ethods to improve the school environment in a manner that will facilitate positive human relations among pupils; and [m]ethods to teach skills to pupils so that the pupils are able to replace inappropriate behavior with positive behavior." Additionally, the policy must prescribe reporting methods for incidents of cyberbullying. Each school must submit a report to the Superintendent of Public Instruction with a description of reported incidents of cyberbullying and whether any students were expelled. The Superintendent of Public Instruction takes this information from all the school districts and further reports to the Attorney General.

Together, the Nevada cyberbullying statute and the Safe and Respectful Learning Environment policy address the need for professional development of school personnel to help educate students about cyberbullying. When students are educated about cyberbullying they are better able to recognize and acknowledge incidents of cyberbullying. Knowing that teachers receive professional development may in turn allow students to feel more comfortable approaching teachers about incidents of cyberbullying.

It is imperative to understand the prevalence of cyberbullying as a new health issue among the student population. Once the prevalence of cyberbullying is captured schools can work proactively to curb the effects of cyberbullying and work towards further intervention. For this reason, the statute also mandates school and state level reporting procedures. In requiring reporting procedures, Nevada will be able to measure the prevalence of cyberbullying in the state and amend state or local policy in response to this information.

Nevada also proscribes a threshold for when schools can intervene in suspected cyberbullying incidents. The threshold is met when a student's cyber actions "[i]ntimidate, harass, frighten, alarm or distress a pupil . . .," or "[i]nterfere with the operation of a public school . . . ." yet the statute says

\[
\text{academic and personal potential; (2) Methods to improve the school environment in a manner that will facilitate positive human relations among pupils; and (3) Methods to teach skills to pupils so that the pupils are able to replace inappropriate behavior with positive behavior.}
\]

\text{Id.}

134. See id.
135. See id.
136. See id.
little about how the school can measure these terms and when, if ever, it can intervene when any or all of these effects of cyberbullying occur. The lack of a concrete threshold requirement may cause a school to intervene when it should not, and consequently, may not survive a court's interpretation of the statute and hold a cyberbully liable. The Nevada statute, although mandating training for teachers, education for students, and reporting requirements, fails to fully grasp the complexities of cyberbullying by providing little direction to schools regarding when they should intervene in suspected cyberbullying incidents.

B. Kansas: Anti-Bullying, Cyberbullying Legislation

In April 2008, Kansas amended its anti-bullying legislation to include cyberbullying. In Kansas, cyberbullying means “bullying by use of any electronic communication device through means including, but not limited to, e-mail, instant messaging, text messages, blogs, mobile phones, pagers, online games and websites.” Cyberbullying occurs under Kansas law when an electronic act is “sufficiently severe, persistent or pervasive that it creates an intimidating, threatening or abusive educational environment for a student or staff member that a reasonable person, under the circumstances, knows or should know will have the effect of harming a student” or placing a student in reasonable fear of harm. The Kansas statute requires that the board of education of each school district adopt and implement an anti-bullying plan that includes “a policy to prohibit bullying on or while utilizing school property, in a school vehicle or at a school-sponsored activity or event.” The plan must also include provisions for teacher training and student education on cyberbullying.


141. See id.

(i) harming a student or staff member, whether physically or mentally; (ii) damaging a student's or staff member's property; (iii) placing a student or staff member in reasonable fear of harm to the student or staff member; or (iv) placing a student or staff member in reasonable fear of damage to the student's or staff member's property.

Id.

142. See id.

143. See id.
The Kansas statute falls short of guiding schools on how to implement their anti-bullying plan and what should be included in their policies. In fact, the Kansas statute gives no guidelines on what should be included in their anti-bullying policy except that the board of education for the school district may “adopt policies the board deems appropriate to perform its constitutional duty to maintain, develop and operate local public schools.”

The Kansas statute limits cyberbullying to acts that occur on school grounds or property (i.e. school buses) or at a school sponsored event. This limitation fails to take into account the fact that the majority of cyberbullying occurs off school property and outside of school hours. Kansas students will still be subject to the anonymity of their bullies outside of school, which will lead them to be more apprehensive to attend school. When in school, students may feel secluded and isolated from their peers due to the schools inability to keep them safe from out of school attacks and the inability of the student to develop important social interactions with their peers.

The Kansas statute, rather than using the Tinker standard of substantial disruption, uses a reasonable person test to determine whether cyberbullying has occurred. The objective standard may be difficult to apply to cyberbullying because, as previously mentioned, cyberbullying can take many forms. Coupled with the fact that the reasonable person standard would apply to school-aged children, who are still developing, some students may be more or less likely to be placed in a reasonable fear of harm from a cyberbully. It may be difficult to determine what a reasonable cyberbullying victim may experience as harm or fear of harm. This may exacerbate the inability of students to report cyberbullying making them feel as if they have no one to turn to and increase their feelings of isolation.

144. KAN. STAT. ANN. § 72-8205(e)(1). The statute also states:
The board shall have authority to prescribe courses of study for each year of the school program and to adopt rules and regulations for teaching in the school district and general government thereof, and to approve and adopt suitable textbooks and study material for use therein subject to the plans, methods, rules and regulations of the state board of education.

§ 72-8205(e).

145. § 72-8256(a)(3).

146. What is Cyber Bullying?, supra note 18.

147. KAN. STAT. ANN. § 72-8256(a)(1).

148. What is Cyberbullying?, supra note 18; see also Hoffman, supra note 42.
Lastly, by not using the *Tinker* standard, the Kansas statute leaves some uncertainty as to when schools can intervene in a suspected cyberbullying case because Kansas schools must look at an objective person and not whether there has been a substantial disruption in school or an interference with the student’s education.

C. Massachusetts: An Act Relative to Bullying in Schools

The Massachusetts statute has been hailed as the strictest in the nation due to the many requirements it imposes on schools to prevent and intervene in cases of suspected cyberbullying. The Massachusetts statute applies to cyberbullying both on and off campus.149 The statute uses several cyberbullying scenarios to help schools determine what is included in the definition of cyberbullying.150 Furthermore, the statute provides that a student is a cyberbully and can be disciplined by the school when that student commits an act that:

(i) causes physical or emotional harm to the victim or damage to the victim’s property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school. . . .

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149. *Mass. Gen. Laws Ann.* ch. 71 § 370 (West 2010). Bullying, including cyberbullying, is prohibited:

At a location, activity, function or program that is not school-related, or through the use of technology or an electronic device that is not owned, leased or used by a school district or school, if the bullying creates a hostile environment at school for the victim, infringes on the rights of the victim at school or materially and substantially disrupts the education process or the orderly operation of a school.

*Id.*


(i) [T]he 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, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of *bullying*. *Cyber-bullying* shall also include the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons.

*Id.*

Massachusetts mandates that every school have an anti-bullying plan, and gives clear instructions of what, at a minimum, should be included in each school's anti-bullying plan. The statute includes an anti-bullying curriculum and school-wide prevention and intervention plans with clear procedures to identify cyberbullying. The school-wide prevention and intervention plans require anonymous reporting procedures at the school level, specific punishments that are balanced with the need to teach appropriate behavior, methods for notification of parents and guardians of


(i) Descriptions of and statements prohibiting bullying, cyber-bullying and retaliation; (ii) clear procedures for students, staff, parents, guardians and others to report bullying or retaliation; (iii) a provision that reports of bullying or retaliation may be made anonymously; provided, however, that no disciplinary action shall be taken against a student solely on the basis of an anonymous report; (iv) clear procedures for promptly responding to and investigating reports of bullying or retaliation; (v) the range of disciplinary actions that may be taken against a perpetrator for bullying or retaliation; provided, however, that the disciplinary actions shall balance the need for accountability with the need to teach appropriate behavior; (vi) clear procedures for restoring a sense of safety for a victim and assessing that victim's needs for protection; (vii) strategies for protecting from bullying or retaliation a person who reports bullying, provides information during an investigation of bullying or witnesses or has reliable information about an act of bullying; (viii) procedures consistent with state and federal law for promptly notifying the parents or guardians of a victim and a perpetrator; provided, further, that the parents or guardians of a victim shall also be notified of the action taken to prevent any further acts of bullying or retaliation; and provided, further, that the procedures shall provide for immediate notification pursuant to regulations promulgated under this subsection by the principal or person who holds a comparable role to the local law enforcement agency when criminal charges may be pursued against the perpetrator; (ix) a provision that a student who knowingly makes a false accusation of bullying or retaliation shall be subject to disciplinary action; and (x) a strategy for providing counseling or referral to appropriate services for perpetrators and victims and for appropriate family members of said students. The plan shall afford all students the same protection regardless of their status under the law.

Id.

154. See id.
both the cyberbully and the victim, and referrals to counseling for perpetrators and victims if necessary.\textsuperscript{155}

The Massachusetts legislation also focuses on the role that teachers must play in cases of cyberbullying, and provides that all school personnel must participate in professional development concerning “information on the incidence and nature of cyberbullying and internet safety issues as they relate to cyberbullying.”\textsuperscript{156} Included in the professional development are prevention and intervention strategies to notice the signs of bullying, especially signs of power struggles between perpetrators and victims.\textsuperscript{157} The Massachusetts statute also includes concise education requirements for students.\textsuperscript{158} The statute requires that principals play an integral role in promptly investigating any reports of suspected cyberbullying.\textsuperscript{159} The principal has the discretion to handle each situation in-house or contact local law enforcement if the principal believes that there should be criminal charges.\textsuperscript{160}

Moreover, the anonymous reporting procedures in Massachusetts will benefit both the students and the school. Anonymous reporting increases the likelihood that students will report incidences of cyberbullying. The

\begin{itemize}
  \item \textsuperscript{155} See id.
  \item \textsuperscript{156} See id.
  \item (i) Developmentally appropriate strategies to prevent bullying incidents; (ii) developmentally appropriate strategies for immediate, effective interventions to stop bullying incidents; (iii) information regarding the complex interaction and power differential that can take place between and among a perpetrator, victim and witnesses to the bullying; (iv) research findings on bullying, including information about specific categories of students who have been shown to be particularly at risk for bullying in the school environment; (v) information on the incidence and nature of cyber-bullying; and (vi) internet safety issues as they relate to cyber-bullying. The department shall identify and offer information on alternative methods for fulfilling the professional development requirements of this section, at least 1 of which shall be available at no cost to school districts, charter schools, approved private day or residential schools and collaborative schools.
  \item MASS. GEN. LAWS ANN. ch. 71 § 370(d)(i)-(x).
  \item \textsuperscript{157} MASS. GEN. LAWS ANN. ch. 71 § 370.
  \item \textsuperscript{158} Id.
  \item \textsuperscript{159} Id.
  \item \textsuperscript{160} Id.
\end{itemize}
reporting system will also help the school understand the prevalence of cyberbullying in its school. In light of this, the school can create additional intervention programs or begin to implement specific strategies targeted at common forms of cyberbullying prevalent in its school to work towards making a safer school and healthier students.

The education requirement for students allows students to understand what cyberbullying is and makes them aware that they could be disciplined for being a cyberbully. Furthermore, the education requirement for teachers works toward closing the technology gap between teachers and students. When teachers become more educated about cyberbullying, they will be able to notice warning signs from victims. Teachers will also learn to become more approachable, assuring that students will feel comfortable reporting incidents of cyberbullying. Educating teachers on how to address cyberbullying will help students learn appropriate online behavior and how to properly respond to future cyberbullying incidents. Together the statute creates an environment where both students and teachers are educated about the effects of cyberbullying and can work together to create a zero tolerance area. Students will be less hesitant to come to school knowing they are no longer helpless when being cyberbullied.

The statute's explicit use of the *Tinker* standard gives clear guidelines of what behavior is considered cyberbullying and when a school should intervene in a suspected case. Allowing the principal to immediately investigate suspected cyberbullying cases allows the school to protect its students from possible incidents of cyberbullying, as well as create a timeline and record of each incident, which may be necessary if a student brings an action against the school.

VI. CRAFTING LEGISLATION TO ENSURE STUDENT SAFETY AND PROTECT STUDENTS’ FIRST AMENDMENT RIGHTS

Cyberbullying legislation must protect students without allowing schools to overstep their authority by stifling students' right to free speech. Cyberbullying legislation should work towards preventing cyberbullying as well as addressing its many complexities. Legislation should first look toward educating students and teachers about what cyberbullying is, including the use of prevention and intervention strategies. Legislation should also focus on reporting procedures that will inform states of the prevalence of cyberbullying. Lastly, legislation must use the *Tinker* substantial disruption standard to determine when schools should intervene in a suspected case of cyberbullying.
A. Education over Criminalization

Making cyberbullying a crime is a scare tactic that has proven to be ineffective.\textsuperscript{161} Labeling cyberbullying as a crime may not actually deter teenagers from engaging in cyberbullying at all. Criminalization does little to enhance a teenager's ability to understand what he can say, and whether his statements will lead to criminal sanctions.\textsuperscript{162}

Indeed, labeling younger children as "criminals" can have lasting effects not only on how they will later be able to fit into social order and re-establish themselves in the community, but also on their future educational endeavors.\textsuperscript{163} One study found that harsh disciplinary measures, such as suspension or expulsion, meted out by schools leads to an increase in behavior problems including more bullying.\textsuperscript{164} Without education, it is difficult for children and teenagers to understand vague terminology such as "intimidate, harass or cause substantial emotional distress."\textsuperscript{165} With criminal sanctions tied to these acts teenagers could be unaware of when and how to draw a line in regards to their speech.\textsuperscript{166} Statutes that place a severe penalty

\begin{itemize}
\item \textsuperscript{161} See Cyberbullying and Other Online Safety Issues for Children, supra note 45, at 109 (referring to use of crime in relation to cyberbullying as "just say no" adage in War on Drugs).
\item \textsuperscript{162} Id. at 64.
\item \textsuperscript{163} From Lockers to Lockup: School bullying in the digital age can have tragic consequences. But should it be a crime?, NEWSWEEK (Oct. 4, 2010), http://www.newsweek.com/2010/10/04/phoebe-prince-should-bullying-be-a-crime.html?GT1=43002; Cyberbullying and Other Online Safety Issues for Children, supra note 45, at 64.
\item \textsuperscript{164} Kirk R. Williams & Nancy G. Guerra, Prevalence and Predictors of Internet Bullying, 41 J. ADOLESCENT HEALTH S14, S15 (2007).
\item \textsuperscript{165} Cyberbullying and Other Online Safety Issues for Children, supra note 45, at 103.
\item \textsuperscript{166} Id.; see also Nancy E. Willard, The Authority and Responsibility of School Officials in Responding to Cyberbullying, 41 J. ADOLESCENT HEALTH S64, S65 (2007), http://www.jahonline.org/webfiles/images/journals/jah/zaq11207000S64.pdf. Willard puts forth a framework in which schools should address cyberbullying including several reasonable precautions such as, "(1) Establish an organized planning effort to address the concerns; regularly conduct needs assessment. (2) Evaluate policies and Internet use management practices. (3) Implement more effective practices to monitor student Internet use. (4) Educate students and teachers. (5) Implement a cyberbullying report, review, and intervention process. (6) Engage in ongoing evaluation of effectiveness." Id.
\end{itemize}
on cyber bullies – who, it should be remembered, are children – do not address the complexities of cyberbullying, nor do they provide the necessary education needed to prevent cyberbullying.\textsuperscript{167} Prevention and education are intertwined concepts.\textsuperscript{168} The use and importance of education for students and school personnel is critical to the prevention of cyberbullying. Educating students on cyberbullying may avoid many of the legal issues that states and schools may face when implementing cyberbullying policies.\textsuperscript{169} Education can focus on cyberbullying both in school and outside of school because “there are no constitutional restrictions whatsoever on schools’ ability to implement comprehensive bullying prevention programs that would address both on-campus and online bullying behavior.”\textsuperscript{170} Education helps students learn how to act in real life Internet situations.\textsuperscript{171} Additionally, education can reinforce new social norms that help prevent cyberbullying and enforce ways in which teenagers can treat each other online as they would in person – as civil human beings.\textsuperscript{172}

Education can help students learn how to report incidents of cyberbullying, how to set up privacy settings on social networking sites, and how to consider the repercussions of posting information on the Internet. Children should learn that pressing the send button means they lose control “over where their photos (information) go next[,] they can also lose control of their future.”\textsuperscript{173} The promotion of safe and informative ways to use the

\textsuperscript{167} Cyberbullying and Other Online Safety Issues for Children, supra note 45, at 103.


\textsuperscript{170} Id.

\textsuperscript{171} Cyberbullying and Other Online Safety Issues for Children, supra note 45, at 110.

\textsuperscript{172} See generally J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 855 (Pa. 2002); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986) (realizing the need for school to instill children with civility to act in society, the court in Bethlehem quotes from Fraser).

\textsuperscript{173} Id.
Internet will help to lessen incidents of cyberbullying, and students will understand when they are victims and when they are offenders.

Currently, many teachers are unaware of how to identify or prevent traditional bullying, let alone cyberbullying. Education for teachers and administrators in identifying and preventing cyberbullying will help to close the gap between technologically savvy students and less technologically savvy teachers. Education allows school-based staff and students to understand cyberbullying and use this knowledge to prevent cyberbullying. Education for school-based personnel will also help them understand the specifics of each student’s cyberbullying experience and craft a plan tailored to prevent the cyberbullying in the future. Once school personnel are educated about cyberbullying, they can watch for the characteristics and predictors of cyberbullying.

Education programs mandating prevention strategies create school cultures which emphasize that cyberbullying is not acceptable. Prevention strategies change the normative beliefs about cyberbullying and the level of tolerance of such behavior among school peers. Additionally, prevention strategies can increase trust and support between schools and students because teachers and administrators are able to understand and prevent future cases of cyberbullying. In a supportive and responsive environment, students will have more of an incentive to report cyberbullying and to refrain from engaging in such conduct. Statutes that

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174. Patricia W. Agatston & Robin Kowalski, Students’ Perspectives on Cyber Bullying, 41 J. ADOLESCENT HEALTH S59, S60 (2007). Agatston reports that the technology gap between teenagers and educators is staggering. Id.

175. Worthen, supra note 168, at S63.

176. Id.


178. Worthen, supra note 168, at S63.

179. See Williams & Guerra, supra note 164, at S15. Researchers found that creating an environment in schools that changes the normative environment to make bullying unacceptable helps in the school-based prevention programs. Id.

180. See id.

181. See id.

182. See generally Ybarra & Diener-West, supra note 44, at S48.
mandate prevention education would have a significant effect on the adverse health effects caused by cyberbullying by creating environments that do not tolerate cyberbullying and students that are willing to conform to that environment.183

B. The Use of Local and State Level Reporting to Understand the Prevalence of Cyberbullying

Reporting, at both the local level and the state level, is essential in understanding the prevalence of cyberbullying.184 To address cyberbullying as a new public health issue, it is important to capture accurate statistics on victims of cyberbullying. State cyberbullying statutes should make clear the need for procedures for students to report cyberbullying in a safe atmosphere.185 Additionally, state statutes or regulations should set forth procedures for schools to relay cyberbullying statistics from local authorities to state authorities.186 Implementing such procedures would show students the importance of the issue and that the school and state are taking the needs of the victim seriously.187 Additionally, reporting would allow each state to measure the severity of the problem in its jurisdiction. Reporting will also help researchers better understand cyberbullying in different ages, geographical locations, and populations. With this information, research-based approaches can be created and utilized to help work with cyber bullies and their victims.

Reporting is also essential to help document and justify a school’s intervention in a given cyberbullying case.188 Under Tinker, and the lower courts’ interpretations, schools must prove that there was a substantial disruption or a foreseeable substantial disruption that permitted them to take

183. See id. at S41.


185. See id.

186. See id.

187. See id.

188. Willard, supra note 166, at S65.
action against student speech.\(^{189}\) Requiring reporting under each state statute would allow schools to document what they believe is a substantial disruption and why. With this information, courts will have a better understanding of the situation at the school through a clear presentation of the facts. Courts can rely on a more accurate record and make the appropriate rulings.

**C. Incorporating the Substantial Disruption Standard into State Cyberbullying Statutes**

Research shows that the spillover of cyberbullying—subsequent academic and social effects in school—makes it essential that schools be able to intervene in cases of cyberbullying.\(^ {190}\) Schools need to know, as legislated through state statute, when they can intervene. Circuit courts' interpretations of *Tinker* can help shape effective cyberbullying legislation. State anti-cyberbullying statutes must include the *Tinker* substantial disruption or foreseeable substantial disruption standard as a threshold for when schools can intervene in a suspected cyberbullying case.

State statutes should go one step further to define "substantial disruption" and give concrete examples of what could constitute a substantial disruption. States can also refer to court cases in their jurisdictions to determine what their court has determined is a substantial disruption. Included could be the persistence of the disruption, how many students were involved in the disruption, and if classes were interrupted. Clear definitions will guide schools and empower them to make informed decisions about when to intervene in possible cyberbullying incidents. Furthermore, if a school can document the substantial disruption or the circumstances leading them to believe that a cyberbullying incident will lead to a foreseeable substantial disruption, a court is more likely to conclude that the school appropriately intervened in the incident and was not encroaching on the rights of the cyberbully.

**VII. CONCLUSION**

States should devote substantial time and effort when enacting cyberbullying legislation or amending bullying legislation to include cyberbullying. States should use the *Tinker* standard in their statutes as a threshold for when schools can intervene in a suspected case of

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cyberbullying. With the *Tinker* standard, schools are more likely to be legally protected when they discipline acts of cyberbullying, particularly if they document the substantial disruption or a foreseeable substantial disruption. *Tinker* provides a guideline for protecting students, but it also gives schools the authority to decide when to intervene in a suspected cyberbullying case. By enacting legislation with the *Tinker* standard, cyberbullying legislation creates a standard that could be applied consistently by lower courts and help guide schools in the implementation of their policies.

Education should be favored over criminalization. Education programs in statutes should focus on teaching both students and school staff about what cyberbullying is, strategies to prevent cyberbullying, and finally, methods to identify students who are bullies or have been bullied. Education for school staff closes the technology gap between school staff and students. An educated school staff can look for warning signs of depression, anxiety, and truancy that are commonly found in cyberbully victims. School staff will take on a new responsibility through this education but in turn will also be improving the education of their students by creating new social norms of no tolerance for cyberbullying.191 These new norms will help to make school a safer place. Students will feel less apprehensive about attending school. School absences and subsequent academic issues may lessen.

Student education will also change the social norms associated with cyberbullying among students. Through education, students will begin to understand the serious implications of hurtful and intimidating Facebook posts, text messages, and emails. Students will also see that cyberbullying not only affects the victim, but it also reflects negatively upon the perpetrator. In each case, the child needs to learn either why they feel the need to bully or why they are being bullied. Starting cyberbullying education at an early age can help to lessen any long-term effects, and early education will also give children the tools to understand bullying issues.

Creating reporting mechanisms should also be a clear goal of cyberbullying statutes. With enhanced reporting of cyberbullying cases, the prevalence of cyberbullying can be properly ascertained, which will help to further understand the issue. With clear numbers on the prevalence of cyberbullying, advocates can help reach students and stop any negative effects of cyberbullying before they reach levels of suicide or long-term psychological issues. Reporting of cyberbullying incidents may spur states that have not implemented statutes to become aware of the need for statutes in their state to protect their students. On a larger scale, understanding the

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prevalence of cyberbullying can help parents, and pediatricians understand many of the issues that children today are facing and push research forward on how to approach these topics. Statistics on the prevalence of cyberbullying can also help to inform future research on cyberbullying and its educational, social, and health effects. Together, statutes that use the *Tinker* substantial disruption standard as a threshold, education for students and school staff, and reporting procedures will help legislators balance the rights of the children, as well as their health and safety, thus creating an environment that allows children to mature into productive adults.