Cyberbullying From Schoolhouse to Courthouse

Cyberbullying is a growing problem, but questions over the extent of schools' responsibility to address the issue remain unresolved. A series of U.S. Supreme Court free speech decisions and state laws may pave the way to accountability.

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Bullying has been a problem for generations, but the scope and depth of its harm has greatly expanded through the use of cell phones, computers, and tablets to intentionally and repeatedly harass, threaten, humiliate, or otherwise harm another person.[1] Examples of cyberbullying include sending hurtful text messages; spreading rumors electronically; posting videos mocking other students on video-sharing websites, such as YouTube, or social media platforms, such as Instagram or Snapchat; creating webpages to humiliate other students; and posting or electronically sharing intimate images or messages sent privately between two students.

Cyberbullying is a growing problem. This is not surprising, given that a whopping 92 percent of teenagers in this country go online daily—and 73 percent of them can do so through smartphones.[2]

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Estimates of the number of youth who experience cyberbullying vary widely, ranging from 10 to 40 percent or more, but a study of more than 10,000 children between 11 and 18 found that 25 percent reported being cyberbullied.[3]

Although the basic elements of cyberbullying resemble traditional forms of bullying and harassment, significant differences make cyberbullying particularly devastating. Victims can be targeted anywhere, 24/7, and cannot escape the bullying by going home. To make matters worse, the speed and ease with which rumors, taunts, and other abuse can be disseminated and go "viral" allow a large number of people to participate in the target's victimization or learn about it. And those who engage in cyberbullying can remain anonymous, which often increases the bullying's frequency and intensity.

As a relatively new phenomenon, cyberbullying law is evolving. Courts are in the early stages of grappling with whether—and the extent to which—schools may or must address

cyberbullying that occurs off campus. Navigating this newly charted territory is challenging, and holding schools liable for failing to protect students from cyberbullying requires thinking outside the box. Here are some things you should know before filing a case.[4]

Schools' Authority to Address Cyberbullying

All 50 states have enacted bullying prevention laws: Forty-eight of them prohibit electronic harassment, and 23 specifically prohibit cyberbullying.[5] But a closer look at the prohibited conduct shows that only 14 states require schools to have policies addressing cyberbullying or electronic harassment that occurs off campus.[6] Despite this gaping loophole, and the fact that there is no private right of action under state anti-bullying laws, other legal avenues may be available. Schools in every state sometimes have the authority, and even an obligation, to address off-campus cyberbullying based on other state and federal laws.

Free speech case law. Schools may try to defend failures to address cyberbullying by arguing that they do not have the authority to regulate student speech that occurs off campus during non-school activities.[7] But courts are consistently rejecting this argument, based primarily on the U.S. Supreme Court's landmark student free speech case, *Tinker v. Des Moines Independent Community School District*.[8]

In *Tinker*, a public school district suspended students who wore black armbands to school to protest the Vietnam War, but the Court held that wearing armbands to make a political statement was protected under the First Amendment.[9] To prohibit a particular expression of opinion, the Court ruled, school officials must be able to show that the expression "would substantially interfere with the work of the school or impinge upon the rights of other students."[10]

Since *Tinker*, the Supreme Court has carved out some additional narrow categories of speech that a school may restrict even without the threat of substantial disruption, such as lewd speech at an assembly (*Bethel School District v. Fraser*)[11] or banners promoting illegal drug use (*Morse v. Frederick*).[12]

Notably, each of these cases involved student speech on school grounds or at school-sponsored events. But courts have consistently held that schools may regulate students' off-campus speech under the *Tinker* standard, which prohibits substantial disruption, and not the *Fraser* standard, which prohibits vulgar speech.[13] Some courts have relied on *Morse* in cyberbullying cases, explaining that just as schools have a duty to provide a safe environment free from messages advocating drug use, they also have a duty to protect students from harassment and bullying.[14]

***Cyberbullying cases under* Tinker.** There is no consensus on what constitutes a substantial disruption under *Tinker*—or when such a disruption is reasonably foreseeable. Schools may defend a lack of action by arguing that the cyberbullying did not cause

widespread disruption at school. If you encounter this defense, argue that the *Tinker* standard does not require school-wide disruption but can be satisfied by behavior interfering with a student's educational performance.

Saxe v. State College Area School District, which involved a constitutional challenge to a school district's anti-harassment policy before the Third Circuit, offers key support for this argument.[15] The court stated that the portion of the district's policy prohibiting speech that would substantially interfere with a student's educational performance could satisfy the *Tinker* standard because conduct that substantially interferes with a public school's mission to educate students "is, almost by definition, disruptive to the school environment."[16]

A significant cyberbullying decision in the Fourth Circuit offers further support for this position. In *Kowalski v. Berkeley County Schools*, a high school student was suspended for creating a MySpace webpage from her home computer that ridiculed another student and encouraged others to post hurtful comments about the targeted student.[17] Applying *Tinker*, the court upheld the school's authority to discipline the student,[18] explaining that "public schools have a 'compelling interest' in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying."[19]

But in another case, *J.C. ex rel. R.C. v. Beverly Hills Unified School District*, the court concluded that the off-campus online speech, a YouTube video posted from the student's home computer that denigrated a classmate in a profanity-laced rant, was not sufficiently disruptive to justify the school's disciplinary action. The video had not been violent or threatening and had not led to confrontations at school.[20] The court also found insufficient evidence of a reasonably foreseeable risk of future substantial disruption to justify regulating the student's speech, explaining that the school's predictions of gossip or increased fear of cyberbullying among its students was too speculative.[21]

It is crucial to present specific evidence of how off-campus, online bullying has caused—or could foreseeably cause—significant interference with the targeted student's education.

Takeaways. There are some practical takeaways from these cases about the evidence necessary to establish a sufficiently substantial disruption to warrant a school's response to cyberbullying. It is crucial to present specific evidence of how off-campus, online bullying has caused—or could foreseeably cause—significant interference with the

targeted student's education. One school administrator's opinion may not be enough to establish that such interference was reasonably foreseeable, especially if he or she fails to provide further details about the history of the relationship between the involved students and any confrontations at school following the online harassment.[22] The bottom line is: When you represent a student whose education and emotional well-being have suffered from cyberbullying, argue that *Tinker* gives schools the authority to address the problem.[23]

Claims and Remedies

Though it is clear that schools have *authority* to regulate cyberbullying, in some circumstances, courts are in the early stages of determining when schools have the *responsibility* to do so. Thus far, most of the case law involves disciplined students' lawsuits against schools, not victims' lawsuits.

Further, very few victims' suits have generated useful precedent, either because the parties settled or the courts' rulings on dispositive motions did not address the school's obligation to address off-campus cyberbullying.[24] However, the types of claims and remedies available to cyberbullying victims are the same as those available to traditional bullying victims.[25]

Become familiar with the relevant state's anti-bullying laws and school district's policies. At a minimum, if a school's response to cyberbullying violates its own policies or state anti-bullying laws, you may be able to use that as evidence to support negligence or civil rights claims. Sometimes cyberbullying constitutes harassment that may trigger responsibilities under federal anti-discrimination statutes and the U.S. Constitution. Your client may also have common law tort claims and civil rights claims under state law.

Federal claims. If your client experienced cyberbullying based on race, color, national origin, sex, or disability,[26] he or she may have claims under Title VI of the Civil Rights Act of 1964 (Title VI);[27] Title IX of the Education Amendments of 1972 (Title IX);[28] or §504 of the Rehabilitation Act of 1973 (§504) and Title II of the Americans with Disabilities Act (ADA) of 1990 (Title II).[29]

Although the elements and nuances of litigating these federal civil rights claims are beyond the scope of this article, keep the following key points in mind. First, claims under Title VI, Title IX, and §504 can be brought against only the entity that receives federal financial assistance—typically a school district or school board—and not against individuals.[30] Second, the Supreme Court's landmark decision in *Davis v. Monroe County Board of Education* established the basic elements for these claims and ADA claims: Victims must prove that the school district acted with deliberate indifference to actually known harassment that was so severe and pervasive that it deprived the victim of educational opportunities.[31]

Davis states that a school district's damages liability is limited to circumstances when it exercises "substantial control" over the harasser and the context in which the harassment

occurs,[32] but in off-campus cyberbullying cases, you should use *Tinker*'s substantial disruption test. Argue that the school district had sufficient authority over the student perpetrator to address off-campus harassment that significantly interfered with the victim's education.[33] This means presenting evidence of *all* the bullying your client experienced—including on and off campus—and how this impacted your client's education.

State claims. When evaluating a cyberbullying case, consider common law tort claims and civil rights claims under state law. Unlike federal civil rights claims, cyberbullying victims may assert tort claims regardless of whether they are a member of a "protected" class. State civil rights statutes also often cover a wider range of discrimination than federal statutes—for example, some prohibit discrimination based on sexual orientation.[34] Another advantage of asserting state law claims is that the standards for establishing liability may be less stringent than under federal standards.[35]

Although state laws vary, many have common law causes of action that could be used to hold school districts and officials accountable for failing to respond appropriately. For example, some states recognize claims against school districts or employees for negligent supervision of students,[36] while others require willful and wanton misconduct for a failure-to-supervise claim.[37] Some states also permit claims for negligent or intentional infliction of emotional distress.[38]

A school's decision to ignore evidence that bullying was harming a student's emotional well-being and education could meet these standards. The remedies available for these claims may include compensatory damages for physical injuries, post-traumatic stress disorder, other emotional distress, pain and suffering, and wrongful death, as well as punitive damages.[39]

There are, however, some significant obstacles to recovery under tort claims, including government immunity. Although most states do not grant school boards or officials sued in their individual capacities absolute immunity for their torts,[40] they typically grant "qualified" immunity that applies only to "discretionary" acts or acts performed negligently, rather than with gross negligence or recklessness.[41]

Other obstacles to tort liability include administrative notice requirements and strict time limitations. Some states, for example, require plaintiffs to serve a notice of claim on the school district before filing any tort action, and the time for serving such notice may be short.[42]

School liability for their students' cyberbullying likely will be evolving for quite some time—at least until the Supreme Court provides clarity on the authority and responsibility of schools to address off-campus cyberbullying.

In the meantime, when you represent a cyberbullying victim, it is critical to present the court with concrete evidence of cyberbullying's impact on your client's educational

experience and health, as well as the connection between cyberbullying and your client's experience at school.

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Notes

1. *See* Sameer Hinduja & Justin W. Patchin, *Cyberbullying: Identification, Prevention, & Response 2* (Oct. 2014), **https://cyberbullying.us/Cyberbullying-Identification-Prevention-Response.pdf**. *See generally* Nancy E. Willard, *Cyberbullying and Cyberthreats: Responding to the Challenge of Online Social Aggression, Threats, and Distress* (2007).

2. Amanda Lenhart, *Teens, Social Media & Technology Overview 2015*, at 2&8 Pew Research Ctr. (Apr. 9, 2015), **www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/**.

3. Hinduja & Patchin, *supra* note 1, at 3.

4. This article focuses only on potential claims against public primary and secondary schools and their employees in cyberbullying cases. The analysis differs for private schools.

5. *See* Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies* 1 (Jan. 2016), **https://cyberbullying.org/Bullying-and-Cyberbullying-Laws.pdf**. Eighteen states also impose criminal sanctions for cyberbullying or electronic harassment.

6. *Id.*

7. *See Nancy Willard, Student Online Off-Campus Speech: Assessing "Substantial Disruption"*, 22.3 Alb. L.J. Sci. Tech. (2012), **www.albanylawjournal.org/documents/articles/22.3.611-willard.pdf**.

8. 393 U.S. 503 (1969).

9. *Id.* at 505–06.

10. *Id.* at 509.

11. 478 U.S. 675, 684–85 (1986).

12. 551 U.S. 393, 408–09 (2007).

13. *See, e.g.*, *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 572–73 (4th Cir. 2011); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1102–03, 1109 (C.D. Cal. 2010).

14. *See, e.g.*, *Kowalski*, 652 F.3d at 572.

15. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001).

16. *Id.* at 217.

17. *Kowalski*, 652 F.3d at 567–68.

18. *Id.* at 573–74.

19. *Id.* at 572.

20. *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1121–22.

21. *Id.* at 1120.

22. *Id.* You can learn more about the kinds of evidence and arguments you should be using by examining cyberbullying cases involving students targeting school staff. *See, e.g.*, *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (en banc); *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015) (en banc).

23. For an extensive analysis of schools' authority to regulate off-campus speech, *see* Willard, *supra* note 7.

24. We are aware of settlements in three cyberbullying victims' cases: *Shively v. Green Local Sch. Dist. Bd. of Educ.*, No. 5:11-cv-02398-BYP (N.D. Ohio 2015) (settlement of

$500,000 and injunctive relief in anti-Semitic and gender-based harassment case); *Harrison v. Clatskanie Sch. Dist.*, No. 3:13-cv-01837 (D. Or. 2015) (settlement of $225,000 and injunctive relief for three plaintiffs in "sexting" case); and *Ketchum v. Newport-Mesa Unified Sch. Dist.*, No. 30-2009-00120182-CU-CR-CJC (Cal. Super. Ct. Orange Cnty. 2009) (settlement of injunctive relief and fees in anti-gay, gender harassment case). For more, *see* Pub. Justice, *Jury Verdicts and Settlements in Bullying Cases* (June 2017), **www.publicjustice.net/wp-content/uploads/2016/02/2017.06.12-Spring-Edition-Bullying-Verdicts-and-Settlements-Final.pdf.**

25. For a detailed description of claims and remedies in school bullying cases, *see* Adele Kimmel & Adrian Alvarez, *Litigating Bullying Cases: Holding School Districts and Officials Accountable* (2013), **www.publicjustice.net/sites/default/files/downloads/Bullying-Litigation-Primer.pdf**.

26. Note that bullying based on a "protected characteristic" may also give rise to a claim under 42 U.S.C. §1983 for violations of the student's constitutional right to equal treatment under the Fourteenth Amendment's equal protection clause or the student's right to substantive due process under the due process clause. As a practical matter, however, substantive due process claims typically fail because the victims must demonstrate a shocking affirmative act by the school (and not its mere failure to act) that caused or increased the danger of harassment by other students. Bullying victims' equal protection claims have fared better than due process claims. *See, e.g., Nabozny v. Podlesny*, 92 F.3d 446, 460 (7th Cir. 1996).

27. 42 U.S.C. §2000d et seq. Courts have permitted Jewish students to proceed with harassment claims under Title VI, when they were harassed based on perceived shared ancestry or ethnic characteristics, rather than solely on their religious practices. *See, e.g., T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp.

28. 20 U.S.C. §§1681–88. Courts have permitted gay students to proceed with harassment claims under Title IX when they were harassed based on gender stereotypes. *See, e.g., Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 864–65 (8th Cir. 2011).

29. 29 U.S.C. §794 (2012) (§504); 42 U.S.C. §§12131–34 (2012) (Title II).

30. *See, e.g., Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1019–21 (7th Cir. 1997).

31. 526 U.S. 629, 633, 650 (1999); *see also Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 669 (2d Cir. 2012) (applying *Davis* standard to Title VI claim); *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 453–54 (6th Cir. 2008) (applying *Davis* standard to Title II and §504 claims).

32. 526 U.S. at 645–46.

33. *See Mihnovich v. Williamson Cnty. Bd. of Educ.*, 2014 WL 5586198 (M.D. Tenn. Nov. 3, 2014) (denying school district's summary judgment motion on Title VI cyberbullying claim based on factual disputes over nexus between victim's experience at school and online racial harassment directed at him off campus).

34. *See, e.g.*, N.Y. Civ. Rights Law §40-c (McKinney 2016); D.C. Code §2-1402.41(1) (2015).

35. *See, e.g.*, *L.W. v. Toms River Reg. Sch. Bd. of Educ.*, 915 A.2d 535, 549–50 (N.J. 2007) (school district may be liable under the New Jersey Law Against Discrimination for peer harassment when the "school district knew or should have known of the harassment, but failed to take action reasonably calculated to end the harassment," rejecting more stringent standard under federal law).

36. *See, e.g., Smith v. Poughkeepsie City Sch. Dist.*, 41 A.D.3d 579, 580–81 (N.Y. App. Div. 2007) (negligent supervision claim based on district's alleged knowledge of student's history of bullying); *see also Ward v. Barnes*, 545 F. Supp. 2d 400, 416 (D.N.J. 2008) (teacher not immune for negligent supervision when he allegedly directed or witnessed assault of student by fellow students).

37. *See, e.g.*, 745 Ill. Comp. Stat. 10/3-108(b) (2017) (no liability for failure to supervise unless public entity or employee has a duty to provide supervision under common law or statute and is guilty of willful and wanton conduct).

38. *See, e.g.*, Ward, 545 F. Supp. 2d at 412–14 (permitting claim for intentional infliction of emotional distress against teacher who witnessed or directed peer bullying); *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 957 (S.D. Ind. 2007) (permitting claim for negligent infliction of emotional distress against school district in peer bullying case).

39. *See Ward*, 545 F. Supp. 2d at 418–19; *M.W. v. Panama Buena Vista Union Sch. Dist.*, 110 Cal. App. 4th 508, 515–16, 525 (Cal. Ct. App. 2003) (affirming an award of damages for post-traumatic stress disorder); *Angel v. Levittown Union Free Sch. Dist. No. 5*, 171 A.D.2d 770, 773 (N.Y. App. Div. 1991) (compensatory and punitive damages available in tort action against school district).

40. *See* Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 11 Temple L. Rev. 641, 684 (2004). However, Virginia school boards enjoy absolute immunity, even when school officials are grossly negligent. *Kellam v. Sch. Bd. of City of Norfolk*, 117 S.E.2d 96, 97–98 (Va. 1960).

41. *See* Weddle, *supra* note 40, at 684–87.

42. *See, e.g.*, N.Y. Gen. Mun. Law §50-i(1)(a) (McKinney 2017) (no tort action against school district for personal injury unless plaintiff serves notice of claim on school district within 90 days after claim arises); N.Y. Educ. Law §3813(2) (2017) (no tort action against a teacher or administrative staff unless the plaintiff serves notice of claim within 90 days after claim arises).