

**CYBERBULLYING AND OTHER STUDENT TECHNOLOGY
MISUSES IN K-12 AMERICAN SCHOOLS:
THE LEGAL LANDMINES**

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ABSTRACT

America's K-12 students have become avid users of technology, but along with their technology use has come technology abuse. Public school administrators and teachers have become targets of online parodies, imposter profiles on social networking sites, and insulting videos on YouTube. In seeking to curtail the offensive, often lewd student comments and visuals, educators often find themselves on the wrong side of the First Amendment. This Commentary attempts to describe the legal landmines that dot the landscape of K-12 educators' responses to such cyberbullying and harassment.

I. INTRODUCTION

America's children today have never known a world without computers and the World Wide Web.¹ By 2000, virtually all American public schools had computers with Internet access.² Use of computers in U.S. schools begins early, with "67 percent of children in nursery school" using computers and eighty percent of kindergarten students using them, with almost half of these young users accessing the Internet.³ Nearly half of all American preteens have cell phones,⁴ and schools have been stymied in their efforts to curtail students' cell phone possession and use in schools.⁵ Significant numbers of teenagers have personal cell phones with picture, music, and mobile computing capability. Text messaging between and among students is rampant, occurring

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1. See Amanda Lenhart, Presentation at the Policy & Advocacy in the Schools Meeting, A Timeline of Teens and Technology (Aug. 16, 2007), http://www.pewinternet.org/PPF/r/105/presentation_display.asp.

2. MATTHEW DEBELL, NAT'L CTR. FOR EDUC. STATISTICS, RATES OF COMPUTER AND INTERNET USE BY CHILDREN IN NURSERY SCHOOL AND STUDENTS IN KINDERGARTEN THROUGH TWELFTH GRADE: 2003 (2005), *available at* <http://nces.ed.gov/pubs2005/2005111rev.pdf>.

3. *Id.*

4. Laura Petrecca, *Cell Phone Marketers Calling All Preteens*, USA TODAY, Sept. 5, 2005, *available at* http://www.usatoday.com/tech/products/gear/2005-09-05-preteen-cell-phones_x.htm (noting the increase in cell phone use by children aged twelve to fourteen).

5. *Cf.* Tech & Learning, Cell Division, Apr. 21, 2008, <http://www.techlearning.com/article/8754> (discussing the decision of schools to either ban or otherwise deal with students' cell phone use in schools).

even during classroom instruction.⁶ Twenty-eight percent of online teens have blogs, with blogs replacing instant messaging as communication tools among a subset of teens known as “super communicators.”⁷ Over half of all American online teens use online social networking sites,⁸ where they can post “profiles” accessible only to their friends or admitted guests, or post messages on a user’s “wall,” a public bulletin board accessible to all users.⁹ Others use sites such as YouTube and Flickr to upload photos and videos.¹⁰

While educators generally support most student uses of this pervasive technology,¹¹ the reality is that technology use among American K-12 students has its dark side and student technology abuses are rampant. Such abuses range from adolescent nonsense and pranks, like taking cell phone pictures of themselves nude or pictures of their breasts or genitals and posting them online,¹² to offenses that more seriously impact classmates and school

6. See Darby Dickerson, *Cyberbullies on Campus*, 37 U. TOL. L. REV. 51, 51 (2005) (referencing the “incivility” and “rudeness” educators face when students use cell phones during class room instruction).

7. AMANDA LENHART ET AL., PEW INTERNET & AM. LIFE PROJECT, TEENS AND SOCIAL MEDIA i-iv, 21-23, 27 (Dec. 19, 2007), http://www.pewinternet.org/~media/Files/Reports/2007/PIP_Teens_Social_Media_Final.pdf.

8. *Id.* at 5-7. Social networking sites had grown to a population of almost 200 million users by 2007, with MySpace gaining approximately 160,000 new members each day. MySpace has been one of the most popular social networking sites for American youngsters. Jessica S. Groppe, Comment, *A Child’s Playground or a Predator’s Hunting Ground? – How to Protect Children on Internet Social Networking Sites*, 16 COMM.LAW CONSPICUOUS 215, 225 (2007).

9. LENHART ET AL., *supra* note 7, at 5-7; see also Kara D. Williams, Comment, *Public Schools vs. MySpace and Facebook: The Newest Challenge to Student Speech Rights*, 76 U. CIN. L. REV. 707, 708 (2008) (describing how teenagers can use social networking sites like MySpace and Facebook). The ability of MySpace users to set access controls to postings may give rise to a right of privacy claim to postings. *Id.* at 726.

10. See LENHART ET AL., *supra* note 7, at 3, 12, 28.

11. Education leaders, both national and international, acknowledge that students of the twenty-first century must acquire the skills necessary to communicate effectively through the “new environments,” including “e-mail, Web sites, message boards, blogs, streaming media, etc.” Learning Point Associates, North Central Regional Educational Laboratory, *Critical Issue: Using Technology to Improve Student Achievement* (2005), <http://www.ncrel.org/sdrs/areas/issues/methods/technlgy/te800.htm#context>. See also Lynne Schrum, *Technology as a Tool to Support Instruction*, EDUC. WORLD, 2005, http://www.educationworld.com/a_tech/tech/tech004.shtml. In fact, the No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425 (codified as amended at 20 U.S.C.A §§ 6301 to 7941 (2002)) requires states to demonstrate that all students are technologically literate by the end of eighth grade through its Enhancing Education Through Technology Act, Pub. L. 107-110, 115 Stat. 1671 (codified as amended at 20 U.S.C.A § 6751 (2002)). Additionally, a Japanese neuroscientist at Tohoku University, Ryuta Kawashima, even contends that “brain fitness software,” such as some Nintendo products, can help strengthen mental abilities. Lee Wilson, *Made in Japan*, TECH & LEARNING, Apr. 2008, at 14, available at <http://www.techlearning.com/article/8752>.

12. *Teens Are Sending Nude Photos Via Cell Phone*, ESCHOOL NEWS, June 6, 2008, <http://www.eschoolnews.com/news/top-news/news-by-subject/safety-security/index.cfm?i=54064>; see also *Seminars in Mass., R.I. Address ‘Sexting’ Danger*, ESCHOOL NEWS, June 1, 2009, <http://www.eschoolnews.com/2009/06/01/seminars-in-mass-r-i-address-sexting-danger/>.

personnel, like cyberbullying,¹³ cyberharassment or cyberstalking,¹⁴ and cyberthreats.¹⁵ There are reports that several victims of cyberbullying have committed suicide as a result of unremitting cruelty perpetuated online.¹⁶ Cyberharassment and cyberthreatening of teachers and administrators have also reached worrisome proportions. Female students, once lagging in technology savvy behind their male counterparts, have become among the most vicious perpetrators of technological bullying and harassment.¹⁷

While school administrators recognize the need to regulate cyberbullying and related cyber offenses, many are uncertain about their legal authority to discipline students for their online postings because such postings usually originate outside the school, mostly from home computers.¹⁸ Many school districts have simplistic and outdated computer use policies that provide no grounds for disciplining students for online abuses.¹⁹ In addition, neither federal nor state statutes create sure grounds for school administrators to report students' improprieties to law enforcement officials.²⁰ This

13. "Cyberbullying . . . is social aggression using the Internet or other digital technologies." NANCY E. WILLARD, *CYBERBULLYING AND CYBERTHREATS: RESPONDING TO THE CHALLENGE OF ONLINE SOCIAL AGGRESSION, THREATS, AND DISTRESS 1* (2007). "Cyberbullying involves the use of information and communication technologies such as e-mail, cell phone[s] . . . , instant messaging, defamatory personal Web sites," and other technologies to promulgate "deliberate, repeated, and hostile behaviour . . . intended to harm others." Dickerson, *supra* note 6, at 56. "A significant amount of [cyberbullying] is sexual, gender driven, or homophobic." Shaheen Shariff & Leanne Johnny, *Cyber-Label and Cyber-Bullying: Can Schools Protect Student Reputations and Free-Expression in Virtual Environments?*, 16 *EDUC. & L.J.* 307, 314 (2007).

14. From a law enforcement perspective, the essential difference between 'cyberbullying' and 'cyber-harassment' is "for cyberbullying . . . both the victim and the perpetrator . . . have to be under-age." Stop Cyberbullying, *Telling the Difference*, http://www.stopcyberbullying.org/lawenforcement/telling_the_difference.html (last visited Sept. 29, 2010).

15. Cyberthreats are actual or implied statements of intent to commit an act of violence or bodily harm to self or others. WILLARD, *supra* note 13, at 2.

16. Anne Marie Calzolari, *Cyberbullying Becoming a Deadly Problem Among Teens*, *STATEN ISLAND ADVANCE*, Feb. 16, 2008, available at http://silive.com/news/index.ssf/2008/02/cyberbullying_becoming_a_deadl.html.

17. Although many researchers assert that girls and boys are equally likely to cyberbully, bullying online has a disproportionate appeal for girls who can use technology to substitute for physicality. See Keturah Gray, *How Mean Can Teens Be?*, *ABC NEWS*, Sept. 12, 2006, <http://abcnews.go.com/print?id=2421562> (reporting on the Primetime television special about girls' cyberbullying); see, e.g., Internet Solutions for Kids, Inc., *Who Cyberbullies?*, <http://www.cyberbully411.org/who-cyberbullies.php> (last visited Oct. 21, 2010).

18. See Kathleen Conn, *The Long and the Short of the Public School's Disciplinary Arm: Will Morse v. Frederick Make a Difference?*, 227 *EDUC. L. REP.* 1, 5-6 (2008).

19. American Association of School Administrators, *Cyberbullying*, http://www.education.com/reference/article/Ref_Cyberbullying_3/ (last visited Sept. 29, 2010).

20. See Susan W. Brenner & Megan Rehberg, "Kiddie Crime"? *The Utility of Criminal Law in Controlling Cyberbullying*, 8 *FIRST AMEND. L. REV.* 1, 16-80 (2009) (discussing the challenges in applying state and federal stalking, harassment, defamation, invasion of privacy, and threat statutes to cyberbullying cases). In juvenile delinquency proceedings, when the juvenile is charged with committing an act which would be a crime if the juvenile were an adult, the state is responsible for proving every element of the crime beyond a reasonable doubt. 43 *C.J.S. Infants* § 56 (2009) (citing *V. v. City of New York*, 407 U.S. 203 (1972)). See also *A.B. v. Indiana*, 885

Commentary will discuss the legal landmines that face school administrators and school officials who seek to regulate students' technological bullying, harassment, and threats and provide some suggestions for avoiding them, giving hope and support to their victims.

II. THE LEGAL PARAMETERS GOVERNING SCHOOL DISCIPLINE FOR STUDENT TECHNOLOGY MISUSE

A. Case Law

The United States Supreme Court has not unequivocally ruled on the jurisdictional authority of school administrators to regulate student expression originating outside school. Its most recent decision on student speech and expression, *Morse v. Frederick*,²¹ explicitly avoided what the Court characterized as the “outer boundaries” of students’ out-of-school expression.²² The *Morse* majority, and especially the concurrence by Justice Samuel Alito, specifically limited its analysis to in-school student expression relating to illegal drug use.²³ The Court’s earlier pronouncement concerning student rights of speech and expression in schools, *Tinker v. Des Moines Independent Community School District*,²⁴ clearly extended some degree of First Amendment protection to students’ in-school speech and expression.²⁵ Despite ambiguity in the *Morse* ruling about the continued viability of the so-called “*Tinker* standard” requiring actual or reasonably foreseeable “material and substantial” disruption of school operations before schools may discipline students for inappropriate speech or expression,²⁶ subsequent lower court decisions have generally agreed that *Tinker* remains good law.²⁷ Therefore, in controversies about student expression on topics unrelated to illegal drugs, whether originating in or out of school, courts since the *Morse* decision have generally used a *Tinker* analysis to decide whether the student expression in question received First Amendment protection.²⁸ The imperfect fit between the facts in *Tinker* and scenarios involving cyberbullying and cyberharassment has led to conflicting decisions when lower courts are called upon to decide the extent of school

N.E.2d 1223 (Ind. 2008) (holding that the statutory requisite intent to harass was lacking in a delinquency adjudication of a student accused of harassing her principal online).

21. *Morse v. Frederick*, 551 U.S. 393 (2007).

22. *Id.* at 401.

23. *Id.* at 397; *Id.* at 422 (Alito, J., concurring).

24. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

25. *Id.* at 506 (holding that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”).

26. *Morse*, 551 U.S. at 403 (quoting *Tinker*, 393 U.S. at 513); see also *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 769 (5th Cir. 2007) (analyzing the application of the *Tinker* standard in light of the Supreme Court’s decision in *Morse*).

27. See, e.g., *Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir. 2007); *B.W.A. v. Farmington R-7 Sch. Dist.*, 508 F. Supp. 2d 740, 748 (E.D. Mo. 2007); *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 640 (D.N.J. 2007).

28. See cases cited *supra* notes 26-27.

administrators' authority to discipline students for technology-enabled bullying or harassment. Moreover, the uncertain and often contradictory legal definitions of the elements constituting a "true threat" are also problematic in the context of courts' analysis of potential cyberthreats.²⁹

To date, most of the lower court decisions in the areas of K-12 students' cyberbullying, cyberharassment, and cyberthreats have been in the context of such expression directed toward school personnel. For example, in *Wisniewski v. Board of Education of the Weedsport Central School District*,³⁰ the Court of Appeals for the Second Circuit upheld the decision of school authorities in upstate New York to suspend middle school student Aaron Wisniewski after he created and circulated from his home computer an AOL Instant Messaging icon showing a bullet passing through the head of his English teacher Philip VanderMolen, accompanied by the words, "Kill Mr. VanderMolen."³¹ Analyzing Wisniewski's message under the *Tinker* rubric, the court ruled that the icon was "reasonably understood as urging violent conduct,"³² and posed "a reasonably foreseeable risk . . . that it would 'materially and substantially disrupt the work and discipline of the school,'"³³ which justified the student's discipline.³⁴ The court, therefore, avoided the need to conduct a "true threat" analysis.

School administrators have also been the targets of harassing and insulting "imposter profiles" on MySpace, as well as offensive comments and blogs online. For example, a high school honor student in western Pennsylvania, Justin Layshock, created and posted from his grandmother's home computer a MySpace profile purporting to be the posting of his school principal Eric Trosch.³⁵ Layshock included the principal's picture on the pages of the profile by cutting and pasting it from the school web site, and represented Trosch as answering questions posed about smoking, alcohol use, and sexual activities with phrases like, "big blunt," "big keg behind my desk," and "big hard-on."³⁶ Word of the profile reached most of the student body at the high school, and

29. See KATHLEEN CONN, BULLYING AND HARASSMENT: A LEGAL GUIDE FOR EDUCATORS (2004).

30. *Wisniewski v. Weedsport Cent. Sch. Dist.* 494 F.3d 34, 36 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008).

31. *Id.* at 36.

32. *Id.* at 38.

33. *Id.* at 38-39 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

34. The court in *Wisniewski* favorably cited *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412 (Pa. Commw. Ct. 2000), *aff'd*, 807 A.2d 847 (Pa. 2002); this decision is arguably the only U.S. decision to find material and substantial disruption severe enough to justify the suspension and ultimate expulsion of a student for creating and posting a website as opposed to a MySpace profile, from his home computer which was critical of school administrators. *Wisniewski*, 494 F.3d. at 39.

35. *Layshock v. Hermitage Sch. Dist. (Layshock I)*, 496 F. Supp. 2d 587, 591 (W.D. Pa. 2007), *aff'd*, 593 F.3d 249 (3d Cir. 2010).

36. *Layshock I*, 496 F. Supp. 2d at 591.

some students accessed the profile at school.³⁷ Although the school district presented evidence that the profile and subsequent student stir inconvenienced several staff members, the court ultimately decided that Layshock's posting had not caused "material and substantial disruption of school operations" and, therefore, the district had exceeded its authority in disciplining the student.³⁸ The Third Circuit Court of Appeals affirmed.³⁹

The Texas Court of Appeals also ruled against a school administrator who sued two students who created a MySpace profile purporting to be the administrator's.⁴⁰ The profile, which was sexually explicit and suggestive, included the administrator's photo and personal information; the administrator alleged that the student's actions intentionally inflicted emotional distress upon her.⁴¹ The administrator argued at the district court level that the students defamed her and libeled her *per se*.⁴² She also alleged that the students' parents were guilty of negligence and gross negligence for failing to supervise the students' Internet use.⁴³ The students argued that the posting was not defamatory as a matter of law, because the "exaggerated and derogatory statements" . . . were not assertions of fact that could be objectively verified."⁴⁴ When the students filed for summary judgment, the administrator filed a response which the court subsequently sealed at her request.⁴⁵ The administrator then amended her complaint to allege intentional infliction of emotional distress by the students and parental negligence, but the district court granted summary judgment in favor of the students and their parents on all the claims.⁴⁶ The appellate court refused to recognize the administrator's claim of intentional infliction of emotional distress, ruling that in Texas such a claim was merely a "gap filler" which she could not allege in substitution for her failed defamation and negligence claims.⁴⁷

37. *Laysbuck I*, 496 F. Supp. 2d at 591-92.

38. *Laysbuck I*, 496 F. Supp. 2d at 600-01.

39. *Laysbuck v. Hermitage Sch. Dist. (Laysbuck II)*, 593 F.3d 249, 259 (3d Cir. 2010) (failing to find either a "nexus" between the profile and the school or substantial disruption of the school environment). A different panel of the Third Circuit court, on the same day, affirmed the decision of a different Pennsylvania district court, upholding school discipline for a middle school female who had also posted an imposter profile of her principal on MySpace. Two judges on the panel accepted the school district's argument that the profile had "threatened to substantially disrupt the Middle School." *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 308 (3d Cir. 2010) (Chagares, J., concurring in part and dissenting in part). In a lengthy discourse, the dissenting judge suggested that the principal's investigation of the posting and subsequent discipline of other students had exacerbated the relatively minor disruptions experienced at the school. *Id.* at 317. The juxtaposition of these two decisions adds to the confusion surrounding the authority of the school to discipline students for speech originating off campus.

40. *Draker v. Schreiber*, 271 S.W.3d 318 (Tex. App. 2008).

41. *Id.* 320-21.

42. *Id.*

43. *Id.* at 321.

44. *Id.*

45. *Id.*

46. *Draker v. Schreiber*, 271 S.W.3d at 321.

47. *Id.* at 322.

Yet a third court refused to uphold a student's punishment for the disrespect and insults directed to a school principal on MySpace.⁴⁸ In this case, an Indiana female middle school student, dissatisfied with her principal's enforcement of a school policy prohibiting the wearing of body piercings in school, posted a vulgar tirade against the principal on MySpace.⁴⁹ The student did not create the original MySpace posting; her friend actually posted an imposter profile of the principal and she added her comments to the profile.⁵⁰ However, she subsequently created her own group page where she continued her vulgarity directed to the principal.⁵¹ Law enforcement officials instituted delinquency proceedings against her for what would have been, if she were an adult, felony harassment;⁵² however the Supreme Court of Indiana ultimately ruled that the State had produced insufficient evidence that the student had intended the principal to learn about or see the postings, and therefore, she did not have the requisite intent to harass under the applicable statute.⁵³

The Second Circuit Court of Appeals in *Wisniewski* was able to rely on application of the *Tinker* analysis to avoid the difficult and confusing task of arguing that a student's speech or expression was a "true threat," and was able to uphold school discipline for the student creator of the objectionable instant messaging icon. However, other courts applying the *Tinker* standard have not found the necessary material and substantial disruption of school operations required to impose discipline for students' out-of-school communications.

One court decision illustrates that the type of school discipline applied may affect the outcome of litigation challenging the school district's actions.⁵⁴ In *Doninger v. Niehoff*, a female high school student was prevented from running for election as Senior Class Secretary because of her vulgar and derogatory postings about her school principal via her blog, which was created at home on an independent website unaffiliated with the school.⁵⁵ The student was angry because the school administration postponed an annual battle-of-the-bands concert previously scheduled for the school auditorium, and she posted to the blog, calling central office administrators "douchebags,"⁵⁶ and encouraged students to communicate with the principal in order "to piss her off more."⁵⁷ As in *Wisniewski*, the appellate court found that the *Tinker* standard was satisfied because of the reasonable foreseeability that the student's message would reach the school and create a risk of substantial disruption.⁵⁸ The court further noted that the discipline deprived the student

48. A.B. v. State, 885 N.E.2d 1223 (Ind. 2008).

49. *Id.* at 1225.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 1227-28.

54. *See Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

55. *Id.* at 45-46.

56. *Id.* at 45.

57. *Id.*

58. *Id.* at 50.

of her ability to run for school office, and that such participation in voluntary, extracurricular activities is a rescindable “privilege” for students, and not a right.⁵⁹

In addition to restricting the extracurricular activities of students who misuse technology in ways that may have a *nexus* to school, administrators should also look carefully at student behaviors and offensive online postings to see if they are truly “speech or expression” or if they are actually *conduct* masquerading as expression. A Washington high school administrator suspended a male student for forty days for secretly videotaping his high school teacher, Ms. M., in her classroom and posting an offensive and insulting audiovisual footage of her on YouTube.⁶⁰ The posting was a video of the teacher filmed from behind, with students making inappropriate gestures, including pelvic thrusts, accompanied by a song titled “Ms. New Booty,” a reference to the teacher’s buttocks.⁶¹ The student argued that his disciplinary suspension violated his First Amendment rights and his rights to due process and sought a temporary restraining order on First Amendment grounds.⁶² The court ruled that, despite students’ rights to critique their teachers and to express unpopular opinions under the aegis of the First Amendment, the student was being disciplined not for his expression, but for his *conduct* in secretly videotaping the teacher.⁶³ The court held that the student violated the school district’s policy prohibiting sexual harassment and disobeyed the school rule against use of electronic devices in school.⁶⁴ In its summary, the court reiterated that students’ right to critique the performance and competence of their teachers is a legitimate and important right, but that this right must be balanced against the school’s responsibility to provide a safe and supportive learning environment for students and teachers alike.⁶⁵

B. Federal and State Statutes

Courts have consistently refused to hold Internet Service Providers (ISPs) civilly liable for the postings of their subscribers or users, ruling that the Communications Decency Act of 1996 (CDA) precludes ISPs’ liability for the postings of unknown information content providers.⁶⁶ The Fifth Circuit Court

59. *Doninger*, 527 F.3d at 52. The Third Circuit mentioned the nature of Doninger’s discipline in its February, 2010 *Layshock* decision, noting that the school discipline meted out to Justin Layshock was “more serious; he was suspended.” *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 263 (3d Cir. 2010).

60. *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1274 (W.D. Wash. 2007).

61. *Id.*

62. *Id.* at 1273.

63. *Id.* at 1276, 1280.

64. *Id.*

65. *Id.* at 1283.

66. Communications Decency Act of 1996, 47 U.S.C. § 230 (2006); *see, e.g.*, *Lunney v. Prodigy Servs. Co.*, 723 N.E.2d 539 (N.Y. 1999) (refusing to hold an ISP liable when an imposter opened an online account in plaintiff’s name and sent threatening emails and posted

of Appeals recently reiterated the CDA's ISP protection in *Doe v. MySpace, Inc.* Here, a mother brought suit on behalf of her daughter who, when the daughter was only thirteen, had misrepresented her age to create a MySpace profile that led to her online communication and subsequent meeting with a nineteen-year-old boy who sexually assaulted her.⁶⁷ The mother attempted to circumvent the CDA's prohibition of ISP liability for the postings of its users by arguing that her cause of action lay in MySpace's failure to verify her daughter's age before allowing her to post her profile.⁶⁸ The court, however, disagreed and characterized the mother's pleading as "disingenuous," designed merely to circumvent the provisions of the CDA,⁶⁹ and ultimately affirmed the district court's grant of judgment on the pleadings to MySpace.⁷⁰

However, with the courts' continuing affirmation of the CDA provisions precluding ISP civil liability, despite the fact that student use of social networking sites provides a vehicle for contact by strangers who might be child predators,⁷¹ states have attempted to respond by passing anti-bullying and anti-cyberbullying laws. According to the watchdog organization Bully Police USA, forty-one states have passed anti-bullying laws.⁷² "A[t] least seven states, including Iowa, Minnesota, New Jersey and Oregon, passed cyberbullying laws in 2007."⁷³ In 2008, four more states—Maryland, New York, Rhode Island and Vermont—considered similar legislation.⁷⁴ In addition, Missouri was prompted to ban Web-based harassment⁷⁵ by the suicide death of teenager Megan Meier after an adult neighbor pretended to be

vulgar messages). *But cf.* *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008) (denying summary judgment to defendants by concluding that a court may hold ISP liable for false advertising claims and false designation under the Lanham Act).

67. *Doe v. MySpace, Inc.*, 528 F.3d 413, 416 (5th Cir. 2008).

68. *Id.* at 417. MySpace requires that individuals desiring to create a posting must represent that they are fourteen years old or older, but Julie Doe represented that she was eighteen years old. *Id.* at 416.

69. *Id.* at 419-20.

70. *Id.* at 422.

71. Approximately one-third of online teens report that they have been contacted by strangers, with seven percent saying that they have felt uncomfortable or scared by the contacts. Memorandum from Aaron Smith on Teens and Online Stranger Contact, (Oct. 14, 2007), http://www.pewinternet.org/~media/Files/Reports/2007/PIP_Stranger_Contact_Data_Memo.pdf.pdf.

72. Bully Police USA Home Page, <http://www.bullypolice.org> (last visited Nov. 29, 2009). Bully Police USA is an independent watchdog organization that surveys state bullying legislation; the site then assigns the legislation a performance based grade, which assesses multiple factors, such as clarity, accountability, and victims' advocacy. Bully Police USA, Making the Grade, <http://www.bullypolice.org/grade.html> (last visited Nov. 29, 2009).

73. Abbott Koloff, *States Push for Cyberbully Controls; But Efforts to go Beyond Schools Raise Concerns Over Freedom of Speech, Privacy*, USA TODAY, Feb. 7, 2008, at A3, available at http://www.usatoday.com/news/nation/2008-02-06-Cyberbullying_N.htm.

74. *Id.*

75. Jim Salter, *Tougher Missouri Law on Internet Bullying*, SFGATE, July 1, 2008, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/07/01/MN3911HK79.D1L>.

a boyfriend who “dumped her.”⁷⁶ The law, signed by Missouri Governor Matt Blunt on June 30, 2008, clarified that communicating harassment by any means, including the Internet, is illegal. The Missouri law further increased penalties for harassment from a misdemeanor to a felony when the harasser is aged twenty-one or older and the victim is aged seventeen or younger, or if the harasser had a previous conviction for harassment.⁷⁷

Several other states have included provisions in their anti-bullying laws that specifically ban Internet or other technology-enabled bullying. In late 2007, Delaware passed an anti-bullying law that was the first such state law to earn an A++ from Bully Police USA.⁷⁸ The Delaware law defines bullying to include “any intentional written, electronic, verbal or physical act,” and ties distribution of state Comprehensive School Discipline Improvement funds to state approval of schools’ anti-bullying policies, along with financial rewards for schools with exemplary programs.⁷⁹ Other states with anti-bullying policies that have earned A++ ratings from Bully Police USA include Florida, whose “Jeffrey Johnston Stand Up for All Students Act” prohibits bullying and harassment “[t]hrough the use of data or computer software that is accessed through . . . a public K-12 educational institution.”⁸⁰ Maryland upgraded its anti-bullying law in 2008 and subsequently received an A++ rating for its new law.⁸¹ Bully Police USA also characterizes Kentucky’s law, HB 91 - “The Golden Rule Act,” as “clearly an anti-bullying law,” although the law never mentions the word bullying, and awards it an A++ also.⁸² Virginia and Wyoming have also earned A++ ratings.⁸³

Virtually all states have enacted laws that require school districts to promulgate some kind of policy that addresses the evils of school-based bullying.⁸⁴ Yet school administrators are still unsure of their ability to regulate types of bullying, such as cyberbullying, which originates outside the school

76. The neighbor, forty-nine year old Lori Drew was indicted by a Los Angeles, California federal grand jury on May 15, 2008, on “one count of conspiracy and three counts of accessing protected computers without authorization,” for violating MySpace’s terms of service. Press Release from Thomas P. O’Brien, U.S. Att’y for Cent. Dist. of Cal., Missouri Woman Indicted on Charges of Using MySpace to ‘Cyber-bully’ 13-year-old Who Later Committed Suicide (May 15, 2008).

77. MO. REV. STAT. § 565.090 (2008), available at <http://www.moga.mo.gov/statutes/c500-599/565000090.htm>.

78. Bully Police USA, Delaware, http://www.bullypolice.org/de_law.html (last visited Sept. 29, 2009). For a list of other states that have achieved high grades by Bully Police, see Bully Police USA, Homepage, <http://www.bullypolice.org> (last visited Oct. 8, 2010).

79. DEL. CODE ANN. tit. 14, § 4112D (2008), available at http://www.bullypolice.org/de_law.html.

80. FLA. STAT. § 1006.147 (2008), available at http://www.bullypolice.org/fl_law.html.

81. MD. CODE ANN., EDUC. §§ 7-424, 7-424.1 (2009), available at http://www.bullypolice.org/md_law.html.

82. KY. REV. STAT. ANN. §§ 158, 525 (West 2009), available at http://www.bullypolice.org/ky_law.html.

83. Bully Police USA Homepage, *supra* note 72.

84. See Fred Hartmeister & Vickie Fix-Turkowski, *Getting Even with Schoolyard Bullies: Legislative Responses to Campus Provocateurs*, 195 EDUC. L. REP. 1 (2005).

setting. Several commentators have argued for expansion of school district authority to discipline cyberbullies,⁸⁵ but First Amendment advocates are equally vocal.⁸⁶

II. CONCLUSION

The evidence is uncontroverted that face-to-face school bullying is harmful.⁸⁷ Cyberbullying may be even more devastating to children and teenagers because it is “on” 24/7, anonymous, insidiously vicious, and is often committed by perpetrators who are simply “bored” or who react in anger to a “friend’s” rejection by publishing private communications about the former friend’s innermost thoughts and aspirations.⁸⁸ Other reasons that kids cyberbully include “empowerment,” “instant gratification,” or the accessibility of a “mass audience.”⁸⁹ Courts certainly must safeguard protections afforded by the Constitution; freedom of speech and expression from restraint or infringement by government actors is a cornerstone of American values. But in the school setting, where individual freedoms conflict with the rights and responsibilities of school administrators and officials, students must nonetheless be protected from physical or psychological harm at the hands of school bullies or off-campus cyberbullies, and courts and state legislatures must step in and strengthen school officials’ authority to discipline these offenders.

Perhaps a redefinition of personal jurisdiction over off-campus bullies and harassers is needed. A Supreme Court decision which clarifies the authority of schools to regulate off-campus speech and expression that negatively impacts students’ educational progress is absolutely needed. Perhaps *Morse* did not provide the appropriate “clean and neat” fact pattern the Court needed. The Court needs to actively scan the horizon for a controversy that does provide an opportunity for it to speak unequivocally to the issue of students’ educationally and psychologically destructive off-campus technology-enabled communications, consistent with the First Amendment. Lower courts also need to do the same.

State legislatures need to act to review and ensure that school district policies prohibiting cyberbullying and other technological abuses have constitutionally permissible “teeth.” Current state laws regarding the adoption of anti-bullying policies vary greatly in their provisions and in their enforcement mechanisms. A national clearinghouse for effective school district policies against all types and manifestations of school bullying and

85. See, e.g., Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257 (2008); Groppe, *supra* note 8.

86. See, e.g., Williams, *supra* note 9.

87. See Kathleen Conn, *Bullying, Harassment, and Student Threats: Are Schools and the Courts Working Together?*, 203 EDUC. L. REP. 1 (2005).

88. See, e.g., Stop Cyberbullying, *supra* note 14.

89. The Ophelia Project, Relational Aggression, Cyberbullying, http://www.opheliaproject.org/main/ra_cyberbullying.htm (last visited Sept. 29, 2009).

harassment is needed, especially of technology-enabled bullying and harassment.

At the local school level, teachers and administrators need to learn to recognize not only the physical signs of bullying, but also the social and emotional effects of bullying, investigate possible causes proactively, and take action to curtail the bullying, including cyberbullying.⁹⁰ Pennsylvania State University researchers Richard Hazler and JoLynn Carney note that situations like the Columbine school massacre are not isolated occurrences, but are “rather part of a developmental continuum that often stems from peer abuse.”⁹¹ Dealing with potential causes of school violence before the violence erupts is a safer alternative than arming teachers and school staff members with concealed firearms.⁹²

Cyberbullying is a pervasive and growing problem.
The victims deserve protection.

90. Pennsylvania State University researchers Richard Hazler and JoLynn Carney contend that teachers and school administrators often fail to recognize the more subtle, but more dangerous, signs of student bullying. Penn State Live, *Educators Fail to Recognize Some Signs of School Bullying*, Dec. 23, 2003, <http://live.psu.edu/story/5124>.

91. *Id.*

92. School superintendent David Thweatt cites the reasoning for allowing teachers and school staff at his north Texas Harrold Independent School District to carry concealed firearms for protection of teachers and students. James C. McKinley, Jr., *In Texas, Some Teachers Carry Books and Guns*, N.Y. TIMES, Aug. 29, 2008, available at <http://www.nytimes.com/2008/08/29/us/29texas.html?fta=y>.