

TAKING THE FIGHT AGAINST CYBER-BULLIES OUTSIDE THE SCHOOL HOUSE GATES

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INTRODUCTION

With the widespread use of the internet in the last decade and the creation of websites such as Facebook and YouTube, the ability for people to connect with one another across the globe and with people they have lost touch with has been enthusiastically welcomed. But with the great benefits that new technology brings also comes the ability for people to use it to the detriment of others.

Bullying has existed “as long as schools have,” but today bullying is no longer confined to the school house gates or even prevented at one’s front door, as it can “follow students to their rooms . . . their cell phones[,] or online.”¹ Through cyber-bullying, bullies can now “harass, threaten or intimidate others” by “e-mail, instant messaging, blogs, chat rooms, pagers, cell phones, and gaming systems.”² Specifically, bullies engage in cyber-bullying by videotaping their peers with their cell phones and posting embarrassing videos online through YouTube, creating fake Facebook profiles to steal the identity of other students,³ and posting embarrassing comments on Facebook to humiliate other students.⁴ Reports of students who have been victims of cyber-bullying have become nationwide news stories, such as the suicide of a freshman at Rutgers University in New Jersey who “jumped to his death . . . after his dormitory roommate and another student posted a video of sexual encounters he had with another man online.”⁵

As has been addressed in a previous *Albany Government Law Review Fireplace* article, the issue of whether school districts can punish students for cyber-bullying when the student’s right to free speech is implicated is not uniformly defined.⁶ Due to the

¹ Carl Azuz, *Involve Students in Stopping Bullying*, CNN (Dec. 23, 2010), <http://www.cnn.com/2010/OPINION/12/23/azuz.stopping.bullies/index.html>.

² *Cyber Bullying: General Information*, N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., http://criminaljustice.state.ny.us/missing/i_safety/cyberbullying.htm (last visited Jan. 5, 2010).

³ Jan Hoffman, *As Bullies Go Digital, Parents Play Catch-Up*, N.Y. TIMES, Dec. 5, 2010, at A1.

⁴ See Leanne Gendreau, *Conn. Woman Fights Back After Cyber Bullying*, NBC N.Y. (Dec. 8, 2010), <http://www.nbcnewyork.com/news/local-beat/Conn-Woman-Fights-Back-After-Cyber-Bullying-111548429.html>.

⁵ Jessica M. Karmasek, *Anti-Bullying Bill Bad For Taxpayers, Some Say*, W. VA REC., Dec. 8, 2010, available at <http://www.wvrecord.com/news/231865-anti-bullying-bill-bad-for-taxpayers-some-say>.

⁶ See Brittany Grome, *ACLU Sues School in Online Photo Controversy: Female Students Punished for Racy MySpace Pictures*, ALB. GOV’T L. REV. FIREPLACE (Dec. 1, 2009), <http://aglr.wordpress.com/2009/12/01/aclu-sues-school->

fact that these incidents exist off of school grounds, the ability for school officials to take action against cyber-bullies is limited because such action can only be justified if the student's online speech "materially disrupts class work or involves substantial disorder o[f] the rights of others."⁷ The uncertainty of the state of the law is not helped by the fact that the Supreme Court has "not addressed online student speech."⁸ The ability of schools to combat cyber-bullying has been tested in at least one case in California where a parent had his child's suspension due to the posting of a video to YouTube overturned when the court found the disruption to the school caused by the video posting was "only minimal."⁹

Because cyber-bullying will usually impact one student's emotional well being and not affect the larger school environment, students may be unable to rely on their school to protect them if cyber-bullying happens outside of school, which in most cases it will. The question this article seeks to answer is whether victims of cyber-bullying have legal remedies through either criminal or civil laws of New York.

I. ATTEMPTS TO COMBAT CYBER-BULLYING

Reports indicate that "[f]orty-three percent of teenagers . . . [have been] victims of cyber-bullying."¹⁰ While attempts have been made to combat this growing problem, such as unsuccessful bills making "internet harassment a Class E felony," establishing a "state hotline for individuals to report instances of . . . cyber-bullying,"¹¹ and creating the crime of cyber harassment,¹² New York currently does not have a statewide cyber-bullying law.

New York has attempted to prevent bullying with the passage of the Dignity For All Students Act, which was signed by Governor Patterson on September 8, 2010.¹³ With this law, which

in-online-photo-controversy-female-students-punished-for-racy-myspace-pictures/.

⁷ *Id.*

⁸ Jan Hoffman, *Online Bullies Pull Schools Into the Fray*, N.Y. TIMES, June 28, 2010, at A1.

⁹ *Id.*

¹⁰ Press Release, Senator Michael F. Nozzolio, Senator Nozzolio Announces Legislative Measures to Stop Bullying in New York State (May 5, 2010), available at <http://www.nysenate.gov/press-release/senator-nozzolio-announces-legislative-measures-stop-bullying-new-york-state>.

¹¹ *Id.*

¹² Assem. 8193, 2009 Leg., 232d Reg. Sess. (N.Y. 2009).

¹³ Press Release, N.Y. State Office of the Governor, Governor Paterson Signs

will go into effect in 2012, school districts are required to “revise their codes of conduct and adopt policies intended to create a school environment free from harassment and discrimination” including any harassment that creates a “hostile environment that unreasonably and substantially interferes with a student’s educational performance, opportunities or benefits, or mental, emotional, or physical well-being”¹⁴ While the act does not explicitly prevent cyber-bullying, it does prohibit any harassment or discrimination of students “with respect . . . to the student’s actual or perceived ‘race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.’”¹⁵

Even though the act is a start to combat bullying, it has fallen on the counties to combat cyber-bullying in their own communities. As of January 2011, at least one county has enacted anti-cyber-bullying legislation. In November 2010, Albany County made cyber-bullying a crime basing the legislation on the fact that the state legislature has failed to pass similar legislation.¹⁶ The county noted that “victims of cyber-bullying suffer very real and serious harm as a result of these incidents, often showing signs of depression, anxiety, social isolation, nervousness when interacting with technology, low self esteem, . . . and declining school performance,” and that “in some cases, victims attempt or commit suicide in part because of the cyber-bullying they’ve endured.”¹⁷ The legislation defines cyber-bullying as

any act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person.¹⁸

Deemed to be “one of the toughest cyber-bullying laws in the

Dignity for All Students Act (Sept. 8, 2010), *available at* <http://readme.readmedia.com/Governor-Paterson-Signs-Dignity-for-All-Students-Act/1717096>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ ALBANY, N.Y., Loc. L. No. 2010-F (July 12, 2010).

¹⁷ *Id.* § 1.

¹⁸ *Id.* § 2.

country” and one of the first to criminalize cyber-bullying,¹⁹ the law makes a “person who knowingly” engages in cyber-bullying “guilty of an unclassified misdemeanor punishable by a fine of up to \$1,000 and/or up to one year imprisonment.”²⁰

II. WHAT IF A LOCALITY HAS NOT ENACTED CYBER-BULLYING LEGISLATION?

While Albany County is at the forefront of combating cyber-bullying, most jurisdictions in New York do not have similar legislation. As a result, parents whose children are repeatedly victims of cyber-bullying may have to turn to the criminal justice system and use existing laws to protect their children when talking to the bully’s parents or relying on the input of school administrators has failed to stop the cyber-bullying.

One potential crime that can be committed by engaging in cyber-bullying is aggravated harassment in the second degree, a class A misdemeanor. To be found guilty, a cyber-bully would have to, “with intent to harass, annoy, threaten or alarm another person . . . either communicat[e] with a person, anonymously or otherwise . . . by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm”²¹ or cause such communication “to be initiated by . . . electronic means.”²² Thus, a bully who uses email²³ or websites,²⁴ such as Facebook, Twitter, YouTube, or a personal website created by himself or another at his direction to humiliate a fellow student, could face being found guilty of aggravated harassment in the second degree since the bully will have the intention to annoy or harass the victim, and the victim will likely be annoyed and humiliated as a result.

While a conviction for a class A misdemeanor may result in imprisonment of up to one year in jail, the reality of a teenager being sentenced with a clean record is minimal and if charges are brought up, the crime would most likely be reduced to harassment in the second degree, a violation.²⁵ A successful

¹⁹ Solomon Syed, *Does Cyberbullying Law Go Too Far?*, YNN (Nov. 11, 2010), http://capitalregion.ynn.com/content/your_news/523484/does-cyberbullying-law-go-too-far-/.

²⁰ ALBANY, N.Y., Loc. L. No. 2010-F § 4.

²¹ N.Y. PENAL LAW § 240.30(1)(a) (McKinney 2008).

²² *Id.* § 240.30(1)(b).

²³ *See* Smith v. Smith, 804 N.Y.S.2d 854, 855 (App. Div. 2005).

²⁴ *See* People v. Kochanowski, 719 N.Y.S.2d 461, 461–62 (Sup. Ct. 2000).

²⁵ N.Y. PENAL LAW § 240.26.

conviction would only require that the bully “with intent to harass, annoy or alarm another person . . . repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.”²⁶ Repeated, intentional postings on social networking sites, instant messages, or other forms of bullying online which annoy the victim could constitute harassment in the second degree, punishable of up to fifteen days imprisonment (though that sentence would likely be turned into community service or a fine).²⁷

If a cyber-bully is found guilty of the above crimes or pleads to an adjournment in contemplation of dismissal, he or she would most likely be subject to an order of protection prohibiting contact with the victim by email or any other electronic means, such as Facebook, and also be prevented from engaging in future harassment.²⁸ The bully then would be under the threat of criminal contempt in the second degree, a class A misdemeanor, if he or she violates the order, which would hopefully deter him or her from engaging in further bullying related conduct.²⁹ Additionally, by bringing the bully into the criminal justice system the bully’s parents will also be involved in preventing future cyber-bullying to save the future of their own child as a conviction of criminal contempt in the second degree can result in a sentence of up to one year imprisonment.³⁰

While many parents or children likely would not want to bring another child into the criminal justice system, thereby subjecting their own families to community gossip and possible social retaliation against their children at school, the criminal justice system may be necessary to save the repeatedly bullied child from future emotional harm and even to prevent suicide if he or she believes there are no means to prevent the bullying. While comments, videos, or pictures online are just words, a bully of any age would be subject to the criminal justice system if he or she physically assaulted a fellow student outside of school grounds. Furthermore, the emotional damage caused by ongoing harassment could be said to equal or even be greater than the physical injury of a black eye, as the emotional damage suffered will be lasting and the evidence of cyber-bullying can exist forever

²⁶ *Id.* § 240.26(3).

²⁷ *Id.* § 70.15(4).

²⁸ See N.Y. UNIFIED CT. SYS., Order of Protection, Non-Family Offense, available at <http://www.nycourts.gov/forms/familycourt/pdfs/crim2.pdf>.

²⁹ N.Y. PENAL LAW § 215.50(3) (McKinney 2010).

³⁰ *Id.* § 70.15(1).

on the internet whereas a physical injury will heal with time.

Additionally, it should be noted that a student or child can mean anyone in middle school, high school, and even college who abuses the privileges of the internet to cause harm to another person. Parents, though, should not resort to calling police after a single incident of bullying, but instead should work through the bully's parents, the school, and the community to prevent future cyber-bullying. The police should only be involved as a last resort if there is no other option to prevent the bullying from continuing.

III. IS CYBER-BULLYING A RECOVERABLE CIVIL ACTION?

The outlook for victims of cyber-bullying to recover civilly is uncertain in New York. Though civil recovery in cyber-bullying is a very new area, at least one case has dealt with this issue. In July 2010, the Nassau County Supreme Court in *Finkel v. Dauber*³¹ held "the [c]ourts of New York do not recognize cyber or internet bullying as a cognizable tort action."³² In that case, a victim of cyber-bullying attempted to bring a defamation suit against the officers of a private Facebook group that she joined after being invited.³³ The group's page said the plaintiff "acquired AIDS while on a cruise . . . [and] was seen [having sex with] a horse."³⁴ Another member said she "got aids when she hired a male prostitute . . . [and she also] acquired crabs, and syphilis."³⁵ After acquiring these sexually transmitted diseases, the page claimed the plaintiff "morfed into the devil."³⁶ As the inquiry was to determine "whether a reasonable [reader] could have concluded that [the comments were] conveying facts about the plaintiff,"³⁷ the court held a "reasonable reader, given the overall context of the posts, simply would not believe"³⁸ the statements were true, stating that, "[t]aken together, the statements can only be read as puerile attempts by adolescents to outdo each other."³⁹

The court also considered the plaintiff's claim against the parents of the defendants for negligent supervision of a child.⁴⁰

³¹ 906 N.Y.S.2d 697 (Sup. Ct. 2010).

³² *Id.* at 703.

³³ *Id.* at 700.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Gross v. N.Y. Times Co.*, 623 N.E.2d 1163, 1167 (N.Y. 1993).

³⁸ *Finkel*, 906 N.Y.S.2d at 702.

³⁹ *Id.*

⁴⁰ *Id.*

The court noted that while parents could be held liable for entrusting a dangerous instrument to a minor which has caused foreseeable harm to a third party, it rejected the attempt to consider a “computer a dangerous instrument in the hands of teenagers in an age of ubiquitous computer ownership” which would have the effect of creating parental liability for every action by a child on the family computer.⁴¹

While the defamation claim was rejected by the court in the context of the circumstances in which they arose, a crude competition for vulgar statements, a successful claim could arise for defamation damages under other circumstances. For instance, a defamation claim might be upheld if a teenager created a Facebook group alleging someone committed a crime, such as, assault, petit larceny, or rape.⁴² Like the criminal law regarding cyber-bullying, the civil law is still developing both in New York and nationwide, and time will tell what civil or even criminal liability may result for cyber-bullying.

CONCLUSION: THE REALITY OF CYBER-BULLYING

Cyber-bullying exists in a world where the school often cannot protect victims, unlike if a student was being physically harassed during school hours or ridiculed in the hallways. As cyber-bullying exists in a no-man’s land where schools do not have the authority to regulate unless it occurs on school grounds or impacts the school environment, the other authorities in students’ lives—parents and police—must attempt to regulate it. If the rest of New York State, including the state legislature, passed legislation similar to Albany County, it could act as a powerful deterrent to cyber-bullying. In the absence of such legislation, schools should educate students and parents about cyber-bullying and take steps to involve parents when cyber-bullying has occurred. Only when the cyber-bullying has reached a level where no other options exist to protect the victim and the bullying does not stop, should the parent involve the police to prevent future harm to their child or take civil action. Bullying in any form is a terrible experience for any child. Unfortunately bullying will always exist and evolve with technology, but with action taken by the New York legislature and schools to prevent

⁴¹ *Id.*

⁴² *See* Sprewell v. NYP Holdings, Inc., 772 N.Y.S.2d 188, 193–94 (Sup. Ct. 2003); *see also* Yammine v. DeVita, 840 N.Y.S.2d 652, 653–54 (App. Div. 2007) (statements accusing plaintiff of a serious crime are considered slander per se).

cyber-bullying, an attempt can be made to make students' lives better before they resort to harming themselves.