

ALBANY COUNTY'S CYBER-BULLYING LAW: IS IT CONSTITUTIONAL?

*Alaina Bergerstock**

INTRODUCTION	853
I. THE EMERGENCE OF THE ISSUE	854
II. WHAT STEPS ARE BEING TAKEN TO DEAL WITH THIS GROWING ISSUE?	855
III. ANTI-CYBER-BULLYING LEGISLATION & FREEDOM OF SPEECH RIGHTS	857
CONCLUSION	859

*J.D. Candidate, Albany Law School 2012; B.S., Business Administration, SUNY Oswego 2008.

This article was previously published on the *Albany Government Law Review Fireplace* on April 3, 2011. See Alaina Bergerstock, *Albany County's Cyber-Bullying Law: Is it Constitutional?*, ALB. GOV'T L. REV. FIREPLACE (Apr. 3, 2011), <http://aglr.wordpress.com/2011/04/03/albany-county%e2%80%99s-cyber-bullying-law-is-it-constitutional/>.

INTRODUCTION

The days of traditional bullying on the playground or school bus have transformed into a more technological type of bullying called “cyber-bullying,” as discussed in a recent article by Michael Telfer.¹ Cyber-bullying has increasingly become an extremely serious problem as technology develops. Cyber-bullying not only includes written words in chat rooms and instant messages, but it also includes impersonation through the creation of fake Facebook and MySpace pages.²

In addition, “happy slapping” has developed as a new means of cyber-bullying.³ “Happy slapping” involves a victim being physically attacked while the attacker’s accomplice stands by and videotapes or takes pictures of the attack, and the video and/or pictures are then posted on an online site, such as YouTube.⁴ Another means of cyber-bullying is where an individual takes pictures of the victim in the locker room, bathroom, or other location, and then posts those pictures online. Online polls, in which readers are asked to vote on humiliating questions about the victim, are also used to cyber-bully.⁵

The problem with cyber-bullying in comparison to face-to-face bullying is that bullying that occurs via electronic means is capable of reaching a lot of people at once.⁶ Cyber-bullying also has the potential of being an around the clock problem since not only does it happen during school hours, but it also takes place off of school grounds.⁷ The use of the internet and cell phones allows

¹ Michael Telfer, *Taking the Fight Against Cyber-Bullies Outside the School House Gates*, ALB. GOV'T L. REV. FIREPLACE (Jan. 23, 2011), <http://aglr.wordpress.com/2011/01/23/taking-the-fight-against-cyber-bullies-outside-the-school-house-gate/> (discussing legislation in New York that may be available as an option to help victims of cyber-bullying). In contrast, the focus of this article is on Albany County’s new anti-cyber-bullying law and its constitutionality.

² Janet Kornblum, *Cyberbullying Grows Bigger and Meaner with Photos, Video*, USA TODAY, July 15, 2008, http://www.usatoday.com/tech/webguide/internetlife/2008-07-14-cyberbullying_N.htm.

³ *Cyber Bullying: General Information*, N.Y. STATE DIV. OF CRIMINAL JUSTICE SERV., http://criminaljustice.state.ny.us/missing/i_safety/cyberbullying.htm (last visited Mar. 22, 2011).

⁴ *Id.*

⁵ *Id.*

⁶ Kornblum, *supra* note 2.

⁷ *See CyberBully and CyberGossip: A New Threat to Your Teen?*, ASPEN EDUC. GRP, <http://www.aspeneducation.com/Article-cyberbullies.html> (last visited Mar. 22, 2011) [hereinafter *CyberBully and CyberGossip*].

bullies to torment their victims any time they want. Young people are using the internet and text messaging as a means of bullying because it is easier for them to be mean when they don't have to face their victims. The internet allows an individual to make embarrassing and derogatory comments and remain anonymous. However, the truth is that cyber-bullying hurts just as much, if not more, than if a victim is being bullied in person.⁸ The importance of peer approval to children is high and thus, cyber-bullying can be extremely destructive to those who fall victim to it.⁹ Unfortunately, the prevalence of cyber-bullying is increasing; “[t]he U.S. Justice Department recently reported that cyber-bullying is at an all-time high, with 43 percent of teens saying they have been victims.”¹⁰

I. THE EMERGENCE OF THE ISSUE

Cyber-bullying has become a national problem with cases around the country ending in suicide. For instance, Megan Meier was a thirteen-year-old girl who killed herself in 2006 due to cyber-bullying. Megan had developed a relationship with a teen boy online. The relationship led to the “boy” leaving Megan devastating messages such as “the world would be better off without you.”¹¹ Megan later committed suicide. It turned out that the mother of one of Megan’s friends, as well as the mother’s daughter and a part-time employee, had created a fake account and impersonated a teenage boy to torment Megan.¹²

Another highly publicized case involved a Rutgers University student who committed suicide after his roommate allegedly secretly taped the student having a sexual encounter with another man, and then posted the footage online.¹³ The story of

⁸ See Katie Gibas, *Parents Outraged at Latest Syracuse Cyberbullying Incident*, YNN, Oct. 23, 2010, http://centralny.ynn.com/content/top_stories/521464/parents-outraged-at-latest-syracuse-cyberbullying-incident/.

⁹ N.Y. STATE DIV. OF CRIMINAL JUSTICE SERV., *supra* note 3.

¹⁰ Editorial, *On Cyber-bullying, New York is Way Behind the Times*, MPNNOW.COM, May 20, 2010, <http://www.mpnnow.com/opinions/x2084256445/Editorial-On-cyber-bullying-New-York-is-way-behind-the-times>.

¹¹ Press Release, Rep. Linda Sanchez Introduces Bipartisan Megan Meier Cyberbullying Prevention Act (May 2008), available at http://lindasanchez.house.gov/index.php?option=com_content&task=view&id=347&Itemid=34.

¹² Matthew C. Ruedy, *Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws Be Created?*, 9 N.C. J.L. & TECH. 323, 323 (2008).

¹³ Jennifer Valentino-DeVries, *Cyberbullying Goes to College*, WALL ST. J.

Phoebe Prince, an individual who has fallen victim to cyber-bullying, has also been covered by the media. Phoebe Prince was a new student at school who was tormented with both cyber-bullying and traditional, in-person bullying. Students “bumped into her, sent her threatening text messages, [and] called her ‘Irish slut’ to her face.”¹⁴ On one occasion, while Phoebe Prince was walking home from school, one of her bullies threw a can of Red Bull at her while passing her in a car.¹⁵ Phoebe Prince was bullied to the point where she hanged herself at home. Her “little sister found her in a stairwell, hanging from the scarf she’d given her for Christmas.”¹⁶

While instances of cyber-bullying are occurring across the country, it is also happening right in our own communities. In Peru, New York, a fourteen-year-old girl’s mother knew that she was having problems with kids at school, and when she began to notice behavioral changes in her daughter, she decided to check out her daughter’s MySpace page.¹⁷ To the mother’s horror, “[a] fake profile popped up—with a picture of her daughter and her cell-phone number—indicating the girl was a prostitute with physical abnormalities.”¹⁸

In the suburbs of New York City, a website made by students at Horace Greeley High School was the subject of cyber-bullying. The website “included biographies, sexual habits, phone numbers and addresses of forty female students.”¹⁹ In this particular case, two students were arrested for aggravated harassment.²⁰ Additionally, in Syracuse, New York, a Facebook page, called Syracuse Smuts, depicted pictures of teenage girls and derogatory comments about them.²¹

II. WHAT STEPS ARE BEING TAKEN TO DEAL WITH THIS GROWING

DIGITS BLOG (Sept. 30, 2010, 4:25 PM), <http://blogs.wsj.com/digits/2010/09/30/the-rutgers-students-suicide-cyberbullying-goes-to-college/>.

¹⁴ Rick Hampson, *A ‘Watershed’ Case in School Bullying?*, USA TODAY, Apr. 5, 2010.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Stephen Bartlett, *Parents Seek End to Cyber Bullying*, PRESS REPUBLICAN (Plattsburg, N.Y.) Aug. 6, 2010, http://pressrepublican.com/0100_news/x91132313/Parents-seek-end-to-cyber-bullying.

¹⁸ *Id.*

¹⁹ *CyberBully and CyberGossip*, *supra* note 7.

²⁰ *Id.*

²¹ Gibas, *supra* note 8.

ISSUE?

New York is finally stepping up and saying that something needs to be done to stop the increasing problem of cyber-bullying. In particular, Albany County passed an anti-cyber-bullying law in November.²² Under the new law, cyber-bullying is now a misdemeanor in Albany County, “punishable by a \$1,000 fine or [up to] a year in jail.”²³ The Albany County legislature defines cyber-bullying as,

[A]ny 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.²⁴

The Albany County legislature hopes that the county’s new anti-cyber-bullying law will be influential and become a statewide law.²⁵

The first case to put the county’s new law “to the test” is being investigated by the Cohoes Police Department.²⁶ The case involves a Facebook page made by a group of high-schoolers on which derogatory sexual remarks were made about several male and female students.²⁷ In addition, the individuals’ pictures were added next to the remarks.²⁸ The police have spoken with the District Attorney and have been told that the office will prosecute.²⁹ At this point no charges have been filed against the students who created the page, but if the police and the District

²² *Albany County Considers Sales Tax Hike, Approves Cyberbullying Ban: Cyberbullying*, CBS NEWS 6, Nov. 9, 2010, <http://www.cbs6albany.com/news/county-1280197-hike-albany.html>.

²³ *Albany County Passes Stronger Cyberbullying Law*, WTEN NEWS, Nov. 8, 2010, <http://www.wten.com/Global/story.asp?S=13467771>.

²⁴ ALBANY, N.Y., Local Law No. “F” Prohibiting Cyber-bullying in Albany County, § 2 (Nov. 8, 2010).

²⁵ *Albany County Passes Stronger Cyberbullying Law*, *supra* note 23.

²⁶ Marci Natale, *Cohoes Police Investigate Cyber-bullying Case*, CBS NEWS, Jan. 11, 2011, <http://www.cbs6albany.com/news/cohoes-1281879-police-law.html>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

Attorney proceed, the students could be arrested.³⁰

Individuals of all ages are coming to the realization that cyber-bullying is unacceptable. New York is taking a step in the right direction to show that this type of behavior is not tolerated in our society, and will not go unpunished.

III. ANTI-CYBER-BULLYING LEGISLATION & FREEDOM OF SPEECH RIGHTS

Some have doubts as to whether Albany County's new anti-cyber-bullying law is constitutional. The U.S. Supreme Court has ruled on student freedom of speech in several cases. In *Tinker v. Des Moines Independent Community School District*,³¹ "the Court indicated that in 'construing the First Amendment, a balance must be struck between the free speech rights of students and the special need to maintain an effective and safe learning environment.'"³² The Court in *Tinker* also ruled that student speech is not afforded First Amendment protection if the school reasonably believes that the student speech will create a material interference or substantial disruption of the educational environment, or if such speech actually does create such material interference or substantial disruption.³³

The Supreme Court has limited specific instances in which speech is not protected under the First Amendment. One such exception occurs when the speech is found to be a true threat. This exception is laid out in *Watts v. United States*.³⁴ But what amounts to a true threat? In interpreting the true threat test, the Ninth Circuit has said, "whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."³⁵ In addition to the true threat exception to

³⁰ *Id.*

³¹ 393 U.S. 503 (1969).

³² Kevin Turbert, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 664–65 (2009) (explaining the ruling in the *Tinker* case).

³³ *Tinker*, 393 U.S. at 513.

³⁴ 394 U.S. 705, 708 (1969).

³⁵ *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. Of Life Activists*, 290 F.3d 1058, 1085–86 (9th Cir. 2002) (citing *United States v.*

free speech, the Supreme Court has also found exceptions where student speech is lewd and indecent,³⁶ where student speech is “school sponsored” and the school’s “actions are reasonably related to a legitimate pedagogical concern,”³⁷ and where student speech pertains to or encourages illegal drug use.³⁸ However, the Supreme Court has not yet ruled on whether or not student speech amounting to bullying is protected by the First Amendment.

Looking to the case law available, it is questioning as to whether Albany County’s new law is constitutional under the freedom of speech protection of the First Amendment. While there are some cases of cyber-bullying that amount to a true threat, that is not often the case. Often comments made by cyber-bullies are extremely derogatory and hurtful, but the remarks will not usually pass the true threat test set up by the Supreme Court.³⁹ This is because words that are hurtful are not often threatening in nature. If cyber-bullying is ever found to amount to a true threat, under the Supreme Court’s rulings schools and law enforcement would be able to punish the speech, whether it occurred on or off campus, without violating the speaker’s First Amendment rights.⁴⁰

While most cyber-bullying may not fall under the true threat analysis, in *Tinker* the Supreme Court found that speech which materially disrupts or interferes with the school’s educational environment may be unprotected by the First Amendment.⁴¹ Off campus cyber-bullying can be substantially disruptive to the school and its educational environment. One reason for this is that cyber-bullying often, if not always, has a negative effect on the victim. The bullying may have a negative effect on the victim’s educational performance in school, as well as the victim’s social habits.⁴² It has been found in several cases of cyber-bullying that the victim’s grades drop, the victim often misses school, and suffers other adverse effects.⁴³ It should be easy to

Orozco-Santillan, 903 F.2d 1262 (9th Cir. 1990)).

³⁶ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

³⁷ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272–73 (1988).

³⁸ *Morse v. Frederick*, 551 U.S. 393, 409 (2007).

³⁹ Turbert, *supra* note 32, at 671.

⁴⁰ *Id.*

⁴¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

⁴² Turbert, *supra* note 32, at 677.

⁴³ See Bartlett, *supra* note 17; Jan Hoffman, *Online Bullies Pull Schools Into*

determine that these results are a substantial disruption to the school's educational environment and educational mission, as the school is unable to provide the victims with a proper education. In addition, it could be argued that cyber-bullying "could weaken the morale of the school community, cause possible physical retaliation on school grounds, create a specter of fear among students because of the possible anonymity of the aggressors, and cause agitation and frustration among parents and school officials in how to effectively punish this elusive problem."⁴⁴ It should also be noted that victims of cyber-bullying, and bullying in general, are more likely to bring a gun to school, which can, and often does, end in tragedy.⁴⁵

CONCLUSION

Cyber-bullying is a huge problem on the rise across the country. Albany County has stepped up and taken a stand, in hopes that the new anti-cyber-bullying law will become a state-wide law. Some may argue that this new law is unconstitutional with respect to freedom of speech rights. While some case law may support that argument, it is a weak one. Surely the creators of the Constitution, when creating the First Amendment's freedom of speech protection, did not have in mind that one day individuals of the United States would be using their speech to purposely torment and cause harm to other individuals. If individuals are going to abuse the right to freedom of speech, then like a child whose toys get taken away when they misbehave, so too should the freedom of speech protection be taken away from those who do not know how to use it properly. It is a shame that this is what society has come to, but valuable lives have been taken because of the harm that can come from the improper use of one's words.

While it may appear that cyber-bullying may not fall under any of the exceptions to freedom of speech that the Supreme Court has ruled on, it can be argued that under *Tinker* cyber-bullying amounts to a material disruption and substantial interference in

the Fray, N.Y. TIMES, June 28, 2010, at A1.

⁴⁴ Turbert, *supra* note 32, at 677-78.

⁴⁵ *Lawmakers Propose a Response to Growth of Cyberbullying*, YOUNGSTOWN NEWS, Oct. 26, 2010, <http://www.vindy.com/news/2010/oct/26/lawmakers-propose-a-response-to-growth-of/>.

the school environment. If and when the Supreme Court rules on this issue it should keep in mind what Justice Breyer said in his concurring opinion in the *Morse* case: “[s]tudents are always going to test the limits as to what is acceptable behavior, and schools should be given flexible authority in dealing with issues that arise involving the school environment since school officials, not judges, are better equipped to deal with “disciplinary challenges.”⁴⁶ In this respect, school officials should be given flexible authority in dealing with cyber-bullying issues without worrying about whether or not they are violating students’ freedom of speech rights.

⁴⁶ *Morse v. Frederick*, 551 U.S. 393, 428 (2007) (Breyer, J., concurring and dissenting in part).