***Chapter 14.    Call to Action for Schools and Legislators – David Keller Trevaskis, Esquire[[1]](#footnote-1)***

*Introduction*

As “bullycide” has become an accepted term of art[[2]](#footnote-2) in public discourse about bullying prevention, many who care about young people in schools have looked to the law for answers. Parents, educators, students, law and justice professionals, and legislators have worked to use existing laws and craft new ones to protect children targeted for bullying.

Much bullying behavior involves actions that could be viewed as crimes under existing laws in every state in the country,[[3]](#footnote-3) but the focus of this chapter will not be on the criminalization of bullying. Zero-tolerance school disciplinary policies[[4]](#footnote-4) and criminal prosecution of bullying fail to stop it from happening[[5]](#footnote-5) and do little more than feed a “school-to-prison pipeline.”[[6]](#footnote-6) Criminally prosecuting a person who bullies another may provide specific deterrence, but no research exists that suggests it has a wider effect. There is more hope in following restorative, not punitive, justice principles.[[7]](#footnote-7) Civil laws that broadly impact schools and support bullying prevention efforts will be the focus of this chapter, which will explore existing law and court interpretations and conclude with suggestions for model state legislation.

*The Law of Bullying*

As of June 2012, 49 states have specific anti-bullying laws.[[8]](#footnote-8) Although there is no specific federal anti-bullying law, there are a number of federal statutes that may be applied to certain bullying situations.[[9]](#footnote-9) But simply creating a new statute or following the existing laws will not prevent bullying from happening, and anti-bullying laws cannot guarantee that incidents of bullying will be handled effectively.

Under most anti-bullying laws, schools need only have anti-bullying policies in place, respond to bullying situations of which teachers and administrators are aware, and report bullying incidents to the appropriate government agency or official. Doing enough to meet the requirements of the law, however, may not be doing enough to protect children from the damaging consequences of bullying. Even in the few states that have more stringent anti-bullying requirements, successful bullying prevention efforts do not rely on the law, but rather the partnership of educators, parents, students and the community at large. Educators have professional and moral standards that direct them to do more than the law dictates.

Although bullying has been a longstanding issue for schools, significant attention to bullying came after Columbine shootings, as noted earlier in this book. Many early media accounts of the tragedy reported that the shootings were retaliation for bullying against the perpetrators.[[10]](#footnote-10) Oftentimes, the media attention garnered by high-profile events pushes legislators to draft legislation in a knee-jerk fashion and the case was no different for anti-bullying laws after Columbine.[[11]](#footnote-11) Skip a little more than a decade ahead in time and you can see the same media driven pattern occur as the suicide of Tyler Clementi helped push through significant revisions to New Jersey’s anti-bullying law.[[12]](#footnote-12) Developments in technology that are highlighted in the Clementi matter add a new element to efforts to craft laws that can protect students who are bullied, as the reach of those who would target others is now seemingly unlimited. Cyberbullying[[13]](#footnote-13) is the area where the law seems most at a crossroads as courts try to apply legal concepts created before technological advances raised implications unimagined by the jurists of earlier times.[[14]](#footnote-14)

Clementi’s death galvanized the Obama administration’s[[15]](#footnote-15) anti-bullying efforts. Importantly, the administration clarified that Title IX, the federal law that prohibits discrimination on the basis of sex and by extension gender stereotyping by recipients of funds from the United States Department of Education (DOE), may offer protection to lesbian, gay, bisexual, and transgender (LGBT) students who are victims of bullying, even though LGBT students do not receive specific federal protection by nature of their LGBT status.[[16]](#footnote-16)

*The Applicability of Anti-Discrimination Laws to Bullying Behavior*

The DOE’s Office for Civil Rights (OCR) issued a “Dear Colleague Letter”on October 26, 2010 that clarified the relationship between bullying and discriminatory harassment under the civil rights laws it enforced, including Title VI (race, color and national origin), Title IX (sex), and Section 504 and Title II of the Americans with Disabilities Act (disability).*[[17]](#footnote-17)* It is important to note, however, that these laws do not apply to bullying when it does not rise to the level of harassment based on race, color, national origin, sex (including gender stereotyping), or disability. The letterexplained how student misconduct that falls under an anti‐bullying policy also may trigger responsibilities under one or more of the anti‐discrimination statutes enforced by OCR. Specifically, the letter discussed harassment based on race and national origin, sex and gender stereotyping, and disability, and illustrated how a school should respond in each case. It also reminded schools that failure to recognize discriminatory harassment when addressing student misconduct may lead to inadequate or inappropriate responses that fail to remedy violations of students’ civil rights.[[18]](#footnote-18)

The letter also explained the extent of a school’s obligations under these anti‐discrimination statutes. According to the DOE, once a school knows or reasonably should know of possible student‐on‐student harassment, it must take immediate and appropriate action to investigate or otherwise determine what occurred. If harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment, and prevent its recurrence. These duties are a school’s responsibility even if the misconduct is also covered by an anti‐bullying policy or law, and regardless of whether the victim makes a complaint, asks the school to take action, or identifies the harassment as a form of discrimination.

The anti-bullying push at the federal level continued in June 2012 with the issuance of a report by the Government Accountability Office (GAO) on school bullying entitled “Legal Protections for Vulnerable Youth Need to Be More Fully Assessed.”[[19]](#footnote-19) In its summary of the report, the GAO reflected on its review of a number of state statutes, school district policies and applicable federal law, finding “that the nature and extent of protections available to students who are bullied depend on the laws and policies where they live or go to school.”[[20]](#footnote-20) The summary notes:

We also found that while federal and state civil rights laws may offer some protections against bullying in certain circumstances, vulnerable groups may not always be covered. Federal civil rights laws can be used to provide protections against bullying in certain circumstances, but some vulnerable groups are not covered and therefore have no recourse at the federal level. For example, federal agencies lack jurisdiction under civil rights statutes to pursue discrimination cases based solely on socioeconomic status or sexual orientation. Some state civil rights laws provide protections to victims of bullying that go beyond federal law, but federal complainants whose cases are dismissed for lack of jurisdiction are not always informed by Education about the possibility of pursuing claims at the state level.

Finally, regarding federal coordination efforts to combat bullying, we found that a variety of efforts are under way, but that a full assessment of legal remedies has not been completed. Specifically, Education, HHS, and Justice have established coordinated efforts to carry out research and disseminate information on bullying. For example, The Federal Partners in Bullying Prevention Steering Committee serves as a forum for federal agencies to develop and share information with each other and the public, and <http://www.stopbullying.gov> consolidates the content of different federal sites into one location to provide free materials for the public. In addition to these efforts, Education has issued information about how federal civil rights laws can be used to address bullying of protected classes of youths and is conducting a comprehensive study of state bullying laws and how selected school districts are implementing them. However, no similar information is being gathered on state civil rights laws and procedures that could be helpful in assessing the adequacy of legal protections for victims of school bullying.[[21]](#footnote-21)

Federal anti-bullying efforts can be traced back to the United States Supreme Court’s 1999 decision in the case of *Davis v. Monroe County Board of Education*. [[22]](#footnote-22) In that case, LaShona Davis, a female fifth grade student at Hubbard Elementary School in Monroe County, Georgia, was repeatedly sexually harassed by a male classmate, “G.F.” The incidents of reported sexual harassment began in December 1992 when G.F. attempted to touch LaShonda's breasts and genital areas while making vulgar statements. LaShonda reported the incident to her teacher, but the school did not initiate any action to prevent future occurrences of the behavior. The behavior continued on two separate days in January 1993 when G.F. committed similar offensive actions against her, after which LaShonda reported both incidents to her teacher and to her mother. When her mother reported the incidents to LaShonda's teacher, she was told that the principal had been informed of the incidents. However, no disciplinary action was taken against G.F.

G.F. similarly harassed her on two occasions in February 1993. The first February incident happened in physical education class when G.F. again acted in a sexually suggestive manner toward LaShonda. She reported the incident to her physical education teacher, but the school again failed to act. A week later, another classroom teacher, Mrs. Pippin, observed G.F. engaged in similar behavior and again no disciplinary action was taken. In March 1993, G.F. yet again harassed LaShonda in physical education class, and the incident was once more reported to the physical education teacher and to Mrs. Pippin. Although the principal was told of the incident, no disciplinary action was taken. G.F. rubbed his body against LaShonda in a sexually suggestive manner again in April 1993 and she reported the incident to her classroom teacher, and like the previous times, no disciplinary sanctions were taken against G.F.

During the time that G.F. was harassing LaShonda, he was also harassing other female classmates. A number of the girls, including LaShonda, asked to speak to the principal about G.F.'s conduct. However, their teacher denied the request, saying that the principal would call them if he needed to do so. When LaShonda’s mother talked to the principal about the continuing incidents, the principal told her, "I guess I'll just have to threaten him a little harder." The principal also told Mrs. Davis that LaShonda was the only student complaining about G.F.'s behavior. In May 1993, the local police charged G.F. with sexual battery for the repeated incidents of misconduct against LaShonda.[[23]](#footnote-23) G.F. pleaded guilty. Although the harassing behavior stopped, LaShonda's grades plummeted, she was no longer able to concentrate on her studies, and her father found a suicide note that LaShonda had written to a friend.

In 1994, Mrs. Davis filed a civil suit in United States District Court. The suit alleged that the school board had violated Title IX by not taking action to stop the student-on-student sexual harassment. Specifically, the suit alleged that the school district's deliberate indifference created an intimidating, hostile, offensive, and abusive school environment in violation of the law. The complaint sought compensatory and punitive damages, attorney's fees, and injunctive relief. The question that the Supreme Court grappled with was not whether the behavior of G.F. against LaShonda was offensive, but whether federal anti-discrimination law provided her a remedy. In a 5-4 decision, Justice Sandra Day O’Connor enunciated a standard that allowed for liability under Title IX when schools act with deliberate indifference to gender based harassment that is severe enough to prevent victims from enjoying educational opportunities. Prior to the Court’s decision, traditional tort remedies would apply only against G.F. and it is unlikely that the resources of a fifth grade student would provide much relief to a victim.

There are a number of areas in which courts are expanding existing law to provide remedies for the victims of bullying behavior. The 2011 United States District Court decision in [*T.K v. New York City Department of Education*](http://paperdame.0catch.com/lawstuff/04-25-11%20T%20K%20v%20New%20York.pdf)[[24]](#footnote-24) provides an excellent summary of the applicability of anti-discrimination laws to the bullying of special needs students when that behavior may lead to the denial of a free appropriate public education. In that opinion, Senior Judge Jack B. Weinstein reviewed how various circuit courts have handled such claims and enunciated the following standard of review:

The rule to be applied is as follows: When responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred. If harassment is found to have occurred, the school must take appropriate steps to prevent it in the future. These duties of a school exist even if the misconduct is covered by its anti-bullying policy, and regardless of whether the student has complained, asked the school to take action, or identified the harassment as a form of discrimination.[[25]](#footnote-25)

 *First Amendment Considerations*

One of the primary concerns in crafting anti-bullying legislation is the extent to which such legislation might interfere with students’ First Amendment[[26]](#footnote-26) free speech rights.In the school context, however, these concerns are greatly diminished, as the Supreme Court has considerably limited the free speech rights of students over the course of the last several decades. These opinions have established that student speech rights must be weighed against the considerable interests of administrators in maintaining an orderly learning environment, with substantial discretion given to schools.

 The most pertinent student First Amendment case remains the 1969 case of *Tinker v. Des Moines,[[27]](#footnote-27)* which established that school administrators may restrict school speech where it causes an actual or reasonably foreseeable “material and substantial disruption” of the school environment. Although an important case, the 1986 case of *Bethel v. Fraser[[28]](#footnote-28)*is less relevant in the bullying context, as it is limited to “vulgar and lewd speech” that “undermine[s] the school’s basic education mission.” *Fraser* involved a “captive audience” of students. While the *Fraser* standard may occasionally be relevant in bullying cases in and of itself, the *Tinker* standard is considerably broader and more applicable. The third case always cited in discussions of student speech is the 1988 case of *Hazelwood. v. Kuhlmeier.[[29]](#footnote-29) Hazelwood* extended the limits on student speech found in *Bethel*.

 The Court’s 2007 decision in *Morse v. Frederick[[30]](#footnote-30)*used reasoning from these previous cases to expand the authority of schools considerably, establishing that the “substantial disruption” requirement is “not absolute” and holding that the school’s “important” interest in discouraging drug use was enough to warrant administrative interference with student speech. This potentially opens the door considerably for anti-bullying legislation, which would no longer be tethered to *Tinker’s* disruption analysis, but instead could be built around the state’s “important interest” in regulating bullying. While *Morse’s* holding was technically narrow, only recognizing the importance of schools’ interest in deterring drug use, the underlying reasoning is quite broad.

 Nevertheless, there remains an open constitutional question as to the scope of schools’ regulatory authority in student speech cases: the extent to which schools may restrict speech that occurs off-campus.[[31]](#footnote-31)Justice Brennan implied a potential territoriality issue in his concurrence in *Fraser*, stating that “[i]f respondent had given the same speech outside of the school environment, he could not have been penalized.” This sentiment was reinforced in *Morse*, where it was said that the speech would have been protected if given “outside the school context.” This restriction only explicitly addresses the use of lewd and vulgar speech. Although its language may be somewhat flexible, it has not been expanded to student speech more broadly.

The Court has never explicitly held that an on-campus/off-campus dichotomy exists with regards to *Tinker*, but has instead hedged on the issue, limiting the language of its decisions to the school grounds or school-sponsored activities. The majority of circuit courts to consider the issue have found that *Tinker* does in fact apply to off-campus speech.[[32]](#footnote-32)

The only example of a circuit court taking the opposite position is merely dicta (nonbinding, but nonetheless authoritative takes) – a concurring panel of five judges of the Third Circuit claimed that *Tinker* does not govern off-campus speech in *J.S. ex rel Snyder v. Blue Mountain Sch. Dist.* While the circuit courts clearly lean toward allowing school officials to sanction certain off-campus speech, since the question remains undecided, it is possible that strong anti-bullying legislation may result in a successful constitutional challenge. However, the Supreme Court declined to review both *Korwalski* and *Snyder* in early 2012, meaning that the circuit courts remain – and are likely to remain for the foreseeable future – the prevailing authority on the issue. This should encourage states to expand the reach of their anti-bullying legislation off campus. But this has yet to happen – only seven states’ anti-bullying laws apply to off-campus activity.[[33]](#footnote-33)

*Shortfalls in Anti-Bullying Laws*

 The failure of many existing anti-bullying laws to address off-campus speech not only limits the ability of school officials to deal with traditional bullying, but leaves schools at an extreme disadvantage in attempting to handle cyberbullying. The Internet provides a medium through which bullies have access to victims without the need for a classroom, cafeteria or schoolyard. The fact that many bullying laws do not address cyberbullying is disconcerting; but even those that do are often powerless to regulate it if those laws do not extend to off-campus speech.

 There are other, non-constitutional concerns regarding state laws’ treatment of cyberbullying as well. Notably, while many states criminalize cyberbullying, the effectiveness of criminalization relative to education programs as a deterrent is in question. Another problem, shared by traditional bullying legislation, is a lack of clarity in the definition of “bullying” and “cyberbullying” - something that not only leads to trouble with enforcement, but exposes the laws to the prospect of being ruled facially invalid and struck down under the constitutional overbreadth and vagueness doctrines.

 Another large concern is the fact that the discretion granted to school administrations that may allow for the regulation of bullying speech is a double-edged sword. The fact that school officials are legally able to impose regulations on students does not mandate action on the part of the schools. Thus, there is no mechanism to ensure that school officials are properly addressing the broad range of bullying behaviors and activities. Further, this discretion is also open to abuse, allowing school officials to restrict what may be constitutionally protected speech, which may occur without malice as a result of the ambiguity surrounding the definition of bullying.

*Legal Remedies for Bullying*

The relevant traditional channels for private relief in tort law include defamation, intentional infliction of emotional distress, and harassment lawsuits. There are a variety of concerns with these channels. Notably, they often require that a private individual hoping to bring suit has ample resources at his or her disposal in order to adequately litigate and that the tortfeasor has the resources to make litigation valuable. Further, private suits are often likely to be defeated by First Amendment claims on the part of the defendant and certain torts – notably defamation – are strictly defined in such a way that do not align well with bullying scenarios. Finally, encouraging individuals to seek relief through tort law potentially runs the risk of excessive litigation and frivolous lawsuits.

As bullying laws have developed, concerns about administrative discretion have given way to concerns that those laws’ reporting requirements are inadequate. In many cases it is only required that more severe cases of bullying be reported. Further, the laws may at times discourage the reporting of bullying, as reporting may portray schools in a negative light. Alternative proposals have involved criminalizing nonfeasance on the part of teachers and school officials or providing qualified immunity to those who report incidents.

New Jersey’s law may well serve as the foundation for a model state law. In 2011 New Jersey passed the Anti-Bullying Bill of Rights Act,[[34]](#footnote-34) which is arguably the most far-reaching and comprehensive anti-bullying legislation in the country. The law not only provides a clear definition of bullying (which incorporates the language of *Tinker*), but mandates and provides guidelines for an institutionalized system for addressing bullying in schools, focused both on prevention and remedial concerns.

This law is argued to more substantively address concerns that teachers and schools may only minimally comply with anti-bullying requirements by putting in place a more comprehensive system to tackle the issue. While some might prefer alterations– it does not, for example, address cyberbullying directly and does not provide for criminal sanctions – it serves to address concerns that anti-bullying laws are largely allowing for minimal compliance on the part of schools without properly seeking to root out the underlying problems. The law effectively creates a set of institutions through which concerns about bullying are pervasive.

As long as circuit courts across the country continue to read broadly the power of the state to regulate student speech, the door is open to expansive anti-bullying legislation that reaches beyond school grounds. States – especially those within the circuits that have explicitly supported more considerable restrictions of student speech – should take advantage of those speech limitations in order to expand their regulation of bullying. Although the constitutional boundaries of bullying regulation are amorphous, states have an opportunity to address bullying and cyberbullying in a comprehensive, yet fair, manner.

1. David Keller Trevaskis is the Pro Bono Coordinator of the Pennsylvania Bar Association. He is a former third grade teacher, a certified Olweus bullying prevention trainer, and a champion of public education about the law. Thanks go to Peter Shadzik, a University of Pennsylvania Law School J.D. Candidate, Class of 2013, for his literature review and other help in preparing this chapter. Much of the conclusion to this chapter reflects Peter’s work. Thanks also go to attorney Jason Imler for his suggestions and edits to this chapter. [↑](#footnote-ref-1)
2. From a first use in 2001 (<http://wordspy.com/words/bullycide.asp>), as of June 2012 there were over 148,000 results in a simple Google search of the term. Although the term minimizes the complexity of adolescent suicide, it captures the pain of loss for those who lose someone who has been subjected to bullying. [↑](#footnote-ref-2)
3. A cursory review of Pennsylvania law indicated that bullying behavior could meet the standards of the following crimes:

Assault

Terroristic Threats

Harassment , Harassment by Communication or Address, Stalking

Possession of Child Pornography

Distribution of Child Pornography

Sexual Abuse of Children

Sexual Exploitation of Children

Unlawful Contact/Communication with a Minor

Ethnic Intimidation (Hate Crime) [↑](#footnote-ref-3)
4. American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*,63.9 Am. Psychologist 852, 852(2008) (defining “zero tolerance” as “a philosophy or policy that mandates the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the gravity of behavior, mitigating circumstances, or situational context.”) [↑](#footnote-ref-4)
5. *See* Ian Parker, *Story of A Suicide*, The New Yorker (Feb. 6, 2012), available onlineat <http://www.newyorker.com/reporting/2012/02/06/120206fa_fact_parker>, for a powerful story of the death of Tyler Clementi, a Rutgers University student who took his own life after his roommate used social media to bully him. The criminal trial and conviction of Clementi’s roommate, Dharun Ravi, resulted in him serving 20 days of a 30 day sentence. (*Ex-Rutgers Student Dharun Ravi Released from Jail*, ABC News (June 19, 2012), available online at <http://abcnews.go.com/US/rutgers-student-dharun-ravi-released-jail/story?id=16602245#.T_FYY9VVmU4>). However, the criminal implications of the bullying behavior did not prevent the bullying and it is doubtful to have much of a deterrent impact on stopping others from similar behavior.

 [↑](#footnote-ref-5)
6. *See* Nancy A. Heitzig, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, Forum on Pub. Policy, 1 (2009), available online at www.forumonpublicpolicy.com/summer09/archivesummer09/heitzeg.pdf (defining “school to prison pipeline” as a “growing pattern of tracking students out of educational institutions, primarily via “zero tolerance” policies, and, directly and/or indirectly, into the juvenile and adult criminal justice systems.”) [↑](#footnote-ref-6)
7. *See* Gordon Bazemore & Lode Walgrave, *Restorative Juvenile Justice: In Search of Fundamentals* *and an Outline for Systemic Reform*, Restorative Juvenile Justice: Repairing the Harm of Youth Crime 45, 48 (1999) (defining restorative justice as “a process whereby parties with a stake in a specific offence [sic] collectively resolve how to deal with the aftermath of the offence and its implication for the future.”) *See also* Leah M. Christensen, *Sticks, Stones, and Schoolyard Bullies: Restorative Justice, Mediation and a New Approach to Conflict Resolution in our Schools ,* 9 Nev. L.J. 545( 2009). [↑](#footnote-ref-7)
8. *See* U.S. Department of Health and Human Services, *Policies & Laws*, Stop Bullying Website, available online at <http://www.stopbullying.gov/laws/index.html> (last visited July 6, 2012). As of the time of this chapter, only Montana failed to have an anti-bullying law. *See also* Bully Police USA, *Bully Police USA* Bully Police USA website, available online at <http://www.bullypolice.org/> (last visited July 6, 2012). [↑](#footnote-ref-8)
9. Among the civil rights laws used in anti-bullying efforts are: **Title VI** of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color, and national origin; **Title IX** of the Education Amendments of 1972 which prohibits discrimination on the basis of sex; and **Section 504** of the Rehabilitation Act of 1973 and the **Americans with Disabilities Act** of 1990 which prohibit discrimination on the basis of disability. [↑](#footnote-ref-9)
10. *See* Dave Cullen, *Columbine,* (2009), for a detailed account of the media coverage and for his debunking of the “myth” that the Columbine attack was in retaliation for bullying. [↑](#footnote-ref-10)
11. Colorado’s anti-bullying legislative declaration was approved May 1, 2001. *See* Bully Police USA, *Colorado*, Bully Police USA website, available at <http://www.bullypolice.org/co_law.html> (last visited July 6, 2012). [↑](#footnote-ref-11)
12. *See* Winnie Hu, *Bullying Law Puts New Jersey Schools on Spot*, New York Times website (August 31, 2011), available online at <https://www.nytimes.com/2011/08/31/nyregion/bullying-law-puts-new-jersey-schools-on-spot.html?_r=1&pagewanted=all> (last visited July 6, 2012), for a summary of both the lead up to the law and subsequent concerns from schools about implementing the law. [↑](#footnote-ref-12)
13. Cyberbullying is defined as “bullying that takes place using electronic technology. Examples of cyberbullying include mean text messages or emails, rumors sent by email or posted on social networking sites, and embarrassing pictures, videos, websites, or fake profiles.” *See* U.S. Department of Health and Human Services, *Cyberbullying*, Stop Bullying Website, available online at <http://www.stopbullying.gov/cyberbullying/index.html> (last visited July 6, 2012). *See also* Cyberbullying Research Center, *News*, Cyberbullying Research Center Website,, available online at <http://www.cyberbullying.us/index.php>. [↑](#footnote-ref-13)
14. In the case of social media, such “earlier times” might be yesterday! [↑](#footnote-ref-14)
15. On October 22, 2010, President Obama spoke about the importance of bullying prevention and safe school climate.  Here is the link to the President’s message: <http://www.youtube.com/watch?v=IYOeQsLszvU> [↑](#footnote-ref-15)
16. In addition, LGBT students are often not specifically protected under state anti-bullying laws. [↑](#footnote-ref-16)
17. United States Department of Education, *October 26, 2010 Dear Colleague Letter* available online at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>. [↑](#footnote-ref-17)
18. The *Dear Colleague Letter* also noted that colleges and universities have the same obligations under the anti‐discrimination statutes as elementary and secondary schools. [↑](#footnote-ref-18)
19. *See* United States Government Accountability Office, *Testimony Before the Committee on Health, Education, Labor and Pensions, U.S. Senate: School Bullying, Legal Protections for Vulnerable Youth Need to be More Fully Assessed*, United States Government Accountability Office website, available online at <http://gao.gov/assets/600/591478.pdf> (last visited July 6, 2012). [↑](#footnote-ref-19)
20. United States Government Accountability Office, *Legal Protections for Vulnerable Youth Need to Be More Fully Assessed*, Government Accountability Office website (June 8, 2012), available online at <http://gao.gov/products/GAO-12-785T> (last visited July 6, 2012). [↑](#footnote-ref-20)
21. *Id.* [↑](#footnote-ref-21)
22. #  *Davis v. Monroe County Bd. of Ed*., 526 U.S. 629 (1999).

 [↑](#footnote-ref-22)
23. This case underscores the limitations of criminal prosecution of bullying behavior since LaShonda suffered months of abuse before police intervened. [↑](#footnote-ref-23)
24. [*T.K v. New York City Department of Education*](http://paperdame.0catch.com/lawstuff/04-25-11%20T%20K%20v%20New%20York.pdf)*,* 779 F.Supp.2d 289 (E.D.N.Y, 2011). [↑](#footnote-ref-24)
25. *Id,* at46-47*.* [↑](#footnote-ref-25)
26. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances…*”U.S. Const. amend. I*. The key language for cyberbullying legal analysis is “Congress shall make no law… abridging the freedom of speech.” [↑](#footnote-ref-26)
27. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Middle-schooler Mary Beth Tinker is the one remembered in today’s textbooks and she still today visits schools to promote education about student rights and responsibilities, but it was a group of students at the high school, including Mary Beth’s brother, who brought this case to the forefront wearing black armbands to school in protest of the Vietnam War. Upon learning of the planned protest, the school issued a rule prohibiting students from wearing such armbands. The Tinkers and three others wore the armbands and were suspended. In its 1969 decision, the Supreme Court held that schools could punish student expression only if the speech would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” The school could not base suspension on “undifferentiated fear or apprehension of disturbance”; the school either had to show past disruption or forecast that disruption was highly likely to occur. [↑](#footnote-ref-27)
28. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). In this case of adolescent double *entendre*, the school suspended a student who gave a speech nominating another student for school office that was filled with sexual innuendo and which actually elicited reactions from other students unlike the typical school election assemblies. The Supreme Court held that schools may prohibit the manner of speech, as in this instance where the speech was sexually explicit, vulgar, and lewd. The Court explained: “Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.” Justice Brennan concurred in the decision, noting that the school could not have punished the student had the student given the same speech outside of the school. [↑](#footnote-ref-28)
29. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 US 260 (1988). In this case, a high school principal deleted two pages of the student newspaper containing stories about teen pregnancy and parental divorce. The principal censored the story about pregnant students over privacy concerns because he was worried that the students might be identified and he cut the divorce article because parents were not given the opportunity to respond to comments in the article. The Supreme Court distinguished *Tinker* by noting that the speech was in a publication distributed as part of the school’s curriculum and thus had both the school’s endorsement and the school’s power to ban. Schools may “exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” Schools, for instance, limit speech that is “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.” [↑](#footnote-ref-29)
30. *Morse et al., v. Frederick*, 551 U.S. 393 (2007). This case, known also as the “Bong Hits For Jesus” case, involved a young man looking for attention who seized upon the passage of the Olympic torch through Juneau, Alaska on its way to the Winter Olympics in Salt Lake City, Utah in 2002. Douglass High School allowed its students to observe the relay as it passed and sanctioned the event as a class trip or social event. As the torch passed, the student – Joseph Frederick – held up a 14-foot banner with the message, “BONG HITS 4 JESUS.” The principal crossed the street and demanded that the sign be taken down. Frederick refused, and the principal grabbed the sign and crumpled it. She told the student to follow her back to her office, and he did. There, the principal suspended Frederick for 10 days, citing a variety of infractions of school rules. The 9th Circuit found a violation of Frederick’s First Amendment rights, and found that the law was so clear on this issue in January 2002 that the principal was not entitled to legal immunity to money damages. The Supreme Court overturned the 9th Circuit after noting both that students in public schools do not have the same constitutional rights as students or adults in public settings and that *Tinker* is not the exclusive framework for analyzing a student’s First Amendment rights. The Court determined that Frederick’s banner, despite his protestations to the contrary, promoted drug use. The Court then explained: “Because schools may take steps to safeguard those entrusted to their care from speech that can be reasonably regarded as encouraging illegal drug use, the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending Frederick.” The Court thus added “an illegal drug use” exception to the free-speech rights of students in school settings. Justice Alito, joined by Justice Kennedy, concurred, noting that the majority opinion should not be read to limit students’ rights to comment on political or social issues, including debates about the merits of the drug laws. [↑](#footnote-ref-30)
31. *J.S. v. Bethlehem Area School District,*807 A.2d 803 (Pa. 2002).This case serves as an example of the difficult decisions such cases bring. Here an 8th grade student published a web site titled “Teacher Sux” on his own personal computer. The website contained vulgar language about his algebra teacher and principal. A separate section of the site showed a picture of the teacher with her head cut off and blood dripping from it and included solicitation for $20 from each viewer so that the student can hire a hit man to kill her. Once it became aware of the website, the school reacted by contacting local law enforcement officials and suspending the student for ten days. The Supreme Court of Pennsylvania applied *Tinker* and held that the website “materially disrupted the learning environment” and interfered with the right of others, including the teacher, the principal, and other students. The Court took into account the anonymous nature of the original postings, the serious and threatening tone of these postings, and the serious effect it had on the teacher, who had to take a one-year medical leave as a result of the postings. Both the principal and teacher sued the student in 1998 and 1999, respectively. A jury awarded the teacher $500,000 for invasion of privacy and the student and principal settled for an undisclosed amount. [↑](#footnote-ref-31)
32. This includes the Second Circuit (*Doninger v. Niehoff*), Fourth Circuit (*Kowalski v. Berkeley County Schools*), Fifth Circuit (*Shanley v. Northeast Indep. Sch. Dist.*), Seventh Circuit (*Poucher v. Sch. Bd. Of Sch. Dist., Bexar Cty., Texas*), and Ninth Circuit (*Pinard v. Clatskanie Sch. Dist.*). [↑](#footnote-ref-32)
33. *See* Bethan Noonan, *Crafting Legislation to Prevent Cyberbullying: The Use of Education, Reporting, and Threshold Requirements,* 27 J. Contemp. Health L. & Pol'y 330 (Spring 2011). This Note argues that in order to protect victims of cyberbullying, states must enact new legislation or update existing anti-bullying statutes to include cyberbullying for elementary, middle, and high school students. [↑](#footnote-ref-33)
34. N.J.S.A. 18A:37-14 [↑](#footnote-ref-34)