

ARTICLES

CYBERBULLYING AND THE LAW: AN OVERVIEW OF CIVIL REMEDIES

*Scott D. Camassar**

ABSTRACT

Cyberbullying is a pervasive and growing problem. Many states have bullying statutes, some of which specifically include prohibitions on cyberbullying, but most of these statutes do not include a private right of action—meaning victims need some other statutory or common law remedy in order to hold wrongdoers liable and possibly recover for their damages.¹ Theories of recovery include defamation, intentional infliction of emotional distress, and invasion of privacy, in addition to negligence claims against a municipal board of education, when viable and appropriate. This Article provides a summary of the statutory schemes in Connecticut, New York, and Massachusetts and an overview of traditional tort remedies.

* Attorney, the Law Firm of Stephen M. Reck, LLC, 391 Norwich-Westerly Road, P.O. Box 431, North Stonington, CT 06359 (www.stephenreck.com). Telephone 860-535-4040, Fax 860-535-3434, Email sdcamassar@gmail.com.

¹ See *State and Federal Bullying Information*, OLWEUS—BULLYING PREVENTION PROGRAM, http://www.olweus.org/public/bullying_laws.page (last visited Apr. 30, 2012) (outlining each state's bullying statutes).

TABLE OF CONTENTS

I.	CYBERBULLYING IS A FORM OF ‘ELECTRONIC AGGRESSION’	568
II.	HOW DO STATES DEFINE, PROSCRIBE CYBERBULLYING	570
	A. Connecticut	570
	B. New York.....	574
	C. Massachusetts.....	575
III.	THEORIES OF RECOVERY: TARGETING BULLIES AND SCHOOL DISTRICTS.....	577
	A. Direct Action Against the Bully.....	580
	1. Defamation.....	580
	2. Intentional Infliction of Emotional Distress	580
	3. Invasion of Privacy	582

I. CYBERBULLYING IS A FORM OF “ELECTRONIC AGGRESSION”

In 2009 the Centers for Disease Control and Prevention (CDC) released a report called *Electronic Media and Youth Violence: A CDC Issue Brief For Educators and Caregivers*, which defined “electronic aggression” as any kind of harassment or bullying (including “teasing, telling lies, making fun of someone, making rude or mean comments, spreading rumors, or making threatening or aggressive comments”) that occurs through email, instant messaging, text messaging, chat rooms, websites, or blogs.² The authors noted that not much was known about electronic aggression, because the few studies done at that time analyzed “similar but not exactly the same behaviors,” leading researchers to describe their findings in terms of broad ranges, for example, that “9% to 35% of young people say they have been the victim of electronic aggression.”³ Other key findings in the report included

- [T]he type of electronic aggression most frequently experienced by victims was rude or nasty comments (32%), followed by rumor spreading (13%), and threatening or aggressive comments (14%);⁴
- [W]hether rates of perpetration and victimization differ for

² CENTERS FOR DISEASE CONTROL, ELECTRONIC MEDIA AND YOUTH VIOLENCE: A CDC ISSUE BRIEF FOR EDUCATORS AND CAREGIVERS (2009) [hereinafter *CDC Issue Brief*], available at <http://www.cdc.gov/ViolencePrevention/pdf/EA-brief-a.pdf>.

³ *Id.* at 4–5 (citations omitted).

⁴ *Id.* at 5 (citations omitted).

boys and girls is unknown, although some research indicates that girls perpetrate electronic aggression more frequently than do boys;⁵

- [S]ome studies indicate that electronic aggression may peak around the end of middle school or beginning of high school;⁶
- In 2005, 6% of internet users reported being the victim of on-line harassment, up 50% from 2000;⁷
- [U]nlike the bullying that occurs in schools, victims of electronic aggression often do not know the perpetrator (13% to 46% of young people reported not knowing the identity of the cyber bully);⁸
- [T]he most common means of electronic aggression appears to be instant messaging;⁹
- [V]ictims of internet harassment are much more likely than non-victims to abuse alcohol or drugs, receive detentions or suspensions in school, skip school, or suffer in-person victimization;¹⁰
- [P]arents or other caregivers who know that their adolescent has been a victim of electronic aggression also experience distress, often reporting that they are even more fearful, angry and/or frustrated about the incidents than are the young victims;¹¹ and
- [T]he “vast majority of electronic aggression appears to be experienced and perpetrated away from school grounds,” but carries real and serious consequences for children at school, including higher incidences of in-school discipline, truancy, emotional distress, and feeling unsafe at school.¹²

As one commentator has noted, the “constantly changing technologies of the internet age” raise new challenges to a healthy school environment:

A new generation of “cyberbullies” are now anonymously manipulating the psyche and emotional stability of victims via text message, instant message, and cruel and hateful customized websites. “Cyberbullying is the epitome of covert aggression; it is anonymous, destructive, and now, instantaneous.” Although internet harassment, for the most part, originates outside the

⁵ *Id.* at 6 (citations omitted).

⁶ *Id.*

⁷ *CDC Issue Brief*, *supra* note 2, at 6 (citations omitted).

⁸ *Id.* at 7 (citations omitted).

⁹ *Id.*

¹⁰ *Id.* at 8 (citations omitted).

¹¹ *Id.* at 9 (citations omitted).

¹² *Id.*

school, it functions as the electronic bathroom wall, insidiously disrupting the school environment. Cyberbullying creates a tension between the First Amendment protection of student speech and the duty of school administrators to prevent the impact of abusive, harassing, threatening or other potentially harmful expression unleashed on the school community.¹³

Cyberbullying cases are said to be on the rise.¹⁴ In an article in *USA Today*, Natalie DiBlasio quoted Francisco Negron, general counsel for the National School Boards Association, who stated that bullying lawsuits are on the rise nationwide.¹⁵ While there are no studies showing it, Negron said “anecdotal evidence shows an obvious increase.”¹⁶ Despite this growing trend and the proliferation of anti-bullying statutes, victims of cyberbullying still lack meaningful civil remedies that are likely to lead to compensation for them. None of the anti-bullying statutes provide for victim compensation.¹⁷

II. HOW DO STATES DEFINE, PROSCRIBE CYBERBULLYING

Almost every state has a bullying law.¹⁸ According to the Cyberbullying Research Center, only Montana and South Dakota do not have a bullying law.¹⁹ Locally, Connecticut’s and Massachusetts’s statutes prohibit cyberbullying, while New York’s statute has a proposed amendment that would add a reference to cyberbullying.²⁰

A. Connecticut

In July 2010, Connecticut repealed its anti-bullying statute

¹³ Laurie Bloom, Note, *School Bullying in Connecticut: Can the Statehouse and the Courthouse Fix the Schoolhouse? An Analysis of Connecticut’s Anti-Bullying Statute*, 7 CONN. PUB. INT. L.J. 105, 112 (2007).

¹⁴ Natalie DiBlasio, *More Bullying Cases Have Parents Turning to Courts*, USA TODAY (Sept. 11, 2011, 9:23PM), <http://www.usatoday.com/news/education/story/2011-09-11/bullying-lawsuits-parents-self-defense-courts/50363256/1>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RESEARCH CENTER (Feb. 2012), http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf (noting that while criminal sanctions are permissible under several state statutes, they lack a requirement for compensatory damages).

¹⁸ See *id.* (noting that only Montana and South Dakota do not have anti-bullying statutes as of February 2012).

¹⁹ *Id.*

²⁰ *Id.*

(Conn. Gen. Stat. § 10-222d) and enacted, by unanimous vote of the legislature, Public Act No. 11-232, which changed the definition of bullying to include cyberbullying:

(1) “Bullying” means (A) the repeated use by one or more students of a written, oral or electronic communication, such as cyberbullying, directed at or referring to another student attending school in the same school district, or (B) a physical act or gesture by one or more students repeatedly directed at another student attending school in the same school district, that: (i) Causes physical or emotional harm to such student or damage to such student’s property, (ii) places such student in reasonable fear of harm to himself or herself, or of damage to his or her property, (iii) creates a hostile environment at school for such student, (iv) infringes on the rights of such student at school, or (v) substantially disrupts the education process or the orderly operation of a school. “Bullying” shall include, but not be limited to, a written, oral or electronic communication or physical act or gesture based on any actual or perceived differentiating characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity or expression, socioeconomic status, academic status, physical appearance, or mental, physical, developmental or sensory disability, or by association with an individual or group who has or is perceived to have one or more of such characteristics;

(2) “Cyberbullying” means any act of bullying through the use of the Internet, interactive and digital technologies, cellular mobile telephone or other mobile electronic devices or any electronic communications;

(3) “Mobile electronic device” means any hand-held or other portable electronic equipment capable of providing data communication between two or more individuals, including, but not limited to, a text messaging device, a paging device, a personal digital assistant, a laptop computer, equipment that is capable of playing a video game or a digital video disk, or equipment on which digital images are taken or transmitted;

(4) “Electronic communication” means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system;

(5) “Hostile environment” means a situation in which bullying among students is sufficiently severe or pervasive to alter the conditions of the school climate;

(6) “Outside of the school setting” means at a location, activity or program that is not school related, or through the use of an electronic device or a mobile electronic device that is not owned,

leased or used by a local or regional board of education;

(7) “School employee” means (A) a teacher, substitute teacher, school administrator, school superintendent, guidance counselor, psychologist, social worker, nurse, physician, school paraprofessional or coach employed by a local or regional board of education or working in a public elementary, middle or high school; or (B) any other individual who, in the performance of his or her duties, has regular contact with students and who provides services to or on behalf of students enrolled in a public elementary, middle or high school, pursuant to a contract with the local or regional board of education; and

(8) “School climate” means the quality and character of school life with a particular focus on the quality of the relationships within the school community between and among students and adults.²¹

According to the Connecticut Commission on Children, the new law “responds to alarming evidence that bullying impedes Connecticut students’ ability to succeed in school. Fully 25 percent of Connecticut high school students—and 35 percent of the state’s 9th graders—report having been bullied or harassed on school property in the previous year.”²² The new law requires all schools to “adopt a clear policy against bullying behaviors,” “gather data to assess the extent of bullying,” “train all staff who interact with students on how to prevent bullying,” and “take immediate action whenever they observe bully or receive a report.”²³ All school employees, including teaching candidates, beginning teachers, bus drivers, and cafeteria staff, must receive annual training on how to prevent and respond to student bullying and suicide.²⁴ School employees must report acts of student bullying to school officials (one day to submit oral reports, three days to submit written reports).²⁵ Schools must promptly investigate reports of bullying.²⁶ Parents of the students in question must be notified of the school’s response within forty-eight hours after the investigation’s completion.²⁷

Connecticut schools must respond to bullying whether it occurs at school or off school grounds, including online, on a school bus,

²¹ CONN. GEN. STAT. § 10-222d (2012).

²² State of Connecticut General Assembly Commission on Children, *Anti-Bullying Bill Becomes Law* (July 2011), http://www.cga.ct.gov/coc/PDFs/bullying/2011_bullying_law.pdf.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ CONN. GEN. STAT. § 10-222d (b) (2012).

²⁷ *Id.*

or at a school-related activity.²⁸ Schools must respond to bullying that takes place outside of school if it creates a hostile environment at school for the bullied student, infringes on the rights of the student at school, or substantially disrupts the student's education or the orderly operation of a school.²⁹ In addition, each school district must appoint a "safe school climate coordinator" to help individual schools implement the district's "safe school climate plan."³⁰ Each school must establish a safe school climate committee to identify bullying patterns, review bullying reports and relevant school policies, advise the school and district on its safe school climate plan, and educate the school community on bullying issues.³¹ Schools also are required to complete biennial assessments of their school climates, with the assistance of the state Department of Education (SDE), and report the results to the SDE.³² The SDE will prepare a list of evidence-based models that schools can use to implement strategies for reducing bullying and promoting safe school climates.³³ The SDE will also monitor districts' intervention and prevention strategies as well as their progress and will report biennially to the state legislature on the effectiveness of school responses.³⁴

The new law also provides protections for those who report bullying and goes so far as to provide immunity to school employees and boards of education if a safe school climate plan is implemented and the employees respond to bullying with good faith actions:

Sec. 10. (a) No claim for damages shall be made against a school employee . . . who reports, investigates and responds to bullying, as defined in said section 10-222d, in accordance with the provisions of the safe school climate plan, described in said section 10-222d, if such school employee was acting in good faith in the discharge of his or her duties or within the scope of his or her employment. The immunity provided in this subsection does not apply to acts or omissions constituting gross, reckless, willful or wanton misconduct.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*; *see also* STATE OF CONN., PUB. ACT NO. 11-232, at 12 (2011) (substituting Senate Bill 1138 and describing implementation of bullying policies).

³¹ STATE OF CONN., PUB. ACT NO. 11-232, at 12 (2011).

³² CONN. GEN. STAT. § 10-222h (a) (2012).

³³ *Id.*

³⁴ *Id.*

(b) No claim for damages shall be made against a student, parent or guardian of a student or any other individual who reports an act of bullying to a school employee, in accordance with the provisions of the safe school climate plan described in said section 10-222d, if such individual was acting in good faith. The immunity provided in this subsection does not apply to acts or omissions constituting gross, reckless, willful or wanton misconduct.

(c) No claim for damages shall be made against a local or regional board of education that implements the safe school climate plan, described in section 10-222d of the general statutes, as amended by this act, and reports, investigates and responds to bullying, as defined in said section 10-222d, if such local or regional board of education was acting in good faith in the discharge of its duties. The immunity provided in this subsection does not apply to acts or omissions constituting gross, reckless, willful or wanton misconduct.³⁵

Thus, not only is there no private right of action under Connecticut's bullying statute, there is now an immunity provision where the statutorily prescribed conditions are met.³⁶

B. New York

In New York, the "Dignity for All Students Act", signed by the governor on September 8, 2010, is scheduled to take effect July 1, 2012.³⁷ The purpose of the law is to provide all public school students a school environment free of harassment and discrimination based on actual or perceived race, religion, ethnicity, national origin, disability, gender, sex, or sexual orientation.³⁸ "Harassment" is defined as

the creation of a hostile environment by conduct or by verbal threats, intimidation or abuse that has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional or physical well-being; or conduct, verbal threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety;

³⁵ STATE OF CONN., PUB. ACT NO. 11-232, at 13-14 (2011) (emphasis added).

³⁶ *See id.* at 14 (referring to the immunity prescribed within the public opinion).

³⁷ S.1987-B, 2009–2010 Senate, Reg. Sess. (N.Y. 2009) (enacted); A.3661-C, Assemb., Reg. Sess. (N.Y. 2009) (enacted); Press Release, Governor Patterson, Governor Patterson Signs "Dignity for All Students Act" (Sep. 8, 2010), available at <http://www.governor.ny.gov/archive/paterson/press/090810-DignityStudentsAct.html>.

³⁸ S. 1987-B, Senate, Reg. Sess. (NY 2009) (enacted).

such conduct, verbal threats, intimidation or abuse includes but is not limited to conduct, verbal threats, intimidation or abuse based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.³⁹

The law would require "instruction in civility, citizenship and character education" in order to promote these goals.⁴⁰

An amendment was proposed, but not voted on, during the 2009–2010 legislative session that would have added a reference to cyberbullying to New York's law. Assembly Bill A04028 (S07158) would have increased the penalty for some forms of hazing from a misdemeanor to a felony, and suggested adding a provision to the education law that would prohibit "bullying and cyber-bullying on school property, including a school function."⁴¹ It defined "cyber-bullying" as "a course of conduct or repeated acts of abusive behavior by communicating through electronic means, with a person anonymously or otherwise over a period of time committing such acts as, but not limited to, taunting, insulting, humiliating, harassing, menacing, sending hate mail or embarrassing photographs."⁴² The proposal would have required policies and instruction to discourage bullying and cyber-bullying in schools, and would have established a class B misdemeanor for any failure to report hazing.⁴³

C. Massachusetts

Massachusetts defines bullying as

the repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim's property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school. For the purposes of this section,

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Hinduja & Patchin, *supra* note 17.

⁴² *Id.*

⁴³ A.4028, 231st Leg., Reg. Sess. (N.Y. 2009). Proposed cyberbullying legislation in the 2011–2012 session includes A.8895 ("prohibits cyber-bullying"), A.9535/S.7108 ("expands provisions relating to cyber-bullying in schools"), and A.10176/S.6614 ("prohibits cyber-bullying").

bullying shall include cyber-bullying.⁴⁴

“Cyberbullying” is defined as

bullying through the use of technology or any electronic communication, which shall include, but shall not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyber-bullying shall also include (i) the creation of a web page or blog in which the creator assumes the identity of another person or (ii) the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying. Cyber-bullying shall also include the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying.⁴⁵

The Massachusetts statute includes prohibitions on activity that “materially and substantially disrupts the education process or the orderly operation of the school” and covers bullying behaviors that occur at a location, activity, function or program that is not school related, or through the use of technology or an electronic device that is not owned, leased or used by a school district or school, if the bullying creates a hostile environment at school for the victim, infringes on the rights of the victim at school or materially and substantially disrupts the education process or the orderly operation of a school.⁴⁶

While the various state statutes underscore the severity of bullying and its consequences, they do not provide a remedy for victims.⁴⁷ In the absence of a statutory right of action, victims must rely on traditional tort theories in order to seek compensation for their injuries and damages.⁴⁸

⁴⁴ An Act Relative to Bullying in Schools, ch. 92, 2010 Mass. Acts.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Shira Auerbach, Note, *Screening Out Cyberbullies: Remedies for Victims on the Internet Playground*, 30 CARDOZO L. REV. 1641, 1645, 1661 (2009).

⁴⁸ *Id.* at 1658–59.

III. THEORIES OF RECOVERY: TARGETING BULLIES & SCHOOL DISTRICTS

Our common law system of jurisprudence allows traditional remedies to be used to address new problems such as cyberbullying.⁴⁹ Victims may bring direct actions for damages against bullies and may also sue their schools and boards of education where negligence of teachers or school officials can be shown to have caused or contributed to the injuries.⁵⁰ For example, if a school employee witnesses or receives a report of bullying and chooses to ignore it, the school will be exposed to liability. In general, however, it is difficult to bring claims against school systems for failing to intervene or prevent bullying. The main hurdle is governmental immunity.⁵¹

Municipal actors have qualified immunity for actions that are discretionary as opposed to ministerial.⁵² Discretionary acts involve the exercise of judgment, while ministerial acts are those that must be performed in a prescribed manner without the use of judgment or discretion.⁵³ There are some limited exceptions to

⁴⁹ *Id.* at 1647–48, 1659.

⁵⁰ *Id.* at 1654, 1658–59.

⁵¹ *See, e.g.,* Gatson v. Becker, 111 Mich. App. 692, 695 (1981) (holding that the school board immune from negligence in hiring the defendant in this case).

⁵² *See, e.g.,* City of Dist. Heights v. Denny, 719 A.2d 998, 1002 (Md. Ct. Spec. App. 1998) (explaining the different functions that municipal actors can fill and the relating immunity therefrom).

⁵³ *See, e.g.,* CONN. GEN. STAT. 52-557n. Section 52-557n states:

(a)(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties; (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit; and (C) acts of the political subdivision which constitute the creation or participation in the creation of a nuisance; provided, no cause of action shall be maintained for damages resulting from injury to any person or property by means of a defective road or bridge except pursuant to section 13a-149. (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or willful misconduct; or (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law.

(b) Notwithstanding the provisions of subsection (a) of this section, a political subdivision of the state or any employee, officer or agent acting within the scope of his employment or official duties shall not be liable for damages to person or property resulting from: (1) The condition of natural

governmental immunity, such as where the victim is an “identifiable person subject to imminent harm,” an exception which often applies to school children injured while participating in classroom activities and would likely apply in situations in which bullying behavior is brought to the attention of school administrators.⁵⁴ However, when presented with issues of

land or unimproved property; (2) the condition of a reservoir, dam, canal, conduit, drain or similar structure when used by a person in a manner which is not reasonably foreseeable; (3) the temporary condition of a road or bridge which results from weather, if the political subdivision has not received notice and has not had a reasonable opportunity to make the condition safe; (4) the condition of an unpaved road, trail or footpath, the purpose of which is to provide access to a recreational or scenic area, if the political subdivision has not received notice and has not had a reasonable opportunity to make the condition safe; (5) the initiation of a judicial or administrative proceeding, provided that such action is not determined to have been commenced or prosecuted without probable cause or with a malicious intent to vex or trouble, as provided in section 52-568; (6) the act or omission of someone other than an employee, officer or agent of the political subdivision; (7) the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization, when such authority is a discretionary function by law, unless such issuance, denial, suspension or revocation or such failure or refusal constitutes a reckless disregard for health or safety; (8) failure to make an inspection or making an inadequate or negligent inspection of any property, other than property owned or leased by or leased to such political subdivision, to determine whether the property complies with or violates any law or contains a hazard to health or safety, unless the political subdivision had notice of such a violation of law or such a hazard or unless such failure to inspect or such inadequate or negligent inspection constitutes a reckless disregard for health or safety under all the relevant circumstances; (9) failure to detect or prevent pollution of the environment, including groundwater, watercourses and wells, by individuals or entities other than the political subdivision; or (10) conditions on land sold or transferred to the political subdivision by the state when such conditions existed at the time the land was sold or transferred to the political subdivision.

(c) Any person who serves as a member of any board, commission, committee or agency of a municipality and who is not compensated for such membership on a salary or prorated equivalent basis, shall not be personally liable for damage or injury occurring on or after October 1, 1992, resulting from any act, error or omission made in the exercise of such person's policy or decision-making responsibilities on such board, commission, committee or agency if such person was acting in good faith, and within the scope of such person's official functions and duties, and was not acting in violation of any state, municipal or professional code of ethics regulating the conduct of such person, or in violation of subsection (a) of section 9-369b or subsection (b) or (c) of section 1-206. The provisions of this subsection shall not apply if such damage or injury was caused by the reckless, wilful [sic] or wanton misconduct of such person.

⁵⁴ Purzycki v. Fairfield, 244 Conn. 101, 107–08, 121 (1998); Burns v. Bd. of

supervision and control of students or implementation of school policies, courts in Connecticut and elsewhere generally hold that these are public duties affecting students in general and are carried out through discretionary acts.⁵⁵

To date, there are no reported cases in Connecticut dealing with cyberbullying, or any form of electronic aggression between or among students, or student against a school system.⁵⁶ Most bullying cases in which plaintiffs have sought to hold school boards or administrators accountable for failing to provide a safe school environment have been unsuccessful, although victims of assault or acts of overt bullying have succeeded in holding perpetrators accountable for their actions.⁵⁷ Also under Connecticut law, parents of unemancipated minors are jointly and severally liable with their children (up to \$5,000) for willful or malicious injury caused to others.⁵⁸

Ed., 228 Conn. 640, 648–49 (1994).

⁵⁵ See, e.g., *Antalik v. Thomaston Bd. of Ed.*, 2008 WL 4150132, at *1, *7 (Conn. Super Ct. Aug. 13, 2008) (disallowing claim by plaintiff who allegedly was bullied and kicked by another student during recess); *Negron v Ramirez*, 2011 WL 2739499, at *5 (Conn. Super Ct., June 10, 2011) (antibullying policy does not create a ministerial duty); *but see* *Esposito v Town of Bethany*, 2010 WL2196910, at *8 (Conn. Super Ct., May 3, 2010) (holding that school bullying procedures may create a ministerial duty, but the issue should be left to the jury); *Girard v Town of Putnam*, 2011 WL 783599, at *3–4 (Conn. Super. Ct., Jan. 28, 2011) (student's suicide as a result of bullying could be a foreseeable result of the school staff's failure to follow a suicide prevention policy; allegations that the school staff failed to follow their own mandatory procedures after a ministerial duty was triggered was a viable claim outside of governmental immunity).

⁵⁶ Jacqueline Rabe Thomas, *New "Cyberbullying Law" Poses Challenge as School Year Starts*, CT MIRROR (Aug. 30, 2011), <http://www.ctmirror.org/story/13722/school-bullying>.

⁵⁷ *Albert v. Kelly*, No. CV030082538S, 2005 WL 2435898, at *1–2 (Conn. Super. Sept. 12, 2005) (awarding judgment against bully and his parents for damages resulting from plaintiff's injuries in a high school locker room assault.); *Gaspar v. Sniffin*, No. CV010343743S, 2003 WL 21152855, at *1 (Conn. Super. May 6, 2003) (validating claims for intentional infliction of emotional distress and false imprisonment for a high school student doused with water, locked in metal school locker and threatened with electrocution).

⁵⁸ Parental Liability for Torts of Minors, CONN. GEN. STAT. ANN. § 52-572(a) (West 1955), which provides:

(a) The parent or parents or guardian . . . of any unemancipated minor or minors, which minor or minors wilfully or maliciously cause damage to any property or injury to any person, or, having taken a motor vehicle without the permission of the owner thereof, cause damage to the motor vehicle, shall be jointly and severally liable with the minor or minors for the damage or injury to an amount not exceeding five thousand dollars, if the minor or minors would have been liable for the damage or injury if they had been adults.

A. Direct Action Against the Bully

The principal common law tort claims that may apply to particular cyberbullying situations, depending on the facts, are defamation, intentional infliction of emotional distress, and invasion of privacy.⁵⁹ Each has limitations in this context, largely due to questions of insurance coverage.

1. Defamation

“Defamation is comprised of the torts of libel and slander. . . . Slander is oral defamation Libel . . . is written defamation. . . .”⁶⁰

A defamatory statement is defined as a communication that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him To establish a case of defamation, the plaintiff must demonstrate that: (1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff’s reputation suffered injury as a result of the statement.⁶¹

Thus, defamation only applies when the cyberbullying involves harmful words that are published to others beyond the victim, and damages the victim’s reputation.

2. Intentional Infliction of Emotional Distress

In order for a plaintiff to prevail on a claim for intentional infliction of emotional distress

four elements must be established: (1) that the defendant intended to inflict emotional distress, or knew or should have known that emotional distress was a likely result of her actions; (2) that the conduct was extreme and outrageous; (3) that the defendant’s

(b) This section shall not be construed to relieve the minor or minors from personal liability for the damage or injury.

(c) The liability provided for in this section shall be in addition to and not in lieu of any other liability which may exist at law.

(d) As used in this section, “damage” shall include depriving the owner of his property or motor vehicle or of the use, possession or enjoyment thereof.

⁵⁹ Andrew S. Kaufman & Betsy B. Baydala, *Outside Counsel: Cyberbullying and Intentional Infliction of Emotional Distress*, 245 N.Y.L.J. 27, (2011).

⁶⁰ *Gambardella v. Apple Health Care, Inc.*, 86 Conn. App. 842, 850 (2005) (quoting *Lowe v. Shelton*, 83 Conn. App. 750, 765–66 (2004)).

⁶¹ *Id.* at 848 (quoting *Cweklinsky v. Mobil Chem. Co.*, 267 Conn. 210, 217 (2004)).

conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe."⁶²

The general rule is that there is liability for conduct exceeding "all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind."⁶³

A claim for intentional infliction of emotional distress will probably apply in most cyberbullying situations.⁶⁴ But being able to allege a viable claim is only the first step; actually recovering money damages is another matter. In *Screening Out Cyberbullies: Remedies for Victims on the Internet Playground*, Shira Auerbach concluded that victims have "the best chance of recovery by relying on the tort of intentional infliction of emotional distress."⁶⁵ But Ms. Auerbach did not address what I see as the main problem with this claim, as well as with invasion of privacy, namely that such claims will not be covered by liability insurance.⁶⁶ There is no coverage for intentional acts—only "accidents," mishaps resulting from negligence, are covered by liability insurance.⁶⁷ Without insurance coverage for the

⁶² DeLaurentis v. New Haven, 220 Conn. 225, 266–67 (1991).

⁶³ Bell v. Bd. of Ed., 55 Conn. App. 400, 409 (1999); see also RESTATEMENT (SECOND) OF TORTS § 46(1) (2011) ("one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm"); see also RESTATEMENT (SECOND) OF TORTS § 46, cmt. (d) (2011) (conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized society.").

⁶⁴ Andrew S. Kaufman & Betsy D. Baydala, *Outside Counsel: Cyberbullying and Intentional Infliction of Emotional Distress*, 245 N.Y.L.J. 27 (2011).

⁶⁵ Auerbach, *supra* note 47, at 1641, 1647 (2009).

⁶⁶ See Joseph J. Porzenski, Note, *Providing Insurance Coverage for Intentional Torts: The Inequitable Application of American Family Mutual Insurance Co v. Pacchetti in Economy Fire & Casualty Co v. Haste*, 38 St. LOUIS U. L.J. 257, 257 (1993) ("[A]s a matter of public policy, a liability insurance policy does not afford coverage for damage intentionally inflicted by the insured; that is, for damage resulting from acts deliberately done by the insured, 'knowing that they were wrong, and intending that harm result from said acts.'").

⁶⁷ "Negligent conduct . . . 'is a matter of risk.' It is defined as 'conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.' 'Negligence is conduct, and not a state of mind.' . . . 'In negligence, the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely the risk of such consequences, sufficiently great to lead a reasonable person in his position to anticipate them, and to guard against them. . . ." Am. Nat'l Fire Ins. Co. v. Schuss, 221 Conn. 768, 776–77 (1992) (citations omitted).

bully,⁶⁸ victims stand a slim chance of recovering damages even if they can prove their claims.

3. Invasion of Privacy

In Connecticut, the definition of invasion of privacy is that set forth in 3 Restatement (Second), Torts § 652A: “(a) unreasonable intrusion upon the seclusion of another; (b) appropriation of the other’s name or likeness; (c) unreasonable publicity given to the other’s private life; or (d) publicity that places the other in a false light before the public.”⁶⁹ This cause of action is also an intentional theory, meaning it will not be covered by liability insurance.⁷⁰

In sum, while there are various claims that might be alleged and proven, collecting compensation in the end is far from assured. As states and municipalities continue to focus on bullying and the growing problem of cyberbullying, hopefully lawmakers will recognize that some real and serious injuries are going uncompensated.

⁶⁸ *Id.*

⁶⁹ *Goodrich v. Waterbury Republican-Am., Inc.*, 188 Conn. 107, 128 (1982); *Venturi v. Savitt, Inc.*, 191 Conn. 588, 591 (1983).

⁷⁰ Porzenski, *supra* note 66, at 257.