

COMMENTS

WHEN WORDS HURT MORE THAN “STICKS AND STONES”: WHY NEW YORK STATE NEEDS CYBERBULLYING LEGISLATION

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I. INTRODUCTION

Sticks and stones may break your bones, but words can hurt even more, especially when words are left permanently in cyberspace. Bullying, in general, has changed dramatically over the years.¹ Cyberbullying periodically received attention in schools and in the media over the years but has recently become the focus of parents, educators and even the President of the United States.² The definition of cyberbullying, and its parameters, was often unclear, resulting in mixed responses to cyberbullying.³ It is suggested that the power of cyberbullying comes from the anonymity associated with posting in cyberspace, while using the computer as a disguise through usernames and chat rooms.⁴ However, the power of the cyberbully emphasizes the weak position of the victim who is subjected to this personal attack.⁵

The definition of cyberbullying has continued to evolve due to new and advancing technology and an increased understanding of what qualifies as cyberbullying.⁶ Cyberbullying is generally

¹ See *What is Bullying?*, STOPBULLYING.GOV, http://www.stopbullying.gov/topics/what_is_bullying/index.html (last visited Sept. 11, 2012) (defining bullying).

² *Background on White House Conference on Bullying Prevention*, THE WHITE HOUSE (March 10, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/10/background-white-house-conference-bullying-prevention>.

³ See Kevin Turbert, Note, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 652–54 (2009) (elaborating on the implications of the online environment to traditional bullying definitions).

⁴ See *id.* at 653–54 (discussing the harm caused by anonymity online).

⁵ See *id.* (stating that the anonymity of the cyberbully can cause developmental and psychological harm to the victim).

⁶ NAT'L CRIME PREVENTION COUNCIL, 21ST CENTURY BULLYING, CRUELER THAN EVER, available at <http://www.ncpc.org/resources/files/pdf/bullying/>

defined to occur when “a child, preteen or teen is tormented, threatened, harassed, humiliated, embarrassed or otherwise targeted by another child, preteen or teen using the Internet, interactive and digital technologies or mobile phones.”⁷ The definition of cyberbullying should focus on four necessary elements: “(1) the behavior is deliberate, not accidental; (2) the behavior is repeated, not just a one-time incident; (3) harm occurs—from the perspective of the target; and, (4) it is executed using the benefit of technology.”⁸ Most definitions state the communications must strictly involve minors to be defined as cyberbullying.⁹ Once adults become the source of bullying it is often defined as “cyberstalking” or “cyber-harassment,” depending on the frequency and severity.¹⁰ Despite clearer definitions of cyberbullying, cyberharassment, and cyberstalking, the law has not adequately kept up with advancing technology. As a result, the disconnect between the law and cyberbullying incidents may have tragic consequences.

As the definition of cyberbullying seems to finally take form, the number of reported cyberbullying incidents is becoming

21st%20Century%20Bullying%20-%20Crueler%20Than%20Ever.pdf; see Karly Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103, 106–07 (2009) (stating that because cyberbullying is a new concept, there is no set definition for what it entails).

⁷ *What is Cyberbullying, Exactly?*, STOP CYBERBULLYING, http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html (last visited Sept. 15, 2012) (“It has to have a minor on both sides, or at least have been instigated by a minor against another minor. Once adults become involved, it is plain and simple cyber-harassment or cyber-stalking.”); Justin Pachin, *Defining Cyberbullying*, CYBERBULLYING RES. CENTER BLOG (Sept. 22, 2008, 10:53 AM), <http://cyberbullying.us/blog/defining-cyberbullying.html> (defining cyberbullying as “willful and repeated harm inflicted through the use of computers, cell phones, or other electronic devices.”); see also *Cyber Bullying: Internet Safety, General Information*, N.Y. DIVISION OF CRIM. JUST. SERVICES, http://criminaljustice.state.ny.us/missing/i_safety/cyberbullying.htm (“Cyber bullying is the repeated use of information technology, including e-mail, instant messaging, blogs, chat rooms, pagers, cell phones, and gaming systems, to deliberately harass, threaten or intimidate others.”).

⁸ See Pachin, *supra* note 7 (stating that definitions of cyberbullying should contain these four main components).

⁹ See STOP CYBERBULLYING, *supra* note 7 (stating that once an adult becomes involved in an online transaction it can no longer be termed cyberbullying).

¹⁰ *Id.*; see also INDEP. DEMOCRATIC CONFERENCE, CYBERBULLYING: A REPORT ON BULLYING IN A DIGITAL AGE 8–9 (2011), available at http://www.nysenate.gov/files/pdfs/final%20cyberbullying_report_september_2011.pdf (stating that the frequency of the harassment is considered when determining whether an act should be termed cyberharassment or cyberstalking).

apparent in the United States.¹¹ From New Jersey to California, cyberbullying has now been thrust into the national spotlight.¹² Ten students around the United States, ranging from 13–18 years old, committed suicide in September 2010 after being victims of bullying and cyberbullying.¹³ A 2010 study by the Cyberbullying Research Center suggested that “one in five middle-school students” were subjected to some degree of cyberbullying.¹⁴ These incidents are correlated with the sharp increase in cyberbullying, which highlights that there are unclear consequences for students who engage in cyberbullying.¹⁵ Studies suggest “cyber victims may be more likely to feel isolated, dehumanized or helpless at the time of the attack.”¹⁶ Sadly, the cyberbully is often left unpunished, which can cause further mental distress for the victim.

New York State is one of several states that have yet to take a definitive stance on cyberbullying.¹⁷ New York has adopted general bullying laws.¹⁸ However, it is increasingly important that New York State pass specific legislation in order to protect victims and establish consequences in order to deter cyberbullying.¹⁹ Cyberbullying legislation and the definitions of cyberbullying proposed at the federal level and those established within the United States will be evaluated in this note in order to ensure comprehensive cyberbullying legislation in New York State. This note will also assess current legislation in New York

¹¹ *Stop Cyberbullying Before it Starts*, NAT’L CRIME PREVENTION COUNCIL, available at <http://www.ncpc.org/resources/files/pdf/bullying/cyberbullying.pdf>.

¹² Alex Tresniowski et al., *Tormented to Death?*, PEOPLE MAG., Oct. 18, 2010, at 56–58.

¹³ David Badash, *Updated: September’s Anti-Gay Bullying Suicides – There Were a Lot More than 5*, THE NEW CIVIL RIGHTS MOVEMENT (Oct. 8, 2010), <http://thenewcivilrightsmovement.com/septembers-anti-gay-bullying-suicides-there-were-a-lot-more-than-5/discrimination/2010/10/01/13297>.

¹⁴ *Cyberbullying*, N.Y. TIMES, Sept. 30, 2010, <http://topics.nytimes.com/top/reference/timestopics/subjects/c/cyberbullying/index.html>.

¹⁵ Michelle R. Davis, *Schools Tackle Legal Twists and Turns of Cyberbullying*, EDUC. WK., Feb. 9, 2011, at 28–33, available at <http://www.edweek.org/dd/articles/2011/02/09/02cyberbullying.h04.html>.

¹⁶ *Depression High Among Youth Victims of School Cyber Bullying*, NIH Researchers Report, NAT’L INST. OF HEALTH (Sept. 21, 2010), <http://www.nichd.nih.gov/news/releases/092110-cyber-bullying.cfm>.

¹⁷ Sameer Hinguja & Justin W. Patchin, STATE CYBERBULLYING LAWS: A BRIEF REVIEW OF STATE CYBERBULLYING LAWS AND POLICIES 1 (2011), available at http://cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf.

¹⁸ See Dignity for All Students Act, 2010 N.Y. Sess. Laws 1319–22 (McKinney) [hereinafter DASA].

¹⁹ *Id.*

State that may be interpreted to include cyberbullying, and will examine the potential for specific cyberbullying legislation in New York. In addition, different legal theories for establishing sanctions and remedies will be examined in order to ensure protection of rights for all parties involved.

II. TRADITIONAL APPROACH TO CYBERBULLYING IN NEW YORK STATE

A. *Current Enacted Legislation in New York State*

New York State Governor David Patterson signed the Dignity for All Students Act (DASA) into law on September 8, 2010.²⁰ DASA was spearheaded by Senator Thomas K. Duane and Assemblyman Daniel O'Donnell and passed after spending nine years in the Assembly and Senate.²¹ DASA requires public school districts to comply with the guidelines established by July 1, 2012, DASA's effective date.²² Public school districts must adopt policies that prohibit harassment and discrimination, and districts must "establish guidelines for training school personnel," with model policies provided by the state Education Department.²³ School districts must also train at least one staff member in each school in handling "human relations in the areas in which discrimination and harassment are prohibited."²⁴ In addition, schools will be required to "at least annually" report incidents of harassment or discrimination that take place on school grounds or at school functions to the State Education Department.²⁵ Overall, the state Education Department estimates the statewide fiscal impact of the legislation around \$275,000, a relatively low cost to school districts, especially when many already have enacted bullying policies.²⁶

The purpose of DASA is to ensure a safe and non-hostile

²⁰ Press Release, N.Y. State Office of the Governor, Governor Patterson Signs "Dignity For All Students Act", (Sept. 8, 2010), *available at* <http://readme.readmedia.com/Governor-Paterson-Signs-Dignity-for-All-Students-Act/1717096>.

²¹ *Id.*

²² *Id.*

²³ Memorandum in Support of Legis. of Assemb. Daniel J. O'Donnell, A. 3661C, 233rd Sess., at 1-75 (2009).

²⁴ *Id.*

²⁵ *Id.*

²⁶ James T. Madore, *Bill Aimed at Bullying Approved*, NEWSDAY, June 24, 2010, at A06.

learning environment for all students who face any type of harassment that substantially interferes with their learning environment, and for students who face discrimination “based on [their] actual or perceived race, national origin, ethnic group, religion, disability, sexual orientation, gender, or sex.”²⁷ New York State United Teacher’s Vice President Kathleen Donahue believes “[t]he goal is not to be punitive in nature, but to work with students and educate them as to the differences among people.”²⁸ The definition of harassment is vital to understanding the scope of the legislation since it generally outlines what qualifies as a hostile environment and establishes whom the protected classes include. DASA states:

“Harassment” shall mean 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 education 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; 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.²⁹

Lawmakers recognized that limiting free speech and expression of students in any context under DASA might violate constitutional guarantees, stemming from the Supreme Court decision *Tinker v. Des Moines Independent Community School District*.³⁰ The legislative intent clarifies that DASA and the definition of harassment do not violate First Amendment protections of free speech and expression under *Tinker* and its progeny.³¹ The definition of harassment contains “an objective

²⁷ Memorandum in Support of Legis. of Assemb. Daniel J. O’Donnell, A. 3661C, 233rd Sess., at 1–75 (2009).

²⁸ Liza Frenette, *Battling Back Against Bullying*, NYSUT UNITED, Sept. 2010, at 23.

²⁹ DASA, *supra* note 18, at 1320.

³⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (“But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”).

³¹ Memorandum in Support of Legis. of Assemb. Daniel J. O’Donnell, A. 3661C, 233rd Sess., at 1–75 (2009); *See also* Turbert, *supra* note 3, at 664–671 (outlining *Tinker* and its progeny, and its impact on cyber bullying legislation).

reasonableness standard,” and remains consistent with *Tinker* by maintaining there must be a substantial interference with the student’s education in order for the speech to become harassment.³² In addition, it was intended that the protected classes listed in DASA be non-exclusive and that the definition is content neutral, leaving it open to judicial interpretation.³³

B. Potential for Cyberbullying Legislation Within DASA

DASA fails to expressly afford protections to students that are victims of cyberbullying.³⁴ Harassment and discrimination are prohibited on schools grounds or at school functions under DASA.³⁵ However, cyberbullying, which serves as a catalyst to in-school bullying, is not expressly subject to the provisions of DASA since it does not physically occur on school grounds.³⁶ Bullying in school may be punishable, however cyberbullying will not be subject to the same treatment.³⁷ It was reported that “[t]he Republican minority tried unsuccessfully to amend the bill to include cyberbullying and to create the crime of aggravated harassment of teachers and other school staff.”³⁸ As a result, the cyberbullying loophole created is too blatant and does not extend adequate protection for students that are victims of cyberbullying.

Recently, there have been tragic cyberbullying incidents in New York State that have gone too far, especially when combined with bullying in school.³⁹ DASA does not explicitly provide how schools are to handle students who harass or discriminate other students, leaving school districts with the discretion to establish

³² Memorandum in Support of Legis. of Assemb. Daniel J. O’Donnell, A. 3661C, 233rd Sess., at 1–75 (2009).

³³ *Id.*

³⁴ See DASA, *supra* note 18.

³⁵ *Id.* at 1320.

³⁶ See *id.* at 1319–20 (McKinney).

³⁷ See Turbert, *supra* note 3, at 661–63, 71 (explaining that while bullying in school is actively addressed through the “implementation of comprehensive measures,” the boundaries of cyberbullying have not been clearly defined, and the “Supreme Court has yet to provide any guidance”).

³⁸ See Madore, *supra* note 26.

³⁹ Susan Donaldson James, *Jamey Rodemeyer Suicide: Police Consider Criminal Bullying Charges*, ABC NEWS (Sept. 22, 2011), <http://abcnews.go.com/Health/jamey-rodemeyer-suicide-ny-police-open-criminal-investigation/story?id=14580832#.TrhhoGCW6kk>; Oren Yaniv, *Long Island Teen’s Suicide Linked to Cruel Cyberbullies, FormSpring.me site: Police*, N.Y. DAILY NEWS (Mar. 25, 2010), http://articles.nydailynews.com/2010-03-25/news/27059918_1_cyberbullies-social-networking-sites-police-probe.

policies for punishment.⁴⁰ It is likely school districts will fail to enact proper guidelines for cyberbullying and for punishing those who cyberbully because it is not required under DASA.⁴¹ Students will be educated on cyberbullying in school, but there is no standard of consequences for violating policies. DASA can be effectively expanded to cover cyberbullying and to require school districts to establish policies to protect students that are victims and sanction students who are carrying out the cyberbullying.

C. Pending Legislation in New York State

There have been bills proposed in the Assembly and Senate over the years that would include specific cyberbullying laws.⁴² This proposed legislation remains relevant, following the enactment of the Dignity for All Students Act, since DASA failed to include cyberbullying. Assembly Bill A04028/Senate Bill S07158, proposed in 2009, would “prohibit bullying and cyberbullying.”⁴³ The bill specifically defines bullying and cyberbullying.⁴⁴ The proposed definition of cyberbullying is “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.”⁴⁵ Assembly Bill A0028 would amend the state Education Code to include the new section of definitions and describe the prohibited behavior.⁴⁶ A definition of cyberbullying is important in any legislation enacted and a nonexclusive definition of cyberbullying may provide the greatest protection. In addition, the bill creates a statewide hotline for students to report incidents of bullying and indemnifies any school faculty

⁴⁰ DASA, *supra* note 18, at 1320.

⁴¹ *See id.* at 1319–20 (prohibiting harassment on school property and providing guidelines on how to implement policies to control harassment, but making no mention of cyberbullying in the guidelines).

⁴² *See* sources cited *infra* notes 43, 49, 56, 58.

⁴³ A.4028, 232nd Sess. (N.Y. 2009).

⁴⁴ *Id.* (“Bullying’ means threatening, stalking or seeking to coerce or compel a person to do something; engaging in verbal or physical conduct that threatens another with harm, including intimidation through the use of epithets or slurs involving race, ethnicity, national origin, religion, religious practices, gender, or disability.”).

⁴⁵ A.4028, 232nd Sess. (N.Y. 2009).

⁴⁶ *Id.*

members who report incidences of bullying or cyberbullying.⁴⁷ A04028 would leave school districts with discretion on how to punish students who cyberbully, similar to the Dignity for All Students Act, and does not impose criminal sanctions.⁴⁸

Assembly Bill A05544, also introduced in 2009, focuses on defining electronic means of harassment or cyberbullying and ensuring the Education Commissioner adopts rules and regulations in order to prevent the harassment and cyberbullying of students.⁴⁹ The definition of electronic harassment or cyberbullying is more specific than the general definition of cyberbullying proposed in A04028.⁵⁰ The electronic means of harassment is defined as “any communication where there is the transmission of information by wire, radio, optical cable, electromagnetic or other similar means. Such terms shall include, but not be limited to, communication via electronic mail, internet-based communications, pager service, cell phones and electronic messaging.”⁵¹ The bill would amend Education Law by adding a new section specifically addressing “Harassment Prevention Policies.”⁵² It is important to clarify that DASA mandates that general school policies be in effect to prevent harassment and discrimination of students under the DASA definitions.⁵³ It does not mandate specific policies for cyberbullying.⁵⁴ A05544 would address this gap and ensure that cyberbullying policies were created.⁵⁵

Additional legislation proposed by Assemblyman Ball during the 2009–2010 legislative session of the New York State Assembly sought to make cyberbullying on a computer network a Class E felony.⁵⁶ This bill also was not enacted, perhaps because of its general definitions.⁵⁷

Several bills have been introduced in the New York State

⁴⁷ *Id.*

⁴⁸ *Id.*; see DASA, *supra* note 18.

⁴⁹ A.5544, 232nd Sess. (N.Y. 2009).

⁵⁰ *Id.*; cf. A.4028, 232nd Sess. (N.Y. 2009) (defining cyberbullying more generally).

⁵¹ A.5544, 232nd Sess. (N.Y. 2009).

⁵² *Id.*

⁵³ DASA, *supra* note 18, § 13.

⁵⁴ See *id.* (mentioning neither cyberbullying, nor the making of references to electronics or the Internet.).

⁵⁵ A.5544, 232nd Sess. (N.Y. 2009).

⁵⁶ A.7048, 231st Leg., Reg. Sess. (N.Y. 2009).

⁵⁷ See *id.* (leaving terms like “computer network” and “communication” open to interpretation, which could be troubling, because technology evolves quickly).

Assembly and/or Senate during the 2011–2012 Legislative Session that would create the specific crimes of cyber harassment, cyber assault and cyber impersonation under New York Penal Law.⁵⁸ Assemblywoman Annie Rabbitt introduced legislation that would establish cyber harassment as a crime under New York Penal Law.⁵⁹ Cyber harassment would be punishable as a Class A misdemeanor when committed between two children or two adults.⁶⁰ However, cyber harassment would be punishable as a “[c]lass D felony when committed by an adult against a child.”⁶¹ This bill also increases the penalty of harassment in the first and second degrees when committed by an adult against a child, as well as increasing the penalty for stalking by an adult against a child.⁶² This bill provides a definition of adult and child for the section, yet leaves an unclear definition for persons ages seventeen through twenty.⁶³ Despite this uncertainty, it appears the bill provides clear definitions that could be useful to law enforcement officials.⁶⁴

Assemblyman Lavine’s bill would create the crime of cyber assault and cyber impersonation under Penal Law.⁶⁵ The crime of cyber assault clarifies that the section only applies to individuals under nineteen years old transmitting communications falling within the qualifications.⁶⁶ Cyber impersonation in the first degree applies to individuals *over* nineteen years old “knowingly and with intent to defraud assumes the identity of another person, and commits the crime of cyber assault . . .” or participates in or attempts to commit a felony. In addition, the crime of cyber impersonation in the second degree only applies to individuals *under* nineteen years old while using the same definitions found in first-degree cyber impersonation.⁶⁷

New York State will need to unify cyberbullying legislation to ensure successful change. It would be more influential to combine elements of these bills and their proposed changes into one bill

⁵⁸ A.4895, 234th Leg., Reg. Sess. (N.Y. 2011); A.2598, 234th Leg., Reg. Sess. (N.Y. 2011); A.2355, 234th Leg., Reg. Sess. (N.Y. 2011).

⁵⁹ A.B. 2598, 234th Leg., Reg. Sess. (N.Y. 2011).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ A.4895, 234th Leg., Reg. Sess. (N.Y. 2011).

⁶⁶ *Id.*

⁶⁷ *Id.*

since they address such similar concerns. The bill will also have to address issues of constitutionality under the First and Fifth Amendment.⁶⁸ This new bill could be used to amend sections of DASA in order to provide concise instructions to school districts on how to handle all types of bullying, including cyberbullying, by providing clear definitions and policies.⁶⁹

D. New York City's Approach to Cyberbullying

New York City's Department of Education is not waiting for New York State to pass specific cyberbullying legislation that mandates public school policies.⁷⁰ The NYC Department of Education has included bullying and cyberbullying under "Dangerous or Violent Behaviors" in the Citywide Standards of Intervention and Discipline Measures: Discipline Code and Bill of Student Rights and Responsibilities, K-12.⁷¹ Potential disciplinary measures range from a parent conference to suspension for all students or even expulsion for students in grades six through twelve.⁷² However, a proposed change to the Disciplinary Code would establish a mandatory suspension period of ninety days for students who engage in "sexting" or cyberbullying both in or outside of school.⁷³ Concerns were raised over penalizing students who engage in cyberbullying outside of school.⁷⁴ However, the threat of a lawsuit did not impede New York City Department of Education from proposing the amendment.⁷⁵ It seems unlikely this type of harassment or intimidation that substantially interferes with a student's education would be protected speech under the First

⁶⁸ See discussion Part II: A, *supra* notes 25-27.

⁶⁹ DASA, *supra* note 18.

⁷⁰ See Rachel Monahan, *NYC Department of Education Proposes to Suspend Students That Are Caught 'Sexting'*, NY DAILY NEWS (June 18, 2010), http://articles.nydailynews.com/2010-06-18/local/27067416_1_sexting-cell-phones-kids (demonstrating that the New York State Department of Education addresses the concerns of the school community by regularly updating school disciplinary codes).

⁷¹ CITYWIDE STANDARDS OF INTERVENTION AND DISCIPLINE MEASURES: THE DISCIPLINE CODE AND BILL OF STUDENTS RIGHTS & RESPONSIBILITIES, K-12, NYC DEPARTMENT OF EDUCATION, at 15, 22 (effective Sept. 2011) *available at* <http://schools.nyc.gov/NR/rdonlyres/3BE58537-D746-43B6-A7E7-BBF90B27C395/0/DiscCode2012English.pdf> [hereinafter NYC Discipline Code].

⁷² *Id.*

⁷³ See Monahan, *supra* note 70.

⁷⁴ *Id.*

⁷⁵ *Id.*

Amendment.⁷⁶

The NYC Department of Education's Discipline Code's definition of cyberbullying is similar to the definition of harassment in New York State's Dignity for All Students Act.⁷⁷ Discipline Code Infractions A37 and B40 specifically define "taunting and/or intimidation including through the use of epithets or slurs involving actual or perceived race, ethnicity, color, national origin, citizenship/immigration status, weight, religion, religious practices, gender, gender identity, gender expression, sexual orientation or disability" as engaging in bullying or cyberbullying.⁷⁸

The NYC Department of Education has also enacted other initiatives aimed at educating students about cyberbullying.⁷⁹ It seems that their policies have been aggressive and original for public schools in battling some forms of cyberbullying. However, the most common problem the NYC Department of Education faces is being able to sanction cyberbullying occurring outside of school with school discipline policies.⁸⁰ Interestingly, the Manhattan District Attorney's Office stated in November 2010 that they would be launching a cyberbullying initiative by creating a cyber crimes bureau and educating parents and students on the problem plaguing schools and the community.⁸¹

⁷⁶ U.S. CONST. amend. I.

⁷⁷ See NYC Discipline Code, *supra* note 71, at 15, 22 (defining cyberbullying as "[e]ngaging in intimidating and bullying behavior through electronic communication, such as texting, e-mail, instant messaging, etc."); DASA, *supra* note 18, § 11 (defining harassment 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; 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.).

⁷⁸ NYC Discipline Code, *supra* note 71, at 15, 22.

⁷⁹ *No Place for Hate in NYC Public Schools*, NYC DEPARTMENT OF EDUCATION (May 29, 2009) <http://schools.nyc.gov/AboutUs/SchoolNews/CitySchools/Issues/052009/NoPlaceForHate.htm>.

⁸⁰ Kathleen Horan, *DA's Office Working to Combat Cyberbullying*, WNYC, (Nov. 28, 2010), <http://www.wnyc.org/articles/wnyc-news/2010/nov/28/fighting-insidious-online-intimidation/>.

⁸¹ *Id.*

Manhattan District Attorney Cy Vance discussed at least one reason for the initiative: “we’re trying to keep it out of our criminal courts by—as we say—educating parents and kids about the issue[.]”⁸²

III. TORT BASED LEGISLATION IN NEW YORK STATE

A. Defamation

The principals of tort law are the most widely suggested theories in forming effective cyberbullying legislation.⁸³ One possibility is defamation.⁸⁴ Cyberbullying legislation is unlikely to succeed on the basis of slander or libel, especially if criminal penalties will be imposed on the cyberbully since criminal charges are often not associated with these theories.⁸⁵ In order to establish a case based on defamation, there must be “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either action ability of the statement irrespective of special harm or the existence of special harm caused by the publication.”⁸⁶ Interestingly, the Restatement Second of Torts clarifies when verbal abuse may become defamation, stating “[w]ords uttered face to face during an altercation may well be understood merely as abuse or insult, while words written after time for thought or published in a newspaper may be taken to express the defamatory charge and to be intended to be taken seriously.”⁸⁷ New York State follows the general Restatement of Torts approach in defining defamation.⁸⁸ However, defamation law

⁸² *Id.*

⁸³ Shira Auerbach, Note, *Screening Out Cyberbullies: Remedies for Victims on the Internet Playground*, 30 CARDOZO L. REV. 1641, 1667 (2009); see also Susan W. Brenner & Megan Rehberg, “Kiddie Crime”? *The Utility of Criminal Law in Controlling Cyberbullying*, 8 FIRST AMEND. L. REV. 1, 46 (2009) (describing history of defamation).

⁸⁴ See *infra* note 86.

⁸⁵ See Brenner & Rehberg, *supra* note 83, at 47–48 (referring to the criminal history and development of criminal libel).

⁸⁶ RESTATEMENT (SECOND) OF TORTS § 558 (1977) (citing the elements of defamation); see also RESTATEMENT (SECOND) OF TORTS § 559 (1977) (defining defamatory communications “[a] communication is defamatory if it tends so 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.”).

⁸⁷ RESTATEMENT (SECOND) OF TORTS § 566 (1977).

⁸⁸ *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1999).

focuses on the public versus private life of the alleged victim and may allow a person who is not in the public light to pursue a defamation claim.⁸⁹ In New York State, the alleged defamatory statement is evaluated as a whole to determine whether or not it reaches the threshold of defamation.⁹⁰ It follows that a variety of defenses would be available in this type of case, including the complete defense that the alleged defamatory statements are true.⁹¹ Permitting defenses under this theory would undermine the cyberbullying communication involved and leave the victim without any recourse. It seems unlikely New York State would follow this theory in constructing legislative civil remedies for cyberbullying victims. However, the definition of defamation may provide some guidance in formulating legislation and interpreting the language, especially since cyberbullying communications can be published on internet websites and forum, with messages forwarded to other people, thus satisfying the “unprivileged publication to a third party” element of defamation.⁹²

B. *Right to Privacy*

Other commentators suggest that claims based on the tort theory “right to privacy” are unlikely to succeed as well.⁹³ In New York State, it is highly unlikely that the New York statute on invasion of privacy would extend to cover cyberbullying because it only protects those whose name or likeness has been used in trade without their consent.⁹⁴ There is not a strong connection to

⁸⁹ *Id.*

⁹⁰ *Id.* (“In evaluating whether a cause of action for defamation is successfully pleaded, the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction (*Silsdorf v. Levine*, 59 N.Y.2d 8, *cert denied*, 464 U.S. 831).”)

⁹¹ *Id.* at 39.

⁹² RESTATEMENT (SECOND) OF TORTS § 558; *see Auerbach, supra* note 82, at 1667 (describing the four elements of defamation and how instances of cyberbullying involving websites or blogs may meet the unprivileged publication to a third party element).

⁹³ *See Brenner & Rehberg, supra* note 83, at 56 (discussing the very narrow class of harm that is needed to find criminal invasion of privacy).

⁹⁴ N.Y. CIV. RIGHTS § 50 (McKinney 2010) (defining right of privacy as “[a] person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.”).

use this theory within the context of cyberbullying since images and likenesses are used between the students, who are minors, and not used within the course of business or earning profit.⁹⁵ It seems unlikely that legislative remedies would be formed around the theory of invasion of privacy for cyberbullying victims to pursue a claim in New York State.⁹⁶

C. *Intentional Infliction of Emotional Distress*

Intentional infliction of emotional distress can most likely be applied to cyberbullying legislation successfully.⁹⁷ It is important to note that the New York Court of Appeals stated intentional infliction of emotional distress (IIED) awards are not prevented on the grounds that the conduct involved is protected speech or expression under the First Amendment.⁹⁸ It seems unlikely that speech or expression involved in cyberbullying that meets the threshold of IIED would remain protected as well. Criminalizing behavior under this theory would not be discouraged because the standard for establishing intentional infliction of emotional distress is high.⁹⁹ However, intentional infliction of emotional distress has not been criminalized in other areas and may present a unique challenge in itself.¹⁰⁰

There are four elements of intentional infliction of emotional distress to be met in New York, which include “(i) extreme and

⁹⁵ *See id.*

⁹⁶ *See id.*

⁹⁷ *See* RESTATEMENT (SECOND) OF TORTS § 46 (1977) (discussing outrageous conduct causing severe emotional distress as

(1) 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. (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress (a) to a member of such person’s immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any other person who is present at the time, if such distress results in bodily harm.).

⁹⁸ *See generally* Esposito-Hilder v. SFX Broad., Inc. 654 N.Y.S. 2d 259, 292–93 (Sup Ct. Albany Co. 1996); *see Cyberbullying and Other Online Safety Issues for Children: Hearing on H.R. 1966 and H.R. 3630 Before the House of Representatives Judiciary Committee Subcommittee on Crime Terrorism and Homeland Security Hearing*, 111th Cong. 41–46 (2009) (statement of Robert O’Neil, Director of Thomas Jefferson Center for the Protection of Free Expression), available at <http://judiciary.house.gov/hearings/pdf/ONeil090930.pdf> [hereinafter Robert O’Neil Testimony].

⁹⁹ Auerbach, *supra* note 83, at 1671.

¹⁰⁰ Robert O’Neil Testimony, *supra* note 98, at 134–35.

outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress.”¹⁰¹ The Restatement clarifies that “[l]iability has been found only where the conduct has been 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 a civilized community.”¹⁰² This outlines the high standard imposed for analyzing the allegedly distressing speech or action.¹⁰³ In New York State, the Court of Appeals has not always embraced IIED claims, stating “of the intentional infliction of emotional distress claims considered by this Court, every one has failed because the alleged conduct was not sufficiently outrageous.”¹⁰⁴ However the Restatement states that the definition of behavior under IIED is not finite, and it is “fully open [to] the possibility of further development of the law, and the recognition of other situations in which liability may be imposed.”¹⁰⁵ It is suggested that cyberbullying legislation that includes IIED theories as a basis for determining criminal sanctions factor in “proof of impact or effect.”¹⁰⁶ This would strengthen a cyberbullying case in order to meet the high threshold of IIED, especially in cases where cyberbullying was clearly the main cause of a student’s suicide.¹⁰⁷ It is also important to establish a threshold in order to prevent frivolous cyberbullying claims from being brought under the adopted law.

IV. PROPOSED FEDERAL LEGISLATION: THE MEGAN MEIER CYBERBULLYING PREVENTION ACT

House of Representatives Member Linda Sanchez of California “introduced the Megan Meier Cyberbullying Prevention Act in May 2008.¹⁰⁸ The bill was prompted by the 2006 suicide of

¹⁰¹ *Howell v. New York Post Co., Inc.*, 81 N.Y.2d 115, 121 (1993).

¹⁰² RESTATEMENT (SECOND) OF TORTS § 46, *supra* note 97 (citing comment d).

¹⁰³ *Id.*

¹⁰⁴ *Howell*, 81 N.Y.2d at 122; *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 143–44 (1985); *Burlew v. Am. Mut. Ins. Co.*, 63 N.Y.2d 412, 417–18 (1984); *Murphy v. American Home Prod. Corp.*, 58 N.Y. 2d 293, 303 (1983); *Fischer v. Maloney*, 43 N.Y. 2d 553, 557 (1978).

¹⁰⁵ RESTATEMENT (SECOND) OF TORTS § 46 (1965).

¹⁰⁶ Robert O’Neil Testimony, *supra* note 98, at 45–46.

¹⁰⁷ *Id.* at 46.

¹⁰⁸ Megan Meier Cyberbullying Prevention Act, H.R. 6123, 110th Cong.

thirteen-year-old-Missouri teen Megan Meier, who was allegedly cyberbullied by a sixteen year old named “Josh Evans”.¹⁰⁹ It was later discovered that “Josh” and his MySpace page were the creation of 47-year-old Lori Drew, the mother of Megan’s former friend and her neighbor.¹¹⁰

As a result, the “Megan Meier Cyberbullying Prevention Act [would] [a]mend[] the federal criminal code to impose criminal penalties on anyone who transmits in interstate or foreign commerce a communication intended to coerce, intimidate, harass, or cause substantial emotional distress to another person, using electronic means to support severe, repeated, and hostile behavior.”¹¹¹ However, the bill remained in the House Judiciary Committee during the 2009–2010 session and never reached the floor.¹¹² It is likely that a similar bill will be introduced during the following Congressional session, despite legislation enacted at State levels.

One concern with the Megan Meier Cyberbullying Prevention Act is whether it violates the right to Free Speech and Expression under the First Amendment.¹¹³ Some First Amendment scholars agree that cyberbullying needs to be sanctioned through federal legislation because of its “interstate nature.”¹¹⁴ However, they emphasize the fine line established by the Supreme Court in determining whether or not the speech used in cyberbullying falls within one of the few specifically outlined exceptions under the First Amendment.¹¹⁵ The Supreme Court standard established in *Tinker* and its progeny, discussed previously under New York State enacted legislation, provides

(2008).

¹⁰⁹ Steve Pokin, ‘My Space’ Hoax Ends with Suicide of Dardenne Prairie Teen, *STLTODAY*, (Nov. 11, 2007, 12:00 AM), http://www.stltoday.com/suburban-journals/stcharles/news/stevepokin/my-space-hoax-ends-with-suicide-of-dardenne-prairie-teen/article_0304c09a-ab32-5931-9bb3-210a5d5dbd58.html; *Hearings*, *supra* note 98, at 22 (statement of Rep. Linda Sanchez).

¹¹⁰ Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, *N.Y. TIMES*, Nov. 28, 2007, at A23.

¹¹¹ *Bill Summary & Status—111th Congress (2009–2010) H.R.1966 All Information*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR01966:@@L&summ2=m&> (last visited Sept. 15, 2012).

¹¹² *See id.* (showing that the bill never made it further than subcommittee hearings on Sept. 30, 2009).

¹¹³ U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

¹¹⁴ Robert O’Neil Testimony, *supra* note 98, at 42.

¹¹⁵ *Id.* at 43–44.

one standard for evaluating whether or not speech is protected.¹¹⁶ The *Tinker* test analyzes offensive speech under an objective reasonableness test and will not protect the speech if it is found to substantially interfere with the student's learning environment.¹¹⁷ Scholar Robert O'Neil suggests that the doctrine of incitement, as established in the U.S. Supreme Court *Brandenburg* case, would not apply to cyberbullying cases because the "speech must pose a direct threat of 'imminent lawless action' with a high probability such action would promptly ensue."¹¹⁸ It seems that this standard is too high to successfully apply in cyberbullying cases. In addition, the "fighting words" exception to the First Amendment is unlikely to apply under cyberbullying circumstances.¹¹⁹ This exception applies to "language so provocative that it would almost certainly trigger immediate violence from the person to whom it is directed."¹²⁰ The language must occur face-to-face, which is not applicable to the communications involved in cyberbullying.¹²¹ The "fighting words" exception recognizes that violence must be an immediate imminent threat¹²², whereas cyberbullying is often repetitive behavior with deeper psychological effects than an imminent threat of violence. These First Amendment exceptions do not suggest that cyberbullying legislation would succeed. Therefore, the *Tinker* standard provides the clearest threshold for interpreting cyberbullying language, which is crucial when students are involved even if the communications do not specifically take place on school grounds or at school functions.

Another concern with the Megan Meier Cyberbullying Act is that the definitions are too broad and violate Fifth Amendment Due Process rights by failing to provide a clear description of what types of communications actually qualifying as cyberbullying.¹²³ "Communication [is defined as] the electronic

¹¹⁶ *Supra* notes 30–33 and accompanying text.

¹¹⁷ J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 861–62 (Pa. 2001).

¹¹⁸ *Hearings*, *supra* note 98, at 43.

¹¹⁹ *Id.* at 44.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 60–61 (statement of Harvey Silverglate, Criminal Def. and Civil Liberties Trial Lawyer) ("A typical citizen cannot be expected to understand how and where to draw a line, not only because of the inherent vagueness of the terms, but also because in this instance the prohibited conduct is solely speech . . ."); *see also* U.S. CONST. amend. V.

transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received. . . ."¹²⁴ In addition, "electronic means [is defined as] any equipment dependent on electrical power to access an information service, including email, instant messaging, blogs, websites, telephones, and text messages."¹²⁵ The Act also fails to specify that the cyberbullying communications must strictly take place between minors¹²⁶, thus differing from the circumstances surrounding the Megan Meier case. The definition of communication needs to be amended in order to clarify that minors are the class affected by the legislation.

Scholars further advise that "[n]ot only is the proposed 'Cyberbullying' statute vague by its own terms, but the array of speech that it would discourage surely is vast, since people tend to severely limit their speech when they even think that they *might* otherwise roam into prohibited territory."¹²⁷ Overall, these scholars suggest that the Act includes "*overbroad* prohibitions in that in practice they prevent an array of speech far broader than the presumed statutory target."¹²⁸ It can be interpreted that enacting general legislation may encourage judicial interpretation and afford wider protection for cyberbullying victims. However, it seems that narrowing and clarifying the definition of "communication" would protect Fifth Amendment rights.

Finally, the criminal sanctions in the proposed legislation include unspecified amounts of fines or imprisonment for up to two years, or the potential for both.¹²⁹ Some scholars suggest that establishing these penalties for cyberbullying is another example of "overcriminalization" of behavior and is not an appropriate way to address the issue.¹³⁰ Authorities vary over whether

¹²⁴ Megan Meier Cyberbullying Prevention Act, H.R. 6123, 110th Cong. (2008).

¹²⁵ *Id.*

¹²⁶ Robert O'Neil Testimony, *supra* note 97, at 67 (statement of Harvey Silverglate, Criminal Def. and Civil Liberties Trial Lawyer).

¹²⁷ *Id.*

¹²⁸ *Id.* at 67–68.

¹²⁹ Megan Meier Cyberbullying Prevention Act, H.R. 6123, 110th Cong. (2008).

¹³⁰ Robert O'Neil Testimony, *supra* note 98, at 60 (statement of Harvey Silverglate, Criminal Def. and Civil Liberties Trial Lawyer) ("One could . . . point out . . . that criminal legislation has been imposed on areas of American life that should not be subject to criminal law . . . and this law would represent

cyberbullying behavior should be criminalized, especially because the definition would apply strictly to communications between minors.¹³¹ It may be more acceptable to impose criminal sanctions under circumstances of cyberharassment or cyberstalking, where parties involved are 18 years or older.¹³² It may be best to leave the Act open to judicial interpretation in order for judges to determine whether the cyberbullying reaches the threshold of jail time. Cyberbullying incidents may vary in its severity and frequency and should be a factor in determining the appropriate measures to enforce.¹³³

V. RESOLVING THE CONCERNS FOR NEW YORK STATE:
LEGISLATION IN OTHER STATES

A. *New Hampshire, Massachusetts & Wisconsin*

New Hampshire passed legislation that plainly states cyberbullying taking place outside of school grounds or functions that interferes with a student's educational process can be sanctioned by the school.¹³⁴ New York State should adopt legislation that specifically applies to cyberbullying taking place outside of school by clearly defining the parameters of where cyberbullying can take place.¹³⁵ By adopting a measure of this magnitude, New York can avoid Fifth Amendment concerns that the law is vague in respect to where the cyberbullying can take place.¹³⁶

In addition, Massachusetts adopted a comprehensive

one further step in that dangerous direction.”).

¹³¹ See *Room for Debate: Cyberbullying and a Student's Suicide*, NY TIMES, Sept. 30, 2010, <http://www.nytimes.com/roomfordebate/2010/09/30/cyberbullying-and-a-students-suicide/> (discussing whether or not there needs to be stronger laws in response to cyberbullying incidents).

¹³² See *supra* notes 1–3 and accompanying text.

¹³³ See, e.g., Elizabeth Englander, PhD., *Research Brief: Cyberbullying & Bullying in Massachusetts: Frequency & Motivations*, MARC-Massachusetts Aggression Reduction Center (2008), <http://webhost.bridgew.edu/marc/MARC%20findings%20summary%202008.pdf> (providing statistics about the frequency and methods of cyberbullying as well as attitudes of students and educators towards the severity of the issue).

¹³⁴ H.R. 1523, 2010 Sess. (N.H. 2010).

¹³⁵ See, e.g., *id.* (New Hampshire bill defines the parameters of where cyberbullying can occur to include both on and off campus locations).

¹³⁶ See Robert O'Neil Testimony, *supra* note 98 (statement of Harvey Silverglate, Criminal Def. and Civil Liberties Trial Lawyer) (suggesting that overbroad and vague cyberbullying legislation can give rise to Constitutional issues).

cyberbullying law in May 2010 following the suicide of cyberbullying victim Phoebe Prince, a fifteen-year-old high school student.¹³⁷ The new Massachusetts law generally defines bullying to include cyberbullying.¹³⁸ Further, the bill explicitly defines cyberbullying 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.¹³⁹

In addition, the Act mandates that public schools implement policies and programs to address cyberbullying.¹⁴⁰ Nonetheless, the Act does not criminalize the specific act of cyberbullying itself.¹⁴¹ However, Section 9 of the Massachusetts Bullying Act amends current law and defines stalking and criminal harassment by electronic means and makes these acts punishable by jail time or a fine.¹⁴² This provides an avenue for criminal charges to be pressed as a result of cyberbullying occurring on or outside school grounds, so long as the cyberbullying behavior satisfies the law's defined standards.¹⁴³

¹³⁷ S.B. 2404, 2010 Gen. Ct. 2d Ann. Sess. (Mass. 2010); Russell Goldman, *Teens Indicted After Allegedly Taunting Girl Who Hanged Herself*, ABC NEWS (March 29, 2010), <http://abcnews.go.com/Technology/TheLaw/teens-charged-bullying-mass-girl-kill/story?id=10231357#.Tsp7QbKd5GR>.

¹³⁸ S.B. 2404, 2010 Gen. Ct. 2d Ann. Sess. (Mass. 2010).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* ("Stalking is defined as, (a) [w]hoever (1) willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person which seriously alarms or annoys that person and

More specifically, the criminal penalty will apply to incidents of stalking, which is clearly defined in the statute.¹⁴⁴

It appears some states are not criminalizing cyberbullying outright, but instead leave potential for criminal liability within the confines of the law.¹⁴⁵ It is common to see States address cyberbullying through their other areas of law as opposed to addressing it strictly through education law.¹⁴⁶ One example of this approach can be found in Wisconsin, which interprets cyberbullying as an “unlawful use of computerized communication systems,” classifying it as a Class B misdemeanor punishable by a fine, jail, or both.¹⁴⁷

B. North Carolina’s Approach

North Carolina takes a broader approach to cyberbullying and defines behaviors that qualify as cyberbullying.¹⁴⁸ The North Carolina bill, known as “Protect Our Kids/Cyber Bullying Misdemeanor” goes beyond the school grounds in order to protect children from online harassment and torment.¹⁴⁹ The term cyberbullying also applies to individuals over eighteen years old and the law does not differentiate between cyberharassment or cyberstalking based on age.¹⁵⁰ It may be important that a certain

would cause a reasonable person to suffer substantial emotional distress, and (2) makes a threat with the intent to place the person in imminent fear of death or bodily injury, shall be guilty of the crime of stalking and shall be punished by imprisonment in the state prison for not more than 5 years or by a fine of not more than \$1,000, or imprisonment in the house of correction for not more than 2½ years or by both such fine and imprisonment. The conduct, acts or threats described in this subsection shall include, but not be limited to, conduct, acts or threats conducted by mail or by use of a telephonic or telecommunication device or electronic communication device including, but not limited to, any device that transfers 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.).

¹⁴⁴ S.B. 2404, 2010 Gen. Ct. 2d Ann. Sess. (Mass. 2010).

¹⁴⁵ See, e.g., *id.* (taking the the Massachusetts statute as an example).

¹⁴⁶ See, e.g., N.C. Gen. Stat. Ann. § 14-458.1 (West 2010); WIS. STAT. § 947.0125 (2010), available at <http://legis.wisconsin.gov/statutes/Stat0947.pdf> (disclosing the cyberbullying statute under criminal law).

¹⁴⁷ WIS. STAT. § 947.0125 (2010), available at <http://legis.wisconsin.gov/statutes/Stat0947.pdf>.

¹⁴⁸ 2009 N.C. Sess. Laws 551.

¹⁴⁹ See Michael Gordon, *The Best Intentions: A Constitutional Analysis of North Carolina’s Anti Cyber-Bullying Statute*, 11 N.C. J.L. & TECH. ONLINE 48 (2009) (regarding the development of the North Carolina approach).

¹⁵⁰ *Id.* at 55–58.

group of adults, namely students over the age of 18, are protected against cyberbullying.¹⁵¹ However, North Carolina law extends protections to people of all ages in a way that is more vague than current law in other states.¹⁵² Massachusetts provides a law organized around cyberbullying that imposes criminal sanctions for behavior that can be cyberbullying.¹⁵³ However, North Carolina criminalizes cyberbullying outright, and applies cyberbullying laws to the entire population.¹⁵⁴ It is suggested that the law in North Carolina does not clearly define the behaviors that constitute cyberbullying under the law and violates the First Amendment.¹⁵⁵ The law in North Carolina does not define cyberbullying through terms that most States use or propose, but provides a list of unclearly defined activities that would be punishable as a misdemeanor.¹⁵⁶

C. New Jersey's Stance

New York can also learn a valuable lesson from a tragic situation that arose involving a New Jersey teen in September 2010.¹⁵⁷ The suicide of eighteen-year-old college freshman Tyler Clementi sparked a fierce debate over bullying and dealing addressing new technology.¹⁵⁸ Tyler Clementi jumped off of the George Washington Bridge after his Rutgers University roommate Dharun Ravi had posted online access to live streaming video of Tyler Clementi with another man in their dorm room.¹⁵⁹ Those responsible for arranging the webcam and posting access to the video were charged with invasion of privacy.¹⁶⁰ While New Jersey had amended their state law to include cyberbullying in 2007, it did not extend beyond public high schools.¹⁶¹ In effect, county prosecutors were left to address

¹⁵¹ See *infra* notes 173–176 and accompanying text.

¹⁵² Gordon, *supra* note 149, at 66–69.

¹⁵³ S.B. 2404, 2010 Gen. Ct. 2d Ann. Sess. (Mass. 2010).

¹⁵⁴ See Gordon, *supra* note 149, at 49.

¹⁵⁵ *Id.* at 58–70.

¹⁵⁶ *Id.* at 55, 66–69.

¹⁵⁷ See Winnie Hu, *Legal Debate Swirls Over Charges in a Student's Suicide*, N.Y. TIMES, Oct. 1, 2010, <http://www.nytimes.com/2010/10/02/nyregion/02suicide.html>.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Richard Pérez-Peña, *Christie Signs Tougher Law on Bullying in School*, N.Y. TIMES, Jan. 6, 2011, <http://www.nytimes.com/2011/01/07/nyregion/07bully.html?ref=cyberbullying>; Anti-Bullying Bill of Rights Act, 2010 N.J.

the matter with criminal charges currently available that did not explicitly deal with cyberbullying.¹⁶² The prosecutors had a strong foundation for pursuing invasion of privacy within the context of the case because of the manner in which the images/video of Tyler Clementi were publicly distributed.¹⁶³ However, the prosecutor is pursuing hate crime charges against Dharun Ravi and is currently scheduled to go to trial in February 2012, alleging that Ravi “target[ed] Clementi because he was gay.”¹⁶⁴

In January 2011, New Jersey Governor Chris Christie signed the nation’s toughest cyberbullying law into effect, entitled the “Anti-Bullying Bill of Rights Act.”¹⁶⁵ The bill had passed both houses of the legislature on November 22, 2010, and received only one dissenting vote.¹⁶⁶ This bill protects students from harassment, intimidation and bullying and gives schools the power to suspend or expel students from school.¹⁶⁷ While this new bill does not specifically define cyberbullying, the bill clarifies that harassment, intimidation or bullying through electronic communications will be subject to the Act.¹⁶⁸ The bill went into effect the beginning of the 2011–2012 school year and applies to public schools.¹⁶⁹ But most importantly, portions of the bill will “apply to public colleges.”¹⁷⁰ The bill specifically reflects that

[h]arassment, intimidation, and bullying is also a problem which occurs on the campuses of institutions of higher education in this State, and by requiring the public institutions to include in their student codes of conduct a specific prohibition against bullying, this act will be a significant step in reducing incidents of such

Laws 122 (2010); *see also* Turbert, *supra* note 3, at 658–59, 665, 670, 685 (describing the implications of online bullying in the school context).

¹⁶² *See* Hu, *supra* note 157 (illustrating the prosecution’s struggle in determining which pre-existing crime has elements most amenable to instances of cyberbullying).

¹⁶³ *Id.*

¹⁶⁴ Stacy Teicher Khadaroo, *Trial Set in Rutgers Case; N.J. Law Takes Effect*, CHRISTIAN SCIENCE MONITOR, Oct. 22, 2011, <http://abcnews.go.com/US/tyler-clementi-trial-set-rutgers-case-nj-law/story?id=14782532#.TsA0ymCW6kl>.

¹⁶⁵ Pérez-Peña, *supra* note 161; Anti-Bullying Bill of Rights Act, 2010 N.J. Laws 122 (2010).

¹⁶⁶ Pérez-Peña, *supra* note 161.

¹⁶⁷ *Id.*; Anti-Bullying Bill of Rights Act, 2010 N.J. Laws 122 (2010).

¹⁶⁸ Pérez-Peña, *supra* note 161; Anti-Bullying Bill of Rights Act, 2010 N.J. Laws 122 (2010).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

activity.¹⁷¹

The bill was well thought out as it extends bullying protections to young adults and avoids having to extend the bill to all adults.¹⁷² New Jersey seems to have clearly learned from negative reactions to North Carolina's approach and will hopefully be well received.¹⁷³

VI. CURRENT CONTEXT

The most recent cyberbullying incident in New York State drew much attention.¹⁷⁴ Williamsville North High School Freshman Jamey Rodemeyer was continuously tormented by an "identifiable group of students" online and in school while attending Heim Middle School and Williamsville North High School near Buffalo, New York, before committing suicide in September 2011.¹⁷⁵ Jamey was ruthlessly bullied and besieged, both online and at school, because of his sexual orientation.¹⁷⁶ In the case of Jamey Rodemeyer, police sought to pursue "harassment, cyber-harassment or hate crime" charges.¹⁷⁷ However, the police acknowledged the challenges to pursue these charges when there is no specific bullying statute.¹⁷⁸ Amherst Police Captain Michael Camilleri stated, "[w]e are not sure if there is anything criminal or not."¹⁷⁹ This tragic situation shows it may be difficult for law enforcement officers to pursue charges against cyberbullies even where the cyberbullying has been so extensive that it is an identifiable factor in a victim's suicide. This current context shows that there is still much that needs to be done.

While there are many suggestions by different groups on how to address the cyberbullying epidemic, the debate among scholars continues. One scholar suggests that enacting another criminal law specific to cyberbullying is unnecessary when there are already so many laws in existence that can potentially be used to prosecute the cyberbully, despite not being explicit to

¹⁷¹ Anti-Bullying Bill of Rights Act, 2010 N.J. Laws 122 (2010).

¹⁷² *Id.*

¹⁷³ See Gordon, *supra* note 149, at 48–49.

¹⁷⁴ Donaldson James, *supra* note 39.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

cyberbullying.¹⁸⁰ Others agree that cyberbullying should not be generally criminalized, and instead should be handled by existing criminal laws which are sufficient to address abhorrent cyberbullying incidents that result in actual harm or suicide.¹⁸¹ Still, some feel that appropriate cyberbullying legislation should be enacted in order to protect students.¹⁸² There does not seem to be a clear-cut answer, and it appears that only time will tell what is most effective, and constitutional.

VII. CONCLUSION

Currently, forty-five states have enacted laws that address at least one form of bullying.¹⁸³ New York can learn from the unclear approach of North Carolina in order to improve their cyberbullying measures by clearly focusing on students and preserving cyberharassment or cyberstalking laws for matters where adults are directly involved in the cyberbullying.¹⁸⁴ In addition, New York State must clearly define cyberbullying. The definition adopted by Massachusetts is one of the most clearly defined examples of cyberbullying in the country and New York may wish to follow parts of their definition.¹⁸⁵ The legislation proposed in New York State thus far provides a strong foundation for creating measures that adequately protect students as well, despite not going quite as far as Massachusetts's definition.¹⁸⁶ The New York definition would be

¹⁸⁰ Paul Butler, *Room for Debate: Not Every Tragedy Should Lead to Prison*, N.Y. TIMES, <http://www.nytimes.com/roomfordebate/2010/09/30/cyberbullying-and-a-students-suicide/new-criminal-laws-arent-the-answer-to-bullying?permid=105&offset=6#comment105> (last updated Dec. 3, 2010).

¹⁸¹ See Justin W. Patchin, *Room for Debate: Most Cases Aren't Criminal*, N.Y. TIMES (Sept. 30, 2010), <http://www.nytimes.com/roomfordebate/2010/09/30/cyberbullying-and-a-students-suicide/most-bullying-cases-arent-criminal> (explaining that most cyberbullying incidents should be handled informally, with the exception of those that qualify as a criminal offense).

¹⁸² See Bernard James, *Room for Debate: A Human Rights Issue*, N.Y. TIMES, <http://www.nytimes.com/roomfordebate/2010/09/30/cyberbullying-and-a-students-suicide/campus-bullying-as-a-human-rights-issue> (last updated Sept. 30, 2010) ("Delaying or interfering with a response to bullying in criminal form is itself a criminal matter . . ."); Daniel K. Gelb, *Room for Debate: Privacy Invasions Last Forever*, N.Y. TIMES, <http://www.nytimes.com/roomfordebate/2010/09/30/cyberbullying-and-a-students-suicide/privacy-invasions-now-last-forever> (last updated Nov. 14, 2011) ("The law must evolve to . . . deter[] future bullying with a legal means to punish those who cause harm.").

¹⁸³ Pérez-Peña, *supra* note 161.

¹⁸⁴ Gordon, *supra* note 149, at 58.

¹⁸⁵ S.B. 2404, 2010 Gen. Ct. 2d Ann. Sess. (Mass. 2010).

¹⁸⁶ *Id.*; A.4028, 231st Leg., Reg. Sess. (N.Y. 2009).

strengthened by combining the clear definition of cyberbullying as proposed in Assembly bill A04028 with the definition of electronic and electronic means found in Assembly Bill A05544.¹⁸⁷ Otherwise, the cyberbullying definition is too vague on its own and is not effective. Cyberbullying legislation is more likely to pass if it is comprehensive. In addition, New York should follow the recent example set in New Jersey, and adopt a provision that incorporates some form of protection for college students, up to a certain age.¹⁸⁸ Limiting the protection to college students at public schools may also be the most effective way to do this since New York bullying bills have not applied to private schools.¹⁸⁹

One of the most effective cyberbullying definitions for New York, as a combination of ideas presented above, appears as follows. The legislation must explicitly apply to students, which should include students in the public school system and possibly extend to private schools as well. Cyberbullying should be defined 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.”¹⁹⁰ The definition of harassment should be the exact one that was adapted in DASA.¹⁹¹ This would apply to electronic communications that could include verbal conduct, intimidation, or abuse, that is related to the person’s ethnicity, race, sexual orientation, gender, national origin, gender, religion, disability or age.¹⁹²

It does not appear that taunting, insulting, humiliating or menacing behavior needs to be explicitly defined since the courts can establish a minimum threshold that would prevent trivial interpretations.¹⁹³ Electronic means would be defined to:

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

¹⁸⁷ A.4028, 231st Leg., Reg. Sess. (N.Y. 2009); A.5544, 231st Leg., Reg. Sess. (N.Y. 2009).

¹⁸⁸ Pérez-Peña, *supra* note 161.

¹⁸⁹ DASA, *supra* note 18.

¹⁹⁰ A.4028, 231st Leg., Reg. Sess. (N.Y. 2009).

¹⁹¹ DASA, *supra* note 18.

¹⁹² *Id.*

¹⁹³ A.4028, 231st Leg., Reg. Sess. (N.Y. 2009).

to, electronic mail, internet communications, instant messages or facsimile communications.¹⁹⁴

In addition,

[c]yber-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.¹⁹⁵

Also, the law will reflect that the Act applies to public universities and colleges for when the following specific instances occur, including harassment over alleged sexual orientation, gender, race, national origin, or ethnicity, and incidents of cyberbullying accompanied by stalking.¹⁹⁶ The definition for stalking should reflect the one adopted by Massachusetts, which would carry potential criminal charges and penalties, including fines and jail.¹⁹⁷

Once New York State has developed a cyberbullying definition that legislators agree upon, it should be adopted directly into DASA.¹⁹⁸ Cyberbullying must be explicitly included into DASA to ensure school districts act, since it is unlikely that *all* school districts will openly interpret DASA to include cyberbullying.¹⁹⁹ In the instance where cyberbullying takes place outside of school, there should be a nexus to school, whether it be the online discussion carrying over into the classroom or a traceable connection or association to the school district in order to fall

¹⁹⁴ S.B. 2404, 2010 Gen. Ct. 2d Ann. Sess. (Mass. 2010).

¹⁹⁵ *Id.*

¹⁹⁶ Anti-Bullying Bill of Rights Act, 2010 N.J. Laws 122 (2010).

¹⁹⁷ S.B. 2404, 2010 Gen. Ct. 2d Ann. Sess. (Mass. 2010).

¹⁹⁸ *See* DASA, *supra* note 18, § 11 (defining harassment 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 . . .”).

¹⁹⁹ *See id.* § 13 (illustrating that under DASA, school districts have to create policies and guidelines “to create a school environment that is free from discrimination or harassment,” but since cyberbullying is not included within the definition of harassment, schools are not obligated to create policies specifically addressing this issue).

under DASA.²⁰⁰ By including those penalties for violating cyberbullying directly into DASA it would make the school districts' responsibility much clearer.²⁰¹

In addition, there needs to be cyberbullying legislation which includes an avenue for criminal charges based on the severity of the alleged cyberbullying under an invasion of privacy/intentional infliction of emotional distress approach. If the legislation includes the possibility of establishing a cyberbullying claim based on fulfilling the elements of intentional infliction of emotional distress, New York Courts will need to recognize cyberbullying victims' claims.²⁰² The threshold should be high enough to prevent frivolous claims by children, or their parents, who could take advantage of a law's interpretative definitions. More severe cases of cyberbullying, such as those involving stalking, should be eligible under both intentional infliction of emotional distress and invasion of privacy.²⁰³

A separate provision may need to be incorporated into the criminal law statute, which would address cyberbullying that is completely separate from the school.²⁰⁴ This would provide the most effective relief for victims of severe cyberbullying that does not share a nexus to school or are cyberbullied by people who are not associated with the school district. This may be more commonly found as technology advances with video gaming systems and social networking sites that bring people together from different states and different countries.²⁰⁵ Overall, it appears that criminal charges may serve as the biggest deterrent and help prevent cyberbullying.

It is possible that New York has taken the right approach by allowing some time to pass with DASA in effect before enacting specific cyberbullying measures.²⁰⁶ It is possible to enact cyberbullying legislation without violating constitutional rights for behavior that may take place off school property that affects

²⁰⁰ *Id.* § 12 (showing a shortcoming of DASA in that while most cyberbullying occurs outside of school, DASA only applies to harassment "on school property or at a school function[.]").

²⁰¹ *Id.*

²⁰² *See supra* Part III, C.

²⁰³ *See supra* Part III, B–C.

²⁰⁴ *See, e.g.*, N.C. Cyberbullying statute, *supra* note 152.

²⁰⁵ *See* BUFFY SUE FEGENBUSH & DIANNE F. OLIVIER, CYBERBULLYING: A LITERATURE REVIEW 25, 52 (2009) (stating that teens often use the Internet in their daily lives to connect to the outside world, which blurs the lines between home and school).

²⁰⁶ *See generally* DASA, *supra* note 18.

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students in their learning environment. However, New York State should not wait for another tragic cyberbullying incident before taking legislative action.