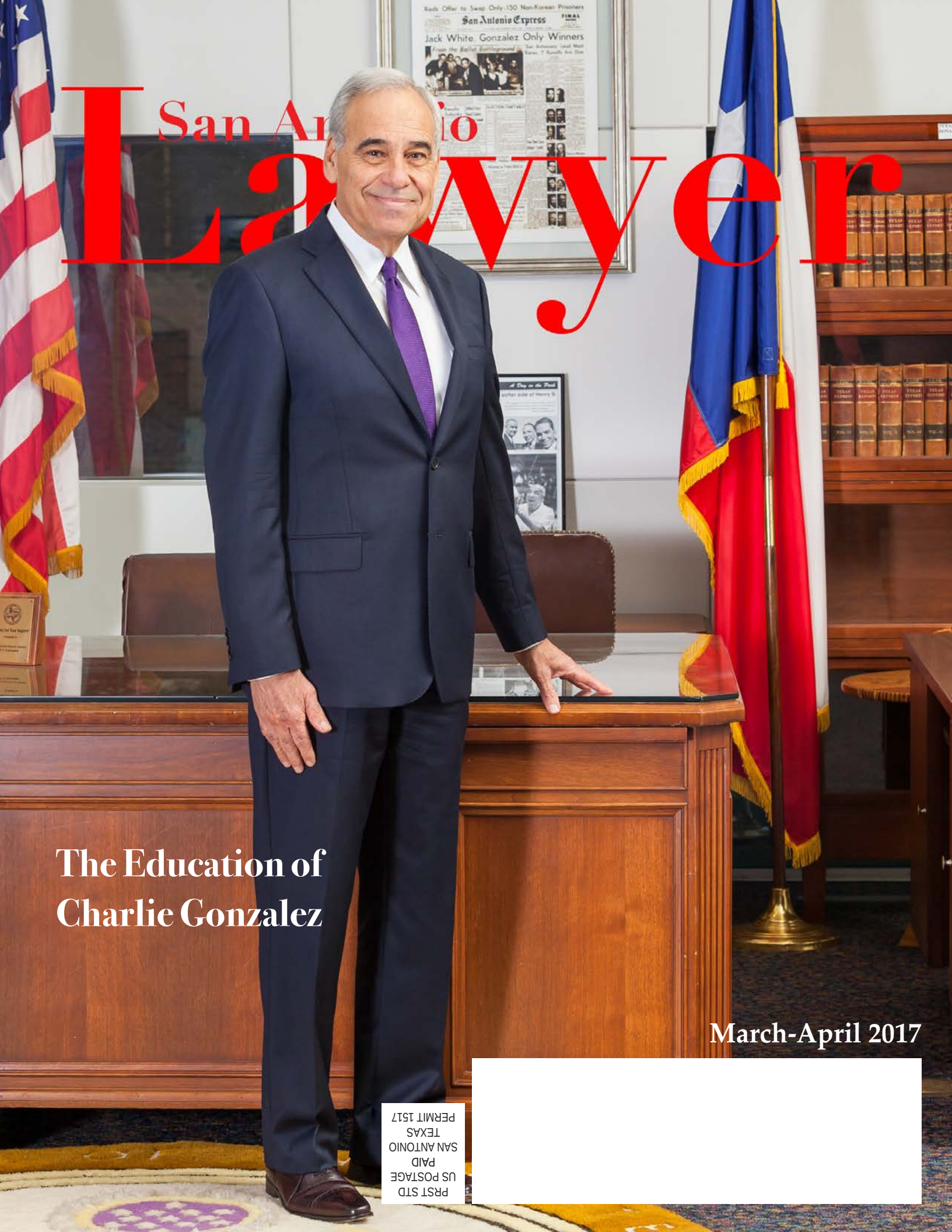

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The Education of Charlie Gonzalez

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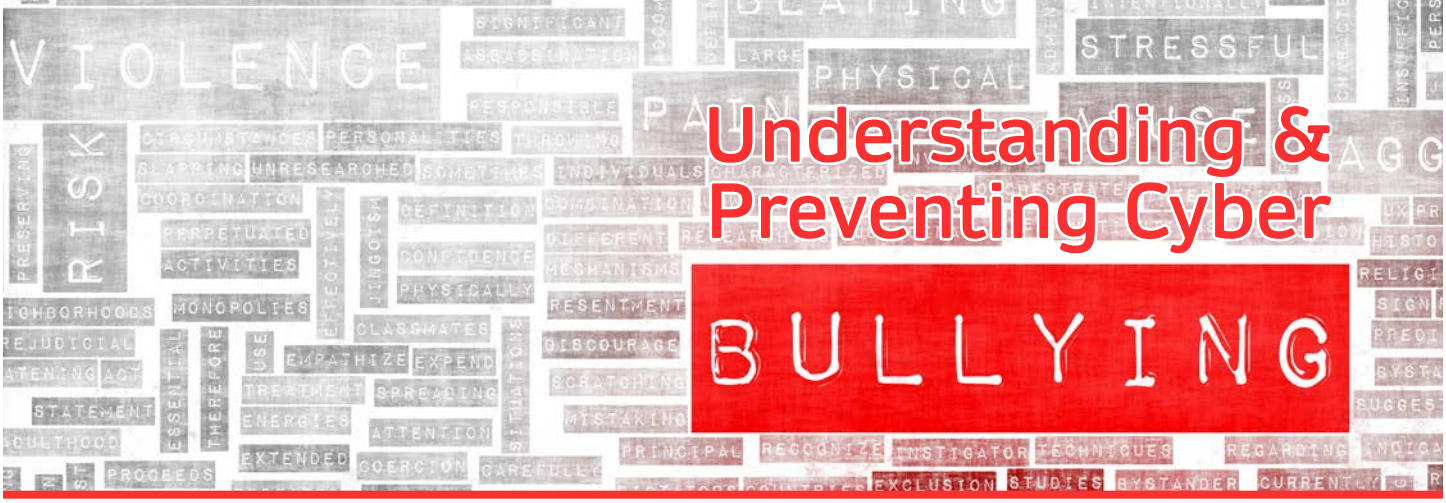

Understanding & Preventing Cyber BULLYING

By Kevin Collins, John Duff, and Samuel Morales

Bullying has been around as long as humans have existed. It was, and is, particularly commonplace in school settings. In the past, a child might have a single person, or perhaps a group of people, bully him or her at school. It would end when the child went home for the day. Today, social media have provided the means to torment another at any time. Social media also enable the bully to acquire a large audience, who then join the bullying. The abuse may go viral in some circumstances, but even if it does not, in the mind of the victim it may seem that way. This mass audience participation, as well as the inability to escape the tormentor, makes cyber bullying particularly harmful.

Why People Bully

Human beings have complex behavioral components. One component is the animal, or brute, self. As in nature, our inner brute strives to establish dominance. One of the primary ways this happened prior to the Internet was "schoolyard bullying." This need to dominate is a reminder that we seek to establish a higher ranking in the pecking order of our group. People seek to dominate on an intellectual level as well, and the cyber world has enabled us to act on this desire. When this behavior becomes harmful, it must be prevented, but determining when that threshold is crossed can be very difficult.

Legal Challenges in the Fight Against Cyber Bullying

School districts face several main issues when implementing cyber bullying policies. First, they face First Amendment issues dealing with free speech. Second, they face due process issues requiring the policy to be written specifically and with notice. Schools may also face Fourth Amendment issues dealing with illegal search and seizure. Finally, any criminal laws enacted by states must be very narrow to withstand constitutional scrutiny.

First Amendment Issues. The first question that must be asked is whether school districts have the ability, authority, and power to regulate the activity.[1] This may get complicated because there are different legal standards for determining whether the school district can regulate, based on whether the speech occurred "on" or "off" the school campus.

If the speech occurred "on" campus[2] or at school events,[3] the Supreme Court has held that the school district can regulate the speech; and in *Morse*,[4] the Supreme Court held that a school could restrict a student's free speech at an off-campus but school-sanctioned event because the student was promoting illegal drug use. The Supreme Court has not addressed regulating off-campus speech for reasons such as cyber bullying or regulating speech that originated "off"[5] campus, and the lower-court cases do not provide a conclusive answer.[6]

The lower-court cases tend to fall into three different categories. The first category skips the ability, authority, and power question.[7] These holdings have a history of being reversed. The second category holds that if it is foreseeable for the speech to reach campus, then the school district can regulate it.[8] The third category holds that there must be a connection between the speech and the school before the school can regulate the speech or punish a student for his or her speech. Within this third category, there is a split of authority regarding what exactly the connection between the school and the speech must be.[9]

After the jurisdictional issues are settled, the school district must then decide as a matter of law whether it can regulate the speech without violating the First Amendment. The school district may be able to regulate some speech categorically. For example, a school district may categorically prohibit or regulate speech that: (i) bears a school emblem[10] (the school can regulate this regardless of where it originated); or (ii) is a valid threat[11] against a faculty member or student. Even if the school district cannot categorically regulate the speech, however, it may still be able to regulate the speech if: (i) the speech materially disrupts[12] class work; or (ii) substantially impinges[13] on the rights of others. In such situations, the standards set out in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), would be met. *Tinker* also requires a showing that the speech was not prohibited merely to avoid the discomfort that accompanies an unpopular viewpoint.

Due Process Issues. Due process issues must be considered when a school district implements a policy against cyber bullying. Failure to provide due process may impede the enforceability of the anti-cyber bullying policy. In particular, the policy must not be vague,[14] and proper notice[15] of the policy must be given. The regulation must be defined and lay out the potential penalties for violations. If the policy is not specific and clearly written, then it could be said that the policy does not clearly set forth what conduct is prohibited. The result would be that the person against whom the policy is being invoked may

be able to successfully reverse a finding or avoid punishment, effectively making an ambiguous policy unenforceable.

With regard to notice of the policy, there are three considerations: (i) the policy must clearly set forth[16] what the exact policy is, to who[m] the policy pertains, and when the policy takes effect; (ii) the school must ensure that parents and students actually receive notice of the policy;[17] and (iii) the school must ensure that the parents of both the victim and the bully are notified in the event of an incident.[18]

Fourth Amendment Issues. What right does the school have to search the laptops, phones, or other personal property of students suspected of participating in cyber bullying? How does the school avoid violating the Fourth Amendment's prohibition against "unreasonable search and seizure"?[19] The applicable test is the two-step process[20] set out in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). In short, the *T.L.O.* standard requires that a search have reasonable grounds and be limited in scope. First, the search must be justified from its origination.[21] There must a reasonable ground for believing the search will turn up evidence that the student is violating, or has violated, the law or a school policy. Second, the scope of the search must be reasonably related to a valid suspicion, and the search must not be excessively intrusive when considering the age and sex of the student and the nature of the violation.[22]

For example, if the student sent a threatening email to another student, the faculty could search the phone for email, but they could not search the phone for pictures because the subject of the act was an email and not a picture.[23] Searching through the pictures stored on the student's phone would exceed the scope of the violation, which involved only an email. A search of the student's pictures would also be invalid based on the origination or inception of the incident since the violation was related only to the student's email.

Criminal Statutes. Implementing a law that is not vague, with proper notice provisions that give it both teeth and enforceability, will not be an easy task. Texas Senator José Menéndez has proposed a new bill known as David's Law, which would criminalize cyber bullying.[24] David's Law is named after David Molak of Alamo Heights, who tragically took his own life after being constantly bullied online. If enacted, this law would go beyond school policy, making it a misdemeanor in Texas for anyone to electronically harass someone under the age of 18, by use of emails, texts, social media, and smart phone applications. Since some school district policies[25] and some criminal statutes[26] relating to cyber bullying have failed on the basis of overbreadth, by regulating more speech than necessary, this area is ripe for future litigation.

Conclusion

Bullying and its new offspring, cyber bullying, may never be completely eradicated. However, that does not mean that states, schools, and parents should stop making efforts to prevent it. Cyber bullying has drastic effects on those being bullied, with both short term and long term effects. It also affects the families of those being bullied. Schools are in the forefront of this fight because most of the incidents occur on school grounds or are connected to school activities. Proposing new school policies and enacting criminal penalties for cyber bullying are necessary, but there will be constitutional challenges.[27] Statutes can run afoul of the First Amendment for vagueness and other issues. Perhaps the best remedy begins in the home, by educating our children concerning the harm that cyber bullying causes. ✤

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ENDNOTES

[1]**www.mass.gov/berkshireda/crime-awarness-and-prevention/bullying-and-cyberbullying** (last visited January 16, 2017).
[2]*See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988) (schools may regulate speech in school sponsored newspapers); *see also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (holding that lewd, disruptive, and offensive speech at a school assembly can be regulated and punished).
[3]*Morse v. Frederick*, 551 U.S. 393, 401, 408 (2007) (schools may restrict student expression, even off campus, if the student is promoting drug use at a school-sponsored event.)
[4]*See id.*
[5]*See Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1049 (2d Cir. 1979) (holding that schools could not punish students who distributed newspapers off campus).
[6]*Compare Doninger v. Niehoff*, 527 F.3d 41, 43-44 (2d Cir. 2008) (holding that the school could take away student's ability to participate in student government when student posted comments that substantially disrupted the school), *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007) (school may regulate speech if it is reasonably foreseeable that the speech would reach the school campus), and *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 459 (W.D. Pa. 2001) (school may regulate speech and discipline a student when the student created a website insulting and degrading one of the teachers and shared it with his friends), *with Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (holding that the discipline of the student was unacceptable because it was based on the administrator's emotional reaction, rather than on fear that the speech would cause a material disruption), *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (speech was created off campus, and there was not enough of a connection for the school to have jurisdiction over the speech), and *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1118 (C.D. Cal. 2010) (off-campus speech did not substantially disrupt school activity; therefore, the school had no authority to punish the student

- Continued on page 19 -

- Continued from page 17 -

The biggest need the Dean sees, however, is to do a better job of providing competent legal counsel to everyone who needs it. But that, he says, is not a problem law schools alone can fix. Lawmakers and lawyers, in general, need to tackle—and are tackling—the problem, as well. For example, Supreme Court of Texas Chief Justice Hecht created a commission to assess current access to the bar. The commission includes practicing attorneys and leaders from various law schools, including St. Mary's own Dean Faye Bracey.

"Law schools can't do everything to create a mid-career lawyer," the Dean says. "We can do lots to create a starting lawyer and should do more." The faculty is currently performing a "wholesale review" of classes with an eye toward developing a more practice-focused curriculum. The goal is to ensure students are taught the significance of the rule of law, along with the basics of theory and history essential to preserving the rule of law, while still teaching the courses essential to practicing law.

St. Mary's wants to support practicing attorneys, as well, by providing more advanced educational opportunities locally. Presently there are two focused masters in the works: one in cyber-security and one in compliance, the latter having a variety of specialized emphases, including educational compliance.

Dean Sheppard believes law schools should be busy places, and he is ensuring that St. Mary's remains committed to providing all the support it can for its students and the community and is thoroughly enjoying himself in the process. "We have a great team, great students, great faculty, and this university is a fantastic place—so, it's kind of hard to top."

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- Continued from page 12 -

for her speech).

[7]*See LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 991 (9th Cir. 2001) (discipline was constitutional, without jurisdictional analysis, for an off-campus written poem that was shown to a teacher).

[8]*See Wisniewski*, 494 F.3d at 40 (holding that the *Tinker* standard applied because it was reasonably foreseeable that the speech would reach the school campus, and it ultimately did reach the school campus).

[9]*See J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 851 (Pa. 2002) (holding that there was a sufficient nexus between speech and school where a website created off campus was viewed by students on campus). *But see Emmett*, 92 F. Supp. 2d at 1090 (holding that even though the "intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside the school's supervision or control").

[10]*See Hazelwood Sch. Dist.*, 484 U.S. at 271 (1988) (allowing the school to delete school newspaper articles discussing teen pregnancy and divorce from a school-sponsored newspaper).

[11]*See Watts v. United States*, 394 U.S. 705, 707-08 (1969) ("true threats" are not protected by the First Amendment); *see also Wisniewski*, 494 F.3d at 38 (stating that schools have broader authority over student speech than allowed by the "true threats" standard in *Watts*).

[12]*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-13 (1969).

[13]*See id.* at 509, 512-13.

[14]*See Layschock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 604-06 (W.D. Pa. 2006) (cyber bullying case in which the plaintiff challenged the school's discipline of a student on grounds that the school policy was vague).

[15]*See Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 266 (3d Cir. 2002).

[16]N.H. Rev. Stat. Ann. § 193-F:4 (2011). New Hampshire's bullying prevention statute allows the school to take action if bullying or cyber bullying "[o]ccurs off of school property or outside of a school-sponsored activity or event, if the conduct interferes with a pupil's educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event."

[17]Darryn Cathryn Beckstrom, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat to Students' Free Speech Rights*, 33 Vt. L. Rev. 283, 315 (2008); *see also* Ark. Code Ann. 6-18-514(b)(2009)(reminders of school policy should be on display throughout school grounds, and on buses).

[18]*See, e.g.,* Conn. Gen. Stat. § 10-222d (2010); Del. Code Ann. tit. 14, § 4112D (b)(2)(j) (2011); Fla. Stat. § 1006.147 (2010); Ga. Code Ann. § 20-2-751.4 (2011); Mass. Gen. Laws ch. 71 § 37O(d)(2)(viii) (2011); N.H. Rev. Stat. Ann. § 193-F:4 (2011); N.Y. Educ. Law § 2801-a (McKinney 2009); Ohio Rev. Code Ann. § 3313.666 (West 2011); Tex. Educ. Code Ann. § 37.001(a)(6) (West 2009); Utah Code Ann. § 53A-11a-301 (West 2011); W. Va. Code Ann. § 18-2C-3 (2011).

[19]*See New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985) (holding that the Fourth Amendment's "prohibition on unreasonable searches and seizures applies to searches conducted by public school officials").

[20]*See id.* at 328-30, 341.

[21]*See id.* at 342-43 (declining to rule on whether "individualized suspicion is an essential element of the reasonableness standard . . . adopt[ed] for searches by school authorities").

[22]*See id.* at 341-43, 347-48.

[23]*See Klump v. Nazareth Area Sch. Dist.*, 425 F. Supp. 2d 622, 627 (E.D. Penn. 2006) (holding that a search by school officials must be justified at its inception).

[24]*Editor's Note*: David's Law is discussed in more detail in "David Bartlett Molak's Legacy – 'Don't Bully Me,'" starting on page 14 of this Mar-Apr 2017 issue of *San Antonio Lawyer*.

[25]*See Sypniewski*, 307 F.3d at 261-65 (finding that the school harassment policy was not overbroad except for the section which allowed for punishing students acting with "ill will," where the term "ill will" was not defined); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215-18 (3d Cir. 2000) (finding discipline stemming from school policy unconstitutional because policy's terms were overbroad and vague); *Killion*, 136 F. Supp. 2d at 458-59 (holding that because the policy did not contain a definition of "abuse" and because it did not provide further specifications or limitations, it was overbroad).

[26]*See State v. Bishop*, 787 S.E.2d 814 (N.C. 2016) (holding that a North Carolina statute was a restriction on content-based speech, and the statute was not narrowly tailored to the State's interest in protecting children from the harms of online bullying); *see also People v. Marquan M.*, 19 N.E.3d 480, 488 (N.Y. 2014) (holding that an Albany county cyber bullying law violated the Free Speech Clause because it was overbroad and facially invalid under the First Amendment).

[27]Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process and Fourth Amendment Challenges*, 46 Wake Forrest L. Rev. 641 (2011).