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Why is it so Difficult to Establish an Anti-bullying Policy in the US?*

I. Introduction

This article provides a concise and comprehensive overview of 4 months of research conducted in the United States, at the Pennsylvania State University (Penn State) and the University of Toledo (UT). The research focused on the establishment of an anti-bullying policy at the university level, and it attempts to offer a solution for US and Hungarian universities as well. In the course of the research, several interviews and discussions were conducted with high-level experts at both universities, in order to explore and discover what are the hindering effects of policies. As a result, a model anti-bullying policy was developed, and several experts reviewed its content, but everyone agreed that the constitutionality of any anti-bullying policy at a public university in the US may be challenged in court due to First Amendment issues. Nonetheless, they found the policy well-established and well-written, but this article briefly summarizes why is it so difficult to adopt an anti-bullying policy at US universities. In the first part, the constitutional issues will be briefly discussed, including the prohibition of content-based restrictions and the strict scrutiny analysis. In the next part, the recommended policy elements will be introduced and analyzed, raising constitutional issues as well. Substantial university interest, anonymous reporting, and the importance of informal meetings and formal sanctions are among the relevant elements. Even though this paper focuses mainly on student-student issues, it must be noted here that faculty and staff are also included in the policy and they are subject to an anti-bullying policy.

Anti-bullying policies are not widely spread in the US higher education context, but we can find several examples (and their issues), which provide important added value to this research.

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II. Constitutional law issues

First of all, we shall emphasize that establishing an anti-bullying law or an anti-bullying policy, in particular in higher education, seems to be an extremely difficult task due to First and Fourteenth Amendment concerns. Every anti-bullying policy will focus on the students' speech and it might lead to constitutional debates, about whether the policy establishes a content-based limitation or not. As Jackson and Schaller note, the Internet and social media are, in the United States, the "modern public square", where First Amendment principles are the most protected.¹ The University of Michigan situation serves as a relevant example.² Therefore, it is necessary to clarify, when it is constitutional to apply a content-based restriction. According to the Supreme Court of the United States (SCOTUS) jurisprudence, there are several areas, where a content-based restriction might pass constitutional muster, such as "*incitement, obscenity, defamation, fighting words, child pornography, frauds, true threats, and speech presenting a grave and imminent threat to the government.*"³ However, off-campus online speech on social media often does not rise to the level of these areas, but it has an effect on the community and educational environment. Consequently, a policy limiting the students' speech based on its content must survive strict scrutiny analysis before it can be applied. Pursuant to this, a content-based restriction is constitutional, if it is narrowly tailored and a compelling governmental interest is present. This standard represents a high burden, as some cases and research suggest. In *Marquan v. New York*, the anti-bullying law was declared to be unconstitutional, because it was vague and thereby chilled constitutionally protected speech.⁴ A North Carolina law, which criminalized cyberbullying was also found unconstitutional by the Supreme Court of North Carolina because it restricted speech and such restriction was content-based.⁵ The University of West Alabama's Cyberbullying and Cyber Harassment Policy Statement received a 'red' rating from the Foundation for Individual Rights in Education (FIRE), see below, and was later amended to comply with the First Amendment's standard.

The constitutional issues regarding anti-bullying laws and policies were succinctly summarized by Justice Hudson (Supreme Court of North Carolina) in the opinion of *State v Bishop*, as follows: "[w]e now conclude that N.C.G.S. § 14-458.1(a)(1)(d) restricts speech, not merely nonexpressive conduct; that this restriction is content based, not content neutral; and that the cyberbullying statute is not narrowly tailored to the State's asserted interest in protecting children from the harms of online bullying. Accordingly, we reverse the decision of the Court of Appeals and hold that the statute violates the First Amendment as applied to the states through the Fourteenth Amendment."⁶

¹ JACKSON, NATALIE-SCHALLER, JANELLE: *Current Legal Issues in Student Affairs*. In: Anne M. Hornak (ed.): *Ethical and Legal Issues in Student Affairs and Higher Education*. Charles C Thomas Publisher Ltd. Springfield, 2020. p. 82.

² See *Speech First Inc. v. Schlissel*, 939 F.3d 756, United States Court of Appeals for the Sixth Circuit, 2019.

³ SEAY III, JAMES L.: *Salvaging the North Carolina Teacher-Cyberbullying Statute*. *Campbell Law Review*, vol. 37. no. 2., 2015. pp. 391–418., p. 404.

⁴ *People v. Marquan M.*, 2014 NY Slip Op 04881, New York Court of Appeals.

⁵ *State v Bishop*, 368 N.C. 869 Supreme Court of North Carolina and See SEAY 2015, pp. 391–418.

⁶ *Bishop* p. 870.

Consequently, establishing a bullying and/or cyberbullying law will be difficult due to the strict scrutiny analysis. However, universities have different purposes and they play different roles in society. Several universities adopted cyberbullying policies in order to provide greater protection for their students, faculty, staff, and community. *Smith and Coel* examined 276 Faculty Codes of Conduct and in 8 cases they found references to bullying. However, “[a] detailed, specific, defined policy noting bullying as unique and important was not found in these documents.”⁷ Keep in mind that their research focused on workplace bullying.

Nonetheless, *Monica C. Barrett and Margaret L. Wu* published an article, where they analyzed the issue of cyberbullying in the college and university context.⁸ In the course of their research, they identified some college policy examples for anti-cyberbullying policies.⁹ In this article, I would like to highlight a few, which are still available, since, unfortunately, the Rutgers University Policy and the Millersville University Policy cannot be found (7 years have passed since the publication of their article), but the University of West Alabama Cyberbullying and Cyber Harassment Policy Statement can be found on FIRE’s website (not on the University’s website).¹⁰ However, this Policy Statement presents major issues. First, it refers to the Code of Alabama Section 13A-11-8, which criminalizes harassment and harassing communication. Note that bullying or cyberbullying is not even mentioned in this Section. Furthermore, the Code of Alabama under Title 28 Education already adopted a Student Harassment Prevention Act. Although this Act declares that it does not cover college students,¹¹ it would be more reasonable for the University of West Alabama to refer to an educational law instead of a criminal sanction. Second, the Policy Statement declared that “*cyberbullying and cyber harassment are prohibited by state law and by various federal laws.*”¹² This statement may be true regarding harassment, but it is definitely false concerning cyberbullying. The Code of Alabama includes cyberbullying in its definition of bullying, but it does not define what actually cyberbullying is.¹³ Moreover, there is no federal law about cyberbullying, since neither the Megan Meier Act nor any similar legislation has ever been passed.¹⁴ In addition to these, FIRE as an important watchdog entity gave a ‘red light’ rating to the above-mentioned Policy Statement, which means that “*an institution has at least one policy that*

⁷ SMITH, FRANCIS L. M. – COEL, CRYSTAL RAE: *Workplace bullying policies, higher education and the First Amendment: Building bridges not walls*. *First Amendment Studies*, 52: 1-2., 2018. pp. 96–111., p. 104.

⁸ BARRETT, MONICA C. – WU, MARGARET L.: *When Bullies Move Online: Dealing With Cyberbullying and Electronic Harassment on Campus*. National Association of College and University Attorneys. 2015.

⁹ BARRETT-WU 2015, pp. 20–21.

¹⁰ Cyberbullying and Cyber Harassment Policy Statement of the West Alabama University, Fire, <https://www.thefire.org/presentation/wp-content/uploads/2014/01/01220116/Cyberbullying-and-Cyber-Harassment-Policy-Statement-University-of-West-Alabama-Acalog-ACMS%E2%84%A2.pdf>

¹¹ Code of Alabama Section 16-28B-2, „*this Chapter apply only in grades prekindergarten through 12....*”.

¹² Cyberbullying and Cyber Harassment Policy Statement of the West Alabama University.

¹³ Code of Alabama Section 16-28B-3.

¹⁴ H.R. 1966 – Megan Meier Cyberbullying Prevention Act, 111th Congress (2009–2010), <https://www.congress.gov/bill/111th-congress/house-bill/1966/all-actions?overview=closed#tabs>

both clearly and substantially restricts freedom of speech."¹⁵ According to their reasoning, the cyberbullying definition is vague and it may chill protected speech. This reasoning reinforces the abovementioned concerns regarding strict scrutiny and its effect on anti-bullying legislation. Currently, the University of West Alabama amended its policy and received a 'green' rating from FIRE.¹⁶ The amendment erased the examples and vague parts of the text to comply with the vagueness doctrine of the Fourteenth Amendment.¹⁷

The Sacred Heart University in Connecticut defines bullying and cyberbullying in its Student Code of Conduct as "*repeated and/or severe aggressive behaviors that intimidate or intentionally harm or control another person physically or emotionally, and are not protected by freedom of expression, slanderous, false or malicious statement(s) about a person or defamation of character.*"¹⁸ Note, this is a private university, which is not subject to the First Amendment, but its code of conduct has important and relevant statements. This code of conduct attempts to comply with the First Amendment and Fourteenth Amendment concerns, mentioned above because they clearly and narrowly tailor the jurisdiction. They call the attention of the students that their off-campus, online activity may be subject to this Code, but it will not be searched by the University.¹⁹ Moreover, the Code highlights that such online, off-campus conducts and speech, which do not use University networks or resources, are protected speech under the First Amendment, except for true threats and such speech which cause "*significant on-campus disruption.*"²⁰ This approach provides a good solution for how to balance the students' freedom of speech and the University's interest in maintaining a safe and welcoming educational environment. As mentioned above, restrictions very rarely survive constitutional muster if they are content-based.

III. Recommended elements of an anti-bullying policy at the university level

Following the constitutional issues, this paper establishes a model anti-bullying policy for universities, considering the above. A proper policy shall include the following parts: jurisdiction, definitions, violations, reporting, procedure, and sanctions. These elements will be discussed in the next part of the article.

1. Jurisdiction

In order to apply a policy, the scope shall be precisely determined. Considering the fact that this research focused on the higher education context, students, faculty, and staff are

¹⁵ BARRETT, JAMES: *Public University Gets Worst Possible Free Speech Rating For Social Media Policy*. 2018, <https://www.dailywire.com/news/public-university-gets-worst-possible-free-speech-james-barrett>

¹⁶ FIRE: Student Handbook: Cyberbullying and Cyber Harassment Policy Statement, https://www.the-fire.org/fire_speech-codes/uwa-cyberbullying/

¹⁷ SEAY III 2015. p. 392., p.398.

¹⁸ Sacred Heart University Connecticut.

¹⁹ Sacred Heart University Connecticut Student Code of Conduct Section 2.

²⁰ Sacred Heart University Connecticut Student Code of Conduct Section 2.

covered by the scope. The definition of the student is important because their status could be wide-ranging. For instance, should we consider a high school student as a student of the given university, if he or she received a letter to be admitted? Can we proceed against a student for a conduct that occurred before they registered at the higher education institution? According to this article's perspective, the answer to these questions is positive. Of course, it can be debated, but usually, students, who are admitted to a university, are already familiar with the values and rules of the given institution. This may be one of the reasons they chose their university.

Regarding the faculty, the situation is easier, because we should include any faculty member (full-time, part-time, adjunct, and emeritus).

Also, staff shall include anyone hired by the University with administrative or professional responsibilities.²¹ Defining the personal scope of the policy is the first step, but another jurisdictional question must be decided, whether the policy governs off-campus activity or not. Generally, it is beyond discussion that any conduct occurring on-campus is under the jurisdiction of the university. Furthermore, *Hazelwood* declared that university-related (organized, supervised, sponsored) events and activities are considered on-campus.²² However, there is a question of off-campus conduct. In the course of my research, I spent several weeks at Penn State and the University of Toledo. Therefore, as I referred to it in the introduction, this article focuses on these two institutions' solutions, because I had the chance to talk to high-level officers dealing with student code of conduct cases. Consequently, instead of just desk research, I had an inside look to identify the crucial elements of any policy. Both of these institutions apply their Code of Conduct to off-campus behaviors. The Penn State Law solution is quite interesting because they use the substantial university interest standard, which means that the university will investigate and respond if the student's behavior falls under the scope of this standard. According to the Penn State Student Code of Conduct, substantial university interest is, if the conduct of the student:

- „a) constitutes a violation of local, state or federal law;*
- b) indicates that the student or student organization may present a danger or threat to the health or safety of themselves or others;*
- c) significantly impinges upon the rights, property or achievements of self or others or significantly breaches the peace and/or causes social disorder; or*
- d) is detrimental to the educational interests of the University.’’²³*

If we analyze this standard in light of the abovementioned First Amendment issues, we might receive interesting results. Regarding a), there is no issue, since violating the law may well-establish a conduct procedure. In the case of b), if online speech causes a danger to the safety of any member of the community, it should be a concern of the university. However, according to the SCOTUS standards, mentioned above, only true threat meets this threshold. True threat “*encompass[es] those statements where the speaker*

²¹ Penn State Student Code of Conduct.

²² *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), 271.

²³ Penn State Student Code of Conduct.

means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,... [t]he speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur."²⁴ Therefore, a student's off-campus online speech may present a danger to another student, but the question remains, whether it meets the true threat standard of SCOTUS. This paper argues that it might, but b) this policy might prohibit speech that would be otherwise protected by the First Amendment.

Concerning c) the text of the policy should be analyzed, whether it is narrowly tailored enough to put everybody on notice of what conduct is prohibited.²⁵ Last but not least, d) seems to fail the vagueness standard of a strict scrutiny review mentioned above. A reasonable person cannot clearly define, what 'detrimental' means. For instance, a freshman student travels back home for Christmas break and shares his experiences about the university in a Facebook post. In this post, he explained that the given university has a lack of resources, its teachers are not helpful, and he is disappointed in the institution, thus he encourages everybody to avoid applying to this university. As a freshman, presumably, he has several friends, who are seniors in high school, and might apply to other institutions instead of this one. Does this meet the substantial university interest standard? It might, but it is hard to decide, and this ambiguity could result in failing the vagueness doctrine. Consequently, the student in this hypothetical scenario might be subject to the conduct procedure, and in this case, he can definitely challenge this wording in court as vague, which chills speech protected by the First Amendment. Nonetheless, this standard has been used by Penn State for years without being challenged. Therefore, this research includes the substantial university interest standard in its policy, noting that it might be challenged in the future.

2. Definitions

Secondly, the strict scrutiny review is very focused on the text and wording.²⁶ For this reason, the policy shall define everything in a very accurate and precise way. Also, we should keep in mind that an anti-bullying policy might be just an add-on section to the Code of Conduct, and in this case, some basic elements are already defined, such as student, faculty, staff, on-campus, or off-campus. The student, faculty, and staff definitions were introduced above as part of the personal scope, but in this part, only the two most important definitions will be introduced: bullying and cyberbullying.

²⁴ *Virginia v. Black*, 538 U.S. 343, 2003, 344.

²⁵ *SEAY III* 2015, p. p. 392.

²⁶ See *People v. Marquan M.*, 2014 NY Slip Op 04881, New York Court of Appeals, *Speech First Inc. v. Schlissel*, 939 F.3d 756, United States Court of Appeals for the Sixth Circuit, 2019., *Seay III*. 2015.

Bullying already has a widely accepted definition (at least crucial elements), which includes repetition, intention to harm, and creating power imbalance.²⁷ Of course, many concepts may be used, but this policy applies the following definition: 'Repeated and harmful conduct towards any student, faculty, or staff with the intention to ridicule or humiliate, and it causes physical and/or mental harm or damage of property and it creates a power imbalance. If such result is reasonably foreseeable, it also establishes bullying conduct.' Repetition is a necessary element of offline bullying, just like the power imbalance between the bully and the victim. However, it can be argued that all of the results, such as physical harm, mental harm, or damage of property are covered by the Student Code of Conduct. Still, I found it important to include this element, because the model anti-bullying policy covers student-faculty scenarios as well, not just student-student cases. Therefore, the Code of Conduct may not be applicable. Also, the anti-bullying policy has the purpose to provide an additional tool to keep the community safe, which may cause redundancy in policies, but it is better to have more rules covering a specific form of conduct than having none.

The next important definition is cyberbullying. According to this paper, cyberbullying is 'an intentional, single or repeated conduct, committed by or against student or faculty or staff, through electronic communication, and with the intent to cause power imbalance and any of the following:

- a) causes physical or mental harm or loss of property, or the occurrence of any of these is reasonably foreseeable; or
- b) creates a hostile educational environment, or deprives the services, benefits, or possibilities provided by the school.²⁸
- c) use of another individual's identification or password.²⁹
- d) use of computing facilities and resources to interfere with the work of another student, faculty member, or University official, to send obscene, [lewd, sexually explicit], or abusive messages.

Note that cyberbullying has no widely accepted definition³⁰ like offline bullying does. Therefore, comprehensive research was necessary to identify the key elements from the

²⁷ OA/HRC/31/20, Office of the UN Special Representative of the Secretary-General on Violence against Children, 'Annual report', 5 January 2016. 12. point 61.; OLWEUS, DAN: *Invited Expert Discussion Paper – Cyberbullying: An overrated phenomenon?*. European Journal of Developmental Psychology, Vol. 9., 2012, pp. 520–538., p. 523.; HINDUJA, SAMEER–PATCHIN, JUSTIN W.: *Bullying Beyond the Schoolyard – Preventing and Responding to Cyberbullying*, (2nd ed.), Corwin. Thousand Oaks California, 2015. p. 12.; WEBER, NICOLE L. – PELFREY, WILLIAM V. JR.: *Cyberbullying – Causes, Consequences, and Coping Strategies*. LFB Scholarly Publishing LLC. 2014. p. 9.; SHARIFF, SHAHEEN: *Sexting and Cyberbullying - Defining the Line for Digitally Empowered Kids*. Cambridge University Press. 2015. pp. 8–9.; RODKIN, PHILIP C. – FISCHER, KARLA: *Cyberbullying form Psychological and Legal Perspectives*. Missouri Law Review. vol. 77. 2012. pp. 619–640., pp. 622–626.

²⁸ PONGÓ, TAMÁS: *Cyberbullying and the students' freedom of speech, with particular attention to the U.S. legal system*. PhD thesis. 2017, for English summary see: http://doktori.bibl.u-szeged.hu/4068/2/Pongo_Tamas_tezisek.pdf, pp. 27–28.

²⁹ UT Student Code of Conduct.

³⁰ Policy Department for Citizen's Rights and Constitutional Affairs: *Cyberbullying Among Young People*. European Union, 2016. p. 9., p. 19., p. 26.

legislative, case law, and academic perspectives. As a first step, I examined every US anti-bullying state law and narrowed the research to those 27 states which applied the term ‘cyberbullying’. In the course of the research, I found the most important elements of a working cyberbullying definition from a legislative point of view. Furthermore, I analyzed SCOTUS case law in student freedom of speech cases (*Tinker*,³¹ *Fraser*,³² *Hazelwood*,³³ *Morse*³⁴), and other federal and state court decisions (*Snyder*,³⁵ *Layshock*,³⁶ *Kowalski*,³⁷ *Wisniewski*,³⁸ *J.C.*³⁹). As a result, several elements were revealed, but not all of these were important for legislatures according to the previous step. Consequently, other elements were added to the definition. Last but not least, the academic perspective was researched worldwide. Controversies were found, such as the power imbalance being an essential element of any academic cyberbullying definition, but the US legislators applied this term only 6 times,⁴⁰ and during the research, Nevada erased it from its law.⁴¹

The above definition was established after the elements of these three perspectives were cross-referenced. Every cyberbullying definition shall include power imbalance because academia agrees that this is a necessity. Also, a single act could constitute cyberbullying (e.g. uploading one image, which inspires comments), as some US laws suggest.⁴² Furthermore, electronic communication shall be defined in order to avoid any vagueness. In this Policy, ‘electronic communication includes, but is not limited to, phone calls, text messages, e-mail, social media, and instant messages.’

These are the most important elements of a cyberbullying definition according to the research conducted.

3. Violations

In the case of an anti-bullying policy, the most important violation is, if someone under the scope and jurisdiction of this Policy commits bullying and cyberbullying as defined therein. Therefore, a student, faculty, or staff member can commit against these persons, on-campus or off-campus, but university-related (sponsored, organized, supervised) event or activity, or off-campus, if it violates the substantial university interest. As it was mentioned before, the Substantial University Interest may be challenged in court in the future, but until today it is used by Penn State without any constitutional debates.

³¹ *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

³² *Bethel School District v. Fraser*, 478 U.S. 675 (1986).

³³ *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

³⁴ *Morse v. Frederick*, 551 U.S. 393 (2007).

³⁵ *JS Ex Rel. Snyder v. Blue Mountain School District*, 650 F. 3d 915, Court of Appeals, 3rd Circuit (2011).

³⁶ *Layshock v. Hermitage School District*, 593 F. 3d 249, Court of Appeals, 3rd Circuit (2010).

³⁷ *Kowalski v. Berkeley County Schools*, 652 F. 3d 565, Court of Appeals, 4th Circuit (2011).

³⁸ *Wisniewski v. Board of Education of Weedsport Central School District*, Court of Appeals, 2nd Circuit (2007).

³⁹ *J.C. v. Beverly Hills Unified School District*, United States District Court, Central District of California, CV 08-03824 SVW (2009).

⁴⁰ PONGÓ 2017.

⁴¹ Nevada (SB504)(2015).

⁴² California Education Code §48900 (r)(1); Illinois Compiled Statutes 105 ILCS 5/27-23.7 (b).

Another violation could be the so-called disruptive conduct, which is used by the University of Toledo Student Code of Conduct and can be defined as

- „(a) actions that interfere with the normal operations of the University and/or interfere with the rights of other members of the University community or visitors;
- (b) actions that interfere with, or obstruct the orderly conduct, processes, and functions in the classroom, or other instructional settings;
- (c) disorderly, lewd, or indecent behavior;
- (d) participating in, leading, or inciting others to disrupt scheduled and/or normal campus activities, events, and programs.”⁴³

Regarding this definition, (a) and (b) are referring to the *Tinker* prongs defined by the SCOTUS⁴⁴ and (c) is applying the term 'lewd', which was used by the SCOTUS in *Fraser*.⁴⁵ Consequently, this wording may pass constitutional muster since it applies terms established by the SCOTUS decades ago in connection with students' freedom of speech cases.

Furthermore, retaliation as a violation should be included, especially if the policy allows anonymous reporting (and it does as you can see below). Highly important to put everyone on notice that reporting an alleged bullying conduct for retaliation purposes is also a violation. Such an approach can avoid fake and malicious reporting practices at the university.

As a general rule, it is useful to declare that these violations are not in controversy with the First Amendment, and its sole purpose is to maintain a safe and welcoming school community, but without suppressing constitutionally protected speech.

4. Reporting and the procedure

First of all, the university shall promote the importance of prevention. The anti-bullying policy must be publicly available on the official website and in every building as a hard copy. Furthermore, the freshman students must participate in anti-bullying training during orientation week. Faculty and staff also shall be trained on an annual basis. Thanks to the training, every member of the community under the scope of this Policy is aware of the reporting form and the following procedure. A report of alleged bullying or cyberbullying conduct may be filed in different ways, such as an online reporting form, via telephone or e-mail, or in person at a designated person or body. This paper strongly encourages anonymous reporting, because it protects the reporter. However, it has its pitfalls since anyone can report from anywhere, so it might have a retaliatory effect. In the course of my discussion with the experts both at UT and Penn State, they all agreed that this hindering effect can be eliminated by inviting the affected person for a talk. This informal

⁴³ UT Student Code of Conduct.

⁴⁴ TINKER p. 509., p. 513.

⁴⁵ FRASER p. 686.

meeting provides great help regarding mapping the situation and why the report was submitted. Also, anonymous reporting could be a good way for bystanders to call the university's attention to ongoing bullying or cyberbullying conduct without getting involved in the process, and allow that person to avoid becoming the next target due to reporting.

In other cases, an investigation may be necessary to explore evidence. The investigation officer submits the report about the results to a designated body (hereinafter referred to as Hearing Board (HB) to adopt a decision. The recommended number of HB members is at least five persons, including one faculty, one person with expertise in student conduct cases, and one student. The procedure of the HB shall be closed to the public, only the persons subject to the procedure and the people invited by the HB may be present. In the procedure, no representation is allowed in order to avoid the academic procedure transforming into a quasi-court procedure.

A highly important requirement is that the standard used by the HB shall be the preponderance of evidence standard instead of the beyond reasonable doubt applied by criminal courts. The preponderance of evidence standard means that in light of the evidence presented the alleged bullying or cyberbullying conduct is more likely to have happened than not. As a result of the different standards, it might happen that a student is found to violate the academic rules, but is acquitted at the criminal court due to the different standards of proof. After the evidence is presented by the parties and assessed by the HB under the preponderance of evidence standard, the decision shall be adopted with the majority of votes. If any party disagrees with the decision, they have the right to seek a remedy within the university. Usually, such remedy is an appeal to the Vice-President responsible for student affairs, but any other person or designated body may be appointed to carry out this duty.

5. Disciplinary sanctions

The primary purpose of sanctions is education. Also, a policy shall include more serious sanctions as well to provide an adequate response to the more severe and pervasive violations. These sanctions are important, but as a first step, an informal meeting and discussion are useful, because sometimes a 'warning talk' can resolve the issue. A person subject to the report may not know that his/her actions are violating any university policies. According to my discussions with student conduct officers, informal meetings are very useful tools to handle minor incidents. Even though sometimes the action of a student does not rise to the level of conduct violation, it easily could be subject to it. In such cases, a talk with the high-level leader responsible for student affairs (e.g. Vice-President) could deter the student from continuing such behavior. The educational approach of a policy supports this idea because the primary purpose is to educate and solve the issue, not to punish the student.

However, these informal meetings cannot always provide a solution, thus formal sanctions are needed. An anti-bullying policy shall include sanctions applicable to students, faculty, and staff as well. This article focuses on students, but a policy governs faculty and staff as well. In light of an educational standpoint, written warnings, probation, or mandatory training, workshops are the first step. Both at Penn State and UT, different

workshops are organized for the students as a sanction to avoid further conduct procedures, such as decision-making workshops or group discussions about a topic. Also, students subject to the sanction may be asked to conduct some research in the field or write a reflection paper about his/her behavior. When major intervention is necessary, suspension or expulsion is also available, but according to the officials, it is extremely rare. Nonetheless, such sanctions shall be included in a policy, because bullying and cyberbullying could lead to very serious consequences in the higher education context.⁴⁶ Furthermore, sanctions for faculty and staff misconduct shall be provided by a policy. Loss of salary increase or a fine can have a deterring effect and administrative leave may be imposed for more serious violations. The most severe sanction could be the revocation of tenure, which is similar to the expulsion of a student. However, revocation of tenure cannot be decided by the HB of this policy, they only can refer the case to the responsible body together with their recommendations. Every university has its own procedure for revocation of tenure, so this policy and the HB have no intention to get involved in such a proceeding.

In summary, the above-introduced elements are the most crucial ones concerning an anti-bullying policy in the higher education context.

IV. Conclusions

This article focused on the establishment of an anti-bullying policy in the higher education context. First, the relevant constitutional concerns were revealed, especially the problem of content-based restriction of speech and the vagueness doctrine. In the US, the paramount First Amendment does not tolerate many speech restrictions, especially if they are based on the content of the speech and not the time, place, or manner. Therefore, content-based restrictions fall under strict scrutiny, where it shall be proved that the text of the limitation was narrowly tailored and a compelling governmental interest was present. However, it represents a high bar to pass since such restriction is assumed to be unconstitutional. Consequently, an anti-bullying policy, which affects the students' speech, might chill protected speech as well. Also, the courts are entitled to decide, whether the wording of the policy was narrowly tailored enough. Therefore, the result of a policy being challenged is highly unpredictable, because it is assumed to be unconstitutional, and also the judge will decide on the vagueness issue.

Despite these concerns, this paper introduced the most important elements of an anti-bullying policy for universities. Jurisdictional questions are the first step, including the personal scope and the regulation of off-campus conduct or speech. The present policy applies the Substantial University Interest standard, even though, it raised concerns about its constitutionality, if it will be challenged in court. Secondly, the definitions must be

⁴⁶ Tyler's Story, <http://tylerclementi.org/tylers-story/>; PILKINGTON, ED: *Tyler Clementi, student outed as gay on internet, jumps to his death*. The Guardian 2010, <https://www.theguardian.com/world/2010/sep/30/tylerclementi-gay-student-suicide>; See MAILI PÖRHÖLÄ ET AL.: *Bullying in university between peers and by personnel: cultural variation in prevalence, forms, and gender differences in four countries*. Social Psychology of Education. (23)2020, 143-169. pp.

narrowly tailored enough to put everybody on notice. Bullying and cyberbullying definitions are the most crucial ones regarding this paper, thus they were more deeply analyzed. Next, the violations of these policies were established, like bullying, cyberbullying, disruptive conduct, and retaliation. Also, it was emphasized that speech protected by the First Amendment cannot be considered a violation of this policy. Following these elements, the reporting system and procedure were determined. According to this article's viewpoint, reporting could be anonymous and filed via an online reporting form or other forms. Anonymous reporting might have its pitfalls, but pursuant to my discussions with high-level and experienced conduct procedure experts, they can handle this situation by inviting the person subject to the report for an informal talk to assess the situation. In the procedure, the preponderance of evidence standard is applied, which is a lower bar than the beyond reasonable doubt used by courts. At the end of the procedure, each party has the right to seek legal remedy. Furthermore, a sanction will be imposed, if the alleged violation of the policy is established, and different sanctions may be applied to students, faculty, and staff. However, the primary purpose of the sanction is education regarding students in particular. In addition to a written warning or probation, mandatory training or workshops can help to achieve the educational goal of sanctions.

In summary, establishing an anti-bullying policy for universities in the US will always be extremely difficult, because it will have a significant influence on students' speech, which is highly protected by the First Amendment. Moreover, the wording of the policy must be narrowly tailored enough to pass the constitutional muster and vagueness doctrine, which depends on the court, which decides the case. Therefore, I would like to say thank you to every professor and expert, who helped my research overseas, and wish them good luck and persistence, because it is hard work to balance the freedom of speech and the safety of the university community on a daily basis.

PONGÓ TAMÁS

MIÉRT OLYAN NEHÉZ EGY ANTI-BULLYING SZABÁLYZAT KIMUNKÁLÁSA AZ EGYESÜLT ÁLLAMOKBAN?

(Összefoglalás)

Jelen tanulmány tömör és átfogó áttekintést nyújt az Egyesült Államokban (a Pennsylvania State University és a University of Toledo egyetemeken), végzett 4 hónapos kutatóút eredményeiről. A kutatás az egyetemi szintű anti-bullying (bántalmazás, megfélemlítés) szabályzatok kialakítására összpontosított, és megpróbál megoldást kínálni az amerikai és a magyar egyetemek számára is egy modell-szabályzat elemeinek kialakításával. A kutatás során mindkét egyetemen több interjút és beszélgetést folytatott a szerző elismert szakértőkkel és gyakorló munkatársakkal, annak érdekében, hogy feltárja és megismerje, melyek a szabályzat megalkotását akadályozó hatások. Ennek eredményeképpen, a szerző elkészített egy mintaszabályzatot angol és magyar nyelven, amely iránymutatásul

szolgálhat az amerikai és hazai felsőoktatási intézményeknek egyaránt. Az első részben a kérdéskör alkotmányjogi jellegű problémáit ismerhetjük meg röviden. A következő részben a szabályzat felépítése és az ajánlott elemek kerülnek bemutatásra és elemzésre, figyelemmel az első részben megismert alkotmányjogi kérdésekre. A jelentős egyetemi érdek (substantial university interest), az anonim módon történő jelentéstétel, az informális találkozók és a hivatalos szankciók fontossága csupán néhány a releváns elemek közül. Noha sem az Egyesült Államokban, sem Magyarországon nem elterjedt az ilyen szabályzatok megléte, azonban a jelenség mindkét ország felsőoktatási rendszerében tetten érhető, így indokolt ezek bevezetése, amelyhez jelen tanulmány segítséget kíván nyújtani.