

# *Nova Law Review*

---

*Volume 37, Issue 2*

2013

*Article 2*

---

## Walking the Regulatory Tightrope: Balancing Bullies' Free Speech Rights Against the Rights of Victims to be Let Alone when Regulating Off Campus K-12 Student Cyber-Speech

Lisa Smith-Butler\*

\*

Copyright ©2013 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

**WALKING THE REGULATORY TIGHTROPE: BALANCING BULLIES' FREE SPEECH RIGHTS AGAINST THE RIGHTS OF VICTIMS TO BE LET ALONE WHEN REGULATING OFF CAMPUS K-12 STUDENT CYBER-SPEECH**

I. INTRODUCTION ..... 243  
 II. FIRST AMENDMENT: STUDENT CYBERSPEECH..... 254  
     A. *First Amendment: What Does It Mean?*..... 254  
     B. *Morse Quartet* ..... 255  
     C. *Circuit Courts: Split or Reconcilable?* ..... 259  
     D. *District Courts: More Confusion?* ..... 278  
 III. THE DEPARTMENT OF EDUCATION'S OFFICE OF CIVIL RIGHTS..... 290  
 IV. STATE ANTI-BULLYING LAWS ..... 294  
 V. ANALYSIS ..... 297  
 VI. CONCLUSION ..... 307

LISA SMITH-BUTLER\*

I. INTRODUCTION

Jared and Delilah—two high school students at James Island County High—dated for months, claiming each other as “soul mates.” A new student, Perry, then arrived at school, and Delilah broke up with Jared to pursue a relationship with Perry. After the breakup, Jared hated Delilah and thought the worst of her. While working from home on his laptop, Jared posted comments to his Facebook page, stating that Delilah was a lying, cheating whore who was HIV positive. Other derogatory comments followed. Classmates shared Jared’s post. Many of the school’s students and some of the school’s personnel read the comments while at home. A national news reporter related to one of the school’s teachers saw the post, picked up the story, and began publishing a series of articles on teen cyberbullying. The school was in an uproar. Students sided with either Jared or Delilah. No one stayed neutral. Delilah and her parents went to school to complain to the principal. They alleged that Jared’s behavior constituted harassment of Delilah because of her sex. Delilah and her parents insisted that the school punish Jared.

While the above is a hypothetical, it is a scenario that schools and school administrations are facing across the country. This is speech that takes place off-campus and after school hours yet it impacts the school. Can the principal address the issue and punish Jared for this speech? Should the

principal tell Delilah and her parents that their options are limited to suing Jared for libel? Can the school lose its funding from the Department of Education for failing to enforce anti-harassment policies? Is there liability to which the school will be subjected at the state level for failing to adequately address cyberbullying? These are conflicts that American school personnel now face on a frequent basis. How do school officials handle and resolve the conflicting rights of students, their parents, and teachers regarding free speech with the right to be let alone and be free from bullying and cyberbullying?

This article will examine whether public school officials can regulate and punish off-campus student cyberspeech when this speech makes its way onto the school's campus. It will review recent federal district and circuit court decisions from the past decade that interpret and apply the Supreme Court of the United States' student speech analysis.<sup>1</sup> It will examine the interaction of this analysis with the First Amendment,<sup>2</sup> the Department of Education's Office for Civil Rights' laws and the Department of Education's interpretation of harassment that applies to schools,<sup>3</sup> and state legislatures' attempts to limit and cope with cyberbullying in the public school setting.<sup>4</sup>

While bullying has been an issue with which schools and students have coped for decades, if not centuries, cyberbullying is a recent phenomenon.<sup>5</sup> How is cyberbullying defined,<sup>6</sup> and how does it differ from bullying?

---

\* Lisa Smith-Butler is the Associate Dean for Information Resources and Associate Professor of Law at the Charleston School of Law where she teaches Children and the Law. She would like to thank her research assistants, Brianna Hewitt, Annie Andrews, and Cassandra Hutchens for their research assistance with this article and her assistant, Carrie Cranford. She would also like to thank colleagues, present and former, as well as the librarians at the Charleston School of Law, for reviewing the article and offering suggestions.

1. See discussion *infra* Part II.B–C.

2. See discussion *infra* Part II.

3. See discussion *infra* Part III. The Department of Education's Office of Civil Rights enforces civil rights laws for programs that receive federal funding from the Department of Education. OCR: *Know Your Rights*, ED.GOV, <http://www2.ed.gov/about/offices/list/ocr/know.html> (last modified April 5, 2012). Because of this, the Department of Education interacts frequently with school administrators for elementary and secondary schools, vocational schools, colleges and universities, proprietary schools, state education agencies, libraries, and museums. See 20 U.S.C. § 3413 (2006); see also OCR: *Know Your Rights*, *supra*. The Office of Civil Rights enforces the statutes prohibiting discrimination “on the basis of race, color, and national origin, sex, [and] disability.” OCR: *Know Your Rights*, *supra*; see also 20 U.S.C. § 1681; 42 U.S.C. §§ 12131, 2000d.

4. See *infra* note 78 and accompanying text.

5. See Robin M. Kowalski, *Teasing and Bullying*, in *THE DARK SIDE OF INTERPERSONAL COMMUNICATION* 169, 169 (Brian H. Spitzberg & William R. Cupach eds., 2d ed. 2007); R. CHACE RAMEY, *STUDENT FIRST AMENDMENT SPEECH AND EXPRESSION RIGHTS: ARMBANDS TO BONG HITS* 139 (Melvin I. Urofsky ed., 2011).

Several decisions from lower courts provide examples that demonstrate courts' definitions of cyberbullying. In the last few years, the United States Courts of Appeals for the Second, Third, Fourth, and Eighth Circuits heard arguments and then published decisions involving off-campus student cyber-speech.<sup>7</sup> A review of each decision provides examples of what the courts and legislatures consider to constitute cyberbullying or threats. While the United States Court of Appeals for the Second and Third Circuits have handed down two decisions each on the topic,<sup>8</sup> the United States Court of Appeals for the Fourth and Eighth Circuits each issued only one opinion.<sup>9</sup>

The United States Court of Appeals for the Second Circuit considered two cases involving off-campus student cyberspeech.<sup>10</sup> Both decisions involved speech that was critical of school officials.<sup>11</sup> In one case, a middle school student created an instant message icon on his home computer that showed a "pistol firing a bullet at a person's head, above which were dots representing spattered blood. Beneath the drawing appeared the words 'Kill Mr. VanderMolen.'"<sup>12</sup> Four years later, the court confronted a similar case in which a student disagreed with a school's decision to refuse to allow students to use a certain facility on a particular date for Jamfest.<sup>13</sup> The school gave the students the option to hold Jamfest in another location or reschedule the

---

6. The Oxford English Dictionary defines cyberbully as "cyberbully, *n*[oun], (a) an experienced user of computers who intimidates new users (*nonce-use*); (b) a person who engages in cyberbullying." *Cyber-bully*, OXFORD ENG. DICTIONARY, <http://www.oed.com/view/Entry/250879?redirectedFrom=cyber-bully#eid212385813> (subscription required) (last visited Nov. 10, 2012) (copy on file with *Nova Law Review*). "The anonymity afforded by cyberbullying suggests that cyberbullies are, in all likelihood, not the same individuals as the schoolyard bullies." Kowalski, *supra* note 5, at 190.

7. See *Doninger v. Niehoff (Doninger II)*, 642 F.3d 334, 340, 358 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35, 40 (2d Cir. 2007); *Layshock ex rel. Layshock v. Hermitage Sch. Dist. (Layshock II)*, 593 F.3d 249, 263 (3d Cir.), *vacated en banc, reh'g granted en banc*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010), *cert. denied sub nom. Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist. (J.S. ex rel. Snyder II)*, 593 F.3d 286, 295, 308 (3d Cir.), *vacated en banc, reh'g granted en banc*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010), *cert. denied*, 132 S. Ct. 1097 (2012); *Kowalski v. Berkeley Cnty. Sch. (Kowalski I)*, 652 F.3d 565, 567, 577 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist.* No. 60, 647 F.3d 754, 756, 767 (8th Cir. 2011).

8. See *Doninger II*, 642 F.3d at 344; *J.S. ex rel. Snyder II*, 593 F.3d at 307–08; *Layshock II*, 593 F.3d at 263; *Wisniewski*, 494 F.3d at 39–40.

9. *D.J.M. ex rel. D.M.*, 647 F.3d at 764, 767; *Kowalski I*, 652 F.3d at 574.

10. *Doninger II*, 642 F.3d at 344–48; *Wisniewski*, 494 F.3d at 39–40.

11. *Doninger II*, 642 F.3d at 344–48; *Wisniewski*, 494 F.3d at 39–40.

12. *Wisniewski*, 494 F.3d at 36 (footnote omitted).

13. *Doninger II*, 642 F.3d at 339.

event.<sup>14</sup> Students objected.<sup>15</sup> One student, Avery Doninger, created a blog at home on her parents' computer, urging students, their parents, and concerned citizens to call the "douchebags" at the school office to complain.<sup>16</sup> In both of these decisions, the school's punishment of the students' speech was allowed to stand.<sup>17</sup>

The United States Court of Appeals for the Third Circuit also dealt with cases that involved the use of the internet to criticize school officials.<sup>18</sup> The court confronted two cases in its 2009 term.<sup>19</sup> One case arose from the Middle District of Pennsylvania,<sup>20</sup> while the other case came out of the Western District of Pennsylvania.<sup>21</sup> Both cases involved similar facts yet two different panels appeared to reach opposite results.<sup>22</sup> In one case, a high school senior created a parody profile of his high school principal while at home on his MySpace account, referring to the principal as a "big steroid freak," "big whore," and "big fag" along with other "big" insults.<sup>23</sup> He then shared the profile parody with other friends from school.<sup>24</sup> While the court was sympathetic to the principal's distress, it concluded that the school's punishment had violated the student's free speech rights.<sup>25</sup> On the same day, a different panel of the United States Court of Appeals for the Third Circuit also handed down a decision, arising from the United States District Court for the Middle District of Pennsylvania, involving another high school parody of a school

---

14. *Id.*

15. *Id.*

16. *Id.* at 334, 340–41.

17. *Id.* at 351, 358; *Wisniewski*, 494 F.3d at 40.

18. *See, e.g., J.S. ex rel. Snyder II*, 593 F.3d 286, 286, 290 (3d Cir.), *vacated en banc, reh'g granted en banc*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010), *cert. denied*, 132 S. Ct. 1097 (2012).

19. *Id.* at 286; *Layshock II*, 593 F.3d 249, 249, 251 (3d Cir.), *vacated en banc, reh'g granted en banc*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010), *cert. denied sub nom.* Blue Mountain Sch. Dist. v. *J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

20. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist. (J.S. ex rel. Snyder I)*, No. 3:07cv585, 2008 WL 4279517, at \*1 (M.D. Pa. Sept. 11, 2008), *aff'd in part, rev'd in part en banc*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

21. *Layshock ex rel. Layshock v. Hermitage Sch. Dist. (Layshock I)*, 496 F. Supp. 2d 587, 587 (W.D. Pa. 2007) *aff'd in part en banc*, 650 F.3d 205 (3d Cir. 2011), *cert. denied sub nom.* Blue Mountain Sch. Dist. v. *J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

22. Paul Easton, Comment, *Splitting the Difference: Layshock and J.S. Chart a Separate Path on Student Speech Rights*, 53 B.C. L. REV. E. SUPP. 17, 17 (2012), [http://bclawreview.org/files/2012/02/02\\_easton.pdf](http://bclawreview.org/files/2012/02/02_easton.pdf). Compare *J.S. ex rel. Snyder II*, 593 F.3d at 307–08, with *Layshock II*, 593 F.3d at 264.

23. *Layshock II*, 593 F.3d at 252–53.

24. *Id.* at 253.

25. *Id.* at 264.

principal.<sup>26</sup> In this particular case, a student created an online profile of her high school principal, describing his interests as: “detention. being a tight ass. riding the fraintain. spending time with my child (who looks like a gorilla). baseball.my golden pen. [sic] fucking in my office. hitting on students and their parents.”<sup>27</sup> This decision upheld the school’s punishment of the student.<sup>28</sup>

While both the United States Courts of Appeals for the Second and Third Circuits heard cases involving student criticism of school officials, the United States Court of Appeals for the Fourth Circuit heard and published an opinion in a case involving student-on-student internet speech.<sup>29</sup> The decision arose in West Virginia and involved a female student who created a web page that was allegedly about another classmate.<sup>30</sup> The website labeled the female student a “whore” and stated that “Shay [h]as [h]erpes.”<sup>31</sup> The student, Kara Kowalski, was suspended and then she sued, alleging a violation of her free speech.<sup>32</sup> The court concluded that the school did not violate her free speech rights when it punished her.<sup>33</sup>

Lastly, the United States Court of Appeals for the Eighth Circuit reviewed, *de novo*, a decision for summary judgment from the United States District Court for the Eastern District of Missouri in *D.J.M. ex rel. D.M. v. Hannibal Public School District No. 60*.<sup>34</sup> *D.J.M. ex rel. D.M.* differs from the *Snyder v. Phelps*,<sup>35</sup> *Kowalski v. Berkeley County School (Kowalski I)*,<sup>36</sup> *Layshock ex rel. Layshock v. Hermitage School District (Layshock III)*,<sup>37</sup> *Doninger v. Niehoff (Doninger II)*,<sup>38</sup> and *Wisniewski v. Board of Education*<sup>39</sup>

26. See *J.S. ex rel. Snyder II*, 593 F.3d at 286, 290–91; *J.S. ex rel. Snyder I*, No. 3:07cv585, 2008 WL 4279517, at \*1 (M.D. Pa. Sept. 11, 2008), *aff’d in part, rev’d in part en banc*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

27. *J.S. ex rel. Snyder II*, 593 F.3d at 291 (footnote omitted).

28. *Id.* at 307–08.

29. *Kowalski I*, 652 F.3d 565, 565, 567 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); see also *Doninger II*, 642 F.3d 334, 334, 339–40 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *J.S. ex rel. Snyder II*, 593 F.3d at 286, 291; *Layshock II*, 593 F.3d at 249, 252; *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 34–36 (2d Cir. 2007).

30. *Kowalski I*, 652 F.3d at 567.

31. *Id.* at 568.

32. *Id.* at 567, 569–70.

33. *Id.* at 577.

34. 647 F.3d 754–55, 757 (8th Cir. 2011).

35. 131 S. Ct. 1207 (2011).

36. 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).

37. 650 F.3d 205 (3d Cir. 2011) (en banc), *cert. denied sub nom.* *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

38. 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011).

39. 494 F.3d 34 (2d Cir. 2007).

decisions, because *D.J.M. ex rel. D.M.* involved threats against other students, made by D.J.M. to another classmate, via his home computer.<sup>40</sup> A concerned classmate shared the threatening emails, which included threats to “get[] a gun and shoot[] other students,” with the principal who then contacted the police.<sup>41</sup> After D.J.M. was released from juvenile detention, he was suspended for ten days by the school; shortly thereafter, he was suspended for the remainder of the semester.<sup>42</sup> D.J.M. and his parents then sued the school, arguing that his First Amendment speech rights had been violated as he contended that his threats did not constitute “true threats.”<sup>43</sup> The Eighth Circuit upheld the United States District Court for the Eastern District of Missouri’s grant of summary judgment in favor of the Hannibal School District.<sup>44</sup>

All of the above cases describe factual backgrounds from circuit court decisions that involved off-campus student cyberspeech, which ultimately found its way on campus.<sup>45</sup> Students used their home computers, working on their own time rather than school time, to create web pages that were aimed at officials or classmates to protest or complain about school-related personnel, classmates, or events.<sup>46</sup> Although these web pages were created off-campus without school equipment, the schools punished—typically either with suspension or expulsion—the speech and the students.<sup>47</sup> These punishments were then appealed by parents, arguing such school conduct violated the students’ First Amendment rights.<sup>48</sup>

This type of speech has existed for years in school settings.<sup>49</sup> Principals disciplined.<sup>50</sup> Students grumbled.<sup>51</sup> Students insulted each other. Because the speech was not easily or readily publicized, it went unnoticed and was

---

40. Compare *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 756–57 (8th Cir. 2011), with *Snyder*, 131 S. Ct. at 1213, *Kowalski I*, 652 F.3d at 567, *Layshock III*, 650 F.3d at 207–08, *Doninger II*, 642 F.2d at 339, and *Wisniewski*, 494 F.3d at 35–36.

41. *D.J.M. ex rel. D.M.*, 647 F.3d at 756.

42. *Id.* at 757.

43. *Id.* at 759–60; see also U.S. CONST. amend. I.

44. *D.J.M. ex rel. D.M.*, 647 F.3d at 767.

45. See Martha McCarthy, *Student Electronic Expression: Unanswered Questions Persist*, 277 EDUC. L. REP. 1, 4–9 (2012).

46. *Id.*

47. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35–37 (2d Cir. 2007); McCarthy, *supra* note 45, at 4–8.

48. See McCarthy, *supra* note 45, at 5–8.

49. See RAMEY, *supra* note 5, at 1.

50. *Id.*

51. See *id.*

ignored.<sup>52</sup> The internet, or cyberspace, changed this.<sup>53</sup> Principals and school personnel were mocked and insulted online.<sup>54</sup> Student rivalries and bullying moved off the playground and online.<sup>55</sup> What once took weeks, months, and sometimes years to travel through a community now buzzed through it in hours, if not minutes.<sup>56</sup> What was once only local news, now often goes viral, becoming national news in just hours.<sup>57</sup>

If such behavior was ignored in the past, why are school authorities now eager to regulate this type of student speech? Are schools seeking to expand their authority and power over students? Or, are schools trying to reign in students and sort out threats, cope with the effects of student-on-student cyberbullying, and teach students civil discourse in addition to teaching the standard curriculum while also coping with the impact of No Child Left Behind? What happened?

April 20, 1999<sup>58</sup> altered the public school landscape as thoroughly as September 11, 2001<sup>59</sup> changed air travel. On April 20th, Eric Harris and Dylan Klebold opened fire at 11:19 a.m. at Columbine High School in Columbine, Colorado.<sup>60</sup> Their massacre lasted forty-nine minutes.<sup>61</sup> They killed thirteen people and wounded twenty-four.<sup>62</sup> Their rampage ended at 12:08 p.m. when they committed suicide,<sup>63</sup> bringing the total number killed in the

52. See VICTORIA STUART-CASSEL ET AL., U.S. DEP'T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES 1 (2011), available at <http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf>; Kowalski, *supra* note 5, at 185.

53. See RAMEY, *supra* note 5, at 139.

54. *Id.* at 139, 141.

55. See *id.* at 141–42; Jocelyn Ho, Note, *Bullied to Death: Cyberbullying and Student Online Speech Rights*, 64 FLA. L. REV. 789, 791 (2012).

56. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35 (2d Cir. 2007); see DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 11 (2007).

57. For an example of local news rapidly becoming national news, consider the story of Karen Klein. *Online Campaign Winds Down for Bullied NY Woman*, AP: THE BIG STORY, July 20, 2012, 3:13 PM, <http://www.bigstory.ap.org/article/online-campaign-winds-down-bullied-ny-woman>. In June of 2012, Karen Klein, a bus monitor employed by the public school system in Greece, New York, was recorded being bullied by students on the bus. *Id.* The video was posted online and “show[ed] Klein enduring profanity, insults, and threats from middle school students on a school bus.” *Id.*

58. See DAVE CULLEN, COLUMBINE 4–5 (2009) [hereinafter CULLEN, COLUMBINE].

59. See Garrick Blalock et al., *The Impact of Post-9/11 Airport Security Measures on the Demand for Air Travel*, 50 J.L. & ECON. 731, 731, 733 (2007).

60. CULLEN, COLUMBINE, *supra* note 58, at 4–7, 35, 46.

61. *Id.* at 83.

62. *Id.* at 4–5.

63. *Id.* at 83.

Columbine Massacre to fifteen.<sup>64</sup> An investigation revealed hate-filled web sites created by the student killers, journal entries containing threats and plans, and other bizarre behaviors.<sup>65</sup> While some of these items came to the attention of law enforcement before the massacre, none of it was taken seriously until after the massacre.<sup>66</sup> Recrimination, blame, lawsuits, new school policies, and zero tolerance resulted.<sup>67</sup> When asked for an explanation for Harris's and Klebold's behavior, some said they had been bullied.<sup>68</sup>

Besides school violence and school shootings,<sup>69</sup> cyberbullying and cyberharassment have become well-publicized problems that public schools are encountering.<sup>70</sup> In Massachusetts, in January of 2010, high school freshman, Phoebe Prince, committed suicide after enduring on-campus bullying and cyberbullying that her parents allege the school's administration knew about, but did nothing to stop.<sup>71</sup> What cyberbullying was used? Besides in-school taunts and insults, students also posted on Prince's Facebook page, calling her a "slut" and "whore."<sup>72</sup> Three of the six students charged with the criminal harassment, i.e., bullying, of Prince were placed on probation in May of 2011<sup>73</sup> while the town of South Hadley settled its suit by Prince's parents for

---

64. *See id.* at 5, 83–84.

65. CULLEN, COLUMBINE, *supra* note 58, at 35, 183–84.

66. *Id.* at 84–85, 165–66, 220.

67. David L. Hudson, Jr., *Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine*, 2000 L. REV. MICH. ST. U. DETROIT C.L. 199, 209–10 (2000).

68. CULLEN, COLUMBINE, *supra* note 58, at 157–58, 339.

69. Since April 20, 1999, there have been more than thirty public school shootings in the United States. *Time Line of Worldwide School and Mass Shootings*, INFOPLEASE, <http://www.infoplease.com/ipa/A0777958.html> (last visited Feb. 24, 2013).

70. Kathleen Conn, *Allegations of School District Liability for Bullying, Cyberbullying, and Teen Suicides After Sexting: Are New Legal Standards Emerging in the Courts?*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 227, 240–41 (2011).

71. Kevin Cullen, *A Mother's Farewell, Forbidding Vengeance: Phoebe Prince, Her Daughter, Lost, She Shares a Shattered Heart*, BOS. GLOBE, May 15, 2011, at A1.

72. *U.S. Teenagers Charged over Suicide of Irish 'New Girl' Targeted in 'Relentless' School Bullying Campaign*, MAIL ONLINE (Mar. 31, 2010, 12:03 AM), <http://www.dailymail.co.uk/news/article-1262487/phoebe-prince-9-us-teenagers-charged-suicide-death-irish-new-girl.html>.

73. Erik Eckholm, *3 Ex-Students Get Probation in Bullying Linked to a Suicide*, N.Y. TIMES, May 5, 2011, <http://www.nytimes.com/2011/05/06/us/06bully.html>.

\$225,000.<sup>74</sup> Since Prince's death, there have been several high profile cyber-bullying cases involving student suicides.<sup>75</sup>

With school violence and cyberbullying increasing,<sup>76</sup> schools, school boards, state legislatures, and the Department of Education are attempting to create solutions to deal with the rise of bullying, cyberbullying, and cyber-harassment. According to the National School Board Association, forty-eight states as of April 2012<sup>77</sup> have enacted some form of legislation<sup>78</sup> that concerns bullying, cyberbullying, or harassment by students in the public school setting.<sup>79</sup> The Department of Education's Office for Civil Rights drafted and published a Dear Colleague Letter (DCL) on October 26, 2010,

---

74. O'Ryan Johnson, *Town Paid \$225G to Avoid Phoebe Prince Suit: ACLU Forces South Hadley to Disclose Sum*, BOS. HERALD, Dec. 28, 2011, [http://bostonherald.com/news/regional/view/2011\\_1228town\\_paid\\_225g\\_to\\_avoid\\_prince\\_suit\\_aclu\\_forces\\_south\\_hadley\\_to\\_disclose\\_sum](http://bostonherald.com/news/regional/view/2011_1228town_paid_225g_to_avoid_prince_suit_aclu_forces_south_hadley_to_disclose_sum).

75. Ho, *supra* note 55, at 789. For further commentary, as well as discussion of specific cases of "bullycide," see Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 392-94 (2012).

76. Ho, *supra* note 55, at 789.

77. See NAT'L SCH. BDS. ASS'N, STATE ANTI-BULLYING STATUTES APRIL 2012 (2012), <http://www.nsba.org/SchoolLaw/Issues/Safety/Table.pdf>.

78. ALA. CODE §§ 16-28B-1 to -9 (2012); ALASKA STAT. §§ 14.33.200-.250 (2012); ARIZ. REV. STAT. ANN. § 15-341 (2012) (West); ARK. CODE ANN. § 6-18-514 (2012); CAL. EDUC. CODE §§ 32261, 48900, 48900.4 (West 2012); COLO. REV. STAT. §§ 22-93-101 to -106 (2012); CONN. GEN. STAT. § 10-222d (2012); DEL. CODE ANN. tit. 14, § 4112D (2012) (LexisNexis); FLA. STAT. § 1006.147 (2012); GA. CODE ANN. § 20-2-751.4 (2012); HAW. CODE R. §§ 8-19-2, -6 (LexisNexis 2012); IDAHO CODE ANN. § 18-917A (2012); 105 ILL. COMP. STAT. 5/10-22.6, 5/27-23.7 (2012); IND. CODE §§ 20-26-5-33, 20-33-8-0.2, 20-33-8-13.5 (2012); IOWA CODE § 280.28 (2012); KAN. STAT. ANN. § 72-8256 (2012); KY. REV. STAT. ANN. §§ 525.070, .080 (LexisNexis 2012); LA. REV. STAT. ANN. §§ 14:40.7, 17:416.1 (2012); ME. REV. STAT. tit. 20-A, § 1001 (2012); MD. CODE ANN., EDUC. §§ 7-424, 7-424.1 (LexisNexis 2012); MASS. GEN. LAWS ch. 71, § 37O (2012); MICH. COMP. LAWS § 380.1310b (2012); MINN. STAT. §§ 120B.232, 121A.0695 (2012); MISS. CODE ANN. §§ 37-11-20, -67 (2012); MO. REV. STAT. § 160.775 (2012); NEB. REV. STAT. §§ 79-267, 79-2,137 (2012); N.H. REV. STAT. ANN. §§ 193-F:1 to :6 (2012); N.J. STAT. ANN. §§ 18A:37-14, -15 to -15.3, -16, -17 (West 2012); N.Y. EDUC. LAW §§ 801-a, 2801 (McKinney 2012); N.C. GEN. STAT. §§ 115C-407.15-.18 (2012); N.D. CENT. CODE § 15.1-19-17-22 (2012); OHIO REV. CODE ANN. § 3313.666 (LexisNexis 2012); OKLA. STAT. tit. 70, §§ 24-100.2-.5 (2012); OR. REV. STAT. §§ 339.351, .353, .356, .359, .362, .364 (2012); 24 PA. STAT. ANN. §13-1303.1-A (West 2012); R.I. GEN. LAWS § 16-21-34 (2012); S.C. CODE ANN. §§ 59-63-110 to -150 (2012); TENN. CODE ANN. §§ 49-6-1014 to -1019 (2012); TEX. EDUC. CODE ANN. §§ 25.0342, 28.002, 37.001, 37.083 (West 2012); UTAH CODE ANN. §§ 53A-11a-102, -201, -202, -301, -302, -401, -402 (LexisNexis 2012); VA. CODE ANN. §§ 22.1-208.01, -279.6 (2012); VT. STAT. ANN. tit. 16, §§ 11, 570, 570c (2012); WASH. REV. CODE §§ 28A.300.285, 28A.600.480 (2012); W. VA. CODE §§ 18-2C-2 to -3 (2012); WIS. STAT. § 118.46 (2012); WYO. STAT. ANN. §§ 21-4-311 to -315 (2012).

79. NAT'L SCH. BDS. ASS'N, *supra* note 77.

concerning the same issue.<sup>80</sup> The problem has become so pervasive and persistent that the American Jewish Committee and the Religious Freedom Education Project jointly published *Harassment, Bullying, and Free Expression: Guidelines for Free and Safe Public Schools*.<sup>81</sup>

Students, disciplined under these school policies, are suing, arguing that their schools have violated their First Amendment rights by imposing discipline for what amounts to off-campus cyberspeech, which is protected by the First Amendment.<sup>82</sup> Constitutional law scholar and dean, Erwin Chemerinsky,<sup>83</sup> argues in an essay that this is all part of the “deconstitutionalization of education” by the Supreme Court.<sup>84</sup> Chemerinsky concludes that the “Supreme Court’s overall approach has been to withdraw the courts from involvement in American schools.”<sup>85</sup> He examines the Court’s decisions in the areas of desegregation, school funding, and freedom of speech.<sup>86</sup> Chemerinsky argues that “[u]nder current First Amendment law, the most basic principle is that the government generally cannot restrict speech based on content unless strict scrutiny is met.”<sup>87</sup> Applying these principles to speech in the public university setting, Chemerinsky says “[a] public university simply cannot prohibit the expression of hate, including anti-Semitism, without running afoul of this principle. Punishing speech because of its hateful message is inherently a content-based restriction on speech and would violate the First Amendment.”<sup>88</sup>

How are public schools handling student cyberspeech that can also be categorized as cyberbullying or cyberharassment? Courts are relying on the

---

80. See Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, to Colleague 1–2 (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> [hereinafter Dear Colleague Letter].

81. AM. JEWISH COMM. & RELIGIOUS FREEDOM EDUC. PROJECT, HARASSMENT, BULLYING, AND FREE EXPRESSION: GUIDELINES FOR FREE AND SAFE PUBLIC SCHOOLS 1, 5 (2012), available at <http://www.nsba.org/schoollaw/issues/equity/harassment-bullying-and-free-expression-guidelines-for-free-and-safe-public-schools.pdf>.

82. Susan S. Bendlin, *Far from the Classroom, the Cafeteria, and the Playing Field: Why Should the School’s Disciplinary Arm Reach Speech Made in a Student’s Bedroom?*, 48 WILLAMETTE L. REV. 195, 195–96 (2011).

83. Erwin Chemerinsky, *Unpleasant Speech on Campus, Even Hate Speech, Is a First Amendment Issue*, 17 WM. & MARY BILL RTS. J. 765, 765 n.\* (2009) [hereinafter Chemerinsky, *Unpleasant Speech*] (introducing Chemerinsky as “Dean and Distinguished Professor of Law, University of California, Irvine, School of Law”).

84. Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 112 (2004).

85. *Id.*

86. *Id.* at 113, 119, 124.

87. Chemerinsky, *Unpleasant Speech*, *supra* note 83, at 770.

88. *Id.*

1969 Supreme Court decision in *Tinker v. Des Moines Independent Community School District*<sup>89</sup> to regulate student cyberspeech in the public school setting.<sup>90</sup> Despite utilizing the *Tinker* test, both federal district and circuit courts have reached a variety of different conclusions.<sup>91</sup> Are the courts misapplying or misunderstanding *Tinker*? Are the facts of each case determinative of the outcome? Are these decisions reconcilable or is there a circuit split?

This article will examine the existing speech cases from federal district and circuit courts in light of the *Morse* quartet, a series of Supreme Court decisions on student speech rights.<sup>92</sup> Part II will review the holdings of these decisions and explore their interaction with the First Amendment.<sup>93</sup> Part III will review the Department of Education's Office for Civil Rights definition of harassment while Part IV will examine state cyberbullying legislation.<sup>94</sup> Part V will analyze and review the interplay of the United States Constitution, Supreme Court decisions, state legislation, the Department of Education's laws and interpretations thereof, and school policies with these cases, attempting to ascertain the appropriate analysis for student cyberspeech cas-

---

89. 393 U.S. 503 (1969).

90. *E.g.*, *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1370 (S.D. Fla. 2010).

91. A selected list of federal district court cases involving regulation of off-campus student speech includes: *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 771, 784 (N.D. Ind. 2011); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1098 (C.D. Cal. 2010); *Evans*, 684 F. Supp. 2d at 1367; *Mardis v. Hannibal Pub. Sch. Dist. No. 60*, 684 F. Supp. 2d 1114, 1115–16 (E.D. Mo. 2010); *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1274, 1276 (W.D. Wash. 2007); *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 700 (W.D. Pa. 2003); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 781 (E.D. Mich. 2002); *Coy ex rel. Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 795–96 (N.D. Ohio 2002). The Supreme Court of Pennsylvania also dealt with the issue in *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850 (Pa. 2002). For circuit court decisions on the topic, see *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 757 (8th Cir. 2011); *Kowalski I*, 652 F.3d 565, 567 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); *Layshock III*, 650 F.3d 205, 207, 210 (3d Cir. 2011) (en banc), *cert. denied sub nom.* *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist. (J.S. ex rel. Snyder III)*, 650 F.3d 915, 920 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); *Doninger II*, 642 F.3d 334, 342 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 37 (2d Cir. 2007).

92. See Melinda Cupps Dickler, *The Morse Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 380–84 (2007); see also *Morse v. Frederick*, 551 U.S. 393, 410 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986); *Tinker*, 393 U.S. at 514.

93. See discussion *infra* Part II.

94. See discussion *infra* Parts III–IV.

es.<sup>95</sup> Part VI will conclude that there is a circuit split that requires the intervention of the Supreme Court to be resolved.<sup>96</sup>

## II. FIRST AMENDMENT: STUDENT CYBERSPEECH

### A. *First Amendment: What Does It Mean?*

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>97</sup>

Protecting speech was so important that it was enshrined in the First Amendment of the Bill of Rights.<sup>98</sup> The Supreme Court has issued numerous opinions discussing this amendment.<sup>99</sup> As the Court recently stated in *Snyder v. Phelps*,<sup>100</sup> “[t]he First Amendment reflects ‘a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’”<sup>101</sup> Why? Quoting *Garrison v. Louisiana*,<sup>102</sup> the Court noted that free speech “‘is more than self-expression; it is the essence of self-government,’”<sup>103</sup> while acknowledging that “‘speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.’”<sup>104</sup>

How is *Snyder* applicable to the student cyberspeech cases? Besides providing the most recent Supreme Court First Amendment analysis, *Snyder*, like the school cyberspeech decisions, deals with speech that can be described as unkind or cruel.<sup>105</sup> The *Snyder* Court upheld Westboro Baptist’s right to picket outside an area near veterans’ funerals with signs that read “‘God Hates the USA/Thank God for 9/11,’” “‘Fag Troops,’” “‘Thank God for Dead Soldiers,’” and “‘God Hates You.’”<sup>106</sup> The Court’s majority opinion concluded:

---

95. See discussion *infra* Part V.

96. See discussion *infra* Part VI.

97. U.S. CONST. amend. I.

98. Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1108 (2000).

99. See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

100. 131 S. Ct. 1207 (2011).

101. *Id.* at 1215 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

102. 379 U.S. 64 (1964).

103. *Snyder*, 131 S. Ct. at 1215 (quoting *Garrison*, 379 U.S. at 74–75).

104. *Id.* at 1215 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

105. See *id.* at 1216–17, 1220.

106. *Id.* at 1216–17.

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro . . . .<sup>107</sup>

How do we apply these principles in the public school setting? Do students and teachers have free speech? What happens in public schools grades K–12 when teachers or principals punish students for speech made or directed at personnel or the students of the school? Is this speech protected? Can schools punish these student speakers even if the speakers “inflict great pain?”<sup>108</sup>

#### B. Morse Quartet

The Supreme Court answered the question about students’ speech rights in the public school setting in its 1969 decision in *Tinker*.<sup>109</sup> The Court further delineated its student speech analysis with three later opinions.<sup>110</sup> Grouped together, these four opinions are sometimes referred to as the “*Morse* quartet.”<sup>111</sup>

*Tinker* was the first decision of the quartet.<sup>112</sup> It involved the now infamous, non-disruptive, black armband worn by Mary Beth Tinker to her school to protest the Vietnam War.<sup>113</sup> Mary Beth was suspended from school until she agreed to no longer wear the armband to school.<sup>114</sup> Her parents sued on her behalf, arguing the school’s actions violated Mary Beth’s First Amendment free speech rights.<sup>115</sup> The *Tinker* Court agreed with Mary Beth, stating “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>116</sup> *Tinker* established the analysis for the punishment of student speech as follows:

---

107. *Id.* at 1220.

108. *See Snyder*, 131 S. Ct. at 1220.

109. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

110. *See Dickler*, *supra* note 92, at 356.

111. *See id.* at 362.

112. *Id.* at 356.

113. *Tinker*, 393 U.S. at 504.

114. *Id.*

115. *Id.* at 504–05.

116. *Id.* at 506.

A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. 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.<sup>117</sup>

Between 1986 and 2007, the Court decided three more student speech cases, which limited the holding of *Tinker*.<sup>118</sup> *Bethel School District No. 403 v. Fraser*<sup>119</sup> allowed schools to punish lewd and offensive speech given at a high school assembly to a captive audience,<sup>120</sup> while *Hazelwood School District v. Kuhlmeier*<sup>121</sup> permitted schools to exercise editorial control over speech for pedagogical purposes, which carried the imprimatur of the school.<sup>122</sup> *Morse v. Frederick*<sup>123</sup> allowed the punishment of student speech occurring at a school-sanctioned off-campus event that appeared to advocate the use of illegal drugs.<sup>124</sup>

In 1983, Matthew Fraser was suspended for three days and had his name removed from the list of potential graduation speakers because of a candidate speech he delivered to a high school assembly.<sup>125</sup> In the speech, Fraser used a sexual innuendo to refer to one of the candidates running for school office.<sup>126</sup> The United States District Court for the Western District of Washington and the United States Court of Appeals for the Ninth Circuit, both applying *Tinker*, held that the school violated Fraser's First Amendment

---

117. *Id.* at 512–13 (alteration in original) (citations omitted).

118. *Morse v. Frederick*, 551 U.S. 393, 410 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *see also* Dickler, *supra* note 92, at 356.

119. 478 U.S. 675 (1986).

120. *Id.* at 685.

121. 484 U.S. 260 (1988).

122. *Id.* at 273.

123. 551 U.S. 393 (2007).

124. *Id.* at 397, 410.

125. *Fraser*, 478 U.S. at 677–78.

126. *Id.*

rights.<sup>127</sup> The Supreme Court, in a majority opinion authored by then Chief Justice Burger, reversed, framing the issue as “whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.”<sup>128</sup> Concluding such discipline was allowed, the Court stated:

The First Amendment guarantees wide freedom in matters of adult public discourse. . . . It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. . . . [T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. As cogently expressed by Judge Newman, “the First Amendment gives a high school student the classroom right to wear Tinker’s armband, but not Cohen’s jacket.”<sup>129</sup>

*Fraser* was followed two years later by *Kuhlmeier*, which involved school censorship of a student-edited school newspaper.<sup>130</sup> The Court framed the issue as “the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school’s journalism curriculum.”<sup>131</sup> The high school principal deleted two articles from the newspaper before it went to print.<sup>132</sup> The paper’s student editors sued, alleging this censorship violated their First Amendment rights.<sup>133</sup> Again, the Court further eroded the holding in *Tinker*.<sup>134</sup> Writing for the majority, Justice White stated:

[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. This standard is consistent with our oft-expressed view that the

---

127. *Id.* at 679; *see also* U.S. CONST. amend. I; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969).

128. *Fraser*, 478 U.S. at 677, 680; *see also* U.S. CONST. amend. I.

129. *Fraser*, 478 U.S. at 682–83 (quoting *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)); *see also* U.S. CONST. amend. I.

130. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988); *Fraser*, 478 U.S. at 675.

131. *Kuhlmeier*, 484 U.S. at 262.

132. *Id.* at 263–64.

133. *Id.* at 264; *see also* U.S. CONST. amend. I.

134. *See Kuhlmeier*, 484 U.S. at 272–73 & n.5 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.<sup>135</sup>

The Court last addressed student speech in 2007 with its decision in *Morse*,<sup>136</sup> completing the series of cases that are sometimes referred to as the *Morse* quartet.<sup>137</sup> *Morse* involved off-campus speech at a school-sponsored activity.<sup>138</sup> The Olympic Torch Relay was scheduled to pass “through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah.”<sup>139</sup> During the procession, the relay was scheduled to pass by Frederick’s high school.<sup>140</sup> To celebrate and participate, Deborah Morse, school principal, allowed teachers and students to leave the school building and attend the relay on the city streets as a school-sponsored activity.<sup>141</sup> As the television cameras rolled by, Joseph Frederick, a student, unfurled a fourteen-foot banner that proclaimed: “‘BONG HiTS 4 JESUS.’”<sup>142</sup> Believing the banner to be advocating the use of an illegal drug, marijuana, Morse demanded that Frederick lower the banner.<sup>143</sup> He refused so she confiscated the banner and then suspended him for ten days.<sup>144</sup> Frederick sued, alleging Morse’s behavior violated his First Amendment rights.<sup>145</sup> He argued his banner was not promoting illegal drug use but rather was simply nonsense, designed to catch the television cameras’ attention.<sup>146</sup> The Court framed the issue as “whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.”<sup>147</sup> The Court then further explained its analysis and holding in *Fraser*, saying:

---

135. *Id.* at 262, 273 (footnote omitted) (citing *Bd. of Educ. v. Rowley ex rel. Rowley*, 458 U.S. 176, 208 (1982); *Wood v. Strickland*, 420 U.S. 308, 326 (1975), *abrogated on other grounds* by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)); *see also* U.S. CONST. amend. I.

136. *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007).

137. *See* Dickler, *supra* note 92, at 380.

138. *Morse*, 551 U.S. at 396–99.

139. *Id.* at 397.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Morse*, 551 U.S. at 398.

144. *Id.*

145. *Id.* at 399; *see also* U.S. CONST. amend. I.

146. *Morse*, 551 U.S. at 401 (quoting *Frederick v. Morse*, 439 F.3d 1114, 1117–18 (9th Cir.), *cert. granted*, 549 U.S. 1075 (2006), and *rev'd*, 551 U.S. 393 (2007)).

147. *Id.* at 403; *see also* U.S. CONST. amend. I.

[I]t is enough to distill from *Fraser* two basic principles. First, *Fraser's* holding demonstrates that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” Had *Fraser* delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, *Fraser's* First Amendment rights were circumscribed “in light of the special characteristics of the school environment.” Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the “substantial disruption” analysis proscribed by *Tinker*.

....

The case, [*Kuhlmeier*], is nevertheless instructive because it confirms both principles cited above. *Kuhlmeier* acknowledged that schools may regulate some speech “even though the government could not censor similar speech outside the school.” And, like *Fraser*, it confirms that the rule of *Tinker* is not the only basis for restricting student speech.<sup>148</sup>

None of the above decisions deal with off-campus student cyberspeech; yet, these are the decisions that lower federal courts—both district and circuit—are relying upon to analyze whether school officials can punish off-campus student cyberspeech.<sup>149</sup> As the discussion below indicates, lower courts are applying the *Morse* quartet analysis with varying results.<sup>150</sup>

### C. Circuit Courts: Split or Reconcilable?

Between 2007 and 2011, the United States Courts of Appeals for the Second, Third, Fourth, and Eighth Circuits published opinions that dealt with off-campus student cyberspeech.<sup>151</sup> Two decisions from the United States Circuit Court of Appeals for the Second Circuit involved student speech

148. *Morse*, 551 U.S. at 404–06 (citations omitted); see also U.S. CONST. amend. I.

149. See discussion *infra* Part II.C–D.

150. See discussion *infra* Part II.C–D.

151. See *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 756 (8th Cir. 2011); *Kowalski I*, 652 F.3d 565, 567 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); *Layshock III*, 650 F.3d 205, 207 (3d Cir. 2011) (en banc), *cert. denied sub nom.* *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012); *J.S. ex rel. Snyder III*, 650 F.3d 915, 920 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); *Doninger II*, 642 F.3d 334, 340 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35 (2d Cir. 2007). Other circuit courts have yet to address the explicit issue of off-campus regulation of student cyberspeech.

about school officials.<sup>152</sup> The court upheld the school's punishment of the student speech in both cases.<sup>153</sup> Meanwhile, the United States Court of Appeals for the Third Circuit published two decisions, issued by two different panels, on February 4, 2010<sup>154</sup> that appeared to reach different results with seemingly similar facts.<sup>155</sup> A decision from the United States District Court for the Middle District of Pennsylvania, which punished a student for an internet profile parody of her high school principal, was upheld.<sup>156</sup> However, a decision from the United States District Court for the Western District of Pennsylvania agreed with a student that his First Amendment rights were violated when he was punished for creating a profile parody of his principal on MySpace.<sup>157</sup> Because this appeared to many observers to reflect a split within the Third Circuit, the court re-heard both cases while sitting en banc.<sup>158</sup> Ultimately, the students prevailed in both cases with the court holding that school officials had violated the students' First Amendment rights.<sup>159</sup> The United States Circuit Court of Appeals for the Fourth Circuit heard a case that involved the school's punishment of a student for offensive cyber-speech made against another student.<sup>160</sup> The court upheld the school's punishment of the student.<sup>161</sup> The United States Court of Appeals for the Eighth Circuit upheld the decision of the United States District Court for the Eastern District of Missouri, agreeing with the court that D.J.M.'s instant messages

---

152. See *Doninger II*, 642 F.3d at 340; *Wisniewski*, 494 F.3d at 36.

153. *Doninger II*, 642 F.3d at 357–58; *Wisniewski*, 494 F.3d at 40.

154. *J.S. ex rel. Snyder II*, 593 F.3d 286, 286, 290–91 (3d Cir.), *vacated en banc, reh'g granted en banc*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010), *cert. denied*, 132 S. Ct. 1097 (2012); *Layshock II*, 593 F.3d 249, 249, 252–54 (3d Cir.), *vacated en banc, reh'g granted en banc*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010), *cert. denied sub nom.* Blue Mountain Sch. Dist. v. *J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012); Easton, *supra* note 22, at 17.

155. See Easton, *supra* note 22, at 17.

156. *J.S. ex rel. Snyder II*, 593 F.3d at 307–08; *J.S. ex rel. Snyder I*, No. 3:07cv585, 2008 WL 4279517, at \*1 (M.D. Pa. Sept. 11, 2008), *aff'd in part, rev'd in part en banc*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

157. *Layshock I*, 496 F. Supp. 2d 587, 587, 591, 606 (W.D. Pa. 2007), *aff'd in part en banc*, 650 F.3d 205 (3d Cir. 2011), *cert. denied sub nom.* Blue Mountain Sch. Dist. v. *J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

158. See *J.S. ex rel. Snyder III*, 650 F.3d 915, 915, 920 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); see also *Layshock III*, 650 F.3d 205, 207 (3d Cir. 2011) (en banc), *cert. denied sub nom.* Blue Mountain Sch. Dist. v. *J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

159. See *J.S. ex rel. Snyder III*, 650 F.3d at 932, 933; see also *Layshock III*, 650 F.3d at 219.

160. *Kowalski I*, 652 F.3d 565, 567 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).

161. *Id.* at 577.

threatening to get a gun and shoot classmates did constitute “true threats” that were not protected by the First Amendment.<sup>162</sup>

Because similar fact patterns appeared to be involved in the above cases, with differing results reached, *Doninger II*, *J.S. ex rel. Snyder III*, and *Kowalski I* were appealed to the Supreme Court of the United States, based on the argument that a circuit split existed.<sup>163</sup> Despite the differing results, the Court denied certiorari for all three petitions, leaving the decisions to stand.<sup>164</sup> Is there a circuit split or can these cases be reconciled? This section will examine and review the decisions.

The decisions from the United States Circuit Court of Appeals for the Second Circuit will be reviewed first. This court has decided two cases, *Wisniewski* and *Doninger II*, on the subject.<sup>165</sup> In both decisions, the court upheld the school’s right to punish students for off-campus student cyber-speech that was ultimately aimed at school officials.<sup>166</sup>

In *Wisniewski*, a middle school student, Aaron Wisniewski, was suspended from school because of an instant message he sent classmates from his parents’ home computer.<sup>167</sup> The message included an instant message icon with “a small drawing of a pistol firing a bullet at a person’s head, above which were dots representing spattered blood. Beneath the drawing appeared the words ‘Kill Mr. VanderMolen.’ Philip VanderMolen was Aaron’s English teacher at the time.”<sup>168</sup> While Aaron did not send the instant message icon or message to any school officials, he shared it with some of his classmates.<sup>169</sup> One of the classmates eventually shared the icon and message with Mr. VanderMolen who was reportedly distressed.<sup>170</sup> Mr. VanderMolen then shared it with school authorities.<sup>171</sup> The school shared it with “the local police [department], the Superintendent . . . , and Aaron’s parents.”<sup>172</sup> When confronted, Aaron admitted he had created the instant message and icon—though a police investigator determined that the icon was

---

162. D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 756, 757 n.1, 762 (8th Cir. 2011).

163. See discussion *infra* note 325.

164. See discussion *infra* note 325.

165. *Doninger II*, 642 F.3d 334, 338 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35 (2d Cir. 2007).

166. *Doninger II*, 642 F.3d at 340, 358; *Wisniewski*, 494 F.3d at 39–40.

167. *Wisniewski*, 494 F.3d at 35–36.

168. *Id.* at 36 (footnote omitted).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Wisniewski*, 494 F.3d at 36.

intended only as a joke.<sup>173</sup> Once the severity of the issue was pointed out to him, Aaron expressed regret.<sup>174</sup> Mr. VanderMolen asked to stop teaching Aaron, and this was allowed.<sup>175</sup>

In the meantime, the police department investigated and questioned Aaron.<sup>176</sup> He was referred to a psychologist for testing.<sup>177</sup> Based on the testing and evaluation, the psychologist concluded the icon was intended as a joke, and that Aaron had no violent intent and posed no actual threat.<sup>178</sup> The police investigation was concluded with no arrest being made, but there was a hearing before the school superintendent.<sup>179</sup> At the hearing, the hearing officer found that “[s]ubstantial and competent evidence exists that Aaron engaged in the act of sending a threatening message to his buddies, the subject of which was a teacher.”<sup>180</sup> The hearing officer said: “He admitted it. . . . I conclude Aaron did commit the act of threatening a teacher . . . creating an environment threatening the health, safety, and welfare of others . . . .”<sup>181</sup> Aaron was suspended for a semester.<sup>182</sup>

Aaron sued, arguing his icon “was protected speech under the First Amendment.”<sup>183</sup> The court upheld the school’s punishment of Aaron, concluding that the fact that his conduct occurred off-campus did “not necessarily insulate him from school discipline.”<sup>184</sup> Instead, the court applied *Tinker*’s “reasonably foreseeable risk” test to the facts and concluded that it was foreseeable that school authorities would learn of Aaron’s pistol icon.<sup>185</sup> It was then foreseeable that the threatening icon would “materially and substantially disrupt” the school’s work.<sup>186</sup>

A year later, the United States Court of Appeals for the Second Circuit heard arguments in *Doninger v. Niehoff (Doninger I)*,<sup>187</sup> which also involved student speech.<sup>188</sup> In *Doninger I*, Avery Doninger was involved in a dispute

---

173. *Id.*

174. *See id.*

175. *Id.*

176. *Id.*

177. *Wisniewski*, 494 F.3d at 36.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 36–37.

182. *Wisniewski*, 494 F.3d at 37.

183. *Id.*

184. *Id.* at 39–40 (footnote omitted).

185. *Id.* at 38–39 (citing *Morse v. Frederick*, 551 U.S. 393, 403 (2007)).

186. *Id.* (quoting *Morse*, 551 U.S. at 403).

187. 527 F.3d 41 (2d Cir. 2008), *aff’d in part, rev’d in part*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011).

188. *See id.* at 44–46.

with school officials about the scheduling and location of a “battle of the bands” known as “Jamfest.”<sup>189</sup> Because of personnel issues, Doninger and the Student Council were advised that Jamfest would either have to be re-scheduled for another date or relocated to another facility if the Council was determined to adhere to the named date.<sup>190</sup> After learning of this, four members of the Student Council met in the computer lab and accessed a parent’s email account.<sup>191</sup> From this email account, the students sent out two mass emails to students and parents—one of which included the contact information for Paula Schwartz, the district superintendent—advising them to contact the district office and forward the email to as many people as possible to see that Jamfest was held as scheduled in the new auditorium.<sup>192</sup> Unhappy with the decision to cancel Jamfest, Avery Doninger then posted an entry on her blog from her home that said:

jamfest is cancelled due to douchebags in central office. here is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. we have so much support and we really appreciate [sic] it. however, she got pissed off and decided to just cancel the whole thing all together [sic].<sup>193</sup>

Because of the vulgar language of the blog and the manner in which Avery expressed disagreement with the school’s administration, Niehoff decided that Avery could not run for Senior Class Secretary because “Avery’s conduct . . . failed to display the civility and good citizenship expected of class officers.”<sup>194</sup> Avery’s mother sued, arguing Niehoff’s actions violated her daughter’s First Amendment rights.<sup>195</sup>

As the United States Court of Appeals for the Second Circuit analyzed Doninger’s First Amendment claims, it began with *Tinker*, noting that “students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”<sup>196</sup> Yet while *Tinker* protected students’

---

189. *Id.* at 44.

190. *Doninger II*, 642 F.3d 334, 339 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011).

191. *Id.*

192. *Id.* at 339–40.

193. *Id.* at 340–41 (second alteration in original).

194. *Doninger I*, 527 F.3d at 46.

195. *Id.* at 46–47.

196. *Doninger II*, 642 F.3d at 344 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

speech rights,<sup>197</sup> the court concluded that these rights, in the public school setting, were not equal to the free speech rights of adults.<sup>198</sup> In fact, the court analyzed and discussed the student speech holdings of the Supreme Court and concluded that “school administrators [could] prohibit student expression” when certain circumstances were met.<sup>199</sup> Utilizing the “foreseeable disruption test” articulated by *Tinker*, the *Doninger I* court stated:

The Supreme Court has yet to speak on the scope of a school’s authority to regulate expression that, like Avery’s, does not occur on school grounds or at a school sponsored event. We have determined, however, that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct “would foreseeably create a risk of substantial disruption within the school environment,” at least when it was similarly foreseeable that the off-campus expression might also reach campus.<sup>200</sup>

Meanwhile, the United States Court of Appeals for the Third Circuit handed down, via two panels, two decisions on school speech cases on February 4, 2010.<sup>201</sup> In two cases, involving seemingly similar facts, the two panels reached what appeared to be different results.<sup>202</sup> Consequently, the Third Circuit sat, en banc, to rehear both cases.<sup>203</sup>

---

197. *Tinker*, 393 U.S. at 506.

198. *Doninger II*, 642 F.3d at 344 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

199. *Id.* at 344 (citing *Tinker*, 393 U.S. at 513).

200. *Doninger I*, 527 F.3d at 48 (quoting *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007)).

201. See *J.S. ex rel. Snyder II*, 593 F.3d 286, 286, 307–08 (3d Cir.), *vacated en banc, reh’g granted en banc*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010), *cert. denied*, 132 S. Ct. 1097 (2012); *Layshock II*, 593 F.3d 249, 249 (3d Cir.), *vacated en banc, reh’g granted en banc*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010), *cert. denied sub nom.* *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

202. Easton, *supra* note 22, at 18; see also Shannon P. Duffy, *Do 3rd Circuit Rulings over Student Speech on MySpace Pages Contradict?*, LAW.COM (Feb. 5, 2010), <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202442025383>.

203. *Layshock III*, 650 F.3d 205, 205 (3d Cir. 2011) (en banc), *cert. denied sub nom.* *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012). The Court vacated both earlier panel opinions. *Id.* at 207; *J.S. ex rel. Snyder III*, 650 F.3d 915, 920 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012). Shortly after this decision was issued, Daniel J. Solove addressed the issue in a blog post. See Daniel J. Solove, *School Discipline for Off-Campus Speech and the First Amendment*, HUFFPOST EDUC. (June 20, 2011, 11:43 AM), [http://www.huffingtonpost.com/daniel-j-solove/school-discipline-free-speech\\_b\\_877203.html](http://www.huffingtonpost.com/daniel-j-solove/school-discipline-free-speech_b_877203.html).

In *Layshock ex rel. Layshock v. Hermitage School District (Layshock II)*,<sup>204</sup> the initial panel comprising Judges McKee, Smith, and Roth,<sup>205</sup> framed the issue before the court as whether “a school district can punish a student for expressive conduct that originated outside of the classroom, when that conduct did not disturb the school environment and was not related to any school sponsored event.”<sup>206</sup> “Justin Layshock, . . . a . . . senior at Hickory High School . . . in Hermitage, Pennsylvania,” posted a “‘parody profile’ of his [high school] principal, Eric Trosch,” on his MySpace account while at his grandmother’s using her computer.<sup>207</sup> While Justin copied and pasted Mr. Trosch’s photograph from the school’s web site, that is the extent to which a school resource was used.<sup>208</sup> Justin’s parody gave bogus “big” answers to questions he pretended Mr. Trosch answered.<sup>209</sup> Justin’s parody stated:

Birthday: too drunk to remember  
 Are you a health freak: big steroid freak  
 In the past month have you smoked: big blunt  
 In the past month have you been on pills: big pills  
 In the past month have you gone Skinny Dipping: big lake, not  
 big dick  
 In the past month have you Stolen Anything: big keg  
 Ever been drunk: big number of times  
 Ever been called a Tease: big whore  
 Ever been Beaten up: big fag  
 Ever Shoplifted: big bag of kmart  
 Number of Drugs I have taken: big<sup>210</sup>

Justin shared the profile with his friends at school who then shared the profile with many other students.<sup>211</sup> Mr. Trosch learned about the profile after three other students posted similar profiles, and Mr. Trosch’s eleventh grade daughter showed one of them to her father.<sup>212</sup> The court noted that the profile spread through the school like “wildfire” and that students accessed

---

204. 593 F.3d 249 (3d Cir.), *vacated en banc, reh’g granted en banc*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010), *cert. denied sub nom.* Blue Mountain Sch. Dist. v. J.S. *ex rel.* Snyder, 132 S. Ct. 1097 (2012).

205. *Id.* at 251.

206. *Id.*

207. *Id.* at 252.

208. *Id.*

209. *Layshock II*, 593 F.3d at 252.

210. *Id.* at 252–53.

211. *Id.* at 253.

212. *Id.*

the profile at school.<sup>213</sup> Mr. Trosch explained he found the profile “‘degrading,’ ‘demeaning,’ ‘demoralizing,’ and ‘shocking.’”<sup>214</sup> After an investigation, the school district suspended Justin for ten days, placed him in the Alternative Education Program for his last semester of high school, banned him from all extracurricular activities, and refused to allow him to participate in his graduation ceremony.<sup>215</sup> The school district concluded that Justin had violated Hermitage School District’s Discipline Code, finding “[d]isruption of the normal school process; [d]isrespect; [h]arassment of a school administrator via computer/internet with remarks that have demeaning implications; [g]ross misbehavior; [o]bscene, vulgar, and profane language; [c]omputer [p]olicy violations (use of school pictures without authorization).”<sup>216</sup>

Justin and his parents sued, arguing that the Hermitage School District had violated his First Amendment rights.<sup>217</sup> The United States District Court for the Western District of Pennsylvania agreed with Justin, granting him summary judgment.<sup>218</sup> The United States Court of Appeals for the Third Circuit panel published their opinion on February 4, 2010, and affirmed the decision of the lower court, holding “schools may punish expressive conduct that occurs outside of school as if it occurred inside the ‘schoolhouse gate’ under certain very limited circumstances, none of which are present here.”<sup>219</sup>

On the same day, February 4, 2010, another panel of the United States Court of Appeals for the Third Circuit, comprising of Circuit Judges Fisher and Chagares and District Judge Diamond,<sup>220</sup> published their opinion in *J.S. ex rel. Snyder v. Blue Mountain School District (J.S. ex rel. Snyder II)*.<sup>221</sup> In *J.S. ex rel. Snyder II*, J.S., an eighth grader, created a MySpace profile parody of her high school principle, Mr. McGonigle, with another friend, K.L., from their home computers.<sup>222</sup> As with *Layshock II*, J.S. and K.L. copied a picture of Mr. McGonigle from the school’s web site and pasted it on their

---

213. *Id.*

214. *Layshock II*, 593 F.3d at 253.

215. *Id.* at 254.

216. *Id.*

217. *Id.* at 254–55.

218. *Layshock I*, 496 F. Supp. 2d 587, 606 (W.D. Pa. 2007), *aff’d in part en banc*, 650 F.3d 205 (3d Cir. 2011), *cert. denied sub nom.* Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder, 132 S. Ct. 1097 (2012).

219. *Layshock II*, 593 F.3d at 249, 263.

220. *J.S. ex rel. Snyder II*, 593 F.3d 286, 286, 290 (3d Cir.), *vacated en banc, reh’g granted en banc*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010), *cert. denied*, 132 S. Ct. 1097 (2012). Judge Diamond, of the Eastern District of Pennsylvania, was sitting on the panel by designation. *Id.* at 290 & n.\*.

221. 593 F.3d 286, 290 (3d Cir.), *vacated en banc, reh’g granted en banc*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010), *cert. denied*, 132 S. Ct. 1097 (2012).

222. *Id.* at 290–91.

2013]

WALKING THE REGULATORY TIGHTROPE

267

MySpace parody profile.<sup>223</sup> While the profile did not identify McGonigle by name or location, it included his school photograph and described him as saying:

## HELLO CHILDREN

yes. it's your oh so wonderful, hairy, expressionless,  
sex addict, fagass, put on this world with a small dick

## PRINCIPAL

I have come to myspace so i can pervert the minds of other  
principal's [sic] to be just like me. I know, I know, you're all  
thrilled

Another reason I came to my space is because—I am

keeping an eye on you students

(who i care for so much)

For those who want to be my friend, and aren't in my school

I love children, sex (any kind), dogs, long walks on the

beach, tv, being a dick head, and last but not least my

darling wife who looks like a man (who satisfies my needs)

## MY FRAINTRAIN

so please, feel free to add me, message me whatever.<sup>224</sup>

J.S. and K.L. left the profile “public” on Sunday night.<sup>225</sup> By Monday afternoon, students at Blue Mountain Middle School had seen the profile and were discussing it, so J.S. made the profile “private” when she went home.<sup>226</sup>

---

223. *Id.* at 291; *see also Layshock II*, 593 F.3d at 252.

224. *J.S. ex rel. Snyder II*, 593 F.3d at 291.

225. *Id.* at 292.

226. *Id.*

On Tuesday, a student at Blue Mountain approached McGonigle and told him about the profile.<sup>227</sup> After McGonigle viewed the profile, he contacted the School Superintendent, Joyce Romberger, and the Director of Technology, Susan Schneider-Morgan.<sup>228</sup> After meeting and reviewing the profile, the three “concluded that it violated the School District’s Acceptable Use Policy (AUP) because it violated copyright laws in misappropriating McGonigle’s photograph from the School District’s website without permission.”<sup>229</sup>

McGonigle then met with J.S. and K.L. and their mothers telling them he was suspending them for ten days and also considering legal action.<sup>230</sup> While students could not view the profile at school because MySpace was a blocked site, McGonigle and other teachers testified that the profile parody disrupted school—students chattered about the profile in class and related disruptions in the hallways, requiring extra student supervision.<sup>231</sup> After the suspended students returned to school, they were greeted by fellow classmates who had decorated their lockers and offered them written congratulations for their behavior.<sup>232</sup>

J.S. and her parents sued, arguing the Blue Mountain School District had violated her First Amendment rights.<sup>233</sup> The United States District Court for the Middle District Court of Pennsylvania decided in favor of the school, holding that the school did not violate J.S.’s First Amendment rights when disciplining her because of the on campus impact of her “lewd and vulgar” speech.<sup>234</sup> The Third Circuit’s panel affirmed the lower court’s decision.<sup>235</sup> According to the court’s panel, *Tinker*’s foreseeable and material and substantial disruption test was the appropriate analysis to be applied to the facts.<sup>236</sup> Certainty regarding a disruption was not required; rather the court indicated that the standard was the reasonable foreseeability of disruption that schools had to anticipate and protect students from.<sup>237</sup> Schools were

---

227. *Id.*

228. *Id.*

229. *J.S. ex rel. Snyder II*, 593 F.3d at 292.

230. *Id.* at 293.

231. *Id.* at 292, 294.

232. *Id.* at 294.

233. *Id.* at 294–95.

234. *J.S. ex rel. Snyder I*, No. 3:07cv585, 2008 WL 4279517, at \*6–7 (M.D. Pa. Sept. 11, 2008), *aff’d in part, rev’d in part en banc*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

235. *J.S. ex rel. Snyder II*, 593 F.3d at 307–08. In this panel opinion, Judge Chagares concurred in part with the decision and also dissented in part. *Id.* at 308 (Chagares, Cir. J., concurring in part and dissenting in part).

236. *See id.* at 298 (majority opinion).

237. *See id.* at 298–99 (citing *Doninger I*, 527 F.3d 41, 51 (2d Cir. 2008), *aff’d in part, rev’d in part*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *Lowery v. Euverard*,

required to engage in a balancing analysis, balancing three rights: The right of students to be free from the invasion of their rights, the right of the students to avoid a “substantial disruption” at school, and the right of students to engage in protected First Amendment speech off-campus which does impact on campus activities.<sup>238</sup> Thus, the court appeared to believe that *Tinker* required a balancing of the rights of others with the rights of an individual.<sup>239</sup>

As the court’s panel applied this analysis to the facts of the case, it concluded that a substantial disruption was not created on campus by J.S.’s profile of McGoingle.<sup>240</sup> However, given the incendiary nature of the profile, i.e. indirectly suggesting that McGoingle engaged in pedophilic behavior with his students, the panel concluded that the school’s behavior did not violate J.S.’s First Amendment rights as McGoingle’s actions forestalled the threat of future disruptions.<sup>241</sup> This, the court indicated, satisfied the *Tinker* test.<sup>242</sup> The court refused to accept J.S.’s argument that off-campus speech could not be regulated by school authorities.<sup>243</sup> Instead, it acknowledged the way that the evolving technology was blurring the boundaries between school and home and stated “[t]erritoriality is not necessarily a useful concept in determining the limit of [school administrators’] authority.”<sup>244</sup>

Given the similar facts of both cases, and yet the dissimilar dispositions,<sup>245</sup> the United States Court of Appeals for the Third Circuit agreed to hear the cases en banc and did so in June of 2010.<sup>246</sup> A year later, in June of 2011, the court published both opinions.<sup>247</sup>

497 F.3d 584, 591–92, 596 (6th Cir. 2007); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001)).

238. *See id.* (citing *Morse v. Frederick*, 551 U.S. 393, 405 (2007); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986) (Brennan, J., concurring); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 216 n.11 (3d Cir. 2001)).

239. *See id.* at 299 (citing *Morse*, 551 U.S. at 405; *Fraser*, 478 U.S. at 688 (Brennan, J., concurring); *Saxe*, 240 F.3d at 216 n.11); *see also Fraser*, 478 U.S. at 680–81; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969).

240. *J.S. ex rel. Snyder II*, 593 F.3d at 299.

241. *See id.* at 300–03.

242. *See id.* at 298, 300, 303; *see also Tinker*, 393 U.S. at 512–13.

243. *J.S. ex rel. Snyder II*, 593 F.3d at 301.

244. *Id.* (quoting *Doninger I*, 527 F.3d 41, 48–49 (2d Cir. 2008) (alteration in original), *aff’d in part, rev’d in part*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011)).

245. *Compare id.* at 290–94, 303, with *Layshock II*, 593 F.3d 249, 252–54, 264 (3d Cir.), *vacated en banc, reh’g granted en banc*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010), *cert. denied sub nom. Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

246. *J.S. ex rel. Snyder III*, 650 F.3d 915, 915, 920 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); *Layshock III*, 650 F.3d 205, 205 (3d Cir. 2011) (en banc), *cert. denied sub nom. Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

247. *J.S. ex rel. Snyder III*, 650 F.3d at 915; *Layshock III*, 650 F.3d at 205.

*Layshock III* affirmed and upheld the holding of the initial panel, published in February of 2010.<sup>248</sup> The en banc court held that the school had violated Justin Layshock's First Amendment rights.<sup>249</sup> After reviewing and reconciling several cases cited by the school district, including *Doninger I* and *Wisniewski*,<sup>250</sup> the *Layshock III* en banc court concluded that school officials have very limited authority, according to the application of *Tinker* and *Fraser*, to punish off-campus student speech.<sup>251</sup> Quoting *Thomas v. Board of Education*,<sup>252</sup> the court stated that "[o]ur willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate."<sup>253</sup> The court said that it was unnecessary to define the parameters of school authorities regarding off-campus student speech since Justin's speech clearly did not substantially or materially disrupt the school's activities.<sup>254</sup> Without a substantial disruption, *Tinker* was not applicable.<sup>255</sup> The court concluded that while *Fraser* allowed school authorities to discipline student speech that was "lewd" or "vulgar," this authority was limited to on campus lewd or vulgar speech.<sup>256</sup> Discussing the applicability of *Fraser*, the court stated "*Fraser* does not allow the School District to punish Justin for expressive conduct [that] occurred outside of the school context."<sup>257</sup> This holding seems to be at odds with the court's holding in *J.S. ex rel. Snyder v. Blue Mountain School District (J.S. ex rel. Snyder III)*,<sup>258</sup> which announced that territoriality was not the defining factor when deter-

---

248. *Layshock III*, 650 F.3d at 207.

249. *Id.* at 207, 219.

250. The Court distinguished the facts in *Layshock III* from *Doninger I* and *Wisniewski* as well as other cases. *Id.*

251. *Id.* at 216, 219 (citing *Morse v. Frederick*, 551 U.S. 393, 404–05 (2007); *Layshock I*, 496 F. Supp. 2d 587, 599–600 (W.D. Pa. 2007), *aff'd in part en banc*, 650 F.3d 205 (3d Cir. 2011), *cert. denied sub nom.* Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder, 132 S. Ct. 1097 (2012)).

252. 607 F.2d 1043 (2d Cir. 1979).

253. *Layshock III*, 650 F.3d at 219 (quoting *Thomas*, 607 F.2d at 1044–45).

254. *Id.*

255. *Id.* at 216; *see also* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

256. *Layshock III*, 650 F.3d at 217 n.17 (citing *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001)); *see also* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

257. *Layshock III*, 650 F.3d at 219 (citing *Morse v. Frederick*, 551 U.S. 393, 404–05 (2007)).

258. Compare *id.* at 218–19, with *J.S. ex rel. Snyder III*, 650 F.3d 915, 936 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012).

mining the reach of school authorities to regulate off-campus student speech.<sup>259</sup>

In *J.S. ex rel Snyder III*, the en banc court remanded the decision to the district court, reversing in part and affirming in part.<sup>260</sup> While the court concluded that the school's disciplinary policies were not facially unconstitutional, as J.S. and her parents alleged,<sup>261</sup> it reversed the holding that the school could punish J.S.'s speech.<sup>262</sup> Noting that schools could suppress or punish student speech in certain situations, the court stated "[t]he authority of public school officials is not boundless."<sup>263</sup> The court then engaged in a discussion as to what the Supreme Court's basic analysis was when reviewing student speech punishment arguments, discussing *Tinker's* "substantial disruption" requirement and noting the further exceptions created by *Fraser*, *Kuhlmeier*, and *Morse*.<sup>264</sup>

An examination of the court's analysis indicated that while the court acknowledged that a school could suppress or punish student speech in the public school setting, in order to prevail in court, "school officials must [show] that 'the forbidden [speech or] conduct would materially and substantially interfere with the . . . appropriate discipline in the operation of the school.'"<sup>265</sup>

The court noted that schools cannot satisfy this burden if they cannot demonstrate more than the "'desire to avoid the discomfort and unpleasantness that always accompan[ies] an unpopular viewpoint.'"<sup>266</sup> When examining the implications and applications of *Fraser*, *Kuhlmeier*, and *Morse*, the court concluded that if *Tinker* was not applicable, then there was no need to establish a substantial disruption and instead the *Fraser*, *Kuhlmeier*, or *Morse* exceptions applied.<sup>267</sup> The court said that *Fraser* allowed schools to discipline school speech, categorized as lewd or vulgar, when a captive audi-

259. *J.S. ex rel. Snyder III*, 650 F.3d at 940 (Smith, Cir. J., concurring).

260. *Id.* at 915, 936. As with the en banc opinion published in *Layshock III*, this opinion involved a concurrence. *Id.* at 936; *Layshock III*, 650 F.3d at 219. It also included a dissent. *J.S. ex rel. Snyder III*, 650 F.3d at 941.

261. *J.S. ex rel. Snyder III*, 650 F.3d at 936.

262. *Id.* at 933 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986)).

263. *Id.* at 925–26 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969)).

264. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Fraser*, 478 U.S. at 685; *Tinker*, 393 U.S. at 509; *J.S. ex rel. Snyder III*, 650 F.3d at 926–27 (citing *Morse v. Frederick*, 551 U.S. 393, 408 (2007); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 213–14 (3d Cir. 2001)).

265. *J.S. ex rel. Snyder III*, 650 F.3d at 926 (quoting *Tinker*, 393 U.S. at 509).

266. *Id.* (quoting *Tinker*, 393 U.S. at 509).

267. *See id.* at 926–27 (citing *Morse*, 551 U.S. at 408; *Tinker*, 393 U.S. at 506; *Saxe*, 240 F.3d at 213–14).

ence was involved,<sup>268</sup> while *Kuhlmeier* allowed discipline, for pedagogical reasons of school sponsored speech.<sup>269</sup> If neither of those categories were applicable, *Morse* then established that speech which advocated illegal drug use, even if off-campus but at a school sponsored event, could also be punished.<sup>270</sup> Applying this analysis to the facts of the case, the court concluded that none of the exceptions articulated by *Fraser*, *Kuhlmeier*, or *Morse* were applicable.<sup>271</sup> Thus, *Tinker* would be the only standard by which the school could punish J.S.'s speech.<sup>272</sup> However, the court concluded that the school did not meet the "substantial disruption" test of *Tinker*, as the school had conceded in the district court that no substantial disruption occurred.<sup>273</sup> Furthermore, the court said that J.S.'s profile of McGonigle "was so outrageous that no one could [or would] have taken it seriously . . . [t]hus it was . . . not reasonably foreseeable" that a "substantial disruption" would occur.<sup>274</sup> In this way, the court concluded that *J.S. ex rel Snyder III* was distinguishable from *Doninger I* and *Wisniewski*.<sup>275</sup>

The Fourth Circuit also addressed this issue in July of 2011 with its decision in *Kowalski I*.<sup>276</sup> Kara Kowalski, then a senior at Musselman High School, created a MySpace page at home with her home computer, naming the page "S.A.S.H.," which stated, "No No Herpes, We don't want no herpes."<sup>277</sup> She invited one hundred or so of her friends to join the group page; of this number, approximately two-dozen were students from Musselman High.<sup>278</sup> A friend and classmate at Musselman High, Ray Parsons, joined the group the day the page was created.<sup>279</sup> He then uploaded a picture of himself, holding his nose with a sign that said "Shay Has Herpes."<sup>280</sup> This was a reference to another Musseleman High classmate, Shay N.<sup>281</sup>

---

268. *Id.* at 927 (citing *Saxe*, 240 F.3d at 213).

269. *Kuhlmeier*, 484 U.S. at 273; *see also J.S. ex rel. Snyder III*, 650 F.3d at 927 (citing *Saxe*, 240 F.3d at 214).

270. *J.S. ex rel. Snyder III*, 650 F.3d at 927 (citing *Morse*, 551 U.S. at 408).

271. *Id.* at 932, 932 n.10, 933.

272. *Id.* at 931–32.

273. *Id.* at 928.

274. *Id.* at 930.

275. *J.S. ex rel. Snyder III*, 650 F.3d at 931 n.8; *see also Doninger I*, 527 F.3d 41, 50–51 (2d Cir. 2008), *aff'd in part, rev'd in part*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35–36 (2d Cir. 2007).

276. *Kowalski I*, 652 F.3d 565, 565, 567 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).

277. *Id.* at 567.

278. *Id.*

279. *Id.* at 568.

280. *Id.*

281. *Kowalski I*, 652 F.3d at 567–68.

According to the court, Parsons “had drawn red dots on Shay N.’s face to simulate herpes and added a sign near her pelvic region, that read, ‘[w]arning: Enter at your own risk.’”<sup>282</sup> “In the second photograph, he captioned Shay N.’s face with a sign that read, ‘portrait of a whore.’”<sup>283</sup> Shay N. learned of the page later that evening.<sup>284</sup> Her father contacted Parsons, expressing his anger.<sup>285</sup> Parsons contacted Kowalski, who tried to take the page down but was not able to remove it.<sup>286</sup>

The next day, Shay N. and her parents went to Musselman High School where they met with Vice Principal Becky Harden.<sup>287</sup> They filed a complaint of harassment with the school, and Shay then returned home, missing school because she was uncomfortable attending classes with students who had posted comments about her on Kowalski’s MySpace page.<sup>288</sup> Ronald Stephens, the school’s Principal, “contacted the central school board . . . to determine whether” this was the type of behavior that should subject students to school discipline.<sup>289</sup> The office responded affirmatively, so the school then conducted an investigation, interviewing the students involved with creating, posting to, and viewing the website.<sup>290</sup> After the investigation, the school “concluded that Kowalski had created a ‘hate website’” that was in violation of the Berkeley Board of Education’s Harassment, Bullying and Intimidation Policy and its Student Code of Conduct.<sup>291</sup> The harassment policy defined bullying as

“[A]ny intentional gesture, or any intentional written, verbal or physical act that”

1. A reasonable person under the circumstances should know will have the effect of:
  - a. Harming a student or staff member;

...

---

282. *Id.* at 568.

283. *Id.*

284. *See id.*

285. *Id.*

286. *Kowalski I*, 652 F.3d at 568.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Kowalski I*, 652 F.3d at 568–69.

2. Is sufficiently inappropriate, severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for a student.<sup>292</sup>

“The Student Code of Conduct [required], ‘[a]ll students . . . shall behave in a safe manner that promotes a school environment that is nurturing, orderly, safe, and conducive to learning and personal-social development.’”<sup>293</sup> Violators of either policy were subject to various punishments—one such punishment was a ten-day suspension.<sup>294</sup> Applying the harassment and conduct policies to the facts, Stephens and Harden then “suspended Kowalski from school for 10 days and issued . . . a 90-day ‘social suspension’” from school extracurricular activities.<sup>295</sup>

Kowalski sued, arguing that the school had violated her First Amendment free speech rights.<sup>296</sup> She argued that the school had disciplined her for “‘off-campus, non-school related speech’” for which it had neither the right nor the authority to punish her.<sup>297</sup> The United States District Court for the Northern District of West Virginia disagreed,<sup>298</sup> and Kowalski appealed its ruling to the Fourth Circuit.<sup>299</sup>

The Fourth Circuit defined the issue facing it as “whether Kowalski’s activity fell within the outer boundaries of the high school’s legitimate interest in maintaining order in the school and protecting the well-being and educational rights of its students.”<sup>300</sup> Concluding it did, the court affirmed the district court’s decision, upholding the school’s punishment of Kowalski.<sup>301</sup> While acknowledging that “[t]here is surely a limit to the scope of a high school’s interest in the order, safety, and well-being of its students when the speech . . . originates outside the schoolhouse gate,”<sup>302</sup> the court concluded that “the language of *Tinker* supports the conclusion that . . . schools have a ‘compelling interest’ in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment

---

292. *Id.* at 569 (alteration in original).

293. *Id.*

294. *Id.*

295. *Id.* at 568–69.

296. *Kowalski I*, 652 F.3d at 570.

297. *Id.* at 570–71.

298. *See* Order Granting Defendants’ Motion for Summary Judgment at 12, *Kowalski v. Berkeley Cnty. Pub. Sch.*, No. 3:07-CV-147 (N.D. W. Va. Dec. 22, 2009), ECF No. 37.

299. *Kowalski I*, 652 F.3d at 570.

300. *Id.* at 571.

301. *Id.* at 574 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969); *Doninger I*, 527 F.3d 41, 51–52 (2d Cir. 2008), *aff’d in part, rev’d in part*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011)).

302. *Id.* at 573.

and bullying.”<sup>303</sup> The court stated that while the Supreme Court of the United States had not yet dealt with a case in which one student targeted another student for verbal abuse, it felt certain that *Tinker* would permit discipline for such speech as it “‘disrupts classwork,’ creates ‘substantial disorder,’ or ‘collid[es] with’ or ‘inva[des]’ ‘the rights of others.’”<sup>304</sup> According to the court, the fact that the student speech involved occurred off-campus was not determinative of the ability of school administrators to impose discipline.<sup>305</sup> Rather, the court stressed that *Tinker* permitted the school’s discipline because *Tinker* allowed schools to intervene where student speech “materially and substantially” interfered with school work and invaded the rights of others “to be let alone.”<sup>306</sup> Since Kowalski’s speech targeted a classmate, the court proclaimed that it was “reasonably foreseeable” that the speech would impact students while at school and create substantial disruption.<sup>307</sup>

The last circuit court decision involved school discipline of a student for off-campus speech that was eventually held to constitute a true threat.<sup>308</sup> *D.J.M. ex rel. D.M.* was decided by the United States Court of Appeals for the Eighth Circuit.<sup>309</sup> This case differs from *Wisniewski*, *Doninger I*, *Layshock II*, *J.S. ex rel. Snyder III*, and *Kowalaski* in that it involved behavior by a student that did appear to constitute a true threat of physical violence against other students.<sup>310</sup> While the other five decisions involved off-campus student speech directed at school personnel or students whose behavior was disliked, *D.J.M. ex rel. D.M.* involved behavior that was perceived to constitute an actual threat to the physical well-being of school personnel and students.<sup>311</sup>

---

303. *Id.* at 572 (citing *DeJohn v. Temple Univ.*, 537 F.3d 301, 319–20 (3d Cir. 2008)).

304. *Kowalski I*, 652 F.3d at 571–72 (alteration in original) (quoting *Tinker*, 393 U.S. at 513).

305. *Id.* at 574.

306. *Id.* at 573–74 (citing *Tinker*, 393 U.S. at 508, 513).

307. *Id.* at 574.

308. *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 764 (8th Cir. 2011).

309. *Id.* at 755.

310. Compare *id.* at 756–59, with *Kowalski I*, 652 F.3d at 567–68, and *J.S. ex rel. Snyder III*, 650 F.3d 915, 920 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012), and *Layshock II*, 593 F.3d 249, 252–53 (3d Cir.), *vacated en banc, reh’g granted en banc*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010), *cert. denied sub nom.* *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012), and *Doninger I*, 527 F.3d 41, 44–46 (2d Cir. 2008), *aff’d in part, rev’d in part*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011), and *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35–36 (2d Cir. 2007).

311. Compare *D.J.M. ex rel. D.M.*, 647 F.3d at 756–59, with *Kowalski I*, 652 F.3d at 567–68, and *J.S. ex rel. Snyder III*, 650 F.3d at 920, and *Layshock II*, 593 F.3d at 252–53, and *Doninger I*, 527 F.3d at 44, and *Wisniewski*, 494 F.3d at 35–36.

*D.J.M. ex rel. D.M.* involved a decision in which a student, D.J.M., was chatting via instant message with another classmate, C.M.<sup>312</sup> During the chat, D.J.M. told C.M. that he was going to get a gun and kill certain classmates.<sup>313</sup> He named specific students that he would “get rid of.”<sup>314</sup> Named individuals included “a particular boy along with his older brother and some individual members of groups he did not like, namely ‘midget[s],’ ‘fags,’ and ‘negro bitches.’”<sup>315</sup> Concerned, C.M. contacted a school administrator, forwarding D.J.M.’s emails.<sup>316</sup> This resulted in D.J.M. being arrested by the police and detained in the psychiatric ward of the Lakeland Regional Hospital for a month.<sup>317</sup> After his release from the hospital, D.J.M. attempted to return to school, but he was initially suspended for ten days for making true threats.<sup>318</sup> After numerous parents expressed concern and demanded action, a school board hearing resulted in the suspension of D.J.M. for the remainder of the school year.<sup>319</sup>

While D.J.M. argued that the school suspension violated his First Amendment free speech rights, the school disputed this, arguing that D.J.M.’s speech constituted a true threat, which violated the school’s conduct policy and was not protected by the First Amendment.<sup>320</sup> The United States District Court for the Eastern District of Missouri held that “the evidence before the [c]ourt is that school was substantially disrupted because of Plaintiff’s threats. Under the *Tinker* test, Defendants could punish Plaintiff for his disruptive statements without violating his First Amendment rights.”<sup>321</sup> The United States Court of Appeals for the Eighth Circuit upheld the lower court’s decision, concluding that “[t]rue threats are not protected under the First Amendment . . . [H]ere [the school] was given enough information that it reasonably feared D.J.M. had access to a handgun and was thinking about shooting specific classmates at the high school.”<sup>322</sup>

Three of the above decisions, *Doninger II*, *J.S. ex rel. Snyder III*, and *Kowalski I*, were appealed to the Supreme Court of the United States during

---

312. *D.J.M. ex rel. D.M.*, 647 F.3d at 757.

313. *Id.* at 758.

314. *Id.*

315. *Id.* (alteration in original).

316. *Id.* at 759.

317. *D.J.M. ex rel. D.M.*, 647 F.3d at 759.

318. *Id.*

319. *Id.*

320. *Id.* at 759–60.

321. *Mardis v. Hannibal Pub. Sch. Dist. No. 60*, 684 F. Supp. 2d 1114, 1124 (E.D. Mo. 2010).

322. *D.J.M. ex rel. D.M.*, 647 F.3d at 764.

the 2011–2012 term.<sup>323</sup> Despite what appears to be confusion, or what some would term a circuit split,<sup>324</sup> the Court denied certiorari in all three cases.<sup>325</sup>

---

323. See generally *Kowalski I*, 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); *J.S. ex rel. Snyder III*, 650 F.3d 915 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); *Doninger II*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011).

324. McCarthy, *supra* note 45, at 1; see also Philip T.K. Daniel & Scott Greytak, *A Need to Sharpen the Contours of Off-Campus Student Speech*, 273 EDUC. L. REP. 21, 36 (2011).

325. See *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder (J.S. ex rel. Snyder IV)*, 132 S. Ct. 1097, 1097 (2012); *Kowalski v. Berkeley Cnty. Sch. (Kowalski II)*, 132 S. Ct. 1095, 1095 (2012); *Doninger v. Niehoff (Doninger III)*, 132 S. Ct. 499, 499 (2011). In her petition to the Supreme Court for certiorari, Avery Doninger, citing *Layshock I* and *J.S. ex rel. Snyder III*, among other cases, argued that the “divergent holdings [among the Second and Third Circuits] represent[ed] an actual concrete split . . . which this Court should resolve sooner rather than later.” Petition for Writ of Certiorari at 13, 16, *Doninger v. Niehoff*, 132 S. Ct. 499 (2011) (No. 11-113). Meanwhile, Niehoff, in the Respondents’ Brief in Opposition, argued that Doninger’s behavior satisfied the *Tinker* standard of “substantial disruption” and denied that a conflict between the circuits existed. Respondents’ Brief in Opposition at 20–22, *Doninger v. Niehoff*, 132 S. Ct. 499 (2011) (No. 11-113). Blue Mountain School District also filed a petition, requesting certiorari. Petition for a Writ of Certiorari at 1, *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012) (No. 11-502). Citing both the en banc and panel decisions of the Third Circuit, Blue Mountain argued there was not only a circuit split, but also a deepening split within the Third Circuit. *Id.* at 1, 14. The school also argued that lower district courts were split on the issue as to whether *Tinker*’s standard applied to student speech that originated off-campus. *Id.* at 15. Interestingly enough, J.S./Snyder’s respondent’s Brief in Opposition argued, as did the school’s brief in *Doninger III*, that there was no split among the courts as they applied *Tinker* to off-campus student speech. See Brief in Opposition at 2, *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012) (No. 11-502). Kowalski too petitioned the Supreme Court of the United States for certiorari, arguing, as did the Blue Mountain School District, that there was a split among the courts as to whether *Tinker* applied to off-campus speech not directed at the school. Petition for a Writ of Certiorari at 2–3, *Kowalski v. Berkeley Cnty. Sch.*, 132 S. Ct. 1095 (2012) (No. 11-461). She also requested that the Court clarify the meaning of *Tinker*’s “substantial disruption” test. See *id.* Berkeley School District responded, arguing—as did the student J.S. in *J.S. ex rel. Snyder*—that there was no circuit court split and that the Fourth Circuit had applied the First Amendment analysis as intended. Brief in Opposition to Petition for Writ of Certiorari at 8, 30, *Kowalski v. Berkeley Cnty. Sch.*, 132 S. Ct. 1095 (2012) (No. 11-461). The Marion B. Brechner First Amendment Project, the Alliance Defense Fund and Liberty Institute, and the Rutherford Institute all filed amicus curiae briefs to support Kowalski, urging the Court to hear the case and clarify the analysis. See Motion for Leave to File Brief in Support of Petitioner for Writ of Certiorari and Brief of Amicus Curiae Marion B. Brechner First Amendment Project at 1–2, *Kowalski v. Berkeley Cnty. Sch.*, 132 S. Ct. 1095 (2012) (No. 11-461); Motion for Leave to File Brief as Amici Curiae and Brief for the Alliance Defense Fund and Liberty Institute as Amici Curiae in Support of Petitioner at 2–3, *Kowalski v. Berkeley Cnty. Sch.*, 132 S. Ct. 1095 (2012) (No. 11-461); Motion of the Rutherford Institute for Leave to File an Amicus Curiae Brief and Amicus Curiae Brief in Support of Petitioner at 2, 14, *Kowalski v. Berkeley Cnty. Sch.*, 132 S. Ct. 1095 (2012) (No. 11-461). The Court denied certiorari in all three cases. *J.S. ex rel. Snyder IV*, 132 S. Ct. at 1097; *Kowalski II*, 132 S. Ct. at 1095; *Doninger III*, 132 S. Ct. at 499.

#### D. District Courts: More Confusion?

If the decisions from the United States Courts of Appeals for the Second, Third, Fourth, and Eighth Circuits appear confusing and inconsistent,<sup>326</sup> an examination of nine decisions rendered by various United States District Courts across the country from 2002 to 2011 and the Pennsylvania Supreme Court reveals more inconsistency. This section will review eight cases decided by United States District Courts, in reverse chronological order, as well as a decision from the Pennsylvania Supreme Court that involved school discipline of what originated as off-campus student cyberspeech.

Most recently, the United States District Court for the Northern District of Indiana issued an opinion in *T.V. ex rel. B.V. v. Smith-Green Community School Corporation*.<sup>327</sup> In *T.V. ex rel. B.V.*, several teenage girls at Churubusco High School, who played on the school's volleyball team, held slumber parties.<sup>328</sup> At these parties, T.V. and other girls posed for various pictures that the court described as "raunchy."<sup>329</sup>

The girls posted pictures of themselves on Facebook, MySpace, and Photo Bucket licking "phallic-shaped rainbow colored lollipops," holding trident-shaped objects from their crotches, putting them in their buttocks, and kneeling beside one another "as if engaging in anal sex."<sup>330</sup> The pictures came to the attention of other classmates who also played on the volleyball team.<sup>331</sup> Some classmates disapproved and then showed the web pages to their parents.<sup>332</sup> Some parents then contacted the school to complain about T.V. and M.K. being allowed to play on the volleyball team.<sup>333</sup> After reviewing the school's extracurricular policy, which required that students "'demonstrate good conduct at school and outside of school,'"<sup>334</sup> the school suspended T.V. and M.K. from participating in extracurricular activities, i.e. playing on the volleyball team, for part of the school year.<sup>335</sup> While the girls argued that the school was violating their First Amendment rights, the school stated, "[t]he basis for the suspension was the determination that the photo-

---

326. See discussion *supra* Part II.C.

327. 807 F. Supp. 2d 767, 767 (N.D. Ind. 2011).

328. *Id.* at 771.

329. *Id.*

330. *Id.* at 772.

331. See *id.*

332. *T.V. ex rel. B.V.*, 807 F. Supp. 2d at 772.

333. *Id.* at 772–73.

334. *Id.* at 773 ("If you act in a manner in school or out of school that brings discredit or dishonor upon yourself or your school, you may be removed from extracurricular activities.").

335. *Id.* at 773–74.

graphs were inappropriate, and that by posing for them and posting them on the internet, the students were reflecting discredit upon the school.”<sup>336</sup> Acknowledging that “the speech in this case doesn’t exactly call to mind high-minded civic discourse about current events,”<sup>337</sup> the court agreed with T.V. that her First Amendment rights had been violated.<sup>338</sup> After concluding that T.V.’s photographs were indeed speech protected by the First Amendment,<sup>339</sup> the court then rejected the school’s argument that the photographs were obscene and constituted child pornography.<sup>340</sup> Having concluded that the speech was protected, the court then applied *Fraser* and *Tinker* to determine whether T.V.’s posting of photographs on Facebook could be punished by school officials.<sup>341</sup> Since the speech was off-campus, the court concluded that *Fraser* was not applicable.<sup>342</sup> Concluding that *Tinker* was the appropriate standard to be applied, the court noted that *Tinker*’s “substantial disruption” test was not met.<sup>343</sup> The court stated that “no reasonable jury could conclude that the photos of T.V. and M.K. posted on the internet caused a substantial disruption to school activities, or that there was a reasonably foreseeable chance of future substantial disruption” since only a few parents had complained.<sup>344</sup> The court noted that “substantial disruption” required “more than the ordinary personality conflicts among” school children.<sup>345</sup>

In 2010, three student cyberspeech cases, *Evans v. Bayer*,<sup>346</sup> *J.C. ex rel. R.C. v. Beverly Hills Unified School District*,<sup>347</sup> and *Mardis v. Hannibal Public School District No. 60*,<sup>348</sup> involved school punishment of students for off-campus cyberspeech.<sup>349</sup> Stretching from coast to coast and including the

---

336. *Id.* at 774.

337. *T.V. ex rel. B.V.*, 807 F. Supp. 2d at 771.

338. *Id.* at 790.

339. *Id.* at 776.

340. *Id.* at 778.

341. *Id.* at 779–80; *see also* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 685 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

342. *T.V. ex rel. B.V.*, 807 F. Supp. 2d at 779 (citing *Fraser*, 478 U.S. at 688 (Brennan, J., concurring)).

343. *Id.* at 783–84 (citing *Tinker*, 393 U.S. at 509, 514).

344. *Id.* at 784.

345. *See id.* (quoting *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1119 (C.D. Cal. 2010)).

346. 684 F. Supp. 2d 1365 (S.D. Fla. 2010).

347. 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

348. 684 F. Supp. 2d 1114 (E.D. Mo. 2010). *Mardis* was appealed to the United States Court of Appeals for the Eighth Circuit where an opinion was issued. *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 757 (8th Cir. 2011). For a discussion of the case and the opinion of the Eighth Circuit, *see infra*, notes 381–91.

349. *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1098; *Evans*, 684 F. Supp. 2d at 1367; *Mardis*, 684 F. Supp. 2d at 1115.

heartland, the decisions ranged in geography, from the Southern District of Florida to the Central District of California, with a stop in Missouri to demonstrate student cyberspeech was an issue across America rather than just an urban bi-coastal problem.<sup>350</sup>

The *Evans* decision involved Katherine Evans, a high school senior at Pembroke Pines Charter School, who created a Facebook page and named it “Ms. Sarah Phelps is the worst teacher I’ve ever met.”<sup>351</sup> She invited students “to express your feelings of hatred” about Ms. Phelps at the site.<sup>352</sup> While “[t]he page included Ms. Phelps’ photograph,” it “did not contain threats of violence.”<sup>353</sup> Students posted to the site, in support of Ms. Phelps while dismissing Evans’ comments.<sup>354</sup> Two days later, Evans removed the post, but the posting still came to Peter Bayer’s attention.<sup>355</sup> Bayer, the high school principal, reviewed the post and concluded that Evans had violated the school policy regarding “‘Bullying/Cyberbullying/Harassment towards a staff member’ and ‘Disruptive behavior.’”<sup>356</sup> Because of this, he suspended Evans for three days and removed her from her advanced placement classes.<sup>357</sup>

Evans sued, arguing she was punished by the school for exercising her First Amendment speech rights.<sup>358</sup> The court framed the issue as “whether the fact that Plaintiff’s speech was arguably aimed at a particular audience at the school is enough by itself to label the speech on-campus speech.”<sup>359</sup> Analyzing the facts under *Tinker* and applying the *Morse* quartet’s holdings, the court found that Evans’s First Amendment rights had been violated, concluding, “Evans’s speech falls under the wide umbrella of protected speech. It was an opinion of a student about a teacher, that was published off-campus, did not cause any disruption on-campus, and was not lewd, vulgar, threatening, or advocating illegal or dangerous behavior.”<sup>360</sup>

---

350. *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1094; *Evans*, 684 F. Supp. 2d at 1365; *Mardis*, 684 F. Supp. 2d at 1114; see also *Bullying Statistics 2010*, BULLYING STAT., <http://www.bullyingstatistics.org/content/bullying-statistics-2010.html> (last visited Feb. 24, 2013).

351. *Evans*, 684 F. Supp. 2d at 1367.

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Evans*, 684 F. Supp. 2d at 1367.

357. *Id.*

358. *Id.* at 1368.

359. *Id.* at 1371.

360. *Id.* at 1374; see also *Morse v. Frederick*, 551 U.S. 393, 405 (2007).

*J.C. ex rel. R.C.* involved student on student misbehavior.<sup>361</sup> In *J.C. ex rel. R.C.*, J.C. and several of her classmates went to a restaurant after school ended.<sup>362</sup> While there, they discussed and made comments about classmates.<sup>363</sup> A classmate, C.C., who was not present at the restaurant, was called a “slut,” “spoiled,” and “the ugliest piece of shit I’ve ever seen in my whole life.”<sup>364</sup> While this conversation ensued, J.C. recorded it with her video camera.<sup>365</sup> After she went home, she then uploaded the four and a half minute video rant against C.C. and posted it on YouTube.<sup>366</sup> She invited five to ten students from Beverly Hills High to view it.<sup>367</sup> J.C. also contacted C.C. directly, telling her to view it.<sup>368</sup> C.C. viewed it, was upset, and took her mother in to complain to the principal the next day.<sup>369</sup> The students who viewed the video did so from their homes with home computers since access to YouTube was blocked at school.<sup>370</sup> The school investigated and consulted “the [local] Director of Pupil Personnel for the District.”<sup>371</sup> The director indicated that the student could be suspended; the school then suspended J.C. for two days.<sup>372</sup>

J.C. sued the school district, arguing the school “violated her First Amendment rights.”<sup>373</sup> The school district disagreed, arguing J.C.’s conduct caused a “substantial disruption” as required by *Tinker*.<sup>374</sup> The court reviewed and examined *Tinker*, *Fraser*, *Hazelwood*, and *Morse*, concluding that *Tinker*’s analysis governed.<sup>375</sup> The court rejected J.C.’s “geography-based argument,” holding that “*Tinker* applies to both on-campus and off-campus student speech.”<sup>376</sup> In its analysis, the court emphasized the importance of the “substantial disruption” test in determining whether schools could regulate off-campus student speech.<sup>377</sup> Applying *Tinker* to the facts of

---

361. *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1098 (C.D. Cal. 2010).

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1098.

367. *Id.*

368. *Id.*

369. *Id.*

370. *See id.* at 1099.

371. *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1099.

372. *Id.*

373. *Id.* at 1097, 1100.

374. *See id.* at 1119.

375. *Id.* at 1103, 1109–10.

376. *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1107–08.

377. *Id.* at 1104, 1107–08.

the case, the court concluded that J.C.'s conduct was "too *de minimis* . . . to constitute a substantial disruption."<sup>378</sup> Rather *Tinker's* "substantial disruption" required "something more than the ordinary personality conflicts among middle school students that may leave one student feeling hurt or insecure."<sup>379</sup> Thus, the school could not punish J.C.'s speech since it failed to satisfy *Tinker's* substantial disruption test.<sup>380</sup>

While the United States Court of Appeals for the Eighth Circuit later weighed in and upheld the lower court's decision in *D.J.M. ex rel. D.M.*,<sup>381</sup> this section will offer a brief discussion of the decision in the case from the lower court. *Mardis* came out of Missouri.<sup>382</sup> It involved an off-campus student instant message exchange between D.J.M. and a classmate, Carly Moore.<sup>383</sup> During the chat, D.J.M. told Moore "that he was going to get a gun and kill certain classmates."<sup>384</sup> Moore was truly concerned so she contacted a school administrator.<sup>385</sup> The police then arrested D.J.M. and detained him in the psychiatric ward at Lakeland Regional Hospital.<sup>386</sup> Once released, D.J.M. was initially suspended for ten days for making threats.<sup>387</sup> The superintendent then extended his suspension for the remainder of the school year.<sup>388</sup>

Angry, D.J.M. sued the school district, arguing that his instant messages did not constitute "true threats," and thus the school's suspension violated his First Amendment free speech.<sup>389</sup> The school disputed this, arguing that D.J.M.'s speech constituted a true threat, which was not protected by the First Amendment.<sup>390</sup> The court agreed with the school district.<sup>391</sup>

In 2007, the United States District Court for the Western District of Washington dealt with off-campus student cyberspeech in *Requa v. Kent School District No. 415*.<sup>392</sup> Gregory Requa was a high school junior at Ken-

378. *Id.* at 1117.

379. *Id.* at 1119.

380. *Id.* at 1122.

381. *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 767 (8th Cir. 2011).

382. *Mardis v. Hannibal Pub. Sch. Dist. No. 60*, 684 F. Supp. 2d 1114, 1114 (E.D. Mo. 2010).

383. *Id.* at 1115.

384. *Id.*

385. *Id.* at 1122.

386. *Id.* at 1115.

387. *Mardis*, 684 F. Supp. 2d at 1115–16.

388. *Id.* at 1116.

389. *Id.* at 1119; *see also* U.S. CONST. amend. I.

390. *Mardis*, 684 F. Supp. 2d at 1119; *see also* U.S. CONST. amend. I.

391. *Mardis*, 684 F. Supp. 2d at 1119.

392. 492 F. Supp. 2d 1272, 1272, 1274 (W.D. Wash. 2007).

tridge High School when he allegedly “surreptitiously” recorded his high school teacher in her classroom.<sup>393</sup> While standing behind Ms. M., Requa made faces, put up rabbit ears, “and ma[de] pelvic thrusts in her general direction.”<sup>394</sup> He filmed the teacher’s buttocks and referred to them as “booty.”<sup>395</sup> He then edited the recording, adding commentary about the teacher’s hygiene.<sup>396</sup> He uploaded and posted the recording to YouTube, where it languished until a local Seattle news station did a story about high school students who posted videos to YouTube that were critical of teachers.<sup>397</sup> During the development of this story, the reporter “contacted the Kentridge administration for comment.”<sup>398</sup> The news station then included Requa’s YouTube clip in its broadcast to the Seattle area.<sup>399</sup>

The school then conducted an investigation to satisfy its administrative policies and determine which student, either Requa or S.W., had made the recordings.<sup>400</sup> Requa denied that he had been involved in the “filming, editing or posting [of] the video,” but four unnamed students disputed this.<sup>401</sup> The school then suspended Requa for forty days, indicating his suspension resulted from the filming of Ms. M. in class.<sup>402</sup> The school’s handbook prohibited “sexual harassment” and the school concluded that the pelvic thrusts and shots of Ms. M’s buttocks constituted sexual harassment.<sup>403</sup> After a school hearing and an appeal to the Board of Directors, the punishment was upheld.<sup>404</sup>

Requa sued, alleging violation of his First Amendment rights and arguing that he had a right to criticize his teacher.<sup>405</sup> The school district again affirmed its defense, which was that Requa was punished for his behavior in class, i.e., “secretly filming the teacher,” rather than his internet posting.<sup>406</sup> The court established that *Tinker*’s “substantial disruption” was the applicable test to determine whether Requa’s in-class behavior was protected

---

393. *Id.* at 1274.

394. *Id.*

395. *Id.*

396. *Id.*

397. *Requa*, 492 F. Supp. 2d at 1274.

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. *Requa*, 492 F. Supp. 2d at 1275–76.

403. *Id.*

404. *Id.*

405. *See id.* at 1273, 1276, 1279.

406. *Id.* at 1277.

speech.<sup>407</sup> Examining Requa's behavior, which consisted of standing behind a teacher in class and filming her while "making 'rabbit ears' and pelvic thrusts," the court concluded that Requa's behavior satisfied *Tinker*'s "substantial disruption" test.<sup>408</sup> Thus, his speech was unlikely to be "protected speech" within the meaning of *Tinker*.<sup>409</sup> Ultimately the school prevailed, as the court noted that Requa's "admitted free speech activities outside the classroom—posting a link to the YouTube video on the internet—are protected speech and the school district agrees that he may not be disciplined for [his] out-of-school expression of his viewpoint."<sup>410</sup> This is an example of the existing confusion about the application of *Tinker* to off-campus student cyberspeech. While the United States District Court for the Central District of California says that *Tinker* is applicable to off-campus student speech that arrives on campus,<sup>411</sup> the United States District Court for the Western District of Washington indicates that *Tinker* is not applicable to off-campus student speech.<sup>412</sup>

In 2003, the United States District Court for the Western District of Pennsylvania confronted an off-campus student cyberspeech issue in *Flaherty v. Keystone Oaks School District*.<sup>413</sup> "Jack Flaherty, Jr. posted three messages from . . . home and one from school" to a public message board discussing, in juvenile terms, his school's volleyball team.<sup>414</sup> Once the school coaches learned of the postings, Flaherty was disciplined based on a policy that defined harassment as "any ongoing pattern of *abuse*, whether physical or verbal."<sup>415</sup> Flaherty sued, arguing the school policies used to punish his off-campus conduct and speech were overreaching and "unconstitutionally overbroad and vague [so] that they fail to limit a school official's authority to discipline."<sup>416</sup> Examining the school's policy in light of the mandates of *Tinker*, the court concluded that the discipline policy was both overbroad and

---

407. *Requa*, 492 F. Supp. 2d at 1280 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001)).

408. *Id.* (citing *Tinker*, 393 U.S. at 513).

409. *Id.* at 1279 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *Tinker*, 393 U.S. at 513).

410. *Id.* at 1283.

411. *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1094, 1105, 1107–08 (C.D. Cal. 2010).

412. *Requa*, 492 F. Supp. 2d at 1272, 1283.

413. 247 F. Supp. 2d 698, 698, 700 (W.D. Pa. 2003).

414. *Id.* at 700.

415. *Id.* at 700, 701 & n.3.

416. *Id.* at 701, 705.

vague in its definition and application.<sup>417</sup> The court announced that the policy failed to follow *Tinker*'s mandate and limit the authority of the school to discipline student expression except in cases of "substantial disruption."<sup>418</sup> Instead, the court stated that the discipline policy "could be interpreted to prohibit a substantial amount of protected speech."<sup>419</sup> Thus, the court granted Flaherty's motion for summary judgment.<sup>420</sup>

In 2002, two federal district court cases involved student cyberspeech, as did a decision from the Pennsylvania Supreme Court.<sup>421</sup> *Coy ex rel. Coy v. Board of Education*<sup>422</sup> involved a middle school student named Jon Coy.<sup>423</sup> While at home, using his own computer, Coy created a website, posting "pictures and biographical information" about himself and some of his school friends.<sup>424</sup> The site also contained a section named "losers" and included pictures of classmates with derogatory sentences under the photos.<sup>425</sup> Specifically, "[t]he 'losers' section contained the pictures of three boys who attended the North Canton Middle School. . . . Most objectionable was a sentence describing one boy as being sexually aroused by his mother."<sup>426</sup> Middle school students learned of the website and eventually reported it to the math teacher, who reported it to the principal, Mr. Stanley.<sup>427</sup> Nothing was done until Coy accessed the website from the school's computer lab.<sup>428</sup> After that, Stanley suspended Coy for four days for violating the school's student conduct code and internet policy.<sup>429</sup> The school found that Coy violated the following portion of the student conduct code: "Inappropriate Action or Behavior: Any action or behavior judged by school officials to be inappropriate and not specifically mentioned in other sections shall be in violation of the Student Conduct Code."<sup>430</sup>

---

417. *Id.* at 704, 705; *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

418. *Flaherty*, 247 F. Supp. 2d at 704; *see also Tinker*, 393 U.S. at 509.

419. *Flaherty*, 247 F. Supp. 2d at 706.

420. *Id.*

421. *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 781 (E.D. Mich. 2002); *Coy ex rel. Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 794-95 (N.D. Ohio 2002); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850 (Pa. 2002).

422. 205 F. Supp. 2d 791 (N.D. Ohio 2002).

423. *Id.* at 794.

424. *Id.* at 795.

425. *Id.*

426. *Id.*

427. *Coy ex rel. Coy*, 205 F. Supp. 2d at 795.

428. *Id.* at 795-96.

429. *Id.* at 796.

430. *Id.*

Coy and his parents sued.<sup>431</sup> Coy argued that the school disciplined him, not for viewing the website at school, but rather for the content of the website, which was created off-campus and thus constituted protected speech under *Tinker*.<sup>432</sup> The school disputed this, saying that it punished Coy because he violated school policy.<sup>433</sup> Discussing both *Tinker*'s and *Fraser*'s requirements, the court refused to grant the school summary judgment, indicating that it must demonstrate a substantial disruption in order to discipline Coy's speech.<sup>434</sup>

In November of 2002, the United States District Court for the Eastern District of Michigan also dealt with a student cyberspeech issue in *Mahaffey ex rel. Mahaffey v. Aldrich*.<sup>435</sup> Joshua Mahaffey, a high school student, created a website with another student and named it "Satan's web page."<sup>436</sup> The site stated "[s]tab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face. Killing people is wrong don't do It [sic]. unless [sic] Im [sic] there to watch."<sup>437</sup>

A parent of another student at the school learned of the web site and reported it to the police.<sup>438</sup> The police investigated and were told that computers at the high school "may have been used to create the website."<sup>439</sup> The police then notified the school.<sup>440</sup> The school then began an investigation, and Mahaffey indicated that he created the website "for laughs" and because he was "bored."<sup>441</sup> The school's investigation centered upon Mahaffey's conduct that was alleged to violate the school's code of conduct.<sup>442</sup> After the investigation, the principal, Carol Baldwin, recommended expulsion because Mahaffey's behavior violated the school's *Conduct Policy* which prohibited "[b]ehavior [d]angerous to [the] [s]elf and [o]thers."<sup>443</sup>

431. *Id.* at 794.

432. *Coy ex rel. Coy*, 205 F. Supp. 2d at 794, 797 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

433. *Id.* at 794, 796.

434. *Id.* at 799–801.

435. 236 F. Supp. 2d 779, 779, 781–82 (E.D. Mich. 2002).

436. *Id.* at 781.

437. *Id.* at 782.

438. *Id.*

439. *Id.*

440. *Mahaffey ex rel. Mahaffey*, 236 F. Supp. 2d at 782.

441. *Id.* at 781.

442. *Id.* at 782.

443. *Id.* The school advised Mahaffey that "based upon the admitted and alleged violation of Categories 5-Behavior Dangerous to Self and Others, 23-Internet Violations and 24-Intimidation and Threats of the Waterford School District Code of Conduct" he was being expelled. *Id.*

The school then recommended expulsion but offered to provide a hearing.<sup>444</sup> Mahaffey sued, arguing that the school's conduct violated his First Amendment rights.<sup>445</sup> The court, applying the *Tinker* analysis, agreed with Mahaffey.<sup>446</sup> When analyzing and applying *Tinker*, the court concluded that Mahaffey's activity had to have occurred on or with school property in order for the school to have taken action.<sup>447</sup> In addition to the geography requirement, the *Tinker* test would require that Mahaffey's behavior must then have created a substantial disruption to the work of the school.<sup>448</sup> Only after establishing this could the school discipline Mahaffey for his speech.<sup>449</sup> Applying *Tinker* to the facts at hand, the court announced that the school produced no evidence that Mahaffey used school equipment to make his website nor had it established that Mahaffey communicated its existence to others at the school.<sup>450</sup> It stated:

[R]egulation of Plaintiff's speech on the website without any proof of disruption to the school or on campus activity in the creation of the website was a violation of Plaintiff's First Amendment rights. Therefore, Plaintiff's motion for summary judgment shall be granted on his free speech and free expression claims.<sup>451</sup>

The last case to be discussed in this section involved a decision handed down by the Supreme Court of Pennsylvania in *J.S. ex rel. H.S. v. Bethlehem Area School District*<sup>452</sup> in 2002.<sup>453</sup> J.S., an eighth grade student, created a website on his home computer, from home, and titled it "Teacher Sux."<sup>454</sup> It made derogatory comments about the school's algebra teacher, Mrs. Fulmer, and the school principal.<sup>455</sup> On the website, J.S. posted a question that asked "Why Should She Die?"<sup>456</sup> Beneath the heading, J.S. then requested "\$20 to help pay for the hitman."<sup>457</sup> In addition to other comments and diagrams,

---

444. *Mahaffey ex rel. Mahaffey*, 236 F. Supp. 2d at 782–83.

445. *Id.* at 781.

446. *See id.* at 784, 786.

447. *See id.* at 783–84.

448. *Id.* at 784 (quoting *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 509 (1969)).

449. *Mahaffey ex rel. Mahaffey*, 236 F. Supp. 2d at 784.

450. *Id.* at 786.

451. *Id.*

452. 807 A.2d 847 (Pa. 2002).

453. *Id.* at 847.

454. *Id.* at 850–51.

455. *Id.* at 851.

456. *Id.*

457. *J.S. ex rel. H.S.*, 807 A.2d at 851.

the final page of the website showed a “drawing of Mrs. Fulmer with her head cut off and blood dripping from her neck.”<sup>458</sup> Students, faculty, and administrators at the school viewed the website.<sup>459</sup> Mrs. Fulmer testified that the website frightened her, and that she was afraid “someone would try to kill her.”<sup>460</sup> She went on medical leave which meant that three substitute teachers had to finish teaching her class, creating a substantial disruption in the educational process.<sup>461</sup>

While the school knew of the website before the school year ended in May, it did not take action until July.<sup>462</sup> In July, the school notified J.S. and his parents that he would be suspended for three days.<sup>463</sup> Why was he being suspended? The school said “that J.S. violated School District policy [with a] threat to a teacher, harassment of a teacher and principal, and disrespect to a teacher and principal, each resulting in actual harm to the health, safety, and welfare of the school community.”<sup>464</sup> The school district conducted a hearing and then suspended J.S. for ten days.<sup>465</sup> Shortly thereafter, it expelled J.S.<sup>466</sup>

J.S. then appealed the district’s decision.<sup>467</sup> The Court of Common Pleas affirmed the school’s discipline and the Commonwealth Court upheld their decision.<sup>468</sup> J.S. then appealed to the Supreme Court of Pennsylvania.<sup>469</sup> While J.S. argued that the school’s behavior violated his First Amendment rights, the school disagreed, saying that J.S.’s speech was not entitled to First Amendment protection since it constituted a true threat.<sup>470</sup> As the court analyzed the facts, it agreed with J.S. that his speech did not constitute a true threat since the school failed to take action for several months after learning about the website.<sup>471</sup> Thus, the court concluded that the *Tinker* analysis was appropriate.<sup>472</sup> As the court understood *Tinker*, it believed that it must first determine whether the speech occurred on-campus as it appeared to believe

---

458. *Id.*

459. *Id.* at 851–52.

460. *Id.* at 852.

461. *Id.*

462. *J.S. ex rel. H.S.*, 807 A.2d at 850, 852.

463. *Id.* at 852.

464. *Id.*

465. *Id.*

466. *Id.* at 853.

467. *J.S. ex rel. H.S.*, 807 A.2d at 853.

468. *Id.* at 869.

469. *Id.* at 847, 853.

470. *Id.* at 855–56.

471. *Id.* at 860.

472. *See J.S. ex rel. H.S.*, 807 A.2d at 867–68.

that *Tinker* was inapplicable to off-campus student speech.<sup>473</sup> Determining that J.S. had accessed the website while at school from school computers, the court concluded that the nexus between off-campus speech and on-campus access was satisfied.<sup>474</sup> Lastly, the court had to determine whether J.S.'s speech created a "substantial disruption" as required by *Tinker*.<sup>475</sup> Given the nature of the statements made on the website, the court announced that the uproar generated by students, parents, and school staff because of the website did indeed result in a substantial disruption in the work of the school.<sup>476</sup> Applying the *Tinker* analysis, the court announced that the school did not violate J.S.'s First Amendment rights, stating "we find that the School District's disciplinary action[s] taken against J.S. did not violate his First Amendment right to freedom of speech."<sup>477</sup>

As the above facts and holdings demonstrate, courts are interpreting and applying the *Tinker* analysis in various ways that do not seem to be consistent.<sup>478</sup> Some courts indicate that *Tinker* applies to both on and off-campus student speech while others courts conclude that it applies only to on-campus speech.<sup>479</sup> Facts that establish a "substantial disruption" vary from district to district.<sup>480</sup> Sometimes the geographic location of the speech is determinative, while at other times courts consider the nexus between the off-campus speech and the on-campus impact when deciding if *Tinker* is applicable.<sup>481</sup> If the lack of clarity from the cases is not sufficient, the article will next consider the impact of the Department of Education's Office for Civil Rights' laws and interpretations regarding harassment as well as state legislation that

---

473. *Id.* at 864.

474. *Id.* at 865.

475. *Id.* at 868–69.

476. *Id.* at 869.

477. *J.S. ex rel. H.S.*, 807 A.2d at 869.

478. *See, e.g., Kowalski I*, 652 F.3d 565, 574 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); *J.S. ex rel. H.S.*, 807 A.2d at 869.

479. *Compare Kowalski I*, 652 F.3d at 574, with *J.S. ex rel. H.S.*, 807 A.2d at 865.

480. *Compare Kowalski I*, 652 F.3d at 574, with *J.S. ex rel. H.S.*, 807 A.2d at 869.

481. *Compare Kowalski I*, 652 F.3d at 574, with *J.S. ex rel. H.S.*, 807 A.2d at 865. The K–12 student speech and school discipline cases continue to arise and head into court. *See, e.g., Kowalski I*, 652 F.3d at 567. Three appellate briefs involving schools and student speech cited to *Tinker*. Brief of Appellees at 13–22, *C.H. ex rel. Hardwick v. Heyward*, No. 12–1445 (4th Cir. Aug. 17, 2012); Brief of Appellants at 21, *Bell v. Itawamba Cnty. Sch. Bd.*, No. 12–60264 (5th Cir. June 6, 2012) [hereinafter Brief of Appellants, *Bell*]; Brief of Appellees at 21–33, *Wynar v. Douglas Cnty. Sch. Dist.*, No. 11–17127 (9th Cir. May 7, 2012) [hereinafter Brief of Appellees, *Wynar*]. Another case involving school discipline and student speech was decided on September 6, 2012. *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist.* No. 2149, No. 12–588, 2012 WL 3870868, at \*1 (D. Minn. Sept. 6, 2012).

mandates school boards provide “safe” schools.<sup>482</sup> Both the Department of Education and several state legislatures not only ask, but require, public schools to enact and enforce certain policies that involve schools with off-campus student cyberspeech.<sup>483</sup> Are these regulations and legislation, at both the state and federal levels, constitutional, given the various interpretations of the Supreme Court decisions about off-campus student cyberspeech?

### III. THE DEPARTMENT OF EDUCATION’S OFFICE OF CIVIL RIGHTS

If interpreting and applying the legal analysis required by the *Morse* quartet is confusing,<sup>484</sup> add more confusion to the analysis when the anti-harassment provisions, monitored by the Department of Education’s Office for Civil Rights, are thrown into the mixture.<sup>485</sup> In 2010, the Department of Education drafted a DCL<sup>486</sup> that lauded efforts by school boards to deal with the harmful effects of bullying.<sup>487</sup> However, the letter warned schools not to forget that some behaviors, labeled as bullying, actually constituted peer harassment on the basis of “race, color, national origin, sex, and disability.”<sup>488</sup> Understanding the distinction between what constitutes bullying and what constitutes harassment is crucial because the Department of Education’s Office for Civil Rights concerns itself with the imposition of liability for peer harassment that is “based on race, color, national origin, sex or disability.”<sup>489</sup> The Department of Education reminded schools of their legal obligations regarding the enforcement of civil rights statutes by the Depart-

---

482. See discussion *infra* Part III. The Department of Education’s Office for Civil Rights enforces civil rights laws for programs that receive federal funding from the Department of Education. OCR: *Know Your Rights*, *supra* note 3; see also 20 U.S.C. § 3413(a) (2006). Because of this, the Department of Education interacts with school administrators for elementary and secondary schools, vocational schools, colleges and universities, proprietary schools, state education agencies, libraries, and museums. OCR: *Know Your Rights*, *supra* note 3. The Office for Civil Rights enforces the statutes “prohibit[ing] discrimination on the basis of race, color [or] national origin, sex, [and] disability.” *Id.*; see also 20 U.S.C. § 1681(a); 42 U.S.C. §§ 2000d, 12131(2).

483. See, e.g., MO. REV. STAT. § 160.775 (2012); OCR: *Know Your Rights*, *supra* note 3.

484. See Dickler, *supra* note 92, at 380–81.

485. OCR: *Know Your Rights*, *supra* note 3.

486. Dear Colleague Letter, *supra* note 80, at 1. This letter is occasionally referred to as the DCL in other texts. Letter from Francisco M. Negrón, Jr., Gen. Counsel, Nat’l Sch. Bds. Ass’n, to Charlie Rose, Gen. Counsel, U.S. Dep’t of Educ. 1 (Dec. 7, 2010) [hereinafter Negrón Letter], available at <http://www.nsba.org/schoollaw/issues/nsba-letter-to-ed-12-07-10.pdf>.

487. Dear Colleague Letter, *supra* note 80, at 1.

488. *Id.* at 1–2.

489. *Id.*

ment of Education's Office for Civil Rights.<sup>490</sup> Failure to meet these obligations could result in the imposition of liability.<sup>491</sup> Schools, coping with students' First Amendment rights and state legislatures' anti-bullying statutes, must also deal with the Department of Education's peer harassment requirements.<sup>492</sup> What happens when there is a conflict? This section will explore those topics.

By 2010, the topic of school bullying had become so widespread and public<sup>493</sup> that the Assistant Secretary for the Department of Education's Office for Civil Rights, Russlynn Ali, spoke to the subject with a DCL on October 26, 2010.<sup>494</sup> Directed to "state departments of education and local school districts," the letter applauded the anti-bullying efforts made by these organizations, noting: "Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential."<sup>495</sup> The letter indicated that some behavior that would fall under a school's anti-bullying policy might also "trigger responsibilit[y] under one or more of the federal antidiscrimination laws enforced by the Department[] [of Education]."<sup>496</sup> The Department of Education then warned schools to not only address student conduct that fell under its bullying policies, but also to consider whether such conduct resulted in discriminatory harassment.<sup>497</sup>

According to the letter, labels used by schools to pigeon-hole behavior were not determinative as to how a school was expected to respond to an incident.<sup>498</sup> The letter advised schools to impartially investigate incidents from a perspective of ascertaining whether the conduct involved harassment that was based on "race, color, national origin, sex, [or] disability."<sup>499</sup> To further explain, the Department of Education indicated that "[h]arassing conduct [could] take many forms."<sup>500</sup> It suggested the following examples:

- "verbal acts and name-calling;"

---

490. *Id.* at 1–3.

491. *See id.*

492. McCarthy, *supra* note 45, at 11–13.

493. *See Bullying Statistics 2010, supra* note 350.

494. Dear Colleague Letter, *supra* note 80, at 1, 10.

495. *Id.* at 1.

496. *Id.*

497. *Id.*

498. *Id.* at 3.

499. Dear Colleague Letter, *supra* note 80, at 2–3.

500. *Id.* at 2.

- “graphic and written statements, which may include the use of cell phones or the [i]nternet;”
- “or other conduct that may be physically threatening, harmful, or humiliating.”<sup>501</sup>

The letter stated that “[h]arassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.”<sup>502</sup> Instead, “[h]arassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school.”<sup>503</sup> The letter then explained that “[w]hen such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that [the Office for Civil Rights] enforces.”<sup>504</sup>

After defining harassment, the letter told schools that “[a] school is responsible for addressing harassment incidents about which it knows or reasonably should have known. . . . When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred.”<sup>505</sup> If the school determined there had been discriminatory harassment, it was advised to “take prompt and effective steps . . . to end the harassment.”<sup>506</sup> Punishment of the student offender would not necessarily suffice.<sup>507</sup> Instead, the school has a responsibility to discover and eradicate the problem, handle the transgressors, provide training, and put a program in place to see that the harassment did not reoccur.<sup>508</sup>

Concerned about the implications of the above letter, Francisco M. Negrón, General Counsel for the National School Boards Association, responded on December 7, 2010, writing to Charlie Rose, the Department of Education’s General Counsel.<sup>509</sup> The letter began by stating the Board’s fear “that absent clarification, the [Department of Education’s] expansive reading of the law as stated in the DCL will invite misguided litigation.”<sup>510</sup> Referring to the Supreme Court’s decision in *Davis v. Monroe County Board of Educa-*

---

501. *Id.*

502. *Id.*

503. *Id.*

504. Dear Colleague Letter, *supra* note 80, at 2.

505. *Id.*

506. *Id.*

507. *See id.* at 3.

508. *Id.*

509. Negrón Letter, *supra* note 486, at 1, 11.

510. *Id.* at 1.

tion,<sup>511</sup> the letter noted that *Davis* imposed liability only upon the demonstration that the school had *actual knowledge* of the harassment, while the October 10<sup>th</sup> Department of Education letter provided for the imposition of liability for harassment about which the school *knows or reasonably should have known*.<sup>512</sup> Besides the distinction between *actual knowledge* and the standard of *should have known*, the letter further noted that:

*Davis* holds that only “harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit” may result in [the imposition of] liability for the school district. The DCL, in contrast, states the following: “Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, *or* persistent so as to *interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by the school*.”<sup>513</sup>

On page six, Negrón’s letter noted that the Department of Education’s October 26<sup>th</sup> letter only minimally acknowledged the limitations of schools to discipline students regarding harassment when students’ First Amendment free speech rights were involved.<sup>514</sup> Negrón wrote:

[S]chool districts may discipline students within the limitations of First Amendment for on-campus, non-school sponsored speech in the following instances only: if the speech is likely to cause a “substantial disruption of or material interference with school activities” or the speech collides with “the rights of other students to be secure and . . . let alone;” if the speech is “sexually explicit, indecent or lewd;” or if it “can reasonably be regarded as encouraging illegal drug use.”<sup>515</sup>

Because of the *Morse* quartet, Negrón argued that many state legislatures, when enacting cyberbullying or bullying legislation, attempted to define bullying, cyberbullying, and harassment in such a way that the terms did not run afoul of the meaning and application of students’ First Amendment rights as delineated by the *Morse* quartet.<sup>516</sup> However, Negrón argued that the De-

---

511. 526 U.S. 629 (1999).

512. Negrón Letter, *supra* note 486, at 2; *see also* Dear Colleague Letter, *supra* note 80, at 2.

513. Negrón Letter, *supra* note 486, at 2–3.

514. *Id.* at 1, 6.

515. *Id.* at 6 (footnotes omitted).

516. *See id.*; *see also* Dickler, *supra* note 92, at 361–62.

partment of Education's interpretation, enforcement, and imposition of liability upon schools for violating the Department's Civil Rights' laws showed no such understanding.<sup>517</sup> How could a school deal with *Snyder*'s hate speech without running afoul of the Department's Civil Rights' laws?<sup>518</sup> It was indeed a dilemma.

#### IV. STATE ANTI-BULLYING LAWS

Between 1995 and April 2011, forty-six states enacted legislation to deal with bullying.<sup>519</sup> A quick look at the state legislation indicates that state legislatures have frequently used "harassment" and "bullying" interchangeably.<sup>520</sup> Given the specific legal definition of "harassment" as enforced by the Department of Education's Office for Civil Rights,<sup>521</sup> more confusion ensues.<sup>522</sup> Some states apply the legislation to off-campus speech while others do not.<sup>523</sup> Some address cyberspeech while others ignore it.<sup>524</sup>

In December of 2011, the Department of Education released a report, *Analysis of State Bullying Laws and Policies*.<sup>525</sup> The study states that between 1999 and 2010, there were over one hundred and twenty bills introduced or amended by state legislatures to either require schools or the juvenile justice system to deal with bullying.<sup>526</sup> While some of these laws require discipline by schools when bullying occurs, other laws require the intervention of the juvenile justice system.<sup>527</sup> Some legislatures included model bullying policies that schools could adopt in order to show compliance.<sup>528</sup>

---

517. See Negrón Letter, *supra* note 486, at 6–7.

518. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011); Dear Colleague Letter, *supra* note 80, at 1–3.

519. STUART-CASSEL ET AL., *supra* note 52, at 15, 17.

520. NAT'L SCH. BDS. ASS'N, *supra* note 77. States whose legislation uses the words "bullying," "cyber-bullying," or "harassment" include, but are not limited to the following states: Arizona, Florida, Hawaii, Idaho, Mississippi, Nevada, Oklahoma, South Carolina, Texas, Washington, and West Virginia. *Id.*

521. Dear Colleague Letter, *supra* note 80, at 2.

522. See STUART-CASSEL ET AL., *supra* note 52, at 17–18.

523. NAT'L SCH. BDS. ASS'N, *supra* note 77.

524. *Id.*

525. STUART-CASSEL ET AL., *supra* note 52, at i–ii.

526. See *id.* at 16.

527. *Id.* at 16, 19–20.

528. *Id.* at 19.

According to the report's executive summary, forty-six states have enacted bullying laws.<sup>529</sup> Forty-three of these states direct schools to create anti-bullying policies; yet three of these states fail to define the behavior that constitutes bullying.<sup>530</sup> Thirty-six states prohibit bullying via electronic media while thirteen of the forty-six states give schools the authority to discipline off-campus behavior if the behavior creates a hostile school environment.<sup>531</sup>

As state legislatures and school agencies as well as local school boards grapple with cyberbullying, the First Amendment, and the Department of Education's Office for Civil Rights definition of "harassment," there are many publications offering model legislation that will allegedly satisfy everyone and every requirement.<sup>532</sup> According to Stuart-Cassel and Dayton, state legislatures should ensure that school bullying legislation incorporates the following components:

- a statement of purpose that explains the reason for the legislation,<sup>533</sup>
- a statement of scope that defines the extent or reach of the legislation, i.e. to what behaviors is it applicable and to what behaviors is it not applicable;<sup>534</sup>
- definitions and examples of behaviors that constitute bullying, cyberbullying, and harassment; these definitions should protect students from the day to day realities of bullying yet not be so overbroad that free speech rights are intruded upon;<sup>535</sup>

---

529. *Id.* at x. Hawaii, Montana, Michigan, and South Dakota were the only states that did not have some form of bullying legislation in effect as of April 2011. STUART-CASSEL ET AL., *supra* note 52, at 17.

530. *Id.* at 25. Arizona, Minnesota and Wisconsin enacted anti-bullying legislation but did not define the behavior that constitutes bullying. *Id.*

531. *Id.* at 15.

532. See Dayton et al., *Model Anti-Bullying Legislation: Promoting Student Safety, Civility, and Achievement Through Law and Policy Reform*, 272 EDUC. L. REP. 19, 24–32 (2011); see also STUART-CASSEL ET AL., *supra* note 52, at 89–94. John Dayton, Anne Proffitt Dupre, and Ann Elizabeth Blankenship discussed the creation of a model anti-bully statute that would protect students and promote civility and safety in a recent article. See Dayton et al., *supra* note 532, at 25–32.

533. STUART-CASSEL ET AL., *supra* note 52, at 22; see also Dayton et al., *supra* note 532, at 25.

534. STUART-CASSEL ET AL., *supra* note 52, at 23; see also Dayton et al., *supra* note 532, at 26.

535. STUART-CASSEL ET AL., *supra* note 52, at 24–25; see also Dayton et al., *supra* note 532, at 24, 26–27.

- the development and creation of state wide school policies that protect children's rights to be free from bullying and to exercise their First Amendment rights; such policies can be shared by school districts throughout the state;<sup>536</sup>
- a requirement that school personnel model appropriate behavior and enforce anti-bullying policies;<sup>537</sup>
- a requirement that schools publicize and communicate the existence of school anti-bullying policies;<sup>538</sup>
- a requirement that training be provided for school personnel to model appropriate behavior and counsel students whose behavior violates school policies;<sup>539</sup>
- a mandatory reporting requirement, requiring schools to report violations of school policies;<sup>540</sup>
- a requirement that criminal acts be treated as criminal acts and not as bullying;<sup>541</sup> and
- a requirement that appropriate counseling and disciplinary provisions be provided for students whose conduct violates school bullying policies.<sup>542</sup>

While the above suggestions for model legislation and model school policies regarding bullying are useful, they are still not sufficiently detailed to answer the questions that courts and school districts continue to ask: Can off-campus student cyberspeech be punished by schools?<sup>543</sup> If so, under what circumstances can off-campus speech be punished?<sup>544</sup> Answering these

---

536. STUART-CASSEL ET AL., *supra* note 52, at 18–19, 22, 24–25, 28.

537. *Id.* at 33; Dayton et al., *supra* note 532, at 27–28.

538. STUART-CASSEL ET AL., *supra* note 52, at 32.

539. Dayton et al., *supra* note 532, at 30.

540. STUART-CASSEL ET AL., *supra* note 52, at 36–37; Dayton et al., *supra* note 532, at 28.

541. STUART-CASSEL ET AL., *supra* note 52, at 20; Dayton et al., *supra* note 532, at 30–31.

542. STUART-CASSEL ET AL., *supra* note 52, at 69–70; Dayton et al., *supra* note 532, at 30.

543. *See, e.g., Coy ex rel. Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 798 (N.D. Ohio 2002) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

544. Presently, there are two student speech cases being appealed from federal district courts to federal circuit courts that involved the discipline of off-campus student cyberspeech. Brief of Appellants, Bell, *supra* note 481, at 7 (appealing to the United States Court of Ap-

questions addresses the intersection of students' First Amendment rights, the Department of Education's enforcement of civil rights laws, and state anti-bullying legislation.<sup>545</sup>

## V. ANALYSIS

As *Snyder* so clearly stated: Speech, even painful and hurtful speech, is revered and protected in America.<sup>546</sup> Why? It is believed that self-government, to a great degree, is determined by the free exchange of ideas even if it does lead to an “uninhibited [and] robust” discussion.<sup>547</sup> “[T]he essence of self-government” is believed to be the ability to speak out on matters of public importance and to discuss unpopular viewpoints.<sup>548</sup> The suppression of speech counteracts this belief.<sup>549</sup> So deeply ingrained in the American psyche is the principle of free speech that America, as a society, was willing to tolerate the free speech rights of Nazis to march through a

---

peals for the Fifth Circuit); Brief of Appellees, Wynar, *supra* note 481, at 7 (being appealed to the United States Court of Appeals for the Ninth Circuit). In *Bell v. Itawamba County School Board*, Taylor Bell wrote and published, via Facebook and YouTube, a rap song that was critical of his coaches. 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012). Taylor was suspended for a week and then moved to an alternative school for the remainder of the semester because his rap song was deemed by the school board to constitute both harassment of school employees and threats. *Id.*; Brief of Appellants, Bell, *supra* note 481, at 16. In *Wynar v. Douglas County School District*, Wynar instant messaged a classmate, saying that he wanted to “shoot” named classmates. No. 3:09-cv-0626-LRH-VPC, 2011 WL 3512534, at \*1 (D. Nev. Aug. 10, 2011); Brief of Appellees, Wynar, *supra* note 481, at 12. These instant messages were forwarded to school administration. *Wynar*, 2011 WL 3512534, at \*1; Brief of Appellees, Wynar, *supra* note 481, at 14–15. The school then suspended Wynar for ninety days. *Wynar*, 2011 WL 3512534, at \*1; Brief of Appellees, Wynar, *supra* note 481, at 18. Also, there is a pending case in the District Court of Minnesota that involves off-campus discipline of a student for cyberspeech. *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist.* No. 2149, No. 12-588, 2012 WL 3870868, at \*1 (D. Minn. Sept. 6, 2012). In that case, R.S. complained about a hall monitor and communicated about sex with a classmate via Facebook. *Id.* at \*1–2. The classmate's guardian complained to the school principal. *Id.* at \*2. To determine the accuracy of these statements, R.S. was detained and her Facebook account was searched by school officials. *Id.*

545. See *Morse v. Frederick*, 551 U.S. 393, 403 (2007); *Kuhlmeier*, 484 U.S. at 273; *Frazer*, 478 U.S. at 681–83; *Tinker*, 393 U.S. at 506.

546. *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011).

547. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)).

548. *Snyder*, 131 S. Ct. at 1215 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

549. See *id.* at 1219 (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)).

village of Holocaust Jewish survivors in Skokie, Illinois.<sup>550</sup> Given the priority that is placed on speech in American life, do K–12 students and their teachers have free speech rights in school where they are learning to participate in the “marketplace of ideas?”<sup>551</sup>

In 1969, the Supreme Court made it plain in *Tinker* that students and teachers did not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>552</sup> After *Tinker*, some would argue that later Supreme Court decisions on the topic made it less clear to what extent student speech rights existed and when schools could suppress or punish student speech. *Fraser*, *Kuhlmeier*, and *Morse* all indicated that while protection of student speech rights was important, it was not absolute.<sup>553</sup> In *Fraser*, Justice Burger wrote that “simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, [does not mean that] the same latitude must be permitted to children in a public school.”<sup>554</sup> It became obvious between 1986 when *Fraser* was decided, and later in 2007 when Chief Justice Roberts authored the majority opinion in *Morse*, that confusion within the courts as to the correct analysis regarding student speech still existed.<sup>555</sup> Justice Roberts sought to clarify by writing:

[I]t is enough to distill from *Fraser* two basic principles. First, *Fraser’s* holding demonstrates that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” Had *Fraser* delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, *Fraser’s* First Amend-

---

550. See Robert D. Richards & Clay Calvert, *Nadine Strossen and Freedom of Expression: A Dialogue with the ACLU’s Top Card-Carrying Member*, 13 GEO. MASON U. C.R. L.J. 185, 203 (2003). The article indicates that the ACLU’s defense of the Nazis to march through Skokie, Illinois, a town then heavily populated with Jewish survivors of the Holocaust, reflected the fact that while many theoretically agreed with *free speech*, the ACLU still lost 15% of its membership for defending the free speech rights of Nazis in Skokie in 1978. *Id.* at 203 & n.79. According to the article, Strossen concluded that while the principle of free speech was *firmly entrenched* within the United States legal system, it was also poorly understood. *Id.* at 203.

551. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

552. *Id.* at 503, 506.

553. See *Morse v. Frederick*, 551 U.S. 393, 396–97, 410 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 273, 276 (1988) (citing *Tinker*, 393 U.S. at 506, 509, 512–13); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

554. *Fraser*, 478 U.S. at 677, 682.

555. See *Morse*, 551 U.S. at 396, 409–10; *Kuhlmeier*, 484 U.S. at 264–66, 276; *Fraser*, 478 U.S. at 679–80, 685–86.

ment rights were circumscribed “in light of the special characteristics of the school environment.” Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the “substantial disruption” analysis prescribed by *Tinker*.<sup>556</sup>

With four Supreme Court opinions on K–12 student speech from 1969 through 2007, it would seem that the issue was settled.<sup>557</sup> The analysis should have been clear for lower courts to apply to the facts of cases before them. However, the lower courts have applied the *Tinker* analysis to cases that involved similar facts; yet these courts have reached dissimilar conclusions.<sup>558</sup>

In *Doninger II*, the United States Court of Appeals for the Second Circuit reiterated the problems facing lower courts.<sup>559</sup> In addition to the confusion surrounding the application of the *Morse* quartet analysis to student speech cases, courts and schools are now grappling with the implications of off-campus cyberspeech that ends up on-campus and is often described by schools as “cyberbullying.”<sup>560</sup> *Doninger II* eloquently captured the dilemma of lower courts, saying “[t]he law governing restrictions on student speech can be difficult and confusing, even for lawyers, law professors, and judges. The relevant Supreme Court cases can be hard to reconcile, and courts often struggle to determine which standard applies in any particular case.”<sup>561</sup> Judges are not alone in their confusion.<sup>562</sup> As Naomi Harlin Goodno states in an article that she authored: “There is no Supreme Court case squarely on point. The split in the lower courts’ decisions shows that the law is ambiguous.”<sup>563</sup>

What is a principal to do? He or she is “damned if they do and damned if they don’t” act when confronted with off-campus cyberspeech that makes

---

556. *Morse*, 551 U.S. at 396, 404–05 (emphasis added) (citations omitted).

557. *See id.* at 410; *Kuhlmeier*, 484 U.S. at 273, 276; *Fraser*, 478 U.S. at 686–87; *Tinker*, 393 U.S. at 514.

558. *Compare* Mahaffey *ex rel.* Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 783–84, 790 (E.D. Mich. 2002), *with* *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 869 (Pa. 2002).

559. *See Doninger II*, 642 F.3d 334, 353 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011).

560. *See, e.g., J.S. ex rel. H.S.*, 807 A.2d at 850–52; *see also* *Evans v. Bayer*, 604 F. Supp. 2d 1365, 1367 (S.D. Fla. 2010).

561. *See Doninger II*, 642 F.3d at 353 (citing *Morse*, 551 U.S. at 430).

562. *E.g.,* 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 FOREST L. REV. 641, 657 (2011).

563. *Id.* (footnote omitted).

its way on-campus and involves either bullying or harassment. Principals, school boards, and school districts face numerous questions, including:

- Whether schools can regulate off-campus student speech that is online, i.e., cyberspeech, if it is directed at either school personnel or students, and then arrives on-campus?<sup>564</sup> If so, under what circumstances can this speech be regulated?<sup>565</sup>
- Whether geography, i.e., on-campus or off-campus, can be the litmus test for regulation of this speech?<sup>566</sup>
- Whether a substantial disruption is established by the arrival, in any form, of off-campus speech on the school's campus?<sup>567</sup> If not, is chaos required to meet the substantial disruption test? What constitutes a substantial disruption?
- Whether the individual student's free speech right that collides with another student's right to be *let alone* will prevail? What about a student's right to be free from bullying and harassment?<sup>568</sup>

Unfortunately, there appear to be more questions than answers, which is why many are urging the Supreme Court of the United States to grant certiorari and resolve the issue.<sup>569</sup>

The issues facing the courts, the schools, the state legislatures, the students, and the Department of Education can be summarized as: Can a school regulate student speech or expression that occurs outside of school and is not connected to a school sponsored event, yet subsequently makes its way on-campus by either the speaker or others? If so, under what circumstances can the speech be regulated? If such speech is beyond the school's ability to regulate, can schools escape the imposition of liability by the Department of Education and state laws for failure to respond to harassment or bullying?<sup>570</sup>

---

564. See Thomas Wheeler, *Facebook Fatalities: Students, Social Networking, and the First Amendment*, 31 PACE L. REV. 182, 214 (2011).

565. See *id.* at 199–200.

566. *Morse*, 551 U.S. at 405; see Wheeler, *supra* note 564, at 214–15.

567. See Wheeler, *supra* note 564, at 199–200.

568. See *id.* at 217.

569. See *id.* at 185.

570. See *id.* at 183–85.

If it is possible to evade liability, how do schools, parents, and society want to handle the bullying that sometimes leads to suicide?<sup>571</sup>

A thorough review of *Tinker* reveals that the Court began its discussion by acknowledging that earlier court decisions affirmed “the comprehensive authority of the [s]tates and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the school[.]. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.”<sup>572</sup> The language of *Tinker* indicates that the Court considered student speech to have First Amendment protection regardless of whether it took place inside or outside of the classroom.<sup>573</sup> The Court said:

*A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without “materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school” and without colliding with the rights of others. 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.*<sup>574</sup>

The Court cites to the earlier decisions of *Burnside v. Byars*<sup>575</sup> and *Blackwell v. Issaquena County Board of Education*,<sup>576</sup> to support the above conclusion.<sup>577</sup>

A literal reading of *Tinker* reflects that schools can regulate or discipline student speech that occurs off-campus if it has an on-campus impact that either causes a substantial disruption with the school’s work, is reasonably foreseeable that it will cause a substantial disruption with the school’s

---

571. See, e.g., *id.* at 183–84, 227; see also BULLY, <http://www.thebullyproject.com/movement/> (last visited Feb. 24, 2013) (providing information about the film, *Bully*, produced by The Bully Project).

572. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (citations omitted).

573. *Id.* at 512–13.

574. *Id.* (emphasis added) (citation omitted).

575. 363 F.2d 744, 749 (5th Cir. 1966).

576. 363 F.2d 749, 753 (5th Cir. 1966).

577. *Tinker*, 393 U.S. at 512–13.

work, or it collides with the rights of others.<sup>578</sup> While some lower courts have debated whether a school's authority even extends to off-campus student speech in any format, *Tinker* does not appear to contemplate that.<sup>579</sup> From my perspective, *Tinker* is applicable to off-campus speech, including cyberspeech, that arrives on-campus and either creates a substantial disruption or collides with the rights of others.<sup>580</sup> Given the technological advances of the last twenty years, a geographical litmus test as to when student speech can be disciplined by schools is too limited.<sup>581</sup>

While courts have discussed and analyzed both the "substantial disruption" and the "reasonably foreseeable substantial disruption" *Tinker* tests, courts have paid little attention to *Tinker*'s third prong, the "collides with the rights of others" test.<sup>582</sup> Perhaps this third prong, in conjunction with the "substantial disruption" test could be developed and used to analyze student speech cases that do not fit the parameters of *Fraser*, *Kuhlmeier*, and *Morse*.<sup>583</sup> Utilization of the "collides with the rights of others" test might resolve some of the behaviors that so bedevil and trouble school administrators.<sup>584</sup> How? This prong could be used to discipline student speech that does not substantially disrupt the school's work but that can be described as bullying, harassing, libelous, or threatening. Speech described as bullying, harassing, libelous, or threatening, if it is directed at other students or school personnel, is not protected speech and can be disciplined even if it does not create a "substantial disruption."<sup>585</sup> Why should this approach be allowed? The school's goal is to teach students civil discourse and debate while pro-

---

578. See *id.* at 514.

579. See *id.* at 507–08; see also *Morse v. Frederick*, 551 U.S. 393, 405 (2007). The Court in *Morse* explained that "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected." *Morse*, 551 U.S. at 405. This statement adds further confusion to the analysis, as some lower courts have concluded that *Fraser* meant lewd speech, if off-campus, could not be regulated under any circumstances. See *Layshock III*, 650 F.3d 205, 219 (3d Cir. 2011) (en banc), cert. denied sub nom. Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder, 132 S. Ct. 1097 (2012).

580. *Tinker*, 393 U.S. at 512–13.

581. See *J.S. ex rel. Snyder I*, No. 3:07cv585, 2008 WL 4279517, at \*9 n.5 (M.D. Pa. Sept. 11, 2008), aff'd in part, rev'd in part en banc, 650 F.3d 915 (3d Cir. 2011), cert. denied, 132 S. Ct. 1097 (2012).

582. See *Tinker*, 393 U.S. at 513–14; see e.g., *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

583. See *Tinker*, 393 U.S. at 513–14; see also *Morse*, 551 U.S. at 403; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–73 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677–80 (1986).

584. See *Tinker*, 393 U.S. at 513–14.

585. See *id.*

protecting their rights to debate contentious issues.<sup>586</sup> Yet the schools must also provide a safe environment in which students can thrive and learn without being subjected to harassment, bullying, libel, or threats. Schools want to protect student political speech rights yet also allow schools the flexibility to cope with the cruelty, racism, sexism, libel, or threats that other types of student speech create.<sup>587</sup>

With the above approach, the analysis of student school speech, whether on or off-campus, then becomes the following:

- Is the speech lewd, involving a captive audience, and used on campus?<sup>588</sup> If so, apply *Fraser*.

- If not, is it speech that carries the imprimatur of the school and involves pedagogy?<sup>589</sup> If so, apply *Kuhlmeier*.

- If not, is the speech off-campus speech at a school sponsored event that appears to promote illegal drug use?<sup>590</sup> If so, apply *Morse*.

- If neither *Fraser*, *Kuhlmeier*, or *Morse* is applicable, apply *Tinker*'s "substantial disruption" test. Did the speech arrive on-campus and disrupt school classes or administration?<sup>591</sup> If so, the speech can be disciplined.<sup>592</sup> An exception to the "substantial disruption" test might mean that pure political speech can be protected even if it does cause a "substantial disruption." What is a substantial disruption? Courts are still debating this.<sup>593</sup> In *Doninger II*, the United States Court of Appeals for the Second Circuit found a "substantial disruption" occurred when the school administration was forced to have numerous meetings and handle many irate parental emails and phone calls because of Avery Donginer's blog post.<sup>594</sup> Yet the United States Court of Appeals for the Third Circuit, in *Layshock III*, held that the student discussion and administrative uproar caused by Jason Layshock's parody posting

---

586. See Dear Colleague Letter, *supra* note 80, at 1–2.

587. See *id.* at 2.

588. See *Fraser*, 478 U.S. at 684; see also *Bd. of Educ. v. Pico ex rel. Pico*, 457 U.S. 853, 859 (1982); *Ginsberg v. New York*, 390 U.S. 629, 636 (1968).

589. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

590. See *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

591. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

592. *Id.* at 513.

593. See *Layshock III*, 650 F.3d 205, 218–19 (3d Cir. 2011) (en banc), *cert. denied sub nom. Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012); *Doninger II*, 642 F.3d 334, 347 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011).

594. See *Doninger II*, 642 F.3d at 341, 351.

about the school's principal did not constitute a substantial and material disruption.<sup>595</sup> If the Supreme Court would define substantial disruption, it would greatly assist the analysis of student speech cases. The definition should not be too restrictive, i.e. one person's bad day should not constitute a substantial disruption, yet neither chaos nor turmoil should be required to establish substantial disruption. A description or list of behaviors that demonstrate substantial disruption would help resolve the issue. From my perspective, student speech that requires school personnel to spend 75% of their week dealing with the problems generated by the speech could be considered a substantial disruption. School personnel responding to telephone calls, emails, student and parent visits, counseling sessions, disciplinary sessions, hearings, and classroom time are examples of substantial disruption.

- If the speech does not cause a substantial disruption, it could be regulated under *Tinker's* third prong—the “collides with the rights of others” test—if the speech is directed at other students or school personnel and can be described as speech that is bullying, harassing, libelous or threatening.<sup>596</sup>

The above analysis would balance competing rights, allowing schools to operate without chaos and disruption while preserving the political speech of students and providing a safe school environment that neither permits, condones, or ignores student bullying or harassment.

How should courts then handle *Tinker's* “reasonably foreseeable disruption” test? While the United States Court of Appeals for the Second Circuit held that it was reasonably foreseeable that a violent instant message icon in *Wisniewski* would cause a substantial disruption,<sup>597</sup> district courts in Indiana and California concluded that raunchy student photos and bullying YouTube videos did not substantially disrupt nor was it foreseeable that the student behavior involved would disrupt school operations.<sup>598</sup> Perhaps the “reasonably foreseeable” test could be retired. If the “substantial disruption” and “collides with the rights of others” tests are used, the “reasonably foreseeable” test becomes irrelevant.<sup>599</sup> Avery Doninger's blast email and blog created a substantial disruption, because parents and students behaved as she

---

595. See *Layshock III*, 650 F.3d at 207–09, 219.

596. See *Tinker*, 393 U.S. at 508–09, 513 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

597. See *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38–39 (2d Cir. 2007).

598. *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 784 (N.D. Ind. 2011); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1107–08, 1117 (C.D. Cal. 2010).

599. *J.C. ex rel R.C.*, 711 F. Supp. 2d at 1122.

requested, contacting the school and bombarding the school with messages on the topic of Jamfest.<sup>600</sup> School personnel spent days dealing with phone calls, emails, and parental concerns that resulted from the Jamfest post.<sup>601</sup> Too much staff time was wasted on an issue that can be judged to be relatively unimportant.<sup>602</sup> The “substantial disruption” test is necessary because Doninger’s speech did not fit in the category of a threat or libel nor did it constitute harassment or bullying which would be necessary to apply in a “collides with the rights of others” test.<sup>603</sup>

Using the “collides with the rights of others” test means the court’s holding in *Wisniewski* is correct, as it involved a true threat which would permit Wisniewski’s speech to be disciplined.<sup>604</sup> *T.V.*’s holding is also then correct under this analysis.<sup>605</sup> In *T.V. ex rel B.V.*, the raunchy pictures did not involve harassment, bullying, libel, or threats.<sup>606</sup> They also did not create a substantial disruption at school as only two or three parents complained to the school.<sup>607</sup> This is not speech with which the school should be involved.<sup>608</sup> This speech, while raunchy, should be protected.<sup>609</sup> Parents who objected to it should interact directly with *T.V.*’s parents rather than requesting that the school act as the intermediary. In *T.V. ex rel B.V.*, there is not a sufficient nexus between the student’s speech, the aggrieved students and parents, and the school.<sup>610</sup> This speech involved off-campus behavior that should have been handled by and among parents rather than involving the school. Thus, the United States District Court for the Northern District of Indiana reached

---

600. *Doninger I*, 527 F.3d 41, 44–45, 49–50 (2d Cir. 2008) (quoting *Wisniewski*, 494 F.3d at 40), *aff’d in part, rev’d in part*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011).

601. *See id.* at 44–45.

602. *See id.* at 46.

603. *See id.* at 53; *see also* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

604. *See* *Wisniewski v. Bd. of Educ.*, 494 F.3d at 37–38 (citing *Tinker*, 393 U.S. at 513). While some of the courts discussed “real” threats as opposed to “perceived” threats, this distinction is not helpful. Given the ability of individuals to heavily arm themselves and then massacre those with whom they disagree, it seems unfair to place school administrators in the position of trying to sort through what constitutes a real threat as opposed to a joke.

605. *See* *T.V. ex rel B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 784 (N.D. Ind. 2011).

606. *See id.* at 771, 775.

607. *Id.* at 784.

608. *See id.* at 783–84.

609. *Id.* at 776.

610. *T.V. ex rel B.V.*, 807 F. Supp. 2d at 783.

the correct decision in *T.V. ex rel B.V.*, as did the United States Court of Appeals for the Second Circuit in *Wisniewski*.<sup>611</sup>

Yet while the United States District Court for the Central District of California applied the correct analysis to the facts in *J.C. ex rel. R.C.*, it reached the wrong conclusion.<sup>612</sup> J.C.'s behavior toward C.C. constituted harassment, bullying, and possibly libel. Had the court used the "collides with the rights of others" test rather than the "substantial disruption" test, it would have been easy for the school to discipline J.C. without worrying about whether J.C.'s behavior resulted in a substantial disruption of work at school.

Using the above analysis, i.e., the student's speech either creates a substantial disruption at school or collides with the rights of others, I would argue that the United States Court of Appeals for the Fourth Circuit reached the correct decision in *Kowalski I*, using the wrong analysis. Kara Kowalski used the internet to mock, taunt, bully, and harass a fellow classmate, Shay N.<sup>613</sup> While Kara's off-campus speech may not have created a substantial disruption in terms of additional work created for school administrators, it was conduct that could certainly be described as bullying or harassing another classmate.<sup>614</sup> Again using the above analysis, the United States Court of Appeals for the Third Circuit, in its en banc opinions in *Layshock III*<sup>615</sup> and *Snyder III*,<sup>616</sup> reached incorrect decisions and used the wrong analysis. Since both of those decisions involved off-campus student cyberspeech that could be described as libelous or harassing of school personnel, one could conclude, using the "collides with the rights of others" test, that *Tinker* was satisfied and that both Layshock and Snyder could be disciplined for their speech.<sup>617</sup>

As *Tinker* is now being construed, it is difficult for courts to apply the appropriate analysis to the particular facts of a case before them.<sup>618</sup> Melinda

---

611. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007); *T.V. ex rel B.V.*, 807 F. Supp. 2d at 784.

612. *See J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1117–18, 1122 (C.D. Cal. 2010).

613. *See Kowalski I*, 652 F.3d 565, 567–69 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).

614. *See id.* at 572.

615. *Layshock III*, 650 F.3d 205, 207 (3d Cir. 2011) (en banc), *cert. denied sub nom. Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

616. *J.S. ex rel. Snyder III*, 650 F.3d 915, 915 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012).

617. *See J.S. ex rel. Snyder III*, 650 F.3d at 930; *Layshock III*, 650 F.3d at 219.

618. *See discussion supra* Part II.C–D.

Cupps Dickler's excellent article suggests that despite the confusion of the student speech cases that the justices agree on the following principles:

- “[S]tudents retain significant First Amendment protection [while] in school;”<sup>619</sup>
- However, students’ rights are limited and are not as extensive as those of adults;<sup>620</sup>
- “[S]chool officials [are] permitted substantial discretion to maintain discipline, even” if that results—not intentionally, but as a consequence—in the restriction of speech;<sup>621</sup>
- “[P]olitical . . . speech is strongly protected . . . from viewpoint discrimination;”<sup>622</sup>
- “*Tinker*’s ‘substantial disruption’ test [is still] applicable to any student speech that [is] not . . . regulated . . . by *Fraser*, *Kuhlmeier*, and *Morse*.”<sup>623</sup>

## VI. CONCLUSION

Schools, state legislatures, courts, students, parents, and the Department of Education continue to grapple with balancing the speech rights of students with the rights of students to be “let alone.”<sup>624</sup> Since the Supreme Court denied certiorari in three cases this past term, it seems clear that they consider the matter settled.<sup>625</sup> However, a reading of decisions from the various district and circuit courts in the last decade indicates confusion still exists.<sup>626</sup> Lower courts are applying, misapplying, or misunderstanding the holdings from the Court’s decisions in this area.<sup>627</sup> Different results, often with similar factual situations, continue.<sup>628</sup> A citation analysis of *Kowalski*, indicates

---

619. Dickler, *supra* note 92, at 380.

620. *See id.*

621. *Id.*

622. *Id.*

623. *Id.*

624. McCarthy, *supra* note 45, at 19–20; *see also* discussion *supra* Part II.C–D.

625. *See* discussion *supra* Part II.C.

626. *See* discussion *supra* Part II.C–D.

627. *See* discussion *supra* Part V.

628. *See* discussion *supra* Part II.C–D.

that cases in the secondary student cyberspeech arena continue through the court's pipelines.<sup>629</sup> Given the importance of bully prevention, the liability issues involved, and the confusion surrounding what is deemed to be the appropriate reaction of school officials to off-campus student cyberspeech that comes on campus, it would be very helpful if the Court addressed this subject and provided a clear analysis soon.

---

629. See, e.g., *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist.* No. 2149, No. 12-588, 2012 WL 3870868, at \*1 (D. Minn. Sept. 6, 2012); *Bell v. Itawamba Cnty. Sch. Bd.*, 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012); *Wynar v. Douglas Cnty. Sch. Dist.*, No. 3:09-cv-0626-LRH-VPC, 2011 WL 3512534, at \*1 (D. Nev. Aug. 10, 2011).