ABSTRACT

STUDENT CYBERSPEECH TARGETING FACULTY: WHAT CAN SCHOOL ADMINISTRATORS LEGALLY DO ABOUT IT?

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This paper investigates how school officials can make sound decisions based on appropriate legal precedent when faced with incidents of student cyberspeech targeting staff members. In particular, this study examined court decisions, law review articles, state and federal legislation, online sources, and newspaper articles relating to student speech issues. Analyzing these decisions offers some insight for school administrators faced with these instances. Trends from various cases at different court levels are discussed, and some recommendations and tips for school administrators are provided.
STUDENT CYBERSPEECH TARGETING FACULTY: WHAT CAN SCHOOL ADMINISTRATORS LEGALLY DO ABOUT IT?

BY
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Chapter 1

INTRODUCTION TO THE STUDY

General Research Problem

As the internet expansion made new forms of communication available on a worldwide scale in 1994, it has spawned new ways to socially communicate.\(^1\) Unfortunately, these new ways of communicating have been associated with incidents of school violence and offensive cyberspeech since then.\(^2\) Some scholars claim it is these incidents that have put pressure on legislatures and school officials to pass tougher laws and to implement stricter discipline policies to punish cyberbullying and other inappropriate cyberspeech.\(^3\) But the internet has made administrative decisions regarding student discipline very difficult because of their competing interests in protecting students and staff members from potentially threatening expression while at the same time allowing students to exercise their constitutionally protected rights to free speech.\(^4\)

School administrators have always had the power to control on-campus student expression and have additionally had at least some authority to discipline students for

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\(^2\) Harriet A. Hader, Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction Over Students’ Online Activity. 50 B.C. L. Rev 1563, 1566 (2009).

\(^3\) Id.

activity which occurred off school grounds. However, where administrators have exercised that authority to impose discipline for off-campus activity, most of those situations involved fighting or alcohol/drug use and the punishment concerned the taking away of participation rights in extra-curricular activities.\(^5\) The ongoing challenge, then, is to determine just how far school administrators can and should reach when dealing with incidents of off-campus student cyberspeech used to attack faculty members.\(^6\)

Though fighting, arguing, and various types of bullying behaviors are not uncommon among students, cyberbullying of students and staff members is relatively new and has opened up avenues for students to attack school personnel. Some scholars believe bullying and being critical of school personnel have been accepted by some as normal adolescent behavior. On the contrary, there never has been anything normal about any form of bullying as part of growing up.\(^7\) In fact, bullying and cyberbullying incidents can have serious negative impacts on both the physical and the psychological health and ultimately the success of victims.\(^8\) Methods of non-physical assault in the form of aggressive cyberspeech can be as harmful to victims as actual punches and in-your-face threats.\(^9\) They can obstruct teachers’ ability to adequately perform their job and may inhibit a student victim’s capability to grow physically and to mentally succeed in school.\(^10\) According to some scholars, the negative

\(^8\) \textit{Id}.
\(^10\) \textit{Id}.
physiological effects cyberbullied victims experience, such as insomnia, unexplainable head and body aches, large swings in weight, and even incontinence, cannot be ignored by school officials.\textsuperscript{11} The negative effects of cyberbullying on victims has also been acknowledged by the medical community. According to the National Association of School Psychologists, cyberbullying can create a demoralizing school environment, hindering victims from being able to function normally.\textsuperscript{12} In addition, Jennifer Caudle, a medical researcher, believes cyberbullied victims are often unhappy, feel lonely, have sleep difficulties, and exhibit symptoms of anxiety and depression.\textsuperscript{13}

With those serious consequences in mind, making decisions about how to respond to aggressive student expression, particularly cyberspeech incidents, may be frustrating for school administrators because although these incidents are being produced away from school, they are certainly felt at school.\textsuperscript{14} What is even more confusing for administrators is the fact that, to date, the legal system has not sent clear messages regarding how school leaders may deal with student cyberspeech incidents.\textsuperscript{15} When faced with incidents of student speech occurring off school grounds, it would seem that courts would hold similar opinions. But, district courts and appellate courts have handed down apparently conflicting rulings in student cyberspeech cases.\textsuperscript{16} One possible explanation for this lack of clarity is that the internet is a

\textsuperscript{11} Id.  
\textsuperscript{13} “Cyberbullying and Its Effect on Our Youth.” \textit{American Osteopathic Association}, \texttt{www.osteopathic.org} July 2, 2013.  
\textsuperscript{14} Global Village, supra note 1, at 273.  
\textsuperscript{15} Id. at 274.  
new medium and the Supreme Court has not provided guidance on its definition or associated First Amendment parameters. The struggle courts have experienced with this student cyberspeech issue was highlighted by the Third Circuit Court in 2011. In that year, not even the same court could hand down an initial ruling that seemed congruent. In opinions filed on the same day, the Third Circuit originally handed down rulings which appeared to conflict with one another (though the Third Circuit has since met en banc and clarified these decisions by adjusting one of the rulings so that the decisions are similar). In *Layshock v. Hermitage*, the Third Circuit concluded school officials could not discipline a student who, using his grandmother’s computer at her home, created an internet profile of the school principal which was both disparaging and somewhat vulgar. On the same day that it ruled in favor of the student in *Layshock*, the Third Circuit in *J.S. v. Blue Mountain School District* ruled against a student who had created a MySpace webpage targeting her principal with sexually explicit epithets and adult themes. In an en banc review, the Third Circuit reversed course on the *Blue Mountain* ruling, deciding school officials did in fact violate J.S.’s First Amendment rights by suspending her for the cyberspeech attack on the principal which she posted on MySpace. Even in cases featuring similar facts, the same circuit court can have difficulty making clear rulings on student cyberspeech issues. Though case law is very fact dependent and the outcomes of each individual case are ultimately determined by those unique facts, the initial rulings in these two Third Circuit cases were perplexing.

17 *Id.*
Though the Third Circuit seems to believe that school officials do not have authority to regulate the cyber conduct of students from their homes, other circuits, like the Fourth, appear to hold a different opinion. For example, the Fourth Circuit held in *Kowalski v. Berkeley County Schools* that student speech which was created away from school can develop into speech within the school walls based on at whom the speech is directed and what happens as a result. Consequently, say some researchers, such student speech then could be controlled and subdued by school authorities. This Fourth Circuit interpretation appears to give much power to school administrators to curb the First Amendment rights of students. It is also possible that the vagueness of the Supreme Court’s voice on this issue has led to the ambiguity and circuit court splits.

Other researchers, however, believe that the Fourth Circuit has a point when it seeks to determine the on-campus/off-campus nature of cyberspeech and that the Third Circuit should conduct similar analyses. This line of thinking promotes the notion that courts should first seek to categorize student speech as either on-campus or off-campus. The Third Circuit could have determined Layshock’s speech to be on-campus since his admitted objective was to amuse students at school, he made it widely available for people connected to the school, he

24 Weeks, *supra* note 22, at 1182.
25 Id.
26 Id. at 1189.
27 Id. at 1189, 1192.
28 Matthew Beatus, *Layshock ex rel. Layshock v. Hermitage School District*, 56 N.Y.L. Sch. L. Rev. 785, 789 (2011/2012). The analyses would focus on whether speech could become on-campus even if created off-campus but is either accessed while on school property or if the speech is aimed at individuals who attend or work at the school. Beatus at 794–795.
accessed it while at school and he persuaded others to do so. Furthermore, the facts of this case differ from Snyder and thus a different opinion could have been warranted because in Blue Mountain the cyberspeech did not travel to school grounds, while students did view Layshock’s cyberspeech at school.

Finally, schools are commonly slow to react to changes in technology, and inappropriate student cyberspeech issues are often characterized by the use of technology to harass or disparage another. Scholars affirm that the courts and the laws which address student cyberspeech are woefully behind in providing guidance on how to deal with student cyberspeech issues. Courts generally tackle this topic by referring to Supreme Court decisions which were decided long before the internet was created. However, these standard-bearing cases all addressed on-campus student speech. School officials have to be frustrated and confused with how to handle off-campus student cyberspeech that has a negative impact within the walls of the school on staff members, students, and on school climate.

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29 Id. at 795.
30 Id. at 801.
32 Id. at 129.
34 Id.
35 Global Village, supra note 1, at 271.
Rationale for the Study

The internet distributes messages and pictures to a huge audience in a short amount of time.\textsuperscript{36} When student online activity occurs at home, those students generally enjoy the free speech protections guaranteed by the First Amendment.\textsuperscript{37} Because the lives of elementary and secondary school students often revolve around the school, the effects of online student activity, even those activities which occur away from school, frequently are brought to campus through cell phones, print-outs, school computers, and general student conversation.\textsuperscript{38} If staff members feel threatened while at school as a result of the online conduct of students which takes place when they are away from school, under what circumstances may the Constitution support school administrators when they discipline students for such off-campus behavior?

School administrators are in a difficult position when trying to decide how to handle any student speech, especially cyberspeech, that occurs off-campus.\textsuperscript{39} To date, court decisions regarding student expression leave much confusion and very little guidance for administrators, particularly their authority over off-campus cyberspeech.\textsuperscript{40} Scholars note that administrators applying the same rules for off-campus speech and harassment as for that which occurs on-campus is problematic because it potentially could to unfairly chill a

\textsuperscript{36} Hader, supra note 2, at 1566.
\textsuperscript{37} Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) at 682.
\textsuperscript{38} Hader, supra note 2, at 1564.
\textsuperscript{39} Porter v. Ascension Parish School Board, 393 F.3d 608 (5th Cir. 2004) at 621.
\textsuperscript{40} Zande, supra note 31, at 129. Zande references the differing opinions in Layshock and Blue Mountain and goes on to discuss the disparate opinions in other cases: “Courts in Thomas and Porter ruled that schools could not curtail off-campus speech under any circumstances, while other courts have ruled that schools can, provided the speech meets a variety of differing tests.”
student’s First Amendment right to expression.\textsuperscript{41} There are a number of court rulings involving school administrators disciplining students for their cyberspeech activity, though the decisions do not provide school administrators with clear direction.\textsuperscript{42} For example, if the school disciplines a student for her cyberspeech, then it may be liable for violating the First Amendment rights of the student being disciplined.\textsuperscript{43} However, if the school decides not to discipline the student for aggressive, intimidating, or otherwise inappropriate student cyberspeech, then that lack of action may be perceived as a school district endorsement of the speech.\textsuperscript{44}

Making the decisions for administrators regarding cyberspeech even more difficult is the current heightened sensitivity in the U.S. regarding cyberspeech and cyberbullying. Many state legislatures have addressed these issues by passing laws and mandates for school districts regarding inappropriate cyberspeech.\textsuperscript{45} Some scholars fear this legislative emphasis on student cyberspace may give school administrators an unrestrained sense of power to unduly diminish students’ rights because under some definitions of bullying and

\textsuperscript{41} Hader, \textit{supra} note 2, at 1568.
\textsuperscript{42} See \textit{Sypniewski v. Warren Hills Regional High School}, 307 F.3d 243 (3\textsuperscript{rd} Cir. 2002), where the court upheld a school district’s right to curtail inflammatory speech; \textit{J.C. v. Beverly Hills Unified School District}, 711 F. Supp. 2d 1094 (C.D. Cal. 2010), in which the court held that the school district did not have the right to punish a student for posting a video to \textit{YouTube} which contained hurtful and arguably harassing content. In \textit{D.C. v. R.R.}, 182 Cal. App. 4th 1190 (2010), the court found that threatening comments one student made toward another via website posting were not protected speech.
\textsuperscript{44} \textit{Bethel School Dist. No. 403 v. Fraser}, 478 U.S. 675, 680 (1986).
\textsuperscript{45} \texttt{www.cyberbullying.us}, July, 2012. This website was created and continues to be updated and managed by Dr. Justin W. Patchin, Associate Professor of Criminal Justice in the Department of Political Science at the University of Wisconsin-Eau Claire, and Dr. Sameer Hinduja, Associate Professor in the School of Criminology and Criminal Justice at Florida Atlantic University. They are co-directors of the Cyberbullying Research Center and have published numerous books and research articles in scholarly publications like the \textit{Journal of Youth and Adolescence}, \textit{European Journal of Developmental Psychology}, \textit{Journal of School Health}, \textit{Computers in Human Behavior}, \textit{Youth and Society}, and the \textit{Journal of School Violence}. See Appendix A for a list of statutes by state.
cyberbullying, almost any student action, perhaps as innocuous as sending an email or text which is misinterpreted to sending a purposefully mean or metaphorical middle finger to another, may be considered bullying and punishable. Furthermore, some scholars claim schools already wield too much power in this area. If schools can discipline and censor any student activity on the internet that might end up coming into the schoolhouse yard, “then the potential jurisdiction of school power over students’ online activity would be limitless.”

Other scholars believe school officials are far better equipped and trained to decide what student speech should be dealt with as causing harm to the school environment and those in that environment than are law enforcement officials and courts. Police are already overburdened with more dangerous activity like burglaries and assaults and are far less versed and thus less willing to work with parents to resolve inappropriate cyberspeech instances.

**Purpose of the Study**

The purpose of this study is to help school administrators navigate the pertinent law cases which relate to student cyberspeech targeting school faculty and staff. This will be accomplished through the examination of court decisions, law review articles, state and federal legislation, and newspaper articles regarding incidences of student cyberspeech used to attack school personnel. These sources will be used to build a body of knowledge regarding

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47 Hader, *supra* note 2, at 1598.
48 Zande, *supra* note 31, at 133.
49 Erb, *supra* note 5, at 283.
student cyberspeech issues, to gather information pertaining to how courts have responded to
cases brought before them dealing with school districts’ disciplining for such behavior, and to
ascertain current trends and outline categories associated with relevant law and constitutional
parameters in an effort to inform the decision making of school officials.

**Research Questions**

1. What are the factors school administrators should consider regarding the relevant legal
   history of student rights pertaining to their First Amendment free speech rights?

2. What do school administrators need to know regarding the current legal status of
   student rights pertaining to discipline in connection with incidents of student
   cyberspeech aimed at staff members?

3. How can prior litigation and court rulings inform the decisions of school
   administrators when faced with incidents of student cyberspeech that targets adults
   connected with the school?

**Delimitations**

This study is delimited to an examination of cases involving student off-campus
speech targeting school staff members. It investigates federal and state court cases which have
addressed First Amendment student rights. The cases reviewed pertain specifically to student
First Amendment cyberspeech incidents.
Definitions

Bullying
Aggressive acts by one or more students with positions of power over the victim. The aggressive acts are made with the intent to repeatedly cause harm.  

Certiorari
To be more fully informed. This is the mechanism by which the U.S. Supreme Court picks most of the cases that it hears. While a decision to deny certiorari keeps the lower court's ruling intact, it does not constitute a decision by the Supreme Court on any of the legal issues raised by the case.

Cyberbullying
A form of harassment characterized by the aggressor using electronic means like Facebook, email, or text messages to threaten, outcast, ridicule, or embarrass other students.

Cyberspeech
Expression (in this study, incidences of student speech) posted on the internet.

En banc
By the full court; When all judges of a court hear a case. Some appellate courts which have a large number of judges and a large caseload often divide into divisions or panels for each case. For example, United States Appeals Court cases are usually heard by three-judge panels. Sometimes, on the request of the panel or one of the litigants, the case is later reheard by the full court: or, en banc.

Facebook
A free social networking internet site which allows registered users to create their own personal profiles, upload photos and videos, send messages, and keep in touch with friends and family members.

Facebook friends
A person who a Facebook user has invited to be a Facebook friend. If the invitation is accepted, then the two people have access to one another’s status updates, to message one another, and to participate in group chats.

50 Hader, supra note 2, at 148.
52 Erb, supra note 5, at 157.
53 Jacob Tabor, Students’ First Amendment Rights in the Age of the Internet: Off-Campus Cyberspeech and School Regulation. 50 B.C. L. Rev 561, 562 (2009).
MySpace
Social networking site that allows its users to create webpages to interact with other users.\textsuperscript{55}

Nexus
A point of causal intersection, link, relation, or connection.\textsuperscript{56} In the case of cyberspeech, the term pertains to whether the student speech, (for example, an email sent using school computers) is considered on-campus or off-campus speech.

Precedent
A court decision that is cited as an example or analogy to resolve similar questions of law in later cases.

Public forum
A place where access to public property exists for speech-related pursuits.

School-sponsored speech
Speech that a reasonable observer would view as the school's own speech.\textsuperscript{57}

Summary judgment
A request for a decision by a court of the matters submitted to it based upon legal arguments only, where no material facts are in dispute.\textsuperscript{58}

True threat
Speech communicating a credible intent of violence against a person or group.\textsuperscript{59}

\textsuperscript{55} http://www.businessdictionary.com/definition/Myspace.html
\textsuperscript{56} Black’s Law Dictionary Free Online Legal Dictionary, 2\textsuperscript{nd} Ed. http://thelawdictionary.org/nexus/#ixzz2kM8tMDMN
Chapter 2

REVIEW OF LITERATURE

Social Media

In May of 2013, the Pew Research Center reported “94% of teen social media users said they had a Facebook profile, and 81% of this population said Facebook was the profile they used most often.”60 A recently interviewed teen student claimed Facebook, with approximately 1.15 billion users,61 and other similar social media sites, provided avenues for students to say things they otherwise would not say “in real life.”62 Clearly some students view cyberspace and internet places like Facebook as a fantasyland where consequences are of no consideration. One newspaper reporter proclaimed the internet to be “the new bathroom wall – the virtual place kids scrawl something when they want to be mean.”63 Cloaked in the illusion of invisibility, some students are using internet sites like Facebook to harass, intimidate, disparage, and in some cases threaten others, including school staff members.64

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63 Sharon Noguchie, Cyberbullies a Growing Problem at School, San Jose Mercury News, Jan. 13, 2008, at 1B.
64 Shannon L. Doering, Tinkering with School Discipline in the Name of the First Amendment: Expelling a Teacher’s Ability to Proactively Quell Disruptions Caused by Cyberbullies at the Schoolhouse. 87 Neb. L. Rev. 630, 635-636 (2009).
This new form of harassment, often termed “cyberbullying,” can have disruptive effects on school faculty, staff, and students.\textsuperscript{65} Often, the cyber-aggressor seeks First Amendment protection if school administrators act to discipline such behavior.\textsuperscript{66} Decisions regarding discipline for student cyber-communication are difficult for school administrators to address because cyber-communication distorts the borders between on-campus speech and off-campus speech.\textsuperscript{67} For example, some administrators and parents may perceive a student’s Facebook post created at home on her own computer as private communication protected by the First Amendment.\textsuperscript{68} On the other hand, others may see the post as being so readily available it may be treated as on-campus expression.\textsuperscript{69} And if that online communication causes disruptions at school, then it is arguably subject to discipline as on-campus speech.\textsuperscript{70} The broad access students enjoy today to both on-campus and off-campus online communication often forces school administrators to make difficult decisions regarding the effect of student cyberspeech on the school environment.\textsuperscript{71} Because the Supreme Court has not yet ruled on a case specifically involving student cyberspeech, courts and school administrators are finding making decisions regarding this issue challenging.\textsuperscript{72}

\textsuperscript{65} Id. at 635.
\textsuperscript{66} Id. at 632.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{72} Kasdan, supra note 67, at 16.
Protecting Students’ First Amendment Speech Rights

In 1967, the Supreme Court in *Keyishian v. Board of Regents* asserted protecting First Amendment speech rights was a crucial part of public school education, calling the classroom “the marketplace of ideas” and declaring that the nation’s future was dependent upon a “robust exchange of ideas.” However, the Supreme Court has also made clear its position that First Amendment speech rights are not without borders. The Court has identified forms of speech which should not enjoy constitutional protection. The list has included speech considered “lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words.” In addition, in *Virginia v. Black*, the Supreme Court asserted true threats of violence are also unprotected by the First Amendment to the U.S. Constitution. It is student cyberspeech targeting staff members which may fall into one of these unprotected categories, and if so, such speech receives no First Amendment protection.

Though the Supreme Court has not yet heard a case specifically involving student cyberspeech, it has ruled on four major cases regarding student speech and its First Amendment implications. In *Tinker v. Des Moines*, *Bethel v. Fraser*, *Hazelwood v.

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Kuhlmeier, and Morse v. Frederick, all of which will be discussed in detail later, the Supreme Court has identified types of student speech that do not enjoy First Amendment protection when expressed at school. Some scholars suggest there is a subtle line between student speech that encourages the spirit of the First Amendment and student speech which should not enjoy protection. Though the Supreme Court has not heard a case specifically involving student cyberspeech, it has made rulings regarding student speech and their First Amendment implications, which lower courts have applied to today’s instances of student cyberspeech.

The terms “speech” and “expression” are synonymous and can be communicated in a variety of ways. For example, displaying a flag or wearing a button can serve as a sign or symbol to communicate a political message in the same way as actual spoken words. The first of the four Supreme Court student free speech cases, Tinker v. Des Moines, decided in 1969, exemplifies the range of constitutional protection student speech enjoys and provides standards for courts to use when deciding cases involving student expression.

In Tinker and the other three major Supreme Court student speech cases, the Court has addressed school officials’ authority to limit student speech rights. And though none of the four Supreme Court cases involving student First Amendment free speech rights contemplated the impact of internet speech in a school setting, any exploration of students’ free speech

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81 Morse v. Frederick, 551 U.S. 393 (2007).
82 McHenry, supra note 74, at 237.
83 Stromberg v. California, 283 U.S. 359, 369 (1931). Similarly, the wearing of armbands, as described in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), was also construed as a form of speech/expression.
85 McHenry, supra note 74, at 237.
86 Weeks, supra note 22, at 1165.
rights must include these decisions because each ruling provides guidelines for the types of student speech school officials can suppress and what types of student speech is constitutionally protected. As such, these Supreme Court decisions are the only benchmarks available to school administrators as precedents for basing their decisions when handling student cyberspeech incidents.\textsuperscript{87} Though these four Supreme Court decisions did not involve nor contemplate student cyberspeech, these rulings currently stand as the source of guidance to both lower courts and school leaders in responding to student cyberspeech.

### The Four Landmark Supreme Court Student Speech Cases

**Tinker v. Des Moines (1969)**

In 1969, the Supreme Court began delineating the parameters of student speech rights within the public school gates in *Tinker v. Des Moines*.\textsuperscript{88} The *Tinker* particulars entailed a group of students (including two children from the Tinker family) and their parents who came together in December 1965 to determine a method for showing support for ending the fighting in Viet Nam.\textsuperscript{89} They decided one of the ways to visibly show this support was to wear armbands during the Christmas season.\textsuperscript{90} When Des Moines school officials became aware of the students’ plans to wear armbands to school, they swiftly created and publicized rules

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\textsuperscript{89} *Id.* at 504. Christopher Eckhardt, a Des Moines high school student, was also a petitioner. The aforementioned meeting actually took place at the Eckhardt home. Furthermore, the Court noted that the students and adults in these two families had participated on previous occasions in similar protest campaigns.

\textsuperscript{90} *Id.*
forbidding students from wearing armbands under penalty of suspension.\textsuperscript{91} Even though the students were aware of the school rule prohibiting the wearing of armbands, they wore the armbands to school. Clearly this act was one the students and their parents created; it could not be confused as being sponsored by the school district. After all, the wearing of armbands was not part of a school newspaper or broadcast nor could it have been confused with other school-district-endorsed speech, like a poster or event. There were a couple of minor incidents connected to the armbands\textsuperscript{92} but there were no threats or actual violent episodes at school in response to the armbands.\textsuperscript{93} Nonetheless, as promised, school officials sent the students home, suspending them until they agreed to return without the armbands.\textsuperscript{94}

Thereafter the students and their parents filed a lawsuit in the United States District Court for the Southern District of Iowa,\textsuperscript{95} alleging officials had violated the students’ free speech rights by prohibiting the wearing of armbands. The students contended the wearing of armbands was a form of speech protected by the First Amendment.\textsuperscript{96} The district court considered the question of “whether the action of officials of the defendant school district forbidding the wearing of armbands on school facilities deprived the plaintiffs of constitutional rights secured by the freedom of speech clause of the First Amendment.”\textsuperscript{97}

\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Id.} at 507. There was some hallway discussion related to the students who wore armbands and there were a few unpleasant comments made to the students wearing armbands. In addition, testimony of one teacher suggested the armbands may have taken some students’ minds off their schoolwork. See \textit{Tinker} 393 U.S. at 508, 514, 518.
\textsuperscript{93} \textit{Id.} at 508.
\textsuperscript{94} \textit{Id.} at 504.
\textsuperscript{96} \textit{Id.} at 971-972.
\textsuperscript{97} \textit{Id.} at 972.
The court referred to a couple of cases, including the 1943 case *West Virginia State Bd. of Educ. v. Barnette*, which acknowledged the Constitution protected a student’s right to free speech. The court further noted wearing an armband to express a political view constituted speech protected by the Constitution. The court, however, asserted this protection was not absolute. The court weighed prohibiting the speech (armbands) by a state actor (in this case, the school district) against what the prohibition was actually attempting to achieve. The court asserted school officials have the daunting task of providing a classroom environment free from disruption. It continued by stating courts should not interfere with the operations of a school district if the actions of school officials were reasonable.

In addition, the district court noted that while the First Amendment did protect the expression of views by the wearing of an armband, First Amendment protections in certain circumstances, within the public school environment, may not always apply. As it sought to determine the reasonableness of the school officials’ actions, the court recognized the need to

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100 Id.
101 Id.
102 Id.
103 Id.
104 Id.
105 Id. Specifically, the court acknowledged school administrators were duty-bound to take reasonable measures to avert material and substantial interference with the education of students. Cases cited were: *Pocket Books, Inc. v. Walsh*, 204 F. Supp. 297 (D.Conn.1962), which involved a suit against law enforcement which prohibited a book store from selling a particular book the police deemed obscene; *Near v. State of Minnesota*, 283 U.S. 697 (1931), concerning a publisher who printed scandalous material attacking local officials. The officials obtained an injunction prohibiting the publishing of the scandal sheet, and the publisher filed suit; *Dennis v. United States*, 341 U.S. 494 (1951), a case about the arrest and conviction of Communist Party of America leaders because they allegedly violated the Smith Act, which prohibited anyone from working to overthrow the government of the United States.
be mindful of the existing controversy in the country regarding the U.S. involvement in Viet Nam. For example, when the school district rule forbidding armbands was put into effect, Washington D.C. had recently been the site of a protest march against the war. In addition, at that time, the Supreme Court had two high-profile draft card burning cases pending. Finally, during the Des Moines School Board meeting featuring the board’s vote in favor of the armband prohibition, individuals on both sides of this issue spoke with animation as they expressed their emotions.

The district court noted teachers and school officials should not commonly exclude an issue from instruction merely because it is contentious. However, wearing armbands at school in opposition to the U.S. involvement in Viet Nam created a potential for disruption within the school environment and therefore the prohibition was justified from the administrators’ perspective. The district court pointed out a contrast between: a) the wearing of armbands to express a political view and b) the protected freedom students would enjoy during a discussion of the Viet Nam conflict in “the disciplined atmosphere of the classroom.” The court observed though the armbands themselves did not cause classroom disruption, it was not unreasonable for school administrators to adopt the armband prohibition to defend against the possibility that other students’ reactions to the armbands could foment a

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106 Id. at 973.
107 Id. at 972-973.
108 Id. at 973.
109 Id.
110 Id.
111 Id. at 972.
112 Id. at 973.
disruption. The court opined the interest of maintaining an orderly school environment should prevail over the rights of students to wear armbands at school. Finally, the district court observed “it was not unreasonable for” school administrators to anticipate a display of the armbands “would create some type of classroom disturbance.” Given the competing interests, i.e., student speech rights vs. school leaders’ responsibility to maintain a disciplined classroom learning atmosphere, Judge Stevenson concluded the need for an orderly classroom environment should prevail. Thus, the district court dismissed the students’ complaint.

The students appealed the lower court decision to the Eighth Circuit. The case was originally argued before a regular panel of the Eighth Circuit Court of Appeals and then was subsequently heard again en banc. An equally divided en banc panel affirmed the decision of the district court. The Supreme Court accepted the case for review and reversed the lower court’s decision finding school officials had indeed infringed on the students’ constitutional right to free expression.

First, Justice Fortas, in writing the Court’s opinion, identified the central issue facing the Court as the friction created when students break school rules in their quest to express their opinions in such a way that may be protected by the First Amendment. The Court held

113 Id.
114 Id.
115 Id.
116 Id.
117 Id.
118 Tinker v. Des Moines Independent Community School District, 383 F. 2d 988 (8th Cir. 1967).
119 Id. at 988.
120 Id.
122 Id. at 507. The Court found it “revealing” that school officials created the rule banning the wearing of armbands only after a student talked to a teacher about writing an article focusing on Viet Nam and after they heard about the students’ plan to wear armbands to school. Tinker, 393 U.S. at 504, 510.
that public schools cannot wield unlimited power over students and “state-operated schools may not be enclaves of totalitarianism.” Among the rights the Court contended students enjoyed was the freedom to evince their own views in school, not just the views that school officials deemed appropriate and uncontroversial. The Court determined disciplining students for wearing armbands was unreasonable in the absence of evidence suggesting this conduct would cause a disruption. And the evidence revealed school officials only conjectured a disruption might occur. The Court determined the district court erred in concluding school administrators were justified in their decision to forbid the wearing of armbands due to anxiety over a disruption that might occur, noting, “Fear of a disturbance is not enough to overcome the right to freedom of expression.” The Court held the suppression of speech by school officials cannot be allowed simply to “avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,” which is exactly what the Supreme Court determined drove the decision of the district court. The Court found no indication that armband wearing would lead to disruption of the “work of the school or impinge upon the rights of other students.” The Court pointed out the minor disruptions that did occur as a result of the armbands were insignificant compared to the First Amendment violations school officials committed. For example, during the district court

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123 Id. at 511.
124 Id.
125 Id. at 509. The Court noted that the official suspension letter which outlined the reasons for the armband prohibition did not indicate any fear of disruption. It mentioned how other students had said they might wear armbands of different colors if the black bands were not banned. Testimony showed school officials simply did not believe school to be an appropriate place for any form of political protest.
126 Id. at 508.
127 Id. at 509.
128 Id.
129 Id. at 508.
trial, there was evidence presented that discussion about the armbands took place in the school hallway and one teacher reported a lesson was “wrecked” as students quarreled with Mary Beth Tinker about her armband.\(^\text{130}\) However, the Supreme Court did not find these minor instances equated to a substantial disruption.

In addition, the *Tinker* Court opined that wearing armbands “was closely akin to pure speech,” which had been protected by the Court in other cases, equating the term “pure speech” to political speech or a passive expression of opinion.\(^\text{131}\) Furthermore, the Court wrote “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”\(^\text{132}\) The Court found it relevant that armbands were singled out for prohibition while other forms of political expression remained allowable.\(^\text{133}\) For example, students were allowed to wear buttons pertaining to political campaigns while others were permitted to wear the Iron Cross, which was commonly associated with Nazism.\(^\text{134}\) The Court reasoned that proscribing one specific type of expression of one political stance, while allowing others, could not withstand First Amendment scrutiny.\(^\text{135}\)

Justice Black’s dissenting opinion is instructive. From the outset, Justice Black asserted that the Constitution does not afford anyone the right to express views via speech or

\(^{130}\) *Id.* at 517. 
\(^{132}\) *Id.* at 506. 
\(^{133}\) *Id.* at 510. 
\(^{134}\) *Id.* 
\(^{135}\) *Id.* at 511.
demonstration “where he pleases and when he pleases.” He went on to say, “Our Court has decided precisely the opposite.” Justice Black, in his dissent, believed there was indeed disruption in the school as a result of the armbands. He pointed to the situation where altercations over Mary Beth Tinker’s wearing of the armband in class “wrecked” an entire class period. Justice Black wrote this occurrence indicated school administrators’ fears actually came to fruition. That is, the wearing of the armbands served to distract students from educational endeavors. Again, the majority did not find this event a significant or material disruption. Justice Black expressed concern over any court meddling in the affairs of school administrators’ attempts to discipline students for blatantly disregarding school rules. Justice Black reasoned students in the public schools should not be sharing views on “politics by actual speech, or by ‘symbolic’ speech.” Furthermore, he warned the majority opinion potentially allowed the First Amendment to be used as a vehicle to force “teachers, parents, and elected officials to surrender control of the American public school system to public school students.”

The Court’s opinion served to lay out the parameters for student expression that have been referenced in numerous subsequent lower court opinions. The first prong of the Tinker test provides public school students the right to express their views as long as the speech does

136 Id. at 517.
138 Id. at 517.
139 Id. at 518.
140 Id.
141 Id. at 523-524.
142 Id. at 526.
not materially and substantially interfere with the necessary operations of the school.\textsuperscript{143} The second prong notes student expression cannot infringe on the rights of others.\textsuperscript{144} In \textit{Tinker}, the Court found no evidence that the wearing of armbands offended either standard.

Though the \textit{Tinker} Court laid out two distinct ways student expression can be limited, subsequent court decisions have relied almost exclusively on the first prong and ignored the second. The second prong of the test sought to protect others who might be negatively affected by the speech. The Court proclaimed student speech which invades “the rights of others is … not immunized by the constitutional guarantee of freedom of speech.”\textsuperscript{145} This verbiage related back to the dissenting opinion of Justice Louis Brandeis in the 1928 Supreme Court decision \textit{Olmstead v. U.S.}\textsuperscript{146} In that case, Justice Brandeis’ dissent asserted the United States Constitution provided civilized citizens the broad and valuable right to be left alone.\textsuperscript{147} He further stressed this right must be protected and any invasion of the right to be left alone was a violation of the Constitution.\textsuperscript{148} Even though courts have referenced the first prong many times when making decisions regarding cases of student First Amendment expression rights, it may be that the second prong will emerge as being more applicable to student cyberspeech cases.

\begin{flushright}
\textsuperscript{143} Id. at 513.
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 511.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\end{flushright}
**Bethel v. Fraser (1986)**

Seventeen years passed before the Supreme Court heard another First Amendment student speech case. Just as in *Tinker*, the student speech in the 1986 case *Bethel v. Fraser* occurred on school grounds. Bethel High School student Matthew Fraser gave a student council campaign speech before 600 of his fellow students at a school-sponsored assembly. Though he had previously discussed the content of the speech with two teachers who warned Fraser not to give it, he delivered it anyway. The speech was laced with unambiguous sexual references which school officials deemed inappropriate for high-school-aged students, some of whom were freshmen as young as fourteen. The district also feared that allowing Fraser’s speech to go unpunished would suggest the content of the speech bore the school administration’s awareness, if not approval. School administrators suspended Fraser for two days. Fraser brought suit against the school district for violation of his right to free speech in the U.S. District Court for the Western District of Washington. Though testimony revealed students in the audience reacted noisily and three students responded to Fraser’s speech inappropriately, the district court did not view the noisy and gesticulating audience member responses as significant enough reason for school administrators to restrict Fraser’s

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150 *Id.* at 677.
151 *Id.* at 678.
152 *Id.* at 677. Fraser’s speech included phrases like, “I know a man who is firm…[he] is a man who takes his point and pounds it in… He doesn’t attack things in spurts – he drives hard, pushing and pushing … [he] … will go to the very end – even the climax, for each … one of you,” *Fraser v. Bethel School District No. 403*, 755 F.2d 1356, 1357 (9th Cir. 1985).
154 *Fraser*, 478 U.S. at 679.
155 *Fraser v. Bethel School District No. 403*, 755 F.2d 1356, 1360 (9th Cir. 1985). The students acted out what Fraser was saying using “sexually suggestive movements.”
First Amendment rights by disciplining him.\textsuperscript{156} Thus, relying upon \textit{Tinker}, the district court found in favor of Fraser. On appeal, the Ninth Circuit affirmed the district court’s judgment, concluding Fraser’s speech had not caused a “material interference with school activity….”\textsuperscript{157}

In 1986, the Supreme Court reversed the lower court decisions.\textsuperscript{158} The Court made a distinction between the school’s duty to support the student expression of political views against the school’s obligation to teach “socially appropriate behavior.”\textsuperscript{159} In addition, the Court found the audience responses to Fraser’s speech harmful.\textsuperscript{160} The Court found it significant that in response to Fraser’s speech, some students were disoriented, confused, and uncomfortable, others whooped and hollered, and a few pantomimed the sexual activity Fraser was describing.\textsuperscript{161} The Court deemed these reactions significant enough to warrant disciplining Fraser to protect both students and the district’s reputation by forbidding student speech which was vulgar, offensive, and not political.\textsuperscript{162} The Court held the school district acted within its authority to discipline “Fraser in response to his offensively lewd and indecent speech.”\textsuperscript{163} The Court differentiated the facts of this case from those of \textit{Tinker}, noting in \textit{Tinker} students were disciplined for wearing armbands expressing a political opinion while Fraser’s “offensively lewd and indecent speech” was “unrelated to any political viewpoint.”\textsuperscript{164} Fraser’s student speech was clearly not school sponsored. The Court pointed

\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Fraser, 478 U.S. at 687.
\textsuperscript{159} Id. at 679.
\textsuperscript{160} Id. at 684.
\textsuperscript{161} Id. at 678.
\textsuperscript{163} Fraser, 478 U.S. at 685.
\textsuperscript{164} Id.
out that school officials are not barred by the First Amendment to prohibit speech like Fraser’s that is “vulgar and lewd.” To allow such speech at a school-sponsored event might suggest that the school district endorses the speech. The Court took the stance that though student political expression, like the relatively peaceful wearing of the armbands in *Tinker*, must enjoy First Amendment protection, “a high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.” Accordingly, the Court found it appropriate for the school district to distance itself from the appearance of school sponsorship of Fraser’s speech. The Court opined that the school district acted appropriately when disciplining Fraser for “vulgar speech and lewd conduct” that was “wholly inconsistent with the ‘fundamental values’ of public school education.”

Justice Burger, in writing for the majority, acknowledged the Supreme Court had acted previously to support the responsibility of a school district to shield children who are “a captive audience” (like those at a school assembly) from students acting inappropriately and through their speech exposing an audience (which may include children) to “sexually explicit, indecent, or lewd speech.” The opinion even referenced Justice Black’s dissent in *Tinker*, agreeing with Justice Black’s dissenting opinion that school officials are not compelled by the

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165 *Id.*
166 *Id.* at 685-686.
167 *Id.* at 685. The Court went on to say schools are charged with the daunting task of educating students and to allow a “vulgar and lewd speech” like Fraser’s to take place did not fit with such an important mission.
168 *Id.* at 685-696.
169 *Id.* at 684. Specifically, Justice Burger cited *Ginsberg v. New York*, 390 U.S. 629 (1968), where the Supreme Court upheld a New York law banning the sale of sexually oriented material to minors. He also referenced *Board of Education v. Pico*, 457 U.S. 853 (1982), where the Court gave school officials the power to remove vulgar books from the school.
Constitution to give up efforts to keep order and teach civility and manners in schools by ceding power to students.\(^{170}\)

The Court held the school district was within the bounds of the Constitution by disciplining Fraser in part because the impetus for the suspension was not motivated by a disagreement with his political views.\(^{171}\) Thus, the Court did not view \textit{Tinker} as the appropriate standard.\(^{172}\) The Court felt Fraser went too far over the border of what school administrators should allow if they are to be expected to promote “socially appropriate behavior.”\(^{173}\) So, instead of applying \textit{Tinker},\(^{174}\) the Court created a different student speech test than was used in \textit{Tinker}\(^{175}\) because the Court recognized that some student speech should be restricted because of its potential harm to students and its incompatibility with the school district’s educational objectives.\(^{176}\) According to \textit{Fraser}, student speech may be restricted if it is so vulgar and lewd that it “would undermine the school’s basic educational mission.”\(^{177}\)

Furthermore, the Court noted "the constitutional rights of students in public school are not

\(^{170}\) \textit{Id.} at 686.

\(^{171}\) \textit{Id.} at 689. The Court further expressed that “a high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.” Since the Court took this stance, it felt that school administrators were almost obligated to make the point to students via disciplining Fraser that inappropriate speech and behavior which conflict with the “fundamental values” of providing students with a public education was not going to be tolerated. \textit{Fraser}, 478 U.S. at 685.

\(^{172}\) Kevin W. Saunders. \textit{Hate Speech in the Schools: A Potential Change in Direction.} 64 Me. L. Rev. 165, 171 (2011).

\(^{173}\) \textit{Fraser}, 478 U.S. at 681.


\(^{176}\) James Patrick, \textit{The Civility-Police: The Rising Need to Balance Students’ Rights to Off-Campus Internet Speech Against the School’s Compelling Interests.} 79 U. Cin. L. Rev. 855, 858 (2010).

\(^{177}\) \textit{Fraser}, 478 U.S. at 685.
automatically coextensive with the rights of adults in other settings.  

Thus, Fraser gave school authorities the ability to disassociate the school district from certain forms of student speech by establishing rules for appropriate student expression that aligned with the school’s basic educational mission.  


Two years after the Fraser decision, the Supreme Court in 1988 decided Hazelwood v. Kuhlmeier, the third Supreme Court case dealing with student First Amendment freedom of speech. In this case, three student members of the Hazelwood High School newspaper staff brought suit against the Hazelwood School District for violation of their First Amendment free speech rights. Principal Robert Reynolds removed pages from the final draft of the school newspaper, *Spectrum*, which contained articles he deemed inappropriate for publication in a school-sponsored newspaper. One of the articles at issue dealt with the impact of parental divorce on teenagers at Hazelwood. A second article concerned Hazelwood East students’ experience with teen pregnancy. Reynolds regularly reviewed page proofs prior to the newspaper’s publication. He objected to the pregnancy article because he did not think it was possible to keep secret the identity of the girls discussed and because the article contained

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178 *Id.* at 682. The quote was initially penned in *New Jersey v. T. L. O.*, 469 U.S. 325, 340-342 (1985).


181 *Id.* at 262.

182 *Id.* at 263.

183 *Id.*

184 *Id.*
references to sexual activity that were not suitable for the younger students.\textsuperscript{185} Reynolds was concerned about the divorce story due to comments from one of the named students who criticized her father’s behavior leading up to the divorce.\textsuperscript{186} He felt that an opportunity to respond should have been given to the student’s parents or at the very least they should have given their consent to be included in the article.\textsuperscript{187} Since the paper had to go to the publisher in only a couple of days to meet the end-of-year deadline, he was thus faced with a choice: either eliminate entirely the two pages containing these articles and publish the rest or do not print the newspaper at all.\textsuperscript{188} Reynolds chose to delete the two pages and publish the rest.\textsuperscript{189} The students contended they could publish virtually anything in Spectrum because it was a venue for student views and opinions.\textsuperscript{190}

The United States District Court for the Eastern District of Missouri held that the school administration’s concerns about safeguarding the privacy of the pregnant students were rational and valid.\textsuperscript{191} The district court tackled the issue of whether Spectrum was a public forum, enjoying significant First Amendment protection as a place for students to freely express their views, or whether it was a fundamental part of the school-sponsored

\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id. at 263-264.
\textsuperscript{189} Id. at 263-264. It is important to note here that it was not just the two articles in question which Principal Reynolds ordered deleted; it was two entire pages. Those deleted pages included other articles which he said he was not opposed to publishing. Those other articles included teenage marriage, juvenile delinquency, and teenage runaways for subject matter. Hazelwood, 484 U.S. at 264.
\textsuperscript{191} Id. at 1466.
The district court observed members of the student newspaper staff were enrolled in a class taught by a faculty member who regularly exerted final editorial control over the newspaper and issued grades and course credit for successful course achievement. Additionally, the bulk of the production work of the newspaper was completed in class, thereby making Spectrum a school-sponsored part of the curriculum rather than a public forum open for free student expression.

Accordingly, the district court concluded Principal Reynolds was justified in his actions to protect students from being subjected to inappropriate articles in a school-sponsored newspaper. The Hazelwood School Board policy manual emphasized the school-sponsored nature of student expression multiple times, noting school-sponsored publications were part of the curriculum and consequently, as long as the pieces were written with sound journalistic practices and integrity, then the administration could not constrain that free

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192 Id. at 1465. A public forum is a place where access to public property exists for speech-related pursuits. Kevin Francis O’Neill, A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework, 29 Sw. U.L. Rev. 223, 284 (2000). In general, the content of public forum expression is constitutionally protected. O’Neill at 286. Conversely, a governmental entity needs only to have a reasonable purpose to regulate content of a nonpublic forum. O’Neill at 287. Forums can be categorized into three types: traditional public forums, designated forums, and nonpublic forums. Examples of traditional public forums include public parks and sidewalks. In these public areas, speakers may speak their minds on political issues while they enjoy strong constitutional protection. Forums, Legal Information Institute, Cornell University Law School, (9/25/13), http://www.law.cornell.edu/wex/forums. When the government makes public property available for public expression, even though the public property is not a traditional public forum, then that area is defined as a designated public forum. Examples of designated public forums include community theatres or a meeting room at a state university. Forums, (9/25/13), http://www.law.cornell.edu/wex/forums. Also, “nonpublic forums are forums for public speech that are neither traditional public forums nor designated public forums.” State restrictions on speech in nonpublic forums are allowable but “must be reasonable, and may not discriminate based on speakers’ viewpoints. Examples of nonpublic forums include airport terminals and a public school’s internal mail system.” Forums, (9/25/13), http://www.law.cornell.edu/wex/forums. Finally, some public areas are not considered a forum at all and thus are not bound by constitutional rules. “For example, public television broadcasters are not subject to forum analysis when they decide what shows to air.” Forums, (9/25/13), http://www.law.cornell.edu/wex/forums. A school-sponsored event or curricular activity at a public school would likewise not be considered a forum. Forums, (9/25/13), http://www.law.cornell.edu/wex/forums.

193 Id. at 1465-1466.

194 Id. at 1461.
expression. Finally, the district court decided that though students had been taught appropriate journalistic practices, they missed several necessary steps related to the writing of these articles. Thus the district court found Principal Reynolds’ actions reasonable.

On appeal, the Eighth Circuit Court of Appeals reversed, holding *Spectrum* was a student newspaper in every sense and that Principal Reynolds had interfered with the rights of students to express their views. To support this conclusion, the court pointed to the fact that students working on the *Spectrum* staff were given autonomy to select staff members, decide the topic of articles and direct much of the content of those articles. Therefore, the Eighth Circuit determined *Spectrum* was a public forum which allowed free expression of student speech and, as such, school administrators had violated the First Amendment rights of the students. Citing *Tinker*, the Eighth Circuit determined the only basis on which the articles could be censored was if school administrators could show they would cause a material and substantial disruption. Thus, the Eighth Circuit would have applied *Tinker*, and since no material and substantial disruption occurred, the school district did indeed violate the students’ First Amendment free speech rights.

When the case reached the Supreme Court, the majority disagreed with the Eighth Circuit’s reasoning. Justice White, writing for the majority, noted since school facilities were generally used for the express purpose of educating students, they are not public forums and

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195 *Id.* at 1455.
196 *Id.* at 1467.
197 *Id.*
199 *Id.*
200 *Id.* at 1370.
201 *Id.* at 1370.
202 *Id.*
school officials were justified in exercising a level of control over the school-sponsored publication.\textsuperscript{203} The Court stressed the school newspaper was an instructional classroom activity and as such could be reasonably edited by school administrators.\textsuperscript{204} The Court further reasoned Principal Reynolds’ actions, specifically the removing “for pedagogical concerns” two entire pages of the paper rather than just the two questionable articles, were logical and did not offend the First Amendment.\textsuperscript{205} Apparently, the majority believed \textit{Tinker} was not strong enough or broad enough to cover the student expression in this case. Since the student speech could be perceived as being endorsed by the school, then school administrators should have more authority to control it.\textsuperscript{206}

The Supreme Court’s reversal created a third judicial First Amendment student speech test by deciding that if educators have “legitimate pedagogical concerns” about student speech

\textsuperscript{204} \textit{Id.} at 265 and 270. In addition, the Court addressed the question of whether the First Amendment compels a school to endorse “particular student speech” which might reasonably be seen as bearing “the imprimatur of the school.” \textit{Hazelwood}, 484 U.S. at 270. The Court affirmed that educators have more latitude to regulate this type of student speech “to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.” \textit{Hazelwood}, 484 U.S. at 270. In addition, the Court defined school-sponsored expression as activities which are generally identified as being part of the curriculum and are thus “supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.” \textit{Hazelwood}, 484 U.S. at 271. The Court further asserted that a school may “disassociate itself,” from individual student speech that would, in line with \textit{Tinker}, substantially interfere with appropriate educational processes or impinge upon the rights of other students and “also student speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.” \textit{Hazelwood}, 484 U.S. at 271. Finally, the Court reasoned “a school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order.’” \textit{Hazelwood}, 484 U.S. at 272.
\textsuperscript{205} \textit{Id.} at 273 and 276. Though Reynolds said that he did not have issues with all the articles on the two deleted pages, he claimed that the entire pages had to be deleted because the necessary changes in the stories and the layout could not be completed in time for the scheduled press run and if they missed that date, then \textit{Spectrum} would not be published at all before the end of the school year. \textit{Hazelwood v. Kuhlmeier}, 484 U.S. 260, 263-264 (1988).
which is linked to the curriculum, then they may curtail that student speech without violating
the First Amendment.\textsuperscript{207} The Court determined the \textit{Tinker} standard, though applicable “for
determining when a school may punish student expression,” was not necessarily the
appropriate “standard for determining when a school may refuse to lend its name and
resources to the dissemination of student expression.”\textsuperscript{208} Thus, the \textit{Hazelwood} test allows
school administrators to prohibit student speech which is associated with a school-sponsored
activity as long “as their actions are reasonably related to legitimate pedagogical concerns.”\textsuperscript{209}

\textbf{Morse v. Frederick (2007)}

The fourth and most recent student free speech case, decided by the Supreme Court in
2007, was \textit{Morse v. Frederick}.\textsuperscript{210} Joseph Frederick, a high school student, brought suit against
Juneau-Douglas High School (JDHS) Principal Deborah Morse and the school for violating
his First Amendment rights to free speech.\textsuperscript{211} In January, 2002, the Olympic Torch Relay was
scheduled to pass by Frederick’s school during the school day.\textsuperscript{212} Principal Morse approved a
school event which allowed students the opportunity to observe the torch relay by leaving
class and standing on either side of the street across from the school to watch the relay while
staff supervised.\textsuperscript{213} Joseph Frederick was late to school that day.\textsuperscript{214} Immediately upon his
arrival, he went straight to his friends who were positioned directly across the street from the

\textsuperscript{207} \textit{Hazelwood}, 484 U.S. at 273.
\textsuperscript{208} \textit{Id.} at 272-273.
\textsuperscript{209} \textit{Id.} at 273.
\textsuperscript{210} \textit{Morse v. Frederick}, 551 U.S. 393 (2007).
\textsuperscript{211} \textit{Id.} at 399.
\textsuperscript{212} \textit{Id.} at 397.
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} \textit{Id.}
school. As media crews with cameras and the torchbearers passed by Frederick’s location, he and his friends unfurled a banner which read "BONG HiTS 4 JESUS." The banner had large letters which made the phrase clearly readable by anyone on the opposite side of the street. As soon as she saw the banner, Principal Morse, judging the banner promoted illegal drug use, crossed the street and ordered the banner taken down. All students obeyed except Frederick. In response, Principal Morse commandeered the banner and suspended Frederick for ten days, prompting Frederick to file suit.

During arguments in 2003 before the United States District Court for the District of Alaska, both sides agreed that determining if the parade-viewing event was school sponsored was a fundamental question which the district court needed to address. The school district contended the student viewing of the torch relay was a school-sponsored activity. Principal Morse asserted she approved of teachers taking students to view the torch relay because she thought the experience had educational significance. Frederick, on the other hand, contested Morse’s claim that the event was school sponsored. In addition, Frederick maintained he had First Amendment free speech rights to display the banner. Finally, Frederick argued since he was not at school at the beginning of the day, the school

\[\text{Id.}\]
\[\text{Id. v. Frederick, 551 U.S. 393, 397 (2007).}\]
\[\text{Id.}\]
\[\text{Id. at 398.}\]
\[\text{Id.}\]
\[\text{Id. at 396, 399.}\]
\[\text{Id. v. Morse, 2003 U.S. Dist. LEXIS 27270, 16 (D. Alaska 2003).}\]
\[\text{Id. at 17.}\]
\[\text{Id. at 16.}\]
\[\text{Id.}\]
\[\text{Id.}\]
administration could not consider him a participant in the event, even if the court determined it to be school sponsored.\textsuperscript{226}

The district court found for Principal Morse and the school district, saying Morse acted reasonably in disciplining Frederick because the banner’s BONG HiTS 4 JESUS message clearly violated the school board’s stated objectives associated with its drug abuse prevention programs and was wholly inconsistent with the school district’s efforts to discourage illegal drug use.\textsuperscript{227} In addition, the district court noted it was common sense to consider the event school sponsored since it took place during school hours, the band and cheerleaders were mobilized to hail the relay participants, and teachers and administrators supervised students.\textsuperscript{228} The district court gave this school-sponsored distinction considerable weight, stating the extent of the school administration’s power to control the student expression was grounded in Fraser and Fraser’s reach was broad enough to allow Principal Morse to discipline Frederick for his speech advocating drug use so that the school district would not be viewed as sanctioning such a message.\textsuperscript{229} Morse’s belief that she had the right and obligation to discipline Frederick for his speech promoting drug use was reasonable, according to the district court, not only because of the Supreme Court ruling in Fraser but

\textsuperscript{226} \textit{Id.} at 17.
\textsuperscript{227} \textit{Frederick v. Morse}, U.S. Dist. LEXIS 27270, 9, 19 (D. Alaska 2003). The language the district court used in making this assertion was very similar to what the Supreme Court said in Hazelwood- “A school must … retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order.’” Hazelwood v. Kuhlmeier, 484 U.S. 260, 272 (1988).
\textsuperscript{228} \textit{Id.} at 16-17. This stance resembles the Supreme Court opinion in Hazelwood, where the Court defined school-sponsored expression as activities which are generally identified as being part of the curriculum and are thus “supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.” Hazelwood v. Kuhlmeier, 484 U.S. 260, 271 (1988).
\textsuperscript{229} \textit{Id.} at 18, 20.
also the school board’s policies forbidding such expression. Conversely, Frederick argued that *Tinker* clearly established his First Amendment rights and thus it stood to bar the school district from disciplining him for his speech. The district court rejected this argument, ruling *Tinker* was inapplicable because “the expression in *Tinker* did not intrude upon the work of the schools.”

The Ninth Circuit Court of Appeals reversed. The Ninth Circuit opined that *Tinker*, rather than *Fraser*, should be the controlling case in this instance. In citing *Tinker*, the court reasoned since the school district did not provide sufficient evidence of a substantial disruption, Principal Morse and the school board violated Frederick’s First Amendment speech rights by disciplining him for displaying the banner.

The Supreme Court agreed to review the case to determine if Frederick really did have a First Amendment right to exhibit the banner, which he claimed was meant to be humorous. Principal Morse maintained the banner served to promote the use of illegal drugs “in violation of established school policy.” The Court denied Frederick’s allegation that the event was not school sponsored, noting Principal Morse approved the event which took place during the school day. Complicating the issue further was the fact that Frederick was late to school that day and instead of checking in when he did arrive, Frederick went

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230 *Id.* at 8.
231 *Id.* at 7-8.
232 *Id.* at 9.
233 *Frederick v. Morse*, 439 F.3d 1114, 1126 (9th Cir. 2006).
234 *Id.* at 1123.
235 *Id.*
237 *Id.* at 398.
238 *Id.* at 400.
straight to where his JDHS friends were assembled across the street from the school.\textsuperscript{239} Frederick claimed because he was across the street from the school, he thus was not at school and consequently Principal Morse had no authority to discipline him.\textsuperscript{240}

The Court disagreed with Frederick’s claims, noting the event fell under the school district rules for an approved, school-sponsored class trip or event.\textsuperscript{241} A number of factors played a role in defining the event as school sponsored. First, the event took place during normal school hours just outside of the school building.\textsuperscript{242} Second, teachers and administrators were there to supervise.\textsuperscript{243} Third, the cheerleaders and band performed while students lined the streets.\textsuperscript{244} The Court sided with the school district in its assertion that “Frederick cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.”\textsuperscript{245} Thus, the event was judged by the Supreme Court to be a school-sponsored student speech case.\textsuperscript{246}

The Supreme Court discussed its previous three student speech cases, namely \textit{Tinker}, \textit{Fraser}, and \textit{Hazelwood}, and their application to \textit{Morse}. The school district sought to have the Court apply \textit{Fraser} to the \textit{Morse} case by deeming the words on Frederick’s banner “plainly offensive.”\textsuperscript{247} Morse and the school district did not claim that Frederick’s banner caused a
disruption. Thus the school district thought *Fraser* applicable since that decision was not grounded on the school district proving a substantial disruption.\(^{248}\) However, the Court determined this would stretch *Fraser* too far.\(^{249}\) The Court pointed out that *Fraser* does not serve to regulate any expression which someone might find offensive. Most religious and

\(^{248}\) *Id.* at 405.

\(^{249}\) *Id.* See also B.H. v. Easton, 725 F. 3d 293 (3rd Cir. 2013). That case began with an attempt by the Keep a Breast Foundation to create an education campaign about the importance of breast self-examination which would appeal to young women. The campaign employed the slogan, “I [heart] boobies (KEEP A BREAST),” and put this slogan on apparel, including silicone bracelets. The education campaign became very popular, including with two Easton Middle School (EMS) female students, B.H. and K.M. The students claimed they bought the bracelets and wanted to wear them in honor of women they knew who had experienced breast cancer and “to promote awareness among their friends. The students wore the bracelets to school every day for several weeks. Though the bracelets had not caused any school disruption, upon the urging of several teachers, one of EMS’s assistant principals, Anthony Viglianti, told teachers to require students to remove bracelets with the word “boobie” on them. The day prior to EMS beginning to celebrate Breast Cancer Awareness Month, Viglianti announced over the public address system that bracelets containing the word “boobies” would not be allowed at school. Staff members and administrators did encourage students to wear pink and other apparel with appropriate slogans. (The Easton School District’s dress code proscribed clothing depicting “nudity, obscenity, profanity” and other items with double meanings. Historically, school officials have required students to remove clothing endorsing Hooters, Big Pecker’s Bar & Grill, and items including the phrase “Save the ta-tas,” which is another slogan involving breast cancer awareness. It should be noted that students are not disciplined for wearing such items unless they repudiate the request to remove the item.) *Easton*, 725 F. 3d at 300.

B.H. wore her “I [heart] boobies! (KEEP A BREAST)” bracelet to school anyway. The first day, when sent to the office, B.H. reluctantly complied with the request to remove it. The second day, B.H., K.M., and R.T. wore the bracelets to school. They were sent to the office by a security guard who had asked them to remove the bracelets, and they refused. Upon request of school administrator Amy Braxmeier that the students remove the bracelets, R.T. complied, but B.H. and K.M. refused. Braxmeier then punished the students for “disrespect, defiance, and disruption” with one and a half days in-school suspensions and barred them from attending the Winter Ball.

B.H. and K.M. sued. They sought a temporary restraining order to allow them to attend the Winter Ball and requested the court issue a preliminary injunction to lift the bracelet prohibition. The district court implored district officials to allow the girls to attend the Winter Ball. The district heeded this advice and allowed the students to attend the dance but reserved the right to levy a similar penalty if the district court later would sustain the bracelet prohibition. As a result, the district court rejected the temporary restraining order motion.

At the district court’s subsequent evidentiary hearing, district officials expanded their reasons for levying the discipline and prohibiting the wearing of the bracelets. They testified that the bracelets violated the dress code and contained “sexual innuendo” which might be detrimental “to students of different physical and sexual developmental levels.” The Easton School District cited *Fraser* as one of the cases which allowed it to ban the bracelets, deeming them “vulgar, lewd, profane, or plainly offensive.” The school district also cited *Tinker*, stating that the bracelets represented student speech that could cause a substantial disruption.

Both the district court and the appellate court rejected these arguments. The courts determined *Fraser* was inapplicable because the bracelets were not vulgar and they did provide commentary on a social issue. They found *Tinker* to be an unsuitable controlling case because the school district could not connect any school disturbance to the bracelets. Thus the district court lifted the school district’s bracelet prohibition. The Third Circuit upheld the district court’s preliminary injunction order.
political speech could fall into the category of offending someone. The Court opined that if Fraser had delivered the same speech in a public place disconnected in every way from the school, then it would have enjoyed protection. Thus, the Court sought to narrowly interpret the Morse decision as constitutional protection for school officials who discipline students for their speech which endorses the use of illegal drugs.

The Court also found Hazelwood did not control because “no one would reasonably believe that Frederick’s banner bore the school’s imprimatur.” However, the Court found Hazelwood important to the analysis of the Morse case for two reasons. First, Hazelwood established the principle that schools may regulate some speech "even though the government could not censor similar speech outside the school." Additionally, Hazelwood supported the notion “that the rule of Tinker is not the only basis for restricting student speech.” Finally, in discussing Tinker, the Court reasoned allowing a pro-drug message displayed on a banner at a school-sponsored event to be far more dangerous than the armbands in Tinker. The Court found it reasonable for Principal Morse to deem the banner with the words “Bong Hits for Jesus” as promoting the use of illegal drugs. In addition, the Supreme Court, like the district court, determined “that failing to act would send a powerful message to the students in her [Morse’s] charge, including Frederick, about how serious the school was about the

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250 Id.
251 Id.
252 Id. at 409.
253 Id. at 405.
254 Id. at 405-406.
255 Id. at 406.
256 Id. at 408. The Court went on to say, “The danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in established school policy, extends well beyond an abstract desire to avoid controversy.” Morse, 551 U.S. at 408-409.
257 Id. at 410.
dangers of illegal drug use.”\textsuperscript{258} Furthermore, the Court maintained school officials overtly fighting against student drug use was a “compelling interest.”\textsuperscript{259}

Justice Alito, in a concurring opinion, outlined his view by cautioning that the reach of the \textit{Morse} opinion can go no further than restricting student speech promoting drug use.\textsuperscript{260} However, Justice Alito did not stop there; he added much more. He opined that the \textit{Morse} opinion should not inhibit students from “commenting on any political or social issue.”\textsuperscript{261} He cautioned anyone from interpreting the \textit{Morse} opinion to mean “that the First Amendment permits public schools, which are ‘organs of the state,’ to censor any student speech that interferes with the school’s ‘educational mission.’”\textsuperscript{262} He said that the Court’s \textit{Morse} opinion should not be construed to support the school district’s argument that school officials can suppress “any student speech that interferes with a school’s ‘educational mission.’”\textsuperscript{263} He warned that supporting such a position would be hazardous because it would permit public schools to push political and social agendas onto students and allow discipline for those who did not concur.\textsuperscript{264} In addition, Justice Alito suggested the educational mission of public schools should be created by school boards and school administrators.\textsuperscript{265} Justice Alito asserted that limiting students’ First Amendment free speech protections should “be based on some special characteristic of the school setting.”\textsuperscript{266} In the school setting, said Justice Alito, school

\begin{footnotes}
\item[258] \textit{Id.}
\item[259] \textit{Id.} at 407.
\item[260] \textit{Id.} at 422.
\item[261] \textit{Id.} at 422. Specifically, Justice Alito mentioned as an example that students should be allowed to comment on the prudence of the United States’ war on drugs or the issue of legalizing marijuana.
\item[262] \textit{Id.} at 423-424
\item[263] \textit{Id.} at 423.
\item[264] \textit{Id.} at 423.
\item[265] \textit{Id.}
\item[266] \textit{Id.} at 424.
\end{footnotes}
officials should have broader power to take measures to prevent student speech from leading to violence.267 In this case, Justice Alito deemed speech promoting the use of illegal drugs as dangerous for students and concluded public schools may prohibit speech advocating illegal drug use.268 However, he wrote that such control exists at the periphery of the Court’s power to do so.269

The majority opinion boiled the case down to the central question of whether a school administrator, at a school-sponsored activity, can suppress student speech that a reasonable administrator would believe endorsed the use of illegal drugs.270 The Court opined a school administrator can indeed forbid such speech.271 Thus, the Court determined Principal Morse and the school district were within their authority to discipline Frederick in order to send a powerful message about the ills of illegal drug use and to show that the First Amendment did not demand schools allow student speech which promotes dangerous behavior.272 Consequently, the Court created yet another student speech standard: schools have broad authority to regulate in-school student speech which endorses the use of illegal drugs.273

The four Supreme Court cases described above provide four tests for courts to use when deciding student free speech cases. The first test, from Tinker, seeks to determine if the student-sponsored speech in question causes or reasonably could cause a substantial disruption to the educational environment or if the student speech infringes upon the rights of

267 Id. at 425.
268 Id.
269 Id.
270 Id. at 402.
271 Id.
272 Id. at 410.
The second test, from Fraser, deals with determining if the student speech is associated with a school-sponsored activity and looks at the impact of the content of the student expression (for example, its level of lewdness and vulgarity). From Hazelwood, the third test addresses if the student speech could be construed as school sponsored. If the speech bears the school’s imprimatur, then Hazelwood allows school administrators to censor that student speech as long “as their actions are reasonably related to legitimate pedagogical concerns.” The fourth test, found in Morse, establishes that school officials can prohibit at school events student speech that advocates the use of illegal drugs.

Tinker and the subsequent three Supreme Court student speech cases all deal with speech that occurred at school. In Tinker, the Court stated, “…students [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” However, neither Tinker nor the other three decisions addressed student speech occurring away from school. Further, cyberspeech which occurs away from school grounds can have a nexus to the school environment and negatively affect the school day. Again, the four Supreme Court student speech cases do not address this issue. Moreover, what about student speech occurring away from school which is accessible at school via computer? Also, how should school administrators handle student speech originating away from school yet still ending up within the metes and bounds of the schoolhouse gate? Over four decades after Tinker, with the

274 Vivian Lei, Student’s Free Speech Rights Shed at the Cyber Gate. 16 Rich. J.L. & Tech. 1, 10 (2009).
275 Id.
276 Id.
278 Id.
279 Morse v. Frederick, 551 U.S. 393, 410 (2007).
281 Findlaw, http://dictionary.findlaw.com/definition/nexus.html. Nexus is defined as a connection or link between things, persons, or events especially as part of a chain of causation.
internet and cell-connected devices like Android phones making communication readily available within the school setting, some scholars assert the Tinker Court could not have conceived of the concept of student cyberspeech.\textsuperscript{282}

In each of the Supreme Court student free speech cases, the Court has indicated that within the school setting, students’ right to free speech is more limited than in other environments.\textsuperscript{283} However, student cyberspeech is very different from the examples portrayed in those four Supreme Court student speech benchmark cases, making the administrative decisions regarding student cyberspeech more difficult. Though a Supreme Court cyberspeech opinion would be helpful, in its absence, courts must apply non-cyberspeech case law to cyberspeech fact patterns.\textsuperscript{284}

Though the Supreme Court has spoken about the protections afforded internet expression, the special circumstances of the school environment\textsuperscript{285} provide many nuances to student expression disseminated via the internet. For instance, some scholars contend school administrators will not be successful in court if they punish students for internet speech which is simply offensive towards or critical of school personnel.\textsuperscript{286} However, those same scholars claim if a student posts internet expression which either law enforcement authorities or school officials define as credibly threatening speech, or speech that is directly tied to a subsequent on-campus disturbance, then administrators are likely to prevail against a court challenge.\textsuperscript{287}

\begin{footnotes}
\textsuperscript{283} Oten, \textit{supra} note 179, at 406.
\textsuperscript{284} Weeks, \textit{supra} note 22, at 1182.
\textsuperscript{286} Wolking, \textit{supra} note 273, at 1528.
\textsuperscript{287} \textit{Id}.
\end{footnotes}
Though the Supreme Court student speech cases did not directly address cyberspeech, those four cases provide the only current guidance for lower courts and school administrators to use in making decisions regarding incidents of student off-campus cyberspeech. Some scholars argue *Tinker* should only be the referent case in dealing with off-campus internet speech if the student deliberately brings the speech onto campus to make a display which may lead to a foreseeable disruption.288

**Review of Current Student Speech Cases and Decisions**

There have been multiple lower court cases with facts describing student expression which served to bully, harass, disparage, or otherwise inappropriately attack students, faculty, and even parents. These lower court decisions, in concert with the four Supreme Court student speech cases described above, provide guidelines for other lower courts and school administrators when faced with decisions regarding student speech incidents. The lower court cases discussed in the remainder of this paper do not all involve cyberspeech incidents. However, they are the referent cases in the area of student expression targeting staff members. Moreover, this study is delimited to an examination of cases involving student off-campus speech targeting school staff members. The cases are presented in chronological order by the date of the decision. They represent an array of issues involving student expression pertinent to providing guidance to courts and school administrators who need to make decisions regarding off-campus student cyberspeech which targets school staff members.


An early non-Supreme Court case which featured student speech targeting school staff members and numerous other topics actually was decided even before the Supreme Court heard Fraser. In 1979, the Second Circuit ruled in Thomas v. Board of Education, Granville School District.\(^{289}\) The case dealt with students who created, for the most part off school grounds, a satirical newspaper titled Hard Times, which poked fun at a number of things at the school, like cheerleaders, school lunches, and staff members.\(^{290}\) The front page made clear the intent of the newspaper’s content with a banner boasting, “Uncensored -- Vulgar – Immoral!!!”\(^{291}\) One article included an editorial about masturbation.\(^{292}\) The newspaper contained other articles with similar content.\(^{293}\)

The students who conceived of the idea for Hard Times held brainstorming sessions at school during their after-school study time. Though most of the work for the publication was conducted off school grounds, part of it was done at school.\(^{294}\) Furthermore, once the first edition was printed, it was stored in a closet located in a teacher’s classroom, with the teacher’s permission.\(^{295}\) The teacher admitted allowing the newspapers to be stored in his classroom might have made him “guilty of poor judgment.”\(^{296}\) In addition, the teacher testified he recommended to students that they sell Hard Times off school grounds.\(^{297}\)

\(^{290}\) Id. at 1045. Additionally, the newspaper contained some off-color content covering such topics as masturbation and prostitution.
\(^{292}\) Id.
\(^{293}\) Id.
\(^{294}\) Id. at 117.
\(^{295}\) Id.
\(^{296}\) Id.
\(^{297}\) Id. at 118.
Students sold copies of *Hard Times* at a local store. Even though *Hard Times* was largely produced and distributed off-campus, upon discovering the newspaper’s existence, school officials suspended the students from school, segregated them from other students during study hall, and revoked all of the students’ senior privileges. These disciplinary measures prompted suit by the students who sought an injunction in the United States District Court for the Northern District of New York to allow them to return to school, claiming their First Amendment right to free speech had been violated.

The district court referenced *Tinker* in its decision denying the students’ motion for injunctive relief. The court noted the evidence showed *Hard Times* posed a threat to administrators’ efforts to keep adequate control of Granville Junior High School. Consequently, the district court held *Tinker* controlled the decision. Thus, the district court determined the student speech expressed in *Hard Times* did not enjoy First Amendment protection.

On appeal, the Second Circuit sided with the students and overturned the district court ruling. The case was remanded to the district court for further proceedings. The Second Circuit panel opined that school administrators were meddling in student speech that was not

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298 *Id.* at 118.
300 *Id.* at 1046.
301 *Id.*
302 Id. at 117.
303 *Id.* at 117.
304 *Id.* at 123.
305 *Id.*
within their purview. The Second Circuit took the stance that though school officials are responsible for student speech which is expressed at school, they are not allowed by the First Amendment to prohibit what students read or say when they are away from school. The court reluctantly recognized that there were certain types of speech which school administrators were constitutionally permitted to prohibit. However, it limited these prohibitions to speech which occurred on-campus by saying school administrators’ power is confined to “the metes and bounds of the school itself.” The Second Circuit could not find evidence that *Hard Times* caused any disruption at school, as *Tinker* required if administration seeks to prohibit student speech. Though the Second Circuit determined *Hard Times* to be off-campus expression and thus beyond the reach of school officials’ authority, Judge Newman, in a concurring opinion for the *Thomas* court, alluded to the verity that determining the reach of school officials may not be as simple as limiting it to within the walls of the school.

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307 Id. at 1050. In fact, the court even refused to scrutinize the content of the newspaper articles, which administrators had claimed was lewd and inappropriate. This perhaps serves as a precursory ruling to the 1986 *Fraser* case in which the Supreme Court did rule on the content of a student’s speech that was inappropriate and thus created an exception to *Tinker*. However, the student speech in *Fraser* occurred on-campus and was delivered to a captive audience. A newspaper created and sold off-campus to students who volunteered to purchase it, as in *Thomas*, seems like a much different scenario than the on-campus captive audience in *Fraser*. 308 Id. at 1049. Judge Kaufman, in writing the court’s opinion, said school administrators must take care to forbid a couple kinds of student speech. First, “out of regard for fellow students who constitute a captive audience,” and second, “in recognition of the fact that the school has a substantial educational interest in avoiding the impression that it has authorized a specific expression.” Both of these reasons are instructive because the language is nearly identical to the foundation of the Supreme Court’s argument seven years later in deciding *Fraser* and nine years later in its *Hazelwood* finding. 309 *Id.* at 1051. 310 *Id.* at 1051, 1052. 311 *Id.* at 1052. However, in a concurring opinion, Judge Newman foreshadowed the difficulty that courts are now experiencing when dealing with cyberspeech when he commented that perhaps geography is not “a useful concept in determining the limit of their [school officials’] authority.” *Thomas*, 607 F. 2d at 1058. 312 *Id.* at 1058.
Klein v. Smith (1986)

In the 1986 District Court of Maine student speech case Klein v. Smith, a student, Jason Klein, sought an injunction prohibiting Oxford Hills High School officials from suspending him for directing an offensive hand gesture (an extended middle finger) toward a teacher while in a parking lot at a restaurant outside of school hours. Though not directly a student cyberspeech case, the issue of whether any real nexus exists to inappropriate off-campus student behavior directed at a staff member is prominent in Klein.

The case involved a teacher, Clyde Clark, who was in his car, waiting on his son, in a restaurant parking lot when Klein pulled up as a passenger in another car and extended the middle finger of one hand toward Clark. In response, school officials suspended Klein for ten days, citing a school rule that called for students to be disciplined for crude or offensive conduct aimed at a staff member. The school district claimed ignoring Klein’s behavior would lead to a weakening of the staff’s ability to maintain order in the school. However, the United States District Court for the District of Maine eschewed the argument, asserting school staff members are far more influential than any webpage could ever be. Some scholars believe school officials must take advantage of such a teachable moment, like in

314 Id.
315 Clay Calvert, Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground, 7 B.U. J. Sci. & Tech. L. 243, 271 (2001). Also, see generally J.S. v. Bethlehem, 757 A.2d 412 (Pa. Cmwlth. 2000). The Pennsylvania Commonwealth Court describes the vulgar content found on J.S.’s website, including comments aimed at the principal which refer to him, among other things, as a “fat f---.” Additionally, the website targeted at least one female teacher, asserting that she should be fired and referring to her as a “stupid b----.”
316 Klein, 635 F. Supp at 1440-1441.
317 Id. at 1441.
318 Calvert, supra note 315, at 275.
319 Id.
Klein, when student cyberspeech aimed at other students or school staff members conflicts with acceptable school values.320

The district court determined the student’s off-campus gesture was indeed made with intent to show his contempt for Clark. However, the court observed that at the time of the incident, Clark was not performing any functions as a teacher, Klein was not performing any functions as a student, and the restaurant was not on school grounds nor was there a school function occurring there.321 Klein, then, was not acting in the capacity of a student but as a non-student or community citizen, enjoying the same free speech rights as an adult. As such, the court found his speech was beyond the reach of school authority.322 Furthermore, the court believed Klein’s gesture was unlikely to incite any sort of disruption at school nor was it likely to illicit an aggressive reaction from Clark.323 Though the court recognized Klein’s act was boorish,324 it determined nonetheless the school district infringed upon Klein’s First Amendment speech rights when it suspended him for communication that was protected.325 The school district did not appeal.


Twelve years later, in 1998, the United States District Court for the Eastern District of Missouri heard Beussink v. Woodland,326 a case involving Brandon Beussink, a Woodland

320 Id. at 286.
322 Calvert, supra note 315, at 271.
323 Klein, 635 F. Supp at 1442.
324 Tabor, supra note 53, at 581.
325 Klein, 635 F. Supp at 1442.
High School student, who created a webpage at home and made it available to anyone conducting a simple internet search. The webpage included sharp and crude criticism of a number of Woodland High School staff members and school procedures, including the administration, teaching staff, and the school’s website. Beussink also encouraged website visitors to share their opinions about Woodland by reaching out to the principal to give their opinions about Woodland. In addition, Beussink’s website included a hyperlink to Woodland High School’s website. A friend of Beussink’s who had knowledge of the website accessed it at school and showed it to a teacher. Beussink testified he never meant for anyone to view the webpage at Woodland High School. Even though Beussink himself did not open the website at school, Principal Yancy Poorman suspended him anyway for ten days because Poorman was upset the website, with its crude language, was displayed on computer screens in classrooms. As a result, Beussink brought suit against the school district for violation of his First Amendment free speech rights.

In finding for Beussink, the district court noted the school district violated his First Amendment rights in a number of ways. First, the court determined Principal Poorman’s decision to suspend Beussink was not founded in any concrete legal standard, but rather in his disdain for the substance of the words Beussink chose to include in the website. The district court made its decision based on Tinker, writing that “disliking or being upset by the content
of a student’s speech is not an acceptable justification for limiting student speech under Tinker.” Tinker requires either a reasonable fear that a substantial disruption will occur or actual incidence of disruption in order to sustain discipline for student speech under the First Amendment. The court additionally applied Tinker in observing “Individual student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection.” Testimony indicated that although several students viewed Beussink’s webpage, no noteworthy disruptions occurred at school. Principal Poorman testified the only incidents resembling a disruption were students discussing the webpage in the halls.

Thus, the court granted Beussink’s request for injunction, ordered the Woodland School District to erase Beussink’s suspension, prohibited the school district from imposing any other discipline related to Beussink’s webpage, and denied the school district the right to constrain Beussink from using his home computer to repost the contents of the webpage. The case was not appealed.


Two years later, in 2000, the United States District Court for the Western District of Washington heard Emmett v. Kent. The case involved a challenge to a school district decision to expel Kentlake High School senior Nick Emmett (“Nick”), who created a

335 Id.
337 Beussink, 30 F. Supp. 2d at 1182.
338 Id. at 1181.
339 Id.
340 Id. at 1182.
webpage at home. The webpage included Nick’s musings about employees at Kentlake and also featured mock obituaries of Kentlake students who were Nick’s friends. The obituaries were inspired by a creative writing class assignment which required students to write their own obituary. Nick stretched the assignment by accepting online votes for who should be the next student to “die”- that is, become the next obituary featured on his website. The media found out about the website and a television news story was broadcast, describing Nick’s website as containing a hit list of people to be killed.

Upon learning of the existence of the website, school officials expelled Nick for “intimidation, harassment, and disruption to the educational process.” School officials argued the expulsion was justified because websites like Nick’s could serve as a warning that the student had violent tendencies. In addition, the school district asserted the website should be taken seriously in light of the recent school shootings in other locations that had taken place around the time of Nick’s webpage postings. However, after further investigation, school officials determined a threat was not imminent and the expulsion was reduced to a five-day suspension.

Nick and his family brought to the district court a motion for a temporary restraining order barring the school district from imposing the suspension. Referring to Tinker, the

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342 Id. at 1089.
343 Id.
344 Id.
345 Id.
346 Id.
347 Id.
348 Id. at 1090.
349 Id.
350 Id. at 1089.
351 Id.
court granted the temporary restraining order, noting there was no disruption of the educational process connected to the website.\textsuperscript{352} Additionally, it found that the website contents, including the mock obituaries, did not constitute a threat to anyone.\textsuperscript{353} The court also discussed the application of \textit{Fraser} and \textit{Hazelwood} to this case but determined they did not apply in this instance because Nick’s speech could not have been confused with speech endorsed by the school. In order for \textit{Fraser} to control, Nick’s expression would have had to have taken place at school, in front of a captive audience. For \textit{Hazelwood} to control, his expression would have had to have been printed in a school-sponsored publication. Neither of these school-sponsored scenarios occurred in this case.\textsuperscript{354} Nick created the website away from school and did not use any school time or resources in designing it.\textsuperscript{355} Thus, since Nick’s expression took place at home after school hours, the court surmised it was beyond the jurisdiction of school administrators and granted the restraining order.\textsuperscript{356} There was no appeal.

\textit{Killion v. Franklin (2001)}

Just a year after the \textit{Emmett} decision, in 2001, the United States District Court for the Western District of Pennsylvania ruled on \textit{Killion v. Franklin Regional School District}.\textsuperscript{357} The case involved Zachariah Paul, a student at Franklin Regional High School, who was upset about school administrators denying him a student parking permit. The case details are not specific, but apparently the permit denial was connected to some school rules being imposed

\textsuperscript{352} \textit{Id.} at 1090.  
\textsuperscript{353} \textit{Id.}  
\textsuperscript{354} \textit{Id.}  
\textsuperscript{355} \textit{Id.}  
\textsuperscript{356} \textit{Id.}  
on the track team, of which Paul was a member.\textsuperscript{358} To vent his frustration, Paul, using his home computer outside of school hours, created a “Top Ten” list referring to athletic director Robert Buzzuto and his appearance in unflattering terms.\textsuperscript{359} The list featured disparaging remarks about Buzzuto’s body type and private body parts.\textsuperscript{360} Paul emailed the list to multiple friends.\textsuperscript{361} Though Paul did not print, copy, or otherwise bring the list to school, some weeks later, hard copies of the Top Ten list appeared in the Franklin Regional High School and Middle School.\textsuperscript{362} School administrators interviewed Paul, who admitted creating the list but denied bringing it to school.\textsuperscript{363} School administrators suspended Paul for ten days because the list included insulting comments about a school official and had made its way to school.\textsuperscript{364}

Both sides sought summary judgment.\textsuperscript{365} Paul claimed his First Amendment rights were violated because he was disciplined for expression he created at home, off school grounds, thus rendering the Supreme Court student speech jurisprudence irrelevant, regardless

\textsuperscript{358} Id. at 448.

\textsuperscript{359} Id.

\textsuperscript{360} Id. The Top Ten list resembled those commonly seen on the David Letterman Show. It was a Top Ten list answering the question, Why is Mr. Buzzuto so unhappy?: 10) The School Store doesn't sell twinkies. 9) He is constantly tripping over his own chins. 8) The girls at the 900 #'s keep hanging up on him. 7) For him, becoming Franklin's "Athletic Director" was considered "moving up in the world." 6) He has to use a pencil to type and make phone calls because his fingers are unable to hit only one key at a time. 5) As stated in previous list, he's just not getting any. 4) He is no longer allowed in any "All You Can Eat" restaurants. 3) He has constant flashbacks of when he was in high school and the athletes used to pick on him, instead of him picking on the athletes. 2) Because of his extensive gut factor, the "man" hasn't seen his own penis in over a decade. 1) Even if it isn't for his gut, it would still take a magnifying glass and extensive searching to find it. \textit{Killion}, 136 F. Supp at 448.

\textsuperscript{361} Id.

\textsuperscript{362} Id. at 448-449.

\textsuperscript{363} Id. at 449.

\textsuperscript{364} Id.

\textsuperscript{365} Id. Summary judgment “is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.”
of its content. On the other hand, the school district asserted the speech was disruptive, lewd, and obscene, and the suspension was therefore justified by *Tinker* and *Fraser*. The district court addressed the fact that the student cyberspeech had originated off school property and noted the Supreme Court student speech decisions involved expression occurring on school grounds. The court alluded to other lower court decisions in which *Tinker* had been used to make decisions regarding student expression created off-campus and conveyed to school grounds by someone other than the creator. The district court observed most courts had applied *Tinker* to student speech cases, regardless of whether the expression was created on- or off-campus. Since Paul’s speech had made its way onto school property, the court determined *Tinker* to be the appropriate analytical tool. Applying *Tinker*, the court concluded school officials had violated Paul’s First Amendment rights because no evidence of disruption was produced.

Thus, the *Killion* court concluded simply finding the contents of the Top Ten list distasteful, without a substantial disruption or serious threat of one, was not sufficient justification for school administrators to discipline Paul. Additionally, the court considered whether *Fraser* applied since school officials contended Paul’s expression was “lewd and

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366 *Id.* at 450.
367 *Id.* at 450, 453.
368 *Id.* at 453.
370 *Id.* at 455.
371 *Id.*
372 *Id.*
373 *Id.*
“obscene” and therefore punishable under Fraser.” The court relied on other courts’ findings that the power school officials possess to control student off-campus expression is far more limited when compared to student expression occurring on-campus. The court noted that Paul’s speech did not occur at a school-sponsored assembly nor was it printed in a school-sponsored publication. Consequently, neither Fraser nor Hazelwood were controlling. The court deemed the speech “entirely outside of the school’s supervision or control.”

The court reasoned the facts of this case were more akin to those in Klein v. Smith and Thomas v. Board of Education. That is, the speech was created at home, disconnected from any school purpose, and thus Fraser was inapplicable. On a final note, the court commented that Paul’s list, though boorish and embarrassing to Bozzuto, did not constitute a real threat nor did it cause Bozzuto to need a leave of absence, as had occurred in other cases. Consequently, the court found the discipline to be in violation of Paul’s First Amendment rights and granted him summary judgment. The case was not appealed.


Most of the cases in this study are federal cases. However, J.S. v. Bethlehem, a Pennsylvania state case from 2002, is included because it is the one state case found which

374 *Id.* at 456.
375 *Id.* at 454.
376 *Id.*
377 *Id.* at 457.
378 See also J.S. v. Bethlehem Area School District, 569 Pa. 638, 645-646 (Pa. 2002). In Bethlehem, the student posted a webpage which detailed reasons a teacher should be killed and then solicited funds to hire a hitman. It featured bloody, decapitated drawings of the teacher. These images and solicitations resulted in the teacher needing doctor care and left her so petrified of what might happen to her that she was unable to come back to school.
380 *Id.* at 458.
dealt specifically with student cyberspeech targeting school staff members. In this case, the court wrestled with the issue of whether the First Amendment allowed Bethlehem school officials to impose discipline on J.S., a student, for his actions away from school which entailed his posting of a website that “contained derogatory, profane, offensive and threatening statements” aimed at a teacher and the principal. In response to the webpage, J.S. was suspended for what school officials alleged were violations of school policy and the Code of Conduct, including statements considered threatening, harassing, and disrespecting to school staff members. J.S. brought suit, alleging the suspension for conduct occurring away from school was a violation of his First Amendment rights.

The speech in question in this case was multiple webpages J.S. created titled Teacher Sux. The pages included content targeting one of his teachers, Mrs. Fulmer. They listed reasons she should be killed and requested readers to contribute money for a hitman. Another page contained profanity directed at her and yet another featured a bloody illustration of a beheaded Mrs. Fulmer. Evidence presented before the court revealed Mrs. Fulmer was so terrified by the webpage that she had to go under the care of a doctor, was rendered incapable of venturing out-of-doors, and could not return to school. In 2000, the Pennsylvania Commonwealth Court recognized that school violence is now often

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382 Id. at 643.
383 Id. at 647. Moreover, the court found that the threats led to “actual harm to the health, safety and welfare of the school community.” Specifically, the offending statements the court highlighted were, “Why Should [Mrs. Fulmer] Die?” and “give me $20 to help pay for the hitman.” See Bethlehem, 569 Pa. at 647.
384 Id. at 673.
385 Id. at 645.
386 Id.
387 Id.
388 Id. at 646. Three substitute teachers were employed to teach Mrs. Fulmer’s classes for the remainder of the school year. The court deemed this a disruption to the education of students and the functioning of the school.
The court believed school officials should take seriously student expression which could reasonably be viewed as a threat. The court found the content of the website and its effect on Mrs. Fulmer to disqualify J.S.’s speech from First Amendment protection. J.S. appealed to the Pennsylvania Supreme Court.

The Pennsylvania Supreme Court acknowledged the internet certainly muddled the extent of students’ First Amendment free speech rights. The court also established that just because student speech occurs away from the school setting does not mean it is exempt from disciplinary action taken by school administrators. The court discovered the school community became aware of the webpage at least in part because J.S. publicized its existence by accessing it while at school and showing it to other students. The court acknowledged Mrs. Fulmer experienced harm and school officials were reasonable in taking potential threats seriously in light of recent violent episodes in schools. However, the court expressed that offensive student speech is not necessarily a true threat just because it is loathsome. As a result, the court found J.S.’s speech did not constitute a true threat.

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390 Id.
391 Id. at 426.
393 Id. at 655.
394 Id. at 645.
395 Id. at 659.
396 Id.
397 Id. True threats were defined mainly in two cases. In Virginia v. Black, 538 U.S. 343, 359 (2003), the Court defined true threats as “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” Additionally, in Watts v. U.S., 394 U.S. 705, 706-708 (1969), the Supreme Court noted that true threats must be differentiated from what is constitutionally protected political speech. The defendant in that case was with a group of friends, talking about their objections to the Viet Nam war, when the defendant asserted that if he were to be drafted, he would first attempt to shoot the President. The Court did not find this type of political speech to be a true threat.
aside, the court considered if school officials acted within the parameters of the First Amendment when they disciplined J.S. for his webpage.\textsuperscript{398}

The court applied both \textit{Tinker} and \textit{Fraser} to make its ruling. In upholding the lower court’s decision that the school district did not violate the First Amendment rights of J.S., the Pennsylvania Supreme Court noted the United States Constitution allowed the State to prohibit some forms of student speech, especially speech occurring at school.\textsuperscript{399} And the website was accessed at school.\textsuperscript{400} The opinion also referred to an earlier Pennsylvania Commonwealth Court decision\textsuperscript{401} which referenced other cases where disciplinary actions against students for their actions away from school had been upheld.\textsuperscript{402} Justice Cappy, in writing the \textit{Bethlehem} opinion for the Pennsylvania Supreme Court, wrote even though J.S. created the website away from school, it became on-campus speech when he opened it at school. Thus, the court surmised \textit{Tinker} was the controlling test.\textsuperscript{403} As a result, the Pennsylvania Supreme Court described several reasons for its decision to uphold the lower court’s finding that the school district did not violate J.S.’s First Amendment rights by

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\bibitem[\textit{Tinker}]{398} Id.
\bibitem[\textit{Fraser}]{399} Id. at 649. The court specified the types of speech which the State may limit or punish are those that “are likely to inflict unacceptable harm.”
\bibitem[\textit{Bethlehem}]{400} Id.
\bibitem[\textit{J.S. v. Bethlehem Area School District}]{401} \textit{J.S. v. Bethlehem Area School District}, 757 A.2d 412, 419 (Pa. Cmwmw. 2000). Specifically, the Commonwealth Court referenced Donovan v. Ritchie, 68 F.3d 14 (1st Cir. 1995), in which a student created at home a “shit list” that profanely referenced other students. The list did end up on school grounds, was found by a faculty member, and the creator was suspended. The challenged suspension was upheld. Also, \textit{Fenton v. Stear}, 423 F. Supp. 767 (W.D. Pa. 1976), in which the Western District of Pennsylvania Court upheld administrators’ rights to suspend a student for calling a teacher “… a prick” on a Sunday evening in the shopping mall parking lot. Finally, the Commonwealth Court cited \textit{Beussink v. Woodland R-IV School District}, 30 F. Supp. 2d 1175 (E.D. Mo. 1998), described above.
\bibitem[\textit{Bethlehem}]{402} \textit{Bethlehem}, 569 Pa. at 648. The court remarked further that \textit{Tinker} requires the student actions to create a significant disruption in order for a court to uphold the discipline. Also, the court referred to an increase in the instances of violence at school in recent times and thus believed it understandable that school officials would deem threats credible and take action to prevent it.
\bibitem[\textit{Bethlehem}]{403} Id. at 652.
\end{thebibliography}
disciplining him for his cyberspeech. First, J.S. communicated to other students that he had created the website and thus it was a foregone conclusion the website and its contents would become common knowledge among students and staff. Furthermore, even though the Pennsylvania Supreme Court recognized other courts had referred to Tinker when deciding on cases of “internet communication,” it was “not convinced that reliance solely on Tinker was appropriate.” Thus, in making its decision, the court focused on both the disruption the website caused (actionable under Tinker) and the effect the lewd, vulgar, and plainly offensive webpage content had on individuals at school (actionable under Fraser).

The court disagreed with J.S.’s contention that any disruption which occurred was so minor that it did not even qualify as substantial under Tinker’s definition. The court pointed to specific examples of disruption. First, Mrs. Fulmer was absent for over three school weeks, causing the school district to utilize three substitute teachers and thereby disrupting the education of students. Second, testimony revealed students experienced feelings of “helplessness and low morale…an atmosphere as if a student had died.” A third example of disruption was parents communicating apprehension over the length of time substitutes would be taking over classes and how this might negatively affect learning. Consequently, the

404 Id. at 667. The court further held that speech is deemed “on-campus” when it is clearly directed at a specific school or staff member(s) and “is brought onto the school campus or accessed at school by its originator.” Once the speech is deemed on-campus, then the contents of the student speech can fall under Fraser.
405 Id. at 671.
406 Id. at 672.
407 Id. The court in fact determined that the Teacher Sux website did cause actual disruption in the operation of the school and that it was indeed substantial. The court went so far as to state that the whole point of the website was to disrupt the educational process, just as Matthew Fraser was found to have done in Bethel v. Fraser, 478 U.S. 675 (1986).
408 Id. at 674.
409 Id.
410 Id.
Pennsylvania Supreme Court found “an actual and substantial interference with the work of
the school to a magnitude that satisfied the requirements of Tinker” as a result of J.S.’s
website.411 Accordingly, J.S.’s First Amendment rights were not violated when he was
disciplined.412


Just five months after the Bethlehem decision, in 2003, the U.S. District Court for the
Western District of Pennsylvania ruled on Flaherty v. Keystone Oaks School District.413 In
that case, Keystone Oaks High School (KOHS) student Jack Flaherty, Jr., posted speech to a
website from both his home and from school. Some of the posts contained disparaging
comments about an upcoming volleyball opponent and about a KOHS teacher.414 Upon
discovering the existence of the public posts, school officials disciplined Flaherty in
accordance with the KOSD Student Handbook. Flaherty filed suit, alleging violation of his
First Amendment rights in regard to his discipline and also alleging that portions of the
language found in the Keystone Oaks School District's Student Handbook violated the U.S.
Constitution.415 Flaherty contended the handbook policies were ambiguous and too
encompassing because they forbade expression that should enjoy constitutional protection.416

411 Id. at 675.
412 Id.
414 Id. at 700.
415 Id. at 700-701.
416 Id. at 703. More specifically, Flaherty asserted the KOSD Student Handbook called for punishment for
student speech which school officials considered "inappropriate, harassing, offensive or abusive." Flaherty
claimed those terms were not clearly defined in the handbook. Furthermore, punishment for student use of those
terms had no stated boundaries, like “at school or school-sponsored events” or for “speech that causes a material
and substantial disruption to the school day.” Flaherty, 247 F. Supp. at 702.
The district court agreed with Flaherty, asserting KOHS Principal Scott Hagy could not show a substantial disruption had occurred. Additionally, the court determined the sections of the student handbook which school officials referenced in punishing Flaherty were indeed vague and too broad and lent themselves to indiscriminate application. Thus, the court found the punishment was a violation of the First Amendment and also found the KOHS Student Handbook unconstitutional because it failed to include geographic boundaries school administrators should observe when curtailing student expression. The court reasoned the handbook language gave school officials virtually “unrestricted power.” Specifically, the court asserted it was a constitutional violation for school officials “to discipline a student for … expression occurring outside of school premises and [was] not tied to a school-related activity.” The district court granted Flaherty’s motion for summary judgment. There was not an appeal.


Nearly two years after the *Flaherty* decision, in 2004, the United States Court of Appeals for the Fifth Circuit decided *Porter v. Ascension Parish School Board*. In that case, Adam Porter, a student at East Ascension High School in Louisiana, created a drawing at

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417 *Id.* at 704.
418 *Id.* at 705.
419 *Id.*
420 *Id.*
421 *Id.* at 706.
422 *Id.*
423 *Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004).
home of his school being attacked.\textsuperscript{424} The drawing portrayed a well-armed military attacking the school and contained images of a brick being thrown at the school principal.\textsuperscript{425} After creating the drawing, Adam tucked the sketchpad away in a closet at home.\textsuperscript{426} Two years later, Adam’s younger brother pulled out the sketchpad to use on a school project.\textsuperscript{427} After drawing his project picture, the brother took the pad to his middle school to show his teacher, and while on the bus trip home, another student noticed the two-year-old sketch Adam had drawn, showed it to the bus driver, and announced that someone was going to blow up the school.\textsuperscript{428} Middle school administrators suspended Adam’s younger brother for having the drawing at school and sent the two-year-old drawing to the EAHS principal.\textsuperscript{429} Alarmed by the sketch, EAHS administrators found reason to search Adam’s book bag, discovering a box cutter and writings describing “death, drugs, sex, depictions of gang symbols, and a fake ID.”\textsuperscript{430} The administrators recommended Adam for expulsion and law enforcement arrested him on charges of “terrorizing EAHS and carrying an illegal weapon.”\textsuperscript{431} Adam filed suit against the school district, alleging that his First, Fourth, Eighth, and Fourteenth Amendment rights had been violated.\textsuperscript{432}

\textsuperscript{424} Id. at 611.
\textsuperscript{426} Porter, 393 F. 3d at 611.
\textsuperscript{427} Id.
\textsuperscript{428} Id.
\textsuperscript{429} Id. at 612.
\textsuperscript{430} Id.
\textsuperscript{431} Id.
\textsuperscript{432} Id. Adam claimed a violation of his constitutional guarantee of procedural due process and equal protection connected to the Fourteenth Amendment claim. Though the case document did not specifically spell out how the Ascension Parish School District violated his Eighth Amendment rights, it can be inferred that Adam was claiming the expulsion proceedings constituted an excessive fine.
The U.S. District Court for the Middle District of Louisiana quickly dismissed, without objection, the claims against the Eighth and Fourteenth Amendments, leaving the court to determine the merits of a case in violation of the First and Fourth Amendments.\textsuperscript{433} After consideration, the district court determined that a reasonable school administrator, upon discovering a drawing like Adam’s, would be justified in searching a student’s belongings and seizing inappropriate materials.\textsuperscript{434} Thus, the district court dismissed the Fourth Amendment claim as well.\textsuperscript{435}

In response to the First Amendment claim, school officials asked the district court for summary judgment in its favor, which was granted.\textsuperscript{436} The district court used the \textit{Tinker} standard in making its determination, finding Adam’s two-year-old drawings were not political expression and also constituted a material and substantial interference with “appropriate discipline in the operation of” the school.\textsuperscript{437} Additionally, the district court considered whether the speech qualified as a “true threat.”\textsuperscript{438} Even though Adam had no knowledge that his younger brother brought the sketchpad to school and he apparently had no intention for the drawings to reach the school campus, given the nature of the drawings and associated language, the court found it reasonable for school officials to regard Adam’s drawings as a true threat. School officials and the court referred repeatedly to the danger of the drawings and did not mention the items discovered in Adam’s backpack during the search. Eventually though, the court did point out that the discovery of the box cutter in Adam’s

\textsuperscript{434} \textit{Id.} at 599.
\textsuperscript{435} \textit{Id.}
\textsuperscript{436} \textit{Id.} at 599.
\textsuperscript{437} \textit{Id.} at 586.
\textsuperscript{438} \textit{Id.}
possession served to bolster school officials’ position that they took appropriate disciplinary action. Thus the court ruled in favor of the school district by determining the discipline was warranted because the drawings did not enjoy First Amendment protection.

The Fifth Circuit disagreed. The appellate court reasoned since Adam did not deliberately convey any intention to harm anyone, the drawings could not be deemed a true threat. In addition, the Fifth Circuit suggested because Adam’s drawing was created off-campus and he had no intention to bring it to campus, it should be protected by the First Amendment. However, because the drawing did eventually appear at school, the Fifth Circuit wrestled with this issue. As such, the court pondered if perhaps it should be considered on-campus expression. As a result, even though the Fifth Circuit believed the district court was wrong in finding that there was no violation of Porter’s First Amendment rights, it upheld the district court’s decision based upon a finding that the principal’s actions had been

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439 *Id.* at 588.
441 *Porter v. Ascension Parish School Board*, 393 F.3d 608, 618 (5th Cir. 2004).
442 *Id.*
443 *Id.* at 620. The Fifth Circuit acknowledged that a reasonable school administrator might have difficulty making a decision on this matter because there was not a trail of consistent court decisions for him/her to follow. *Porter*, 393 F. 3d at 620. As a result, given the confusing variety of court decisions regarding how school administrators should apply First Amendment rights to off-campus student expression, the court determined Adam’s First Amendment protections were not clearly established. *Porter*, 393 F. 3d at 620. Furthermore, even if Adam’s First Amendment protections were clearly established, the court could not find fault in Principal Braud’s decision to discipline Adam for the drawing because a school administrator, in efforts to protect the school, its students, and its staff, could reasonably view the drawing as on-campus speech and a true threat. *Porter* 393 F. 3d at 620-621.
reasonable under the circumstances.\textsuperscript{444} The Supreme Court denied a subsequent petition for a writ of certiorari.\textsuperscript{445}

\textit{Wisniewski v. Board of Education (2007)}

Two and a half years after the \textit{Porter v. Ascension Parish} decision, the United States Court of Appeals for the Second Circuit, in 2007, decided \textit{Wisniewski v. Board of Education of the Weedsport Central School District}.\textsuperscript{446} Aaron Wisniewski, an eighth-grade student at Weedsport Middle School in upstate New York, used the computer at his parents’ home to create an AOL Instant Messaging (IM) icon of a gun shooting at a person’s head causing blood splatters.\textsuperscript{447} The accompanying caption said, “Kill Mr. VanderMolen,” who was one of Aaron’s teachers at the time.\textsuperscript{448} Aaron sent multiple IM messages which featured this icon to about fifteen of his friends over a period of approximately three weeks.\textsuperscript{449} Eventually, another student gave Mr. VanderMolen a printout of the icon, which greatly upset him.\textsuperscript{450} Upon confirming it was Aaron’s icon and that he had sent it to multiple people, school officials suspended Aaron for five days.\textsuperscript{451} A subsequent hearing was convened before a hearing officer, who found the icon to be a threat and a disruption to the educational process and recommended a one-semester suspension.\textsuperscript{452} School officials acted on that recommendation

\textsuperscript{444} \textit{Id.} at 625.  
\textsuperscript{446} \textit{Wisniewski v. Board of Education of the Weedsport Central School District}, 494 F. 3d 34 (2nd Cir. 2007).  
\textsuperscript{447} \textit{Id.} at 36.  
\textsuperscript{448} \textit{Id.}  
\textsuperscript{449} \textit{Id.}  
\textsuperscript{450} \textit{Id.}  
\textsuperscript{451} \textit{Id.}  
\textsuperscript{452} \textit{Id.} at 36-37.
and suspended Aaron for an entire semester.\textsuperscript{453} The suspension prompted Aaron’s parents to file suit, claiming Aaron’s First Amendment rights were violated.\textsuperscript{454}

The District Court for the Northern District of New York rejected Aaron’s arguments and sided with the school district.\textsuperscript{455} On appeal, citing \textit{Tinker}, the Second Circuit Court of Appeals upheld the district court ruling, concluding Aaron’s icon caused a reasonably foreseeable disruption to the educational process.\textsuperscript{456} The Second Circuit believed that discipline was warranted because Aaron’s icon went beyond what represented his political opinion and ventured into unprotected, school-disrupting speech.\textsuperscript{457} Aaron had asserted the school discipline violated his First Amendment rights because he did not send the icon to Mr. VanderMolen or to any other school official,\textsuperscript{458} and he created the icon at home on his parents’ computer, not at school.\textsuperscript{459} The district court disagreed and the Second Circuit affirmed that under not only \textit{Tinker}, but also \textit{Thomas, Boucher},\textsuperscript{460} and \textit{Bethlehem}, school officials have authority to discipline for student off-campus conduct which can lead to substantial disruption at school.\textsuperscript{461} In those cases, the court upheld discipline for off-campus expression that produced a foreseeable risk of substantial disruption at school.\textsuperscript{462} In addition, the court determined it was reasonably foreseeable that Aaron’s icon would at some point

\textsuperscript{453} Id. at 37.
\textsuperscript{454} Id. at 35.
\textsuperscript{455} Id.
\textsuperscript{456} Id. at 35, 39.
\textsuperscript{457} Id. at 38.
\textsuperscript{458} Id. at 36.
\textsuperscript{459} Id. at 39.
\textsuperscript{460} \textit{Boucher v. School Bd. of the Sch. Dist. of Greenfield}, 134 F.3d 821 (7th Cir. 1998).
\textsuperscript{461} \textit{Wisniewski}, 494 F. 3d at 38.
\textsuperscript{462} Id. at 39.
become known to school staff members, including its target, Mr. VanderMolen.\footnote{Id. at 40.} After the icon became common knowledge, the court thought the risk of a substantial school disruption was evident.\footnote{Id.} As a result, the court determined that school discipline for Aaron’s posts was permissible.\footnote{Id. at 40.}

Some scholars find it interesting that the Second Circuit did not deem Aaron’s icon a true threat yet upheld the district’s right to levy discipline anyway under Tinker’s substantial disruption clause.\footnote{Id. Lorillard, supra note 4, at 225.} Those same scholars believe the court’s decision in Wisniewski supports school administrators who act to protect students and staff by eschewing the notion that any damage caused by online expression must be tolerated in order to protect the free speech rights of the online poster.\footnote{Id. at 261.} On the other hand, other scholars summarize Wisniewski as a license for school administrators to suppress student off-campus speech if they believe that it might somehow come onto school grounds.\footnote{Kyle W. Brenton. BONGHiTS4JESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction. 92 Minn. L. Rev. 1206, 1222 (2008).}

This analysis stems from the court’s determination that it was reasonably foreseeable that school officials and the targeted teacher would discover the icon.\footnote{Wisniewski, 494 F. 3d at 39.} Because the court deemed the icon threatening and widespread, then the court found the possibility of school disruption to be “foreseeable to a reasonable person, if not inevitable.”\footnote{Id. at 40.} The fear of some scholars is that the Wisniewski decision allows
school administrators to stretch their disciplinary reach far beyond the school realm without any restraints.\footnote{Benjamin F. Heidlage, \textit{A Relational Approach to Schools’ Regulation of Youth Online Speech}. 84 N.Y.U.L. Rev. 572, 587 (2009).}

\textit{O.Z. v. Board of Trustees (2008)}

A year after the district court decision in \textit{Wisniewski}, in 2008, the United States District Court for the Central District of California court ruled on \textit{O.Z. v. Board of Trustees}.\footnote{\textit{O.Z. v. Board of Trustees}, 2008 U.S. Dist. Lexis 110409 (C.D. Cal. 2008).} Middle school student O.Z. made a slide show depicting the murder of his teacher, Mrs. Rosenlof, then posted it on YouTube.\footnote{Id. at 2.} The video contained captions in red print referring to Mrs. Rosenlof in a disparaging manner and describing the action in the photos.\footnote{Id. at 2-3. Some examples of photo captions include, “Mrs. Rosenlof dies,” “Jelly Donut’s knife: haha fat bastard, here I come?” The photo attached to that caption depicts a knife thrust at a character supposed to be Mrs. Rosenlof. The next slide shows the knife on the murder victim’s dead body with the caption, “hehehe. I’m a shank yooooooo!” The end of the slide show features a caption saying, “your dead, BITCH!”} The slide show images were graphic and the verbiage used was crude.\footnote{Id. at 3.} A couple of months after the slide show was posted on YouTube, Mrs. Rosenlof Googled her own name to see what she would find. The slide show came up. Along with the slide show, a written description of the slide show’s content also was displayed. It conveyed that the slide show was a video of a student killing a teacher named Mrs. Rosenlof and that the video was actually shot in Mrs. Rosenlof’s classroom during class.\footnote{Id.} The video so distressed Mrs. Rosenlof that she became sick and endured multiple sleepless nights.\footnote{Id.} Mrs. Rosenlof told Hughes Middle School Principal Monica Daley about the existence of the posting, which prompted Principal Daley to...
investigate the situation and communicate with O.Z. and her mother that O.Z. would be suspended and transferred to another school.478 O.Z. argued that her First Amendment right to free speech covered the slide show and, as a result, discipline for the slide show was a violation of the U.S. Constitution.479 Thus, O.Z. sought a preliminary injunction, asking the court to force the school district to allow O.Z. to remain at Hughes Middle School.480

The court identified Tinker as the applicable standard in this case.481 Though O.Z. claimed the slide show was just a joke, the court found it reasonable for school administrators to believe the YouTube post would create a substantial disruption at school due to the intense words used in the captions and the strange photos which accompanied the captions.482 The court did not support the notion that O.Z. was immune to school discipline just because she created and posted the slide show away from school.483 The court reasoned that other courts, like in Wisniewski and Thomas, have ruled that off-campus student behavior can create a reasonable threat of substantial disruption at school.484 Bolstering its stance on this point, the court pointed out Mrs. Rosenlof did discover the YouTube post even though it was created off-campus.485

The court noted school officials are more equipped to make decisions regarding what is best for students than are federal courts.486 Furthermore, the court recognized a middle school student being forced to move to another school can be stressful. Nonetheless, the court

478 Id. at 3-4.
479 Id. at 6.
480 Id. at 5.
481 Id. at 6.
482 Id. at 9.
483 Id. at 10.
484 Id. at 10-11.
485 Id. at 11.
486 Id. at 13.
asserted O.Z. was not convincing in her claim that the discipline would cause “irreparable harm.”\textsuperscript{487} In addition, the court was not convinced that O.Z.’s case had a high probability of success if it moved forward.\textsuperscript{488} Consequently, the court denied O.Z.’s request for preliminary injunction.\textsuperscript{489} There was no appeal.

\textit{Evans v. Bayer (2010)}

Two years after \textit{O.Z.}, the United States District Court for the Southern District of Florida heard \textit{Evans v. Bayer}.\textsuperscript{490} Katherine Evans, a high school senior, using her home computer after school hours, formed a Facebook group intended to provide an avenue for students to vent about a teacher. Evans titled the group, “Ms. Sarah Phelps is the worst teacher I’ve ever met” and she posted Phelps’ photo there.\textsuperscript{491} Evans displayed her opinion by stating that Phelps was the “worst teacher I’ve ever met!” and going on to say that her behaviors were “insane” and then inviting others to express their “feelings of hatred.”\textsuperscript{492} It does not appear from court documents that any other students posted their feelings of hatred. However, three students actually posted words of support for Phelps and admonished Evans for forming the Facebook group.\textsuperscript{493} Evans removed the posting after a couple of days. Phelps never saw it and no school disruption occurred in connection with it.\textsuperscript{494} High School Principal Peter Bayer became aware of the posting after Evans took it down, and he suspended Evans from school

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\item[487] \textit{Id.} at 12-13.
\item[488] \textit{Id.} at 17.
\item[489] \textit{Id.}
\item[490] \textit{Evans v. Bayer,} 684 F. Supp. 2d 1365 (S.D. Fla. 2010).
\item[491] \textit{Id.} at 1367.
\item[492] \textit{Id.}
\item[493] \textit{Id.}
\item[494] \textit{Id.}
\end{itemize}
\end{footnotesize}
for three days and changed her schedule from AP courses to some with less weight toward GPA calculation.\textsuperscript{495}

Evans filed suit, claiming her posting took place in an off-campus public forum and did not threaten violence in any way.\textsuperscript{496} Therefore, Evans argued, the discipline violated her First Amendment rights. Evans sought an injunction which would require Bayer to remove records from her permanent file pertaining to the discipline and expunging any mention of the three-day suspension.\textsuperscript{497} Bayer argued that he had an obligation to discipline Evans in order to protect the school environment from “potentially disruptive” conduct.\textsuperscript{498} Bayer additionally contended Evans did not have a clearly established right to create the posting about a teacher.\textsuperscript{499}

The court brought forth the question of whether or not Evans’s expression should be considered on-campus. The court reasoned even though Evans directed her posting message at a school employee, it was not enough to put the expression on-campus.\textsuperscript{500} Furthermore, the court observed the speech was created off-campus, it was never accessed nor brought onto campus, and when its existence came to Bayer’s attention, the posting had already been taken down.\textsuperscript{501} As a result, the court deemed Evans’ Facebook posting to be off-campus expression.\textsuperscript{502} The court was quick to point out, however, that off-campus expression can be

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\textsuperscript{495} Id.
\textsuperscript{496} Id. at 1367-1368.
\textsuperscript{497} Id. at 1368.
\textsuperscript{498} Id.
\textsuperscript{499} Id. at 1369.
\textsuperscript{500} Id. at 1371.
\textsuperscript{501} Id. at 1372.
\textsuperscript{502} Id.
\end{flushright}
subject to school discipline if it falls into a category unprotected by the Constitution.\textsuperscript{503}

Indeed, Bayer contended that \textit{Tinker} allowed school administrators to protect the school from disruptive expression like the negative comments Evans posted about Ms. Phelps.\textsuperscript{504} The court, however, rejected this argument, stating there was no clear indication of a disruption connected to the posting. The court said upholding the discipline for Evans’ speech would forbid students from making even minor criticisms of their teachers.\textsuperscript{505} Another unprotected speech category which Bayer suggested the court consider in upholding the discipline was the speech found in \textit{Fraser}. Again, the court determined Evans’ speech was not vulgar, it was not delivered before a captive audience, and it did not undercut the “fundamental values” of the educational process.\textsuperscript{506} Consequently, the court found Evans’ speech to be constitutionally protected and denied Bayer’s motion to dismiss.\textsuperscript{507} However, without addressing Evans’ request for an injunction, the court dismissed it, but left the door open for Evans “to file an amended complaint.”\textsuperscript{508} No such amendment was filed.

\textbf{\textit{Doninger v. Niehoff} (2011)}

The next year came the 2011 United States District Court for the District of Connecticut decision in \textit{Doninger v. Niehoff}.\textsuperscript{509} The dispute revolved around an issue with the scheduling of an annual school event called Jamfest that high school student Avery Doninger

\begin{itemize}
\item \textsuperscript{503} \textit{Id.}
\item \textsuperscript{504} \textit{Id.} at 1373.
\item \textsuperscript{505} \textit{Id.}
\item \textsuperscript{506} \textit{Id.} at 1374. The court went on to say it would stretch too far to equate a school assembly like in \textit{Fraser} to the entire internet. Additionally, the court pointed out that the Supreme Court said Fraser’s speech would have enjoyed protection if he had delivered it outside of the school environment.
\item \textsuperscript{507} \textit{Id.}
\item \textsuperscript{508} \textit{Id.} at 1377.
\item \textsuperscript{509} \textit{Doninger v. Niehoff}, 514 F. Supp. 2d 199 (D. Conn. 2007).
\end{itemize}
and the student council helped plan.\textsuperscript{510} The event was scheduled to take place in the high school’s new auditorium.\textsuperscript{511} This new auditorium required a person with special knowledge and skills to properly run the light and sound equipment. Due to an unforeseen conflict with the personal schedule of the teacher who possessed this knowledge, either the date or location of the event had to be moved, much to the dismay of Doninger and other members of the student council who had worked to plan the event.\textsuperscript{512} In response to this scheduling problem, Doninger accessed a computer while at school and sent a mass email to parents, students, and others providing contact information for school administrators and urging recipients to contact the school to complain.\textsuperscript{513} And complain they did, as the district office and the high school office were deluged with calls and emails over multiple days, causing Principal Karissa Niehoff to be called away from working with staff members on a training project.\textsuperscript{514} Subsequently, while at home after school hours, Doninger published a message on a “publicly accessible” website about the incident, further encouraging action by readers and referring to school administrators as “douchebags.”\textsuperscript{515} The next day, a crowd of disgruntled students assembled near the district office to protest about what they perceived was a decision by the administration to cancel Jamfest altogether, which was not the case.\textsuperscript{516} Here again, students

\textsuperscript{510} Doninger v. Niehoff, 642 F.3d 334, 339 (2nd Cir. 2011).
\textsuperscript{511} Id.
\textsuperscript{512} Id.
\textsuperscript{513} Id. at 339-340.
\textsuperscript{514} Id. at 340.
\textsuperscript{515} Id.
\textsuperscript{516} Id. at 341.
and school administrators were pulled away from their educational endeavors like class sessions and other school activities.\textsuperscript{517}

Days later, Principal Niehoff denied Doninger the opportunity to accept a nomination for Senior Class Secretary.\textsuperscript{518} Principal Niehoff deemed the website posting a violation of the student handbook ethics code to which Doninger had agreed in writing earlier in the year, prior to agreeing to participate in the extra-curricular activity of becoming a student class officer.\textsuperscript{519} The lawsuit, filed by Doninger’s mother, requested the court to order the school district to allow her daughter several privileges set aside for class officers, including being allowed to speak at graduation.\textsuperscript{520} Doninger claimed Niehoff and other school district officials had violated her First Amendment right to free expression.\textsuperscript{521}

The district court concluded Principal Niehoff did not violate Doninger’s First Amendment rights when she prohibited Doninger from running for Senior Class Secretary as punishment for a scathing website blog entry (described below) that Doninger posted from her home computer during non-school hours.\textsuperscript{522} Doninger appealed to the Second Circuit, which upheld the district court decision, declaring the First Amendment right which Doninger was claiming, that is, to write whatever she wished on a website blog post and to use mass email to encourage people to flood the school administration offices with complaint phone calls and emails, was not clearly established.\textsuperscript{523} The court determined Doninger’s First Amendment

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\item \textsuperscript{517} Id.
\item \textsuperscript{518} Id. at 342.
\item \textsuperscript{519} Id.
\item \textsuperscript{520} Id. at 344.
\item \textsuperscript{521} Doninger v. Niehoff, 514 F. Supp. 2d 199, 202 (D. Conn. 2007).
\item \textsuperscript{522} Id. at 216.
\item \textsuperscript{523} Doninger, 642 F.3d at 338.
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rights were not impinged because there was no clearly established right to publish the website blog entry which she intended to reach campus.\textsuperscript{524} Furthermore, the court determined there was no clearly established right for Doninger to be allowed to run for a class office.\textsuperscript{525} Additionally, though the Second Circuit recognized the Supreme Court had not provided clear guidance on “a school’s authority to regulate expression that, like Doninger’s, does not occur on school grounds or at a school-sponsored event,”\textsuperscript{526} the court referenced two cases addressing the issue. First, the Second Circuit referred to \textit{Thomas v. Board of Education},\textsuperscript{527} noting \textit{Thomas} “does not clearly establish that off-campus speech-related conduct may never be the basis for discipline by school officials.”\textsuperscript{528} The Second Circuit referred to its decision in \textit{Wisniewski v. Board of Education},\textsuperscript{529} asserting that it allowed school administrators to discipline students for “off-campus speech-related conduct.”\textsuperscript{530} Also, the Second Circuit suggested \textit{Tinker} afforded school administrators plenty of fodder in this case to deduce that disruptions to the educational process were foreseeable and in fact did occur, spurred by Doninger’s emails and website posting.\textsuperscript{531} In communicating the reasonableness of the school administrators’ actions, the court pointed to the torrent of phone calls and emails received by the school district in response to Doninger’s email blast and website blog post, the group of angry students who gathered outside the administrative offices, the missing of class time by

\begin{itemize}
\item \textsuperscript{524} \textit{Id.} at 346.
\item \textsuperscript{525} \textit{Id.} at 350.
\item \textsuperscript{526} \textit{Id.} at 346, 350.
\item \textsuperscript{527} See generally \textit{Thomas v. Board of Education, Granville Central School District}, 607 F. 2d 1043 (2d Cir. 1979).
\item \textsuperscript{528} \textit{Doninger}, 642 F.3d at 347.
\item \textsuperscript{529} See generally \textit{Wisniewski v. Board of Education of the Weedsport Central School District}, 494 F. 3d 34 (2\textsuperscript{nd} Cir. 2007).
\item \textsuperscript{530} \textit{Doninger}, 642 F.3d at 347.
\item \textsuperscript{531} \textit{Id.} at 348.
\end{itemize}
students and the pulling away of school officials from other duties to deal with the issue. Furthermore, the court recognized that the discipline meted out to Doninger did not keep her from educational classroom endeavors; she was not suspended from school. The discipline dealt only with her being allowed to participate as a class officer, which required that she function as a liaison between the student body and faculty/administration. Thus, the court held that since Doninger’s actions were obviously disruptive and since she felt compelled to post in a website blog that the district office personnel were “douchebags,” then Principal Niehoff’s stance that Doninger could no longer serve in a student leadership capacity was reasonable. The Supreme Court denied a petition for writ of certiorari to the United States Court of Appeals for the Second Circuit.


In 2011, the United States Court of Appeals for the Third Circuit was deciding both **J.S. ex rel. Snyder v. Blue Mountain School District** and **Layshock v. Hermitage** virtually

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532 *Id.* at 349.
533 *Id.* at 340. On this point, the United States District Court for the District of Connecticut argued and the Second Circuit concurred that *Doninger* was different from both *Tinker* and *Fraser* because Doninger’s discipline did not preclude her from classes or other academic endeavors. Allison E. Hayes, *From Armbands to Douchebags: How Doninger v. Niehoff Shows the Supreme Court Needs to Address Student Speech in the Cyber Age*. 43 Akron L. Rev. 247, 268 (2010). Also, both courts agreed Doninger had no established right to participate in extra-curricular activities. Bradley Gibson, *Doninger v. Niehoff: Tinker Is Online and In Trouble*. 36 N. Ky. L. Rev. 185, 208 (2009).
534 *Id.* at 340, 351. The court pointed out these were the same school officials with whom Doninger was expected to work with and communicate with in her capacity as class officer.
535 *Id.* at 350-351.
concurrently. *J.S. ex rel. Snyder v. Blue Mountain School District*, later renamed as *Snyder*, involved J.S., a middle school student in the Blue Mountain School District, who posted, from her home computer, a webpage on MySpace which was disparaging to her principal, James McGonigle. In response, school officials suspended J.S. She and her parents brought suit, arguing multiple constitutional violations occurred, including a violation of her First Amendment free speech rights.  

The facts of the case indicate that J.S. and a friend created the profile of Principal McGonigle on her home computer. The profile contained Principal McGonigle’s picture, though not his name, the school’s name, nor its location. J.S. made the profile fully accessible to anyone who knew the address or who searched MySpace for key phrases included in the profile. Moreover, the MySpace profile featured tasteless subject matter, offensive words, and crude personal attacks targeting Principal McGonigle and his family. However, though

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539 Christopher Lynett, *Constitutional Law: Revising the Application of Tinker and Fraser in the Age of the Internet*, 17 Suffolk J. Trial & App. Adv. 407, 408 (2012). This article and other law reviews and subsequent cases refer to this case in short form during discussion as *Snyder*. Furthermore, the full case name describes J.S. as a minor and names J.S.’s parents as Terry Snyder and Steven Snyder. *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011).

540 *Id.*

541 *Id.*

542 *Id.*

543 *Id.* Specifically, the profile described “a forty year old, married, bisexual man living in Alabama.” His interests were described as: “detention, being a tight ass, riding the fRAINTRAIN, spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, hitting on students and their parents.” It also indicated that he likes television and mainly watches “the playboy channel on directv.” Also, a statement on the profile included the heading "HELLO CHILDREN." It read: “yes. It's your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL Rave come to myspace so I can pervert the minds of other principals to be just like me. I know, I know, you're all thrilled. Another reason I came to myspace 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"
the webpage content was unseemly, J.S. contended it was so exaggeratingly offensive that no reasonable person would take it seriously.\footnote{Id. at 921.} Furthermore, J.S. attested that not only did she never mean for the profile to be taken seriously, she also did not intend for it to come onto the school campus. This assertion was supported by the fact that the day after creating the profile, she restricted access to the webpage to just over twenty friends who were students in the school district.\footnote{Id.} She implemented the restricted access after a number of students at school had told her they had seen the open-access profile and believed it was amusing.\footnote{Id.} To further support J.S.’s assertion, testimony showed the profile was never accessed and viewed at school because the district’s computers prevented entry to the MySpace website.\footnote{Id.}

McGonigle first learned about the MySpace profile’s existence from a student who happened to be in his office on another matter.\footnote{Id. at 922.} At McGonigle’s request, the student brought him a printed copy of the profile and told him J.S. created it.\footnote{Id.} During a meeting with J.S. regarding the MySpace profile, J.S. initially denied having created it, but soon confessed to having made it.\footnote{Id.} Principal McGonigle thus determined J.S. had committed violations of both the Blue Mountain Middle School Disciplinary Code and the computer use policy and suspended her for ten days.\footnote{Id. at 921-922.} School officials claimed the profile caused disruptions at school, highlighted by “general rumblings,” which included students discussing the profile in
multiple classes, both amongst themselves and with a teacher. Additionally, a couple of school counselors’ schedules needed adjustment to assist in dealing with J.S. and the situation.

The District Court for the Middle District of Pennsylvania originally determined that even though no significant interference with the educational process occurred in connection with the MySpace post, J.S.’s actions were nonetheless punishable because a clear correlation existed “between her off-campus action and on-campus effect.” Since the district court determined that no educational interference occurred at school, it decided Tinker was not the operative case on which to base its judgment. Instead, the district court deemed the content of the MySpace profile to be rude and insulting to Principal McGonigle, it ultimately did have an effect on-campus, and the discipline was thus warranted under Fraser, due to the vulgar and lewd terms used. Even though the court referenced Fraser, there was no discussion of the school sponsorship issue, which was a major pillar of the Supreme Court’s Fraser decision.

The Third Circuit Court of Appeals disagreed and explained its decision to reverse and remand the district court’s ruling on the First Amendment violation count, noting that since no significant educational disturbance was evident as a result of the MySpace profile, then school

552 Id. at 922-923.
553 Id. at 923.
555 Id. at 17.
556 Id. at 18. The district court continued its discussion of Tinker by concluding that the MySpace profile invaded McGonigle’s rights, which it pointed out is speech not protected by Tinker. Blue Mountain, 2008 U.S. Dist. at 19. In addition, the district court also found Morse to be relevant in its decision because Snyder’s expression could have been the foundation for criminal charges. The State Police indicated to Principal McGonigle and to Snyder that he had the right to press harassment charges because of the imposter profile. J.S. v. Blue Mountain School District, 2008 U.S. Dist Lexis 72685, 18 (M.D. Pa. 2008).
officials abridged J.S.’s First Amendment rights by disciplining her for the posting.\textsuperscript{558} The Third Circuit took the stance that Fraser provides an exception to the free speech tenets provided in Tinker, but that Fraser does not stand alone as an autonomous precedent.\textsuperscript{559}

The Third Circuit further delineated its disagreement with the district court by noting that if the armbands in Tinker, which served as a highly charged symbol of the contentious and emotional conflict involving many Americans in Viet Nam, were not enough to reasonably lead school officials to anticipate a substantial disruption of the educational process at school, then J.S.’s MySpace profile could not rise to this level.\textsuperscript{560} Moreover, the Third Circuit pointed to J.S.’s intent as a factor in its decision, noting that she wrote it as a prank, she limited viewing rights to the post, and even though Principal McGonigle undoubtedly was humiliated because his picture was posted with the written words, J.S. did not provide any further written documentation linking the words she wrote specifically to the school principal in the Blue Mountain School District.\textsuperscript{561} Also, the school district took measures with its computer web filters to prevent students from having the ability to access MySpace. As a result, no students logged on to MySpace or were able to view the posting from school.\textsuperscript{562} Finally, the Third Circuit was clear in its opinion of the power of public school administrators by stating, “The authority of public school officials is not boundless,”\textsuperscript{563} yet the court then acknowledged the difficult balancing act facing school administrators and

\begin{itemize}
\item \textsuperscript{558} J.S. v. Blue Mountain School District, 650 F.3d 915, 920 (3d Cir. 2011).
\item \textsuperscript{559} Jett, supra note, 162 at 915.
\item \textsuperscript{560} Blue Mountain, 650 F. 3d at 929-930.
\item \textsuperscript{561} Id. at 929.
\item \textsuperscript{562} Id.
\item \textsuperscript{563} Id. at 923.
\end{itemize}
courts in the quest to protect the free speech rights of students while preserving order in the educational process.\textsuperscript{564}

The Third Circuit contemplated \textit{Fraser}'s inapplicability to this case by writing that using \textit{Fraser} to control the decision would give far too much latitude to school officials to control student speech off school grounds, going so far as to call such latitude “dangerously overbroad.”\textsuperscript{565} The court then settled on \textit{Tinker} as the controlling case, stating that “under \textit{Tinker}…the School District violated J.S.’s First Amendment free speech rights when it suspended her for creating the profile.”\textsuperscript{566} Consequently, the Third Circuit reversed the district court’s decision on the violation of J.S.’s First Amendment rights and determined her rights had been violated.\textsuperscript{567} In 2012, the Supreme Court denied a petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.\textsuperscript{568}

\textit{Layshock v. Hermitage (2011)}

In 2011, the other case the United States Court of Appeals for the Third Circuit was deciding was \textit{Layshock v. Hermitage}.\textsuperscript{569} In \textit{Layshock}, the court made clear how it felt about the First Amendment rights of students early in its opinion. In citing \textit{Tinker}, the court declared the constitutional protections of the First Amendment do not allow school officials to extend their power “beyond the schoolyard to impose what might otherwise be appropriate
discipline. The case arose when Justin Layshock, a student at Hickory High School, using his grandmother’s computer at her house, designed and posted a MySpace webpage which, using vulgar language, poked fun at his principal, Eric Trosch. The school district determined Justin had violated several sections of the school discipline code. School officials suspended Justin ten days for his actions. Subsequently, Justin brought suit, claiming the school district had no standing to punish him because his webpage was protected by the First Amendment.

The Third Circuit upheld the district court’s ruling in favor of Justin, agreeing the suspension “transcended the protection of free expression guaranteed by the First Amendment.” The Third Circuit acknowledged some disruptions did occur as a result of the MySpace webpage because Justin shared access to it with friends at Hickory High, including logging into it on a school computer during the school day. After that happened, testimony showed that news of the webpage’s existence “spread like wildfire” and it seemed that nearly the entire Hickory High School population was aware of it. In response, the

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570 Id. at 207.
571 Id. at 207, 210. Specifically, Justin employed a “big” theme, referring to Principal Trosch as a large person. Justin included on the webpage comments referring to Principal Trosch as being: excessively drunk and having stolen a big keg, a big marijuana smoker, a big pill and steroid taker, not having a big dick, and being a big whore and a big fag. Layshock, 650 F.3d at 208.
572 Id. at 209-210. Specifically, according to the school district, the portions of the code Justin violated included: “Disruption of the normal school process; Disrespect; Harassment of a school administrator via computer/internet with remarks that have demeaning implications; Gross misbehavior; Obscene, vulgar and profane language; Computer Policy violations (use of pictures without authorization).” Layshock 650 F.3d at 209-210.
573 Id. at 210. In addition to the 10-day suspension, district officials consigned Justin to the alternative education program for the rest of the year, barred him from all extracurricular activities, and forbade him from participating in his graduation ceremony. Furthermore, district officials advised Justin’s parents that the district was contemplating expulsion for Justin.
574 Id. at 207.
575 Id.
576 Id. at 208-209.
location of computer usage was restricted to only the learning center and computer labs so school officials could more closely monitor internet access. Additionally, to help control access even further, school administrators decided to cancel computer programming classes altogether.\textsuperscript{577}

Justin’s complaint claimed his punishment was an infringement of his First Amendment free speech rights.\textsuperscript{578} In rendering its decision, both the district court and the Third Circuit referenced \textit{Tinker}, stating that the schoolhouse gate referred to in \textit{Tinker} does not apply strictly to “the brick and mortar surrounding the school yard,” though there must be limits on the reach of school officials.\textsuperscript{579} Also, since the school district did not convince the district court that any significant disruption occurred in the educational process of the school as a result of the MySpace posting, and the school district did not dispute this ruling, then the Third Circuit agreed with the district court’s decision that \textit{Tinker} did not apply to this case.\textsuperscript{580}

The Third Circuit strongly worded its opinion on this issue, referring to the analysis in \textit{Thomas}\textsuperscript{581} when asserting school administrators’ arms cannot be so long as to extend “into Justin’s grandmother’s home” to levy discipline for what he did there on her computer.\textsuperscript{582} Though school administrators have much discretion as to how to effectively handle student actions while at school, the Third Circuit did not believe the First Amendment allowed school administrators that same authority over students when they are away from the school

\begin{footnotes}
\footnote{\textsuperscript{577} \textit{Id.} at 209.}
\footnote{\textsuperscript{578} \textit{Id.} at 210.}
\footnote{\textsuperscript{579} \textit{Id.} at 216.}
\footnote{\textsuperscript{580} \textit{Id.} at 214.}
\footnote{\textsuperscript{581} \textit{Thomas v. Board of Education, Granville Central School District}, 607 F. 2d 1043, 1051 (2d Cir. 1979).}
\footnote{\textsuperscript{582} \textit{Layshock}, 650 F.3d at 216.}
\end{footnotes}
Finally, the court acknowledged Justin did access the school district website, made a copy of a picture of Principal Trosch which he found there, and used the picture on the MySpace posting. These facts supported the school district’s claim that Justin’s speech actually began on school property when he entered the school campus in the form of the district’s website, stole the picture of the principal, and used it inappropriately, in violation of the Hermitage School District Discipline Code and computer policy. However, the court determined that accessing the school district website did not equate to him being at school, and as such, school administrators violated Justin’s First Amendment rights by suspending him for his conduct away from school. The Supreme Court refused to hear this case as well.

**R.S. v. Minnewaska (2012)**

A year after **Layshock** and **Blue Mountain** were decided, the United States District Court for the District of Minnesota heard **R.S. v. Minnewaska Area School District**. R.S., a Minnewaska Area Middle School (MAMS) student, posted a Facebook message stating how much she hated “Kathy,” a person employed as a hall monitor at her school, because R.S. claimed Kathy was mean to her. R.S. posted the message from home during non-school hours and allowed only her Facebook friends access to it. However, one of those Facebook friends shared the message with Principal Pat Falk, who treated it as a bullying incident. He

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583 *Id.*
584 *Id.* at 207.
585 *Id.* at 209-210, 214.
586 *Id.* at 219.
588 *Id.* at 1133.
589 *Id.* Incidentally, Facebook was blocked at MAMS and it could not have been accessed at school.
required R.S. to apologize to Kathy and issued R.S. a detention.\textsuperscript{590} R.S. reacted to the discipline by posting a follow-up message, “I want to know who the f--- told on me.”\textsuperscript{591} Someone also shared this message with Principal Falk, who responded by assessing R.S. a one-day in-school suspension and banned R.S. from going on an upcoming class ski trip.\textsuperscript{592}

R.S. filed suit, alleging, among other counts, that her First Amendment rights were violated under the U.S. Constitution.\textsuperscript{593} The school district moved for dismissal of all claims, asserting it followed all appropriate policies.\textsuperscript{594}

The court indicated that \textit{Tinker}, \textit{Wisniewski}, and \textit{Doe v. Pulaski} (citing Watts)\textsuperscript{595} applied to this case, opining that those cases serve as applicable summaries of the rules for off-campus student expression. In particular, the court maintained that off-campus student expression is protected by the First Amendment and is not subject to school discipline unless the expression is considered a true threat or it creates a substantial school disruption.\textsuperscript{596} The court determined R.S.’s Facebook postings were not nearly as volatile as students made in other circumstances where courts upheld discipline.\textsuperscript{597} Thus, the court concluded R.S.’s Facebook postings were not threats.\textsuperscript{598} In addition, the court observed that R.S. stating on Facebook she hated a faculty member and posting a crude question about who told on her

\textsuperscript{590} \textit{Id.}  
\textsuperscript{591} \textit{Id.} at 1133-1134.  
\textsuperscript{592} \textit{Id.} at 1134.  
\textsuperscript{593} \textit{Id.} at 1135. In addition, R.S. claimed that her rights to free speech were infringed upon under the Minnesota Constitution.  
\textsuperscript{594} \textit{Id.}  
\textsuperscript{595} \textit{Doe v. Pulaski Cnty. Special Sch. Dist.}, 306 F. 3d 616, 622 (8th Cir. 2002).  
\textsuperscript{596} Minnewaska, 894 F. Supp. at 1140.  
\textsuperscript{597} \textit{Id.}  
\textsuperscript{598} \textit{Id.}
were unlikely to cause a school disruption.\textsuperscript{599} The court determined R.S.’s speech to be clearly nonviolent and nondisruptive off-campus speech and, as such, protected by the First Amendment.\textsuperscript{600} The court noted this case is in its infancy, and in light of the facts currently available, it denied the Minnewaska School District’s motion to dismiss the First Amendment claim and allowed it to proceed for further review.\textsuperscript{601}

\textit{Bell v. Itawamba (2014)}

Late in 2014, the Fifth Circuit reversed a decision by the United States District Court for the Northern District of Mississippi, Eastern Division, in \textit{Bell v. Itawamba County School Board}.\textsuperscript{602} Taylor Bell, a senior at Itawamba, created and recorded a song and posted it on Facebook and YouTube.\textsuperscript{603} Bell’s song crudely alleged two coaches behaved inappropriately with female students.\textsuperscript{604} The song included verses describing how the coaches drool when looking down girls’ shirts, how they “mess” with certain girls, and how listeners should put up a middle finger “if you can’t stand that nigga.”\textsuperscript{605} In addition, the song took a threatening tone with phrases describing how the coaches were “going to get a pistol down your mouth” and “middle fingers up if you want to cap that nigga.”\textsuperscript{606} It is unclear from the case

\textsuperscript{599} Id.
\textsuperscript{600} Id. at 1141.
\textsuperscript{601} Id. at 1149.
\textsuperscript{602} Bell v. Itawamba County School Board, 2014 U.S. App. LEXIS 23433 (5th Cir. 2014).
\textsuperscript{603} Bell v. Itawamba County School Board, 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012).
\textsuperscript{604} Id.
\textsuperscript{605} Id. Other lyrics included very base language, referring, for example, to Coach Wildmon as a “dirty a-- nigger” and said that he was “fu------ around cause his wife ain’t got no ti--” Lyrics also said Coach Wildmon told female students they “are sexy” and referred to him as a “pervert.” In reference to Coach Rainey, the lyrics said he was a “pervert,” that he “f----- minors, that he came to football practice “high,” and threatened that Taylor Bell was going to hit him with a ruler. \textit{Bell}, 859 F. Supp at 839.
\textsuperscript{606} Id.
background description how school officials became aware of the song’s existence, but indeed they did. In response, school administrators suspended Bell indefinitely pending a hearing.\textsuperscript{607} The Itawamba County School Board Disciplinary Committee held the hearing and determined that Bell’s posting harassed, intimidated, and threatened teachers. As a consequence, the committee suspended Bell for seven days and transferred him to an alternative school for the remainder of the grading period.\textsuperscript{608} Following an appeal of the decision by Bell, the full school board upheld the committee’s decision.

Bell filed a complaint with the court, contending, among other counts, that the school’s discipline violated his First Amendment right to free speech.\textsuperscript{609} The court cited \textit{Tinker} in noting that off-campus student expression which causes a material or substantial disruption at school can be cause for school discipline.\textsuperscript{610} In addition, the court articulated that \textit{Porter} served to add the condition that in order for the discipline to be constitutional, the student needed to take steps which showed intent for the speech to reach the campus.\textsuperscript{611} Since Bell posted the song for over 1,300 Facebook “friends” and for an unlimited audience to access via YouTube, the court reasoned \textit{Tinker} was applicable even though it was created, performed, recorded, and distributed off-campus.\textsuperscript{612} Once the court determined \textit{Tinker} applicable, it identified the primary questions it needed to consider: 1) if Bell’s song caused or

\begin{thebibliography}{99}
\bibitem{607} Id.
\bibitem{608} Id.
\bibitem{609} Id.
\bibitem{610} Id. at 837-838.
\bibitem{611} Id. at 838.
\bibitem{612} Id.
\end{thebibliography}
was meant to cause a material or substantial school disruption and 2) if school administrators could reasonably forecast such a disruption at school.\textsuperscript{613}

The district court sided with the Itawamba School Board in its finding that the song and its accessible postings on Facebook and YouTube “constituted harassment and intimidation of teachers and possible threats against teachers.”\textsuperscript{614} The court record indicated further that actual disruptions to the school environment did occur as Coach Wildmon and Coach Rainey both testified their teaching styles were negatively impacted because students were more suspicious of them.\textsuperscript{615} Coach Wildmon also testified he felt threatened by the lyrics which discussed killing him.\textsuperscript{616} Consequently, the court found Bell’s song did cause a material and substantial disruption and it was reasonable for school administrators to foresee that it would. Thus, the court determined the song did not enjoy First Amendment protection and the school district’s moves to discipline Bell for posting the song were reasonable.\textsuperscript{617} Bell’s First Amendment violation claim was dismissed.\textsuperscript{618} Bell appealed to the Fifth Circuit Court of Appeals.

The Fifth Circuit reversed, awarding damages to Bell and rendering summary judgment against the school district.\textsuperscript{619} The Fifth Circuit plainly identified the case’s central question as: Did school officials violate Bell’s First Amendment free speech rights by

\textsuperscript{613} \textit{Id.} at 839.
\textsuperscript{614} \textit{Id.} at 840.
\textsuperscript{615} \textit{Id.}
\textsuperscript{616} \textit{Id.}
\textsuperscript{617} \textit{Id.}
\textsuperscript{618} \textit{Id.} at 840-841.
\textsuperscript{619} \textit{Bell v. Itawamba County School Board}, 2014 U.S. App. LEXIS 23433, 2 (5th Cir. 2014).
disciplining him for his off-campus speech which was posted on the internet?\(^{620}\) The court claimed the district court’s application of \textit{Tinker} was faulty for two reasons: first, \textit{Tinker} does not apply to off-campus speech, and second, the evidence did not reveal the occurrence of a material and substantial disruption on-campus nor could one have reasonably been anticipated, as required by \textit{Tinker}.\(^{621}\) The Fifth Circuit reiterated its stance by asserting that none of the Supreme Court’s student speech cases, which includes \textit{Tinker}, pertain to student speech which happens off-campus and not at a school-sponsored event.\(^{622}\) The Fifth Circuit clearly delineated its opinion of \textit{Tinker’s} application by maintaining the \textit{Tinker} Court did not intend for its opinion to allow school officials to censor student speech occurring at home and off-campus.\(^{623}\) Additionally, when the \textit{Tinker} Court stated its analysis applied to student “conduct… in class or out of it,”\(^{624}\) the Supreme Court was merely “indicating that the delicate balance between the protection of free speech rights and the regulation of student conduct extends to all facets of on-campus student speech.”\(^{625}\)

The court extended its discussion of why it decided against the school district by supposing for a moment that \textit{Tinker} could be applied to off-campus speech.\(^{626}\) Given that verity, the court affirmed the student’s internet rap song did not lead to any classes being disturbed nor was there any upheaval or disorderly conduct at school.\(^{627}\) Moreover, the court determined the song was completely created and posted to the internet off-campus. Because

\(^{620}\) Id. at 26-27.
\(^{621}\) Id. at 27-28.
\(^{622}\) Id. at 28.
\(^{623}\) Id. at 34-35.
\(^{625}\) Bell, 2014 U.S. App. LEXIS at 34.
\(^{626}\) Id. at 39.
\(^{627}\) Id. at 39.
school internet filters blocked Facebook and since student possession of cell phones was
forbidden by school rules, the possibility of accessing the rap song on-campus was greatly
reduced.\textsuperscript{628} Thus, no nexus existed. Therefore, the court rejected the school district’s claim
that it projected an on-campus material and substantial disruption in connection with Bell’s
song.\textsuperscript{629}

\textsuperscript{628} Id. at 45.
\textsuperscript{629} Id. at 44.
Chapter 3
ANALYSIS

Introduction

The way students express their views and interact with one another has changed dramatically over the last four decades since the Supreme Court handed down its 1969 *Tinker v. Des Moines*\textsuperscript{630} decision. Today’s students text or post to the Internet many of the communications their forerunners used to either write in a note or scrawl on the bathroom stall.\textsuperscript{631} Administrative options for responding to those past forms of student communication were clearer than the options for responding to student cyberspeech. If a student was caught writing a note during class or there was a message carved into a school bathroom stall, the administrator generally did not pause to consider whether the student speech was on-campus and thus under the school’s jurisdiction. Also, if the speech caused a material and substantial disruption to the process of educating students, then pursuant to *Tinker*, administrators were on solid ground to impose disciplinary consequences. However, the types of message delivery students utilize today via the Internet and social networking sites have clouded the distinction between on-campus and off-campus student speech. Furthermore, the demarcation is


obscured for when school administrators may discipline a student for speech without
trampling on First Amendment rights. In crafting student handbook language and
making decisions regarding student discipline, school administrators often rely upon their own
education, training, and experience. Furthermore, they likely consult with colleagues and legal
counsel regarding the appropriate items and wording to include based on applicable case law.
However, since the Supreme Court has declined requests to review a student cyberspeech case
and because court rulings on cyberspeech issues have been inconsistent, school administrators
must act with care when imposing discipline for cyberspeech incidents. Even in cases
presenting virtually the same facts, the courts have often ruled differently. For example, two
Third Circuit cases from 2010, J.S. ex rel. Snyder v. Blue Mountain School District and
Layshock v. Hermitage School District, presented similar fact patterns. In Blue Mountain,
the court decided in favor of school officials who disciplined a student for posting a fake
profile of the student’s principal on MySpace. The posting included personal attacks on not
only the principal but also his family. The profile was created away from school, during
non-school hours using a privately owned computer. Since the district’s technology filters
blocked access to MySpace, students were not able to open the posting at school. However,
the Third Circuit held “off-campus speech that causes or reasonably threatens to cause a
substantial disruption or material interference with a school need not satisfy any geographical

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632 Beatus, supra note 28, at 786.
635 J.S. ex rel. Snyder v. Blue Mountain School District, 650 F.3d 915, 920 (3d Cir. 2011). The attacks included phrases like, “I am keeping an eye on you students (who[m] 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.” Blue Mountain, 650 F. 3d at 921.
technicality in order to be regulated pursuant to *Tinker.*” The court concluded the student’s off-campus speech created a “reasonable possibility of a future disruption” and found for school officials.

On the same day the *Blue Mountain* decision was released, a different Third Circuit panel ruled on another student speech case, *Layshock v. Hermitage School District.* Here, the student, Justin Layshock, also created a MySpace profile of his principal on his grandmother’s home computer. The profile depicted the principal as being “big” in a variety of ways, including being a big drug user, not having big genitals, and being a big homosexual. The court noted the profile had caused disruptions and was accessed on-campus. Even so, the Third Circuit refused to treat the profile as on-campus speech and determined school officials over-reached in disciplining Justin for his off-campus conduct. The panel ruled for the student. Shortly after issuing these divergent rulings, the Third Circuit granted a request to rehear the cases *en banc.* Thereafter, the *en banc* panel reversed the *Blue Mountain* decision. As such, if two appellate panels each within the Third Circuit struggle to render consistent ruling in cases featuring similar facts, it is understandable that school administrators are confounded when faced with student cyberspeech attacking a faculty member.

Even in this age of online student expression, for over 40 years *Tinker* has remained the benchmark case for student speech cases connected to the school. The fifteen lower

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636 *Blue Mountain,* 593 F. 3d at 301.
637 *Id.* at 300.
638 *Layshock,* 650 F.3d at 208.
639 *Id.* at 208-209. These facts were more than what administrators had on the student in the *Blue Mountain* case.
640 *Blue Mountain,* 650 F. 3d.
federal court decisions and one state-level decision reviewed in this study all involved student speech targeting school employees. In each case *Tinker* was applied and provided the foundation for each court’s analysis either singularly or in tandem with other cases. This chapter discusses how both Supreme Court and lower court student speech decisions are influencing the analysis of student off-campus cyberspeech cases. In particular, the analytical focus lies with *Tinker*’s first prong and its application to off-campus student cyberspeech targeting school employees.

**Tinker Is the Benchmark**

*Tinker* is widely recognized as the landmark student speech decision. Here, the Supreme Court created a two-prong test for analyzing and regulating on-campus student-sponsored speech deemed to have either caused a material and substantial disruption to the school environment or infringed upon the rights of others to be left alone. In particular, every court ruling reviewed in this study applied *Tinker*’s first prong, material and substantial disruption, as a tool to analyze each of the sixteen decisions. The rulings in these cases yielded eleven decisions in favor of students and five decisions in favor of school officials. In the eleven cases in which courts found for the student, the court could not connect a material and substantial disruption to the student speech. In six of those cases, the court specifically stated the First Amendment protected student speech that did not cause a material

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641 Lei, supra note 274, at 5-6.
642 Id. at 10.
643 Cases in which students won: *Thomas, Klein, Beussink, Emmett, Killion, Flaherty, Evans, Blue Mountain, Layshock, Minnewaska*. Courts found for the school district in *Bethlehem, Porter, Wisniewski, O.Z., Doninger, Bell*. 
and substantial disruption. In analyzing the five court decisions in favor of the school district, each court found either some form of material and substantial disruption actually occurred or was reasonably foreseeable. Thus school officials were justified in imposing discipline.

**Tinker’s Two Prongs**

*Tinker* set forth two distinct circumstances where student on-campus expression could be limited. Lower courts like the Ninth Circuit have opined that both of *Tinker*’s prongs give school officials a standard by which to discipline students for their speech. However, since the *Tinker* decision in 1969, lower court decisions involving student speech have relied almost exclusively on the material and substantial prong and have ignored the second prong. The second prong sought to protect others who might be negatively affected by the speech. The *Tinker* majority proclaimed student speech that invades “the rights of others is … not immunized by the constitutional guarantee of freedom of speech.” This verbiage can be traced back to Justice Louis Brandeis’ dissenting opinion in *Olmstead v. U.S.* In *Olmstead*, Justice Brandeis asserted the United States Constitution provided civilized citizens the broad and valuable right to be left alone. He further stressed this right must be protected and any invasion of the right to be left alone was a violation of the Constitution. Even though courts

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644 Those five cases were *Thomas, Beussink, Killion, Evans, Blue Mountain.*
648 Id.
649 Id.
reference *Tinker’s* first prong in all student speech cases, only a few courts, like the Fourth Circuit,\(^650\) have applied or at least mentioned the second prong, the right to be left alone, as having relevance as a potential standard in student First Amendment free speech cases. In some instances, the second prong may even be applicable to student cyberspeech cases. The Ninth Circuit, for example, has avowed that under *Tinker*, student speech which encroaches on the rights of others can be disciplined.\(^651\) However, to date, *Tinker’s* second prong has only been considered in cases where the student cyberspeech victimized other students.\(^652\) In cases involving student cyberspeech targeting adults, courts have exclusively applied *Tinker’s* first prong and have avoided using the second prong. While *Tinker’s* second prong may be gaining acceptance and perhaps will evolve into a viable judicial tool in future student cyberspeech decisions, based on jurisprudence employing the second prong so far, courts have not viewed it as applicable to cases involving student cyberspeech targeting school faculty members. This may be because courts do not believe adult school employees have a constitutional right to be left alone in their school workplace.\(^653\)

**Other Significant Supreme Court Cases Besides Tinker**

In addition to *Tinker* serving as the foundation for all sixteen reviewed cases, several courts also cited other cases as being significant in their decision making. For example,

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\(^{652}\) See *Kowalski v. Berkeley Cnty. Schools*, 652 F.3d 565 (4th Cir. 2011); *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1108 (C.D. Cal. 2010); *Harper v. Poway*, 445 F.3d 1166 (9th Cir. 2006). These are examples of cases which student speech targeted other students and the court considered and discussed *Tinker’s* second prong.

“Fraser” was considered for its applicability in three cases. However, it was the basis for the ruling in only one case, and that court jointly applied Fraser in tandem with Tinker. The Supreme Court’s Fraser ruling was very fact specific and therefore has only been applied to “lewd and indecent” on-campus speech. Since that decision, subsequent Supreme Courts have admitted confusion regarding the basis used to decide Fraser. Chief Justice Roberts, in Morse, observed the Fraser Court was unmistakably focusing on the actual content of Fraser’s speech, its inappropriate nature, and its contrast to the political implication of the armbands in Tinker. Furthermore, Roberts asserted the “mode of analysis set forth in Tinker is not absolute.” The Court went on to opine that school officials may regulate on-campus student speech if they deem it inappropriate. However, the Fraser Court’s decision did not employ Tinker’s substantial disruption analysis. It appears Fraser may be too weak to stand on its own as a foundational cyberspeech precedent. This is largely because, as Chief Justice Roberts suggested in Morse, Fraser is only applicable to on-campus, school-sponsored speech, such as student speech during a school assembly. Some scholars support this view and believe Fraser’s discipline would not have been allowed had he posted his

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654 Bethel v. Fraser, 478 U.S. 675, 685 (1986). The Fraser test involves determining if the student speech is associated with a school-sponsored activity and looks at the impact of the content of the student expression (for example, its level of lewdness and vulgarity) on others.
656 Fraser, 478 U.S. at 685.
657 Morse v. Frederick, 551 U.S. 393, 404 (2007).
658 Id.
659 Id.
660 Id. at 405.
661 Id. at 404.
662 Id. at 405.
663 Willard, supra note 653, at 320.
664 Morse v. Frederick, 551 U.S. 393 (2007).
665 Id. at 405. A vulgar speech delivered during the school day in the auditorium, under the supervision of teachers and administrators, in front of a captive audience of students, is a very different scenario than exists when a student creates and posts from his home computer his thoughts or solicitations on a webpage.
speech on the internet instead of presenting it in front of a captive audience at a school assembly. Other scholars agree and say school officials and courts alike should be aware the Fraser holding was very specific and should only be cited as the basis for decision when the student speech both occurs on-campus and is lewd and/or vulgar.  

However, J.S. v. Bethlehem applied Fraser in tandem with Tinker to online student speech. The court deemed Fraser applicable due to the negative effect the student’s lewd, vulgar, and plainly offensive webpage contents had upon the targeted teacher. There are scholars who support this stance. Rose Spellman, California attorney and legal scholar, has opined that teaching is not simply limited to the text of books. Indeed, as Spellman further explains, schools are responsible to set the example by educating students about how to behave in a civilized society. As such, any student speech, including off-campus cyberspeech, which serves to harass or threaten educators is unacceptable and school policies designed to quell such behavior should be allowed via Fraser. On the other hand, there are scholars who believe that courts like the Third Circuit, which favors an expansive interpretation of Fraser, provide school officials too much power to censor student speech. The Sixth Circuit, for example, used an expanded view of Fraser to uphold discipline for a

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671 Id.
672 Id.
673 Clay Calvert, Mixed Messages, Muddled Meanings, Drunk Dicks, and Boobies Bracelets: Sexually Suggestive Student Speech and the Need to Overrule or Radically Refashion Fraser. 90 Denv. U. L. Rev. 131, 146-47, 156 (2012).
student who wore a concert t-shirt to school which in the view of school administrators served to enervate its educational objectives.\textsuperscript{674} Some scholars believe that when courts put the whims of school officials too far above students’ constitutional rights, then they are effectively requiring students to "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."\textsuperscript{675}

The other two Supreme Court student speech cases, \textit{Hazelwood} and \textit{Morse}, were each mentioned in only one reviewed case, and neither was used as the standard for the decision. These two Supreme Court decisions are just too narrow to apply to cyberspeech cases.\textsuperscript{676} \textit{Hazelwood}, for example, dealt with an administrator making a time-sensitive educational decision about what to include in an issue of the school newspaper.\textsuperscript{677} And the \textit{Morse} Court specifically stated that its decision addressed only the issue of allowing school policy to be upheld when the discipline is aimed at thwarting the promotion of illegal drug use.\textsuperscript{678}

\textbf{Lower Court Cases Often Cited}

Also, there are two lower court decisions frequently cited in combination with \textit{Tinker}. The Second Circuit’s decision in \textit{Thomas}\textsuperscript{679} was referenced in its own decisions in \textit{Wisniewski} and \textit{Doninger}. Also, the Central District Court of California discussed the application of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{674} See \textit{Boroff v. Van Wert City Bd. of Educ.}, 220 F.3d 465, 470 (6th Cir. 2000).
\item \textsuperscript{677} Hazelwood v. Kuhlmeier, 484 U.S. 260, 262 (1988).
\item \textsuperscript{678} Morse v. Frederick, 551 U.S. 393, 410 (2007).
\item \textsuperscript{679} Thomas v. Board of Education, Granville Central School District, 607 F. 2d 1043 (2d Cir. 1979).
\end{itemize}
\end{footnotesize}
Thomas in its O.Z. decision.\(^{680}\) In those cases, the courts believed Thomas allowed for the possibility school officials could discipline students for their off-campus speech.\(^{681}\) It is Judge Newman’s concurring opinion in Thomas which suggests this possibility. Judge Newman opined that student speech could be disciplined if it was clearly lewd and was disseminated to school-age students.\(^{682}\) He also said that the authority of school officials to deal with such conduct does not end at the school’s boundary lines.\(^{683}\) Perhaps most applicable to instances of student cyberspeech, he wrote “Territoriality is not necessarily a useful concept in determining the limit of their [school officials’] authority.”\(^{684}\) Furthermore, Wisniewski\(^{685}\) was also discussed by the Doninger and O.Z. courts, while the District Court of Minnesota referenced Wisniewski in R.S. v. Minnewaska\(^ {686}\) for the same reason as Thomas was discussed. These two cases provide at minimum the notion that school authorities may have constitutional permission to discipline students for off-campus speech if it could be reasonably anticipated to come onto school grounds or if it has the potential to cause a substantial disruption at school. A detailed discussion of Wisniewski’s potential application to future student speech cases follows later in this chapter.

\(^{681}\) Thomas 607 F. 2d at 1058.
\(^{682}\) Id.
\(^{683}\) Id.
\(^{684}\) Id.
\(^{685}\) Wisniewski v. Board of Education of the Weedsport Central School District, 494 F. 3d 34 (2\(^{nd}\) Cir. 2007).


Jurisdiction

In *Layshock v. Hermitage*, the United States District Court for the Western District of Pennsylvania referred to school officials’ jurisdiction over students as a “threshold” for courts when considering cases pertaining to off-campus student speech. Some commenters believe school administrators’ jurisdiction to discipline students for off-campus speech is vague at best due to the inconsistent application of benchmarks to these cases. As a result, these commenters assert victims of cyberbullying and other inappropriate cyberspeech are often left unprotected from these attacks.

The term “jurisdiction” is defined in the context of this study as school officials’ authority to levy discipline. The Cornell University Legal Information Institute equates the term “jurisdiction” to the word “power.” So when does a school administrator have the power, without running afoul of the Constitution, to discipline a student for off-campus speech? Courts generally seek to first resolve this jurisdictional question before proceeding to subsequent issues. It is accomplished by looking at some key factors.

Nexus

The term “nexus” is defined as a point of causal intersection, link, relation, or connection. In the case of cyberspeech, the term pertains to whether the student speech, like

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688 *Id.*
689 Zande, supra note 31, at 126.
690 *Id.*
an email sent using school computers, is considered on-campus or off-campus speech. Nexus also considers whether a sufficient link exists between the student speech and disruptions or other incidents at school. Prior to the creation of the internet, there was a clear demarcation between what occurred at home and what occurred at school. They were two separate and distinctly different physical spaces. However, today, what students do at home, especially if they post it on the internet, is often easily accessed by large numbers of people. Even so, for school officials to be on solid ground in disciplining students for their cyberspeech, they must first establish a strong link between the cyberspeech and the school.

If that link, or nexus, can be established, then courts generally will consider if the school officials’ disciplinary actions were warranted. As outlined above, courts often support the imposition of discipline if the speech resulted in a substantial or material disruption at school. In instances where the student speech was created, accessed, or brought to school, the nexus is clear. In other cases, the student speech either occurred or was created away from school, did not come to school in hard-copy form, nor was accessed at school via the internet. Under these conditions courts generally found no nexus between the student speech and the school. So, nexus is a gateway issue courts address when determining if school administrators had jurisdiction to discipline students for off-campus speech.

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693 Lynett, supra note 539, at 407.
694 Layshock v. Hermitage, 496 F. Supp. 2d 587, 599 (W.D. Pa., 2007). The Layshock district court opined that in cases involving off-campus speech, the school must demonstrate an appropriate nexus.
695 The reviewed cases in which the student speech was created, accessed, or brought to school include: Beussink, Killion, Bethlehem, Porter, Wisniewski, O.Z., Doninger, and Bell.
696 The reviewed cases in which the student speech either occurred or was created away from school, did not come to school in hard copy form, nor was accessed at school via the internet were Thomas, Klein, Flaherty, Emmett, Flaherty, Evans, Blue Mtn, Layshock, Minnewaska.
697 See Table 1 for the courts’ nexus findings of the reviewed cases. See Appendix D for information and notes related to nexus for each reviewed case.
reviewed cases, courts determined no clear nexus existed between the off-campus student speech and the school nine times. In all nine of these cases, the court found for the student. In the other seven reviewed cases, courts determined a nexus existed between the student speech and the school district. In two of those cases, the court still found for the student. Courts found for the school district in the other five cases where a nexus was established between the student speech and the school district.

The following situations in the reviewed cases were not enough for the court to find a nexus existed between the student speech and the school: a newspaper about school created off school grounds, flipping a teacher the bird in a restaurant parking lot on the weekend, social media posts seeking others to agree teacher X was the worst teacher ever or the staff member should be hated, a rap song alleging male teachers were engaging in improper intimate relations with female students, and web postings containing negative comments and pictures about the school principal.

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698 These eight cases included Thomas, Klein, Emmett, Flaherty, Evans, Blue Mtn, Layshock, and Minnewaska. 699 Those two cases were Beussink and Killion. In Beussink, the webpage was displayed on computer screens at school, establishing a clear nexus. However, the court determined the principal disciplined the student because he did not like the content of the student speech. Tinker does not allow school authorities to censor speech which they do not like. Second, no disruption occurred in connection to the student cyberspeech. Thus, the court determined the discipline violated the student’s First Amendment rights. In Killion, hard copies of the student expression, which made fun of the athletic director, showed up at school, establishing the nexus. However, since the student speech did not cause a material and substantial school disruption nor was a threat of one, the court found for the student. 700 Those six cases were Bethlehem, Porter, Wisniewski, O.Z., Doninger, and Bell. 701 See Thomas v. Board of Education, Granville Central School District, 607 F. 2d 1043 (2d Cir. 1979). 702 See Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986). 703 See Evans v. Bayer, 684 F. Supp. 2d 1365 (S.D. Fla. 2010), and R.S. v. Minnewaska Area School District, 894 F. Supp. 2d 1128 (D. Minn. 2012). 704 See Bell v. Itawamba County School Board, 2014 U.S. App. LEXIS 23433 (5th Cir. 2014). 705 See J.S. ex rel. Snyder v. Blue Mountain School District, 650 F.3d 915 (3d Cir. 2011), and Layshock v. Hermitage School District, 650 F.3d 205 (3d Cir. 2011).
Conversely, a couple of examples of student speech deemed by courts to have created a sufficient nexus included student drawings depicting the school being attacked which were brought to school by a third party\textsuperscript{706} and a student using online postings and emails to inflame parents and students leading to protests at school, students to skip class, and both to flood the school with complaint phone calls.\textsuperscript{707}

Thus, it appears in the reviewed cases courts did not believe a nexus was established when the student speech originated off-campus (and stayed off-campus by virtue of it never arriving in hard-copy form or not being accessed online at school), and the negative nature of the expression was clearly an opinion as opposed to being hostile. On the other hand, when the student online expression was accessed at school or came to school in hard-copy form, then a nexus was created. Also, a nexus was found to exist when the student expression aggressively expressed a desire for a teacher to be murdered or the school to be attacked. Finally, a nexus was established when the student cyberspeech led to a material and substantial disruption or it created a foreseeable threat of one. In summary, though a nexus must exist for a school district to have a chance at prevailing in court when disciplining a student for their speech, it does not mean that the presence of a nexus requires discipline.

\textsuperscript{706} See Porter v. Ascension Parish School Board, 393 F.3d 608 (5th Cir. 2004).
Table 1

Courts’ Nexus Findings

<table>
<thead>
<tr>
<th>Cases</th>
<th>Court Found NO Nexus Between the Student Speech and the School: Found for Student</th>
<th>Court Found Nexus: Decided for School District</th>
<th>Court Found Nexus: Decided for Student</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thomas, Klein, Emmett, Flaherty, Evans, Blue Mountain, Layshock, Minnewaska, Bell</td>
<td></td>
<td>Bethlehem, Porter, Wisniewski, O.Z., Doninger</td>
<td>Beussink, Killion</td>
</tr>
</tbody>
</table>

Intent

Nexus is not the only way courts determined school district jurisdiction for student off-campus speech incidents. In the reviewed cases, courts also examined the intent of the student. There were 11 cases in which the court discussed the importance of the student’s intent.\(^{708}\) Instances of intent focused on the student speaker’s efforts to cause a disturbance at school or to inflict some sort of harm or reputation stain on the victim, both of which could establish a nexus. Five times the court sided with the school district and six times with the student.\(^{709}\) Courts finding for the student had similar comments regarding intent. For example, in *Thomas*, the Second Circuit Court concluded the students were purposeful in working to keep *Hard Times* from reaching school grounds. The students typed the articles mostly off school property, printed the newspapers off-campus, and did not sell them at school.\(^{710}\) Even though copies of the newspaper were sometimes secretly stored in the closet of a teacher, the court did not find this fact significant in showing the students intended for the speech to reach

\(^{708}\) Those eleven cases were *Thomas, Emmett, Killion, Bethlehem, Porter, Doninger, Wisniewski, O.Z., Blue Mountain, Bell, Minnewaska*.

\(^{709}\) The court sided with the school district in *Bethlehem, Porter, Doninger, Wisniewski, O.Z.*, and *Bell*. The court sided with the student in *Thomas, Emmett, Killion, Blue Mountain, and Minnewaska*.

the school campus. In other cases, like the Third Circuit’s decision in *Blue Mountain* and the District Court of Minnesota’s decision in *R.S. v. Minnewaska*, courts found the students took deliberate steps to limit access to the online speech to only their friends. Conversely, in the cases decided in favor of the school districts, students often claimed they never intended for the speech to reach the school campus, but the courts eschewed those arguments. For example, in *O.Z.*, the student argued she had no intention for her menacing slide show to be communicated to anyone outside her home. In fact, though this was not proven, the student contended her friend was the one who actually posted it on YouTube. The student did acknowledge she intended to share the slide show with someone, in this case, her friend. Consequently, the court concluded she did indeed take steps to share the video and rejected her contention that she did not intend for it to be viewed outside her home. In a 2004 Fifth Circuit decision, *Porter v. Ascension Parish*, a student created a drawing at home of his school being attacked. He left it at home, with no intention of bringing it to school. However, his brother brought it to school and school officials found out about it. The Fifth Circuit inferred since the student had not intended to bring the drawing to school, it should probably enjoy First Amendment protection. However, since the drawing did make its way to school, a nexus was developed. As such, the suspension was upheld. In the 2002 Pennsylvania State

711 *Id.*
713 *O.Z. v. Board of Trustees*, 2008 U.S. Dist. Lexis 110409, 2 (C.D. Cal. 2008). The slide show, which was posted on YouTube, showed the murder of one of O.Z.’s teachers.
714 *Id.* at 10.
715 *Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004).
716 *Id.* at 618.
Supreme Court case *J.S. v. Bethlehem*, the court held a nexus could be established if the intent of the off-campus student speech was to target a particular staff member or school and the student speech either somehow traveled to school via hard copy or was accessed at school via computer. Finally, the Second Circuit in *Wisniewski v. Weedsport* stated whether or not the student intended his online speech to reach campus was inconsequential if the speech created a foreseeable risk of a material and substantial disruption.

**Reasonable Foreseeability: The Effect of Wisniewski**

*Wisniewski* provides an important distinction for defining jurisdiction, nexus, and intent which subsequent courts seem to have embraced. Though *Tinker* was the foundation for the Second Circuit’s decision in *Wisniewski*, it determined a nexus could be established if the student speech “poses a reasonably foreseeable risk that [it] would come to the attention of school authorities and that it would materially and substantially disrupt the work and discipline of the school.” The *Wisniewski* court determined it was reasonably foreseeable the student’s IM icon, depicting the killing of a teacher, would come to the attention of both students and school officials. Additionally, once the icon’s existence became known, the possibility of substantial disruption was more than reasonable; it became “clear.” As a result, the Second Circuit concluded when school officials were faced with the potential for

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718 *Id.* at 668. The court went even further by saying that depending on the circumstances, other off-campus student speech could be considered on-campus if it is available for others to access and they do in fact access it.
720 *Id.* at 38-39.
721 *Id.* at 40.
disruption, the imposition of discipline was acceptable.\footnote{Id.} Thus, the Second Circuit determined a reasonably foreseeable risk of disruption created sufficient nexus to strip the student of \textit{Tinker}’s constitutional protection.\footnote{Id. at 39.} In six of the seven cases decided after the Second Circuit’s 2007 \textit{Wisniewski} decision, \textit{Wisniewski} and the Second Circuit’s finding “that \textit{Tinker} can have applicability to student speech that occurs off-campus”\footnote{Id. at 38.} was discussed at length.

The \textit{Wisniewski} panel referenced \textit{Tinker} in its decision. However, it created its own two-part test for application when courts were faced with student off-campus expression. The first part of the \textit{Wisniewski} test involves a determination of whether there was a reasonably foreseeable risk the student speech would reach campus and its students or employees.\footnote{Id. at 39-40.} The second part of the test requires a determination of whether the student speech actually caused a disruption on-campus or if there was a reasonably foreseeable reason to believe if the speech \textit{did} reach campus, it would cause a disruption.\footnote{Id. at 40.} Ultimately, the Second Circuit concluded the student cyberspeech in \textit{Wisniewski} went beyond the type of student speech articulated in the \textit{Tinker} case into speech that disrupted the educational management of the school\footnote{Porter v. Ascension Parish School Board, 301 F. Supp. 2d 576, 586 (M.D. La. 2004).} and upheld the school discipline. And the \textit{Wisniewski} court additionally identified \textit{Thomas,}\footnote{Thomas v. Board of Education, Granville Central School District, 607 F. 2d 1043 (2d Cir. 1979).} \textit{Boucher,}\footnote{Boucher v. School Bd. of the Sch. Dist. of Greenfield, 134 F.3d 821 (7th Cir. 1998).} and \textit{Bethlehem}\footnote{J.S. v. Bethlehem Area School District, 569 Pa. 638 (Pa. 2002).} as decisions providing legal precedent for school officials to
discipline students for their off-campus speech having the potential to lead to substantial disruption at school.\footnote{Wisniewski, 494 F. 3d at 38.}

The Second Circuit relied upon Wisniewski in the\textit{ Doninger v. Niehoff}\footnote{Doninger v. Niehoff, 642 F.3d 334 (2\textsuperscript{nd} Cir. 2011).} decision. The court observed it was reasonably foreseeable that Avery Doninger’s offensive online speech would reach school grounds and, as such, the First Amendment offered it no protection.\footnote{Id. at 346, 350.} Other federal courts have also discussed Wisniewski’s application to student speech. For example, in\textit{ O.Z. v. Board of Trustees}, the court noted school discipline was not proscribed simply because the speech was created off school grounds because Wisniewski acknowledged such off-campus speech can lead to a foreseeable risk of on-campus substantial disruption.\footnote{O.Z. v. Board of Trustees, 2008 U.S. Dist. Lexis 110409, 10-11 (C.D. Cal. 2008).} Similarly, in\textit{ J.C. v. Beverly Hills}, the court noted Wisniewski had suggested the substance of a student’s off-campus student speech could reasonably portend a substantial disruption at school.\footnote{J.C. v. Beverly Hills Unified School District, 711 F. Supp. 2d 1094, 1113 (C.D. Cal. 2010).} In\textit{ Blue Mountain}, Judge Fisher’s dissenting opinion pointed out the Third Circuit’s decision created a split with Wisniewski and placed school officials’ authority to preserve an orderly educational environment at risk.\footnote{J.S. ex rel. Snyder v. Blue Mountain School District, 650 F.3d 915, 950-951 (3d Cir. 2011).} In\textit{ Layshock}, Judge Jordan’s concurring opinion suggested distance between the Third Circuit and the Second Circuit’s Wisniewski decision.\footnote{Layshock v. Hermitage School District, 650 F.3d 205, 222 (3d Cir. 2011).} He pointed out, however, the Layshock decision came with an understanding that Wisniewski allowed school officials to discipline students for their off-campus speech.\footnote{Id.} Legal scholar Steve Varel noticed the Wisniewski decision has been relied upon by other courts numerous
times and, therefore, sees value in courts using Wisniewski’s reasonable foreseeability test. 739 Varel believes the test protects some off-campus student speech while at the same time giving school officials the authority to discipline students for speech that could “foreseeably reach campus.” 740 However, Varel cautions a court could broadly apply this test and find nearly any student speech posted on or sent via the internet to have a reasonably foreseeable chance of reaching the school campus. 741 Wisniewski’s tests could continue to be cited and ultimately used as the foundation in future court decisions.

Material and Substantial Disruption

As discussed above, Tinker’s first prong, material and substantial disruption, is the judicial test the majority of courts apply when analyzing student speech cases. 742 Yet applying Tinker’s material and substantial disruption prong can be troublesome because courts have not clearly and conclusively defined what constitutes a material and substantial disruption and what elements must be present for the disturbances at school to be deemed reasonably foreseeable. 743 California Judicial Clerk Andrew Miller suggests making a determination of whether student speech has caused or will foreseeably cause a material and substantial disruption is a major obstacle school officials must overcome in order to justify discipline for

740 Id.
741 Id.
742 Lei, supra note 274, at 5-6.
student expression. Thus, the bar should be set high. Making matters more difficult for school officials is the fact that, to date, no courts have applied a specific test to discern if a material and substantial disruption has occurred. However, from what courts have said, utter pandemonium is not required for a material and substantial disruption to have occurred. Nonetheless something more than an administrator being upset at the content of the student speech is necessary.

It would be helpful for school administrators to have clearer direction from the courts when faced with student cyberspeech incidents. For example, to what degree does the instructional environment need to be impacted by the student cyberspeech for a material and substantial disruption to have occurred? Just how much does the student cyberspeech need to distress a staff member or otherwise divert his/her attention from educating students before it constitutes a material and substantial disruption? Cases involving these questions will be addressed below.

Even with the difficulty in answering these challenging questions, Tinker’s first prong, the material and substantial disruption prong, was applied in all 16 reviewed cases. So if Tinker’s material and substantial disruption prong generally serves as the foundation for lower court decisions, it is important to define what constitutes a material and substantial disruption. Black’s Law Dictionary does not define the term. It does, however, define the legal term

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744 Andrew D.M. Miller, Balancing School Authority and Student Expression. 54 Baylor L. Rev. 623, 653 (2002).
745 Id.
746 Erb, supra note 5, at 266.
material as, “Important; more or less necessary; having influence or effect….”\textsuperscript{749} Substantial is also defined as, “Being significant or large and having substance.”\textsuperscript{750} These definitions are not very helpful to school administrators. This definitional dearth places school officials in a quandary when attempting to make decisions regarding off-campus student speech. Though many commentators reference \textit{Tinker} and the material and substantial disruption test, few attempt to define it. However, Justin Peterson, a Florida attorney, suggested in the \textit{Michigan State Law Review} that student speech which “retards” the classroom learning process should be deemed a material and substantial disruption.\textsuperscript{751} Peterson went on to say racial slurs are generally volatile enough to constitute a material and substantial disruption.\textsuperscript{752} Peterson further asserted student speech resulting in some level of violence may also be considered a material and substantial disruption.\textsuperscript{753} Loyola of Los Angeles Law Professor Aaron Caplan suggests when a student uses inappropriate verbiage in front of a captive audience at a school-sponsored event, a material and substantial disruption has occurred.\textsuperscript{754}

Though the opaqueness of court views on what constitutes a material and substantial disruption is an area of confusion for school administrators, some patterns did emerge from the reviewed court decisions. If the student speech targeted an individual teacher and the targeted teacher became extremely distraught, making it necessary to alter her or his teaching,
for some courts this constituted a material and substantial disruption.\textsuperscript{755} On the other hand, \textit{Klein v. Smith}\textsuperscript{756} suggested because teachers have significant influence on student conduct, a student directing an inappropriate hand gesture to the teacher at an off-campus location should have been used as a teachable moment rather than an opportunity to impose discipline.\textsuperscript{757} In contrast, when the student speech depicts the murder of a teacher, courts tend to investigate if the speech should be considered a true threat and did deem this sufficient enough to constitute a material and substantial disruption.\textsuperscript{758} Interestingly, in the cases where student speech targeted school administrators, regardless of how vulgar the speech or how the administrator reacted, the court generally found for the student.\textsuperscript{759} When students missed class en masse or hundreds of phone calls came into the school in response to the student speech\textsuperscript{760} or the student speech caused school officials to legitimately fear for the safety of students and staff, courts determined these results constituted a material and substantial disruption.\textsuperscript{761} However, if the speech caused counselors to alter their schedules to deal with issues resulting from the


\textsuperscript{757} Calvert, \textit{supra} note 315, at 275.

\textsuperscript{758} Cases in which the student cyberspeech depicted the murder or the student sought to have a school employee murdered included \textit{J.S. v. Bethlehem Area School District}, 569 Pa. 638 (Pa. 2002), Wisniewski \textit{v. Board of Education of the Weedsport Central School District}, 494 F. 3d 34 (2\textsuperscript{nd} Cir. 2007), \textit{O.Z. v. Board of Trustees}, 2008 U.S. Dist. Lexis 110409 (C.D. Cal. 2008), and \textit{Bell v. Itawamba County School Board}, 859 F. Supp. 2d 834 (N.D. Miss. 2012).


\textsuperscript{760} See \textit{Doninger v. Niehoff}, 642 F.3d 334 (2\textsuperscript{nd} Cir. 2011).

\textsuperscript{761} See \textit{Porter v. Ascension Parish School Board}, 393 F.3d 608 (5\textsuperscript{th} Cir. 2004).
speech or the speech merely resulted in student hallway discussions, courts generally found for the student.

When a Staff Member Has Intense Reactions to a Cyberspeech Attack

When student cyberspeech attacks anyone, including school staff members, it can gravely affect the victim’s physical and the psychological health. Some courts have determined if the student speech had some sort of negative effect on the staff member’s work, then a material and substantial disruption existed. The courts took into account what the staff member and teacher described as detrimental consequences of the student speech. Five of the reviewed cases underscored the negative effects upon the staff member victims of the student cyberspeech. The effect on the staff members included a nuisance, extra work, stressful phone calls and discussions, public humiliation, and negatively affected teaching styles. Examples of more serious consequences experienced by staff members included teachers feeling threatened, becoming ill, or developing sleep-related issues. And

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763 For example, see J.S. ex rel. Snyder v. Blue Mountain School District, 650 F.3d 915, 922-923 (3d Cir. 2011), and Beussink v. Woodland R-IV School District, 30 F. Supp. 2d 1175, 1181 (E.D. Mo. 1998).
764 Grim, supra note 9, at 159.
766 See Doninger v. Niehoff, 642 F.3d 334 (2nd Cir. 2011).
767 Id.
768 Id.
770 Id.
in one instance, the targeted teacher in *Bethlehem*\(^{772}\) became so disturbed by the contents of a student-created website soliciting funds to hire a hitman to kill her that she had to undergo medical treatment, could not leave her home, and was not able to return to school.\(^{773}\) She was granted a medical leave of absence for the remainder of the school year and for the following school year. As a result, the educational environment was disrupted because three different substitute teachers taught the students in her classes at different times during the leave period.\(^{774}\) The *Bethlehem* court found discipline valid because the student’s disparaging cyberspeech negatively affected school climate.\(^{775}\) Also, since students had to receive instruction from substitutes, the court determined that a material and substantial disruption had occurred.\(^{776}\) The Pennsylvania Supreme Court viewed these effects as a sufficient disruption via *Tinker* to uphold disciplining the student.

In three of the five cases where courts considered the negative influence student cyberspeech had on staff members, the court found discipline was warranted. This result begs an important question regarding the nature of teaching, classroom management, and what school staff members should expect when dealing with students: How much should school staff members be expected to tolerate regarding poor decisions adolescents make when they become irritated or even angry about something an adult at school did? Should teachers be expected to have reasonably thick skin when it comes to students expressing their frustrations?

\(^{773}\) *Id.* at 646.
\(^{774}\) *Id.*
\(^{775}\) *Id.*
\(^{776}\) *Id.*

\(^{776}\) Lei, *supra* note 274, at 19.
off the school campus? In *Klein*, the court acknowledged the student was ill-mannered and his middle finger gesture to a teacher in an off-campus restaurant parking lot was disrespectful. But the court refused to believe a student not being punished for giving the finger to a staff member off-campus or a court refusing to uphold the school district’s discipline for this act would cause the “professional integrity, personal mental resolve, and individual character” of school staff members to evaporate.

The personal anguish suffered by a staff member in response to a student cyberattack may have some influence over courts’ decisions, as evidenced by the aforementioned three decisions finding for the school district. But should it? Should a staff member’s fears, perhaps exaggerated in some cases, have an effect on the administrator’s decision to impose discipline or on a court’s opinion? If courts continue to react in this manner and be influenced by the severity of the staff member’s reaction, this places staff members in a strong position. This power could even be inappropriately wielded. Suppose a staff member decides, when faced with a student cyberspeech attack, to overreact to the attack. Based on what has happened in a couple of the cases discussed above, the teacher could claim he/she cannot come to work for fear of the threats or humiliation the cyberattack may have caused.

**When Students Protest and Cause Chaotic Scenes**

Due to the substantial disruption caused by Avery Doninger’s emails and postings, the court ruled in favor of school officials in *Doninger v. Niehoff*. The Second Circuit has been

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778 Id. at 1442.
779 *Doninger v. Niehoff*, 642 F.3d 334 (2nd Cir. 2011).
criticized for its application of Supreme Court doctrines in student speech cases. For example, Bradley Gibson, a Cincinnati attorney and legal scholar, asserts the Second Circuit inappropriately applied student speech benchmarks when deciding *Doninger v. Niehoff*\textsuperscript{780} Additionally, Adam Dauksas, a Chicago attorney and legal scholar, noted the court discussed the particulars of the case by framing it in terms of *Fraser*\textsuperscript{781} yet applied *Tinker* to make its final decision.\textsuperscript{782} The flood of phone calls the school received from parents in response to Avery Doninger’s email request for them to call, students missing class time to protest outside the administrative offices, and excessive time administrators had to spend quelling the protests and fielding the phone calls and emails was enough for the Second Circuit to find a material and substantial disruption. Additionally, the Second Circuit ultimately rejected *Fraser* as controlling in this case, noting, “The applicability of *Fraser* to plainly offensive off-campus student speech is uncertain.”\textsuperscript{783} However, one of the factors on which it focused in its ruling was Avery Doninger’s use of the term “douchebags” to refer to central office staff, thus

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\textsuperscript{780} Gibson, *supra* note 33, at 185.

\textsuperscript{781} Adam Dauksas, *Doninger’s Wedge: Has Avery Doninger Bridged the Way for Internet Versions of Matthew Fraser?* 43 J. Marshall L. Rev. 439, 453 (2010). Dauksas claims that as its only basis for the assertion that Doninger’s offensive speech could somehow cause a substantial disruption, the court merely pointed out that another student had responded to Doninger’s blog post with a vulgar comment of his or her own. *Dauksas*, 43 J. Marshall L. Rev. at 454.

\textsuperscript{782} *Id.* at 453.

\textsuperscript{783} *Doninger v. Niehoff*, 642 F.3d 334, 348 (2\textsuperscript{nd} Cir. 2011). The court even stated that it was not clear whether the First Amendment protected Avery’s right to run for class office in the face of her offensive online expression. *Doninger*, 642 F. 3d at 350.
lending credence to the Second Circuit’s consideration of *Fraser* being at least partially applicable.\(^{784}\)

The Second Circuit was thus left to apply *Tinker*. The court determined Avery Doninger’s speech went beyond simply being offensive, exemplified by the aforementioned phone calls and student protests. In addition, the court noted the discipline meted out to Doninger did not keep her from educational classroom endeavors; she was not suspended from school. The discipline dealt only with her being allowed to participate as a class officer, an optional activity which is a privilege, not a right. The role of class officer required her to function as a liaison between the student body and faculty/administration.\(^{785}\) After her actions, it was certainly reasonable to think it would be difficult for this relationship to work properly.

### The School District Often Claims a Material and Substantial Disruption Occurs in Response to the Student Speech

A careful analysis of the 16 reviewed lower court cases shows school officials claimed a disruption occurred or was reasonably forecast 13 times as a result of the student speech. Of those 13 cases, the court ruled in favor of the student in nine and found in favor of the school.

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\(^{784}\) Gibson, *supra* note 33, at 185. Also, Allison E. Hayes, *From Armbands to Douchebags: How Doninger v. Niehoff Shows the Supreme Court Needs to Address Student Speech in the Cyber Age*. 43 Akron L. Rev. 247, 272-273 (2010), points out even though the Second Circuit refused to consider applying *Fraser* to this case, the content of Doninger’s blog post and the heart of her online actions were noted on eleven pages of the Second Circuit’s 21-page opinion. That seems like a lot of writing for a topic that the court openly dismissed as inapplicable to the Doninger case.

\(^{785}\) *Doninger*, 642 F.3d at 340. On this point, the United States District Court for the District of Connecticut argued and the Second Circuit concurred that *Doninger* was different from both *Tinker* and *Fraser* because Doninger’s discipline did not preclude her from classes or other academic endeavors. Allison E. Hayes, *From Armbands to Douchebags: How Doninger v. Niehoff Shows the Supreme Court Needs to Address Student Speech in the Cyber Age*. 43 Akron L. Rev. 247, 268 (2010). Also, both courts agreed that Doninger had no established right to participate in extra-curricular activities. Bradley Gibson, *Doninger v. Niehoff: Tinker Is Online and in Trouble*. 36 N. Ky. L. Rev. 185, 208 (2009).
district in four.\textsuperscript{786} In the other three cases, school authorities cited violations of school rules or codes of conduct but did not attempt to link the student speech to a material or substantial disruption at school.\textsuperscript{787} For example, in \textit{Beussink v. Woodland},\textsuperscript{788} the school district did not claim the student speech caused a disruption. Instead, the principal claimed he disciplined Beussink because he was upset that his inappropriate speech was accessed at school and was shown on computer screens in classrooms.\textsuperscript{789} Even so, the court used \textit{Tinker} and its substantial disruption prong in making its ruling for the student.

\textbf{Location, Location, Location}

As mentioned previously, many of the courts in the reviewed cases emphasized that an important consideration in their decisions was whether or not the student speech could be considered to have occurred either on-campus or off-campus. An issue both school officials and courts alike must wrestle with is defining the reach of the schoolyard and determining if school officials have jurisdiction over the off-campus student expression based on the location of the student speech. Using available information and acting accordingly is the best a school administrator can do at this point in the absence of a U.S. Supreme Court student cyberspeech ruling.

\textsuperscript{786} The nine reviewed cases featuring court decisions finding for the student were \textit{Thomas, Emmett, Killion, Flaherty, Evans, Blue Mountain, Layshock, Bell,} and Minnewaska. The ones finding for the school district were Wisniewski, O.Z., Doninger, and Porter.

\textsuperscript{787} These three cases featured different claims by the school district. In one, \textit{Beussink v. Woodland R-IV School District}, 30 F. Supp. 2d 1175 (E.D. Mo. 1998), a principal was angry because a website with crude language was accessed and displayed at school. In the other two, the district cited a school district rule or conduct code which prohibited crude or offensive conduct aimed at a staff member. \textit{See Klein v. Smith}, 635 F. Supp 1440 (D. Me. 1986), and \textit{J.S. v. Bethlehem Area School District}, 569 Pa. 638 (Pa. 2002).

\textsuperscript{788} \textit{Beussink v. Woodland R-IV School District}, 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

\textsuperscript{789} \textit{Id.} at 1178, 1180.
School Administrators and Courts Must Ask: Is It Off-Campus or On-Campus Student Speech?

When formulating a response to off-campus student speech incidents, school administrators must attempt to define the student speech as either off-campus or on-campus speech. The distinction is important if challenged in court. Courts must make similar determinations. Courts have traditionally considered two questions in cases involving the location of student internet speech. The first question is whether student internet expression can ever be considered to be totally off-campus, given its accessibility virtually anywhere at all times. Second, in suppressing internet speech, are school officials venturing into areas beyond their purview since the internet is so intertwined in students’ lives? These issues have made decisions regarding student discipline for cyberspeech incidents difficult because of school officials’ competing interests in protecting the school, its students and its staff members from speech which could substantially disrupt the school environment while at the same time allowing students to exercise their constitutionally protected rights to free speech. Finally, determining whether the student speech should be considered off-campus or on-campus cannot be accomplished with broad strokes; it is dependent upon the specific facts of each case.

Of the 16 cases reviewed, only five courts treated the speech as being on-campus and another strongly considered the speech to be on-campus before finally deciding it was off-

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790 Heidlage, supra note 471, at 574.
791 Id.
792 Id. at 584. An example would be Wisniewski v. Board of Education of the Weedsport Central School District, 494 F. 3d 34 (2nd Cir. 2007).
793 Lorillard, supra note 4, at 194.
Of these five cases, one court definitively called the original cyberspeech off-campus until the student accessed it at school. At that point the court treated the speech as being on-campus. Thus, only five courts labeled the student speech as being on-campus, while the student speech in the other 11 cases was characterized as occurring off-campus. However, this on-campus vs. off-campus distinction was not a clear indicator of which party would prevail with the court. Among the five cases in which the court considered the student speech on-campus, the court found in favor of the student four times and the school district once. Surprisingly, students succeeded in court a lower percentage of the time when the speech was considered off-campus, though this might have just been a function of the small sample size. In the 11 cases the court deemed the student speech off-campus, students prevailed seven times and the school district four times. Eight cases involved students posting their speech to some sort of social media webpage, like Facebook or MySpace. Seven of those eight decisions went in favor of the student. In three cases, the student emailed the cyberspeech to multiple people. Courts found in favor of the school district in two of those three cases. Two other courts heard cases in which the student created a video and posted it on YouTube. Those decisions were split between the school district and the student. One of these YouTube cases featured graphic images of the teacher’s murder, and the other showcased a song.

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794 See Appendix C for information from each case dealing with the on-campus/off-campus nature of each.

795 The two YouTube cases were O.Z. v. Board of Trustees, 2008 U.S. Dist. Lexis 110409 (C.D. Cal. 2008)-found for school district, and Bell v. Itawamba County School Board, 2014 U.S. App. LEXIS 23433 (5th Cir. 2014)-found for student.

containing violent phrases and alleged two male teachers were acting inappropriately with female students.\textsuperscript{797}

**How Did School Officials Hear About the Student Speech?**

Another matter brought to the forefront by student plaintiffs in some of the reviewed cases was the issue of how school officials came to know about the student speech. In seven of the sixteen cases, someone other than the disciplined student physically brought the speech to campus or called it to the attention of school officials.\textsuperscript{798} The third parties included other students, siblings, and faculty members who were not targets of the speech. Students were victorious in five of those seven cases.\textsuperscript{799} Of the five cases students won, the court considered the speech off-campus three times.\textsuperscript{800} In the two cases the school district won, both courts deemed the student speech off-campus.

**The Relevance of Regions of the Country**

Additionally, location played an important role in the reviewed cases in relation to the region of the country where the case occurred. Five of the 16 reviewed cases were argued before Pennsylvania courts. Four were federal courts and one was the State Supreme Court. Two of the federal courts were decided by the Western District Court of Pennsylvania and two were Third Circuit Court of Appeals decisions. These four decisions went in favor of the students. The fifth Pennsylvania case was argued before the State Supreme Court of

\textsuperscript{797} See Bell v. Itawamba County School Board, 2014 U.S. App. LEXIS 23433 (5th Cir. 2014).
\textsuperscript{798} Those seven cases are Thomas, Beussink, Killion, Porter, Wisniewski, Blue Mountain, and Minnewaska.
\textsuperscript{799} Students won in Thomas, Beussink, Killion, Blue Mountain, and Minnewaska.
\textsuperscript{800} Those were Thomas, Blue Mountain, and Minnewaska.
Pennsylvania. It was the only state court case in which the fact pattern featured student cyberspeech attacking a staff member. The court found in favor of the school district.

The United States Census Bureau map shown in Figure 1 dissects the country into four regions: Northeast, South, West, and Midwest.801 Table 2 provides a list of locations and decisions of the reviewed cases. Most of the reviewed cases, nine, came before courts in the Northeast section. Those decisions went in favor of students 6-3. The Second Circuit heard three of these cases, with two of those decisions finding for the school district. Three of the reviewed cases took place in the South, with students prevailing twice. The Midwest had two cases, with a school district and a student each winning one. Decisions also were even in the Western region of the country, with a student and a school district each winning one.

Figure 1. Census Bureau Map
# Table 2

## Reviewed Cases by Regions of the Country

<table>
<thead>
<tr>
<th>U.S. Census Bureau Region</th>
<th>Case</th>
<th>Court</th>
<th>Winning Side</th>
</tr>
</thead>
<tbody>
<tr>
<td>Northeast</td>
<td><em>Thomas</em></td>
<td>2nd Circuit</td>
<td>Student</td>
</tr>
<tr>
<td></td>
<td><em>Wisniewski</em></td>
<td>2nd Circuit</td>
<td>School District</td>
</tr>
<tr>
<td></td>
<td><em>Doninger</em></td>
<td>2nd Circuit</td>
<td>School District</td>
</tr>
<tr>
<td></td>
<td><em>Blue Mountain</em></td>
<td>3rd Circuit</td>
<td>Student</td>
</tr>
<tr>
<td></td>
<td><em>Layshock</em></td>
<td>3rd Circuit</td>
<td>Student</td>
</tr>
<tr>
<td></td>
<td><em>Killion</em></td>
<td>Western District Court of Pennsylvania</td>
<td>Student</td>
</tr>
<tr>
<td></td>
<td><em>Flaherty</em></td>
<td>Western District Court of Pennsylvania</td>
<td>Student</td>
</tr>
<tr>
<td></td>
<td><em>Bethlehem</em></td>
<td>State Supreme Court of Pennsylvania</td>
<td>Student</td>
</tr>
<tr>
<td></td>
<td><em>Klein</em></td>
<td>District Court of Maine</td>
<td>Student</td>
</tr>
<tr>
<td></td>
<td><em>Porter</em></td>
<td>5th Circuit</td>
<td>School District</td>
</tr>
<tr>
<td></td>
<td><em>Evans</em></td>
<td>Southern District Court of Florida</td>
<td>Student</td>
</tr>
<tr>
<td></td>
<td><em>Bell</em></td>
<td>5th Circuit</td>
<td>Student</td>
</tr>
<tr>
<td></td>
<td><em>Beussink</em></td>
<td>Eastern District Court of Missouri</td>
<td>Student</td>
</tr>
<tr>
<td></td>
<td><em>Minnewaska</em></td>
<td>District Court of Minnesota</td>
<td>Student</td>
</tr>
<tr>
<td></td>
<td><em>Emmett</em></td>
<td>Western District Court of Washington</td>
<td>Student</td>
</tr>
<tr>
<td></td>
<td><em>O.Z.</em></td>
<td>Central District Court of California</td>
<td>School District</td>
</tr>
</tbody>
</table>
Finally, it appears the type of courts making final decisions in these cases was important. Final decisions in district courts largely favored students. Eight cases reached final decision in district courts, with seven of those decisions going in favor of students. The eight district court decisions were Klein, Beussink, Emmett, Killion, Flaherty, O.Z., Evans, and Minnewaska. Students won all of these cases except O.Z. Seven other cases went to an appellate court decision, where students won four times and school districts won three times. Finally, as mentioned, the one pertinent state-level case decision was decided in favor of the school district.

**Conclusion**

The line is sometimes blurry when it comes to school administrators’ decisions regarding safeguarding students’ First Amendment rights and supporting a school setting where students can learn without unnecessary distractions. Amanda McHenry, Cleveland lawyer and legal scholar, argues just because a person is a student does not give school administrators the power to discipline her for what she says at home after school. The seven circuit court cases reviewed were Thomas, Porter, Wisniewski, Doninger, Blue Mountain, Layshock, and Bell. That case was Bethlehem. McHenry, *supra* note 74, at 244-245.
School administrators are routinely confronted with decisions involving a myriad of important issues, not the least of which is protecting the safety of all persons within the school setting. This decision-making process is arduous because school officials must also protect students’ right to free speech as outlined in the First Amendment of the United States Constitution. Tinker v. Des Moines Independent Community School District expressly stated students are not stripped of their constitutionally protected right to free speech “at the schoolhouse gate.” Aaron H. Caplan, an attorney for the American Civil Liberties Union of Washington and the counsel in student speech cases like Emmett v. Kent, argues this clear language implies school administrators must recognize that student speech outside the schoolhouse gate should be similarly protected, “otherwise, they would have nothing to shed.” Conversely, Judge Newman’s concurrence in Thomas v. Board of Education noted determining the reach of school officials’ authority over off-campus student speech might not be as simple as limiting it to within the walls of the school. These diverse opinions are examples of the quandary school administrators face when confronting student cyberspeech.

806 The Constitution of the United States, Amendment 1.
809 Caplan, supra note 666, at 140.
810 Id.
811 Thomas v. Board of Education, Granville Central School District, 607 F. 2d 1043 (2d Cir. 1979) at 1058.
incidents. Though courts might not always agree on certain definitions or how to handle incidents in particular cases, school officials must still deal with student cyberspeech incidents when they arise.

**Research, Questions, and Considerations**

Research suggests student internet speech can, and often does, have an impact within the schoolhouse gates. This prompts the question, “Is student internet speech ever really off-campus?” A related question school administrators must ask is, “How far can school administrators’ disciplinary arms legally extend into cyberspace?” These queries may be too difficult to answer when posed singularly, but the lessons learned from case law can be used to formulate a framework for school administrators to consider when making disciplinary decisions related to student cyberspeech targeting staff members. Aside from the aforementioned two questions, school officials must also consider the following: When do school authorities have jurisdiction to levy discipline for student cyberspeech; did the student cyberspeech cause a material and substantial disruption within the school environment, and was the material and substantial disruption reasonably foreseeable?

To protect students’ constitutional speech rights and to guide decisions about student speech issues, school officials often rely upon school board policy and board-adopted handbook language. These written policies must be rooted in clear legal precedent, and in the area of harassing student cyberspeech, courts have, to date, not provided clear and

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812 For example, what constitutes on-campus speech or what events must really happen for a material and substantial disruption to have occurred.

unassailable direction on how school officials should deal with off-campus student
cyberspeech. The appellate courts from the Second, Third, Fourth, Fifth, and Ninth Circuits
have dealt with student cyberspeech cases and have offered opinions, although sometimes
incongruent, on the subject of student expression. The Third Circuit and the Fifth Circuit, for
example, have ruled school officials do not have authority to discipline students for
cyberspeech they create at home, while the Fourth Circuit has declared student speech
originating from outside the school walls can be disciplined depending on who the speech
targets and what transpires in connection to it. In Thomas, the Second Circuit grounded
its ruling in the principles of the Tinker and Fraser decisions and made determinations
based upon the physical location where the speech originated, the substance of the student
speech, and the effect the speech had upon others. These are some of the same factors
school officials must take into account when making discipline decisions related to student
cyberspeech targeting staff members.

What follows is a discussion examining these questions surrounding student
cyberspeech which attacks staff members. Each section begins with an overview of court
decisions school administrators should be aware of. The second part of each section provides
thoughts on how courts may rule on future student cyberspeech cases. Next, a tool school

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School District, 650 F.3d 205 (3d Cir. 2011), and Bell v. Itawamba County School Board, 2014 U.S. App.
LEXIS 23433 (5th Cir. 2014).
815 Weeks, supra note 22, at 1182.
818 Bethel v. Fraser, 478 U.S. 675 (1986).
819 May, supra note 814, at 1128.
administrators may use to guide them through an incident of student cyberspeech involving an attack upon a staff member will be offered. Finally, topics for future study will be suggested.

**Thoughts and Advice for School Administrators Faced with Student Cyberspeech Incidents**

**Jurisdiction and Nexus Defined**

Student cyberspeech targeting staff members remains a gray area for school administrators. The term “jurisdiction” is defined in the context of this study as school officials’ authority to levy discipline. To be on solid constitutional ground, school administrators must demonstrate that an obvious link exists between the student speech and the school environment via a strong nexus. Nexus is defined as a point of causal intersection, link, relation, or connection. Nexus considers whether a sufficient link exists between the student speech and material and substantial disruptions or other incidents within the schoolhouse gates. An examination of the target of the speech, the ease of accessibility, the prevalence of the speech, the length of time it was available, and the student’s intent are all important factors surrounding nexus the courts have considered. If a nexus between student cyberspeech and the school can be established, then school administrators have overcome the first obstacle to imposing discipline. Absent a sufficient nexus, school officials should not impose discipline.

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820 Black’s Law Dictionary Free Online Legal Dictionary, 2nd Ed. [http://thelawdictionary.org/nexus/#ixzz2kM8tMDMN](http://thelawdictionary.org/nexus/#ixzz2kM8tMDMN)
Handbooks and Policies Are Powerful Tools

As mentioned previously, current case law remains unsettled in terms of providing clear direction for school administrators regarding student cyberspeech issues. Consequently, school administrators faced with student cyberspeech discipline decisions should explore all possible resources at their disposal. Useful tools for identifying jurisdiction and determining nexus include student handbooks, signed acceptable use policies, and solid school board policies. These tools are so helpful, in fact, that using them as the basis for disciplining a student may make that discipline decision far more clear-cut. By identifying student cyberspeech which leads to discipline as a violation of school policy or the handbook, school officials may avoid entanglements with First Amendment issues altogether. For example, in Thomas, the Second Circuit found discipline for students creating a newspaper replete with sexual references to be a First Amendment violation. In this case, school administrators identified the reason for the suspensions as the offensive nature of the student speech. However, according to the court, had administrators disciplined the students for their on-campus insubordination, a handbook violation, they would have totally avoided the off-campus First Amendment complications which led to court proceedings and ultimately to the district losing in court.

The Supreme Court has provided school officials with guidance in crafting appropriate handbook language via Tinker and the other three major First Amendment student speech decisions. The Court has identified conditions permitting school officials to either censor or

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822 Id. at 1050.
823 Id.
restrict student speech, the most common condition being student speech either causing a substantial disruption of the school environment or reasonably expected to do so. These conditions should be explicitly written in the school district’s handbook. Other regulations for student cyberspeech may also be written into handbook language; however, case law suggests very broad handbook language is not likely to survive judicial scrutiny. Bell v. Itawamba dealt specifically with this overly broad policy language issue. In Bell, school officials claimed the student’s internet-posted rap song attacking the moral integrity of teachers violated school policy. The school board’s policy identified harassment as intimidation of teachers as a serious disruption. The Fifth Circuit rejected the argument that any off-campus communication which criticized teachers was “inherently disruptive.” The court observed that almost all of the offenses listed in the policy under the heading of “Severe Disruptions” were activities that occur at school, like “running in the hall” and “gambling or possession of gambling devices at school.” Thus, if the language is too broad and attempts to encompass too much student activity that transpires off-campus, courts are less likely to uphold discipline even for handbook violations.

The Western District Court of Pennsylvania in Flaherty also struck down overly broad policy language. The Flaherty court determined the sections of the student handbook school officials relied upon in punishing the student were vague and overly broad and lent themselves to indiscriminate application. Thus, the court found silencing the student’s

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824 Osborne, supra note 743, at 359.
825 Bell v. Itawamba County School Board, 2014 U.S. App. LEXIS 23433, 46 (5th Cir. 2014).
826 Id.
827 Id. at 47-48.
829 Id. at 705.
expression was a violation of the First Amendment and the student handbook unconstitutional because it failed to include geographic boundaries school administrators should observe when curtailing student expression. 830 The court reasoned the handbook language would give school officials virtually “unrestricted power”831 over students’ rights to expression. Specifically, the court asserted it was unconstitutional for school officials “to discipline a student for … expression occurring outside of school premises [that was] not tied to a school-related activity.”832

So, if not overly broad, relevant, specific, and legal policy language will help support a school district’s case in court if the student brings suit disputing the legality of discipline for student expression.833 But this is not an easy process. Though drafting clear and constitutional handbook language may be difficult, this doesn’t mean it should not be attempted.834 It is imperative for school officials to both write and follow solid board policy on the acceptable use of computers, other electronic devices, the internet, and appropriate cyberconduct. Courts have recognized school handbooks and acceptable use policies are necessary but nonetheless unable to address all potential incidents of disruptive student behavior.835 Given this reality, the Supreme Court has indicated handbooks and acceptable use policies need not “be as detailed as a criminal code which imposes criminal sanctions.”836 Indeed, it is not feasible to

830 Id.
831 Id.
832 Id. at 706.
833 Osborne, supra note 743, at 362.
834 PRESS is a service to which school districts in Illinois can subscribe. It is connected to the Illinois Association of School Boards and provides suggested policies and specific language which local school boards can adapt and then adopt as their own. PRESS is a great help to school officials and school boards crafting board policies. http://www.iasb.com/policy/overview.cfm
836 Id.
expect any school district policy to cover every conceivable student behavior. However, the handbook language and board policy must be as specific as possible and cannot suppress student speech unless there is a reasonable rationale.

Effective handbook and acceptable use policy language may not allow school officials to violate student First Amendment speech rights but it does afford school leaders more avenues to discipline students for unacceptable cyber-behavior while avoiding the pitfalls and associated uncertainty when courts become involved with First Amendment violation claims. Disciplinary decisions grounded in effective handbook and acceptable use policy language, with documented awareness by both students and parents/guardians, can provide school leaders with a legally defensive rationale for their decisions.

Location and the Disruption Hurdle

Another jurisdictional consideration for school administrators is the on-campus versus off-campus nature of the student cyberspeech and any related material and substantial disruptions. Essentially, if the student cyberspeech in question somehow occurs on-campus, is accessed on-campus, or reaches the campus, school administrators will have crossed the next hurdle in establishing authority to impose discipline. The subsequent hurdle is the effect the student speech actually has on-campus. As discussed in Chapter 3, Tinker’s first prong, material and substantial disruption, is the judicial test courts apply almost exclusively when analyzing student cyberspeech cases. This first prong provides school administrators with

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838 *Id.* at 801.
839 For example, if anyone brings a hard-copy printout to school, even if it is brought by another student.
840 Lei, supra note 274, at 5-6.
the most defensible justification for imposing discipline. If the student expression causes a material and substantial disruption at school, then discipline is more likely to be constitutionally supported. If, however, the speech or a school disruption connected to the speech never reaches campus, court decisions suggest discipline may not be constitutionally supported.\textsuperscript{841}

As discussed in Chapter 3, defining a material and substantial disruption is an imprecise endeavor. Still, the reviewed cases provide some assistance. Courts in the reviewed cases have ruled the following types of incidents associated with student speech constituted a material and substantial disruption:

- Students leaving class to protest\textsuperscript{842}
- Teachers rendered unable to perform their duties in response to student speech\textsuperscript{843}
- A legitimate fear that someone at school may be in danger\textsuperscript{844}

First, when student cyberspeech has rendered teachers unable to effectively teach and school officials silence student cyberspeech by disciplining for it, courts have found for the school district. For instance, when teachers have been so distressed by student cyberspeech...
they had to be away from school for a period of time or were so distraught they had to seek medical attention, the courts have decided against the student. These cases featured student cyberspeech graphically depicting violence aimed at teachers.

It is interesting to note that when school administrators, like the principal or athletic director, were the targets of student cyberspeech attacks, courts have been less willing to uphold the imposition of discipline. For example, in *J.S. v. Bethlehem, Wisniewski v. Board of Education*, and *O.Z. v. Board of Trustees*, student cyberspeech attacked one or more teachers. Here the student speech included a depiction of harm coming to the teacher. All of these cases resulted in the court supporting the imposition of disciplinary consequences for silencing the student speech. However, when school administrators were cyber-targeted, such as in *Killion v. Franklin, J.S. v. Blue Mountain School District*, and *Layshock v. Hermitage School District*, the courts upheld the First Amendment rights of the student. The severity of the student cyberspeech may be the key piece here. Each of the cases described above involving teachers depicted or encouraged the death of the teacher. However, the student cyberspeech targeting school administrators accused them of a variety of sins, including illegal drug use, excessive alcohol use, theft, and inappropriate relations with students and parents. Thus, though the administrators were personally attacked and accused of actions

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845 Examples of cases featuring evidence that teachers were extremely distraught or afraid in response to the student speech include *J.S. v. Bethlehem Area School District*, 569 Pa. 638 (Pa. 2002), and *O.Z. v. Board of Trustees*, 2008 U.S. Dist. Lexis 110409 (C.D. Cal. 2008).


unbecoming a school official, the student cyberspeech did not call for their assassination. Thus, the courts determined the silencing of the student speech via the imposition of discipline was a First Amendment violation.

Generally, some type of event must occur at school for a material and substantial disruption to be declared. The Second Circuit sided with the school district when school officials silenced students who left class to protest outside the superintendent’s office in *Doninger.* However, not every event which happened in connection to student cyberspeech found favor with the court. Courts determined the following events which occurred in connection to student speech incidents did not constitute a material and substantial disruption to the school environment:

- Students discussing a racy off-campus publication
- A middle finger gesture flipped from a student to a teacher at an off-campus restaurant parking lot
- Webpages created at a student’s home critical of or even disparaging of school staff members and their integrity
- A webpage inspired by a class assignment which depicted mock obituaries of the student’s friends

*Tinker’s Second Prong*

It should be noted the material and substantial standard discussed here assumes *Tinker’s* first prong will remain the standard for future student speech or cyberspeech cases. Perhaps a Supreme Court precedent has existed all along but plaintiffs haven’t asserted the “right to be left alone” argument and courts have largely not considered it. However, a few

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849 *Doninger v. Niehoff*, 642 F.3d 334 (2nd Cir. 2011).
examples do exist where the second prong has been considered as an appropriate test for student speech situations. In *Morse*\textsuperscript{850} the majority suggested benchmarks other than *Tinker*’s material and substantial disruption standard could be used to decide student expression cases. This suggestion could arguably be interpreted as a subtle approval of the use of *Tinker*’s second prong.\textsuperscript{851} Relying in part on this Supreme Court possibility, the Ninth Circuit in *Harper v. Poway*\textsuperscript{852} determined *Tinker*’s second prong did not require a disruption in order for school officials to prohibit student speech.\textsuperscript{853} Furthermore, the Ninth Circuit concluded *Tinker*’s two prongs could be applied independently of one another to support school officials in prohibiting student speech.\textsuperscript{854} In *Harper*, the Ninth Circuit upheld school officials’ removal of a student from class because the t-shirt he was wearing featured wording critical of homosexuality.\textsuperscript{855} The Supreme Court vacated the Ninth Circuit’s opinion remanding it back to the Ninth Circuit and instructing the court to dismiss the appeal as moot.\textsuperscript{856} This demonstrates one federal appeals court applied *Tinker*’s second prong in deciding a student speech case.

Thus *Tinker*’s second prong, addressing student speech infringing upon the rights of others, may emerge as an independent analytical test in future student speech cases. Should

\textsuperscript{850} *Morse v. Frederick*, 551 U.S. 393, 406 (2007). “Fourth Amendment rights, no less than First and Fourteenth rights, are different in public schools than elsewhere… ‘special needs’ inhere in the public school context…while schoolchildren do not shed their constitutional rights when they enter the schoolhouse, Fourth Amendment rights…are different in public schools than elsewhere; the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.” (Citations and internal quotation marks omitted.)

\textsuperscript{851} Martha McCarthy, *Curtailing Degrading Student Expression: Is a Link to a Disruption Required?* 38 J.L. & Educ. 607, 611 (2009).

\textsuperscript{852} *Harper v. Poway*, 445 F.3d 1166 (9th Cir. 2006).

\textsuperscript{853} Martha McCarthy, *Student Expression That Collides with the Rights of Others: Should the Second Prong of Tinker Stand Alone?* West’s Education Law Reporter, 7 (March 5, 2009).

\textsuperscript{854} Id. See also *Harper v. Poway*, 445 F.3d 1166 (9th Cir. 2006).

\textsuperscript{855} *Harper v. Poway*, 445 F.3d 1166, 1171 (9th Cir. 2006).

this occur, it will be prudent for school administrators to craft associated handbook language and consider a student victim’s rights to be left alone. To this point, however, courts have not embraced Tinker’s second prong in cases where student speech targets a staff member.

**Reasonable Foreseeability – The Effect of Wisniewski**

As previously discussed, every court ruling reviewed in this study applied Tinker’s first prong, material and substantial disruption, in formulating a decision. This suggests to school officials that a material and substantial disruption at school connected to the student speech is a requirement for imposing discipline. However, while this places school administrators on solid ground to discipline students for their cyberspeech, the Second Circuit’s decision in *Wisniewski v. Board of Education* may represent a different way for school administrators to approach student cyberspeech cases. ⁸⁵⁷ In *Wisniewski*, the Second Circuit focused on the foreseeability of the student speech coming onto campus and causing a disruption. The court outlined a two-part test to be applied when school officials seek to discipline a student for off-campus cyberspeech. The first prong of the test asks if it was reasonably foreseeable the student cyberspeech would be communicated or otherwise become known to school officials? And second, was the risk of substantial disruption reasonably foreseeable? ⁸⁵⁸ If the answer to either of these questions is yes, then school discipline would be permitted. ⁸⁵⁹ Injecting some handbook language incorporating these reasonable foreseeability tests is another section school officials should add to the student handbook.

⁸⁵⁸ Id. at 39-40.
⁸⁵⁹ Id. at 40.
In Summary

Though courts appear to accord some weight to the location of origin of the student speech, the factors below set forth guidelines for school administrators to consider. The following bullet points serve to advise school officials on how to proceed when faced with student cyberspeech incidents targeting school staff members.

**Discipline is more likely to be upheld by the courts if:**

- The student speech has a clear nexus to the school;
- The student speech can be clearly connected to a material and substantial disruption on school grounds;
- A teacher suffers substantial negative effects as a result of the cyberspeech attack;
- Clear and specific school policies and handbook language are crafted and administrators follow it;
- Students miss class or inhibit the educational process; for example, the student speech provokes a student walkout.

Absent these impacts, decisions to impose discipline for student speech incidents will be subject to critical judicial scrutiny.

**Other factors to consider:**

- When malevolent student cyberspeech targets staff members, courts are generally more protective of teachers than they are of school administrators.
- Accessing the school district’s website does not necessarily constitute being on-campus.
- Arguing that a person has the right to be left alone has not been fully explored. Thus, using it as a reason to discipline for malicious student cyberspeech is tenuous. The limited use of *Tinker*’s second prong suggests courts may view this analysis as more relevant in cases where the student cyberspeech attacks other students. Thus, at least at this time, it may not be applicable when the student cyberspeech attacks a staff member.
A Tool for Administrators to Use to Identify Key Elements of Cyberspeech Situations

The tool below, Figure 2, is designed to guide school leaders in gathering, documenting, and assessing relevant facts when contemplating discipline for incidents of student off-campus cyberspeech targeting staff members. The tool is not intended to provide a prescription or formula to be used as a standard for every situation. Of course, every school is different, every student is unique, and every situation has its own characteristics. Consequently, school officials must make their ultimate decisions based upon school board and district handbooks and policies and assess each event on its own merits. At the same time, it is advisable to take into consideration how other similar situations have been handled by the courts. The tool is a guide and a way to get facts of the case and administrators’ thoughts on paper. It is also advisable to seek guidance from legal counsel before taking major disciplinary steps in response to student cyberspeech
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<th>Contact Number</th>
<th>Date/Time of Parent Contact/ Form of Contact</th>
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<table>
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<tr>
<th>Victim Name/Grade Level</th>
<th>Administrator Completing Form</th>
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<table>
<thead>
<tr>
<th>Considerations</th>
<th>Description &amp; Explanation</th>
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<tr>
<td>What was the connection between the speech and the school? Describe the nexus between the student speech and the school.</td>
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<tr>
<td>Identify the handbook provision or policy that has been violated.</td>
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<tr>
<td>Did the student speech reach campus? How?</td>
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<tr>
<td>Did a disruption occur? Please identify (then explain) the types of disruption that occurred in connection with the student speech. For example:</td>
<td></td>
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<tr>
<td>1) A danger to others was caused as a result of the student speech</td>
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<td>2) Students out of class without permission—maybe even protesting</td>
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<td>3) Teachers unable to perform their duties</td>
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<td>4) The educational process was negatively altered or halted</td>
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<td>5) A danger to others was caused as a result of the student speech</td>
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<tr>
<td>If a disruption did not actually occur, did the student speech bring about a reasonably foreseeable disruption from the above list? If so, explain.</td>
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<tr>
<td>Did the student speech infringe upon another’s right to be left alone? If so, explain.</td>
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<tr>
<td>Thoughts and Recommendations</td>
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**Figure 2.** Administrator Off-campus Student Speech Documentation Form

**Topics for Further Study**

This study provides an analysis of the legal environment regarding student free speech issues in public schools, specifically pertaining to student off-campus cyberspeech attacking
staff members. It focuses on the constitutionality of administrator disciplinary actions relating to these matters. Further study surrounding student off-campus cyberspeech would offer school administrators and others interested in the issue more information to assist in making decisions regarding how to respond. As these cases continue to come before the courts, researchers interested in this topic and school administrators as well would be wise to stay informed as to how courts rule.

One extension of this line of study might include examining the implications of a teachers’ union taking a strong stance in support of a faculty member who has been cyber-attacked. Litigation is costly. By focusing on a few states with a strong union presence, a study looking at how school officials react to incidents of student cyberspeech attacking staff members in those states would be interesting. This type of study could include comparisons of how school officials deal with these incidents in strong union states versus states where unions are not as prevalent.

Gender trends are another issue of potential significance. In other words, the study would involve an exploration of the incidence of student cyberspeech attacking faculty members disaggregated by gender. Males are often the gender that first comes to mind when thinking about bullies. However, females are heavily involved in cyberspeech cases where school staff members are targeted. The study would gather and report data on the amount, type, and severity of the associated school discipline, again, disaggregated by gender.

A look at the types of recourse school officials can take outside of the school to defend against student cyber-attack and the success of those attempts could also prove to be a study worth considering.
A study investigating the use of other judicial decisions, e.g., *Fraser* and *Wisniewski*, and their applicability to off-campus student speech (if any) is another area for future research, as would be further exploration of how *Tinker*’s second prong could pertain.

Legal scholars Karly Zande and Mickey Jett point out *Fraser* and *Hazelwood* 860 called for schools to educate students about appropriate social behavior. 861 Cyberspeech is a form of communication students often abuse as exemplified in the reviewed cases contained in this study. Student use of the internet as a means of communication and a sounding board suggests the need for education on its appropriate use. A study exploring how or if this important area of education is being done in schools would be useful for educators. It just may be that instead of wearing armbands as the students did in *Tinker*, perhaps the internet is today’s most appropriate avenue for students to air their views and criticisms of school procedures and personnel. 862 One educator has even called the internet today’s bathroom wall. 863

Perhaps cases argued since the turn of the century involving student-created websites critical of school officials were really nothing more than those students giving a symbolic middle finger to school staff members. 864 The *Klein* 865 decision supports the stance that giving the finger in the general public is protected speech for everyone. It follows then that maybe when students engage in such acts away from school, including in a restaurant parking lot or in cyberspace, school administrators should make discipline decisions by viewing those acts

862 Wolking, *supra* note 273, at 1530.
864 Calvert, *supra* note 315, at 275. See generally *J.S. v. Bethlehem*, 757 A.2d 412 (Pa. Cmmw. 2000). The Pennsylvania Commonwealth Court described the vulgar content found on J.S.’s website, including comments aimed at the principal which refer to him, among other things, as a “fat f---.” Additionally, the website targeted at least one female teacher, asserting that she should be fired and referring to her as a “stupid b----.”
as if they were committed merely by members of the general public and not by students at school. However, if Klein had taken a picture of the incident and distributed it via email or posted it on a website, and someone brought the picture to school, then it is plausible a nexus to school would have been established and the discipline may have been upheld. This is the quandary facing school administrators who are presented with instances of student cyberspeech attacking school personnel.

866 Calvert, supra note 315, at 276.

Bell v. Itawamba County School Board, 2014 U.S. App. LEXIS 23433 (5th Cir. 2014).


B.H. v. Easton, 725 F. 3d 293 (3rd Cir. 2013).


Boucher v. School Bd. of the Sch. Dist. of Greenfield, 134 F.3d 821 (7th Cir. 1998).


Coy v. Board of Education of the North Canton City Schools, 205 F. 2d 791 (N.D. Ohio 2002).


Doe v. Pulaski Cnty. Special Sch. Dist., 306 F. 3d 616 (8th Cir. 2002).

Doninger v. Niehoff, 642 F.3d 334 (2nd Cir. 2011).

Donovan v. Ritchie, 68 F.3d 14 (1st Cir. 1995).


Fraser v. Bethel School District No. 403, 755 F.2d 1356 (9th Cir. 1985).

Frederick v. Morse, 439 F.3d 1114 (9th Cir. 2006).


Harper v. Poway, 445 F.3d 1166 (9th Cir. 2006).


Kowalski v. Berkeley County Schools, 652 F.3d 565 (4th Cir. 2011).


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


Porter v. Ascension Parish School Board, 393 F.3d 608 (5th Cir. 2004).


Tinker v. Des Moines Independent Community School District, 383 F. 2d 988 (8th Cir. 1967).


Wisniewski v. Board of Education of the Weedsport Central School District, 494 F. 3d 34 (2nd Cir. 2007).

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thelawdictionary.org/material/

thelawdictionary.org/substantial/


APPENDIX A

STATE CYBERBULLYING AND ELECTRONIC HARASSMENT LAWS
# State Cyberbullying and Electronic Harassment Laws

http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf  
July 2013

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<td>Virginia</td>
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<td>Washington</td>
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<td>Yes</td>
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<td>West Virginia</td>
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<tr>
<td>Wisconsin</td>
<td>Yes</td>
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<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Wyoming</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Washington D.C.</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>
APPENDIX B

CASE SUMMARIES
## Case Summaries

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Highest Court to Rule</th>
<th>Fact Summary or Identifier</th>
<th>Benchmarks</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Tinker v. Des Moines</em></td>
<td>1969</td>
<td>U.S. Supreme Ct., 393 U.S. 503</td>
<td>Students wore armbands to school to protest war in Viet Nam. Students were suspended for it.</td>
<td>1. Material and Substantial disruption. 2. Infringe on rights of others. Also, nexus to school.</td>
<td>Decision for STUDENT</td>
</tr>
<tr>
<td><em>Bethel v. Fraser</em></td>
<td>1986</td>
<td>U.S. Supreme Ct., 478 U.S. 675</td>
<td>Student gave sexually explicit speech in front of a captive audience in auditorium at a school sponsored assembly.</td>
<td>School sponsored on-campus speech can be prohibited if it is lewd, vulgar, indecent.</td>
<td>Decision for DISTRICT</td>
</tr>
<tr>
<td><em>Hazelwood v. Kuhlmeier</em></td>
<td>1988</td>
<td>U.S. Supreme Ct., 484 U.S. 260</td>
<td>Principal deleted two pages from student newspaper using his editorial discretion.</td>
<td>Schools can proscribe school sponsored student speech as long as that decision is made for legitimate pedagogical concerns.</td>
<td>Decision for DISTRICT</td>
</tr>
<tr>
<td><em>Morse v. Frederick</em></td>
<td>2007</td>
<td>U.S. Supreme Ct., 551 U.S. 393</td>
<td>Commonly referred to as the “Bong Hits for Jesus” case.</td>
<td>School officials can prohibit student speech at school events which advocates the use of illegal drugs.</td>
<td>Decision for DISTRICT</td>
</tr>
<tr>
<td><em>Thomas v. Board of Education, Granville School District</em></td>
<td>1979</td>
<td>2nd Circuit 607 F. 2d 1043</td>
<td>Student underground newspaper created and distributed off school grounds, contained vulgarities and other inappropriate content.</td>
<td>Tinker. No substantial disruption occurred. The First Amendment does not allow school officials to prohibit what students read or say when they are away from school. But a concurring opinion does leave the “away from school” door open.</td>
<td>Decision for STUDENT</td>
</tr>
<tr>
<td><em>Klein v. Smith</em></td>
<td>1986</td>
<td>Dist. Ct. of Maine 635 F. Supp. 1440</td>
<td>Student gave the finger to a teacher in a restaurant parking lot, off school grounds.</td>
<td>Tinker. The First Amendment protected Klein’s speech off school grounds. His gesture, made off-campus, was not likely to cause a material and substantial disruption on-campus.</td>
<td>Decision for STUDENT</td>
</tr>
<tr>
<td><em>Beussink v. Woodland</em></td>
<td>1998</td>
<td>Eastern District Court of Missouri 30 F. Supp. 2d 1175</td>
<td>Student created a website from home which criticized many things about his school, including staff members.</td>
<td>Tinker. Student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection.</td>
<td>Decision for STUDENT</td>
</tr>
<tr>
<td><em>Emmett v. Kent</em></td>
<td>2000</td>
<td>Western District of WA 92 F. Supp. 2d 1088</td>
<td>Student created a webpage from home which included mock obituaries and took votes for who should “die” next.</td>
<td>Tinker. No disruption occurred in connection to the website.</td>
<td>Decision for STUDENT</td>
</tr>
<tr>
<td>Case</td>
<td>Year</td>
<td>Highest Court to Rule</td>
<td>Fact Summary or Identifier</td>
<td>Benchmarks</td>
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</tr>
<tr>
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</tr>
<tr>
<td><strong>Killion v. Franklin</strong></td>
<td>2001</td>
<td>Western District of PA 136 F. Supp. 2d 446</td>
<td>Student created at home a Top Ten list which was disparaging to the HS AD. Emailed it to friends. Hard copies showed up at school later.</td>
<td><em>Tinker.</em> The court concluded school officials had violated student’s First Amendment rights because no evidence of disruption was produced.</td>
<td>Decision for STUDENT</td>
</tr>
<tr>
<td><strong>J.S. v. Bethlehem</strong></td>
<td>2002</td>
<td>State Supreme Court of PA 569 Pa. 638</td>
<td>Student created webpages titled Teacher Sux.</td>
<td><em>Tinker.</em> School officials had violated student’s First Amendment rights because no evidence of disruption was produced.</td>
<td>Decision for DISTRICT</td>
</tr>
<tr>
<td><strong>Flaherty v. Keystone</strong></td>
<td>2003</td>
<td>Western District of PA 247 F. Supp. 2d 698</td>
<td>Student posted on a website disparaging remarks about a teacher and about an upcoming volleyball opponent.</td>
<td><em>Tinker.</em> No substantial disruption occurred in connection with the student's speech.</td>
<td>Decision for STUDENT</td>
</tr>
<tr>
<td><strong>Porter v. Ascension Parish</strong></td>
<td>2004</td>
<td>5th Circuit 393 F. 3d 608</td>
<td>Student drew a picture of his school being attacked. Two years later, his brother brought the picture to school.</td>
<td><em>Tinker.</em> The speech was not political expression and also constituted a material and substantial interference with the operation of the school. The court also considered whether the speech qualified as a “true threat” but determined it did not.</td>
<td>Decision for DISTRICT</td>
</tr>
<tr>
<td><strong>Wisniewski v. Board of Education</strong></td>
<td>2007</td>
<td>2nd Circuit 494 F. 3d 34</td>
<td>Student created, at home, an AOL instant message icon of a gun shooting one of his teachers in the head.</td>
<td><em>Tinker.</em> The icon caused a reasonably foreseeable disruption to the educational process.</td>
<td>Decision for DISTRICT</td>
</tr>
<tr>
<td><strong>O.Z. v. Board of Education</strong></td>
<td>2008</td>
<td>Central District Court of California U.S. Dist. Lexis 110409</td>
<td>Student posted on YouTube a slide show he created which depicted the murder of one of his teachers.</td>
<td><em>Tinker.</em> Reasonable for school administrators to believe the YouTube post would create a substantial disruption at school.</td>
<td>Decision for DISTRICT</td>
</tr>
<tr>
<td><strong>Evans v. Bayer</strong></td>
<td>2010</td>
<td>Southern District of Florida 684 F. Supp. 2d 1365</td>
<td>Student, from home, created a Facebook group intended as an avenue for people to vent about a teacher.</td>
<td><em>Tinker and Fraser.</em> No substantial disruption and no vulgarity.</td>
<td>Decision for STUDENT</td>
</tr>
<tr>
<td><strong>Doninger v. Niehoff</strong></td>
<td>2011</td>
<td>2nd Circuit 642 F. 3d 334</td>
<td>Student sent a mass email from school urging others to call the school to complain about the cancellation of the Battle of the Bands. Student was denied opportunity to be class officer and to speak at graduation.</td>
<td><em>Tinker, Thomas, and Wisniewski.</em> There were obvious disruptions.</td>
<td>Decision for DISTRICT</td>
</tr>
<tr>
<td>Case</td>
<td>Year</td>
<td>Court to Rule</td>
<td>Fact Summary or Identifier</td>
<td>Benchmarks</td>
<td>Decision</td>
</tr>
<tr>
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<tr>
<td>Layshock v. Hermitage</td>
<td>2011</td>
<td>3rd Circuit 650 F. 3d 205</td>
<td>Student, from his grandmother’s home, designed and posted a MySpace webpage which, using vulgar language, poked fun at his Principal.</td>
<td>Tinker. The First Amendment does not allow school officials to extend their power beyond the schoolyard to impose what might otherwise be appropriate discipline. No significant disruption shown.</td>
<td>Decision for STUDENT</td>
</tr>
<tr>
<td>R.S. v. Minnewaska</td>
<td>2012</td>
<td>District of Minnesota 894 F. Supp. 2d 1128</td>
<td>Student posted on Facebook she hated “Kathy,” a hall monitor at school. Then posted a follow up which included coarse language.</td>
<td>Tinker, Wisniewski, Doe v. Pulaski (citing Watts). The court determined R.S.’s speech to clearly be nonviolent and non-disruptive off campus speech and as such, protected by the First Amendment.</td>
<td>Decision for STUDENT</td>
</tr>
<tr>
<td>Bell v. Itawamba</td>
<td>2014</td>
<td>5th Circuit 2014 U.S. App. LEXIS 23433</td>
<td>Student created off-campus and posted off-campus a song on YouTube and Facebook, which alleged two coaches/teachers behaved inappropriately with female students.</td>
<td>Tinker. No disruption of the school environment in connection with the song was evident.</td>
<td>Decision for STUDENT</td>
</tr>
</tbody>
</table>
APPENDIX C

CASES IDENTIFIED AS ON-CAMPUS OR OFF-CAMPUS
### Cases Identified As On-campus or Off-campus

<table>
<thead>
<tr>
<th>Case</th>
<th>Court</th>
<th>Student Speech Type</th>
<th>Creation Location</th>
<th>Did the Speech Reach School Campus?</th>
<th>Court Considered Speech On or Off-campus?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thomas</td>
<td>2&lt;sup&gt;nd&lt;/sup&gt; Circuit</td>
<td>Newspaper- not school sanctioned</td>
<td>Mostly off-campus, though papers were stored at school and at least some typing took place at school</td>
<td>YES- students brought the papers to school</td>
<td>OFF</td>
</tr>
<tr>
<td>Wisniewski</td>
<td>2&lt;sup&gt;nd&lt;/sup&gt; Circuit</td>
<td>AOL Instant Message</td>
<td>Created the online icon at home</td>
<td>YES- a student printed out a hard copy of the icon and brought it to school</td>
<td>OFF</td>
</tr>
<tr>
<td>Doninger</td>
<td>2&lt;sup&gt;nd&lt;/sup&gt; Circuit</td>
<td>Mass email. Subsequent online webpage created at home.</td>
<td>Email created and sent from school and webpage created at home</td>
<td>YES- emails were sent, student protests took place</td>
<td>OFF</td>
</tr>
<tr>
<td>Blue Mountain</td>
<td>3&lt;sup&gt;rd&lt;/sup&gt; Circuit</td>
<td>MySpace online profile</td>
<td>At student’s grandmother’s home</td>
<td>NO</td>
<td>ON</td>
</tr>
<tr>
<td>Layshock</td>
<td>3&lt;sup&gt;rd&lt;/sup&gt; Circuit</td>
<td>MySpace online profile</td>
<td>At student’s grandmother’s home</td>
<td>YES- the student logged onto the profile at school during the school and showed it to other students</td>
<td>ON</td>
</tr>
<tr>
<td>Porter</td>
<td>5&lt;sup&gt;th&lt;/sup&gt; Circuit</td>
<td>Picture drawn of school being attacked</td>
<td>At home</td>
<td>YES- brother brought it to school two years later</td>
<td>OFF</td>
</tr>
<tr>
<td>Bell</td>
<td>5&lt;sup&gt;th&lt;/sup&gt; Circuit</td>
<td>YouTube and Facebook song postings</td>
<td>Off-campus</td>
<td>NO</td>
<td>OFF</td>
</tr>
<tr>
<td>Killion</td>
<td>W. District of PA</td>
<td>Emailed list to friends</td>
<td>At home</td>
<td>YES- some other student brought hard copies</td>
<td>ON</td>
</tr>
<tr>
<td>Flaherty</td>
<td>W. District of PA</td>
<td>Website posting</td>
<td>From home and from school</td>
<td>NO</td>
<td>OFF</td>
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<tr>
<td>Bethlehem</td>
<td>State Supreme Court of PA</td>
<td>Multiple webpage postings</td>
<td>From home</td>
<td>YES- student accessed it at school and showed it to other students</td>
<td>ON</td>
</tr>
</tbody>
</table>

The speech became on-campus when the student accessed it at school.
<table>
<thead>
<tr>
<th>Case</th>
<th>Court</th>
<th>Student Speech Type</th>
<th>Creation Location</th>
<th>Did the Speech Reach School Campus?</th>
<th>Court Considered Speech On or Off-campus?</th>
</tr>
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<tbody>
<tr>
<td>Klein</td>
<td>District Court of Maine</td>
<td>Student gave the finger to a teacher</td>
<td>Off-campus restaurant parking lot</td>
<td>NO</td>
<td>OFF</td>
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<tr>
<td>Evans</td>
<td>So. Dist. Court of Florida</td>
<td>Facebook postings</td>
<td>At home</td>
<td>NO</td>
<td>OFF</td>
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<tr>
<td>Beussink</td>
<td>E. Dist. Court of MO</td>
<td>Website creation</td>
<td>At home</td>
<td>YES- a friend of the student-creator accessed it at school and showed it to a teacher</td>
<td>ON</td>
</tr>
<tr>
<td>Minnewaska</td>
<td>District Court of MN</td>
<td>Facebook posting</td>
<td>At home</td>
<td>YES- one of the friends which the student-creator allowed access shared it with the Principal</td>
<td>OFF</td>
</tr>
<tr>
<td>Emmett</td>
<td>W. District Court of WA</td>
<td>Webpage</td>
<td>At home</td>
<td>YES- the news media found out about it and ran a story on the television newscast</td>
<td>OFF</td>
</tr>
<tr>
<td>O.Z.</td>
<td>Central Dist Court of CA</td>
<td>YouTube posting</td>
<td>At home</td>
<td>YES- the targeted teacher discovered it during a Google search</td>
<td>OFF</td>
</tr>
</tbody>
</table>
APPENDIX D

NEXUS NOTES
### No Nexus Established - Finding for Student

<table>
<thead>
<tr>
<th>Cases</th>
<th>Nexus Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Thomas</strong></td>
<td>The Second Circuit took the stance that though school officials are responsible for student speech which is expressed at school, they are not allowed by the First Amendment to prohibit what students read or say when they are away from school. As a result, no nexus was established for the student speech which was away from school.</td>
</tr>
<tr>
<td><strong>Klein</strong></td>
<td>The court observed that at the time of the incident, the teacher was not performing any functions as a teacher, the student was not performing any functions as a student, and the off-campus restaurant where the student speech incident transpired was not on school grounds nor was there a school function occurring there. The student, then, was not acting in the capacity of a student but as a non-student or community citizen, enjoying the same free speech rights as an adult. As such, the court found his speech was beyond the reach of school authority. No nexus was thus established.</td>
</tr>
<tr>
<td><strong>Emmett</strong></td>
<td>Since the student’s online expression took place at home after school hours, the court surmised it was beyond the jurisdiction of school administrators. Thus, no nexus was created.</td>
</tr>
<tr>
<td><strong>Flaherty</strong></td>
<td>The district court asserted it was a constitutional violation for school officials “to discipline a student for … expression occurring outside of school premises and [was] not tied to a school related activity.” Thus, no nexus existed.</td>
</tr>
<tr>
<td><strong>Evans</strong></td>
<td>The district court reasoned even though the student targeted a school employee with her Facebook posting, it was not enough to put the expression on-campus. Furthermore, the court observed the online speech was created off-campus, it was never accessed nor brought onto campus, and when its existence came to the attention of school officials, it had already been taken down. As a result, the court did not find a sufficient nexus.</td>
</tr>
<tr>
<td><strong>Blue Mountain</strong></td>
<td>The student speech was created on a personal computer away from school grounds. The speech was not accessed at school because the school district took measures with its computer web filters to prevent students from having the ability to access MySpace. Thus, no nexus was generated.</td>
</tr>
<tr>
<td><strong>Layshock</strong></td>
<td>The Third Circuit asserted school administrators’ reach could not extend into the home of the student’s grandmother and cannot be so long as to extend “into Justin’s [the student’s] grandmother’s home” to impose discipline for what he did there on her computer. So, the court found no nexus.</td>
</tr>
</tbody>
</table>

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867 *Thomas v. Board of Education, Granville Central School District*, 607 F. 2d 1043, 1049 (2d Cir. 1979). Judge Kaufman, in writing the court’s opinion, said school administrators must take care to forbid a couple kinds of student speech. First, “out of regard for fellow students who constitute a captive audience,” and second, “in recognition of the fact that the school has a substantial educational interest in avoiding the impression that it has authorized a specific expression.” Both of these reasons are instructive because the language is nearly identical to the foundation of the Supreme Court’s argument seven years later in deciding *Fraser* and nine years later in its *Hazelwood* finding.

868 Id. at 1051.


870 Calvert, supra note 315, at 271.


873 Id. at 1372.

874 Id.


| Minnewaska      | The court determined R.S.’s Internet postings to be undoubtedly nonviolent and non-disruptive off-campus speech and as such, no nexus was formed.  
Bell            | The Fifth Circuit court affirmed the student Internet rap song did not lead to any classes being disturbed nor was there any upheaval or disorderly conduct at school. Moreover, the court determined the song was completely created and posted to the Internet off-campus. Because school Internet filters blocked Facebook and since student possession of cell phones was forbidden by school rules, the possibility of accessing the rap song on-campus was greatly reduced. Thus, no nexus existed. |

| Nexus Established - Finding for School District |

| Bethlehem       | The Pennsylvania Supreme Court opined that just because student speech occurs away from the school setting does not mean it is exempt from disciplinary action taken by school administrators. The court discovered the school community became aware of the webpage at least in part because J.S. publicized its existence by accessing it while at school and showing it to other students. These actions created a nexus. |

| Porter          | The student expression was student drawings of the school being attacked. Though the student did not intend for the drawings to come onto school grounds, a third party, his brother, brought them on-campus. These two facts created a nexus. |

| Wisniewski      | The Second Circuit determined it was reasonably foreseeable that the student’s online expression would at some point become known to school staff members, including its target, his teacher. And once the icon did become common knowledge at school, a foreseeable risk of substantial disruption at school was manifest, thus creating the nexus. |

| O.Z.            | The district court did not believe that O.Z. was immune to school discipline just because she created and posted the slide show away from school. The teacher who was targeted by the YouTube video discovered it after a simple Google search, and she was severely affected by its contents. Thus, a nexus was created. |

| Doninger        | The student stirred up students and parents about a perceived injustice by posting a web blog and sending a mass email, encouraging people to deluge the school administration offices with phone calls and emails. When, in response to the student’s communication, the school office was inundated with phone calls and many students missed class to attend a protest rally, the nexus was formed. |

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878 Id. at 39.
879 Id. at 45.
881 Id. at 645.
882 Wisniewski v. Board of Education of the Weedsport Central School District, 494 F. 3d 34, 39 (2nd Cir. 2007).
883 Id. at 40.
885 Doninger v. Niehoff, 642 F.3d 334, 349 (2nd Cir. 2011).


<table>
<thead>
<tr>
<th>Nexus Established- Finding for Student</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Beussink</strong></td>
</tr>
<tr>
<td><strong>Killion</strong></td>
</tr>
</tbody>
</table>