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Can Students Be Disciplined for Off-campus Cyberspeech: The Reach of the First Amendment in the Age of Technology

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CAN STUDENTS BE DISCIPLINED FOR OFF-CAMPUS CYBERSPEECH?: THE REACH OF THE FIRST AMENDMENT IN THE AGE OF TECHNOLOGY

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I. INTRODUCTION

The widespread use of technology in today's schools has ushered in a host of legal issues that educators and parents could not have contemplated just a few years ago. Within the past decade, students have had the unprecedented ability to send text messages and instant messages, create websites, post blogs, construct Internet profiles, and post messages on burgeoning social networking sites, most notably Facebook.[1] Even when students engage in such speech-related activity off campus using their personal computers, their actions and posts on such social networking sites as MySpace and Facebook can have carryover effects into school and classroom environments.[2]

The question of whether educational administrators can discipline students for Internet postings made off campus has been controversial, as evidenced by four recent decisions: a pair from the Third Circuit[3] and single cases from the Fourth and Eighth Circuits. The issue in these cases, which reached different outcomes, revolved around the reach of such postings into the school setting and how they affected the safe and efficient operation of the schools. Given the nature of the

1. *See, e.g.*, Mike Swift, *Facebook Mobile to Roll Out Brand Ads; Strategy Will Feature Sponsored Stories to Link Users, Companies*, SAN JOSE MERCURY NEWS (Cal.), Mar. 1, 2012, at 1D (noting that Facebook now has 850 million users). This is incredible growth considering that Facebook was "born" on February 4, 2004. *Facebook's Timeline*, USA TODAY, Feb. 12, 2012, at 3B.

2. For commentary on this issue, see Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 BYU. EDUC. & L.J. 123 (2000).

3. Martha McCarthy, *Cyberspeech Controversies in the Third Circuit*, 258 EDUC. L. REP. 1 (2011). Kathleen Conn, *The Third Circuit En Banc Decisions on Out-of-School Student Speech: Analysis and Recommendations*, 270 EDUC. L. REP. 389 (2011).

Internet, this is no easy question and presents school administrators with First Amendment issues never before contemplated.

As these recent appellate court decisions illustrate, educational administrators are rightfully concerned when students post negative comments about school personnel or peers on the Internet for all to see. Litigation has arisen when school officials have disciplined students for derogatory, defamatory, lewd, and threatening items students have posted about teachers, administrators, and classmates on social networking sites such as MySpace and Facebook. In challenging the disciplinary sanctions imposed on them, students have alleged that punishments, such as suspensions or loss of privileges, amount to unconstitutional censorship and have questioned the rights of administrators to impose discipline for off-campus activities.[4]

This Article begins by exploring the First Amendment free-speech protections afforded to students, along with earlier cases dealing with issues concerning their being disciplined for online postings and cyber threats. The Article next reviews the facts, judicial history, and latest opinions in the four most recent Circuit court cases involving online postings targeted at both school administrators and students. Finally, the Article examines the abilities of school administrators to discipline students for making derogatory and false statements about school personnel or other students via the Internet or other technology, concluding with a discussion about the wisdom of these decisions and recommendations for school administrators. It is important to recognize that the judicial opinions, and thus the focus of this article, are concerned only with the right of school administrators to discipline students for off-campus postings. This Article does not venture into the area of what other recourse educators have to protect themselves against the possible defamatory and damaging effects of false postings.

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4. ALLAN G. OSBORNE & CHARLES J. RUSSO, THE LEGAL RIGHTS AND RESPONSIBILITIES OF TEACHERS (2011).

II. BACKGROUND

In determining whether students can be disciplined for off-campus conduct involving the use of cyberspace, courts first need to ascertain whether the social networking or cyber posts in question are protected speech. In doing so, the judiciary turns to a line of United States Supreme Court cases on student speech in general. As with speech in more traditional educational contexts, an important factor that courts examine is whether Internet postings caused, or had a reasonable potential to cause, substantial disruptions in schools.[5]

The First Amendment includes some of the basic rights guaranteed to all individuals in the United States. Accordingly, it has been the focus of much litigation in education, involving not only the rights of students, but also those of teachers.[6] Even though the language of the First Amendment applies to Congress, it has been extended to the states via the Fourteenth Amendment.[7] The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."[8]

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5. For a discussion of related issues, see Ronald D. Wenkart, *Disruptive Student Speech and the First Amendment: How Disruptive Does it Have to Be?*, 236 EDUC. L. REP. 551 (2008).

6. For examples of cases involving teachers' First Amendment rights, see Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979); Connick v. Myers, 461 U.S. 138 (1983); Garcetti v. Ceballos, 547 U.S. 410 (2006). For discussions of these issues, see Charles J. Russo, *Social Networking Sites and the Free Speech Rights of School Employees*, 75 SCH. BUS. AFFAIRS 38 (Apr. 2009); Ralph D. Mawdsley & Allan G. Osborne, *The Supreme Court Provides New Direction for Employee Free Speech in* Garcetti v. Ceballos, 214 EDUC. L. REP. 457-465 (2007).

7. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940) (invalidating the convictions of Jehovah's Witnesses who violated a state statute against soliciting funds for religious, charitable, or philanthropic purposes unless they had the prior approval of public officials). *But see* Barron v. Mayor & City Council of Baltimore, 32 U.S. 7 (1833) (holding that the Bill of Rights was inapplicable to the states since its history revealed that it was limited to the federal government).

8. U.S. CONST. amend. I.

III. SUPREME COURT DECISIONS ON STUDENTS' FREE SPEECH RIGHTS

The Supreme Court's 1969 ruling in *Tinker v. Des Moines Independent Community School District*[9] recognized and established that students are persons under the United States Constitution and have free speech rights protected by the First Amendment. Even though the Court drew back on the sweeping protections it afforded students, *Tinker* stands out as the first of four Supreme Court cases in which the Justices addressed students' free speech rights. *Tinker* thus set the standard by which all courts begin their analysis in determining whether students can be disciplined for expressions either on or off campus. In its three subsequent cases on student expression, *Bethel School District No. 403 v. Fraser*,[10] *Hazelwood School District v. Kuhlmeier*,[11] and *Morse v. Frederick*,[12] the Court refined, and arguably narrowed, the protections it established in *Tinker*, but left its basic holding unaltered.

A. Schenck v. United States

Prior to reviewing the four cases on students' free speech rights, it may be helpful at this juncture to examine the government's ability to limit free speech in general. The Supreme Court has essentially fashioned two standards addressing state-imposed limits on free speech. In *Schenck v. United States*,[13] a dispute involving national security during the World War I era, the Court maintained that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[14] In so doing, the Court enunciated the so-called "clear and present danger" test, contending that "[t]he question . . . is whether the words used are used in such circumstances and are of such a

9. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
10. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
11. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
12. Morse v. Frederick, 551 U.S. 393 (2007).
13. Schenck v. United States, 249 U.S. 47 (1919).
14. *Id.* at 52.

nature as to create a clear and present danger . . . ."[15] Thus, the clear and present danger test requires more than the possibility of disruption in order for free speech to be curtailed. Speech cannot be limited unless there is an explicit concern that serious harm to the public welfare may follow. However, recognizing that the clear and present danger test was not entirely appropriate for use in schools, the Court created a different measure for schools in *Tinker* by stating that students' free speech could be curtailed only if it caused material and substantial disruptions in schools. Before *Tinker*, when students challenged school administrators' exercise of control over disruptive expressive activity, courts typically deferred to school administrators' judgment. For example, an appellate court in California upheld a student's expulsion for refusing to apologize for making critical statements about a school facility during a speech at a school assembly.[16]

B. Tinker v. Des Moines Independent Community School District

The Supreme Court decided *Tinker* amid the social and political upheaval of the 1960s. In its first case on an issue directly related to student expression, the Court invalidated the policy of a school board in Iowa prohibiting students from wearing black armbands to school in protest of the United States' involvement in Vietnam. Stating that "[i]t [could] hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[17] the Court attempted to balance the rights of students against the recognized needs of educators to preserve order and discipline in schools. The Court saw the dispute as one "involv[ing] direct, primary First Amendment rights akin to 'pure speech,'"[18] rather than one "concern[ing] speech or action that intrudes upon the work of the schools or the rights of other students."[19] In order to prohibit students from expressing particular points of view, the Court was

15. *Id.*
16. Wooster v. Sunderland, 148 P. 959 (Cal. Dist. Ct. App. 1915).
17. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
18. *Id.* at 508.
19. *Id.*

convinced that school officials must be able to show that their actions were motivated by

> something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.[20]

Hence, the Court declared that disciplining students for expression violates the First Amendment unless school authorities can show that either a material or substantial disruption occurred or that the potential for disruption was reasonably foreseeable.[21]

C. Bethel School District No. 403 v. Fraser

Seventeen years after *Tinker*, the Supreme Court examined the limits of student expression in *Fraser*, a dispute in Washington involving a student who delivered a lewd speech at a school assembly nominating a friend for student council prior to elections.[22] The speech was laced with elaborate, graphic, and explicit sexual metaphors, but did not contain any explicit profanity.[23] Not surprisingly, the speech caused a substantial disruption because some students in the audience responded boisterously while others seemed embarrassed.[24] The student, who ignored warnings from two educators not to deliver the speech, was suspended for three days for violating the school's rule prohibiting obscene and profane language.[25]

In reversing the Ninth Circuit's ruling in favor of the student, the Supreme Court held that school officials are not prohibited from disciplining students for offensively lewd or

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20. *Id.* at 509 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

21. For a recent commentary on *Tinker* and its progeny, see Perry A. Zirkel, *The Rocket's Red Glare: The Largely Errant and Deflected Flight of* Tinker, 38 J.L. & EDUC. 593 (2009).

22. For a representative commentary, see David Schimmel, *Lewd Language Not Protected:* Bethel School District v. Fraser, 23 EDUC. L. REP. 999 (1986).

23. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678 (1986).

24. *Id.*

25. *Id.*

indecent speech under the First Amendment.[26] The Court reasoned that school administrators were justified in disciplining the student for violating school rules because he delivered the speech after being advised not to do so.[27] The Court distinguished the speech in *Fraser* from that in *Tinker*, where the armbands were a passive, non-disruptive expression of a political position, rather than a lewd and obscene speech incident to a student election lacking in political viewpoint and delivered to an unsuspecting captive audience.[28] Recognizing the duty of school personnel to inculcate habits and manners of civility while teaching students the boundaries of socially appropriate behavior, the Court insisted that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[29]

D. Hazelwood School District v. Kuhlmeier

In *Kuhlmeier*, the Supreme Court addressed an issue involving school officials' control over school-sponsored publications.[30] *Kuhlmeier* arose in Missouri when a high school principal deleted two articles—one on teenage pregnancy and the other about the divorce of a student's father—from a newspaper written and edited by students in a journalism class.[31] The Eighth Circuit had held that the student newspaper was a public forum for First Amendment purposes and that school officials were not justified in censoring the articles.[32]

Acknowledging that the newspaper was not an open forum either by policy or past practice, the Court agreed that the principal acted reasonably in light of factors such as the possible identification of unnamed pregnant students,

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26. *Id.* at 685.

27. *Id.*

28. *Fraser*, 478 U.S. at 684.

29. *Id.* at 683.

30. For a representative commentary, see David Schimmel, *Censorship of School-Sponsored Publications:* Hazelwood v. Kuhlmeier, 45 EDUC. L. REP. 941 (1988).

31. Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1988), *remanded to* 840 F.2d 596 (8th Cir. 1988).

32. *Id.* at 1375.

references to sexual activity and birth control that were inappropriate for some of the school's younger students, and a student's unilateral criticism of her father.[33]

The Court distinguished *Kuhlmeier* from *Tinker* by stating that the issue was not so much the right of students to speak as it was the duty of school personnel to not promote particular student speech.[34] In this respect, the Court recognized the authority of school administrators over school-sponsored publications, theatrical productions, and other expressive activities that could reasonably be perceived to bear a school's imprimatur.[35] In a split decision, the Court was satisfied that the First Amendment is not violated when school personnel exercise editorial control over the substance of school-sponsored expressive activities if their actions are reasonably related to valid educational objectives.[36]

In its analysis, the Supreme Court reviewed different categories that it demarcated for free speech. The Court noted that governmental power to regulate expression is most restricted on public property such as parks, streets, and sidewalks. According to the Court, the government may bar speakers from traditional public fora only when necessary to serve compelling state interests and only when doing so by the least restrictive means available.[37] The Court added that narrowly tailored, content-neutral regulations as to time, place, and manner of expression can be enforced, but only if the governmental interest is significant and alternative channels of communication are open.[38] Conceding that the public school setting is a special context for First Amendment purposes, the Court wrote that school personnel do not need to allow student speech that is inconsistent with the school's basic educational mission when that speech is sponsored by the school or is part of its curriculum.[39] Further, the Court made a distinction between the forum in *Fraser* and situations where school

33. *Kuhlmeier*, 484 U.S. at 274.
34. *Id.* at 271.
35. *Id.* at 281.
36. *Id.* at 260.
37. *Id.* at 267.
38. *Id.* at 267.
39. *Kuhlmeier*, 484 U.S. at 266.

facilities and media are open for use by the general public, including student organizations.[40]

E. Morse v. Frederick

In its latest student First Amendment case, the Supreme Court further refined the free speech rights of students attending school-supervised events.[41] *Morse* arose when a high school principal suspended a student for displaying a banner while he was watching an Olympic Torch parade near his school in Juneau, Alaska.[42] The principal allowed students and staff supervising the event to leave class to watch the parade as an approved social activity.[43] One student was disciplined because he created, displayed, and refused to take down a large banner which read "BONG HiTS 4 JESUS," which the principal interpreted as advocating illegal drug use.[44] When the student challenged his suspension, the federal trial court in Alaska granted the school board's motion for summary judgment, but the Ninth Circuit reversed in his favor.[45]

On appeal, the Supreme Court reversed the decision and rejected the student's claim that he was not engaged in school speech, noting that the event was sufficiently associated with the school.[46] In finding that the principal's interpretation that the banner could be perceived as promoting illegal drug use was reasonable, the Court relied on *Tinker*, *Fraser*, and *Kuhlmeier* in conducting a two-part analysis.[47] First, the Court observed that students' free speech rights must be viewed in light of the "special characteristics" existing in a school environment.[48] Next, the Court ruled that *Tinker* is neither absolute nor the only basis on which student speech can be

40. *Id.* at 267.

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

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 408. For representative commentary on *Morse*, see Charles J. Russo, *Supreme Court Update: The Free Speech Rights of Students in the United States Post* Morse v. Frederick, 19 EDUC. & L. 245 (2007); John Dayton & Ann Proffitt Dupre, *Morse Code: How School Speech Takes a ("Bong") Hit*, 233 EDUC. L. REP. 503 (2008).

47. *Morse*, 551 U.S. at 408.

48. *Id.*

restricted.[49]

Noting that its own Fourth Amendment jurisprudence understood the important, and perhaps even compelling, interest of educators to deter student drug use, the Supreme Court ascertained that the principal acted properly in disciplining the student for displaying the banner.[50] However, the Court did reject the school board's argument that the principal could have banned the banner under *Fraser*'s "plainly offensive" standard, reasoning that doing so would grant school officials too much authority.[51] The Court instead decided that the principal acted out of the school's legitimate concern of preventing the student from promoting illegal drug use.[52]

IV. EARLY DECISIONS REGARDING STUDENT CYBERSPEECH

With technology playing an increasingly larger role in both schools and the lives of students, it was inevitable that litigation involving cyberspeech would arise. As often occurs when new issues arise, court decisions produce different outcomes depending on the particular facts of the various cases. As can be expected, students have frequently challenged disciplinary sanctions for their cyberspeech on First Amendment grounds.[53]

A. Discipline Upheld When Cyberspeech Creates Disruptions

In an early case dealing directly with the issue of student cyberspeech directed toward school personnel, the Supreme Court of Pennsylvania upheld the expulsion of a student who posted negative comments about teachers and suggested that the principal had engaged in sex with another administrator.[54] The record revealed that the student went so far as to solicit funds to help pay for a hit man after listing reasons why a

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49. *Id.* at 405.

50. *Id.* at 407, 409-10.

51. *Id.* at 408.

52. *Id.* at 410.

53. For a representative commentary, see Duffy B. Trager, *New Tricks for Old Dogs: The* Tinker *Standard Applied to Cyber-Bullying*, 38 J.L. & EDUC. 553 (2009).

54. J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412 (Pa. Commw. Ct. 2000).

named teacher should die.[55] While the court recognized that the student's comments were sophomoric and never constituted a real threat, it supported the school board's decision since the postings resulted in an actual disruption of the educational process.[56] The teacher who was the target of the solicitations to hire the hit man was so distraught by the threats made in the postings that she took a medical leave of absence because she suffered severe anxiety after viewing the website.[57] Substitute teachers were hired to replace the teacher during the duration of her leave, causing a disruption of the educational process for her students.[58]

In two separate decisions, the Second Circuit held that school administrators could discipline students for Internet postings that caused, or had the potential to cause, disruptions in their respective schools.[59] In the first case, the court affirmed the long-term suspension of a middle-school student from New York who created a drawing and text on the Internet suggesting that a named teacher should be shot and killed.[60] Even though a criminal investigation and a psychological evaluation of the student indicated that his actions never posed a real threat, school officials suspended him after a hearing officer found that his postings disrupted the school environment.[61] The court was convinced that the student's postings constituted a threat that crossed the boundary of acceptable free speech and therefore was not protected.[62]

In the second case, the Second Circuit upheld the Connecticut federal trial court's denial of a student's request for a preliminary injunction to void disciplinary action taken against her for posting a vulgar message on her website urging others to contact the Superintendent of Schools to protest her

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55. *Id.* at 416.

56. *Id.* at 425.

57. *Id.* at 420.

58. *Id.* at 417.

59. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007); Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008), *cert. denied*, 2011 WL 3204853 (Oct. 31, 2011).

60. *Wisniewski*, 494 F.3d at 34.

61. *Id.* at 36-37.

62. *Id.* at 38-39.

cancellation of a school activity.[63] The student's purpose in posting the comments was to anger the Superintendent.[64] The court ruled that the student failed to show a likelihood of success on the merits inasmuch as her conduct "created a foreseeable risk of substantial disruption to the work and discipline of the school."[65] Although the student's request for an injunction was since mooted by her graduation, she again filed suit seeking damages.[66] The trial court subsequently denied her motion for summary judgment, concluding that her First Amendment rights were not violated when she was prohibited from running for class office because her off-campus posting was clearly intended to come on to campus and influence other students.[67] In the alternative, the court determined, and the Second Circuit affirmed, that insofar as any First Amendment rights that the student claimed were not clearly established at the time of the alleged violation, the school officials were entitled to qualified immunity.[68] The court saw no need to reach the question of whether the student's First Amendment rights had actually been violated when school officials prohibited her from running for class office.

A federal trial court in Tennessee upheld the suspension of students who created fake profiles of school personnel suggesting that the targeted individuals engaged in inappropriate behavior with students.[69] The court stated that the profiles were not parodies protected under the First Amendment inasmuch as visitors to the websites could believe that the profiles were authentic.[70]

In an interesting case illustrative of the importance of having explicit policies in place to regulate student conduct, a federal trial court in Ohio agreed that school officials did not violate a student's First Amendment rights by suspending him

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63. *Doninger*, 527 F.3d at 41.

64. *Id.* at 45.

65. *Id.* at 53.

66. Doninger v. Niehoff, 594 F. Supp. 2d 211 (D. Conn. 2009), 642 F.3d 334 (2d Cir. 2011), *cert. denied*, 2011 WL 3204853 (Oct. 31, 2011).

67. *Id.* at 221.

68. *Id.* at 224.

69. Barnett v. Tipton Cnty. Bd. of Educ., 601 F. Supp. 2d 980 (W.D. Tenn. 2009).

70. *Id.* at 984.

for accessing an unauthorized website on school computers.[71] The student created the website, which contained pictures of classmates labeled as losers with lewd captions, on his home computer, but then accessed the site in the school's computer lab.[72] The student was suspended for violating the school's code, which prohibited accessing such sites on school computers.[73]

B. Discipline Not Upheld Absent Disruptions

School authorities have not succeeded in disciplining students for Internet postings when they have failed to show that the offensive material caused a disruption to the educational process. In an illustrative Missouri case, a federal trial court ruled for a student who posted vulgar and insulting comments critical of the school, its administration, and its teachers.[74] Finding no evidence of actual or potential disruption to the school, the court remarked that the fact that school officials disliked or were upset by the content of the posting was insufficient grounds for limiting the student's speech by suspending him for ten days.[75] In another case, a principal suspended a student for violating school rules regarding cyberbullying and harassment of a staff member after the student created a group on Facebook and encouraged her peers to express dislike of a named teacher.[76] A federal trial court in Florida asserted that the posting fell within the umbrella of protected speech, observing that it expressed an opinion about a teacher, but did not cause a disruption and was not lewd, vulgar, or threatening.[77]

For the most part, courts have not upheld disciplinary actions when educational officials are unable to show that student cyberspeech—created off campus on home computers

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71. Coy v. Bd. of Educ. of N. Canton City Schs., 205 F. Supp. 2d 791 (N.D. Ohio 2002).

72. *Id.*

73. *Id.*

74. Beussink *ex rel.* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

75. *Id.* at 1180.

76. Evans v. Bayer, 684 F. Supp. 2d 1365, 1367 (S.D. Fla. 2010).

77. *Id.* at 1374.

or personal devices—reached into school settings to cause material and substantial disruptions. In this regard, a federal trial court in Michigan found that a student's suspension for contributing objectionable material to a website violated his First Amendment free speech rights in the absence of evidence that his postings either caused a disruption in the school or were created using a school computer.[78] Similarly, a federal trial court in Pennsylvania held that school officials exceeded their authority by disciplining a student who had sent e-mails from his home computer ridiculing the athletic director.[79] Even though the e-mails were lewd and vulgar, given the fact that they were not created in school, the court reasoned that administrators could not suspend the student in the absence of evidence that it caused a disruption.[80]

Another case from Pennsylvania further highlights the importance of having specific policies to guide administrators in disciplining students for engaging in any form of expression. A student who had been disciplined for taking part in an online conversation challenged various aspects of the student handbook as being unconstitutionally overbroad and vague.[81] In ruling for the student, the federal trial court stated that terms such as "abuse," "offend," "harassment," and "inappropriate" were vague in that they were not further defined.[82] In addition, the court insisted that the school's policies were vague in their application and interpretation, which could lead to arbitrary enforcement.[83] The court also agreed with the student's contention that the student

78. Mahaffey v. Aldrick, 236 F. Supp. 2d 779 (E.D. Mich. 2002). *See also* J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1125-26 (S.D. Cal. 2010) (ruling that school officials lacked the authority to suspend a student who had posted a video clip on YouTube since it was created off campus and did not result in a substantial disruption to the school environment).

79. Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001).

80. *Id.* at 454. *See also* Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088 (W.D. Pa. 2000) (granting a temporary restraining order to prevent suspension of a student for speech that was created entirely outside of the school's supervision and control, even though the intended audience was connected to the school).

81. Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 2d 698 (W.D. Pa. 2003).

82. *Id.* at 706. *See also Killion* , 136 F. Supp. 2d at 446 (ruling that school district's policies against abuse of teachers and administrators was unconstitutionally overbroad and vague).

83. *Killion*, 136 F. Supp. 2d at 446.

handbook was unconstitutionally overbroad and vague to the extent that it failed to geographically limit school officials' authority to discipline expression that occurred on school property or at school functions.[84]

Courts have closely examined situations where student speech, whether spoken verbally[85] or electronically through cyberspeech,[86] has been critical of school officials' actions or school boards' policies when those criticisms have been expressed in vulgar terms. For example, the Supreme Court of Indiana invalidated a student's delinquency adjudication for posting vulgar remarks about her school's rules banning body piercings, holding that the student engaged in protected speech that criticized a governmental action and that there was insufficient evidence of any intent to harass, annoy, or alarm her middle-school principal.[87]

V. RECENT CIRCUIT COURT CASES ON STUDENT CYBERSPEECH

As the above discussion indicates, courts have issued seemingly conflicting opinions on school administrators' abilities to control cyberspeech, especially when that speech originated off campus. In these decisions, courts have attempted to balance students' First Amendments rights with administrators' obligations to maintain safe, orderly schools. Even so, the result has left school officials with little guidance regarding the extent to which they can regulate student speech created using today's technology. Recently, three circuits issued four decisions that have shed new light on the controversy. Although three of these four decisions were appealed to the Supreme Court, the Justices denied certiorari in all

84. *Id.*

85. Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990) (affirming that officials in Tennessee could discipline a candidate for the position of president of the student council for making a speech at an election assembly that was disrespectful of school authorities since it included discourteous and rude remarks).

86. *See, e.g.*, Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008), *cert. denied*, 132 S. Ct. 499 (2011) (affirming that educational officials could prohibit a student from running for class office because of vulgar comments that she made about administrators on her blog).

87. A.B. v. State of Indiana, 885 N.E.2d 1223 (Ind. 2008).

instances.[88]

A. Third Circuit: Layshock v. Hermitage School District

The dispute in *Layshock v. Hermitage School District*[89] began when a high school student created a false, unflattering profile of his school principal on a social networking site.[90] The student created the profile using his grandmother's home computer during non-school hours.[91] In creating the profile, the student used a picture of the principal that he copied from the school's website.[92] The student gave access to the profile to several of his classmates, and soon much of the student body became aware of the profile.[93] At one point, the student also accessed the profile on a school computer and showed it to some of his classmates.[94] Following an investigation, school officials suspended the student for ten days, placed him in an alternative curriculum program, banned him from attendance and participation in extracurricular activities, and barred him from participating in his high school graduation ceremony.[95] The student and his parents filed suit seeking, inter alia, a temporary restraining order or preliminary injunction to prevent imposition of the penalties.[96] In their suit, the plaintiffs alleged that the disciplinary actions imposed by the school officials violated the student's rights under the First Amendment.[97]

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88. Blue Mountain Sch. Dist. v. J.S. *ex rel.* Snyder, 132 S. Ct. 1097 (2012) (denying certiorari for *Snyder* and *Layshock v. Hermitage School District*); Kowalski v. Berkeley Cnty. Schs., 132 S. Ct. 1095 (2012).

89. Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007), *reh'g en banc granted and opinion vacated*, 593 F.3d 249 (3d Cir. 2010), *aff'd*, 650 F.3d 205 (3d Cir. 2011), *cert. denied sub nom. Snyder*, 132 S. Ct. 1097 (2012).

90. Layshock v. Hermitage Sch. Dist., 412 F. Supp. 2d 502, 504 (W.D. Pa. 2006) (denying plaintiffs' motion for temporary restraining order). For a commentary of such profiles, see Kevin P. Brady, *Student-Created Fake Online Profiles Using Social Networking Websites: Protected Online Speech Parodies or Defamation*, 244 EDUC. L. REP. 907 (2009).

91. *Layshock*, 412 F. Supp. 2d at 502.

92. *Id.* at 505.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 505-06.

97. *Layshock*, 412 F. Supp. 2d at 505-06.

1. Initial Trial Court Decision: Denial of Injunctive Relief

Following a hearing on the motion for a preliminary injunction, a federal trial court in Pennsylvania agreed that the educators were justified in disciplining the student.[98] In denying the student's request for a temporary restraining order, the court was satisfied that school authorities had presented sufficient evidence that the posting created a material and substantial disruption of the school.[99] Specifically, the record revealed that students accessed the website so frequently on school computers that officials had to shut down the school's computer system for several days, causing the cancellation of some computer classes and limiting student use of computers for school assignments.[100] Further, the school's technology coordinator was required to devote considerable time to dealing with the situation and installing additional firewall protections.[101] The court also did not find that the student would suffer irreparable harm if it did not intervene in his behalf.[102]

2. Trial Court Decision on the Merits

Following a trial with a more fully developed record, the court granted the plaintiffs' motion for summary judgment on their First Amendment claims.[103] The court acknowledged the difficulty in establishing the school's boundaries for First Amendment purposes.[104] The court observed that the "mere fact that the Internet may be accessed at school" does not give school officials the authority to discipline students for off-

98. *Id.* at 508-09.

99. *Id.*

100. *Id.* at 507-08. For cases where students were disciplined for "hacking" into the computer systems of their schools, see Harris *ex rel.* Harris v. Pontotoc Cnty. Sch. Dist., 635 F.3d 685 (5th Cir. 2011); M.T. v. Cent. York Sch. Dist., 937 A.2d 538 (Pa. Commw. Ct. 2007), *appeal denied*, 951 A.2d 1168 (Pa. 2008).

101. *Layshock*, 412 F. Supp. 2d at 508.

102. *Id.*

103. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007). The court also granted the school board's motion for summary judgment on the plaintiffs' Fourteenth Amendment due process claims. However, since the plaintiffs did not appeal this decision during the rehearing, it is beyond the scope of this commentary.

104. *Id.* at 595-96.

campus actions such as occurred in this case.[105] Thus, relying on the Supreme Court's student speech decisions, the trial court held that, in order to discipline students for off-campus speech, school administrators need to show a connection between the speech and the material and substantial disruption, either actual or potential, of the educational setting.[106] However, the court made it clear that any assertions of potential disruption on the part of school personnel must be well-founded.[107]

After reviewing the record and hearing further testimony, the court changed its position regarding the school administrators' claims that the student's actions created a substantial disruption to the educational process.[108] This time around, the court determined that the disruption was not so substantial as to warrant curtailment of the student's free speech rights.[109] The court found that even in the light most favorable to the school officials, the plaintiffs failed to establish a sufficient causal nexus between the student's off-campus actions and any disruption to the school.[110] Specifically, the court pointed to the fact that other false profiles of the principal had been created during the same time period, and it was not clear that this student's profile was the one responsible for the alleged disruption.[111] Further, the court noted that the actual disruption was minimal in that no classes had been cancelled and no widespread disorder occurred.[112]

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105. *Id.* at 597.

106. *Id.* at 599-600.

107. *Id.* at 597.

108. *Id.* at 600.

109. *Layshock*, 496 F. Supp. 2d at 600.

110. *Id.*

111. *Id.* Although three other false profiles of the principal had been created, none of those students was disciplined, presumably because school officials never learned the identities of their creators.

112. *Id.* In the trial court's initial decision it stated that the school's shut-down of the computer system "caused the cancellation of several classes and interfered with students' ability to use the computers for their school-intended purposes." Layshock v. Hermitage Sch. Dist., 412 F. Supp. 2d 502, 508 (W.D. Pa. 2006). In the Third Circuit's review of the facts, it states that "[c]omputer programming classes were also cancelled." Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 209 (3d Cir. 2011). The reason for the discrepancy between these statements and the court's finding here that no classes were cancelled is unclear.

3. Third Circuit Decisions[113]

Upon further review, a panel of the Third Circuit affirmed that the suspension violated the student's free speech rights, since his posting did not result in a foreseeable or substantial disruption of the school.[114] The court later vacated that decision and granted a rehearing en banc in light of a seemingly contrary decision issued by another panel of the Third Circuit, discussed later in this commentary.[115] Following the rehearing, the full Third Circuit unanimously affirmed the trial court's ruling.[116]

In its appeal, the school board did not challenge the trial court's finding that a substantial disruption of the school environment had not occurred.[117] Rather, the board claimed that it had the authority to discipline the student because he "entered" school property by accessing the school's website and copying a picture of the principal to use in his false profile, his speech was aimed at the school community, and it was reasonable to assume that the profile would come to the attention of school authorities.[118] The court, however, was not persuaded by the board's arguments.

The court stated that because the school board conceded that the false profile did not cause a disruption, under the First Amendment, school officials could not stretch their authority into the home of the student's grandmother and reach him "while he [was] sitting at her computer after school in order to punish him for the expressive conduct that he engaged in there."[119] The court recognized that in today's world, "*Tinker*'s 'schoolhouse gate' is not constructed solely of the bricks and mortar surrounding the school yard."[120] To this end, the court posited that "[i]t would be an unseemly and dangerous precedent to allow . . . school authorities[] to reach into a child's

113. Since the Third Circuit's two decisions are almost identical, only the en banc opinion is reviewed here.

114. Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 263 (3d Cir. 2010).

115. *Id.*

116. *Layshock*, 650 F.3d at 205.

117. *Id.* at 214.

118. *Id.*

119. *Id.* at 216.

120. *Id.*

home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities."[121] The court did not find that the student's use of the school website to appropriate a picture of the principal amounted to entering the school.[122] The court also rejected the notion that the profile was aimed at the school community and would come to the attention of school personnel as the school board claimed.[123] Thus, the court affirmed the trial court's ruling that the school's response to the student's expressive actions violated his First Amendment guarantee of free expression.[124]

Much of the school board's appeal rested on its allegations that the student's speech was vulgar, lewd, and offensive and therefore unprotected under *Fraser*.[125] Again, the court rebuffed the board's argument under the circumstances of this case.[126] The court noted that school authorities may punish students for expressive conduct that occurs outside of school only under very limited circumstances, such as when it causes or has the potential to cause a disruption at school.[127] Since the board conceded that no disruption occurred within the school, the court ruled that school authorities were not empowered to discipline the student for his off-campus expressions.[128]

B. Third Circuit: J.S. ex rel. Snyder v. Blue Mountain School District

A second dispute, *J.S. ex rel. Snyder v. Blue Mountain School District*,[129] arose in Pennsylvania when an eighth-grade honor-roll student created a false profile of her middle-school

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121. *Id.*

122. *Layshock*, 650 F.3d at 219.

123. *Id.* at 216.

124. *Id* at 219.

125. *Id.* at 216.

126. *Id.* at 216-17.

127. *Id.* at 217.

128. *Layshock*, 650 F.3d at 219.

129. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008), *reh'g en banc granted and opinion vacated*, 593 F.3d 286 (3d Cir. 2010), *aff'd in part and rev'd in part*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

principal and posted it on MySpace.[130] The false profile, which the student created at home on her parents' computer, did not identify the principal by name but incorporated his official school-website photograph.[131] The profile also contained sexually explicit content and vulgar language.[132] Since the school system's computers blocked access to MySpace, no students were able to look at the false profile at school but could access it at home.[133] After finding out that some of her classmates had viewed the profile, the student made it private so that access was limited to the twenty-two individuals listed as her friends on the social networking site.[134] Still, the principal suspended the student and a classmate who assisted her in creating the profile for ten school days.[135] The student wrote a letter of apology to the principal, but her parents subsequently filed suit seeking to have the suspension overturned.[136]

1. Trial Court Decision

At the trial, school officials claimed that the false profile disrupted school since students discussed it in class and that the job responsibilities of two school counselors were disrupted because one needed to sit in on disciplinary meetings with the students' parents while another counselor covered the other's scheduled duties.[137] In unpublished opinions, a federal trial court found that the school officials' actions were justified inasmuch as they had established a connection between the student's off-campus action and its effect on the school.[138] The court pointed out that the website was about the school's principal, the intended audience consisted of other students,

130. *Snyder*, 650 F.3d at 920.

131. *Id.* at 920.

132. Among other things, the profile depicted the principal as a sex addict and a pedophile who "hit on" parents and other students. The profile also included insulting comments about the principal's wife (who also worked at the school) and child. *Id.*

133. *Id.* at 921.

134. *Id.*

135. *Id.* at 922.

136. *Snyder*, 650 F.3d at 922.

137. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008).

138. *Id.*

the website was discussed at school, the student created the profile out of anger toward the principal for disciplining her in the past, and there was some disruption during school hours.[139] Further, the court held that although a substantial disruption had not occurred, the discipline was permissible because the false profile was vulgar and offensive and had an effect on the school.[140]

2. Third Circuit Decisions

A three-judge panel of the Third Circuit initially acknowledged that the disruption caused by J.S.'s actions was not substantial.[141] Nevertheless, a majority affirmed the lower court's ruling that her suspension did not violate her free speech rights because the profile's potential to cause disruption was reasonably foreseeable.[142] Further, the court noted that the profile was not created to criticize, but rather to humiliate the principal.[143] To the extent that it might cause suspicions about him in the community, the court stated that it could undermine his authority.[144] However, a dissenting judge argued that since the speech took place out of school during non-school hours and the disruption was not substantial, under *Tinker*, the suspension violated the student's free speech rights.[145] Given the apparent inconsistency between this ruling and the panel's first opinion in *Layshock*, an en banc panel of the Third Circuit vacated both decisions and granted rehearings.[146]

In an eight-to-six decision, the en banc court reversed and remanded the finding that the student's suspension for off-campus speech did not violate the First Amendment.[147] The court began by acknowledging that courts struggle to strike a balance between safeguarding students' rights and protecting

139. *Id.*
140. *Id.*
141. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010).
142. *Id.*
143. *Id.* at 316.
144. *Id.* at 317.
145. *Id.* (Chagares, Circuit Justice, concurring in part and dissenting in part).
146. *Id.* at 286; Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (3d Cir. 2010).
147. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011).

school officials' authority to maintain an appropriate learning environment.[148] Even so, the court emphasized that *Tinker* sets a standard that is subject to narrow exceptions.[149] One of those exceptions, as set out in *Fraser*, is to regulate lewd, vulgar, indecent, and plainly offensive speech in school.[150]

The court maintained that the student's false profile of her principal did not cause a substantial disruption in the school and that there was no indication that substantial disruption was foreseeable.[151] Concerning a forecast of disruption, the court observed that under *Tinker*, an "undifferentiated fear or apprehension of disturbance [was] not enough to overcome the right to freedom of expression."[152] Further, the court was of the opinion that the profile was "so outrageous that no one could have taken it seriously" such that "it was clearly not reasonably foreseeable that J.S.'s speech would create a substantial disruption or material interference in school."[153] Next, the court simply stated that *Fraser* does not apply to off-campus speech and could not be used to give school officials the authority to punish a student's out-of-school conduct.[154] Commenting that students' free speech rights outside of school are similar to those of adults, the court thus ruled that *Fraser*'s standard could not be used to justify the school's discipline for the student's use of profanity outside of school during non-school hours.[155]

3. Dissent

In a dissent, Judge Fisher, who wrote the majority opinion in the Third Circuit's initial decision, criticized the court's judgment because it allowed "a student to target a school official and his family with malicious and unfounded accusations about their character in vulgar, obscene, and

148. *Id.* at 926.

149. *Id.* at 927.

150. *Id.*

151. *Id.* at 928.

152. *Snyder*, 650 F.3d at 929 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)) (quotation marks omitted).

153. *Id.* at 930.

154. *Id.* at 932.

155. *Id.*

personal language."[156] The dissent contended that in posting the false profile online, the student not only caused psychological harm to the principal and his family, but also undermined his authority.[157] In contrast to the majority, the dissent was satisfied that the profile had the potential to cause disruption that was reasonably foreseeable.[158] In allowing the student's speech to go unpunished, the dissent insisted that the speech could disrupt the educational process by interfering with the operations of classrooms and the principal's ability to perform his duties.[159] Further, the dissent maintained that if the student's deeds went unpunished, the court would be sending a message to the student body and others that this form of speech was acceptable behavior.[160]

Responding to the student's claim that the profile was intended as a joke, the dissent insisted that school officials did not have to treat it as such. In this respect, the dissent remarked that the sexual nature of the profile and its accusations of sexual misconduct on the part of the principal were not matters that should be taken lightly by school personnel or the courts.[161]

C. Fourth Circuit: Kowalski v. Berkeley County Schools

Unlike the two Third Circuit cases reviewed above, the underlying incident in *Kowalski v. Berkeley County Schools*[162] involved harassment of a student rather than a school administrator.[163] The dispute began when a high school senior using her home computer created a discussion group on MySpace dedicated to ridiculing one of her classmates and invited approximately 100 individuals to join the group.[164] Other students, some using school computers, posted comments and pictures on the discussion group stating that the targeted

156. *Id.* at 941 (Fisher, Circuit Justice, dissenting).
157. *Id.*
158. *Snyder*, 650 F.3d at 945.
159. *Id.*
160. *Id.*
161. *Id.* at 948.
162. Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565 (4th Cir. 2011).
163. *Id.* at 567.
164. *Id.*

student had herpes.[165] Although the student did not post such comments herself, she did react positively to the other postings.[166] The targeted student's parents filed a harassment complaint with the school's vice principal after they found out about the MySpace postings.[167] After determining that the student had created a "hate website" in violation of the school's policy against harassment and bullying, school administrators suspended her for ten days and issued further sanctions prohibiting her from attending specified school events for ninety days.[168] Officials reduced the suspension to five days in response to an appeal filed by the student's father.[169]

1. Trial Court Decision

Even though her suspension had been reduced, the student's father filed suit claiming that the disciplinary action violated her free speech rights.[170] In an unpublished order, a federal trial court in West Virginia granted summary judgment for the school board, finding that Kowalski's web page was created to invite others to engage in disruptive and hateful conduct that caused a school disruption.[171] The court concluded that school officials were justified in taking disciplinary action for the student's vulgar and offensive speech, as well as her invitation for others to follow her lead.[172]

2. Fourth Circuit Decision

On appeal, the school board argued that the student's web page singled out a classmate for "harassment, bullying, and intimidation" and "that it was foreseeable that the off-campus conduct would reach the school," thereby creating a substantial disruption.[173] The Fourth Circuit agreed, commenting that school administrators need to prevent and punish harassment

165. *Id.*
166. *Id.*
167. *Id.* at 568.
168. *Kowalski*, 652 F.3d at 569 (quotation marks omitted).
169. *Id.*
170. *Id.* at 569-570.
171. *Id.* at 566.
172. *Id.* at 570.
173. *Id.* at 571.

and bullying to provide a safe school environment.[174] Further, the court emphasized that schools were not required to tolerate such conduct, particularly as they attempt to educate students about the habits and manners of civility and the fundamental values necessary to maintain a democratic political system.[175]

In terms of the web page's reach into the school, the court ascertained that the student knew that it would go beyond her home to impact the school environment. In this respect, the Fourth Circuit observed that "a court could determine that speech originating outside of the schoolhouse gate but directed at persons in school and received by and acted on by them was in fact in-school speech."[176] In such an instance, the regulation of that speech would be permissible under both *Tinker* and *Fraser*. Thus, the court concluded that even though the student was not physically present in the school when she created the web page, it was foreseeable that her conduct would reach the school because it was sent to students and those who participated were mostly students.[177] Accordingly, in the final analysis, the court ruled that since the speech had a sufficient nexus with the school, the school administrators' actions did not violate the Constitution.[178]

D. Eighth Circuit: D.J.M. ex rel. D.M. v. Hannibal Public School District #60

At issue in *D.J.M. ex rel. D.M. v. Hannibal Public School District #60*[179] were the disciplinary measures meted out to a high school student who had threatened harm to other

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174. *See also* In re Keelin B., 27 A.3d 389 (N.H. 2011) (affirming that educational officials could suspend a student for sending e-mails including sexually explicit language to a principal and teacher under the name of a peer and that the thirty-four-day exclusion was excessive).

175. *Kowalski*, 652 F.3d at 573.

176. *Id.*

177. *Id.* at 574.

178. The court also held that officials did not violate the student's due process rights because her Internet-based bullying and harassment of another student could be expected to interfere with the rights of that student and thus disrupt the school environment. Therefore, the court was satisfied that she was on notice that administrators could regulate and punish her conduct.

179. Mardis v. Hannibal Pub. Sch. Dist., 684 F. Supp. 2d 1114 (E.D. Mo. 2010), *aff'd sub nom.* D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. #60, 647 F.3d 754 (8th Cir. 2010).

students in an online conversation with a friend.[180] A student and a classmate exchanged instant messages in which the student talked about getting a gun and shooting other students at the school.[181] The student was placed in juvenile detention, suspended, and expelled after the classmate contacted a trusted adult and the police and school officials were notified of the threats.[182] The student challenged the disciplinary action, claiming that it violated his free speech rights.[183]

1. Trial Court Decision

A federal trial court in Missouri granted the school board's motion for summary judgment on the basis that the student's speech constituted an unprotected true threat.[184] In the alternative, the court found that school officials could discipline the student due to the disruptive impact his behavior had on the school.[185] The court added that the principal had testified that campus security had been increased in response to the threats, and considerable time was taken up addressing concerns of students and parents.[186]

2. Eighth Circuit Decision

Upon further review, the Eighth Circuit affirmed the lower court decision in favor of the school board.[187] As an initial matter, the court, citing its own precedent,[188] reiterated that a true threat is a "statement that a reasonable recipient would

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180. For representative commentary dealing with student threats, *see* Diane Heckman, *Just Kidding: K-12 Students, Threats and First Amendment Freedom of Speech*, 259 EDUC. L. REP. 381 (2010); Thomas E. Wheeler, *Lessons from Lord of the Flies: The Responsibility of Schools to Protect Students from Internet Threats and Cyber-Hate Speech*, 215 EDUC. L. REP. 381, 227 (2007); Richard V. Blystone, *School Speech v. School Safety: In the Aftermath of Violence on School Campuses Throughout This Nation, How Should School Officials Respond to Threatening Student Expression?*, 2007 BYU. EDUC. & L.J. 199 (2007).

181. *Mardis*, 684 F. Supp. 2d 1114.

182. *Id.*

183. *Id.*

184. *Id.* at 1119.

185. *Id.* at 1123-1124.

186. *Id.*

187. D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. #60, 647 F.3d 754, 762 (8th Cir. 2011).

188. Doe v. Pulaski Cnty. Special Sch. Dist. 306 F.3d 616 (8th Cir. 2007).

have interpreted as a serious expression of an intent to harm or cause injury."[189] The court added that the speaker must have intended to communicate the statement to another or a third party.[190] Since the student communicated his threats to a third party, admitted that he was depressed, stated that he had access to weapons, and indicated that he wanted his school to be known for something, the court had little difficulty deciding that his speech was a true threat.[191] Since true threats are not protected under the First Amendment, and, in view of the fact that school boards have an obligation to protect their students, the court affirmed that the school officials' actions did not violate the student's rights.[192]

Next, the court examined the issue of whether the student's threats caused a substantial disruption in the school.[193] Insofar as school personnel spent considerable time addressing student and parent concerns about safety and increased security at the school, the court was satisfied that a substantial disruption occurred.[194] Further, the court observed that it was reasonably foreseeable that the student's threats would have been brought to the attention of school authorities and created a risk of disruption to the school setting.[195] The court made it clear that school personnel did not need to wait to see whether the student's threats would be carried out before taking action.[196]

VI. DISCUSSION

The Supreme Court has clearly recognized that school settings provide a special context for the First Amendment when dealing with student rights.[197] While it concedes that students are persons who are entitled to First Amendment free

189. *D.J.M.*, 647 F.3d at 762 (quoting *Doe*, 306 F.3d at 624) (quotation marks omitted).

190. *Id.*

191. *Id.* at 764.

192. *Id.*

193. *Id.* at 765.

194. *Id.*

195. *D.J.M.*, 647 F.3d at 766.

196. *Id.* at 764.

197. *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 827 (2002) (upholding suspicionless drug testing of student athletes, noting that special needs exist in the public school context, giving officials greater authority over students).

speech rights under the Constitution, the Court also is well aware that school authorities must be given latitude in maintaining safe and orderly learning environments free from disruptions that will have a negative impact on their educational mission. Thus, in the past, the Court has sought to strike a proper balance between allowing non-disruptive student expression and limiting that which can substantially interfere with the operation of the schools. In this respect, the Court has created a test which allows school officials to curtail student speech when it causes material and substantial disruptions in schools or has the potential to do so.[198] Yet questions remain as to what actions constitute material and substantial disruptions and what factors make such disruptions reasonably foreseeable. At the same time, questions persist regarding how much off-campus cyberspeech reaches into school settings.

It is clear from the litigation to date that students may be disciplined for off-campus student speech that causes a material and substantial disruption in the school setting. Most agree that the arm of school administrators cannot extend to off-campus activities unless those activities reach and have a detrimental effect on the operation of the school. Again, an important issue raised in all four of the recent circuit court cases on cyberspeech reviewed in this Article is what exactly constitutes a substantial disruption. A corollary issue is the extent to which off-campus cyberspeech can reasonably be considered to have entered the school, particularly in an age when cyberspeech can be so easily accessed on the school premises via computers and other electronic devices.

Effective school administrators take actions to quell student disruptions before they become substantial. Therefore, administrators frequently take proactive disciplinary action when they see the potential for disruption. As Judge Jordan stated in a concurring opinion in *Layshock*,

> Modern communications technology, for all its positive applications, can be a potent tool for distraction and fomenting disruption. *Tinker* allows school officials to discipline students based on a reasonable forecast of

198. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

> substantial disruption, without waiting for the chaos to actually hit the hallways.[199]

Unfortunately, the actions of school administrators may be second-guessed by the courts after the fact, imposing on them the burden of showing that the disruptions were reasonably foreseeable. As is often the case, when those actions are examined weeks or months later, the potential for disruption may seem less obvious than it did at the time of the incidents. School administrators thus need to be given some latitude in this regard. Courts must understand that they should not substitute their judgment for that of school administrators unless the administrators clearly overreacted.[200]

The cases reviewed in this Article provide a contrast. It is unclear why the school board in *Layshock* abandoned its claims that the student's false profile of the principal caused or had the potential to cause a disruption. Certainly, as the trial court found in its initial ruling, having to shut down the school's computer network and cancel classes would be a substantial disruption in today's schools where computer and Internet use are important tools in the instructional process. In *Layshock,* the disruption likely would have been greater but for the fact that the incident occurred just prior to a school break. In *J.S.*, the school board also conceded that the disruption to the school was minimal, although, as the trial court noted, there was some disruption.

More importantly, in both *Layshock* and *J.S.*, the Third Circuit appears to have played down the potential damage the fake profiles may have caused to the principals' reputations and their abilities to continue to maintain order in their schools. In *J.S.*, the court incredulously wrote that the fake profile was "so outrageous that no one could have taken it seriously . . . ."[201] Judge Fisher's dissent responded that the

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199. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 222 (3d Cir. 2011) (Jordan, Circuit Justice, concurring).

200. *See* Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 208 (1982) (denying a sign language interpreter to a student with disabilities) ("We previously have cautioned that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy'").

201. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist, 650 F.3d 915, 921 (3d Cir. 2011).

court essentially "allow[ed] a student to target a school official and his family with malicious and unfounded accusations about their character in vulgar, obscene, and personal language."[202] Further, in both *Layshock* and *J.S.*, the court seems to have ignored the fact that by targeting school officials, the students reached into the school setting and had an impact on the school environment. One can only wonder whether the judges would have been as magnanimous had they been the subject of similar postings.

In the two cases reviewed in this Article involving cyberspeech targeting students, *Kowalski* and *D.J.M.*, the Fourth and Eighth Circuits were quick to recognize that the actions of the offenders had a detrimental effect on the operation of the school. Oddly, in the two cases where school administrators were subjects of the harassing student postings, the Third Circuit was not convinced of their detrimental effect on the educational environment in the schools. Conversely, the Fourth and Eighth Circuits rightfully were cognizant of the obligation of school personnel to act quickly when students were being threatened, intimidated, harassed, or bullied. In contrast, as stated above, the Third Circuit failed to recognize that when school personnel are harassed or ridiculed by students, especially in a vulgar and demeaning fashion as in *Layshock* and *J.S.*, it can cause as much harm as when students are the targets.

As Judge Fisher noted in his dissent in *J.S.*, "[b]roadcasting a personal attack against a school official and his family online to the school community not only causes psychological harm to the targeted individuals but also undermines the authority of the school."[203] Further, as Judge Fisher noted, allowing such speech to go unpunished not only undermines principals' authority, but "demonstrate[s] to the student body that this form of speech is acceptable behavior—whether on or off campus."[204] It is reasonably foreseeable that under these circumstances, other students may see that they also can attack school personnel in the same manner without fear of retribution.

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202. *Id.* at 941 (Fisher, Circuit Justice dissenting).

203. *Id.* at 941.

204. *Id.* at 945.

If school administrators are to fulfill their responsibilities to maintain order and discipline in the schools and sustain proper environments for learning, they must be given the latitude necessary to do so. When administrators take disciplinary actions to quell potential disruptions, the courts should not second-guess them just because they succeeded in preventing anticipated disruptions.

VII. RECOMMENDATIONS

As school boards and administrators face the new challenges posed by evolving technology while continuing to meet their obligations to maintain safe, orderly, and well-disciplined environments for learning, it is imperative that they develop, implement, and, when necessary, revise policies that address acceptable Internet use, as well as harassment and bullying. With the widespread use of technology in all aspects of students' lives, it is crucial to have policies in place that cover both topics. Disciplinary sanctions are more likely to be upheld when challenged if they were made pursuant to and consistent with policies of which both students and their parents were aware.

In *Kowalski*, the school administrators suspended the student based on the school board's policy against harassment, bullying, and intimidation. In its decision supporting the school officials' action, the Fourth Circuit noted that this policy put the student on notice that such behavior could be punished. In developing and reviewing such policies, school officials should consider the following recommendations.

A. Policies in General

School boards should work with attorneys prior to developing policies to make sure that they are consistent with federal and state statutes, regulations, and case law.

At the beginning of each school year, students, parents, and teachers should sign receipts acknowledging that they have received copies of all policies. This can provide concrete proof that students were put on notice that specified violations are punishable.

All policies should make it clear that violations are punishable and identify possible sanctions, including loss of

privileges and suspensions for more serious offenses. Additionally, as reflected in some of the litigation discussed earlier, school officials need to distinguish carefully between violations that occur in school and those that take place off campus so that policies are not struck down as vague and overbroad. Based on mixed results to date, the debate over the extent to which school officials can discipline students for misbehavior that does not originate in school but has an effect on the school is one that is likely to receive increased judicial attention.

All policies should be reviewed annually, typically between school years, not during or immediately after controversies. Revising policies on a scheduled basis affords educators better perspectives, and, in the event of litigation, provides evidence that educators are doing their best to stay up-to-date in maintaining safe, orderly schools while safeguarding the rights of all in school communities in the face of rapid legal, social, and technological changes.

B. Acceptable Use Policies (AUPs)

Carefully written AUPs in school settings and on school-owned computer systems should limit computer access to legitimate academic, instructional, or administrative purposes.

AUPs should make it clear that anyone who refuses to sign receipt acknowledgements or fails to comply with their provisions may be denied access to district-owned technology and to the Internet through that technology.

In devising AUPs, school boards must clarify the educational missions of their schools and delineate how accessing the Internet supports that mission. Thus, school personnel should use their AUPs as instructional tools to teach students about the positive uses of the Internet and technology while warning about hazards that can come about as a result of unrestricted use, such as contacting strangers or losing respect for others by accessing pornography.

AUPs should be differentiated based on student age. In other words, AUPs should take into consideration the maturity level of the students who will be accessing the technology.[205]

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205. For the way in which schools deal with the age of students see Karen

To the extent that computers, hardware, and software are purchased and maintained with board funds, AUPs should contain clear and unequivocal language indicating that use of technology can be restricted. By clarifying ownership issues, school boards can maintain greater latitude in regulating access to and use of equipment.

In regulating student use of district-owned technology consistent with legitimate educational and administrative purposes, AUPs should warn against visiting inappropriate websites and transmitting materials such as viruses, jokes, and the like.

AUPs should address privacy and use limitations, such as preventing students from using school computers for non-school related purposes, while clarifying reasonable expectations of privacy, especially relating to the sending and receiving of messages. As to privacy, AUPs should make it clear that computers, or, more properly, their hard drives, are subject to random checks for compliance, whether accessed in school or from home computers that link into school servers. This part of the policy should also warn users against seeking unauthorized access to the files of others, especially in such sensitive areas as student grades and personnel material, while advising users not to share their passwords with anyone, including friends. On a related privacy issue, AUPs should remind educators that since anything they write on district-owned computers is subject to disclosure under state public records law, they should not put anything in print that they would not want the public to see.

AUPs should make it known that filtering software is in use but that it is not foolproof. While educators have legitimate rights and duties to limit access to locations such as pornographic websites, they must recognize that although software in this area has improved, it still has not reached the same level of sophistication as the sites they seek to monitor. Thus, as school boards consider using filtering packages, they should bear in mind that there are three broad types of programs, each of which suffers from varying losses of

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Thomas, *Tangled Web for Kids*, USA TODAY, May 9, 2002, at 10D (noting that school officials start introducing policies for children based on their ages around such groupings as 7-9, 10-12, 13-15, 16-18).

precision. The first kind typically lists objectionable sites. Software of this type may be helpful, but as sites multiply can rapidly become obsolete, requiring constant monitoring and updating. The second type of filter ordinarily lists inappropriate words and/or phrases. However, problems can arise when students are, for example, blocked from obtaining material on breast cancer if, as it typically is, "breast" is among the words that are screened out. The third kind of software rates material in a fashion similar to the way in which movies, television programs, and video games are classified. One difficulty here may be that ratings are based partly on the subjective judgments of evaluators whose perspective may differ from those of educators and parents. In response to critics who may equate Internet filters with censorship, it is important to note that the courts agree that educators have discretion to direct the content of school activities "so long as their actions are reasonably related to legitimate pedagogical concerns."[206] Since courts regularly defer to educators who exercise their reasonable discretion in excluding magazines from school libraries that, for example, glorify drug use, violence, and/or pornography, to the extent that filters are tools to assist officials in limiting student access of inappropriate Internet materials, the judiciary is unlikely to intervene.

C. Policies Addressing Harassment, Bullying, and Intimidation

All policies should:

Include clear definitions of harassment, bullying, and intimidation since doing so puts students on notice as to the types of behavior that will not be tolerated. These definitions should encompass verbal, written, and electronic communications, as well as physical acts and gestures that cause physical or emotional harm, damage a bully victim's property, put a victim in fear of harm, create a hostile environment, infringe on the rights of a victim, or create a material and substantial disruption to the school environment.

Prohibit all forms of harassment, bullying, and intimidation on the basis of an individual's race, ethnicity, religion, gender,

206. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

sexual orientation, or disability.

Make it clear that they apply to activities that occur on school grounds, property adjacent to schools grounds,[207] and school buses and at school-sponsored and school-related events and activities (whether on or off school grounds), school bus stops, etc.

Include statements covering harassment, bullying, or intimidation of school personnel or students via the Internet, technology, and electronic devices, whether or not the devices used are owned, leased, or used by the school district. Such statements should make it clear that students are not immune from discipline just because they use their own devices to harass, bully, or intimidate others.

Specify that off-campus behavior is punishable if it creates a hostile environment at school for a bully victim, infringes on the rights of a victim, or creates a material and substantial disruption to the educational process or the operation of the school. Care should be taken that this aspect of the policy is not overly broad, but covers only areas in which the school has a legitimate interest.

Include provisions for age-appropriate instruction on bullying prevention at all grade levels.

Contain mandates that all staff report instances of harassment, bullying, or intimidation to designated administrators either immediately or, if impossible, by the end of the school day at the latest. By the same token, policies must mandate that administrators thoroughly investigate all such reports. Courts have been consistent in finding school authorities liable for showing indifference by failing to properly investigate and respond to incidents of harassment and bullying.[208]

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207. Statutes or ordinances preventing loitering on school grounds or in the vicinity of school buildings are increasingly common. Courts uphold these kinds of rules as long as they are not overly vague or restrictive. For such a case, see Wiemerslage *ex rel.* Wiemerslage v. Maine Twp. High Sch. Dist. 207, 29 F.3d 1149 (7th Cir. 1994) (affirming a dismissal in favor of school officials in Illinois where parents and their son sued school officials claiming that his being disciplined for breaking an anti-loitering rule did not violate his rights to free speech, assembly and due process as unconstitutionally vague).

208. *See, e.g.*, Gebser v. Lago Visa Indep. Sch. Dist., 524 U.S. 274 (1998) (holding that a school district can be held liable for damages when an appropriate person was notified of harassment and responded to that notice in a deliberately indifferent

Make it clear that incidents will be reported to law enforcement authorities when there is evidence that a crime has been committed.

VIII. CONCLUSION

The Federal Circuit cases on student cyberspeech demonstrate the challenges courts face in addressing charges that school officials have violated the First Amendment rights of students. The cases from the Third Circuit provide a contrast to those litigated in the Fourth and Eighth Circuits in the manner in which the respective courts applied prior Supreme Court jurisprudence to situations involving types of cyberspeech. Initially, it may appear that the difference lies in the fact that courts may not take harassment of school personnel as seriously as they do harassment or threats against students. However, a closer examination shows that differences in the judicial outcomes are more dependent on whether the courts interpret student cyberspeech as reaching into the schools and how they gauge its potential to cause disruption.

The intersection of the First Amendment and the Internet has created new challenges for educators and courts in recent years, especially considering technology's potential to develop at a faster rate than the law. Accordingly, it may be several years before school administrators are given concrete guidance regarding the extent to which they may discipline students for off-campus cyberspeech. Unfortunately, since the Supreme Court denied certiorari in *Layshock*, *J.S.*, and *Kowalski*, it appears that the Court will not be providing clarity to this complex issue in the next term.

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