

ABSTRACT

THE SCHOOLHOUSE GATE IN THE DIGITAL AGE: EXAMINING THE FIRST AMENDMENT WHEN STUDENT ELECTRONIC SPEECH TARGETS SCHOOL EMPLOYEES

Jessica Ann Herrmann, Ed.D.

Department of Leadership, Educational Psychology, and Foundations

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Dr. Christine Kiracofe, Advisor

This paper investigates the intersection of student First Amendment free speech rights and off-campus electronic speech that targets school employees. Specifically, this study researched case law involving students who were disciplined as a result of off-campus electronic speech that targeted a staff member at their school. Analysis of case law and court decisions provides insight about how courts are interpreting and applying *Tinker* and other foundational student speech decisions in today's era of digital communication. The paper concludes with a set of recommendations for school administrators around the topic of student electronic speech that targets school employees. By implementing some of these practices in schools, school administrators will be better positioned to prevent this type of cyberspeech from occurring and to respond to it if and when the need arises.

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THE SCHOOLHOUSE GATE IN THE DIGITAL AGE: EXAMINING
THE FIRST AMENDMENT WHEN STUDENT ELECTRONIC
SPEECH TARGETS SCHOOL EMPLOYEES

BY
JESSICA HERRMANN
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Doctoral Director:
Christine Kiracofe

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TABLE OF CONTENTS

	Page
LIST OF FIGURES	viii
Chapter	
1. INTRODUCTION	1
Student Cyberbullying	2
Adults as Targets.....	3
Social Media and Schools.....	4
Statement of the Problem.....	6
Significance of the Study.....	7
Research Questions	8
Limitations of the Study.....	8
2. LITERATURE REVIEW	9
The Supreme Court and the “True Threat”	9
<i>Watts v. United States</i>	10
The Supreme Court and Student Freedom of Speech.....	13
<i>Tinker v. Des Moines</i>	13
<i>Bethel v. Fraser</i>	19
<i>Hazelwood v. Kuhlmeier</i>	22

Chapter	Page
<i>Morse v. Frederick</i>	27
Student Electronic Speech	31
<i>Beussink v. Woodland</i>	32
<i>Killion v. Franklin</i>	34
<i>J.S. v. Bethlehem</i>	39
<i>Wisniewski v. Board of Education</i>	45
<i>Doninger v. Neihoff</i>	48
<i>Evans v. Bayer</i>	53
<i>Doninger v. Niehoff II</i>	56
<i>J.S. v. Blue Mountain</i>	58
<i>Layshock v. Hermitage</i>	63
<i>R.S. v. Minnewaska</i>	70
<i>Sagehorn v. Independent School District No. 728</i>	71
<i>Burge v. Colton School District 53</i>	76
<i>Bell v. Itawamba</i>	79
3. ANALYSIS	87
Trends by Region and Level of Court.....	87
Trends by Student Age and Gender	89
Student Race and Electronic Speech that Targets School Employees.....	90
Student Electronic Speech Containing Threats against School Employees	92
<i>Watts</i> and Student Speech that References Violence toward School Employees	92

Chapter	Page
<i>Watts</i> and Student Speech with No Threats or References to Violence	95
Conclusions: <i>Watts</i> and Student Electronic Speech.....	95
<i>Tinker</i> : Approaching a Tipping Point	97
<i>Tinker</i> and Substantial Disruption Caused by Student Electronic Speech.....	98
Disciplinary Consequences and the Application of <i>Tinker</i>	99
<i>Tinker</i> in <i>Bell</i> : Most Questionable Application to Date.....	100
The <i>Wisniewski</i> Application of <i>Tinker</i> : Little Traction to Date	101
<i>Tinker</i> in Off-Campus Electronic Speech: An Uncertain Future	103
<i>Fraser</i> and Student Electronic Speech that Targets School Officials.....	104
Matters of Public Concern	105
Disciplinary Actions Imposed.....	107
School Policies: Copyright Law & Acceptable Use	109
School Officials' Initial Response to Student Speech	109
4. CONCLUSION AND RECOMMENDATIONS.....	113
Student Speech in Public Schools: 1969 to 2017.....	113
So, What Does This Mean For Public School Officials?.....	115
Recommendations for School Administrators: Prevention is the Best Intervention	116
Develop and Promote a Positive School Climate that Includes Healthy Channels of Communication Between Students and Staff.....	117
Teach Students Pro-Social Interpersonal Skills and Digital Citizenship	120

Chapter	Page
Recommendations for School Administrators: When Situations Arise, Respond with Intention and Thoughtfulness	120
Did the Student Speech Contain Threatening Language?.....	123
Did the Student Speech Cause – Or is It Reasonably Foreseeable That It Could Cause – a Material and Substantial Disruption to the Discipline of the School?.....	125
In the Second and Third Circuits: Was There a Reasonably Foreseeable Risk The Speech Would Come to the Attention of School Officials?.....	126
To What Extent Did the Speech Cause – Or Have the Potential to Cause – a Substantial Disruption to the Discipline of the School?	127
Does the Student’s Speech Address a Potential Matter of Public Concern?	128
What Disciplinary Action is Appropriate?	129
Potential Areas for Future Research	131
Conclusion	132
Executive Summary: A Tool for School Administrators.....	133
REFERENCES.....	134
APPENDIX	140

LIST OF FIGURES

	Page
Figure 1. Decisions by Circuit, Level of Court, and Outcome.....	88
Figure 2. A Graphic Tool for School Administrators.....	133

CHAPTER ONE INTRODUCTION

The Internet has dramatically changed the landscape of student expression and communication. Two decades ago it was easy for administrators to identify where students were located when they engaged in verbal or written expression; they were either on school grounds or off school grounds, during the school day or outside of school hours. Today, however, as more and more students participate in social networking¹ and have constant access to the Internet, student expression in schools is much more difficult for school officials to monitor and control. In reality, electronic student expression can occur at any moment and in any location, and as a result can permeate the proverbial schoolhouse gate.

According to a 2015 Pew Research Center study, 92% of teens ages 13 to 17 report going online daily, and more than half (56%) go online several times a day.² Nearly three quarters of teens have access to a smart phone, and nearly one quarter is online “almost constantly.”³ Social networking makes up a significant portion of this individual Internet use. Among teenagers in the

¹ According to Google Dictionary, social networking is “the use of dedicated websites and applications to interact with other users, or to find people with similar interests to oneself.” GOOGLE DICTIONARY, www.google.com (type “What is social networking?”)(last visited Nov. 17, 2017).

² Amanda Lenhart, *Teens, Social Media & Technology Overview 2015*, PEW RESEARCH CENTER (Apr. 9, 2015), <http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/>.

³ *Id.*

United States, Snapchat⁴ is the most frequently used social media platform, with Facebook⁵ and Instagram⁶ following.

Student Cyberbullying

With adolescents spending a significant amount of time on social media, opportunities for interaction now extend far beyond the school day. This increased communication via the Internet is in some ways exciting but also potentially concerning. Electronic communication via social networking sites may be used to enhance relationships and increase collaboration, but it can also provide a platform for hurtful interpersonal exchanges.

A National Center for Education Statistics (NCES) study found that, during the 2011-12 school year, 27.8% of sixth through twelfth grade students reported having been bullied at school and 9% reported having been bullied via the Internet.⁷ Among the students who reported having been cyberbullied, the following experiences were reported: “[the sharing of] hurtful information on the internet” (3.6%), “purposely shared private information” (1.1%), “unwanted contact via e-mail” (1.9%), “unwanted contact via instant messaging” (2.7%), “unwanted contact via online

⁴ According to Whatis.com, Snapchat is a mobile application that allows users to send and receive self-destructing photos and videos, called snaps. <http://searchmobilecomputing.techtarget.com/definition/Snapchat> (last visited Nov. 18 2017).

⁵ According to Whatis.com, Facebook is a popular free social networking website that allows registered users to create profiles, upload photos and videos, send messages, and keep in touch with others. The site is available in 37 different languages. <http://whatis.techtarget.com/definition/Facebook> (last visited Nov. 18, 2017).

⁶ According to Whatis.com, Instagram is a free online photo sharing application and social network platform. <http://searchcio.techtarget.com/definition/Instagram> (last visited Nov. 18, 2017).

⁷ *Student Reports of Bullying and Cyber-bullying: Results from the 2011 School Crime Supplement to the National Crime Victimization Survey*, INSTITUTE OF EDUCATION SCIENCES (IES) NATIONAL CENTER FOR EDUCATION STATISTICS, Table 1.1, p. T-1, <https://nces.ed.gov/pubs2013/2013329.pdf>

gaming” (1.5%), and “purposeful exclusion from an online community (1.2%).”⁸ Other studies have suggested significantly higher rates of cyberbullying. According to a meta-analysis by the Cyberbullying Research Center, approximately 26% of middle and high school students in the United States reported having been the victims of cyberbullying at some point in their lifetime.⁹

Adults as Targets

Adolescents are not the only targets of cyberbullying. During the 2011-12 school year, nine percent of schoolteachers reported having been threatened with injury by a student from their school.¹⁰ While this statistic does not differentiate between threats made on-campus and those made off-campus or via the Internet, it shows that teachers are not immune to being targets of student expression. In fact, the Cyberbullying Research Center dedicates a portion of its website to support for adult victims of cyberbullying. The site provides a document entitled “Responding to Cyberbullying: Top Ten Tips for Adults who are Being Harassed Online.” These tips include “Do not retaliate,” “Talk about it,” “Contact Law Enforcement,” “Cut ties” and “Block the Bully.”¹¹

⁸ *Id.*

⁹ *Summary of Our Cyberbullying Research (2004-2016)*. CYBERBULLYING RESEARCH CENTER, <http://cyberbullying.org/summary-of-our-cyberbullying-research/> (last visited Nov 18, 2017).

¹⁰ *Fast Facts: School Crime*, INSTITUTE OF EDUCATION SERVICES (IES) NATIONAL CENTER FOR EDUCATION STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=49> (last visited Nov. 18, 2017).

¹¹ Sameer Hinduja and Justin W. Patchin, *Responding to Cyberbullying: Top Ten Tips for Adults who are Being Harassed Online*, CYBERBULLYING RESEARCH CENTER (Oct. 2013), http://cyberbullying.org/response_cyberbullying_adults/ (last visited Nov. 18, 2017).

The Cyberbullying Research Center website also provides tips for dealing with fake Facebook pages, outlining steps an individual should take if they wish to pursue legal action after viewing a fake profile of themselves. This website acknowledges that, in many cases, adolescents do not fully understand the consequences of their behavior and create fake profiles as a joke. In these types of situations, the website authors recommend trying to work through the problem informally and involving parents and other adults as appropriate. The authors recommend some proactive measures to prevent students from creating fake profiles of educators or classmates, including educating students about these issues and creating a positive climate at school.¹² While these suggestions may be helpful in some circumstances, however, they likely do not provide relief once a school official has been targeted by one or more of their students. Indeed, a teacher or coach cannot easily block a student from her classroom or cut ties with a student in the school.

Social Media and Schools

Educators are frequently provided guidance regarding ways to teach students about digital citizenship and Internet safety. However, many educators have difficulty finding a balance between being aware of student social media involvement and invading student privacy. Experts such as danah boyd¹³ offer guidance on this issue. Specifically, boyd argues that the key to a successful school-based approach to supporting healthy teen social media usage is fostering

¹² Justin W. Patchin, *Help with Fake Facebook Pages*, CYBERBULLYING RESEARCH CENTER (July 25, 2012), <http://cyberbullying.org/help-with-fake-facebook-profile-pages/> (last visited Nov. 18, 2017).

¹³ danah boyd is the founder and president of Data & Society, researcher at Microsoft Research, and visiting professor at New York University. She chooses to spell her name without capitalization.

citizenship. She writes, “We need to help youth be responsible members of society and [understand] that society is no longer bounded by physical space.”¹⁴

In addition to taking an instructional, preventive approach to promoting positive student electronic media usage, many school officials have utilized disciplinary action as a punitive response to student cyberbullying. However, the constitutionality of discipline for off-campus electronic speech is often disputed. On one hand, school officials often feel that they need the authority to limit student speech in order to maintain school safety and order. On the other hand, some First Amendment advocates argue that such school policies infringe upon student rights. For example, expert Clay Calvert¹⁵ believes that punishment for student electronic speech amounts to “a constant, Orwellian problem of school officials trying to stretch their jurisdiction far beyond campus and into the homes and bedrooms of minors across the country.”¹⁶

At least one state has gone a step further than school discipline, turning to state law for support. In New Hampshire, state officials made it a crime to intimidate or torment teachers online. Specifically, under a 2013 New Hampshire statute, students can be exposed to potential criminal sanctions for creating fake online profiles of teachers, posting real images, or making

¹⁴ Benjamin Herold, *Teachers, Teens, and Social Media: Q & A with danah boyd*, EDUCATION WEEK: DIGITAL EDUCATION BLOG (Jan. 26, 2016), <http://mobile.edweek.org/c.jsp?cid=25920011&item=http%3A%2F%2Fapi.edweek.org%2Fv1%2Fblog%2F63%2F%3Fuuid%3D56496&cmp=SOC-SHR-TW>.

¹⁵ Clay Calvert is Director of the Brechner First Amendment Project, a group that filed a friend-of-the-court brief to the U.S. Supreme Court to hear a recent student electronic speech decision, *Bell v. Itawamba County School Board*, 799 F.3d 379 (5th Cir. 2015).

¹⁶ *Recent Briefs*, MARION B. BRECHNER FIRST AMENDMENT PROJECT, <http://firstamendment.jou.ufl.edu/pubs/> (last visited Nov. 18, 2017).

any statement online that provokes harassment.¹⁷ While some individuals, including representatives from the ACLU of New Hampshire, have argued this law is unconstitutional, it is nonetheless currently the law in New Hampshire.

Statement of the Problem

To date, the Supreme Court has declined to hear any cases involving student electronic speech, leaving the lower courts to establish geographic judicial precedents. Lower courts have used different standards to reach their verdicts, resulting in sometimes contradictory and inconsistent rulings. This issue is even further complicated by the fact that technology and the Internet are changing at such a rapid pace. Every time a new type of smart device appears on the market, and every time a new social media platform makes its way into the mainstream, new factors emerge that were never before considered.

The lack of Supreme Court precedent regarding the restriction of student off-campus electronic speech leaves school officials with little guidance when faced with First Amendment student electronic speech questions. School officials, responsible for balancing individual student rights to freedom of speech and a student body's right to a safe and secure learning environment, are left to navigate these situations on their own. Without a clear United States Supreme Court standard to govern student electronic speech, several potential challenges arise. Among these challenges include inconsistency in school officials' responses to student electronic speech, risks to student and staff safety and morale (for example, the potential for threats to be carried out,

¹⁷ Lisa Worf, *Cyberbullying Law Shields Teachers from Student Tormentors*, NPR (Feb. 19, 2013), <http://www.npr.org/2013/02/19/172329526/cyber-bulling-law-shields-teachers-from-student-tormentors> (last visited Jan. 17, 2018).

increased staff and student anxiety, and a decreased overall sense of safety or wellbeing), and a risk to students' rights of freedom of expression.

Significance of the Study

With the rise in student Internet and social media use, school officials face more and more questions about when, and under what circumstances, they have the authority to regulate off-campus electronic student expression. Student electronic speech that targets public school employees has the potential to disrupt the school environment and impact the safety and/or wellbeing of students and staff.

School officials need guidance on the parameters for responding to student off-campus electronic speech. With such guidance, school officials would be better able to support and discipline students more consistently. What happens in one school, district, or state should not differ dramatically from what happens in a similar situation in another school, district, or state.

Developing guidance around issues of off-campus student electronic speech will not only allow for consistency across schools, but could also help improve school safety. If school officials had a better understanding of their scope of authority to discipline students around these issues, they could provide more effective guidance to students and staff to prevent these types of incidents from occurring. That is, school officials would be better able to explain to students the legal risks and consequences of engaging in this type of activity over social media, thereby potentially mitigating some of these issues.

Finally, providing guidance around the legal implications of student off-campus electronic speech that targets school employees would also help protect students' First

Amendment rights to freedom of speech. Without a clear standard for regulating student off campus electronic speech, school officials risk violating individual student rights.

Research Questions

The following research questions will guide this study:

1. What is the relevant legal history of public school discipline regarding student speech in the United States?
2. What do existing court decisions indicate about the balance between a student's First Amendment rights to freedom of speech and school officials' authority to regulate student electronic off-campus speech that targets school officials?
3. How can prior litigation inform current school officials' decision-making with regard to imposing disciplinary consequences upon students in response to off-campus electronic speech that targets school officials?

Limitations of the Study

This study will conduct an extensive search of litigation pertaining to school officials' authority to impose disciplinary action in response to student off-campus electronic speech targeting school officials. However, because not all court decisions are published, it is possible there is additional case law on this subject unavailable to the researcher.

CHAPTER TWO LITERATURE REVIEW

Although the United States Supreme Court has not yet decided a student speech case involving off-campus electronic speech, five of the Court's decisions are frequently referenced in the analysis of such cases. Lower courts always apply one or more of these five U.S. Supreme Court's decisions: *Watts v. United States*,¹⁸ *Tinker v. Des Moines*,¹⁹ *Bethel v. Fraser*,²⁰ *Hazelwood v. Kuhlmeier*,²¹ and *Morse v. Frederick*.²² For this reason, an understanding of these Supreme Court decisions is an important component in examining the intersection of the U.S. Constitution and student off-campus electronic speech.

The Supreme Court and the “True Threat”

The first of these decisions did not address students or schools but nevertheless remains relevant in the analysis of some student off-campus speech cases. This case, *Watts v. United States*,²³ involved the intersection of threatening speech and the First Amendment.

¹⁸ *Watts v. United States*, 394 U.S. 705 (1969).

¹⁹ *Tinker v. Des Moines*, 393 U.S. 503 (1969).

²⁰ *Bethel v. Fraser*, 478 U.S. 675 (1986).

²¹ *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988).

²² *Morse v. Frederick*, 551 U.S. 393 (2007).

²³ *Watts*, 394 U.S. at 705.

*Watts v. United States*²⁴

In August 1966, a group of people held a public rally on the Washington Monument grounds.²⁵ During the rally, individuals broke out into small group discussions. During one discussion about police brutality, a group member suggested that the young people present should get more education before expressing their views.²⁶ In response, Watts, an 18 year-old man in the group, commented that he had received a draft classification and was expected to report for a physical the following Monday. He further stated, “I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. . . . They are not going to make me kill my black brothers.”²⁷

The following day the Secret Service arrested Watts for threatening the life of the President.²⁸ Following a trial in the United States District Court for the District of Columbia, a jury convicted Watts of violating a 1917 federal statute prohibiting any person from “knowingly and willfully...[making] any threat to take the life or to inflict bodily harm upon the President of the United States . . .”²⁹ The jury found that Watts had committed a felony by knowingly and willfully threatening the President.

²⁴ *Id.*

²⁵ *Id.* at 705.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Watts v. United States*, 402 F.2d 676, 677 (D.C. Cir. 1968).

²⁹ *Watts*, 394 U.S. at 705.

Watts appealed the conviction to the United States Circuit Court for the District of Columbia, arguing that his speech was protected by the First Amendment.³⁰ Watts contended there was no evidence showing he had made a threat against the life of the President. He asserted that his speech had been uttered during a political debate and was expressly made conditional upon an event that would never occur – namely, his induction into the Armed Forces. The Court of Appeals concluded that the First Amendment did not protect speech that knowingly and willfully threatened the life or safety of the President.³¹ Finding that the jury had reasonably interpreted Watts’s speech to be a threat against the President, the Court of Appeals affirmed Watts’s conviction.

On appeal, the United States Supreme Court acknowledged that the Nation had a valid interest in protecting the President from threats of physical violence.³² However, the Court pointed out, this interest must be balanced against individuals’ First Amendment right to free speech. The Court stated, “What is a threat must be distinguished from what is constitutionally protected speech.”³³ The Court further explained that comments uttered during a political debate, such as Watts’s speech, might sometimes be abusive, inexact, and include attacks on the government and/or public officials.³⁴ However, observing that Watts’s audience had responded

³⁰ *Id.*

³¹ *Watts*, 402 F.2d at 682.

³² *Watts*, 394 U.S. at 707.

³³ *Id.*

³⁴ *Id.*

to his speech with laughter, the Court concluded that no “true threat” had been made. The Supreme Court reversed the Appellate Court decision and ruled in favor of Watts.³⁵

Though *Watts* determined that the First Amendment did not protect “true threats,” the decision stopped short of providing a clear standard for the level of intent needed for a true threat.³⁶ For several years following *Watts*, courts turned to cases interpreting other categories of unprotected speech in attempts to create a consistent test for true threats.³⁷ In 2003, the Supreme Court further defined the contours of the “true threat” exception in *Virginia v. Black*.³⁸ Citing *Watts*, the Court in *Black* defined true threats as “encompassing those 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.”³⁹ While this ruling provided slightly more clarity, the *Black* decision failed to truly clarify the “true threat” definition for lower courts.⁴⁰

Supreme Court Justice Sotomayor, in a recent concurring opinion of the Supreme Court’s denial of certiorari in a Florida case,⁴¹ attempted to provide further clarification of a true threat. Sotomayor wrote, “Together, *Watts* and *Black* make clear that to sustain a threat conviction

³⁵ *Id.*

³⁶ Adrienne Scheffey, *Defining Intent in 165 Characters or Less: A Call for Clarity in the Intent Standard of True Threats After Virginia v. Black*, 69 U. MIAMI L. REV. 861, 871 (2015).

³⁷ *Id.*

³⁸ *Virginia v. Black*, 538 U.S. 343 (2003). In *Black*, the Supreme Court held that a statute prohibiting cross burning with the intent to intimidate was constitutional. *Virginia*, 538 U.S. at 359.

³⁹ *Id.* at 359.

⁴⁰ Scheffey, *supra* note 36 at 874.

⁴¹ *See Perez v. State*, 189 So. 3d 797, 855 (Fla. 2016) (Sotomayor, S., concurring).

without encroaching upon the First Amendment, States must prove more than the mere utterance of threatening words- *some* level of intent is required.”⁴²

The Supreme Court and Student Freedom of Speech

The other four Supreme Court cases, *Tinker v. Des Moines*,⁴³ *Bethel v. Fraser*,⁴⁴ *Hazelwood v. Kuhlmeier*,⁴⁵ and *Morse v. Frederick*,⁴⁶ serve as the foundation for analysis of all student speech cases – both electronic and non-electronic, off-campus and on-campus. In order to understand courts’ reasoning in cases involving student electronic speech that targets school employees, it is critical to have an understanding of these Supreme Court decisions.

Tinker v. Des Moines⁴⁷

In 1969, the Supreme Court issued the first of its four student free speech decisions, *Tinker v. Des Moines*.⁴⁸ In December 1965, a group of students in Des Moines, Iowa planned to publicize their objections to the United States’ involvement in the Vietnam War by wearing black armbands to school. The armbands symbolized mourning for those who had died in the

⁴² *Id.*

⁴³ *Tinker v. Des Moines*, 393 U.S. 503 (1969).

⁴⁴ *Bethel v. Fraser*, 478 U.S. 675 (1986).

⁴⁵ *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988).

⁴⁶ *Morse v. Frederick*, 551 U.S. 393 (2007).

⁴⁷ *Tinker v. Des Moines*, 393 U.S. 503 (1969).

⁴⁸ *Id.*

war and represented the wearers' support for a truce.⁴⁹ At this time, the Nation was experiencing unrest over the United States' involvement in the war. Examples of this unrest included a protest march in Washington, D.C. and several protests throughout the country involving the burning of draft cards.⁵⁰

Upon hearing about the students' plan to wear the armbands to school, the school district's Director of Secondary Education met with the school district's five high school principals to decide how to respond. With the goal of maintaining a disciplined classroom atmosphere amidst the country's unrest over the Vietnam War, Des Moines school officials decided to prohibit students from wearing the armbands to school. The policy emerging from this December 14 meeting warned, "any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband."⁵¹

On December 16, Mary Beth Tinker, a 13 year-old junior high school student, and Christopher Eckhardt, a 16 year-old high school student, each wore a black armband to their respective school. The next day John Tinker, a 15 year-old high school student and Mary Beth's brother, wore an armband to the high school he attended.⁵² Notwithstanding the school district's regulation prohibiting the armbands, the students wore the armbands to mourn those who had died in the Vietnam War and to support Senator Robert F. Kennedy's proposal for a truce.⁵³ As a consequence of violating the newly promulgated armband policy, each student was suspended

⁴⁹ *Tinker v. Des Moines*, 258 F. Supp. 971, 972 (S.D. Iowa 1966).

⁵⁰ *Id.* at 973.

⁵¹ *Tinker*, 393 U.S. at 505.

⁵² *Tinker*, 258 F. Supp. at 972

⁵³ *Id.*

from school. Following the school district's winter break, each student returned to school without an armband.⁵⁴

The students' parents challenged the suspensions by filing a complaint in the United States District Court for the Southern District of Iowa. The lawsuit alleged that school officials' prohibition against wearing armbands to school violated their children's First Amendment free speech rights as guaranteed by the U.S. Constitution.⁵⁵ The district court found that school authorities' disciplinary action was a reasonable measure designed to prevent a school disturbance. The court's opinion cited the Fifth Circuit's earlier decision in *Burnside v. Byars*.⁵⁶ In *Burnside*, the Fifth Circuit had concluded that students could not be prevented from wearing protest buttons to school unless the buttons would create a material and substantial interference with the operation of the school.⁵⁷ However, in light of the *Tinker* facts, the district court reasoned that school officials should be granted wider discretion than was granted in *Burnside*. Specifically, the court reasoned that school officials should have the latitude to prohibit speech they believed would lead to a material and substantial school disturbance.⁵⁸ Finding Des Moines

⁵⁴ *Id.* at 971.

⁵⁵ *Id.*

⁵⁶ *Burnside v. Byars*, 363 F. 2d 744 (5th Cir. 1966). The Fifth Circuit ruled that high school students at a school in Mississippi could not be prevented from wearing buttons with the words "One Man One Vote." The buttons, worn by Black students who attended a high school with all Black students, were meant to communicate the belief that people of color should exercise their civil right to vote. Given that no significant disruption occurred as a result of the buttons, the Fifth Circuit concluded that the regulation to prohibit the buttons on school grounds was an unnecessary infringement of the students' free speech rights.

⁵⁷ *Id.* at 749.

⁵⁸ *Tinker*, 258 F. Supp. at 972.

school officials could have reasonably anticipated that the armbands would cause a disruption, the district court ruled in favor of school officials. On appeal, the Court of Appeals for the Eighth Circuit affirmed the district court's decision without opinion.⁵⁹

The parents appealed, and the Supreme Court granted certiorari. In its decision, the *Tinker* majority observed that students who attended public schools possessed fundamental constitutional rights.⁶⁰ The Court characterized the wearing of the armbands as symbolic speech, which was akin to "pure speech" meriting protection under the United States Constitution.⁶¹ The Court noted that the students had been quiet and passive when wearing the armbands, had not been disruptive, and had not impinged on the rights of others. Based upon these observations, the Court reasoned that the armbands constituted protected speech under the First Amendment's Free Speech Clause.⁶²

In order to lawfully prohibit students from wearing the armbands to school, the Court concluded, school officials needed to show that the armbands either caused an actual disruption or that a disruption could be reasonably predicted. This conclusion led the Court to formulate the two-pronged "substantial disruption," test, or *Tinker* test, for determining whether school officials could constitutionally regulate in-school student speech.⁶³ The *Tinker* analysis asks whether the student's speech would: 1) "materially and substantially disrupt the work and

⁵⁹ *Tinker v. Des Moines*, 383 F.2d 988 (8th Cir. 1967).

⁶⁰ *Tinker v. Des Moines*, 393 U.S. 503, 504 (1969).

⁶¹ The Court expressed that the wearing of the armbands was entirely divorced from disruptive conduct from those participating in it, therefore finding the speech to be "pure speech." *Id.* at 508.

⁶² *Id.* at 514.

⁶³ *Id.*

discipline of the school”⁶⁴ or 2) collide with the “rights of other students to be secure and to be left alone.”⁶⁵ If either prong of this inquiry is satisfied, school officials are authorized to restrict student in-school speech.⁶⁶

Applying this two-pronged test to the present situation, the Court concluded that Des Moines school officials had not shown they had sufficient reason to believe the armbands would disrupt the school environment.⁶⁷ The Court rejected the district court’s reasoning that the suspensions were permissible because this disciplinary consequence was based upon a fear that wearing the armbands would cause disruption within the school. Indeed, the High Court inferred that the district court’s opinion had relied upon the conclusion that school officials’ motivation for disciplining the students centered around a desire to avoid controversy over the country’s involvement in the Vietnam War, rather than an attempt to prevent disruption.⁶⁸ The Court noted, “Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”⁶⁹ The Court further pointed out that many statements uttered by students during the school day could potentially cause trouble, inspire fear, or cause a disturbance.

⁶⁴ *Id.* at 513.

⁶⁵ *Id.*

⁶⁶ Daniel Marcus-Toll, *Note: Tinker Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech* (2014), 82 *FORDHAM L. REV.* 3395, 3409 (discussing what speech constitutes a substantial disruption).

⁶⁷ *Tinker*, 393 U.S. at 513.

⁶⁸ *Id.* at 508.

⁶⁹ *Id.*

However, the Court pointed out, such potential alone did not provide sufficient justification for censoring a student's Constitutional right to freedom of speech.⁷⁰

The *Tinker* Court noted that Des Moines school officials had not previously prohibited students from wearing controversial symbols to school.⁷¹ For example, school officials had allowed students to wear the Iron Cross, traditionally a symbol of Nazism, to school. As such, the Court concluded that the black armbands worn in opposition to the United States' involvement in Vietnam had been singled out for prohibition based upon the message they communicated. The Court pointed out that this type of viewpoint discrimination was not constitutionally permissible.⁷²

The Court found no facts that would have reasonably led school officials to anticipate the armbands would cause a substantial disruption in the schools, and in fact no disruption had occurred as a result of the students wearing the armbands. Because the students expressed their viewpoints without interfering with the school environment or intruding on the lives of others, the Court concluded it had not been permissible for school officials to prohibit their speech. Based upon these conclusions, the Court majority reversed the lower courts' decisions and ruled for the students.⁷³

In dissent, Justice Black argued that the armbands had caused disruption within the school.⁷⁴ Specifically, Justice Black argued that students had been distracted from their lessons

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 510.

⁷³ *Id.* at 514.

⁷⁴ *Id.* at 525 (Black, J., dissenting).

and talked about the armbands and about the Vietnam War instead of their studies. Justice Black further asserted the majority's decision afforded students, rather than school officials, the authority to make decisions about appropriate speech in school.⁷⁵ Justice Black observed:

I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 states. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.⁷⁶

Bethel v. Fraser⁷⁷

Eighteen years after *Tinker*, the Supreme Court addressed questions involving the offensive content of a student speech delivered during a school-sponsored assembly. On April 26, 1983, Matthew Fraser, a student at Bethel High School in Pierce County, Washington, delivered a speech during a school assembly. The speech nominated a fellow student who was running for a student council office.⁷⁸ During the speech, Matthew referred to the candidate using “elaborate, graphic, and explicit sexual metaphor.”⁷⁹ The speech included phrases such as “he’s firm in his pants... his character is firm,” “a man who takes his point and pounds it in,” and “a man who will go to the very end—even the climax, for each and every one of you.”⁸⁰

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Bethel v. Fraser*, 478 U.S. 675 (1986).

⁷⁸ *Fraser v. Bethel*, 755 F.2d 1356, 1357 (9th Cir. Wash. 1985).

⁷⁹ *Bethel*, 478 U.S. at 678.

⁸⁰ *Id.* at 687.

Before the assembly, two of Matthew's teachers had warned him the speech was inappropriate and that there might be "severe consequences" if he delivered it.⁸¹ Matthew eschewed these warnings and delivered the speech. During the assembly a school counselor observed some students in the audience who appeared to be embarrassed. The following day one teacher also reported that she found it necessary to forego a portion of a class lesson in order to discuss the speech with her class.⁸² The morning after the assembly, the assistant principal informed Matthew that his speech had violated a school rule prohibiting "conduct which materially and substantially interferes with the educational process... including the use of obscene, profane language or gestures."⁸³ As a disciplinary consequence Matthew was suspended for three days, and his name was removed from the list of candidates for graduation speaker.

Matthew sought review of the disciplinary action through the school district's grievance procedures and requested a hearing. At the hearing, the hearing officer determined that Matthew's speech had been "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly."⁸⁴ The hearing officer considered the content of Matthew's speech "obscene" as defined by the school district's disruptive conduct rule and therefore affirmed the disciplinary action.⁸⁵

⁸¹ *Id.* at 678.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

Matthew and his father filed suit in the United States District Court for the Western District of Washington, alleging that school officials had violated Matthew's First Amendment right to freedom of speech.⁸⁶ In defense, school officials argued that Matthew's speech had disrupted the educational process. They reasoned that school officials had an obligation to protect a captive audience of minors from offensive language in a school-sponsored event and contended that school officials had authority to control the language used during a school-sponsored event.⁸⁷ Notwithstanding these assertions the district court ruled in favor of Matthew, finding that the disciplinary action violated Matthew's First Amendment rights. On appeal, the Ninth Circuit affirmed the District Court's judgment, finding that Matthew's speech was comparable to the armbands in *Tinker*.⁸⁸

The school district appealed the Ninth Circuit's decision to the Supreme Court. The Court opened its opinion by discussing the purpose of public education, which included helping students develop an understanding of socially appropriate behavior. The opinion observed that expectations of socially appropriate behavior existed within all spaces of our Nation, from the halls of Congress to public spaces.⁸⁹ Thus, the Court reasoned, a primary function of schools was to help students understand and adhere to these social expectations. The opinion stated, "Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."⁹⁰

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Fraser v. Bethel*, 755 F.2d 1356, 1364 (9th Cir. Wash. 1985).

⁸⁹ *Bethel*, 478 U.S. at 683.

⁹⁰ *Id.*

The Court drew a distinction between the political symbolism of *Tinker's* armbands and the sexual content of Matthew's speech. Matthew's speech, the Court pointed out, was distinct from *Tinker's* armbands in that Matthew's speech was unrelated to any political viewpoint. Given this distinction, and recognizing school officials' legitimate interest in protecting minors from offensive speech during school activities, the Court reasoned that it was within school officials' authority to punish Fraser for his offensive speech.⁹¹ The Court noted, "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."⁹² Ultimately, the *Fraser* decision established that school officials could prohibit lewd or offensive student speech delivered during a school-sponsored assembly.

Hazelwood v. Kuhlmeier⁹³

The third of the Supreme Court's student speech decisions, *Hazelwood School District v. Kuhlmeier*,⁹⁴ considered school officials' authority to censor student articles written for publication in a school-sponsored high school newspaper. In 1983, three students in Hazelwood School District in St. Louis County, Missouri filed suit against their school district and school officials. The students claimed that school officials violated their First Amendment speech rights

⁹¹ *Id.*

⁹² *Id.* at 685.

⁹³ *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988).

⁹⁴ *Id.*

by deleting two pages of articles from an edition of the school newspaper.⁹⁵ At the time, the practice at Hazelwood East High School was for the journalism teacher to submit page proofs of each newspaper issue to the principal for review prior to publication. In accordance with this policy, on May 10, the newly hired newspaper advisor delivered the proofs of the May 13 issue to the school principal for review. The principal had concerns with two of the articles. One of the articles described three students' experiences with pregnancy, and the other article discussed the impact of divorce on students.⁹⁶

The principal feared that readers of the pregnancy article might be able to determine the identities of the students whose pregnancies provided the article's context. He also was concerned that the article's references to sexual activity and birth control were inappropriate for some of the school's younger students. Regarding the article about divorce, the principal was concerned because the article named the student who had complained about her father. The principal also believed the student's parents should have been given an opportunity to respond to the student's remarks or been asked to provide consent for publication of their daughter's comments.⁹⁷ Believing there was no time to make changes to the stories before the press run, the principal concluded that his only options were to either eliminate the two pages containing the focus of his concerns or not publish the newspaper. He directed the journalism teacher to delete the two pages containing the stories on pregnancy and divorce.⁹⁸

⁹⁵ *Id.* at 262.

⁹⁶ *Id.* at 263.

⁹⁷ *Id.*

⁹⁸ *Id.* at 264.

The students filed suit in the United States District Court for the Eastern District of Missouri, claiming that the principal's censorship of the student articles violated their First Amendment speech rights.⁹⁹ The District Court found that no First Amendment violation had occurred. Specifically, the court concluded that school officials were permitted to censor student speech in activities that were integrally connected to the school's educational function, including the publication of a school-sponsored newspaper, so long as their censorship had a reasonable basis.¹⁰⁰

On appeal, the Court of Appeals for the Eighth Circuit reversed the district court's decision.¹⁰¹ The Eighth Circuit declared that since the newspaper was "intended to be and operated as a conduit for student viewpoint," the school newspaper should be treated as a public forum.¹⁰² Therefore, because the newspaper was a public forum, The Eighth Circuit reasoned that school officials were only entitled to censor the contents of the newspaper when appropriate

⁹⁹ *Hazelwood v. Kuhlmeier*, 578 F. Supp. 1286, 1289 (E.D. Mo. 1984).

¹⁰⁰ *Id.* at 1295.

¹⁰¹ *Hazelwood v. Kuhlmeier*, 795 F.2d 1368 (8th Cir. 1986).

¹⁰² *Id.* at 1372. In *Perry Education Association v. Perry Local Educators' Association*, the Supreme Court categorized forums into three types: traditional public forums, limited public forums, and nonpublic forums. Traditional public forums include spaces such as public parks, sidewalks, and areas that have been traditionally open to political speech and debate. In traditional public forums, the government may not discriminate against speakers based on their views. Restrictions of speech are subjected to strict scrutiny; that is, restrictions are allowed only if they serve a compelling state interest and are narrowly tailored to meet the needs of that interest. In limited forums, the government may limit access to a designated public forum to certain classes or types of speech. In limited forums, the government may discriminate against classes or speakers or types of speech but may not exercise viewpoint discrimination. Finally, in nonpublic forums, such as airport terminals and a public school's internal mail system, government restrictions on speech must be reasonable and may not discriminate based on viewpoint. *See: Forums*, LEGAL INFORMATION INSTITUTE [LLI], CORNELL LAW SCHOOL, <https://www.law.cornell.edu/wex/forums> (last visited Jan. 22, 2018).

under the *Tinker* standard. Finding no evidence that the principal could have forecast the articles would lead to any material and substantial disruption within the school, the Eighth Circuit held that the deletion of the two pages violated the students' First Amendment rights.¹⁰³

On appeal, the United States Supreme Court granted certiorari and reversed the Eighth Circuit's decision.¹⁰⁴ Citing *Fraser*, the Court recognized that school officials had the right to determine the appropriateness of student speech uttered in a school assembly or within a classroom.¹⁰⁵ The Court dismissed the appellate panel's conclusion that the newspaper constituted a forum for public expression. In rejecting the public forum characterization, the Court observed that Hazelwood East school officials had historically been entitled to regulate the content of the newspaper in a reasonable manner, per Board policy. Therefore, the Court found that the public forum classification was not supported by the facts.¹⁰⁶

The Court also drew a distinction between tolerating a student's personal in-school expression, such as the *Tinker* armbands, and regulating school-sponsored student expressive activities that were part of the school curriculum. The Court held that school officials were entitled to exercise greater control over student expression within the context of a school-sponsored activity. Specifically, the Court pointed out that school officials could ensure the speech in question serves its intended educational purpose, is appropriate for the maturity level of the readers or listeners, and that the views of the speaker are not attributed to the school.¹⁰⁷

¹⁰³ *Hazelwood*, 795 F.2d at 1370.

¹⁰⁴ *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988).

¹⁰⁵ *Id.* at 267.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 288.

The Court observed that school officials must be able to set high standards for student speech disseminated as part of a school-sponsored activity and therefore must have the authority to refuse to disseminate speech that does not meet those standards.¹⁰⁸

Given school officials' authority to consider the content of school-sponsored speech and the maturity level of the audience, the Supreme Court reasoned that the *Tinker* analysis would not be appropriate for determining when school officials have authority to regulate school-sponsored student expression.¹⁰⁹ Instead, the Court formulated an alternate analysis to be applied to school-sponsored student expression. The Court held that school officials could regulate student speech uttered in conjunction with school-sponsored activities as long as such regulation was "reasonably related to legitimate pedagogical concerns."¹¹⁰

Applying this new student speech test, the Supreme Court determined that the principal's censorship of the student newspaper articles was justified. According to the Court, the principal had reasonably concluded that the students who wrote the articles had not mastered the curriculum within their Journalism II class. This conclusion was based upon the students having not demonstrated an understanding of how to treat controversial issues or protect the privacy of individuals, nor a full appreciation of the legal, moral, and ethical guidelines within the school journalism context.¹¹¹ Because the articles did not meet the standards set forth in the journalism class and textbook, the Court reasoned that the principal's censorship was justified. As a result,

¹⁰⁸ *Id.* at 272.

¹⁰⁹ *Id.* at 273.

¹¹⁰ *Id.*

¹¹¹ *Id.*

the Court reversed the Eighth Circuit's decision and ruled the principal's censorship of the school-sponsored newspaper had not violated the students' First Amendment speech rights.¹¹²

Morse v. Frederick¹¹³

Almost 20 years later, the Supreme Court heard another student speech case, *Morse v. Frederick*.¹¹⁴ On January 24, 2002, students from Juneau-Douglas High School (JDHS) in Juneau, Alaska were released from school to observe the Olympic Torch Relay as it passed in front of their high school. Students stood at the side of the street to observe the relay, while teachers and administrators supervised.¹¹⁵

Joseph Frederick was an 18 year-old JDHS senior. Joseph had not attended school on the morning of the relay because he had been stuck in the snow in his driveway, but he arrived in time to join his friends on the street to watch the event.¹¹⁶ As the torchbearers and camera crews passed by, Joseph and his friends unfurled a 14-foot banner reading "BONG HiTS 4 JESUS."¹¹⁷ The banner was easily readable by the students and by the principal, Deborah Morse, who were standing on the other side of the street.

Principal Morse immediately crossed the street and directed the students to take the banner down, and everyone but Joseph complied. When Joseph refused, Morse confiscated the

¹¹² *Id.*

¹¹³ *Morse v. Frederick*, 551 U.S. 393 (2007).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 397.

¹¹⁶ *Frederick v. Morse*, 439 F.3d 1114, 1115 (9th Cir. 2006).

¹¹⁷ *Id.*

banner and later suspended Joseph for 10 days.¹¹⁸ She explained that she had told Joseph to take the banner down because she thought it encouraged illegal drug use, in violation of school policy.¹¹⁹

Joseph appealed his suspension to the district superintendent, who upheld the suspension. The superintendent concluded that Joseph's suspension was warranted because he had displayed the banner at a school-sanctioned activity in the midst of fellow students. The superintendent further explained that Joseph had been disciplined because his speech appeared to advocate the use of illegal drugs.¹²⁰ Joseph appealed his suspension to the school board, where it was sustained.¹²¹

Joseph filed suit in the U.S. District court for the District of Alaska, alleging the school board and Principal Morse had violated his First Amendment free speech rights. The district court first concluded that viewing the parade had constituted a school-sponsored event. The court reached this conclusion based on several facts: Principal Morse had authorized teachers to take their classes to view the relay, the band and cheerleaders were organized to greet the relay participants, and school officials monitored students throughout the event.¹²² The district court granted summary judgment for the school board and Morse, finding the principal had the authority, if not the obligation, to stop messages that could be reasonably interpreted as

¹¹⁸ *Morse*, 551 U.S. at 398. Note: The Ninth Circuit's opinion indicates that Principal Morse saw the banner, crossed the street, and grabbed and crumpled up the banner before suspending Frederick. *Morse*, 439 F.3d at 1115.

¹¹⁹ *Morse*, 551 U.S. at 398.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 400-401.

promoting illegal drug use. Citing *Fraser*, the court pointed out school officials had authority to censor lewd or offensive student speech. This observation led the district court to reason that Joseph's banner could be censored because its message expressed a contradiction of the Board's policies relating to drug abuse prevention.¹²³

On appeal, the Ninth Circuit reversed. The Ninth Circuit concluded that *Tinker*, not *Fraser*, should govern Joseph's speech. The court noted that the message conveyed on Joseph's banner was not sexual, like the speech in *Fraser*, and was not "plainly offensive."¹²⁴ Applying *Tinker*, the Ninth Circuit found the school district had violated Joseph's free speech rights because the banner had not caused substantial disruption to the school.¹²⁵

The United States Supreme Court granted certiorari and reversed the Ninth Circuit's decision.¹²⁶ The Court observed that the principal could have reasonably perceived the banner as promoting illegal drug use in violation of school policy.¹²⁷ Discussing the *Tinker*, *Fraser*, and *Hazelwood* decisions, the Court noted *Fraser*'s express acknowledgement that *Tinker* was not the only basis for restricting student speech.¹²⁸ The Court further explained that *Hazelwood* was not applicable because Joseph's banner could not be characterized as school-sponsored speech. That is, while Joseph displayed his banner in a school-sanctioned event, he was not acting as a representative of the school when he displayed it. Nonetheless, the majority pointed out,

¹²³ *Id.* at 399.

¹²⁴ *Frederick v. Morse*, 439 F.3d 1114 (9th Cir. 2006).

¹²⁵ *Id.* at 1123.

¹²⁶ *Morse*, 551 U.S. at 397.

¹²⁷ *Id.* at 398.

¹²⁸ *Id.* at 405.

Hazelwood had acknowledged that school officials had authority to regulate some types of in-school student speech that might not otherwise be regulated outside of the school setting.¹²⁹

The Court acknowledged concerns about drug use among the nation's youth and emphasized the role of schools in educating students about the dangers of illegal drug use.¹³⁰ The Court reasoned that, in Joseph's case, the principal saw a banner she believed promoted illegal drug use and made an immediate decision about whether and how to respond. The Court agreed with Principal Morse's response, noting, "Failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use."¹³¹

In conclusion, the *Fraser* Court did not rely on *Tinker*, *Fraser*, or *Hazelwood*, but instead established another test altogether. Acknowledging school officials' interest in deterring drug use by schoolchildren, the Court declared that school officials could restrict student speech at a school event when the speech could be reasonably interpreted as promoting illegal drug use.¹³² Accordingly, the Supreme Court reversed the Ninth Circuit's decision, finding that Joseph's First Amendment rights had not been not violated when his banner was prohibited at a school-sponsored event.

In a concurring opinion, Justice Alito agreed that school officials could restrict student in-school speech that threatens students' physical safety, such as speech advocating illegal drug use. Alito made it clear, however, that his concurring opinion did not "endorse any further extension"

¹²⁹ *Id.* at 424.

¹³⁰ *Id.* at 395.

¹³¹ *Id.* at 410.

¹³² *Id.* at 395.

of *Tinker*'s substantial disruption standard.¹³³ As such, Justice Alito pointed out that *Morse* did not extend the authority of school officials to restrict student speech that could “plausibly be interpreted as commenting on any political or social issue.”¹³⁴

Student Electronic Speech

Though numerous student off-campus electronic speech cases have sought Supreme Court review,¹³⁵ the Court has declined each invitation. Lower courts, however, have decided several cases around this topic. Interestingly, despite the media focus on cyberbullying, or student-to-student bullying online, the majority of the student off-campus speech cases decided by the lower courts have involved student speech targeting school officials.¹³⁶ Many of these cases have involved student speech appearing on websites, mySpace profiles, or blog posts created by students using home computers outside of school hours.

The following section provides an overview of these cases. Courts grapple with a variety of issues in determining whether student off-campus speech can be regulated. These issues include nexus (i.e., the connection between the speech and the school), lewd or offensive speech,

¹³³ *Id.* at 422 (Alito, S., concurring).

¹³⁴ *Id.*

¹³⁵ See *Wisniewski v. Board of Education*, 494 F.3d 34 (2nd Cir. 2007); *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008); *J.S. v. Blue Mountain*, 650 F.3d 915 (3rd Cir. 2011); *Layshock v. Hermitage*, 650 F.3d 205 (3rd Cir. 2011); and *Bell v. Itawamba*, 774 F.3d 280, 291 (5th Cir. 2014).

¹³⁶ Joe Dryden, J.D, *School Authority over Off-Campus Student Expression in the Electronic Age: Finding a Balance Between a Student's Constitutional Right to Free Speech and the Interest of Schools in Protecting School Personnel and Other Students from Cyber Bullying, Defamation, and Abuse* (Dec. 2010) (unpublished Doctor of Education dissertation, University of North Texas) (on file with Digital Libraries, University of North Texas).

speech containing threatening language, and the location of the speech. Relevant student off-campus electronic speech cases are presented chronologically below, and an analysis of emerging trends and future implications will be discussed in subsequent chapters.

Beussink v. Woodland¹³⁷

In 1998, the United States District Court for the Eastern District of Missouri decided *Beussink v. Woodland*, one of the first cases involving student off-campus electronic speech. In February 1998, Brandon Beussink, a junior at Woodland High School in Marble Hill, Missouri, created a website using his home computer outside of school hours. The website contained vulgar language and conveyed Brandon's negative opinions about his teachers, principal, and the school's website.¹³⁸ Brandon's website invited readers to contact the school principal to communicate their opinions about the school. The website also contained a hyperlink to the school's website.

Brandon testified that he had not intended for the website to be accessed or viewed at school.¹³⁹ Nonetheless, one of Brandon's friends borrowed Brandon's home computer and viewed his website from home. Apparently wanting to retaliate against Brandon following an argument with him, the friend re-accessed the website while on school grounds and showed it to the computer teacher.¹⁴⁰ The teacher, upset by the website's content, informed the principal. The

¹³⁷ *Beussink v. Woodland*, 30 F.Supp. 2d 1175 (E.D. Mo. 1998).

¹³⁸ *Id.* at 1177.

¹³⁹ *Id.* at 1178.

¹⁴⁰ *Id.*

principal viewed the website and immediately made the decision to discipline Brandon.¹⁴¹ The principal later explained he had disciplined Brandon because he was upset by the website having been displayed in a classroom. It is unclear how many times the website was viewed at school that day, as there was no evidence indicating that Brandon had shown it to other students. Further, there was no evidence that any disruption had occurred as a result of the website being viewed.¹⁴²

Later that day, Brandon received notice of a 10-day suspension.¹⁴³ He spoke with the principal, but the principal would not reconsider the disciplinary action. Brandon deleted the website when he arrived home that afternoon and thereafter served his suspension.¹⁴⁴ As a consequence of his suspension and the school district's policy on unexcused absences (which included days of suspension), Brandon failed all of his classes for the semester.¹⁴⁵

Brandon's parents, on his behalf, filed suit in the United States District Court for the Eastern District of Missouri, alleging that school officials had violated his First Amendment rights to freedom of speech.¹⁴⁶ The district court noted the principal had disciplined Brandon because he was upset over the website's content, not because of a fear the website would cause a disruption. The court pointed out that disliking the content of a student's speech was not an acceptable justification for limiting it, stating, "Individual student speech which is unpopular but

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1180.

¹⁴⁶ *Id.*

does not substantially interfere with school discipline is entitled to protection.”¹⁴⁷ Ultimately, the court ruled for the student, finding that the principal’s decision to suspend Brandon had violated his free speech rights.¹⁴⁸ The school district did not appeal.

Killion v. Franklin¹⁴⁹

In 2001, a Pennsylvania district court decided a similar case involving a student’s off-campus electronic speech targeting a school official. During the 1998-99 school year, Zachariah Paul was a student at Franklin Regional High School in Pennsylvania.¹⁵⁰ In March 1999, while at home after school hours, Zachariah composed a “Top Ten” list targeting the high school’s athletic director, Robert Bozzuto. Zachariah was apparently angered after hearing about the rules and regulations being imposed upon members of the track team.¹⁵¹ The “Top Ten” list contained statements regarding Bozzuto’s appearance, including the size of his genitals.¹⁵² The list included the following statements:

- 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.

¹⁴⁷ *Id.* at 1181.

¹⁴⁸ *Id.* at 1180.

¹⁴⁹ *Killion v. Franklin*, 136 F. Supp. 2d 446 (W.D. Pa. 2001).

¹⁵⁰ *Id.* at 448.

¹⁵¹ *Id.*

¹⁵² *Id.*

- 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 wasn't [sic] for his gut, it would still take a magnifying glass and extensive searching to find it.¹⁵³

Zachariah emailed the list to friends from his home computer. He neither printed nor distributed copies of the list at school, because he had copied and distributed similar lists in the past and been warned he would be punished if he brought another list to school.¹⁵⁴

Several weeks later, another student reformatted Zachariah's email and distributed the document on school grounds.¹⁵⁵ Copies were found at both the high school and middle school. Thereafter, Zachariah was called to a meeting with the school principal, assistant principal, and Bozzuto. During this meeting school officials questioned Zachariah about the list, and Zachariah admitted he had created the list and emailed it to several friends from his home computer.¹⁵⁶ However, he denied bringing the list onto school grounds. Zachariah was instructed to bring a copy of the email to school the next day. He agreed and was allowed to return to class.¹⁵⁷

The next day, Zachariah and his mother met with the principal and Bozzuto. School officials informed Zachariah's mother that Zachariah was being suspended for ten days. They

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 449.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

indicated that the suspension was issued as a consequence of Zachariah having made offensive remarks about a school official and the fact the list was found on school grounds. The principal also informed Zachariah's mother that Zachariah would not be allowed to participate in any school-related activities, including track and field events, during the suspension.¹⁵⁸ The next day, Zachariah and his family received a certified letter advising them of the ten-day suspension for "verbal/written abuse of a staff member."¹⁵⁹

Zachariah and his family filed a lawsuit in the Westmore County Court of Common Pleas, Pennsylvania. They contended school officials had violated Zachariah's First Amendment rights of free expression by suspending him for speech that had originated off school grounds in the privacy of his home.¹⁶⁰ School officials argued that Zachariah's suspension was appropriate because he had violated school policy and because the speech was disruptive, lewd, obscene, and had the potential to disrupt school administration.¹⁶¹

The parties entered into a settlement agreement whereby Zachariah and his parents would withdraw their complaint in exchange for a suspension hearing. After this suspension hearing, which resulted in a ten-day suspension, Zachariah and his family filed a civil lawsuit in the United States District Court for the Western District of Pennsylvania. Zachariah's family alleged that school officials had violated Zachariah's First and Fourteenth Amendments when they suspended him.¹⁶² The parties entered into an agreement, allowing Zachariah to return to school.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 450.

¹⁶¹ *Id.*

¹⁶² *Id.* at 449.

In addressing the speech claim, the district court considered the *Tinker*, *Fraser*, and *Hazelwood* decisions. Considering school officials' substantial disruption claim, the court examined cases involving school officials punishing students for off-campus speech, including *Emmett v. Kent School District No. 415*,¹⁶³ *Buessink v. Woodland R-IV School District*,¹⁶⁴ and *J.S. v. Bethlehem*.¹⁶⁵ This analysis led the district court to observe that the *Tinker* analysis could probably be applied when student off-campus speech made its way to campus, even if another student brought the speech to campus.¹⁶⁶ The court also noted that the majority of courts had applied *Tinker* in analyzing both on- and off-campus student speech. As a result, the Court applied *Tinker* to Zachariah's speech.

Applying *Tinker*, the district court concluded that school officials had failed to provide evidence that Zachariah's speech had led to a substantial disruption.¹⁶⁷ There was no evidence that teachers were incapable of teaching or controlling their classes, nor did the speech cause any

¹⁶³ *Emmett v. Kent School District*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000). In February 2000, the United States District Court for the Western District of Washington ruled that a high school student's First Amendment freedom of speech rights were violated when he was suspended for a website he created from his home. The website contained some commentary on school administration and faculty, including mock obituaries of two of the student's friends as well as a vote on whose mock obituary might be written next. The district court found no evidence of intent to threaten, actual threat, or manifestations of violent tendencies, and granted the injunction.

¹⁶⁴ *Beussink v. Woodland*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

¹⁶⁵ *J.S. v. Bethlehem*, 569 Pa. 638 (Pa. 2002). This case was going through lower courts around the same time as *Killion*. This case will be discussed later in the literature review.

¹⁶⁶ See *Boucher v. School Bd.*, 134 F.3d 821 (7th Cir. 1998); *Bystrom v. Fridley*, 686 F.Supp. 1387 (D. Minn. 1987); *Sullivan v. Houston*, 307 F. Supp. 1382 (S.D. Tex. 1969); *Baker v. Downey*, 307 F. Supp. 517 (C.D. Cal. 1969); and *Pangle v. Bend-Lapine*, 169 Or. App. 376 (Or. Ct. App. 2000).

¹⁶⁷ *Killion*, 136 F. Supp. 2d at 455.

faculty member to take a leave of absence, as had occurred in *J.S.*¹⁶⁸ Therefore, the court determined *Tinker's* disruption prong had not been met.¹⁶⁹

The court also noted *Fraser* had allowed school officials to limit student speech if it was lewd, vulgar, or profane.¹⁷⁰ The court observed, “Courts considering lewd and obscene speech occurring off school grounds have held that students cannot be punished for such speech, absent exceptional circumstances.”¹⁷¹ The court noted that several passages from Zachariah’s list were “lewd, abusive, and derogatory.”¹⁷² In accordance with *Thomas v. Board of Education*¹⁷³ and *Klein v. Smith*,¹⁷⁴ though, the court found that Paul’s speech was not punishable since it occurred

¹⁶⁸ *J.S.*, 569 Pa. at 638.

¹⁶⁹ *Killion*, 136 F. Supp. 2d at 455.

¹⁷⁰ *Killion*, 136 F. Supp. 2d at 454.

¹⁷¹ *Killion*, 136 F. Supp. 2d at 457.

¹⁷² *Id.*

¹⁷³ *Thomas v. Board of Education*, 607 F.2d 1043 (2nd Cir. 1979). In 1979, the Second Circuit ruled on a case involving a student-published newspaper that was published and distributed by several students off-campus. The newspaper, entitled “Hard Times,” was critical of the school environment. School officials suspended the students for publishing the offensive publication, and the students filed suit, claiming a violation of their First Amendment rights. The Second Circuit found that the suspension was indeed a violation of the students’ free speech rights, as the authority of school officials did not extend beyond the school day.

¹⁷⁴ *Klein v. Smith*, 635 F.Supp. 1440 (Dist. Me. 1986). In 1986, a District Court in Maine held that school officials lacked authority to punish a student for conduct that did not occur on school grounds or during the school day. School officials had suspended a high school student, Jason Klein, after he raised his middle finger toward a teacher when they saw one another in a parking lot after school hours. The court found that school officials could not establish that the vulgar gesture would adversely impact the operation of the school, ruling in favor of Klein.

in Zachariah's home away from school premises and was not associated with his role as a student.¹⁷⁵

In conclusion, the district court held that school officials had violated Zachariah's First Amendment rights. This decision was based upon the following observations: school officials had failed to provide evidence of a substantial disruption, Zachariah's speech was not threatening, and the speech did not cause any faculty member to take a leave of absence. Though school officials found the "Top Ten" list offensive, the court cited *Beussink* in noting that disliking the content of a student's speech was not an acceptable justification for limiting it.¹⁷⁶ The court determined that Zachariah's First Amendment rights had been violated.¹⁷⁷ The school district did not appeal.

J.S. v. Bethlehem¹⁷⁸

The following year, the Supreme Court of Pennsylvania decided another early case involving student off-campus electronic speech.¹⁷⁹ In the spring of 1998, J.S., an eighth grade student at Nitschmann Middle School in the Bethlehem Area School District, created a website on a home computer outside of school hours.¹⁸⁰ The website was titled "Teacher Sux" and consisted of several webpages containing derogatory comments about J.S.'s principal, Mr.

¹⁷⁵ *Killion*, 136 F. Supp. 2d at 457.

¹⁷⁶ *Id.* at 455.

¹⁷⁷ *Id.* at 458.

¹⁷⁸ *J.S. v. Bethlehem*, 569 Pa. 638 (Pa. 2002).

¹⁷⁹ *J.S. v. Bethlehem*, 757 A.2d 412 (Pa. Commw. Ct. 2002).

¹⁸⁰ *Id.* at 415.

Kartsotis, and algebra teacher, Mrs. Fulmer. The website included statements such as “Why Does Kartsotis suck?...He sees Mrs. Derrico [another employee within the school district]...He sees Mrs. Derrico naked... He fucks Mrs. Derrico,” and “Why Fulmer Should be Fired...She shows off her fat fucking legs... The fat fuck smokes... She’s a bitch!”¹⁸¹ A webpage also stated “Why Should She Die?” and went on to say “(Take a look at the diagram and the reasons I gave, then give me \$ 20.00 [sic] to help pay for the hitman [sic].) Some words from the writer: Fuck you Mrs. Fulmer. You are a Bitch. You are a Stupid Bitch.”¹⁸² Another page included a diagram of Mrs. Fulmer with her head cut off and blood dripping from her neck.¹⁸³

A teacher learned about the website through an anonymous email and reported it to the principal, who convened a faculty meeting and informed the faculty there was a problem in the school.¹⁸⁴ The principal contacted the local police and the Federal Bureau of Investigation (FBI) to investigate. As a result, J.S. was identified as the website’s creator. Additionally, the principal immediately informed Mrs. Fulmer, because he took the website threats seriously.¹⁸⁵

The record indicated that the principal and his family were embarrassed by the website and that Fulmer was frightened that someone would try to kill her.¹⁸⁶ Fulmer experienced adverse effects from having viewed the webpage, including stress, anxiety, headaches, loss of appetite, loss of sleep, loss of weight, and a sense of lost well-being. Fulmer applied for and was

¹⁸¹ *Id.* at 416.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 415.

¹⁸⁵ *Id.* at 416.

¹⁸⁶ *Id.*

granted a medical sabbatical leave for the 1998-99 school year because of her inability to return to teaching.¹⁸⁷ School officials also determined the website “had a demoralizing impact on the school community,”¹⁸⁸ resulting in “a feeling of helplessness and...plummeting morale”¹⁸⁹ among members of the school community.

In July 1998, school officials sent J.S. and his family a letter indicating J.S. would be suspended for three days. The letter stated J.S. had committed three serious offenses in violation of school district policy: “threat to a teacher, harassment of a teacher and principal, and disrespect to a teacher and principal.”¹⁹⁰ After a hearing on the suspension, J.S.’s suspension was extended to ten days. Thereafter, school officials initiated expulsion proceedings against J.S.¹⁹¹

J.S.’s parents enrolled J.S. in an out-of-state school for the 1998-99 school year. The expulsion hearings were conducted in August 1998. During the expulsion proceedings, school officials determined: 1) the statement “Why Should Mrs. Fulmer die?...give me \$20 to help pay for the hitman [sic]” constituted a threat to a teacher and was perceived by the teacher and others as a threat; 2) the statements regarding the principal and teacher constituted harassment; 3) the statements constituted disrespect to a teacher and principal, resulting in actual harm to the school community; 4) the School District Code of Conduct prohibited such student conduct; and 5) the

¹⁸⁷ *Id.* at 417.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 415.

¹⁹¹ *Id.*

statements caused harm to Mrs. Fulmer as well as other students and teachers.¹⁹² Based on these conclusions, the school board voted to permanently expel J.S. from school.¹⁹³

J.S.'s family appealed the expulsion and filed suit in the Northampton County Court, claiming J.S.'s First Amendment speech rights had been violated. The trial court affirmed the expulsion decision.¹⁹⁴ J.S.'s family then appealed to the Commonwealth Court of Pennsylvania. This appellate court considered *Tinker* and *Fraser* in analyzing whether J.S. could be disciplined as a consequence of his off-campus Internet speech.¹⁹⁵ The Commonwealth Court of Pennsylvania cited *Donovan v. Ritchie*,¹⁹⁶ *Fenton v. Stear*,¹⁹⁷ and *Beussink v. Woodland*,¹⁹⁸ all cases where the courts had upheld school officials' discipline of students for off-campus speech deemed to have substantially interfered with the educational process.¹⁹⁹

¹⁹² *Id.* at 417.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 415.

¹⁹⁵ *Id.* at 418.

¹⁹⁶ *Donovan v. Ritchie*, 68 F.3d 14 (1st Cir. 1995). In 1995, the First Circuit addressed the issue of whether a student was denied due process when he was suspended for three days and prohibited from participating in school events and athletics. The First Circuit ruled that the school did not violate a Massachusetts law prohibiting suspension of a student for conduct that was not connected with school-sponsored activities.

¹⁹⁷ *Fenton v. Stear*, 423 F. Supp. 767 (W.D. Pa. 1976). The Western District Court of Pennsylvania ruled that a student's First Amendment Freedom of Speech rights were not violated when he was suspended for three days based on conduct that occurred off of school grounds. The District Court determined that the student's act of saying "He's a prick" when a teacher passed by him at the mall on a Sunday evening constituted "fighting words," which are not protected by the First Amendment. Thus, the student's complaints were dismissed.

¹⁹⁸ *Beussink v. Woodland*, 30 F.Supp. 2d 1175 (E.D. Mo. 1998).

¹⁹⁹ *J.S.*, 757 A.2d at 421.

The court concluded that J.S.'s speech had substantially disrupted the educational process. Specifically, the court observed that the website had a damaging effect on Fulmer, as evidenced by the emotional and physical effects she suffered after viewing the website's violent pictures and solicitation of funds to cover the cost of a hit man.²⁰⁰ The court also referenced *Fraser's* finding that schools "must teach by example the shared values of a civilized social order"²⁰¹ and could therefore prohibit student speech that was lewd, offensive, or indecent. The court concluded J.S.'s speech met the *Fraser* standard and found the school officials' imposition of disciplinary consequences permissible.²⁰² In conclusion, given the substantial disruption that occurred as a consequence of J.S.'s website and the offensive, lewd content of the website, the court found the disciplinary consequences imposed upon J.S. were permissible under both *Tinker* and *Fraser*.²⁰³

In a dissenting opinion, Judge Friedman disagreed with the majority's conclusion that J.S. did not have First Amendment protection because Fulmer reasonably saw the website as a threat.²⁰⁴ Friedman argued the record showed that school officials had not perceived the website as a "true threat" as defined by the U.S. Supreme Court in *Watts*.²⁰⁵ Friedman offered several arguments for this conclusion. First, even after school officials had identified J.S. as being

²⁰⁰ *Id.*

²⁰¹ *Id.* at 422.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 426 (Friedman, R., dissenting).

²⁰⁵ *See Watts v. United States*, 394 U.S. 705 (1969).

responsible for creating the website, they took no action to have J.S. remove the site.²⁰⁶ In addition, they never investigated whether J.S. had indeed collected any money for a hit man, never separated J.S. from faculty or other students, and never warned any faculty that J.S. posed a possible threat. Further, the School District did not take any action to suspend the student until several months after discovering the website.²⁰⁷ For these reasons, Friedman argued, it was apparent the School District did not take the “hit man” portion of the website seriously.

Friedman also concluded the involvement of the FBI was inconsistent with the school officials’ other actions. Friedman wrote, “Delegating the investigation to criminal prosecutors while permitting Student to remain on school premises, to interact with other students and faculty and to engage in school sponsored activities is inconsistent with the severe action subsequently imposed on Student.”²⁰⁸ For these reasons, Friedman would have found that school officials abused their discretion in deciding to expel J.S.

On appeal, the Pennsylvania Supreme Court agreed with Friedman’s dissent, opining that the website did not constitute a true threat.²⁰⁹ This conclusion was based upon the court’s observation that J.S.’s website speech had “not reflect[ed] a serious expression of intent to inflict harm.”²¹⁰ While the court noted the importance of taking all student threats against students or faculty seriously, it reasoned, “Distasteful and even highly offensive communication does not

²⁰⁶ *J.S.*, 757 A.2d at 426 (Friedman, R., dissenting).

²⁰⁷ *Id.* at 427.

²⁰⁸ *Id.* at 429.

²⁰⁹ *J.S. v. Bethlehem*, 569 Pa. 638, 658 (Pa. 2002).

²¹⁰ *Id.*

necessarily fall from First Amendment protection as a true threat simply because of its objectionable nature.”²¹¹

Next, the appellate court considered the location of the speech, finding there was a sufficient nexus between the website and the school campus to treat the speech as having occurred on-campus.²¹² Specifically, although the website had been created at an off-campus location, J.S. had accessed it at school and shown it to another student. The Pennsylvania Supreme Court determined that because J.S.’s speech had been viewed on-campus, it could be limited based on both *Fraser’s* restriction of lewd, vulgar, and offensive on-campus student speech and *Tinker’s* substantial disruption standard. The court found J.S.’s speech to be lewd, vulgar, and offensive, finding it punishable according to *Fraser*.²¹³ In conclusion, the Pennsylvania Supreme Court affirmed the Commonwealth Court’s finding that school officials had not violated J.S.’s First Amendment speech rights when they expelled J.S.²¹⁴

Wisniewski v. Board of Education²¹⁵

In 2007, the Second Circuit decided its first case addressing school officials’ authority over student Internet speech. In April 2001, Aaron Wisniewski, an eighth grade student at Weedsport Middle School in upstate New York, used his parents’ home computer and AOL

²¹¹ *Id.*

²¹² *Id.* at 667.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Wisniewski v. Board of Education*, 494 F.3d 34 (2nd. Cir. 2007).

Instant Messaging (IM) software to send an IM to 15 people.²¹⁶ The message contained a small drawing of a pistol firing a bullet at a person's head, with dots representing splattered blood. Beneath the drawing appeared the words "Kill Mr. VanderMolen." Philip VanderMolen was Wisniewski's English teacher.²¹⁷

VanderMolen became aware of the icon and forwarded it to the high school and middle school principals, who notified local police, the school district superintendent, and Aaron's parents.²¹⁸ School officials suspended Aaron for five days. After the suspension, Aaron was allowed to return to school pending a superintendent's hearing.²¹⁹

The superintendent's hearing, held before a hearing officer, occurred in May 2001 and was decided in June. The hearing officer found the icon threatening and concluded that Aaron had violated school rules and disrupted school operations.²²⁰ The Board of Education approved the hearing officer's recommendation that Aaron be suspended for one semester. As a result, Aaron was suspended for the first semester of the 2001-02 school year.²²¹

In November 2002 Aaron's parents filed suit in the District Court for the Northern District of New York, claiming school officials had violated Aaron's First Amendment freedom of speech rights by suspending him. Aaron's parents argued that Aaron's Internet posting was protected by the First Amendment and alleged that school officials had acted in a retaliatory

²¹⁶ *Id.* at 36.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 37.

manner by suspending him.²²² The district court, referencing the Supreme Court's *Watts* decision, determined that Aaron's icon could have been reasonably construed to be a "true threat" and thus lacked First Amendment protection.²²³

On appeal, the Second Circuit decided not to address the issue of whether Aaron's icon constituted a "true threat," reasoning that the *Watts* standard was not appropriate for application to Aaron's speech.²²⁴ In explanation, the opinion stated, "School officials have significantly broader authority to sanction student speech than the *Watts* standard allows."²²⁵ Instead, the Second Circuit found *Tinker* to be a more appropriate tool for analysis. The Second Circuit focused on the issue of Aaron's intent. Specifically, according to the court, it had been reasonably foreseeable that school officials would eventually see the IM icon and that the icon would create a risk of substantial disruption within the school environment.²²⁶ Given the reasonably foreseeable risk of substantial disruption, the Second Circuit affirmed the district court's decision that Aaron's First Amendment rights had not been violated by his suspension.²²⁷

In deciding *Wisniewski*, the Second Circuit relied upon *Tinker* to formulate a two-pronged test. Specifically, the court ruled that students could be disciplined for off-campus speech that included violent content where (1) there was a reasonably foreseeable risk the speech would come to the attention of school officials, and (2) there was a reasonably foreseeable risk

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 38.

²²⁵ *Id.*

²²⁶ *Id.* at 40.

²²⁷ *Id.*

the speech would materially and substantially disrupt the discipline of the school.²²⁸ Aaron appealed the case to the Supreme Court, but the Court denied certiorari.

*Doninger v. Niehoff*²²⁹

A year after the *Wisniewski* decision, the Second Circuit decided a case involving Avery Doninger. Avery was a high school junior, a Student Council member, and Junior Class Secretary at Lewis Mills High School (LMHS) in Burlington, Connecticut.²³⁰ In 2007, LMHS administrators and Student Council members were attempting to schedule and plan their annual battle-of-the-bands concert, Jamfest.²³¹ Jamfest had been previously postponed twice due to delays in the opening of LMHS's new auditorium. Shortly before the rescheduled Jamfest date, the Student Council was advised that either the date or location of the event would need to change because an auditorium worker who needed to facilitate the event was not able to attend on the new date.²³²

Student Council members were concerned, as they believed that Jamfest needed to occur on the rescheduled date in the new auditorium in order to ensure all bands could participate.²³³ Avery and three other student council members decided to alert community members and solicit the community's help in persuading school officials to let Jamfest occur as scheduled. The

²²⁸ *Id.*

²²⁹ *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008).

²³⁰ *Id.* at 44.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

students sent emails to several email addresses obtained from an account belonging to one of the student's fathers.²³⁴ The email stated that the LMHS administration had decided Student Council could not hold Jamfest in the auditorium because an employee who worked in the auditorium was not available.²³⁵ The email asked recipients to contact the district superintendent and tell her that Jamfest must be held as scheduled. Recipients were also asked to forward the email to as many other people as possible.²³⁶

The school district superintendent and principal received several telephone calls and emails from people expressing concerns about Jamfest's scheduling. Thereafter, Principal Niehoff encountered Avery in the hallway at LMHS and indicated she was disappointed that Student Council members had resorted to a mass email rather than working collaboratively with school officials to resolve the issue.²³⁷ Principal Niehoff told Avery she was amenable to rescheduling Jamfest so that it could be held in the auditorium and asked Avery to send a corrective email. Avery agreed to do so.²³⁸

That night, Avery posted a message on her publicly accessible blog. Her blog post began as follows:

jamfest is cancelled due to douchebags in central office. here is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest, basically, because we sent it out, Paula Schwartz [Superintendent] is

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 45.

getting a TON of phone calls and emails and such. we have so much support and we really appreciate it. however, she got pissed off and decided to just cancel the whole thing all together. anddd [sic] so basically we aren't going to have it at all, but in the slightest chance we do it is going to be after the talent show on may 18th. andd...here is the letter we sent out to parents.²³⁹

The post also included the email message Student Council members had sent that morning, along with the contents of an email Avery's mother had sent to Superintendent Schwartz earlier in the day. In the introduction to the letter from her mother, Avery wrote, "And here is a letter my mom sent to Paula [Schwartz] and cc'd Karissa [Niehoff] to get an idea of what to write if you want to write something or call her to piss her off more. im down... [sic]"²⁴⁰

The following day, school officials met with the Student Council members who were involved in sending the initial email. Student Council members and school officials agreed to reschedule Jamfest to a date in June.²⁴¹ After this meeting, the principal and superintendent continued to receive phone calls and emails. Superintendent Schwartz first became aware of Avery's blog post a few days after the meeting, when her adult son found it on the Internet.²⁴² The superintendent notified the principal of Avery's blog post, and the principal concluded Avery's conduct had failed to display the good citizenship expected of class officers. In addition, Avery had disregarded the principal's suggestions regarding appropriate ways to raise concerns

²³⁹ *Id.* at 44.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 46.

with school administrators.²⁴³ Principal Niehoff decided Avery should be prohibited from running for Senior Class Secretary, but she did not confront Avery immediately due to the Advanced Placement exams taking place at that time.²⁴⁴

On May 17, Avery went to the principal's office to accept her nomination for Senior Class Secretary. There, the principal handed Avery a printed copy of Avery's blog post and requested that Avery apologize to the superintendent in writing, show a copy of the post to her mother, and withdraw her candidacy for the Senior Class Secretary office.²⁴⁵ Avery apologized to Superintendent Schwartz and showed her mother the blog post, but she refused to withdraw her candidacy. In turn, the principal declined to endorse Avery's nomination. The principal's denial of the endorsement prohibited her from running for Senior Class Secretary.²⁴⁶ As a result, Avery was not allowed to have her name on the ballot or deliver a campaign speech at a school election assembly.²⁴⁷

Avery's mother, Lauren Doninger, filed suit in the United States District Court for the District of Connecticut, alleging the principal had violated Avery's First Amendment freedom of speech rights by denying her the opportunity to run for the student government office.²⁴⁸ The district court cited *Wisniewski* in concluding that Avery's blog entry should be treated as on-

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 211 (D. Conn. 2007)

campus speech.²⁴⁹ Finding Avery's speech comparable to *Fraser's* offensive speech, the district court reasoned school officials had acted within their authority in punishing Avery for her offensive speech.²⁵⁰ The court ruled in favor of school officials.²⁵¹

Avery's mother appealed the decision to the Second Circuit. She argued that her daughter's speech was protected under *Tinker* and *Wisniewski*, since the speech originated within the confines of the Doningers' home and was not likely to cause substantial disruption within the school environment.²⁵² The Second Circuit panel applied *Wisniewski*, concluding it had been reasonably foreseeable Avery's speech would come to school officials' attention. Also, the panel pointed out that under a *Tinker* analysis, Avery's posting had created a risk of substantial disruption within the school.²⁵³

This conclusion was based on three factors. First, the language Avery used was both offensive and potentially disruptive to school officials' efforts to work with student council members to resolve the Jamfest scheduling issue.²⁵⁴ Second, Avery's post included misleading or false information designed to solicit more emails and calls to Schwartz. Specifically, Avery had stated that Jamfest had been cancelled, when in fact the event was, at the time of the post, in the process of being rescheduled.²⁵⁵ Finally, not only did Avery's speech potentially disrupt efforts

²⁴⁹ *Id.* at 217.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 51.

to settle the Jamfest scheduling issue, but it had also complicated the operation of the school's student government activities.²⁵⁶ Specifically, Avery's conduct had undermined the values that student government was designed to promote, such as working cooperatively with advisors and administration and promoting good citizenship.²⁵⁷

In its conclusion, the court acknowledged that its ruling might have been different had school officials imposed a different type of consequence. The panel explained, "We are mindful that, given the posture of this case, we have no occasion to consider whether a different, more serious consequence than disqualification from student office would raise constitutional concerns."²⁵⁸ Nevertheless, upon reviewing the evidentiary record, the panel concluded that Avery's blog post had created a foreseeable risk of substantial disruption within the school and that Ms. Doninger had failed to clearly show that her daughter's First Amendment rights had been violated.²⁵⁹ Therefore, based upon a *Tinker* analysis, the court affirmed the district court's finding in favor of school officials. Doninger appealed the case, but the United States Supreme Court denied certiorari.

*Evans v. Bayer*²⁶⁰

In 2010, a Florida district court ruled in a case involving a student's use of Facebook. In November 2007, Katherine Evans was a senior at Pembroke Pines Charter High School.²⁶¹

²⁵⁶ *Id.* at 52.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 53.

²⁵⁹ *Id.*

²⁶⁰ *Evans v. Bayer*, 684 F. Supp. 2d 1365 (SD Fla. 2010).

Katherine created a Facebook group in which she posted the comments, “Ms. Phelps is the worst teacher I’ve ever met! To those select students who have had the displeasure of having Ms. Sarah Phelps, or simply knowing her and her insane antics: Here is the place to express your feelings of hatred.”²⁶² The page was created on Katherine’s home computer after school hours and included Ms. Phelps’s photograph. Katherine removed the posting after two days. Following the removal, the school principal became aware of the posting.²⁶³

The principal suspended Katherine from school for three days due to “Bullying/Cyber Bullying/Harassment towards a staff member” and “Disruptive Behavior.”²⁶⁴ In addition, the principal transferred Katherine from Advanced Placement classes into lesser-weighted honors courses. Katherine filed suit against the principal in the United States District Court for the Southern District of Florida, arguing the principal’s actions had violated her First Amendment free speech rights.²⁶⁵

The district court reasoned that, while student off-campus speech was generally protected, it could be subject to analysis under *Tinker* if the speech raised on-campus concerns.²⁶⁶ The court first concluded that the speech should be treated as off-campus speech. Next, the court concluded that school officials had not produced sufficient evidence that a

²⁶¹ *Id.* at 1367.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ See *J.S. v. Blue Mountain*, 593 F.3d 286 (3rd Cir. 2010); *Doninger v. Niehoff*, 527 F.3d 41, 50 (2nd Cir. 2008); and *Wisniewski v. Board of Education*, 494 F.3d 34, 38-39 (2nd Cir. 2007).

substantial disruption could be reasonably forecast as a result of Katherine having created the Facebook group.²⁶⁷

The court then applied *Fraser*. The principal had argued that Katherine's speech could be regulated due to its lewd and vulgar content.²⁶⁸ The court rejected this argument, pointing out Katherine's Facebook group did not involve the same type of speech that was at issue in *Fraser*. Specifically, Katherine's speech had neither undermined educational values nor occurred within the school setting.²⁶⁹ The court declared, "For the Court to equate a school assembly to the entire internet would set a precedent far too reaching."²⁷⁰

Finally, the court addressed school officials' argument that Katherine's speech was not protected because it constituted libel. Here, the court reasoned, Katherine's speech was an opinion and did not meet the definition of either libel or defamation.²⁷¹ Ultimately, the district court ruled that Katherine's speech failed both *Tinker's* substantial disruption test and *Fraser's* lewd or vulgar speech standard. The court pointed out that Katherine's speech was never accessed at school and had not caused a disruption of the school environment. For these reasons, the court ruled in Katherine's favor, finding that the suspension had violated Katherine's free speech rights.²⁷² The principal did not appeal.

²⁶⁷ *Evans*, 684 F. Supp. 2d at 1373.

²⁶⁸ *Id.* at 1374.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 1377.

*Doninger v. Niehoff II*²⁷³

After Avery Doninger graduated from high school, she was substituted for her mother as plaintiff in seeking damages for the alleged violation of her constitutional rights.²⁷⁴ The district court again found in favor of school officials, and Avery appealed the decision to the Second Circuit. In her appeal, Avery argued that the case should be reconsidered in light of new facts. Specifically, according to Avery, the facts did not support a finding that the principal had informed Avery her behavior was inappropriate for a class officer and that the mass email contained inaccurate information.²⁷⁵ In addition, Avery contended that there were some factual disputes to address: first, whether the principal obtained Avery's assurance that her email would be corrected, and second, whether Avery's blog post claiming Jamfest had been cancelled was false.²⁷⁶

Assessing Avery's assertions in the light most favorable to Avery, the Second Circuit pointed out that under *Tinker* it had been objectively reasonable for school administrators to conclude the posting was potentially disruptive.²⁷⁷ The court noted that the blog post directly pertained to a school event, invited other students to read and respond to the post by contacting

²⁷³ *Doninger v. Niehoff*, 642 F.3d 334 (2nd. Cir. 2011).

²⁷⁴ *Id.* at 348.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 349.

school officials, solicited student comments, and had, in fact, come to the attention of school administrators.²⁷⁸

Avery also argued the court should consider the principal's motives for disciplining her. Specifically, Avery claimed the principal had forbidden her to run for office because she had found the content of her blog post to be offensive – not because she had anticipated the post would cause a disruption.²⁷⁹ Avery asserted that this factual dispute should have rendered the district court's grant of summary judgment erroneous.²⁸⁰

In response to this argument, the court cited *Lowery v. Euverard*,²⁸¹ a Sixth Circuit decision addressing students' First Amendment rights and exclusion from extra-curricular activities. In *Lowery*, the Sixth Circuit concluded that high school football players had a right to free speech (in this case, writing negative blog posts about their coach) but did not have a right to continue playing for the coach while undermining his authority.²⁸² Similarly, Avery's discipline extended only to her role as a student government representative, as she was not suspended from classes or punished in any other way. Because the role of a student council representative was to

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ See *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007). A high school football coach dismissed players after they refused to apologize for signing a petition expressing their hatred for the coach and their desire not to play for him. The Sixth Circuit, applying *Tinker*, concluded that the school did not violate the players' First Amendment rights, as their regular education had not been impeded. The Sixth Circuit noted that the football players had a right to continue their campaign to have the coach fired, but they did not have a right to continue to play football for him while actively working to undermine his authority.

²⁸² *Id.*

help maintain a communication channel between students, faculty, and administration, the Second Circuit reasoned, “[I]t was not unreasonable for [the principal] to conclude that Doninger, by posting an incendiary blog post in the midst of an ongoing school controversy, had demonstrated her unwillingness properly to carry out this role.”²⁸³ As such, pursuant to *Tinker*, it was objectively reasonable for school officials to have concluded that Avery’s behavior was potentially disruptive of student government functions and to have determined that she was not free to engage in such behavior while serving as a class representative.²⁸⁴ In conclusion, the Second Circuit again affirmed the district court’s ruling, finding Avery’s First Amendment rights had not been violated.²⁸⁵

J.S. v. Blue Mountain²⁸⁶

The same year as the Second Circuit decided *Doninger II*, the Third Circuit decided a case involving a student’s fake Internet profile of her school principal.²⁸⁷ In March 2007, J.S., an eighth grade student in Blue Mountain School District and her friend K.L., a fellow eighth grade student at the same school, created a fake MySpace profile of their principal, James McGonigle. The students created the profile using J.S.’s parents’ home computer.²⁸⁸

²⁸³ *Doninger*, 642 F.3d at 351.

²⁸⁴ *Id.* at 358.

²⁸⁵ *Id.*

²⁸⁶ *J.S. v. Blue Mountain*, 650 F.3d 915 (3rd Cir. 2011).

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 920.

The MySpace profile contained an official photograph of the principal from the school website but did not identify him by name, school, or location. The profile was presented as a self-portrayal of a bisexual middle school principal named M-Hoe and contained crude content and vulgar language, including personal attacks on both the principal and his family.²⁸⁹ The profile listed some of M-Hoe's interests as "detention, being a tight ass, riding the fraintain [Ms. Frain, a school counselor, was the principal's wife], spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, hitting on students and their parents."²⁹⁰ According to J.S.'s deposition, the profile was intended to be a joke between J.S. and her friends.

Initially the profile could be viewed by anyone who knew the URL or who found it by searching MySpace. The day after creating the profile, J.S. made the posting private after several students approached her at school indicating they had seen it.²⁹¹ The record showed that no Blue Mountain students had been able to view the profile from the school because the school district's computers blocked access to MySpace.²⁹²

The principal learned about the profile from a student who was in his office to discuss a separate incident.²⁹³ The principal asked the student to attempt to find out who had created the profile, and the student came back later that day reporting J.S. had created it. The principal asked

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 921.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

the student to bring a copy of the profile to school the next day, and the student obliged.²⁹⁴ The next day, the principal showed the profile to the superintendent, the director of technology, and two guidance counselors. Because the profile contained a false accusation about a staff member, the principal decided the profile constituted an infraction of the school's disciplinary code.²⁹⁵ He also concluded that the profile's use of a school district photograph violated both copyright law and the school district's computer use policy.²⁹⁶

The principal met with J.S. and her mother. During this meeting, he showed J.S.'s mother the profile and placed J.S. on a 10-day out-of-school suspension. The principal notified the superintendent of the suspension, who supported his decision.²⁹⁷ Thereafter, J.S. and her parents filed a lawsuit against the school district in the United States District Court for the Middle District of Pennsylvania, alleging a violation of J.S.'s First Amendment freedom of speech rights.²⁹⁸

School officials asserted that J.S.'s profile had disrupted school in the following ways: First, students were discussing the profile in classes, with one teacher reporting he had to tell his students to stop talking about the profile three times. Also, the school counselor's job activities

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *J.S. v. Blue Mountain*, No. 3:07cv585, 2008 U.S. Dist. LEXIS 72685 (M.D. Pa. 2008).

had been disrupted, as the counselor had cancelled student appointments in order to meet with J.S. and her mother.²⁹⁹

The district court granted the school district's summary judgment motion on all claims.³⁰⁰ The court held that *Tinker* did not govern the case because no "substantial and material disruption" had occurred. Instead, the district court relied upon *Fraser*, reasoning that the school's disciplinary action was applicable because the profile included vulgar and lewd language. The court also indicated that J.S.'s speech was akin to the speech that promoted illegal activities in the *Morse* case, noting, "The speech at issue here could have been the basis for criminal charges against J.S."³⁰¹ The district court found that the nexus, or connection, between J.S.'s off-campus speech and the school campus was sufficient in justifying the imposition of disciplinary consequences.³⁰²

J.S. and her parents appealed, and the Third Circuit first affirmed the district court's ruling. The court ruled that J.S.'s speech could be regulated under *Tinker* due to its potential to cause a substantial disruption within the school.³⁰³ Thereafter, the Third Circuit granted J.S. and her parents' petition for rehearing *en banc*. The Third Circuit's *en banc* ruling cited *Tinker*, noting the facts did not support a finding that school officials could have reasonably forecast the profile would produce a substantial disruption within the school.³⁰⁴ The Third Circuit

²⁹⁹ *J.S.*, 650 F.3d at 923.

³⁰⁰ *J.S.*, 2008 U.S. Dist. LEXIS 72685 at *29.

³⁰¹ *Id.* at 18.

³⁰² *Id.*

³⁰³ *J.S. v. Blue Mountain*, 593 F.3d 286 (3rd Cir. 2010).

³⁰⁴ *J.S. v. Blue Mountain*, 650 F.3d 915, 920 (3rd Cir. 2011).

distinguished the *Doninger* blog from J.S.'s fake MySpace profile by observing that J.S. had not intended for her speech to reach the school; rather, she had made efforts to prevent others from viewing the profile by making the profile private.³⁰⁵ With this reasoning, the Third Circuit implied that the speaker's intent should be considered in the *Tinker* analysis.³⁰⁶ Therefore, the Third Circuit indicated that in order for student electronic speech to be regulated due to a substantial disruption, the speaker must have intended for speech to reach campus.³⁰⁷

Next, the *en banc* panel addressed school officials' argument that J.S.'s speech could have been prohibited under *Fraser*, due to its lewd and offensive content.³⁰⁸ Here the Third Circuit concluded that *Fraser* was not applicable to J.S.'s case because *Fraser* had not involved student off-campus speech.³⁰⁹ The panel reasoned that applying *Fraser* to J.S.'s speech would extend *Fraser* beyond its reasonable scope. Essentially, it would allow school officials to punish students for offensive speech originating anywhere, at any time, as long as the speech was about either the school or a school official.³¹⁰

Ultimately, the Third Circuit reversed both the district court's holding and the earlier panel's decision. The *en banc* Third Circuit held that school officials had violated J.S.'s First

³⁰⁵ *Id.* at 929.

³⁰⁶ Anika Hermann Bargfrede, *Demolishing the Schoolhouse Gate: Tinkering with the Constitutional Boundaries of Punishing Off-Campus Student Speech*, U. ILL. L. REV. 1645, 1665 (2015).

³⁰⁷ *Id.*

³⁰⁸ *J.S.*, 650 F.3d at 932.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 933.

Amendment free speech rights by suspending her for creating the profile.³¹¹ The *en banc* court expressed concern about allowing school officials too much authority over student behavior, stating, “an opposite holding would significantly broaden school districts’ authority over student speech and would vest school officials with dangerously overbroad censorship discretion.”³¹² School officials appealed to the Supreme Court, but the Court denied *certiorari*.

Layshock v. Hermitage³¹³

On the same day as the three-member panel of the Third Circuit made its initial ruling on *J.S.*, a separate Third Circuit panel ruled on a similar case involving student electronic speech in *Layshock v. Hermitage School District*.³¹⁴ In December 2005, Justin Layshock was a seventeen year-old senior at Hickory High School in Hermitage School District in Hermitage, Pennsylvania. Justin created a parody profile of his principal, Eric Trosch, on MySpace.³¹⁵ The parody was created at his grandmother’s house during non-school hours. Justin used a photograph copied from the school’s website and designed a profile based upon answers to various survey questions. He centered the profile around the theme of “big.” For example, he answered questions as follows:

“Are you a health freak? (Answer – “big steroid freak”);

“In the past month have you smoked?” (Answer – “big blunt”);

³¹¹ *Id.*

³¹² *Id.* at 930.

³¹³ *Layshock v. Hermitage*, 650 F.3d 205 (3rd Cir. 2011).

³¹⁴ *Id.*

³¹⁵ *Id.* at 208.

“In the past month have you been on pills?” (Answer – “Big pills”);

“In the past month have you gone Skinny Dipping?” (Answer – “Big lake, not big dick.”); and

“In the past months have you Stolen Anything?” (Answer – “Big keg.”)³¹⁶

Justin listed other students in the school district as “friends” on his MySpace website, thereby affording them access to the profile.³¹⁷ Students found the profile and, by mid-December 2005, three other students had also posted similar fake, unflattering profiles of the principal on MySpace. Each of these profiles was more vulgar and offensive than Justin’s. The principal became aware of these profiles and found them to be “degrading,” “demeaning,” “demoralizing,” and “shocking.”³¹⁸ He asked the school’s technology director to disable access to the websites from school, but students continued to find ways to access the profiles.³¹⁹

School officials learned that Justin might have been the author of one of the profiles.³²⁰ In a meeting with the superintendent, co-principal, and Justin’s mother, Justin admitted to creating one of the profiles.³²¹ On January 3, 2006, school officials sent a letter to Justin and his parents, notifying them that an informal hearing would be conducted as a result of Justin’s violation of the School District Disciplinary Code. Specifically, the letter indicated that Justin’s creation of the profile amounted to disrespect, disruption of the normal school process, harassment of a

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.* at 209.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

school administrator via the Internet, obscene language, and a computer policy violation (i.e. use of school pictures without authorization).³²²

The hearing officer found that Justin was responsible for all of the charges against him. School officials imposed the following disciplinary consequences: a 10-day out-of-school suspension, placement for the remainder of the school year in the Alternative Education Program (a segregated area of the high school generally reserved for students with behavior and attendance problems), exclusion from participation in all extracurricular activities, and exclusion from participation in the graduation ceremony.³²³ The Layshocks were also informed that school officials were considering expelling Justin. Justin, despite having created the “least vulgar and offensive profile”³²⁴ and being the only student to apologize, was the only student punished for the MySpace profiles.³²⁵

The Layshocks filed suit in the United States District Court for the District of Pennsylvania on January 27, 2006, claiming that the disciplinary consequences violated Justin’s First Amendment speech rights. The district court entered summary judgment in favor of Justin and against school officials.³²⁶ The court concluded that *Fraser* did not justify the school officials’ disciplinary actions, since *Fraser* involved in-school student speech and did not extend school officials’ authority to discipline students for lewd and profane off-campus speech.³²⁷

³²² *Id.* at 210.

³²³ *Id.*

³²⁴ *Id.* at 209.

³²⁵ *Id.*

³²⁶ *Layshock v. Hermitage*, 496 F. Supp. 2d 587 (W.D. Pa. 2007).

³²⁷ *Id.* at 600.

Further, the district court found that the suspension could not be justified under *Tinker* because school officials had failed to establish a sufficient nexus between Justin's speech and a substantial disruption of the school environment. Notably, three other profiles of the principal were available on MySpace.com, so any alleged disruption could not be solely attributed to Justin's profile.³²⁸ In addition, the court ruled, "the actual disruption was rather minimal – no classes were cancelled, no widespread disorder occurred, and there was no violence or student disciplinary action."³²⁹ For these reasons, the district court ruled in Justin's favor.

School officials appealed the decision to the Third Circuit, where the district court's ruling was affirmed.³³⁰ School officials petitioned for and were granted a rehearing *en banc*. School officials argued that Justin had created a sufficient link between his profile and the school district by accessing the school district's website to obtain the principal's photograph.³³¹ The *en banc* panel found this argument "unpersuasive at best."³³² In coming to this conclusion the court relied upon *Thomas v. Board of Education*,³³³ a case examining the nexus between student conduct and the school environment. In *Thomas*, the Second Circuit ruled that school officials violated students' free speech rights when they suspended students for producing and selling a satirical publication outside of school.³³⁴ The students had only created and distributed the

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *See Layshock v. Hermitage*, 593 F.3d 249 (3rd Cir. 2010).

³³¹ *Layshock v. Hermitage*, 650 F.3d 205, 214 (3rd Cir. 2011).

³³² *Id.* at 215.

³³³ *See Thomas v. Board of Education*, 607 F.2d 1043 (2nd Cir. 1979).

³³⁴ *Id.* at 1045.

publication after school and off-campus, so the Second Circuit found there was not a sufficient nexus allowing the school to exercise authority.³³⁵

Applying *Thomas*, the *en banc* panel addressed the location of Justin’s speech.³³⁶ The court concluded that the relationship between Justin’s profile and the school was “far more attenuated”³³⁷ than had existed in *Thomas*, given that Justin had created the profile while at his grandmother’s house on her computer. The panel stated, “It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child’s home and control his/her actions there to the same extent that it can control the child when he/she participates in school sponsored activities.”³³⁸

The *en banc* panel next addressed school officials’ claim that Justin’s speech should be considered “on-campus” speech because it was aimed at the school community, was accessed on campus by Justin, and would likely come to the attention of school officials.³³⁹ Relying upon *Fraser*, school officials had argued the First Amendment should not protect Justin’s profile because the speech was vulgar, lewd, offensive, and “ended up inside the school community.”³⁴⁰

³³⁵ *Id.* at 1041.

³³⁶ *Layshock*, 650 F.3d at 216.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*

School officials also referenced several previous student electronic speech cases³⁴¹ that allowed school officials to respond to vulgar student speech posted on the Internet.

The *en banc* court disagreed, reasoning that Justin's punishment was not appropriate under *Fraser* because there was no evidence Justin had engaged in lewd or profane speech within the school setting.³⁴² The majority of the *en banc* panel reasoned, "*Fraser* [did] not allow the School District to punish Justin for expressive conduct which occurred outside of the school context."³⁴³ Citing *Tinker*, the panel further pointed out, "[we] have found no authority that would support punishment for creating such a profile unless it results in foreseeable and substantial disruption of school."³⁴⁴

The Third Circuit ultimately affirmed the district court's decision that Justin's conduct had not disrupted the school and that his use of the school district's website had not constituted entering the school. The court concluded that school officials had violated Justin's First Amendment rights by suspending him.³⁴⁵ School officials filed a consolidated appeal with *J.S. v. Blue Mountain*, but the U.S. Supreme Court denied *certiorari*.

In its petition to the United States Supreme Court, school officials expressed the need for the Supreme Court to both address the inconsistencies in lower court decisions and to determine

³⁴¹ See *J.S. v. Bethlehem*, 757 A.2d 412 (Pa. 2002); *Wisniewski v. Board of Education*, 494 F.3d 34 (2007); and *Doninger v. Niehoff*, 642 F.3d 334 (2011).

³⁴² *Layshock*, 650 F.3d at 216.

³⁴³ *Id.* at 219.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

the appropriate analytical standard to be applied to student off-campus speech.³⁴⁶ An amicus brief filed by several national professional educator organizations³⁴⁷ in support of petitioners argued that public school officials needed authority to regulate off-campus student speech in order “to further their educational mission” and to maintain order within the school.³⁴⁸ In opposition, J.S.’s attorneys argued that, while the question of whether *Tinker* and *Fraser* applied to off-campus speech was indeed important, neither *Blue Mountain* nor *Layshock* was a suitable vehicle for addressing this question.³⁴⁹ In response to the Supreme Court’s decision not to rule on this issue, various law students and lawyers proposed legal tests and recommendations for school officials to consider in the absence of a Supreme Court precedent.

³⁴⁶ Petition for Writ of Certiorari, *J.S. v. Blue Mountain*, 650 F.3d 195 (3rd Cir. 2011) and *Layshock v. Hermitage*, 650 F.3d 205 (3rd Cir. 2011) (No. 11-502).

³⁴⁷ The Amici Curiae Brief in support of petitioners included the National School Boards Association, American Association of School Administrators, American School Counselor Association; Gay, Lesbian, and Straight Education Network; National Association of Elementary School Principals; National Association of Secondary School Principals; Pennsylvania School Boards Association; and School Social Work Association of America.

³⁴⁸ Brief for Petitioners at 17, *J.S. v. Blue Mountain*, 650 F.3d 195 (3rd Cir. 2011) and *Layshock v. Hermitage*, 650 F.3d 205 (3rd Cir. 2011) (No. 11-502).

³⁴⁹ J.S.’s attorneys argued, namely: 1) The issue of whether *Tinker* applies to off-campus speech is waived in *Layshock* and thus not before this Court; 2) *Blue Mountain* rests on adequate and independent state law grounds; and 3) These cases do not address First Amendment issues arising from student-to-student cyberbullying. See Brief in Opposition, *J.S. v. Blue Mountain*, 650 F.3d 195 (3rd Cir. 2011) and *Layshock v. Hermitage*, 650 F.3d 205 (3rd Cir. 2011) (No. 11-502).

R.S. v. Minnewaska³⁵⁰

The following year, a Minnesota federal district court decided a case involving a middle school student who was punished after making postings on her Facebook wall.³⁵¹ R.S., a 12-year-old sixth grade student at Minnewaska Area Middle School, made two postings on Facebook. The first posting expressed her dislike of a school employee, a hall monitor “Kathy.” It stated, “[I hate] a Kathy person at school because [Kathy] was mean to me.”³⁵² R.S.’s posting was created at home outside of school hours and was designed to be accessible by her Facebook friends but not by the general public.

According to R.S.’s complaint, one of R.S.’s Facebook friends viewed and recorded the message about Kathy.³⁵³ Shortly thereafter, the school principal viewed the message. The principal met with R.S. and told her he considered the message to be impermissible bullying. He required R.S. to apologize to the hall monitor and gave her a detention as a consequence for behavior described in disciplinary records as “rude/discourteous” and “other.”³⁵⁴ Following this incident, R.S. published a second message on Facebook stating, “I want to know who the f%\$# [sic] told on me.”³⁵⁵ In response to this posting, R.S. was given a one-day in school suspension and was prohibited from attending a class ski trip. These consequences were a response to

³⁵⁰ *R.S. v. Minnewaska*, 894 F. Supp. 2d 1128 (D. Minn. 2012).

³⁵¹ *Id.* at 1133.

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 1134.

behavior considered “insubordination” and “dangerous, harmful, and nuisance substances and articles.”³⁵⁶ R.S. filed suit in the United States District Court for the District of Minnesota, alleging school officials had violated her First Amendment rights to freedom of speech by disciplining her for her Facebook posts.³⁵⁷

Relying upon *Tinker*, *Watts*, and *Wisniewski*, the court held that out-of-school speech was protected under the First Amendment and not punishable by school authorities unless it: a) posed a true threat, or b) was reasonably calculated to reach the school environment and was so egregious as to pose a serious safety risk or other substantial disruption to the school.³⁵⁸ The court ruled that R.S.’s Facebook wall postings did not constitute threats and were not likely to cause substantial disruption in school. The court stated, “The facts alleged in Plaintiffs’ complaint place R.S.’s speech in the heartland of protected nonviolent and nondisruptive out-of-school speech.”³⁵⁹ Finding R.S.’s freedom of speech rights had been violated, the court ruled in favor of R.S.³⁶⁰

Sagehorn v. Independent School District No. 728³⁶¹

Three years later, a different judge in the same district court in Minnesota ruled in a case involving a high school student who responded to a post on Twitter. In February 2014, Reid

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 1141.

³⁶⁰ *Id.*

³⁶¹ *Sagehorn v. Independent*, 122 F. Supp. 3d 842 (D. Minn. 2015).

Sagehorn was an honor student and athlete at Rogers High School in Minnesota. He had been admitted to North Dakota State University, pending completion of remaining high school courses.³⁶²

On January 26, 2014, someone anonymously posted the following on a website titled “Roger Confessions:” “did @R_Sagehorn3 actually make out with [name of female teacher at Rogers High School]?”³⁶³ In response to this question, Reid posted “actually yes.”³⁶⁴ Reid created this post outside of school hours while he was off-campus. Thereafter, the parent of a student contacted school officials and expressed concern about the postings, and Reid was summoned to the principal’s office.³⁶⁵

In the principal’s office, the principal and a police officer asked Reid about the website and about his post. Reid admitted he had authored the post and it was meant to be sarcastic. He also stated he had not intended for anyone to believe it to be true.³⁶⁶ Later Reid was again summoned to the principal’s office and placed upon a five-day suspension. The principal told Reid’s mother that Reid was being suspended because he had “damaged a teacher’s reputation.”³⁶⁷ The suspension notice indicated Reid had committed the offense of “threatening, intimidating, or assault of a teacher, administrator, or staff member.”³⁶⁸

³⁶² *Id.* at 849.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.*

A few days later, the principal called Reid's parents and informed them that Reid's suspension was being extended for another five school days and that a recommendation for expulsion would be presented to the School Board. At this time, Reid's parents told the principal they disapproved of the decision and felt the punishment was excessive.³⁶⁹ Soon after, Reid's mother requested an open hearing and meetings with school officials.

During meetings with the superintendent and assistant superintendent, Reid's parents expressed their view that the punishment was excessive and unwarranted.³⁷⁰ School officials told the Sagehorns they could contest the expulsion in a hearing but indicated that a hearing would be meaningless because the outcome had already been determined. School officials also warned Reid's parents that school officials would consider increasing the expulsion through the remainder of the school year if the parents requested a hearing.³⁷¹ The parents were further warned that an expulsion would likely result in North Dakota State University withdrawing Reid's early acceptance. Reid's parents alleged school officials made it appear their only real option was to withdraw Reid from school.³⁷² School officials presented Reid's parents with a pre-drafted withdrawal agreement, which Reid's parents signed.³⁷³

Reid filed action in the United States District Court for the District of Minnesota, alleging that the school district and several school officials had violated his First Amendment freedom of

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 850.

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.*

speech rights when they disciplined him for his post.³⁷⁴ According to Reid, the post was neither reasonably calculated to reach the school environment, nor had it presented a risk of substantial disruption to the school environment.³⁷⁵ School officials argued that Reid's Internet post was not protected by the First Amendment because the post was obscene, caused substantial disruption, and was lewd and offensive.³⁷⁶

In response to the claim that Reid's Internet post had been obscene, the district court applied a test developed in a 1973 Minnesota Supreme Court decision, *Miller v. California*.³⁷⁷ In order for speech to be considered obscene under the Miller Test, it needed to meet three criteria: a) the average person would find the speech appealed to the prurient interest; b) the speech depicted or described, in a patently offensive way, sexual conduct, and c) the speech lacked serious literary, artistic, political, or scientific value.³⁷⁸ Applying this test, the court found that Reid's speech had not met the test's second prong because it was neither obscene nor patently offensive.³⁷⁹

School officials had also argued they had a right to regulate Reid's speech under *Tinker's* substantial disruption exception. Specifically, they claimed that because Reid's post had suggested a physical relationship between a teacher and a student, it was foreseeable the speech

³⁷⁴ *Id.* at 852.

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ See *Miller v. California*, 413 U.S. 15 (1973).

³⁷⁸ P. Heath Brockwell, *Comment: Grappling with Miller v. California: The Search for an Alternative Approach to Regulating Obscenity* (1994), 24 CUMB. L. REV. 131, 134.

³⁷⁹ *Sagehorn*, 122 F. Supp. 3d at 855.

would reach the school environment and cause a substantial disruption.³⁸⁰ In response, the court reasoned that the fact that Reid’s speech referenced sexual conduct between a teacher and a student “[did] not, de facto, result in the post being likely to reach school and cause a substantial disruption.”³⁸¹ Further, the court noted, similar to the student speech at issue in both *Layshock* and *J.S. v. Blue Mountain*, Reid’s speech caused no disruption to the school environment.³⁸²

Finally, school officials maintained they were authorized to regulate Reid’s post under *Fraser* because it was lewd and constituted harassment of a teacher.³⁸³ The court, however, observed that *Fraser* was “clearly limited to on-campus speech.”³⁸⁴ Even considering the Fourth Circuit decision *Kowalski v. Berkeley County Schools*,³⁸⁵ which found that school officials were authorized to regulate speech that was directed at the school and created substantial disruption to the school environment, the court found no evidence that Reid’s post directly targeted the school.³⁸⁶

Ultimately, the court ruled in Reid’s favor, concluding that Reid’s post had not caused a substantial disruption and was not lewd, obscene, vulgar, or harassing in nature. The court noted,

³⁸⁰ *Id.* at 852.

³⁸¹ *Id.* at 858.

³⁸² *Id.*

³⁸³ *Id.* at 859.

³⁸⁴ *Id.*

³⁸⁵ See *Kowalski v. Berkeley*, 652 F.3d 563 (4th Cir. 2011).

³⁸⁶ *Sagehorn*, 122 F. Supp. 3d at 859.

“The law is sufficiently clear” in cases such as this one, stating that a student such as Reid “would have a clearly established right to free speech.”³⁸⁷ The school district did not appeal.

Burge v. Colton School District 53³⁸⁸

In 2015, an Oregon federal district court ruled in a case involving a middle school student and his Facebook posts. Braeden Burge was a 14 year-old eighth-grade student at Colton Middle School.³⁸⁹ Braeden, who typically earned “As” in school, learned he had received a “C” from his health teacher.³⁹⁰ As a consequence for receiving this low grade, Braeden’s mother grounded him for a portion of the summer.³⁹¹ To vent his frustration, Braeden posted several comments on his private Facebook page from his own home while school was not in session. He posted that he wanted to “start a petition to get mrs. [sic] Bouck fired, she’s the worst teacher ever.”³⁹² After a peer asked what the teacher had done, Braeden posted, “She’s just a bitch haha” and later “Ya haha she needs to be shot.”³⁹³ According to Braeden’s deposition, he had not intended to threaten his teacher, did not seriously believe she should be shot, and did not intend to start a petition to

³⁸⁷ *Id.* at 863.

³⁸⁸ *Burge v. Colton*, 100 F. Supp. 3d 1057 (D. Or. 2015).

³⁸⁹ *Id.* at 1065.

³⁹⁰ *Id.*

³⁹¹ *Id.* at 1064.

³⁹² *Id.* at 1060.

³⁹³ *Id.*

get her fired. Rather, his only purpose in posting the comments was to elicit a response from his friends.³⁹⁴

Less than 24 hours after he posted his comments, Braeden's mother viewed them. She immediately instructed Braeden to remove the posts, and he did.³⁹⁵ Later, the parent of another student anonymously placed a printout of Braeden's Facebook post in the school principal's school mailbox.³⁹⁶ The principal brought Braeden to the school office to question him, and Braeden acknowledged he had made the comments. The principal accused Braeden of violating School Board policies and placed him on a three and a half day in-school suspension.³⁹⁷ The principal then called Braeden's mother, who informed the principal she was aware of the post and had already talked to Braeden about it. Braeden's mother told the principal she disagreed with the school's discipline decision, stating that her child could not be disciplined for misconduct that had occurred outside of school.³⁹⁸ The principal continued with the suspension despite Braeden's mother's opposition. Following the suspension, Braeden returned to classes to complete the last week of eighth grade.³⁹⁹

Braeden's family filed suit in the United States District Court for the District of Oregon, alleging the principal had violated Braeden's First Amendment right to free speech when she

³⁹⁴ *Id.* at 1061.

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.*

punished him for the Facebook posts.⁴⁰⁰ School officials argued that Braeden’s speech was not protected by the First Amendment because it fell within the “true threat” exception and because it presented an actual or potential material and substantial disruption of the school environment.⁴⁰¹

First addressing the “true threat” claim, the district court observed, “Not every off-hand reference to violence is a true threat unprotected by the First Amendment.”⁴⁰² The court pointed out that it was undisputed that Braeden had not intended to threaten or intimidate anyone with his posts; in fact, Braeden had not intended for his teacher to even view the posts, as they were accessible only to his Facebook friends.⁴⁰³ The court applied an objective test to the “true threat” claim, asking whether a reasonable person would foresee Braeden’s statement being interpreted as a serious expression of intent to harm or assault his teacher.⁴⁰⁴ The court noted that because neither Braeden’s mother nor school officials had conducted any investigations, contacted police or mental health professionals, or removed Braeden from the teacher’s classroom, it was apparent Braeden’s comments had not created any real concerns about potential violence.⁴⁰⁵ Given the benign nature of Braeden’s comments and his lack of intent to do harm, the court ruled that the posts were not “true threats” under either a subjective or objective test.⁴⁰⁶

⁴⁰⁰ *Id.* at 1060.

⁴⁰¹ *Id.* at 1067.

⁴⁰² *Id.* at 1068.

⁴⁰³ *Id.*

⁴⁰⁴ *See Fogel v. Grass Valley Police Dep’t*, 531 F.3d 824, 831 (2008).

⁴⁰⁵ *Burge*, 100 F. Supp. 3d at 1069.

⁴⁰⁶ *Id.* at 1069.

Turning to the school's substantial disruption claim, the court referenced two Ninth Circuit cases addressing whether *Tinker* governed off-campus speech.⁴⁰⁷ The court found no evidence indicating that Braeden's Facebook posts had impacted classroom activity or that school officials could have foreseen a potential for substantial disruption based on the posts. In fact, during the six-week period before the principal became aware of the posts, no one had talked about or otherwise acknowledged the posts.⁴⁰⁸ Finding no evidence that Braeden had a history of violence or disciplinary issues or access to guns, the court found that no reasonable fact-finder could conclude that Braeden's posts had been reasonably likely to substantially disrupt the school environment.⁴⁰⁹ The court declared, "Thus, even if *Tinker* applies to Braeden's off-campus speech, [school officials] violated Braeden's First Amendment free speech rights when [they] suspended him."⁴¹⁰ The school district did not appeal.

Bell v. Itawamba⁴¹¹

In 2015, the Fifth Circuit ruled on a case originating in Mississippi. During the 2010-11 school winter holiday break, Taylor Bell, an aspiring rap artist and senior at the Itawamba Agricultural School in Mississippi, composed, sang, and recorded a rap song.⁴¹² He posted the

⁴⁰⁷ See *LaVine v. Blaine*, 258 F.3d 981 (9th Cir 2001) and *Wynar v. Douglas*, 728 F. 3d 1062 (9th Cir 2013).

⁴⁰⁸ *Burge*, 100 F. Supp. 3d at 1073.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 1074.

⁴¹¹ *Bell v. Itawamba*, 779 F.3d 379 (5th Cir. 2015).

⁴¹² *Id.* at 383.

song on both Facebook and YouTube.⁴¹³ The rap song criticized two coaches, Coach Wildmon and Coach Rainey, alleging both coaches had engaged in sexual misconduct toward female students. The rap song contained vulgar language, including the phrases “looking down girls’ shirts/drool running down your mouth/messing with the wrong one/going to get a pistol down your mouth” and “middle fingers up if you can’t stand that nigga/middle fingers up if you want to cap that nigga.”⁴¹⁴ Taylor’s song was made available to over 1,300 Facebook “friends” and an unlimited audience on YouTube.

According to Taylor, several of his female student friends had told him that the coaches had inappropriately touched them and had made sexually-charged comments to them and to other female students at the school.⁴¹⁵ Taylor later explained that his song was an effort to speak out on the issue of teacher-on-student sexual harassment, noting he had not reported these complaints to school officials because he believed that school officials generally ignored student complaints.⁴¹⁶

The day after the recording was posted, one of the coaches learned about the posting in a text message from his wife, who had learned about it from a friend. The coach listened to the recording on a student’s phone at school and immediately reported the rap song to the school’s principal, who then informed the school district’s superintendent.⁴¹⁷ The following day, Taylor was taken out of class to meet with the principal, district superintendent, and school board

⁴¹³ *Id.*

⁴¹⁴ *Id.* at 384.

⁴¹⁵ *Id.* at 410.

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* at 385.

attorney.⁴¹⁸ During this meeting, school officials accused Taylor of making threats and false allegations. Taylor denied making threats but admitted he had made allegations about the coaches' improper contact with female students. According to Taylor, he made these allegations believing they were true.⁴¹⁹ After the meeting, the principal drove Taylor to a friend's house rather than allowing him to attend his remaining classes for the day. On the next day school was in session, the assistant principal told Taylor he was being suspended indefinitely pending a hearing.⁴²⁰

The Itawamba County School Board's Disciplinary Committee held a hearing on January 26, 2011, which Taylor attended with his mother and a private attorney. The Committee concluded that Taylor's rap song had constituted harassment, intimidation, and possible threats against teachers.⁴²¹ The Committee suspended Taylor for seven days and transferred him to an alternative school for the remaining five weeks of the nine-week school period.⁴²² On February 7, 2011, Taylor appealed the Disciplinary Committee's findings and punishment at a hearing before the school board. The school board upheld the punishment, affirming the Committee's finding that Taylor's rap song had threatened, harassed, and intimidated school officials.⁴²³

A week later, Taylor's mother, Dora Bell, filed a complaint on behalf of her son in the United States District Court for the Northern District of Mississippi. The lawsuit claimed that the

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 386.

⁴²⁰ *Id.*

⁴²¹ *Id.* at 388.

⁴²² *Id.* at 386.

⁴²³ *Id.* at 387.

punishment imposed upon Taylor violated his First Amendment right to free speech.⁴²⁴ In its ruling, the district court agreed with both the Disciplinary Committee's and Itawamba School Board's conclusion that the rap song had constituted harassment, intimidation, and possible threats toward school officials.⁴²⁵ The court observed that the rap song had included charges of serious sexual misconduct against two teachers, used vulgar and threatening language, was published on Facebook and an unlimited Internet audience on YouTube.com, and would cause a substantial disruption at school.⁴²⁶ Therefore, ruling that school officials had not erred in punishing Taylor for publishing the song, the court dismissed Bell's lawsuit.⁴²⁷

On appeal, the Fifth Circuit initially reversed the lower court's decision, before affirming it *en banc* a year later. In its first decision, the panel found that the district court's application of *Tinker* had been "legally incorrect"⁴²⁸ because posting the rap song would not have substantially disrupted the discipline of the school even if *Tinker* had been applied. Further, the panel concluded that Taylor's rap song could not be regulated as a "true threat" under *Watts*.⁴²⁹

After an *en banc* rehearing of the case, the Fifth Circuit concluded that *Tinker* could, in fact, be applied to Taylor's rap song. According to the *en banc* panel, a rap song such as Taylor's that could be understood by school officials to threaten, harass, and intimidate a teacher should

⁴²⁴ *Id.*

⁴²⁵ Bell v. Itawamba, 859 F. Supp. 2d 834 (N.D. Miss. 2012).

⁴²⁶ *Id.* at 840.

⁴²⁷ *Id.* at 841.

⁴²⁸ Bell v. Itawamba, 774 F.3d 280, 291 (5th Cir. 2014).

⁴²⁹ *Id.*

be subjected to a *Tinker* analysis.⁴³⁰ Having decided *Tinker* was the correct analytical tool, the *en banc* panel reasoned that school officials could have forecast that the rap song's publication would cause a substantial disruption to the school environment. This conclusion was based upon the panel's observation that Taylor's rap song had pertained to specific events occurring at the school, identified the teachers by name, and was understood as being threatening.⁴³¹ The panel pointed out that threatening and intimidating a teacher impedes teachers' ability to teach and educate and disrupts the educational environment.⁴³² The Fifth Circuit observed, "If there is to be education, such conduct cannot be permitted."⁴³³ Having determined the rap song could be regulated under *Tinker's* substantial disruption standard, the Fifth Circuit found no need to decide whether the speech also constituted a "true threat" under *Watts*. In conclusion, the *en banc* panel affirmed the district court's decision, finding in favor of school officials.⁴³⁴

Four of the judges on the *en banc* panel wrote dissenting opinions. Three of the dissenters questioned *Tinker's* application to off-campus student speech, and one expressed hope that the Supreme Court would soon provide guidance regarding how to resolve these challenging disputes.⁴³⁵ In dissent, Judge Dennis argued that the majority had committed several fundamental errors. According to Dennis, the ruling: 1) failed to acknowledge that Taylor's rap song constituted speech on a "matter of public concern" and therefore should be protected under the

⁴³⁰ Bell v. Itawamba, 779 F.3d 379 (5th Cir. 2015).

⁴³¹ *Id.* at 399.

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.* at 403-436 (Dennis, J., Prado, E., Haynes, C., and Graves, J. dissenting).

First Amendment; 2) drastically expanded the scope of school officials' authority to regulate students' off-campus speech and minimized students' First Amendment protection; and 3) inappropriately applied the *Tinker* framework, which was far too broad a standard to adequately protect the rights of students who engage in speech outside of school.⁴³⁶ He wrote, "The majority opinion allows schools to police their students' Internet expression anytime and anywhere- an unprecedented and unnecessary intrusion on students' rights."⁴³⁷

In his dissent, Judge Dennis raised significant concerns about the majority opinion, declaring that the majority had sent a message to Taylor and to all children that the First Amendment does not protect students whose speech challenges those in power.⁴³⁸ He wrote, "[the decision] undermines the rights of all students and adults to both speak and receive speech on matters of public concern through the Internet."⁴³⁹ Three other judges joined Judge Dennis in questioning *Tinker's* application to off-campus speech.⁴⁴⁰

⁴³⁶ *Id.* at 405 (Dennis, J., dissenting).

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Id.* In this comment, Judge Dennis referenced a Supreme Court case, *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Pickering*, an Illinois public school teacher was dismissed by the Board of Education for writing and sending a letter to a local newspaper in connection with a recently proposed tax increase. The letter was critical of the way the Board and district administration had handled past proposals to raise new revenue for the schools. District administration dismissed the teacher after determining the letter's publication was "detrimental to the efficient operation and administration of the schools of the district." (564). Reversing the decision of the Illinois Supreme Court, the United States Supreme Court held that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." (574).

⁴⁴⁰ *Id.* at 403-436 (Dennis, J., Prado, E., Haynes, C., and Graves, J. dissenting).

In November 2015, Bell appealed the decision to the United States Supreme Court. The question presented on appeal was “whether and to what extent public schools, consistent with the First Amendment, may discipline students for their off-campus speech.”⁴⁴¹ In the petition, Bell argued that *Tinker*’s application to off-campus speech would have “particularly devastating consequences” in light of students’ use of online social media. The petition further noted that students risk “life-altering consequences” like suspension or expulsion any time they say anything potentially controversial on a social media platform.⁴⁴² The petition went on to argue that *Tinker* should not apply to off-campus speech on matters of public concern.⁴⁴³

Further, the petition raised concerns about the “troubling racial overtones” communicated by the Fifth Circuit’s decision.⁴⁴⁴ In punishing Taylor for his song, school officials targeted rap music, a type of music often considered particularly relevant to African American youth.⁴⁴⁵ Taylor’s rap contained violent rhetoric, as is common in rap music. School officials and the Fifth Circuit agreed the lyrics would not necessarily qualify as “true threats” under *Watts* but nevertheless constituted threats, harassment, and intimidation. According to the petition, this was unacceptable. Taylor argued that his song was not threatening under any conceivable standard, as evidenced by the fact the school officials had allowed Taylor to return to classes as usual after learning about the song.⁴⁴⁶ Further, petitioners argued, by interpreting Taylor’s lyrics literally,

⁴⁴¹ Petition for Writ of Certiorari at i, *Bell v. Itawamba*, 799 F.3d 379, (5th Cir. 2015) (No. 15-666).

⁴⁴² *Id.* at 27.

⁴⁴³ *Id.* at 28.

⁴⁴⁴ Petitioner Reply Brief at 10, *Bell v. Itawamba*, 799 F.3d 379, (5th Cir. 2015) (No. 15-666).

⁴⁴⁵ Petition for Writ of Certiorari at 29, *Bell v. Itawamba*, 799 F.3d 379, (5th Cir. 2015) (No. 15-666).

⁴⁴⁶ *Id.*

the *en banc* majority had “ignore[d] settled First Amendment jurisprudence” and “pose[d] a grave threat to artistic expression.”⁴⁴⁷ On February 29, 2016, the Supreme Court denied certiorari.

⁴⁴⁷ *Id.* at 31.

CHAPTER THREE

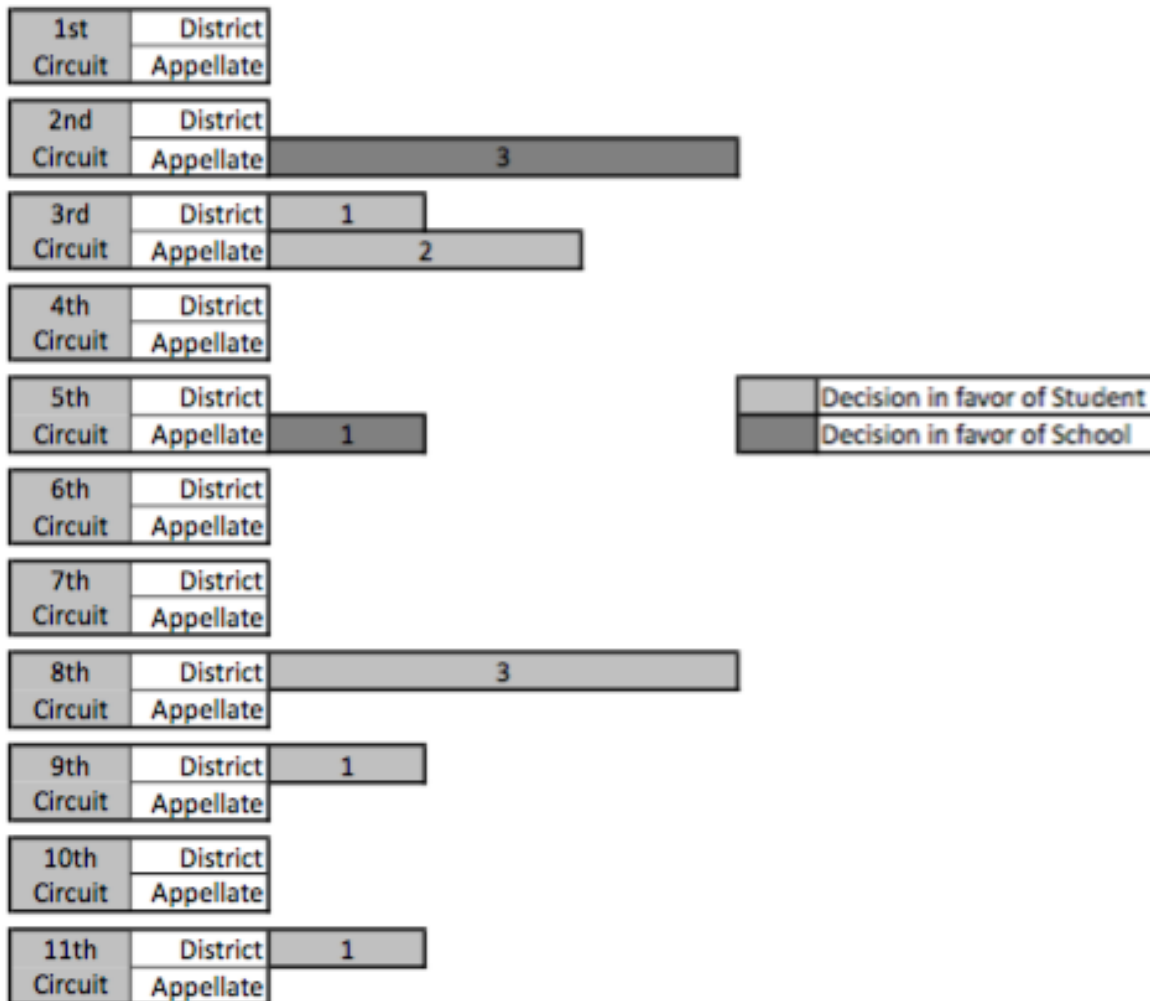
ANALYSIS

This chapter will provide an analysis of the cases reviewed in chapter two. The purpose of this chapter is to analyze and identify trends in the case law. The areas to be discussed include trends by region and level of court; trends by student age and gender; issues relating to student race; electronic speech containing threats toward staff members; the application of *Tinker*, *Wisniewski*, and *Fraser*; speech addressing matters of public concern; the disciplinary actions imposed on students; school copyright law and acceptable use policies; and school officials' initial response to student speech.

Trends by Region and Level of Court

While both state and federal constitutions have free speech provisions, litigation in the area of student free speech has primarily taken place in federal courts. Of the thirteen cases reviewed, twelve cases were decided in federal courts and one (*J.S. v. Bethlehem*) was decided by the Supreme Court of Pennsylvania. The breakdown of decisions by region and level of court is illustrated in Figure 1.

Federal Courts



State Courts

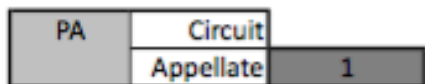


Figure 1. Decisions by Circuit, Level of Court, and Outcome.

An analysis of decisions by circuit indicates that, within each circuit, courts have ruled consistently. That is, each circuit has ruled either 100% in favor of the student or 100% in favor of the school. To date, students have been unsuccessful in litigation in the Second and Fifth Circuits, while school officials have never prevailed in the Third, Eighth, Ninth, or Eleventh Circuits. Geographically, while cases have spanned from the east to the west coast, the majority of cases have occurred in either the country's eastern or mid-western states.

Because of the small sample size of decisions, it is not possible to draw conclusions about how courts across circuits may rule in future cases involving student electronic speech that targets school employees. However, a descriptive statistical analysis suggests that, as would be expected, courts may follow precedent within their own circuits. For example, school officials may be more likely to prevail within the Second Circuit, whereas students may be more likely to prevail in the Third and Eighth Circuits. That said, until more cases around this topic are brought forward, it will be difficult to identify definitive patterns in decisions by region and level of court.

Trends by Student Age and Gender

All of the student-plaintiffs in the cases reviewed were middle or high school students. Specifically, a slight majority of the students were in high school (seven of thirteen), and the majority were boys (eight of thirteen). Of the four cases where school officials prevailed, three of the four students were boys (two in middle school/junior high school and one in high school), and one was a girl (high school). In the decisions where students prevailed, five involved boys (two middle school and three high school), and three involved girls (two middle school and one high school).

An analysis of demographic trends suggests that high school students, and boys in particular, might be more likely to find themselves in legal disputes regarding student off-campus electronic speech that targets school employees. In addition, schools may be more likely to prevail in cases involving disciplinary action toward boys, though this relationship is clearly impacted by multiple variables.⁴⁴⁸

Student Race and Electronic Speech That Targets School Employees

The ability to analyze decisions by student race is limited, as the student-petitioner's race was only mentioned in one of the reviewed cases: *Bell v. Itawamba*. Then, even in *Bell*, neither the majority opinion nor any of the dissenting opinions commented on the student's race as a factor in the decision. Bell's petition brief to the Supreme Court was the first point in the legal proceeding where this issue was addressed. Specifically, Bell's petition argued that school officials had targeted rap music, which was characterized as "an established form of artistic expression of particular relevance to African American youth."⁴⁴⁹ The petition further pointed out that experts agreed Taylor Bell's lyrics were "no more 'threatening' than any number of critically acclaimed and commercially successful rap songs."⁴⁵⁰ The petition stated, "Social

⁴⁴⁸ Namely, the rate of suspension and expulsion is higher for boys than for girls. According to the National Center for Education Statistics, in 2012 25.7% of all males in grades 6-12 had ever been suspended or expelled and 13.2% of all females had ever been suspended or expelled. *See Digest of Education Statistics*, INSTITUTE OF EDUCATION SCIENCES (IES) NATIONAL CENTER FOR EDUCATION STATISTICS, Table 233.20, https://nces.ed.gov/programs/digest/d15/tables/dt15_233.20.asp?current=yes (last visited Jan. 22, 2018). So, given this, more boys than girls would likely find themselves in a position to take legal action against their school districts.

⁴⁴⁹ Petition for Writ of Certiorari at 29, *Bell v. Itawamba*, 799 F.3d 379 (5th Cir. 2015) (No. 15-666).

⁴⁵⁰ Petitioner Reply Brief at 6, *Bell v. Itawamba*, 799 F.3d 379 (5th Cir. 2015) (No. 15-666).

justice organizations explain that the [*Bell*] decision... enables schools to censor off-campus speech that officials dislike, and exacerbates a well-documented pattern of racially disproportionate discipline.”⁴⁵¹ Here, the petition seemed to imply that the Fifth Circuit’s decision in favor of school officials perpetuated a history of discriminatory disciplinary practices toward black youth.⁴⁵²

Though *Bell* was the first time a student’s race or ethnicity was raised as a contributing factor in a student electronic speech decision, many might argue that this discussion was long overdue. Data from 2012 indicates that almost one half of all black males in grades six through twelve had been either suspended or expelled from school at least once.⁴⁵³ As such, the topic of race is one that cannot and should not be ignored in any school discipline case. Though the Supreme Court did not grant certiorari and therefore did not address this specific issue in *Bell*, the fact that this issue was raised opens new doors for future cases. School officials and courts should feel obliged to consider how a student’s race may be impacting the school district’s reasoning as they decide when – and whose – student speech can be regulated.

⁴⁵¹ Petitioner Reply Brief at 6, *Bell v. Itawamba*, 799 F.3d 379 (5th Cir. 2015) (No. 15-666).

⁴⁵² The pattern of racially disproportionate discipline to which this petition is referring is evident in a review of suspension rates nation-wide from the National Center for Education Statistics. In 2012, 19.6% of all sixth through twelfth grade students had ever been suspended or expelled. However, black students, and particularly black males, had been suspended at a much higher rate than their white counterparts. While the suspension or expulsion rate for white males was 21.4%, the rate for black males was much higher. Specifically, as of 2012, almost half (48.3%) of all black males in grades 6 through 12 had been suspended or expelled at least once. See *Digest of Education Statistics*, INSTITUTE OF EDUCATION SCIENCES (IES) NATIONAL CENTER FOR EDUCATION STATISTICS, Table 233.20, https://nces.ed.gov/programs/digest/d15/tables/dt15_233.20.asp?current=yes (last visited Jan. 22, 2018).

⁴⁵³ *Id.*

Student Electronic Speech Containing Threats Against School Employees

As outlined in Chapter 2, in *Watts v. United States*⁴⁵⁴ the Supreme Court recognized an exception to speech protected by the First Amendment, ruling that “true threats” are never considered protected speech. However, the Court stopped short of proposing a test to help courts determine when speech constitutes a true threat.⁴⁵⁵ In the absence of a test, lower courts have varied in their interpretations of how a true threat is defined.⁴⁵⁶ This variation in whether and how courts interpret *Watts* has been evidenced in student electronic speech cases. In fact, not only have courts differed in their interpretations of what a true threat entails, but they have also expressed varying perspectives about whether *Watts* is even applicable to student speech.

Watts and Student Speech That References Violence Toward School Employees

Of the student electronic speech cases reviewed in this study, four cases addressed speech that referenced violence toward a staff member: *J.S. v. Bethlehem*, *Wisniewski v. Board of Education*, *Burge v. Colton*, and *Bell v. Itawamba*. Of these four cases, courts applied *Watts* in *Bethlehem* and *Burge*. In both of these decisions, despite *Bethlehem* finding in favor of the school district and *Burge* finding in favor of the student, the courts found that no true threat existed. Specifically, though the *Bethlehem* court ruled that J.S.’s speech was punishable, they

⁴⁵⁴ *Watts v. United States*, 394 U.S. 705 (1969).

⁴⁵⁵ Fiona Ruthven, *Note: Is the True Threat the Student or the School Board? Punishing Threatening Student Expression*, (2003), IOWA L. REV. 931, 943.

⁴⁵⁶ *Id.*

stopped short of finding J.S.'s speech to constitute a true threat. The court agreed that J.S.'s speech was "a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody"⁴⁵⁷ but held the speech had not reflected a serious intent to inflict harm.⁴⁵⁸

Similarly, when an Oregon federal district court addressed a true threat claim in *Burge*, the court ruled that no reasonable person would foresee the student's statement being interpreted as a serious intent to harm or assault.⁴⁵⁹ The court ruled that because the school district had not conducted an investigation, contacted police or mental health professionals, nor removed the student from the classroom as a result of the student's speech, district officials must not have had any real concerns about violence.⁴⁶⁰ In *Burge* the district court pointed out, "Not every off-hand reference to violence is a true threat unprotected by the First Amendment."⁴⁶¹

The student speech in both *Wisniewski* and *Bell* also included some threatening language, and in both cases the courts ruled in favor of the school district. Interestingly, however, neither of these courts applied *Watts*. The *Wisniewski* court reasoned the *Watts* standard was not appropriate for schools, finding that school officials have broader authority to regulate student speech than the true threat standard allows.⁴⁶² The opinion stated, "With respect to school officials' authority to discipline a student's expression reasonably understood as urging violent

⁴⁵⁷ *J.S. v. Bethlehem*, 569 Pa. 638, 658 (Pa. 2002).

⁴⁵⁸ *Id.*

⁴⁵⁹ *Burge v. Colton*, 100 F. Supp. 3d 1057, 1067 (D. Or. 2015).

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² *Wisniewski v. Board of Education*, 494 F.3d 34, 38 (2nd Cir. 2007).

content, we think the appropriate First Amendment standard is the one set forth by the Supreme Court in *Tinker v. Des Moines Independent Community School District*.⁴⁶³ Thus, the *Wisniewski* court held that *Watts* was inapplicable not just to the case at hand, but to any situations involving student speech in public schools.

In *Bell*, the Fifth Circuit seemed somewhat divided about the true threat issue. In its first decision, in favor of the student, the panel found that Bell’s speech could not be characterized as a “true threat” under *Watts*.⁴⁶⁴ A year later, when an *en banc* panel ruled in favor of the school district, the panel made several references to Bell’s threatening language but avoided a “true threat” analysis. The *en banc* panel determined that it was, in part, the threatening nature of Bell’s speech that led to a substantial disruption in school.⁴⁶⁵

It is interesting to consider whether the *Bell* outcome would have been different had *Watts* been applied. Indeed, had the Appellate Court performed a true threat analysis, the court would likely have found Bell’s speech to be protected.⁴⁶⁶ Bell denied making threats in his lyrics,⁴⁶⁷ and his lyrics were not taken seriously by anyone within the school.⁴⁶⁸ In petitioning for Supreme Court review, Bell commented on these apparent contradictions. Petitioners noted that the Fifth Circuit had agreed that the speech did not qualify as a true threat but nevertheless

⁴⁶³ *Id.*

⁴⁶⁴ *Bell v. Itawamba*, 774 F.3d 280, 301 (5th Cir. 2014).

⁴⁶⁵ *Bell v. Itawamba*, 779 F.3d 379, 391 (5th Cir. 2015).

⁴⁶⁶ Aleaha Jones, *Article: Schools, Speech, and Smartphones: Online Speech and the Evolution of the Tinker Standard*, 15 DUKE L. & TECH REV. 155, 167 (2017).

⁴⁶⁷ *Bell v. Itawamba*, 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012).

⁴⁶⁸ Jones, *supra* 462 at 167.

punished Bell for engaging in threatening speech. The reply brief stated, “[t]his Court has never recognized a category of unprotected speech for ‘threatening’ rap lyrics that are not a threat.”⁴⁶⁹

Watts and Student Speech With No Threats or References to Violence

Only one court applied *Watts* in the absence of violent or threatening student speech. In *R.S. v. Minnewaska*,⁴⁷⁰ a Minnesota federal district court applied *Watts* to a student’s Facebook postings that had expressed the student’s dislike of a school hall monitor. Not surprisingly, the court found that the postings did not constitute true threats.⁴⁷¹ The fact that the *R.S.* court applied *Watts* along with *Tinker* and *Fraser* suggests that this particular court perceived *Watts* to be applicable to student speech. In fact, the opinion asserted, “[Student statements made off-campus] are protected under the First Amendment and not punishable by school authorities unless they are true threats or are reasonably calculated to reach the school environment and are so egregious as to pose a serious safety risk or other substantial disruption in that environment.”⁴⁷²

Conclusions: Watts and Student Electronic Speech

Ultimately, while courts appear mixed in their opinions as to whether *Watts* applies to student speech, the spirit of the *Watts* standard seems relevant to decisions involving threatening student electronic speech. In fact, regardless of the courts’ perspective on the applicability of

⁴⁶⁹ Petition for Writ of Certiorari at 10, *Bell v. Itawamba*, 799 F.3d 379, (5th Cir. 2015) (No. 15-666).

⁴⁷⁰ *R.S. v. Minnewaska*, 894 F. Supp. 2d 1128 (D. Minn. 2012).

⁴⁷¹ *Id.* at 1140.

⁴⁷² *Id.*

Watts, it is notable that the school district won in three of the four cases where student speech included a reference of violence toward a staff member.⁴⁷³

This statistic might not be as noteworthy if school districts had prevailed more frequently. However, school officials prevailed in only five of the thirteen student electronic speech cases reviewed.⁴⁷⁴ In three of these five, the student speech included references to violence toward a staff member. In fact, given that the fourth and fifth cases (both *Doninger* decisions) involved some facts that distinguished it from the other cases,⁴⁷⁵ the trend of courts ruling in favor of school districts in cases of threatening student language becomes even more significant.

Taken altogether, it seems that courts do tend to agree on one issue: Student speech that poses a potential threat toward a school official can be regulated. Even though *Watts* can take very little, if any, credit for these school district victories in court, it is nevertheless undeniable that courts tend to side with school districts when faced with student speech that threatens school officials.

⁴⁷³ See *J.S. v. Bethlehem*, 757 A.2d 412 (Pa. Commw. Ct. 2002); *Wisniewski v. Board of Education*, 494 F.3d 34 (2nd Cir. 2007); *Burge v. Colton*, 100 F. Supp. 3d 1057 (D. Or. 2015); and *Bell v. Itawamba*, 779 F.3d 379 (5th Cir. 2015). The school district won in *Bethlehem*, *Wisniewski*, and *Bell*.

⁴⁷⁴ See *J.S.*, 757 A.2d at 412; *Wisniewski*, 494 F.3d at 379; *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008); and *Bell*, 779 F.3d at 379.

⁴⁷⁵ Notably, the student in *Doninger* was not suspended or expelled as a result of her speech, as were most of the students in the other cases. In *Doninger*, the disciplinary action involved the student being prohibited from running for student government. In its opinion, the *Doninger* court acknowledged that its ruling might have been different had school officials imposed a more serious disciplinary action.

***Tinker*: Approaching a Tipping Point**

Despite having been decided in 1969, *Tinker* remains the foundational case for judicial analysis of First Amendment student speech issues. *Tinker* was the first time the U.S. Supreme Court ruled on a case involving student freedom of speech within the school environment, and it is among the most well-known and frequently referenced legal cases involving students. Interestingly, despite its popularity, some scholars have raised concerns about the judiciary's continued reliance upon *Tinker*.⁴⁷⁶ These concerns have been evidenced by lower courts' reticence to apply *Tinker*'s second prong⁴⁷⁷ and, perhaps more importantly, lower courts' tendency to defer to school officials in student speech cases.⁴⁷⁸ Specifically, although Justice Black's dissent did not garner wide attention at the time *Tinker* was decided, the dissent has steadily been accorded growing support. In fact, in the almost five decades since *Tinker*, courts' student speech decisions have moved closer in line with Justice Black's dissent than with the majority opinion.⁴⁷⁹

⁴⁷⁶ See, e.g., Perry Zirkel, *The Rocket's Red Glare: The Largely Errant and Deflected Flight of Tinker*, 38 J.L. & EDUC. 593 (2009). Zirkel argues that the impact of *Tinker* on students' rights case law has been "more symbolic rather than substantial." *Id.* at 602.

⁴⁷⁷ Daniel Marcus-Toll, *supra* note 345 at 3409 and Anika Hermann Bargfrede, *supra* note 304 at 1665.

⁴⁷⁸ Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?* 48 DRAKE L. REV. 527 (2000).

⁴⁷⁹ *Id.*

Tinker and Substantial Disruption Caused by Student Electronic Speech

Tinker's significance remains relevant to student electronic speech as well, though its applicability has recently come into question. All thirteen of the decisions reviewed in this study referenced and/or applied *Tinker* or the “substantial disruption” test. However, some of these decisions raised questions regarding *Tinker*'s relevance.

In each of the five cases where school districts prevailed,⁴⁸⁰ courts applied *Tinker* and determined that the student's speech had indeed caused – or was likely to cause – substantial disruption to the school environment. Interestingly, the court concluded that a substantial disruption had in fact occurred in only one of these decisions: *J.S. v. Bethlehem*. In *J.S.*, the court reasoned that the physical and emotional impact Mrs. Fulmer experienced, together with the “demoralizing impact on the school community” that occurred as a result of J.S.'s speech, constituted a substantial disruption to the school environment.⁴⁸¹ With this ruling, the court set the bar high for what was considered a “substantial” disruption.

In contrast, courts in the other four decisions where schools prevailed - the Second Circuit in *Wisniewski*, *Doninger I*, and *Doninger II* and the Fifth Circuit in *Bell* - seemed to rely on different interpretations of *Tinker*. In *Wisniewski*, the Second Circuit built upon *Tinker* to formulate a new test, the application of which will be analyzed in a subsequent section of this Chapter. In the *Doninger* decisions, the Second Circuit applied this new test, along with *Tinker*, to the student's speech. In both *Doninger* decisions the court concluded that the speech had

⁴⁸⁰ See *J.S. v. Bethlehem*, 757 A.2d 412 (Pa. Commw. Ct. 2002; *Wisniewski v. Board of Education*, 494 F.3d 34 (2nd Cir. 2007); *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008); *Doninger v. Niehoff*, 642 F.3d 334 (2nd Cir. 2011). and *Bell v. Itawamba*, 779 F.3d 379 (5th Cir. 2015).

⁴⁸¹ *J.S.*, 757 A.2d at 417.

created a risk of substantial disruption within the school because it undermined the values student government was designed to promote.⁴⁸² It should be noted that, in this case, the substantial disruption identified seemed more subjective than was the case in *J.S.* That is, it seems easier to find a connection between a student's speech and a teacher's leave of absence than between a student's speech and the undermining of values within a student government organization. Nevertheless, the school districts prevailed in each of these cases.

Disciplinary Consequences and The Application of *Tinker*

Another interesting element of the *Doninger* decisions is the Second Circuit panel's implication that the disciplinary consequence the student received (i.e., disqualification from student government) played a factor in the court's ruling. Specifically, the court pointed out that the outcome may have been different had school officials imposed a more serious consequence than disqualification from student office.⁴⁸³ This acknowledgement suggested that *Tinker's* application might not always be as straightforward as some courts might prefer it to be. Had the student been suspended or given a more serious consequence than disqualification from student office, the Second Circuit may have ruled differently. Under different circumstances (had, for example, the student's property interest in education been impacted by a suspension or expulsion), the court may have applied the test more strictly in light of the impacted property rights. In this case, the court may have determined no substantial disruption occurred and thereby ruled in favor of the student.

⁴⁸²*Doninger*, 527 F.3d at 52 and *Doninger*, 642 F.3d at 350-351.

⁴⁸³ *Doninger*, 527 F.3d at 53.

Tinker in Bell: Most Questionable Application to Date

The Fifth Circuit in *Bell* did not reference any disruption caused by Taylor Bell’s rap song. However, the panel nevertheless found Taylor’s speech punishable under *Tinker*, determining school officials could have forecast that the rap song’s publication would have caused a substantial disruption to the school environment due to its threatening language.⁴⁸⁴ Interestingly, three of the four dissenting opinions in *Bell* questioned *Tinker*’s application to off-campus student speech. In one dissenting opinion, Judge Dennis not only questioned the applicability of *Tinker* to off-campus speech in general but also argued that *Tinker* had been incorrectly applied to Taylor’s speech.⁴⁸⁵ According to Judge Dennis, the summary-judgment evidence simply did not support a conclusion that Taylor’s song had substantially disrupted school activities or that school officials could have forecasted it would do so. “In reaching the opposite conclusion,” Judge Dennis argued, “the majority opinion . . . dilute[d] the *Tinker* ‘substantial disruption’ framework into an analytic nullity.”⁴⁸⁶ In the fourth dissenting opinion, in an effort to address the blurred lines between on- and off-campus speech, Judge Graves proposed a modified *Tinker* standard for off-campus speech.⁴⁸⁷

Tinker’s applicability to off-campus speech was further questioned in Bell’s petition to the Supreme Court. In a writ for certiorari, Bell argued that applying *Tinker* to off-campus speech would have “devastating consequences” in light of students’ use of online social

⁴⁸⁴ *Bell v. Itawamba*, 799 F.3d 379, 398 (5th Cir. 2015).

⁴⁸⁵ *Id.* at 405 (Dennis, J., dissenting).

⁴⁸⁶ *Id.* (Dennis, J., dissenting).

⁴⁸⁷ *Id.* at 434 (Graves, J., dissenting).

media.⁴⁸⁸ In the petition, Bell also argued that the Fifth Circuit's finding conflicted with the Third Circuit's *en banc* decisions in *J.S. v. Blue Mountain* and *Layshock v. Hermitage*. Specifically, the petition argued that Taylor would have prevailed under the Third Circuit's analysis of case law. The court held in *J.S.* that school officials could not forecast a disruption from speech that was neither spoken nor heard on campus, and Taylor's speech was not heard on school grounds other than when a coach ordered a student to play it.⁴⁸⁹

The *Wisniewski* Application of *Tinker*: Little Traction to Date

Of the five decisions where the school district prevailed under *Tinker*, three relied on the *Wisniewski* court's application of *Tinker*. In these decisions, *Wisniewski* and *Doninger I and II*, courts determined that the student speech at issue could be regulated under *Tinker* because it was foreseeable the speech would make its way on campus and cause a substantial disruption in school.

Wisniewski presented a new avenue for school officials to prevail in cases where student electronic speech targeted school employees. According to the *Wisniewski* test, students could be disciplined for off-campus speech that included violent content where (1) there was a reasonably foreseeable risk the speech would come to the attention of school officials, and (2) there was a reasonably foreseeable risk the speech would materially and substantially disrupt the discipline of the school.⁴⁹⁰

⁴⁸⁸ Petition for Writ of Certiorari at 27, *Bell v. Itawamba*, 799 F.3d 379, (5th Cir. 2015) (No. 15-666).

⁴⁸⁹ *Id.*

⁴⁹⁰ *Wisniewski v. Board of Education*, 494 F.3d 34, 40 (2nd Cir. 2007).

In the *Doninger* decisions, the Second Circuit relied on the *Wisniewski* application of *Tinker*. Applying *Wisniewski* in *Doninger I* and *II*, the appellate panels determined that Avery's blog post would likely reach the school and cause substantial disruption. The Second Circuit made this determination due to the fact that the blog post contained offensive language as well as misleading or false information. Ultimately, the court found that Avery's speech was disruptive to school officials' efforts to work with student council members and that it complicated school government activities by undermining the student council's values.⁴⁹¹

In contrast, the Third Circuit has shown limited interest in *Wisniewski*. In fact, the *Wisniewski* decision was not referenced at all in the *J.S. v. Blue Mountain* opinion,⁴⁹² and the *Layshock* court only briefly mentioned (but did not apply) *Wisniewski* in its majority opinion. Interestingly, the Third Circuit attempted to differentiate *Doninger's* blog post and the website in *J.S. v. Blue Mountain* through a discussion of the student's intent.⁴⁹³ The *Doninger* panel noted that Avery Doninger had emailed others and invited them to contact school officials, whereas J.S. had made her MySpace profile private.⁴⁹⁴ In *Doninger*, the Third Circuit panel implied that a speaker must have intended for the speech to reach campus in order for it to be regulated under *Tinker* or *Wisniewski*.⁴⁹⁵ Similarly, the Fifth Circuit in *Bell* referenced *Wisniewski* only to justify

⁴⁹¹ *Doninger v. Niehoff*, 527 F.3d 41, 52 (2nd Cir. 2008).

⁴⁹² *Wisniewski* is addressed in a concurring and dissenting opinion within *Blue Mountain* but the majority opinion only mentions it in reference to the dissent.

⁴⁹³ *J.S. v. Blue Mountain*, 650 F.3d 915, 931 (3rd Cir. 2011).

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.*

its application of *Tinker*.⁴⁹⁶ Though the Fifth Circuit panel could have applied the *Wisniewski* test given the facts of the case (specifically, because Taylor’s speech contained violent content), the court relied upon a traditional *Tinker* analysis instead.

Ultimately, *Wisniewski* has not gained much traction beyond the Second Circuit with regard to cases involving student off-campus electronic speech targeting school employees. This could be due to *Wisniewski*’s potential for allowing school officials to discipline students for nearly any electronic speech of which they did not approve. Nowadays almost all communication created online can make its way to a school campus and to the attention of school authorities.⁴⁹⁷ As one legal scholar noted, “A bare foreseeability standard would encompass virtually all off-campus speech and would leave very little First Amendment protection for students.”⁴⁹⁸ Until the Third Circuit is challenged with another student off-campus electronic speech case that targets school employees and involves violent content, courts will likely continue to rely on the original *Tinker* test rather than on the *Wisniewski* application of *Tinker*.

Tinker in Off-Campus Electronic Speech: An Uncertain Future

Ultimately, though *Tinker* was referenced and/or applied in each case reviewed, the controversies evident in the most recent relevant decision, *Bell v. Itawamba*, suggest that lower courts are beginning to question *Tinker*’s application to off-campus speech. The lower courts may be reaching a tipping point, where only the Supreme Court can provide guidance regarding

⁴⁹⁶ *Bell v. Itawamba*, 799 F.3d 379, 392 (5th Cir. 2015).

⁴⁹⁷ Jessica K. Boyd, *Note: Moving the Bully from the schoolyard to cyberspace: How much protection is off-campus student speech awarded under the First Amendment?* 64 ALA. L. REV. 1215, 1236 (2013).

⁴⁹⁸ *Id.*

if and to what extent *Tinker* applies to student off-campus electronic speech. As students' use of online social media continues to grow, these questions will likely continue to challenge the courts' reliance on this foundational Supreme Court decision.

***Fraser* and Student Electronic Speech That Targets School Officials**

The consensus of almost all cases reviewed is that *Fraser* is specific to on-campus speech. In fact, several courts implied or specifically stated that *Fraser* was not applicable to the off-campus speech at hand,⁴⁹⁹ and others acknowledged that its applicability was unclear.⁵⁰⁰ Still, other courts refrained from any mention of *Fraser* in their opinions at all.⁵⁰¹

Only two courts applied *Fraser* to the off-campus electronic speech at issue: the Pennsylvania Supreme Court in *J.S. v. Bethlehem* and the Fifth Circuit in *Bell v. Itawamba*. In *J.S. v. Bethlehem*, the Pennsylvania Supreme Court determined J.S.'s speech met the *Fraser* framework because the speech was viewed on campus.⁵⁰² Interestingly, other courts did not apply *Fraser* in this way, despite the student speech having been viewed on campus. The Fifth Circuit did not apply *Fraser* in *Bell*, but this decision was not based upon a conclusion that

⁴⁹⁹ See *Killion v. Franklin*, 136 F. Supp. 2d 446 (W.D. Pa. 2001); *Evans v. Bayer*, 684 F. Supp. 2d 1365, (S.D. Fla. 2010); *J.S. v. Blue Mountain*, 650 F.3d 915 (3rd Cir. 2011); *Layshock v. Hermitage*, 650 F.3d 205 (3rd Cir. 2011); *Sagehorn v. Independent*, 122 F. Supp. 3d 842 (D. Minn. 2015); and *Burge v. Colton*, 100 F. Supp. 3d 1057 (D. Or. 2015).

⁵⁰⁰ See *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008) and *Doninger v. Niehoff*, 642 F.3d 334 (2nd Cir. 2011).

⁵⁰¹ See *Beussink v. Woodland*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998) and *Wisniewski v. Board of Education*, 494 F.3d 34, 40 (2nd Cir. 2007).

⁵⁰² *J.S. v. Bethlehem*, 569 Pa. 638, 667-668 (Pa. 2002).

Fraser was inapplicable to off-campus speech.⁵⁰³ Rather, the panel reasoned, *Fraser* was not “on point” because school officials had not suspended Bell due to the lewdness of his speech.⁵⁰⁴ In this decision, the Fifth Circuit implied that *Fraser* could potentially be applied to student off-campus electronic speech.

In conclusion, to date, no federal court has relied upon *Fraser* to limit student off-campus electronic speech that has targeted school officials. On the contrary, most courts have been explicit in concluding that *Fraser* is specific to on-campus speech. For example, in *Evans*, the Florida district court explained, “For a court to equate a school assembly to the Internet would set a precedent far too reaching.”⁵⁰⁵ However, given the Second Circuit’s avoidance of the issue in the *Doninger* decisions and the Fifth Circuit’s implication that *Fraser* might have applied under slightly different circumstances in *Bell*, the question of *Fraser*’s applicability to off-campus speech might not have been completely laid to rest.

Matters of Public Concern

In the most recent case reviewed, *Bell v. Itawamba*, the student’s speech at issue expressed concern about staff members allegedly having engaged in inappropriate conduct toward students. The student testified that he believed these accusations were true and explained that his speech was an effort to speak out about the issue.⁵⁰⁶ After the Fifth Circuit held that school officials did not violate the student’s freedom of speech rights by disciplining him, one of

⁵⁰³ *Bell v. Itawamba*, 799 F.3d 379, 392 (5th Cir. 2015).

⁵⁰⁴ *Id.*

⁵⁰⁵ *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1374 (SD Fla. 2010).

⁵⁰⁶ *Bell*, 779 F.3d at 410.

the appellate judges in a dissenting opinion (like Taylor Bell's mother in her petition to the United States Supreme Court) argued that the student's speech should be protected speech because it addressed a matter of public concern.⁵⁰⁷ The judge wrote, "[the decision] undermines the rights of all students and adults to both speak and receive speech on matters of public concern through the Internet."⁵⁰⁸ In this argument, the judge alluded to the United States Supreme Court's *Pickering v. Board of Education* decision, where the Court held that a public school Board of Education could not dismiss a teacher for speaking on issues of public importance.⁵⁰⁹ *Bell's* dissenting opinion and petition to the Supreme Court posed an interesting question that had not yet been explored in a case involving student off-campus electronic speech. That question was whether student speech that contained information of "public importance" should be treated as protected speech.

On a daily basis, school administrators and local boards of education are responsible for balancing the safety and wellbeing of all students against individual free speech rights. With *Bell* having elevated this question on a national level, school officials and courts will have another factor to consider when making decisions about student speech. As students increasingly find their voices online and inevitably speak out about issues that matter to them, school officials will likely find themselves grappling with this balance.

⁵⁰⁷ *Id.* at 405 (Dennis, J., dissenting).

⁵⁰⁸ *Id.*

⁵⁰⁹ *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968).

Disciplinary Actions Imposed

In the majority of the cases reviewed, school officials imposed suspension and/or expulsion as disciplinary consequences in response to student electronic speech that targeted school employees. The lengths of these suspensions or expulsions varied significantly. For example, in *Wisniewski*, the student received a semester-long suspension.⁵¹⁰ Most students in the cases reviewed were penalized with ten-day suspensions (*Killion*, *Buessink*, *Blue Mountain*, *Layshock*, and *Sagehorn*), some of which included or led to other significant consequences. For example, the student in *Buessink* failed all of his classes as a result of the school district's policy on unexcused absences, which included days of suspension.⁵¹¹ In addition, the student in *Layshock* was placed in the Alternative Education Program for the remainder of the year, excluded from participation in extracurricular activities, and excluded from participation in the graduation ceremony.⁵¹² The disciplinary action in *Sagehorn v. Independent* was significant, as well. The student in this case was first issued a five-day suspension, which was then extended another five days.⁵¹³ In addition, the school district considered expelling the student, which would likely have resulted in a university withdrawing the student's early acceptance. Given the significant consequences of a potential expulsion, the student's parents decided to withdraw him from school.⁵¹⁴

⁵¹⁰ *Wisniewski v. Board of Education*, 494 F.3d 34, 38 (2nd Cir. 2007).

⁵¹¹ *Buessink*, 30 F.Supp. 2d 1175, 1180 (E.D. Mo. 1998).

⁵¹² *Layshock v. Hermitage*, 650 F.3d 205, 210 (3rd Cir. 2011).

⁵¹³ *Sagehorn v. Independent*, 122 F. Supp. 3d 842, 849 (D. Minn. 2015).

⁵¹⁴ *Id.*

Some cases involved suspensions of fewer than ten days (*Bethlehem, Evans, Burge, and Bell*), although some of these shorter suspensions also involved additional, perhaps more significant, consequences. For example, though the student in *Evans v. Bayer* was suspended for just three days, she was also transferred from AP-level to regular-level courses.⁵¹⁵ Similarly, the student in *Bell* was suspended for seven days but was then transferred to an alternative school for the remaining five weeks of the nine-week school period.⁵¹⁶

The one disciplinary consequence that did not involve either a suspension and/or an expulsion occurred in the *Doninger* cases. In response to the student's conduct in *Doninger*, school officials disqualified the student from running for student government office. Admittedly, in *Doninger's* case, this comparatively benign disciplinary action may have had a significant impact on the Second Circuit's decision to rule in favor of the school.⁵¹⁷ Interestingly, *Doninger I* was the only opinion reviewed that mentioned the disciplinary action imposed as a factor in the court's reasoning and ultimate decision. Ultimately, this finding suggests that courts may be more likely to defer to school officials in cases where the disciplinary actions imposed do not infringe upon a student's property right to education (i.e., do not involve suspension or expulsion).

⁵¹⁵ *Evans v. Bayer*, 684 F.Supp. 2d 1365, 1367 (S.D. Fla 2010).

⁵¹⁶ *Bell v. Itawamba*, 779 F.3d 379, 386 (5th Cir. 2015).

⁵¹⁷ *Doninger v. Niehoff*, 527 F.3d 41, 53 (2nd Cir. 2008).

School Policies: Copyright Law and Acceptable Use

Of the cases reviewed, two majority opinions involved either the use of a school district owned computer or a violation of copyright law. In *J.S. v. Blue Mountain*, school officials claimed that the student's use of a school district photograph in her MySpace profile violated both copyright law and the school district's computer use policy.⁵¹⁸ Similarly, in *Layshock v. Hermitage*, school officials contended that the student's creation of a MySpace profile amounted to a computer policy violation, as the student had used school pictures without authorization.⁵¹⁹

Interestingly, in both of these decisions the student ultimately prevailed. This finding suggests school district policies around copyright law and acceptable computer use may not completely protect school officials who attempt to regulate student off-campus speech. However, as technology becomes more prevalent in schools and school districts develop and modify their policies around acceptable technology use, this issue will likely begin to surface more frequently in cases involving student electronic speech.

School Officials' Initial Response to Student Speech

In most of the cases reviewed, school officials made the decision to discipline the student immediately or shortly after becoming aware of the student's speech. In a few cases, however, school officials delayed the imposition of disciplinary consequences for various reasons. For example, in *Bell*, the principal drove the student to a friend's house and then suspended him the

⁵¹⁸ *J.S. v. Blue Mountain*, 650 F.3d 915, 921 (3rd Cir. 2011).

⁵¹⁹ *Layshock v. Hermitage*, 650 F.3d 205, 210 (3rd Cir. 2011).

following day.⁵²⁰ In *Doninger*, school officials delayed notifying the student she would be unable to run for student government office due to Advanced Placement (A.P.) testing being conducted at the time of the incident.⁵²¹ In *J.S. v. Bethlehem*, school officials sent the student a notice of suspension several weeks after the incident, when the school year had concluded for summer recess.⁵²²

In a couple cases, in response to a perceived threat, school officials involved either local or federal law enforcement officials in the investigation. In *Wisniewski v. Board of Education*, school officials contacted the local police,⁵²³ and in *J.S. v. Bethlehem* both the local police and F.B.I were contacted.⁵²⁴ School officials prevailed in both cases where law enforcement was involved, as well as in *Bell*. In all three of these cases, school officials had reportedly found the student's speech threatening.

Interestingly, some judges took note of school officials' initial responses to the student speech at hand. In a dissenting opinion to the first *Bethlehem* decision, a judge argued that school officials' initial response to the student's speech suggested that school officials had not actually perceived the speech to be a true threat.⁵²⁵ Specifically, the judge pointed out, school officials had not taken any action to have the student removed from school, had not investigated whether the threats were true, never separated the student from faculty or other students, and had not

⁵²⁰ *Bell*, 779 F.3d at 386.

⁵²¹ *Doninger*, 527 F.3d at 46.

⁵²² *J.S. v. Bethlehem*, 569 Pa. 638, 648 (Pa. 2002).

⁵²³ *Wisniewski v. Board of Education*, 494 F.3d 34, 36 (2nd Cir. 2007).

⁵²⁴ *Bethlehem*, 569 Pa. at 646.

⁵²⁵ *J.S. v. Bethlehem*, 757 A.2d 412, 426-428 (Pa. Commw. Ct. 2000) (Friedman, R., dissenting).

warned faculty that the student posed a possible threat.⁵²⁶ In addition, the judge pointed out that the school officials' delay in suspending the student suggested that they had not perceived the student's speech to be truly threatening.⁵²⁷

In a similar vein, in *Bell v. Itawamba*, both a dissenting opinion⁵²⁸ and the petition for certiorari to the United States Supreme Court⁵²⁹ raised an issue over school officials' immediate response to a perceived threat. Both Bell and the judges authoring the dissenting opinion argued that school officials must not have truly perceived the student's rap song to be threatening because they did not separate him from other students or take any other action to prevent potential violence.

Interestingly, this apparent mismatch between threat perception and the response to a threatening situation did not seem to matter in the end. In both *Bethlehem* and *Bell*, school officials prevailed. Neither final decision determined the application of *Watts* true threat analysis was appropriate, but instead utilized different analytical tools. Had the courts found *Watts* to be applicable in both *Bell* and *J.S. v. Bethlehem*, they would likely have been forced to confront these apparent contradictions between school officials' initial response and school officials' basis for suspending the student.

In conclusion, of the cases reviewed, there does not appear to be a strong relationship between school officials' initial response to controversial student speech that targets a school employee and the court's ultimate ruling. School officials have responded to student speech in

⁵²⁶ *Id.*

⁵²⁷ *Id.*

⁵²⁸ *Bell v. Itawamba*, 799 F.3d 379, 429 (5th Cir. 2015) (Dennis, J., dissenting).

⁵²⁹ Petitioner Reply Brief at 10, *Bell v. Itawamba*, 799 F.3d 379, (5th Cir. 2015) (No. 15-666).

various ways, and the courts have not seemed to take issue with any of these responses. Though some individual judges have questioned some school officials' initial responses, particularly in cases where school officials indicated they found the student's speech to be threatening, this questioning has not led to a different outcome for the student.

CHAPTER FOUR CONCLUSION AND RECOMMENDATIONS

Student Speech in Public Schools: 1969 to 2017

The U.S. Constitution and public school officials have at least one common interest: protecting the rights of individuals. Children who live and attend public schools within the United States are protected by the Constitution whether they are inside or outside of a public school building. Perhaps the *Tinker* majority said it best when 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.”⁵³⁰

However, two decades after the *Tinker* decision, the U.S. Supreme Court began giving public school officials more authority to regulate student speech. The *Fraser*, *Hazelwood*, and *Morse* decisions delineated the parameters within which school officials could regulate student speech that: was lewd or obscene,⁵³¹ was published as part of a school-sponsored newspaper,⁵³² or promoted illegal drug use.⁵³³ As a result, the relationship between the U.S. Constitution and public school officials began to evolve.

⁵³⁰ *Tinker v. Des Moines*, 393 U.S. 503 (1969)

⁵³¹ *See Bethel v. Fraser*, 478 U.S. 675 (1986).

⁵³² *See Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1998).

⁵³³ *See Morse v. Frederick*, 551 U.S. 393 (2007).

When *Tinker* was decided in 1969, the Internet – not to mention Facebook and Instagram – had not even been invented. Fast-forward to 2018, where a vast amount of communication occurs on a minute-by-minute basis via the Internet and social media sites. Not surprisingly, recent data demonstrates that student use of social media is on the rise.⁵³⁴ As children and adults become more interested in and informed about social media, the potential consequences of children’s online behaviors become greater. Student behavior on social media has implications for students themselves, for individuals who are the targets of student electronic speech, and for the public schools these students attend.⁵³⁵

To date, the Supreme Court has not directly addressed the issue of student electronic speech that targets school employees. Despite five requests to review decisions from the Second,⁵³⁶ Third,⁵³⁷ and Fifth Circuits,⁵³⁸ the High Court has denied *certiorari* in each case.

⁵³⁴ Amanda Lenhart, *Teens, Social Media & Technology Overview 2015*, PEW RESEARCH CENTER (Apr. 9, 2015), <http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/>.

⁵³⁵ In fact, student electronic speech can even have implications for students’ college admissions. For example, in 2017, Harvard College rescinded admissions offers to at least ten prospective members of the Class of 2021 after becoming aware that the students had created a private Facebook group chat, where they had sent each other memes and other images. Some of these memes mocked sexual assault, the Holocaust, and the deaths of children. Others joked that abusing children was sexually arousing or had punchlines targeting specific racial groups. See Natanson, H. June 5, 2017. *Harvard rescinds acceptances for at least ten students for obscene memes*. THE HARVARD CRIMSON (June 5, 2017), <http://www.thecrimson.com/article/2017/6/5/2021-offers-rescinded-memes/>.

⁵³⁶ See *Wisniewski v. Board of Education*, 494 F.3d 34 (2nd. Cir. 2007) and *Doninger v. Niehoff*, 527 F.3d 41 (2nd. Cir. 2008).

⁵³⁷ See *J.S. v. Blue Mountain*, 650 F.3d 915 (3rd Cir. 2011) and *Layshock v. Hermitage*, 650 F.3d 205 (3rd Cir. 2011).

⁵³⁸ See *Bell v. Itawamba*, 799 F.3d 379 (5th Cir. 2015).

These denials have left lower courts to determine to what extent the Supreme Court's earlier rulings on public student speech – namely *Tinker*, *Fraser*, *Hazelwood*, and *Morse* – apply to student electronic speech. As evidenced by this study's literature review, lower courts have responded to this challenge with often contradictory and inconsistent approaches. In fact, courts have begun to disagree over *Tinker*'s application to student electronic speech that was created off campus. Now, one short year shy of *Tinker*'s 50-year anniversary (but light years ahead of where we were with technology just 10 years ago), it is time to re-examine the relationship between the United States Constitution and student speech in public schools.⁵³⁹

So, What Does This Mean For Public School Officials?

School administrators are often called upon to make difficult and complex decisions within a short amount of time. With student use of social media increasing so rapidly, school officials often find themselves needing to respond, almost instantaneously, to controversial student electronic speech. Undoubtedly, this challenge will only become increasingly complex as technology advances. Gone are the days when it was clear where and how a student accessed the

⁵³⁹ In response to the Supreme Court's decisions not to rule on this issue after *Wisniewski*, *Doninger*, *Blue Mountain*, *Layshock*, and *Bell*, various law students and lawyers have proposed legal tests and recommendations for school districts to consider in the absence of a Supreme Court precedent. See, e.g., Lindsay J. Gower, *Article: Blue Mountain School Districts v. J.S. Ex Rel. Synder: Will the Supreme Court Provide Clarification for Public School Officials Regarding Off-Campus Internet Speech?* 4 ALA. L. REV. 709 (2012); Nancy Willard, M.S., J.D., *Article: Student Online Off-Campus Speech: Assessing "Substantial Disruption"*, 22 ALB. L. J. SCI. & TECH 611 (2012); Aaron J. Hersh, *Note: Rehabilitating Tinker: A Modest Proposal to Protect Public-School Students' First Amendment Free Expression Rights in the Digital Age*, 98 IOWA L. REV. 1309 (2013); Daniel Marcus-Toll, *Note: Tinker Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 FORDHAM L. REV. 3395 (2014); and Elizabeth A. Shaver, *Article: Denying Certiorari in Bell v. Itawamba County School Board: A Missed Opportunity to Clarify Students' First Amendment Rights in the Digital Age*, 82 BROOKLYN L. REV. 1539 (2017).

Internet. Now, the second a student steps onto campus with an iPhone or Apple Watch, the student's Facebook post or Twitter tweet instantly becomes "on campus" as well. In addition, with more and more schools adopting 1:1 Chromebook or iPad policies, students' increased access to social media will further complicate the issue of where, when, and how students may create or access electronic speech.

Until the Supreme Court definitively addresses the topic of student off-campus electronic speech that targets school employees, both lower courts and school officials will continue to be called upon to navigate these situations on their own. Clearly, school officials would benefit from judicial guidance designed to assist them in maintaining safe learning environments for all students and staff while at the same time honoring individual students' rights to freedom of speech and expression. Until more definitive judicial guidance is provided, school officials should focus on the development, communication, and implementation of both school-wide prevention efforts and a protocol for responding to student cyberbullying.

**Recommendations for School Administrators:
Prevention is the Best Intervention**

On average, students spend more than six hours in school per day and attend school for 180 or more days each year.⁵⁴⁰ With so much of a student's time spent within the walls of the school, it is not surprising that what happens in school plays a role in shaping a young person's attitudes, mindsets, and behaviors. For this reason, school officials must be both thoughtful and intentional in their efforts related to student cyberbullying that targets staff. In order to foster

⁵⁴⁰ *Schools and Staffing Survey (SASS)*, INSTITUTE OF EDUCATION SERVICES (IES) NATIONAL CENTER FOR EDUCATION STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=49> (last visited Jan. 21, 2018).

pro-social and healthy communication, school officials must focus on building and maintaining a positive school climate and teaching students pro-social behaviors.

Develop and Promote a Positive School Climate That Includes Healthy Channels of Communication Between Students and Staff

A large body of research demonstrates the many benefits of a positive school climate.⁵⁴¹ Specifically, healthy school climates are correlated with positive academic and social outcomes for students, including a decreased likelihood of aggression and bullying.⁵⁴² Though research on cyberbullying is in its early stages, preliminary findings suggest a link between school climate and cyberbullying. In a study conducted by the Cyberbullying Research Center, in schools where students reported higher quality school climates, fewer students reported experiencing cyberbullying either as a victim or as a bully.⁵⁴³

In some of the judicial decisions reviewed in this study, students reported having initially created their electronic speech due to a concern or frustration about something that had happened within the school community.⁵⁴⁴ The most recent and perhaps most significant example of this

⁵⁴¹ Amrit Thapa, Jonathan Cohen, Shawn Guffey, Ann Higgins-D'Alessandro, *A Review of School Climate Research*, 83, REVIEW OF EDUCATIONAL RESEARCH, 357-385 (2013).

⁵⁴² *Id.*

⁵⁴³ *School Climate and Cyberbullying: An Empirical Link*, CYBERBULLYING RESEARCH CENTER (2012), <https://cyberbullying.org/school-climate-and-cyberbullying-an-empirical-link> (last visited Nov. 19, 2017).

⁵⁴⁴ For example, in *Killion*, the student created a “Top Ten” list because he was apparently angered after hearing about rules being imposed on members of the track team, and in *Doninger*, the student was upset about an event being rescheduled and attempted to solicit the community’s help in persuading school officials to let the event occur as scheduled.

type of student experience occurred in *Bell v. Itawamba*. In *Bell*, some of the petitioner's female friends told him that some of the high school's coaches were sexually harassing them. Believing that school officials generally ignored student complaints, the student wrote a rap song in an effort to speak out about the alleged sexual harassment.⁵⁴⁵ Thereafter, Taylor Bell was suspended and transferred to an alternative school as a consequence of having composed and posted the rap song on the Internet. In *Bell*, although school officials technically prevailed in the legal proceedings, one could argue that neither the student nor the school community ultimately won. The student's message was likely overshadowed by the disciplinary actions and legal proceedings, and students could have interpreted the school officials' response to the speech as a message that students should not weigh in on important issues. Had the student believed that school officials would have genuinely listened to him, considered his concerns, and investigated his allegations, perhaps he would not have utilized the Internet as the forum to communicate his concerns.

Thus, in order to reduce the likelihood of cyberbullying toward school staff, school officials must foster an environment where students genuinely feel that their individual and collective voices are being heard. In addition, students must be engaged in the school process and in decision-making within their school community.⁵⁴⁶ Some strategies to help build a voice for students and staff include creating a Principal's Advisory Council, encouraging dialogue

⁵⁴⁵ *Bell v. Itawamba*, 779 F.3d 379, 410 (5th Cir. 2015).

⁵⁴⁶ Peter DeWitt, *5 Ways to Foster a Positive School Climate*, EDUCATION WEEK BLOGS (2016), http://blogs.edweek.org/edweek/finding_common_ground/2016/06/5_ways_to_foster_a_positive_school_climate.html (last visited Nov. 19, 2017).

rather than monologue, co-constructing student goals with students, and using results of student climate surveys to make changes within the school.⁵⁴⁷

Finally, in considering how to develop a positive school climate in an effort to prevent cyberbullying, school administrators should also remember that elements of students' identities, such as race and ethnicity, might impact students' perceptions of school climate.⁵⁴⁸ For example, a meta-analysis about school climate found that students of some racial subgroups reported teacher-child relations to be the most important dimension of school climate, while other groups emphasized teacher dispositions and behaviors such as fairness and caring.⁵⁴⁹ In order for school leaders to improve school climate for all students, then, the authors indicated that school leaders must "[have] the most complete understanding possible of what a positive school climate would look and feel like for students who identify as belonging to specific races, ethnicities, or cultures."⁵⁵⁰

It is important to consider that the student in *Bell* reported believing that school officials would ignore any report of teacher misconduct.⁵⁵¹ According to *Bell's* petition to the Supreme Court, it appeared that Bell was right; at the time of writing the petition, the Board of Education never denied the validity of Bell's accusations, "[y]et no 'responsible adult' ha[d] ever done anything to acknowledge them."⁵⁵² The petition challenged the High Court to consider the

⁵⁴⁷ *Id.*

⁵⁴⁸ Thapa, et. al, *supra* note 538 at 364-365.

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.* at 365.

⁵⁵¹ *Bell v. Itawamba*, 799 F3d 379, 410 (5th Cir. 2015).

⁵⁵² Brief for the Petitioner at 9, *Bell v. Itawamba*, 799 F.3d 379, (5th Cir. 2015) (No. 15-666).

“troubling racial overtones” of the case, implying that Bell might have been treated unfairly due to his race.⁵⁵³ Thus, in developing a positive school climate wherein all students feel a sense of belonging, feel heard, and feel respected by school staff, school officials need to consider how a student’s race, ethnicity, or even gender, gender identity, or sexual orientation may be impacting both the student’s perception of their school as well as the school employees’ responses to the student.

Teach Students Pro-Social Interpersonal Skills and Digital Citizenship

In addition to focusing on school climate and communication to prevent cyberbullying, school officials should also consider incorporating social-emotional learning into their curricula. According to CASEL, the Collaborative for Academic, Social, and Emotional Learning, social and emotional learning (SEL) involves the process of learning and applying various knowledge, attitudes, and skills that allow one to “[m]anage emotions, set and achieve positive goals, feel and show empathy for others, establish and maintain positive relationships, and make responsible decisions.”⁵⁵⁴ A 2011 meta-analysis showed that an intentional focus on building social and emotional skills in students led to academic gains, improved classroom behavior, increased student ability to manage depression and stress, and better student attitudes about themselves, others, and school.⁵⁵⁵ Had the students in the reviewed cases learned and practiced pro-social

⁵⁵³ *Id.* at 10.

⁵⁵⁴ *What is SEL?* COLLABORATIVE FOR ACADEMIC, SOCIAL, AND EMOTIONAL LEARNING (CASEL), <http://www.casel.org/what-is-sel/> (last visited Jan. 21, 2018).

⁵⁵⁵ Joseph A. Durlak, Allison B. Dymnicki and Rebecca D. Taylor, Roger P. Weissberg, and Kriston B. Schellinger, *The impact of enhancing students’ social and emotional learning: A meta-analysis of*

ways of communicating their concerns about school-related issues, perhaps they may have utilized different channels or different language in expressing themselves. In considering ways to prevent student cyberbullying, school officials would be wise to refer to several websites and organizations⁵⁵⁶ that offer programs, tools, and strategies to guide school officials in building their social-emotional curriculum for students of all ages.

Not only do students need to learn how to interact productively and respectfully, they also need to learn about communication and problem solving in a whole new dimension: the Internet. That is, students need to develop what Common Sense Media⁵⁵⁷ calls “digital citizenship.” Educator Vicki Davis offers “9 Key Ps” of digital citizenship.⁵⁵⁸ Davis suggests that curriculum around digital citizenship include information about the following: 1) Passwords (knowing how to create a secure password, developing a system for remembering passwords, etc); 2) Privacy (knowing how to protect private information); 3) Personal Information (choosing with whom to share personal information); 4) Photographs (developing awareness that some private things may show up in photographs, knowing how to turn off geo-tagging, understanding

school-based universal interventions, 82, *CHILD DEVELOPMENT*, 405-432 (2011). As summarized on CASEL website, <http://www.casel.org/impact/> (last visited Jan. 21, 2018).

⁵⁵⁶ Some of these organizations include the Collaborative for Academic, Social, and Emotional Learning (CASEL), the Center for Great Teachers and Leaders, and Safe and Civil Schools.

⁵⁵⁷ According to its website, Common Sense Media is the leading nonprofit organization dedicated to helping kids thrive in a world of media and technology. The organization provides parents, teachers, and policymakers with information, advice, and tools to help them utilize media and technology positively and productively. See <https://www.commonsensemedia.org/about-us/our-mission> (last visited Jan. 21, 2018).

⁵⁵⁸ Vicki Davis, *What your students really need to know about digital citizenship*, EDUTOPIA, <https://www.edutopia.org/blog/digital-citizenship-need-to-know-vicki-davis> (last visited Jan. 22, 2018).

types of facial recognition software); 5) Property (understanding copyright, licenses for work, and intellectual property), 6) Permission (knowing how to get permission for work and cite it correctly); 7) Protection (understanding viruses, malware, phishing, ransomware, and identity theft); 8) Professionalism (developing online grammar and global competence, understanding cultural taboos and cultural disconnects, and building problem solving skills); and 9) Personal Brand (understanding the student voice and awareness of how one is perceived online).⁵⁵⁹ Had the students in the reviewed cases had a stronger sense of digital literacy – for example, had they engaged in more discourse about professionalism on the Internet – it is possible they may never have chosen to express their concerns or frustrations via social media.

Ultimately, public school officials can take proactive steps in attempt to prevent and minimize cyberbullying. By establishing a positive school climate that includes positive channels for communication between students and staff and teaching students social and emotional skills, school officials can help set the conditions for positive and healthy relationships among all members of the school community.

**Recommendations for School Administrators:
When Situations Arise, Respond with Intention and Thoughtfulness**

Despite their best efforts to prevent student cyberbullying, school officials may find themselves confronting a situation involving student electronic speech that targets school employees. In such a circumstance, it is important for school officials to respond thoughtfully and intentionally in order to best support the students and staff involved as well as to prepare

⁵⁵⁹ *Id.*

themselves for any potential litigation. This section provides some questions for school officials to consider, based on an analysis of the judicial decisions reviewed in this dissertation.

Did The Student Speech Contain Threatening Language?

First, school officials should review the student speech to determine whether it contains threatening language. Of course, one of school officials' primary responsibilities is to maintain a safe school environment. Therefore, threats to anyone's safety can cause concern among students and staff alike. It may be a reflection of the gravity of this responsibility that school officials prevailed in three of the four cases reviewed where the student speech included a reference of violence toward a staff member. In fact, situations involving threatening electronic student speech have been one of the only circumstances where lower courts have agreed that school officials can regulate student speech.

With this in mind, school officials should consider two factors when responding to student speech perceived as threatening. First, educators should pay attention to the specific language in the speech, as well as to how various stakeholders perceive this language. Is the speech formatted as song lyrics? If so, what is the genre of music? If the language used corresponds with language typical for that musical genre (as *Bell* argued about his rap song),⁵⁶⁰ it will be important to consider whether that same message would have been threatening had it been presented in a different style. If these questions are not considered, school officials risk repeating the response Bell identified in his petition. That is, the *Bell* petition argued that by

⁵⁶⁰ In his petition, Bell wrote that the rap song "borrows the rap genre's most basic conventions by using hyperbolic and provocative rhetoric as a form of artistic expression." Brief for the Petitioner at 2, *Bell v. Itawamba*, 799 F.3d 379, (5th Cir. 2015) (No. 15-666).

disciplining the student due to his speech, which was consistent with the rap genre's basic conventions, the Fifth Circuit created a "new category of unprotected speech: rap music that was not a threat, was neither perceived nor intended as a threat, but was nonetheless 'threatening.'"⁵⁶¹ *Bell* went on, "That decision is profoundly wrong and sends an unfortunate signal that rap is not on the same First Amendment footing as other genres of music."⁵⁶² Ultimately, officials should think through the specific language used and consider how realistic it would be for the student to follow through with any specified negative actions. This analysis might help school officials determine the extent to which the perceived threat is, in fact, a threat to which school officials need to respond.

Second, if school officials determine student speech does contain threatening language, it is absolutely essential that they respond accordingly. In *Burge*, *Bethlehem*, and *Bell*, school officials' immediate responses to a perceived threat came into question during legal proceedings. In each of these cases, school officials suspended the student due to threatening language toward a school official. However, in none of these cases did school officials respond to the student as if the threatened school employee were truly in harm's way.⁵⁶³ In some cases, this inconsistency later led the courts to question the school officials' responses.

⁵⁶¹ *Id.*

⁵⁶² *Id.*

⁵⁶³ In *Burge*, school officials did not conduct an investigation, contact police or mental health professionals, or remove the student from the classroom. In *Bethlehem*, school officials contacted local police and the F.B.I. but did not remove the student from school, separate the student from faculty or other students, or warn faculty about a possible threat. Similarly, in *Bell*, school officials did not separate the student from other students or take any other action to prevent violence.

These findings highlight the fact that judges will take note of how school officials immediately respond to a perceived threat. Thus, school officials should develop and follow specific protocols for responding to student threats, including removing the student from others, ensuring the student is under constant supervision, and having the student assessed for risk to self or others. In other words, if school administrators believe the speech to be a threat, they need to respond accordingly. Ultimately, though situations where a staff member is threatened can be emotional and stressful for all involved, it will be important for school officials to be thorough and thoughtful in their responses. By creating a protocol for addressing threats, school officials can be best equipped to handle any future situation if and when it arises.

Did The Student Speech Cause – Or Is It Reasonably Foreseeable That It Could Cause – A Material And Substantial Disruption To The Discipline Of The School?

The review of literature indicates that courts are in agreement that *Tinker* is at least relevant, and often directly applicable, to cases involving student electronic speech that targets school employees. Though some individual judges have questioned *Tinker's* applicability to online speech, courts in all thirteen cases reviewed either applied or referenced *Tinker* and/or the substantial disruption test. Thus, when school officials are deciding how and when they can regulate student electronic speech of this type, they must consider the extent to which the speech caused or had the potential to cause substantial disruption to the school environment. In addressing these questions, school officials should first consider the federal appellate district where their school districts are located. School officials within the Second and Third Circuits might benefit from thinking through the *Wisniewski* approach to *Tinker*.

In The Second and Third Circuits: Was There A Reasonably Foreseeable Risk The Speech Would Come To The Attention Of School Officials?

In *Wisniewski*, the Second Circuit held that school officials could discipline a student for off-campus speech that included violent content where (1) there was a reasonably foreseeable risk the speech would come to the attention of school officials, **and** (2) there was a reasonably foreseeable risk the speech would materially and substantially disrupt the discipline of the school.⁵⁶⁴ The review of relevant cases suggests the Second and Third Circuits have referenced *Wisniewski* in their *Tinker* analyses, while most other federal courts have not. It is essential that school officials working in school districts located within the Second and Third Circuits consider the *Wisniewski* questions when making decisions about student electronic speech.

Specifically, the Second Circuit has determined it is reasonable to foresee that student speech containing violent or offensive language about a school employee or misleading or false information about a school or school event will come to the attention of school officials and can therefore be subject to a *Tinker*-type analysis.⁵⁶⁵ Therefore, if the student speech in question contains language or content of this type, school officials may move forward to consider whether it caused a substantial disruption.

For administrators dealing with these issues within the Third Circuit, school leaders should consider the student's intent. Did the student share the speech with others and/or invite others to contact school officials? If so, school officials may have more justification for

⁵⁶⁴ *Wisniewski v. Board of Education*, 494 F.3d 34, (2nd Cir. 2007).

⁵⁶⁵ The Second Circuit held the speech in *Wisniewski* was likely to come to school officials' attention because it included violent content directed at school employees. The Second Circuit held the speech in *Doninger* was likely to come to school officials' attention because it was offensive and contained misleading or false information.

regulating the speech under *Tinker*. On the other hand, if the student took steps to keep the speech private (such as sharing it only with specific friends on a social media website), *Wisniewski* may not be sufficient justification for regulating the speech, as it may not have been foreseeable that the speech would make its way to campus.

Ultimately, school officials need only consider the question of foreseeability if the schools in which they work are located within the Second or Third Circuits. In these cases, school officials would benefit from examining the student's intent more closely. In all other federal jurisdictions, in accordance with current case law, school officials would be safe conducting a *Tinker* analysis. The next step, then, is returning to the question of whether and to what extent the speech caused a substantial disruption to the discipline of the school.

To What Extent Did The Speech Cause – Or Have The Potential To Cause – A Substantial Disruption To The Discipline Of The School?

Of the decisions reviewed, the only case where school officials prevailed due to a substantial disruption having already occurred was *J.S. v. Bethlehem*. In *Bethlehem*, the teacher who was targeted by the student's speech experienced significant adverse effects as a result of the speech.⁵⁶⁶ The court determined that, in this case, school officials had correctly concluded that the adverse effects of the student's speech constituted a substantial disruption.⁵⁶⁷ In the other cases where school officials prevailed based on *Tinker*, school officials did not believe that a substantial disruption had already occurred but rather anticipated that a substantial disruption could have been possible due to the speech in question.

⁵⁶⁶ *J.S. v. Bethlehem*, 569 Pa. 638, 647 (Pa. 2002).

⁵⁶⁷ *Id.* at 667.

Knowing this, it will be important for school officials to give significant consideration to the type of substantial disruption that occurred or could have been forecast to occur. If a staff member experiences significant adverse effects due to the student speech, such as those experienced by the teacher in *Bethlehem*, school officials will likely be seen as justified in imposing disciplinary action on the student. Further, if the speech contains violent or threatening language, school officials may be justified in regulating it. However, if the speech contains vulgar language or expresses negative opinions about school staff in the absence of any specific threats, it may be more difficult for school officials to effectively argue that the speech could have caused a substantial disruption. In fact, previous litigation suggests that even violent language⁵⁶⁸ and references to sexual conduct between a student and teacher⁵⁶⁹ may not be sufficient to justify regulating speech due to *Tinker*.

Ultimately, the literature review suggests that evidence of a substantial disruption may be defined as one or more of the following having taken place: a staff member has experienced significant distress, a threat was posed to a school official, classes needed to be cancelled, or students engaged in violence at school. In the absence of these situations, school officials may be hard-pressed to show that substantial disruption occurred as a result of the student speech.

Does The Student's Speech Address A Potential Matter Of Public Concern?

In the most recent decision reviewed, *Bell v. Itawamba*, a dissenting judge argued that the student's speech should have been protected because the student had been speaking out about a

⁵⁶⁸ See *Burge v. Colton*, 100 F. Supp. 3d 1057 (D. Or. 2015).

⁵⁶⁹ See *Sagehorn v. Independent*, 122 F. Supp. 3d 842 (D. Minn. 2015).

matter of public concern.⁵⁷⁰ Though the Fifth Circuit ultimately ruled in favor of the school officials in *Bell*, the question was nonetheless brought forward and will likely continue to be considered in future case law. Thus, in determining how to respond to student electronic speech that targets school employees, school officials should consider to what extent the student was speaking out about an issue that impacted the safety or wellbeing of members of the school community. If the speech was, in fact, about a matter of public concern, school officials should consider the message the student was trying to convey and determine whether further response or investigation is needed. Depending on the circumstances, school officials could choose to defer disciplinary action for a student who was genuinely expressing a concern about something occurring within the school community.

What Disciplinary Action Is Appropriate?

Finally, after considering the nature of the student speech and the impact the speech had on staff and the school at large, school officials should consider what disciplinary action, if any, is appropriate for the situation. In this review of case law, the students in all cases but one received at least a suspension as a consequence for their speech. Notably, it is possible that many school officials dealing with situations of student electronic speech of this kind impose consequences that are less severe than suspension. Unless these cases were challenged legally, however, they were not available for legal analysis.

⁵⁷⁰ *Bell v. Itawamba*, 799 F.3d 379, 405 (5th Cir. 2015) (Dennis, J., dissenting).

The Third Circuit in *Doninger* made it clear that its conclusion may have been different had more severe disciplinary consequences been imposed upon the student.⁵⁷¹ Thus, it seems that courts may be more apt to defer to school officials' judgment in situations where less severe consequences are imposed. As seen in *Doninger*, courts might allow school officials more freedom to prohibit a student from running for student government than to suspend a student from school. In order to prevent potential constitutional conflicts, then, school officials should consider consequences that do not infringe upon a student's property right to education.

When making decisions about disciplinary action or decisions about or for students, school officials should consider how various student characteristics could be impacting their thinking. For example, if the student speech contained a rap, as it did in *Bell*, school officials should be intentional in thinking through any potential implicit biases they may have around rap music as compared to music from other genres. Bell's petition to the Supreme Court provided a compelling example of the ways race and culture may come into play in this type of decision-making. In the petition, Bell argued that every genre of music – and every other form of artistic media – uses violent rhetoric and hyperbole.⁵⁷² For example, Johnny Cash famously sang, "I shot a man in Reno just to watch him die," and Bob Marley and Eric Clapton won critical acclaim for their song about killing a police officer, "I Shot the Sheriff."⁵⁷³ Bell wrote, "Of course listeners do not take any of these lyrics literally. Nor could they. But the [court] majority took *Bell's* lyrics

⁵⁷¹ *Doninger v. Niehoff*, 527 F.3d 41, 53 (2nd Cir. 2008).

⁵⁷² Brief for the Petitioner at 31, *Bell v. Itawamba*, 799 F.3d 379, (5th Cir. 2015) (No. 15-666).

⁵⁷³ *Id.*

literally.”⁵⁷⁴ With these references, Bell implied that school officials and the courts may have responded more severely to his lyrics simply because they occurred in a rap song, a type of music often of interest to African American youth.⁵⁷⁵ Had the student in *Bell* been of a different race and/or presented a different type of song with the same underlying message, would school officials have reacted in the same way? Ultimately, school officials will need to wrestle with these questions when considering whether and how to discipline students for their controversial electronic speech.

Potential Areas for Future Research

Looking ahead, it will be important to monitor closely what happens with regard to student electronic speech that targets public school employees. Of particular relevance will be the question of how *Tinker* applies to student electronic speech. How are courts deciding when *Tinker* should be applied? To what extent are courts relying on the foreseeability standard presented in *Wisniewski*? Further, when *Tinker* is deemed relevant, what types of situations will constitute a “substantial disruption” to the school environment? Though *Tinker* has been long regarded as a critical foundational tool for all student speech cases, its applicability and utility has recently come into question. As student speech takes on new forms and new modalities, courts will be required to be more explicit about the relevance and applicability of this 1969 decision. Thus, school officials would benefit from closely monitoring courts’ use of *Tinker* in the years ahead.

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.*

Conclusion

The landscape surrounding issues involving student First Amendment speech rights has changed a great deal over the past 50 years. In 2018, student speech is more complicated and a great deal more nebulous than speech communicated via an armband, newspaper article, assembly speech, or poster. Now, student speech can take place almost anywhere at any time, and through more channels than the *Tinker* Court could ever have imagined. For these reasons, it is time for the Supreme Court to re-examine the question of when and to what extent school officials can regulate students' electronic speech that targets school employees. In the meantime, school officials would benefit from being thoughtful and intentional about how they can prevent and address student electronic speech that targets school employees.

Executive Summary: A Tool for School Administrators

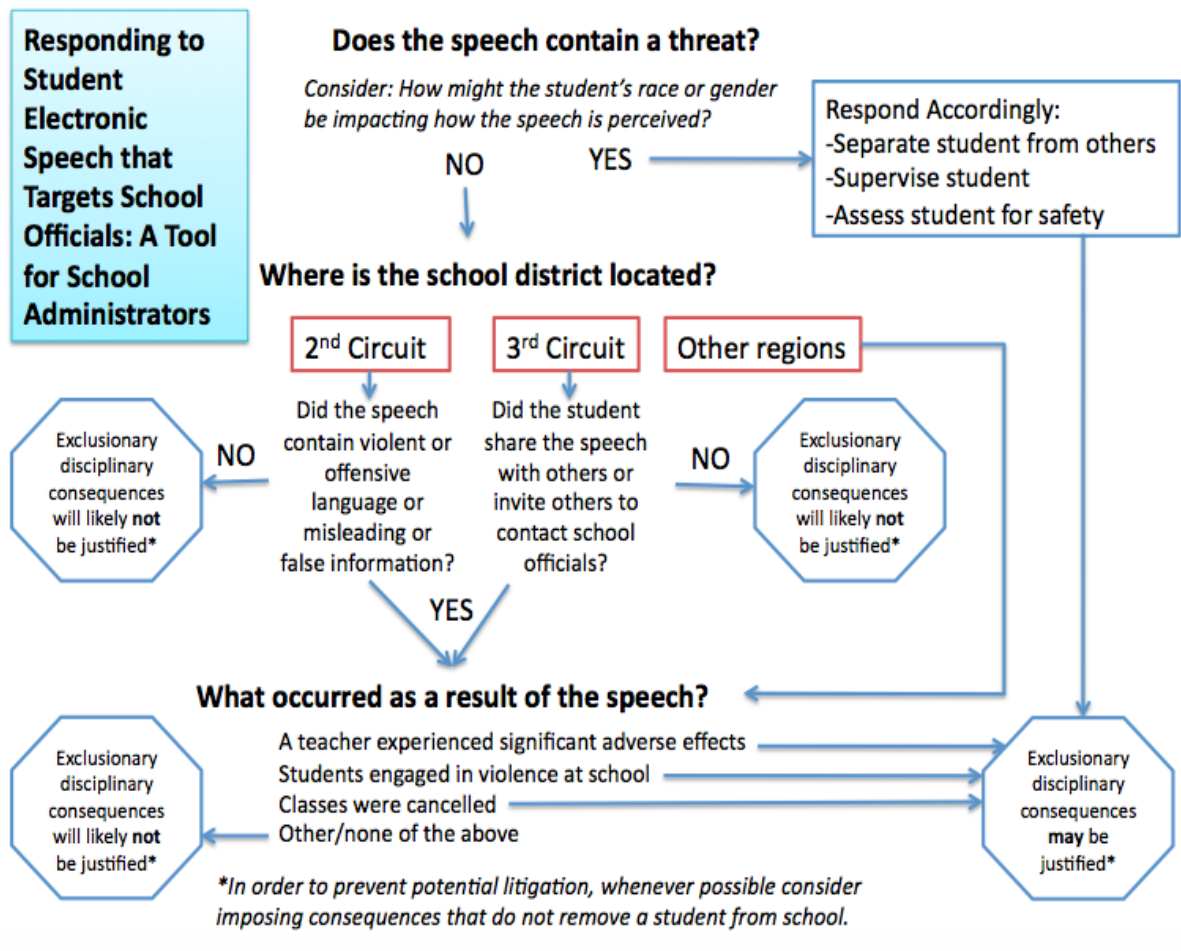


Figure 2. A graphic tool for school administrators

REFERENCES

Aaron J. Hersh, *Note: Rehabilitating Tinker: A Modest Proposal to Protect Public-School Students' First Amendment Free Expression Rights in the Digital Age*, 98 IOWA L. REV. 1309 (2013)

Adrienne Scheffey, *Defining Intent in 165 Characters or Less: A Call for Clarity in the Intent Standard of True Threats After Virginia v. Black*, 69 U. MIAMI L. REV. 861, 871 (2015)

Aleaha Jones, *Article: Schools, Speech, and Smartphones: Online Speech and the Evolution of the Tinker Standard*, 15 DUKE L. & TECH REV. 155, 167 (2017)

Amanda Lenhart, *Teens, Social Media & Technology Overview 2015*, PEW RESEARCH CENTER (Apr. 9, 2015), <http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/>

Amrit Thapa, Jonathan Cohen, Shawn Guffey, Ann Higgins-D'Alessandro, *A Review of School Climate Research*, 83, REVIEW OF EDUCATIONAL RESEARCH, 357-385 (2013)

Anika Hermann Bargfrede, *Demolishing the Schoolhouse Gate: Tinkering with the Constitutional Boundaries of Punishing Off-Campus Student Speech*, U. ILL. L. REV. 1645, 1665 (2015)

Baker v. Downey, 307 F. Supp. 517 (C.D. Cal. 1969)

Bell v. Itawamba, 859 F. Supp. 2d 834 (N.D. Miss. 2012)

Bell v. Itawamba, 774 F.3d 280, 291 (5th Cir. 2014)

Bell v. Itawamba, 779 F.3d 379 (5th Cir. 2015)

Benjamin Herold, *Teachers, Teens, and Social Media: Q & A with danah boyd*, EDUCATION WEEK: DIGITAL EDUCATION BLOG (Jan. 26, 2016), <http://mobile.edweek.org/c.jsp?cid=25920011&item=http%3A%2F%2Fapi.edweek.org%2Fv1%2Fblog%2F63%2F%3Fuuid%3D56496&cmp=SOC-SHR-TW>

Bethel v. Fraser, 478 U.S. 675 (1986)

Beussink v. Woodland, 30 F.Supp. 2d 1175 (E.D. Mo. 1998)

Boucher v. School Bd., 134 F.3d 821 (7th Cir. 1998)

Brief in Opposition, J.S. v. Blue Mountain, 650 F.3d 195 (3rd Cir. 2011) and Layshock v. Hermitage, 650 F.3d 205 (3rd Cir. 2011) (No. 11-502).

Brief for Petitioners at 17, *J.S. v. Blue Mountain*, 650 F.3d 195 (3rd Cir. 2011) and *Layshock v. Hermitage*, 650 F.3d 205 (3rd Cir. 2011) (No. 11-502)

Burge v. Colton, 100 F. Supp. 3d 1057 (D. Or. 2015)

Burnside v. Byars, 363 F. 2d 744 (5th Cir. 1966)

Bystrom v. Fridley, 686 F.Supp. 1387 (D. Minn. 1987)

Center for Great Teachers and Leaders

Collaborative for Academic, Social, and Emotional Learning (CASEL)

Common Sense Media, <https://www.commonsensemedia.org/about-us/our-mission>

Daniel Marcus-Toll, *Note: Tinker Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 *FORDHAM L. REV.* 3395 (2014)

Digest of Education Statistics, INSTITUTE OF EDUCATION SCIENCES (IES) NATIONAL CENTER FOR EDUCATION STATISTICS, Table 233.20, https://nces.ed.gov/programs/digest/d15/tables/dt15_233.20.asp?current=yes

Doninger v. Niehoff, 527 F.3d 41 (2nd Cir. 2008)

Doninger v. Niehoff, 514 F. Supp. 2d 199, 211 (D. Conn. 2007)

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

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

Elizabeth A. Shaver, *Article: Denying Certiorari in Bell v. Itawamba County School Board: A Missed Opportunity to Clarify Students' First Amendment Rights in the Digital Age*, 82 *BROOKLYN L. REV.* 1539 (2017)

Emmett v. Kent School District, 92 F. Supp. 2d 1088 (W.D. Wash. 2000)

Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?* 48 *DRAKE L. REV.* 527 (2000)

Evans v. Bayer, 684 F. Supp. 2d 1365 (SD Fla. 2010)

Fenton v. Stear, 423 F. Supp. 767 (W.D. Pa. 1976)

Fast Facts: School Crime, INSTITUTE OF EDUCATION SERVICES (IES) NATIONAL CENTER FOR EDUCATION STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=49> (last visited Nov. 18, 2017)

Fiona Ruthven, *Note: Is the True Threat the Student or the School Board? Punishing Threatening Student Expression*, *IOWA L. REV.* 931 (2003)

Fogel v. Grass Valley Police Dep't, 531 F.3d 824, 831 (2008)

Forums, LEGAL INFORMATION INSTITUTE [LLI], CORNELL LAW SCHOOL,
<https://www.law.cornell.edu/wex/forums>

Fraser v. Bethel, 755 F.2d 1356, 1364 (9th Cir. Wash. 1985)

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

Google Dictionary

Hazelwood v. Kuhlmeier, 578 F. Supp. 1286, 1289 (E.D. Mo. 1984)

Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988)

Jessica K. Boyd, *Note: Moving the Bully from the schoolyard to cyberspace: How much protection is off-campus student speech awarded under the First Amendment?* 64 ALA. L. REV. 1215, 1236 (2013)

Joe Dryden, J.D, *School Authority over Off-Campus Student Expression in the Electronic Age: Finding a Balance Between a Student's Constitutional Right to Free Speech and the Interest of Schools in Protecting School Personnel and Other Students from Cyber Bullying, Defamation, and Abuse* (Dec. 2010) (unpublished Doctor of Education dissertation, University of North Texas) (on file with Digital Libraries, University of North Texas)

Joseph A. Durlak, Allison B. Dymnicki and Rebecca D. Taylor, Roger P. Weissberg, and Kriston B. Schellinger, *The impact of enhancing students' social and emotional learning: A meta-analysis of school-based universal interventions*, 82, CHILD DEVELOPMENT, 405-432 (2011). As summarized on CASEL website, <http://www.casel.org/impact/>

J.S. v. Bethlehem, 757 A.2d 412 (Pa. Commw. Ct. 2002)

J.S. v. Bethlehem, 569 Pa. 638 (Pa. 2002)

J.S. v. Blue Mountain, 593 F.3d 286 (3rd Cir. 2010)

J.S. v. Blue Mountain, 650 F.3d 915 (3rd Cir. 2011)

J.S. v. Blue Mountain, No. 3:07cv585, 2008 U.S. Dist. LEXIS 72685 (M.D. Pa. 2008)

Justin W. Patchin, *Help with Fake Facebook Pages*, CYBERBULLYING RESEARCH CENTER (July 25, 2012), <http://cyberbullying.org/help-with-fake-facebook-profile-pages/> (last visited Nov. 18, 2017)

Killion v. Franklin, 136 F. Supp. 2d 446 (W.D. Pa. 2001)

Klein v. Smith, 635 F.Supp. 1440 (Dist. Me. 1986)

- Kowalski v. Berkeley, 652 F.3d 563 (4th Cir. 2011)
- LaVine v. Blaine, 258 F.3d 981 (9th Cir 2001)
- Layshock v. Hermitage, 593 F.3d 249 (3rd Cir. 2010)
- Layshock v. Hermitage, 650 F.3d 205 (3rd Cir. 2011)
- Layshock v. Hermitage, 496 F. Supp. 2d 587 (W.D. Pa. 2007)
- Lindsay J. Gower, *Article: Blue Mountain School Districts v. J.S. Ex Rel. Synder: Will the Supreme Court Provide Clarification for Public School Officials Regarding Off-Campus Internet Speech?* 4 ALA. L. REV. 709 (2012)
- Lisa Worf, *Cyberbullying Law Shields Teachers from Student Tormenters*, NPR (Feb. 19, 2013), <http://www.npr.org/2013/02/19/172329526/cyber-bulling-law-shields-teachers-from-student-tormenters> (last visited Jan. 17, 2018)
- Lowery v. Euverard, 497 F.3d 584 (6th Cir. 2007)
- Nancy Willard, M.S., J.D., *Article: Student Online Off-Campus Speech: Assessing "Substantial Disruption"*, 22 ALB. L. J. SCI. & TECH 611 (2012)
- Natanson, H. *Harvard rescinds acceptances for at least ten students for obscence memes*. THE HARVARD CRIMSON (June 5, 2017), <http://www.thecrimson.com/article/2017/6/5/2021-offers-rescinded-memes/>
- Miller v. California, 413 U.S. 15 (1973)
- Morse v. Frederick, 551 U.S. 393 (2007)
- P. Heath Brockwell, *Comment: Grappling with Miller v. California: The Search for an Alternative Approach to Regulating Obscenity*, 24 CUMB. L. REV. 131 (1994)
- Pangle v. Bend-Lapine, 169 Or. App. 376 (Or. Ct. App. 2000)
- Perez v. State, 189 So. 3d 797 (Fla. 2016)
- Perry Zirkel, *The Rocket's Red Glare: The Largely Errant and Deflected Flight of Tinker*, 38 J.L. & EDUC. 593 (2009)
- Peter DeWitt, *5 Ways to Foster a Positive School Climate*, EDUCATION WEEK BLOGS (2016), http://blogs.edweek.org/edweek/finding_common_ground/2016/06/5_ways_to_foster_a_positive_school_climate.html (last visited Nov. 19, 2017)
- Petition for Writ of Certiorari at i, Bell v. Itawamba, 799 F.3d 379, (5th Cir. 2015) (No. 15-666)

Petition for Writ of Certiorari, *J.S. v. Blue Mountain*, 650 F.3d 195 (3rd Cir. 2011) and *Layshock v. Hermitage*, 650 F.3d 205 (3rd Cir. 2011) (No. 11-502)

Petitioner Reply Brief at 10, *Bell v. Itawamba*, 799 F.3d 379, (5th Cir. 2015) (No. 15-666)

Pickering v. Board of Education, 391 U.S. 563 (1968)

Recent Briefs, MARION B. BRECHNER FIRST AMENDMENT PROJECT, <http://firstamendment.jou.ufl.edu/pubs/> (last visited Nov. 18, 2017)

R.S. v. Minnewaska, 894 F. Supp. 2d 1128 (D. Minn. 2012)

Safe and Civil Schools, <http://www.safeandcivilschools.com/>

Sagehorn v. Independent, 122 F. Supp. 3d 842 (D. Minn. 2015)

Sameer Hinduja and Justin W. Patchin, *Responding to Cyberbullying: Top Ten Tips for Adults who are Being Harassed Online*, CYBERBULLYING RESEARCH CENTER (Oct. 2013), http://cyberbullying.org/response_cyberbullying_adults/ (last visited Nov. 18, 2017)

School Climate and Cyberbullying: An Empirical Link, CYBERBULLYING RESEARCH CENTER (2012), <https://cyberbullying.org/school-climate-and-cyberbullying-an-empirical-link> (last visited Nov. 19, 2017)

Schools and Staffing Survey (SASS), INSTITUTE OF EDUCATION SERVICES (IES) NATIONAL CENTER FOR EDUCATION STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=49> (last visited Jan. 21, 2018). *Student Reports of Bullying and Cyber-bullying: Results from the 2011 School Crime Supplement to the National Crime Victimization Survey*, INSTITUTE OF EDUCATION SCIENCES (IES) NATIONAL CENTER FOR EDUCATION STATISTICS, Table 1.1, p. T-1, <https://nces.ed.gov/pubs2013/2013329.pdf>

Sullivan v. Houston, 307 F. Supp. 1382 (S.D. Tex. 1969)

Summary of Our Cyberbullying Research (2004-2016). CYBERBULLYING RESEARCH CENTER, <http://cyberbullying.org/summary-of-our-cyberbullying-research/> (last visited Nov 18, 2017)

Thomas v. Board of Education, 607 F.2d 1043 (2nd Cir. 1979)

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

Tinker v. Des Moines, 393 U.S. 503 (1969)

Vicki Davis, *What your students really need to know about digital citizenship*, EDUTOPIA, <https://www.edutopia.org/blog/digital-citizenship-need-to-know-vicki-davis> (last visited Jan. 22, 2018)

Virginia v. Black, 538 U.S. 343 (2003)

Watts v. United States, 394 U.S. 705 (1969)

Whatis.com, <http://whatis.techtarget.com/>

What is SEL? COLLABORATIVE FOR ACADEMIC, SOCIAL, AND EMOTIONAL LEARNING (CASEL),
<http://www.casel.org/what-is-sel/> (last visited Jan. 21, 2018)

Wisniewski v. Board of Education, 494 F.3d 34 (2nd. Cir. 2007)

Wynar v. Douglas, 728 F. 3d 1062 (9th Cir 2013)

APPENDIX
SUMMARY OF CASES

Student Electronic Speech that Targets School Employees

CASE	COURT	YEAR	SYNOPSIS	HISTORY	ANALYSIS/ SIGNIFICANCE	RULING FOR			ISSUES		
						Student	School	Threat	Sub. Disrupt	Lewd	Other
The Supreme Court and the "True Threat"											
Watts v. United States	U.S. Supreme Court	1969	Man arrested and convicted of threatening the President after making comment about getting President in his sights if they ever made him carry a rifle	District Court (State), D.C. Circuit Court (State), Supreme Court (Individual)	No "true threat" had been made. Established "True Threat" standard	X		X			
The Supreme Court and Student Freedom of Speech											
Tinker v. Des Moines	U.S. Supreme Court	1969	Students suspended for wearing black armbands to school in protest of the Vietnam War	District Court (School), 8th Circuit (School), Supreme Court (Students)	<i>Tinker</i> Standard: Speech can be regulated if it caused or is likely to cause substantial or material disruption to the discipline of the school or infringe on the rights of others	X			X		

Student Electronic Speech that Targets School Employees

CASE	COURT	YEAR	SYNOPSIS	HISTORY	ANALYSIS/ SIGNIFICANCE	RULING FOR		ISSUES			
						Student	School	Threat	Sub. Disrupt	Lewd	Other
Bethel v. Fraser	U.S. Supreme Court	1986	Student disciplined for giving lewd, offensive speech at a school assembly	District Court (Student), 9th Circuit (Student), Supreme Court (School)	Speech at a school-sponsored assembly can be regulated if lewd or offensive	X				X	
Hazelwood v. Kuhlmeier	U.S. Supreme Court	1988	School officials removed two articles from school newspaper	District Court (School), 8th Circuit (Students), Supreme Court (School)	Schools can regulate speech in school-sponsored activities if related to legitimate pedagogical concerns.	X					School-sponsored speech
Morse v. Frederick	U.S. Supreme Court	2007	Student disciplined for refusing to take down "Bong Hits 4 Jesus" banner at school-sponsored event	District Court (School), 9th Circuit (Student), Supreme Court (School)	School officials can regulate speech at school-sponsored events if the speech promotes illegal drug use	X					Illegal drug use
Student Electronic Speech that Targets School Employees											
Buessink v. Woodland	District Court in MO	1998	Student suspended for creating a website critical of teachers and principal	n/a	No risk of disruption; can't limit speech due to disliking content	X				X	

Student Electronic Speech that Targets School Employees

CASE	COURT	YEAR	SYNOPSIS	HISTORY	ANALYSIS/ SIGNIFICANCE	RULING FOR		ISSUES			
						Student	School	Threat	Sub. Disrupt	Lewd	Other
Killion v. Franklin	District Court in PA	2001	Student disciplined for composing "Top Ten" list about athletic director	District Court (Student)	No substantial disruption. Speech was lewd but off-campus, so can't be regulated	X			X		
J.S. v. Bethlehem	Supreme Court of PA	2002	Student expelled for creating offensive and threatening website about school employees	Trial court (School), Appellate Court (School), Supreme Court of PA (School)	Not a "true threat" under <i>Watts</i> . Sufficient nexus to be considered on-campus. Lewd and disruptive		X		X	X	
Wisniewski v. Board of Education	3rd Circuit	2007	Student suspended for sending AOL IM drawing of pistol, blood, and teacher's head	District Court (School), 3rd Circuit (School). SCOTUS denied cert.	Not a "true threat" under <i>Watts</i> . <i>Trinker</i> : would foreseeably create risk of sub disruption. <i>Wisniewski</i> foreseeability standard.		X		X		
Doninger v. Niehoff	2nd Circuit	2008	Student disqualified from running for class secretary as punishment for blog entry	District Court (School), 2nd Circuit (School). SCOTUS denied cert.	<i>Wisniewski</i> reasonably foreseeable test. Acknowledged a more serious consequence may have yielded different outcome.		X		X		

Student Electronic Speech that Targets School Employees

CASE	COURT	YEAR	SYNOPSIS	HISTORY	ANALYSIS/ SIGNIFICANCE	RULING FOR		ISSUES			
						Student	School	Threat	Sub. Disrupt	Lewd	Other
Evans v. Bayer	District Court in FL	2010	Student disciplined for creating Facebook group and posting comments about teacher	District Court (Student)	No sub. Disruption. Fraser DNA to off-campus speech	X			X		
Doninger v. Niehoff II	2nd Circuit	2011	Doninger filed suit again after she graduated from high school.	District Court (School), 2nd Circuit (School)	Student's behavior was disruptive of student government functions		X		X		
J.S. v. Blue Mountain	3rd Circuit	2011	Student disciplined for creating fake internet profile of principal from home computer	District Court (School), 3rd Circuit (School), en banc (Student), SCOTUS denied cert.	No reasonable forecast of sub disruption. Fraser DNA to off-campus speech	X			X		
Layshock v. Hermitage	3rd Circuit	2011	Student disciplined for creating fake internet profile of principal from home computer	District Court (Student), 3rd Circuit (Student), en banc (Student), SCOTUS denied cert.	No sub. disruption occurred. Fraser DNA to off-campus speech	X			X		Thomas (nexus)

Student Electronic Speech that Targets School Employees

CASE	COURT	YEAR	SYNOPSIS	HISTORY	ANALYSIS/ SIGNIFICANCE	RULING FOR		ISSUES				
						Student	School	Threat	Sub. Disrupt	Lewd	Other	
R.S. v. Minnewaska	District Court in MN	2012	Student posted comments on Facebook about dislike of hall monitor	District Court (Student)	No threats, no sub. Disruption	X		X	X			
Sagehorn v. Independent	District Court in MN	2015	Student disciplined for tweeting "yes actually" response to question about student making out with teacher	District Court (Student)	No sub. disruption, no obscene speech, <i>Fraser</i> DNA to off-campus speech	X			X			<i>Miller</i> (obscene)
Burge v. Colton	District Court in OR	2015	Student disciplined for Facebook posts about teacher after earning C in class	District Court (Student)	No true threats. No sub. disruption	X		X	X			

Student Electronic Speech that Targets School Employees

CASE	COURT	YEAR	SYNOPSIS	HISTORY	ANALYSIS/ SIGNIFICANCE	RULING FOR		ISSUES		
						Student	School	Threat	Sub. Disrupt	Lewd
Bell v. Itawamba	5th Circuit	2015	Student suspended for composing and publishing rap song that criticized and threatened coaches in response to concern about peers	District Court (School), 5th Circuit (Student), en banc (School). SCOTUS denied cert.	Threatening speech causes disruption		X		X	