A Legal Analysis of Students' First Amendment Rights in K-12 Public Education as it Relates to Internet Speech

by

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Abstract

JULIA WELLS ERDIE. A legal analysis of students' First Amendment rights in K-12 public education as it relates to Internet Speech. (Under the direction of DR. DAVID M. DUNAWAY)

Adolescents are rarely without a cellphone and typically have unfettered access to social media sites where they post their status or comment on their friends' posts. When said communication is used to bully or threaten others, it brings on challenges for schools. School administrators routinely ask the question: *When the Internet is used in harmful ways by students, how should the school respond?*

This study was a legal analysis of students' First Amendment rights in K-12 schools. State and federal appellate court considered and analyzed caselaw to determine the prevailing legal status of students' rights when students utilized Internet speech as a tool for bullying another student. This study also considered to what extent the courts applied the *Tinker* test in the cases involving Internet speech. The conclusions from this study provide school administrators with context as to when they have regulatory power when discipline involves to Internet speech.

Dedication

This writing is dedicated to my family, my husband Jim, daughter Carmen, son Robert and daughter-in-law Jordan. It was your support and inspiration that motivated me to continue working and never give up.

Acknowledgements

My professional career has been impacted greatly by Dr. David M. Dunaway, Professor Emeritus at the University of North Carolina at Charlotte. He graciously continued as the chair of my committee while in retirement. Dr. Dunaway has served as my most respected mentor since I began my journey in school administration in the fall of 2006. With every new job opportunity, I spent a few hours at Starbucks seeking his advice. His words were always valuable and for that I am forever grateful. Dr. Dunaway always encouraged me to be my very best, and I am where I am today because of his never-failing belief in me and my leadership abilities.

My niece, Dr. Danielle Elizabeth Seal, readily agreed to serve as my editor. I thank her for spending free time reading through this dissertation and providing welcomed feedback. She was there to help with every edit and rewrite and words cannot express my appreciation to her.

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Chapter 1: Introduction

True and Common Story

On Monday morning, the high school principal met with parents who were urgently seeking assistance from the school. The parents told a troubling story of how their daughter had been a victim of harassment on social media over the weekend by students at the principal's school, although the victim did not attend the principal's school.

On Friday evening, a group of high school girls from the principal's school posted a video to social media in which they burned a picture of the daughter and made extremely hateful comments. The post generated many "likes."

The parents came to the school looking for help, but the issue was less than clear for the principal. She had to evaluate the legal status of the situation to determine if she could address the harassing behavior with school punishment. To make the determination, she had to ascertain whether the misbehavior met the legal threshold for "materially and substantially"[1] disrupting the school as required by the United States Supreme Court.

Judicial Background

Since *West Virginia State Board of Education v. Burnett,* 319 U.S. 624 (1943), the United States Supreme Court has handed down landmark decisions related to students' rights in schools. A landmark decision, as defined by Black's Law Dictionary, is a

[1] *Tinker v. Des Moines Sch. Dist.,* 393 U.S. 503 (1969) at 513.

"judicial decision that significantly changes existing law."[2] These decisions have provided school administrators with caselaw that protected students' free speech rights and defined how schools may discipline students when disruptions occur in school.

In 1969, in *Tinker v. Des Moines Sch. Dist.,* 393 U.S. 503 (1969), the United States Supreme Court stated, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[3] This decision established the First Amendment rights for students in school. Then in 1986, the Court ruled in *Bethel School District v. Fraser*, 478 U.S. 675 (1986) that "the First Amendment did not prevent the school district from suspending the student in response to his speech, since the penalties imposed were unrelated to any political viewpoint, and since the First Amendment did not prevent the school officials from determining that to permit such a vulgar and lewd speech would undermine the school's basic educational mission."[4] Two years later in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), the United States Supreme Court determined it was within the rights of the school to "exercise editorial control" over the school newspaper, *Spectrum,* if there were "legitimate pedagogical concerns"[5] giving the school board jurisdiction over matters of curriculum and instruction. In 2007, in a case that prioritized safety over student speech, Justice Roberts wrote the majority opinion in *Morse v. Frederick*, 551 U.S. 393 (2007) which, in part, stated "[t]he question becomes whether a principal may, consistent with

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[2] *Black's Law Dictionary.* 5th pocket ed. (St. Paul: Thomson Reuters, 2016), 452.

[3] *Tinker v. Des Moines Sch. Dist.,* 393 U.S. 503 (1969) at 506.

[4] *Bethel School District v. Fraser*, 478 U.S. 675 (1986) at 685.

[5] *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988) at 273.

the First Amendment, restrict student speech at a school event when that speech is reasonably viewed as promoting illegal drug use. We hold that she may."[6] These landmark cases have provided the foundation for decisions made by school administrators when disciplining students for inappropriate behaviors that may be related to free speech. *Tinker* established the foundation for determining that students have First Amendment rights in schools until it creates a disruption. These landmark cases used *Tinker* to establish how schools determine students' rights under varying circumstances. While this study examined the First Amendment, in particular the rights to freedom of speech, the researcher considered two additional landmark cases.

Oftentimes, school administrators must search the belongings of a student or their person. Citizens of the United States are protected from unlawful searches by the Fourth Amendment. In the landmark case, *New Jersey v TLO,* 468 U.S. 325 (1985), the United States Supreme Court held "[u]nder ordinary circumstances the search of a student by a school official will be justified at its inception where there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[7] This situation is commonly referred to as "responsible suspicion" by school administrators.

When school administrators investigate serious offenses, the consequence is typically out-of-school suspension. The Fourteen Amendment guarantees the State will not deprive citizens of life, liberty, and property without due process of the law. *Goss v. Lopez,* 419 U.S. 565 (1975), was a landmark decision where the United States Supreme Court

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[6] *Morse v. Frederick*, 551 U.S. 393, 403 (2007) at 403.

[7] *New Jersey v TLO,* 468 U.S. 325 (1985) at 341.

mandated that when short suspensions are the course of discipline, administrators shall provide notice along with an informal hearing which allows students to provide their own version of events. This process "will provide a meaningful hedge against erroneous action"[8] and it upholds due process for the students. *TLO* and *Goss* provide guidance for school administrators to investigate and discipline students when necessary.

Societal Impact of Internet Speech

The use of social media today is a common practice for adults and children. About 95% of adolescents aged 12-17 use the Internet, and 80% of those are active members of social media sites.[9] The culture of our youth is to use social media for friendship or personal interests.[10] Additionally, our youth are experiencing increased use of technology in the school environment.

The modalities of speech, since the approval of the First Amendment, are continually changing, and questions of what constitutes protected free speech have been just as constant. One could argue that few if any changes have had the impact of the Internet on all forms of communication: how that communication takes place, where that communication takes place, and even who controls the communication. Society's traditional definition of speech continues to be drastically changed by the Internet with significant effects on schools. A frequently voiced question by school administrators is:

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[8] *Goss v. Lopez,* 419 U.S. 565 (1975) at 583.

[9] Mike Ribble and Teresa N Miller, "Educational Leadership in An Online World: Connecting Students to Technology Responsibly, Safely and Ethically." *Journal of Asynchronous Learning Networks 17*, no. 1 (2013): 135-143. https://eric.ed.gov/contentdelivery/servlet/ERICServlet?accno=EJ1011379.

[10] Brooke Lusk, "Digital Natives and Social Media Behaviors: An Overview." *The Preventive Researcher* 17, no. 5 (2010): 3-6. http://search.ebscohost.com/login.aspx?direct=true&db=rzh&AN=104961023&authtype=shib&site=ehost-live&scope=site&custid=s5822979.

when the Internet is used in harmful ways by students, how should the school respond? This question becomes significant when the harm caused to students is in the form of bullying.

Students' use of social media has a downside concerning bullying. Students bully others by spreading rumors, posting hateful comments, communicating threats or posting inappropriate pictures of others.[11] These instances of bullying may take place outside of the school environment but are frequently brought to the attention of school administration by students, parents, or staff members due to the anti-bullying and anti-harassment policies adopted by a school system.

At the time of this writing, the United States Supreme Court had not heard a case involving Internet speech in the school setting. Without a ruling by the United States Supreme Court on the issue of Internet speech, school administrators must apply the legal precedents set previously in *Tinker, Fraser*, *Hazelwood*, and *Morse* to Internet speech.

How often does Internet speech generate a potential legal issue in schools? A primary impact is an increase in bullying among students. In *Kowalski v Berkeley County Schools*, No. 10-1098 (4th Cir. 2011), the Fourth Circuit Court of Appeals stated:

> According to a federal government initiative, student-on-student bullying is a 'major concern' in schools across the country and can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide *See* StopBullying.gov, available at www.stopbullying.gov (follow 'Recognize the Warning Signs' hyperlink). Just as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use, *see Morse,* 551 U.S. 393, 127 S.Ct. 2618, 168 L.Ed.2d 290, schools have a duty to protect their students from harassment and bullying in the school environment, *cf*

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[11] Brooke Lusk, "Digital Natives and Social Media Behaviors: An Overview." *The Preventive Researcher*17,no. 5 (2010): 3-6. http://search.ebscohost.com/login.aspx?direct=true&db=rzh&AN=104961023&authtype=shib&site=ehost-live&scope=site&custid=s5822979.

> *Lowery v. Euverard,* 497 F.3d 584, 596 (6th Cir. 2007) ('School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions but to prevent them from happening in the first place').[12]

Each of the 50 states currently has anti-bullying laws for schools. It is the statement from the Fourth Circuit in *Kowalski v Berkeley County Schools* that emphasizes the necessity for school administrators to address bullying issues; therefore, providing the need to understand the current caselaw.

Purpose Statement

The purpose of this study was to analyze the evolving legal status of students' Internet speech when used as a tool for bullying other students. The nature of such harassment for school leaders is that each occurrence is typically unique. In order to determine the legality of the speech, a school administrator must determine its potential impact on the school environment.

Research Questions

This study investigated the following research questions:

1. What is the prevailing legal status of public school students' First Amendment Internet speech rights when that speech is used as a tool for bullying another student?
2. To what extent has the United States Appellate Court System applied the *Tinker* test in cases involving Internet speech?

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[12] *Kowalski v Berkeley County Schools*, 652 F.3d 565 (4th Cir., 2011) at 572 citing *Morse v. Frederick*, 551 U.S. 393, 403 (2007) and *Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir.2007).*

Procedures

In this study, the standard legal research methodology was used to analyze the data collected. Standard legal research determines how relevant caselaw applies to legally significant facts. The methodology in this research included data analyses of arguments of plaintiffs, arguments of defendants, judiciary decisions, judiciary reasoning, the scope of regulatory power, related Constitutional issues, and the impact on schools or school systems. The literature review in this study consisted of a discussion of landmark cases, which have established students' First Amendment rights on school grounds. Additionally, litigation of the Fourth and Fourteenth Amendments was reviewed.

Significance of Study

The introduction of electronic means of communication has dramatically impacted the context of student speech. The courts have generally provided schools the right to regulate student speech that occurs on campus and to protect students' freedom of speech off-campus.[13] Recently, the courts have applied tests with different thresholds and interpretations of caselaw to accommodate the regulation of off-campus speech under the *Tinker* standard of material and substantial disruption (substantial disruption of the school environment). These tests are not consistent and may not serve the rights and needs of both students and schools.[14]

There are differing opinions regarding the school's rights to regulate speech that occurs off campus through electronic avenues. In the 2012 *Georgia Law Review*, Weeks

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[13] Daniel Marcus-Toll, "Tinker Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech." *Fordham Law Review 82*, (2014): 3395-3437. WestlawNext Campus Research.

[14] Marcus-Toll, 3395-3437.

concluded that punishing a student's speech at school within the schoolhouse gate or on a school activity may be acting as *in loco parentis,* which means *in place of the parents*.[15] He further stated it is difficult to see why school officials' regulatory rights would extend to the students' speech at home or on social media sites.[16] Leach, in the 2014 *Missouri Law Review,* examined the Eighth Circuit decision in *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School District*. She stated that it "strikes the correct balance of respecting and applying speech rights to students while still recognizing that the school context entails a unique need for control."[17] She indicated the court was wise in the decision to expand the regulatory powers of school administrators in light of the technological times because of the harm brought to a student or group of students within the schoolhouse walls.[18] The contrasting views of experts such as Weeks and Leach highlight the challenges for school officials regarding Internet speech and cyberbullying.

Bullying and Cyberbullying

The use of technology for cyberbullying is increasing among students and is causing school administrators to address these situations, which occur outside the school building.[19] The problem for many school administrators is how they are to reconcile

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[15] *Black's Law Dictionary.* 5th pocket ed. (St. Paul: Thomson Reuters, 2016), 406.

[16] Rory A Weeks, "The First Amendment, Public School Students, And The Need For Clear Limits on School Officials' Authority Over Off-Campus Student Speech," *Georgia Law Review*, *46*, (2012): 1157-1193. Accessed on February 26, 2017, WestlawNext Campus Research.

[17] Erin M. Leach, "From Keyboard to Schoolhouse: Student Speech in an Age of Pervasive Technology." *Missouri Law Review 79*, (2014): 234. WestlawNext Campus Research.

[18] Leach, 205-235.

[19] David J. Hvidston, Brynn A. Hvidston, Brett G. Range, and Clifford P. Harbour, "Cyberbullying: Implications for Principal Leadership." *NASSP Bulletin 97*, (2013): 297-313. https://doi.org/10.1177/0192636513504452.

students' First Amendment Internet freedom of speech rights when such speech creates disruptive issues of harassment within the school environment.

Bullying among school-aged children has raised public awareness, which has caused state legislatures to enact laws addressing bullying. Most states mandate school systems to adopt policies related to bullying.[20] Cornell and Limber discuss the gap between legislative and scholarly definitions for bullying[21] and state:

> Perhaps the statute that is closest to the scholarly understanding of bullying is found in Virginia Law (Va. Code Ann. §22.1 – 276.01): 'Bullying' means any aggressive and unwanted behavior that is intended to harm, intimidate, or humiliate the victim; involves a real or perceived power imbalance between the aggressor or aggressors and victim; and is repeated over time or causes severe emotional trauma. 'Bullying' includes cyberbullying.[22]

Through policy, schools have established protocols and programs that address bullying in schools. Bullying, in the traditional sense, may take place during school, on school grounds, or traveling on the school bus before or after school.[23] Nickerson et al., note that schools should identify and intervene in the early stages by taking direct actions, such as administering student conferences and restorative justice. They further state that disciplinary consequences should be firm.[24]

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[20] Amanda B. Nickerson, Dewey G. Cornell, J. David Smith, and Michael J. Furlong, "School Antibullying Efforts: Advice for Education Policymakers." *Journal of School Violence 12*, no. 3, (2013): 268-282. https://doi.org/10.1080/15388220.2013.7873366.

[21] Dewey G. Cornell, and Susan P. Limber. "Law and Policy on the Concept of Bullying at School." *The American psychologist* 70, no. 4 (May 1, 2015): 333–343. http://doi.org/10.1037/a0038558.

[22] Cornell and Limber, 339.

[23] Amanda B. Nickerson, Dewey G. Cornell, J. David Smith, and Michael J. Furlong, "School Antibullying Efforts: Advice for Education Policymakers." *Journal of School Violence 12*, no. 3, (2013): 268-282. https://doi.org/10.1080/15388220.2013.7873366.

[24] Nickerson et al., 268-282.

Disciplining Internet Speech

Nickerson et al. mention that cyberbullying has received significant attention from the media due to the increased harm to the victims, which sometimes results in suicide.[25] Additionally, they indicated that cyberbullying is the fastest growing form of harassment in our schools.[26] With cyberbullying taking place through electronic avenues and frequently off campus, it presents challenges for school administrators to discipline cyberbullies.[27] The difficulty arises due to the need for school administrators to determine the impact the Internet speech has on the school and whether a disruption has occurred. In 1965, students were suspended for wearing black armbands in protest of the Vietnam War. The students sued, and eventually, the United States Supreme Court heard the case *Tinker v Des Moines*. The Court determined that schools may regulate free speech when it causes a material and substantial disruption resulting in the two-prong Tinker test that provided students maintain freedom of speech unless it 1) caused a substantial disruption or 2) impedes the rights of others.[28]

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[25] Amanda B. Nickerson, Dewey G. Cornell, J. David Smith, and Michael J. Furlong, "School Antibullying Efforts: Advice for Education Policymakers." *Journal of School Violence 12*, no. 3, (2013): 268-282. https://doi.org/10.1080/15388220.2013.7873366.

[26] Nickerson et al., 268-282.

[27] Stacie A. Stewart, "A Trade-off That Becomes a Rip-off: When Schools Can't Regulate Cyberbullying." *Brigham Young University Law Review*, (2013): 1645-1675. on WestlawNext Campus Research.

[28] Stacie A Stewart, 1645-1675.

Chapter 2: Historical Perspective

This chapter examined the judicial branch of government, common law, and the rules of law defined in *Barnette, Tinker, Fraser*, *Hazelwood, Morse, TLO,* and *Goss*. The cases *Barnette, Tinker, Fraser*, *Hazelwood,* and *Morse* provided caselaw for student speech in school and the basis for school administrators regarding discipline when a student's First Amendment rights may be involved. *TLO* and *Goss,* which established caselaw for search and seizure and due process, were included in this review due to the nature of the study. This study examined caselaw with regard to students' First Amendment rights with relationship to Internet speech. When students receive discipline at school and litigation ensues, plaintiffs typically challenge Fourteenth Amendment rights. Furthermore, when considering situations where school officials search a students' technological device, a clear understanding of students' Fourth Amendment rights is essential. Therefore, this study included these landmark cases on the Fourth and Fourteenth Amendments that established caselaw for search and seizure and due process.

Judicial Branch of Government

The Judicial branch is defined as "the division of government consisting of the courts, whose function is to ensure justice by interpreting, applying, and generally administering the laws."[29] The website, www.uscourts.gov, provides the background of the United States Supreme Court.

> Article III of the Constitution establishes the federal judiciary. Article III, Section I states that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Although the Constitution establishes the Supreme Court, it permits Congress to decide how to

[29] *Black's Law Dictionary.* 5th pocket ed. (St. Paul: Thomson Reuters, 2016), 437.

> organize it. Congress first exercised this power in the Judiciary Act of 1789. This Act created a Supreme Court with six justices. It also established the lower federal court system.[30]

The federal court system has a hierarchy of courts, district court, appellate court, and the United States Supreme Court. Generally, federal cases begin in a district court within the jurisdiction of where the action or offense took place. At the conclusion of the district case, the losing party has the right to appeal the decision. "The appellate courts do not retry cases or hear new evidence. They do not hear witnesses testify. There is no jury. Appellate courts review the procedures and the decisions in the trial to make sure that the proceedings were fair and that the proper law was applied."[31] The losing party in cases heard by the United States Courts of Appeal, or State Supreme Courts may petition for a writ of certiorari to the United States Supreme Court (Court). "The Certiorari Act of 1925 gives the Court the discretion to decide whether or not to do so. In a petition for a writ of certiorari, a party asks the Court to review its case."[32]

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[30] *United States Courts* "about the Supreme Court." Retrieved September 15 2019 from https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about.

[31] *United States Courts* "about the U. S. Courts of Appeals." Retrieved September 15 2019 from https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals.

[32] *United States Courts* "about the Supreme Court." Retrieved September 15 2019 from https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about.

Summary Judgment

In civil cases, such as those analyzed in this study, the parties involved can file a motion for summary judgment. In the motion, the plaintiff (person(s) who filed suit) or the defendant (person(s) who is defending their actions) ask the court to make a judgment on the whole or part of the case. When one of two conditions exist, (1) if the parties do not dispute the material facts in the case, or (2) if there is a matter of law which favors one side over the other, a defendant or plaintiff may request a summary judgment. Upon reviewing the motion and documents presented, the judge will either rule in favor of the motion or deny it. If the judge grants summary judgment in whole, the court enters the decision, and the trial is concluded. When the judge grants summary judgment in part, the portion granted will be entered into the record and the parties will argue the other claims at trial. If the judge denies summary judgment, the case proceeds to trial.[33]

Common Law

This study was necessarily based on an examination of common law addressing First Amendment rights of public school students. Common law continually evolves and grows based on precedents set by appellate court opinions, which is the legal basis for all common law.[34] However, it would be a mistake to assume American Constitutional Law is solely interpreted on precedents and void of interpretation of the text or Framers.[35]

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[33] *Black's Law Dictionary.* 5th pocket ed. (St. Paul: Thomson Reuters, 2016) and *United States Courts* "covering civil cases- journalist's guide." Retrieved September 24, 2019 from https://www.uscourts.gov/statistics-reports/covering-civil-cases-journalists-guide.

[34] David A. Strauss, "Common Law, Common Ground, and Jefferson's Principal." *The Yale Law Journal 112,* no. 7, (2003): 1717-1755. https://doi.org/10.2307/3657499.

[35] David A. Strauss, "Common Law Common Constitutional Interpretation," *The University of Chicago Law Review, 63,* no. 6, (1996): 877-935. https://doi.org/10.2307/1600246.

"The common law tradition rejects the notion that law must be derived from some authoritative source and finds it instead in understandings that evolve over time."[36] In the United States, the constitutional law represents the rejection of command theory, meaning to follow the direction of an authoritative entity and a flowering of the common law.[37] Command theory is associated with legal philosophers, Jeremy Bentham and John Austin. This theory is grounded in the idea that the sovereign power issued "commands". "The habit of obedience to the commands of the sovereign is an important aspect of the theory."[38] In contrast, Black's Law Dictionary defines common law as "the body of law derived from judicial decisions, rather than from statutes or constitutions; caselaw <federal common law>."[39]

There are two components of common law interpretation, traditionalism, and conventionalism. The traditionalist, one who aligns with traditionalism, relies on provisions of past judgments that have been accepted for generations. The conventionalist, one who aligns with conventionalism, sustains the importance of the Constitution's text and the flexibility for the judges in interpreting it.[40] Traditionalism is void of reference to the text of the Constitution. Not so with conventionalism. "Conventionalism is a generalization of the notion that it is more important that some

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[36] David A. Strauss, "Common Law Common Constitutional Interpretation," *The University of Chicago Law Review, 63,* no. 6, (1996): 879. https://doi.org/10.2307/1600246.

[37] Strauss, "Common Law Constitutional Interpretation," 877-935.

[38] *Collins Dictionary of Law*. S.v. "command theory." Retrieved September 15 2019 from https://legal-dictionary.thefreedictionary.com/command+theory.

[39] *Black's Law Dictionary.* 5th pocket ed. (St. Paul: Thomson Reuters, 2016), 140.

[40] Strauss, "Common Law Constitutional Interpretation," 877-935.

things be settled than that they be settled right."[41] The text of the Constitution is accepted, and regardless of the opinions or disagreements, the Constitution is respected.[42]

The central idea of the traditionalist is when examining judgments of those who were acting in good faith and who's decisions have been accepted and reaffirmed over time, one must be careful in rejecting them.[43] This form of traditionalism is reflected in the accepted common law concept of *stare decisis* or *let the decision stand*. The system of precedent assures that practices have sustained scrutiny over time and have evolved. Therefore, they should have precedence over practices that are old but not tested over time.[44]

The combination of traditionalism and conventionalism as they contribute to common law was the foundation of the analysis in this study. The landmark cases discussed in this chapter looked at judicial appellate court opinions that have provided the precedent for determining cases in the courts today. The landmark cases discussed as a historical perspective, while not speaking directly to Internet speech, are the foundations on which interpretation of student speech rights today are built.

Landmark Case Review

The case reviews that follow are United States Supreme Court decisions centering on students' free speech – either expanding it or limiting. While none of the cases specifically address Internet speech, each opinion informs the reader about the state of

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[41] David A. Strauss, "Common Law Common Constitutional Interpretation," *The University of Chicago Law Review, 63,* no. 6, (1996): 907. https://doi.org/10.2307/1600246.

[42] Strauss, "Common Law Constitutional Interpretation," 877-935.

[43] Strauss, "Common Law Constitutional Interpretation," 877-935.

[44] Strauss, "Common Law Constitutional Interpretation," 877-935.

common law regarding Internet speech, and potential directions of future decisions which, will most likely present one or more of the cases reviewed as a foundation of their judicial examination.

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)

On January 9, 1942, the West Virginia State Board of Education adopted a resolution that required schoolchildren to salute the flag and recite the Pledge of Allegiance, and if students refused to do so administrators considered them insubordinate, and disciplined accordingly.[45] Students who were Jehovah's Witness refused to salute the flag. As a Jehovah's Witness, the students held religious beliefs including "a literal version of Exodus, Chapter 20, verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in water under the earth; thou shalt not bow thyself to them nor serve them.'"[46] Due to this religious belief, they considered the flag as an "image" and refused to salute.[47] The school determined their failure to salute the American Flag to be insubordination and punished the students.[48] Their parents, as citizens of the United States and residents of West Virginia, brought suit to the United States District Court[49] "asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witness."[50]

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[45] *West Virginia State Board of Education ET Al. v. Barnette ET AL,* 319 U.S. 624 (1943).

[46] *Barnette,* at 629.

[47] *Barnette,* at 629.

[48] *Barnette,* at 629.

[49] *Barnette,* at 629.

[50] *Barnette,* at 62

The majority opinion delivered by Justice Jackson stated, "[w]e think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[51] The Court affirmed the decision of the United States District Court, which determined the punishment a violation of the students' First Amendment rights.[52] Before this case, it was thought that students were not protected under the First Amendment at a public school.

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

In December 1965, a group of students and adults held a meeting to organize a protest by wearing armbands in order to protest hostilities in Vietnam and support a truce. Principals in the school district were made aware of the planned silent armband protest. On December 14, 1965, the Des Moines Independent Community School District adopted a policy stating that wearing armbands was prohibited, and school officials would suspend students wearing armbands until they came to school without them. Students John Tinker, Mary Beth Tinker, & Christopher Eckhardt wore armbands to school and endured a suspension until they were willing to return without the bands. The students filed suit in United States District Court under § 1983 of Title 42 of the United States Code requesting an injunction; furthermore, they sought nominal damages. The district court dismissed the complaint, stating it was within the Board's power. Following argument before a three-judge panel of the Eighth Circuit Court, the case was reargued before the entire court. The judges on the en banc court ("with all judges present and

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[51] *West Virginia State Board of Education ET Al. v. Barnette ET AL,* 319 U.S. 624 (1943) at 642.

[52] *Barnette.*

participating; in full court."[53]) were equally divided on the issue, and the decision of the district court was affirmed without formal opinion. The Tinkers and Eckhardts filed a petition for a writ of certiorari to the United States Supreme Court.

The Court's opinion stated that the district court recognized wearing an armband is protected under the free speech clause. The question was whether wearing the armband is a facet of speech. The Court determined it is "entirely divorced from actually or potentially disruptive conduct by those participating."[54] The Court stated it was "akin to 'pure speech'," which allowed for "comprehensive protection" under the First Amendment[55]. "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students are 'persons' under the Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."[56] "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[57] The court continually expressed the need to "affirm the comprehensive authority of the State."[58] The court states the "problem lies in the area

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[53] *Black's Law Dictionary.* 5th pocket ed. (St. Paul: Thomson Reuters, 2016).

[54] *Tinker v. Des Moines Sch. Dist.,* 393 U.S. 503 (1969) at 506.

[55] *Tinker v. Des Moines Sch. Dist.,* 393 U.S. 503 (1969), *Cf. Cox v. Louisiana,* 379 U.S. 536, 555 (1965); *Adderley v. Florida,* 385 U.S. 39 (1966) at 506.

[56] *Tinker v. Des Moines Sch. Dist.,* 393 U.S. 503 (1969) at 511.

[57] *Tinker* at 507.

[58] *Tinker* at 507.

where students, in the exercise of First Amendment rights collide with the rules of the school authorities."[59]

The Court was specific about students and teachers maintaining their constitutional rights. The Court established the *Tinker* test, which states that students maintain First Amendment rights unless 1) the speech is "materially and substantially disruptive,"[60] or 2) impedes upon the rights of others. Most, if not all, student speech cases argued in Federal Court will begin with a recitation of this test established by *Tinker.* Moreover, *Tinker's* affirmation of student constitutional rights in school will likely precede a quote of the *Tinker* test. The direction for school administrators from *Tinker* is the two-prong *Tinker* test, which applies when questions arise regarding free speech in public schools. The caselaw in *Tinker* is foundational to litigation regarding free speech regardless of the mode of speech.

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

On April 26, 1983, Matthew Fraser gave a speech at Bethel High School in support of a student running for an elected office, which contained innuendos that were sexual along with gestures while delivering the speech. The school disciplined Fraser in accordance which a school rule which held "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."[61] Fraser's father brought an action to the district court seeking injunctive relief and monetary damages, claiming the discipline was a violation

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[59] *Tinker v. Des Moines Sch. Dist.,* 393 U.S. 503 (1969) at 507.

[60] *Tinker* at 513.

[61] *Bethel School District v. Fraser*, 478 U.S. 675 (1986) at 678.

of Fraser's First Amendment rights. The school policy used the exact wording from the *Tinker* opinion, which clearly defines when First Amendment rights do not apply in school. However, the district court ruled in favor of Fraser and granted the injunction and monetary compensation. The United States Supreme Court granted a writ of certiorari petitioned by Bethel School District.[62]

The Court's opinion begins with the caselaw from *Tinker* by acknowledging that students and teachers do not "shed" their rights on school property. Furthermore, it notes the appeals court equated the lewd speech with the wearing of armbands in *Tinker*. However, the Court makes the distinction between a silent political demonstration with armbands and an obscene speech delivered to a student body that infringed upon the rights of those students and the workings of the school itself. Due to this conclusion, the court must "consider the level of First Amendment protection accorded to Fraser's utterances and actions before an official high school assembly attended by 600 students."[63] The Court stated the Constitution does not prohibit the state from determining "that certain modes of expression are inappropriate and subject to sanctions."[64]

The Court indicated that the nature of Fraser's speech was offensive to students and teachers and further stated that the sexual nature of the speech was especially offensive to girls. The court noted that he First Amendment caselaw limits the speaker when children are the audience. The Court delineated between *Tinker.* It determined Bethel School District was within its rights to disassociate itself from the speech

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[62] *Bethel School District v. Fraser*, 478 U.S. 675 (1986)

[63] *Fraser*, at 681.

[64] *Bethel School District v. Fraser*, 478 U.S. 675 (1986) at 683 *Tinker,* 393 U.S. at 508; see *Ambach v. Norwich, supra.*

delivered at a school function and reversed the decision of the Ninth Circuit Court of Appeals. This case was significant due to the fact that the lower court interpreted the speech, in this case, to be similar to wearing the armbands in *Tinker.* However, the Supreme Court disagreed. This case established caselaw where free speech rights were limited in circumstances when the speech was lewd and impeded on the rights of others.

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

On May 10, 1983, Robert Reynolds Principal of Hazelwood East High School, received the draft of the May 13 edition of the *Spectrum*, the school newspaper from Mr. Emerson. Upon review, Principal Reynolds had concerns with two articles, one on pregnancy and the other on divorce. The article on pregnancy used false names; however, it described the stories of three pregnant students, and the concern was that the students might be recognizable. The article on divorce identified the student by name and quoted personal information without parental consent. Due to the short amount of time, Principal Reynolds determined he had to make one of two choices, either eliminate the two articles or eliminate the entire edition of the *Spectrum*. He chose to eliminate the two articles and publish a four-page edition. Three students at Hazelwood East High School claimed the principal, Robert Eugene Reynolds and teacher Howard Emerson violated their First Amendment rights and filed suit in district court for the Eastern District of Missouri.

The district court determined there was not a violation of the students' First Amendment rights. They concluded that if the speech was part of the activities related to the education function, a school official might impose restraints. The students filed an

appeal to the Court of Appeals for the Eighth Circuit.[65] The appellate court found the *Spectrum* to be a public forum, and the status as public forum prohibited school officials from censoring the articles.[66] The Court of Appeals for the Eighth Circuit reversed the district court decision. The United States Supreme Court granted the Hazelwood School district's petition for a writ of certiorari.

Justice White delivered the opinion in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988). He began by citing *Tinker* by stating, "Students in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' *Tinker*, supra at 506."[67] "A school need not tolerate student speech that is inconsistent with its 'basic educational mission.' Fraser, supra at 685, even though the government could not censor similar speech outside of school."[68] The Court addresses two questions. Was Spectrum a public forum for expression? And,

> The question whether the First Amendment requires a school to tolerate particular student speech - the question that we addressed in *Tinker* - is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprint of the school.[69]

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[65] *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988).

[66] *Hazelwood.*

[67] *Hazelwood* at 267.

[68] *Hazelwood* at 267.

[69] *Hazelwood*, at 271.

The Court answered the first question when it stated "School officials did not evince either 'by policy or by practice,' *Perry Education Assn*., 460 U.S., at 407, any intent to open the pages of Spectrum to 'indiscriminate use, by its student reporters and editors, or by the student body generally. Instead, they 'reserve[d] the forum for its intended purpos[e],' as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of Spectrum in a reasonable manner. It is this standard, rather than our decision in *Tinker*, that governs this case."[70] The Court addressed the second question in the following statement. "[A] school may in its capacity as publisher of a school newspaper or producer of a school play ‘disassociate itself,’ *Fraser*, 478 U.S., at 685, not only from speech that would 'substantially interfere with [its] work... or impinge upon the rights of other students,' *Tinker*, 393 U.S. at 509, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[71] The Court concluded "that the principal's decision to delete two pages of Spectrum, rather than to delete only the offending articles or to require that they be modified, was reasonable under the circumstances as he understood them. Accordingly, no violation of First Amendment rights occurred."[72] The United States Supreme Court reversed the judgment of the United States Court of Appeals for the Eighth Circuit. The importance of this decision is that it again established that students have First

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[70] *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), at 270.

[71] *Hazelwood*, at 272.

[72] *Hazelwood*, at 276.

Amendment rights in school. However, Principal Reynolds, as the publisher of Spectrum has curricular control when the speech infringes on the rights of others.

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

On January 24, 2002, the Olympic Torch Relay passed through Juneau, and the torchbearers were expected to follow a path in front of Juneau-Douglas High School.[73] Principal Deborah Morse sanctioned this event as "an approved social event or class trip"[74] for students and staff who were standing on either side of the street. Joseph Frederick and several friends were across the street and unveiled a banner "BONG HiTS 4 JESUS" at the school's supervised and sanctioned event.[75] Principal Deborah Morse directed the students to put the banner down, and Joseph Frederick refused. She removed the banner and later suspended Fredrick. He filed suit in district court alleging Morse and the school district had violated his First Amendment rights.

The district court determined the school district, and Morse did not violate Frederick's First Amendment rights. The district court "found that Morse reasonably interpreted the banner promoting illegal drug use."[76] Frederick appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals reversed the district court's decision and held there was a violation of Frederick's First Amendment rights because the punishment was given without showing a risk for material and substantial

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[73] *Morse v. Frederick*, 551 U.S. 393 (2007).

[74] *Morse,* at 296.

[75] *Morse*.

[76] *Morse,* at 296.

disruption.[77] Morse petitioned a writ of certiorari to the United States Supreme Court, and they granted certiorari on two questions: "whether Frederick had a First Amendment right to wield his banner, and, if so, whether that right was so clearly established that the principal may be held liable for damages."[78]

Justice Roberts delivered the majority opinion.

> The Court concluded that the 'substantial disruption' rule of *Tinker* was not the only basis for restricting student speech. Considering the special characteristics of the school environment and the governmental interest in stopping student drug abuse, the Court held that schools were entitled to take steps to safeguard those entrusted to their care from speech that reasonably be regarded as encouraging illegal drug use.[79]

Tinker warned that prohibiting student speech to avoid discomfort was unconstitutional. With this in mind, the Court stated, "[t]he danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in established school policy, extends well beyond an abstract desire to avoid controversy."[80] The Court reversed and remanded the Ninth Circuit Court of Appeals decision. This opinion not only upheld *Tinker* with regard to disrupting the school environment but also established the need for schools to censure speech if it promotes illegal drug use.

***New Jersey v TLO*, 469 U.S. 325 (1985)**

Often, school administrators need to search a student's belongings due to an investigation. The search may include a backpack, pockets, shoes, personal electronics

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[77] *Morse v. Frederick*, 551 U.S. 393 (2007).

[78] *Morse* at 400.

[79] *Morse,* at 290.

[80] *Morse,* at 303

etc. For this reason, it is imperative that school administrators understand the constitutional rights delineated by the Fourth Amendment, which protects individuals from unreasonable searches of personal property. For the purpose of this study, understanding the protection provided under the Fourth Amendment is critical for administrators who may need to search a personal electronic device when investigating a cyberbullying or harassment claim.

In *New Jersey v TLO*, 469 U.S. 325 (1985), two students were found smoking in a school bathroom by a teacher. The girls were brought to the office and questioned by Assistant Vice Principal, Mr. Choplick. One of the girls admitted to smoking while the other denied it. Mr. Choplick searched the purse of one 14-year-old high school freshman known as T.L.O. due to reasonable suspicion that she had violated the school rule of no smoking on school property. Mr. Choplick found a pack of cigarettes in the purse, and as he pulled them out, he discovered rolling papers. The presence of rolling paper was closely related to marijuana use, and Mr. Choplick proceeded with the search. The search produced evidence that implicated marijuana dealing. Law enforcement was informed, and they charged T.L.O. with delinquency.

T.L.O. claimed a violation of her Fourth Amendment and moved to suppress the evidence, and the Juvenile Court denied the motion to suppress.[81] The court found the Fourth Amendment applied to searches by school officials and held that:

> [A] school official may properly conduct a search of a student's person if the official has a reasonable suspicion that a crime has been or is in the process of being committed or reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies.[82]

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[81] *New Jersey v TLO*, 469 U.S. 325 (1985), citing *State ex rel. T.L.O.,* 178 N.J. Super. 329, 428 A. 2d 1327 (1980).

[82] *New Jersey v TLO*, 469 U.S. 325 (1985), at 341, 248 A. 2d, at 1333

On appeal to the New Jersey Supreme Court, the court ordered the evidence suppressed. The Court granted the State of New Jersey certiorari. The Court determined that the Fourth Amendment prohibited unreasonable searches by public school officials.[83] This ruling means that the United States Supreme Court determined that students are protected from unreasonable searches by school administrators. Furthermore, the Court found that the search by Mr. Choplick was reasonable, and the judgment by the New Jersey Supreme Court was reversed.[84] The reversal occurred due to the reasonable suspicion Mr. Choplick had when he found the items implicating marijuana use and the possible distribution when he was searching for the cigarettes.

***Goss v. Lopez*, 419 U.S. 565 (1975)**

Discipline in schools for serious offenses will likely entail out-of-school suspension. The phrase short-term suspension is used to describe suspensions involving ten days or less,. The Fourteenth Amendment provides students with the constitutional right to due process when they are disciplined. School administrators must understand this right and conduct investigations so that all students are afforded due process when they have been accused of an offense at school. With regard to this study, due process holds importance because students may be disciplined for cyberbullying and hence be entitled to due process.

The class action brought by students in *Goss v. Lopez*, 419 U.S. 565 (1975) claims administrators suspended students without a hearing, which violated the Fourteenth

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[83] *New Jersey v TLO*, 469 U.S. 325 (1985).

[84] *TLO.*

Amendment Due Process Clause. The two named students in the suit, Dwight Lopez and Betty Crome, were suspended from their schools for ten days. Dwight Lopez was suspended after a disturbance in the cafeteria, where at least seventy-five students were also suspended. Lopez claimed he was a bystander and not a party to the disturbance, and the official record has nothing in it to justify the suspension, and he was not provided a hearing. Betty Crome was involved with a demonstration at another school where she was arrested and brought to the police station. She was released, and no criminal charges were filed. Upon returning to her school, she was notified that she had been suspended for ten days. The official record does not state on what grounds she was suspended, and she was not provided a hearing.

The class-action suit filed in the district court by Ohio public high school students "sought a declaration that §3313.66 was unconstitutional in that it permitted public school administrators to deprive plaintiffs of their rights to an education without a hearing of any kind, in violation of the procedural due process component of the Fourteenth Amendment."[85] The Ohio statue §3313.66 allowed the principal of an Ohio public school to suspend a student for ten days or less and required them to make parental contact within twenty-four hours and state his/her reasons for the suspension. There was no provision in the statue for a hearing. In the United States District Court for Southern District of Ohio, Eastern Division, 372 F.Supp. 1279, a three-judge panel held that the district denied students due process and that the statute was unconstitutional.[86] Several

[85] *Goss v. Lopez*, 419 U.S. 565 (1975) at 568 and 569.

[86] *Goss.*

administrators from the Columbus, Ohio Public School System appealed to the United States Supreme Court.

The Court recognized the vast number of short-term suspensions in public schools. Accordingly, the Court stopped short of holding that students receiving short suspensions were entitled to "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident."[87] The Court stated, "requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action."[88] The Court affirmed the district court's opinion that the school district violated the due process clause and the statue was unconstitutional by permitting suspensions without notice or hearing.[89]

These landmark cases regarding students' First Amendment rights have established the foundation for school administrators. The question became, how does the current caselaw established in *Tinker, Fraser*, *Hazelwood*, and *Morse* apply to students' First Amendment rights related to Internet speech? At present, school administrators only have prior caselaw to guide situations dealing with Internet speech and procedures on searching electronic devices such as computers and cell phones.

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[87] *Goss v. Lopez*, 419 U.S. 565 (1975) at 583.

[88] *Goss* at 583.

[89] *Goss.*

Chapter 3: Methodology

The framework for this study was Standard Legal Analysis. The current and unsettled state of the law involving Internet speech in public schools was examined through an analysis of the common law precedents established in previous cases. The data for this study was collected through analyses of court opinions; therefore, no humans were subjected to data collection in this study. An Institutional Review Board (IRB) examination was not necessary for this study.

The data analysis in this study sought to answer the following questions regarding Internet speech.

1. What is the prevailing legal status of public school students' First Amendment Internet speech rights when that speech is used as a tool for bullying another student?
2. To what extent has the United States Appellate Court System applied the *Tinker* test in cases involving Internet speech?

Research Design - Standard Legal Analysis

The research design in this study mirrored the Standard Legal Analysis methodology, the standardized process used by legal professionals in researching and preparing briefs presented to appellate courts at all levels. The process included an in-depth analysis of each case included in the data. In *Fundamentals of Legal Research*, Barken, Bintliff, and Whisner introduce legal research in the passage below:

> Legal research is the process of identifying and retrieving the law-related information necessary to support legal decision-making. In its broadest sense, legal research includes each step of a course of action that begins

> with an analysis of the facts of a problem and concludes with the application and communication of the results of the investigation.[90]

Through the process of legal research, analysis of each case sought to identify the legal statutes under relevant law when there was a presence of legally significant facts. In *A Practical Guide to Appellate Advocacy,* Beazley referred to this analysis as the under-does-when structure.[91]

This study examined the First Amendment rights of public school students; therefore, the relevant law is the First Amendment. The "under-step" of the research methodology identified the relevant law. With regard to this study, the First Amendment aligns with the the "under-step" for each case analyzed. To narrow the focus of the analysis for each case, the "does-step" answered the yes or no question regarding the legal condition in question.[92] In this study, the "does-step" answered either yes or no to whether there was a violation of a student's First Amendment rights. The last step of the under-does-when structure identified the legally significant facts associated with the answer to the "does-step" of the statement. The "when-step" provided the relevant facts when the answer to "does" is yes and when the answer is no.[93] It is important to note that the "when-step" may be different for each case. The "when-step" provided the relevant facts that narrowed the research and answered the research questions. Each case will have

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[90] Steve Barkan, Barbara A. Bintliff and Mary Whisner, "An Introduction to Legal Research." In *Fundamentals of Legal Research,* 10th ed., 1. St. Paul: Leg, Inc. d/b/s West Academic, 2015.

[91] Mary Beth Beazley, "Before You Write," in *A Practical Guide to Appellate Advocacy,* 2nd ed., 27-48. New York: Aspen, 2006.

[92] Beazley, 27-48.

[93] Beazley, 27-48.

an abundance of facts associated with it; however, only the legally significant facts will be considered in this study. In further support of this methodology, Schiess and Einhorn wrote:

> We believe that the strength of the *under-does-when* model is that it forms a sort of syllogism, with the "under" portion taking the form of the major premise about the legal rule, the "when" portion taking the form of a minor premise about the facts of the case at hand, and the "does" portion taking the form of a conclusion.[94]

The use of under-does-when structure assisted in the collection of information from cases selected into the data. When considering the landmark case, *Tinker v. Des Moines Sch. Dist.,* 393 U.S. 503 (1969) described in Chapter 2, the under-does-when structure, generated the following statement about the judicial appellate court opinion for *Tinker*: Under the First Amendment's freedom of speech clause, as it pertains to wearing armbands in a silent protest, a school or school system will violate students' First Amendment rights by disciplining the students when there is no evidence of a material or substantial disruption to the learning environment. This structure of analysis was used for each case to identify the information needed for the criteria explained later in this chapter.

Data Collection

The research process for this study gathered judicial appellate court opinions from cases involving Internet speech in public schools. All research was conducted through J. Murray Adkins Library at the University of North Carolina at Charlotte. The cases were

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[94] Wayne Schiess and Elana Einhorn, "Issue Statements: Different Kinds for Different Documents," *Washburn Law Journal* 50, no. 2, (Winter 2011): 343. https://heinonline.org/HOL/Page?handle=hein.journals/wasbur50&id=357&collection=journals&index=.

accessed through Westlaw Next, LexisNexis, and Google Scholar. Keywords in the search process will be First Amendment, Internet, bullying, cyberbullying, and public schools. The researcher considered any case arguing a violation of First Amendment rights related to Internet speech in the public school setting. At the time of this study, the United States Supreme Court had not granted a writ of certiorari to a First Amendment rights case involving Internet speech in public schools. Therefore, the cases analyzed in this study are from the United States Circuit Court of Appeals and district courts. The United States Circuit Court of Appeals is the appellate court system for litigation in the Federal Court System. Cases from the state supreme courts were reviewed; however, they were not applicable within the limitations of this study.

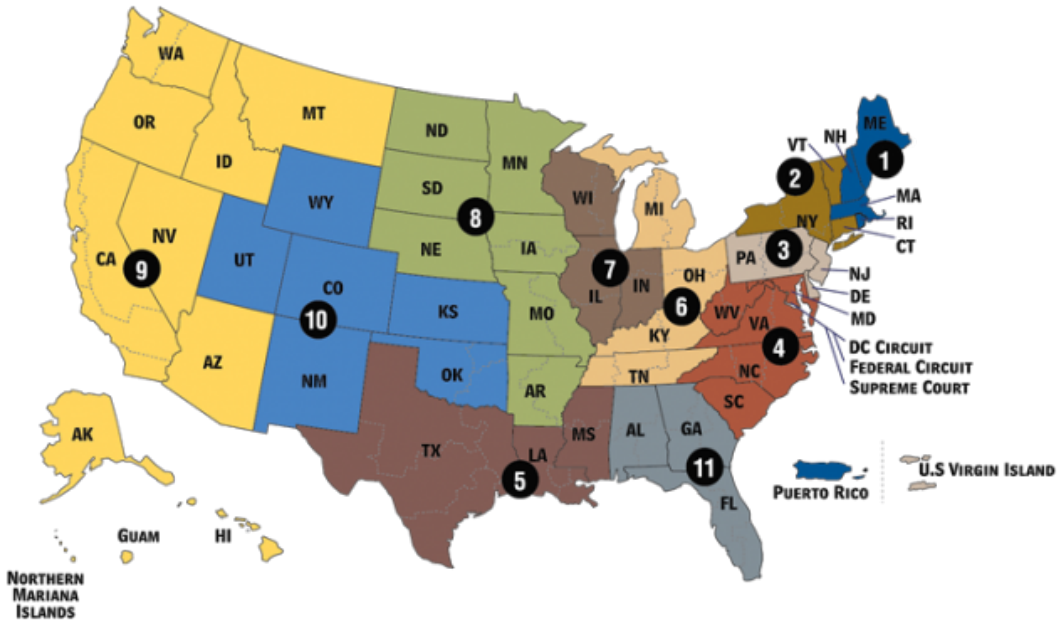

Figure 3.1 U. S. Federal Courts Map[95]

[95] *U.S. Federal Courts Circuit Map*. Courts Role and Structure: United States Courts. http://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf Accessed on May 7, 2017.

The cases selected for the study were organized geographically based on the United States Federal Circuit Court of Appeals. Figure 3.2 displays the framework for organizing the cases.

U. S. Federal Court of Appeal	District Courts - Geographical Region
U.S. Court of Appeals - 1st Circuit	Maine, Massachusetts, New Hampshire Rhode Island, and Puerto Rico
U.S. Court of Appeals - 2nd Circuit	Connecticut, New York, and Vermont
U.S. Court of Appeals - 3rd Circuit	Delaware, New Jersey, Pennsylvania, and Virgin Islands
U.S. Court of Appeals - 4th Circuit	Maryland, North Carolina, South Carolina, Virginia, and West Virginia
U.S. Court of Appeals - 5th Circuit	Louisiana, Mississippi, and Texas
U.S. Court of Appeals - 6th Circuit	Kentucky, Michigan, Ohio, and Tennessee
U.S. Court of Appeals - 7th Circuit	Illinois, Indiana, and Wisconsin
U.S. Court of Appeals - 8th Circuit	Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota
U.S. Court of Appeals - 9th Circuit	Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington
U.S. Court of Appeals - 10th Circuit	Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming
U.S. Court of Appeals - 11th Circuit	Alabama, Florida, and Georgia
U.S. Court of Appeals - District of Columbia Circuit	District of Columbia
U.S. Court of Appeals - Federal Circuit	Not Applicable

Figure 3.2 - Circuit of the United States Federal Court of Appeals and geographical region for U.S. District Courts.

Data Analysis

The cases selected for this study were analyzed with specific criteria. The purpose of the analysis was to establish the facts in each case, judiciary decision, judiciary reasoning, the scope of regulatory powers, and the impact on schools and school systems. Figure 3.3 defined the analysis criteria.

Analysis Category	Description
Court/Case	Identify the U.S Federal Circuit Court of Appeal or the State Supreme Court. Identify the case citation.
Arguments of Plaintiff	Describe the legal arguments of the person or persons who brought litigation.
Arguments of Defendants	Describe the legal arguments of defense for the person or persons who were named in the litigation.
Facts	What are the facts in the case?
Judiciary Decision	Did the court rule in favor of the plaintiff or defendant? Did the court find a violation of the First Amendment?
Judiciary Reasoning • **How was the Tinker Test applied?** **If not, what was the court reasoning**?	Did the court apply the Common Law determined in *Tinker v. Des Moines Sch. Dist.,* 393 U.S. 503, 511 (1969)? If so, how were the *Tinker* findings applied to the case? If not, what was the court's reasoning for not applying the findings from *Tinker*? What caselaw did they apply to write the opinion of the court?
Scope of Regulatory Power as determined by the courts	The scope of power the courts give administrators in public schools to regulate speech on the school campus.
Impact on Schools/Systems	How will the judiciary opinion impact how schools & school systems discipline for Internet speech?

Figure 3.3 - Analysis Criteria

The analysis of each case was reviewed, coded, and organized within the geographic regions described in figure 3.3. Within this analysis, the researcher sought similarities and differences and clearly defined caselaw among the geographical regions.

At the conclusion of this study, the researcher anticipated that the data analysis would reveal judiciary patterns. These patterns enabled the researcher to provide recommendations to school administrators concerning Internet speech.

Delimitations

This study examined the prevailing legal status of students' First Amendment rights related to Internet speech. A delimitation of this study was that only caselaw from the United States Courts of Appeal and United States District Courts were analyzed.

Internet speech in schools is an emerging issue; therefore, cases filed claiming a violation of a student's First Amendment rights with relationship to Internet speech may still be in the appellate or district court system.

Chapter 4: Case Briefs

This chapter will provide a brief for each case analyzed in the study. The brief for each case will include an explanation of the facts in the case and an analysis of the First Amendment argument. Additionally, the caselaw applied by the appellate court will be presented, and the court's reasoning will be discussed. This chapter will address each case individually organized by the appellate circuit; furthermore, Chapter 5 will present the analysis and findings as they relate to the research questions.

This study examined court cases related to Internet speech in schools from the Federal District Courts and the United States Courts of Appeal. Cases from the state supreme courts were reviewed; however, they were not applicable within the limitations of this study. While Federal District Court cases were analyzed, the information gathered did not enhance the findings from the appellate courts; therefore, they were not included in this paper. Due to binding precedent, it is not uncommon that district courts use appellate judgments as the foundation for their analysis. Precedent is an official action or decision used to guide decisions or action at a later date, and a binding precedent is a precedent a court is required to follow.[96] An example of binding precedent would be "a lower court is bound by an applicable holding of a higher court in the same jurisdiction."[97] In total, nine cases from the Second, Third, Fourth, Fifth, Eighth, and Ninth Circuits were analyzed for this study.

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[96] *Black's Law Dictionary.* 5th pocket ed. (St. Paul: Thomson Reuters, 2016).

[97] *Black's Law Dictionary,* 609.

U.S. Court of Appeals, 2nd Circuit

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

In April 2001, Weedsport Middle School student, Aaron Wisniewski used his AOL Instant Messenger (a means to communicate instantaneously with friends known as "buddies") on his parents' home computer. Aaron created an icon, which is a personal identifier to his AOL Instant Messenger (IM) "buddies". The icon was a drawing of his English teacher, Mr. VanderMolen, with a small pistol to his head and blood splatters in red dots.[98] The caption below the drawing stated, "Kill Mr. VanderMolen"[99]. The school became aware of the icon when a classmate shared it with Mr. VanderMolen, who brought it to the attention of the middle school and high school principals. Once they became aware of the icon, they informed the local police, Superintendent Mabbett, and Aaron's parents.[100]

When questioned, Aaron admitted to creating the icon and apologized. He was suspended for five days and allowed to come back to school with a pending superintendent's hearing. The local police and a psychologist determined Aaron's actions were a joke, and he was not a threat to Mr. VanderMolen. In May 2001, hearing officer, attorney Lynda M. VanCoske conducted a hearing regarding a potential long-term suspension. In June 2001, VanCoske's decision determined Aaron's icon was threatening. Additionally, she concluded the threat was in violation of school rules and a disruption to

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[98] *Wisniewski v. BOE of Weedsport Central School District* 494 F.3d 34 (2nd Cir., 2007).

[99] *Wisniewski*, at 36.

[100] *Wisniewski.*

the school's operations. She recommended a one-semester suspension, and the school offered alternative education.[101]

Martin and Annette Wisniewski, parents of Aaron Wisniewski brought action against the Board of Education of Weedsport Central School District and Superintendent Richard Mabbett, claiming the suspension violated Aaron's First Amendment rights. The Wisniewski's appealed the summary judgment granted in favor of the school board and superintendent in the United States District Court for the Northern District of New York.[102]

Case Analysis – First Amendment

The district court found that the hearing officer made a factual determination that the icon was a threat; therefore, not protected by the First Amendment. The district court determined the icon to be understood as a "true threat", which means the speech is not protected by the First Amendment.[103] The district court dismissed the federal law claims and granted summary judgment in favor of the defendants (Board of Education of the Weedsport Central School District and Richard Mabbett) and the Wisniewski's appealed.

The *Wisniewski* court determined "school officials have significant broader authority to sanction student speech than the Watts standard allows."[104] The Watts standard was established by the Supreme Court's decision in *Watts v. United States,* 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). In *Watts*, the Court noted, "'What

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[101] *Wisniewski v. BOE of Weedsport Central School District* 494 F.3d 34 (2nd Cir., 2007).

[102] *Wisniewski.*

[103] *Wisniewski.*

[104] *Wisniewski,* at 38.

is a threat must be distinguished from what is constitutionally protected speech.' Id. At 707, 89 S.Ct. 1399 (emphasis added). Ruling that 'the statute initially requires the Government to prove a true 'threat'."[105] Hence, the *Wisniewski* court turned to the "merits of the Plaintiff's claim that Aaron's icon was protected speech under the First Amendment."[106]

The *Wisniewski* court determined "the appropriate First Amendment standard is one set forth by the Supreme Court in *Tinker v. Des Moines Sch. Dist.,* 393 U.S. 503 (1969)."[107] The *Tinker Test* was previously discussed in Chapter 2 of this study. As previously noted, students maintain First Amendment rights unless 1) the speech is "materially and substantially disruptive,"[108] or 2) impedes upon the rights of others. While Aaron's icon depicting the killing of his teacher may be viewed as an expression of his opinion as denoted in *Tinker,* it was the determination of the *Wisniewski* court that it crossed the boundary of protected speech and established that Aaron's conduct could reasonably come to the attention of school officials and cause a disruption.[109] Therefore, Aaron's speech was not protected by *Tinker.*

The *Wisniewski* court addressed the fact that Aaron's icon was created and transmitted outside of school property. It was held that off-campus conduct does not necessarily shield students from discipline at school. The *Wisniewski* court stated, "[w]e

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[105] *Wisniewski v. BOE of Weedsport Central School District* 494 F.3d 34 (2nd Cir., 2007) at 38 quoting *Watts v. United States,* 394 U.S. 705, 707, 708, 89 S.Ct. 1399.

[106] *Wisniewski v. BOE of Weedsport Central School District* 494 F.3d 34 (2nd Cir., 2007) at 37.

[107] *Wisniewski* at 38.

[108] *Tinker v. Des Moines Sch. Dist.,* 393 U.S. 503 (1969) at 513.

[109] *Wisniewski.*

have recognized that off-campus conduct can create a foreseeable risk of substantial disruption within a school, see *Thomas v. Board of Education,* 607 F.2d 1043, 1052 n. 17 (2d Cir.1979) ('We can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale.')"[110] In discussing the connection between Aaron's speech and the school, the *Wisniewski* court indicated that the panel was divided. The division of the panel positioned around whether one must show the speech was reasonably foreseeable to reach the school or whether the speech, in fact, reached the "school pretermits any inquiry as to this aspect of reasonable foreseeability."[111] However, the panel agreed "on the undisputed facts, it was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot."[112]

The *Wisniewski* court concluded no reasonable jury could dispute foreseeability of this speech reaching school authorities, including the teacher, and that it had the potential for disrupting the school environment; furthermore, it indicated it is not only reasonable but evident.[113] The *Wisniewski* court affirmed the district court ruling that the Board of Education of Weedsport Central School District and Superintendent Richard Mabbitt did not violate Aaron's First Amendment rights.

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[110] *Wisniewski v. BOE of Weedsport Central School District* 494 F.3d 34 (2nd Cir., 2007) at 39 quoting *Thomas v. Board of Education,* 607 F.2d 1043, 1052 n. 17 (2d Cir.1979).

[111] *Wisniewski v. BOE of Weedsport Central School District* 494 F.3d 34 (2nd Cir., 2007) at 39.

[112] *Wisniewski.*

[113] *Wisniewski*.

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

In April 2007, Avery Doninger was a junior at Lewis S. Mills High School (LMHS) in Burlington, Connecticut. Avery was a member of the student council and held the office of Junior Class Secretary. The LMHS student council planned the annual "Jamfest" to be held on April 28, 2007. The battle of bands event had been rescheduled twice due to the change in dates of the opening of the new LMHS auditorium. It was brought to the attention of the students that Mr. David Miller, the teacher who operates the lighting and sound in the auditorium, was unable to attend Jamfest on April 28. The students provided an alternative in which a professional was hired to operate the equipment, or student technicians were supervised by a parent. At a student council meeting on April 24, 2007, members were notified the event could not proceed without Mr. Miller in attendance.[114]

Student council members were upset and concerned with the announcement that Jamfest could not proceed on April 28 as planned. As it was close to the end of the school year, members felt it would be difficult rescheduling with few dates available. Additionally, they were concerned bands would drop out due to rescheduling three times. A change in venue to the school cafeteria wasn't acceptable due to the necessary shift from electric to acoustic instruments.[115]

Avery, along with three additional student council members, met in the school computer lab and organized a plan to inform a wide-ranging community and solicit support in persuading the school to allow Jamfest to proceed as scheduled in the

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

[115] *Doninger.*

auditorium. On April 24, the students accessed a parent's email account and designed a message to be sent out to recipients in the account's address book and supplementary addresses provided by Avery. The message explained school administration decided Jamfest could not proceed without Mr. Miller in attendance and encouraged recipients to contact district superintendent, Paula Schwartz. Additionally, the message encouraged that it be forwarded to others. The four students signed their names to the email.[116] As a result of the email, Paula Schwartz and Karissa Niehoff, principal at LMHS, received numerous calls and emails. Furthermore, Niehoff was off campus at a planned in-service and was asked to return to school by Schwartz.[117]

Niehoff saw Avery in the hall later that day and discussed the email. Niehoff expressed disappointment in the manner the student council members handled the situation rather than speaking with her or Schwartz. In this conversation, Niehoff discussed the responsibilities of student council officers and shared they are expected to work cooperatively with the advisor and school administration. Subsequently, Niehoff asked Avery to work with the three other students and send out a follow-up email to correct the situation. That evening, Avery posted a message on her public blog at livejournal.com which was not affiliated with LMHS that read:

> [J]amfest is cancelled due to douchbags in central office. Here is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. Basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and 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 [sic] is the

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

[117] *Doninger.*

letter we sent out to parents.[118]

The post continued with the email previously sent by the four Student Council members earlier in the morning. Avery continued with "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 write something or call her to piss her off more, im down-"[119]

On the morning of April 25, 2007, a meeting was held between the student council members who sent the email the previous day, Schwartz, Niehoff, Miller, Jennifer Hill (advisor), and David Fortin (LMHS's building and grounds supervisor). In this meeting, they agreed Jamfest would be scheduled for June 8, 2007. The resolution to Jamfest was announced in the school newsletter by Niehoff and through an email to recipients of the April 24 email. At the time of this meeting, a resolution to the situation was found, Schwartz and Niehoff were unaware of Avery's blog posted on April 24.

On May 7, 2007, Schwartz notified Niehoff of the post. Schwartz was made aware of the post by her adult son after he came across it while using an Internet search engine.[120] "Niehoff concluded that Avery's conduct had failed to display the civility and good citizenship expected of class officers. She noted that the posting contained vulgar language and inaccurate information."[121] Consequently, Niehoff concluded that Avery had disregarded their conversation on April 24 regarding responsibilities and appropriate behavior for addressing issues. She researched Connecticut education law, and LMHS

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[118] *Doninger v. Niehoff,* 527 F.3d 41 (2nd Cir., 2008) at 45.

[119] *Doninger* at 45.

[120] *Doninger.*

[121] *Doninger* at 46.

policies and determined Avery should be prohibited from running for Senior Class Secretary.[122] At the time, Niehoff held off speaking with Avery due to her participation in Advanced Placement exams.

Anticipating a nomination for Senior Class Secretary, Avery came to Niehoff's office on May 17, 2007. At that time, Niehoff gave Avery a copy of the blog post and requested she issue a written apology to Schwartz, show the blog post to her mother, and withdraw her candidacy. Avery complied with the exception of withdrawing her candidacy for Senior Class Secretary. Niehoff withheld an administrative endorsement of Avery's nomination; therefore, Avery was unable to run for office. However, Avery continued her duties as Junior Class Secretary, and no disciplinary action was taken. As a result of this action, Avery's name was not on the May 25 ballot, and she was not able to give a campaign speech at the assembly. "Avery received a plurality of the votes as a write-in candidate. The school did not permit her to take office, and the second-place candidate became class secretary for the Class of 2008."[123]

A complaint was filed by Lauren Doninger on behalf of Avery in Connecticut Superior Court, citing claims under 42 U.S.C. § 1983 and state law. She alleged a violation of Avery's First Amendment rights, due process, and equal protection under the Fourteenth Amendment.[124] Doninger sought damages and an injunction, which would require a new election for Senior Class Secretary where Avery be allowed to run and speak at the 2008 commencement ceremony as a duly elected officer.[125]

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

[123] *Doninger* at 46.

[124] *Doninger.*

[125] *Doninger.*

Case Analysis – First Amendment

"The district court developed the facts outlined here from exhibits, affidavits, deposition testimony, and the hearing testimony of ten live witnesses, including students, faculty, administrators, and parents. The district court concluded that a preliminary injunction was not warranted because Doninger did not show a sufficient likelihood of success on merits.[126] The Doninger's appealed the district court's ruling.

The *Doninger* court began the discussion by addressing the facts one must show when seeking preliminary injunction. The court stated,

> A party seeking a preliminary injunction ordinarily must show: (1) a likelihood of irreparable harm in the absence of the injunction; and (2) either a likelihood of success on the merits or sufficiently serious questions going on the merits to make them a fair ground for litigation, with a balance of hardships tipping in the movant's favor. *Sunward Elecs., Inc. v. McDonald,* 362 F.3d 17, 24 (2d Cir.2004)[127]

When a person makes a motion to the court, they are referred to as the movant.[128] When an injunction will "alter rather than maintain the status quo,"[129] it is considered a "mandatory" injunction.[130] In the case of a mandatory injunction, a movant "must meet the more rigorous standard of demonstrating a 'clear' or 'substantial' likelihood of success on the merits. *Id*. at 24-25."[131] The *Doninger* court reviewed the district court's

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[126] *Doninger v. Niehoff,* 527 F.3d 41 (2nd Cir., 2008) at 47.

[127] *Doninger* at 47 citing *Sunward Elecs., Inc. v. McDonald,* 362 F.3d 17, 24 (2d Cir.2004).

[128] *Black's Law Dictionary.* 6th ed. (St. Paul, MN: Thomson Reuters, 2016).

[129] *Doninger* at 47.

[130] *Doninger.*

[131] *Doninger* at 47 citing *Sunward Elecs., Inc. v. McDonald,* 362 F.3d 17, 24-25 (2d Cir.2004).

denial of the preliminary injunction for "abuse of discretion"[132] Doninger claimed First Amendment violations; therefore, the *Doninger* court cited Federal Rule of Civil Procedure, which states that findings of fact shall not be discarded unless they are found to be inaccurate.[133] The *Doninger* court provided a fresh examination of the facts and records.

The foundation for First Amendment rights of students established by the *Doninger* court is grounded in caselaw previously discussed in Chapter 2. In *Tinker,* the Court states, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[134] The matter of off-campus speech was addressed by caselaw previously established in the Second Circuit court by Wisniewski v. BOE of Weedsport Central School District 494 F.3d 34 (2007) where they indicated "We have recognized that off-campus conduct can create a foreseeable risk of substantial disruption within a school, see *Thomas v. Board of Education,* 607 F.2d 1043, 1052 n. 17 (2d Cir.1979) ('We can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale.')"[135] It is this foundational background that the *Doninger* court "conside[ed] whether the district court

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[132] *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir., 2008) at 47.

[133] *Doninger*.

[134] *Tinker v. Des Moines Sch. Dist.,* 393 U.S. 503 (1969) at 507.

[135] *Wisniewski* at 39 quoting *Thomas v. Board of Education,* 607 F.2d 1043, 1052 n. 17 (2d Cir.1979).

abused its discretion in concluding that Doninger failed to demonstrate a clear likelihood of success on the merits of her First Amendment claim."[136]

The *Doninger* court began the discussion of the First Amendment by acknowledging that if the blog post had been created and posted on campus, "this case would fall squarely within the Supreme Court's precedents recognizing that the nature of a student's First Amendment rights must be understood in light of the special characteristics of the school environment and that, in particular, offensive forms of expression may be prohibited. *See Fraser,* 478 U.S. at 682-83, 106 S.Ct. 3159."[137] *Fraser* previously discussed Chapter 2, referred to the case where Matthew Fraser gave a speech at Bethel High School in support of a student running for an elected office, which contained innuendos that were sexual in nature along with gestures while delivering the speech. Fraser was disciplined by the school. Matthew Frasier claimed a violation of the First Amendment. The Court noted the First Amendment caselaw limits the speaker when children are the audience. The Court delineated between *Tinker* and determined Bethel School District was within its rights to disassociate itself from the speech delivered at a school function.

When examining this case with regard to caselaw established by *Fraser*, it was not clear if the finding applies to off-campus speech. The principal argument in this case by Doninger was that the blog was created and posted off campus, and the standards established in *Tinker* and *Wisniewski* are not satisfied by the record in this case.

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[136] *Doninger v. Niehoff,* 527 F.3d 41 (2nd Cir., 2008) at 49.

[137] *Doninger v. Niehoff,* 527 F.3d 41 (2nd Cir., 2008) at 49 citing *Bethel School District v. Fraser*, 478 U.S. 675 (1986).

Alternately, the appellees argue "that the *Tinker* test is not the only standard for determining whether school discipline may properly be imposed for off-campus speech."[138] They contended that offensive off-campus speech might be regulated by schools if it is "likely to come to the attention of school authorities."[139] The *Doninger* court stated, "We reject appellees' broad reading of *Wisnieski* on the ground that we had no occasion to decide in that case whether *Fraser* governs such off-campus student expression. We agree, however, with appellees' alternative argument that, as in *Wisnieski,* the *Tinker* standard has been adequately established here."[140]

The *Doninger* court applied the *Wisnieski* framework and found the record supported the district court's findings that it was reasonably foreseeable that the blog posted by Avery would reach the school property.[141] The district court found Avery's posting, "although created off campus, 'was purposely designed by Avery to come onto the campus.' *Doninger,* 514 F.Supp.2d at 216. The blog posting directly pertained to events at LMHS, and Avery's intent in writing it was specifically 'to encourage her fellow students to read and respond.' *Id*. at 206."[142]

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[138] *Doninger v. Niehoff,* 527 F.3d 41 (2nd Cir., 2008) at 50.

[139] *Doninger* at 50.

[140] *Doninger* at 50.

[141] *Doninger.*

[142] *Doninger* at 50.

The *Doninger* court determined three factors that established the conclusion that the "record also supports the conclusion that Avery's posting 'foreseeably create[d] a risk of substantial disruption within the school environment.' *Wisniewski*, 494 F.3d at 40."[143] The first factor considered was the language used by Avery to entice others to reach out to administration was not only clearly offensive but potentially created a disruption that would hamper the efforts to resolve the controversy regarding Jamfest. "Her chosen words—in essence, that others should call the 'douchebags' in central office to 'piss [them] off more'—were hardly conducive to cooperative conflict resolution."[144] The risk of disruption as evidenced by a "LMHS student (the one who referred to Schwartz as a 'dirty whore') responded to the post's vulgar and, in this circumstance, potentially incendiary language with similar such language."[145]

The second factor considered by the *Doninger* court was, "Avery's post used the 'at best misleading and at wors[t] false' information that Jamfest had been cancelled in her effort to solicit more calls and emails to Schwartz. *Doninger,* 514 F.Supp.2d at 202. The district court found that Avery 'strongly suggested in her [post] that Jamfest had been cancelled.'"[146] The information Avery posted on her blog mislead readers and disrupted school activities. In her testimony, Avery stated that on the morning of April 25, 2007, students were "'riled up' and that a sit-in was threatened because students

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[143] *Doninger* at 50 quoting Wisniewski v. BOE of Weedsport Central School District 494 F.3d 34 (2007) at 40.

[144] *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir., 2008) at 51.

[145] *Doninger* at 51.

[146] *Doninger* at 51 quoting *Doninger,* 514 F.Supp.2d at 202.

believed the event would not be held."[147] When considering school disruption, the *Doninger* court concluded Schwartz and Niehoff received numerous calls and emails that disrupted their ability to fulfill responsibilities to school-related activities as they were late or completely missed them. Furthermore, they indicated Avery and other students responsible for the April 24 mass email missed class or other activities on April 25, where a rescheduled date for Jamfest was determined. Additionally, staff members, Miller, Hill, and Fortin missed class or other activities for the April 25 meeting.

The third factor considered by the *Doninger* court discussed the district court's determination that Avery's discipline was related to her extracurricular role as a leader in student government as significant. "The district court found this significant in part because participation in voluntary, extracurricular activities is a 'privilege' that can be rescinded when students fail to comply with the obligations inherent in the activities themselves. *Doninger*, 514 F.Supp.2d at 214."[148] The Doninger court considered this factor for its relevance rather than for the context in which *Tinker* related to regulating speech that may reasonably disrupt the school environment. Avery's behavior undermined the efforts to resolve the Jamfest controversy, as well as the values student government intended to promote.[149] The Doninger court noted the similarity of this factor with a First Amendment case in the Sixth Circuit, *Lowery v. Euverard,* 497 F.3d 584 (6th Cir, 2007), where a football player created a petition expressing hatred for his coach. The *Lowery* court applied *Tinker* with the relevant question as to whether it was reasonable

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[147] *Doninger v. Niehoff,* 527 F.3d 41 (2nd Cir., 2008) at 51.

[148] *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir., 2008) at 51 citing *Doninger,* 514 F.Supp.2d at 214.

[149] *Doninger.*

for the school to predict a disruption to the football team. In this case, it was noted the players had not been suspended or prohibited from continuing to criticize the coach; however, they were not allowed to continue playing for the coach while actively trying to get him fired. In this case, the court held there was not a violation of the First Amendment. Comparably, Avery was unable to gain an administrative endorsement to run for Senior Class Secretary because she had not upheld the standards and conduct expected of leaders in student government. "The district court determined not only that Avery's posting was offensive and misleading, but also that it 'clearly violate[d] the school policy of civility and cooperative conflict resolution.' *Doninger*, 514 F.Supp.2d at 214."[150]

The *Doninger* court concluded the district court did not abuse its discretion in this case based on the cumulative effect and support of the record. The court stated,

> [w]e decide only that based on the existing record, Avery's post created foreseeable risk of substantial disruption to the work and discipline of the school and that Doninger had thus failed to show clearly that Avery's First Amendment rights were violated when she was disqualified from running for Senior Class Secretary.[151]

The judgment of the district court was upheld.

U.S. Court of Appeals, 3rd Circuit

***Layshock ex rel. Layshock v. Hermitage School District*, 650 F.3d 205 (3rd Cir., 2011)**

This case was originally argued on December 10, 2008. This opinion was filed on February 4, 2010. The opinion was vacated, and the petition for rehearing en banc was

[150] *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir., 2008) at 52 quoting *Doninger,* 514 F.Supp.2d at 214.

[151] *Doninger* at 53.

granted on April 9, 2010.[152] The term en banc is defined as "with all judges present and participating; in full court."[153]

Justin Layshock was a senior at Hickory High School, Hermitage School District, in Hermitage, Pennsylvania. "Sometime between December 10th and December 14th, 2005, while Justin was at his grandmother's house during non-school hours, he used her computer to create what he would later refer to as a 'parody profile' his Principal, Eric Trosch."[154] Justin's "parody profile" was created and posted on MySpace, a social networking website that was popular at the time of this case. He used the survey questions from MySpace template and provided bogus answers in order to create a disparaging profile using his Principal's picture he copied from the school district's website. "All of Justin's answers were based on a theme of 'big,' because Trosch is apparently a large man."[155] Examples of Justin's answers were, "In the past month have you smoked: big blunt," "In the past month have you gone Skinny Dipping: big lake, not big dick."[156] "Under 'Interests,' Justin listed: 'Transgender, Appreciators of Alcoholic Beverages.' Justin also listed 'Steroids International' as a club Trosch belonged to."[157]

Justin listed other students at Hickory High as "friends" on MySpace; consequently, they were given access to the profile. Talk of the profile circulated among

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[152] *Layshock ex rel. Layshock v. Hermitage School District,* 650 F.3d 205 (3rd Cir., 2011).

[153] *Black's Law Dictionary.* 5th pocket ed. (St. Paul: Thomson Reuters, 2016).

[154] *Layshock ex rel. Layshock v. Hermitage School District,* 650 F.3d 205 (3rd Cir., 2011) at 207.

[155] *Layshock ex rel. Layshock* at 208.

[156] *Layshock ex rel. Layshock* at 208.

[157] *Layshock ex rel. Layshock* at 208.

the students and the majority of the student body, if not all, were made aware of the profile.

Three other Hickory High School students created profiles of Trosch on MySpace around the same time as Justin Layshock. Initially, Trosch learned about one of these profiles from his 11th grade daughter. Trosch told his Co-Principal Todd Gill and District Superintendent, Karen Ionta about the other profile and requested for it to be disabled by the district technology department on Monday, December 12, 2005. Unfortunately, students found other avenues to access the profile. Justin's profile was discovered by Trosch on December 15th, and a fourth profile was discovered by Trosch on December 18th.[158] "Trosch believed all of the profiles were 'degrading,' 'demeaning,' 'demoralizing,' and 'shocking.' He was also concerned about his reputation and complained to the local police."[159] There were no criminal charges filed against Justin or the other students who created profiles.

Using a computer in Spanish class, Justin accessed the MySpace profile of Trosch and showed it to other students on December 15th. On December 16th, Justin attempted to access the profile to allegedly delete it. The administration was unaware of Justin's attempts to access MySpace from school computers until the following week as a result of their investigation. Additionally, Craig Antush, a computer lab class teacher, glimpsed the profile when students gathered around a computer and reportedly giggled. He told them to shut it down.[160] The school limited students' access to computers in areas that

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[158] *Layshock ex rel. Layshock v. Hermitage School District,* 650 F.3d 205 (3rd Cir., 2011).

[159] *Layshock ex rel. Layshock* at 209.

[160] *Layshock ex rel. Layshock.*

could be supervised. The access was limited from December 16th to December 21st, which was the last day before the Christmas Break.

School officials learned that Justin might have authored the profile on December 21st. "On that day, Justin and his mother were summoned to a meeting with Superintendent Ionta and Co-Principal Gill. During this meeting, Justin admitted to creating a profile, but no disciplinary was taken against him."[161] On January 3, 2006, Justin and his parents were sent a written notice of an informal hearing. The letter indicated that Justin admitted to creating the profile of Mr. Trosch and the following statement:

> This infraction is a violation of the Hermitage School District Discipline Code: Disruption of the normal school process; Disrespect; Harassment of a school administrator via computer/ internet with remarks that have demeaning implications; Gross misbehavior; Obscene, vulgar, and profane language; Computer Policy violations (use of school pictures without authorization).[162]

The School district determined Justin was guilty of the offense and issued a ten-day out of school suspension and placement to the Alternate Education Program (ACE) for the remainder of the school year. This placement banned Justin from extracurricular activities, foreign language tutoring, and participation in the graduation ceremony.[163]

On January 27, 2006, the Layshocks filed suit in district court, citing the school district violated Justin's First Amendment, the district policies and rules were "unconstitutionally vague and/or overbroad, both on their face and as applied to

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[161] *Layshock ex rel. Layshock v. Hermitage School District,* 650 F.3d 205 (3rd Cir., 2011) at 209.

[162] *Layshock ex rel. Layshock* at 209 and 210.

[163] *Layshock ex rel. Layshock.*

Justin,"[164] and the District's punishment interfered with their rights as parents in violation of the Fourteenth Amendment Due Process Clause.[165]

Case Analysis – First Amendment

The United States District Court for the Western District of Pennsylvania entered summary judgment in favor of the Layshocks on the First Amendment claim. Additionally, the district court favored the school district on the due process claim. The Layshocks (appellee) and the school district (appellant) cross-appealed ("an appeal by the appellee, usually heard at the same time as the appellant's appeal"[166]).

In its decision, the court laid the foundation for First Amendments rights in school with a discussion on the landmark cases *Tinker, Fraser*, *Hazelwood,* and *Morse.* Furthermore, the court stated, "It is against this legal backdrop that we must determine whether the District's actions here violated Justin's First Amendments rights."[167]

In the analysis of the facts, the court provided, "[a]t the outset, it is important to note that the district court found the District could not 'establish[ ] a sufficient nexus between Justin's speech and a substantial disruption of the school environment[,]' *Layshock,* 496 F.Supp.2d at 600, and the School District does not challenge that finding on appeal."[168]

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[164] *Layshock ex rel. Layshock v. Hermitage School District,* 650 F.3d 205 (3rd Cir., 2011) at 210.

[165] *Layshock ex rel. Layshock.*

[166] *Black's Law Dictionary.* 5th pocket ed. St. Paul: Thomson Reuters, 2016), 45.

[167] *Layshock ex rel. Layshock* at 214.

[168] *Layshock ex rel. Layshock* at 214.

The school district presented two arguments. The first argument was that the connection was established when Justin created and distributed a profile of Mr. Trosch that was offensive and derogatory, which permitted the district to regulate his speech.[169] The second was while the speech began off campus, Justin accessed the district website and a picture of the principal, and he used it on the profile. The district claimed Justin's actions provided the district to reasonably foresee that the profile would reach the school and the attention of the school district and school administration.[170]

The court's response to the first argument:

> The School District's attempt to forge a nexus between the School and Justin's profile by relying upon his 'entering' the District's website to 'take' the District's photo of Trosch was unpersuasive at best. The argument equates Justin's act of signing onto a web site with the kind of trespass he would have committed had he broken in the principal's office or a teacher's desk; and we reject it. *See Thomas v. Board of Educ.,* 607 F.2d 1043 (2d Cir.1979).[171]

The court acknowledges "that it is now well established that *Tinker's* 'schoolhouse gate' is not constructed solely of the bricks and mortar surrounding the school yard. Nevertheless, the concept of the 'school yard' is not without boundaries and the reach of school authorities is not without limits."[172] Additionally, the court stated, "[i]t 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

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[169] *Layshock ex rel. Layshock v. Hermitage School District,* 650 F.3d 205 (3rd Cir., 2011).

[170] *Layshock ex rel. Layshock.*

[171] *Layshock ex rel. Layshock* at 215.

[172] *Layshock ex rel. Layshock* at 216.

extent that it can control that child when he/she participates in school sponsored activities."[173]

With regard to the second claim that the school district could regulate his conduct due to the fact the off-campus speech "can be treated as 'on-campus' speech because it 'was aimed at the School District community and the Principal and was accessed on campus by Justin [and] [i]t was reasonably foreseeable that the profile would come to the attention of the School District and the Principal.'"[174] The school district viewed Justin's speech through the MySpace profile as "unquestionably vulgar, lewd and offensive and consequently, not shielded by the First Amendment because it ended up inside the school community."[175] "The district court held that the School District's punishment of Justin was not appropriate under *Fraser* because '[t]here is no evidence that Justin engaged in any lewd or profane speech while in school.' *Layshock,* 496 F.Supp.2d at 599-600.**"**[176]

The argument by the district rests on three cases, *J.S. v. Bethlehem Area Sch. Dist.,* 569 Pa. 638, 807 A.2d 847 (2002), *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch Dist.,* 494 F.3d 34 (2nd Cir. 2007) and *Doninger v. Niehoff,* 527 F.3d 41 (2d Cir. 2008) in which students' off-campus speech created a substantial disruption of the school and the schools were provided regulatory power to respond to the substantial disruption caused by the off-campus conduct.[177] The court rejected the argument by stating:

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[173] *Layshock ex rel. Layshock v. Hermitage School District,* 650 F.3d 205 (3rd Cir., 2011) at 216.

[174] *Layshock ex rel. Layshock* at 216.

[175] *Layshock ex rel. Layshock* at 216.

[176] *Layshock ex rel. Layshock* at 216.

[177] *Layshock ex rel. Layshock.*

> We believe the cases relied on by the School District stand for nothing more than the rather unremarkable proposition that schools may punish expressive conduct that occurs outside of school, as if it occurred inside the 'schoolhouse gate,' under certain very limited circumstances, none of which are present here.[178]

Furthermore, the court stated:

> We need not now define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate because, as we noted earlier, the district court found that Justin's conduct did not disrupt the school, and the District does not appeal that finding. Thus, we need only hold that Justin's use of the District's web site does not constitute entering the school, and that the District is not empowered to punish his out of school expressive conduct under the circumstances here.[179]

The court determined, based on the above conclusions, that the district court was, in fact, justified in granting summary judgment to Layshock; therefore, they affirmed on the First Amendment claim.[180]

***J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915 (3rd Cir., 2011)**

This case was originally argued on June 2, 2009. This opinion was filed on February 4, 2010. The opinion was vacated, and the petition for rehearing en banc was granted on April 9, 2010.[181]

On Sunday, March 18, 2007, in her parent's home using their computer, J.S. and her friend, K.L., created a fake profile of their principal, James McGonigle, on MySpace (a social network).[182] The profile did not include McGonigle's name; however, it included

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[178] *Layshock ex rel. Layshock v. Hermitage School District,* 650 F.3d 205 (3rd Cir., 2011) at 219.

[179] *Layshock ex rel. Layshock* at 219.

[180] *Layshock ex rel. Layshock.*

[181] *J.S. ex rel. Snyder v. Blue Mountain School District,* 650 F.3d 915 (3rd Cir., 2011).

[182] *J.S. ex rel. Snyder.*

his official photo from the school district's website. "The profile was presented as a self-portrayal of a bisexual Alabama middle school principal named 'M-Hoe.' The profile contained crude content and vulgar language, ranging from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family."[183] For example, the profile listed "riding the fraintrain," "being a tight ass," "fucking in my office," and "hitting on students and their parents."[184] Furthermore, the section "About me" stated:

> HELLO CHILDREN[.] yes. it's your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL[.] I have come to myspace so I can pervert the minds of other principal's [sic] to be just like me. I know, I know, you're all thrilled[.] Another reason I came to myspace is because—I am keeping an eye on you students (who[m] I care for so much0[.] For those who want to be my friend, and aren't in my school[,] I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN…[185]

When J.S. created the profile, she made it public. The following day, after other Blue Mountain students commented on the profile, J.S made the profile private. "By making the profile 'private,' J.S. limited access to the profile to people whom she and K.L. invited to be a MySpace 'friend.' J.S. and K.L. granted 'friend' status to about twenty-two school district students."[186]

On Tuesday, March 20, 2007, McGonigle learned of the profile from another student who was in his office for an unrelated incident. McGonigle requested the student

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[183] *J.S. ex rel. Snyder v. Blue Mountain School District,* 650 F.3d 915 (3rd Cir., 2011) at 920.

[184] *J.S. ex rel. Snyder* at 920.

[185] *J.S. ex rel. Snyder* at 921.

[186] *J.S. ex rel. Snyder* at 921.

attempt to discover who created the profile. Later in the day (Tuesday, March 20), the student informed McGonigle that J.S. created the profile. McGonigle requested the student bring a printout of the profile to him the following day. "It is undisputed that the only printout of the profile that was ever brought to school was one brought at McGonigle's specific request."[187]

On Wednesday, March 21, 2007, McGonigle brought the profile to the attention of Superintendent, Joyce Romberger and Technology Director, Susan Schneider-Morgan.[188] Additionally, he showed the profile to guidance counselors, Michelle Guers and Debra Frain (McGonigle's wife).[189] In due course, McGonigle made the decision that creating the profile "was a Level Four Infraction under the Disciplinary Code of Blue Mountain Middle School, Student-Parent Handbook, App-65-66, as a false accusation about a staff member of the school and a 'copyright' violation of the computer use policy, for using McGonigle's photograph."[190]

McGonigle received the printout of the profile on Wednesday, but J.S. was absent from school. "[O]n Thursday, March 22, 2007, McGonigle summoned J.S. and K.L. to his office to meet with him and Guidance Counselor Guers. J.S. initially denied creating the profile, but then admitted her role. McGonigle told J.S. and K.L. that he was upset and angry, and threatened the children and their families with legal action."[191] J.S. and

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[187] *J.S. ex rel. Snyder v. Blue Mountain School District,* 650 F.3d 915 (3rd Cir., 2011) at 921.

[188] *J.S. ex rel. Snyder.*

[189] *J.S. ex rel. Snyder.*

[190] *J.S. ex rel. Snyder* at 921.

[191] *J.S. ex rel. Snyder* at 922.

K.L. remained in the office while McGonigle contacted their parents and requested they come to the school.[192] McGonigle met with J.S.'s mother, Terry Snyder, showed her the profile and informed her that J.S would receive a ten-day suspension.[193] Additionally, he informed her the suspension prohibited attendance to school dances.[194] "Although Romberger could have overruled McGonigle's decision, she agreed with the punishment. On Friday, March 23, 2007, McGonigle sent J.S.'s parents a disciplinary notice, which stated that J.S. had been suspended for 10 days. The following week, Romberger declined Mrs. Snyder's request to overrule the suspension."[195]

The Snyder's on behalf of J.S. filed suit in the United States District Court for the Middle District of Pennsylvania claiming a violation of free speech rights, due process rights, and state law:[196]

> On March 28, 2007, J.S. and her parents filed this action against the School District, Superintendent, Romberger, and Principal McGonigle. By way of stipulation ('an agreement relating to a proceeding made by attorneys representing adverse parties to the proceeding'[197]), on January 7, 2008, all claims against Romberger and McGonigle were dismissed, and only the school district remained as the defendant. After discovery, both parties moved for summary judgment.[198]

The district court granted summary judgment in favor of the school district. The Snyders appealed the district court's decision.

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[192] *J.S. ex rel. Snyder v. Blue Mountain School District,* 650 F.3d 915 (3rd Cir., 2011).

[193] *J.S. ex rel. Snyder.*

[194] *J.S. ex rel. Snyder.*

[195] *J.S. ex rel. Snyder* at 922.

[196] *J.S. ex rel. Snyder.*

[197] *Black's Law Dictionary.* 5th pocket ed. (St. Paul: Thomson Reuters, 2016), 742.

[198] *J.S. ex rel. Snyder* at 923.

Case Analysis – First Amendment

In the court's analysis, they recognized the "'comprehensive authority' of teachers and other public school officials."[199] Furthermore, the court provided "[t]he authority of public school officials is not boundless, however. The First Amendment unquestionably protects the free speech rights of students in public school. *Morse,* 551 U.S. at 396, 127 S.Ct. 2618."[200] The court continued to discuss First Amendment rights in school with the following passage:

> The exercise of First Amendment rights in school, however, has to be 'applied in light of special characteristics of the school environment.' *Tinker,* 393 U.S. at 506, 89 S.Ct. 733, and thus the constitutional rights of students in public schools 'are not automatically coextensive with the rights of adults in other settings.' *Fraser,* 478 U.S. at 682, 106 S.Ct. 3159. Since *Tinker*, courts have struggled to strike a balance between safeguarding student's First Amendment rights and protecting the authority of school administrators to maintain an appropriate learning environment.[201]

The court continued with a discussion of *Tinker* and the narrow exceptions afforded through *Fraser, Hazelwood,* and *Morse.* [202] The parties did not dispute that a substantial disruption did not occur in this case, and the district court determined "a substantial disruption so as to fall under *Tinker* did not occur."[203] Additionally,

> [t]he facts simply do not support the conclusion that the School District could have reasonably forecasted a substantial disruption of or material interference with the school as a result of J.S.'s profile. Under *Tinker,*

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[199] *J.S. ex rel. Snyder v. Blue Mountain School District,* 650 F.3d 915 (3rd Cir., 2011) at 925.

[200] *J.S. ex rel. Snyder* at 926.

[201] *J.S. ex rel. Snyder* at 926.

[202] *J.S. ex rel. Snyder.*

[203] *J.S. ex rel. Snyder* at 928.

> therefore, the School District violated J.S.'s First Amendment rights when it suspended her for creating the profile.[204]

The school district argued that the district court's ruling that the speech was prohibited under the *Fraser* exception due to the fact the speech was "lewd, vulgar, and offensive [and] had an effect on the school and the educational mission of the District."[205] The school district maintained the speech entered the school through a printout of the profile. However, the court discussed "the fact that McGonigle caused a copy of the profile to be brought to school does not transform J.S.'s off-campus speech into school speech."[206] Hence, the court determined the facts, in this case, do not support the *Fraser* exception, and the district did not have the authority to suspend J.S. for her off-campus speech.[207]

The court's decision to reverse the holdings of the district court was explained by stating, "[a]n opposite holding would significantly broaden school districts' authority over student speech and vest school officials with dangerously overbroad censorship discretion."[208] With regard to the Fourteenth Amendment substantive due process claim and the claim that school district policies were overbroad, the court affirmed the district court's holdings.[209]

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[204] *J.S. ex rel. Snyder v. Blue Mountain School District,* 650 F.3d 915 (3rd Cir., 2011) at 931.

[205] *J.S. ex rel. Snyder* at 931.

[206] *J.S. ex rel. Snyder* at 932.

[207] *J.S. ex rel. Snyder.*

[208] *J.S. ex rel. Snyder* at 932.

[209] *J.S. ex rel. Snyder.*

U.S. Court of Appeals, 4th Circuit

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

Kara Kowalski was a 12th grader at Musselman High School in Berkley County Schools. After school on December 1, 2005, Kowalski created a discussion group webpage on MySpace.com using her home computer. The site was titled "S.A.S.H." along with the statement "No No Herpes, We don't want no herpies."[210] In a deposition, Kowalski shared the acronym "S.A.S.H." was "Students Against Sluts Herpes;" however, another student, Ray Parsons indicated the "S.A.S.H." was the acronym for "Students Against Shay's Herpes,"[211] referring to a Musselman student named Shay N. Kowalski. Kowalski invited 100 "friends" to join the group, and approximately 24 Musselman responded and joined the group. "Kowalski later explained that she had hoped that the group would 'make other students actively aware of STD's (sexually transmitted diseases),' which were a 'hot topic' at her school."[212]

Musselman High School student, Ray Parsons, responded to the invitation at 3:40 p.m. and was the first to join the group using a school computer during an afterschool class. Parsons uploaded a picture of himself and a friend holding their noses and a sign which read "Shay Has Herpes."[213] Kowalski commented on Parson's picture saying, "Ray you are soo funny!=)" and "the best picture [I]'ve seen on myspace so far!!!!"[214] Similar

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[210] *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir., 2011) at 567.

[211] *Kowalski.*

[212] *Kowalski* at 567.

[213] *Kowalski* at 568.

[214] *Kowalski* at 568.

posts were made by other students. Additionally, Parsons posted two pictures of Shay N., one simulating herpes and a sign near her pelvic area that read "Warning: Enter at your own risk" and another with Shay N.'s face and a sign "portrait of a whore."[215] Students continued to comment on the "S.A.S.H." webpage primarily focusing on Shay N. The comments clearly showed students supported the webpage, "Kara sent me a few interesting pics… Would you be interested in seeing them Ray?", "Kara=My Hero" and "your so awesome kara… i never thought u would mastermind a group that hates [someone] tho, lol."[216] Shay N.'s father contacted Parsons a few hours after the comments and photos were posted to the webpage and expressed his anger. Parsons contacted Kowalski, and she attempted to delete the group and photos but was unsuccessful. She renamed the group "Students Against Angry People."[217]

The following morning December 2, 2005, Shay N. and her parents met with Vice Principal Becky Harden about the "S.A.S.H." webpage. They filed a harassment complaint and provided printouts from the webpage. Shay was not comfortable remaining at school and left with her parents after the meeting with the administration.[218]

Upon receiving the harassment complaint, Musselman High School Principal Ronald Stephens consulted the central school board office and confirmed discipline was appropriate in this situation. Stephens and Harden conducted the investigation and interviewed students who joined and commented on the "S.A.S.H." webpage. In the

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[215] *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir., 2011) at 568.

[216] *Kowalski* at 568.

[217] *Kowalski* at 568.

[218] *Kowalski.*

course of the investigation, Parsons was questioned, and he admitted to posting the pictures. Kowalski was interviewed, and she admitted to creating the "S.A.S.H." group; however, she denied posting pictures or negative comments on the webpage.[219]

The investigation concluded that Kowalski had created a "hate website", which was a "violation of the school policy against 'harassment, bullying, and intimidation.' For punishment, they suspended Kowalski for 10 days and issued her a 90-day 'social suspension,' which prevented her from attending school events in which she was not a direct participant."[220] Kowalski's father requested the suspension be reduced or revoked and Assistant Superintendent upheld the 90-day social suspension but reduced the ten-day suspension to five days. "Kowalski claims as a result of her punishment, she became socially isolated from her peers and received cold treatment from teachers and administrators."[221] Additionally, she stated that she was treated for depression, which included prescription medication.

Kowalski acknowledged receipt of the student handbook at the beginning of her senior year. The *Kowalski* court provided:

> Student Handbook which, included the School District's Harassment, Bullying, and Intimidation Policy, as well as the Student Code of Conduct. The Harassment, Bullying, and Intimidation Policy prohibited 'any form of … sexual… harassment… or any bullying or intimidation by any student… during any school-related activity or during any education-sponsored event, whether in a building or other property owned, use[d] or operated by Berkeley Board of Education.'[222]

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

[220] *Kowalski.* at 569.

[221] *Kowalski* at 569.

[222] *Kowalski* at 569.

The Berkley Board of Education defined "Bullying, Harassment, and/or Intimidation" as:

> any intentional gesture, or any intentional written, verbal or physical act that
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> 1. A reasonable person under the circumstances should know will have the effect of:
>   a. Harming a student or staff member
> 2. Is sufficiently inappropriate, severe, persistent, or pervasive that it creates an intimidating, threatening or abusive educational environment for a student.[223]

This policy indicated that students who violated this policy would be suspended and that there was an appeal process for disciplinary actions.

In November 2007, Kowalski filed suit in district court against Berkeley County Schools, Superintendent Manny Arvon (in his official capacity), Assistant Superintendent Rick Deuell (in his official capacity), Principal Ronald Stephens (in his official and individual capacities), Vice Principal Becky Harden (in her official and individual capacities), and cheerleading coach Buffy Ashcraft (in her official and individual capacities) citing violations of free speech under the First Amendment, due process under the Fourteenth Amendment, cruel and unusual punishment under the Eighth Amendment and equal protection under the Fourteenth Amendment.[224]

Case Analysis – First Amendment

"On the defendant's motion to dismiss the complaint, the district court dismissed Kowalski's free speech claim for lack of standing, concluding that she failed to allege that she had been disciplined under the School District's policy for engaging in speech protected by the First Amendment."[225] Additionally, the district court denied her other

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[223] *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir., 2011) at 569.

[224] *Kowalski.*

[225] *Kowalski* at 570.

claims and the motion for reconsideration. Kowalski appealed the district court's findings related to free speech, due process, and intentional or negligent infliction of emotional distress to the Fourth Circuit Court of Appeals.[226] "Kowalski contends first that the school administrators violated her free speech rights under the First Amendment by punishing her for speech that occurred outside the school."[227] The speech, in this case, was off campus and non-school related; therefore, Kowalski argued that administrators did not have the authority to discipline her.

> She asserts, 'The [Supreme] Court has been consistently careful to limit intrusions on students' rights to conduct taking place on school property, at school functions, or while engaged in school-sponsored or school-sanctioned activity.' She maintained that 'no Supreme Court case addressing students' free speech has taken pains to emphasize that, were the speech in question to occur away from school, it would be protected.'[228]

The defendants, "contend that school officials 'may regulate off-campus behavior insofar as the off-campus creates a foreseeable risk of reaching school property and causing a substantial disruption to the work and discipline of the school,' citing *Doninger v. Niehoff,* 527 F.3d 41 (2d Cir.2008)."[229] Without binding precedent in the U.S. Court of Appeals, Fourth Circuit, the defendants relied on the findings in the *Doninger* case. They argued it was foreseeable that the off-campus speech on Kowalski's webpage targeting Shay N. would reach the school and that it would "create a substantial disruption in the school."[230]

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

[227] *Kowalski* at 570.

[228] *Kowalski* at 571.

[229] *Kowalski* at 571.

[230] *Kowalski* at 571.

The *Kowalski* court established the obligation of school officials as it related to this case. They stated:

> Although the Supreme Court has not dealt specifically with factual circumstances where student speech targeted classmates for verbal abuse, in *Tinker*, it recognized the need for regulation of speech that interfered with the school's work and discipline, describing that interference as speech that 'disrupts classwork,' creates 'substantial disorder' or collid[es] with' or 'inva[des]' 'the rights of others.' *Tinker,* 393 U.S. at 513, 89 S.Ct. 733."[231] The court concluded "the language of *Tinker* supports the conclusion that public schools have a 'compelling interest' in regulating speech that interferes with or disrupts the work and discipline of the school, including disciplining for student harassment and bullying. *See DeJohn v. Temple Univ.*, 537 F.3d 301, 319-20 (3d Cir. 2008).[232]

The *Kowalski* court discussed the "major concern" in schools related to bullying. They cite StopBullying.gov when stating the victims of bullying may become depressed, exhibit anxiety, become fearful of attending school, or have thoughts of suicide. Furthermore, they referenced *Morse* by declaring:

> Just as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use, *see Morse,* 551 U.S. 393, 127S.Ct. 2618, 168 L.Ed.2d 290, schools have a duty to protect their students from harassment and bullying in the school environment, *c.f. Lowery v. Euverard,* 497 F.3d 584, 596 (6th Cir.2007) ('School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place').[233]

The *Kowalski* court expressed confidence that Kowalski's speech, in fact, caused "the interference and disruption described in *Tinker* as being immune from First Amendment protection. The S.A.S.H, webpage functioned as a platform for Kowalski

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[231] *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir., 2011) at 571 and 572.

[232] *Kowalski* at 572.

[233] *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir., 2011) at 572 citing *Morse v. Frederick*, 551 U.S. 393 (2007).

and her friends to direct verbal attacks towards classmate Shay N."[234] Additionally, the *Kowalski* court cited *Fraser* when considering Kowalski's conduct. They provided, "This is not the conduct and speech that our educational system is required to tolerate, as schools attempt to educate students about 'habits and manners of civility' or the 'fundamental values necessary to the maintenance of a democratic political system.' *Fraser,* 478 U.S. at 681, 106 S. Ct. 3159"[235] Kowalski argued she created the forum of speech from home and thus had a right to the full protection of the First Amendment. The *Kowalski* court addressed the claim by stating:

> This argument raises the metaphysical question of where her speech occurred when she used the Internet as the medium. Kowalski indeed pushed her computer's keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment.[236]

The *Kowalski* court acknowledged while there is a limited scope to schools' interest in order, safety, and the well-being of students when considering off-campus speech; however, there is no need to define the limit in this case. The court was satisfied the link between Kowalski's speech and the Musselman High School's pedagogical interests was "sufficiently strong" and supported the action taken by the school.[237]

In conclusion, the *Kowalski* court acknowledged the school's efforts to maintain order and protect the pedagogical environment. The court expressed regret that Kowalski

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[234] *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir., 2011) at 572 and 573.

[235] *Kowalski* at 572 citing *Bethel School District v. Fraser*, 478 U.S. 675 (1986).

[236] *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir., 2011) at 573.

[237] *Kowalski.*

did not see her actions in bullying and harassing Shay N. on the S.A.S.H. webpage as inappropriate. They stated:

> Indeed, school administrators *are* becoming increasingly alarmed by the phenomenon, and the events in this are but one example of such bullying and school administrators' efforts to contain it. Suffice it to hold here that, where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem.[238]

The judgment of the district court was upheld.

U.S. Court of Appeals, 5th Circuit

***Bell v. Itawamba County School Bd*., 799 F.3d 379 (5th Cir., 2015)**

This case was originally argued on December 12, 2014. "A divided panel in December 2014 held, *inter alia* (among other things[239]): the school board violated Bell's First Amendment rights by disciplining him based on the language in a rap recording. *Bell v. Itawamba Cnty. Sch. Bd.*, 774F.3d 280, 304-05 (5th Cir.2014), *reh'g en banc granted & opinion vacated,* 782 F.3d 712 (5th Cir.2015). En-banc review was granted in February 2015.[240]

On Wednesday, January 5, 2011, Taylor Bell, a senior at Itawamba Agricultural High School, created and posted a rap song on his Facebook (social network site) profile.[241] The rap recording used derogatory lyrics which alleged misconduct by Coaches W. and R. The court noted:

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[238] *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir., 2011) at 577.

[239] *Black's Law Dictionary.* 5th pocket ed. (St. Paul: Thomson Reuters, 2016), 416.

[240] *Bell v. Itawamba County School Bd*., 799 F.3d 379 (5th Cir., 2015).

[241] *Bell.*

> At the very least, this incredibly profane and vulgar rap recording had at least four instances of threatening, harassing, and intimidating language against the two coaches:
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> 1. 'betta watch your back/I'm a serve this nigga, like I serve the junkies with some crack';
> 2. 'Run up on T-Bizzle (how Bell refers to himself)/I'm going to hit you with my rueger';
> 3. 'you fucking with the wrong one/going to get a pistol down your mouth/Boww'; and
> 4. 'middle fingers up if you want to cap that nigga/middle fingers up/he get no mercy nigga'.
>
> Bell's use of 'rueger' [sic] references a firearm manufactured by Sturm, Ruger & Co.; to 'cap' someone is slang for 'shoot'.[242]

In addition to the threatening lyrics above, Bell included disparaging lyrics such as "[f]ucking with the students and he just had a baby/ever since I met the cracker I knew that he was crazy/always talking shit cause he knew I'm from daw-city/the reason he fucking around cause his wife ain't got no tidies/" and "OMG/Took some girls in the locker room in PE/Cut off the lights/you motherfucking freak/Fucking with the youngins/."[243] Approximately 16 hours after the recording was posted on Bell's Facebook profile, a screenshot indicated his profile was open to the public, which meant anyone could view the profile and listen to the rap recording.[244]

The following day, Thursday, January 6, 2011, Coach W. reported the rap to the principal, Wiygul, after his wife sent a text message advising him of the recording that she had learned about from a friend.[245] Following Coach W.'s report, Wiygul informed the school district superintendent, McNeese. Bell was questioned on Friday, January 7,

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[242] *Bell v. Itawamba County School Bd*., 799 F.3d 379 (5th Cir., 2015) at 384 and 385.

[243] *Bell* at 384.

[244] *Bell.*

[245] *Bell.*

2011, by the principal, superintendent, and school-board attorney "about the rap recording, including the veracity of the allegations, the extent of the alleged misconduct, and the identity of the students involved."[246] At that time, Bell was sent home.

Due to inclement weather, the school district was closed through Thursday, January 13, 2011.[247] During this time, "Bell created a finalized version of the recording (adding commentary and a picture slideshow) and uploaded it to YouTube for public viewing."[248] YouTube is a website where the public can upload videos for anyone to view.

Upon school reopening, Bell was notified midday on Friday, January 14, 2011, that "he was suspended, pending a disciplinary-committee hearing."[249] The superintendent, by letter, informed Bell's mother: "Bell's suspension would continue until further notification; and a hearing would be held to consider disciplinary action for Bell's 'alleged threatening intimidation and/or harassment of one or more school teacher." Furthermore, the letter cited as a "possible basis for such action was consistent with the school district's administrative disciplinary policy, which lists '[h]arassment, intimidation, or threatening other students and/or teachers' as a severe disruption."[250] The disciplinary hearing was scheduled for January 19, 2011, but was delayed at Bell's mother's request to Wednesday, January 26, 2011.[251]

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[246] *Bell v. Itawamba County School Bd*., 799 F.3d 379 (5th Cir., 2015) at 385.

[247] *Bell.*

[248] *Bell* at 385.

[249] *Bell* at 385.

[250] *Bell* at 385.

[251] *Bell.*

At the discipline hearing, Principal Wiygul summarized the situation and played the YouTube version of the rap recording for the committee.[252] Upon questioning by the disciplinary committee, Bell indicated that he had not reported the alleged misconduct to school administration due to feeling the report would be ignored. He further indicated, "[i]nstead, he made up the rap recording because he knew people were 'gonna listen to it, somebody's gonna listen to it', acknowledging several times during the hearing that he posted the recording to Facebook because he knew it would be viewed and heard by students."[253] A committee member questioned Bell about why he placed an updated version of the rap recording on YouTube after he had been questioned by school officials about the Facebook post. The record showed:

> Bell gave a few (somewhat conflicting) explanations: the Facebook version was a raw copy, so he wanted a finalized version on YouTube; the Facebook version was for his friends and 'people locally' to hear, whereas the YouTube version was for the music labels to hear; and he posted the YouTube version with the slideshow of pictures to help better explain the subject matter of the recording (his Facebook version only included a brief explanation of the backstory in the caption to the rap recording).[254]

The day following the hearing, January 27, 2011, the school board attorney communicated via letter to Bell's mother that the suspension for seven days would be upheld and that he would finish the current nine-week grading period in the county's alternative school. Bell's mother appealed the decision to the school board. On February

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[252] *Bell v. Itawamba County School Bd*., 799 F.3d 379 (5th Cir., 2015).

[253] *Bell* at 385.

[254] *Bell* at 386.

7, 2011, "the school board, after being presented with a recitation of the recording, unanimously found: Bell 'threatened, harassed and intimidated school employees.'"[255]

On February 24, 2011, Bell and his mother filed action in the U. S. District Court for the Northern District of Mississippi claiming a violation of his First Amendment rights and Fourteenth Amendment due process rights by the school board, superintendent, and principal.[256] In August 2011, both Bell and the school district filed motions for summary judgment. The district court denied Bell's motion and found the school district did not violate Bell's First Amendment and Fourteenth Amendment rights.[257] Bell contested the First Amendment findings and appealed the district court's summary judgment on the First Amendment claim.

Case Analysis – First Amendment

Bell's argument was that the school board violated his First Amendment rights by issuing the seven-day suspension and placing him in the alternative school for the remainder of the nine-week grading period, which was approximately six weeks. His claim was that "*Tinker* does not apply to off-campus speech, such as his rap recording: and even if it does, *Tinker's* 'substantial disruption' test is not satisfied."[258]

The court considered landmark First Amendment cases in its decision. The court discussed that "the record does not show, that the school board disciplined Bell based on the lewdness of his speech or its potential perceived sponsorship by the school; therefore,

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[255] *Bell v. Itawamba County School Bd*., 799 F.3d 379 (5th Cir., 2015) at 387.

[256] *Bell.*

[257] *Bell.*

[258] *Bell* at 391.

Fraser and *Hazelwood* are not directly on point."[259] In addressing Bell's claim that *Tinker* did not apply to off-campus speech, the court cited Morse when discussing issues surrounding off-campus speech:

> Experience shows that schools can be places of special danger." *Morse*, 551 U.S. at 424, 127 S.Ct. 2618 (Alito, J concurring). Over 45 years ago, when *Tinker* was decided, the Internet, cellphones, smartphones, and digital social media did not exist. The advent of these technologies and their sweeping adoption by students present new and evolving challenges for school administrators, confounding previously delineated boundaries of permissible regulations. *See e.g. Wynar v. Douglas Cnty. Sch. Dist.,* 728 F.3d 1062, 1064 (9th Cir. 2013).[260]

Furthermore, the court discussed the challenges of school administrators to balance school safety and First Amendment rights when addressing communication on the Internet. The court provided:

> Although, under other circumstances, such communication might be protected speech under the First Amendment, off-campus threats, harassment, and intimidation directed at teachers create a tension between a student's free-speech rights and a school official's duty to maintain discipline and protect the school community. These competing concerns, and differing standards applied to off-campus across circuits, as discussed *infra*, have drawn into question the scope of school officials' authority. *See Morse,* 551 U.S. at 418, 127 S. Ct. 2618 (Thomas, J., concurring)[261]

When discussing whether *Tinker* applies to off-campus speech, the courts indicated that at the time of this case, six circuits had addressed the issue. Five circuits, including the Fifth, have held that *Tinker* does, in fact, apply to off-campus speech. The court noted the

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[259] *Bell v. Itawamba County School Bd*., 799 F.3d 379 (5th Cir., 2015) at 391 and 392.

[260] *Bell* at 392 citing *Morse v. Frederick*, 551 U.S. 393 (2007) and *Wynar v. Douglas County School Dist.,* 728 F.3d 1062 (9thCir., 2013).

[261] *Bell v. Itawamba County School Bd*., 799 F.3d 379 (5th Cir., 2015) at 392 citing *Morse v. Frederick*, 551 U.S. 393 (2007).

intra-circuit split in the Third Circuit,[262] which means a split within the circuit.[263] Additionally, the court noted that the First, Sixth, Seventh, Tenth, Eleventh, and District of Columbia "do not appear to have addressed this issue."[264] In determining the court's position on whether *Tinker* applies to off-campus speech, it is stated, "based on our court's precedent and guided by that of our sister circuits, *Tinker* applies to off-campus speech in certain situations."[265]

Following the determination that *Tinker* does, in fact, apply to off-campus speech, the court considered the circumstance(s) where off-campus speech would be restricted.[266] The court determined in this case, there was not a need to establish a specific rule due to the fact that the record of the summary judgment indicated rather that "Bell admittedly intentionally directing at the school community his rap recording containing threats to, and harassment and intimidation of, two teachers permits *Tinker's* application in this instance."[267] The court affirmed the district court's finding; by holding that the school board did not violate Bell's First Amendment rights due to the fact that *Tinker* was applicable and that the school could reasonably forecast the rap recording may have caused a disruption.[268]

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[262] *Bell v. Itawamba County School Bd*., 799 F.3d 379 (5th Cir., 2015).

[263] *Black's Law Dictionary.* 5th pocket ed. (St. Paul: Thomson Reuters, 2016) 425.

[264] *Bell* at 392.

[265] *Bell* at 394.

[266] *Bell v. Itawamba County School Bd*., 799 F.3d 379 (5th Cir., 2015).

[267] *Bell* at 394.

[268] *Bell.*

U.S. Court of Appeals, 8th Circuit

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

D.J.M. was in tenth grade at Hannibal High School. On October 24, 2006, after school, he engaged in online instant messaging with his friends from his home computer. Using their home computers, D.J.M. and C.M. were messaging when C.M. became concerned with D.J.M.'s comments.[269] C.M. confided in a trusted adult, Leigh Allen, and eventually, Principal Darin Powell. C.M. emailed some of the messages to Leigh Allen, and she encouraged C.M. to continue messaging with D.J.M.[270] The messaging began with D.J.M. sharing frustration with being rebuffed by "L." the conversation continued with comments where C.M. asked D.J.M.:

> 'what kidna gun did your friend have again?' D.J.M responds '357 magnum' C.M. then replies, 'haha would you shoot [L.] or let her live?' D.M.J. answers, 'I still like her so i would say let her live.' C.M. follows up by asking, 'well who would you shoot then, lol (laugh out loud),' to which D.J.M responds 'everyone' else.' D.J.M. then named specific students who he would 'have to get rid of,' including a particular boy along with his older brother and some individual members of groups he did not like, namely 'midget[s],' 'fags,' and 'negro bitches.' Some of them 'would go' or 'would be going.'[271]

Leigh Allen became "concerned enough herself to contact Principal Powell about the situation and later emailed Powell transcripts of her instant message conversation with

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[269] *D.J.M. ex rel. D.M. v. Hannibal Public School Dist.* No. 60, 647 F.3d 754 (8th Cir., 2011).

[270] *D.J.M. ex rel. D.M.*

[271] *D.J.M. ex rel. D.M.* at 758.

C.M."[272] Eventually, C.M. emailed Principal Powell in which she shared portions of her conversation with D.J.M., and she sent the following comment:

> [D.J.M] had told me earlier before I started saving the messages that he had a friend who had a gun that he could get. A revolver I think he said. He told me he wanted Hannibal to be known for something and that after he shot the people he didn't like he would shoot himself… I asked him if he had a way to buy a gun and I asked if had anyone old enough to get one for him and he said someone who was 21 could get one but he doesnt think he would buy it for him…[273]

Upon receiving the emails from Allen and C.M., Powell contacted the district superintendent, Jill Janas, about the threat. Together, they decided to contact the police.[274]

On the evening of October 24, 2006, the police went to the home of D.J.M. and interviewed him. After interviewing D.J.M., they took him into custody. He was placed in juvenile detention after providing a voluntary statement. The juvenile court referred him for a psychiatric examination. He was evaluated and admitted to suicidal thoughts. On November 28, 2006, he was discharged from the hospital and returned to juvenile detention.[275]

Principal Powell and Assistant Principal Ryan Sharkey decided to suspend D.J.M. for ten days on October 31, 2006, one week after he was placed in juvenile detention.[276] On November 3, 2006, "Superintendent Janas extended the suspension for the rest of the

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[272] *D.J.M. ex rel. D.M. v. Hannibal Public School Dist.* No. 60, 647 F.3d 754 (8th Cir., 2011)at 578.

[273] *D.J.M. ex rel. D.M.* at 759.

[274] *D.J.M. ex rel. D.M.*

[275] *D.J.M. ex rel. D.M.*

[276] *D.J.M. ex rel. D.M.*

school year because D.J.M. had been placed in juvenile detention and his instant message conversation had had a disruptive impact on the school."[277] Powell stated word spread among the school community, and he received numerous phone calls from concerned parents inquiring about the threat and rumored hit list.[278] "D.J.M.'s parents appealed his suspension to the school board."[279]

> After according D.J.M. the type of due process procedure suggested in *Goss v. Lopez,* 419 U.S. 565, 584, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), the board found that D.J.M.'s actions had been 'prejudicial to the good order and discipline in the Hannibal School District,' having 'caused significant disruption and fear,' and that he had violated the student code of conduct which prohibited disruptive and threatening speech. Thereafter the board unanimously affirmed Janas' suspension of D.J.M. for the remainder of the 2006-2007 school year.[280]

D.J.M.'s parents filed suit in Missouri circuit court, claiming D.J.M.'s First Amendment rights to free speech were violated by his suspension and requested "administrative review of the board's decision under state law."[281] The school district removed ("transfer of an action from state to federal court"[282]) the case to federal district court.[283] The district court granted summary judgment to the school district on the First Amendment claim and remanded the D.J.M's state law claim to the Missouri circuit court.[284] The school district

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[277] *D.J.M. ex rel. D.M. v. Hannibal Public School Dist.* No. 60, 647 F.3d 754 (8th Cir., 2011)at 759.

[278] *D.J.M. ex rel. D.M.*

[279] *D.J.M. ex rel. D.M.* at 759.

[280] *D.J.M. ex rel. D.M.* at 759.

[281] *D.J.M. ex rel. D.M.* at 759.

[282] *Black's Law Dictionary.* 5th pocket ed. (St. Paul: Thomson Reuters, 2016), 671.

[283] *D.J.M. ex rel. D.M.*

[284] *D.J.M. ex rel. D.M.*

appealed the district court's decision to remand D.J.M.'s state law claim, and D.J.M appealed the summary judgment in favor of the school district.

Case Analysis – First Amendment

The court began the analysis with a discussion of landmark cases, *Tinker, Fraser, Hazelwood,* and *Morse.* Following the discussion of these cases, the court stated:

> In none of these cases was the Court faced with a situation where the First Amendment question arose from school discipline exercised in response to student threats of violence or for conduct outside of school or a school sanctioned event. Such cases have been brought in the lower courts, however, and the courts of appeal have taken different approaches in resolving them.[285]

Furthermore, the court provided two lines of cases to consider, those with the "concept of "true threat" derived from *Watts v. United States,* 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969)"[286] and those where *Tinker's "*materially and substantial"[287] disruption apply.

In consideration of true threat, the court discussed a "leading case in the Eighth Circuit dealing with a student threat [that] arose from a letter written by a student outside of school. *See Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616 (8th Cir.2002) (en banc)."[288]

> *Doe* defined a true threat as a 'statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another.' *Doe,* 306 F.3d at 624. The speaker must in addition have intended to communicate his statement to another *Id.* That element of

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[285] *D.J.M. ex rel. D.M. v. Hannibal Public School Dist.* No. 60, 647 F.3d 754 (8th Cir., 2011) at 761.

[286] *D.J.M. ex rel. D.M. v. Hannibal Public School Dist.* No. 60, 647 F.3d 754 (8th Cir., 2011) at 761 citing *Watts v. United States,* 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969).

[287] *Tinker v. Des Moines Sch. Dist.,* 393 U.S. 503 (1969) at 507.

[288] *D.J.M. ex rel. D.M.* at 761 citing *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616 (8th Cir.2002).

> a true threat is satisfied if the 'speaker communicates the statement to the object of the purported threat *or to a third party.' Id. (emphasis added)*[289]

In comparing the facts in this case to the *Doe* excerpt above, it was clear that C.M. took the comments made by D.J.M as a threat to the students he named who "would go" or "would be first to die."[290] He referenced targeted classmates as "midget[s]", "fags," and "negro bitches" which are comments grounded in hate.[291] Additionally, he commented on borrowing a gun from a friend. When considering the facts, it was reasonable that C.M. would interpret D.J.M.'s comments as a threat to harm. In fact, she reached out to Allen with concern. True threats are not protected speech under the First Amendment, and the information provided to the school district was sufficient to cause reasonable fear from D.J.M messages. The court held:

> In light of the District's obligation to ensure the safety of its students and reasonable concerns created by shooting deaths at other schools such Columbine and the Red Lake Reservation school, the district court did not err in concluding that the district did not violate the First Amendment by notifying the police about D.J.M's threatening instant messages and subsequently suspending him after he was placed in juvenile detention.[292]

In the discussion of *Tinker's* material and substantial disruption, the court considered *Wisniewski* (2nd Cir. 2007), which was previously discussed in this study. In this case, the Second Circuit chose not to determine whether the Internet transmission was a true threat, but rather considered the *Tinker* standard to be more appropriate. The school district argued that a material and substantial disruption occurred due to D.J.M.'s

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[289] *D.J.M. ex rel. D.M.* at 762 citing *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616 (8th Cir.2002).

[290] *D.J.M. ex rel. D.M. v. Hannibal Public School Dist.* No. 60, 647 F.3d 754 (8th Cir., 2011) at 764.

[291] *D.J.M. ex rel. D.M.* at 674.

[292] *D.J.M. ex rel. D.M.* at 764.

messages. Students and parents contacted school officials regarding the messages inquiring about the measures taken to ensure student safety.[293] Questions arose regarding the rumored hit list and which students were on the list. "School officials had to spend considerable time dealing with these concerns and ensuring that appropriate safety measures were in place."[294] Summary judgment in favor of the school district was granted by the district court on the grounds the school was substantially disrupted. The court agreed and affirmed the decision of the district court.

***S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.*, 696 F.3d 771 (8th Cir., 2012)**

The Wilsons (twin brothers) were juniors at Lee's Summit North High School. The Wilsons created a website, which they named NorthPress, sometime during the week of December 12, 2011. The site included a blog, a place online for individuals to express their thoughts. According to the record, "the purpose of the blog was to discuss, satirize, and 'vent' about events at Lee's Summit North."[295] The website was not accessible to United States users through a Google search due to being created on a Dutch domain site; however, anyone could access the site if they had the website address.[296] Posts were added to the NorthPress blog by the Wilsons between Tuesday, December 13 and Friday, December 16, 2011. "The Wilsons' posts contained a variety of offensive and racist comments as well as sexually explicit and degrading comments about particular female

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[293] *D.J.M. ex rel. D.M v. Hannibal Public School Dist.* No. 60, 647 F.3d 754 (8th Cir., 2011).

[294] *D.J.M. ex rel. D.M.*at 766.

[295] *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.*, 696 F.3d 771 (8th Cir., 2012) at 773.

[296] *S.J.W. ex rel. Wilson.*

classmates, whom they identified by name."[297] Fights at Lee's Summit North were included, as well as posting that mocked black students.[298] An additional racist post was added by a third student.[299]

It is noted the Wilsons used school computers on December 13, 2011, to upload files and create NorthPress.[300] Furthermore, "[t]he parties dispute the extent to which the Wilsons used Lee's Summit North computers to create, maintain, or access NorthPress."[301] The school district had the ability to track the access to North Press, and records indicate the site was accessed from school computers on December 14 and December 15, 2011. According to the Wilsons, they intended for only friends to know and have access to NorthPress.[302] "However, whether by accident or intention, word spread quickly. On the morning of Friday, December 16, the Lee's Summit North student body at large learned about NorthPress."[303]

School administrators determined the Wilsons were responsible for NorthPress from student, and faculty reports and they were suspended for ten days and referred the incident to the school district. The Wilsons were provided with a hearing from the district, and they appealed. At the conclusion of the second hearing, "[t]he School District

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[297] *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.*, 696 F.3d 771 (8th Cir., 2012) at 773.

[298] *S.J.W. ex rel. Wilson.*

[299] *S.J.W. ex rel. Wilson.*

[300] *S.J.W. ex rel. Wilson.*

[301] *S.J.W. ex rel. Wilson* at 773.

[302] *S.J.W. ex rel. Wilson*.

[303] *S.J.W. ex rel. Wilson* at 774.

suspended both Wilsons from Lee's Summit North for 180 days but allowed them to enroll in another school, Summit Ridge Academy."[304]

On March 6, 2012, the Wilsons filed suit in the United States District Court for the Western District of Missouri, claiming the school district violated their First Amendment rights to free speech. Additionally, they filed a Motion for a Preliminary Injunction in order to lift the suspensions.[305] A preliminary injunction is defined as "[a] temporary injunction (court order preventing an action) issued before or during a trial to prevent irreparable injury occurring before the court has a chance to decide the case."[306] The Eighth Circuit case *Dataphase Sys., Inc. v. C.L. Syst., Inc.,* 640 F.2d 109, 113 (8th Cir. 1981) provided binding precedent when considering whether to grant a preliminary injunction:

> Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on the other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.[307]

The district court granted the preliminary injunction on March 23, 2012, and the school district filed a Notice of Appeal on March 27, 2012.[308]

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[304] *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.*, 696 F.3d 771 (8th Cir., 2012) at 774.

[305] *S.J.W. ex rel. Wilson.*

[306] *Black's Law Dictionary.* 5th pocket ed. (St. Paul: Thomson Reuters, 2016),

[307] *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.*, 696 F.3d 771 (8th Cir., 2012) quoting *Dataphase Sys., Inc. v. C.L. Syst., Inc.,* 640 F.2d 109, 113 (8th Cir. 1981).

[308] *S.J.W. ex rel. Wilson.*

Case Analysis – First Amendment

The district court determined the NorthPress blog was targeted to Lee's Summit North; however, "[t]he district court found that the Wilsons' inability to try out for Lee's Summit North band or attend the honors classes offered at Lee's Summit North constituted irreparable harm."[309] The district court considered the likelihood of success and irreparable harm when deciding this case, which were the points of analyses by the *Wilson* court.

The Wilsons' argued they suffered irreparable harm in two instances. The first was the inability to take honors courses at Summit Ridge Academy. The *Wilson* court noted that "Summit Ridge Academy is an accredited school in the same district as Lee's Summit North. While attending Summit Ridge Academy, the Wilsons earned academic credit and stayed on track for graduation in May 2013."[310] The second instance of irreparable harm claimed by the Wilsons was the "inability to try out for the Lee's Summit North band during their suspension. The Wilsons argued they might pursue careers in music; if they did not participate in band, they might jeopardize their music careers in college and beyond."[311] In response to this claim, the *Wilson* court stated harm to their careers was speculative, which is not grounds to grant a preliminary injunction.[312] The *Wilson* court stated, "[t]herefore, the harms the District Court identified do not constitute irreparable harm sufficient to sustain a preliminary injunction."[313]

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[309] *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.*, 696 F.3d 771 (8th Cir., 2012) at 775.

[310] *S.J.W. ex rel. Wilson* at 779.

[311] *S.J.W. ex rel. Wilson* at 779.

[312] *S.J.W. ex rel. Wilson.*

[313] *S.J.W. ex rel. Wilson* at 779.

The *Wilson* court considered the likelihood of success with regard to the Wilsons' claim that their First Amendment rights to free speech were violated when they were suspended for creating NorthPress. In laying the foundation for their decision, the *Wilson* court discussed the United States Supreme Court's decision in *Tinker.* Additionally, they discussed *D.J.M. ex rel. D.M. v. Hannibal Public School Dist.*, which was an Eighth Circuit case and holds precedence. Furthermore, the discussed cases from other circuits: *Doninger v. Niehoff, Wisniewski v. Bd. of Educ., Kowalski v. Berkeley County Schools,* and *J.S. v. Mountain School District.* The *Wilson* court determined, based on these cases, that *Tinker* would apply "because the Wilson's speech was, in the District Court's words, 'targeted at' Lee's Summit North."[314] The *Wilson* court concluded:

> Just like the online speech in *Kowalski* and *Doninger*, the NorthPress posts 'could reasonably be expected to reach the school or impact the environment.' *Kowalski*, 652 F.3d at 573. Furthermore, unlike in *J.S.,* the District Court found that the NorthPress postings 'caused considerable disturbance and disruption on Friday, the 16th.' Under *Tinker,* speech which actually caused a substantial disruption to the educational environment is not protected by the First Amendment. Therefore, the Wilsons are unlikely to succeed on the merits.[315]

Since the *Wilson* court determined the district court findings with regard to irreparable harm and likelihood of success were not sufficient to grant a preliminary injunction, it was not necessary to address the remaining *Dataphase* factors.[316] The *Wilson* court further stated:

> However, our decision not to analyze the interests of the School District, its students, and the public does not mean those interests are unimportant;

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[314] *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.*, 696 F.3d 771 (8th Cir., 2012) at *778.*

[315] *S.J.W. ex rel. Wilson* at 778 citing *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir., 2011) and *Tinker v. Des Moines Sch. Dist.,* 393 U.S. 503 (1969)

[316] *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.*, 696 F.3d 771 (8th Cir., 2012).

> they are important. The specter of cyberbullying hangs over this case. The repercussions of cyberbullying are serious and sometimes tragic. The parties focus their arguments on the disruption caused by the racist comments, but possibly even more significant is the distress the Wilsons' return to Lee's Summit North could have caused the female students whom the Wilsons targeted.[317]

U.S. Court of Appeals, 9th Circuit

***Wynar v. Douglas County School Dis*t., 728 F.3d 1062 (9th Cir., 2013)**

Landon Wynar was in tenth grade at Douglas High School. "He collected weapons and ammunition and reported owning various rifles, including a Russian semi-automatic rifle and a .22 caliber rifles."[318] Landon regularly used MySpace to instant message with his friends. Frequently, Landon would discuss various topics associated with weapons or war, such as going shooting and mentioning Hitler. As the months progressed into his tenth-grade year, his comments became more violent. Some comments centered on "a school shooting to take place on April 20 (the date of Hitler' birth and the Columbine massacre and within days of the anniversary of the Virginia Tech massacre)."[319] Examples of various comments he messaged were:

> Its pretty simple / i have a sweet gun / my neighbor is giving me 500 rounds / dhs is gay / ive watched the kinds of movies so i know how NOT to go wrong / i just cant decide who will be on my hit list / and thats totally deminted and it scares even my self
>
> i haven't decided which 4/20 i will be doing it on / by next year, i might have better gun to use such as an MI cabine w/ a 30 rd clip… or 5 clips… 10?

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[317] *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.*, 696 F.3d 771 (8th Cir., 2012) at *779.*

[318] *Wynar v. Douglas County School Dist.,* 728 F.3d 1062 (9th Cir., 2013) at 1065.

[319] *Wynar* at 1065.

> And ill probably only kill the people i hate? Who hate me /then a few random to get the record
>
> [in response to a statement that he would 'kill everyone'] no, just the blacks / and Mexicans / halfbreeds / atheist / french /gays / liberals / david
>
> that stupid kid from vetch. he didnt do shit and got a record. i bet i could get 50+ people / and not one bullet would be wasted.[320]

Landon's friends joked with him about school violence; however, as the comments worsened, his friends became concerned and talked with one another about the situation.[321] "One boy forwarded Landon's messages to a friend, who responded, 'that's[f…] crazy / landon and i have messages like that too / he told me he was going to rape [redacted] / then kill her / then go on a school shotting / maybe we should be worried.'"[322]

Two of Landon's friends decided to talk with a trusted adult about Landon. They chose to talk with a football coach, and the coach accompanied the boys to speak with the principal about the concerns with Landon. After they talked with the principal, two deputies interviewed the boys, where they shared printouts of the messages. The deputies questioned Landon after speaking with his friends.[323]

The police took Landon into custody, and school administrators gave Landon the opportunity to have his parents present, but he chose not to have them there. Landon admitted to writing the messages but stated they were a joke. Landon provided the school

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[320] *Wynar v. Douglas County School Dist.,* 728 F.3d 1062 (9th Cir., 2013) at 1065 and 1066.

[321] *Wynar.*

[322] *Wynar* at 1066.

[323] *Wynar*.

administrators with a signed, written statement. The school suspended Landon for ten days. [324]

The school board convened a formal hearing, due to charging that Landon violated Nevada Code § 392.4655, where a student will be designated a habitual discipline problem if the student threatens (among other things) another student and must be suspended or expelled for at least a semester.[325] Landon was represented by an attorney at the hearing. Ultimately, the school board found Landon had violated Nevada Code §392.4655 and chose to expel him for ninety days.

Landon and his father, acting as guardian, filed suit in the United States District Court for the District of Nevada claiming a violation of U.S. Code §1983- Civil action for deprivation of rights and negligence and negligent infliction of emotional distress.[326] The district court summary judgment in favor of the school district and the Wynars appealed.[327]

Case Analysis – First Amendment

The *Wynar* court began the discussion of the framework for the analysis of the First Amendment claim. The *Wynar* court discussed the landmark cases, *Tinker, Fraser, Hazelwood,* and *Morse*. Additionally, they discussed *LaVine v. Blaine School District*, which is a Ninth Circuit case where the *Wynar* court stated was "our circuit's most analogous precedent."[328] In *LaVine,* a student wrote a poem at home that discussed a

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[324] *Wynar v. Douglas County School Dist.,* 728 F.3d 1062 (9th Cir., 2013).

[325] *Wynar.*

[326] *Wynar.*

[327] *Wynar.*

[328] *Wynar* at 1067.

school shooting and suicide and then brought it to school. In this case, the Ninth Circuit held the school did not violate the First Amendment rights of a student, who was "expelled on a temporary, emergency basis."[329] Furthermore, cases in the Second, Third, Fourth, Fifth, and Eighth Circuits in which speech initiated on the Internet were discussed, such as *Doninger*, *Kowalski*, *Wilson*, *Wisniewski*, and *Snyder.*

In considering the *Tinker* standard, the *Wynar* court provided "[g]iven the subject and addresses of Landon's messages, it is hard to imagine how their nexus to the school could have been more direct; for the same reasons, it should have been reasonably foreseeable to Landon that his messages would reach campus."[330] The *Wynar* court indicated that when Landon's friends became alarmed by his message, they acted as one would hope and notified school officials. They further stated, "[h]ere we make explicit what was implied in *LaVine:* when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*."[331] The *Wynar* court mentioned, on several occasions, the difficult task, for school officials, of balancing First Amendment rights to free speech while protecting the school environment from threats and violence.

Tinker does not require school officials to wait until a substantial disruption occurs. When considering the prong in the *Tinker* standard, material or substantial disruption, the *Wynar* court stated, "[i]t was reasonable for Douglas County to interpret

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[329] *Wynar v. Douglas County School Dist.,* 728 F.3d 1062 (9th Cir., 2013) at 1067.

[330] *Wynar* at 1069.

[331] *Wynar* at 1069.

the messages as a real risk and forecast a substantial disruption."[332] In his testimony, Landon indicated he was making a joke in his instant messages, and the *Wynar* court's responded with, "[w]e need not discredit Landon's insistence that he was joking; our point is that it was reasonable for Douglas County to proceed as though he was not."[333] With regard to the interference with the rights of others prong in the *Tinker* standard, the *Wynar* court addressed with the following statement: "[w]hatever the scope of the 'rights of other students to be secure and to be let alone,' *Tinker,* 393 U.S. at 508, 89 S.Ct. 733, without doubt the threat of a school shooting impinges on those rights. Landon's messages threatened the student body as a whole and targeted specific students by name."[334]

The *Wynar* court affirmed the district court's grant of summary judgment in favor of the school district. They reasoned, "[t]he messages presented a real risk of significant disruption to school activities and interfered with the rights of other students. Under the circumstances, the school district did not violate Landon's rights to freedom of expression or due process."[335]

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[332] *Wynar v. Douglas County School Dist.,* 728 F.3d 1062 (9th Cir., 2013) at 1070.

[333] *Wynar* at 1071.

[334] *Wynar* at 1072.

[335] *Wynar* at 1065.

Chapter 5: Findings

What are students' rights to free speech under the First Amendment? This question has been asked by school administrators of the courts since *Burnett* in 1943. The landmark cases, *Tinker, Fraser, Hazelwood,* and *Morse* have laid the foundation for the legal analysis of student speech in schools. It is important to note that *Fraser, Hazelwood,* and *Morse* offer alternative analysis to the two-prong *Tinker* test.

This study analyzed First Amendment rights cases related to Internet speech from the Federal District Courts and United States Appellate Court System. Cases from state supreme courts were considered and did not apply to this study. The United States Supreme Court has yet to accept an Internet speech case. Without a decision from the United States Supreme Court, binding precedent within the United States Appellate Court system was sought when analyzing the data. The analysis sought to provide answers to the following questions:

1. What is the prevailing legal status of public school students' First Amendment Internet speech rights when that speech is used as a tool for bullying another student?
2. To what extent has the United States Appellate Court System applied the *Tinker* test in cases involving Internet speech?

This study sought answers to the prevailing legal status of Internet speech when students are bullying another student and the extent to which *Tinker* was used in determining the outcome of the cases; however, Internet speech that targeted school officials and communicated threats emerged in the cases analyzed. Hence, in addition to the research questions, this chapter will present findings for Internet speech when it targeted school

officials and communicated threats.

Prevailing Legal Status - Bullying

This study sought to determine the prevailing legal status of public school students' First Amendment Internet speech rights when that speech was used as a tool for bullying another student. *Kowalski v. Berkley County Schools* from the Fourth Circuit and *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.* from the Eighth Circuit were cases of bullying. Kowalski created a MySpace group in which a particular student was targeted, and other students participated by adding pictures and comments. The Wilsons created NorthPress, a website that contained a blog where offensive and racist comments were posted as well as sexually explicit and demeaning comments about female classmates. Considering the Virginia Law definition of bullying discussed in Chapter 1, these cases were one or more students bullying another student(s).

The *Kowalski* court, citing *Morse,* declared that schools have a responsibility to protect their students from harassment and bullying. The *Kowalski* court determined that the facts in the case met the "materially and substantial"[336] outlined in *Tinker.* Furthermore, the *Kowalski* court cited *Fraser* and connected Kowalski's behavior to conduct and speech that schools need not be expected to tolerate in the educational environment.[337] The *Kowalski* court indicated that when Kowalski created the S.A.S.H. group, while at home on her computer keyboard, she knew the electronic delivery would extend outside of her home and reasonably reach the school or interfere with the learning

[336] *Tinker v. Des Moines Sch. Dist.,* 393 U.S. 503 (1969) at 507.

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

environment.[338] Additionally, the *Kowalski* court was satisfied the connection between the pedagogical interests and Kowalski's speech was "sufficiently strong".[339]

In *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.,* the Wilsons were seeking a preliminary injunction; therefore, the *Wilson* court need only to determine the likelihood of success on the merits of the case. The *Wilson* court considered *D.J.M ex rel. D.M. v. Hannibal Public School Dist.* (Eighth Circuit), *Doninger v. Niehoff* (Second Circuit), *Wisniewski v. Bd. of Educ.* (Second Circuit), *Kowalski v. Berkley County Schools* (Fourth Circuit), and *J.S. ex rel. Snyder v. Blue Mountain School District* (Third Circuit) in determining the likelihood of success. In the analysis, the *Wilson* court noted the district court determined that NorthPress targeted Lee's Summit North; therefore, *Tinker* would apply. The *Wilson* court paralleled NorthPress with the speech in *Kowalski* and *Doninger*. It indicated that it was reasonable to presume NorthPress would reach the school or interfere with the learning environment.[340] In contrast with *Snyder,* where there was not a disruption in school*,* the postings on NorthPress "caused considerable disturbance and disruption".[341]

The prevailing legal status for Internet speech when a student is bullying another student is that there was a likelihood that *Tinker* would apply. If the speech specifically targeted an individual student or a particular group of students at the school, it was reasonable to expect the Internet speech to reach the school or interfere with the learning

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

[339] *Kowalski.*

[340] *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.*, 696 F.3d 771 (8th Cir., 2012).

[341] *S.J.W. ex rel. Wilson* at 778.

environment. Furthermore, if the speech caused a disruption, such as NorthPress, then *Tinker* applied. The *Kowalski* court (Fourth Circuit) was satisfied there was a link between the MySpace group, S.A.S.H., and the pedagogical interest of the school; however, the *Snyder* court (Third Circuit) dismissed *Fraser* with regard to the offensive profile created for the school principal.[342] The *Doninger* court articulated that the caselaw established by *Fraser* was not clear on its application to off-campus speech.[343] The *Bell* court (Fifth Circuit) dismissed *Fraser* because Bell was not disciplined for lewd speech, rather he was disciplined for harassment and intimidation.[344] Consequently, the prevailing legal status with regard to *Fraser* was uncertain as it related to bullying.

Tinker Test

Tinker is a landmark case that is consistently associated with students' First Amendment rights. This study sought to determine the extent to which the United States Appellate Courts applied the *Tinker* test to cases involving Internet speech. The *Tinker* test states that students maintain First Amendment rights unless 1) the speech is "materially and substantially disruptive,"[345] or 2) impedes upon the rights of others.

In the Second Circuit, *Wisniewski v. BOE of Weedsport Central School District* and *Doninger v. Niehoff* were analyzed. The *Wisniewski* court applied the *Tinker* test. It determined that while Aaron's icon was created and transmitted off campus, it was

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[342] *J.S. ex rel. Snyder v. Blue Mountain School District,* 650 F.3d 915 (3rd Cir., 2011).

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

[344] *Bell v. Itawamba County School Bd*., 799 F.3d 379 (5th Cir., 2015).

[345] *Tinker v. Des Moines Sch. Dist.,* 393 U.S. 503 (1969) at 513.

reasonably foreseeable that the icon would come to the attention of the school and had the potential for disrupting the school.[346] The *Doninger* court indicated the record supported that it was reasonably foreseeable the blog post created by Avery would reach school property.[347]

In the Third Circuit, *Layshock ex rel. Layshock v. Hermitage School District* and *J.S. ex rel. Snyder v. Blue Mountain School District* were analyzed. In *Layshock,* the *Tinker* test was considered. The *Layshock* court explained the district court was unable to establish a nexus between Justin's speech and the school and the school district did not challenge this determination.[348] The school district attempted to establish a relationship between Justin's speech and the school by arguing he entered the district's website and accessed Trosch's picture and placed it on the profile page and that Justin's speech was aimed at the school community; therefore, it was reasonably foreseeable the profile would come to school.[349] The *Layshock* court rejected the argument. The *Snyder* court did not consider *Tinker* to be applicable in this case due to the fact that the parties did not dispute that a substantial disruption did not occur.[350]

In the Fourth Circuit, *Kowalski v. Berkley County Schools* was argued. The *Kowalski* court determined *Tinker* was applicable and that Kowalski knew when she

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[346] *Wisniewski v. BOE of Weedsport Central School District* 494 F.3d 34 (2nd Cir., 2007).

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

[348] *Layshock ex rel. Layshock v. Hermitage School District,* 650 F.3d 205 (3rd Cir., 2011).

[349] *Layshock ex rel. Layshock.*

[350] *J.S. ex rel. Snyder v. Blue Mountain School District,* 650 F.3d 915 (3rd Cir., 2011).

created the group and targeted Shay N. it was reasonable the speech would reach the school.[351]

In the Fifth Circuit, *Bell v. Itawamba County School Bd*. was argued. The *Bell* court noted that five circuits, (Second, Fourth, Fifth, Eighth, and Ninth) have held that *Tinker* applied to off-campus speech. The *Bell* court concluded the summary judgment record showed Bell admitted to directing the rap recording, which contained threats, harassment, and intimidation towards the school community; therefore, the school district could reasonably forecast a disruption at school.[352]

In the Eighth Circuit, *D.J.M. ex rel. D.M. v. Hannibal Public School Dist.* and *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.* were argued. The *D.J.M.* court considered *Wisniewski* when analyzing the facts in this case. While the *D.J.M.* court determined that D.J.M.'s messages were a true threat, they correspondingly considered the *Tinker* test as well. In this case, the school officials spent a considerable amount of time with concerned parents and students. They had to address a rumored hit list and assuring the community that appropriate safety measures were in place.[353] In the *D.J.M.* court's opinion, this satisfied the material and substantial prong of the *Tinker* test.[354] The *Wilson* court considered *Kowalski* and *Doninger* and determined that NorthPress specifically targeted Lee's Summit North and some of their students; therefore, it was reasonably foreseeable that the speech would reach the school.[355]

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

[352] *Bell v. Itawamba County School Bd.,*774F.3d 280 (5th Cir. 2104).

[353] *D.J.M. ex rel. D.M. v. Hannibal Public School Dist.* 647 F.3d 754 (8th Cir., 2011).

[354] *D.J.M. ex rel. D.M.*

[355] *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.*, 696 F.3d 771 (8th Cir., 201

In the Ninth Circuit, *Wynar v. Douglas County School Dist.* was argued. The *Wynar* court considered *Doninger, Kowalski, Wilson, Wisniewski,* and *Snyder* and established that applying the *Tinker* test was appropriate. The *Wynar* court clearly established that by the nature of Landon's messages, it was reasonable for the school district to interpret the messages as a threat and forecast a substantial disruption.

When considering the application of the *Tinker* test to the nine cases included in this study, the courts sought to establish a connection between the speech and the school. The Second, Fourth, Fifth, Eighth, and Ninth Circuits were relatively consistent in applying *Tinker.* The Third Circuit was cautious in their analyses with regard to establishing a nexus between off-campus speech and the school. Additionally, in the Second, Fourth and Eighth Circuits, speech that specifically targeted the school or persons in the school provided reasonable foresight that disruption may occur, which deemed the speech unprotected by the First Amendment.

Internet Speech Targeting School Officials

The terms bullying or targeting inherently bring to mind negative thoughts. Typically, one thinks about students being bullied by other students. The Second, Third, and Fifth Circuits brought about another similar issue where students targeted school officials. The Third Circuit's full-court decision in *J.S. ex rel. Snyder v. Blue Mountain School District* split from the Second Circuit's decision in *Doninger v. Niehoff* and the Fifth Circuit's decision in *Bell v. Itawamba County School Bd.*

The *Snyder* en banc court (fourteen circuit judges) heard the case and held, with an 8-6 split (8 judges agreeing and 6 judges disagreeing), that the school district violated J.S.'s First Amendment rights by disciplining her for creating a malicious MySpace

profile of her principal, James McGonigle. This study would be remiss without discussing the commanding dissent written by Circuit Judge, Smith with whom Circuit Judges, Scirca, Rendell, Barry, Jordan, and Vanaskie joined.

Judge Fisher began the dissent by indicating the majority opinion "severely undermines schools' authority to regulate students who 'materially and substantially disrupt the work and discipline of the school.'"[356] He further stated, "I fear that our Court leaves schools defenseless to protect teachers and school officials against such attacks and powerless to discipline students for the consequences of their actions."[357] It is this researcher's opinion that these statements ignited the need to explore further the legal arguments made in this dissent and the implications for school administrators.

The United States Supreme Court has not addressed the rights of students to make off-campus speech where school officials are targeted. Fisher argued the majority in the *Snyder* court err in the determination that the facts did not support that the school district could not reasonably foresee a disruption. He noted the majority concluded by comparing the facts in *Tinker* and the facts in this case.[358] In *Tinker,* the students were engaged in a silent political protest by wearing armbands. In considering *Tinker,* the majority cited the dissent by Justice Black that indicated, due to the political climate relating to the Vietnam War, the wearing armbands would be distracting and disrupt the classroom.[359] The majority in *Tinker* held, that there were no facts to support the school could forecast a

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[356] *J.S. ex rel. Snyder v. Blue Mountain School District,* 650 F.3d 915 (3rd Cir., 2011) at 941 citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 513, 89 S.Ct. 733, 21 L. Ed.2d 731 (1969).

[357] *J.S. ex rel. Snyder v. Blue Mountain School District,* 650 F.3d 915 (3rd Cir., 2011) at 941.

[358] *J.S. ex rel. Snyder.*

[359] *J.S. ex rel. Snyder v. Blue Mountain School District,* 650 F.3d 915 (3rd Cir., 2011.

disruption or interference in the school.[360] "J.S. by contrast, targeted her principal and her principal's family with lewd, vulgar and offensive speech" and "she publicly disseminated numerous hurtful accusations"[361] such as sexual misconduct and insults to McGonigle, Frain(his wife), and their son.[362] Additionally, Fisher noted the school district found that J.S. violated of school policy.

Fisher argues the facts in *J.S.* were sufficient for the school district to foresee the potential for disruption. He stated, "[f]inally, I discuss how the majority misconstrues the facts to underestimate the foreseeable impact of J.S's speech."[363] There was potential that J.S.'s speech, if unpunished, could undermine McGonigle's authority and could impede upon McGonigle and Frain's ability to perform their jobs.[364] Additionally, if J.S.'s speech went unpunished, there was a potential for the student body to view this as acceptable behavior; therefore, prompting other students to target staff members. While the sexual misconduct allegations were untrue, those accusations "poses a foreseeable threat of diverting school resources required to correct the misinformation and remedy confusion."[365] There was a potential for the school community, who are unfamiliar with McGonigle, to have concerns regarding the sexual misconduct allegation implying harm to students. It was foreseeable the school district could spend a significant amount of time

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[360] *Tinker v. Des Moines Sch. Dist.,* 393 U.S. 503 (1969).

[361] *J.S. ex rel. Snyder v. Blue Mountain School District,* 650 F.3d 915 (3rd Cir., 2011) at 944.

[362] *J.S. ex rel. Snyder.*

[363] *J.S. ex rel. Snyder* at 945.

[364] *J.S. ex rel. Snyder.*

[365] *J.S. ex rel. Snyder* at 945.

mitigating these concerns.[366] Fisher indicated, [i]f such steps were not taken, it is likely that the Middle School would have suffered substantial disruptions because McGonigle' authority would have been severely undermined and school resources would have been diverted to alleviate the inevitable concerns."[367]

Fisher's dissent was aligned with the holdings in *Doninger* that concluded the numerous phone calls and emails received by Schwartz and Niehoff, interfered with the administrator's ability to fulfill their responsibilities to school-related activities.[368] The split decisions between the Second and Fifth Circuits and the Third Circuit leave a divide in caselaw which carries the potential to impact school administrators in the future

School Safety

School violence has, unfortunately become a significant issue for school administrators across the United States. In an online CNN report, it is conveyed that from 2009 to 2018 there have been 180 school shootings and 365 victims.[369] Walker examined school shooting on K-12 campuses over the past ten years. It was found that incidents of school shootings are increasing, and all communities are at risk. In the last decade, there have been 114 school shooting related deaths. These staggering facts necessitate that administrators must put school safety at the forefront of their daily responsibilities. The current study found that the Second, Eighth, and Ninth Circuits issued opinions on

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[366] *J.S. ex rel. Snyder v. Blue Mountain School District,* 650 F.3d 915 (3rd Cir., 2011).

[367] *J.S. ex rel. Snyder* at 946.

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

[369] Christina Walker, "10 Years. 180 school shootings. 356 victims," CNN Retrieved September 27 2019, https://www.cnn.com/interactive/2019/07/us/ten-years-of-school-shootings-trnd/#storystart.

cases involving Internet speech where the student communicated a threat of violence towards a school, students, or a school employee.

Wisnieski v. BOE of Weedsport Central School District, from the Second Circuit, determined *Tinker* was appropriate, and while Aaron's icon was created off campus, it was reasonable to expect the speech would reach the school and the teacher to whom the threat was directed.[370] *D.J.M ex rel. D.M. v. Hannibal Public School Dist.*, from the Eighth Circuit, considered caselaw related to true threat and *Tinker* and determined *Tinker* was most applicable. The *D.J.M.* court concluded the disruption occurred when word of the messages spread, and considerable time was spent addressing concerns and reassuring the school community that safety measures were in place.[371] *Wynar v. Douglas County Schools Dist.* ruled on both prongs of the *Tinker* test. With regard to substantial disruption, the *Wynar* court held it was reasonable to forecast the potential substantial disruption at school from the messages Landon posted. Furthermore, the *Wynar* court indicated that Landon's messages threatened the school, student body, and a few named students, which interfered with students ability to feel safe and secure at school.[372] Establishing the connection between the Internet speech that delivered a threat and the school was straight forward, which suggested the speech was not protected and that school administrators may act quickly to address the threat.

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[370] *Wisniewski v. BOE of Weedsport Central School District* 494 F.3d 34 (2nd Cir., 2007).

[371] *D.J.M. ex rel. D.M. v. Hannibal Public School Dist.* 647 F.3d 754 (8th Cir., 2011).

[372] *Wynar v. Douglas County School Dist.,* 728 F.3d 1062 (9th Cir., 2013).

Summary

This chapter offered the findings from the analysis of the nine appellate court cases from the Second, Third, Fourth, Fifth, Eighth, and Ninth Circuits presented in this study. While the analysis sought to answer specific research questions regarding Internet speech used to bully students and the extent to which the *Tinker* test was applied, the issues of targeting staff and school safety through Internet speech emerged from the cases; therefore, an analysis of these areas was presented. Based on this analysis, the following chapter will offer recommendations to school administrators when addressing Internet speech, specifically speech where students bully, threaten, or target a school official.

Chapter 6: Recommendations

The Internet has presented challenges to school administrators as they navigate the waters of school-related student speech occurring off campus. This study examined court cases related to Internet speech in schools from the United States Courts of Appeals and Federal District Courts throughout the United States. Based on the analysis from the study, this chapter will offer recommendations for school administrators when they address Internet speech related to bullying, targeting school officials, and communicating threats.

Recommendations – Bullying

School administrators must be knowledgeable about their school or school district's policy on bullying investigations, the student code of conduct and state law and or policies on bullying. The *Kowalski* court referenced the website www.stopbullying .gov. This site provides bullying laws, and policy for each state. By understanding the school and school district's policies and state law and policy, the administrator is assured the expectation has been communicated to the school community, and prior notice of expected behavior is met, which assures due process is given.

Based on my analysis, Courts routinely apply the Tinker standard to off-campus speech. Therefore, one must consider the connection between off-campus speech and the school. Once the link is established, consideration of the disruption or potential for disruption and whether the speech impedes on the rights of another student must be given. In *Kowalski* and *Wilson,* the courts were clear that when Internet speech was used to bully, and the targeted student (*Kowalski)* or school is identified (*Wilson)*, that the

administration could reasonably presume the speech will reach the school and potentially interfere or disrupt the learning environment.

However, all situations are not as straightforward as *Kowalski* and *Wilson.* Frequently, school administrators are presented with situations involving social media where student names are not in the post, and the targeted victim is not evident. In these cases, administrators must proceed cautiously. The *Kowalski* and *Wilson* courts established the connection between the speech and school because there was indisputable evidence that a particular student or students were targeted. In such cases, without a witness statement, as in *Kowalski*, it will be difficult to establish the link between the speech and the school. It is advisable to question the alleged aggressor, essentially to put them on notice that the school is aware of the behavior and then contact the parent(s) but refrain from administering discipline to the student. While it may seem counterintuitive to simply conference with the student and make parent contact, the absence of nexus creates a slippery slope when balancing First Amendment rights and off-campus speech.

Recommendations – Students Targeting School Officials

The findings in this study indicated that Internet speech targeting school officials would present a challenge for school administrators when balancing First Amendment rights and off-campus speech. Therefore, school administrators must know the district policy and follow it.

The Second and Fifth Circuits applied *Tinker* in *Doninger* and *Bell* and found the facts in the cases satisfied the *Tinker* test. The courts found that the off-campus speech was directed towards the school officials which established the relationship, and with such a connection, it was determined a disruption was reasonably predicted. The Third

Circuit was not inclined to establish nexus in *Layshock* and *J.S.* The Third circuit did not accept the argument that the off-campus speech, which targeted school officials ,created a potential disruption in the school. The split between these circuits presents challenges for administrators when investigating incidents where school officials are targeted through off-campus speech.

The uncertainty in caselaw regarding off-campus speech targeting school officials creates difficulty for school administrators in addressing these incidents. Initially, it must be determined if the speech simply incites the targeted staff member to feel uncomfortable, such as the armbands in *Tinker,* or if the speech is directed at the school and has the potential to cause a disruption. The administrator must determine whether the facts of the investigation indicated the student violated district policy and if so, they may discipline according to policy. If the facts of the investigation indicated the likelihood of satisfying the *Tinker* test, the school administrator should seek guidance from their district office.

The analysis of the Third Circuit court cases is the most alarming in this study. The Third circuit's decision allowed students to publicly, through social media, undermine school officials with defamatory profiles. The dissent discussed in Chapter 5 summarized the concerns of this researcher. School districts must protect the staff and preserve the integrity of their positions. The precedent set in the Third Circuit generates concern, especially for the educators who live and work within the Third Circuit. Even though the Third Circuit did not align with the other circuits and establish a connection, I recommend that school administrators should investigate and attempt to establish a link before taking action or seeking guidance from the district.

Recommendations – School Safety

School safety is at the forefront of the school administrator's daily responsibilities. In 2018, within approximately three months of each other, school shootings occurred at Marjory Stoneman Douglas High School in Parkland, Florida, and Santa Fe High School in Santa Fe, Texas, with seventeen and ten killed, respectively. Events such as these sparks fear in every school administrator and render them hyper-aware of student safety. In light of the increase in school shootings over the years, schools and school districts have generally refined the process for investigating threats towards schools, students, and staff. School administrators must clearly understand the policy and precisely follow it.

When off-campus speech threatens the school, students, or staff, *Tinker* will often apply. For example, in the cases, *Wisnieski, D.J.M.,* and *Wynar,* analyzed in this study, *Tinker* was applied and held in all three cases, that where threats communicated through Internet speech directed at a school, students or staff are prone to quickly create fear in those who see the off-campus speech, schools may act. It is through that fear that the link is established, and it becomes reasonable to forecast a disruption. Administrators will spend valuable time addressing concerns and calming fears of the school community. Additionally, threats directed at schools, students, or staff may interfere with students and staff feeling safe and secure at school, such as the *Wynar* court described. The legal arguments presented in *Wisnieski, D.J.M.,* and *Wynar* provide school administrators with the regulatory power to assess the threat and act accordingly with a diminished possibility of infringing upon students' First Amendment rights.

School Administrator's Legal Understanding

School administrators are not typically trained to interpret school law in a courtroom; however, they are expected to explicitly understand the rights of students and act accordingly in all school-related activities. For this researcher, the experience of analyzing the caselaw with regard to the First Amendment for this study has provided valuable insight. In the future, this knowledge will allow more accurate assessment of discipline situations involving student Constitutional rights and to discern when discipline is appropriate and when it violates the First Amendment.

Considerations

In 2007, the United States Supreme Court issued its opinion in *Morse v. Frederick*, which was discussed in Chapter 2: Historical Perspective. In his concurring opinion, Justice Clarence Thomas stated he fully supports the Court's decision that public schools may censure student speech that promotes illegal drug use. He further stated that he wrote the opinion in order to provide his view that *Tinker* "is without basis ('a fundamental principle'[373]) in our Constitution."[374] Thomas discussed that "*Tinker* effected a sea of change in students' speech rights extending well beyond traditional bounds."[375] He indicated the decisions the Court held in *Hazelwood, Fraser,* and *Morse* distanced itself from *Tinker* and provided exceptions where a school may regulate student speech.

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[373] *Black's Law Dictionary.* 5th pocket ed. St. Paul: Thomson Reuters, 2016), 72.

[374] *Morse v. Frederick*, 551 U.S. 393 (2007) at 410.

[375] *Morse* at 416.

With regard to *Tinker*, he notes the Court does not overrule or offer guidance as to when it controls or when it does not.[376] Justice Thomas further stated:

> I am afraid that our jurisprudence [collective judicial precedents[377]] now says that students have a right to speak in schools except when they do not -- a standard continuously developed through litigation against local schools and their administrators. In my view, petitioners could prevail for a much simpler reason: As originally understood, the Constitution does not afford students a right to free speech in public schools.[378]

The issues analyzed in this study when students used Internet speech to bully, threaten, or target a teacher, are considerable concerns for school administrators. This study showed *Tinker remains* as significant caselaw when determining the First Amendment rights of students regarding Internet speech. We are living in a technological society, and it is highly likely that Internet speech will become more convoluted in the future. Considering Justice Thomas' concurring opinion in *Morse*, one must ask the question: *When will the United States Supreme Court grant a writ of certiorari and issue an opinion on Internet speech in schools?*

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[376] *Morse v. Frederick*, 551 U.S. 393 (2007).

[377] *Black's Law Dictionary.* 5th pocket ed. St. Paul: Thomson Reuters, 2016), 442.

[378] *Morse* at 418.

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