

# OHIO SCHOOL BOARDS ASSOCIATION

CAPITAL CONFERENCE  
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## First & Fourth Amendment Rights: How “Free” Are Students?

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*Technology and its effect on the balance between  
student rights and the interests of public schools.*

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## I. INTRODUCTION

### A. SOCIAL TECHNOLOGY AND STUDENT CONDUCT: THE SCOPE OF THE PROBLEM

The 21<sup>st</sup> Century comes standard with cell phones, Internet usage, blogging, YouTube, MySpace, Facebook, texting, instant messaging, digital videos, and image sharing. The frequency with which administrators confront technology issues in public education has grown exponentially.

How students communicate and express themselves has drastically changed and we are witnessing the corresponding evolution of education and constitutional law as it relates to student expression and conduct in the public school environment.

Unfortunately, these concepts continue to change as the courts confront the new fact patterns created by the integration of technology in public schools. In this regard, these materials are best used as a resource, and should not take the place of securing competent legal advice when addressing the various challenges you will likely face as educators/administrators.

To that end, **issue identification** by school officials and employees becomes crucial to successfully understanding the developing legal landscape.

### B. THE UNITED STATES CONSTITUTION: A MAJOR PLAYER IN THE DIGITAL REVOLUTION

The legal landscape of technology in public education has for its background the United States Constitution. Specifically, the First Amendment directly impacts the extent to which public schools can control student expression and conduct. Meanwhile, the Fourth Amendment restricts the extent to which public schools may investigate violations of school policy involving electronic communication devices and how to use technology to monitor the school environment.

These amendments state:

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

– United States Constitution, First Amendment.

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*“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”*

– United States Constitution, Fourth Amendment.

C. BASIC LEGAL PRINCIPLES OF THE FIRST AMENDMENT

1. The First Amendment generally prevents government from proscribing speech ... because of disapproval of the ideas expressed. *R.A.V. v. City of St. Paul* (1992), 505 U.S. 377.
2. To survive constitutional scrutiny, a state must narrowly tailor any regulation that limits the content of unprotected speech unaccompanied by conduct. *State of Wisconsin v. Douglas D.* (2001), 243 Wis.2d 204, 626 N.W.2d 725.
3. State regulation of speech must be content-neutral. *State of Wisconsin v. Douglas D.* (2001), 243 Wis.2d 204, 626 N.W.2d 725.
4. It is well understood that the right of free speech is not absolute at all times and under all circumstances. *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568. Some categories of speech are “likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest”:
  - a. Fighting words;
  - b. Speech that incites others into imminent lawless action;
  - c. Obscenity;
  - d. Libel and defamatory speech; and
  - e. True threats.

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D. BASIC LEGAL PRINCIPLES OF THE FOURTH AMENDMENT

1. In the realm of criminal law, courts have interpreted the Fourth Amendment prohibition against “unreasonable searches and seizures” to require that an officer has “probable cause” before conducting a search or seizure without a warrant. Courts interpreted “probable cause” using a high standard, explaining the concept as a belief formed by a reasonable person based on trustworthy information. *U.S. v. Caleb* (6<sup>th</sup> Cir. 1977), 552 F.2d 717.
2. The United States Supreme Court determined that the “probable cause” standard was an inappropriate measure for Fourth Amendment considerations in school settings. Based on the increase in drug use and violent crimes in schools and the need for schools to be able to take corrective action, the Court held that the legality of a school searching a student would depend on the reasonableness of the search, including all surrounding circumstances. *New Jersey v. T.L.O.* (1985), 469 U.S. 325.
3. The search standard is even broader for school officials when they are on field trips. *Webb v. McCullough* (6<sup>th</sup> Cir. 1987), 828 F.2d 1151.
4. In circumstances when a credible threat to school safety exists, courts have construed the Fourth Amendment in a manner that affords administrators great latitude in conducting searches and seizures. *Williams v. Cambridge Bd. of Edn.* (6<sup>th</sup> Cir. 2004), 370 F.3d 630.
5. Summary of Traditional School Search and Seizure Analysis:
  - a. Before searching or seizing a student, a school must first determine whether it has “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.” *New Jersey v. T.L.O.* (1985), 469 U.S. 325, 341-42.
  - b. When searching or seizing a student, the school must conduct the search using methods that “are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the students and the nature of the infraction.” *Id.*

6. School District Use of Technology Goes Awry –

A recent Fourth Amendment case in Pennsylvania highlights the problems associated with new technology. In that case, the school district provided a laptop computer to each of its high school students. Unbeknownst to the students and their parents, the laptops were equipped with webcams. The webcams were being remotely activated by certain persons in the district and used to spy on students and their parents.

**II. FIRST AMENDMENT LIMITATIONS ON DISCIPLINE FOR STUDENT SPEECH**

A. TRADITIONAL SCHOOL SPEECH ANALYSIS

1. *Tinker v. Des Moines Indep. Community Sch. Dist.* (1969), 393 U.S. 503.  
*Bethel School Dist. No. 403 v. Fraser* (1986), 478 U.S. 675.  
*Hazelwood Sch. Dist. v. Kuhlmeier* (1988), 484 U.S. 260.  
*Morse v. Frederick* (2007), 551 U.S. 393, 127 S.Ct. 2618.

Pursuant to *Bethel*, a school may categorically prohibit lewd, vulgar or profane language on school property.

Under *Hazelwood*, a school may regulate school-sponsored speech (i.e., speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern.

- a. Caution: The ability to regulate speech in student publications (electronic or otherwise) may be limited by the nature of the forum that has been created or emerged.
  - b. If the student publication can reasonably be deemed a limited public forum, the ability to restrict speech based upon content becomes increasingly more circumspect.
2. Any speech that does not fall into one of the two categories addressed in *Bethel* and *Hazelwood* is analyzed under *Tinker* and *Morse*. Accordingly, student speech may be regulated only if it:
    - a. Substantially disrupts school operations or interferes with the rights of others (or if there is a reasonable and particularized fear of a disruption or interference); or

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- b. Promotes illegal drug use.
3. Courts have applied the *Tinker* analysis to the following types of cases:
- a. Speech on school property that is not school-sponsored speech;
  - b. Speech off school property; and
  - c. Speech promoting illegal drug use.
    - (1) Example: *Morse v. Fredericks*, 551 U.S. 393 (2007), The Supreme Court held that “BONG HITS 4 JESUS” sign was not protected by the First Amendment. A student unfurled this banner at a school sanctioned event, refused to take it down, and was suspended for 10 days. The court determined that the First Amendment does not require school districts to tolerate student expressions that encourage drug use.
4. Off-Campus Speech – How Far Does a School District’s Authority to Regulate Conduct Extend?
- a. How courts are applying *Tinker* to off-campus speech demonstrates their reluctance to allow public schools to discipline students for speech occurring outside of school (But see the *J.S.* case, below, decided by a federal district court in Pennsylvania, where the judge curiously sidestepped *Tinker*).
  - b. According to the courts, disparaging remarks and criticism of the administration or teachers off campus through the Internet will not alone qualify as a material disruption to the educational process (even if the author uses foul or sexually suggestive language). (See the *Evans* case below).
  - c. In determining how to handle off-campus “cyber” speech, districts should consider the following four things – what we refer to as “LEND”:
    - (1) Location of the speech – is there a viable nexus or connection to the district network or system?;



- (2) The disruptive **E**ffect, if any, on the educational environment;
  - (3) The **N**ature or type of speech (personal, violent, lewd, vulgar, pro-drug, threatening?); and
  - (4) The manner in which the speech was **D**istributed (i.e., how did the speech make its way onto the campus?).
- e. To discipline a student, the district must show that the student’s conduct violated a law or school rule. Make sure your rules are not “vague” and “overbroad.”
- (1) A rule is “overbroad” when it punishes protected activities as well as non-protected ones.
  - (2) A rule is “vague” if it fails to give adequate warning that particular conduct is prohibited or fails to set out adequate standards to prevent arbitrary and discriminatory enforcement.

**B. MANAGING LIABILITY AND DISCIPLINE IN THE CHANGING TECHNOLOGICAL LANDSCAPE – SOCIAL NETWORKING WEBSITES (FACEBOOK, MYSPACE AND TWITTER) AND “SEXTING” ON CELL PHONES**

1. The Evolution of MySpace and Facebook.
- a. In September of 2005, with nearly 5 million registered college students, Facebook opens up to high school students. In September of 2006, Facebook allows anyone to join.
  - b. In July of 2005, Robert Murdoch’s company, News Corporation, bought MySpace.com for 580 million dollars. Since October 2005, the site has grown from 25 million registered users to well over 100 million.
  - c. In 2012, Facebook reported a billion users worldwide as compared to February of 2010, with 400 million registered users.
  - d. MySpace users must be at least 14 years old. According to information from MySpace.com, profiles will be deleted if there is reason to believe that the person is under the age of 14 or 14-17

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years of age and representing themselves as 18 or older. The primary age demographic is 14 to 34 years old.

- e. Facebook users must be at least 13 years old to register. According to facebook.com, profiles will be deleted if there is reason to believe that the person is under the age of 13. Also, the networking site has “tools” for parents and educators to report users under 13 years old. Parents and educators are directed to use the “report link” to flag any profile in violation of Facebook terms including, unwanted photos of a child, abuse, pornography, threats, graphic violence, bullying and spam.
2. Twitter started in 2006 when the podcasting company Odeo realized they needed to reinvent themselves and began brainstorming new creative ideas. In October 2006, the first “tweet” was published, “just setting up my twttr.” The prototype for twitter was tested as an internal service for Odeo employees but later launched publically in July 2006. Twitter really took off in 2007, when Odeo used a marketing plan to display streaming twitter messages on massive plasma screens at the South by Southwest festival. On that day, twitter usage went from 20,000 tweets per day to 60,000.
    - a. In June of 2009, Twitter was estimated to have 2.5 million users, with 20 million unique U.S. visitors and 628 million page views.
    - b. In a recent article published by the Huffington Post in October, 2013, Twitter reported it had 232 million “active” users – people who access the service at least once a month.
    - c. USA Today reported in 2013 that 24% of young people, ages 12-17, said they use Twitter (up from 8% in 2011).
    - d. Teens were reported to have taken a “liking” to Twitter because their “parents don’t have one.”
    - e. 64% of teens with Twitter accounts have accounts set to public.
  3. Facebook, MySpace, Twitter and other Social Networking Websites in the Schools.
    - a. According to a survey published by the National School Boards Association in July 2007, 36% of districts surveyed said the

content of student postings on social networking websites is disruptive and, of the districts who reported problems, almost 70% said that students posting inappropriate material is the biggest problem, followed by students giving out too much personal information. (*Creating & Connecting//Research & Guidelines on Online Social – and Educational – Networking*).

- b. Additionally, four out of ten districts cited “cyberbullying” and “causing too much time off task” as disruptions. One in four districts said their disruptions were caused by students creating parody websites of teachers and administrators.
- c. Approximately 35% of districts surveyed disclosed that they have social networking policies, although most of the policies are focused on blocking access to these sites rather than policies regulating the use of them.
- d. An alarming 96% of teens and tweens (ages 9-12) utilize social networking technologies such as chatting, text messaging, blogging, and visiting online communities like MySpace and Facebook.
- e. The average amount of time children (ages 8-18) spend using media for non-school related activities is up to roughly 7.5 hours a day.
- f. Students also reported that they spend about 9 hours a week online.
- g. On the morning of November 6, 2013, the “Today Show” reported that ninety-four percent (94%) of teens use Facebook; twenty-six percent (26%) access Twitter; eleven percent (11%) use Instagram; seven percent (7%) use MySpace and 2.5% use some other form of social networking device.

4. **School District Underestimates the First Amendment: *Layshock v. Hermitage School District*** (W.D.Pa., 2007), 496 F.Supp.2d 587.

In early December of 2005, a high school senior created a parody profile of his principal on MySpace.com. The profile was created from home using his grandmother’s computer. The only school resource used was a photograph of the principal taken from the school’s website. The student sent the profile to several of his friends and eventually word of the profile

spread to the rest of the school. Around the same time, three other unflattering profiles of the principal also appeared on MySpace.com which were much more vulgar and offensive than the profile created by the student. The student accessed his MySpace.com profile once while at school and showed it to other classmates, but the teacher was not aware of this activity and it was not disruptive. The co-principal spoke with approximately 20 students who were referred to his office because they had caused a disruption in class by discussing the profiles. That same day, the school contacted MySpace.com directly and had the profiles removed. For the next five days, until winter break, computer use in the school was limited and computer-programming classes had to be cancelled. During this five-day period, the technology coordinator disabled access to the entire MySpace.com site from school computers.

On the last day of class before winter break, the student and his mother were summoned to a meeting with the superintendent and co-principal. The student admitted creating the profile. Two weeks later, the student received a 10-day suspension for violating several school rules. Despite his prior participation in Advanced Placement classes, the student was also placed in an alternative curriculum program for the remainder of the year, banned from school events, including serving as a tutor for other students, and prohibited from participating in the June graduation ceremony. The student challenged the school's actions as violating his First Amendment rights, and claimed its rules were unconstitutionally vague and overbroad.

In its decision, the court acknowledged that school officials' authority over off-campus speech is much more limited than speech occurring on school grounds, however, the standard from *Tinker* can apply to both – speech may be regulated only if it would substantially disrupt school operations or interfere with the rights of others. This standard requires more than a mere desire to avoid discomfort or unpleasantness. Schools must identify an actual substantial disruption or a well-founded expectation of disruption (such as past incidents arising out of similar speech).

In order to punish off-campus speech, schools must demonstrate an appropriate nexus between the speech and a substantial disruption of school activities. In the student's case, the school failed to do so. The school was unable to connect the alleged disruption to the student's conduct insofar as there were three other parody profiles of the principal available on MySpace.com at the same time. Also, the school did not show that the "buzz" or discussions occurring in classrooms were caused

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by the student's profile as opposed to the reaction of administrators. Further, any disruption was minimal. No widespread disorder occurred and there was no violence or disciplinary action in the five days before winter break. There was no evidence that teachers were incapable of teaching or controlling their classes. Finally, it is clear the student was punished only for his off-campus conduct. There was no evidence administrators even knew the student accessed his profile during class prior to disciplinary proceedings. According to the court, the school's right to maintain an environment conducive to learning did not trump the student's First Amendment rights.

On appeal in 2010, the Third Circuit determined that the student was properly granted summary judgment as to his First Amendment Claim because:

- a. the student's conduct did not disrupt the school;
- b. the district could not establish a sufficient nexus between the school and the student's profile since his use of the district's website did not constitute entering the school (off-campus speech); and
- c. the district was not empowered to punish his out of school expressive conduct under the circumstances.

The Court of Appeals acknowledged that there is case precedent (e.g., *Bethlehem, Wisniewski* and *Doninger*) to allow schools to punish expressive conduct that occurs outside the school as if it occurred inside the "schoolhouse gate" under certain very limited circumstances but that those circumstances were not found in the *Layshock* case.

5. **District Discipline for Off-Campus Conduct Upheld: *J.S. v. Blue Mountain School District*** (M.D.Pa. 2008), 2008 WL 4279517.

In March of 2007, a student used a home computer during non-school hours to create a MySpace profile of her middle school principal. The profile indicated the principal was a pedophile and a sex addict who enjoyed hitting on students and their parents. The profile's "url" included the phrase "kids rock my bed." A picture of the principal, lifted from the district's website, was also posted on the MySpace profile. At some point, the profile was set to "private," which required permission from the profile's creator for a person to view the profile. As word of the site

spread through the school, it eventually came to the attention of the principal, who determined the student responsible for the creation of the profile. The principal determined the student had violated school policy by falsely accusing a school staff member and using copyrighted material without permission. The student received a ten-day out-of-school suspension (although apparently allowed to get credit for assignments brought to her home) and did not appeal the discipline.

The student and her parents sued claiming the First Amendment prohibited the school from disciplining the student since the profile was non-threatening, non-obscene, and a parody. They also argued that the school was prohibited from disciplining a student's out-of-school conduct that did not cause a substantial disruption of classes or school business. The parents also alleged that the school's actions violated their rights as parents to determine how to best raise and discipline their child in violation of the Fourteenth Amendment. Plaintiffs sought a restraining order and a preliminary injunction, which were denied.

After reviewing the standards enunciated in *Tinker*, *Bethel*, *Hazelwood*, and *Morse*, the court determined that the language at issue was "vulgar, lewd, and potentially illegal speech that had an effect on campus." Although the speech did not cause a substantial disruption of the school, the court held that the school had not violated the student's First Amendment rights. The court further held that the school had the right to discipline the student even though the website was created off campus. The court noted that the language in this case was much more vulgar and offensive than that involved in *Layshock*. The court granted defendant's motion for summary judgment and dismissed the case.

In its curious decision, the court likened the MySpace parody here with cases involving students "flipping off" a teacher or faculty member at the mall. In sidestepping the recent *Morse* case, the opinion appears to be an attempt to forge a new angle for attacking disrespectful off-campus Internet behavior somewhere between *Tinker* and *Fraser*.

On appeal in 2010, the Third Circuit reviewed the district court's decision and held that the potential impact of the MySpace profile's language alone was enough to satisfy the *Tinker* substantial disruption test.

In its opinion, the Third Circuit held on February, 4, 2010, that "off-campus speech that causes or reasonably threatens to cause a substantial disruption or of material interference with a school need not satisfy any geographical technicality in order to be regulated pursuant to *Tinker*."

Importantly, the court made the distinction that its decision was based on the "significant risk that the conduct would cause a substantial disruption" and NOT the "vulgarity of the MySpace page."

Curiously, the court's opinion focused entirely on a *Tinker*'s "substantial disruption test" analysis and avoided the *Fraser* "vulgarity test" analysis altogether even though its companion case, *Layshock*, had somewhat similar facts but that School District's arguments stemmed from *Fraser*, not *Tinker*.

6. *J.S. v. Blue Mt. Sch. Dist.* 2011 U.S. App. LEXIS 11947 (3<sup>rd</sup> Cir. 2011) and *Layshock v. Hermitage Sch. Dist.* 2011 U.S. App. LEXIS 11994 (3<sup>rd</sup> Cir. 2011)

**Student's display of webpage at school did not cause a substantial disruption to the school environment and, therefore, the school district cannot discipline the student.**

In these decisions involving all of the judges (not just the standard three-judge panel) from the U.S. Third District Court of Appeals, the court resolved a conflict between two different three-judge panels of the court from two separate cases. In *Layshock v. Hermitage School District*, a student used his grandmother's computer to create a fake webpage that appeared to belong to a principal. The only school resource used was the principal's picture from the school's website, which the student copied and inserted into the fake webpage. The student displayed the webpage for students at school. The three-judge panel that originally heard the case decided that the school district could not discipline the because the display of the webpage in class did not cause a substantial disruption of the school environment. Absent this, disciplining the student for speech violated the First Amendment.

A different three-judge panel reached the opposite result based on similar facts in the original *J.S. v. Blue Mountain School District* case, holding that the district could discipline the student. The court did not allow the discipline because the student's publication of the website caused a substantial disruption in the school environment. Instead, the panel

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allowed the discipline because it found that school officials had a reasonable fear of potential future disruption if publication of the fake website went unchecked.

The court vacated both opinions and ordered the cases reargued to the entire court.

In the second round of *J.S. v. Blue Mountain*, the court (by an 8 to 6 vote) determined that the district could not discipline the student. The majority agreed that a district did not need to wait to discipline a student until speech actually caused a substantial disruption to the school environment. The majority agreed that a district could discipline a student based on a "reasonable forecast that a substantial disruption or material interference [with the educational environment] will occur." The majority, however, concluded that the district's fear of future disruption was merely an "undifferentiated fear or apprehension of [potential] disturbance," not a "reasonable forecast" of potential disruption.

The majority viewed the fake website to be "so outrageous that no one could have taken it seriously" and there was no evidence that any one did. The court stated that if no one could believe the fake website was really the principal's, it was not reasonable to believe that the content of the website might cause a disruption in school (i.e. cause students or school personnel to be upset with how the principal purported to portray himself and others on the webpage).

The minority simply viewed the webpage differently, stating that its content could have caused school personnel to reasonably forecast that the portrayal of the principal could result in disruption by causing students or school personnel to believe the principal had disturbing personal habits and views.

In the new decision in *Layshock*, the court again held the district could not discipline the student. The school district conceded that the publication of the fake webpage did not cause a substantial disruption of the school environment or cause it to reasonably foresee such a disruption. The school stated it had disciplined the student solely for *creating* the webpage, which happened at home.

7. **FINAL: United States Supreme Court Decides Not to Review Two Free Speech Cases Involving Student Internet Speech Critical of School Administrators.**

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On January 17, 2012, the U.S. Supreme Court denied the request of two school boards to review the decisions of the U.S. Third Circuit Court of Appeals in *J.S. v. Blue Mountain School District* and *Layshock v. Hermitage School District*. In those cases, the court of appeals determined that the school boards lacked authority to discipline students who, using their home computers created fake web sites mocking their respective principals. The court of appeals concluded that the First Amendment's guarantee of freedom of speech insulated the students from discipline for off-campus speech because the speech did not cause a substantial disruption of the school environment and could not be viewed as reasonably likely to do so.

The school boards asked the Supreme Court to review the cases so that the Supreme Court could publish a rule outlining the scope of authority of school officials to discipline students for such off-campus speech. Although neither case involved internet speech targeting students, many in public education had hoped the Supreme Court would address that issue as well.

The reluctance of the Supreme Court to weigh-in on these critical issues will require schools to carefully weigh their exposure in extending the student code of conduct "off campus" for social media misconduct.

8. **District Discipline for Off-Campus Conduct NOT Upheld:**  
*Evans v. Bayer* (S.D. Fl. 2010), 2010 U.S. Dist. LEXIS 12560.

Katherine Evans was a senior at Pembroke Pines Charter High School when she created a group on Facebook about her teacher, Sarah Phelps. The group was entitled "Ms. Sarah Phelps is the worst teacher I've ever met" and its purpose was for others to express their dislike of Phelps. The posting was made after school hours from Evans' home computer, was not accessed at school and did not disrupt school activities.

The posting was removed after two days. Bayer, the school principal, later learned of the posting and suspended Evans from school for three days and forced her to move from her advanced placement classes into lesser weighted honors courses. Evans then brought suit.

The court held that First Amendment rights are stronger for public school students' off-campus expressions than on-campus expression. Because Evans had made the posting at home, without any on-campus disruption,

and without showing it to others at school, the court found that the posting was made off-campus. The court held that Evans' speech was protected by the First Amendment.

9. **When is a Parody Not a Parody? – *Barnett v. Tipton Cty. Bd. of Educ.*** (W.D. Tenn. 2009), 601 F.Supp.2d 980.

Two high school students created fake MySpace profiles of their assistant principal and a coach. The profiles contained pictures and biographies of the assistant principal and the coach copied from the board's website, along with sexually suggestive comments about female high school students. The school first learned about the profile of the assistant principal through phone calls from a concerned parent and a local reporter who believed that the profile was real and that the assistant principal had engaged in inappropriate communications with high school students. The administration conducted an investigation and learned that the students had created the profiles and that one of the students had accessed one of the fake profiles during one of his classes in the school's computer lab. As a result of the investigation, the school suspended the students for eight and eleven days.

The students brought suit against the board and administrators alleging that their First Amendment rights were violated when they were disciplined for the fake profiles. The court found that the First Amendment protects "parodies that involve speech that cannot reasonably be understood as describing actual facts about [the subject of the parody]." The court found that the students offered no evidence to support their contention that a visitor to the websites would understand them to be parodies and not describing actual facts. Further, visitors to the fraudulent website believed it was authentic and that the assistant principal had engaged in inappropriate behavior. Based on this analysis, the court dismissed the First Amendment claims of the students against the school board and administrators.

10. **First Amendment Rights Violated by Discipline for Posting Vulgar Photos Online – *T.V. Smith-Green Cnty. Sch. Corp.*** (Aug. 10, 2011), N.D. Ind. No. 09-290, unreported.

During a summer slumber party, two female students bought phallic-shaped rainbow colored lollipops and took numerous photos of themselves sucking on the lollipops. The students then posted pictures to their MySpace and Facebook accounts. Subsequently, a parent brought

printouts of the photos to the superintendent, reporting that the photos were causing “divisiveness” among the girls on the volleyball team.

Both students were suspended from participating in extracurricular activities for the school year, a sanction that resulted from the school’s code of conduct that stated “if you act in a manner in school or out of school that brings discredit or dishonor upon yourself or your school, you may be removed from extracurricular activities for all or part of the year.” The two students brought a claim against the district, alleging that it had violated their First Amendment rights and that the policy the district relied on to impose the discipline was unconstitutionally overbroad and vague.

The district court granted the students’ motions for summary judgment on both the free speech and overbreadth and vagueness claims, holding that regardless of whether the students were being disciplined for the conduct itself, posing in a sexually suggestive manner with the phallic lollipops, or posting photos of the poses online, “each of those possibilities qualified as ‘speech’ within the meaning of the First Amendment.”

In addressing whether the speech was protected by the First Amendment, the court determined that while it was crude, provocative and raunchy, this expression was not obscene or pornographic enough that would exempt it from the protections of the First Amendment. In so doing, it rejected the district’s reliance on *Bethel School District v. Fraser* (1986), 478 U.S. 675. In that case, the school was upheld in disciplining student speech (a distasteful nominating speech for a classmate) because the student’s conduct amounted to lewd, vulgar, or offensive speech. The district’s reliance on *Fraser* was misplaced it does not apply to off-campus speech.

As to the application of *Tinker*, the court implied that *Tinker* applied to off campus speech, but then concluded that the facts did not support the conclusion of “reasonable forecast of substantial disruption” to the operation of the school. As a result, the speech was not susceptible to regulation through the code of conduct under the *Tinker* standard.

Finally, the court found the code of conduct provision that served as the basis for the discipline to be overbroad and vague.

11. Targeted School Employees Fight Back:

a. *A.B. v. Indiana* (2008), 885 N.E.2d 1223.

When the 2005-2006 school year began, A.B. was a student at Greencastle Middle School, where Shawn Gobert had been principal for 13 years. Sometime before February 2006, the student transferred to a different school. In February 2006, the principal learned from some of his students of a vulgar tirade posted on MySpace.com that apparently targeted his actions in enforcing a school policy.

*hey you greencastle s\*\*t. what the f\*\*\* do you think of me know (sic) that you cant (sic) control me? huh? ha ha ha guess what ill (sic) wear my f\*\*\*ing piercings all day long and to school and you cant (sic) do s\*\*t about it! Ha ha f\*\*\*ing stuping b\*\*\*tard.*

*die...gobert...die*

The principal discovered that a parody profile of him had been created. It was on this fake MySpace page that A.B. had posted vulgarities directed at the principal. A.B. also created her own MySpace “group” page and titled it with an expletive directed at the principal and the school (“F\*\*\* MR. GOBERT AND GC SCHOOLS”).

Juvenile delinquency adjudication proceedings were initiated against the student. The Indiana Supreme Court analyzed the facts of the case to determine whether, if the student were an adult, her postings would meet the definition of harassment. The court overturned the decision of the trial court and found that A.B.’s postings did not constitute harassment because she did not have the requisite intent to harass, annoy or alarm the principal when she made the postings. Rather, the court observed that the student merely intended to amuse and gain approval or notoriety from her friends and/or to generally vent anger for her personal grievances.

b. Eric Trosch, the high school principal in the *Layshock* case who was the subject of many unflattering parody profiles on MySpace, brought an action for defamation of character against the four students who created the profiles. In November of 2008, Trosch

dropped his claims against three of the defendants, leaving only Layshock as a defendant. This action is still pending.

- c. In *J.S. v. Bethlehem Area School District* (2002), 569 Pa. 638, 807 A.2d 847, a teacher who was the victim of the vicious student web page was successful in obtaining a significant civil judgment against the student and his parents.

12. School Employees are not the only ones targeted by social media:

- a. **Student's Out-of-School Cyber Speech to Classmate, Threatening to Kill Specific Students at School, is Not Protected by the First Amendment. Even if Such Speech Were Protected, the School Can Discipline the Student Because the Out-of-School Speech Caused a Substantial Disruption of the Educational Environment – *D.J.M. v. Hannibal Public School District*, 647 F.3d 754 (8<sup>th</sup> Cir. 2011).**

High school student sent instant messages ("IMs") after school from his home computer to a classmate on her home computer. Student's IMs discussed getting a gun, bringing it to school and shooting particular students. The classmate who received the IMs called an adult friend and forwarded the IMs to her. The adult then called the principal, and both the adult and classmate forwarded the IMs to the principal. The principal notified the superintendent, and they called the police. That evening, the police interviewed the student who sent the IMs, arrested him, and transported him to juvenile detention.

After the principal suspended the student, word of the IMs spread throughout the school community. Numerous parents called the superintendent to ask what was being done to keep students safe and whether their children were on the student's "hit list." The superintendent expelled the student for the remainder of the school year.

The student sued the Board and the superintendent, alleging the discipline violated his right to free speech. The trial court granted the superintendent's motion to dismiss based on qualified immunity. The trial court also granted the Board's motion for summary judgment, holding that the student's speech was a "true threat" that was not protected by the First Amendment, and that

even if the speech were protected by the First Amendment, the Board could discipline the student for his speech because it caused a substantial disruption to the educational environment. Student appealed the grant of summary judgment to the Board.

The court of appeals affirmed, holding that the student's message was a "true threat" that was not protected by the First Amendment. A "true threat" is a "statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another" that the speaker communicates to "the object of the purported threat or to a third party."

Because the Supreme Court has not had occasion to review a free speech claim under a "true threat" analysis, the court of appeals also applied *Tinker*, noting that the Supreme Court in *Tinker* contemplated a school disciplining a student for "out-of-class" speech if that speech caused a substantial disruption to the school environment. The appellate court agreed with the trial court that the student's threat caused a substantial disruption to the school environment because administrators had to address the concerns of numerous parents and provide extra security at school.

- b. **One Student Telling Another That the Other Student's Views or Conduct Will Cause the Other Student to End Up in Hell are Fighting Words That the School District May Regulate – *R.Z. v. Carmel Clay Schools*, 2012 U.S. Dist. LEXIS 50945 (S.D. Ind. 2012).**

A male student complained to the bus driver that a female student on the bus, R.Z., had repeatedly told him that his brother was going to Hell because his brother was gay. Rather than single R.Z. out, one morning the bus driver lectured all of her riders that they should embrace diversity and stop criticizing other students for their differences and different viewpoints, including differences in religious beliefs. The bus driver was especially critical of students telling others that they would go to Hell for holding certain views. The bus driver noticed that R.Z. was listening to her iPod during most of her speech, so after completing her afternoon run, she drove her bus back to R.Z.'s house and asked R.Z. and her older sister to get back on the bus to talk. The bus video system recorded the conversation that followed.

The bus driver accused R.Z. of telling the male student that the student's brother was going to Hell. R.Z. denied this, but acknowledge she told the student that she did not support President Obama because the President supported gay marriage and abortion, which were contrary to R.Z.'s religious beliefs. R.Z. also said she told the student that Obama's presidency would cause "gays to rule the world" and that God "made Adam and Eve, not Adam and Adam." The situation deteriorated after R.Z.'s mother joined the discussion, and R.Z.'s mother told the bus driver that R.Z. would no longer ride the bus. The bus driver told R.Z. that if she could not be tolerant of others, she belonged in a parochial school.

R.Z. and her parents sued the school board and the bus driver for violating R.Z.'s right to free speech and free exercise of religion, claiming that the bus driver's speech, both to all of the students on the bus and later with R.Z. and her sister, was retaliation against R.Z. for expressing her political and religious beliefs, and was evidence of a board policy against free expression of beliefs.

The court granted the board and bus driver summary judgment on the free speech claim. The court applied *Tinker*, which allows schools to regulate student speech that materially and substantially interferes with the provision of educational services, or that "collides with the rights of other students." The court noted that the Seventh Circuit Court of Appeals, which includes Indiana, previously held that a school could discipline one student for telling another student that the latter was "going to Hell" because these were "fighting words" which could be regulated.

The court also based its decision on R.Z.'s failure to allege any adverse action based on her speech, and that no reasonable jury could construe the bus driver's speech to express board policy. The court did not consider R.Z.'s statements about "gays ruling the world" and the nature of God's creation because there was no evidence that the bus driver ever heard those comments.

The court also granted the board and bus driver summary judgment on the free exercise of religion claim. The First Amendment prohibits the government from infringing on a person's religious beliefs or practices. The court held that to the extent the bus driver's comments could be construed to be critical of R.Z.'s

religious beliefs, the comments did not cause a substantial burden on R.Z.'s ability to express or practice her religious beliefs.

13. Students aren't all "talk."
  - a. **School Board May Not Prohibit Students from Wearing T-Shirts with an Anti-Homosexual Message that is not "fighting words" Unless There is Evidence that the Message is Likely to Cause a Substantial Disruption in School – *Zamecnik v. Indian Prairie School District*, 2011 U.S. App. LEXIS 3874 (7th Cir. 2010).**

A high school principal allowed students to participate in the "Day of Silence," an annual event meant to show support to homosexual students. Some students and teachers wore t-shirts on the Day of Silence with the slogan "Be Who You Are." The next day, other students wore t-shirts with the slogan "Be Happy, Not Gay." The principal inked out the words "Not Gay" on the students' shirts, ruling that the slogan violated the board's prohibition against "derogatory comments" that refer to race, ethnicity, religion, gender, sexual orientation, or disability.

The students obtained an injunction from the district court prohibiting the school from prohibiting students from wearing the "Be Happy, Not Gay" shirts. The board appealed, but the court of appeals affirmed, holding that prohibiting students from wearing the shirts violated their First Amendment right to free speech.

The court of appeals stated that although a board can ban lewd, vulgar, obscene, or plainly offensive speech from school, the phrase "Be Happy, Not Gay" was not such speech. Nor did the court find that the phrase qualified as "fighting words," speech that by its very utterance would be likely to cause a physical confrontation (the court used the phrase "homosexuals go to Hell" as an example of fighting words that the board could prohibit). The court relied on *Tinker v. Des Moines Ind. Comm. Sch. Dist.* to determine that the board could ban the anti-homosexual phrase only if it could present facts that might reasonably lead school officials to determine that the slogan was likely to cause a substantial disruption in school. Here, the board failed to present any evidence that the speech would cause any disruption in school.



The court of appeals seemed particularly troubled by the board's establishment of a day specifically meant to show support for homosexuality while, at the same time, prohibiting speech that in an "only tepidly negative" manner expressed disapproval of homosexuality. The court stated: "a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality."

- b. **School Board May Prohibit Display of the Confederate Flag When There is a History of Disruption of the Educational Environment Associated with Such Display; the Board Need not Demonstrate that Past Display of the Confederate Flag Actually Caused Disruption – *Defoe v. Spiva*, 625 F.3d 324 (6th Cir. 2010).**

A Tennessee school district's code of conduct prohibited students from wearing clothing or carrying accessories that displayed racial or ethnic slurs or symbols; gang affiliations; vulgar, subversive, or sexually suggestive language or images; or promoted products that students cannot legally purchase, such as alcohol, tobacco, or illegal drugs. The principal suspended the student from school for wearing a Confederate flag belt buckle after giving the student several warnings about such attire. The student sued, claiming the board's rule violated his First Amendment free speech rights. School officials testified that from the time the district was integrated in 1956, there had been numerous incidents involving the display of racially charged symbols, including the Confederate flag, as well as racial insults, that had disrupted school. The district court granted summary judgment to the school board and administrators, and the student appealed.

The three judge panel of the court of appeals unanimously affirmed judgment in the board's favor. The court of appeals held that the testimony of school officials that there was a history of racial conflict in the district, including incidents involving the Confederate flag, satisfied the standard from *Tinker v. Des Moines Ind. Comm. Sch. Dist.* In *Tinker*, the Supreme Court held that school officials can regulate speech only when they reasonably believe that the speech will substantially and materially interfere with schoolwork or discipline. In *Defoe*, the court of appeals held that school officials need not demonstrate that a past display of the

Confederate flag was directly responsible for any past substantial and material interference.

If this were all the court of appeals said, this case would simply place the Sixth Circuit court in the same place as other courts of appeal. What is interesting about this case is the concurring opinion written by one of the three judges who granted the board judgment. A second judge in the three judge panel concurred with the author of the concurring opinion, but did not join the opinion. If the concurring judge had joined the opinion of the author of the second opinion, the concurring opinion would have become the majority opinion, and new law in the Sixth Circuit.

The judge who authored the concurring opinion used the Supreme Court's 2007 opinion in *Morse v. Frederick* (the "BONG HiTs 4 JESUS" case) to suggest that after *Morse*, boards have much greater latitude to restrict student speech than afforded by *Tinker*. In *Morse*, the Court gave the board discretion to ban what could be interpreted as a pro-drug message without the need to demonstrate that past pro-drug speech had caused any past substantial and material interference with school work or discipline. Instead, the Supreme Court justified the ban on pro-drug speech because "[t]he special characteristics of the school environment and the governmental interest in stopping student drug use -- reflected in the policies of Congress and myriad school boards...allow schools to restrict student expression that they reasonably regard as promoting illegal drug use." The concurring opinion in *Defoe* stated that this same rationale applied to racial tension: a board should be permitted to regulate speech that could reasonably be interpreted to promote racial division, such as display of the Confederate flag, without any showing of past racial discord associated with such display.

- c. **School District May Not Prohibit Student From Wearing to School a T-shirt Stating "Jesus is Not a Homophobe" – *Maverick Couch v. Wayne Local School District*, U.S. District Court for the Southern District of Ohio (Case No. 1:12-cv-00265 May 21, 2012).**

High school student wore to school a T-shirt displaying the Christian fish symbol with a rainbow-colored interior and the phrase "Jesus in Not a Homophobe." The principal ordered the

student to turn the shirt inside-out, which the student did. The student wore the shirt again a week later, which prompted the Principal to threaten the student with discipline if he wore the shirt a third time. The principal or board legal counsel wrote student and his parents a letter stating that the student could not wear the T-shirt to school because the phrase was "sexual in nature and therefore indecent and inappropriate in a school setting." Student sued the Board and Principal, alleging that he had a First Amendment free speech right to wear the T-shirt.

It appears from the district's letter to parents and student explaining why student could not wear the T-shirt that the district conceded early on that the message on the T-shirt did not cause a substantial and material disruption of the school environment or an imminent threat of such a disruption. Instead, the district sought to censor the student's speech because it was lewd, vulgar, or obscene. A school district may prohibit student speech that is lewd, vulgar, or obscene, but otherwise the general rule is that student speech may not be suppressed unless it causes a substantial and material disruption of the school environment, or school officials have a reasonable belief that such a disruption is imminent unless the speech is censored or that discipline is necessary to prevent a substantial and material disruption.

The characterization of the phrase on the T-shirt to be lewd, vulgar, or obscene ("sexual in nature") was tenuous, and the parties quickly settled the lawsuit. The district agreed that the Student's right to wear the T-shirt was protected by the First Amendment, and the Board agreed to pay the Student's attorney \$20,000.00 in attorney's fees.

- d. **School District May Discipline Student for Essay Describing Student's Wish to Blow Up the School and Teachers – *Cuff v. Valley Central School District*, 2012 U.S. App. LEXIS 6024 (2<sup>nd</sup> Cir. 2012).**

Teacher assigned her fifth grade students to write an essay about a wish they had. The teacher told the students they could write about any wish they wanted. One student wrote an essay describing his wish to "blow up the school with the teachers in it." Before the essay was turned in, a classmate read it, became worried, and alerted the teacher. When the teacher asked the

student if he really wanted to do what he described in the essay, the student remained serious and refused to answer. The teacher sent the student to the principal's office.

The student had a history of drawing violent images with violent commentary, as well as a history of discipline for pushing other students. The principal, assistant principal, and school psychologist had previously been involved with the student as a result of his behaviors. Although the student told the principal that his essay was a joke, the principal suspended him out-of-school for six days.

Student's parents sued the school district and principal, alleging that the discipline violated the student's free speech rights. The trial court granted summary judgment to the school and principal, and parents appealed.

The appellate court affirmed. The court first noted that school officials deserve wide latitude when dealing with threats of violence by students. The court applied *Tinker*, holding that discipline was warranted because school officials had a reasonable belief that substantial disruption of the school environment might occur if the student's statement went unpunished. The court described the potential substantial disruption to be other students copying or escalating the student's behavior if it went unpunished, leading to a substantial decrease in discipline, an increase in behavior distracting students and teachers, and "tendencies to violent acts."

The court also indicated that a substantial disruption in the school environment may have actually taken place: the student's drawing scared a classmate, causing a disruption in the classmate's learning when the classmate stopped her school work to alert the teacher.

14. What's happening now?

- a. ***Tinker Standard Applies to Student Speech in Elementary Schools – K.A. v. Pocono Mountain School District***, 710 F.3d 99 (3rd Cir. 2013).

The court held that a school district could not prohibit an elementary school student from distributing invitations to her classmates to a party at her church because there was no evidence

that the distribution would cause a substantial disruption. A fifth-grade student attempted to hand out invitations to her classmates during non-instructional time for a Christmas party at her church. The student claimed that "she wanted to hand out the invitations to share her religious faith with her classmates." Although students are typically permitted to distribute invitations to events and parties before and after class, the student was told that the principal would have to pre-approve her flyer. The principal, as well as the superintendent, relying on school district policy, refused to approve the invitation and therefore the student was prohibited from distributing it. The student's father filed suit against the school district for violating the First Amendment by denying the student permission to distribute the flyer.

The district court held that the school violated the First Amendment because, under the standard established in *Tinker*, the school could not articulate a specific and significant fear of disruption if the student had distributed the invitations. On appeal, the court affirmed. First, the appellate court determined that the *Tinker* analysis was the proper standard to use when a student is expressing herself in school, not the forum analysis standard that applies when an outsider attempts to speak in public schools. Second, the court sought to clarify student speech in the context of elementary schools, and determine whether age-related developmental, disciplinary, and educational concerns should allow schools additional authority to limit student speech. The court found that, although a school's authority to control student speech in an elementary setting is clearly greater than in a high school setting, the *Tinker* analysis is still appropriate to evaluate the constitutionality of speech of younger students. The *Tinker* analysis has sufficient flexibility to accommodate the educational, developmental, and disciplinary interests at play in the elementary school environment.

The court then proceeded to apply the *Tinker* test to the case at hand, which only permits schools to limit student speech when the speech will substantially disrupt or interfere with the work of the school or the rights of other students. The court found that there was insufficient evidence that the distribution of the invitations would have caused a substantial disruption or would have interfered with the rights of other students. The school failed to present evidence that the flyers were likely to cause the student to

be ridiculed or bullied, that the distribution of the flyers would disrupt the school environment because the student sought to distribute them during non-instructional time, or that there would be a misperception that the school was sponsoring a religious-themed gathering.

Finally, the court addressed the issue of whether the forum analysis standard, rather than *Tinker*, should be used when a student is seeking to distribute materials prepared by an outside organization. The court held that the fact that the invitations originated from a particular church and were not technically prepared by the student did not change the analysis. The speaker is still the student who is choosing to bring the invitations to school, not the church.

b. **School Can Require a Student to Remove a "Blessing" from Her School Ceremony Speech – *A.M. v. Taconic Hills Central School District*, 2013 U.S. App. LEXIS 2440 (2d Cir. 2013).**

By virtue of her student council co-presidency, an eighth-grade student had the opportunity to briefly address students, parents, and staff at the middle school's "moving-up" ceremony. Before the ceremony, the student asked a teacher to review her speech for punctuation and grammar. The final sentence read, "[a]s we say our goodbyes and leave middle school behind, I say to you, may the LORD bless you and keep you; make His face shine upon you and be gracious to you; lift up His countenance upon you, and give you peace." The reviewing teacher relayed the language to the principal, who asked the student to remove the sentence because of the potential that listeners will perceive it as school endorsement of religion. The student refused. The district's superintendent, after seeking the advice of counsel, then notified the student that she could not give her speech unless she removed the sentence. She complied, and omitted the final sentence from her address. The student then sued the school district for infringing upon her First Amendment right to free speech (she did not make a corresponding freedom of religion claim). The district court granted the school district summary judgment; the appellate court affirmed.

To determine whether the school violated the student's right to free speech by ordering her to remove the final sentence, the appellate court opted for the more lenient *Hazelwood* standard applicable to school-sponsored speech rather than the stricter *Tinker* standard

used for personal student speech in school. The court held that observers of the speech would reasonably perceive it as a school endorsement of religion because the ceremony (1) was a school event, (2) was held at the school, (3) was operated and funded by the school district, (4) and featured event-specific décor prominently displaying the school's name and insignia. Thus, the court set aside the *Tinker* standard for personal student expression and instead applied a standard that permits editorial control over student speech if the control reasonably relates to a legitimate pedagogical concern.

The court of appeals noted that the stricter *Tinker* standard would control if the school engaged in viewpoint discrimination. But the Court found the school's conduct constituted only content discrimination because it sought to remove the general subject matter of religion rather than a specific religious ideology or view. The court focused on the sentence's purely religious nature along with the student's admitted intent to give a "blessing." Because the school was not prohibiting the speech based upon the viewpoint expressed, the school only had to act reasonably in limiting the student's speech. The school did so by acting on the legitimate pedagogical concern of preventing an Establishment Clause violation.

- c. **Teacher Violates Student's First Amendment Right by Disciplining Him for Stating that He Could Not "Accept Gays"** – *Glowacki v. Howell Public School District*, 2013 U.S. Dist. LEXIS 85960 (E.D. Mich. 2013).

A federal district court in Michigan held that a teacher who removed a student from class for stating that he did not accept gays because of his religious faith violated the student's First Amendment right to free speech. In 2010, on the high school's "Anti-Bullying Day," a teacher engaged his students in a discussion about bullying, and showed a short video about an individual who committed suicide because he was bullied due to his sexual orientation. In response, one student told the teacher that he did not "accept gays" because he was Catholic. The teacher told the student that it was fine if his religion opposed homosexuality but stated that saying such things in class was inappropriate. When the student repeated his disapproval of homosexuality, the teacher threw him out of class and wrote up a

referral for unacceptable behavior. Based upon the incident, the school district conducted an investigation, and decided to remove all records of any discipline from the student's file. The school district also issued the teacher a reprimand, suspended him for one day, and required him to participate in First Amendment training.

The court began its opinion by noting that public schools must balance the need to provide a safe environment for students while fostering an environment that tolerates all viewpoints, even those that are unpopular. The court also noted that this case highlights the tension between anti-bullying policy and free speech rights. The court determined that because the incident involved purely student speech, *Tinker* provides the framework for determining whether the speech restriction comports with the First Amendment. Under *Tinker*, public schools can regulate student expression when the speech substantially disrupts school activities or impinges upon the rights of other students. Courts also look to whether the school officials are targeting truly harassing speech and not simply unpopular opinions, and whether the policies discriminate on the basis of viewpoint.

Applying *Tinker*, the court held that the student's speech neither substantially disrupted school activities nor impinged upon the rights of other students. First, the student's speech did not cause a disruption of a sufficient magnitude to constitute suppression. Although one additional student chose to leave the classroom with the other student, and the student later apologized for the incident, the disruption was not material or substantial. Second, the student's statements, although unpleasant for some students, were not directed at any student and did not constitute bullying. The student was expressing an opinion, not attacking any individual student. While some students may have been offended, *Tinker* does not justify the prohibition of a particular opinion simply because it may result in hurt feelings. Finally, the court found that the teacher's decision to remove the student from the classroom was primarily motivated by his disagreement with the student's opinion, which constitutes impermissible viewpoint discrimination.

Finally, the court held that the teacher did not have qualified immunity and also held that the school district was not liable for the teacher's actions. Since the court found that the teacher violated the student's First Amendment rights, the court next



examined whether a reasonable teacher should have known that the student's protected speech could not serve as the basis for discipline. The court found that the teacher should have understood that his conduct of disciplining the student because of his viewpoint was unlawful, and therefore the teacher was not entitled to qualified immunity. Although the teacher could be held liable, the school district was not liable for the teacher's actions nor for failing to properly train employees or enact lawful policies. First, the fact that the school district subsequently chose to provide staff training on First Amendment rights did not prove that the school failed to train before the incident. There was no evidence that other free speech issues had arisen at school, and therefore it was not foreseeable that such an incident would occur. Second, the court held that the school district can enact anti-bullying policies that limit some expression if such policies focus on preventing substantial disruption of school activities or interference with the rights of other students. The school district's policies met these requirements and were therefore constitutional.

- d. ***Tinker Standard Applies When a Substantial Disruption Is Reasonably Foreseeable from Off-Campus Student Speech – S.J.W. v. Lee's Summit R-7 School District***, 696 F.3d 771 (8th Cir. 2012).

Two high school boys created a blog for the avowed purpose of discussing, satirizing, and venting about their high school. In the blog, the students posted several offensively racist and sexual remarks. One post named and degraded a female classmate, and others derided the school's black students. The students told administrators that they had only mentioned the site to only five or six friends. Nonetheless, word of the website quickly spread. School administrators connected the website to the boys and suspended them for ten days. The school board subsequently held two hearings before suspending the students for 180 days, while allowing them to enroll in another school during the suspensions.

The students sued the superintendent and the local school board, alleging that the defendants infringed upon their First Amendment right to free speech. The students also moved for a preliminary injunction to lift their suspensions. The district court granted the preliminary injunction, even though it expressly credited the teachers' testimony that the website created classroom disruptions.

On appeal, the Eighth Circuit reversed the preliminary injunction, ruling that the plaintiffs were unlikely to succeed on the merits of their case. Key to this ruling was the standard the appellate court held should apply to the boys' blog posts. The defendants argued that *Tinker's* substantial disruption standard should apply, while the students contended that this type of off-campus speech should be exempt from student discipline, whether or not it is aimed at school. The Eighth Circuit sided with the school, asserting that *Tinker* applies to off-campus student speech when it is reasonably foreseeable that the speech will reach the school and cause a substantial disruption to education.

Because the speech took aim at the high school, the posts could reasonably have been expected to reach and impact the school environment. The court deemphasized the speech's source location and instead emphasized its intended destination. Given the classroom disruptions the comments caused, the plaintiffs were unlikely to succeed on the merits under *Tinker*.

The Eighth Circuit added that the district court's findings did not support that the students would suffer sufficient irreparable harm to warrant an injunction. During their suspensions, the boys attended an accredited school within the district and earned credit to remain on track for graduation. The court rejected as speculative the boys' claimed harm to their potential music careers caused by missing high school band tryouts.

- e. **School District Can Prevent Students from Distribution Anti-Abortion Fetus Dolls that Caused Significant Disruption at School – *Taylor v. Roswell Independent School District*, 713 F.3d 25 (10th Cir. 2013).**

The court held that a school district could limit the distribution of controversial rubber dolls at school because the school district had significant evidence that the dolls caused a substantial disruption. Numerous high school students, who belong to a religious group called "Relentless," sought to distribute to their classmates 2,500 small rubber dolls designed to be a realistic representation of a human fetus. A card attached to the doll explained that the doll was the actual size and weight of a fetus at 12 weeks of gestation, and also included a scripture passage and the information for a local pregnancy resource center. The students, along with the

pastor of their church, set up tables in the lobby of the high school and began to distribute the rubber fetus dolls at 7:30am. They approached each student that entered the school and offered him or her a doll. When the assistant principal arrived to school, he observed several students throwing what appeared to be small rubber balls at the wall, which turned out to be the dismembered heads of the rubber fetus dolls. Several female students complained. The assistant principal, in response to the disruption, confiscated the remaining dolls and returned them to the Relentless students at the end of the day. At that point, the group had distributed roughly 300 of their 2,500 dolls. The school experienced significant doll-related disruptions during the school day. Many students tore the dolls apart, using the pieces as rubber balls or sticking them on pencil tops. Other students threw the pieces into the ceiling where they became stuck. Some students plugged the school toilets with the dolls while other covered the dolls with hand sanitizer and set them on fire. At least one male student removed the doll's head and inverted the body to make it resemble a penis. Students engaged in much of this disruptive activity during class. Some teachers complained that their teaching plans were derailed entirely, and one class cancelled a scheduled test because students became engaged in name calling and insults over the topic of abortion. The Relentless students sued, alleging that the school violated their First Amendment rights by preventing them from distributing the rubber fetus dolls to other students.

The district court judge granted summary judgment for the school district, and the court of appeals affirmed. Both courts used the *Tinker* standard to evaluate the constitutionality of the school's actions because the students were expressing their private views at school, and their expression was not part of any school-sponsored program. Under *Tinker*, a public school may not restrict student expression unless the school reasonably believes that the expression will materially and substantially interfere with the requirements of appropriate discipline in operation of the school or impinge upon the rights of other students. Schools may act to prevent problems as long as the administrators reasonably believe that the expression will lead to a substantial disruption; a disruption need not actually materialize. Applying *Tinker*, the court found that the school officials reasonably forecasted that the distribution would cause a substantial disruption, and the distribution did in fact cause such a disruption. The court noted

that the sheer number of dolls distributed, and the fact that they were made of a material that could easily be pulled apart and manipulated, created a strong potential for substantial disruption. The potential also came to fruition, with reports of substantial disruptions throughout the day including missed instructional time, damage to school property, and risks to student safety. Therefore, the school did not violate the First Amendment by preventing the students from distribution the dolls.

f. **Federal Court Lifts Ban on Controversial Jewelry – *B.H v. Easton Area School District***, 3rd Cir. No. 11-2067 (August 5, 2013).

Two Middle School students in Easton, PA purchased bracelets as part of the “I ♥ Boobies! (KEEP A BREAST)” Initiative, as part of a breast cancer awareness program. They wore the bracelets to commemorate friends and relatives who suffered from breast cancer and to promote awareness among their friends. The bracelets achieved the desired result, and other students joined the girls in wearing the bracelets at school. After several weeks, however, a few teachers questioned the appropriateness of the accessories in school: one teacher felt the message trivialized breast cancer, while others feared they would lead to offensive comments or invite inappropriate touching. The administration, believing that middle school boys didn’t need the bracelets as an excuse to make sexual statements, decided not to act, until several teachers sought permission to ask the students to remove the bracelets in class. This was despite the fact of no reported disruptions.

On the day before the school’s scheduled Breast Cancer Awareness Month activity, an assistant principal announced – over the school’s public-address system and student TV station - a ban on bracelets containing the word “boobies.” The school did not restrict the bracelets reading “check y♥urself (KEEP A BREAST). That same day, one student was ordered to remove her “I ♥ Boobies!” bracelet by the security guard. The next day, the two girls wore their “I ♥ Boobies! (KEEP A BREAST)”bracelets in observance of the school’s Awareness Day, and were again instructed by security to remove the bracelets. They refused along with another student, and were escorted to the female assistant principal’s office. The only detected disruption was a male student

announcing that he also loved boobies. In the assistant principal's office, one student removed her bracelet while the others stood firm, declaring their right to free speech. As a result, the two girls were suspended for one and a half days and forbidden to attend the Winter Dance. Thereafter, the bracelet ban spread to the rest of the school district.

The students sued the district in federal court, seeking a restraining order allowing them to attend the Winter Dance and to lift the bracelet ban. The school relented as to the dance, so the court denied the TRO. At the injunction hearing, the school alleged a dress code policy violation and possible sexual innuendo as justification for its action. Nonetheless, the court enjoined the bracelet ban and the school district appealed, citing its authority to restrict lewd, vulgar, profane or plainly offensive student speech.

In its review, the federal appeals court for the 3<sup>rd</sup> Circuit distinguished this case from other student speech cases, determining that the bracelets did not threaten the specific and substantial disruption required by the *Tinker v. Des Moines Independent Community School District* case. Likewise, comparing the facts to the test in *Bethel School District No. 403 v. Fraser*, the court found that the speech did not rise to the level of plainly lewd and could be interpreted as a permissible comment on social issues. Therefore, the appeals court affirmed the lower court's decision striking down the ban on the bracelets.

On October 29, 2013, the Easton Area School District Board of Education voted 7-1 to appeal the federal appeals court's decision to the United States Supreme Court.

But the story doesn't end there...

- h. **Lower Federal Court also Reviews Controversial Jewelry – *J.A. et al v. Fort Wayne Community Schools*, 2013 US Dist LEXIS 117667 (August 20, 2013).**

Just months after a Federal Circuit Court covering Pennsylvania, Delaware, New Jersey and the Virgin Islands ruled that certain breast cancer awareness jewelry could not be banned at school because the bracelet was only "ambiguously lewd" and not "plainly lewd", a federal trial court in Indiana went the other way.

This case stems from the actions of the Fort Wayne Community Schools and JA, is a senior this year at the District's North Side High School. At the time, the School's existing dress policy placed a ban on what it called "inappropriate" plastic bracelets that contained "messages that are solicitous, profane, or obscene," and promised to confiscate such inappropriate bracelets once known. Over time, the school accumulated a quite collection of bracelets, with such slogans as "I'm a free B\*&%ch," "Sexy," "Ask me about my wiener," "Bad Ass," and even "Save the Boobs."

The "I ♥ Boobies!" bracelet came to the school's attention when a male student began harassing a female student sporting the wristband. The school determined that the bracelet's terminology was "offensive to women and inappropriate for school wear." Since then, they confiscated a number of "I ♥ Boobies!" bracelets. JA was given a "I ♥ Boobies! (KEEP A BREAST)" bracelet as a gift from her mother, a breast cancer survivor. JA began wearing the bracelet in December, 2011. She wore the bracelet without incident for three months until March, 2012 when she was informed that her "I ♥ Boobies! (KEEP A BREAST)" bracelet conveyed a "lewd, vulgar, obscene and plainly offensive message" and had the gift confiscated.

The student filed an action in federal court seeking a permanent injunction allowing her to wear the bracelet at school. She argued that the bracelet promoted a breast cancer awareness message and claimed the school violated her right to free speech.

In order to get the permanent injunction, JA had to show that she 1) succeeded in the merits, 2) had no adequate remedy at law, 3) will suffer irreparable harm without injunctive relief, 4) the irreparable harm outweighs the harm the School would suffer if the injunction is granted, and 5) the injunction will not harm the public interest.

The School in turn argued that the student did not have a First Amendment right to wear the bracelet at school. The court, looking first to the standard in *Bethel School Dist No 403 v. Fraser*, which, in reviewing a school's ability to limit vulgar speech, recognized that schools are responsible for teaching students the "habits and manners of civility" essential to a democratic society. Interestingly, the trial court also examined the

District Court's opinion in *BH v. Easton Area Sch. Dist.*, which was upheld by the 3<sup>rd</sup> Circuit on appeal. However, the Indiana court felt the 3<sup>rd</sup> Circuit narrowed *Fraser* standard by finding that speech can only be limited by the school if it is plainly lewd or ambiguously lewd and cannot plausibly be interpreted as commenting on political or social issues. The Indiana court found that no one else was limited *Fraser* that way, and neither would they. Accordingly, the Indiana court disagreed with the Pennsylvania trial court and the 3<sup>rd</sup> circuit and found that, when it considered the age and maturity level of the student population at North High School, Fort Wayne Community Schools was justified in its action.

### III. HOW TO RESPOND TO INTERNET-RELATED STUDENT MISCONDUCT

#### A. A CHECKLIST FOR 2013

Although there is not a book containing "lawsuit-proof" answers for handling specific situations, one can obtain guidance by reviewing how courts decide cases involving similar issues or circumstances. Rather than reprint summaries of all of the cases in this widely-litigated area, the following provides a workable "checklist" for analyzing student discipline for Internet misconduct (web page, website, MySpace, Facebook, YouTube, blogs, etc.).

1. Carefully and thoroughly investigate the incident in question and fully identify the potential legal issues presented. Begin with these basic questions:
  - a. What kind of speech is involved (i.e., political, lewd, threatening, pro-drug, satirical)?
  - b. Why do we want/need to discipline (because it threatens the mission of the school vs. because I don't like being parodied on line)?
2. Review the student handbook to assure that there is clear language supporting an offense.
  - a. Language that is vague or overbroad and/or which fails to reasonably put a student on notice that conduct is a violation may not survive judicial scrutiny, particularly where the First Amendment is implicated.

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- b. This is true, despite the supportive language appearing in Ohio Revised Code Section 3313.661, which requires districts to have policies in place for suspension and expulsion and permits among the types of misconduct for such removals:

*[M]isconduct by a pupil that occurs off of property owned or controlled by the district but that is connected to activities or incidents that have occurred on property owned or controlled by that district and misconduct by a pupil that, regardless of where it occurs, is directed at a district official or employee, or the property of such official or employee.*

3. Apprised of this vital information, communicate with Board counsel whenever the First Amendment is involved. This may be the most important step in avoiding unnecessary litigation and/or adverse publicity.
4. Location, Location, Location: Assess whether the student’s speech occurred off campus, on campus, or both. There are significant ramifications that flow from this critical determination.
- a. In-school conduct. If the Internet was accessed and/or utilized at school to develop the “speech,” there is a dramatically increased chance of applying the code of conduct to such behavior.
- (1) The stronger the “nexus” between the school and the conduct, the greater the efficacy of the disciplinary response.
- (2) However, minimal use/access by a student (cutting and pasting a photo, accessing a non-approved website, etc.) will not remove First Amendment protections.
- b. If it is determined that significant use of the school computer (i.e., “in school conduct”) was involved, then apply the code of conduct to the offender in a measured fashion.
- (1) For example, if a website developed on the school computer is critical of the building principal (but not obscene, threatening, or defamatory), consider how you



would punish a student who engaged in similar conduct on school grounds.

- (2) However, be careful not to overreact simply because the District's AUP was violated. For example, if the speech in question is purely "political" – say the cyber-equivalent of Tinker's armband – and there is no substantial disruption of the educational environment, any attempt to extend punishment beyond the violation of the AUP may likely be met with a First Amendment challenge.
  - (3) By the same token, if it can be established that significant conduct occurred on school grounds and/or on the school's computer system, where there is significant disrespectful, lewd, obscene, threatening, "pro-drug," and/or defamatory speech, the use of a computer should NOT prevent an appropriate and significant disciplinary response.
- c. Where student Internet misconduct ("speech") occurs entirely or predominantly off campus, a school's ability to discipline the student is **significantly limited**, unless one or more of the following is present:
- (1) The website contains "true threat" speech, which can be defined as speech that would cause a reasonable person to interpret the alleged threat as a serious expression of intent to cause present or future harm. In a post-Columbine era, courts are much more likely to allow a school to reach out in relation to a cyber-threat of this nature. Contrast this, however, with the more popular "MySpace" parodies and satire, which are constitutionally protected where they cannot reasonably be interpreted to be stating believable facts.
  - (2) You have reliable proof of either an actual substantial and material disruption to the educational environment or there exists a provable concrete and particularized reason to anticipate that such a disruption would result from the student's speech.

- (a) Remember *Tinker* – “undifferentiated fear or apprehension of disturbance” is not enough to overcome the right to freedom of expression.
- (b) While it is not totally clear what a substantial disruption actually looks like, it would be critical for a school district moving solely upon this basis (off-campus behavior ) to have documented incidents of classroom unrest, palpable reactions by students and staff, and/or other data showing that normal operations (work and discipline, for example) were actually affected.
- (c) Specific and significant fear of disruption. As a practical matter, if discipline (in effect, censorship) under these circumstances is attempted before the speech actually makes it to the educational environment, there must be a well-founded fear of a genuine disruption that you are certain will substantially interfere with school operations or the rights of others.
  - i) Tread carefully here.
  - ii) Only if you have sustained previous disruptions through similar speech or experienced a prior incident within the district that is certain to be ignited or reignited by the publication of this speech should you act.
  - iii) For those with higher degrees of risk tolerance, there is a minority view that in order for a district to meet the *Tinker* standard (above) on predicting a disruption, one need only show that it was “reasonably foreseeable” that the student speech would materially and substantially disrupt the work and the discipline of the school. *Wisniewski v. Bd. of Educ. of Weedsport Central Sch. Dist.* (2nd Cir. 2007), 494 F.3d 34; *O.Z. v.*

- d. **In the absence of a substantial disruption, concrete prediction of a substantial disruption, or unprotected (true threat) speech, disciplinary action for off-campus expression (Internet or otherwise) is extremely risky business for schools.**
- (1) The U.S. Supreme Court held in *Morse v. Frederick* (2007) that it would NOT extend the holding of the *Fraser* decision (lewd, suggestive speech in school could be proscribed) to off-campus speech of a similar nature.
  - (2) However, after the *Morse* decision, a federal court in Pennsylvania determined that off-campus Internet speech by a student that was “lewd and vulgar” but that did not rise to *Tinker’s* level of substantial disruption, could nevertheless support a ten-day suspension.
    - (a) In *J.S. v. Blue Mountain School District*, 2008 WL 427951 (M.D. Pa., September 11, 2008) the court sidestepped the decision in *Morse* in upholding discipline for a student who – off campus – created a MySpace parody of her high school principal.
    - (b) In its curious decision, the court in *Blue Mountain* likened a MySpace parody with cases involving students “flipping off” a teacher or faculty member at the mall. The opinion attempts to forge a new angle for attacking disrespectful Internet behavior somewhere between *Tinker* and *Fraser*.
    - (c) The Third Circuit affirmed the district court's ruling but on different ground in *J.S. v. Blue Mt. Sch. Dist.* (3rd Cir. 2010), 593 F.3d 286 (see case above). The court of appeals held that the potential impact of the MySpace profile's language alone was enough to satisfy the *Tinker* substantial disruption test and did not delve into *Fraser* analysis.

- (3) Contrast this with the decision of a neighboring federal court in Pennsylvania in *Layshock* (W.D. Pa. 2007), where the judge rejected the application of the *Fraser* standard to an off-campus created MySpace parody of a principal (moderately less offensive than the one in *Blue Mountain*) and rejected a school's attempt to punish him for it.

In effect, the rule in *Fraser* may be deemed a subset of the more generalized principle in *Tinker*, i.e., that lewd, sexually provocative student speech may be banned without the need to prove that it would cause a substantial disruption to the school learning environment. However, because *Fraser* involved speech expressed during an in-school assembly, it does not expand the authority of schools to punish lewd and profane off-campus speech.

- (a) The Third Circuit affirmed the district court's grant of summary judgment to the student in *Layshock v. Hermitage Sch. Dist.* (3rd Cir. 2010), 593 F.3d 249, because the student's conduct did not disrupt the school, the district could not establish a sufficient nexus between the school and the student's profile since his use of the district's website did not constitute entering the school, and the district was not empowered to punish his out of school expressive conduct under the circumstances.

Nevertheless, the Third Circuit acknowledged that that there is case precedent (e.g., *Bethlehem Area Sch. Dist., Wisniewski*, and *Doninger*) to allow schools to punish expressive conduct that occurs outside the school as if it occurred inside the "schoolhouse gate" under certain very limited circumstances but that those circumstances were not found in the *Layshock* case.

- (4) Recommendation – These cases (including the plurality decision of the U.S. Supreme Court in *Morse*) point to the overall struggle courts are having adjusting to the incredible influence of the Internet. Nevertheless, while Pennsylvania federal courts have fought it out in the Third Circuit, we strongly urge restraint in attempting to extend

the *Fraser* decision (discipline for lewd, vulgar language in school) to address off-campus speech in the absence of a real on-campus disruption or concrete proof that such a disruption will occur.

The primary way to benefit from these cases is to look at how the courts analyzed the facts and applied the law. These cases are merely a resource. They should not be treated as controlling or how a specific set of facts will always be decided as there are specific court rules governing what, if any, effect a prior court's decision has on the court deciding your case.

B. CELL PHONES, TEXTING AND “SEXTING”

1. According to a number of recent surveys, nearly 20% of all teens have sent or posted nude or partially nude photographs of themselves either online or through text messaging. About that same number have received such a photograph either on a cell phone, via e-mail, iPod, and/or through a social networking website such as Instagram, MySpace or Facebook.
2. All too often, the end product of these originally “private” exchanges is the distribution of photographs throughout a child’s school – and beyond!
3. In the end, the result is often significant embarrassment and ridicule. In a few instances, student suicides have resulted.
4. As we all know, cell phones and other electronic communication devices can be used to:
  - a. Make and receive phone calls;
  - b. Send and receive text messages;
  - c. Take pictures;
  - d. Store phone numbers;
  - e. Receive voicemails;
  - f. Record the times of all incoming and outgoing oral and text communications;

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- g. Perform math calculations;
  - h. Download and play music, including ringtones;
  - i. Play games;
  - j. Access the Internet;
  - k. Receive and send e-mails;
  - l. Scan and transmit text and images;
  - m. Record videos; and
  - n. Many other functions.
5. Student Use of Cell Phones – Generally
- a. According to a 2012 study performed by the Berkman Center for Internet & Society at Harvard University (research program founded to address different problems of digital age), seventy-eight percent (78%) of teens have cell phones and almost half (47%) own smartphones. That translates into thirty-seven percent (37%) of all teens having smartphones – up from just twenty-three (23%) in 2011.
  - b. Twenty-five percent (25%) of teens are “cell-mostly” internet users and seventy-four (74%), ages 12-17, say they access the internet on cell phones.
  - c. “Cell phones make it a cinch to send or store test answers, or, with a few keystrokes, even search for hints on the Internet. In a 2002 survey by the Josephson Institute of Ethics, 74% of high school students admitted to cheating on at least one exam in the last year, up from 61% in 1992. Perhaps more troubling, almost half agreed with the statement: ‘A person has to lie or cheat sometimes to get ahead.’” (Flannery, Mary Ellen. “Cyber-Cheating,” *NEA Today*, November 2004).

- d. Students have used phones to record inappropriate comments or actions by teachers in the classroom and to videotape instruction – at times for parental review.
- e. Cyberbullying is made easier with cell phones, both through calling and text messaging. (See Section V., below for comprehensive discussion of cyberbullying).
- f. Some districts encourage the use of web-enabled cell phones to access posted homework, academic content and class assignments.
- g. Similarly, given the mandates of the IDEIA and Section 504, it is not inconceivable that cell phones and/or PDAs or other electronic communication devices may soon be required to be provided by districts as these items become less expensive and more easily accessed by disabled students. What then?
- h. “Policies restricting student possession of pagers and cellular phones on school property were first enacted by state legislatures in the late 1980s and early 1990s in response to concerns that students were carrying such devices to participate in gang activity or drug sales, as well as concerns that these devices served as a distraction in the classroom setting. However, in response to the use of cellular phones to contact family members during the events at Columbine High School in April 1999, the terrorist attacks of September 11, 2001, and in other emergency situations, some state education policies have been revised, revoking the statewide restrictions on use of such devices and permitting local boards to adopt policies limiting or prohibiting student possession of pagers and cellular phones on school property.” *Education Commission of the States, September, 2003 Report.*

6. State Law Requirements

- a. Ohio Revised Code Section 3313.753(B):

*The board of education of any city, exempted village, local, joint vocational or cooperative education school district may adopt a policy prohibiting pupils from carrying a pocket pager or other*

*electronic communications device<sup>1</sup> in any school building or on any school grounds or premises of the district. The policy may provide for exceptions to this prohibition as specified in the policy. The policy shall specify any disciplinary measures that will be taken for violation of this prohibition.*

*If a board of education adopts a policy under this section, the board shall post the policy in a central location in each school building and make it available to pupils and parents upon request.*

- b. School boards must create and disseminate policies regarding the use of cell phones to the students and the students' parents. With the rise of cyberbullying, boards may want to require parent and student signatures to allow a student to carry a cell phone at school.
  - (1) Since cell phones may be the only method of communication for some families during a busy day, some boards have felt compelled to prepare cell phone policies that attempt to accommodate the hectic lives of both parents and students.
  - (2) While the trend among state legislatures and school boards is to permit cell phones at school (but only to be used before and after school), each school has its own policies:
    - (a) Some policies allow students to bring cell phones to school, but mandate that the phones must be turned off and stored in the student's locker or the student's backpack during school hours. (i.e., the phones are not permitted to be visible during school hours).
    - (b) Some boards prohibit cell phones entirely.
    - (c) Some board policies permit students to use their cell phones only before school, at lunch, and after school; that way, parents can leave messages on the

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<sup>1</sup> Electronic communications device is defined as any device that is powered by batteries or electricity and that is capable of receiving, transmitting, or receiving and transmitting communications between two or more persons or a communication from or to a person. Ohio Revised Code § 3313.753 (A)(1).



cell phone and the student can check their messages at the appropriate times.

- (d) Some board policies restrict the use to before and after school only, and forbid lunchtime usage.
- (e) Some board policies require that phones be confiscated if used during prohibited times. Students are then required to call their parents explaining why their phone was confiscated and that the phone will only be returned to the parent.

7. Inappropriate Use of Cell Phones – The Bad, the Worse and the Ugly.

a. Text messaging and the “Sexting” Phenomenon

The National School Boards Association’s Council of School Attorneys published an article, “Sexting At School: Lessons Learned The Hard Way,” reporting that twenty percent (20%) of teens have sent or posted nude or semi-nude photos of themselves online or via text message:

- (1) Twenty-two percent (22%) of teens have received a nude or semi-nude photo of someone else.
- (2) Fifteen percent (15%) of teens have forwarded images to someone they only know online.

In April 2012, Pew Internet released results of their survey:

- (1) Half of teens who are texters send more than 200 texts a day, or more than 6,000 texts a month.
- (2) Sixty-four (64%) of all phone owning teens at school say they have texted in class while twenty-five (25%) have made or received a call during class time.

According to at least one study, eighty percent (80%) of 15-17 year olds have been exposed to hardcore porn multiple times, with the average age of Internet exposure to pornography being 11 years old. ([www.Internet-Filter-Review.com](http://www.Internet-Filter-Review.com))

- (1) Text messaging is sending short written messages to a device such as a cellular phone, PDA, or pager. Text messaging is used for messages that are no longer than a few hundred characters. The term is usually applied to messaging that takes place between two or more mobile devices. (www.webopedia.com). “Text-Speak” has found its way into the classroom.
  - (a) Teachers are catching terms such as “B4,” “nite,” “@,” “u,” “NE,” “NE1,” and other such abbreviations riddled through student work.
  - (b) Some school officials are concerned that this “language” will hurt the students’ ability to write and communicate since it has found its way into written and spoken language in the classroom.
8. “Sexting” (a combination of sex and texting) is the act of sending sexually explicit messages or photos electronically. Although sexting usually occurs through cell phones, it can also occur through e-mail, MP3 players, social networking websites, and other forms of technology.
  - a. Criminal implications:
    - (1) **“Illegal use of a telecommunications device”** – House Bill 132, proposed in April, 2009, if enacted, would prohibit a minor, by use of a telecommunications device, from recklessly creating, receiving, exchanging, sending or possessing a photograph or other material showing a minor in a state of nudity. It is **not** a defense that the material a minor creates or sends is of themselves.

H.B. 132 did not pass but was reintroduced during the 2011-2012 Regular Session as H.B. 53. Again, it did not pass. It has yet to be introduced this session.
    - (2) Ohio Revised Code Section 2907.323, **“Illegal Use of Minor in Nudity-Oriented Material or Performance”** – prohibits photography of minors in any state of nudity or transferring such material.

- (3) **Schools May Face Liability for Bullying Resulting from Sexting – *Logan V. Sycamore Cnty. Sch. Bd. of Educ.*, 780 F. Supp 2d 594, 599 (S.D. Ohio 2011).**

The impact of “sexting” hit home in Ohio through the Jessica Logan story. An 18 year-old Sycamore student sent nude photos to her boyfriend. After they broke up, the ex-boyfriend sent them to other students, who harassed her. No criminal case was filed because the female student was not a minor. After a reporter requested to interview the victimized student, the office passed on the reporter’s contact information to her. The student, after consultation with her parents, decided to take part in a televised interview on the subject of sexting. After the interview was aired, the harassment continued and allegedly intensified. Tragically, this episode ended with the student taking her own life. Thereafter, the victim’s parents filed actions against the students involved in the harassment, against the school resource officer, and against his employer, the city. After limited discovery was conducted, the parties moved for dismissal. The district court dismissed the claims against the office because it found that he had qualified immunity as he followed proper protocol, and because the student chose to participate in the televised interview of their own accord. The district court, however, permitted continued discovery against the school district to clarify the district’s policy and actions with regard to harassment.

- (4) **House Bill 116** – requires school districts to establish cyber-bullying policies and to annually teach teachers and inform parents about their overall bullying policies. It also requires them to teach students about the policies if state or federal funding is provided for that purpose. It was signed into law by Gov. John Kasich on February 2, 2012.

The bill was named in memory of Jessica Logan. The primary changes contained in H.B. 116 are:

1. The new law expands the definition of the term “harassment, intimidation, or bullying” to include an “electronic act” and defines “electronic act” as “an act committed through the use of a cellular

telephone, computer, pager, personal communication device, or other electronic communication device.”

2. The board’s policy must prohibit “harassment, intimidation, or bullying” on a school bus, too.
  3. The board’s policy must provide for:
    - a) the possibility of suspension of a student responsible for harassment, intimidation, or bullying by an electronic act;
    - b) anonymous reporting of “harassment, intimidation, or bullying;” and
    - c) a prohibition against making a false report of “harassment, intimidation, or bullying” and a disciplinary procedure for a student making a false report;
  4. The board must make a copy of its policy and a statement of the seriousness of bullying by electronic means available to students and their custodial parents and must provide each student’s legal guardian, each school year, a written statement describing its anti-bullying policy;
  5. The board must provide annual, age-appropriate instruction to students regarding its anti-bullying policy (if state or federal funds are appropriated for such training);
  6. The board must train its employees on its anti-bullying policy.\*
9. **Student Use of Cell Phones Goes Beyond Texting And “Sexting”**
- a. Cheating – With the advent of camera phones, the widespread use of text messaging, and cell phones equipped with Internet capabilities, cheating is a concern for school officials. Students who are caught using cell phones during an exam are often presumed to be cheating and are reprimanded in accordance with the school’s policy on cheating.

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A 2009 report from Common Sense Media included the results of a national poll conducted by Beneson Strategy Group, which found more than thirty-five (35%) of teens admitted to cheating with cell phones and the Internet. The cheating involved texting answers to one another during tests, etc.

- (1) Camera phones are used by students to take a picture of an exam they are taking and transmit that picture to a student who will be taking the same test at a later time.
- (2) Students text message each other during an exam to exchange answers.
- (3) Students access the Internet to find answers to exam questions or even access e-mail accounts that may contain documents that hold answers to the exam.

- b. Candid Photographs – Camera phones are also used to take inappropriate photographs of students that are then either posted on the Internet or printed and distributed in school. Embarrassing, inappropriate, and sometimes pornographic photographs taken with camera phones that are then posted on websites or otherwise distributed cause emotional harm to the student whose photograph was taken. In addition, indecent photographs and videos of educators are also showing up on the Internet.

Many schools expressly prohibit cell phones from being used in locker rooms and bathrooms because of concerns that some phones' camera features could capture students disrobing.

*Tun v. Whitticker* (C.A.7 2005), 398 F.3d 899. An Indiana high school student, Brandon Tun, was temporarily expelled for “allowing” another student to take pictures of him while he was showering in the locker room after wrestling practice. The expulsion was based on a violation of the school code for public indecency and possession of pornography. The student brought a 42 USC § 1983 action alleging that his constitutional right to substantive due process was violated.

Substantive due process involves the exercise of governmental power without reasonable justification. It is most often described

as an abuse of governmental power that “shocks the conscience.” The Court determined that the student’s substantive due process rights were not violated. The Court further held that while the school employees overreacted and gave an overly broad reading to the district’s behavior code, their actions did not shock the conscience.

- c. Fighting - School fights have gone high tech. Students are now using their cell phones to call or text message reinforcements.

Milwaukee Public Schools consider cell phones to be potential weapons. In one case, police were called and had to use pepper spray to break up a fight that swelled to about 20 family members on school grounds. Six students and three adults were arrested. The District now expels students who use cell phones to summon outsiders for a fight.

- d. Increased School Threats, Text Messaging Violence Rumors and School Closings – The National School Safety and Security Services is tracking more and more school incidents across the nation where rumors have disrupted schools and have even resulted in dramatic decreases in school attendances and even school closures due to fears of rumored violence. The issues of text messaging in particular, and cell phones in general, were credited with often creating more anxiety and panic than any actual threats or incidents that may have triggered the rumors.

In terms of school safety, cell phones have been used by students in a number of cases nationwide for calling in bomb threats to schools. In far too many cases, these threats have been difficult or impossible to trace since they have been made by cell phones. The use of cell phones by students during a bomb threat, and specifically in the presence of an actual explosive device, also may present some risk for potentially detonating the device as public safety officials advise school officials not to use cell phones, two-way radios, or similar communications devices during such threats. As reported by the National School Safety and Security Services, experience in crisis management has shown that regular school telephone systems become overloaded with calls in times of a crisis. While it recommends cell phones for school administrators and crisis team members as a crisis management resource tool, it is highly probable that hundreds (if not thousands) of students

rushing to use their cell phones in a crisis would also overload the cell phone system and render it useless. Therefore the use of cell phones by students could conceivably decrease, not increase, school safety during a crisis.

Cell phone use, texting, and other outside communications by students during a crisis also expedites parental flocking to the school at a time when school and public safety officials may need parents to be away from the school site due to evacuations, emergency response, and/or other tactical or safety reasons. This could also actually delay or otherwise hinder timely and efficient parent-student reunification. In extreme situations, it could thrust parents into a zone of potential harm.

#### IV. SOCIAL TECHNOLOGY AND FOURTH AMENDMENT IMPLICATIONS

##### A. CONFISCATING STUDENT CELL PHONES – 4<sup>th</sup> AMENDMENT ISSUES

1. **Introduction:** As we know from the landmark decision of the U.S. Supreme Court in *New Jersey v. T.L.O.*, school officials can conduct a search of students as long as the search is justified at its inception and reasonable in scope. The operative question is whether the official has reasonable grounds for suspecting that the student has or is violating the law or the student code of conduct. Any subsequent search must be reasonable and not excessively intrusive.
2. The unique problems posed by student-owned digital devices relate to the expectation of privacy individuals have in stored information on cell phones, etc. How far can/should an administrator go?
3. Administrators violated the 4<sup>th</sup> Amendment in *Klump v. Nazareth Area School District* (E.D. Pa 2006), 425 F. Supp.2d 622.

The student's high school has a policy that permits students to carry, but not use or display, cell phones during school hours. The student's cell phone fell out of his pocket and came to rest on his leg. Upon seeing the student's cell phone, his teacher enforced the school policy prohibiting the use or display of cell phones by confiscating his phone. Subsequent to the confiscation of the student's phone, his teacher, along with the assistant principal, began making phone calls with the student's cell phone. The teacher and assistant principal called nine other high school students listed in the student's phone number directory to determine whether they, too,

were violating the school's cell phone policy. The teacher and assistant principal also accessed the student's stored text messages and voicemail and held an instant messaging conversation with his younger brother (without identifying themselves as being anyone other than the student).

The student's parents met with the teacher, assistant principal and assistant superintendent regarding the cell phone confiscation. During the meeting, the assistant principal told the student's parents that while she was in possession of their son's phone, he received a text message from his girlfriend requesting that he get her a "f\*\*\*ing tampon." The term "tampon" is a reference to a large marijuana cigarette and prompted the assistant principal's subsequent use of the phone to investigate possible drug use at the school.

The student and his parents brought a lawsuit against the school district, the superintendent, the assistant principal and the teacher. The lawsuit asserted the following charges:

- Violations by all defendants of Pennsylvania's Wiretap Act which prohibits the interception, disclosure or use of wire, electronic or oral communications;
- Invasion of privacy on the grounds that the defendants published statements which placed the student in a false light;
- Defamation based on slander per se against the superintendent and the school district; and
- Violations of the student's Fourth Amendment right to be free from unreasonable searches and seizures as guaranteed under the United States and Pennsylvania Constitutions.

The court, upon defendants' motion to dismiss, determined that the student had no claim regarding communications intercepted and replied to by the teacher and the assistant principal. The Court further determined that because the school officials intercepted and replied to text messages *sent to the student* rather than being *originated by him*, their actions were not violations of the Pennsylvania Wiretap Act. However, the student's charges regarding the school officials' access to his stored text messages were not dismissed by defendants' motion. The court also determined that accessing stored phone numbers and call logs would not fall under Pennsylvania's Wiretap Act because they are not considered

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communications; the school district was immune from a claim of invasion of privacy by false light; if the superintendent acted outside of his authority, he could be held liable for false light and invasion of privacy (this claim was not dismissed); **the alleged action of the assistant principal and the teacher, calling other students from the student's cell phone, if proven at trial, would constitute an unreasonable search**; the student stated a valid cause of action for negligence against the assistant principal and teacher under Pennsylvania law; the student stated a valid cause of action against school officials in their individual capacities; and the student's parents asserted valid causes of action for negligence and punitive damages on their own behalf.

The fact that some of the student's claims survived the motion to dismiss is significant, particularly in the area of the 4<sup>th</sup> Amendment "search" and the potential for individual liability on the part of school officials.

4. **Dismissal Denied Where Student's Cell Phone Revealed Nude Photos and County Sought to Prosecute Based on Those Personal Photos – *N.N. V. Tunkhannock Area Sch. Dist.*, Case No. 3: 10-CV-1080, 2011 U.S. Dist. LEXIS 73637 (M.D. Pa. July 8, 2011).**

The plaintiff student's high school had a policy requiring cell phones to be turned off during the school day. The school's handbook outlined penalties for violating the policy, which ranged from confiscation to a one-day suspension. Despite the policy, the student placed a call from her cell phone on school property, and the phone was immediately confiscated. Later that day, she was called to the principal's office. The principal reviewed the plaintiff's cell phone, discovered inappropriate images, and handed the phone over to law enforcement. The photos were of the plaintiff—in some she was fully clothed and others included her exposed breasts. The photos were for her and her boyfriend's eyes only. The photographs were taken off school property and never shared. The student was suspended for three days.

The student and her mother met with the chief detective, who indicated her cell phone was sent to a crime lab for review. He told the student he would get her phone back, while winking at her. After that meeting, the plaintiff received a call from the district attorney, who threatened to bring child pornography charges against the plaintiff and other students whose similar conduct was reported to the police, unless they took a re-education course on sexual violence and victimization. The district attorney called the plaintiffs and other families into a courthouse meeting where the

attorney had them review all of the children's photographs, and also indicated he intended to charge the students with child pornography unless they took the re-education course.

The plaintiff took the class, and her phone was returned to her with all images deleted. The plaintiff filed suit based on the county officials' alleged continued possession of the photographs, which she claims were the fruits of an unreasonable search and seizure. She also claimed the search and seizure, along with the threatened prosecution, violated her first and fourth amendment rights.

The trial court denied the defendants' motion to dismiss the case. The court explained that the district attorney was acting as a local policymaker, not a state policymaker, when he allegedly failed to train and supervise his employees and, therefore, the county could be held liable for that conduct.

Specifically, the attorney was not engaging in prosecutorial acts when he searched her phone, he was engaging in an administrative function of the local government. The county was immune from liability, however, for the attorney's conduct on behalf of the state—namely, his decision to threaten prosecution. The court also held that the plaintiff stated enough facts in her complaint to overcome a motion to dismiss her Fourth Amendment and First Amendment claims.

5. **General History of Drug Use and Suicidal Thoughts Do Not Alone Justify Search of Student's Cell Phone – *G.C. v. Owensboro Public Schools*, 711 F.3d 623 (6th Cir. 2013).**

An out-of-district student's history at his high school entailed various troubles that nearly led to his removal between school years. He admitted to an assistant principal that he had had suicidal thoughts and smoked marijuana. In addition, the student had been disciplined for excessive tardiness and fighting. Nonetheless, the school district permitted him to continue at the high school on condition that he avoid further disciplinary problems. During the next year, a teacher observed him texting in class. His phone was confiscated and handed to another assistant principal who read four of his texts. As a result of this incident, the superintendent revoked the student's privilege to attend the school out-of-district.

The student filed an action that alleged First, Fourth, and Fifth Amendment violations and later added a Rehabilitation Act claim. The

district court granted the school district and its administrator's summary judgment on all claims. Student appealed.

The appellate court determined that the district court erred in granting defendants summary judgment on the Fourth Amendment claim. For a student search to be constitutional, it must be both (1) justified at its inception and (2) conducted in a manner reasonably related in scope to the circumstances initially justifying the search. The court focused on the first step, explaining that it requires a context-driven analysis. In assessing the facts underlying the student's claim, the court rejected the defendants' argument that the student's past drug abuse or depression alone could justify the cell phone search. Because the school district did not offer any specific reason for believing that the student was engaging in unlawful activity or was contemplating hurting himself or others, the court reversed summary judgment.

Additionally, the court reversed summary judgment on the student's procedural due process claim because he offered evidence that the school expelled him. The court held that students must be afforded due process before expulsion, whether in-district or out-of-district. Yet summary judgment on the Rehabilitation Act claim was affirmed.

6. **Students to be Criminally Charged for “Sexting” – *Mary Jo Miller v. Geroge Skumanick, Jr.*, 605 F. Supp.2d 634 (M.D. Pa. 2009).**

School confiscated students' cell phones with images of young teens in their bras and turned phones over to the district attorney. The district attorney said he would charge the girls in the pictures with child pornography unless they attended a “re-education program.” The girls refused and their parents filed a temporary restraining order regarding the program. The court granted parents' motion for a temporary restraining order (enjoining the district attorney from bringing criminal charges) in part on First Amendment grounds: plaintiffs demonstrated a reasonable likelihood of success on the merits regarding retaliation in violation of teens' right to be free from compelled expression and reasoned that even temporary violation of First Amendment rights constitutes irreparable harm.

The court found the student and her mother had shown a reasonable likelihood of establishing that coercing the student's participation in the education program violated the mother's right to parental autonomy and the student's right against compelled speech. The district attorney could not coerce parents into permitting him to impose on the students his ideas

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of morality and gender roles. Further, the court determined that compelled speech would have arisen from the program's requirement that the student explain how her actions were wrong. Moreover, the court found that a lack of evidence of probable cause to force the "re-education program" suggested a retaliatory motive.

7. **Prosecution of School Administrator for Possession of Child Pornography – *Commonwealth v. Ting-Yi Oei*.**

Oei, an assistant principal at Freedom High School in South Riding, Virginia, was charged in 2008 over a photo he obtained in the course of investigating a sexting issue at his high school. In March 2008, Oei's principal tasked him investigation rumors that some students at the school were exchanging sexually explicit photos of a teenage girl. When confronted by Oei, a male student admitted he had one photo. After the principal instructed him to retain a copy of the photo for the investigation, Oei had the student e-mail the image to his cell phone, as well as transfer it to Oei's desktop computer. The image depicted only the torso of a young woman clad in underwear with her arms draped over her breasts. Prosecutors deemed it child pornography and threatened Oei with criminal charges unless he resigned. When he refused, they charged him with felony possession of child porn as well as with two misdemeanor counts of contributing to the delinquency of a minor for instructing the male student to send him the photo.

The local school board reimbursed Oei \$167,000.00 for his legal fees in defending the criminal charges. Although the charges were later dismissed, Oei spent over a year fighting this legal battle and the allegation that he was a "child pornographer."

It is recommended to promptly notify law enforcement when any school administrator, teacher or staff member discovers nude photos or other lewd or explicit material. Rather than transfer or receive any images from a student's phone, maintain the sexually explicit photo(s) on the student's phone and confiscate it.

B. A CHECKLIST FOR RESPONDING TO A SEXTING ISSUE:

1. Take steps to assure that the policy and code of conduct addresses "sexting" and allows for a search of phones if the administration has reasonable suspicion that school rules have been violated.

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2. When sexting is discovered, strong consideration should be given to the following immediate steps:
  - a. Communicate with ALL the parents of ALL the students involved;
  - b. Call the police;
  - c. Report suspected child abuse or neglect;
3. Educate your staff about sexting with a particular emphasis in avoiding potential exposure to child pornography and related criminal laws by developing a protocol for dealing with this digital information carefully.
4. After a full and comprehensive investigation, discipline the students involved as equally as possible.
5. Control the response. When the photographs have made their way into cyberspace, administrators must be mindful of possible harassment and bullying that may result from the unwanted exposure. (Remember Jessica Logan!).
6. Update and coordinate board policies to meet the challenge of sexting (i.e., AUP, harassment, sexual harassment, bullying, etc.)
7. Communicate and educate your staff, student body and community about the lessons learned from the unfortunate instances of sexting.

C. YOU-TUBE: ON THE RISE

1. What is YouTube?
  - a. YouTube is a video sharing website that lets users upload, view and share video clips at no cost. It was founded in February 2005 by three former employees of PayPal. YouTube was named TIME magazine's "Invention of the Year" for 2006. On November 13, 2006, it was acquired by Google for \$1.65 billion in Google stock.
  - b. There are more than 1 billion unique users that visit YouTube each month and over 6 billion hours of videos are watched each month – that's almost an hour for every person on Earth, and 50% more than last year.

D. STUDENT “BLOGGING”

1. Webster’s dictionary defines a “blog” as, “a website that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer.”
  - a. “Blogs,” short for “web logs” emerged in the 1990s when new software made it much easier to publish on the web.
  - b. Technorati.com, considered the “Google” of the blogosphere, is now tracking more than 50 million bloggers.
  - c. The transformation from the diary or journal with a lock and key has dramatically transformed in the last 10 years.
  - d. People are no longer keeping their thoughts private.
  - e. Some of the most popular web sites offering traditional blogs include LiveJournal, Xanga, Facebook, and MySpace.
  - f. According to a study by the Pew Internet & American Life Project, 77% of bloggers keep blogs to express themselves creatively, with 37% citing their lives and experiences as their primary topics. ([www.pewinternet.org](http://www.pewinternet.org)).
2. According to the Pew Internet & American Life Project, a fifth of teens who have access to the Web have their own blogs and 38% of teens say they read other people’s blogs. ([www.pewinternet.org](http://www.pewinternet.org)).
3. ***The Pros of Student Blogging***
  - a. Seeing their words published on the Web is a great motivation.
  - b. Blogs offer innovative ways for students to engage in reflective writing on classroom topics in a familiar medium.
  - c. Students that know they have an audience other than their teacher tend to write more credibly, accurately, and carefully.
  - d. Blogs can be used to reflect on readings and/or classroom discussions.

- e. Precautions:
  - (1) Obtain parental permission.
  - (2) Review school and district policies.
  - (3) Avoid blogging sites that ask students for personal information.
  - (4) Teach students the importance of tone and respect for the opinions of others.
  - (5) Formulate clear expectations, rules, and consequences.

4. ***The Cons of Student Blogging***

- a. Some teens believe that parents or other adults reading their blog is an invasion of privacy - however, blogs are *not* private. Information posted on the Internet is available for anyone to read. There are some websites that allow you to set up privacy parameters, limiting access to a blog.
- b. Revealing too much information (i.e., real names, addresses, email addresses, schools) on a blog can be especially harmful for teens - it is naive to believe that there are not people out there gathering this type of information to possibly harm someone - stalkers and even child predators are constantly fishing the Internet for this type of information.

5. ***Doninger v. Niehoff*** (2009), 594 F.Supp.2d 211. In April of 2007, the student was a junior in high school and served on the student council as the junior class secretary. A dispute arose between the student council and school administrators over the rescheduling of a school-sponsored event known as "Jamfest." When the student council was informed that Jamfest would need to be postponed for the third time, the student and three other student council members sent an email to members of the community urging them to persuade school officials to let Jamfest occur as scheduled. Contact information for particular school officials was provided and all four students affixed their names to the message. The next day, both the high school principal and the superintendent were inundated with phone calls and emails. The principal told the student she was disappointed that the student council had not discussed the matter with school officials

directly, and that class officers were expected to work cooperatively with faculty. That night, the student posted the following on livejournal.com:

*jamfest is cancelled due to \*\*\*\*\*bags in central office. here is an email 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 [the superintendent] is getting a TON of phone calls and emails and such. we have so much support and we really appreciate it. however, she got pissed off and decided just to cancel the whole thing altogether. . .and here is a letter my mom sent to Paula and cc'd Karissa [the principal] to get an idea of what to write if you want to write something or call to piss her off more. I'm down -*

The following morning, the administrators received more phone calls and emails. They met with the student council members who sent the prior email and agreed on a date for Jamfest; however, even though the issue was resolved, the administrators, unaware of the student's blog, continued to receive phone calls and emails. The administrators learned of the blog when it was discovered by the superintendent's adult son. Noting that the blog post contained vulgar language and inaccurate information, the principal determined that the student should be prohibited from running for senior class secretary. The student was not otherwise disciplined.

The student's mother sued the principal and the superintendent. The student claims the administrators violated her First Amendment rights by disqualifying her from running for senior class secretary as punishment for her blog entry and by prohibiting students from wearing "Team Avery" t-shirts into the school auditorium during the election assembly. She also alleges the administrators violated her Fourteenth Amendment rights by treating her differently from other similarly-situated students when they punished her for her blog entry and allegedly placed a disciplinary log in her permanent file.

The lower court denied the parent's request for a preliminary injunction requiring the school to hold a new election, and the parent appealed. The appellate court found that the preliminary injunction was properly denied. Though her request for an injunction was mooted by her graduation, the student continued to pursue the lawsuit for damages against the



administrators. The court ultimately determined that a genuine issue of material fact existed as to the motivation behind punishing the student's speech (i.e., whether she was punished because the speech was offensive or because it would have created a disruption).

The court denied the motions for summary judgment filed by both parties relating to the t-shirt prohibition. Finding *Tinker* applicable, and the right of students to engage in non-offensive, non-disruptive speech on school property clearly defined, the defense of qualified immunity was denied, and the issue allowed to proceed to trial. At trial, the court noted, the student will be required to show that her speech was chilled and the amount of damages she suffered as a result. The court also denied the student's Fourteenth Amendment claim, refusing to find her similarly situated to any other individual (as there was no evidence that any of the student council members who sent the initial email participated in composing the blog or authored other messages like it), and rejecting her "class-of-one" argument.

## V. SOCIAL NETWORKING AND BULLYING

### A. "CYBERBULLYING"

#### 1. Definition

- a. "Cyberbullying involves the use of information and communication technologies such as e-mail, cell phone and pager text messages, instant messaging (IM), defamatory personal Web sites, and defamatory online personal polling Web sites, to support deliberate, repeated, and hostile behavior by an individual or group that is intended to harm others." Bill Belsey (<http://www.cyberbullying.ca>).
- b. Bullying is commonly defined as intentional, repeated hurtful acts, words, or other behavior, such as name calling, threatening, and/or shunning committed by one or more child against another. These negative acts are not intentionally provoked by the victims.
- c. Cyberbullying differs from other forms of bullying in a number of ways.

- (1) It is a cowardly form of bullying because cyberbullies can more easily hide behind the anonymity that the Internet can provide.
- (2) Cyberbullies can spread their hurtful messages to a very wide audience with remarkable speed. Unlike traditional rumors that eventually die out, rumors in cyberspace can be cut, pasted, printed and forwarded ad infinitum.
- (3) Cyberbullies do not have to own their own actions, as it is usually very difficult to identify cyberbullies because of screen names, so they do not fear being punished for their actions.
  - (a) This can affect a young person's ethical behavior because it does not provide tangible feedback about the consequences of actions on others.
  - (b) This lack of feedback minimizes feelings of empathy or remorse.
  - (c) Young people say things online that they would never say face-to-face because they feel removed from the action and the person at the receiving end.
- (4) Cyberbullying is often outside the legal reach of schools and school boards because the behavior often happens outside of school on home computers or cellular phones.
- (5) Victims of cyberbullying are often also afraid to report it to adults, because they fear that adults will overreact and take away their cell phone, computer, and/or Internet access.
- (6) The reflection time that once existed between the planning of a prank – or a serious stunt – and its commission has all but been erased.
- (7) The power and speed of technology has made it nearly impossible to contain a regrettable deed – because once committed, there is almost no way to retrieve and destroy all evidence of it in cyberspace.

- (8) Home may no longer be a haven from negative peer pressure such as bullying.

d. Forms

- (1) Cyberbullies post slurs, rumors or other disparaging remarks about a student on a website or on a blog.
- (2) The most common instances of cyberbullying involve instant messaging and text messaging because cyberbullies can send mean or threatening instant messages (“IMs”) with no immediate identification beyond a screen name or text messages so numerous as to drive-up the victim’s cell phone bill.
- (3) Using a camera or videophone to take and send embarrassing photographs and videos of students.
- (4) Posting misleading or fake photographs of students on websites.
- (5) “Flaming” which constitutes online fights using electronic messages with angry and vulgar language.
- (6) “Impersonation” such as pretending to be someone else and sending or posting material to get that person in trouble or danger or to damage that person’s reputation or friendships.
- (7) “Exclusion” which is intentionally and cruelly excluding someone from an online group.
- (8) “Trickery” which is tricking someone into revealing secrets or embarrassing information and then sharing it online.
- (9) Websites are often used to circulate rumors, ask students to vote on the ugliest or fattest kid in school, and focus on one individual.
- (10) Blogs are cyber reality shows, widely read diaries that publicly detail the social drama and fluctuating emotions of young lives.

- (11) Cyberbullying frequently involves a population that is largely middle-class, usually known as the “good kids” who are “on the right track” or “the ones you’d least expect” to bully or degrade others.
- e. According to one recent study conducted by the Cyberbullying Research Center, nine percent (9%) of a representative sample of middle schoolers said they had been a victim of cyberbullying in the past month, while eight percent (8%) said they had been a cyberbully. (Seattle Times, 1/15/2010, Linda Shaw)
- f. Cyberbullying may not only happen to students. Some situations may involve the cyberbullying of school administrators such as the *Evans* case above where the student created a Facebook page to disparage one of her teachers. Her actions allegedly violated the school's prohibition on cyberbullying.

2. **School May Discipline a Student for Creating a Derogatory Webpage Discussion Group Targeting a Fellow Student to Protect Student from Bullying – *Kowalski v. Berkeley County Schools*, 2011 U.S. App. LEXIS 15419 (4th Cir. 2011).**

A principal suspended a high school student for five days after the student created a MySpace discussion group webpage dedicated to ridiculing a fellow student. School officials concluded that the student created a “hate website” in violation of the district’s prohibition against “harassment, bullying and intimidation.” The student created the webpage from her home computer, and then invited her MySpace “friends” to join the discussion. Two dozen students at the school joined the group and posted derogatory comments about the targeted student, including one student who joined and posted negative content from a school computer during an after-hours class at the high school. The next morning, the targeted student’s parents went to the high school and filed a harassment complaint against the student who created the webpage. The parents also told the principal that their daughter did not want to attend class that day because she did not feel comfortable sitting in class with students who had posted derogatory comments about her. After being suspended from school and thrown off the cheerleading squad, the student sued, claiming that disciplining her for her speech violated her First Amendment free speech rights. The student argued that her speech occurred outside of school and did not affect the school environment, and that therefore the school could

not discipline her. The district court disagreed and granted summary judgment to the district, and the Fourth Circuit Court of Appeals affirmed.

The court of appeals first addressed the significance that the student created the webpage outside of school. The court downplayed this issue, characterizing it as a “metaphysical question of where [the] speech occurred when [the student] used the internet as the medium....[The student] indeed pushed her computer’s keys in her home, but she knew that the electronic response would be, and indeed was, published beyond her home and could reasonably be expected to reach the school or impact the school environment.” The court never decided whether the speech was “in-school” or “out-of-school” (in-school speech is easier for a school to curtail), instead citing *Tinker* for the principle that a school could discipline a student regardless of where the speech originated if the speech was materially and substantially disruptive by “interfer[ing]...with the schools’ work [and] colli[ding] with the rights of other students to be secure and be let alone.” Also, the court seemed to use an expansive reading of *Tinker* not often seen in other decisions, citing *Tinker* for the proposition that a school could discipline a student for speech that “materially disrupts class work or involves substantial disorder or *invasion of the rights of others* [emphasis added].”

The court concluded that the student’s speech, by targeting another student in a defamatory manner, “created actual or nascent substantial disorder and disruption in the school” and that this was foreseeable to the student. To support this conclusion, the court noted that the student named her discussion group “*Students Against Sluts Herpes* [emphasis added].” The court also noted that the student invited fellow students to join the discussion group and that she must have known that her conduct and speech would be felt in the school itself, and that one of the students invited to join the discussion did so at school on a school computer during class. Finally, the targeted student missed school in order to avoid additional abuse, and the student’s parents viewed the speech as school-related because they immediately complained to school officials about it.

The court also made some expansive comments about school administrations’ reaction to bullying. After noting the federal government’s initiative against student-on-student bullying, the court stated that school administrators have a duty to protect students from harassment and bullying in the school environment, and that the conduct and speech contained in the discussion group “is not the conduct and speech that our educational system is required to tolerate.”

B. DISTRICT POLICIES AND THE LAW

1. In order to discipline a student, the District must be able to prove that the student's conduct violates a law or school rule. Outdated school rules and new policies alike are consistently being challenged in school Internet speech cases across the country as "vague" and "overbroad."
  - a. A rule is "overbroad" when it is designed to punish activities that are not constitutionally protected, but that also prohibits (or could be interpreted to prohibit) protected activities as well.
  - b. A rule may be declared "vague" if it fails to give a person adequate warning that his conduct is prohibited or if it fails to set out adequate standards to prevent arbitrary and discriminatory enforcement.
2. Policy Suggestions:
  - a. Evidence of illegal or inappropriate student conduct posted on the Internet should be included as grounds for disciplinary action.
  - b. Acceptable Use Policy
    - (1) Acceptable Use Policies ("AUPs") can help educate students, parents, and staff about Internet use and issues of online privacy and safety, and to seek parental consent for their children's Internet use.
    - (2) Make cyberbullying a punishable offense.
    - (3) Require students to sign a statement agreeing to comply with District rules on network or Internet use and have parents sign a consent form and a release authorizing their child's use of the school network.
    - (4) In the release, the authorized student user and his/her parent (if the student is under age 18) should agree to indemnify and hold the school system harmless from all claims that result from the student's activities while using the school's network and that cause direct or indirect damage to the user, the school system, or third parties.

- (5) Also in the release, e-mails that include malicious gossip and slander, “hit lists” via e-mail or other methods of electronic communication naming specific students and/or teachers, and changing other students’ e-mail or personal settings should be prohibited.
3. Laws on Privacy of Records and Internet Use.
    - a. School districts must comply with various federal and state laws governing the privacy of student records and children’s use of the Internet. Schools must be especially vigilant in complying with such laws so that private student information and school networks are not used by cyberbullies to harass or intimidate other students or school employees.
      - (1) Family Educational Rights and Privacy Act (“FERPA”) – If a school fails to safeguard student education records and a cyberbully publicizes confidential information to classmates or on the Internet, the school may be in violation of FERPA.
      - (2) Children’s Online Privacy Protection Act (“COPPA”).
        - (a) COPPA is a federal law that requires commercial online content providers who either have actual knowledge that they are dealing with a child 12 or under or who aim their content at children to obtain verifiable parental consent before they can collect, archive, use, or resell any personal information pertaining to that child.
        - (b) Schools should educate staff and students’ parents about the requirements of COPPA so that personal information concerning a child under 12 does not fall into the hands of online content providers or others.
      - (3) Above all, enforce a fair and consistent disciplinary procedure which should be in place for students who misuse computers, the Internet, or other electronic communication devices in violation of school rules.

(4) Ohio Revised Code 3313.666

(a) Under this law, harassment, intimidation, and bullying are defined as any intentional written, verbal, or physical act that a student exhibits towards another particular student more than once and the behavior both:

- i) Causes mental or physical harm to the other student; and
- ii) Is sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for the other student.

*\*Given the language of this section, it appears that harassment, intimidation, or bullying directed towards a group of students would not qualify under the above definition. The behavior must be directed at a "particular student." Additionally, the section does not state how determinations of harm or severity of behavior and its effects will be determined. Presumably, whether or not a student feels threatened or intimidated is a subjective determination.*

iii) Under R.C. § 3313.666, the boards of education of each city, local, exempted village, and joint vocation school district must establish a policy prohibiting harassment, intimidation, or bullying. This policy must be developed in consultation with parents, school employees, school volunteers, students, and community members. Also, the policy must include the following:

- a. A statement prohibiting harassment, intimidation, or bullying of any student on school property or at school-sponsored events;



- b. A definition of harassment, intimidation, or bullying that includes the definition described above;
- c. A procedure for reporting incidents;
- d. A requirement that school personnel report prohibited incidents to the school principal or other administrator designated by the principal;
- e. A requirement that the parents of any student involved in prohibited conduct be notified and, to the extent permitted under Ohio law and FERPA, have access to any written reports pertaining to the conduct;
- f. A procedure for documenting reported incidents;
- g. A procedure for responding to and investigating reported incidents;
- h. A strategy for protecting victims from additional harassment, intimidation, or bullying, and from retaliation following a report;
- i. A disciplinary procedure for any student guilty of harassment, intimidation, or bullying, that does not infringe on that student's First Amendment rights; and
- j. A requirement that the district administration semiannually provide the board president with a written summary of all reported incidents

and post the summary on the district website to the extent permitted by Ohio law and FERPA.

- iv) The policy developed by each board must appear in student handbooks, and in any other publication setting forth the comprehensive rules, procedures, and standards of conduct for students. Additionally, information on the policy must be incorporated into employee training materials.
- v) District employees, volunteers, and students are immune from liability in a civil action arising from the reporting of an incident in accordance with district policy so long as the report was made in good faith and complied with district policy.
- vi) School districts have the option of forming bullying prevention task forces, programs, or other initiatives involving volunteers, parents, law enforcement, and community members.
- vii) To the extent that state or federal funds are used for the programs described above, each district must:
  - a. Provide training, workshops, or courses on the district's harassment, intimidation, or bullying policy to school employees or volunteers who have direct contact with students. Time spent in these workshops will apply towards state or district-mandated continuing education requirements.
  - b. Develop a process for educating students about the policy.

- viii) Audits – It should be noted that beginning in March 2008, the Auditor of State will be required to identify whether a district has adopted an anti-harassment policy and note such determination in the audit. The Auditor of State, however, is not authorized to prescribe the content or operation of the policy.