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SCHOOL RESPONSE TO CYBERBULLYING AND SEXTING: THE LEGAL CHALLENGES

*Nancy Willard**

I. INTRODUCTION

The wonderful new interactive communication technologies are immersing and benefitting our society while causing some major headaches for school leaders. Young people are engaging in what is commonly called “cyberbullying,” the use of electronic communication technologies to intentionally engage in repeated or widely disseminated cruel acts towards another that results in emotional harm. The newly emerging issue of sexting, sending nude images via cell phone texting, presents ever more challenging concerns. These two concerns overlap. Distributing nude images is one form of cyberbullying.

A major challenge for school officials is that many of these interactions occur when students post information while they

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are off-campus or when they are using their personal digital devices while at school, which is hard to detect. But the harmful impact of these off-campus interactions is evident at school, because this is where students are physically together. Electronic aggression is a contributing factor in altercations that occur on campus and creates an environment in which students do not feel safe coming to school or are unable to focus effectively on their studies.

School officials who respond formally to sexting and cyberbullying by imposing a disciplinary consequence put their authority into question and raise questions about student free speech. Other legal issues arise when addressing these situations, including questions about the extent to which a school district has a responsibility to address these forms of technological bullying and the issue of the search and seizure of records on student personal digital devices, which may include nude images of minors.

There is limited case law in this area. This article will explore these issues, setting forth recommendations supported by a reasonable analysis of existing case law. This article will provide an analysis to support the following standards:

- School officials have the authority to respond to off-campus student speech if that speech has caused, or reasonably could cause, a substantial disruption at school or interference with the rights of students to be secure.
 - This disruption or interference could include violent physical or verbal altercations between students, significant interference with the right of a student to receive an education and feel safe at school, or significant interference with instruction or school operations.
- The disruption or interference must be likely to impact students and interfere, or potentially interfere, with their right to be safe at school and receive an education.¹
 - If the off-campus speech has targeted a staff member, school officials may only have the

1. As will be discussed below, this standard may be changed in the context of an upcoming decision by the U.S. Third Circuit Court of Appeals.

authority to respond is if the off-campus speech has caused, or threatens, a substantial disruption of school activities that will interfere with school operations or the ability of the school to deliver instruction. The fact that a school official must take the time to investigate or that material posted is highly offensive likely does not likely give rise to the authority to formally respond with discipline. However, a range of informal responses, including talking with the student and notifying the parents, as well as warning of the potential of civil or criminal litigation, may be appropriate.

- School officials do not have the responsibility to monitor or supervise student's off-campus or personal communications, and this would be impractical.
 - But school officials likely do have a responsibility to respond to situations involving harmful interactions both off- and on-campus that have created a hostile environment at school once they have been informed of the situation.
- School officials have the authority and responsibility to respond to any harmful or inappropriate speech created on or disseminated through the District Internet system or through personal digital devices used at school based on pedagogical reasons. School officials may act if such speech is lewd or otherwise inconsistent to the educational mission of the school, or the speech has caused, threatens substantial disruption at school, or significant interference with the rights of students to be secure.
- In order to search the records held on a student's cell phone or other personal digital device, a school official must have a reasonable suspicion that a search of the records is likely to reveal that a law or school policy has been violated. The extent of the search must be reasonably related to the circumstances that justified the search in the first place. Simple violation of a school policy prohibiting

use during school or in a classroom will not, without more evidence, justify searching all of the records on that device. Searches that result in the discovery of a nude image of a student are particularly problematical. Search policies must be developed in conjunction with law enforcement officials, preferably at the state level.

II. STUDENT SPEECH AND SCHOOL SAFETY

The most recent Supreme Court student speech case, *Morse v. Frederick*² will provide the initial framework for the free speech analysis. *Morse* involved a cryptic, supposedly pro-drug statement, “Bong hits 4 Jesus,” on a banner raised by a student across the street from a school during a time when students had been released to watch a parade for the Olympic torch.³ In a 5-4 decision, the Court ruled that public school officials might restrict student speech at a school event when the speech is reasonably viewed as promoting illegal drug use.⁴ The Court specifically rejected the argument advanced by the petitioners and school leadership organizations that the First Amendment permits school officials to censor “any speech that could fit under some definition of ‘offensive’” or might interfere with a school’s educational mission.⁵ Instead, the Court’s focus was on student safety concerns related to a message that was contrary to avoiding drug abuse.⁶

Despite questions about the intent of the language on the banner, the Court accepted the idea that the principal was permitted to censor the banner as he believed it was advocating illegal drug use.⁷ The Court noted, “Drug abuse can cause severe and permanent damage to the health and well-being of young people.”⁸ The Court further described, in detail, these concerns. The Court cited statistics that documented the concerns, discussed federal and state initiatives directed

2. 551 U.S. 393 (2007).

3. *Id.* at 397.

4. *Id.* at 397, 403.

5. *Id.* at 409.

6. *Id.* at 407, 409.

7. *Id.* at 401.

8. *Id.* at 407.

towards preventing drug abuse, and noted the important role schools play in addressing drug abuse concern.⁹

Comments made by Justice Alito in his concurring opinion strengthened the focus on student safety:

[A]ny argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. The special characteristic that is relevant in this case is the threat to the physical safety of students. School attendance can expose students to threats to their physical safety that they would not otherwise face. . . . During school hours, however, parents are not present to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger.

In most settings, the First Amendment strongly limits the government's ability to suppress speech on the ground that it presents a threat of violence But due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence. And, in most cases, *Tinker's* "substantial disruption" standard permits school officials to step in before actual violence erupts.¹⁰

Thus, the *Morse* majority and concurring opinions provide strong support for the belief that when faced with speech that has the potential of significantly interfering with the safety of students or could potentially cause violence, the Court will support the authority of school officials to respond effectively to such speech.

III. HARMS OF BULLYING AND CYBERBULLYING

This section will discuss the concerns associated with bullying and cyberbullying in a manner that parallels the student safety approach taken by the majority opinion in *Morse*. The *Morse* Court indicated that deterring drug use by

9. *Id.* at 407–08.

10. *Id.* at 424–25 (Alito, J., concurring) (citations omitted).

schoolchildren was an “important—indeed, perhaps compelling” interest.¹¹ The following kinds of insight should provide the basis for the legal conclusion that deterring bullying and aggression among school children is clearly a most compelling interest.

Bullying has sometimes been seen as an inevitable part of school culture or a rite of passage for youth. However, recently attention to bullying has increased dramatically.¹² School personnel and policy makers have recognized that the consequences of bullying can be significant, affecting not only those who are bullied, but also those who bully. Bullying behavior also seriously damages the school climate.

Research indicates that bullying is prevalent in schools. The rate of bullying varies depending on how the questions are asked. In a recent study, over 49% of elementary, middle, and high school students reported being bullied by other students at school at least once during the previous month.¹³ Additionally, 31% of the students reported bullying others during that time.¹⁴

Both bullies and victims are at high risk of suffering from serious health, safety, and educational risks.¹⁵ Victims of bullying report more difficulties sleeping, despondency, headaches, stomach pains, and other health symptoms than other children. Victims avoid school, which can lead to lower

11. *Id.* at 407 (majority opinion) (quoting *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 661 (1995)).

12. See, e.g., John Cloud, *When Bullying Turns Deadly: Can It Be Stopped?*, TIME, Oct. 24, 2010, available at www.time.com/time/magazine/article/0,9171,2024210,00.html.

13. Catherine P. Bradshaw, Anne L. Sawyer & Lindsey M. O’Brennan, *Bullying and Peer Victimization at School: Perceptual Differences Between Students and School Staff*, 36 SCH. PSYCHOL. REV. 361, 368 (2007).

14. *Id.*

15. Gemma L. Gladstone, Gordon B. Parker & Gin S Malhi, *Do Bullied Children Become Anxious and Depressed Adults? A Cross-Sectional Investigation of the Correlates of Bullying and Anxious Depression*, 194 J. NERVOUS & MENTAL DISEASE, pt.3, 201(March 2006); Tonja R. Nansel, Mary D. Overpeck, Denise L. Haynie, W. June Ruan & Peter C. Scheidt, *Relationships Between Bullying and Violence Among US Youth*, 157 ARCHIVES PEDIATRIC ADOLESCENT MED. 348 (2003); Young Shin Kim & Bennett Leventhal, *Bullying and Suicide. A Review*, 20 INT’L J. ADOLESCENT MED. & HEALTH 133 (2008); Katrina Williams, Mike Chambers, Stuart Logan & Derek Robinson, *Association of Common Health Symptoms with Bullying in Primary School Children*, 313 BRIT. MED. J. 17 (1996); George M. Batsche & Howard M. Knoff, *Bullies and Their Victims: Understanding a Pervasive Problem in the Schools*, 23 SCH. PSYCHOL. REV. pt. 2, 165 (1994); DAN OLWEUS, BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO (Blackwell Publishers 1993).

academic performance. They are more likely to suffer from depression and low self-esteem, and are at increased risk of depression and suicide. Perpetrators are more likely to get into frequent fights, be injured in a fight, vandalize or steal property, drink alcohol, smoke, be truant from school, drop out of school, and carry a weapon.

Bullying is also associated with school violence. Perpetrators of school-based homicides were more than twice as likely to report being bullied by their peers.¹⁶ In a study of the violent school attacks in the United States from 1974 through June 2000, the U.S. Office of Safe and Drug Free Schools and Secret Service found that almost three-quarters (71%) of the attackers felt persecuted, bullied, threatened, attacked, or injured by others prior to the incident.¹⁷

Research on cyberbullying is just emerging. In September 2006, the Centers for Disease Control and Prevention convened a panel of experts to discuss issues related to the emerging public health problem of electronic aggression. The panel included representatives from research universities, public school systems, federal agencies, and nonprofit organizations. A special issue of the *Journal of Adolescent Health* summarizes the data and recommendations from this expert panel meeting.¹⁸ The research studies in this journal establish that, depending on how the questions were asked, between 9% and 35% of middle and high school students reported being victimized by cyberbullying.¹⁹

The research also demonstrated that youth involved in cyberbullying, as targets or perpetrators, also demonstrate other significant psychosocial concerns. Perpetrators were significantly more likely to report beliefs endorsing bullying behavior, a negative perception of the school climate, and a

16. Mark Anderson, et al., *School-Associated Violent Deaths in the United States, 1994-1999*, 286 *J. MED. ASS'N* 2695 (2001).

17. BRYAN VOSSEKUIL ET AL., FINAL REPORT AND FINDINGS OF THE SAFE SCHOOL INITIATIVE: IMPLICATIONS FOR THE PREVENTION OF SCHOOL ATTACKS IN THE UNITED STATES 21 (2002), available at http://www.secretservice.gov/ntac/ssi_final_report.pdf.

18. *Youth Violence and Electronic Media: Similar Behaviors, Different Venues?*, 41 *J. ADOLESCENT HEALTH* (Supplement) S1 (2007).

19. Janis Wolak, Kimberly J. Mitchell & David Finkelhor, *Does Online Harassment Constitute Bullying? An Exploration of Online Harassment by Known Peers and Online-Only Contacts*, 41 *J. ADOLESCENT HEALTH* (Supplement) S51, S52 (2007).

negative perception of their peer social support.²⁰ Targets of cyberbullying were significantly more likely to report two or more detentions or suspensions and skipping school in the previous year, eight times more likely to report carrying a weapon to school in the past thirty days, poorer parental monitoring and caregiver-child emotional bond, and increased alcohol use and other drug use.²¹ Perpetrators and targets reported a high degree of involvement in offline relational, physical, and sexual aggression.²² In a more recent study that focused on issues related to suicide, researchers found that youth who experienced traditional bullying or cyberbullying, either as an offender or a victim, had more suicidal thoughts and were more likely to attempt suicide than those who had not experienced such forms of peer aggression.²³

The Federal Government has recognized the close connection between bullying and school violence, as well as the other negative effects on young people including school performance. The Office of Safe and Drug-Free Schools administers, coordinates, and recommends policy for improving quality and excellence of programs and activities that provide funding for drug and violence prevention activities, as well as character and civics education.²⁴ Since 1999, the U.S. Departments of Education, Health and Human Services, and Justice have collaborated on the Safe Schools/Healthy Students (SS/HS) Initiative, a discretionary grant program that provides students, schools, and communities with federal funding to implement an enhanced, coordinated, comprehensive plan of activities, programs, and services that focus on promoting healthy childhood development and preventing violence and

20. Kirk R. Williams & Nancy G. Guerra, *Prevalence and Predictors of Internet Bullying*, 41 J. ADOLESCENT HEALTH (Supplement) S14, S15 (2007).

21. Michele L. Ybarra, Marie Diener-West & Philip J. Leaf, *Examining the Overlap in Internet Harassment and School Bullying: Implications for School Intervention*, 41 J. ADOLESCENT HEALTH (Supplement) S42, S46, S49 (2007).

22. Michele L. Ybarra, Dorothy L. Espelage & Kimberly J. Mitchell, *The Co-Occurrence of Internet Harassment and Unwanted Sexual Solicitation Victimization and Perpetration: Associations with Psychosocial Indicators*, J. ADOLESCENT HEALTH (Supplement) S31, S36 (2007).

23. Sameer Hinduja & Justin W. Patchin, *Bullying, Cyberbullying, and Suicide*, 14 ARCHIVES SUICIDE RES. 206, 214, 216 (2010).

24. U.S. DEPARTMENT OF EDUCATION, OFFICE OF SAFE AND DRUG-FREE SCHOOLS, <http://www2.ed.gov/about/offices/list/osdfs/index.html> (last visited Sept. 27, 2010).

alcohol and other drug abuse. Both of these programs provide financial support for bullying prevention programs in schools.²⁵

On August 11 and 12, 2010, the U.S. Department of Education hosted the first ever Bullying Prevention Summit, the first event of the Federal Partners in Bullying Prevention Task Force.²⁶ As noted by Secretary Duncan, “When children feel threatened, they cannot learn.”²⁷ Notably, this summit included participants from the U.S. Department of Justice, Department of Health and Human Services, Department of Agriculture, Department of Defense, and Department of Interior. Assistant Deputy Secretary Jennings added, “Bullying behavior is not only troubling in and of itself but if left unaddressed, can quickly escalate into harassment, violence and tragedies.”²⁸

Currently it appears that forty-five states have laws addressing bullying in schools.²⁹ These laws typically require that state or local officials establish and enforce policies against student bullying, require or recommend procedures for reporting and properly investigating bullying incidents, and most highlight the importance of discipline for students who bully.³⁰ Many statutes require the state department of education to publish model bullying policies. In addition, these state statutes frequently contain findings about the seriousness of bullying. New Jersey states: “Bullying, like other disruptive or violent behaviors . . . disrupts both a student’s ability to learn and a school’s ability to educate its students in a safe environment.”³¹ Vermont’s statute indicates “Students who are continually filled with apprehension and anxiety are unable to learn and unlikely to succeed.”³² Even without such legislation, schools understand the importance of addressing this problem.

25. U.S. DEPARTMENT OF EDUCATION, THE SAFE SCHOOLS HEALTHY STUDENTS (SS/HS) INITIATIVE, <http://www.sshs.samhsa.gov/> (last visited Sept. 27, 2010).

26. Press Release, U.S. Department of Education, U.S. Education Secretary to Keynote Department’s First-Ever Bullying Summit (2010), *available at* <http://www.ed.gov/news/media-advisories/us-education-secretary-keynote-departments-first-ever-bullying-summit>.

27. *Id.*

28. *Id.*

29. STOP BULLYING NOW!, STATE LAWS ON BULLYING, <http://stopbullyingnow.hrsa.gov/adults/state-laws.aspx> (last visited Jan. 31, 2011).

30. Susan P. Limber, *Bullying Laws, Policies and Prevention Effort*, in 54 (Aug. 5, 2010), <http://www2.ed.gov/about/offices/list/osdfs/bullyingread.pdf>.

31. N.J. STAT. ANN. § 18A:37-13, -14, -16 to -18 (West 2002).

32. VT. STAT. ANN. tit. 16, § 565 (2009).

A 2007 study demonstrated that 95% of school districts in the United States have anti-bullying policies.³³ As of July 2010, it appears that thirty-four states have proposals for or have amended their bullying prevention laws to incorporate provisions addressing cyberbullying or electronic harassment.³⁴

The medical community has also taken note of the serious health concerns associated with bullying. The American Medical Association advised physicians to look for signs and symptoms of bullying and other psychosocial trauma in children and adolescents.³⁵ The AMA also recommended that physicians enhance their awareness of the social and mental health consequences of bullying and other aggressive behaviors and advocate for family, school, and community programs to prevent bullying.³⁶ The American Academy of Pediatrics recommended that pediatricians advocate bullying awareness by teachers, educational administrators, parents and children coupled with adoption of evidence-based programs.³⁷ The Commission for the Prevention of Youth Violence, consisting of nine of the leading medical and mental health organizations, issued a report in 2000 entitled *Youth and Violence: Medicine, Nursing, and Public Health: Connecting the Dots to Prevent Youth Violence*.³⁸ This report reviewed successful violence prevention programs and noted key commonalities, one of which was a positive climate that does not tolerate aggression or bullying.³⁹

In sum, there is extensive evidence that the prevention of bullying behavior among students, including cyberbullying, is an exceptionally compelling concern. This has led to strong

33. Sherry Everett Jones, Carolyn J. Fisher, Brenda Z. Greene, Marci F. Hertz & Jane Pritzl, *Healthy and Safe School Environment, Part I: Results From the School Health Policies and Programs Study 2006*, 77 J. SCH. HEALTH 522, 535 (2007).

34. SAMEER HINDUJA & JUSTIN PATCHIN, STATE CYBERBULLYING LAWS: A BRIEF REVIEW OF CYBERBULLYING LAWS AND POLICIES ACROSS AMERICA (2010), available at http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws_20100701.pdf.

35. AMERICAN MEDICAL ASSOCIATION, FEATURED REPORT: BULLYING BEHAVIORS AMONG CHILDREN AND ADOLESCENTS 4 (2002), available at <http://www.ama-assn.org/ama1/pub/upload/mm/443/csaa-02.pdf>.

36. *Id.*

37. *The Role of the Pediatrician in Youth Violence Prevention in Clinical Practice and at the Community Level*, 103 PEDIATRICS 173 (1999).

38. Commission for the Prevention of Youth Violence, *Medicine, Nursing, and Public Health: Connecting the Dots to Prevent Violence* (Dec. 2000), <http://www.ama-assn.org/ama1/pub/upload/mm/386/youthviolenceguide.pdf>.

39. *Id.*

support from policy makers, educators, and the medical community for initiatives to prevent and respond to the harms of bullying. This evidence, especially the demonstrated linkage between bullying with school violence and school failure, strongly supports the argument that a very important special characteristic of the school environment must be the assurance that school officials have the legal authority to respond to student speech, regardless of its geographic origin, if that speech has or reasonably could place the safety, emotional well-being, and education of other students at risk.

IV. HISTORICAL FRAMEWORK OF FREE SPEECH

When addressing issues of bullying and cyberbullying, it is necessary to consider student's rights of free speech. It is helpful to frame the discussion of student free speech rights with an analysis of the historical underpinnings of the free speech provision in the First Amendment. In his excellent book, *The Emergence of a Free Press*, Leonard Levy states that it is generally accepted that the framers of the First Amendment were thinking in terms of the English common-law notion of freedom of speech when they adopted language that prohibited laws "abridging the freedom of speech, or of the press."⁴⁰ The English common-law notion of freedom of speech prohibited prior restraints on the press, but did not preclude after the fact civil or criminal prosecution for obscene, blasphemous, libelous, or seditious speech.

[W]here blasphemous, immoral, treasonable, schismatical, seditious or scandalous libels are punished by the English law . . . the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: . . . but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity . . . Thus the will of individuals is still left free; the abuse only of that free-will is the object of legal punishment So true will it be found,

40. LEONARD W. LEVY, *THE EMERGENCE OF A FREE PRESS* 220–81 (New York: Oxford University Press 1985).

that to censure the licentiousness, is to maintain the liberty of the press.⁴¹

Levy noted that there is an alternative perspective on the historical basis for freedom of speech. This is the natural rights philosophy advocated by John Locke, who was revered by many of the early leaders. John Trenchard and Thomas Gordon, writing under the nom de plume “Cato,” addressed the issue of freedom of speech as follows:

Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as publick Liberty, without Freedom of Speech; Which is the Right of every Man, as far as by it does not hurt and controul the Right of another; and this is the only Check which it ought to suffer, the only Bounds which it ought to know.⁴²

The essential difference in these two philosophies is that under the English common law approach, government has the authority to determine what speech is contrary to the public good, including such social values as order, morality, and religion; whereas under the natural rights philosophy, the role of government is to enforce the fundamental free speech rights of individuals unless exercising those rights injures another.

V. SUPREME COURT STUDENT FREE SPEECH CASES

While neither the Supreme Court nor lower Federal Courts have referenced this historical basis in cases addressing school authority to regulate student speech, the courts appear to have created standards that are grounded in both of these philosophies. Understanding this distinction can assist in gaining a better understanding of the situations under which school officials have the constitutional authority to respond formally, including imposing a disciplinary consequence, to off-campus student speech.

The landmark case involving student free speech rights is the case of *Tinker v. Des Moines Independent Community*

41. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151-5253 (Garland Publ'g, Inc. 1978) (1783).

42. John Trenchard & Thomas Gordon, *Of Freedom of Speech: That the Same is Inseparable from Publick Liberty, No 15, Feb 4, 1720*, 1 CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, & OTHER IMPORTANT SUBJECTS 96 (Da Capo Press 1971) (1755).

School District.⁴³ *Tinker* involved a group of high school students who decided to wear black armbands to school to protest the Vietnam War.⁴⁴ The Court began its opinion by stating that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁴⁵ However, the Court acknowledged “the special characteristics of the school environment” by permitting school officials to prohibit student speech if that speech “would substantially interfere with the work of the school or impinge upon the rights of other students,” including the right “to be secure.”⁴⁶ The decision in *Tinker* appears to be grounded in the natural rights analysis, balancing student right to speech against the rights of other students to receive an education and be safe.

The Supreme Court’s next student speech case was *Bethel School District No. 403 v. Fraser*.⁴⁷ Fraser made a speech before a high school assembly that presented “an elaborate, graphic, and explicit sexual metaphor,” and was suspended.⁴⁸ The Supreme Court held that the school district acted “entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.”⁴⁹ The Court stressed that the purpose of public education was to “prepare pupils for citizenship in the Republic” and indicated that to do so it “must inculcate the habits and manners of civility.”⁵⁰ The Court further noted that schools might punish student speech that “would undermine the school’s basic educational mission.”⁵¹ However, it is important to note that the boundaries of this standard. In a concurring opinion, Justice Brennan stated: “[I]f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.”⁵²

43. 393 U.S. 503 (1969).

44. *Id.* at 504.

45. *Id.* at 506.

46. *Id.* at 508–09.

47. 478 U.S. 675 (1986).

48. *Id.* at 678.

49. *Id.* at 685.

50. *Id.* at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)).

51. *Id.* at 685.

52. *Id.* at 688 (Brennan, J., concurring) (citing *Cohen v. California*, 403 U.S. 15 (1971)).

The case of *Hazelwood School District v. Kuhlmeier* involved student speech in articles that were to appear in a school newspaper.⁵³ The Supreme Court held that schools are able to exercise editorial control over student speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate pedagogical concerns.⁵⁴ It is important to note that some states have enacted student free press laws that have pulled back on school district authority.⁵⁵

Thus, in both *Fraser* and *Hazelwood*, the Court appears to have followed the common law philosophy, indicating that when students are in school, officials have the authority to determine what student speech was contrary to the public good, including such social values as order and morality, as well as ensure that student speech is in accord with the educational mission of the schools. Under *Hazelwood*, school officials have even greater authority over student speech in school-sponsored publications.

The *Morse* decision, discussed above, appears to be grounded in the common law philosophy. While the case was decided based on student safety grounds, the speech in question did not raise concerns that were directly related to such safety. Rather, the focus was on limiting speech that was contrary to the educational mission of the school with respect to imparting a consistent message related to a safety issue.

In review, when students are on-campus, school officials can impose restrictions on speech that (1) is inconsistent with pedagogical purposes if such speech is in a school-sponsored publication; (2) is inconsistent with the educational mission of the school because it is lewd, vulgar, profane or plainly offensive; (3) advocates the illegal use of drugs and presumably other restrictions grounded in the interest of protecting students from receiving messages that are contrary to their safety; or (4) if the speech has or could cause a substantial and material disruption or interference with the rights of students to be secure. Thus, when students are on-campus, it appears

53. 484 U.S. 260 (1988).

54. *Id.* at 273.

55. *Understanding Student Free-Expression Laws: Renewed Push to Pass State Laws as Courts Chip Away at First Amendment Rights in Schools*, STUDENT PRESS LAW CENTER REPORTS (Student Press Law Center, Arlington, Va.), Fall 2007, at 30, available at http://www.splc.org/report_detail.asp?id=1351&edition=43.

that school officials may respond to student speech based both on common law and natural rights philosophies.

VI. FREE SPEECH STANDARDS FOR STUDENT OFF-CAMPUS SPEECH

However, when students are off-campus, school officials no longer appear to have the authority to act in accord with the common law philosophy that allows them to seek to inculcate habits and manners of civility and prepare students for citizenship. The Court explained the purpose of this boundary on school authority in *Thomas v. Board of Education*:

When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.⁵⁶

The *Morse* case also raised the question of a school response to off-campus student speech, but did not find such a question applicable. The Court noted at the outset that the case involved speech conducted during a school activity because the students were on what was essentially a school field trip.⁵⁷ The Court did not address the issue of the standards with respect to off-campus student speech beyond one sentence: “There is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents, see *Porter v. Ascension Parish School Board*, 393 F. 3d 608, 615 n.22 (5th Cir. 2004), but not on these facts.”⁵⁸

Footnote 22 from the *Porter* case contains helpful insight:

We are aware of the difficulties posed by state regulation of student speech that takes place off-campus and is later brought on-campus either by communicating student or others to whom the message was communicated. Refusing to

56. 607 F.2d 1043, 1052 (2d Cir. 1979).

57. *Morse v. Frederick*, 551 U.S. 393, 400 (2007).

58. *Id.* at 401.

differentiate between student speech taking place on-campus and speech taking place off-campus, a number of courts have applied the test in *Tinker* analyzing off-campus speech brought onto the school campus.⁵⁹

The lower Federal Courts have consistently maintained that school officials may respond to off-campus student speech under the *Tinker* standard, if it has or reasonably could cause a substantial disruption on campus.⁶⁰ Thus, when students are off-campus, the authority of school officials to respond formally to student speech appears to be grounded solely in natural rights related to the importance of protecting the rights of other students while they are at school. This makes legal, practical, and logical sense. Regardless of the geographic origin of any speech, school officials are responsible for ensuring the delivery of instruction and the well-being of all of the students under their custodial care. They must have the legal authority

59. 393 F.3d 608, 615, n.22 (5th Cir. 2004).

60. In *Scoville v. Board of Education*, 425 F.2d 10 (7th Cir. 1970), the situation involved two public high school students who had published an underground paper, which was distributed on-campus. The paper criticized school policies and contained language that school officials considered inappropriate and indecent. However, there was no evidence of disruption on campus and the school officials could not reasonably forecast such disruption, and the court determined the discipline was inappropriate. In *Shanley v. Northeast Independent School District*, 462 F.2d 960, 964 (5th Cir. 1972), students published an underground newspaper. The court noted: “[T]he activity punished here does not even approach the ‘material and substantial’ disruption that must accompany an exercise of expression, either in fact or in reasonable forecast.” *Id.* at 970. In *Klein v. Smith*, 635 F. Supp. 1440 (D. Me. 1986), a high school student made a vulgar gesture with his middle finger to a teacher when in a parking lot of a restaurant. The court agreed that such behavior would be unacceptable on campus. However, despite the fact that sixty-two school employees had signed a letter indicating that the boy’s actions had “sapped their resolve to enforce proper discipline,” the court ruled that their “professional integrity, personal mental resolve, and individual character [were not] going to dissolve, willy-nilly, in the face of the digital posturing of the splenetic bad-mannered . . . boy.” *Id.* at 1442 n.4. *Boucher v. School Board of the School District of Greenfield*, 134 F.3d 821 (7th Cir. 1998) addressed the situation of a high school student, who wrote and distributed an off-campus newspaper that provided guidance on how to hack the school computer. The court vacated the injunction that prevented the school from expelling Boucher, and held that the injunction undermines the school board’s authority to “take disciplinary action for what it believed to be a serious threat to school property.” *Id.* at 827. *Pangle v. Bend-Lapine School District*, 10 P.3d 275 (Or. Ct. App. 2000) involved an off-campus newspaper, where the student advocated specific methods for causing personal injury, property damage and the disruption of school activities. He also described where to obtain the necessary materials to engage in some of the acts that he advocated. *Id.* at 286. The court held that the “school district reasonably could have believed that [the newspaper] would substantially interfere with the work of the school or impinge upon the rights of other students.” *Id.* at 287 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1998)).

necessary within the special environment of the school to accomplish this.

However, school officials must recognize that when students are off-campus, they are beyond the “schoolhouse gate” when it comes to any effort to inculcate values. When students are off-campus, parents are responsible for imparting values. It is only when the impact of the student’s speech has or could come back through that “schoolhouse gate” and significantly interfere with the rights of other students that school officials have the authority to respond formally to off-campus speech.

VII. APPLYING *TINKER* TO STUDENT SPEECH

Because the *Tinker* decision relates most closely to the concerns of student security and responses to off-campus speech, it is appropriate to consider cases where courts have applied the *Tinker* standard to student speech, both on and off-campus, to determine what kinds of situations have been found to meet this standard.

Saxe v. State College Area School District was written by then-Judge Alito whose language from the Supreme Court decision on *Morse* was quoted above.⁶¹ The school district’s anti-harassment policy had been challenged on the basis that it was overbroad and could impact speech that someone might find merely offensive.⁶² In discussing various provisions of the policy, the court noted:

We agree that the Policy’s first prong, which prohibits speech that would “substantially interfer[e] with a student’s educational performance,” may satisfy the *Tinker* standard. The primary function of a public school is to educate its students; conduct that substantially interferes with the mission is, almost by definition, disruptive to the school environment.⁶³

Note specifically the use of the term “a” student which leads to the presumption that speech that interferes with the rights of any student, not the school or school activities, can be restricted. Further, the court appeared to be drawing a close

61. 240 F.3d 200 (3rd Cir. 2001).

62. *Id.* at 203–04.

63. *Id.* at 217.

connection between the two prongs of *Tinker*, essentially stating that speech that substantially interferes with a student's education constitutes a substantial disruption. Another part of the school district's policy was found to be overbroad and potentially interfering with protected speech that some might find to be offensive.⁶⁴

In another portion of the *Saxe* decision, referring to a Supreme Court case related to finding a hostile environment in the workplace, Alito noted: "in order for conduct to constitute harassment under a 'hostile environment' theory, it must both: (1) be viewed subjectively as harassment by the victim and (2) be objectively severe or pervasive enough that a reasonable person would agree that it is harassment."⁶⁵ This is an important consideration for school officials when considering responses in particular situations. It is important to ask: from the target's perspective, is the situation preventing the target from feeling safe while at school and receiving an education and, from a third party perspective, is the target's perspective reasonably supported?

In a subsequent Third Circuit case, *Sypniewski v. Warren Hills Regional Board of Education*, which also addressed the constitutionality of a district's anti-harassment policy, the court quoted with approval the new policy language adopted by the State College Area School District subsequent to the prior decision:

The term "harassment" as used in the Policy means verbal, written, graphic or physical conduct which does or is reasonably believed under the totality of the circumstances to 1. substantially or materially interfere with a student's or students' educational performance; and/or 2. deny any student or students the benefits or opportunities offered by the School District; and/or 3. substantially disrupt school operations or activities; and/or 4. contain lewd, vulgar or profane expression; and/or 5. create a hostile or abusive environment which is of such pervasiveness and severity that it materially and adversely alters the condition of a student's or students' educational environment, from both an objective viewpoint and the subjective viewpoint of the student at whom the harassment is directed. The term "harassment" for purposes of this Policy does not mean merely offensive

64. *Id.*

65. *Id.* at 205.

expression, rudeness or discourtesy; nor does the term “harassment” mean the legitimate exercise of constitutional rights within the school setting. The School District recognizes there is a right to express opinion, ideas and beliefs so long as such expression is not lewd or profane or materially disruptive of school operations or the rights of others.⁶⁶

The court in *Sypniewski* affirmed the rights of students to attend school in an environment free from abuse, stating “Intimidation of one student by another . . . is the kind of behavior school authorities are expected to prevent. There is no constitutional right to be a bully Schools are generally permitted to step in and protect students from abuse.”⁶⁷

Another line of lower court cases has focused on school dress code issues, such as T-shirts or other items worn by students in school. The courts have followed a consistent approach to analysis of these cases.⁶⁸ If the material is considered offensively lewd, or indecent, the courts generally apply the *Fraser* standard. Otherwise, the courts have applied *Tinker*. The decision in these latter cases has been dependent on the ability of the district to present facts that establish a history of discord related to the symbol or slogan that could portend the potential of school violence.⁶⁹ For example, in

66. 307 F.3d 243, 262 n.20 (3rd Cir. 2002). Note: the “subjective” and “objective” language in the new State College School District policy relates to an additional discussion in the *Saxe* case where the Court noted: “[I]n order for conduct to constitute harassment under a ‘hostile environment’ theory, it must both: (1) be viewed subjectively as harassment by the victim and (2) be objectively severe or pervasive enough that a reasonable person would agree that it is harassment. . . . The Court emphasized that the objective prong of this inquiry must be evaluated by looking at the ‘totality of the circumstances.’ ” These may include,” the Court observed, “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” 240 F.3d at 205 (quoting *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993)).

67. 307 F.3d at 264.

68. Wendy Mahling, Note, *Secondhand Codes: An Analysis of the Constitutionality of Dress Codes in the Public Schools*, 80 MINN. L. REV. 715 (1996).

69. See, e.g., *West v. Derby Unified Sch. Dist.*, 206 F.3d 1358 (10th Cir. 2000) (upholding district restriction against wearing Confederate symbols because the district was able to demonstrate that there had been actual fights at school involving racial symbols, particularly the Confederate flag); *Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246 (11th Cir. 2003), cert. denied, 540 U.S. 824 (2003) (upholding restrictions on Confederate symbols were justified because of the school’s history of racial tensions including racially based altercations).

schools where there has been a history of racial discord, policy prohibitions against wearing confederate symbols are upheld.

Two off-campus newspaper cases are also instructive. In these cases, the courts rejected the use of *Fraser* and applied *Tinker*. In *Boucher v. School Board of the School District of Greenfield*, a high school student wrote and distributed an off-campus newspaper that provided instructions on how to hack the school's computers.⁷⁰ The Seventh Circuit ruled that it was reasonable for school officials to foresee that the article would cause a substantial disruption of school operations by disrupting the functions of the school computer.⁷¹ In *Pangle v. Bend-Lapine School District*, the student advocated specific methods for causing personal injury, property damage and the disruption of school activities.⁷² The Oregon Court of Appeals held that the school district could have reasonably believed that the newspaper would substantially interfere with the work of the school or impinge upon the rights of other students.⁷³

Thus, under *Saxe* and *Sypniewski*, school officials appear to have the authority to respond to student speech that has, or could foreseeably, significantly interfere with the ability of a student to feel safe at school and receive an education. This conclusion is strengthened by Justice Alito's concurring opinion in *Morse*. Under a long line of dress code cases, school officials appear to have the authority to respond to speech that has, or foreseeably could, trigger violence at school, which is obviously a safety issue. Under cases related to off-campus newspapers, school officials appear to have the authority to respond to student speech that could cause a substantial disruption in school operations that could likely interfere with classroom instruction. Consider this from another perspective: If student speech, regardless of its geographic origin, has or could cause violence at school, prevent the delivery of instruction to students, or prevent any other student from receiving an education, would any rational person argue that school officials should not have the authority to respond?

70. 134 F.3d 821, 822 (7th Cir. 1998).

71. *Id.* at 828.

72. 10 P.3d 275, 277 (Or. Ct. App. 2000).

73. *Id.* at 287.

VIII. OFF-CAMPUS ONLINE SPEECH CASES

Federal Courts have decided cases related to a school disciplinary consequence imposed on a student related to off-campus online speech under the *Tinker* standard, and have, thus far, rejected the *Fraser* standard. It should be noted that all but one of these cases have involved student speech directed at a school staff member. This is a significant consideration. Note from the above discussion that the courts have always focused on the potential impact on students—disruption of operations, activities or instruction, violence, or interference with a student’s educational performance. Thus far, no court has upheld the discipline of a student where the only disruption or interference has been directed at a school staff member.

In these cases, school districts have set forth arguments either that school officials should have the authority to respond to student off-campus speech on the grounds that the speech was lewd and offensive and because it pertained to school, responding to such speech was important in serving their educational mission, a *Fraser*-based, common law-grounded argument. Alternatively, school districts argue that the speech caused a substantial disruption at school, a *Tinker*-based, natural rights-grounded argument. Civil rights organizations such as the American Civil Liberties Union (ACLU) argue that school officials have absolutely no authority to respond to off-campus student speech whatsoever.⁷⁴ In early online speech cases, the courts discussed whether the *Fraser* or *Tinker* standard was appropriate, declined to apply *Fraser* because the student was off-campus, and applied the *Tinker* standard—but did not find the requisite substantial disruption.⁷⁵

In two recent cases in the Second Circuit, the courts applied the *Tinker* standard and found there to be substantial disruption. In *Wisniewski v. Board of Education*, the Second Circuit upheld the suspension of a student who created an

74. Brief of Appellee and Cross Appellants, *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 294 (3d Cir. 2010) (No. 07-4465, 07-4555), 2008 U.S. 3rd Cir. Briefs LEXIS 535; Brief of Cross Appellants, *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 294 (3d Cir. 2010) (No. 07-4465, 07-4555), 2008 U.S. 3rd Cir. Briefs LEXIS 530, available at <http://www.aclupa.org/legal/legaldocket/studentsuspendedforinterne.htm>.

75. *E.g.*, *Beussink v. Woodland R-IV*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998); *Emmett v. Kent*, 92 F. Supp. 2d 1088 (W.D. Wa. 2000).

instant messaging icon depicting his teacher being shot.⁷⁶ He sent messages with this icon to fifteen people, none of whom were school officials, but some of whom were classmates.⁷⁷ One classmate showed the icon to the teacher, who found it distressing and brought it to the attention of school officials. The student expressed regret, was initially suspended for five days, and allowed to return to school pending a hearing on further action.⁷⁸ The teacher was permitted to stop teaching the student's English class.⁷⁹

The Second Circuit applied the *Tinker* standard uniquely. The court determined that school officials can impose discipline if off-campus conduct, "poses a reasonably foreseeable risk that [it] would come to the attention of school authorities" and that it would "materially and substantially disrupt the work and discipline of the school."⁸⁰ The court then stated: "[T]here can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment."⁸¹

The first half of the standard, "reasonably foreseeable risk that it would come to the attention of school authorities," is not grounded in any prior case law.⁸² Virtually all material posted online could foreseeably come to the attention of school authorities. Under *Tinker*, the focus must be on the impact of the speech at school, because it is the prevention of a harmful impact at school that provides school officials with the authority to respond. However, applying *Tinker*, the court did find there to be a substantial disruption due to the interference in the delivery of instruction to many students by the removal of the teacher from the class.

The Second Circuit continued to use the standard enunciated in *Wisniewski* in the case of *Doninger v. Neihoff*.⁸³ *Doninger* was a junior class student body officer.⁸⁴ Four days before a student council planned-event, called Jamfest, the

76. 494 F.3d 34, 38–39 (2d Cir. 2007), cert. denied, 552 U.S. 1296 (2008).

77. *Id.* at 36.

78. *Id.*

79. *Id.*

80. *Id.* 38–39.

81. *Id.* at 40.

82. *Id.* at 39.

83. 527 F.3d 41, 49 (2d Cir. 2008).

84. *Id.* at 44.

student body leaders were informed that it could not be held because a staff member who handled the technical services in the auditorium had a scheduling conflict.⁸⁵ This was the third postponement.⁸⁶ The students tried to communicate with the principal, who was not available.⁸⁷ The school staff advisor for the student government suggested they contact members of the community to generate support for holding the event on the day scheduled.⁸⁸ Doninger and three other members of the student council sent out a mass e-mail, encouraging recipients to contact the school officials and urge the district to hold the event as scheduled.⁸⁹ Both the principal and the superintendent were inundated with e-mails and phone calls.⁹⁰

Doninger and the principal disagreed about what happened next. Doninger claims that the principal told her that the event would be cancelled because of the students' actions.⁹¹ The principal disputed this, indicating that she expressed disappointment with the students because they resorted to a mass e-mail rather than coming to her or the superintendent to resolve the issue.⁹² That evening, Doninger posted the following announcement to her personal blog, which clearly set forth her understanding that the event had likely been cancelled:

jamfest is cancelled due to douchebags in central office. here is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. basically, because we sent it out, [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 to just cancel the whole thing all together. and so basically we aren't going to have it at all, but in the slightest chance we do it is going to after the talent show on may 18th. . . . And here is a letter my mom sent to [superintendent] and cc'd [principal] to get an idea of what to

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 44–45.

92. *Id.* at 45.

write if you want to write something or call her to piss her off more. im down.⁹³

Shortly thereafter Jamfest was rescheduled. Much later, the superintendent became aware of Doninger's blog post. The principal barred her from running for senior class secretary.⁹⁴ Doninger sought a preliminary injunction to hold a new election allowing her to run for class secretary or to install her as an additional senior class secretary, but the District Court denied it.⁹⁵

The Second Circuit affirmed.⁹⁶ However, the way the court applied the foreseeable risk of substantial disruption standard presents concerns. While denying that it was applying *Fraser*, the court clearly focused on the nature of Doninger's language, referring to the language as "plainly offensive" and "potentially incendiary."⁹⁷ Stripped of the language the court considered offensive, Doninger merely urged her readers to write or call the superintendent to express their displeasure that this popular event had been cancelled. She did not advocate any form of disruption other than the expression of an objection to what the school officials had done. This raises an additional aspect of the First Amendment—the right of students to protest the actions of school officials. This additional right, which is foundational to our democracy, was not discussed by the court. In point of fact, in the U.S. Declaration of Independence, our founders called King George a "Tyrant,"⁹⁸ which likely made him angry also. While thus far in these cases the student's right to protest the actions of public school officials has not been raised as a legal theory to contest a disciplinary action, clearly there are situations where this theory would apply.

Of greater concern is the approach the court took to the application of the "reasonably foreseeable" portion of the *Tinker* standard. The reason for this portion of the standard is to ensure that school officials can act in advance of any actual disruption to prevent it.⁹⁹ The superintendent only discovered

93. *Id.*

94. *Id.* at 46.

95. *Id.* at 47.

96. *Id.* at 54.

97. *Id.* at 49, 51.

98. THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).

99. *See, e.g., LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001)

Doninger's post after the overall situation had been resolved.¹⁰⁰ The causation factor should have presented even greater concern. There were many potential causes of any actual disruption around the time Doninger's comments were posted. A school staff member, who was scheduled to manage the technical aspects of a scheduled event that was important to the students and the community, backed out four days before the event, thus requiring the event to be cancelled or postponed for the third time. In the context of this situation Doninger's post, which reportedly received only three comments, was arguably not a significant cause of any disruption.¹⁰¹ Thus, for many reasons, the *Doninger* decision presents significant concerns.

Currently, the question of a school's response to speech directed at staff is under review by the Third Circuit Court of Appeals in two cases: *Layshock v. Hermitage School District* and *J.S. v. Blue Mountain School District*.¹⁰² Two separate three-judge panels of the Third Circuit Court of Appeals issued

("Tinker does not require school officials to wait until disruption actually occurs before they may act."); *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007) ("School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place.").

100. *Doninger*, 527 F.3d at 46.

101. The situation in the *Doninger* case also raises another matter for consideration. Closely related to the right of free speech, there is another principle that is even more at the foundation of the U.S. democracy: the right to petition. "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I. Our students study the right to petition in action. In the Declaration of Independence, our founders stated "A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people." THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776). It is highly likely that King George found both the language and ideas presented in this document to be highly offensive, similar to the district Superintendent. The Boston Tea Party was likely considered by the British as to be a material and substantial disruption. Martin Luther King, who has had a day set aside in his honor, clearly relied on the right to petition to force government to right the wrongs of how African-American people were treated in this country. King's words and actions were considered by some to be highly offensive and frequently caused a substantial and material disruption. What is the right of students, who are on a day-to-day basis subjected to the impact of policies and actions of representatives of the state (principals and teachers)—to petition those state officials to right a wrong or correct a problem—even if that petition does cause a substantial disruption?

102. *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, *vacated*, 2010 U.S. App. LEXIS 7362 (3d Cir. 2010); *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286, *vacated*, 2010 U.S. App. LEXIS 7342 (3d Cir. 2010).

conflicting opinions in these cases.¹⁰³ Both cases involved the creation of an offensive profile on a social networking site that was directed at the school principal. The losing parties in both cases asked the full court to rehear the cases.¹⁰⁴

In *Layshock*, the student created a profile that was a parody of his principal on MySpace while at home. As word of the profile spread throughout school, students were accessing it from school computers. Despite the presence of filtering software, the school had a difficult time blocking access.

The District Court decision in this case was helpful in outlining the specific evidentiary elements necessary to create the conditions where school official's response to off-campus speech is justified under *Tinker*.¹⁰⁵ The court found that the school failed to "establish[] a sufficient nexus between [Layshock]'s profile and substantial disruption of the school environment."¹⁰⁶ The court also noted that even if it had found a sufficient nexus that no reasonable jury would find that a substantial disruption occurred, indicating that the actual disruption here was minimal.¹⁰⁷ The court noted that the school failed to demonstrate that the profile, rather than the investigation and reaction of school administrators, caused any disruption.¹⁰⁸ Thus under this decision, there is a requirement to establish a school nexus, substantial disruption or reasonable fear of future disruptions, and a causal connection between the off-campus speech and any on-campus disruptions.

At the Circuit Court level, the school district conceded that there was not a sufficient nexus between the profile and any disruption on campus.¹⁰⁹ The school district argued that because the speech was aimed at the school community, Layshock took a photograph from the district site, he accessed the profile from school, and it was foreseeable that the speech would come to the attention of the school community the case

103. Shannon P. Duffy, *3rd Circuit Mulls Student Suspensions for MySpace Postings*, LAW.COM (June 04, 2010), <http://www.law.com/jsp/article.jsp?id=1202459201824>.

104. An update to this article will be provided on the BYU Education and Law Journal web site after release of this decision.

105. *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007).

106. *Id.* at 600.

107. *Id.*

108. *Id.* at 602.

109. *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 258 (3d. Cir. 2010).

should be evaluated under the *Fraser* standard.¹¹⁰ The three-judge panel rejected this argument.¹¹¹

In *J.S. v. Blue Mountain School District*, the three-judge panel relied on *Tinker*, but did not find any actual disruption.¹¹² However, because the profile featured the principal and alluded to his engagement in sexually inappropriate behavior and illegal conduct, two judges determined that it was reasonably foreseeable that the profile threatened to substantially disrupt the school because other students and parents might question the principal's conduct and his fitness to serve as a principal.¹¹³ In a dissenting opinion, the third judge argued that the facts did not support the conclusion that a forecast of substantial disruption was reasonable.¹¹⁴ This judge compared the foreseeable impact of the student's private profile that set forth allegations that were not credible to the potential disruption in the *Tinker* case related to wearing of armbands at school to protest an unpopular war.¹¹⁵ This judge indicated that if the apprehension of disruption related to the armbands was not sufficient to overcome the students' rights of freedom of speech, any apprehension related to the impact of this profile certainly was not sufficient.¹¹⁶

The full court decision in these two cases will be helpful, but will only impact the guidance set forth in this article if the court adopts the argument set forth by the ACLU, that the school district has no authority whatsoever to respond to student off-campus speech.¹¹⁷ This is unlikely. The decision may provide some helpful guidance in the form of dicta.¹¹⁸

110. *Id.* at 260.

111. *Id.* at 261.

112. *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 302 (3d. Cir. 2010).

113. *Id.*

114. *Id.* at 313–14.

115. *Id.*

116. *Id.* at 316.

117. Brief of Appellee, *supra* note 74.

118. Note, the fact that a school official might not be able to respond formally to a student's offensive or harmful speech directed at a staff member does not mean that nothing can be done. A school official can certainly meet with the parents and perhaps discuss the fact that if their child persists in this kind of action this does not bode well for his or her success in the future. In some situations, a civil law suit based on a claim of defamation, invasion of personal privacy, false light, or intentional infliction of emotional distress might be appropriate. Sometimes, the speech may have criminal

IX. OFF-CAMPUS ONLINE SPEECH TARGETING A STUDENT

There has been one case involving online hurtful speech directed at a student where the court's opinion was unfortunately not well founded: *J.C. v. Beverly Hills Unified School District*.¹¹⁹ J.C. created a video depicting several other students disparaging C.C. and posted this video on YouTube.¹²⁰ C.C. and her mother raised this video to the attention of the school. J.C. was suspended.¹²¹ In this case, the court decided to apply the *Tinker* standard, but struggled with how to apply this standard to a situation where speech was directed at a student.

The apparent lack of full briefing of the case law related to a school's response to student speech that harmfully targets another student was evident in how the court analyzed the case. The court stated "Tinker establishes that a material and substantial disruption is one that affects 'the work of the school' or 'school activities' in general."¹²² The court did reference the other important language in *Tinker* regarding rights of students to be secure, but stated: "[T]he Court is not aware of any authority . . . that extends the *Tinker* rights of others prong so far as to hold that a school may regulate any speech that may cause some emotional harm to a student. This court declines to be the first."¹²³ In its discussion, the court failed to reference the decision and language in *Saxe*—which is clearly directly on point.

After thus narrowing the analysis of *Tinker* to an assessment of the impact on the school activities, the court assessed a variety of issues that were not relevant to the harmful impact on C.C., including whether a ripple effect in the classroom had disturbed instruction, whether students were planning to physically assault C.C. or any evidence that C.C. intended to engage in physical violence, the demand on staff time to address the situation, the potential that students could take sides and this could lead to violence, and whether

ramifications, such as hate speech. School officials can also frequently have the speech taken off the website by filing an abuse report with the website.

119. *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

120. *Id.* at 1098.

121. *Id.* at 1098–99.

122. *Id.* at 1119.

123. *Id.* at 1123.

there was any history of a prior video posted on YouTube that led to violence. None of these factors, in the court's opinion, provided sufficient evidence of substantial disruption of school "activities."¹²⁴

The court further appeared to discount the emotional harm inflicted on C.C. The court indicated that after meeting with the principal, C.C. was willing to go to class, but failed to note that her willingness to go to class was predicated on her knowledge of the forthcoming discipline of the students who had attacked her.¹²⁵ The court's abject lack of insight into the problems of bullying and the serious consequences of bullying on the emotional well-being and educational success of students was evident:

[T]he School's decision must be anchored in something greater than one individual student's difficult day (or hour) on campus

[N]o one could seriously challenge that thirteen-year-olds often say mean-spirited things about one another, or that a teenager likely will weather a verbal attack less ably than an adult. The Court accepts that C.C. was upset, even hysterical, about the YouTube video, and that the School's only goal was to console C.C. and to resolve the situation as quickly as possible

The Court cannot uphold school discipline of student speech simply because young persons are unpredictable or immature, or because, in general, teenagers are emotionally fragile and may often fight over hurtful comments.¹²⁶

The court's comments and interpretation of the situation fly in the face of bullying research and prevention insight. While it appears that the school principal provided excellent testimony about issues related to the harms caused by bullying, school attorneys are likely well-advised to provide expert testimony regarding these concerns. As noted in *Saxe*, Judge Alito stated the need to focus on both subjective and objective perspectives in defining a hostile environment.¹²⁷ From an evidentiary perspective, school attorneys would be well advised to recognize that some judges might lack a sophisticated understanding of

124. *Id.* at 1117, 1120–21.

125. *Id.* at 1098.

126. *Id.* at 1117, 1119, 1121–22 (citations omitted).

127. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 205 (3d Cir. 2001).

the harms caused by bullying, and ensure the presentation of evidence regarding the target's subjective reaction to the situation, supported by expert testimony that provides an objective, research-based perspective. This evidence, in combination with language in *Saxe*, as well as Justice Alito's language in *Morse*, should ward off a similar erroneous decision in the future.

Unfortunately, this case was not appealed. If the Court's decision in the *J.C.* case is correct—that the disruption must be of school “activities”—this calls into question the constitutionality of all state statutes and district policies against bullying as these are grounded in the ability of school officials to respond to student speech that has or could cause a substantial interference with the ability of another student to receive an education. Clearly, the decision was in error.

X. OFF-CAMPUS LIKELY IS ALSO ON-CAMPUS

While the discussion regarding legal issues related to off-campus speech is necessary, an additional factor school officials and attorneys must recognize is that in the vast majority of these situations, the aggression directed at a student is not solely off-campus. These hurtful situations most often involve both off-campus and on-campus altercations. The on-campus actions could include sending hurtful text messages via cell phone and a range of harmful in-person interactions, including offensive comments and nasty looks. Further, if hurtful material has been posted on a commercial site, such as Facebook, school officials should be aware that many students now have Internet access through their cell phones or iPods, or they can easily bypass the school's filter to access these sites through the district's Internet system. What might appear at first to be off-campus speech might have actually been posted while the aggressor was at school.

Thus, even if the majority of the offensive speech is posted off-campus, there are generally indications of an ongoing pattern of harmful interactions occurring on-campus. A full investigation of these incidents should specifically document all on-campus actions and interactions related to the overall situation. A record of these on-campus interactions will support the student's subjective perspective and an objective perspective that the combination of off-campus electronic

speech with the on-campus interactions have or could result in a significant disruption of the ability of a student to receive an education and fully participate in school activities.

XI. NOTICE AND DUE PROCESS

In a separate opinion in the *J.C.* case, the court found a lack of appropriate due process.¹²⁸ The court determined that neither the district policy nor the state statute provided notice to *J.C.* that the school would impose discipline in response to off-campus speech.¹²⁹ Therefore, due to the failure to provide notice, there was a lack of due process. It appears that it is very important to include specific language in the district policy making it clear to students and their parents regarding when the school will assert its authority to respond to off-campus student speech that has or reasonably could create a substantial disruption at school. A situation in some states and districts raises concerns with respect to adequacy of notice.

Some states have passed legislation to address cyberbullying. An Oregon statute provides an example of the problems that can be created by legislative language:

- (1) “Cyberbullying” means the use of any electronic communication device to harass, intimidate or bully.
- (2) “Harassment, intimidation or bullying” means any act that
 - (a) substantially interferes with a student’s educational benefits, opportunities or performance;
 - (b) that takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation or at any official school bus stop;
 - (c) and that has the effect of:
 - (a) Physically harming a student or damaging a student’s property;
 - (b) Knowingly placing a student in reasonable fear of physical harm to the student or damage to the student’s property; or
 - (c) Creating a hostile educational environment.¹³⁰

This language appears to create a statutory limitation that would prevent school officials from responding to cyberbullying

128. *J.C.*, 711 F. Supp. 2d at 1102.

129. *Id.* at 1098.

130. OR. REV. STAT. § 339.351 (2009).

occurring off-campus. If school districts adopt a policy grounded in this language, which many districts could do, their policy would fail to provide appropriate notice to students that the district may also impose discipline for off-campus speech that causes an impact at school that meets the *Tinker* standard.

The failure to provide appropriate notice to students that the school also can and will respond to off-campus speech is also evident in a new bullying prevention policy provided by the Florida Department of Education. This policy specifically states:

The school district upholds that bullying or harassment of any student or school employee is prohibited:

- a) During any education program or activity conducted by a public K-12 educational institution;
- b) During any school-related or school-sponsored program or activity;
- c) On a school bus of a public K-12 educational institution; or
- d) Through the use of data or computer software that is accessed through a computer, computer system, or computer network of a public K-12 education institution.¹³¹

The failure to provide effective notice both through state statute and district policy of the school official's authority to respond to off-campus online speech that has or could cause a substantial disruption at school presents a "no-win" situation for principals and could lead to school violence or situations where students are denied their right to receive an education. If the principal feels it necessary to suspend a student to control a cyberbullying situation, that student or his or her parents will likely argue that, based on the language of the policy, such disciplinary response is not justified. When targeted students do not feel that there are any options available to stop the bullying, they might resort to violence against the aggressors. Alternatively, students could not feel safe coming to school, and thus be denied an education.

131. FLORIDA DEPARTMENT OF EDUCATION, MODEL POLICY AGAINST BULLYING AND HARASSMENT, http://www.fldoe.org/safeschools/bullying_prevention.asp (last visited Sept. 21, 2010).

The statutory language of the recently passed New Hampshire bullying prevention statute, HB 1523, provides school authorities with greater authority:

193-F:4 Pupil Safety and Violence Prevention.

I. Bullying or cyberbullying shall occur when an action or communication as defined in RSA 193-F:3:

(a) Occurs on, or is delivered to, school property or a school-sponsored activity or event on or off school property; or

(b) Occurs off of school property or outside of a school-sponsored activity or event, if the conduct interferes with a pupil's educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event.¹³²

Likewise, the new policy of the Chicago Public Schools effectively addresses off-campus harmful activities:

The SCC applies to actions of students during school hours, before and after school, while on school property, while traveling on vehicles funded by the Board, at all school-sponsored events, and while using the CPS Network or any computer, Information Technology Devices or social networking website, when the actions affect the mission or operation of the Chicago Public Schools. Students may also be subject to discipline for Group 5 or 6 Inappropriate Behaviors that occur either off campus or during non-school hours, including actions that involve the use of any computer, Information Technology Device or social networking website, when the misconduct disrupts or may disrupt the orderly educational process in the Chicago Public Schools.¹³³

If a state has includes language such as that in the Oregon statute, a possible interpretation of the state statutory language is that the state statute presents the minimum requirements, but that districts certainly can have a policy that is constitutionally justified that goes beyond this minimum. Districts should be free to adopt policies that are grounded in appropriate constitutional standards to address harmful off-campus harmful speech. Thus, even with these statutory

132. H.B. 1523, 2010 Leg., 161st Sess. (N.H. 2010).

133. CHICAGO PUBLIC SCHOOLS, STUDENT CODE OF CONDUCT FOR THE CHICAGO PUBLIC SCHOOLS FOR THE 2010-2011 SCHOOL YEAR 4, <http://policy.cps.k12.il.us/documents/705.5.pdf>.

provisions in place, districts can, and arguably should, adopt policies that are in accord with the *Tinker* standard with respect to off-campus speech. Clearly, the better alternative will be to amend state statutes that contain this language to make it clear that school officials can also respond, under the *Tinker* standard, to off-campus bullying and harassment.

XII. SUGGESTED APPROACH TO RESPOND TO OFF-CAMPUS SPEECH

The following are factors school officials should consider when crafting policies to respond to off-campus speech:

- Notice. While this requirement may not be required by all courts, it is prudent for districts to ensure that their disciplinary policy provides clear notice to students and parents that the school intends to discipline students for off-campus speech that causes or threatens a substantial disruption at school or interference with students' rights to be secure.
- School "nexus." A nexus between the off-campus online speech and the school community is necessary. The speech involves students or staff or is in some other manner connected to the school community.
- Impact at school. The impact has, or it is reasonably foreseeable it will be, at school. "School" includes school-sponsored field trips, extracurricular activities, sporting events, and transit to and from school or such activities.
- Impact has occurred or is reasonably foreseeable. School officials must be able to point to specific and particularized facts that support why they foresee a substantial disruption or interference—not mere apprehension of a possible disruption. Timing is also an issue. The response should be to prevent an imminent foreseeable substantial disruption or interference—not after the fact because a disruption could possibly have occurred, but did not.
- Impact is material and substantial. The impact has, or it is reasonably foreseeable it will be, significant. Not anger or annoyance. Not disapproval of the expression of a controversial opinion. Not simply a

situation that requires a school official to investigate.

- The disruption has negatively impacted, or reasonably could negatively impact, students' rights. The speech has caused, or it is reasonably foreseeable it will cause:
 - Significant interference with instructional activities, school activities, or school operations. (If speech is directed at staff, a significant interference with instruction, school activities, or school operations likely must be demonstrated.)
 - Physical or verbal altercations.
 - A hostile environment or substantial interference with a student's ability to participate in educational programs or school activities. Establish such interference based on the target's subjective response and a reasonable observer perspective.
- Causal relationship. The speech has, or it is reasonably foreseeable it will, be the actual cause of the disruption, not some other factor, such as administrator actions or student responses to administrator actions.

XIII. ON-CAMPUS SPEECH AND POLICIES REGARDING PERSONAL DIGITAL DEVICES

As noted in the above discussion about school dress codes, the courts normally approach these cases by first determining whether the speech can be addressed under the *Fraser* standard. If not, the student speech is analyzed under *Tinker*. The same approach can be applied to situations where student electronic speech originates on campus.

School officials should have the authority and responsibility to respond to any harmful or inappropriate speech propagated through the District Internet system and by students using personal digital devices at school. This authority can stem from *Hazelwood*, for any student speech appearing in school-sponsored online publications, under *Fraser*, if the speech is lewd and offensive or are inconsistent with the school's educational mission, or under *Tinker*, if the speech has caused,

or threatens, a substantial disruption at school or interference with students' rights to be secure. However, in states with student free speech statutes, the ability to rely on *Hazelwood* is a question that will have to be answered by local counsel.

Districts are advised to exercise care in policies related to student personal digital devices. Many districts have policies forbidding cell phone use during the school day. Many students do not abide by this policy and it is exceptionally hard to enforce the policy during class breaks. Some schools, recognizing the impossibility of enforcing such policies, are shifting to an approach that restricts use of cell phones during class or instructional time. A challenge with the more restrictive policies is that if students are being cyberbullied via a personal digital device while at school, they may fear reporting this because this would implicate them violating the policy against use of the cell phone at school. If a policy provides that possessing a nude image on a cell phone at school is a violation and a student receives such an image, this student would have significant apprehension about reporting. Lack of reporting could lead to altercations at school or the further dissemination of a nude image. Thus, in addition to relaxing the overall restrictions, districts may want to carve out an exception in their policy covering personal digital devices to encourage students to report concerns without fear of discipline for use of their device in school.

XIV. SCHOOL DISCIPLINE FOR SEXTING

Districts will need to consider how these on-campus speech standards may apply to handle situations involving student sexting. In some situations, generally where the dissemination of images is bullying or harassment, school officials should have the authority to impose discipline for on- or off-campus sexting acts that are directed at harming a student's reputation or causing a hostile environment at school for that student. This could include situations where sending the image to a recipient who does not want to receive it constitutes harassment, distributing an image to others, or maliciously soliciting the image.

A situation that must be handled delicately is when a student has been pressured to provide an image, or has sent an image with the expectation that it would remain private, and

that image has been disseminated. The student or students who are at fault in this situation and should receive discipline are the one(s) who provided the coercion to produce the image or have distributed the image. The fact that a student may have engaged in an action that is now causing him or her to be ridiculed does not mean that this student has caused the substantial disruption. Imposing a disciplinary consequence on the student who is depicted can contribute to profound harm by legitimizing the sexual harassment of the student depicted.

In situations where the images are retained privately and there is no apparent intent to distribute, but for some reason such images have been reported to or their existence has been discovered by a school official, it may be difficult to justify a school response. School officials may argue that they have a responsibility to inculcate values or that possessing these images is a violation of the law. However, if the images are not significantly affecting the school or other students, school officials likely have no authority to seek to usurp parents' role in inculcating values. Even the possibility that a student might have committed a criminal offense, if not committed at school, likely does not provide the justification for a school disciplinary response. Certainly, the school official will want to alert parents and make sure the images are destroyed so that distribution is impossible.

It is also exceptionally important that the responses to these situations be based on who actually has caused the harm, and that the disciplinary responses are applied in a manner that is gender neutral. A district in Washington was sued because it allegedly banned a cheerleader from the squad for sending an image, but did not ban the football players who were distributing her image without her consent.¹³⁴

XV. POTENTIAL OF LIABILITY FOR HOSTILE ENVIRONMENT— STUDENT'S RIGHT TO FEEL SAFE AT SCHOOL

School officials must also be mindful of potential liability for failure to respond to situations involving cyberbullying or sexting that affect their students. Although there are no cases

134. Lisa E. Soronen, Nicole Vitale & Karen A. Haase, *Sexting at School: Lessons Learned the Hard Way*, INQUIRY AND ANALYSIS (National School Boards Association, Alexandria, Va.), Feb. 2010, at 6, available at <http://www.nsba.org/MainMenu/SchoolLaw/Issues/Technology/Resources/1A-Feb-10.pdf>.

directly on point, the combination of harmful actions that occurred off-campus and that continue on-campus, which is a frequent occurrence, can contribute to the creation of a hostile environment at school for the student targeted.

It is important to consider a school official's duty to intervene when an instance of cyberbullying or sexting affects a student in the context of students' right to receive an education. As the Court said in *Brown v. Board of Education*:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.¹³⁵

The importance of ensuring that students feel safe at school was recently emphasized in comments made by the U.S. Secretary of Education Duncan at a Bullying Prevention Summit:

For the record, let me state my basic, operating premise, both in Chicago and Washington DC: No student should feel unsafe in school. Take that as your starting point, and then it becomes inescapable that school safety is both a moral issue, and a practical one.

The moral issue is plain. Every child is entitled to feel safe in the classroom, in the hallways of school, and on the playground. Children go to school to learn, and educational opportunity must be the great equalizer in America. No matter what your race, sex, or zip code, every child is entitled to a quality education and no child can get a quality education if they don't first feel safe at school.

It is an absolute travesty of our educational system when students fear for their safety at school, worry about being bullied, or suffer discrimination and taunts because of their

135. 347 U.S. 483, 493 (1954).

ethnicity, religion, sexual orientation, disability, or a host of other reasons.

The job of teachers and principals is to help students learn and grow—and they can't do that job in schools where safety is not assured.

The practical import of school safety is just as plain as the moral side of the equation. A school where children don't feel safe is a school where children struggle to learn. It is a school where kids drop out, tune out, and get depressed. Not just violence but bullying, verbal harassment, substance abuse, cyber-bullying, and disruptive classrooms all interfere with a student's ability to learn.¹³⁶

Students receive important federal protections from discrimination and harassment. Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in educational programs and activities that receive federal financial assistance.¹³⁷ Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in programs or activities that receive federal financial assistance.¹³⁸ Section 504 of the Rehabilitation Act of 1973 prevents discrimination based on disability in programs or activities that receive federal funding, while Title II of the Americans with Disabilities Act of 1990 prohibits discrimination based on disability in public entities, including educational institutions.¹³⁹ Some state statutes offer even greater protection against discrimination.

Schools have a legal responsibility to prevent student-on-student harassment. In *Davis v. Monroe County Board of Education*,¹⁴⁰ the Supreme Court allowed a private Title IX damages action against a school board in a case of student-on-student harassment. The Court held that to establish a prima facie case of student-on-student harassment that would render school officials liable, the student must demonstrate each of the following elements: (1) “the harassment was so severe,

136. Arne Duncan, U.S. Sec'y of Educ., *The Myths About Bullying*, Remarks at the Bullying Prevention Summit (Aug. 11, 2010), <http://www.ed.gov/news/speeches/myths-about-bullying-secretary-arne-duncans-remarks-bullying-prevention-summit>.

137. 20 U.S.C. § 1681 (2010).

138. 42 U.S.C. § 2000d-7 (2010).

139. 42 U.S.C. § 12101 (2009).

140. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 632 (1999).

pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school”; (2) the school “had actual knowledge” of the harassment; and (3) the school was “deliberately indifferent to the harassment.”¹⁴¹

The Davis Court engaged in a significant discussion about when it might be found that a school was deliberately indifferent to student-on-student harassment. Ultimately, the Court concluded:

Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.¹⁴²

The lower courts have struggled to apply the three-part test set forth in *Davis*, and the results are inconsistent. The inconsistencies appear to be related to the question of the effectiveness of the school’s response. Essentially, the question is: If, despite policies and some level of response to reported incidents, egregious bullying and harassment has continued, does this constitute “deliberate indifference” by the school? As noted in *Vance v. Spencer County Public School District*, a case from the Sixth Circuit:

[W]here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.¹⁴³

A contradictory opinion was enunciated in the First Circuit in *Fitzgerald v. Barnstable School Committee*. The court determined Title IX does not “require educational institutions to take heroic measures, to perform flawless investigations, to

141. *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999) (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999)).

142. *Davis*, 526 U.S. at 652.

143. 231 F.3d 253, 261 (6th Cir. 2000). *See also* *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 966 (D. Kan. 2005); *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 446 (6th Cir. 2009).

craft perfect solutions, or to adopt strategies advocated by parents.”¹⁴⁴ The standard according to *Fitzgerald* is objective: was the response of the institution, deficient to the extent that it could be considered unreasonable?¹⁴⁵

We have recognized that if an institution learns that its initial response is inadequate, it may be required to take further steps to prevent harassment. Here, however, the school responded reasonably each time the Fitzgeralds notified it of new developments

The fact that subsequent interactions between [the two students] occurred does not render the School Committee deliberately indifferent. To avoid Title IX liability, an educational institution must act reasonably to prevent future harassment; it need not succeed in doing so.¹⁴⁶

Civil rights laws are not the only laws under which claims can be filed in cases involving bullying and harassment that affect a student’s school experience. The *Fitzgerald* opinion was appealed to the Supreme Court, but on a different issue—whether Title IX precludes use of 42 U.S.C. § 1983 to redress unconstitutional gender discrimination in schools.¹⁴⁷ This issue was in conflict in various Circuits. The Court noted that Title IX was modeled after Title VI of the Civil Rights Act of 1964 and passed Title IX with the explicit understanding that it would be interpreted the same as Title VI. When Title IX was enacted, “Title VI was routinely interpreted to allow for parallel and concurrent § 1983 claims.”¹⁴⁸

Additionally, in *Davis*, the Court noted:

The common law, too, has put schools on notice that they may be held responsible under state law for their failure to protect students from the tortious acts of third parties. (citation omitted). In fact, state courts routinely uphold claims alleging that schools have been negligent in failing to protect their students from the torts of their peers.¹⁴⁹

144. 504 F. 3d 165, 174–75 (1st Cir. 2007), *rev’d and remanded*, 129 S. Ct. 788 (2009).

145. *Id.*

146. *Id.*

147. *Fitzgerald v. Barnstable Sch. Committee*, 129 S. Ct. 788, 792 (2009).

148. *Id.* at 797.

149. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643 (1999).

Thus, there are a number of legal avenues that can be pursued to hold a school district or official liable if they do not respond, or do not respond effectively, to bullying or cyberbullying. The issue of the effectiveness of the school response is likely to become far more relevant with the emergence of recent research that will prove that the lack of school effectiveness in responding to student reports of bullying is a significant problem.

A recent study was issued by the Youth Voice Project, the first known large-scale research project that solicits students' perceptions about strategy effectiveness to reduce peer mistreatment in schools.¹⁵⁰ This study surveyed 11,893 students in grades 5 through 12, representing 25 schools in 12 states.¹⁵¹ Only 42% of moderately to very severely affected youth reported that they told an adult at school.¹⁵² In 34% of the situations where the students reported to an adult at school, the situation improved.¹⁵³ But in 37% of the cases, the situation remained the same, and in 29% of the cases, the peer aggression got worse.¹⁵⁴ Thus, students report that school officials failed to respond effectively in 66% of the cases of reported peer aggression. This failure rate likely also relates to the low level of reporting of significant incidents to school officials. If students do not believe that reporting to a school official will resolve the problem or if they fear it could make the situation worse, they are unlikely to report. What grade would students receive if they failed to respond effectively 66% of the time? Legally the questions will continue to be asked, if upon report of bullying and harassment to a school official, the situation gets worse, does this constitute "deliberate indifference?"

Another recent study focused on the differences in perspective between students and teachers with respect to bullying:

The vast majority of students felt their school was *not* doing enough to prevent bullying (67.3% MS; 60.0% HS), whereas

150. STAN DAVIS & CLARISSE NIXON, PRELIMINARY RESULTS FROM THE YOUTH VOICE RESEARCH PROJECT: VICTIMIZATION & STRATEGIES 1 (March 2010), available at <http://www.youthvoiceproject.com/YVPMarch2010.pdf>.

151. *Id.* at 2.

152. *Id.* at 7.

153. *Id.* at 8.

154. *Id.*

most staff members believed their prevention efforts were adequate (81.7% ES; 52.8% MS; 65.0% HS). Compared to staff, students were less likely to think adults at their school were doing enough to prevent bullying . . . False and were more likely to report having “seen adults in the school watching bullying and doing nothing” (51.7% MS and HS students; 18.1% all staff). . . . In fact, most students reported believing school staff made the situation worse when they intervened (61.5% MS; 57.0% HS).¹⁵⁵

But this perspective was not shared by staff members. Of significant concern, this study also found the following:

Fewer than 7% of all staff surveyed (4.8% ES; 9.7% MS; 10.0% HS) believed that things got worse when they tried to intervene in a bullying situation. In fact, over 86% of all staff surveyed (89.2% ES; 84.4% MS; 77.8% HS) endorsed the statement “I have effective strategies for handling a bullying situation,” thereby indicating their perceived efficacy for handling such situations.¹⁵⁶

However, these studies do not mean that schools should implement Zero Tolerance policies or become more aggressive in suspending students. The APA Task Force on Zero Tolerance carefully reviewed the research literature and concluded:

[S]chools with higher rates of school suspension and expulsion appear to have less satisfactory ratings of school climate, less satisfactory school governance structures, and to spend a disproportionate amount of time on disciplinary matters. Perhaps more importantly, recent research indicates a negative relationship between the use of school suspension and expulsion and school-wide academic achievement.¹⁵⁷

Thus, there is ample reason to be concerned about the adequacy of school responses to reported incidents of bullying and harassment and the overall decision of schools to ensure a positive school climate that allows all students to feel safe and receive an education. Given such a stark differences in perspective and reality of the effectiveness of the school intervention response, school districts should not be surprised

155. Bradshaw, *supra* note 13, at 374–75. MS is middle school, HS is high school, ES is elementary school.

156. *Id.*

157. APA Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 855 (2008).

to find students and parents continuing to seek judicial remedies in situations where the harm was not stopped or has gotten worse. Studies of bullying prevention have demonstrated that school-wide programs that address bullying by implementing interventions at multiple levels (school, classroom, individual, and community) and by engaging parents at all levels are the only programs that demonstrate effectiveness.¹⁵⁸ All districts would be well-advised to proactively implement comprehensive effective programs to support positive school climate and to set up an ongoing process to evaluate the effectiveness of school official responses to reports of bullying or cyberbullying.

XVI. HOSTILE ENVIRONMENT AND SEXTING

It is imperative that school officials recognize the potential danger of sexual harassment related to the concern of sexting. The fact that a student has done something incredibly “stupid,” like provide a nude or semi-nude image that has now “gone viral” (been widely disseminated) and has led to sexual harassment, likely does not obviate school officials of their responsibility to prevent a hostile environment and stop the sexual harassment.

School officials must be exceptionally careful in how they handle these situations so as to ward off, to the extent possible, subsequent sexual harassment of the students. Further, such subsequent harassment must be predicted. Efforts to stop the harassment must be implemented, with ongoing consultation with the students involved, to ensure success of these efforts.

158. See Dan Olweus & Susan Limber, *The Olweus Bullying Prevention Program: Implementation and Evaluation Over Two Decades*, in HANDBOOK OF BULLYING IN SCHOOLS: AN INTERNATIONAL PERSPECTIVE (S.R. Jimerson et al. eds., 2010); M.M. TTOFI, D.P. FARRINGTON & A.C. BALDRY, EFFECTIVENESS OF PROGRAMMES TO REDUCE BULLYING (2008); K.W. Merrell, B.A. Guelder, S.W. Ross, & D.M. Isava, *How Effective Are School Bullying Intervention Programs? A Meta-Analysis of Intervention Research*, 23 PSYCHOL. Q. 26 (2008); J.D. Smith, B.H. Schneider, P.K. Smith, & K. Ananiadou, *The Effectiveness of Whole-School Anti-Bullying Programs: A Synthesis of Evaluation Research*, 33 SCH. PSYCHOL. REV. 547 (2004); M.M. Ttofi & D.P. Farrington, *What Works in Preventing Bullying: Effective Elements of Anti-Bullying Programmes*, 1 J. AGGRESSION, CONFLICT & PEACE RES. 13 (2009); Rachel C. Vreeman & Aaron E. Carroll, *A Systematic Review of School-Based Interventions Prevent Bullying*, 161 ARCHIVES PEDIATRIC ADOLESCENT MED. 78 (2007).

The situation of Jessica Logan provides an example of how important it is to handle sexting cases with special care.¹⁵⁹ Jessica, a senior at an Ohio high school, sent nude photos of herself to a boyfriend. After the relationship ended, her ex-boyfriend sent the photos to other female students at Logan's school, after which the image went "viral" and was distributed to many students. This resulted in months of harassment and teasing for Logan, to which the school allegedly did not respond. Logan hung herself one month after her graduation. Logan's parents filed suit against the high school and several other defendants, alleging that the school and the local police did not do enough to protect their daughter from harassment.¹⁶⁰

A very significant challenge in this regard is what has been happening in some schools when police officers overreact. Reports of students involved in sexting who have been hauled from school in handcuffs are exceptionally disturbing. The predictable consequence of this police overreaction is to place the student depicted at an exceptionally high risk of intense harassment by peers. Such actions will also make it exceptionally difficult for school officials to prevent sexual harassment, for which schools could be held liable.

School officials must assert authority over actions that might take place on their campus if those actions could cause emotional harm to students. It is entirely unnecessary, even if a law enforcement response might be appropriate, to have students hauled from school in handcuffs. It is recommended that school districts work with their local district attorney, as well as with their legal counsel, to develop an approved protocol to follow in these situations.¹⁶¹ This protocol should ensure that, to the greatest degree possible, students are protected from emotional harm. To be successful, it is essential that the provisions of any protocol are effectively communicated to all school officials and police officers.

159. Kimball Perry, *Lawsuit Filed Over 'Sexting' Suicide*, CINCINNATI.COM (May 12, 2009), <http://news.cincinnati.com/article/20090512/NEWS0107/305120011/Lawsuit-filed-over-sexting-suicide>.

160. *Id.*

161. Guidance of creating this recommended profile is provided on the author's site at <http://csriu.org>.

XVII. SEARCH AND SEIZURE

In 1985, the U.S. Supreme Court in *New Jersey v. T.L.O.* held that the Fourth Amendment prohibition on unreasonable search and seizures applies to searches by public school officials of students and their possessions.¹⁶² The Court held that student searches must be reasonable; there must be a balance between students' privacy rights and the school's need to maintain order.¹⁶³

To determine the reasonableness, two questions must be asked: 1) whether the action was justified at its beginning, and 2) whether the extent of the search as conducted was reasonably related to the circumstances that justified the search in the first place.¹⁶⁴ To justify a student search, reasonable grounds must exist for suspecting that the search will turn up evidence that the student has violated or is violating either the law or school policy.¹⁶⁵

The *T.L.O.* standard will likely apply to school official searches of a student's cell phone or other digital device. However, in some states, the state constitutional interpretation of search and seizure may be more restrictive. In addition, there appear to be variations related to who completed the search—a school official or a law enforcement officer stationed at the school.

In 2006, a Federal Court in Pennsylvania applied the *T.L.O.* reasonableness standard in the context of a search of cell phone records in the case of *Klump v. Nazareth Area School District*.¹⁶⁶ In *Klump*, a teacher had confiscated a student's cell phone because it was visible in class, which violated a school policy that prohibited the display or use of cell phones during instructional time. An administrator then searched through the student's stored text messages, voicemail, and phone number directory. The student filed suit, asserting that these actions constituted an unreasonable search.¹⁶⁷

The court determined that the school district had reasonable suspicion that the display/use policy was violated,

162. 469 U.S. 325, 333 (1985).

163. *Id.* at 326.

164. *Id.* at 341.

165. *Id.* at 326.

166. 425 F. Supp. 2d 622, 640 (E.D. Pa. 2006).

167. *Id.* at 627.

but did not have reasonable suspicion that any other law or policy had been violated. Thus, the confiscation of the cell phone was justified, but the search of the phone records violated the student's Fourth Amendment rights.¹⁶⁸ The fact that a cell phone is visible, which may be in violation of a district policy, does not, in and of itself, appear to provide the authority to search the records on that phone. Additional suspicion appears to be necessary. In addition, the court found that the school district may have violated the Pennsylvania Wiretap Act by accessing stored voicemail and text messages.¹⁶⁹

The issue of consent to search is likely to become more relevant, especially if there is the potential for any significant criminal charges that might be associated with sexting. There is currently a lack of clarity related to consent in the context of a search by school officials. Can students refuse to consent to a search of their personal belongings? If a law enforcement official is denied consent, the official can apply to the court for a search warrant. This process ensures that the standard of "probable cause" has been met. What process is in place that will allow a student to challenge a school official's decision that he or she has reasonable suspicion to search?

In the context of a search by a law enforcement official, consent must be voluntary and knowing.¹⁷⁰ Important factors to consider when deciding if the consent was given include the age, education, intelligence, physical and mental condition of the person giving consent, whether the person was under arrest, and whether the person had been advised of his right to refuse consent.¹⁷¹ The government carries the burden of proving that consent was voluntary. If a police officer asks for consent to look at images on a student's cell phone while the student is sitting in the school office, how many students or parents will know they have the right to refuse consent and require the officer to obtain a search warrant? Likely not many. Considering the potential seriousness of a situation involving a nude image, any student involved in a search of his or her property should be informed of the right to refuse consent.

168. *Id.* at 640.

169. *Id.* at 634-35.

170. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27 (1973).

171. *See, e.g., id.* at 245.

How does the concept of “exigent circumstances” play into this consideration? In situations of suspected sexting, it will be important for school officials to check recent call records so they can identify other numbers to which images might have been sent. Confiscation of cell phones suspected of having images and a search of the call records of those phones to facilitate confiscation of other phones may qualify as “exigent circumstances,” but those circumstances should be determined by local counsel based on relevant state law.

The presence of state and federal wire-tapping laws further complicates the matter. How these laws might impact searches is not clear because the statutes vary from state to state, making the provision of general guidance impossible. If a school official is faced with a report of nude images of a student, it presents even greater concerns both with respect to searches and to the subsequent criminal ramifications.

It is necessary to consider the implications of the recent U.S. Supreme Court decision in *Safford Unified School District No. 1 v. Redding*.¹⁷² The Supreme Court referred to a strip search of a student as “categorically extreme intrusiveness” and indicated that the barrier for justification for such a search was extremely high.¹⁷³ Is there a similar level of intrusiveness for a school official to view a nude image of a student?

In September 2010, the American Civil Liberties Union of Pennsylvania announced that it has settled a lawsuit alleging that the Tunkhannock Area School District illegally searched a student’s cell phone.¹⁷⁴ The situation in this case related to the concern of students who were charged with “sexting”—sending nude images. The images of the students that were stored on cell phones were discovered by school officials, who then brought in local law enforcement. As of the writing on this article, the ACLU-PA is now working with the Pennsylvania School Boards Association to draft a policy that will cover searches of student’s cell phones.

172. 129 S. Ct. 2633 (2009).

173. *Id.* at 2642; *see also* *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005) (stating “[s]tudents have a significant privacy interest in their unclothed bodies”).

174. *ACLU Settles Student-Cell-Phone-Search Lawsuit With Northeast Pennsylvania School District*, AMERICAN CIVIL LIBERTIES UNION (Sept. 15, 2010), <http://www.aclu.org/free-speech/aclu-settles-student-cell-phone-search-lawsuit-northeast-pennsylvania-school-district>.

It is important to consider public perceptions in this area. A commentary that appeared in *The Times Tribune* entitled “Electronic Peeping Toms” stated:

It’s one thing for school officials to confiscate a phone in order to enforce policy. It’s quite another to search its memory as part of a fishing expedition As lawmakers, the courts and schools figure out how to deal with sexting, they should pay equal attention to protecting the privacy rights of students.¹⁷⁵

The other issue to which school officials must pay scrupulous attention is that these are nude images of minors. Possession or distribution by an adult constitutes a federal and state felony. At present, there are currently no statutory “exceptions” for school officials to possess or distribute these images. News reports and privately reported situations suggest that some administrators are not handling these images properly. The author heard of one incident where an overreacting principal sent the nude image of a minor student to a dozen other administrators asking for guidance on what to do. School administrators in Pennsylvania were under criminal investigation for how they handled student images, although it does not appear that charges are forthcoming.¹⁷⁶ In another incident, an assistant principal was prosecuted for possession of child pornography, although ultimately the charges were dismissed because the image itself was not deemed

175. Editorial, *Electronic Peeping Toms*, THE TIMES TRIBUNE (May 24, 2010), <http://thetimes-tribune.com/opinion/electronic-peeping-toms-1.807464>.

176. Joel Elias & Daniel Victor, *Susquenita High School Officials Being Investigated for Handling of Images in ‘Sexting’ Case*, THE PATRIOT NEWS (Apr. 15, 2010, 12:00 AM), http://www.pennlive.com/midstate/index.ssf/2010/04/susquenita_high_school_officia.html.

The youths involved in a sexting case at Susquenita High School last year are facing felony charges. Now, based on parents’ complaints, the administrators who caught them might face their own consequences, creating another murky legal issue in the largely untested intersection of children, technology and pornography. Susquenita High School officials are being investigated after parents claimed pornographic images and videos from cell phones confiscated from students were “passed around” and viewed by more than just those administrators who investigated the incident. “Of course, one or two people had to see the images to determine what they were,” Perry County District Attorney Charles Chenot said. “But if more than one or two top administrators saw them, there better be a good reason why.” School employees could be charged with displaying child pornography—the same charges the students involved face—if they showed the images to people not involved in the investigation, Chenot said.

Id.

pornographic.¹⁷⁷ There should be a statutory exemption for school official who handle these images in accord with an approved protocol.

Lastly, there is a concern related to what might happen to cell phones that are found to contain nude images. Ideally, if a student receives such an image, he or she will either simply delete this image or report this to the school or law enforcement. But can any public official advise students to delete evidence? Likely not. Typically, what happens when law enforcement officials obtain electronic devices that contain illegal images, these devices are retained and destroyed. Students are highly unlikely to report receipt of a nude image to a school or law enforcement official if the known consequence of such report is the permanent confiscation and destruction of their cell phone. Thus, this device retention practice could lead to failure to report, which could result in wider distribution of an image.

Obviously, these are challenging issues that cannot be clearly addressed in the context of this article, because of the different state standards, along with many unanswered questions. Thus, a high priority in every state must be the development of a legally-grounded policy for search and seizure of cell phones and other personal digital devices that is developed by state educational leadership organizations in partnership with the state department of justice. Likely, statutory changes may also be desired, such as the statutory exemption for school officials. Education of students and parents about their rights under this policy should also be provided.

XVIII.CONCLUSION

State laws addressing bullying in schools did not exist until 1999, when the Georgia legislature became the first to codify requirements for school districts to address bullying between students in public schools.¹⁷⁸ Concerns associated with cyberbullying only began to emerge in the public arena around

177. Kim Zetter, 'Sexting' Hysteria Falsely Brands Educator as Child Pornographer, WIRE MAGAZINE (Apr. 3, 2009), <http://www.wired.com/threatlevel/2009/04/sexting-hysteri/>.

178. Limber, *supra* note 30, at 54.

2004. The sexting concern exploded into public awareness in 2008. The Federal Partners in Bullying Prevention Task Force was just established in 2010. New research continues to be published that provides greater insight into factors related to bullying and peer aggression, cyberbullying and sexting, as well as effective prevention and intervention approaches.

Most school leaders received their professional training well before the emergence of any level of insight and information related to these issues. Further, during the last decade, the primary focus in schools has been on achieving Annual Yearly Progress under the No Child Left Behind Act.

Despite the challenges, one fact remains crystal clear: The cruelty that some young people inflict on others can cause significant harm. It is imperative that school leaders focus attention on this concern, proactively implement effective school-wide prevention and intervention initiatives, and engage in ongoing solicitation of feedback from students and their parents to evaluate the effectiveness of their initiatives.