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# OFF-CAMPUS CYBERBULLYING: FIRST AMENDMENT PROBLEMS, PARAMETERS, AND PROPOSAL

*David R. Hostetler, J.D.\**

To a certain extent, law must forever be subject to uncertainty and doubt; not from the obscurity and fluctuation of decisions . . . but from the endless complexity and variety of human actions . . . [T]here will remain immeasurable uncertainties in the law, which will call for the exercise of professional talents, and the grave judgments of courts of justice.

– U.S. Supreme Court Justice Joseph Story (1779–1845)<sup>1</sup>

## I. INTRODUCTION

Bullying pervades our nation’s schools.<sup>2</sup> Too many students suffer too much, too often, driving some to suicide. The bullying problem is being increasingly exposed, researched, quantified, debated, written about, and legislated against. However, courts have been slow to weigh in and help shape the law to adapt to this growing reality. A recent federal court opinion describes one view of the problem:

The typical victim of bullying is more anxious and insecure than her peers. . . . Bullying brings with it a whole host of . . . issues. It impairs concentration and leads to poorer

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<sup>1</sup> JOSEPH STORY, *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 70–71 (William W. Story ed. 1852).

<sup>2</sup> See generally, RACHEL DINKES ET AL., NAT’L CTR. FOR EDUC. STATISTICS & BUREAU OF JUSTICE STATISTICS, *INDICATORS OF SCHOOL CRIME AND SAFETY: 2009*, (2009), available at <http://nces.ed.gov/pubs2010/2010012.pdf> (providing nationwide statistics relating to cyberbullying, including related deaths and instances of non-fatal student and teacher victimization).

academic performance. Additionally, victims are more likely to engage in antisocial behavior, have increased health problems, and struggle to adjust emotionally.

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The end of school does not bring an end to the damage done by years of harassment. As a result of this trapped setting, where harassment is a repeated occurrence, victims carry lasting emotional and psychological scars into adulthood.<sup>3</sup>

In this article, “bullying,” is used broadly as shorthand for any communication that is not a true threat of physical harm, but instead goes only so far as to offend, demean, ridicule, embarrass, harass, or intimidate others.<sup>4</sup> Cases involving true threats of harm are not included in the term’s use or substantially addressed herein. Courts have clearly held that such threats, if substantiated by evidence, are not protected speech or, at a minimum, courts have allowed school administrators to take protective and/or disciplinary action without much legal difficulty.<sup>5</sup>

Cyberbullying is a type of bullying that occurs in electronic forums. It exponentially expands bullying opportunities, the number of victims, and the legal risks. This expansion is primarily attributable to electronic media’s ease of use, accessibility, anonymity, speed, breadth of distribution, and capacity to be easily recorded, stored, and redistributed. Cyberbullying can threaten victims’ educational wellbeing both on and off campus because of its debilitating emotional, social,

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<sup>3</sup> T.K. v. N.Y.C. Dep’t of Educ., 779 F. Supp. 2d 289, 304–05 (E.D.N.Y. 2011) (citations omitted). This case also cited a study that found those who were bullied for at least three years in grades six through nine had higher rates of depressive symptoms and lower self-esteem when they were twenty-three years old. *Id.* at 305.

<sup>4</sup> In reality, there are technically and legally significant differences among various forms and degrees of offensive speech. These include: (1) speech that is bothersome or offensive (e.g., mean, disparaging, lewd); (2) harassing (frequently offensive, ridiculing, obstructive, and often based on a person’s individual traits); (3) bullying (physically, socially, or otherwise threatening speech often by someone in a position of physical, electronic or other form of one-sided control); or (4) threatening (physical, reputational, or social). Where such distinctions are required herein they will be noted.

<sup>5</sup> A more recent example is *Wynar v. Douglas Cnty. Sch. Dist.*, No. 11-17127, 2013 WL 4566354, (9th Cir. Aug. 29, 2013) (student’s threatening instant messages conveyed a clear threat of harm and substantial disruption due to specific statements that he had access to guns that he intended to use against specific students on a specific day—the anniversary of the Columbine shootings, thus warranting a 90-day expulsion.).

and other consequences. Nevertheless, few courts have addressed the legally complicated problem of off-campus cyberbullying. The extent, therefore, to which schools can effectively address this problem without running afoul of First Amendment free speech rights is unclear.<sup>6</sup>

As far back as 1969, in *Tinker v. Des Moines Independent Community School District*, the Supreme Court recognized the “collision” of students’ free speech rights and school safety.<sup>7</sup> This collision of rights has resulted in treatment by the courts that is often inconsistent and confusing. Today, students are seldom without personal electronic devices that provide constant access to each other’s speech, and new avenues from which to reach large audiences associated with their schools. Previously, a student was only able to shout from his isolated “soapbox” to those within physical earshot. Now, the same student’s speech is amplified considerably, as he or she may tweet, blog, or post repeatedly, quickly, cheaply, and anonymously to anyone with an Internet connection, including the targets of cyberbullying attacks. Given today’s cacophony of electronic speech (“e-speech”), what is a school official to do?

This article aims to clarify the law surrounding cyberbullying, to provide recommendations on how to address the problem, and to point out where legal uncertainties preclude definitive answers. To simplify the analysis of permissible actions rectifying the effects of cyberbullying, this article proposes a marriage of the Supreme Court’s “substantial disruption” standard in *Tinker* and the “educational deprivation” standard found in Title IX. This approach is preferable to the current disjointed approach for three reasons. First, the educational deprivation standard has an element of predictability. Second, the standard comports with the explicit acknowledgement in *Tinker* of a school’s responsibility to protect its students. Third, use of this commonly applied standard would lead to a uniform approach among courts when hearing cases regarding cyberbullying, rather than the widely

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<sup>6</sup> Legally, cyberbullying is multi-dimensional, involving an extensive array of state and federal legal claims and principles. These claims include defamation, invasion of privacy, infliction of emotional distress, cyberstalking, and other electronic-related criminal laws. These are not substantially addressed herein due to space and topic limitations.

<sup>7</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507–08 (1969).

diverging standards that exist today under interpretations of First Amendment cases.

The following analysis proceeds in three parts. Part I provides an overview of Supreme Court precedents relating to student speech in schools and their development over time. Part II provides summaries revealing the difficulties lower courts have found in applying the traditional student speech cases in the cyberbullying and online speech contexts. Part III discusses the “educational deprivation” standard of Title IX, provides additional cases where it has been applied, and provides an analytical protocol based on a merging of the “substantial disruption” standard found in *Tinker* and its progeny with the “educational deprivation” standard found in Title IX. This article concludes by considering the practical implications of merging the “substantial deprivation” standard with the “substantial disruption” standard.

## II. SUPREME COURT PRECEDENTS: *TINKER*, *BETHEL*, *HAZELWOOD*, AND *MORSE*

To date, the United States Supreme Court has not substantively opined on a case involving off-campus student e-speech. Consequently, its 1969 opinion in *Tinker v. Des Moines* remains the seminal student free speech decision in today’s vastly different environment. In *Tinker*, students had planned a protest of the Vietnam War by wearing black armbands to school.<sup>8</sup> Fearing that the armbands might incite conflict and disruption, school administrators created a policy prohibiting protesting behavior.<sup>9</sup> When students violated the ban, school administrators suspended them.<sup>10</sup> The Court upheld the students’ right to wear the armbands.<sup>11</sup> In support of its decision, the Court reasoned that the political expression involved did not “materially or substantially disrupt” school operations, nor did it create a reasonably foreseeable threat of doing so.<sup>12</sup> The Court held that the administrators only had an

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<sup>8</sup> *Id.* at 504.

<sup>9</sup> *Id.* at 508.

<sup>10</sup> *Id.* at 504.

<sup>11</sup> *Id.* at 514.

<sup>12</sup> *Id.* at 513–14.

“undifferentiated fear”<sup>13</sup> of a potential disruption:

There is here no evidence whatever of petitioners’ interference, actual or nascent, with the schools’ work or a *collision with the rights of other students to be secure and to be let alone*. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or *the rights of other students*.<sup>14</sup>

The Court expounded on the Tinker standard in the 1986 case, *Bethel School District v. Fraser*, where the Court upheld a short-term suspension of a high school student who gave a lewd campaign speech at a student assembly on behalf of a friend running for class president.<sup>15</sup> In support of its holding, the Court declared that the suspension was reasonably justified because the school had a legitimate role in promoting fundamental civic values and socially acceptable behavior, as well as in protecting other students from offensive communications.<sup>16</sup>

Furthermore, in 1988, the Court upheld a high school principal’s decision to retract student-written articles for a school newspaper that discussed teen pregnancy and divorce within the school community in *Hazelwood School District v. Kuhlmeier*.<sup>17</sup> The Court held that the principal had the discretion to censor such speech because the newspaper was tied to the official school curriculum and invoked pedagogical concerns,<sup>18</sup> since the article about pregnancy would have revealed sensitive personal information,<sup>19</sup> and because both retracted articles might have given the false impression that the school endorsed the articles.<sup>20</sup>

Finally, in 2007, the Court upheld a high school student’s suspension for violating a school policy prohibiting the promotion of illegal drug use in *Morse v. Frederick*.<sup>21</sup> Morse and his friends raised a 14-foot banner that declared, “BONG HiTS

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<sup>13</sup> *Id.* at 508.

<sup>14</sup> *Id.* (emphasis added).

<sup>15</sup> *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

<sup>16</sup> *Id.* at 681–83.

<sup>17</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273–74 (1988).

<sup>18</sup> *Id.* at 273.

<sup>19</sup> *Id.* at 274.

<sup>20</sup> *Id.* at 271.

<sup>21</sup> *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

4 JESUS” during a school-organized event at which students gathered along both sides of the street in front of the school to watch the Olympic Torch Relay pass by.<sup>22</sup> The Court determined that the principal could reasonably interpret the banner as promoting illegal drug use.<sup>23</sup> Thus, the Court held that the principal acted reasonably in taking down the banner and suspending the student.<sup>24</sup> The Court reasoned that schools have an important role in protecting students from drug-related influences, especially in times of prevalent illegal drug use.<sup>25</sup>

Currently, *Tinker* and its progeny offer the primary basis (“substantial disruption”) for determining the constitutionality of schools restricting or disciplining students for their off-campus, personal speech. Cyberbullying, however, poses a far more difficult legal challenge than the physical, on-campus speech issues faced in *Tinker*. As one court aptly stated, “the advent of the Internet has complicated analysis of restrictions on speech. . . . Indeed, *Tinker’s* simple armband, worn silently and brought into a Des Moines, Iowa classroom, has been replaced by . . . complex multi-media web site[s], accessible to fellow students, teachers, and the world.”<sup>26</sup>

Particularly important for this article is *Tinker’s* less-cited recognition of the “rights of other students to be secure and to be let alone.”<sup>27</sup> A review of lower court decisions applying *Tinker* to off-campus cyberspeech reveals that courts, more often than not, uphold student speech rights for offensive off-campus cyberspeech directed at students or staff (e.g., graphic, lewd, and demeaning speech) if schools are unable to show or reasonably forecast a substantial disruption at school. These points are addressed more specifically in Part III.

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<sup>22</sup> *Id.* at 397.

<sup>23</sup> *Id.* at 401.

<sup>24</sup> *Id.* at 408.

<sup>25</sup> *Id.*

<sup>26</sup> J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 863–64 (Pa. 2002) (citations omitted).

<sup>27</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

### III. CONFUSING AND CONFLICTING LOWER COURT CYBERBULLYING DECISIONS

#### A. *Tinker and J.C.’s Off-Campus “Rant” Video*

Particularly instructive is a 2010 California federal district court case, *J.C. ex rel. R.C. v. Beverly Hills Unified School District*.<sup>28</sup> J.C., a high school student, videotaped a conversation with her friends at a restaurant after school.<sup>29</sup> The four-and-a-half minute video contained profane, crude, and derogatory comments about a thirteen-year-old fellow student (referred to as “C.C.”).<sup>30</sup> In the video, J.C. and her friends called C.C. “a slut,” “spoiled,” and “the ugliest piece of shit I’ve ever seen in my whole life.”<sup>31</sup> J.C. encouraged such comments during the video, telling one friend “to continue with the Carina rant.”<sup>32</sup> Another student was heard asking, “[a]m I the only one that doesn’t hate Carina?”<sup>33</sup>

That night, J.C. posted the video on *YouTube* and told five to ten other peers, including C.C., to watch it.<sup>34</sup> About fifteen students saw the video that night; webpage data showed approximately ninety “hits” to the site, including many by J.C.<sup>35</sup> The next day, J.C. claimed she heard ten students at school talking about the video.<sup>36</sup> Unsurprisingly, C.C. was initially very upset, humiliated, and hurt.<sup>37</sup> The morning following the video post, she missed the beginning of her first class after spending twenty to thirty minutes with the school counselor, who eventually persuaded C.C. to attend her class.<sup>38</sup> Administrators investigated all morning.<sup>39</sup> Several students talked about the video while at school, but there was no

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<sup>28</sup> *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

<sup>29</sup> *Id.* at 1098.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1108.

<sup>34</sup> *Id.* at 1098.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1098–99.

evidence that any student accessed it on any school computer.<sup>40</sup> By noon, the matter had been fully addressed, according to the school's counselor.<sup>41</sup> In the litigation, the school presented no evidence of any lasting impact that C.C. suffered academically or otherwise as a result of the video.<sup>42</sup>

The school suspended J.C. and she filed suit.<sup>43</sup> She claimed the school violated her free speech rights, in part, because her video was protected First Amendment speech, made and posted off-campus on her own computer, on her own time.<sup>44</sup> Following a comprehensive review of free speech case law across jurisdictions,<sup>45</sup> the court applied *Tinker's* substantial disruption standard and analyzed the free speech claim.<sup>46</sup> The trial judge identified three major issues: First, whether the video substantially disrupted the school.<sup>47</sup> Second, whether it was reasonably likely to cause a future substantial disruption.<sup>48</sup> Lastly, whether the video interfered with the rights of other students.<sup>49</sup>

First, the judge found no evidence of any substantial disruption.<sup>50</sup> Its analysis, in this regard, is an important reminder to school officials and attorneys that "substantial disruption" is a qualitative standard that *requires evidence of significant one-time or cumulative impact*, not just that some impact has occurred.<sup>51</sup> The court further clarified the

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<sup>40</sup> *Id.* at 1099.

<sup>41</sup> *Id.* at 1117–18.

<sup>42</sup> *Id.* at 1118–19.

<sup>43</sup> *Id.* at 1097, 1099.

<sup>44</sup> *Id.* at 1100.

<sup>45</sup> *Id.* at 1100–17.

<sup>46</sup> *Id.* at 1117–23.

<sup>47</sup> *Id.* at 1117–19.

<sup>48</sup> *Id.* at 1119–22.

<sup>49</sup> *Id.* at 1122–23.

<sup>50</sup> *Id.* at 1117.

<sup>51</sup> Specifically, the court held:

For the *Tinker* [substantial disruption] test to have any reasonable limits, the word "substantial" must equate to something more than the ordinary personality conflicts among middle school students that may leave one student feeling hurt or insecure. Likewise, the Court finds that the mere fact that a handful of students are pulled out of class for a few hours at most, without more, cannot be sufficient. *Tinker* establishes that a material and substantial disruption is one that affects "the work of the school" or "school activities" in general. . . . Thus, while the precise scope of the substantial disruption test is still being sketched by lower courts, where discipline is based on actual disruption (as opposed to a fear of pending disruption), the *School's decision must be anchored in something greater*

contextual dimensions of disruption findings, stating:

The substantial disruption inquiry is *highly fact-intensive*. Perhaps for that reason, *existing case law has not provided clear guidelines* as to when a substantial disruption is reasonably foreseeable. There is, for example, *no magic number of students or classrooms that must be affected* by the speech. One court has held that a substantial disruption requires something *more than “a mild distraction or curiosity created by the speech”* but need not rise to the level of “complete chaos.” . . . Not surprisingly, however, the gulf between those two concepts swallows the vast majority of factual scenarios. Further complicating matters is the fact that the *Court has not uncovered any cases, in this Circuit or otherwise, that address speech targeted at a particular student, as is the case here.*<sup>52</sup>

Secondly, the judge concluded that there was no evidence of a *reasonably foreseeable* substantial disruption.<sup>53</sup> If “a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster.”<sup>54</sup> Judge Wilson noted, instead, that the principal had only a speculative, unsubstantiated fear of disruption and that the impact on C.C. was not substantially harmful.<sup>55</sup>

J.C.’s video was *not violent or threatening*. There was no reason for the School to believe that C.C.’s safety was in jeopardy or that any student would try to harm C.C. as a result of the video. Certainly, C.C. never testified that she feared any type of physical attack as a result of the video. Instead, *C.C. felt embarrassed, her feelings were hurt, and she temporarily did not want to go to class. These concerns cannot, without more, warrant school discipline*. The Court does not take issue with Defendants’ argument that young students often say hurtful things to each other, and that students with limited maturity may have emotional conflicts over even minor comments. *However, to allow the School to cast this*

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*than one individual student’s difficult day (or hour) on campus. Id.* at 1119 (emphasis added) (citations omitted) (citing *Tinker*, 393 U.S. at 509, 514 and *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d at 852).

<sup>52</sup> J.C. ex rel. R.C., 711 F. Supp. 2d at 1111 (emphasis added) (citations omitted).

<sup>53</sup> *Id.* at 1121.

<sup>54</sup> *Id.* at 1116.

<sup>55</sup> *Id.* at 1117–1119.

*wide a net and suspend a student simply because another student takes offense to her speech, without any evidence that such speech caused a substantial disruption of the school's activities, runs afoul of Tinker.*<sup>56</sup>

Lastly, Judge Wilson observed that *Tinker* recognized schools' authority to restrict speech that "impinge[s] upon the rights of other students," even if the disruption is not foreseeable.<sup>57</sup> However, the extent to which this may be the case remains unclear and was not relevant to this case.<sup>58</sup> Underlying the court's determinations described above was the fact that there was insufficient evidence presented by the Defendants of any actual or reasonably foreseeable substantial disruption or threat to the rights of others.<sup>59</sup> Had they been able to present more specific evidence of a substantial impact to the school and/or on C.C., their likelihood of prevailing would have increased accordingly.<sup>60</sup> This offers a pointed lesson to school officials when investigating similar situations and to attorneys gathering and presenting evidence to a court.

### *B. Other Individual Impact Cases and Tinker's "Rights of Others" Prong*

In light of existing case law, the question remains whether and to what extent schools may restrict cyberspeech when that speech: is expressed off-campus; does not enter the campus or transform itself into "on-campus" speech (subject to *Bethel* or

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<sup>56</sup> *Id.* at 1117 (emphasis added).

<sup>57</sup> *Id.* at 1122 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

<sup>58</sup> J.C. ex rel. R.C., 711 F. Supp. 2d at 1122–23 (noting that "the 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").

<sup>59</sup> *Id.* at 1121 ("A comparison of this case to the record in *LaVine* helps illustrate the Defendants' evidentiary shortcomings.") (citing *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001)).

<sup>60</sup> Judge Wilson also noted that some courts have required an additional showing that the student who generated the speech could reasonably foresee that the speech would reach the campus. J.C. ex rel. R.C., 711 F. Supp. 2d at 1107. The judge concluded that J.C. could reasonably foresee that her video would "make its way to campus." *Id.* at 1108. She posted it on the Internet for the public to see, and deliberately contacted other students that night, including C.C., urging them to view the video on YouTube. *Id.* Furthermore, J.C. made no efforts to guard against the video making its way onto campus. *Id.* at 1109. Without deciding whether this prong was in fact a requirement, Judge Wilson held it was satisfied regardless.

*Morse* standards); does not cause and is not reasonably likely to cause substantial disruption to school operations; does not cause or threaten physical harm, but does reasonably threaten one individual's or group's educational well-being.

Presently, there is limited case law that clearly addresses this narrow question.<sup>61</sup> It is reasonable to predict that some courts may allow schools to restrict such speech under *Tinker's* "substantial disruption" and/or its "rights of others" prongs. Some courts may merge the two prongs: speech that invades the "rights of others" is a "substantial disruption." Other courts may distinguish the two prongs: speech that does not substantially disrupt (generally) may still invade the rights of others.<sup>62</sup> There are several cases hinting at these possibilities.

A case that roughly matches the above criteria was decided in July 2011 by the Fourth Circuit Court of Appeals in *Kowalski v. Berkeley County Schools*.<sup>63</sup> Kara Kowalski, a high school student, created a MySpace discussion group page called "S.A.S.H." which, according to Kowalski, stood for "Students Against Sluts Herpes," although another student testified that it stood for "Students Against Shay's Herpes" (referring to the specific student victim, Shay).<sup>64</sup> Kowalski invited approximately a hundred people on her "friends" list to join the group, of which about two-dozen of Kowalski's classmates responded.<sup>65</sup> One student submitted several derogatory postings about Shay, including images of her with red dots imprinted on her face to simulate herpes and a sign near her pelvic area indicating, "Warning: Enter at your own risk."<sup>66</sup> Within hours of posting, Shay's father contacted the student

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<sup>61</sup> Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1094 (2008) ("As of this writing, no court has invoked *Tinker's* rights-of-others prong as the sole basis for upholding restriction on student speech in the digital media.").

<sup>62</sup> It is also conceivable that a court may apply *Morse* on the basis of protecting student safety. This seems unlikely given that Court's explicit directions that its holding applied narrowly to the facts of that case. Furthermore, the Court treated the matter as "on-campus" expression, unlike the scenario presented above.

<sup>63</sup> 652 F.3d 565 (4th Cir. 2011).

<sup>64</sup> *Id.* at 567.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 567–68. In a second photograph, one student posted an image of Shay, captioning her face with a sign stating "portrait of a whore." *Id.* at 568. Most other postings focused on Shay N. Numerous student comments celebrated the derogatory page and/or were eager for Shay N. to see it.

who posted the images and Kowalski to express his anger and to ask for the removal of the page. However, Kowalski was unable to delete the webpage and remove the photos.<sup>67</sup> Shay and her parents met with school officials the next day and filed a harassment complaint pursuant to the school's bullying and harassment policy.<sup>68</sup> Shay then returned home for the remainder of the day due to the discomfort of attending classes with the same students who made these incendiary remarks on the MySpace page.<sup>69</sup>

Ultimately, the school board suspended Kowalski for five days (reduced from ten days), imposed a ninety-day "social suspension" precluding her from attending any school events in which she was not a direct participant, and banned her from the cheerleading squad for the remainder of the year.<sup>70</sup> Kowalski sued officials and the school system asserting, among other things, a First Amendment free speech claim, contending that the MySpace group was purely off-campus private speech not subject to the school's jurisdiction.<sup>71</sup> The trial court ruled in favor of the defendants on summary judgment.<sup>72</sup> Applying a unique analysis, the Fourth Circuit affirmed the ruling in favor of the defendants.<sup>73</sup> Notably, the court applied *Tinker's* substantial disruption and "rights of others" standards, appearing to conjoin them.<sup>74</sup> In applying the standard, the court relied on numerous generalized assumptions about the disruptive effects of the "verbal attacks" and "defamatory accusations" on Shay N. and the school.<sup>75</sup> The court was particularly dismissive of off- and on-campus boundaries that

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<sup>67</sup> *Id.* at 568.

<sup>68</sup> *Id.* at 568–69.

<sup>69</sup> *See id.* at 568.

<sup>70</sup> *Id.* at 568–69.

<sup>71</sup> *Id.* at 567.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 577.

<sup>74</sup> *See id.* at 572–73. The court held that Kowalski's MySpace page, by interfering with Shay N.'s educational rights and wellbeing, substantially disrupted the school's "work and discipline of the school." *Id.* Specifically, the court stated,

[w]e are confident that Kowalski's speech caused the interference and disruption described in *Tinker* . . . This is not the conduct and speech that our educational system is required to tolerate, as schools attempt to educate students about "habits and manners of civility" or the "fundamental values necessary to the maintenance of a democratic political system." *Id.*

<sup>75</sup> *Id.*

have dictated the outcome of most other courts in favor of plaintiffs:

This [off-campus speech] argument . . . raises the *metaphysical* question of where her speech occurred when she used the Internet as the medium. Kowalski indeed pushed her computer's keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and *could reasonably be expected to reach the school or impact the school environment*. She also knew that the dialogue would and did take place among Musselman High School students whom she invited to join the "S.A.S.H." group and that the fallout from her conduct and the speech within the group would be felt in the school itself.

. . . .

[R]egardless of where her speech originated, . . . the speech was materially and substantially disruptive in that it "interfer[ed] . . . with the schools' work [and] colli[ded] with the rights of other students to be secure and to be let alone."<sup>76</sup>

The court also cited several indicators of actual disruption: the fact that Shay N. missed a day of school to avoid further abuse and that her parents considered the MySpace comments as "school-related" leading them to file their complaint.<sup>77</sup> The court assumed, without evidence, the reasonable foreseeability of other disruptions:

[H]ad the school not intervened, the *potential* for continuing and more serious harassment of Shay N. as well as other students *was real*. *Experience suggests* that unpunished misbehavior *can have* a snowballing effect, in some cases resulting in "copycat" efforts by other students or in retaliation for the initial harassment.

. . . .

*To be sure, it was foreseeable* in this case that Kowalski's conduct would reach the school via computers, smartphones, and other electronic devices, given that most of the "S.A.S.H." group's members and the target of the group's harassment were Musselman High School students.<sup>78</sup>

The Fourth Circuit's analysis is arguably not in the judicial

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<sup>76</sup> *Id.* at 573 (emphasis added).

<sup>77</sup> *Id.* at 573–74.

<sup>78</sup> *Id.* at 574 (emphasis added).

mainstream due to its highly speculative and conclusory determinations about the effect (real or potential) of Kowalski's MySpace page on Shay N. and the school. Whereas most court opinions<sup>79</sup> require specific and compelling evidence or the likelihood of substantial disruption, the Fourth Circuit in *Kowalski* seemed satisfied with what it considered common sense assumptions, and less concerned with concrete evidence of actual and foreseeable effects.<sup>80</sup>

In the 2006 case of *Harper v. Poway Unified School District*,<sup>81</sup> the Ninth Circuit upheld a student suspension after the student wore a t-shirt to school condemning homosexuality during a "day of silence" that was intended to promote tolerance of gay students.<sup>82</sup> The court determined that the shirt's message was a "verbal assault" based on one of three core-identifying characteristics (i.e., race, religion, and sexual orientation), and was therefore "harmful" speech to "particularly vulnerable" students.<sup>83</sup>

The court explicitly chose not to apply *Tinker's* "substantial disruption" prong and, instead, applied its "rights of others" prong.<sup>84</sup> In doing so, it made several significant declarations. For example, the "rights" prong applies not just to deprivations of *legal rights*, but also to soft rights, such as the right to "be left alone" and to privacy against "unwanted communication,"

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<sup>79</sup> See *supra* Part III.A.

<sup>80</sup> There are many of these conclusory remarks through the opinion. For example, "[Kowalski's and other students'] conduct was *indisputably* harassing and bullying, in violation of Musselman High School's regulations prohibiting such conduct." *Kowalski*, 652 F.3d 565, at 572 (emphasis added). In another example, the court states, "*We are confident* that Kowalski's speech caused the interference and disruption described in *Tinker* . . ." *Id.* (emphasis added). Even more evidence of this "common sense" approach is indicated in the court's acknowledgment that "[Kowalski] *knew* that the electronic response . . . *could* reasonably be expected to reach the school . . . and that the fallout from her conduct . . . *would be felt* in the school itself." *Id.* at 572 (emphasis added).

<sup>81</sup> *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007).

<sup>82</sup> *Id.* at 1171. While this case carries no precedential value (see *Bowler v. Town of Hudson*, 514 F. Supp. 2d 168, 179 (D. Mass. 2007)), it still carries persuasive value. See *Zamecnik v. Indian Prairie Sch. Dist.*, 2007 U.S. Dist. LEXIS 28172, at \*20-\*21 (N.D. Ill. Apr. 17, 2007). The case also demonstrates how a court may choose to apply *Tinker's* "rights of others" prong as a separate standard from *Tinker's* "substantial disruption" standard.

<sup>83</sup> *Harper*, 445 F.3d at 1182.

<sup>84</sup> *Id.* at 1183-84.

particularly for “persons [who] are ‘powerless to avoid’ it.”<sup>85</sup> For instance, the *Harper* court stated that

[t]here is nothing in *Tinker* that remotely supports the dissent’s contention that the rights to “be secure and to be let alone” are limited to rights such as those that protect against “assault, defamation, invasion of privacy, extortion and blackmail.” Security and privacy entail far more than freedom from those torts [i.e., legal rights]. Nor does the dissent offer any reason why the rights to security and privacy do not include freedom from verbal assaults that cause psychological injury to young people.<sup>86</sup>

The court identified “psychological health and well-being [as well as] educational development” as protected rights.<sup>87</sup> The court further noted some of the related tangible indicators and consequences, including the risk of and decline in academic failure, difficulty concentrating, fear for one’s safety, feelings of isolation, truancy, and dropping out of school.<sup>88</sup> Remarkably, the court assumed all or many of these “deprivations” occurred based simply on “self-evident” notions and “common sense,” without citing any evidence: “you don’t need an expert witness to figure out the self-evident effect of certain policies or messages.”<sup>89</sup> The Ninth Circuit’s reasoning and conclusions extend *Tinker*’s “rights of others” prong very broadly and uniquely. To what extent other circuits are likely to follow suit is unclear.<sup>90</sup>

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<sup>85</sup> *Id.* at 1178; *contra id.* at 1198 (Kozinski, J., dissenting) (disputing the majority’s position that if the speech was directed at non-minority individuals, the analysis would require the more difficult substantial disruption standard, not the “rights of others” standard applied in this case for protecting gay students). Judge Kozinski further explained that “[t]he ‘rights of others’ language in *Tinker* can only refer to traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established.” *Id.* at 1198. Kozinski further states that “[s]urely, this language is not meant to give state legislatures [via additional civil protections] the power to define the First Amendment rights of students out of existence by giving others the right not to hear that speech.” *Id.*

<sup>86</sup> *Id.* at 1178 n.18 (citation omitted).

<sup>87</sup> *Id.* at 1179.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1180 (quoting dissenting Judge Kozinski’s own language from a prior Ninth Circuit decision).

<sup>90</sup> This problem is made plain by Judge Kozinski in dissent:  
I find this a difficult and troubling case . . . On the record to date, the school authorities have offered no lawful justification for its actions . . . It is entirely a judicial creation, hatched to deal with the situation before us, but likely to cause

Several cases show that some courts will uphold disciplinary actions under *Tinker's* “substantial disruption” standard based largely on the impact the Internet speech has on the targeted individual.<sup>91</sup> One such example is found in *J.S. v. Bethlehem Area School District*,<sup>92</sup> the Pennsylvania Supreme Court upheld a fourteen-year-old’s expulsion for posting a “Teacher Sux” website.<sup>93</sup> The site contained “derogatory, profane, offensive, and threatening comments,” primarily about the student’s algebra teacher and his principal.<sup>94</sup> One page began, “Why Should She Die?” (referring to the teacher) and invited readers to “give me \$20 to help pay for the hit man.”<sup>95</sup> That page also included images of the teacher being decapitated (with blood dripping from her neck) and morphing into Adolph Hitler.<sup>96</sup>

The teacher consequently became ill and suffered sleeplessness, stress, anxiety, and loss of weight, causing her to take a medical leave of absence for the rest of the school year. This required replacing her with three different substitute teachers.<sup>97</sup> The evidence showed that J.S., at least once, opened the website on a school computer and showed a classmate and that other students and staff became aware of the site as well.<sup>98</sup> The principal testified that morale at the school was “worse than anything he had witnessed” in his forty-year professional

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innumerable problems in the future. *Id.* at 1192, 1200.

<sup>91</sup> For example, in a 2008 California case, a court denied a student’s request for a preliminary injunction, thus allowing a school to suspend a student for posting a YouTube video dramatizing the murder of her teacher. *O.Z. v. Bd. of Trs. of Long Beach Unified Sch. Dist.*, No. CV 08-5671 ODW (AJWx), 2008 U.S. Dist. LEXIS 110409 at \*1–\*2 (C.D. Cal. Sept. 9, 2008). Key factors were the school’s duty to “protect the teacher and address safety concerns” and the impact on the teacher who “feared for her safety and became physically ill.” *Id.* at \*9–\*10 (also noting, “it would appear reasonable, given the violent language and unusual photos depicted in the slide show, for school officials to forecast substantial disruption of school activities.”).

<sup>92</sup> *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002).

<sup>93</sup> *Id.* at 869 (Also, the summary of this and other cases in this section are quoted and adapted from a prior publication by the author. See David Hostetler, *School Cyberlaw Part I: Cyberspeech: First Amendment and Defamation*, 34 SCH. L. BULL. 4 (2003), available at <http://sogpubs.unc.edu/electronicversions/slb/slbfal03/article1.pdf>).

<sup>94</sup> *Bethlehem*, 807 A.2d at 851.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* Further, some pages urged the teacher’s dismissal because of her looks and personality and also referred to her as a “bitch” or “stupid bitch” and associated her with a picture of a witch. *Id.*

<sup>97</sup> *Id.* at 852.

<sup>98</sup> *Id.* at 851–52.

career, comparing its effect to the death of a student or staff member.<sup>99</sup>

In this instance, the court determined that the speech came “onto campus” because J.S. opened the webpage in one instance, as did other students.<sup>100</sup> Following this determination, the court had to decide how to apply *Tinker* (substantial disruption) and Bethel (lewd on-campus speech).<sup>101</sup> Relying mostly on *Tinker*, the court ruled that the web site substantially disrupted the school community, especially because of its effect on J.S.’s algebra teacher:

[I]n this day and age where school violence is becoming more commonplace, school officials are justified in taking threats against faculty and students seriously . . . .<sup>102</sup>

Further examples are found in the Third Circuit Court of Appeals, which issued two separate but related *en banc* opinions in June 2011. Each addressed virtually identical facts involving separate school systems: students suspended for 10 days for posting lewd and derogatory MySpace parody profiles of their respective principals.<sup>103</sup> In *Layshock v. Hermitage School District*,<sup>104</sup> the circuit court upheld the trial court’s

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<sup>99</sup> *Id.* at 853.

<sup>100</sup> *Id.* at 865.

<sup>101</sup> *Id.* at 669.

<sup>102</sup> *Id.*

<sup>103</sup> *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (en banc); *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219, n.1 (3d Cir. 2011) (en banc) (Jordan, J., concurring) (noting that “[t]his case and *J.S.* [v. Blue Mountain Sch. Dist.] are not related cases in the sense of being linked on our docket, but they raise nearly identical First Amendment issues. It is no accident that they were taken en banc at the same time, were argued on the same date, and are being decided simultaneously.”).

<sup>104</sup> *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (2011). The MySpace profile at issue in the case was especially disturbing. The court noted:

It all began when Justin Layshock used his grandmother’s computer to access [MySpace] where he created a fake internet “profile” of his Hickory High School principal . . . Justin created “bogus answers” to the site’s survey questions, applying a theme of “big” because the principal was, apparently, a large man. Some of these answers included numerous self-designating and demeaning statements: “big steroid freak,” smoking a “big blunt” (marijuana), “big pills,” “skinny dipping,” getting drunk a “big number of times,” “big whore,” and “big fag.” Layshock listed the principal’s “Interests” as “Transgender, Appreciators [sic] of Alcoholic Beverages.”

News of the site “spread like wildfire” at the school. Some students, including the principal’s daughter, alerted the principal to the site’s existence. After investigating, the principal determined the profile to be “degrading,” “demeaning,” “demoralizing,” and “shocking.” Though the principal expressed interest in pressing criminal charges, none were ever filed. The school system eventually suspended Justin for ten days and imposed other discipline.<sup>104</sup> *Id.* at 205–10.

ruling in favor of Layshock.<sup>105</sup> The school district did not dispute that there was insufficient evidence to prove that the off-campus profile caused a substantial disruption.<sup>106</sup> The court rejected the district's argument that the profile entered the campus to become "on-campus" speech; i.e., the personal MySpace profile was "on-campus" speech because the student opened the site on a school computer to show classmates, and the student copied a picture of the principal from the school webpage to create the fake profile."<sup>107</sup> Justin Layshock opened the site one time on a school computer to show classmates<sup>108</sup> and also copied a picture of the principal from the school webpage to paste into the page.<sup>109</sup> The court stated, "we do not think that the First Amendment can tolerate the School District stretching its authority into Justin's grandmother's home and reaching Justin while he is sitting at her computer after school in order to punish him for the expressive conduct that he engaged in there."<sup>110</sup>

*J.S. v. Blue Mountain School District*<sup>111</sup> was the companion case decided by the Third Circuit *en banc* panel. It too involved a derogatory MySpace parody about the school principal.<sup>112</sup> The profile was initially available to the public, but J.S. made the

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<sup>105</sup> *Id.* at 207.

<sup>106</sup> *Id.* at 216.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 209.

<sup>109</sup> *Id.* at 207–08.

<sup>110</sup> *Id.* at 216.

<sup>111</sup> *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (*en banc*).

<sup>112</sup> The court noted:

The profile contained crude content and vulgar language, ranging from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family. For instance, the profile lists M-Hoe's [the principal's] general interests as: "detention, being a tight ass, riding the frainttrain [apparently referring to his relationship with his wife], spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, hitting on students and their parents." [Citation omitted.] In addition, the profile stated in the "About me" section:

HELLO CHILDREN[,] yes. it's your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL[,] I have come to myspace so i can pervert the minds of other principal's [sic] to be just like me. I know, I know, you're all thrilled[,] Another reason I came to myspace is because - I am keeping an eye on you students (who[m] I care for so much)[.] For those who want to be my friend, and aren't in my school[,] I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs ) MY FRAINTRAIN. *Id.* at 921.

site private the next day so that only “invited” friends could view it.<sup>113</sup> Although numerous students saw the profile, nobody considered the content to be true, or suspected the principal of any of the alleged activities.<sup>114</sup> The principal, after investigating, threatened criminal action against J.S. and her parents, had law enforcement officials summon them to headquarters for questioning, and got MySpace to remove the profile.<sup>115</sup>

The court began its analysis by recognizing the “comprehensive,” though “not boundless,” authority of teachers and other public school officials on school premises.<sup>116</sup> Reviewing the law, the court characterized *Tinker* as the “general rule” in<sup>117</sup> student school speech cases, with *Fraser*, *Hazelwood*, and *Morse* being the “exceptions” to the rule (i.e., for regulating speech not otherwise substantially disruptive).<sup>118</sup> Based on this characterization of the law, it found J.S.’s MySpace parody only caused *some* disruption at the school.<sup>119</sup> For example, administrators spent time investigating and had to alter some meetings.<sup>120</sup> Additionally, teachers had to quiet students down in classrooms.<sup>121</sup> The court viewed these as only minor disruptions.<sup>122</sup> It also determined that the speech was not subject to *Fraser*’s “lewd speech” analysis because the speech stayed off-campus,<sup>123</sup> except for a printed hardcopy requested and reviewed by the principal.<sup>124</sup>

The court applied *Tinker*’s “the rights of others” prong in a footnote that is important to this article’s consideration of the relationship between “substantial disruption” and individual impact at school:

The School District seizes upon language in *Tinker* that is arguably *dicta*, claiming that it was justified in abridging

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 922.

<sup>116</sup> *Id.* at 925–926.

<sup>117</sup> *Id.* at 929–30.

<sup>118</sup> *Id.* at 927.

<sup>119</sup> *Id.* at 928–29.

<sup>120</sup> *Id.* at 929.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 930.

<sup>123</sup> *See id.* at 937–38.

<sup>124</sup> *Id.* at 932.

J.S.'s First Amendment rights because the profile defamed [the principal]. In *Tinker*, the Court [also] discussed its concern with "the rights of other students to be let alone." As a result, the Court appeared to indicate that school officials could stop conduct that would "impinge upon the rights of other students." Later in the opinion, the Court reiterated the point, but referred simply to "invasion of the rights of others." Although [the principal] is not a student, the School District claims J.S.'s speech is not immunized by the First Amendment because [the principal's] right to be free from defamation fits within this language in *Tinker*. We are not aware of any decisions analyzing whether this language applies to anyone other than "students," but we do note that our cases have employed both of these clauses. We further note there is a danger in accepting the School District's argument: if that portion of *Tinker* is broadly construed, an assertion of virtually any "rights" could transcend and eviscerate the protections of the First Amendment. In any event, we agree with J.S. that, as a matter of law, [the principal] could not succeed in his claim that the profile violated his right to be free from defamation.<sup>125</sup>

The court, in other words, implied that if *Tinker's* "rights of others" prong is valid and applies, it must involve a formal *legal* right only.<sup>126</sup> Here, the court concluded that the principal had not been defamed: the content was so patently outrageous and could not be taken seriously.<sup>127</sup> It remains to be seen if courts in other jurisdictions agree that *Tinker's* "individual rights" prong is more than mere *dicta* and, if so, whether those courts will apply the "individual rights" standard as rigidly as the *J.S.* court did by limiting its application to formal legal rights.

Some courts have not specifically considered *Tinker's* "individual rights" prong, even when an individual has been negatively affected. In such instances, courts have rejected speech restrictions and discipline for minor offensiveness or discomfort. Examples include a principal upset by an offensive and vulgar student website criticizing him and the school;<sup>128</sup>

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<sup>125</sup> *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (2011), at 931 n.9 (citations omitted).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 928.

<sup>128</sup> *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

two teachers upset by a student's offensive and lewd "top ten" lists about them, causing one to have "a hard time doing his job" and another to "almost come to tears;"<sup>129</sup> a school anti-harassment policy ruled to be overbroad by precluding *all* offensive speech;<sup>130</sup> and student placards with a website address, which directed users to a site that contained graphic images of terrorist beheadings.<sup>131</sup> These provide support for the notion that the individual harm must be extensive for speech to be considered substantially disruptive to an individual.

#### IV. PROPOSAL TO MERGE TITLE IX'S "EDUCATIONAL DEPRIVATION" AND *TINKER*'S "SUBSTANTIAL DISRUPTION" STANDARDS

The above discussion exposes at least two difficult and unanswered legal questions: whether bullying's harmful effects on an individual's or group's educational rights may suffice as a basis for discipline under *Tinker*, and if so, how should these rights be measured and proved? As the Third Circuit Court of Appeals has succinctly stated, "[t]here is no constitutional right to be a bully" on campus.<sup>132</sup> Similarly there is no right to harass another student on campus; Titles VI and IX provide such safeguards relating to race and gender based discrimination.<sup>133</sup> However, the Third Circuit court noted that a school's efforts to prohibit harassment might also conflict with student free speech rights under *Tinker* when such harassment includes offensive, disparaging speech that involves religious or political

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<sup>129</sup> *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446 (W.D. Pa. 2001) ("Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*.").

<sup>130</sup> *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (Alito, J.) ("[T]he mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.").

<sup>131</sup> *Bowler v. Town of Hudson*, 514 F. Supp. 2d 168 (D. Mass. 2007) (noting that school officials' concerns about the potential of students' psychological reaction and need for "counseling to cope with their subsequent feelings of helplessness and despair" were too vague and unspecific).

<sup>132</sup> *Sypniewski v. Warren Hill Reg'l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002).

<sup>133</sup> 20 U.S.C. § 1681 (2012); 42 U.S.C. § 2000(d) (2012). Although both Title IV and Title IX involve similar protections and analyses, this Article refers only to Title IX as shorthand for both and because it seems that cases involving the issue of off-campus conduct affecting individual educational deprivation arise primarily under Title IX.

content.”<sup>134</sup> The Third Circuit summarizes the law as follows:

Although mere offense is not a justification for suppression of speech, schools are generally permitted to step in and protect students from abuse [on campus]. Even where harassment by name calling does not involve a racial component, and even where there is no special history of disruption, prohibition accompanied by the threat of sanction is—and has always been—a standard school response. Students cannot hide behind the First Amendment to protect their “right” to abuse and intimidate other students *at school*. *Outside the school context, of course, much harassment by name calling (understood broadly) is protected*. But the First Amendment does not interfere with basic school discipline.<sup>135</sup>

This article suggests that the most predictable and logical legal standard for proving an actual or reasonably foreseeable substantial disruption based on individual or group educational impact can be found in Title IX of the 1972 Educational Amendments, which protects against gender-based discrimination, including harassment and hostile environment claims.<sup>136</sup> Title IX claims are guided, in part, by the Supreme Court’s 1999 opinion in *Davis v. Monroe*.<sup>137</sup> Accordingly, proving a Title IX violation by a school requires evidence that a student has been subject to conduct “so severe, pervasive, and *objectively* offensive that it effectively bars the victim’s access to an educational opportunity or benefit” (referred to herein as the “educational deprivation” standard).<sup>138</sup> This test includes both a subjective element as well as an objective element. The plaintiff must show a subjective belief the conduct was so offensive that he or she could not have obtained his or her education, and the plaintiff must also show that an objective person would have experienced the same form of

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.* (emphasis added).

<sup>136</sup> 20 U.S.C. §§ 1681–1688 (2006); *see also* T.K. v. New York City Dep’t of Educ., 779 F. Supp. 2d 289, 314 (E.D. N.Y. 2011) (distinguishing from the statute because the case involved on-campus bullying of a special education student). The court in *T.K.* considered whether the existence of bullying could be proof that a school failed to provide a Free Appropriate Public Education under the Individual with Disabilities Education Act, while providing an extensive review of federal case law. *T.K.*, 779 F. Supp. 2d at 309–19.

<sup>137</sup> *Davis v. Monroe*, 526 U.S. 629 (1999).

<sup>138</sup> *Id.* at 632 (emphasis added).

discrimination.<sup>139</sup> When read in *pari materia*<sup>140</sup> with the standards that have evolved from *Tinker*, a well-defined standard is created that will prove useful to practitioners, parents, and pupils. Further, at least one federal district court has acknowledged that “general principles of anti-harassment law may be relevant” to the *Tinker* analysis.<sup>141</sup> Also, Judge Kozinski, in his dissent in *Harper*, acknowledges that “[h]arassment law might be reconcilable with the First Amendment, if it is limited to situations where the speech is so severe and pervasive as to be tantamount to [disruptive] conduct.”<sup>142</sup>

In addition to these admittedly limited judicial references, there are several reasons justifying the use of Title IX’s “educational deprivation” standard. First, is well-established and somewhat predictable. Second, it comports well with *Tinker*’s acknowledgment of schools’ responsibilities to protect students’ individual rights; i.e., student access to educational opportunities and benefits. Third, common sense seems to dictate simplicity and uniformity by using an already established and more predictable legal standard (rather than creating another standard or doing nothing to clarify existing confusion).

We can, at this time, only guess if and how courts would apply a merged standard to off-campus cyberspeech. That is, how will courts determine whether off-campus cyberbullying has impeded a victimized individual or group from enjoying educational benefits on campus? There already exists established extensive precedent for applying Title IX protections in cases involving educational deprivations caused by off-campus behavior.<sup>143</sup> This is best exemplified in the

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<sup>139</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993).

<sup>140</sup> BLACK’S LAW DICTIONARY, 862 (9th ed. 2009) (defined as a “canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.”). Naturally, the approach is one that suggests conflating a standard of jurisprudence that has evolved in interpreting Titles VI and IX with a speech standard for off-campus cyberspeech, but it is a standard that nonetheless would prove helpful in the absence of clarity from the United States Supreme Court regarding the subject.

<sup>141</sup> *Sypniewski v. Warren Hills Reg’l Bd. Of Educ.*, No. 01-3061, 2001 U.S. Dist. LEXIS 25388, \*62 n.13 (D.N.J. 2001).

<sup>142</sup> *Harper*, 445 F.3d 1166, at 1198 (Kozinski, J., dissenting).

<sup>143</sup> *See Crandell v. New York Coll. of Osteopathic Med.*, 87 F. Supp. 2d 304, 316 n.126 (S.D.N.Y. 2000) (citing *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223 (5th

Supreme Court's 1998 Title IX ruling in *Gebser v. Lago Vista Indep. Sch. Dist.*,<sup>144</sup> which involved a teacher and student who were engaged in a sexual relationship that occurred extensively off-campus.<sup>145</sup> An oft-used test<sup>146</sup> emerged from the case; namely, to prove that an educational deprivation occurred, the party must show that (1) a school district official, with the ability to implement corrective measures, knew of the inappropriate conduct; and (2) that despite having knowledge of the inappropriate conduct, the educational entity deliberately failed to respond properly.<sup>147</sup>

A. *What's good for Title IX ought to be good for Tinker.*

*Tinker's* analysis should be extended to off-campus speech affecting on-campus individual educational opportunities. It is suggested here that Title IX's "educational deprivation" standard be applied across the board to *all* instances of off-campus cyberbullying, not just to instances involving gender-based harassment.<sup>148</sup> Resorting to this approach would be necessary only if the speech could not be restricted otherwise under any already-established First Amendment bases (i.e., under *Tinker*—regarding substantial disruption to school operations, *Bethel*, *Morse*, etc.). Thus, if the off-campus cyberbullying effectively denies, or is likely to deny, the victim his or her on-campus educational benefits (under the Title IX

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Cir. 1997) (upholding Title IX claims where all sexual contact occurred off school property), *rev'd on other grounds sub nom.* 524 U.S. 274 (1998)); *Doe v. Claiborne County, Tenn.*, 103 F.3d 495 (6th Cir. 1996) (upholding claim where some incidents of misconduct took place off campus) *rev'd in part on other grounds by Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (according to *Phillips v. Anderson County Bd. of Educ.*, No. 3:06-CV-35, 2006 U.S. Dist. LEXIS 92120, at \*33 n.5 (E.D. Tenn. 2006)); *Warren v. Reading Sch. Dist.*, 82 F. Supp. 2d 395 (E.D. Pa. 2000); *Doe v. School Admin. Dist. No. 19*, 66 F. Supp. 2d 57 (D. Maine 1999) (upholding claim where all misconduct occurred off campus); *Donovan v. Mount Ida College*, 1997 U.S. Dist. LEXIS 23048 (D. Mass. Jan 3, 1997) (some incidents of misconduct occurred off campus); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1296-97 (N.D. Cal. 1993) (all misconduct occurred off campus).

<sup>144</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

<sup>145</sup> *Id.* at 278.

<sup>146</sup> *See, e.g., Jennings v. Univ. of N.C.*, 482 F.3d 686, 701 (4th Cir. 2007).

<sup>147</sup> *Id.* at 290-92.

<sup>148</sup> However, it is worth noting that when there are off-campus activities which do result in a form of gender discrimination that satisfy the requirements of *Lago Vista*, the school *will* be required to respond and take prompt action to end the hostile environment caused by the sexual harassment.

standard), this presumably meets *Tinker*'s "substantial disruption" test. Alternatively, a court may choose to apply *Tinker*'s "individual rights" prong if it does not consider it *dicta*.

Applying this standard to two of the aforementioned cases, *J.C.* and *Kowalski*, would likely improve the predictability of their results. In *J.C.*, the judge noted that the plaintiff would have failed at least one of the elements of the Title IX test, namely the objective analysis: "J.C.'s video was *not violent or threatening*. There was no reason for the School to believe that C.C.'s safety was in jeopardy or that any student would try to harm C.C. as a result of the video."<sup>149</sup> *Kowalski* proves a tougher case, despite similar facts, as it used a somewhat speculative analysis and eschewed more widely adopted rules concerning off-campus speech.<sup>150</sup> Under a Title IX analysis, the *Kowalski* court would have more pronounced standards for on-campus and off-campus regulation of speech to rely upon, and would be bound by the *Davis* subjective and objective test when determining whether regulation of a student's off-campus speech was proper.

## V. CONCLUSION

School officials, attorneys, and the lower courts need greater clarity in knowing how to balance student safety, effective school operations, and student free speech rights. Bullying victims, most of all, need protection and freedom from cyberbullying. All who have a role and interest in the dangers and problems of cyberbullying will be well served if the Supreme Court, someday soon, provides us with greater legal clarity. Until then, this article argues that the Title IX "educational deprivation" standard conjoined with *Tinker*'s "substantial disruption" test provides a useful, common sense, and legally sound basis to resolve some of the ambiguities and uncertainty in this area of the law.

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<sup>149</sup> *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1098, 1117 (C.D. Cal. 2010).

<sup>150</sup> See *supra* notes 71–80 and accompanying text.