FIRST AMENDMENT CONSTRAINTS OF PUBLIC SCHOOL ADMINISTRATORS TO REGULATE OFF-CAMPUS STUDENTS’ SPEECH IN THE TECHNOLOGY AGE

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In a world where students and teachers both rely on technology in the process of education, understanding the constraints of public school administrators to regulate off-campus student’s speech is a vital issue. This dissertation focuses on ways to evaluate legal analysis of cases involved in off campus speech. The methodology of legal analysis is used to identify judicial reasoning concerning established legal principles pertaining to the constitutional right of public school students to freedom of expression, and the application of those principles to off-campus student expression delivered by electronic means. This research produces a number of key findings: Many lower court cases have favored with the students unless the school district could prove substantial disruption to the learning environment or a true threat existed due to the off campus speech. In addition, it is crucial for the districts to have concrete policies in place to educate the students about acceptable usage of technology. The main conclusions drawn from this research are that current approaches to punishing students for their offensive off campus speech does not uphold in the courts and administrators must be resilient to speech that may be unpleasant to them. This research also includes several recommendations for administrators such as guidelines on how to write their acceptable usage policy. It also provides a chart with a summary of critical cases of importance to administrators.
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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>LIST OF TABLES</th>
<th>vi</th>
</tr>
</thead>
<tbody>
<tr>
<td>LIST OF FIGURES</td>
<td>vii</td>
</tr>
<tr>
<td>1 INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>1.1 Purpose of the Study</td>
<td>2</td>
</tr>
<tr>
<td>1.2 Background of the Study</td>
<td>2</td>
</tr>
<tr>
<td>1.3 Theoretical Framework of the Study</td>
<td>6</td>
</tr>
<tr>
<td>1.4 Statement of the Problem</td>
<td>6</td>
</tr>
<tr>
<td>1.5 Method of the Study</td>
<td>7</td>
</tr>
<tr>
<td>1.6 Significance of the Study</td>
<td>7</td>
</tr>
<tr>
<td>2 LITERATURE REVIEW</td>
<td>9</td>
</tr>
<tr>
<td>2.1 <em>Tinker v. DesMoines</em></td>
<td>9</td>
</tr>
<tr>
<td>2.2 <em>Bethel School District no. 403, v. Fraser</em></td>
<td>12</td>
</tr>
<tr>
<td>2.3 <em>Hazelwood School District v. Kuhlmeier</em></td>
<td>14</td>
</tr>
<tr>
<td>2.4 <em>Morse v. Frederick</em></td>
<td>17</td>
</tr>
<tr>
<td>3 METHODOLOGY</td>
<td>20</td>
</tr>
<tr>
<td>3.1 Source of Law</td>
<td>21</td>
</tr>
<tr>
<td>3.2 Primary Sources</td>
<td>22</td>
</tr>
<tr>
<td>3.3 Secondary Sources</td>
<td>23</td>
</tr>
<tr>
<td>3.4 Data Sources</td>
<td>25</td>
</tr>
<tr>
<td>3.5 Legal Process</td>
<td>26</td>
</tr>
</tbody>
</table>
3.6 Conceptual Framework ........................................................................................................ 27

3.7 Reasoning ........................................................................................................................... 28

3.8 Synthesis ............................................................................................................................. 29

4 RESEARCH FINDINGS .............................................................................................................. 30

4.1 Beussink v. Woodland R-IV School District .................................................................... 37

4.2 Beidler v. North Thurston School District ....................................................................... 39

4.3 Emmett v. Kent School District ........................................................................................ 40

4.4 Killion v. Franklin Regional School District .................................................................. 42

4.5 Coy ex rel. Coy v. Board of Education ........................................................................... 44

4.6 J.S. v. Bethlehem Area School District .......................................................................... 46

4.7 Mahaffey ex rel. Mahaffey v. Aldrich ........................................................................... 50

4.8 Flaherty v. Keystone Oaks School District ..................................................................... 52

4.9 Dwyer v. Oceanport School District .............................................................................. 53

4.10 Latour v. Riverside Beaver School District ................................................................... 55

4.11 Barnett v. Tipton County Board. of Education ............................................................... 56

4.12 Layshock v. Hermitage School District ......................................................................... 59

4.13 Requa v. Kent School District ....................................................................................... 62

4.14 Weedsport District v. Wisniewski .................................................................................. 64

4.15 A.B. v. State, No. 67A01-JV-372 .................................................................................... 65

4.16 Doninger v. Neihoff ........................................................................................................... 66

4.17 Riehm v. Engelking ......................................................................................................... 68

4.18 D.J.M. v. Hannibal Public School District ..................................................................... 70
LIST OF TABLES

Table 1: Summary of Off-Campus Cases ..................................................................................... 33
## LIST OF FIGURES

<table>
<thead>
<tr>
<th>Figure 1:</th>
<th>Student guidelines for technology resource</th>
<th>90</th>
</tr>
</thead>
</table>
In 1969, the Supreme Court articulated for the first time that students enjoy a First Amendment right to free speech that they do not relinquish “at the schoolhouse gate” (Tinker, 393 U.S. 503 (1969)). In *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969) the Supreme Court ruled that students enjoy a right to free speech while on school premises that cannot be censored by school authorities unless the speech is likely to create a substantial disruption in the work of the school or interfere with the rights of other students.

Since the Supreme Court’s initial ruling in 1969, students in public schools have relied on the *Tinker* ruling to challenge the right of schools to regulate all kinds of student expression. School grooming codes, school uniforms, restrictions on slogans that appear on clothing, and sanctions on pure student speech have all been challenged by students as an infringement of their right to freedom of expression under the First Amendment.

In the wake of the Sandy Hook’s tragedy and many other higher institution shootings, school authorities have become more and more concerned about student violence, and have begun respond more aggressively to student speech that has a threatening tone or contains violent language. In general, the courts have analyzed these cases under two constitutional standards: First, does the student speech constitute a “true threat,” in which case the speech enjoys no constitutional protection. Second, the courts have asked whether the student speech causes or is likely to cause a “substantial disruption” that would entitle school authorities to discipline students for engaging in the speech (Hudson, 2005).
In recent years, cases have arisen in which school authorities have attempted to sanction students for speech that was technology-delivered from sites off the school campus. Although this speech was delivered via technology, the courts have utilized the traditional free speech standards that have been articulated by the United States Supreme Court.

1.1 Purpose of the Study

The purpose of this study is to identify and analyze the federal court cases that have considered the authority of public school officials to sanction students for engaging in technology-delivered off-campus speech. The following questions are addressed:

- What are the First Amendment constraints on public school districts’ authority to regulate students’ off-campus technology-delivered speech?
- What legal precedents have been utilized by the courts to decide the schools’ authority to regulate students’ off-campus, technology-delivered speech?
- What factors appear in the relevant case law that can help public school administrators make decisions about students’ technology-delivered off-campus speech?

1.2 Background of the Study

With the arrival and prevalent use of the Internet and mobile devices, school officials are having difficulty regulating when, where, and how the technology should be used. In 2011, The Internet Crime Complaint Center (IC3) was developed to help online Internet crime victims and law officials. For the past three years, this agency has received over 300,000 complaints.
The majority of complaints regarded online frauds or scams. However, electronic communication has been on the rise bringing with it legal problems such as electronic privacy, copyright practices, censorship and freedom of speech, computer fraud and computer viruses. Some of the problems associated with electronic communication are a lack of privacy or security of information, cyber bulling, cyber stalking, forged or altered e-mail messages, identity of the sender being altered or disguised making it difficult to identify the sender, messages forwarded without permission, or risky behavior (Williams, 2012).

The relationship between the Internet and the First Amendment rights of public school students is a complicated topic. Some complications are instigated inside school walls where schools allow use of the Internet on campus. On the other hand, complications can also arise when offensive material is posted off campus by a student. For example, a student can write negative comments about another student, staff member, or school official from home, yet the effects of the post are spread throughout the school campus. When questionable material is posted to the Internet, the location of the student becomes crucial to the administrators’ investigation. More difficulties arise when the student’s electronic communication is not on school grounds (Harpaz, 2002).

The emergence of Facebook and Twitter has also added a new dimension to First Amendment rights of school students. Around the country, school teachers are posting homework assignments, quizzes, notes and classroom discussions on the Internet. Unlike five to ten years ago when a student who ran into a teacher in the grocery store and was shocked to discover that the teacher had a life outside the school walls, now students and teachers are communicating on a whole new level.
Social networks sites, such as Facebook, have gained remarkable popularity. According to Facebook, 845 million users had logged in as of December 31, 2011; of those, 161 million came from the United States of America, while India registered 46 million and Brazil 37 million. Equally impressive is 483 million people logging into Facebook every day (Chereder, 2012). In 2012, the average person had 130 “friends” and “liked” 50 pages. Fifty-six consumers recommended a brand or claimed a coupon. Each week on Facebook more than 3.5 billion pieces of content are shared (Daniells, 2012).

Twitter’s rapid transformation into the largest community of teens and twenty-something in history made a backlash perhaps inevitable. In the three years since its launch, Twitter has had 2.2 million users. One hundred million of these users are logging in at least once a month; 50 million are logging in every day. Almost two million tweets are sent out daily. Another social medium site that is rapidly growing is YouTube. In 2011, YouTube had 490 million visitors on a monthly average. At least 35 hours of video is uploaded onto YouTube every minute (Pring, 2012).

The confusion in free speech rights occurs when a student makes use of devices such as smart phones, Ipads, and other electronic devices for electronic communication, to engage in activities that are not part of the curricula on school grounds. For example, Lewisville Independent School District (LISD) has launched BYOT (Bring Your Own Technology) for students. According to administrators in LISD, this modification may be a major factor in the increased number of cyber bullying cases. Can school officials search a device to find evidence of the alleged cyber bullying?
Further, under such an arrangement, questions arise about public schools’ authority to discipline a student based on the location of a particular electronic device. According to the Fourth Amendment to the Constitution, school officials are forbidden to seize a student’s personal property including cell phones. In this situation, administrators rely on the students' or the parents' permission to view the cell phone. However, when the student or parents refuse to present the cell phone, the investigation ceases. These incidences make it impossible for administrators to do the job of indentifying the problem and implementing the proper consequences (Student Press Law Center, 2012).

Student discipline becomes even more complex when cyber bullying takes place off campus but the implications of it are present on campus. For instance, a student might write on another student’s Facebook wall derogatory comments such as the student is a whore and needs to die. When the victim student reads the comments at school, she is not able to concentrate on her school work because she is disturbed by the comments. She is not able to perform for days at school, so the parent reports the harassment to school officials. The school officials investigate the situation. Because the parent prints the comments and brings them to school to show to the administrator, the administrator discovers that such comments were indeed posted on Facebook. Now the difficulty is amplified because the comments are posted at the perpetrator’s home, but the victim is visibly having trouble performing at school in school time. The law creates a hazy cloud for school officials to address when such incidences occur. Administrators regularly witness how the off-campus speech of students can affect the ambience of the school.
Reviewing the recent and past decisions of upper and lower court cases, this dissertation reveals the pattern the courts have established in determining the limitations placed on school officials to discipline and still maintain students’ First Amendment rights. It will also help identify the type of circumstances in which school officials can bring consequences to bear where and when a threat is present. It also explores cases related to some speech that, although offensive to the victim, is not subject to school discipline (Harpaz, 2000).

1.3 Theoretical Framework of the Study

The theoretical background of the study is provided by free speech jurisprudence as articulated by the United States Supreme Court and the lower federal courts. Further, it helps guide administrators in making appropriate decisions when acting on off-campus technology related issues.

1.4 Statement of the Problem

The purpose of this study is to analyze Internet off-campus concerns versus students’ First Amendment rights. The study provides an overview historically of what the courts have said about students’ rights and how the influence of technology may change the courts’ decisions in the future. The rulings in these cases and legal standards can be used to make those verdicts that will aid in development of specific guidelines to assist school administrators in the decision making progress when faced with a student Internet free speech issue.
1.5 Method of the Study

The methodology of legal analysis is used to identify judicial reasoning concerning established legal principles pertaining to the constitutional right of public school students to freedom of expression, and the application of those principles to off-campus student expression delivered by electronic means. The procedure involves identifying controlling statutes and case law. A list of relevant federal and state cases is compiled using legal research tools, including the computer-assisted research tool of Lexis Nexis. After identifying all the relevant published court decisions, the research analyzed the cases, looking for themes and patterns in judicial opinions that define the legal right of students to engage in off-campus technology-delivered expression.

1.6 Significance of the Study

In recent years, the courts have issued numerous rulings on the constitutional right of public school students to engage in technology-delivered off-campus speech that may have some impact on the school environment. These rulings show that schools are struggling with the issue of maintaining order and discipline while trying to respect the constitutional rights of students. This study identifies all the relevant court decisions that pertain to the constitutional right of public school students to engage in off-campus, technology-delivered speech and analyzed these decisions to identify important themes and patterns in the courts’ rulings. Thus, this dissertation provides important guidance to public school administrators regarding their authority to regulate students’ speech that is delivered off the school campus through some electronic means. By gaining a better understanding of students’ constitutional right to free
speech in the off-campus, cyberspace environment, school authorities are able to perform their duties without violating students’ constitutional right to freedom of expression under the First Amendment.
CHAPTER 2
LITERATURE REVIEW

The purpose of this chapter is to discuss the landmark trilogy cases, *Tinker*, *Fraser*, and *Hazelwood* that have set precedents for the deliberations of the lower court cases. In addition, it also discusses another Supreme Court case, *Morse* that added a new clause to the *Tinker* case.

2.1 *Tinker v. Des Moines Community School District, 393 U.S. 503 (1969)*

Even though a key precedent is set by the United States Supreme Court in *Tinker v. Des Moines Independent Community School District* (ICSD), many questions still remain unanswered for administrators. The *Tinker v. Des Moines ICSD* case involved 15-year-old petitioner John F. Tinker, 16-year-old petitioner Christopher Eckhardt, who attended high schools in Des Moines, Iowa, and 13-year-old petitioner Mary Beth Tinker, who attended a junior high school. In December 1965, some students and parents decided to meet to discuss their objections to the hostilities in the Vietnam War and their support for a truce, by wearing black armbands. However, the principals of the Des Moines schools became aware of the plan to wear the armbands and on December 14, 1965, they met to adopt a policy against the wearing of armbands. The parents and students were aware of the newly generated schools’ policy but chose to wear armbands anyway. Consequently, all the students who wore armbands were suspended from school until they removed their armbands. The parents filed a complaint in the United States District Court. However, the district court dismissed the
complaint and upheld the schools’ ruling. The petitioners then filed in the Court of Appeals for the Eighth Circuit and again the court sided with the school officials. The petitioners then filed their complaint in the Supreme Court (*Tinker*, 1969). According to the Court’s decision, “School officials do not possess absolute authority over their students.” Thus, students’ right of free speech does not stop simply because students enter the school building. According to the Court, student free speech rights can be limited only when the speech in question “materially disrupts class work or involves substantial disorder or invasion of the rights of others.”

However, *Tinker* failed to answer how far students’ free speech should extend on campus to ensure a safe environment for all. In addition, the Court in *Tinker* implied that due to the schools' interest in maintaining order on campus, the First Amendment rights of public school children are slightly diminished while at school. Accordingly, the Court held that free speech rights could be limited only when the speech in question "materially disrupts class work or involves substantial disorder or invasion of the rights of others" (*Student Press Law Center*, 2000).

Further, *Tinker* left open a number of questions concerning the First Amendment and exactly how far students' free speech rights should extend. For example, Mary Beth Tinker made no use of school resources to further her personal expression—other than being in school while wearing her armband. Still, her symbolic expression was, in the Court's words, "akin to pure speech," involving no foul language or insult to any individual. The armbands caused virtually no disruption of the school day—making it impossible for the school to prove that the armbands had interfered with the school's educational objectives (*Tinker*, 1969). Therefore, questions were necessarily left unanswered as to whether students' rights as recognized in
Tinker still exists if some of Tinker's facts were different. Forty years after the Tinker decisions some school officials are still confused. In April 1999, school officials in Allen Texas, suspended several students, including Jennifer Boccia, for wearing black armbands to their school to mourn the victims of the Columbine school shooting and to protest what they viewed as schools overstepping their boundaries. Even though, in Boccia v. The Allen Independent School District, Jennifer Boccia and the school district settled the case, it would have been interesting to see if the case might be decided differently today or whether the Tinker test would hold equally as strongly as it had almost forty years ago. Recently, in Depinto v. Bayonne Board of Education, a New Jersey federal court has issued an order prohibiting a school district from disciplining elementary school students who wore a button protesting the school district’s mandatory uniform policy. On the other hand, in B.W.A. v. Farmington R-& School District, a United States district court in Missouri has ruled that a school district did not violate a student’s free speech rights by prohibiting that student from wearing a Confederate flag symbol in school (B.W.A, 2007). Similarly, in D.B. v. Lafon, the United States Court of Appeals for the Sixth Circuit ruled that school officials at a Tennessee high school did not violate students’ free speech rights by prohibiting clothing that depicts the Confederate battle flags (D.B.). In Scott v. Napa Valley Unified School District, a California trial court found that schools enforcing dress code policies that require students to wear apparel that is plain—that is “no pictures, patterns, stripes, or logos of any size or kind”—are in violation of students’ free speech rights. Hence, the lower courts also have been struggling with the limits of students’ free speech rights. Generally, they have relied on the Tinker decision as to whether material disruptions are caused by students’ actions and whether the student’s actions invade the rights of others (Hudson, 2003).
2.2  *Bethel School District v. Fraser, no. 403*

Seventeen years after the *Tinker* decision, the Court revisited and answered some more students’ free speech rights questions in *Bethel School District No. 403 v. Fraser*. On April 26, 1983, a student at Bethel High School in Pierce County, Washington, Matthew Fraser delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students attended this mandatory assembly; a majority of the students were 14 years old. During the entire speech, Fraser used elaborate, graphic, and explicit sexual metaphors that caused the audience to react. The next day Fraser was called to the assistant principal’s office, notified of the accusations against him, and was given a chance to give his side of the story. Fraser admitted to having given the speech described and that he deliberately used sexual innuendos in the speech. Fraser was then informed that he would be suspended for three days and that his name would be removed from the list of candidates for graduation speaker at the school’s commencement exercises. Fraser immediately filed with school district’s grievance committee. The hearing officer ruled that the speech was obscene and confirmed the school officials’ ruling. Then Fraser and his father filed the complaint with the district court for the Western District of Washington. The district court awarded the respondent $278 in damages and $12,750 in litigation costs and attorney fees and told the school officials that they could not remove his name from the list of candidates for graduation speaker at the commencement ceremonies because they had violated respondent’s freedom of speech. In addition, the Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, 755 F. 2d 1356 (1985), holding that the respondent’s speech was similar to the armbands in *Tinker*. However, the Supreme Court discerned a marked distinction between the
political “message” of the armbands in *Tinker* and the sexual content of Fraser’s speech, and reversed the court of appeals decision. Here, the Court stated that public education was to “prepare pupils for citizenship in the Republic...It must inculcate the habits and manners of civility.” Further, it confirmed “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” With these two statements, the Court supported the schools’ disciplinary actions by concluding that “Schools, an instrument of the state, may determine that the essential lessons of civil, mature, conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct” (Carvin, 2000).

In *Poling v. Murphy*, Dean Poling, a high school student at Unicoi County High School in Tennessee gave a speech for his student council presidency campaign at a school assembly. All students were required to attend the assembly. Prior to delivering the speech to the student body, Poling gave the speech to a faculty member. The teacher approved the speech but asked Poling to remove a controversial sentence toward the administration. Poling did remove the sentence but replaced it with other degrading remarks toward the administration. Consequently, Poling was disqualified from the student council presidency election. A lawsuit was then filed against the school administrators alleging violations of the First and Fourteenth Amendments. The district court favored the school officials’ decision. Poling then appealed to the Sixth Circuit Court of Appeals who upheld the district court’s decision. The court, quoting from *Tinker* and *Fraser*, restated the status of students’ First Amendment rights:

> It is true, to be sure, that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” and “[s]chool officials do not possess absolute authority over their students.” ....It also remains true, however, that the Federal Constitution does not compel “teachers, parents, and elected school officials to
surrender control of the American public school systems to public school students.”...Limitations on speech that would be unconstitutional outside the schoolhouse are not necessarily unconstitutional within it (Tinker, 1969).

In *Tinker v. Des Moines*, the Court upheld the right for students to express themselves when their words are non-disruptive, the ruling in *Fraser* can be seen as limitation on the scope of that ruling, prohibiting certain styles of expression that are sexually vulgar.

2.3 *Hazelwood School District v. Kuhlmeier*

Two years after *Fraser*, the Court answers a question involving high school students’ free speech rights in school media in the case of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). In *Hazelwood*, three Hazelwood East High School students who were staff members of *Spectrum*, the school newspaper, contended that school officials had violated their First Amendment rights by deleting two pages of articles from the May 13, 1983 issue. *Spectrum* was written and edited by the Journalism II class supervised by Howard Stergos, the teacher. The funding for *Spectrum* came from state allocations and from sales of the newspaper. Prior to printing the newspaper, the class submitted the articles to the principal for approval. On May 10, Emerson delivered the proofs of the May 13 edition to Robert Reynolds, the principal. Reynolds objected to two of the articles discussing teen pregnancy and parent divorce, scheduled to appear in that edition. Reynolds was concerned that although the pregnancy articles used false names, the girls mentioned might still be identified from the text. Further, the articles’ reference to sexual activity and birth control were inappropriate for some of the younger students at the school. The other article contained names of students whose parents were going through divorce. Reynolds believed the parents should have been given an
opportunity to respond or consent to the remarks in the articles. Due to a lack of time to properly edit the articles, Reynolds eliminated these pages from the newspaper. The respondents, the Kuhlmeier’s presented their case in United States District Court for the Eastern District of Missouri, but the district court said that the school officials did not violate the students’ free speech rights. However, the Court of Appeals for the Eighth Circuit reversed the decision. When the lawsuit went to the Supreme Court, the Court stated that school officials have the right to control school-sponsored publications as long as censorship is “reasonable and related to legitimate pedagogical concerns and the paper has not been converted by the school into an open forum.” The United States Supreme Court mentioned both *Tinker* and *Fraser* to establish the benchmarks for the decision. Nevertheless, many civil libertarians viewed the *Hazelwood* decision as a step backward. They reasoned that it reversed the rights of the students set forth by *Tinker*. However, many educators viewed the decision as a reinforcement of difference – student speech rights are simply not identical to the rights of adults in public. In other words, as long as students produce content that is not lewd or disruptive in nature nor sponsored by the school, they can still practice free speech. Godwin summarizes the three landmark cases as follows:

Vulgar or plainly offensive speech (*Fraser*-type speech) may be prohibited without a showing of disruption or substantial interference with the school’s work. Second, school-sponsored speech (*Hazelwood*-type speech) may be restricted with limitations reasonably related to legitimate educational concerns. Third, speech that is neither vulgar nor school-sponsored (*Tinker*-type speech) may only be prohibited if it causes a material disruption of the school’s operation (1998).

Therefore, as long as administrators can prove that the speech made by students is vulgar or lewd in nature or is substantially disruptive in nature, they have a better chance of obtaining the Court’s approval.
Even though, the Supreme Court tried to answer questions on a wide range of topics from political expression to obscene speeches, many questions still remained un-answered about free-speech on campus. Then it was the lower court’s turn to answer some of the remaining questions.

Almost a decade later, the Supreme Judicial Court of Massachusetts asked the following: “Do high school students in public schools have the freedom under Massachusetts General Law, Chapter 71, 82 (1994), to engage in non-school sponsored expression that may be considered vulgar, but causes no disruption or disorder?” In *Pyle v. South Hadley School Committee’s* 423 Mass. 283 (Mass., 1996), Jeffery Pyle and his brothers repeatedly violated the school’s dress code by wearing shirts with offensive slogans, pictures, comments, or designs. Due to the school’s punitive response, the students filed a lawsuit against the school officials of South Hadley claiming that the dress code violated their freedom of speech. The Court found that under Massachusetts state law, students do have the right to engage in non-sponsored expression that may have been reasonably considered offensive but caused no disruption. The Court again re-visited the landmark cases of *Tinker* (1969), *Fraser* (1986) and *Hazelwood* (1988) to conclude that even though the T-shirt may have been offensive to the school administrators, they could not prove that it caused any disruption or disorder as required under Massachusetts law (Bowlin, 2004).

The issue of disorder and disruption was again challenged in the Ninth Circuit Court of Appeals in *Chandler v. McMinnville School District*, 978 F. 2d. 524 (9th Cir. 1992). In this case, school teachers in McMinnville, Oregon, instigated a lawful strike. In response to the strike, the school district hired replacement teachers. Chandler and Depweg were students at
McMinnville High School, and their fathers were among the striking teachers. In response to their fathers being replaced by substitute teachers, they wore buttons to show support for the teachers. When ordered to remove the buttons by Mr. Whitehead, Vice Principal, the boys refused to do so because they felt the request violated their freedom of speech. Upon refusal to remove the buttons, the boys were suspended for the remainder of the day. A district court dismissed the action. However, on appeal the appellate court reversed the dismissal and concluded that the buttons were improperly censored. According to the decision, the school district failed to prove the buttons caused any disruption. Again, the appeals court referenced the decision of *Tinker* and *Hazelwood* that requires schools to demonstrate that given speech is disorderly or causes substantial or material disruption (Bowlin, 2004).

2.4 *Morse v. Fredrick*

Recently, the United States Supreme Court delivered its decision in the closely watched case of *Morse v. Frederick* also known as the “Bong Hits 4 Jesus” case. On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. The torchbearers were to pass along in front of Juneau Douglas High School (JDHS) during school time. Deborah Morse, the principal, allowed students and staff to participate in the Torch Relay.

A senior, Joseph Frederick, arriving late to school joined his friends across the street from the school to watch the event. As soon as the torch bearer and cameras rolled by, Frederick and some of his friends held a 14-foot banner stating “Bong Hits 4 Jesus.” The fonts
were big enough for the students on the other side of the street to see clearly. Principal Morse immediately crossed the street and demanded the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner and told Frederick to report to her office where she suspended him for ten days. Frederick filed his complaint with the superintendent who upheld the principal’s decision. The United States District Court also upheld the superintendent’s decision. However, the United States Court of Appeals for the Ninth Circuit reversed, holding that the school failed to show a “risk of substantial disruption” within the meaning of the Supreme Court’s ruling in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), and that Ms. Morse was not entitled to qualified immunity from personal liability. The Supreme Court reversed the Ninth Circuit decision. The Court relied on two basic principles from its previous rulings on student speech, *Tinker, Fraser, and Hazelwood*: first, the students’ free speech rights are construed “in light of the special characteristics of the school environment,” and second, that “the mode of analysis set forth in Tinker is not absolute” nor “the only basis for restricting student speech.” Further, the Court professed that “detering drug use by schoolchildren is an ‘important-indeed, perhaps compelling’ interest.” Student speech celebrating illegal drug use at a school event in the presence of school administrators and teachers thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse. The school administrators anxiously awaiting the Supreme Court’s decision were relieved to hear that the Court had sided with the school officials. David Hudson, First Amendment scholar, posed the question: Will the Court decision restrain student speech rights drastically or will it represent a narrow “drug exception” clause to *Tinker* (2007)?
CHAPTER 3

METHODOLOGY

The methodology adopted for this study follows the traditional methodology of legal research. The legal methodology is described in the following sections. Legal research is subject to the same general requirements as other forms of research. In order to analyze the data, it is important to summarize the findings from the upper and lower courts, trace the pattern in the decision making, and imply the findings to current cases (Mouly, 1997). Hence, the methodology of educational legal research diverges from traditional qualitative research (McMillan & Schumacher, 1989).

In studying a legal issue, the researcher analyzes the federal, state and local laws where applicable to the case on hand. Once the researcher has reviewed the information, a list of court cases is compiled through the use of legal finding tools, including reasonable forecast tools. Each of these court decisions is read and analyzed, a process that allows the researcher to proceed systematically in the case-by-case analysis. The final step of legal research is often a synthesis of selected cases (McMillan & Schumacher, 1989).

The second step in studying a legal issue occurs after the research has analyzed the relevant laws and court decisions, and the researcher then examines secondary sources including legal periodicals, legal encyclopedia, and legal articles. After synthesizing both primary and secondary sources, the researcher must develop a concrete position on the legal issue.
This particular study primarily concerns federal and state, school district statutes and case law, and charts the judicial and legislative development of public school students’ First Amendment free speech rights off campus. Concentrating upon the progression of case law concerning administrative regulations, an evaluation is made of cases from on-campus versus off-campus judgments in cases which led judges to refer to them as “controlling.”

Understanding the role of the courts and their hierarchy is necessary in order to apply appropriate weight to the dicta and holdings of relevant cases in the evolution of the legal concepts. Since the beginning of students’ free speech rights in 1969 in the Tinker case to the recent judgment of the Morse case, courts have shun the regulation and control of students’ free speech rights by administrators and faculty members. Generally, the judiciary considered that students’ right to free speech should not be controlled.

1.1 Source of Law

For purposes of this research, the hierarchy of the court system is important in determining the weight accorded to the decisions. Most states have court systems that mirror the system created by the Great Judiciary Act of September 24, 1789. The first Congress, empowered by Article III, established the federal trial courts with three levels: (1) district courts; (2) courts of appeal; and (3) the United States Supreme Court. Most states have similar levels.

The reported case law of the United States Supreme Court is central to any legal issue on which the Court has expressed an opinion. Reviews of federal appellate and district court decisions are important to explain the application of Supreme Court decisions and the
evaluation of legal principles. Reported cases of state Supreme Court decisions are important for their states. Most state court decisions are not binding outside the state where the decision was rendered; however, the reasoning may be persuasive in deciding a case in another state. The subject of this research has not been directly reviewed by the United States Supreme Court; thus four supreme rules of law have been issued on this subject (Roberts, 2000).

3.2 Primary Sources

Understanding the role of the courts within the legal system requires legal research involving numerous methods and sources. Two general areas of sources exist in law, primary sources and secondary sources. First, there are primary sources which include constitutions (both federal and state), statutes and reported case holdings (Kunz, 1989). A hierarchy exists within primary sources; constitutions are the highest order and case holdings the lowest.

Court decisions or holdings in case law comprise the classification of common law. Holdings perform three functions: They answer questions that are not answered by statutes, they interpret statutes, and they may hold statutes or actions to be unconstitutional. Commonly referred to as dicta, these are the statements and commentary by the court that are not necessary to the decision. Although dicta are not part of the court’s official opinion, dicta are often given consideration because of their persuasive value, particularly if given by a prestigious jurist.

Court decisions are a major source of material for this research, along with statutes. In legal research, court decisions are considered “primary authority” and are therefore “mandatory and persuasive.” Other primary sources are the United States Constitution and
state constitutions, although they will not be extensively discussed because they are not directly relevant to the questions researched (Roberts, 2000).

3.3 Secondary Sources

Second, secondary sources comprise the second main body of legal sources, which are or persuasive purposes only. Some secondary sources include dictionaries, treatises, encyclopedia, legal periodicals, the American Law Reporter annotations and loose-leaf services. Reviews such as the American Law Reporter (ALR), were created when legal publishers selected “leading cases” for full-text publication, and provided commentaries or annotations, which described other cases with similar facts, holdings or procedures. ALR is an early set of annotated reports that are currently published in two series: ALR 5th for general state legal issues and ALR Federal for issues of federal law (Cohen & Olson, 1992). Loose-leaf services provide access to cases faster than bound reports. In loose-leaf form, publishers reproduce official slip opinions: documents containing basic identifiers and court opinion (usually posted promptly to the web) and mail them to subscribers the day after they are announced by the court. Additional finding tools include Shepard’s Citations and digests. Digests are legal publications that reprint in “subject arrangement” the head note summaries of each case’s points of law. The summaries are grouped under alphabetically arranged topics and then organized into numerical subdivisions within each topic. Digests allow researchers to scan summaries of numerous cases on similar legal issues.

Shepard’s Citations is used to update American case law. The body of published American case law contains many decisions which have long since been overruled or limited to
specific facts. Before relying on a case, a researcher must verify its current validity. *Shepard’s Citations* is the tool most utilized. *Shepard’s Citations* verifies the current status of cases and lists virtually every subsequent case citing the decision at issue. *Shepard’s Citations* allows a researcher to trace the development of a legal doctrine from the time a known case was decided to the present. “*Shepardizing*” as this updating is called, accomplishes the following purposes:

- Tracing a case’s judicial history by providing parallel citations for the decision and references to other proceedings in the same case.
- Verifying the current status of a case to determine whether it is still good law or has been overruled limited or otherwise diminished.
- Providing research leads to later citing cases, as well as periodical articles, annotations and other sources.

Legal periodicals are also important secondary sources of law. Legal periodicals are among the most highly influential secondary sources in American law. Some articles have led directly to major changes in legal doctrine. The most serious and highly reputed legal periodicals are the academic law reviews produced at the major American law schools. Other sources of periodicals include specialized academic journals and legal newsletters. All named secondary sources finding tools and several computer search services including ERIC and Lexis Nexis were reviewed and used to support this research (Lectlaw, 1995).
3.4 Data Sources

For this study, a search of appropriate federal and state decisions was conducted through a number of research procedures, including the descriptive word method, the topic method, and the table of cases method. Relevant cases were most often located in the United States Reports, if they had reached the United States Supreme Court level. *Shepard's Citations* were used to determine the current validity and case history of relevant cases. Federal legislation was reviewed in the United States Code (USC), the United States Code Annotated (USCA), and the United States Code Service (USCS). State legislation was reviewed in the appropriate state service.

In addition to traditional legal research tools, other resources were identified through the computerized data bases finding tools of *ERIC* and *Lexis Nexis*. Finally, general information on students’ free speech rights and current efforts to regulate them were obtained from various journal articles, books and websites.

The appropriateness of each source was reviewed to determine its value. Distinguishing cases and secondary sources follow traditional legal research methods. The initial process included consideration of the parties, the location and subject matter, the legal theories argued, the relief sought, and the court’s holding. Secondly, consideration was given to the courts’ discussions of their decisions and their dicta, particularly where education institutional policies and practices are addressed directly. Relevant connections in holdings were identified through dicta and secondary sources to detect any consistent principles. Observed principles were then applied to subsequent cases to examine the degree, if any, of consistency of application by the courts.
3.5 Legal Process

Generally, for an opinion to reach a level within the court system to be reported, the appellant (the dissatisfied party) must have proved in the documents of appeal and in argument, that error was committed at the trial level. The error that occurred had to satisfy the appellate court that it was of the type that required review of the lower court’s decision. Often, the higher court (except in Louisiana) will not review factual determinations of the lower court but will limit their review to errors concerning issues of law.

Two levels of appeal are available in the federal courts and in most state judicial systems. The first level of appeal is usually an intermediate court that has mandatory jurisdiction, requiring the court hear the appeal. Some systems do not have mandatory appeals; thus, the appellate court has the discretion to review cases. Appeals from the intermediate level sometimes are sometimes presented to courts that possess discretionary review, which means the courts have the authority to deny review of appeals. If the court (with discretionary jurisdiction) decides to hear the case, the case is then treated procedurally as though there was mandatory jurisdiction.

An appellate court may rule in several ways. Most often, the court will affirm or overrule the lower court’s decision, either in part or entirely. However, the decision may be to remand the case, or portions of it, to a lower court for further proceeding. Not all final decisions of appellate courts result in reported decisions, although many cases are reported annually. This research was limited primarily to those cases that have been reported and serve as precedent unless and until they are overturned by a subsequent court. This research also noted some pending cases that have been discussed in various media.
3.6 Conceptual Framework

Legal research is as much an art as it is a science. There are as many approaches to legal research as there are problems to be solved. . . . Each researcher must develop a system which best suits his or her need (Jacobstein & Mersky, 1981).

The general conceptual framework for this research, Levi’s Basic Pattern of Legal Reasoning, is dependent upon the doctrine of precedent. Therefore, conclusions of law, as it presently stands, will depend upon the past decisions of a court in a given jurisdiction (Casad, 1976). In legal research, each court case in which a decision is rendered serves a dual purpose. First, the case resolves the controversy brought by the parties because of the particular facts at issue. Additionally, it sets a precedent for future cases that arise with similar facts and legal issues. Previously reported case law, therefore, is of great value to determine the development of the legal concepts and legal principles created by the courts in deciding tort law cases. To identify the appropriate reported holdings, Levi’s steps of precedent will be used as a guide to trace cases that may be identified within the line of precedent for this research. They are as follows:

- Similarity as seen between cases
- The rule of law inherent in the first case is announced
- Then the rule of law is made applicable in the second case

Lack of pure consistency within case precedent is inherent in tracing court decisions; however, inconsistency is not a weakness within legal research. Moreover, the variance in court holdings has been noted as a necessity within the legal process, including the application and interpretation of statutes and the Constitution. Inconsistency assures that both sides of a
controversy may be argued before a tribunal. Inconsistency in precedent allows common law to be changed as the common ideas of society vary (1949).

Justice Cardozo addressed this contradictory aspect of law by expressing that: . . . law, like other branches of social science must be satisfied to test the validity of its conclusions by the logic of probabilities rather than the logic of certainty. When there is such a degree of probability as to lead to a reasonable assurance that a given conclusion ought to be and will be embodied in a judgment, we speak of the conclusion as law, though the judgment has not yet been rendered, and though, conceivably, when rendered it may disappoint our expectation (1924).

3.7 Reasoning

Traditionally, the common law reasoning by courts that establishes precedent has been founded in inductive reasoning. Levi argued that this proposition is correct, but only partially. Levi agreed that courts tend to consider the particular facts of a case and then espouse a conclusion that is to be made applicable to future similar cases. However, when a court applies the definition of a specific term, it applies the general to the specific set of facts before it. Therefore, the decision is partially reached through deductive reasoning.

This research effort applied reasoning similar to the courts’ consideration of reported precedent with inductive and deductive approaches. It extracted consistency in the development of judicial interpretation of students’ on-campus cases and identified any consistent legal principles that recur in off-campus cases. Findings from the review were synthesized to identify implications for institutional policy and practice. Finally, all cases were shepardized to determine whether they have been overruled or if they were still valid at law.
3.8 Synthesis

A legal analysis of the relevant cases was completed. Then a summary analysis was used to integrate the results of the legal research. This analysis provides an explanation of the law concerning students’ First Amendment speech rights can prevent administrators from being in the hot seat.

The syntheses of the findings of the analyses provided a full understanding of how and why the legal concept of free speech rights evolved. The outcome will provide administrators with a framework for understanding when and where to regulate students’ speech and assist administrators in designing policies to regulate the off-campus speech.
CHAPTER 4
RESEARCH FINDINGS

Although, the Supreme Court has not been challenged to review cases on student speech off campus, many federal and state courts are struggling with such cases. This category of cases arises when schools have disciplined students when the speech is conducted off campus. In actuality, the courts must distinguish public schools’ authority over the speech of students once they leave the campus. To overcome the disparity, public schools attempt to connect the off-campus speech to some on-campus event; either way the speech reaches the campus via some medium and has some effect on campus. Some of the cases in this category involve fact patterns that allow public school officials to show the direct relationship between the off-campus and on-campus speech of students.

For instance, a Web site that is created off campus but causes disruption to the learning environment at school can be cause for disciplinary action from the school. However, the burden of proof of such disruption of the learning environment falls on the school district. Table 1 (below) summarizes the research finding. Following the table are discussions of each case.
Table 1
Summary of Off-Campus Cases

<table>
<thead>
<tr>
<th>Cases</th>
<th>Ruling Date</th>
<th>Basic Facts</th>
<th>Was the Tinker standard applied?</th>
<th>Speech causes or forecasts substantial disruption</th>
<th>Speech Causes “True Threat”</th>
<th>Speech Location</th>
<th>Prevailing Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beussink v. Woodland</td>
<td>28-Dec-1998</td>
<td>Student created Web page criticizing principal</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Made off-campus; friend showed it to a teacher at school</td>
<td>Student¹</td>
</tr>
<tr>
<td>Beidler v. North Thurston School District No. 3</td>
<td>Jul-2000</td>
<td>Student created Web page depicting assistant principal as a Nazi</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Made off-campus</td>
<td>Student</td>
</tr>
<tr>
<td>Emmett v. Kent School District</td>
<td>23-Feb-2000</td>
<td>Created unofficial Web page of his high school</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Made off-campus</td>
<td>Student</td>
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</table>

¹ All cases were filed in court by minor’s parents. For simplicity, “Student” refers to the parents winning the case.
Table 1 (continued).

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</thead>
<tbody>
<tr>
<td><em>Killion v. Franklin Regional School District</em> 22-Mar-2001</td>
<td>Created Web page with “top ten” list about the athletic director</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Made off-campus; brought to school by a friend</td>
<td>Student</td>
<td></td>
</tr>
<tr>
<td><em>Coy ex re. Coy v. Bd. of Ed. of North Canton City</em> 9-Apr-2002</td>
<td>Web site with vulgar language and images</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Made off-campus; accessed on-campus</td>
<td>Student</td>
<td></td>
</tr>
<tr>
<td><em>J.S. v. Bethlehem</em> 25-Sep-2002</td>
<td>Student created Web page with Algebra teacher's face changing to Hitler</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Made off-campus; anonymously emailed to the teacher</td>
<td>School</td>
<td></td>
</tr>
<tr>
<td>Cases</td>
<td>Ruling Date</td>
<td>Basic Facts</td>
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<tr>
<td>Mahaffey ex. Rel. Mahaffey v. Aldrich</td>
<td>26-Nov-2002</td>
<td>Student co-created a Web site entitled &quot;Satan's web page&quot;</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Made off-campus; local police brought it to the school's attention</td>
<td>Student</td>
</tr>
<tr>
<td>Flaherty v. Keystone Oaks School District</td>
<td>26-Feb-2003</td>
<td>Student posted messages about volleyball game</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Three messages posted off-campus, one posted on-campus</td>
<td>Student</td>
</tr>
<tr>
<td>Dwyer v. Oceanport School District</td>
<td>Nov. 2003</td>
<td>Student created a website criticizing school officials</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Off-campus at student’s house</td>
<td>Student</td>
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<tr>
<td>Cases</td>
<td>Ruling Date</td>
<td>Basic Facts</td>
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<tr>
<td>Latour v. Riverside Beaver School District</td>
<td>Aug. 3, 2005</td>
<td>Student posted his rap music on the Internet</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Off-campus at student’s house</td>
<td>Student</td>
</tr>
<tr>
<td>Barnett v. Tipton County Board of Education</td>
<td>13-Feb-2007</td>
<td>Students posted false profile of assistant principal on My Space page</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Made off-campus, accessed on-campus</td>
<td>School</td>
</tr>
<tr>
<td>Requa v. Kent School District</td>
<td>22-May-2007</td>
<td>Student-made video of teacher posted onto YouTube</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Made off-campus; local news alerts the school</td>
<td>School</td>
</tr>
<tr>
<td>Weedsport Central School District v. Wisniewski</td>
<td>5-Jul-2007</td>
<td>Student created an IM icon of a pistol firing at his teacher</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Made off-campus; shown on-campus</td>
<td>School</td>
</tr>
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Table 1 *(continued)*.

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<thead>
<tr>
<th>Cases</th>
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<th>Was the <em>Tinker</em> standard applied?</th>
<th>Speech causes or forecasts substantial disruption</th>
<th>Speech Causes “True Threat”</th>
<th>Speech Location</th>
<th>Prevailing Party</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Layshock v. Hermitage School District</strong></td>
<td>10-Jul-2007</td>
<td>Student created a parody profile My Space page of the principle</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Made off-campus; accessed on-campus</td>
<td>Student</td>
</tr>
<tr>
<td><strong>A.B. vs. State</strong></td>
<td>13-May-2008</td>
<td>Student created a webpage on MySpace pretending to be the principal</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Made On-campus</td>
<td>Student</td>
</tr>
<tr>
<td><strong>Doninger v. Niehoff</strong></td>
<td>29-May-2008</td>
<td>Students sent emails encouraging people to contact the principal and superintendent concerning an event</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Made On-Campus using computers in computer lab</td>
<td>School</td>
</tr>
<tr>
<td>Cases</td>
<td>Ruling Date</td>
<td>Basic Facts</td>
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<tr>
<td><em>Riehm v. Engelking</em></td>
<td>15-Aug 2008</td>
<td>Student wrote three essays in his creative writing class that contained vulgar and threatening speech</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Off Campus – brought on campus</td>
<td>School</td>
</tr>
<tr>
<td><em>D.J.M. v. Hannibal Public School District</em></td>
<td>1-Aug 2011</td>
<td>Student created an IM talking about bringing gun to school and shooting students at school</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Off Campus – seen by other students at school</td>
<td>School</td>
</tr>
<tr>
<td><em>Kowalski v. Berkeley County</em></td>
<td>27-July 2011</td>
<td>Student created a MySpace webpage defaming another student</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Off Campus – accessed at school by another student</td>
<td>School</td>
</tr>
</tbody>
</table>

In early February 1998, Brandon Beussink, a junior at Woodland High School, created a home page that he posted on the Internet. To do so, Beussink used his own computer at home. He did not use school facilities or school resources to create the Web site. The home page was not created during school hours. Beussink designed the Web site using software he found on the Internet.

On his Web site, Beussink used vulgar language to lampoon the teachers and principals. He was highly critical of the administration at Woodland High School. Beussink’s home page encouraged visitors to his Web site to contact the school principal and voice their opinions regarding Woodland High School policies. Beussink also included a hyper-link that allowed visitors to access the school’s home page from his Web site.

Prior to February 17, 1998, Beussink’s friend, Amanda Brown, saw the Web site at her home. Beussink and Brown argued about the Web site. On February 17, 1998, Amanda Brown then purposely accessed Beussink’s Web site home page in her computer class and showed it to the computer teacher, Delma Ferrell. Beussink was not with Brown when she accessed his home page. At the time she showed the Web site to Ms Ferrell, there was only one other student in the classroom.

After seeing the Web site, Ms. Ferrell was clearly upset and reported it to the principal, Yancy Poorman. Mr. Poorman viewed the Web site with Ms. Ferrell in the computer lab. Shortly after viewing the Web site, Mr. Poorman decided to discipline Beussink. During Beussink’s fourth period class, Mr. Poorman sent a notice to the student to inform him of his five-day suspension from school. Later in the day, Mr. Poorman decided to increase the
consequence from 5 days to 10 days. Beussink went to talk to Mr. Poorman after receiving the second disciplinary notice. After their discussion, Beussink went home and deleted the Web site as instructed by Mr. Poorman and served his 10-day suspension.

The Woodland School District had an absenteeism policy which reduced students’ grades by one letter grade for unexcused absences. Each day of the suspension was considered to be an unexcused absence which resulted in Beussink failing all of his classes. Prior to the application of the absenteeism policy, Beussink was failing two classes and passing four.

Beussink filed for a preliminary injunction. When considering whether to grant the preliminary injunctive relief, the court considered

- The plaintiff’s success on the merits
- The harmful effects of the disciplinary actions
- The impact on the public interest
- The possibility of harm to others

The court ruled that the evidence presented at the preliminary injunction hearing supported a finding that Beussink was likely to succeed on the merits of his claim. In the hearing, Mr. Poorman testified that he was upset by the Web site and had decided to discipline Beussink immediately. Judge Sippel wrote in his opinion that, “Disliking or being upset by the content of a student’s speech is not an acceptable justification for limiting speech under Tinker “(id 508-09). In considering the harmful effects of the disciplinary action, the court determined that since Beussink failed classes he would have not failed otherwise; therefore, there was a harmful academic effect on Beussink. Additionally, there was no harm to others and the public
interest is best served by the wide dissemination of ideas. Therefore, the court concluded that Mr. Poorman had violated Beussink’s First Amendment Free Speech Rights by suspending him for ten days. After applying the *Tinker* standard, the school district failed to provide evidence that substantial disruption of the school’s operation was caused by Beussink’s Web site.


In January 1999, a Washington state court, ruled that school officials at Timberline High School in Lacey overstepped their boundary in disciplining Karl Beidler. While completing his junior year Beidler created a Web site depicting one of Timberline’s assistant principals as a Nazi, a drunk, and a graffiti artist. He also scanned several pictures from the school district’s publications and photo-edited them. One of his created pictures depicted the assistant principal having intercourse with the cartoon figure Homer Simpson. Additionally, the site included a derogatory statement against a female student, the assistant principal flirting with a male teacher, the assistant principal defecating in class, a pig taken for sodomizing, and a girl about to be raped. Teachers complained to the principal that they felt uncomfortable with Beidler in their classes, and the principal asserted that he found the Web site “appalling and inappropriate.” Beidler was ultimately transferred to an alternative educational program in his school district, but he was allowed to return to Timberline for his senior year.

Beidler took his case to a Washington state trial court and argued that his suspension and placement were unconstitutional under the First Amendment. Specifically, Beidler’s attorney argued that because the Web site "caused no substantial disruption" and school
officials had no "authority to police off-campus or Internet student speech": the suspension was unconstitutional (Beidler v. North Thurston School Dist., No. 99-2-00236-6, (Thurston County. Super. Ct. July 18, 2000).

The state trial court agreed with Beidler’s attorney, ruling that the school district had failed to meet the Tinker standard governing disruptive speech. After the court found that school officials overstepped their bounds in expelling Beidler, the school district agreed to pay him $62,000 in damages announcing a landmark victory for students across the country.


Another case similar to Beussink is Emmett v. Kent School District, 92 F. Supp. 2d 1088 (W.D. Wash. 2000), in which Nick Emmett, an 18-year-old senior at Kentlake High School in Kent, Washington, created his unofficial Kentlake High School Home Page at home outside of school hours. Emmett was an excellent academic student with a grade point average of 3.95. He was also co-captain of the basketball team, and did not have any prior disciplinary history. On February 13, 2000, he posted the unofficial Kentlake High School Home Page, in which he added the disclaimer that the Web site was not the official Web site of the school and it was used for entertainment purposes only. The site featured mock obituaries of Emmett’s two friends. The obituaries were inspired by a class assignment that was given in a creative writing class in which the students were encouraged to write their own obituaries. The obituaries became a common topic of discussion among the students, faculty, and administrators. Emmett also set up a voting poll in his site to allow visitors to vote on who should “die” next.
On February 16, a local television station aired a story regarding the Web site and told the public about the “hit list” featured on the Web site. As a result of the news story, Emmett removed the Web site immediately. The next day at the school, Emmett was informed by the principal that he would be facing expulsion for threatening, harassing, and intimidating students and was suspended for five days. Emmett then filed a lawsuit against the school district contesting the punishment. Since the principal failed to show any evidence that any student(s) actually felt threatened, Judge Coughenour issued a temporary restraining order prohibiting Kentlake School District from enforcing Emmett's suspension until a preliminary injunction hearing could be held. Due to then recent school shootings in Oregon and Colorado, the administrators of Kentlake High School argued that they must take this matter seriously. However, the Ninth Circuit Court, while applying the *Tinker* standard, asked whether there was substantial material disruption of school operation. In addition, the Ninth Circuit Court also applied both the *Fraser* and *Hazelwood* cases. Since Emmett did not present his Web site at a school assembly (he made it in the privacy of his home), did not distribute any materials at school, and there was no evidence that disruption was caused at school, the court favored Emmett. Due to a lack of evidence, Emmett had a substantial likelihood of success on the merits of his claim. The school officials lifted the penalty and allowed Emmett to attend school and participate in the basketball play-off games. The court once again sided with the student in an off-campus speech case, this time applying the trilogy of cases: *Tinker*, *Fraser*, and *Hazelwood*.

Zachariah Paul was a student at Franklin Regional High School in Pittsburg, Pennsylvania during the 1998-1999 school year. In March of 1999, Paul was denied a student parking permit and was subject to the impositions of various rules and regulations for members of the track team of which Paul was a member. Due to his annoyance, Paul created a Web site at home after school hours in which he compiled a “Top Ten List” about the athletic director, Robert Bozzuto. The list was extremely derogatory with regard to Bozzuto’s appearance, including references to the size of his genitals. In late March, Paul emailed the list from his home computer to a few of his friends. However, he never printed a copy of the list, nor did he bring it to school. Instead, a friend of Paul’s brought the list to school.

On or about May 3, 1999, Paul was called to a meeting with the principal, Richard Plutto, the assistant principal, Thomas Graham, and Robert Bozzuto. Upon questioning, Paul admitted to creating the “Top Ten List.” He also confessed to emailing the list to some of his friends, but denied ever bringing the list onto school grounds. Mr. Plutto asked Paul to bring the original list to school the next day which Paul did. Shortly after he brought the list, he was suspended for ten days and was not allowed to participate in school sponsored activities including the track meet.

Paul’s mother Ms. Killion filed a law suit claiming that Paul’s First and Fourteenth Amendment rights had been violated. She alleged that the school officials violated Paul’s free speech expression since the speech was made off campus and in the privacy of his home. Furthermore, she alleged that the school policy was unconstitutionally vague and overbroad.
She also claimed that the school violated Paul’s due process since the Pennsylvania Code states that a parent must be given written notification of the suspension.

District Court Judge Donald Ziegler reviewed the case. Judge Ziegler relied on the precedents in *Tinker*, *Beussink*, and *Bethlehem* to arrive at his judgment. Applying *Tinker* and its progeny, the court found that Paul’s suspension violated his First Amendment rights since school officials failed to provide evidence of actual disruption that was caused by the “Top Ten List.” There was also no substantiation that it affected the teachers or their teaching styles. The list was actually on campus for several days before administration had discovered it. Judge Ziegler commented that “disliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under *Tinker*.” The court also stated that *Fraser* did not apply in this case because Paul’s speech was off campus and he had no intention of bringing it on campus. The court granted summary judgment in favor of the student on the basis of the *Tinker* test. Since the list was created off campus and was not brought to campus by Paul, and since it did not cause any material disruption at school, the school’s 10-day suspension of Paul violated his First Amendment rights. Further, his Fourteenth Amendment rights were violated since he was not provided a written notice as required by the Pennsylvania Code.

4.5  *Coy ex rel. Coy v. Board of Education of North Canton City Schools, 205 F. Sup. 2d 791* (Ohio, 2002)

In this case, Coy created a Web site using his computer at home. He did not use school facilities or school resources. The Web site contained information about skateboarders who called themselves “NBP.” It also contained pictures and biographical information of Coy and his
friends, quotes attributed to Coy and his friends, and a section entitled, “Losers.” The “Losers” section contained pictures of some students who also attended North Canton Middle School. A few derogatory sentences were written about the boys. The most controversial sentence included sexual innuendo about a boy and his mother. In addition to the “Losers” section, the Web site included some profane and vulgar remarks.

On March 25, 2001, some students told the math teacher, Ester Presutto, about Coy’s Web site. After viewing the Web site, Mr. Presutto decided to tell the administrator, Mr. Stanley, about it. Mr. Stanley viewed the Web site, but decided not to take any immediate disciplinary action against Coy.

On March 27, 2001, Coy’s computer teacher observed him toggling between screens instead of working on his assignment. The teacher spoke to the administrator about Coy’s behavior, which prompted Mr. Stanley to ask Curtis, the computer expert, to conduct a history of the computer that Coy had been using in the computer lab. After this investigation, Curtis reported to Mr. Stanley that Coy had been accessing his own unauthorized Web site on the school computer.

On April 6, 2001, the administrator, Mr. Stanley, called Coy into his office and informed him of his four-day suspension. He also gave Coy a letter for his parents informing them of the infractions leading up to the suspension and the possibility of expulsion. Stanley also notified the North Canton Police Department regarding Coy’s Web site.

On April 24, 2001, Superintendent Shoup held the expulsion hearing for Coy and expelled him for eighty days from April 26, 2001 to November 4, 2001. On May 17, 2001, Coy’s attorney appealed the expulsion hearing to the Board of Education, but the Board upheld the
district’s decision. On July 26, 2001, the plaintiffs filed their complaint in the court. They alleged that the school district had violated Coy’s First Amendment rights by disciplining him for creating, publishing, and maintaining the Web site at issue. Their second complaint alleged the school district had disciplined him under unconstitutionally ambiguous and overbroad sections of the Student Code of Conduct. In their third complaint, they alleged that since the police were involved, the Internet service was discontinued by the provider, causing the termination of the Web site. Finally, in their fourth claim, they alleged that the defendants had indeed violated Article 1, section 11 of the Ohio Constitution.

Because Coy accessed the Web site on a school computer during school time in the computer lab, the court relied on Tinker rather than Fraser. The court noted that Coy had simply accessed his own Web site, a Web site he created on his own time and with his own equipment. At the time Coy was expelled, there was no evidence that substantial disturbance had occurred. Unlike Fraser, there was no evidence that Coy had exposed other students to the Web site. Furthermore, unlike Fraser, Coy’s Web site was deemed to be “crude,” rather than the “elaborate, graphic, and explicit sexual metaphor” at issue in Fraser (478 U.S. at 678).

In conclusion, Judge James Gwin concluded, while applying the Tinker standard that the school district failed to show that Coy’s Web site had caused a substantial disruption of the school’s operation, and that therefore there had been a violation of Coy’s First Amendment free speech rights.

In May of 1998, JS was in the eighth grade at Nitschmann Middle School in the Bethlehem Area School District. Sometime prior to May of 1998, JS created a Web site entitled “Teacher Sux” from his home computer and on his own time. On his Web site, he dedicated several Web pages to offensive comments about his Algebra teacher, Mrs. Fulmer and his principal, Mr. Kartsotis. In addition, prior to accessing the Web site, visitors came to an optional entry screen that asked them to declare they had no affiliation with the school’s faculty and administrators and agree not to disclose the Web site nor the identity of its creator to school’s officials.

Through an anonymous email, a teacher of the school learned about the Web site. The teacher immediately reported the Web site to Mr. Kartsotis. After viewing the Web site, Mr. Kartsotis conducted a faculty meeting in which he told the faculty that there was a problem, but he did not provide the faculty with any detail of the problem.

In addition, Mr. Kartsotis contacted the local police, who in turn involved the Federal Bureau of Investigation (FBI). In attempting to identify the creator of the Web site, both agencies launched their investigation. JS continued to attend classes and participate in extracurricular activities. JS voluntarily removed the Web site one week after Mr. Kartsotis became aware of it.

On or about July 30, 1998, school officials sent a letter to JS informing him of his three-day suspension. The letter alleged that JS had violated School District policy by three Level III offenses: threat to a teacher, harassment of a teacher and principal, and disrespect to a teacher and principal. The school official, after the hearing, extended his suspension to ten days,
pending an expulsion hearing. By the time the expulsion hearing took place on August 19, JS’s parents had enrolled him in an out-of-state school; thus JS was unable to attend his hearing. At the hearing, the school officials presented the following findings of fact:

- JS was an eighth grader at Nitschmann Middle School during the 1997-1998 school year.
- Mr. Kartsotis was the principal at Nitschmann Middle School for 15 years, and served in that capacity during the 1997-1998 school year.
- Kathleen Fulmer had taught Math at Nitschmann Middle School for 26 years, and served in that capacity during the 1997-1998 school year.
- JS was a student in Ms. Fulmer’s class during the 1997-1998 school year.
- JS had informed another student about the Web site.
- On a band trip, JS told another student that he was removing his Web site.
- There was no password to access the Web site: Anyone could access it and ignore the declaration and agreement.
- One of the Web pages in the Web site announced “Welcome to Kartsotis Sux!”
• Another Web page titled “Why Does Kartsotis Sux?” showed the principal engaged in a sexual act with another teacher.

• The Web site caused embarrassment and stress to Mr. Kartsotis and his family.

• The Web site also included a Web page entitled “Why Fulmer Should be Fired” which included vulgar and profane language toward Mrs. Fulmer.

• On that Web page appeared the text “Why Should She Die?... give me $20 to help pay for hitman,” and more vulgar and profane language toward Ms. Fulmer.

• Another Web page had a diagram of Ms. Fulmer with her head cut off and blood dripping from her neck.

• Mr. Kartsotis took the Ms. Fulmer Web pages as threats.

• After viewing the Web pages, Ms. Fulmer felt threatened and feared that someone might kill her.

• Ms. Fulmer experienced lasting effects from viewing the Web site, including stress, loss of sleep, loss of appetite, anxiety, loss of weight, and a general loss of well-being.

• As a result of the Web site, Ms. Fulmer’s lifestyle changed drastically, including some memory loss and an inability to leave her house.

• Ms. Fulmer had to be medicated and was unable to return to school.

• The Web site had a demoralizing impact on the school community.

• The Web site was viewed not only by other faculty members, but by other students as well, causing helplessness and a plummeting morale.
As a result of Ms. Fulmer being unable to return to school, the school had to call in substitutes, which disrupted the educational process of the students.

Consequently, the School District concluded that:

- JS’s Web page “Why Should Ms. Fulmer die?” constituted a threat to Ms. Fulmer, and Ms. Fulmer perceived it to be a threat.
- The statements regarding the teacher and principal constituted harassment.
- The statements constituted disrespect to the teacher and principal, resulting in actual harm to physical and emotional health.
- The School District Code of Conduct prohibited such student conduct.
- The statements caused physical harm to Ms. Fulmer, as well as other students and faculty.

Therefore, the school expelled the student, JS.

At trial, evidence was introduced showing that the teacher, Ms. Fulmer, had suffered psychological harm because of her reaction to the Web site, and was unable to return to school (757 A. 2d 412 (Pa Comm. Ct. 2000)). The case eventually reached the Supreme Court of Pennsylvania. The Court did not apply the Fraser case even though the Web site included vulgar and profane language; it recognized that the Web site was made at home and on JS’s own time. Instead, the Court relied on Tinker and ruled that the student did bring the vulgar and obscene language onto campus and it did result in a material disruption of the learning environment as well as emotional distress to the teacher. Therefore, it affirmed the lower
court decision that the school district’s disciplinary action taken against the student, JS, did not violate his First Amendment right to freedom of speech (807 A. 2d 847(Pa. 2002)).


Joshua Mahaffey co-created a Web site with another student in the Waterford School District. The Web site was titled “Satan’s Web page”. They made the Web page for entertainment purposes only. In their Web page, they listed “people I wish would die,” “people that are cool,” “movies that rock,” and “music that is cool.” Another Kettering High School parent notified the local police about the Web site. The police then notified the school about the Web site. Mahaffey admitted to the police about contributing to the Web site and stated that Kettering High School computers may have been used to create the Web site. On August 28, 2001, school officials suspended Mahaffey for contributing to the Web site. Principal Carol Baldwin then sent a letter home to the Mahaffey’s parents informing them of the recommendation to expel the student for dangerous behavior, Internet violations, and threats to the Waterford School District Code of Conduct.

District Court Judge Patrick Duggan relied on *Tinker, Bethlehem*, and *Boucher* for this case. He stated that there was no evidence on record that Mahaffey communicated the statements on the Web site to anyone. The plaintiff also stated that the Web site was created “for laughs,” and never meant “anyone else to see it.” Even though other students did see the Web site, Mahaffey did not intend for them to see it. Applying the *Tinker* standard, the court concluded that the school officials failed to provide any evidence of material and substantial disruption that was caused by the Web site. Therefore, Mahaffey’s First Amendment rights had been violated when he was suspended for contributing material to another student’s Web site.
The court also rejected any notion that the Mahaffey Web site was a true threat. The court cited a disclaimer on the Web site that said: “PS: Now that you’ve read my Web page please don’t go killing people and stuff then blaming it on me. OK?” In the court’s opinion, any reasonable person who visited the Web site would see the disclaimer and know that Mahaffey did not intend to kill anyone, so there was no “true threat.”


In Flaherty vs. Keystone Oaks School District, a student at Keystone Oaks High School, Jack Flaherty Jr., engaged in a blog regarding an upcoming volleyball game with Baldwin High School. He posted four messages—three from his home computer and one from a school computer. The administrators punished Flaherty for violating the School’s Handbook policy which prohibited speech that was abusive, harassing, inappropriate, and offensive. Flaherty’s parents filed a lawsuit against the school due to the overbroad regulation and vagueness of the Student Handbook policies and the school’s failure to define the geographic location of the speech. They claimed that the school officials failed to define the terms, “inappropriate, harassing, offensive, or abusive,” and further, that the school officials failed to define the geographic location (on campus, off campus or school-sponsored event) of such speech. Since the school failed to define the geographic location in their policy, Flaherty declared that his First Amendment Speech Rights had been violated. Judge Donetta Ambrose agreed with Flaherty. Even though the judge did not find the policies to be overbroad, she did find the Student Handbook policies to be unconstitutionally vague. Moreover, not only were the policies vague in definition, but they also had been implemented and interpreted incorrectly by the principal,
Scott Hagy. Additionally, Mr. Hagy did not provide any evidence that Flaherty’s messages caused any substantial disruption of the school’s operation. Judge Ambrose commented that the span of the student handbook, which included board policies, was trespassing on the rights of the students, since the speech did not substantially disrupt school operations as stated in Tinker. Because the terms “abuse,” “offend,” “harassment”, and “inappropriate” were not defined in a significant manner, the policies as stated in the student handbook did not provide the students with adequate warning of misconduct. Secondly, Judge Ambrose also agreed with Flaherty’s point regarding the geographic location of the speech. She concluded that if the geographic location is not defined in the Student Handbook the school officials have unrestricted power to discipline students’ expression, and so she found the policy overreaching. Once again while applying the Tinker standard; the student speech prevailed in court.

4.9  

Ryan Dwyer was an eighth grader at Maple Place School in Oceanport School District. On or about April 1, 2003, Ryan published a website entirely from his home called “Welcome to the Anti-Maple Place – Your Friendly Environment.” The website also contained six individual pages: a home page, an “About” page, a “Favorite Links” page, a “What’s New” page, a “Guest Book” page, and a “Custom” page. At the bottom of the home page, Dwyer wrote: “THIS PAGE IS PROTECTED BY THE U.S. CONSTITUTION.” On his “About” page Dwyer wrote his opinion regarding the principal, Mr. Amato, and a teacher, Mrs. Hirshfield. On his “Favorite Links” page, he posted links to some of his favorite search engines, music groups and a body piercing site. On his “What’s New” page, he posted various articles. On his “Guest Book” page, he included
an online form by which visitors could leave their names, email addresses and comments. The page also contained the following instructions:

Please sign my guestbook but NO PROFANITY AT ALL!!!!!! NO PROFANITY (that’s curse words and bad words) and no threats to any teacher or person EVER. If you think it may be a bad word or it may be threatening DO NOT TYPE IT IN. Go to links page to read guestbook (suggestion by Brianna). Thank you.

From April 1 to April 7, 2003, several visitors left comments in the Guestbook. The comments ranged from words of encouragement to Ryan Dwyer for his website and his critics of the teachers and school. Some of the comments left on the website were considered to crude and offensive. On April 5, 2003, the district officials learned about the website. On April 7, Mr. Amato called Ryan to his office. At that time, Mrs. Dwyer, was also called to Mr. Amato’s office. The principal requested that Ryan take down the Web site immediately. Mrs. Dwyer and Ryan agreed to do so. Later, the school officials called the Dwyer’s to inform them that Ryan was under a five day suspension, banned from participating in school sports for one month, and banned from the end-of-year class trip. Mrs. Dwyer wrote a letter and later appeared to appeal the school’s disciplinary actions against Ryan. The Board agreed with the school’s decision.

Mrs. And Mr. Dwyer took the case to the district court. The district court ruled that by punishing Ryan for a Web site criticizing his teachers and other faculty members, school officials had violated his First Amendment rights and ordered the district to pay $117,500 in monetary damages. In addition to monetary damages, the court ordered the school district to provide training to teachers, students, and administrators on First Amendment rights.
Anthony Latour was an eighth grade student who attended Riverside Beaver Middle School. Latour was a talented rap song writer. His family supported his hobby and purchased expensive recording equipment to help Anthony pursue his interest. Over a two year period beginning in 2002, Latour recorded many songs, publishing them on CDs and on Internet Web sites. His music was of the hip-hop genre and he competed in “battle rap.” Battle rap is hip-hop competition, where contestants battle each other with their music to determine who the best rapper is. Some of the lyrics in Latour’s battle rap were considered violent and promoted the shooting of other students. Although the Latour’s songs were sold on the Internet and in the community, the school’s officials admitted that the CDs were not brought on campus. Once the school officials learned about the songs, on May 5, 2005, they suspended Anthony and then, on May 17, 2005, expelled him for two years on grounds that songs he had written at home in 2002 mentioned another middle school student, and contained what was considered a threat directed toward that student. The North Sewickley Township Police arrested and charged him with terroristic threats over the lyrics of his rap songs.

Anthony Latour’s parents, John and Denise Latour, sued, alleging that Riverside Beaver County School District had violated Anthony’s free speech rights guaranteed by the First Amendment. The parents sought preliminary injunctions to prevent the school expelling Anthony until the court ruled on the merits of their claim. The court declined the district’s argument that the songs were not protected by free speech since they posed a true threat or caused substantial disruption of the school day. Instead, the court found that the songs were not a true threat but were written as entertainment presented in Hip-Hop genre. Further, since
Latour did not have any previous history of violence, the court concluded that there was no evidence that copies of the songs were sold in school or brought on campus, that there had been no fights in the hallways about the songs, and there was no evidence of substantial disruption of school operation. Therefore, Riverside Beaver School District had violated Latour’s First and Fourteenth Amendment rights.


On October 23, 2006, Christopher Barnett, Kevin Black, and Gary Moses created a false personal profile on MySpace that purported to be that of Mr. Earl LeFlore, assistant principal of Brighton High School. Even though the Web site was created at the home of one perpetrator, the idea of the Web site was conceived at school during lunch break. However, there was some evidence that Barnett may have accessed the Web site at school in one of his classes.

Once other students found out about the profile, they began to discuss it and post comments on the Web site. Some comments alluded to an incident of inappropriate behavior of a female student with Mr. LeFlore. Shortly after the posting of the comments, the creators deleted the profile on October 26, 2006 (Bennett, 2007). Even though the profile was deleted, the students continued to talk about it in their classes. One student interrupted a teacher to discuss the validity of the remarks posted on the Web site. At that point the Brighton High School administrators launched an investigation regarding the profile, which at that time they believed may have been created by Mr. LeFlore himself. The administrators quickly discovered that the profile was created by Barnett, Black and Moses, who were immediately suspended.

Barnett then posted a “Wanted” poster of a student whom he believed had turned in the boys to the administrators. He also confronted the student he suspected at school
regarding the situation and he pushed the student. After this a disciplinary hearing was set to determine any further disciplinary actions that needed to be imposed upon the boys. Since Gary Moses was a special education student, his Individual Education Plan team determined that no further disciplinary action could be imposed upon him. Barnett was assigned to Tipton County’s Alternative Learning Center (ALC) and was allowed to return to Brighton High School in the fall of 2007. However, Barnett did not attend the ALC; instead his parents enrolled him in a private school. Kevin was placed on “zero tolerance” probation, meaning that any further infractions would result in his placement in the Alternative Learning Program.

Subsequently, the students filed suit in federal court against the Tipton County Board of Education, various school districts, and Brighton High School officials. In filing the suit the plaintiffs argued that the students were retaliated against for exercising their constitutionally protected right to free speech and sought a preliminary injunction to prevent the school from carrying out their disciplinary actions. The students requested the court order the defendants to:

- Permit Christopher Barnett to return to Brighton High School
- Eliminate Kevin Black’s "zero tolerance" probationary status
- Refrain from taking any further action against the students

In order for the court to grant the preliminary injunctions, it had to consider

- The plaintiff’s success on the merits
- The harmful effects of the disciplinary actions
- The impact on the public interest
- The possibility of harm to others
Since Black’s probationary period had expired and the plaintiff failed to provide evidence of any potential or immediate harm caused by the disciplinary actions, the only factor the court needed to consider was whether to allow Barnett to return to campus immediately. The plaintiffs focused on the facts that the Web site was created off campus and did not utilize any of the school resources. In reaching its conclusion, the court relied on the holding of Tinker v. Des Moines Independent School District, 93 U.S. 530 (1969), that school officials may regulate students’ speech if it substantially disrupts the school operations. In particular, it relied on a recently ruled case out of Pennsylvania, Layshock v. Hermitage School District, 412 F. Supp. 2d 502 (W.D. Pa. 2006). In Layshock, the Pennsylvania district court found that even though the incident began off campus, it did cause disruption on campus. Therefore, in agreement with the Pennsylvania District Court, the Tennessee District Court stated that even after the profile was deleted, it continued to cause substantial disruption of the learning environment. Hence, the students had failed to demonstrate a likelihood of success on the merits in regard to their First Amendment claim. In conclusion, the Tennessee District Court did apply the Tinker standard and found the students’ false profile of the assistant principal, Mr. LeFlore, did cause substantial disruption of the school’s operation and that such students’ speech is not protected by the First Amendment. Therefore, it upheld the school’s administrator’s disciplinary actions.


Justin Layshock was a seventeen-year-old senior at Hickory High School in the Hermitage School District. Layshock was enrolled in advanced placement classes and did well
academically. He had earned numerous honors and awards at language competitions and he tutored middle school students.

On December 10, 2005, Layshock created a parody profile of the principal, Eric Trosch on MySpace. Layshock had created the parody using his grandmother’s computer and he had done it outside school hours. The parody was created using the Web site’s template for profiles, which allows Web site users to fill in background information and include answers to specific questions. He centered the questions around the theme of “big.” For example, in response to the question “in the past month have you smoked?” he answered, “big blunt.”

Layshock had told several of his close friends about the parody. Eventually, almost everyone at school had heard about the Web site. On December 21, 2005, Layshock and his grandmother, Cheryl were called to a meeting with the superintendent, Karen Ionta and Co-Principal Chris Gill regarding the parody. At that time Layshock admitted to creating the Web site, however no disciplinary action was taken at that meeting.

An informal hearing was held at the school on January 6, 2006 to discuss disciplinary action against Layshock. Hermitage School District officials charged Layshock with the following violations:

- Disruption of school process
- Disrespect of school officials’
- Harassment of the school’s principal
- Gross misbehavior—use of vulgar, profane, and obscene language
- Violation of computer policy (illegal use of school pictures)
Therefore, they suspended him for ten days and placed him in an Alternative Education Program for the remainder of the school year. Furthermore, he was banned from attending any school sponsored events including the graduation ceremony in June of that year. On January 27, 2006, Ms. Layshock filed a three-count Verified Complaint as well as a Motion for a Temporary Restraining Order and/or Preliminary Injunction. Ms. Layshock’s alleged that:

- The school’s disciplinary action of Layshock for his parody Web site of principal Trosch violated his rights under the First Amendment.
- The school’s policies were vague and overbroad.
- Layshock’s punishment by the school officials for constitutionally protected speech in his home interfered with, and continued to interfere with Mr. and Mrs. Layshock’s rights as parents to determine how best to raise, nurture, and discipline and educate their children in violation of their rights under the Fourteenth Amendment.

At the hearing, the court denied the motion for a temporary restraining order since the school officials provided evidence that day-to-day operations were disrupted from December 12 through December 21, 2005. As a judge would later put it, "word of the parody ... soon reached most, if not all, of the student body of Hickory High School," and the fake MySpace profile, along with several less nuanced commentaries crafted by other students, became an enormous hit at the school.

In order to discuss the three alleged violations of the school’s officials, the courts discussed each one individually. The first allegation involved Layshock’s First Amendment claim. The court reviewed the *Killion* case and agreed that school officials’ authority over off-campus speech is much more limited than with on-campus speech. It also commented on *JS v.*
Bethlehem in which substantial disruption was caused by the presence of a “true threat.” On the other hand, the court stated that a mere desire to avoid feeling discomfort and unpleasantness does not constitute a “true threat.” After applying the Tinker standard, the court concluded that Layshock’s First Amendment rights of free speech had been violated (JS v. Bethlehem 807 A. 2d at 868).

The second allegation involved the vagueness and over breadth of the district’s policies. After an extensive review of the policies, the court found that the policies at issue provided students with appropriate warning of the type(s) of conduct which were prohibited and set out adequate enforcement standards and parameters for school administrators. Hence, the policies themselves are vague or overbroad; however, they were misapplied in this case. Therefore, the summary of judgment favored the school district.

The third allegation involved the claims asserted by the parents. The court stated that this claim was without merit. School officials possess the authority to impose discipline on students. Therefore, the court ruled in favor of the school.

In conclusion, the court agreed that Justin Layshock’s First Amendment rights of free speech had been violated by Hermitage School District, but the court favored the school district on allegations II and III.


Gregory Requa was a senior at Kentridge High School and was over eighteen-years old. When Requa was a junior, a friend of his secretly filmed his teacher, Ms. M., on two different occasions. In June 2006, Requa edited the video and audio and posted a link from his personal
MySpace page to YouTube. The final product included comments about the teacher’s hygiene and organizational habits. It also included a student making faces, putting two fingers up, and making pelvic thrusts behind the teacher. In addition, there was footage of Ms. M.’s buttocks with the comments “Caution Booty Ahead” and “Ms. New Booty.”

In February of 2007, a local Seattle news channel aired the story about Ms. M. on YouTube. After watching the news, Requa removed the video. Meanwhile, the principal of Kentridge High School, Albrecht, launched an investigation to determine the creator of the video. Albrecht investigated the student who was standing behind the teacher in the video. During the investigation, Albrecht encountered Requa’s name. Requa confessed to linking the video on YouTube to his personal MySpace page, but denied filming, editing, or posting the video. On February 15, Albrecht sent letters to all the students involved in the incident to inform them of their forty-day suspension. In March, the students requested a hearing. In the hearing, the Board of Directors upheld the school’s decision. Requa filed a law suit claiming his First Amendment rights had been violated.

District Court Judge Marsha Pechman presided over the case. Judge Pechman commented that even though the Fraser case involved lewd and vulgar speech, it could not be applied to this case since the speech was not on school grounds. Applying the Tinker standard, the court ruled that it, “has no difficulty in concluding that one student filming another student standing behind a teacher making ‘rabbit ears’ and pelvic thrusts in her direction, or a student filming the buttocks of a teacher as she bends over in the classroom, constitutes a material and substantial disruption to the work and discipline of the school.” Requa argued that since the filming took place in the last week of school, not much learning was taking place. The court
refuted this and pointed out that the school is not required to establish that an actual educational discourse had been disrupted. The court rejected Requa’s attempt to characterize the video as “criticism” of the teacher. Therefore, since the school was able to provide evidence that material and substantial disruption of the school operations had occurred, the school district prevailed.


Aaron Wisniewski, an eighth-grade student at Weedsport Middle School was disciplined for creating an instant message (IM) icon showing his teacher being shot. In April 2001, while using his parents computer at home, Wisniewski created a small drawing (IM icon) of a pistol firing a bullet at his English teacher, Mr. VanderMolen’s head. Beneath the drawing appeared the words “Kill Mr. VanderMolen.” The IM icon was available for view by his classmates for about three weeks. During this time, one of Wisniewski’s classmates revealed the icon to Mr. VanderMolen who, in distress, forwarded the icon to high school and middle school principals who then reported it to the local police, the superintendent and Wisniewski’s parents. Wisniewski admitted to making the icon and apologized for it. He was then suspended for 5 days, pending a hearing with the superintendent, Mabbett. Mr. VanderMolen requested permission to cease teaching Wisniewski’s class, and his request was granted. Simultaneously, the police conducted an investigation of Wisniewski’s act. The police concluded that Wisniewski had created the icon as a joke, and had not intended to cause any harm. Hence, they closed the criminal case. At the superintendent hearing on June 2001, the hearing officer, Lynda VanCoske, found that the icon was indeed threatening and had caused disruption of the
learning environment because the threatened teacher had to be replaced and special attention from the administrators had been required to investigate the incident. The hearing officer recommended that the punishment of a five-day suspension be extended to a full semester. The school also barred Wisniewski from participating in extracurricular activities during this time.

Aaron Wisniewski’s parents, Martin and Annette Wisniewski, sued the school district and the superintendent in federal court in New York, alleging that the suspension violated Aaron Wisniewski’s First Amendment rights. After applying the Tinker standard, the district court, later affirmed by the 2nd Circuit Court, ruled that the icon constituted a true threat, so the school had not violated Wisniewski’s free speech in undertaking disciplinary action.


A.B. was a minor student at Greencastle Middle School when the 2005-2006 school year began. A.B. posted some comments on his MySpace Web page which criticized Shawn Gobert, the principal, and the assistant principal, Matthew Taylor. A.B. was lashing out at the school’s policy against body piercing. In February 2006, the school officials learned about the Web site and they investigated it. In the investigation, they found not only a web posting concerning Mr. Taylor, but they also uncovered a Web page on MySpace.com claiming to be created by Mr. Gobert, that was actually created by R.B who was a friend of A.B. As a result, delinquency proceedings were initiated against A.B. The state brought charges of identity deception, harassment, a Class C felony, and a Class B misdemeanor which was approved by the juvenile court. The court placed A.B. on nine months of probation. A.B. appealed to the Indiana Court
of Appeals which ruled that her comments were political speech and protected by federal and state law because they concerned school policy and her comments were protected under the free expression provision of the Indiana Constitution.


Avery Doninger was a junior at Lewis Mills High School (LMHS). She served on the Student Council and was also the Junior Class Secretary. This case arises from an argument between student council members and the school’s administration over scheduling of a battle of bands event known as “Jamfest.” Jamfest was delayed twice due to the delays in opening the new auditorium. The new scheduled date for the “Jamfest” was April 28, however, Mr. Miller, the teacher in charge of lighting and sound equipment, was unable to attend on that date. The student council proposed to administration to hire a professional to run the lights and sound so “Jamfest” could take place on the scheduled date. However, at their meeting, they were advised that hiring the professional is not possible so either the date or the location needed to change. The student council members became frustrated with the administration’s decision. They were afraid the bands that agreed to participate in the event would cancel.

Four student council members, including Doninger decided to take action by making the community aware of the Jamfest situation and enlisting help in persuading school’s administration to let the Jamfest take place in the auditorium as scheduled. The four decided to meet at the school’s computer lab and accessed an email account belonging to a father of one of the students. They compiled a large list of email addresses and sent a message to all the recipients, encouraging them to contact Paula Schwartz, the district superintendent (they
included her phone number, though incorrectly), to convince her to let the Jamfest to take place. Further, they told the recipients to forward the message to all the people they knew. Later that morning the message was re-sent with the correct phone number of the superintendent. As a direct result, both the superintendent and the principal received floods of telephone calls and emails regarding Jamfest. The following morning, April 25, after receiving more calls and emails, Ms. Schwartz and Niehoff along with Ms. Hill, the student’s faculty advisor, and Mr. Fortin, the building supervisor, met with the four student council members. They agreed that Jamfest would be re-scheduled for June 8, 2007.

On May 17, Doninger came to the principal’s office to accept her nomination for Senior Class Secretary. At that point, Niehoff handed a copy of a blog Doninger had posted on April 24, criticizing Schwartz. Niehoff asked Doninger to apologize in writing to Paula Schwartz, show the blog to her mother, and withdraw her name from the nomination. Doninger agreed to the first two requests but refused to withdraw her name. Hence, Niehoff, practicing her administrative powers, withdrew Avery’s nomination.

Lauren Doninger, Avery’s mother, filed a complaint in the Connecticut Superior Court, claiming that Avery Doninger’s First Amendments rights had been violated. She also alleged violations of Avery’s due process and equal protection rights under the Fourteenth Amendment.

The court’s opinion was sympathetic to Avery Doninger’s disappointment at being disqualified from running for Senior Class Secretary and also acknowledged that in this case “the punishment did not fit the crime.” But, it is not the court’s job to decide whether the school officials in this case acted wisely. The court recognized that school officials have a
difficult task of teaching “the share values of a civilized social order.” Hence, they agreed with
the decision of the school officials.

4.17  Riehm v. Engelking, 538 F. 3d 952 - Court of Appeals, 8th Circuit 2008

In January 2005, David Riehm was a student at Cook County High School in Grand
Marais, Minnesota. As a creative writing assignment in Ms. Ann Mershon’s class, Riehm wrote
three essays. Ms. Mershon was disturbed and threatened by the essay. His first essay “Poor
John Redfield” described a boy who fell on a toy that penetrated his anus which caused the boy
to bleed to death. He wrote the morale of the story is “don’t have wet dreams or you’ll die a
horrible death.” Mershon was offended by the essay and asked Riehm to change it.

Riehm’s second essay consisted of two parts, “View Number One” and “View Number
Two.” In the first part, he wrote “about life in general. And you know, life is not g rated. There
is violence, language, sexual content everywhere.” In part two, he criticized an English teacher
he called “Mrs. Cuntchenson.” He called this teacher “narrow minded, old fashioned,
uncreative, paranoid….jealous.” After reading the essays, Ms. Mershon called a parent
conference with David Riehm’s mother. After the meeting, she assumed the issue was
resolved.

In Riehm’s third essay titled “Bowling for Cuntchenson,” he called the teacher “bitch”
that is “way out of line.” He went on to explicitly describe how the narrator went to school and
committed a massacre parallel to school the shooting in Littleton, Colorado. After reading the
essay, Ms. Mershon felt threatened, scared, and hurt. She immediately showed the essay to the
principal, John Engelking. Principal Engelking suspended Riehm and gave his essay to Cook
County Deputy Sheriff, Joseph Zallar. Zallar took Riehm in custody, and by court order Riehm underwent psychiatric evaluation and was released after 72 hours. David Riehm and his mother, Colleen Riehm, filed a suit against the county defendants, seeking damages on the grounds that the detention violated Riehm’s First Amendment right to free speech and Fourth Amendment right to be free from unreasonable seizure. Further, she also filed on a violation of the Fourteenth Amendment on the basis that the county failed to pay for David Riehm’s medical bills. The district court dismissed the case, consequently, the Riehm’s appealed to the Minnesota Supreme Court. The Minnesota Supreme Court agreed with the district court.


After being home schooled for two years, D.J.M. entered 9th grade at Hannibal High School. D.J.M. and his friends daily sent instant messages (IM) to each other at home. This happened without any incidence for his entire ninth grade. However, on October 24, 2006, D.J.M. sent an IM to C.M., his friend. Disturbed by the IM sent to her home computer, C.M. shared the following messages between her and D.J.M. with an adult friend, Leigh Allen.

"that D.J.M was frustrated with his love interest "L.". C.M. asked D.J.M. "what kinda gun did your friend have again?" D.J.M replied "357 magnum." C.M. asked "haha would you shoot [L.] or let her live?" D.J.M. answered, "i still like her so i would say let her live." C.M. follows up by asking, "well who would you shoot then lol," to which D.J.M. responds "everyone else." D.J.M. then named specific students who he would "have to get rid of," including a particular boy along with his older brother and some individual members of groups he did not like, namely "midget[s]," "fags," and "negro bitches." Some of them "would go" or "would be going." C.M. later forwarded most of these statements to Allen by email."

C.M. told Leigh that she was afraid that D.J.M. would bring a gun to school. She then emailed the excerpts from the conversation to the principal, Darin Powell. After reading the
email, Powell contacted the superintendent, Jill Janes, who advised Powell to contact the police.

The police went to D.J.M.'s house on the same evening, asked him questions and arrested him. D.J.M. was detained at a juvenile detention overnight and taken to Hawthorn Psychiatric Hospital in the morning for examination. Upon discharge from the hospital on November 28, he was transported back to the juvenile detention center.

While D.J.M. was in the hospital on October 31, the school administrators decided to suspend him for ten days. On November 3, Superintendent Janes extended the ten day suspension to the rest of the school year due to the disruption caused at school. Both Powell and Janes told the school board that the IM had people panicked. There were numerous phone calls generated because people were scared they were on the hit list. They had to increase the security of the school. Powell and Janes testified that the IM indeed cause disruption of the learning environment.

D.J.M.’s parents appealed the suspension to the Hannibal School District Board. The Board determined that D.J.M.’s action did cause significant disruption and fear, and violated the student code of conduct; therefore, they upheld the administrator’s decision. The parents subsequently filed in the Missouri Circuit Court. They claimed that their son’s First Amendment right to free speech was violated and wanted punitive damages and attorney fees. The district moved the case to the federal district court, which also agreed with the school district on the basis that where there is a true threat speech is not protected.

Kara Kowalski was a senior at Musselman High School in the Berkeley County School District. On December 1, 2005, after returning from school, Kara created a MySpace.com Web page. She titled her Web page “S.A.S.H.,” an acronym for “Students Against Sluts Herpes.” She then invited one hundred people to be her friend on the page. One classmate, Ray Parson joined the group from a school computer. He stated the “S.A.S.H.” stood for “Student Against Shay’s Herpes.” Shay was another student at Musselman High School. He uploaded a picture of himself and another student holding a sign saying “Shay Has Herpes.” Kowalski’s response to Parson’s posting was “Ray you are soo funny! =)” Further, Kowalski posted that the picture was the best one the Web page. This caused others to post similar comments. Many comments commended Kowalski for masterminding the Web page. Some even called her a “hero.” After seeing the Web page, Shay’s father angrily telephoned Parson. Subsequently, Parson asked Kowalski to remove the Web page. Since Kowalski was unable to delete the page, she renamed it “Students Against Angry People.”

The next day, Shay’s parents filed a harassment complaint with Vice Principal Becky Hardin regarding the comments made on the Web page. Since Shay was disturbed by the comments, she did not attend school that day. Ms. Hardin talked to Principal Ronald Stephens who in turn called the school board for advice. After conducting the investigation, school administrators suspended Kara for ten days from school and added a 90-day “social suspension for creating a ‘hate website’” which was a violation of the school code of conduct. She was also removed from the cheerleading squad. After the appeal to the assistant superintendent, Kowalski’s punishment was reduced to five days suspension, but the 90-day social suspension was upheld.
Kowalski filed against the principal, vice principal, assistant superintendent, and superintendent alleging that her First Amendment right to free speech, Fifth Amendment right to due process, and Eighth Amendment right prohibiting cruel and unusual punishment had been violated.

The district court favored the Berkeley County School District on basis of their student code of conduct. The handbook, which Kowalski acknowledged receiving at beginning of the school year, stated that school officials “may regulate off-campus behavior insofar as the off-campus behavior creates a foreseeable risk of reaching school property and causing a substantial disruption to the work and discipline of the school.” The United States Court of Appeals for the Fourth Circuit also affirmed the district court’s decision.
School administrators across United States of America are battling the issue of disciplining students for their improper use of technology. They seek to answer the question where does one student’s freedom of speech infringe on the rights of another student. The primary responsibility of educators is to provide a safe and secure environment for student learning to take place. However, the increase in reports of cyber bullying, the safety of the students is threatened. Educators rely heavily on the standards set by the district and laws to answer the questions.

In order to answer the questions, administrators, before deciding the discipline of the student, must put the incident through a Tinker test. Secondly, they must decide on the location of the speech in question. Then, it is important to summarize their rationale for applying Tinker instead of Fraser. In addition, the administration team must have their roles and responsibilities clearly defined.

The courts reviewed each case by using the two prongs of the Tinker standard. The first prong is whether the speech is protected by the First Amendment, and the second prong is whether the speech has caused a substantial disruption on campus.

5.1 The First Prong of Tinker- Is the Speech Protected?

Is the speech of the student protected? The first condition does not involve the mode of communication; it can be spoken on the campus, written on Facebook, or texted on a mobile
phone. For example, in all the cases reviewed in this study, the courts agreed that initially all students’ speech off campus does have protection under the First Amendment. If the speech is found to be protected under the first prong of Tinker, may the educators still institute discipline? The answer is no—unless the administrators prove that the speech creates a substantial or material disruption of the learning environment on campus: the second prong of the Tinker standard.

### 5.2 The Second Prong of Tinker Standard - Substantial Disruption

The burden of proof lies with the administrators to prove the action was likely to cause substantial disruption of the learning environment. This is derived from the fact that school administrators have a responsibility to provide an environment that is conducive to learning for all students.

The difficulty lies in the meaning of the word “substantial.” According to Webster’s Dictionary online, substantial is defined as:

- Consisting of or relating to substance
- Not imaginary or illusory: real, true
- Important, essential.

An educator must look at each incident and decide whether the speech has created or can create an impediment to the victim’s learning. However, the more difficult question lies in the administrators’ perception of the disruption. For example, is it disruption when the victim student is unable to perform in the classroom, hence the grades suffer, or the disruption causes the student to miss school because of the emotional stress caused by the speech? How much
disruption warrants actions on behalf of the administrators? The latest litigation gives some
guidance. At one end of the spectrum is *Buessink v. Woodland R-IV (1998)*, in which a student
who was off campus and using their own personal computer created a Web site that contained
offensive comments about the principal. Even though the speech was created off campus,
when another student showed the Web site to the principal, the principal reacted by
suspending the creator for ten days. Hence, the student filed a case against the principal. The
district court overturned the suspension, finding that the speech was protected by the First
Amendment and that the public school had not demonstrated a compelling interest as there
was no evidence that it substantially disrupted the learning environment (*Buessink*, 1998). At
the other end of the spectrum is *J.S. v. Bethlehem Area Public school District No. 415, 2000,*
where the Pennsylvania Supreme Court found that the offensive remarks off campus could not
be construed as a “true threat” and therefore were protected speech. However, the court
upheld the expulsion of the student due to the fact that the remarks had indeed created
substantial disturbance of the learning environment since the victim of the off-campus speech,
the teacher, had to take medical leave from the job due to mental stress. Hence, this
“unquestionably disrupted the delivery of instruction to students and adversely impacted
the education environment” (*J.S.*, 2000). Taken together, these cases create a useful
framework for analyzing student cyber-speech claims.
5.3 Off Campus versus On Campus

The location where the speech occurred is one of the most important factors educators must decipher. The easiest to discipline is the speech that occurred on campus. For example, in Lewisville Independent School District, if student A directs a derogatory remark toward student B and student B is offended by the speech, Student A may receive a citation from the police officer. According to the Texas Penal Code Title 9, Sec. 42.01, a person can be charged with disorderly conduct if they commit any of the following offences in a public place:

- Use “abusive, indecent, profane, or vulgar language,” of the kind likely to provoke a physical altercation. These are known legally as “fighting words.”
- Make an obscene gesture that is likely to start a physical
- Use chemicals to make a “noxious and unreasonable odor.”
- Verbally abuse or threaten another person “in an obviously offensive manner.”
- Make an “unreasonable noise” in a public place or near a private residence that’s not your own. The law defines “unreasonable” as making a sound more than 85 decibels after being warned once by a police officer. (This state law, separate from any local noise ordinances.)
- Fight physically with another person.
- Fire a gun, or display a gun with intention to scare other people.
- Expose your genitals or anus in a “reckless” manner that disregards anyone else who might see and be offended.
• Peer into someone else’s home or motel room, or into a private restroom, shower stall, or dressing room for “lewd or unlawful purposes.”

Therefore, the Texas Penal Code and Student Code of Conduct make it easier to discipline for offensive speech on campus, whether it is written or spoken. With cyber-speech, however, unlike the written or spoken word, it is often difficult to pinpoint the location of the speech. As a result, courts have usually focused on where the information was accessed instead of where it was created. For example, in J.S. the Pennsylvania Supreme Court recognized that the comments were created off campus although it was accessed at school. “We hold that where speech that is aimed at specific administrators and/or its personnel is brought onto administrators’ campus or accessed at school by its originator, the speech will be considered on-campus speech (JS, 2000).” The court stated that focusing on the location of receipt rather than the location of the creation provides a criterion for the administrators and students to use. If the comment is accessed at school, the speech will be deemed to have taken place on campus and the administrators will be able to discipline it. However, once a comment is placed on the Internet the creator cannot control who and where the comment is accessed. Therefore, even if the creator did not intent the comment to be accessed at school and actually takes steps to prevent it, if someone does access it on school grounds, the creator is subject to discipline by the administrators.

5.4 *Tinker* versus *Fraser* for Off-Campus Students’ Speech

Although the Supreme Court has not set a clear precedent for lower courts to follow, the lower courts do attempt to analyze the reasoning for the Supreme Court decisions. In the
decisions made about off-campus speech, more often the courts have applied the *Tinker* standard instead of *Fraser*. One possible reason for applying *Tinker* test could be that *Tinker* requires the administrators to prove that the speech created a disruption of the learning environment, while *Fraser* deals with showing the speech itself is offensive. In other words, the administrators must show how the off-campus speech carried over to on campus to cause the disruption which courts find is easier to prove. As a result, more often courts have ruled in favor of the protecting the students' off-campus speech. They shun educators who try to control student's speech. On the contrary, the courts do support administrators to protect students from offensive speech. From administrators’ point of view, it is easier to prove that the speech was offensive regardless where the speech took place. For instance, if a student is posting on Facebook that another student is a homosexual and writes offensive word about the student, the administrator are quick to discipline such speech even if it was done at home. Therefore, *Fraser* provides more freedom for administrators, meanwhile, the courts like to use *Tinker* standards to restrict and limit the power of the administrator to discipline students' off-campus speech (Papandrea, 2008).

5.5 Power and Responsibility

*It is clear to see the inconsistencies in decision making for the cases involved* with cyber-speech. Therefore, it is crucial for the administrators to closely examine policies and procedures for their district. Some tools are available for districts to develop policies and programs that address school climate, Code of Conduct, Children’s Internet Protection Act, Internet Safety Policies; and analysis of Violent and Disruptive Incidents Reports (VADIR).
• School Climate: This could be the most important factor in eliminating harassment and bullying on or off campus. It is the job of all educators to teach students to respect all people, to embrace diversity, and observe appropriate behavior. The most positive school climates are culturally sensitive and model positive behavioral interactions that clearly show that no tolerance exists for certain types of behaviors, including, but not limited to, harassment and bullying. Educators must hold high standards for all students.

• Code of Conduct: All school districts must adopt and enforce a code of conduct (COC) for the maintenance of order on school property and at school functions. The COC governs the conduct of students, teachers, other school personnel, and visitors. Since the COC must be provided to the parents and students at the beginning of the year, an opportunity is provided for school personnel to both review the COC with students and parents and to identify possible gaps in policy, practices, and procedures. The COC is an ideal document to use to establish expectations and consequences for both student and staff conduct regarding internet safety and the use of technology while on school grounds and/or at school functions. In addition, the COC is the framework by which school administrators can implement and equitably enforce a safe school climate. School personnel must be provided with a copy of the COC and copies of the COC must also be made available for review by students, persons in parental relation to students, and other community members. Since the COC must be updated yearly basis, an opportunity is provided to update with the latest trends with Internet and technology usage. The COC should provide
guidelines for proper usage of electronic devices as well as defining words such as “sexting” and “cyber bullying.” The COC should include statements that make it abundantly clear that cyber bullying is a form of electronic aggression and that both it and sexting are inappropriate and will not be tolerated on school grounds or at school-sponsored events or functions, using either school or personal information technology equipment. In addition, it must clearly define the consequences of breaking the policy, for example, if the incident provided meets the conditions of being violent/disruptive, occurring on school property/school-sponsored events; and meeting/exceeding the disciplinary actions. Disciplinary or referral actions include the following:

- Referral to counseling
- Teacher removal (formal 3214 hearing)
- Suspension from class or activities; if in-school—the equivalent of one full day; if during activities or transportation—for five (5) consecutive school days
- Out of school suspension equivalent to one full day
- Transfer to alternative setting; or
- Transfer to law enforcement

When developing policies it is important for school districts to consult their attorneys for guidance.
The Children’s Internet Protection Act (CIPA): This law was enacted by Congress in 2000 to protect children from obscene or harmful materials over the Internet. This law requires the libraries and schools to take measures to ensure students do not have access to indecent materials. Requirements of this law include:

School and libraries are eligible to receive discount for Internet access or internal connections through the E-rate program. However, in order to receive the discount, the schools and libraries must block or filter internet access. The protection measures must block or filter internet access to pictures or content that is: (a) obscene; (b) child pornography; or (c) harmful to minors. Further, Schools must also adopt and enforce policy for technology use. Before adopting the proper technology use policy, they must make the policy available to the public.

According to CIPA, the adopted technology usage policy must include:

- access by minors to inappropriate matter on the internet
- the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications
- unauthorized access, including so-called “hacking,” and other unlawful activities by minors online
- unauthorized disclosure, use, and dissemination of personal information regarding minors
- Measures restricting minor’s access to materials harmful to them. (FCC, 2011)

Internet Safety Policies: With the recent increase in the use of social networking websites, the policies must include acceptable behavior on the Internet. The schools must take a stand on whether to allow social networking on campus. Many districts have allowed communication between students, parents, staff, and community using social networking sites. However, it is crucial to set guidelines to ensure that
staff, students, and parents are not subject to allegations of improper use of the Internet.

According to CIPA statutory Amendment, beginning July 1, 2012, when schools certify their compliance with CIPA, they will also be certifying that their Internet safety policies have been updated to provide for educating minors about appropriate online behavior, including interacting with other individuals on social networking websites and in chat rooms and cyberbullying awareness and response (FCC, 2011).

5.6 Recommendations for Administration

Even though some scholars will argue that the Tinker/Bethel/Hazelwood trilogy is outdated and does not address the issues of Internet today, courts still have relied on decisions of these cases. With newly arising issues of sexting and cyber bullying on- and off-campus grounds, administrators must approach each incident with caution. With each incidence, the administrators should:

- Consider the district’s written policy technology use
- Identify whether the speech causes a "true threat" to the victim by asking:
  - What was the intent of the speech? Did the speaker mean the speech to create a threat to the other person?
  - How would the listener interpret the speech? Can the speech be interpreted as a threat to the listener?
If the administrator finds that there is a true threat present, then they should discipline the student and contact the proper authorities and student's parents.

- If the speech is non-threatening, then the administrator needs to consider:
  
  - Where was the speech delivered?
  
  - How the speech was delivered—was it a school newspaper, school project, essay, or Internet?
  
  - Was the information accessed at school?
  
  - Was a school computer used to create the speech?
  
  - Was there a link to the school website?

  If the administrator finds any of these questions to be true, then the administrator must provide evidence as to how the speech caused disruption of the learning at school.

### 5.7 School Administrators Must be Resilient

One clear theme that has occurred in all the courts’ decisions on students’ free speech right is that the administrators must be resilient. They cannot afford to be emotional. They must make a distinction between their feelings getting hurt versus disruption of the learning environment. As Judge Rodney Sippel wrote in the *Beussink* case: “Disliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under *Tinker*” (*Buessnik*, 30 F. supp.2d at 1180).
Thomas Hutton with the National School Board Association stated, “I do think schools want to be careful to reacting to anything they don’t like with disciplinary action because courts tend to be very skeptical of school actions based on opposition to the content of a student’s expression.” Conversely, “… courts should defer to school officials when the issue is the impact of the off-campus behavior on campus” (Tuneski, 2003).” “Courts have knocked down schools when they rely on the ‘I don’t like the student speech’ rationale,” Hutton said. “But when schools provided evidence of how off-campus expression had a negative impact at school, the courts was much more deferential. Courts are and should be more deferential when it comes to questions of safety and potential threats (Hudson, 2006).”

5.8 Speech That is Harmful is not Protected

Another theme that occurs in court decisions is that speech that poses a threat to another person is not protected. According to Caplan, an attorney with the America Civil Liberties Union of Washington,

School districts don’t have to ignore harmful material on the Internet. They can notify the parents, talk to the students involved and provide services to any students that may have been victimized. As stated in Watts v. United States,” [w]hat is a threat must be distinguished from what is constitutionally protected speech (394 U.S. 705 (1969) Id. at 707).”

The courts have recognized that it is the administrators’ duty to provide a safe and secure environment for students to learn. They do not have to be reactive to a threat, if they have a reason to believe the speech can pose or cause harm to people, they can take proactive measures to discipline the student (Hudson, 2006).
5.9 Administrators Must Provide Prevention Training for Students

Administrators have a responsibility to educate students about the difference between appropriate and inappropriate speech. In order to educate students, administrators must be trained first. For example, administrators must learn the difference between offensive speeches versus threatening speech. Each person’s tolerance level is different, so it is crucial to set a standard that defines appropriate and inappropriate behavior. “Kids have to understand there is a practical difference between playground/water-cooler talk and posting something on the Internet” says Vic Walczak of the ACLU of Pennsylvania. “When you post something on the Internet, there can be “real world” consequences. Some of the stuff on the Internet is mind-boggling. I’ve heard about school employees Googling on the Internet to find student comments. There is a lesson for students about responsibility. While school officials may not legally be able to punish you, there may be other real-life consequences that should give students pause about posting something the whole world can see” (Hudson, 2006).

According to a survey done by CareerBuilder.com, 37 percent of hiring supervisors are checking social networking Web sites of the applicants; over 65 percent are using Facebook as their primary resource (Huff Post, 2012). Many students believe that what they post on the Internet is only seen by friends, but they are very much mistaken. For example, Michael Guinn, a student at John Brown University, posted a picture of himself dressed in drag. The administrators at the university saw the post and dismissed him from the university. Being a Christian University, the administrators justified their actions by stating, “Guinn's activities were in violation of campus conduct codes stating that behavior must affirm and honor Scripture (Kornblum and Marklein 2006). Since students’ careers and future education relies on their
appropriate speech, the school officials have an obligation to teach the difference to the students (Hudson, 2006).

5.10 Policies Should Be Clearly Defined

Most school districts have developed acceptable use standards for electronic communication by students. According to CIPA, policies have the following purposes:

- Educate parents about their children's use of the Internet
- Teach students about risks peculiar to computer communication
- Teach students rules for efficient, ethical, legal computer/network use
- Teach safe and appropriate computer social behavior
- Inform the school community of available and unavailable services
- Preserve digital materials created by students and teachers
- Protect vulnerable children from inappropriate approaches
- Discourage children from making inappropriate personal disclosures
- Encourage ethical behavior, and discourage criminal behavior
- Encourage accepted “Netiquette” from the very start
- Encourage polite and civil communication
- Encourage individual integrity and honesty
- Encourage respect for others and their private property
- Allow enforcement of necessary rules of behavior
- Protect the school networking equipment and software from danger
- Help improve network efficiency by influencing resource usage
• Share responsibility for the risks of using the Internet
• Reduce the risk of lawsuits against teachers, schools, and providers
• Simplify the duties of computer systems administrators
• Discourage copyright infringement, software piracy, and plagiarism
• Discourage network game playing and/or anonymous messages
• Discourage use of computers and networks for profit or politics
• Assure Internet users that their online activities are monitored or assure Internet users that their e-mail privacy is (or is not) being respected (2012).

For instance, Figure 1: Lewisville ISD Acceptable Use Policy states the following:
Student Guidelines
For Technology Resources

Lewisville Independent School District provides a variety of electronic communications systems for educational purposes. The electronic communications system is defined as the district’s network (including the wireless network), servers, computer workstations, mobile technologies, peripherals, applications, databases, online resources, Internet access, email, and any other technology designated for use by students, including all new technologies as they become available. This also includes any access to the Lewisville ISD electronics system while on or near school property, in school vehicles and at school-sponsored activities, and includes the appropriate use of district technology resources via off-campus remote access. Please note that the Internet is a network of many types of communication and information networks, including Web 2.0 resources (Blogs, Wikis, Podcasts, etc.), and is part of the district’s electronic communications systems. Web 2.0 applications offer a variety of 21st Century communication, collaboration, and educational creativity opportunities. In a 21st Century school system, technologies, the Internet, and Web 2.0 tools are essential.

In accordance with the Children’s Internet Protection Act, Lewisville Independent School District educates staff and students regarding appropriate online behavior to ensure Internet safety, including use of email and Web 2.0 resources, and has deployed filtering technology and protection measures to restrict access to inappropriate content such as those that are illegal, harmful, or contain potentially offensive information. While every effort is made to provide the most secure and optimal learning environment, it is not possible to absolutely prevent access (accidental or otherwise) to inappropriate content. It is each student’s responsibility to follow the guidelines for appropriate and acceptable use.

SOME GUIDELINES FOR APPROPRIATE USE

- Students must only open, view, modify, and delete their own computer files.
- Internet use at school must be directly related to school assignments and projects.
- Students will be assigned individual email and network accounts and must use only those accounts and passwords that they have been granted permission by the district to use. All account activity should be for educational purposes only.
- Students must immediately report threatening messages or discomforting Internet files/sites to a teacher.
- Students must at all times use the district’s electronic communications system, including email, wireless network access, and Web 2.0 tools/resources to communicate only in ways that are kind and respectful.
- Students are responsible at all times for their use of the district’s electronic communications system and must assume personal responsibility to behave ethically and responsibly, even when technology provides them freedom to do otherwise.

SOME EXAMPLES OF INAPPROPRIATE USE

- Using the district’s electronic communications system for illegal purposes including, but not limited to, cyberbullying, gambling, pornography, and computer hacking.
- Disabling or attempting to disable any system monitoring or filtering or security measures.
- Sharing user names and passwords with others; and/or borrowing someone else’s username, password, or account access.
- Purposefully opening, viewing, using or deleting files belonging to another system user without permission.
- Electronically posting personal information about one’s self or others (i.e., addresses, phone numbers, and pictures).
- Downloading or plagiarizing copyrighted information without permission from the copyright holder.
- Intentionally introducing a virus or other malicious programs onto the district’s system.
- Electronically posting messages or accessing materials that are abusive, obscene, sexually oriented, threatening, harassing, damaging to another’s reputation, or illegal.
- Gaining unauthorized access to restricted information or network resources.

FIGURE 1. Student guidelines for technology resources.

The figure is reproduced with written permission from Lewisville Independent School District’s Technology Department.
SPECIAL NOTE: CYBERBULLYING
Cyberbullying is defined as the use of any Internet-connected device for the purpose of bullying, harassing, or intimidating another student. This includes, but may not be limited to:

- Sending abusive text messages to cell phones, computers, or Internet-connected game consoles.
- Posting abusive comments on someone’s blog or social networking site (e.g., MySpace or Facebook).
- Creating a social networking site or web page that masquerades as the victim’s personal site and using it to embarrass him or her.
- Making it appear that the victim is posting malicious comments about friends to isolate him or her from friends.
- Posting the victim’s personally identifiable information on a site to put them at greater risk of contact by predators.
- Sending abusive comments while playing interactive games.
- Taking photos—often using a cell phone camera—and posting them online, sometimes manipulating them to embarrass the target.

CONSEQUENCES FOR INAPPROPRIATE USE

- Appropriate disciplinary or legal action in accordance with the Student Code of Conduct and applicable laws including monetary damages.
- Suspension of access to the district’s electronic communications system.
- Revocation of the district’s electronic communications system account(s); and/or
- Termination of System User Account: The district may deny, revoke, or suspend specific user’s access to the district’s system with or without cause or notice for lack of use, violation of policy or regulations regarding acceptable network use, or as a result of disciplinary actions against the user.
- Possible criminal action.

EMERGENCY PLAN
During an emergency situation, students may only use their cell phones to contact 911. All other calls will be in violation of the AUP. Status, actions required, and official information will be communicated to parents and others by the District.

Electronic Communication Devices: Bring Your Own Technology
LISD is excited about the new learning opportunities available through Bring Your Own Technology. It is our goal that students and teachers will collaborate in rich, engaging learning experiences using technology. Students may bring their own technology and utilize personal electronic communication devices at school and at school activities. Students may use these devices in the classroom when the teacher deems them appropriate for educational purposes. All devices must remain silent or be put away unless being used within a lesson during class time. Students may also use devices during non-instructional times, such as passing periods, lunch and before/after school.

Devices include, but are not limited to, the following: notebooks, smart phones, iPhones, iPads, iPods, mp3 players and eReaders. All devices should be clearly labeled with student’s full name. Students are responsible for personal property brought to school and should keep personal items with self or in a locked space. Devices should be charged prior to bringing to school.

In the event the technology is used inappropriately, normal disciplinary consequences may occur.

FIGURE 1 (continued).
Administrators Must Be Flexible

With the ever changing use of electronic communication, school officials need to be flexible when developing and implementing their school polices. Administrators must practice discretion and treat each incident individually. Hutton states:

We do not advocate any one particular approach. If a school is going to go after student behavior off-campus, the school must make it clear in the code of student conduct so that it puts the students on notice. When it comes to using school equipment, the Internet-use policy should be very clear. There is a lot that schools can do short of imposing disciplinary actions, such as educating kids about responsibilities online and educating parents about the Internet. If a school official is aware of cyber bullying, one option is rather than imposing discipline, call the parent of the student who has been doing the cyber bullying (Hutton and Bailey, 2007).

While laws regarding student First Amendment rights and the Internet are continually changing, administrators must show the flexibility to change with them. A generic approach is outdated. Congress has the power to affect schools by passing new laws to govern electronic communication and the power of the administrators to regulate it. Each day, more cases are filed in courts asking for clarification for students’ First Amendment Rights. Each day, administrators face a new challenge as to what is appropriate. Hutton proclaims:

It is still very early (in terms of) how these student Internet speech cases have progressed. There are not a lot of appellate cases; what is clear is that this emerging area is likely to become one of the most fertile fields of First Amendment jurisprudence. This will happen for at least several reasons: (1) the Internet is the new First Amendment frontier; (2) the U.S. Supreme Court is long overdue to decide a student Internet case; and (3) the explosion of commercial social-networking sites ensures that a greater number of disciplinary actions will be taken against students for online expression (Hutton and Bailey, 2007).

Administrators will develop the most useful and wise policies using knowledge, discretion and flexibility; they must become like willow trees and learn to flow in the direction the wind takes them.
5.12 Research Questions Answered

The purpose of this study is to identify and analyze upper and lower court cases in order to answer the following questions:

- What are the First Amendment constraints on public school districts’ authority to regulate students’ off-campus technology-delivered speech?
- What legal precedents have been utilized by the courts to decide the schools’ authority to regulate students’ off-campus, technology-delivered speech?
- What factors appear in the relevant case law that can help public school administrators make decisions about students’ technology-delivered off-campus speech?

The first question posits a need for public school administrators to comprehend the constraints before delivering consequences to the students for their off-campus speeches. According to the cases discussed in this study, administrators must investigate the allegations thoroughly and several factors must be considered when handling the incident. Such factors include 1) the need for administrators to be cognizant of location of the speech, 2) the medium used to deliver the speech, 3) the intention of the speech, and 4) the targeted audience of the speech.

The location of the speech is the most important factor judges have considered in their deliberations. In each case there were long discussions regarding where the speech was made and how it was brought onto campus. In all cases it was made at home by the students using their own computer and on their own time. In most cases the speech was brought on campus
by someone else not the author of the speech, therefore, courts have heavily ruled in favor of the students’ First Amendment rights for off campus speeches.

The medium used to deliver the speech is another factor judges have considered in rendering their decisions. For most cases, the students created a website or a blog on their MySpace or Facebook account. The courts felt that the students did have a right to express themselves freely outside school walls, hence have favored students in most of their rulings.

An understanding of the intention of a student’s speech is critical for an administrator. Administrators must distinguish between speeches that may be offensive versus threatening speeches. The only time the courts have favored the school districts is when they can prove an imminent danger did exist. However, the courts have repeatedly said the proof of burden falls heavily on the administrator. Therefore, the courts have favored the students in most of the cases.

The targeted audience of the speech is the final factor of consideration for the courts. The question becomes “was the targeted audience other students or administrators for the off-campus speech?” Most of the time, the courts have protected other students from harmful speech, but not adults, especially those employed by the school. Hence, when the speech infringed on the rights of students, the courts have favored school district, but when it offended the administrators, the courts have favored the students.

The second question posits a need for administrators to utilize the precedents set by the courts before delivering punishment to students for their off-campus speech. The decisions in the nineteen lower court cases presented in this research have been inconsistent. However, the four Supreme Courts cases (Tinker, Fraser, Hazelwood, and Morse) have created the precedents
for administrators to follow regarding on campus speech. Overall, on-campus speech can be regulated more easily than off-campus speech. Between the years 1990 and 2000, the courts repeatedly said that administrators must not be too quick to consequence students’ off campus speech and mostly have favored students; unless, the school districts have been able to prove the speech did cause a substantial disruption of the school learning environment or was indeed a true threat.

The third question posits the need for administrators to comprehend the factors in the relevant case law before delivering consequences to the student for their off-campus speech. This question’s finding parallels the finding of the first question posed in this research. The courts have relied on the location of the speech, the medium used to deliver the speech, the intention of the speech, and the targeted audience of the speech. It is therefore incumbent upon the administrator to stay current with potential changes in the case law related to the four controlling cases (*Tinker, Fraser, Hazelwood, and Morse*).

5.13 Opportunities for Future Research

The fluid nature of technology makes it difficult to conclude this topic. For example, since this research began five years ago, technology usage has changed tremendously hence the decisions of the courts have also changed. Therefore, opportunities for future research include the need to study the current trends or modes for delivery of the speech. Initially the mode of speech delivery was MySpace and Facebook, however, now the mode of preferred communication by teenagers is Instagram and Twitter. What will the mode of communication look like in the future?
Another opportunity for future research is studying the growing number of court cases that are arising from the search of cell phones. One important question for administrators to ask is do students have an expectation of privacy on their cell phones while at school? Since most school districts have adopted “Bring your Own Technology to Schools” policies, it would be informative to know how many cell phone searches by teachers and administrators have resulted as court cases.

An additional opportunity for research would be to study the impact of the location of the courts where these suits have been brought to trial. For instance, most of the cases in this study occurred in states that have not adopted a tort reform law such as Pennsylvania, Washington, and Indiana. There were no cases from Oklahoma, Texas, or states with a tort reform law at the time the case was brought. Could the presence of a tort reform law impact the filling of these kinds of free speech cases?

5.14 Final Summary

One of the most important conclusions from this research is the need for administrators to investigate each incident involving the off-campus speech of students thoroughly before rendering any discipline. The burden of proof in verifying that a substantial disruption was caused by the speech falls entirely on the school district. The courts have repeatedly rendered that off-campus student speech is protected unless the speech has caused a substantial disruption of the learning environment. Further, when the off campus speech attacks the school officials, the school official must have a thick skin as the courts have never offered any protection in these instances. Lastly, the tenor and tone of the decisions in these matters shows
a clear need for a detailed student code of conduct for all school districts in this age of technology.
APPENDIX A

DEFINITION OF TERMS
Affirmed – to assert (as a judgment or decree) as valid or confirmed

Appellate – having the power to review the judgment of another tribunal (court)

Case law – law developed by the courts through issuing judicial opinions

Court of Appeals – a legal proceeding by which a case is brought before a higher court for review of the decision of a lower court

Cyberspace – the online world of computer networks

Cyber bullying - actions that use information and communication technologies to support deliberate, repeated, and hostile an individual or group that is intended to harm another or others

Disclaimer – a denial or disavowal of legal claim

Educational activity – any activity that has a connection to a school’s curriculum or extracurricular forum

Internet – an electronic communication network that connects computer networks and organizational facilities around the world

Internet speech – communication of written words, pictures or drawings using the Internet

Legal standard – a reference to specific case law when courts render an official opinion

Legitimate pedagogical concerns – connected to the educational process of teaching and learning within a school context

Lewd, indecent, offensive speech – communication or speech that others find inappropriate but is not threatening

Lower courts – any court below the Supreme Court; ex. Circuit courts

Nexus – a causal link between offensive behavior and disruption in school

Off-campus speech - any form of communication that is in no way connected to a school or done physically at another location

On-campus speech – any form of communication that is educationally connected to the school or done on school property
Plaintiff – a person who brings legal action

Post-Columbine – anytime after the 1999 Columbine High school shootings

Pure speech – silent speech, speech represented by actions not words

School sponsored speech – speech that occurs as part of the educational process, directed by the school

Schoolhouse gate – the door or entrance to a school

Sexting - the sending of sexually explicit messages or images by cell phone

Shepardizing - A term used in the legal profession to describe the process of using a citatory to discover the history of a case or statute to determine whether it is still good law.

Substantial or material disruption – a real, true or essential disorder of the normal course

Suspension – a short-term exclusion from school usually for disciplinary purposes

Summary judgment – a formal decision given by the court


True threat – the perception and/or intention of speech toward an individual taken as a threat
APPENDIX B

TABLE OF CASES


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


D.J.M. v. Hannibal Public School District #60 (2011)

Doe v. Pulaski County Special School District, 306 F. 3d 616, (2002). (8th Circuit Court)


Kowalski v. Berkeley County Schools, 652 F.3d 565 (2011)


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