SCHOOL AUTHORITY OVER OFF-CAMPUS STUDENT EXPRESSION IN THE ELECTRONIC AGE: FINDING A BALANCE BETWEEN A STUDENT’S CONSTITUTIONAL RIGHT TO FREE SPEECH AND THE INTEREST OF SCHOOLS IN PROTECTING SCHOOL PERSONNEL AND OTHER STUDENTS FROM CYBER BULLYING, DEFAMATION, AND ABUSE

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In *Tinker v. Des Moines Independent School District*, the Supreme Court ruled that students have speech rights in the school environment unless the speech causes or is likely to cause 1) a substantial disruption, or 2) interferes with the rights of others. The Supreme Court has yet to hear a case involving school officials’ authority to regulate electronically-delivered derogatory student speech, and no uniform standard currently exists for determining when school authorities can discipline students for such speech when it occurs off campus without violating students’ First Amendment rights.

This dissertation examined 19 federal and state court decisions in which school authorities were sued for disciplining students for electronically delivered, derogatory speech. Eighteen of these cases involved student speech that demeaned or defamed school teachers or administrators. Only one involved speech that demeaned another student. Each case was analyzed to identify significant factors in court holdings to provide a basis for the construction of a uniform legal standard for determining when school authorities can discipline students for this type of speech. The full application of *Tinker’s* first and second prongs will provide school officials the authority needed to address this growing problem while still protecting legitimate off-campus student cyber expression. Predictions of future court holdings and policy recommendations are included.
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CHAPTER I

INTRODUCTION

This dissertation provides an analysis of the balance between the First Amendment right of students to engage in electronically delivered, off-campus speech and the interest of school authorities in maintaining and operating safe, orderly, efficient, and effective learning environments in the context of cyber expression. The Second Circuit Court in *Thomas v. Board of Education of Granville Central School District* (1979) described this tension as “the delicate balance we have endeavored to strike between institutional needs and individual rights” (p. 1049).

The Internet and other forms of electronic communication have had a transformative impact both on the individual and collective levels, but these changes are not all positive (Laser, 2010). Inappropriate and malicious expressions posted by students on the Internet or sent with electronic communication devices have resulted in tragic outcomes (Make a Difference for Kids, 2008), and in some cases, produced substantial disruptions of school operations (*J. S. v. Bethlehem Area School District*, 2002; *Wisniewski v. Board of Education of Weedsport Central School District*, 2007). An epidemic in the form of cyber bullying and cyber harassment is sweeping the country, and school officials need guidance (Bradshaw, 2010).

Specifically, this researcher analyzed the circumstances under which school officials may punish off-campus student expressions posted on the Internet or sent over some form of electronic media that either disrupts school operations or interferes with the rights of others. Calvert (2009a) framed the issue by asking whether school officials punishing students for off-campus expressions which disrupts the learning environment, defames classmates or school personnel, or threatens acts of violence is consistent with the First Amendment.
Inconsistent Court Rulings on the First Amendment Right of Students to Engage in Off-Campus Electronically-Delivered Speech

_Tinker v. Des Moines Independent Community School District_, decided by the United States Supreme Court in 1969, is the single most important Supreme Court pronouncement about the free speech rights of students in the environment of the public schools. In that decision, the Court ruled that students have a right to engage in free speech protected by the First Amendment, and that school officials cannot censor that speech unless the speech causes or is reasonably likely to cause a “substantial disruption” in the school environment or interferes with the rights of other students. The “substantial disruption test” has come to be known as the first prong of Tinker’s ruling on the free speech rights of students. The “interference with the rights of others” test has come to be known as Tinker’s second prong.

In the vast majority of cases, federal and state courts have applied Tinker’s first prong when analyzing the constitutional right of students to engage in off-campus speech—asking whether the speech disrupted the school environment or whether substantial disruptions could have reasonably been forecast by school authorities. Unfortunately, courts have inconsistently applied the first prong of Tinker’s substantial disruption test, and what constitutes a substantial disruption of school operations for one court may not in another (Reeves, 2008). This inconsistency has produced a lack of clarity for school officials as they attempt to walk the fine line between students’ rights to freedom of expression and institutional needs. This problem is especially acute in the context of electronically delivered student speech because court cases show that the electronically delivered student speech that schools have tried to regulate is often speech that ridicules, demeans, and even defames targeted school officials or vulnerable students.

In addition, courts have been reluctant to support the use of Tinker’s second prong as the
legal justification for the exercise of school authority over off-campus expressions which interfere with the rights of others (McCarthy, 2009). Tinker’s second prong, which allows schools to censor student speech that interferes with the rights of others, supplies one of the main recommendations for the crafting of a legal standard that appropriately balances the constitutional right of students to engage in electronically delivered off-campus expression and the important interest of school districts in maintaining a safe and orderly school environment while protecting students and staff members from speech that is wounding, hurtful, demeaning, or defamatory.

The Importance of Education

Many believe that the education of children represents one of the most important of all governmental functions (Brown v Board of Education of Topeka, 1954). James Garfield (1880), the 20th president of the United States, wrote in his letter of acceptance, “next in importance to freedom and justice is popular education, without which neither freedom nor justice can be permanently maintained” (para. 3). The Supreme Court in Goss v. Lopez (1975) described the education of the nation’s children as “perhaps the most important function of state and local governments” (p. 736). Given this interest, the Supreme Court has consistently recognized public schools as unique institutions where school officials must be afforded greater power and latitude in accomplishing their objectives (New Jersey v. T. L. O., 1985). The operative question is how to maintain an appropriate balance between the individual rights afforded to children and the lawful authority of school officials. How can officials establish policies that provide the necessary authority to accomplish their legitimate objectives while still protecting most off-campus student expressive rights? Proponents of student expression rights have argued that allowing school officials to punish off-campus expressive activities could have a chilling effect
on First Amendment rights (Tuneski, 2003; Williams, 2008). The likelihood of this chilling effect is certainly a legitimate concern. However, freedom of expression has never been absolute (Cohen v. California, 1971). Furthermore, the rights of children are not equivalent with those of adults (Bethel School District No. 403 v. Fraser, 1986). Under what circumstances can school officials limit the off-campus expressive activities of students without violating their constitutional rights?

Tinker v. Des Moines Independent School District: The Bellwether of Student Expression Cases

In Tinker v. Des Moines Independent School District (1969), the U. S. Supreme Court declared that students in the public schools are “persons” under the United States Constitution and as such “do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” (p. 506). Alexander and Alexander (2009) observed that the Tinker decision represented “a proclamation of utmost importance to all students who would, from that day forward, be enrolled in the public schools” (p. 414). Although Tinker did not explicitly abolish the doctrine of in loco parentis, the Supreme Court’s decision implicitly made clear that school authorities have an obligation to respect students’ constitutional right to free speech under the First Amendment and could no longer disregard this right based on the argument that the schools’ authority over public-school students was identical to the authority of the students’ parents.

The facts of Tinker (1969) are well known. In 1965, the Tinker children wore black armbands to school as symbols of their protest against the war in Vietnam. School authorities, anticipating the Tinkers’ actions, passed a rule prohibiting students from wearing the armbands at school. When the Tinker children arrived at school wearing the armbands, they were suspended. The children’s parents then sued the school district in federal court, alleging that
school officials had violated their children’s constitutional right to free speech under the First Amendment.

In ruling in favor of the Tinker children, the Supreme Court articulated an unambiguous rule about the First Amendment rights of students in the school environment. The Court concluded that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression” (*Tinker v. Des Moines Independent School District*, 1969, p. 508), and “in order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” (p. 509). The Court recognized that the students’ actions in this case did “not concern speech or action that intrudes upon the work of the schools or the rights of other students” (p. 505). If the students’ speech in Tinker had intruded upon the work of the school or interfered with the rights of others, their speech would not have been protected. Nevertheless, Tinker clearly established that “in our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students” (*Tinker v. Des Moines Independent School District*, 1969, p. 506).

**Inconsistent Application of Tinker by Lower Courts**

Tinker has served as a strong affirmation by the Supreme Court of the value of robust free speech rights for students in the public schools (Fossey, DeMitchell, & LeBlanc, 2006). In the years since the Court issued the 1969 Tinker decision, state and federal courts have cited Tinker almost 700 times in cases involving schools. Sometimes these cases have involved student speech on important social or political issues, but often the First Amendment right that students sought to vindicate involved speech on issues much less important than students’ right
to protest the Vietnam War (Fossey & DeMitchell, 1997). For example, students have claimed a First Amendment right to wear sagging pants (Blivens v. Albuquerque Public Schools, 1997) and athletic insignia on their clothing (Jeglin v. San Jacinto Unified School District, 1993) and to make a lewd speech at a school assembly (Bethel School District No. 403 v. Fraser, 1986). Students have invoked Tinker to challenge dress code regulations, school uniform codes (Canady v. Bossier Parish School Board, 2001), and school bans on the display of the Confederate battle flag (Melton v. Young, 1972; Scott v. School Board of Alachua County, 2003). They have sought protection under Tinker for the distribution of lewd and vulgar underground newspapers (Thomas v. Board of Education of Granville Central School District, 1979) and for defamatory depictions of school personnel (Layshock v. Hermitage School District, 2010).

In almost all of these cases, the courts decided students’ First Amendment claims by applying Tinker’s “substantial disruption” test (Ellison, 2010). Unless school authorities successfully showed that the challenged student expression was likely to cause a substantial disruption of school operations, the student generally prevailed. Virtually ignored in every cited case has been the consideration of Tinker’s second prong, which gives school officials the authority to regulate students’ speech that interferes with the rights of others (McCarthy, 2008). To date, Tinker’s second prong has been relied upon in only one case as a justification for the regulation of student speech (Harper v. Poway Unified School District, 2006). Other courts have briefly discussed the possible application of Tinker’s second prong; however, with the one exception, all have ignored the opportunity to utilize Tinker’s second prong. West v. Derby Unified School District (2000), for example, mentioned the possibility that the “display of the confederate flag might…interfere with the rights of other students to be secure and let alone” (p. 1366), yet the court used Tinker’s first prong as the basis for its decision.
In short, the first prong of the test from Tinker receives almost all the attention to the point that many commentators and courts virtually ignore the second prong all together. Nevertheless, some scholars have recommended that courts utilize Tinker’s second prong when analyzing cases involving demeaning and hurtful student speech that is targeted toward school employees or students but is delivered electronically outside the school environment (Shiffhauer, 2010).

Harper v. Poway Unified School District: The Ninth Circuit and Tinker’s Second Prong

According to Calvert (2009a), the Ninth Circuit Court made history in the case of Harper v. Poway (2006) when it ruled that the expressive activities of one student interfered with the rights of other students to be let alone. This is the only case for which any court has used Tinker’s second prong as the foundation for its decision. The court stated that public school students have a right to be free from verbal assaults “on the basis of a core identifying characteristic such as race, religion or sexual orientation” (Harper v. Poway, 2006, p. 1178) and that the wearing of a t-shirt with demeaning slogans and phrases interfered with the fundamental rights of students to have security and to be let alone. Fossey et al. (2006) asserted that the Harper ruling is “broad enough to protect not only gay and lesbian students from derogatory student speech but other minority students as well” (p. 1). However, Shiffhauer (2010) noted “applying the Ninth Circuit’s approach, a number of students who do not qualify for ‘minority status’ may be threatened or harassed by other students, but will not be protected from disruptions in their learning process” (p. 764).

In Harper, the Poway Unified School District sponsored what is known as the Day of Silence, which was designed to promote the tolerance of individual differences, specifically toward students with alternate sexual orientations. In 2003, the first year of the school-sponsored
event, several incidents and disruptions occurred. In addition, approximately one week after the Day of Silence, a different group of students decided they would organize their own club and have what they called Straight Pride Day. Several of these students were suspended when they refused to remove t-shirts that contained comments critical of homosexuality.

The following year, the Day of Silence was again planned despite the disruptions that had taken place the previous year. On this second annual Day of Silence, the plaintiff, Tyler Harper, wore a shirt which stated “I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED” on the front and “HOMOSEXUALITY IS SHAMEFUL” on the back. The next day, Harper wore a similar shirt. This time, a teacher took notice and sent Harper to the office asserting that he believed the shirt created a negative, hostile environment. Once in the office, Harper spoke with school officials who ordered him to either remove the shirt or spend the rest of the day in the office. Harper spent the rest of the day in the office.

Harper sued the Poway Unified School District for allegedly violating his constitutional right to free speech, freedom of religion, equal protection, and due process. The district court applied the first prong of the Tinker standard and held that there was enough evidence to lead school officials to believe that a substantial disruption was likely to occur if they allowed Harper to return to class wearing the shirt in question. Harper appealed the decision to the Ninth Circuit Court which made history when it became the first and only court to apply Tinker’s second prong. The Ninth Circuit Court argued that students have a right to “be secure and to be let alone” (Harper v. Poway, 2006, p. 1178). In the court’s view, Harper’s expression before the other students was “detrimental not only to their psychological health and well-being, but also to their educational development” (Harper v. Poway, 2006, p. 1179). The court in Harper noted that schools represent special environments and stated: “while Harper’s shirt embodies the very sort
of political speech that would be afforded First Amendment protection outside the public school setting, his rights in the case before us must be determined in light of [those] special characteristics” (p. 1176).

In some cases, students invoked Tinker in defense of their right to engage in off-campus speech. In those cases, the courts were prone to rule that students have an unrestricted right to speak outside the school environment unless the speech had some disruptive impact on school operations (Burch v. Barker, 1988; Shanley v. Northeast Independent School District, 1972; Thomas v. Board of Education Granville Central School District, 1979). The history of post-Tinker litigation surrounding students’ free speech rights is discussed in greater detail in Chapter II.

A New Type of Litigation: Electronically Delivered, Off-Campus Student Speech that Attacks School Authorities or Other Students

In the last 12 to 13 years, a new type of litigation concerning the free speech rights of school students has emerged (Beussink v. Woodland R-IV School District, 1998). In these cases, school officials sanctioned students for expressing themselves through electronic media such as web sites, blogs, social networking sites, or e-mail messages. Typically, these students expressed criticism or ridicule toward school authorities or other students. Usually, students engaged in this speech away from school grounds initially, but in time, the expression came to the attention of school officials operating within the school grounds (Barnett v. Tipton County Board of Education, 2009).

Courts have not ruled consistently with regard to school officials’ authority to sanction electronically delivered student speech. In one case, for example, the court ruled that students had an almost unfettered right to criticize school officials from students’ home-constructed web sites (Beussink v. Woodland R-IV School District, 1998). In another case, the Pennsylvania
Supreme Court ruled that school officials could expel students who constructed web sites used to criticize school personnel (*J. S. v. Bethlehem School District*, 2000).

More recently, incidents have been reported during which students engaged in off-campus electronically delivered speech demonstrating a vicious quality. Students have engaged in what has been termed *cyber bullying*, defined as “willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices” (Cyberbullying Research Center, 2010). Some of these bullying and vicious messages by students constituted sexual harassment, and some were merely insults directed at students who were unpopular or otherwise vulnerable to ridicule and insults. The consequences have produced tragic outcomes with teen suicides linked directly to cyber bullying (Halligan, 2009). Nine children were recently charged with felonies in the relentless and vicious cyber bullying of Phoebe Prince who committed suicide only 6 months after immigrating to this country (Archer, 2010). Within the past 2 years, students have engaged in *sexting*, a term referring to the practice of displaying, via cell phones or web sites, nude photos of themselves or of student acquaintances. In at least two instances, students whose nude photos were widely circulated without their permission were so humiliated that they committed suicide (Meyer, 2009). Jeffrey Johnston committed suicide in 2005 as a consequence of being cyber bullied, and his mother wrote of cyber bullying and her son the following:

> With the keyboard as his weapon, the bully violated the sanctity of my home and murdered my child just as surely as if he had crawled through a broken window and choked the life from Jeff with his bare hands. It was not a death that was quick and merciful. It was carried out with lies, rumors and calculated cruelty, portioned out day by day. (Make a Difference for Kids, 2008, para. 10)
The Need for a Uniform Standard for Analyzing Students’ Constitutional Right to Engage in Off-Campus Electronically Delivered Speech

In the absence of a uniform standard, school officials face a dilemma when attempting to protect children and school employees from the harmful effects of cyber bullying and cyber harassment. Some are reticent to act leaving the victims of these cyber attacks with only limited, time-consuming, and expensive civil or criminal remedies. Others over-react and run the risk of violating students’ First Amendment expression rights. A uniform standard not only will provide school officials with the authority to protect the learning environment from material and substantial disruptions, but it will also provide them with the authority to protect innocent children and school employees from the harmful effects of cyber bullying and cyber harassment. In addition, a uniform standard will provide notice and fair warning to the perpetrators of cyber bullying and cyber harassment that they do not have the right to bully and defame fellow classmates or school personnel with impunity.

Statement of the Problem

A review of federal and state court decisions shows that courts have applied inconsistent standards when determining the constitutional right of students to engage in electronically delivered, off-campus speech that ridicules, demeans, or even defames school authorities and other students. The inconsistency in court decisions has made it difficult for school officials to know the constitutional limits of their authority when they respond to student speech that attacks, demeans, or defames school personnel or other students using electronic media such as blogs, social networking web sites, e-mail, or students’ personal web pages.

The need for a detailed legal analysis of the court cases that have addressed the constitutional right of students to engage in electronically delivered, off-campus speech and to identify the various approaches courts have taken in deciding these cases led to the design of this
legal study. This analysis was needed for the construction of a clear and consistent constitutional standard for the courts to use that balances the constitutional right of students to engage in off-campus electronically delivered speech against the important interest of school authorities in protecting the rights of school personnel and students from electronically delivered student speech that is wounding, demoralizing, demeaning, or defamatory. The dissertation was used to answer: What standard should courts apply in cases of off-campus student cyber expression which will respect the First Amendment rights of students, yet allow school officials to exercise authority over expressions which substantially disrupt the learning environment or defame, harass and bully school personnel or other students?

Significance of the Study

This study contributed to a growing body of literature that concerns itself with the negative consequences of electronically delivered student speech used to attack school authorities or other students. The author used a review of existing court decisions and law review articles related to the authority of school officials to regulate electronic speech to develop a workable standard based on the language hinting at a court’s willingness to rule that students have no constitutional right to demean vulnerable students (Fossey, Eckes, & DeMitchell, 2009; Harper v. Poway Unified School District, 2006; Nuxoll v. Indian Prairie School District, 2008) nor the right to defame and humiliate school personnel (J. S. v. Bethlehem Area School District, 2000). Developing a concrete standard that school officials can uniformly enforce to protect the integrity of the learning environment from specific and limited types of off-campus student cyber expression was designed to reduce the confusion concerning the limits of school authority over students’ off-campus speech and as a result, to reduce the frequency with which the interests of the state collide with individual student rights.
Research Questions

The following research questions formed the focus of this study:

1. What has the U. S. Supreme Court said about the appropriate balance between students’ First Amendment expression rights and the interest of the state in maintaining and operating safe, orderly, efficient and effective learning environments?

2. What do the existing court decisions indicate about the balance between a student’s First Amendment right of expression and the authority of school officials to censor or punish off-campus speech?

3. How have courts ruled in cases involving student speech that is delivered electronically from off-school locations but is targeted at school authorities or other students for ridicule, abuse, bullying, humiliation, or defamation?

4. Based on a review of the legal literature and court decisions, what are the advantages and disadvantages of the standards recommended by other commentators and what should be the appropriate legal standard for determining the constitutional limits of school authorities to censor or punish students who engage in electronically delivered speech from off-campus locations?

Organization of the Chapters

Chapter I introduces the background, problem, and sociological context concerning the use of the Internet by school-aged children, the prevalence of cyber bullying and its impact on victims. In addition, Chapter I includes the research methodology used to locate all relevant court decisions and other legal commentary.

Chapter II examines the legal landscape of student expression rights by focusing on the U. S. Supreme Court decisions that address traditional student speech issues and the manner in which these decisions may or may not apply to off-campus electronic expression. Included in
Chapter II is a discourse of several collateral, yet relevant legal concepts, including a discussion of the limits of First Amendment expression rights, a review of how courts have addressed earlier forms of off-campus expression, and an examination of the legal parameters of defamation and sexual harassment.

Chapter III analyzes the state and lower federal court decisions through which student cyber speech issues and the limits of school authority to regulate off-campus electronic expression have been examined. This chapter includes a framework where factual comparisons of each case are analyzed in an attempt to clarify what appears to be a collection of contradictory holdings.

Chapter IV examines the tests other authors have proposed for how administrators and courts should handle off-campus student cyber speech. Chapter IV includes additional considerations and recommendations concerning the application of Tinker’s second prong and this author’s recommended standard as to how administrators and courts should address the growing problems of cyber bullying and cyber harassment.

Chapter V includes concluding remarks and caveats relevant to future attempts at addressing the growing problem of cyber bullying and cyber harassment. Recommendations are provided for policy construction, and a prediction is made concerning how the current Supreme Court might rule on cases involving students’ off-campus cyber expression rights.

Sociological Context

Arthur Miller, a noted professor at New York University School of Law, has discussed the appropriate way to conduct legal research. The first, and perhaps most important, step in the process, according to Miller, is to clearly understand the nature and extent of the legal problem (West & Miller, 2008). Given this advice, examining the existing literature on the prevalence of
cyber bullying, the forms it can take, and the manner in which cyber bullying impacts victims is necessary. This review examines the connection between off-campus student cyber speech and potential disruptions to the school environment or interference with the rights of other students and school personnel. How have advances in electronic communication changed the balance between individual rights and the interest of the state to maintain safe, orderly, efficient, and effective learning institutions? As a result of these technological advances, children now have the ability to disrupt school operations and harass fellow classmates and school personnel with a click of a mouse in the most public of forums.

The Internet is ubiquitous and used by billions of people worldwide every day. According to Internet World Stats (2010), 1.96 billion people out the 6.84 billion people on this planet use the Internet every day. The Internet has revolutionized the world and enriched people’s lives in incredible ways with new applications being developed all the time. The Internet is one of the most transformative technological innovations in the history of the human race. People now have most of the accumulated knowledge of the world at their fingertips and can communicate with other people on the opposite side of the world instantaneously. Hundreds of millions of people shop using the Internet daily. Businesses that once viewed the Internet as a threat now embrace the advantages of a connected marketplace. Almost every competitive business uses the Internet and other electronic media to sell products, to communicate internally and externally, and to ship and track inventory. Internet-based retailers have flooded the marketplace providing considerable competition and choice resulting in lower prices which benefit the consumer. Financial services have changed as individuals can buy and sell stocks and commodities online and manage their own accounts. Travel agencies are virtually a thing of the past as people now have the ability to
purchase airline tickets, make hotel reservations and rental car arrangements from the convenience of their own desk (CNN International, 2006).

The Internet is changing the education profession on several levels from credit recovery programs to in-class instruction. Millions of people are continuing their education by getting college and graduate degrees from online universities (Fox, 2008). E-mails and other forms of electronic communication have made the post office almost obsolete. More and more people turn to the Internet for news coverage, and as such, print media and even network television have been slowly dying (Fox, 2008). The Internet has even changed the way people interact socially. Social networking sites, such as Facebook and MySpace, have become extremely popular. According to Starrett (2009), in a recent Harvard poll, 75% of college students reported having Facebook accounts, and most of the students reported checking their Facebook pages every day. Hardmeier (2005), in a column on the 10th anniversary of the launch of Internet Explorer, stated:

“The Web” is now so popular it has permeated our everyday life, changing how we stay in touch, share information, complete chores, and even earn an income. A whole new industry has sprung up dedicated to providing new ways to improve productivity, in the process changing how we communicate and allowing us to fit ever more into our ever busier lives. (p. 1)

Despite the enumerated positive characteristics of the Internet and all the fantastic applications yet to be developed, it, like most other transformative innovations, has the potential for misuse. The same tool that serves as a source of knowledge and cultural awareness leaves users vulnerable to exploitation. Sadly, the Internet is the location of thousands of crimes every day, and the number of victims is increasing at a rapid rate (Internet Crime Complaint Center, 2009). Many are crimes of moral turpitude involving fraud and deceit, including identity theft,
but some are even more serious. Social sites provide prime hunting grounds for child predators. Finkelhor, Mitchell, and Wolak (2006) estimated that 1 out of 7 children who use the Internet regularly have been solicited sexually online, 1 out of 3 have seen sexually inappropriate material, and almost 1 out of 25 have received requests to meet in person with someone holding sexual intentions.

The Internet and other forms of electronic communication also provide an efficient, effective means for one person to maliciously threaten, defame, bully and harass another. Students now have the ability to publish their criticisms and opinions online with instantaneous reach to everyone in the world with Internet access. Students can send instant messages to classmates that are filled with abusive words or images. According to Cyber Bully Alert (2008), an Internet watchdog organization, 40% of all teenagers who use the Internet have been bullied in the last year. Only 10% of the teenagers who are bullied ever report the bullying to an adult, and, when adults are notified, only about 20% of the cases are investigated. I-Safe (2004), a leading publisher in media literacy and digital citizenship, conducted a survey of 1,500 students enrolled in the fourth through the eighth grades nationwide and found that 58% reported that someone was responsible for posting something mean about them online and 53% admitted to saying mean things about other children online. The incidence of cyber bullying is also on the rise. According to Cyber Bully Alert, in 2000, only 9% of students aged 10 to 17 years had been cyber bullied. By 2008, that percentage had increased to 50% (Cyber Bully Alert, 2008).

As long as schools have existed so have bullies, but the use of electronic media to intimidate, harass, and inflict monetary, psychological, or emotional harm to others has added a whole new dimension of anonymous aggression and hostility. Erb (2008) argued that cyber bullying has a greater impact than traditional bullying given the fact that hurtful comments
posted on the Internet are more public than traditional face-to-face bullying and that electronic communication devices allow for continual harassment. Beckstrom (2008) described cyber bullying as:

The use of information and communication technologies such as e-mail, cell phone, and pager text messages, instant messaging, defamatory personal Web sites and defamatory personal polling Web sites to support deliberate, repeated and hostile behavior by an individual or group, that is intended to harm others. (p. 3)

Internet use by teenagers continues to increase. Computer savvy students can attack their peers from long distances under the cover of pseudonyms. Internet anonymity emboldens cyber bullies to post online comments that they would never have the courage to say to the face of their victims. In some respects, this newer electronic form of bullying has generated more invasive tactics than traditional face-to-face bullying and has produced highly destructive and tragic consequences.

Patchin and Hinduja (2006) defined cyber bullying as “willful and repeated harm inflicted through the medium of electronic text” (p. 149). If the victim is a minor, the crime is known as cyber bullying. If the victim is an adult, the crime is called cyber harassment. Patchin and Hinduja (2006) studied 384 responses from students 17 years of age and younger and found that 30% of the students who responded reported being victims of cyber bullying. Almost 32% of these students reported that the repercussions of the bullying impacted them in the school setting. Patchin and Hinduja (2007) showed cyber bullying to be linked to several maladaptive behaviors both in victims as well as the perpetrators. Patchin and Hinduja (2007) asserted that the real consequences to cyber bullying included academic problems and social delinquency. According to Patchin and Hinduja (2007), cyber bullying “has real implications for adolescent development,
and…parents, teachers, and other stakeholders must be proactive in addressing this form of aggression so that it does not adversely impact the long-term trajectory of youth” (p. 107).

The consequences of cyber bullying can be tragic. Many people are familiar with the widely publicized story of Megan Meier, a 13-year old girl who committed suicide after receiving malicious and insulting messages from a woman posing as a 16-year-old boy. The woman was the mother of one of Megan’s former friends (Magg, 2007). While Megan’s story is shocking, the event was not isolated. Carl Joseph Walker-Hoover was an 11 year old ridiculed by classmates for the way he dressed, because they said he acted like a girl. He hanged himself with an electrical cord at his home, leaving behind a note in which he told his family that he loved them and gave his Pokémon games and cards to his 6-year-old brother (Vaznis, 2009). Ryan Patrick Halligan was bullied and torment ed over the course of several years due to learning and motor disabilities. He made the mistake of telling one of his classmates about a medical checkup that included a rectal exam. The classmate misrepresented the description of the exam and posted the story online, which added to the already unacceptable level of bullying that Ryan had endured. Before long, many of Ryan’s classmates began taunting him about being gay. One of Ryan’s female classmates acted as if she liked him and tricked him into sharing personal and embarrassing information. The female student then posted this information online for all of Ryan’s classmates to see. Ultimately, Ryan could no longer take the public humiliation, and he took his own life (Halligan, 2009). Recently, Phoebe Prince, a 15-year-old transfer student from Ireland, committed suicide after being cyber bullied through text messages and social networking sites. Bullying Phoebe Prince online was not enough for the cyber bullies who continued to post offensive and insulting comments on her memorial web page after her tragic death (Kotz, 2010).

In response to tragedies such as these, the federal government and many state
governments have enacted legislation to criminalize cyber bullying and cyber harassment. In 1996, Congress passed the Internet Stalking statute, 18 U.S.C. §2261A, which criminalized using the postal mail or Internet to harass, intimidate, or cause substantial emotional distress to another person or put the victim in reasonable fear of death or serious harm, including a member of the victim’s immediate family or spouse. The statute was designed to address issues related to stalking, but according to Brenner and Renberg (2009), the emotional distress portion could be applicable to cases of cyber bullying. When students use the Internet or some other form of electronic media to bully, harass, or intimidate fellow classmates or school personnel, they violate statute 18 U.S.C. § 2261A.

According to Vaznis (2009), 37 states, at the time of publication, had passed bullying prevention statutes of some form, but these statutes varied considerably in the power they granted authorities desiring to punish unprotected speech published electronically. Zande (2009) reviewed state anti-bullying statutes and found that only nine states have enacted statutes granting adequate and sufficient authority for school officials to address the growing cyber bullying problem. Willard (2008) reported that many state legislatures require school districts to include cyber bullying in their bullying prevention policies, but the American Civil Liberties Union (ACLU) has been fighting to restrict school administrators from responding to speech generated off campus that is harmful or disruptive. Beckstrom (2008) noted, at the time of publication, that nine states had enacted statutes that require school districts to include policies which are aimed at reducing the incidence of cyber bullying. As of the spring of 2008, those states include: Arkansas, Delaware, Iowa, Minnesota, Nebraska, New Jersey, Oregon, South Carolina, and Washington. In addition, Idaho, Maryland, Missouri, New York, Rhode Island, and Vermont had some type of statute related to the issue of cyber bullying (USA Today, 2008).
According to Nies, James, and Netter (2010), 41 states and the District of Columbia have passed anti-bullying measures, and 23 have statutes specifically addressing cyber bullying.

Brief Overview of Methodology

This dissertation involved the use of legal research as the means to answer the research questions. Legal research uses the methods by which judges, attorneys, and legal scholars analyze legal issues and answer legal questions. In utilizing legal research methodology, this researcher followed in the path of others who used legal research to answer research questions about educator liability in tort cases (Carman, 2009; Carman & Fossey, 2009; Lacefield, 2009).

This dissertation focused on published court decisions which involved an analysis of the constitutional right of public school students to express themselves through electronically delivered speech, usually from off-campus locations. As explained more fully in Chapter II, the Supreme Court first recognized the First Amendment rights of students in public schools in the landmark decision of Tinker v. Des Moines Independent School District (1969). The Tinker decision has been cited in almost 700 cases in which schools have been named parties, and the case appears in the titles of more than 60 law review and legal journal articles and as an important focus in other law articles and professional articles examining the First Amendment rights of students in the schools (Fossey et al., 2006; Fossey & DeMitchell, 2006, 2007; Fossey et al., in press).

Initially, specific secondary sources were selected to identify potentially relevant cases and to identify appropriate terminology for the subsequent use in computer based searches: American Public School Law (Alexander & Alexander, 2009), School Law for K-12 Educators (Aquila, 2008), and The Educator’s Guide to Texas School Law (Walsh, Kemerer, & Maniotis, 2005). American Public School Law by Alexander and Alexander (2009) included a chapter on
students’ rights which focused on students’ right of speech, expression, and privacy. This chapter included edited versions of all four Supreme Court cases dealing with student expression issues as well as a section dedicated to the Internet and free speech. Alexander and Alexander (2009) included edited versions of Wisniewski v. Board of Education of the Weedsport Central School District (2007), a Second Circuit Court case upholding the authority of school officials to punish off-campus electronic expressions in limited circumstances, and Beussink v. Woodland R-IV School District (1998), a federal district court case from Missouri, in which the court ruled in favor of a student who was disciplined by school officials for creating and posting a web site from home that offered highly critical comments about school officials and included vulgar language to describe the teachers and principal. School Law for K-12 Educators (2008) included a chapter on school violence and Internet issues, but the information was limited and only made reference to one lower court case dealing with the limits of school authority to punish or suppress off-campus Internet expression. Aquila’s School Law for K-12 Educators did include, however, a discussion of the four Supreme Court cases dealing with student expression but on a somewhat superficial level. Walsh et al.’s (2005) The Educator’s Guide to Texas School Law has been one of the most widely respected sources on school law issues in Texas and contained several sections discussing the legal issues related to computer and Internet use by students both on and off campus. However, the date of publication was a limiting factor, as several recent cases had yet to be adjudicated, notably, Wisniewski v. Board of Education (2007), Doninger v. Niehoff (2008), Layshock v. Hermitage School District (2007), and Morse v. Frederick (2007).

In the present study, the terminology used to frame and describe the issues discussed in the secondary sources was incorporated into Boolean searches using Lexis/Nexis Academic database accessed via the University of North Texas library home page. Boolean searches allow
researchers to combine words, phrases, and other terminology using connectors to define, expand, or narrow searches. Specifically, this researcher combined the terms “off campus” and “on campus” and “speech” and “Internet” and entered these terms into the general tab of the Lexis/Nexis search engine with the Major United States and World Publications, Web Publications, and Legal boxes checked. The search produced 844 articles sorted by relevance. The researcher reviewed the title, publishing institution, date, and summary of the first 200 articles and selected approximately 12 law review articles directly related to the issues associated with this dissertation. From this initial inspection, it was clear that the relevant articles were primarily limited to the 50 most recent listings. The search criterion was refined by adding the search term “student.” This refinement reduced the list to 647 articles. Again, the researcher reviewed the title, publishing institution, and date of the first 200 articles and found approximately 10 more articles directly related to the research questions.

The law review articles and journal publications identified as relevant were read, summarized, and divided into three categories: (a) decisions strongly in favor of protecting student First Amendment rights, (b) decisions recognizing the limited circumstances under which school officials would be authorized to interfere with this fundamental right, and (c) decisions arguing for more school authority to combat the hurtful and destructive impact of cyber bullying. The names of the cases identified and analyzed in each law review article were entered into the Lexis/Nexis search engine under both the general and legal tabs, which produced additional secondary sources from law reviews and journal articles in addition to decisions by the courts about the respective cases. The cases were divided into those ruling in favor of students or in favor of school districts. The Lexis/Nexis database, through specific Boolean searches, was used to identify all relevant cases and secondary sources to produce a thorough and expansive
examination of the issues and to adequately answer each and every research question.

Several additional Boolean searches were conducted using different words and terminology. These terms included “off” and “campus” and “student” and “expression” and “student” and “first” and “amendment” and “rights.” With each subsequent search, it became clear that the same law review articles and cases were identified. The search ended when all of the relevant information and documentation being identified, the data were saturated. As a final check to ensure the identification of the relevant articles and cases, each case was entered in the search tab “look up a legal case” in the Lexis/Nexis search engine. Once the respective case appeared in the search engine window, it was shepardized. Shepardizing a case enables a researcher to identify all subsequent citations associated with the particular case including all subsequent cases, law review articles, state and federal statutes, legal treatises, and other court documents. Upon shepardizing each identified case, it became clear that the previous research efforts identified all relevant cases and other articles as the same citations continued to appear.

To develop a clear understanding of the nature and the extent of the problems with cyber bullying and cyber harassment, the researcher entered the terms “cyber bullying” and “cyber harassment” into a Google search. This search enabled the researcher to identify several web sites dedicated to monitoring and reducing the incidence of cyber bullying and cyber harassment. Many of these web sites contained links to the work of other organizations and researchers concerned about the growing problem of cyber bullying. Additional search terms were utilized in various combinations and included “cyber bullying,” “teen suicide,” “student first amendment rights,” “free speech,” and “Internet.” These searches were used to identify several organizations dedicated to monitoring and protecting student expression rights such as the First Amendment Center, Association for Supervision and Curriculum Development, Cyber Bullying Research
Center, and the Student Press Law Center. In addition, dozens of articles from universities’ web sites and other print media which discussed the growing problems related to cyber bullying and balancing between students’ First Amendment rights and the interest of the state to maintain effective learning environments were identified.

Legal cases were selected purposefully based upon the presence of issues related to student expression rights. These cases were classified into one of three categories: (a) Supreme Court cases dealing with student First Amendment expression rights, (b) circuit and district level cases dealing with the conditions under which school officials may have the authority to punish off-campus cyber speech, and (c) cases dealing with off-campus expression prior to the use of the Internet and other forms of electronic communication.

One final, yet significant, finding from the methods used to research this issue involved a search for the terms “cyber bullying,” “cyber speech,” and “bullying.” I identified only one case where school officials were sued for punishing a child’s off-campus cyber speech involving the cyber bullying of a classmate (*J. C. v. Beverly Hills Unified School District*, 2010). Every other case identified through this research methodology involved students’ off-campus cyber speech which was either critical of school officials, personnel, or both, or cyber speech containing potentially threatening language.
CHAPTER II
REVIEW OF LITERATURE

As explained in Chapter I, this dissertation was used to analyze all the published court decisions regarding the constitutional right of public-school students to engage in electronically delivered off-campus speech. The analysis, contained in Chapter III, showed that the courts have issued conflicting opinions on this issue and that school authorities remain in need of a clear constitutional standard for determining their authority to discipline students who engage in such speech when that speech demeans or denigrates a school official or another student.

Before undertaking this analysis, it was appropriate to review federal case law addressing the limitations on First Amendment rights of expression and the First Amendment rights of students in the public schools. This chapter constitutes that review. The chapter begins with a review of cases clearly articulating that freedom of expression is not an absolute right followed by an analysis of the four United States Supreme Court opinions regarding the First Amendment rights of students in the public schools. Although these four cases provide guidance about the constitutional rights of students in the school environment, none of them deal with the First Amendment rights of students to engage in off-campus speech.

Following a review of the four Supreme Court cases on students’ free speech, the review examined the lower courts’ holdings regarding the constitutional rights of students to engage in off-campus free speech that did not involve electronic delivery. As explained below, several of these cases involved the authority of school officials to discipline students who published off-campus, underground newspapers critical of school operations. In general, these cases severely restricted the power of school officials to punish students for engaging in off-campus speech.
unless it had been shown that the speech disrupted the school environment or had the potential for doing so.

This chapter concludes with some additional justifications for giving school officials the authority to regulate students’ off-campus speech, particularly electronically delivered speech. In this section, the researcher argued that school authorities have an interest in preventing students from defaming other students or individual school employees and that this interest is heightened when the defamatory speech is delivered electronically via a blog, social networking web site, e-mail, or a student’s personal web site. In addition, the schools have a legal duty to prevent students from bullying one another or engaging in sexual harassment, which justifies giving them the authority to censor students’ off-campus, electronically delivered speech intended to harass or bully fellow students.

Limitations on First Amendment Expression Rights

This chapter is primarily a review of students’ constitutional right to expression as articulated by the courts, however, it is worth noting that courts have recognized limits on the First Amendment rights of adults, and these limits apply to students as well. Freedom of expression is not absolute; it is a qualified right that must be subordinated under certain limited circumstances. In Chaplinsky v. New Hampshire (1942), the Supreme Court wrote, “it is well understood that the right of free speech is not absolute at all times and under all circumstances” (p. 571). In Cox v. Louisiana (1965), the Supreme Court ruled in favor of peaceful demonstrators, but acknowledged that freedom of expression is a qualified right. The Court noted that the notion of free speech does not mean that anyone with an idea or opinion has the right to address groups of people at public events whenever they want. In Cornelius v. NAACP Legal Def. and Educ. Fund, Inc. (1985), the Supreme Court stated:
Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker’s activities. (p. 799)

The government can suppress speech that represents a clear and present danger (Schenck v. United States, 1919). Obscenities are not protected speech under the First Amendment (Miller v. California, 1973; Roth v. United States, 1957). An individual has no First Amendment right to incite riots or make terroristic threats (Doe v. Pulaski County Special School District, 2002; Lovell v. Poway Unified School District, 1996). One cannot defame the character of another and expect First Amendment protection (New York Times v Sullivan, 1964). One cannot use fighting words, which are defined as those designed to inflict injury or tend to incite an immediate breach of the peace (Chaplinsky v. New Hampshire, 1942). Depending on the context, racial epithets and hate speech are not protected when such speech threatens a particular individual (Virginia v. Black, 2003). Justice Murphy, who wrote the majority opinion in Chaplinsky v. New Hampshire (1942), stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or ‘fighting’ words, those by which their very utterance inflict injury or tend to incite an immediate breach of the peace. (p. 572)

Clearly the right of expression is not without limits. The operative inquiry for the purpose of this dissertation was, therefore, how these limits should be defined for public school children, and what role, if any, school officials should play in the enforcement of these limitations?
Any examination of a public-school student’s constitutional right to freedom of expression must begin with an analysis of four cases decided by the Supreme Court dealing specifically with the proper balance between students’ First Amendment expression rights and the need for efficient and effective school operations. The four cases were: *Tinker v. Des Moines Independent Community School District* (1969); *Bethel School District No. 403 v. Fraser* (1986); *Hazelwood School District v. Kuhlmeier* (1988); and *Morse v. Fredrick* (2007). Even though the Internet was not used for student expression in any of these cases, and each case involved on-campus speech, their results guide almost every student expression case that has arisen in recent years. In fact, virtually every law review and journal article addressing student expression issues has begun with analyses and attempted applications of these four Supreme Court cases.

*Tinker v. Des Moines Independent Community School District*

The first and most notable Supreme Court case dealing with student expression rights was *Tinker v. Des Moines Independent Community School District* (1969). McCarthy (2009) referred to Tinker as the “Magna Carta of students’ expression rights” (p. 1). Calvert (2009a) described Tinker as a “bulwark against the censorial proclivities of school officials” (p. 3). LoMonte (2009), despite arguing for greater First Amendment protection for students, acknowledged that every single student expression case since 1969 has cited Tinker and none have overturned its holding. LoMonte (2009) called *Tinker* the standard by which almost all other student speech cases are measured. The operative question is the breadth of Tinker’s control: can school officials rely on Tinker to punish off-campus speech that “materially and substantially interferes with the requirements of appropriate discipline in the operation of the schools or collides with the rights of others” (*Tinker v. Des Moines Independent Community School District*...
What is clear from subsequent case history is that Tinker represents the most permissive recognition of student expression rights, and since its ruling, courts have retreated to a position which, by necessity, affords more authority to school officials (Calvert, 2009a; Williams, 2008; Wolking, 2008).

In Tinker (1969), a handful of students, mostly from the same family, decided to wear black arm bands to school as a means of silent, non-disruptive, symbolic protest against the Vietnam War. When school officials learned of the plans to wear the armbands, they decided that any students who came to school wearing an armband would be asked to remove it, and if the students refused, they would be suspended until they returned to campus without the armband. When a few students came to school wearing the armbands, they were suspended. The parents subsequently filed suit seeking damages under 42 U.S.C. §1983 and an injunction claiming that the actions of school officials violated the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

At first glance, it would appear that Tinker (1969) represented a sweeping victory for freedom of expression proponents due to the fact that the Court held unconstitutional the school’s decision to suspend the students. For the first time, the U. S. Supreme Court recognized that students and teachers retain some constitutional rights while at school and school-related events. Justice Fortas, who wrote the majority opinion, used strong language supporting student expression rights. Fortas began by asserting that the armbands, under scrutiny in the present case, were akin to pure speech, which the Court had consistently held to be entitled to broad First Amendment protection. Fortas then noted that for more than 50 years, the Supreme Court had recognized that “it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” (Tinker v. Des Moines School District, 1969, p. 512).
Considering these factors, the Tinker (1969) Court concluded that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression” (p. 508) and “in order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” (p. 509). The Court recognized that the students’ actions, in this case, did “not concern speech or actions that intrudes upon the work of the schools or the rights of other students” (p. 505). If the students’ speech had intruded upon the work of the school or interfered with the rights of others, their speech would not have been protected. Nevertheless, Tinker clearly established that “in our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students” (*Tinker v. Des Moines Independent Community School District*, 1969, p. 506).

Despite this apparent victory for the advocates of student speech rights, the Tinker (1969) Court clearly recognized the authority of school officials in limited circumstances to punish and even suppress student speech whether it occurs on or off campus. Justice Fortas, citing *Blackwell v. Issaquena County Board of Education* (1966) stated:

Conduct by the students in class or out of it, which for any reason -- whether it stems from time, place or type of behavior -- materially disrupts classwork, or involves substantial disorder, or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. (*Tinker v. Des Moines Independent Community School District*, 1969, p. 513)

The Court in Tinker was bitterly divided, and Justice Black wrote a scathing dissent in which he
said, among other provocative sentiments, that the Tinker decision was “the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary” (*Tinker v. Des Moines Independent Community School District*, 1969, p. 513). Black went on to state:

This case therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest students…I wish therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents and elected school officials to surrender control of the American public school system to public school students. I dissent. (*Tinker v. Des Moines Independent Community School District*, 1969, p. 513)

Clearly the Tinker (1969) decision, while recognizing that students still have constitutional rights, supported the need for school officials to maintain order and discipline and to protect the rights of others. The language of the Court was clear and unequivocating. Furthermore, school officials do not have to wait for disruption to occur; they can suppress the expression before it is even uttered if they can articulate objective facts which would lead the reasonable person to believe that a substantial or material disruption is foreseeable (*Guzick v. Drebus*, 1970).

The nature and content of the speech the Supreme Court protected in Tinker (1969) occurred during a time of cultural transformation. A small number of students had worn simple armbands to silently and peacefully demonstrate their disapproval of a controversial war. Their speech was symbolic. The speech was not disruptive, vulgar, lewd, obscene, defamatory, or threatening. Tinker remains the most significant and substantive student expression case to date and provides the standard by which almost all student expression cases are analyzed. Not only
did the Court formally recognize expression rights of public school students, but it also recognized that schools officials must have the authority to punish or suppress speech when such speech poses a likelihood of a material or substantial disruption in the school environment or interferes with the rights other students. According to Calvert (2009a), Tinker was the Supreme Court’s high water mark in the recognition of students’ First Amendment rights, but Calvert found subsequent Supreme Court cases to “chip away at Tinker’s foundation” (p. 3). Subsequent cases have made it clear that Tinker’s substantial disruption test is not the only standard under which school officials can restrict or punish student speech (Bethel School District No. 403 v. Fraser, 1986; Hazelwood School District v. Kuhlmeier, 1988; Morse V. Fredrick, 2007).

Approximately 40 years after Tinker, three additional cases adjudicated by the Supreme Court concerned the proper balance between students’ First Amendment expression rights and the need for school authorities to maintain safe, orderly, efficient, and effective learning environments and to protect the rights of others.

**Bethel School District No. 403 v. Fraser**

In **Bethel School District No. 403 v. Fraser** (1986), the Supreme Court limited student expression by holding that school authorities did not violate the student’s First Amendment expression rights when they punished Fraser, a high school senior, for giving a lewd and sexually explicit nominating speech at a school assembly. Fraser argued that his speech should be given the same protection as the black armbands in Tinker, but the Supreme Court disagreed, noting that vulgar and lewd speech does not garner the same protection as symbolic, political speech. The Court in Fraser recognized that schools teach more than just the academic curriculum by stating:

> It is a highly appropriate function of public school education to prohibit the use of vulgar
and offensive terms in public discourse. Nothing in the Constitution prohibits the states
from insisting that certain modes of expression are inappropriate and subject to sanctions.

*(Bethel School District No. 403 v. Fraser, 1986, p. 676)*

The Supreme Court in Fraser (1986) stated quite reasonably that “the undoubted freedom
to advocate unpopular and controversial views in schools and classrooms must be balanced
against the society’s countervailing interest in teaching students the boundaries of socially
appropriate behavior” (p. 679). Justice Burger, who wrote the Court’s majority opinion, noted
that even in the halls of Congress, where heated political debates occur regularly, rules are in
place to prohibit offensive expressions. “Can it be that what is proscribed in the halls of
Congress is beyond the reach of school officials to regulate” (*Bethel School District No. 403 v.
Fraser*, 1986, p. 680)? Through this language, the Supreme Court recognized the need for
schools to teach children the limits and parameters of socially appropriate speech.

In Tinker (1969), Justice Black wrote a scathing dissent in which he blasted the majority
for ushering in “a new era in which the power to control pupils by the elected officials of state
supported public schools in the United States is in ultimate effect transferred to the Supreme
Court” (p. 514). Justice Burger, in Fraser (1986), appeared to take pleasure in referencing
Black’s dissent as support for the Court’s holding. Fraser (1986) was the first step back from the
permissive holding of Tinker. Fraser (1986) afforded school officials the authority to punish
students who use lewd, vulgar, or obscene forms of expression while on campus or while
attending school-related events, but the Court’s holding is largely limited by geographic location.
Attempts to apply the holding of Fraser (1986) to off-campus expression have, in almost every
case, proved unsuccessful. Most courts considering the possible application of Fraser’s holding
to cases involving off-campus student expression reference Justice Brennan, who wrote in his
concurring opinion, “if respondent gave the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate” (Bethel School District No. 403 v. Fraser, 1986, p. 683). Despite this widely cited passage, students can and have been penalized when the government can show that their language posed a true threat to others (Doe v. Pulaski County Special School District, 2002; LaVine v. Blaine School District, 2001), produced a substantial or material disruption on campus (J. S. v. Bethlehem Area School District, 2000; Wisniewski v. Board of Education of the Weedsport Central School District, 2007), or interfered with the rights of others (Harper v. Poway Unified School District, 2006).

Hazelwood School District v. Kuhlmeier

The balance between students’ First Amendment expression rights and the interest of the state to maintain safe, orderly, efficient, and effective public schools was further clarified by the case of Hazelwood School District v. Kuhlmeier (1988), in which the Supreme Court recognized that school officials retain some editorial control over school-sponsored publications. In Hazelwood, a high school principal was concerned about two articles scheduled to appear in Spectrum, the school newspaper, one dealing with teenage pregnancy and the other dealing with the impact of divorce on students at school. With time running out in the school year and the principal working with a new journalism teacher, the principal ordered the last edition of the Spectrum to be printed with the two pages that contained the articles in question removed. The article on teenage pregnancy contained references to sexual activity and the use of birth control, which, in the principal’s opinion, may not have been appropriate for younger students. The article on divorce had inflammatory and critical quotes from students about parents without obtaining the consent of the parents or giving the parents a chance to respond. The respondents
were three former high school students, who filed suit for injunctive relief and monetary damages and claimed the school had violated their First Amendment expression rights.

The first issue the Court addressed in *Hazelwood School District v. Kuhlmeier* (1988) was whether or not public schools are public forums. The Court cited *Perry Education Association v. Perry Local Educators’ Assn.* (1983) and a note from *Widmar v. Vincent* (1981) to argue that public schools do not share the same characteristics and attributes as traditional public forums, and as a result, public schools are not public forums unless school authorities have opened those facilities up to unbridled use by the general public. In *this* case, the publication of the school newspaper was closely tied to the adopted curriculum, and by policy and practice, the school controlled every aspect of its publication and dissemination. It was a “supervised learning experience for journalism students” (*Hazelwood School District v. Kuhlmeier*, 1988, p. 266). *Spectrum* was not a public forum available for unbridled public use. It was a school sponsored publication.

Justice White, writing for the majority, stated that school officials are entitled to exercise editorial control over school-sponsored publications and other expressive activities such as theatrical productions when members of the public could reasonably conclude that the expression in question appears to “bear the imprimatur of the school” (*Hazelwood School District v. Kuhlmeier*, 1988, p. 266). “A school must be able to set high standards for the student speech that is disseminated under its auspices…and take into account the emotional maturity of the audience” (*Hazelwood School District v. Kuhlmeier*, 1988, p. 266). Interestingly enough, Justice White went on to say that school officials must retain authority to suppress student speech that might reasonably be perceived to advocate drug or alcohol use, which became the factual context of *Morse v. Frederick* (2007); irresponsible sexual activity, which became the factual context in
Caudillo v. Lubbock Independent School District (2004); or conduct otherwise contradictory to the essential values of a civilized society, which represented the holding from Bethel School District No. 403 v. Fraser (1986). In holding in favor of school officials, Justice White wrote “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns” (Hazelwood School District v. Kuhlmeier, 1988, p. 267).

Hazelwood (1988) has not been applied to off-campus Internet speech cases given the fact that the holding only recognized the authority of school officials over speech which falls within the imprimatur of the school district. In a vast majority of cases, off-campus student expressive activities do not fall within the imprimatur of the schools.

Morse v. Frederick

Recently, the Supreme Court had the opportunity to revisit the balance between students’ First Amendment expression rights and the interest of the state in maintaining safe, orderly, efficient, and effective public schools when it heard Morse v. Frederick (2007). Joseph Frederick, a student at Juneau-Douglas High School, and some of his friends unfurled a 14-foot banner at a school-supervised event which read “Bong Hits 4 Jesus.” Upon seeing the banner, Principal Morse, believing it displayed a message which promoted drug use in violation of local board policy as well as the Safe and Drug Free Schools and Communities Act of 1994, approached the boys and demanded that the banner be taken down. All complied except Joseph, who was subsequently taken to the office and suspended for 10 days. In its analysis, the Court reviewed Tinker, Fraser, and Hazelwood, but decided that none of these cases fit the factual scenario of Morse. The Court eventually held “that schools may take steps to safeguard those
entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use” (*Morse v. Frederick*, 2007, p. 2619).

The Morse Court (2007) relied on two points made in Fraser. Justice Roberts, who wrote the majority opinion, quoted Justice Burger by writing “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings” (*Morse v. Frederick*, 2007, p. 682). This was a clear indication that the Court recognized the special characteristics of the school setting. Second, the Court in Morse recognized that the ruling in Fraser did not limit the authority of school officials to the substantial disruption analysis of Tinker, thereby indicating that schools can exercise greater authority over student rights beyond the circumstances described by the Court in Tinker. In Morse, the Court recognized that schools have a compelling interest in deterring drug use and therefore can suppress and punish speech that encourages illegal drug use at any school-sponsored event. Of additional significance, Justice Thomas, in his concurring opinion, called for an end to the protection of student expression rights by stating that if given the chance he would “dispense with Tinker altogether” (*Morse v. Frederick*, 2007, p. 2636). Justice Thomas recognized the unique relational role played by public school officials and concluded “as originally understood, the Constitution does not afford students a right to free speech in public schools” (*Morse v. Frederick*, 2007, p. 2634).

Commentators argue that the holding in Morse opened a portal through which school officials could punish or suppress student speech in any circumstance where the safety of children may be in jeopardy (Negron, 2009; Reeves, 2008). Reeves (2008) suggested that the Morse decision created a new test that gives the government more power to suppress speech aimed at “preventing the evils that might be brought about by the speech” (p. 7). This assertion has some support. Negron (2009) wrote that Morse created a new avenue through which school
officials may regulate student speech when the welfare of students may be at stake. Negron further asserted that the student welfare standard has support when taking into account Tinker’s second prong as well as the language from Fraser. This justification is supported by McCarthy (2009) who asserted that lower courts may “expansively interpret” (p. 2) the holding in Morse to permit school officials to punish student expressions especially if the expression poses some danger to students or school officials. When a public-school student uses hurtful, malicious, and defamatory language which interferes with the rights of others and thereby places students at risk of losing access to educational opportunities, or undermines the professional effectiveness of school personnel, schools should have an affirmative duty to act.

The holding in Morse has been used to allow school officials to suppress and punish speech that threatens violence. In *Ponce v. Socorro* (2007), a student was disciplined for creating a detailed notebook that described how he was going to carry out a coordinated shooting spree at several schools. The court refused to apply the Tinker standard, arguing that the test was too difficult and time consuming to use in cases dealing with serious threats of violence. Instead, the court stated:

> School administrators must be permitted to react quickly and decisively to address a threat of physical violence against their students without worrying they will have to face years of litigation second guessing their judgment as to whether the threat posed a real risk of substantial disturbance. (*Ponce v. Socorro*, 2007, p. 772)

How far will the student danger test, generated as a result of the Morse decision and subsequent cases, allow school officials to go as they attempt to protect the safety and well-being of others? Will this test finally bring the second prong of Tinker to the attention of attorneys and judges who litigate these issues? How many more children will have to endure the public
humiliation and scorn associated with cyber bullying? How many more teachers and school officials will have to endure malicious and defamatory Internet postings only to see the perpetrators walk the school halls with impunity? How many more children will have to die before this sociotechnological issue is appropriately confronted?

The Application of These Supreme Court Cases to Off-Campus Student Speech

What should be clear from these four Supreme Court cases is the fact that all four cases dealt with student speech occurring on the school campus. Thus, these four cases gave no clear guidance regarding the authority of school officials to regulate or punish student speech taking place outside the school’s physical environment. In Fraser, however, Justice Brennan suggested in a concurring opinion that a school’s authority to regulate student speech off campus is severely restricted. Although Justice Brennan agreed with the majority opinion in that case that school officials can punish a student’s lewd and vulgar speech when it occurs on school grounds, Brennan asserted that school officials might not have the authority to punish the same speech if the student delivered it outside of the school environment. “If respondent gave the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate” (Bethel School District No. 403 v. Fraser, 1986, p. 683).

Can School Officials Regulate Off-Campus Student Activity?

Virtually every state has passed and codified statutes which provide school officials with some authority over off-campus student behavior, particularly if that behavior has the potential for adversely impacting the school environment. Most of these statutes mandate that children be removed to alternative educational facilities or expelled if there is reason to believe that they have committed certain crimes. The justification for this mandatory removal lies in the fact that these children’s continued presence on campus poses a substantial threat to the safety and well-
being of others. For example, the Connecticut General Statute § 10-233d(a)(2) (2001) mandates
the expulsion of a student whenever there is reason to believe that the student, while off campus,
illegally possessed a firearm, used a firearm in the commission of a crime, or manufactured or
sold a controlled substance. Idaho Code § 33-205 (2007) grants authority to districts to deny
enrollment to any student whose presence may pose a threat to the health and safety of other
committing a crime off campus that involves force if an adult could be charged with a felony or a
class A misdemeanor for the same crime. Texas Education Code Chapter 37.006 (2003) lists
numerous situations for which a student must be removed from campus or expelled based on
certain forms of off campus activity, including, but not limited to, the commission of a Title V
Felony and retaliation against a school employee.

What is clear from these statutes is that under limited circumstances the authority of
school officials extends beyond the schoolhouse gate. When the off-campus actions of students
threaten the safety or welfare of other students while on campus or pose a substantial likelihood
of a material disruption of school operations, the application of school authority is
constitutionally permissible. While each of the state statutes described appears to focus on
felonious, off-campus student activity, off-campus cyber expression can and has threatened the
safety and welfare of students and school personnel. These statutes authorizing schools the
authority to punish students for certain types of off-campus behavior seem consistent with the
holding in Tinker (1969). As Justice Fortas observed in Tinker:

Conduct by the students in class or out of it, which for any reason -- whether it
stems from time, place or type of behavior -- materially disrupts classwork, or
involves substantial disorder, or invasion of the rights of others is, of course, not

In most cases in which the courts have upheld the actions of school officials to regulate student off-campus expression, the courts have primarily relied on Tinker’s substantial disruption standard as a basis for their holding. As mentioned earlier, the Supreme Court’s holding in Morse has arguably opened an additional avenue for school officials to punish or suppress off-campus student expression if it poses a threat to student safety. The Court’s holding in Fraser, however, has only limited application, and to date, has not been directly referenced as the justification for any lower court holding involving off-campus speech. Finally, the Supreme Court’s ruling in Hazelwood appears to have no application to student off-campus expression since the decision was limited to school-sponsored publications or speech falling within the imprimatur of the school.

Off-Campus Student Expression not Involving the Internet or Other Forms of Electronic Communication

Prior to the explosion of the Internet, students, on occasion, would resort to other more traditional means of expressing their displeasure with school policies and personnel. Budding young journalists would occasionally establish newspapers that were not sanctioned or approved by school officials. These publications became known as *underground newspapers*. The Student Press Law Center (1998) defines an underground newspaper as “any type of student publication not affiliated with a school” (p. 1). The Student Press Law Center added that “the distinguishing feature of any underground paper is that it is produced apart from any course and without any school materials or other official assistance” (p. 1). Despite the obvious distinction between electronic cyber speech and underground newspapers, court decisions which have addressed the
latter might provide guidance in the analysis of the problems associated with cyber bullying and cyber harassment.

Most of the cases dealing with the First Amendment expressive rights of students have been fact specific, and as such, must be examined, to some extent, on an ad hoc basis. This being the case, any analysis in this arena should follow suit and examine the existence of specific facts and the impact of these facts on school operations, the rights of others, and the decisions of the courts. The Second Circuit Court in *Thomas v. Board of Education Granville Central School District* (1979) concurred with this assertion when noting that “these cases, therefore, are not easy of solution and much depends on the specific facts” (p. 1048).

In *Thomas*, the Second Circuit Court held that school officials exceeded their authority by suspending several students for the publication of an underground newspaper and used language which implied that school authority ends at the school-house gate. “Indeed our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself” (*Thomas v. Board of Education Granville Central School District*, 1979, p. 1055). In *Thomas*, school officials were attempting to punish students for publishing an underground newspaper that contained satires about school lunches, cheerleaders, and teachers and other articles dealing with prostitution and masturbation. The paper was published and distributed almost completely off campus, but despite the efforts of the students, a copy was found on campus and school officials ultimately issued a suspension. In overturning the suspensions, the court stated that "school officials ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith" (*Thomas v. Board of Education Granville Central School District*, 1979, p. 1051). Consequently, “when an educator seeks to extend his dominion beyond
these bounds; therefore, he must answer to the same constitutional commands that bind all other institutions of government” (*Thomas v. Board of Education Granville Central School District*, 1979, p. 1043).

The Thomas court made a concerted effort to classify the students’ publication as off-campus by stating that the students “worked exclusively in their homes, off campus and after school hours” (*Thomas v. Board of Education Granville Central School District*, 1979, p. 1044). However, this finding was inaccurate. In Thomas, some of the articles were written on school grounds, but after school hours, by students using school typewriters, and several copies of the final version were stored in one of the teacher’s closets, the same teacher who had offered editorial advice to the students. Although no threshold appears to exist which would represent a bright-line of demarcation between on-campus and off-campus expression, any attempt to assert that the expression of the students in Thomas represented off-campus expression was not supported by the facts of the case. This case has represents a perfect example of how student expression intended to remain off-campus can easily find its way onto campus, a circumstance only exacerbated by the advent of electronic communication devices such as the Internet and cell phones. In many cases, off-campus expressions carry over into on-campus discussions and altercations. This point is further supported by the fact that according to the court, the students took great precautions to keep the paper off campus, but despite their best efforts, copies ended up inside the school’s boundaries.

One important factor the court used to justify the decision to overturn the suspensions was that the initial reaction of school officials was to wait and see if any disruptions occurred (*Thomas v. Board of Education Granville Central School District*, 1979). The principal and the superintendent initially planned not to take any action due to the fact that school operations were
not disrupted. It was not until one of the school board members became aware of the paper that school officials were ordered by board members to respond.

From a review of the cases that have been decided in this context, the reaction of school officials appears to represent an important factor that courts take into consideration. Whenever it appears as though school officials overreact or equivocate, resulting in graduated or severe consequences, courts often view the overreaction negatively. The response of school officials may be an indication that what is driving the consequence faced by the students is not associated with a disruption of the school environment or an attempt to protect the rights of others, but the sentiments of a school official who might merely want to “avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” (Tinker v. Des Moines Independent Community School District, 1969, p. 509). If school officials in Thomas used as their justification Tinker’s substantial disruption standard, they lacked the capacity to articulate objective facts which would lead any reasonable person to believe that a substantial or material disruption had occurred or was imminent. Instead, school officials justified their actions by claiming that the paper contained content that was morally offensive, indecent, and obscene; language more aligned with the subsequent holding in Fraser.

The Thomas court acknowledged that school officials must have some latitude in punishing and prohibiting what is ordinarily protected speech, and the court cited Trachtman v. Anker (1978) to support this contention. In Trachtman, the Second Circuit Court upheld the actions of school officials when they refused to permit the distribution of a sexually explicit survey. Apparently, the Thomas court did not consider articles on prostitution and masturbation to be sexually explicit.

Several additional cases have been used to look at student off-campus expression rights

The Fifth Circuit Court in Shanley stated that the school board’s policy allowed school officials to exercise suzerainty over students’ rights of expression and thought, but this assertion is as overly broad as the policy the court overturned. The policy in Shanley was so broad that it would have given school officials the authority to suspend and even expel a student for distributing invitations to a birthday party without administrative approval. Clearly, the school board’s policy was *ultra vires*, meaning they acted beyond their authority, but this overbroad circumstance does not mean that school officials cannot implement anti-bullying and anti-harassment policies when these policies are clear, reasonable, and based upon the recognized limitations on First Amendment expression rights as fashioned by federal courts.

In *Burch v. Barker* (1988), seniors at Lindbergh High School distributed 350 copies of an underground newspaper entitled *Bad Astra* at a school-sponsored senior class barbeque. In addition, copies were placed in staff mailboxes. The paper included articles critical of school policies concerning student activities, the school’s attendance policy, as well as a teacher evaluation poll. The paper, however, did not include material which could be considered obscene, threatening, or defamatory. As far as underground papers go, *Bad Astra* was exceptionally mild. Nevertheless, since the students failed to follow the district approved policy
for the distribution of non-school sponsored publications, reprimands were placed in their files. The students were neither suspended nor expelled.

The parents, on behalf of their children, filed suit seeking the removal of the reprimands from the files. The Ninth Circuit Court ruled that the pre-distribution review policy was overly broad and afforded school officials unlimited power to punish and suppress protected speech. The court in Burch cited Hazelwood and concluded that since the publication at issue was in no way associated with the school, it could not be considered a school-sponsored publication. As a result, the publication fell outside the imprimatur of the school. The Ninth Circuit Court also applied the Tinker test and found no evidence that the publication interfered with either school operations or the rights of others, and as such, held that the policy violated the students’ First Amendment rights. The Burch court considered Tinker, Hazelwood, and Fraser, to be narrow, finite exceptions to student First Amendment expression rights. In the end, the court ruled that the prior review policy was unlimited in its scope, which made it unconstitutional. This holding relieved the court of the need to elaborate on the circumstances which would justify a prior review policy.

The only circuit court case to approve a district’s prior review policy over non-school sponsored publications was the Second Circuit Court in Eisner v. Stamford Board of Education (1971). The policy in Eisner stated:

No material shall be distributed which, either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others. (Eisner v. Stamford Board of Education, 1971, p. 805)

Judge Kaufman held that the school board’s express authority over school operations granted it
the power to “minimize or eliminate influences that would dilute or disrupt the effectiveness of
the educational process” (Eisner v. Stamford Board of Education, 1971, p. 807). The language
used in the school policy at issue in Eisner parallels Tinker’s first and second prongs.

Summary of Court Decisions on Students’ Right to Engage in Off-Campus Speech

Based on the review of cases dealing with underground newspapers, clearly some courts
have been willing to support the authority of school officials to regulate off-campus student
expression if school officials could show that the distribution of the publication could create a
substantial or material disruption of school operations, lead to violence on campus, or interfere
with the rights of others and that the policy in questions was not vague and overbroad (Burch v.
Barker, 1988; Eisner v. Stamford Board of Education, 1971; Riseman v. School Committee of
City of Quincy, (1971). Other courts, however, have considered off-campus expression to be off-
limits (Shanley v. Northeast Independent School District, 1972; Thomas v. Board of Education

Although cases dealing with underground newspapers are analogous in many respects to
current student cyber-expression cases, the holdings have been inconsistent and have provided
no clear standard regarding school officials’ authority to punish student speech that is
electronically delivered off campus. Most cases did not deal with the punishment of off-campus
expressions which interfered with school operations or the rights of others, but instead were
focused on censoring speech before it was uttered through predistribution policies. Prior restraint
of speech has been consistently looked at by the courts with a higher level of scrutiny.
Additionally, Tinker’s second prong, although referenced in a few cases, has never provided the
basis for any decisions as they related to off-campus expression.
Additional Justifications for Regulating Off-Campus Student Expression

Defamation

Defamation can be defined as written or spoken words “which tend to injure „reputation’ in the popular sense; to diminish the esteem, respect, goodwill, or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him” (Dobbs, Keeton, Keeton, Owen, & Prosser, 1984, p. 773). Defamation goes beyond legitimate criticisms, which focus on matters of public interest, into the realm of personal vilification. Defamation represents a personal attack, which includes a malicious purpose, to harm another’s reputation through the publication of lies or assertions of fact that represent a reckless disregard for the truth. Intentionally publishing defamatory information about another is an actionable offense. People have a fundamental right to protect their reputations. In *Milkovich v. Lorain Journal Company* (1990), Justice Rehnquist quoted Justice Stewart and wrote:

> The right of a man to the protection of his own reputation from unjustified invasions and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. (p. 4)

Applying the legal concept of defamation in the public school context requires the consideration of privileged communication, public official versus private citizen status, and malice.

Privileged Communication

The operation of public schools is a matter of considerable state interest, and those in the best position to monitor school operations are students and parents. Therefore, it makes sense that students and parents should possess some legally recognizable privilege to communicate legitimate concerns regarding school policy or practice (Alexander & Alexander, 2009). Orenstein (2005) pointed out that courts assign privilege to a publisher of information when
society’s need for protected disclosure outweighs the rights of the individual to protect their reputation. If this privilege is absolute, then the harmed individual has no means of redress even when the statements are false and made with the intent to harm the reputation of another. According to Orenstein, three states, California, Maryland, and New York, consistently extend an absolute privilege to students who bring complaints against teachers, leaving teachers exceedingly vulnerable to false claims. Orenstein asserted that students should be granted no more than a conditional or qualified privilege. A qualified or conditional privilege protects legitimate good faith claims of wrongdoing yet also enables victims of malicious assertions to protect their reputation. If a student posts speech on a social networking web site that a particular teacher is the worst teacher they have ever had, and bases this assertion on the teacher assigning worksheets every day and never answering student questions, this should be protected speech. However, if a student posts speech on a social networking web site that the particular teacher is a child molester or a drug addict, and posts pictures of the teacher in obscene, unflattering positions, the student loses this qualified privilege due to the malicious nature of their public Internet posting. This loss, of course, is assuming that the statements are not true due to the fact that truth is an absolute defense against suits for defamation (Restatement of the Law, Second, Torts, 2009).

Constitutional Limitations on Defamation Claims Brought by Public Officials

In *New York Times v. Sullivan* (1964), the Supreme Court established a zone of privileged communications for defendants who made false statements about public officials. Under this standard, the plaintiff must carry the burden of proving that the statements were made with the intent to harm. Private citizens are not public officials, and as such, do not have to prove malice to recover for false, defamatory statements. The operative question is when do public school
employees become public officials? Rosenblatt v. Baer (1966) attempted to define the term public official by asserting that public officials are “those among the hierarchy of governmental employees who have or appear to have, substantial responsibility for or control over the conduct of governmental affairs” (p. 85). Further clarification came from the case of Hutchinson v. Proxmire (1979), in which the Supreme Court specifically stated that the term public official does not include all public employees, only those who “have substantial authority for or control over the conduct of governmental affairs” (Rosenblatt v Baer, 1966, p. 85). The operative question that must be ascertained is whether or not teachers have substantial authority over the conduct of school operations. In most cases, teachers do not have such authority and are not considered to be public officials (Poe v. San Antonio Express News Corp, 1979; Richmond Newspapers Inc. v. Lipscomb, 1987; True v. Ladner, 1986).

The Supreme Court in Gertz v. Robert Welch (1974) justified the application of the public official or public figure status by articulating that these individuals typically enjoy substantially more access to the channels of communication which could be used to counteract defamatory statements. The Second Circuit Court in True v. Ladner (1986) correctly recognized that teachers typically lack access to effective channels of communication, which makes them especially vulnerable to the harm done by defamatory statements. According to Alexander and Alexander (2009), school administrators, including principals, superintendents, and school board members, have, or appear to have, substantial authority over the conduct of school operations. As a result, a majority of the jurisdictions consider school administrators to be public officials (Britton v. Koep, 1991; Jee v. New York Post Co., Inc., 1999; Palmer v. Bennington School District, 1992; Scott v. News-Herald, 1986). However, Indiana, South Carolina, Illinois, Georgia, and Ohio have produced cases in which the courts determined that principals and assistant principals were too
Malice as Required in Defamation Cases Brought by Public Officials

Regardless of the designation of public official status and the conditional privilege typically given to students for good faith legitimate complaints, malicious statements intended to damage the reputation of another are not protected forms of expression. Malice has been defined in the context of defamatory communications as statements known to be false or made with a reckless disregard for the truth (New York Times v. Sullivan, 1964). Malicious statements are those made with the intent to injure or cause harm to the reputation of another. Applying the concept of malice provides a useable standard by which school officials can address the off-campus expressive activities of public school students. Postings that are clearly malicious and designed to damage the reputations of public school employees fall outside the penumbra of protected speech. As a result, school officials, in an effort to prevent a substantial or material disruption of school operations or to protect the rights of others, should have the authority to punish off-campus electronic communications which defame fellow classmates or school personnel.

According to Alexander and Alexander (2009), cases subsequent to the Gertz decision have produced a three-part test that has been used when deciding whether a defendant in a defamation case should be granted conditional privilege by the court. First, the plaintiff must have voluntarily entered into the arena surrounding the public issue. Deciding to enter the educational profession is a volitional act, so the first part of the test is easily satisfied. Second, the contextual issue giving rise to the defamation suit must represent a specific issue, the resolution of which could impact a large segment of the general public in a substantial manner.
When a student posts critical remarks about the effectiveness of a teacher or remarks concerning an administrator’s decision to change the school’s schedule from a traditional schedule to a block schedule, these remarks represent matters of public interest that could impact a large segment of the general public in a substantial manner. As a result, these remarks deserve some protection.

Third, the courts look at whether the expression is related to the respective issue. Taking the previous example of the ineffective teacher into account, if the student added to his or her critical remarks that the teacher once was a man who had a sex change operation or that the child of the teacher was retarded and deserved to be beaten at school, these comments clearly would be considered unrelated to the legitimate matter of public interest. As a result, the student should not be granted any conditional privilege by the courts. Furthermore, in an effort to teach students the norms of socially appropriate expression essential to any civilized society, school officials should have the authority to implement reasonable but not excessive punishments.

Sexual Harassment

An additional line of analysis which should be considered involves cases which have been adjudicated for student-on-student sexual harassment. Compensatory or punitive damages for sexual harassment were not expressly authorized under Title IX of the Educational Amendments of 1972, the governing federal statute. Penalties for non-compliance with the requirements of Title IX were limited to the withholding of federal funding, and as a result, very few cases involving student-on-student sexual harassment were litigated (Alexander & Alexander, 2009). However, the Supreme Court changed the legal landscape of sexual harassment litigation with its ruling in the case of Franklin v. Gwinnett County Public Schools (1992). The Court in Franklin held that a damage remedy is available to plaintiffs who bring a cause of action to enforce compliance with Title IX. According to Alexander and Alexander
(2009), Franklin opened the flood gates for cases involving student-on-student sexual harassment where plaintiffs could prove that a hostile environment had been created.

What is clear from the line of cases following Franklin is that school officials must take reasonable steps to protect students from the damaging effects of sexual harassment, regardless of whether the source is a school employee or a fellow student. Some have even argued that school officials have an affirmative duty to protect students when they know or should know that students are harming other students (Bethel, 2004). When a plaintiff can show that school officials were aware of severe and pervasive harassment, yet acted with deliberate indifference, the school’s officials can be held personally liable for compensatory and punitive damages (Gebser v. Lago Vista Independent School District, 1998; Davis v. Monroe County Board of Education, 1999). How could it be that school officials are virtually mandated to take corrective action to address sexual harassment to protect the rights of students to be let alone, yet are precluded from taking corrective action when the harassment is in the form of off-campus electronic communication?

Lessons Learned from the Review of Literature

Although the Supreme Court has issued four opinions on the First Amendment rights of students, all four cases were decided in the context of student speech delivered in the school environment. These cases give limited guidance with regard to the constitutional authority of school officials to punish student speech that is electronically delivered off campus. The Four Supreme Court cases dealing with student First Amendment expression rights, as applied through existing court cases, seem ill-suited to deal with the growing problems of cyber bullying brought on by advances in technology.
Lower court cases have considered whether schools have the authority to sanction student speech delivered off campus, particularly with regard to student off-campus newspapers. In general, these cases have shown that off-campus student speech can be punished only if it creates or is likely to create a substantial disruption in the school environment. Despite including language recognizing the role of schools in teaching children the norms of socially appropriate behavior, the holding in Fraser has been limited only to expressions which occurred on campus or at school-sponsored events. Likewise, Hazelwood also remains limited only to those publications falling within the imprimatur of the school. The holding in Morse may have some application, but only if courts view the impact and dangers of cyber bullying in the same light as they have viewed the dangers of student expression advocating drug use.

School officials have an affirmative duty to protect students from the harmful effects of sexual harassment especially when the harassment is so severe and pervasive that it prevents children from taking advantage of their educational opportunities. Cyber bullying can produce this same effect. Many states have passed statutes imposing a duty on school districts to attempt to stop students from being bullied or harassed, and the public policy considerations behind these statutes suggests that schools should have the authority to address student bullying and harassment even when occurring off campus. However, this authority appears to be limited to those expressions which produce a material or substantial disruption of school operations leaving individual victims with little, if any, immediate recourse. In addition, while student expression concerning school policy or practice is protected by a conditional privilege, student speech that is defamatory is not entitled to constitutional protection, yet courts seem to be reluctant to allow school officials to punish students for defamatory expressions. Public policy considerations imply that schools should be able to punish electronically delivered student speech that is
defamatory toward other students or toward school personnel, even if the speech had been delivered from an off-campus location.

The courts have consistently supported school officials’ efforts to prevent substantial and material disruptions of school operations as well as to act when students post messages which threaten the safety of others. However, as explained in the following chapter, the courts have ruled inconsistently with regard to student speech that is electronically delivered off campus, even in cases in which the student speech appeared to be defamatory or purposely hurtful. By and large, the courts have analyzed student cyber speech cases under Tinker’s substantial disruption standard. As the review of the cases in the next chapter shows, the courts continue to disagree about what constitutes a material or substantial disruption.

Remarkably, as Chapter III shows, courts have never relied on Tinker’s second prong, which allows schools to punish student speech that interferes with the rights of others, when deciding student cyber speech cases. In fact, in a 2010 case involving a student who posted a YouTube video that defamed a fellow student, a federal court in California specifically rejected the application of Tinker’s second prong (J. C. v. Beverly Hills Unified School District, 2010).

In the following chapter, an analysis of all of the reported court cases in which school districts have attempted to discipline a student for electronically delivered off-campus speech is presented. As this analysis shows, in these cases spanning from 1998 until the present, the courts have provided school authorities with no clear guidance. This analysis demonstrated the urgent need for a uniform and constitutional standard to allow school officials the authority to discipline students who engage in electronically delivered off-campus speech not only when that speech might cause a substantial disruption in the school environment, but also when the speech interferes with the rights of other students or school personnel.
CHAPTER III

LOWER COURT RULINGS ON OFF-CAMPUS STUDENT CYBERSPEECH

As noted, the Supreme Court of the United States has yet to hear a case dealing with the authority of school officials to punish a student for off-campus cyber speech, but it has had the opportunity. The ruling in *Wisniewski v. Board of Education of Weedsport Central School District* (2007) was appealed to the United States Supreme Court, but the Court denied certiorari (*Wisniewski v. Board of Education of Weedsport Central School District*, 2008). Might this denial be indicative that the Supreme Court agrees with the decision of the Second Circuit Court? Perhaps, but generally speaking, the denial of certiorari cannot be viewed as an affirmation of the decision of a lower court (*Missouri v. Jenkins*, 1995). Thousands of cases are appealed to the Supreme Court each year, and on average, the Court accepts around 1% of those cases for review (Wachtell & Thompson, 2009).

Despite the lack of guidance from the Supreme Court, several district and circuit courts have issued rulings on cases dealing with off-campus student cyber expression. However, these rulings have failed to clearly identify a uniform standard for courts to follow in the attempt to define the boundaries of school intervention regarding territory many consider to be protected by the First Amendment. As a result, cases with very similar fact patterns have been decided inconsistently, leaving school officials and students to wonder about what forms of student off-campus expressions are protected and what forms may be censored by school officials. Starrett (2009) summarized this state of affairs as follows: “The few judicial opinions examining student ‘cyber speech’ have offered little clarity as to when educational institutions may properly sanction student Internet speech” (p. 2). Even more limiting, is the fact that the literature review only identified one case in which the efforts of school officials to punish expressions that could
be characterized as off-campus cyber bullying were analyzed (J. C. v. Beverly Hills Unified School District, 2010). Every other case has involved student off-campus cyber expression directed at school personnel.

As shown in Table 1 through Table 6, most cases involving the balance between the First Amendment off-campus cyber expression rights of public school children and the competing interest of school authorities to maintain a safe and secure school environment, tip in favor of the student. In a majority of the cases examining off-campus expression, the courts focused the analysis on the Tinker material and substantial disruption test as the standard to determine whether or not school officials exceeded their authority when they disciplined a student for cyber speech that the school officials found to be inappropriate. The inconsistencies in case outcomes largely resulted from the courts defining a “material and substantial disruption” in different ways. What one court considers a substantial or material disruption another does not. If the substantial disruption test, generated as a result of the Tinker decision, is the only constitutional avenue through which school officials can punish off-campus student cyber speech, then the federal courts must develop a consistent and readily understandable operational definition as to what constitutes a material or substantial disruption. This necessitates an ad-hoc analysis where the decision in each case is based upon its unique facts as measured against a uniform standard. Therefore, the purpose of this dissertation was to develop a uniform standard for school officials and courts to follow as they attempt to achieve a suitable balance between students’ First Amendment off-campus cyber expression rights and the affirmative duty of school officials to maintain safe, orderly, efficient, and effective learning environments and to protect the rights of others.
### Table 1

**Matrix of Lower Court Decisions Supporting Student Off-Campus First Amendment Expression Rights, 1998**

<table>
<thead>
<tr>
<th>Case Name and Date</th>
<th>Expression</th>
<th>Student’s Intent</th>
<th>Disruption Level</th>
<th>School Official Reaction</th>
<th>Policy Construction</th>
<th>Impact on Fellow Students</th>
<th>Impact on School Personnel</th>
<th>On or Off Campus Origination</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Buessink v. Woodland R-IV School Districts (1998)</strong></td>
<td>apolitical, crude &amp; vulgar, linked to schools website to facilitate complaints</td>
<td>student intended expression to impact campus</td>
<td>minimal, mostly the result of the actions of school officials</td>
<td>severe consequences, 5 day suspension changed to 10 based upon emotion, resulted in 4 failed classes</td>
<td>not analyzed by the court</td>
<td>minimal</td>
<td>almost non-existent</td>
<td>minimal</td>
</tr>
<tr>
<td><strong>O’Brien v. Westlake City Schools Board of Education (1998)</strong></td>
<td>mostly legitimate complaints, nonthreatening, not defamatory, not lewd &amp; vulgar</td>
<td>no evidence of speech being intended to disrupt school operations, threaten, or maliciously defame</td>
<td>no disruption noted</td>
<td>10 day suspension based on a probably overbroad &amp; vague policy, “disrespect”</td>
<td>not analyzed by the court</td>
<td>none</td>
<td>minimal at best</td>
<td>created off campus</td>
</tr>
</tbody>
</table>
Table 2

Matrix of Lower Court Decisions Supporting Student Off-Campus First Amendment Expression Rights, 2000-2001

<table>
<thead>
<tr>
<th>Case Name and Date</th>
<th>Expression</th>
<th>Student’s Intent</th>
<th>Disruption Level</th>
<th>School Official Reaction</th>
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<th>On or Off Campus Origination</th>
</tr>
</thead>
<tbody>
<tr>
<td>Emmett v. Kent School District No. 415 (2000)</td>
<td>non defamatory, not cyber bullying, not threatening, mock obituaries</td>
<td>no evidence of intention to impact school, fellow classmates, or school personnel</td>
<td>minimal, officials took no action until featured in newspaper as a hit list</td>
<td>threatened expulsion, reduced to 5 day suspension</td>
<td>Not analyzed by the court</td>
<td>virtually none</td>
<td>none noted</td>
<td>off campus</td>
</tr>
<tr>
<td>Beidler v. North Thurston School District No. 3 (2000)</td>
<td>apolitical, incredibly crude &amp; vulgar, highly defamatory</td>
<td>student intended to defame school personnel by posting malicious defamatory profile</td>
<td>no disruptions noted</td>
<td>emergency removal followed by 1 month suspension</td>
<td>Not analyzed by the court</td>
<td>none noted</td>
<td>significant damage to the reputation of a school official</td>
<td>off campus</td>
</tr>
<tr>
<td>Killion v. Franklin Regional School District (2001)</td>
<td>apolitical, defamatory top 10 list about coach, obscene</td>
<td>student’s intent was to defame school personnel with defamatory descriptions</td>
<td>minimal</td>
<td>moderate consequences, 10 day suspension</td>
<td>policy ruled to be vague &amp; overbroad</td>
<td>none noted</td>
<td>potentially significant, list in teachers’ lounge for colleagues to see</td>
<td>created off campus, brought to school by 3rd party</td>
</tr>
</tbody>
</table>
Table 3

Matrix of Lower Court Decisions Supporting Student Off-Campus First Amendment Expression Rights, 2002-2005

<table>
<thead>
<tr>
<th>Case Name and Date</th>
<th>Expression</th>
<th>Student’s Intent</th>
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<th>School Official Reaction</th>
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<th>Impact on School Personnel</th>
<th>On or Off Campus Origination</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coy v. Board of Education of North Canton Schools (2002)</td>
<td>apolitical, nonthreatening, mildly vulgar, pictures with crude captions</td>
<td>expression not directed at the school or its personnel, shape form of fashion</td>
<td>minimal at best</td>
<td>severe consequences, 80 day expulsion, disproportionate to the offense</td>
<td>policy ruled to be vague &amp; overbroad</td>
<td>mild at best</td>
<td>almost nonexistent</td>
<td>created off campus, accessed on campus</td>
</tr>
<tr>
<td>Mahaffey v. Aldrich (2002)</td>
<td>apolitical, threatening, Satan’s web page, juvenile attempt at humor</td>
<td>no evidence of student intent to disrupt school operations or harass fellow classmates or school personnel</td>
<td>no disruption reported</td>
<td>severe consequences, expulsion, disproportionate to the offense</td>
<td>not analyzed by the court</td>
<td>despite content of expression, no one felt threatened, or bullied in any way</td>
<td>none noted</td>
<td>created on campus, school officials informed by concerned parent</td>
</tr>
<tr>
<td>Flaherty v. Keystone Oaks School District (2003)</td>
<td>apolitical, nonthreatening, non-disruptive, non-defamatory mild criticism of teacher</td>
<td>no evidence student intended to disrupt school operations or harass classmates or personnel</td>
<td>no disruption noted</td>
<td>student removed from volleyball team, loss of computer privileges</td>
<td>policy ruled as vague &amp; overbroad</td>
<td>none noted</td>
<td>none noted</td>
<td>combination of on &amp; off campus</td>
</tr>
<tr>
<td>Latour v. Riverside Beaver School District (2005)</td>
<td>rap songs with crude, vulgar &amp; violent language. apolitical, potentially threatening</td>
<td>no evidence of student intent to disrupt school operations or harass classmates or personnel</td>
<td>minimal, school official used almost 2 months to expel after aware of songs</td>
<td>severe consequence, 2 year expulsion disproportionate to offense</td>
<td>not analyzed by the court</td>
<td>no one threatened, 1 girl, humiliated &amp; broken hearted, withdrew from school</td>
<td>none noted</td>
<td>off campus</td>
</tr>
<tr>
<td>Case Name and Date</td>
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<tr>
<td>Layshock v. Hermitage School District (2010)</td>
<td>apolitical, defamatory, obscene, mock profile of principal</td>
<td>evidence of intention to maliciously defame character &amp; reputation of school principal</td>
<td>significant, classes cancelled, computer access limited, faculty meetings, IT specialist with significant time, principal humiliated</td>
<td>severe consequences; 10 day suspension; alternative education school placement; no extra-curricular activities, incl. graduation</td>
<td>not analyzed by the court</td>
<td>significant, the learning environment for hundreds of students interrupted for a week or more</td>
<td>significant stress &amp; anxiety experienced by principal, undermined capacity to do job, public humiliation</td>
<td>created off campus, viewed on campus &amp; shown to other students</td>
</tr>
<tr>
<td>Evans v. Bayer (2010)</td>
<td>apolitical, minor criticism of teacher, non-defamatory, non-threatening, non-disruptive, not vulgar or lewd or obscene</td>
<td>student intended to vent frustration concerning teacher perceived as ineffective</td>
<td>no disruption noted</td>
<td>short-term suspension, significant academic penalty</td>
<td>none noted</td>
<td>no evidence of negative impact on school personnel</td>
<td>off campus</td>
<td></td>
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<tr>
<td>J. C. v. Beverly Hills Unified School District (2010)</td>
<td>vulgar &amp; defamatory speech directed at another student</td>
<td>student intended to humiliate &amp; defame classmate via malicious YouTube video</td>
<td>almost no disruption of any kind</td>
<td>short term suspension of 2 days</td>
<td>none noted</td>
<td>target of expression was embarrassed &amp; humiliated</td>
<td>none noted</td>
<td>created off campus, brought to campus by victim’s parent for view by school officials</td>
</tr>
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<tr>
<td><em>J. S. v. Bethlehem Area School District</em> (2002)</td>
<td>defamatory, threatening, lewd &amp; vulgar</td>
<td>Student directed expression at school personnel</td>
<td>teacher replaced, low campus morale, teacher stress &amp; anxiety</td>
<td>graduating, 3 days, then 10, then expulsion, withdrew before hearing</td>
<td>serious, 3 subs in 1 class, learning disrupted for 100+ students</td>
<td>serious, anxiety, threatening, defamatory</td>
<td>on campus, J. S. showed another student using school computer</td>
<td></td>
</tr>
<tr>
<td><em>Requa v. Kent School District</em> (2007)</td>
<td>apolitical, non-threatening</td>
<td>off-campus component, intentionally humiliated teacher</td>
<td>classroom disruption created by on-campus filming</td>
<td>moderate reaction, 40 day suspension reduced to 20 with student submitting report</td>
<td>none noted</td>
<td>teacher humiliated as victim of unjustified ridicule</td>
<td>off-campus expression created on campus</td>
<td></td>
</tr>
<tr>
<td><em>Wisniewski v. Board of Education of Weedsport Central School District</em> (2007)</td>
<td>threatening &amp; disruptive, apolitical</td>
<td>expression directed at school personnel</td>
<td>moderate to serious, learning interrupted, teacher had to be replaced</td>
<td>serious, semester long suspension with placement at an alternative educational facility</td>
<td>moderate interruption of learning opportunities</td>
<td>serious, teacher no longer felt safe &amp; had to be replaced</td>
<td>created off campus, brought to camp by other student</td>
<td></td>
</tr>
<tr>
<td><em>Doninger v. Niehoff</em> (2008)</td>
<td>apolitical, inaccurate, mildly vulgar, not defamatory</td>
<td>student intentionally misrepresented truth &amp; recruited others to act disruptively</td>
<td>moderate, mostly administrative disruption</td>
<td>minor/calculated, lost extra-curricular privileges, not allowed to hold position as class officer</td>
<td>mild, set a poor example for other students</td>
<td>none noted other than the disruption</td>
<td>composed with district technology, encouraged disruption of school operations.</td>
<td></td>
</tr>
<tr>
<td><em>O. Z. v. Board of Trustees of the Long Beach Unified School District</em> (2008)</td>
<td>threatening, graphic slide show of killing of English teacher</td>
<td>student claimed no intent but posted slide show on YouTube</td>
<td>no disruption reported, likelihood of future disruptions elevated</td>
<td>transferred student to different school within district, no loss of educational opportunity</td>
<td>none noted</td>
<td>severe impact on English teacher could have been worse if student not transferred</td>
<td>composed off-campus, posted on YouTube to the attention of school officials</td>
<td></td>
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<tr>
<td><em>Barnett v. Tipton County Board of Education</em> (2009)</td>
<td>apolitical, non-threatening, accused school official of inappropriate contact with female students</td>
<td>student intended to defame school personnel</td>
<td>teachers reported classes were disrupted</td>
<td>proportionate reaction; 2 students received short suspensions, plaintiff sent to the district alternative educational facility</td>
<td>plaintiff posted wanted poster to find a culprit, identity of responsible party led to a physical altercation</td>
<td>potentially serious, members of community &amp; local reporter believed web site info was true</td>
<td>created off campus, accessed on campus</td>
<td></td>
</tr>
<tr>
<td><em>J. S. v. Blue Mountain School District</em> (2010)</td>
<td>defamatory attack on school personnel, lewd vulgar, offensive</td>
<td>expression intended to defame &amp; humiliate school personnel</td>
<td>moderate, several classes disrupted, “buzz” on campus, future substantial disruption threat</td>
<td>mild given impact of expression on officials’ reputations &amp; effectiveness</td>
<td>some interruption of the learning environment</td>
<td>school principal defamed &amp; humiliated, capacity as professional compromised</td>
<td>almost entirely off-campus, brought to school by third party</td>
<td></td>
</tr>
</tbody>
</table>
Factors Impacting the Decisions of Lower Courts

Based upon an analysis of lower court decisions dealing with off-campus student cyber expression, several factors appear to be relevant to their respective holdings. Given the apparent, contradictory nature of the rulings, the discovery from this analysis that different courts place varying degrees of weight on different factors was not surprising. In addition, different courts have held different definitions of what constitutes a substantial disruption under the Tinker analysis, and almost without exception, the courts ignore Tinker’s second prong regarding interference with the rights of others. Hopefully, an analysis of each case reveals workable patterns that can be built into a uniform standard. A number of the factors the courts have considered when attempting to strike a balance between student expression rights and the compelling interest of the state have included:

1. The content of the students’ expression. Was it political speech concerning a matter of public interest; or was it disruptive, defamatory, threatening, or obscene? Could the expressions be characterized as cyber bullying?

2. The student’s intent at the time of the online expression. Was the student’s expression intended to make legitimate criticism of school policies or practices, or was the intention to recruit or encourage others to act in a disruptive manner? Did the student intend to bully others by making them fearful to attend school or was the student merely participating in juvenile banter? Did the student intend to defame and harass school personnel so as to negatively impact the esteem in which they are viewed, or was the student merely venting legitimate frustration with school policy or practice?

3. The level of disruption the expression created or was likely to create. Was the disruption limited to one class where a teacher had to redirect a few students resulting in the loss of
only a minute or two of instructional time or did the disruption impact several classes over
the course of several days? How much time did administrators dedicate toward
investigating the disruption and how many students were involved? Did it take only one
administrator an hour or so to question two or three children or did the investigation require
several administrators, to question dozens of students over several days?

4. The reaction of school officials. Did school officials expel the student resulting in a
cessation of educational services or did the student merely lose the privilege of
participation in extracurricular activities? Was the consequence clear, decisive and based
upon adequate due process, or did school officials rush to judgment and then elevate the
severity of discipline during the course of the investigation because they were upset by an
unpopular viewpoint? Does it appear as though school officials over-reacted?

5. The policy upon which school officials relied in their attempts to regulate the off-campus
expression. Was the policy clearly defined and narrowly tailored to accomplish a
compelling governmental interest, or was it vague and overbroad allowing for arbitrary or
discriminatory enforcement?

6. The impact of the expression on fellow students. Was one child slightly embarrassed by the
teasing of a few students that lasted no more than one or two days or was a child or group
of children ridiculed and bullied over the course of an extended period of time to the point
that they were effectively cut off from their right to an education or worse became
depressed, withdrawn or suicidal?

7. The impact of the expression on school personnel. Was one teacher insulted by critical
remarks about her teaching effectiveness or was a teacher or school administrator defamed
by malicious, obscene, or defamatory remarks that undermined their professional effectiveness?

8. Whether the expression was completely limited to off-campus communication, whether it was communicated on campus, or, as was typically the case, whether the expression represented a combination of on-campus and off-campus communication?

From a review of the lower court decisions, it does not appear as though any of these factors are dispositive, nor were the factors used consistently by the courts. Without a uniform standard, some administrators exceed their authority by instituting severe punishments for off-campus expressive activities falling under the penumbra of First Amendment protected speech. Others fail to act, thereby allowing students to interfere with the rights of others, specifically the rights of classmates and school personnel to be let alone, to be free from cyber bullying and cyber harassment, and to protect their reputations from defamatory publications. School officials need a uniform standard to follow as they attempt to find the appropriate balance between individual rights and the legitimate interests of school authorities in maintaining a safe and secure school environment and in protecting students and employees from harassment and demoralizing personal attacks. Through an analysis of district and circuit court cases and law review articles, this author sought to be able to articulate a uniform standard to provide clear directives for school officials as they attempt to carry out the compelling interest of the state without violating students’ First Amendment expression rights.

The Civil Rights Act of 1871

According to Starrett (2009), courts addressing off-campus student cyber speech appear to follow one of three paths: (1) the off campus equals off limits path (Mahaffey v. Aldrich, 2002); (2) the Tinker substantial disruption path (Coy v. Board of Education of North Canton
City Schools, 2002); (3) the origin of the expression can be determined by its ultimate destination path (Killion v. Franklin Regional School District, 2001). In cases where the court cannot find any evidence of a material and substantial disruption, or a threat of disruption, student suspensions and expulsions have been overturned, and in some cases, students have recovered compensatory damages under the Civil Rights Act of 1871, 42 U.S.C. §1983 (U. S. Code, 1988). The Civil Rights Act of 1871, 42 U.S.C. §1983, states:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (Civil Rights Act of 1871, 1988)

Section 1983, enacted in 1871, is also known as the “Ku Klux Klan Act” due to the fact that its primary purpose was to provide a means of redress against southern state officials who refused to protect the rights of recently freed slaves (Forsythe, 2010). Recovery under this federal statute for public school students can be appropriate given the fact that they are considered persons under the jurisdiction of the states. School officials act under color of law when they exercise, and in some cases, abuse the power that has been vested in them by a state or federal statute. When a school official suspends, expels, or otherwise punishes a child for exercising a constitutional or statutory right without proper legal justification, the official can be held personally liable to the injured party in an action at law. Clearly, punishing children because they exercise their First Amendment expression rights without proper legal justification is a violation of this section of the U. S. Code.
Cases that Protect Off-campus Student Cyber Expression from School Authority

*Beussink v. Woodland R-IV School Districts*

Factual Background

In *Beussink v. Woodland R-IV School Districts* (1998), a student, Brandon, created a website, from his home computer, critical of school personnel without using any school resources. However, the posting contained crude and vulgar remarks and was highly critical of teachers and school officials. Brandon’s page invited visitors to “please visit our fucked up high school” and “email our asshole principal and tell Delma Farrell that her page sucks” (McCullagh, 1998, p. 1).

The site also contained a link to the school’s official home page and invited readers to contact the school to express their displeasure. Brandon did not access the page at school, although there was some testimony to the contrary; but another student, in an attempt to get Brandon in trouble, showed the website to one of the teachers, Ms. Ferrell. Only one other student was in the room while Ms. Ferrell viewed the website, and no others disruptions were mentioned at that time.

The teacher, in turn, showed the site to the principal, Mr. Poorman, who was offended by its contents and concerned that other students may have seen the site.

According to the testimony, Poorman decided, at that time, that he was going to punish Brandon prior to conducting an investigation. Initially, Brandon was ordered to remove the website and given a 5-day suspension. Later that same day, Poorman decided to increase the length of the suspension to 10 days. The school had an attendance policy which called for a grade reduction for unexcused absences in excess of 10 for the year. As a result of the suspension, Brandon failed all of his classes for the semester. Brandon’s parents filed a motion for a preliminary injunction arguing that the actions of school officials unconstitutionally interfered with Brandon’s First Amendment rights of expression.
Legal Analysis

When considering a request for a preliminary injunction, the courts look at four factors: (1) the level of irreparable harm the moving party is likely to suffer if the motion is not granted; (2) balanced against the harm the non-moving party would suffer if the motion is granted; (3) the likelihood that the moving party will succeed on the merits of the claim; and (4) the public interest associated with the outcome (Dataphase Systems Inc. v. C L Systems Inc., 1981). The Court in Beussink (1998) first examined the likelihood that Brandon would succeed on the merits of his claim and felt that punishing him for his off-campus postings, without a showing how the web site created a substantial disruption, was a violation of his First Amendment right to expression. The court found very little evidence of school disruption and noted that “disliking or being upset by the content of student speech is not an acceptable justification for limiting student speech under Tinker” (p. 1180). Judge Sippel, citing Tinker, wrote that in order for school officials to justify the suspension they had to show that it “was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” (p. 1180). In this case, the principal testified that the reason he decided to punish Brandon was that he was upset by the web site. Although there exists a great deal of contradiction in this legal landscape, the courts are uniform that restrictions on students’ First Amendment rights of expression are not justified solely because someone is upset by the content of the expression.

In balancing the likelihood of irreparable harm to both parties as a function of the ruling on the motion, the court in Beussink (1998) cited Elrod v. Burns (1976), and stated “the loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury” (p. 1181). The court felt that Brandon was deprived of his First Amendment
rights when Poorman ordered him to remove the web site, an order with which Brandon complied. Beyond the loss of First Amendment rights Brandon would also suffer a severe academic penalty as a result of the punishment. As a result of the school’s attendance policy, Brandon failed four classes he would not have failed otherwise, which jeopardized his graduation. The court noted that “the harm to the Woodland school district is not as apparent” (p. 1181). There was no sign of disruption nor was there a likelihood of future disruptions as a result of the web site. The balance concerning the level of irreparable harm clearly tipped in favor of Brandon. Finally, the court noted that any encroachment into First Amendment expression rights by school officials is a matter of public interest by stating “the public’s interest is best served by the wide dissemination of ideas” (p. 1181). The court held in favor of Brandon and ruled that the actions of school officials violated his First Amendment expression rights.

Application of the Identified Factors

When applying the identified factors listed previously, the court’s decision seems appropriate. Brandon’s web site was not akin to the kind of pure speech protected in Tinker, but it was not threatening; and despite the fact that Brandon’s intention was to encourage others to contact the school, little, if any, disruption of school operations occurred. In fact, most of the disruption was the result of the actions of school personnel. Classmates were not defamed, harassed, or bullied. The postings were vulgar and highly critical of school officials, but probably would not be considered defamatory. The web site was largely limited to off-campus communication and very little evidence existed to indicate Brandon had accessed the web site using campus computers. The reaction of school officials was probably the most significant factor in the court’s decision. Initially, the principal decided to suspend Brandon for 5 days because he was upset by the content of the web site. According to the record, Principal Poorman
unilaterally decided to double the length of the suspension, not as the result of a further investigation uncovering more evidence, but most likely because Poorman was hostile toward Brandon who had made Poorman the target of the cyber based criticisms. Based upon this analysis, it appears as though the court came to the correct decision.

In Beussink (1998), the court ignored Tinker’s second prong and seemed to conclude that the only time a school can punish student expression, whether it occurs on or off campus, is if the expression materially and substantially interferes with school operations. However, as observed by Starrett (2009), this case opened the door for school officials to exert authority over students’ off-campus expressive activities, for “had the student's Internet speech created an on-campus disruption, the school may have been justified in punishing the student, even though such speech was created entirely off-campus” (p. 6). Starrett (2009) asserted that courts are not as concerned about the origins of the speech as they are about the destination of the speech. If the off-campus speech reaches onto campus by whatever means, foreseeable or not by the publisher, the schools have jurisdiction and can punish the child if the speech disrupts school operations or has the substantial likelihood of doing so.

O'Brien v. Westlake City Schools Board of Education

Factual Background

In O’Brien v. Westlake City Schools Board of Education (1998), Sean, a junior in high school, did not like his band teacher, so he decided to create a web site called raymondsucks.org. The site contained some legitimate complaints, but also included some offensive, personal observations unrelated to matters of public concern. Sean wrote:

He is an overweight middle-aged man who doesn't like to get haircuts….He demands that band be your number one priority, and favors people who kiss his ass….He often thinks
that problems are caused by certain students and/or groups of students and no one else (p. 6).

When school officials learned of the web site they suspended Sean for 10 days for violating a school board policy that prohibited students from demonstrating physical, verbal, or written disrespect toward teachers. As a result of the suspension, Sean failed band and his grades in his other classes were negatively impacted.

Legal Analysis

Judge Manos, who wrote the opinion of the court in O’Brien (1998), did not apply either prong of the Tinker decision and simply ruled that the school did not have the authority to regulate off-campus speech. After the ruling, school officials wrote Sean a letter of apology and paid him $30,000 for violating his First Amendment rights.

Application of the Identified Factors

When applying the identified factors listed previously, it appears that Judge Manos came to the correct conclusion in O’Brien (1998), but used the wrong rationale. In this case, the nature of the expression was apolitical but non-threatening. The expression did not produce, nor was it likely to produce a substantial disruption of school operations. It did not appear as though Sean intended his off-campus expression to disrupt campus operations nor did he encourage others to act in a disruptive manner. The expression did not interfere with the rights of fellow classmates, nor did it constitute cyber bullying. The postings were probably offensive to the band teacher, but the language was neither blatantly malicious nor defamatory especially when compared to other cases to be discussed later. A majority of the expression was directed at the band teacher’s role as a teacher and was protected by a conditional privilege (Alexander & Alexander, 2009).
The fact that the expression occurred off campus did not automatically mean it was beyond the regulatory authority of school officials. As should be clear, in some cases, schools can punish student speech that occurs off campus. For example, when students post threatening messages at home, school officials can immediately remove or suspend a child from school pending an expulsion hearing (*Doe v. Pulaski County Special School District*, 2002). School officials do not have to wait for violence or disruptions to occur before they take steps to maintain order, safety, and an environment conducive to learning.

*Emmett v. Kent School District No. 415*

Factual Background

In *Emmett v. Kent School District No. 415* (2000), a student, Nick, created a web site from his home computer without the use of any school resources called the “Unofficial Kentlake High Home Page” (p. 1089). The web site contained mock obituaries for two students, both friends of Nick, which appeared to be connected to, or inspired by, a creative writing assignment at school. The web site also contained an area where viewers could vote on who would be the next to die. Included was a disclaimer “warning a visitor that the site was not sponsored by the school and for entertainment purposes only” (p. 1089). School officials did not react until a local television station learned of the site and characterized it as a hit list. Only then did school officials decide to take action. Originally, Nick was told that he was being expelled for “intimidation, harassment, disruption to the educational process and violation of Kent School district copyright” (p. 1089). This penalty was later reduced to a 5-day suspension.

Legal Analysis

In awarding the temporary restraining order against the district, Judge Coughenour considered Tinker’s first prong, the limitations on student expression from Fraser, and the
limitations on student expression identified in Hazelwood. Coughenour concluded that the web site was not school-sponsored speech which would give rise to the application of Hazelwood; it was not presented at a school assembly to a captive audience, which would give rise to the application of Fraser; and school officials could not point to any disruption associated with the web site, which would give rise to the application of Tinker’s first prong. In addition, Coughenour determined that the contents of the web site were in no way threatening. Here, as in Beussink, school officials over-reacted and violated the student’s speech rights. Since the school district was unable to show any disruption or likelihood of disruption, and unable to show that anyone actually felt threatened by the web site, the balance between the irreparable harm potentially at stake for each party tipped in favor of the plaintiff. The court in Emmett (2000) granted Nick’s motion for a restraining order.

Application of the Identified Factors

In examining the facts under Tinker’s substantial disruption test, no evidence was presented in Emmett (2000) indicating that the web site created a substantial or material disruption or that a substantial disruption was likely to occur. No defamation of any kind was included in the web site nor was the site deemed to be vulgar and offensive. The expression did not interfere with the rights of other classmates nor could it be described as cyber bullying. It did not defame school personnel and there was no evidence that Nick’s intention was to impact the school in any way. In fact, the disclaimer showed that Nick was participating in a juvenile attempt at humor which no one took seriously. Based upon this analysis, it appears the court came to the correct decision.
Beidler v. North Thurston School District

Factual Background

In *Beidler v. North Thurston School District* (2000), a student was removed from school on an emergency basis and later suspended for one month for posting a defamatory web site about his assistant principal, Mr. Lehnis (Student Press Law Center, 2001). The web site showed the face of Mr. Lehnis pasted on the body of Homer Simpson gobbling Viagra and having sex. Additional content included images of Mr. Lehnis hitting on students, taking drugs, flirting with male teachers, burning books, and defecating in class.

Legal Analysis

The district argued that its authority to regulate Beidler’s graphic and malicious web site could be found in the three Supreme Court cases dealing with student expression: Tinker, Fraser, and Hazelwood. The court in Beidler (2000) distinguished the case from Fraser by noting that this case did not involve a captive audience. It distinguished the case from Hazelwood by noting that Beidler’s expression was not connected to any classroom exercise nor could it be considered school-sponsored speech. The only case that could have supplied any precedential authority was Tinker, but the court found no evidence of a material or substantial disruption. The court did not consider Tinker’s second prong.

In the alternative, the district argued that their actions in punishing Beidler resulted from its effort to protect school employees from defamatory expressions. The court in Beidler (2000) noted that this was a question of fact for a jury to decide and stated “that action is not this action” (p. 6). Although the court noted that “defamation is a…category of words that may be proscribed” (p. 6), it stated that defamation can only be proscribed when supported by an accompanying statute. The limitations on First Amendment expression rights in the context of
defamation are not dependent on any statute but supported by a long history of common law. The court’s discussion of the defamatory nature of Beidler’s speech was cryptic and did not really grapple with the question of whether the school had the authority to punish a student’s off-campus electronically delivered speech which was directed at a school administrator. After denying the district’s motion for summary judgment, the school district settled the suit by paying $52,000 in attorney’s fees and $10,000 in damages.

Application of the Identified Factors

When applying the identified factors listed previously, the school district should have been justified in punishing Beidler for his off-campus expression. The expression in question did not concern a matter of public interest. It was apolitical, yet non-threatening. Beidler’s expression did not interfere with the rights of his fellow classmates nor did it create a material or substantial disruption of school operations, but the expression defamed a member of the school’s staff by maliciously attacking his reputation and interfering with his right to be let alone (Tinker’s second prong). Based upon this analysis, it appears the court in Beidler (2000) came to the incorrect decision.

Beidler (2000) is an excellent demonstration of the no-win position school officials find themselves in when dealing with off-campus student cyber bullying and cyber harassment. They are forced to endure malicious attacks upon their reputations without any immediate legal means of recourse. While expulsions for such postings are arguably disproportionate to the offense, short term suspensions would seem reasonable, especially if those suspensions did not result in the cessation of educational services. Limiting the remedial options available for school officials to defamation or invasion of privacy lawsuits, which might take years to conclude and tens of thousands of dollars, leaves school officials vulnerable to attacks which undermine their
credibility and effectiveness and permit the verbal assailants to walk the halls of the school with impunity. It sends an unfortunate and untenable message to students that these types of attacks are legally protected by the First Amendment.

*Killion v. Franklin Regional School District*

**Factual Background**

In *Killion v. Franklin Regional School District* (2001), a high school student named Paul compiled a “top ten” list about the school’s athletic director on his home computer and sent it to several of his classmates. Paul did not bring the list to school due to the fact that he had previously constructed and distributed similar lists on campus and had been warned “that he would be punished if he brought another list to school” (p. 448). Apparently, Paul was upset about “a denial of a student parking permit” (p. 448) and the enforcement of disciplinary measures by the athletic director upon members of the track team. The list included comments that were critical of the athletic director’s appearance, specifically his weight, as well as comments about the small “size of his genitals” (p. 446). Another student printed the list and brought several copies to school, many of which ended up in the faculty lounge. School officials decided to suspend Paul for 10 days, only three of which were served. During the time of the suspension Paul was not allowed to participate in any track meets. Paul’s parents filed suit under 42 U.S.C. §1983 claiming that the punishment violated their son’s First Amendment rights.

**Legal Analysis**

The court in Killion (2001) considered the application of the three Supreme Court cases dealing with students’ First Amendment expression and noted that Fraser gives school officials the authority to regulate lewd and vulgar language communicated on school property or at school sponsored events and Hazelwood gives school officials authority over speech which could be
perceived as school sponsored if school officials have legitimate pedagogic concerns, neither of which were applicable under the facts presented in Killion. The court ruled that the student’s speech, not controlled by Fraser or Hazelwood, can only be regulated “if it would substantially disrupt school operations or interfere with the right of others” (p. 453). Despite the fact that the court included Tinker’s second prong in its discussion, it was only mentioned in passing and never included in the actual adjudication of the case. Instead, the court completely relied on Tinker’s substantial disruption test. The district could not show any evidence of an actual or potential disruption and no evidence that anyone felt threatened. In fact, the evidence showed that the flyer was on campus for almost a week before school officials decided to take any action.

The court in Killion (2001) also ruled that the policy that school officials used as a justification for their actions was vague and overbroad. The school’s policy made it a violation of the student code of conduct for a student to verbally or otherwise abuse a member of the staff. The policy stated “if a student verbally or otherwise abuses a staff member, he or she will be immediately suspended from school. It may then be the recommendation…that they indefinitely suspend or expel the student involved” (p. 458). The court recognized several problems with the policy. First, the policy made no geographic distinctions between on-campus and off-campus expression. Second, the application of the policy could easily reach constitutionally protected speech in light of the ambiguous nature of the term “abuse.” In addition, the court was concerned that the authority of school officials was not limited to substantially disruptive speech.

Despite the fact that the web site contained malicious and defamatory content that was vulgar, the court in Killion (2001) relied on Justice Brennan’s concurrence in Fraser in which Brennan had stated, “if respondent had given the same speech outside of the school environment, he could not have been penalized simply because governmental officials considered the language
to be inappropriate” (p. 688). The court acknowledged that several of the passages from the list were lewd and derogatory yet went on to assert that the speech took place within the confines of Paul’s home which were beyond the reach of school officials due to the fact that no disruption of school operations were noted.

**Application of the Identified Factors**

When applying the identified factors listed previously, school officials should have been justified in issuing a moderate punishment consisting of a short term off-campus suspension or a few days of in-school suspension. The web site was not used to discuss a matter of public interest akin to the speech protected by Tinker. The speech did not create a substantial disruption of school operations nor was it likely to do so. The list could not be characterized as cyber bullying nor was it threatening. It was, however, a personal attack on the character and reputation of a school official in retaliation for the teacher’s efforts to discharge his professional duties in good faith. As such, the speech interfered with the rights of others, which should have triggered Tinker’s second prong. It would be difficult to argue that Paul intended his expression to reach campus especially in light of the fact that a third party ultimately brought the list to school. However, Paul’s intention clearly was to humiliate school personnel publicly, as evidenced by the fact that he distributed his list to several students who attended the same school. Based upon this analysis, it appears the court in Killion (2001) came to the incorrect decision.

*Coy v. Board of Education of North Canton City Schools*

**Factual Background**

In *Coy v. Board of Education of North Canton City Schools* (2002), school officials suspended an eighth grade student, Jon for 4 days because he accessed, while at school, an unauthorized web site which contained what school officials considered to be obscene and lewd
material. The suspension was later increased to an 80 day expulsion. The expulsion was probated, which meant that Jon could continue to attend school, but any further violations of the student code of conduct would result in the full application of the penalty. In addition, Jon was not allowed to participate in or attend any after-school activities for the duration of his eighth grade year. The facts showed that Jon created the web site at home, and it included mostly pictures of Jon and his skateboarding buddies. The web site did contain a section titled “losers” (p. 795) where three of Jon’s classmates were pictured along with insulting comments. One comment described “one boy as being sexually aroused by his mother” (p. 795). In addition, there were a few pictures of Jon’s friends giving the middle finger to the camera.

Jon’s parents filed suit claiming that the actions of school officials violated their son’s First Amendment rights and further that the district’s code of conduct the school officials used as justification for the expulsion was unconstitutionally vague and overbroad. The policy in question, which was signed by Jon’s parents, forbade students from accessing web sites which contained offensive messages or pictures and stated that “discipline…may be applied for violations of the policy” (p. 795).

Legal Analysis

In its analysis, the court deciding Coy (2002) cited Tinker’s substantial disruption test as one measure courts can use when adjudicating student expression cases. In this case, school officials were unable to articulate any objective facts to show that a material or substantial disruption occurred, and they did not show that such a disruption was likely to occur. The court did not consider the application of Tinker’s second prong. Even if the court had considered Tinker’s second prong, the comments posted under the pictures were mildly crude attempts at
humor, and no testimony was presented to would indicate that Jon’s buddies were cut off from their educational opportunities or felt threatened, defamed, or bullied.

The court in Coy (2002) also considered the application of Fraser but distinguished it in light of the fact that no evidence existed to show that Jon subjected other students to the expression at issue. The court stated that Jon “occasionally accessed his website in a manner designed to draw as little attention as possible to what he was doing” (p. 800). Fraser involved a school-wide assembly where a captive audience of about 600 students was subjected to graphic, sexual metaphors and gyrations. Additionally, the court ruled that the web site was not vulgar, obscene, or lewd.

Finally, the court in Coy (2002) distinguished Hazelwood because no evidence existed to indicate that the school sanctioned or endorsed the material contained on the web site. Ultimately, the court felt that the only standard which could apply was Tinker’s substantial disruption test, the determination of which was a question for the jury. Central to the court’s decision was a determination as to the motivation for the school district’s action. The facts indicated that the motivating factor in the district’s decision to expel Jon was not due to a substantial disruption but due to his action in accessing a web site that contained obscene material. The court felt that expulsion, under these circumstances, was disproportionate to the offense. As a result, the court denied the school district’s motion for summary judgment on Jon’s First Amendment claim.

In regard to the parents’ claim that the policy in question was vague and overbroad, the court in Coy (2002) was guided by several widely accepted principles. First, as the Supreme Court stated in Bethel School District No. 402 v. Fraser (1986), "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we
have respected the value of preserving the informality of the student-teacher relationship” (p. 686). In light of the unique characteristics of the school environment, which was also recognized in *New Jersey v. T.L.O.* (1985), a school’s code of conduct need not be as detailed and specific as a criminal code that imposes criminal sanctions. However, it must be detailed enough so that those who are subjected to its sanctions understand which types of behaviors are prohibited. This necessitates the use of unambiguous language or language which is defined within the policy or regulation.

In *Leonardson v. City of East Lansing* (1990), the Sixth Circuit described a vague ordinance as one which “denies fair notice of the standard of conduct to which a citizen is held accountable” (p. 196). Vague ordinances or policies give rise to constitutional concerns because they give governmental authorities the power to define the terms, which can lead to arbitrary and discriminatory enforcement. “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application” (*Grayned v. City of Rockford*, 1972, p. 109). To avoid this constitutional problem, school policies must be described in enough detail so students and parents have fair notice as to which types of behaviors are prohibited and so school officials know the limits of their authority.

Second, a policy is considered overbroad if it "reaches a substantial number of impermissible applications relative to the law's legitimate sweep" (*Déjà vu of Nashville, Inc. v. The Metropolitan Government of Nashville and Davidson County*, 2001, p. 396). If part of the purpose of a school policy is to protect students from cyber bullying and school personnel from cyber harassment in the form of malicious attacks on their reputations, policy developers should avoid using terms such as “abuse,” “disrespect,” “inappropriate,” “offensive,” and “hurtful.” Use
of such ambiguous and subjective terms would permit the policy to reach a number of
impermissible applications beyond the legitimate scope of state interest as was the case in
Killion. Thus, school policies should include specific terminology with clear definitions.

In Coy (2002), the policy in question basically said that school officials reserved the right
to punish any behavior that they found to be inappropriate. Section 21 prohibited “any action or
behavior judged by school officials to be inappropriate and not specifically mentioned in other
sections shall be in violation of the Student Conduct Code” (p. 796). The policy was clearly void
for vagueness under well-established constitutional principles because school officials had the
subjective authority to punish any expression they did not like, and the policy provided virtually
no notice as to the specific behaviors that would be prohibited.

Application of the Identified Factors

When applying the identified factors listed previously, the court’s decision in Coy (2002)
was appropriate. The postings by the student were not threatening; little if any disruption of
school operations occurred; the three students whose pictures were posted with insulting remarks
were not so pervasively bullied that they were effectively cut off from their educational
opportunities; and school personnel were in no way defamed. No evidence was presented that
Jon’s intent was to impact the school or its personnel. Despite these facts, school officials
instituted the severe consequence of expulsion and prohibited Jon from participating in after-
school activities. Under these circumstances, school officials over-reacted. Had the school
officials only implemented the 4-day suspension, the suit might never have been filed. Expulsion
for violating an acceptable computer use agreement by accessing a web site with mildly crude
humor was a disproportionate response to the offense.
In *Mahaffey v. Aldrich* (2002), school officials suspended and attempted to expel a student, Joshua, for constructing a web site titled Satan’s web page. The web site included a weekly task from Satan. Readers were instructed to "stab someone for no reason, then set them on fire, throw them off a cliff, watch them suffer and with their last breath, just before everything goes black, spit in their face" (p. 782). The web site included the disclaimer that “killing people is wrong don’t do it” (p. 782). A parent of another student at Kettering High School became aware of the web site and notified the police out of concern for her child’s safety. In turn, the police contacted school officials, who promptly initiated an investigation that confirmed Joshua had contributed to the construction of the web site. In addition, Joshua admitted to using school computers in the process of constructing the web site. In response, school officials decided that expelling Joshua was the appropriate course of action due to the threatening nature of the expression in violation of the school district’s code of conduct. Ultimately, Joshua’s parents withdrew him from Kettering High School and enrolled him in a neighboring district. Nevertheless, they initiated a lawsuit claiming, among other things, that school officials violated their son’s First Amendment expression rights.

### Legal Analysis

In analyzing the merits of Joshua’s complaint, the court in Mahaffey (2002) ruled that the expression did not occur on campus, which was contradicted by Joshua’s admission. In addition, the court stated that even if the expression occurred on campus, the only circumstances under which school officials could punish Joshua for his expression would be if it created a substantial disruption of school operations or interfered with the rights of others. Although the court
acknowledged both Tinker’s first and second prongs, it ignored other constitutionally permissible reasons for punishing or regulating student speech, such as those identified by Fraser and Pulaski. The most critical analysis regarded whether or not Joshua’s statements truly constituted threatening language.

When looking at threatening language, courts have been split as to the standard that should be applied. The Ninth Circuit Court, for example, looks at the message from the viewpoint of the communicator and asks whether a reasonable person making the same comments would believe that his message would be interpreted it as a threat (Lovell v. Poway Unified School District, 1996). The Eighth Circuit Court looks at the message from the viewpoint of the recipient and asks whether the reasonable person to whom the message was communicated would interpret it as a threat (Doe v. Pulaski County Special School District, 2002). The court in Mahaffey (2002) applied the same standard described in Lovell. Regardless of the standard applied, it was difficult to conclude that Joshua’s message constituted a true threat. Included in the message was a disclaimer that said “killing people is wrong” (p. 782) and further urged people not to do it. The court correctly concluded that Joshua’s message did not constitute a threat, and as such the application of the district’s code of conduct, which gave officials the authority to punish Joshua, could not be supported. The only violation of the school’s code of conduct under which Joshua could have been disciplined was for a violation of the acceptable use policy that most children must sign before using district technology. In the court’s view, expulsion from school for a computer use violation could only be characterized as excessive and disproportionate to the offense. The court granted Joshua’s motion for summary judgment on his First Amendment claim.
Application of the Identified Factors

When applying the identified factors listed previously, it appears as though the decision of the court in Mahaffey (2002) was correct. Justin’s web site was not akin to the pure speech protected in Tinker; however, no evidence was presented indicating that the web site created a substantial or material disruption and no evidence was offered to argue that a disruption was likely to occur. No defamatory language of any kind was included in the web site, and the web site was not deemed by the court to be vulgar and offensive. The expression did not interfere with the rights of other classmates and could not be described as cyber bullying. No evidence existed which indicated that Justin intended to disrupt school operations or interfere with the rights of fellow classmates or school personnel to be let alone. Even though the web site was created using district technology, and as such, probably violated the acceptable use policy, expelling a student for such a feeble and misguided attempt at humor represented a gross over-reaction by school officials and a violation of Joshua’s First Amendment rights.


Factual Background

In Flaherty v. Keystone Oaks School District (2003), school officials removed a student, Jack, from his high school volleyball team, revoked his on-campus computer privileges and banned him from participating in all additional after-school activities after he posted messages about an upcoming volleyball game that included statements critical of a teacher. Jack’s parents filed suit claiming that the policies authorizing school officials to punish student expression were unconstitutionally vague and overbroad and sought a motion for summary judgment.

The evidence showed that three of the four messages were posted from home with the fourth being posted at school. The messages consisted of mild forms of “trash-talking” about an
upcoming volleyball game. The critical comments about the teacher were exceptionally mild and
directed at a student on the opposing team whose mother was an art teacher. One comment stated
“your mom is a bad art teacher” (p. 701), and the other stated “my dog could teach art better than
Bemis’ mom” (p. 701).

Legal Analysis

The parties in Flaherty (2003) reached a partial settlement prior to the proceedings, so, as
a result, the only issue before the court was whether the policies listed in the student handbook
were unconstitutionally vague and overbroad. However, the application of Tinker was still
relevant as the plaintiff’s argument was based on the First Amendment protections articulated in
Tinker. The court agreed with the plaintiff and noted that nothing in the district’s policy “put a
school official on notice that his authority to discipline under a school policy is limited to those
instances where a student’s…behavior causes or is likely to cause a substantial disruption of
school operations” (p. 703). The district cited provisions in board policy that contained language
which paralleled the language of Tinker, but this language was not incorporated into the student
handbook and as such could not be relied upon by the district as evidence of adequate notice. As
such, the court ruled that the policies were both “vague in definition [and] in application and
interpretation such that they could lead to arbitrary enforcement” (p. 704).

Mr. Hagy, the principal of the school, testified that he could discipline a student for
“brining disrespect, negative publicity, negative attention to our school and to our volleyball
team” (p. 704). The court ruled that “this is simply not sufficient to rise to the level of substantial
disruption under Tinker” (p. 704).

The policy upon which school officials relied to justify the disciplinary consequences
included words such as “abuse,” “harassment,” “offend,” “respectful,” and “inappropriate”
without adequate definitions. The court in Flaherty (2003) ruled that these policies “could be interpreted to prohibit a substantial amount of protected speech [and] are overbroad because they are not limited to speech that causes or is likely to cause a substantial disruption of school operations” (p. 706). Consequently, the court held that the application of these vague and overbroad policies found in the student handbook violated Jack’s First Amendment expression rights.

**Application of the Identified Factors**

Even though the only issue in front of the court was the issue of policy construction, when applying the identified factors listed previously, it appears that the decision of the court in Flaherty (2003) was correct. Jack’s comments were apolitical, non-threatening, non-disruptive, and non-defamatory. It does not appear as though Jack intended to disrupt school operations or interfere with the rights of others. His comments were related to the ineffective teaching practices of an art teacher, but in no way, could be considered malicious or defamatory. As such, his criticisms should be protected by a conditional privilege. Although the teacher in question, may have found the comments offensive, the First Amendment protects speech that is merely offensive. Justice Brennan, writing for The Supreme Court in *Texas v. Johnson* (1989), put it clearly when he said “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable” (p. 414). If school officials were granted the authority to punish expressions like those posted by Jack, then school officials would have the authority to police all off-campus expression, a power they should not have and probably do not want.
Latour v. Riverside Beaver School District

Factual Background

In Latour v. Riverside Beaver School District (2005), school officials expelled a student, Anthony, for 2 years after they became aware of four rap songs he created and posted on the Internet. The songs contained crude and vulgar language and what school officials considered to be threatening messages and lyrics. The rap songs were written, recorded over a 2-year period at Anthony’s home, and posted on his web site from his home computer. Anthony never personally brought the songs onto school premises. Anthony’s parents filed a motion for a preliminary injunction, asking the court to enjoin the school district from expelling Anthony and to prevent the application of any additional penalties against Anthony in response to Anthony’s constitutionally protected speech.

Legal Analysis

After describing the factors that courts should consider when asked to issue a preliminary injunction, the court in Latour (2005) felt that Anthony had a good chance of succeeding on the merits of his First Amendment claim. The district attempted to argue that the songs constituted “true threats” or in the alternative that songs “caused a material and substantial disruption of the school day” (p. 3). In analyzing the “true threat” claim, the court applied the standard used in Lovell v. Poway Unified School District (1996) in which the court considered the intent of the speaker. The evidence showed that “Anthony’s songs were written in the rap genre and that the rap songs are just rhymes and are metaphors….No actual violence was intended” (p. 4). The court found no evidence existed which indicated that the songs were directly communicated to anyone or that anyone felt threatened.
In addition, the court in Latour (2005) noted that the songs came to the attention of school officials in late March, yet they took little action to address or investigate the issue until the May 17 expulsion hearing. According to the court, school officials “did not search Anthony's locker to determine whether he had any types of weapons, did not refer Anthony to counseling, [and] did not talk to Anthony or his parents” (p. 5). These facts led the court to conclude that the songs did not create a substantial or material disruption of school operations. If school operations were substantially disrupted or were likely to be substantially disrupted, why, the court asked, did school officials wait almost 2 months to hold an expulsion hearing? The balance of irreparable injuries tipped strongly in Anthony’s favor, and a significant public interest in protecting First Amendment rights existed. Based upon this analysis, the court granted Anthony’s motion for a preliminary injunction. Ultimately, the dispute was settled out of court, and the district agreed to pay Anthony $90,000 and to revise its policy for punishing student expressions (Cato, 2006).

Application of the Identified Factors

When applying the identified factors listed previously, the court in Latour (2005) appears to have reached the correct decision. Despite the fact that the language used in the songs was crude and vulgar, it did not appear as if anyone felt threatened. The songs did not defame school personnel, and Anthony’s expression did not create a substantial or material disruption of school operations. No evidence was presented that the lyrics could be characterized as cyber bullying, although the mother of Jane Smith, one of the girls mentioned in the lyrics, testified that her daughter felt “humiliated and broken hearted” (p. 4) and ultimately withdrew her from school. The reaction of school officials did not constitute a timely response, which speaks to the lack of severity of the situation; however, despite this lack of severity, school officials attempted to
expel Anthony for 2 years, the most severe consequence issued in all of the cases described in this study. The response by school officials was disproportionate to any possible legitimate concern related to the lyrics of the songs.

*Layshock v. Hermitage School District*

Factual Background

In *Layshock v. Hermitage School District* (2010), a student, Justin, used his grandmother’s computer to set up a fake profile on MySpace that contained defamatory and malicious language about the school principal. The fake profile described the principal as a “big fag” (p. 253), a “big whore” (p. 252), a “big steroid freak” (p. 252), a marijuana smoker, and a drunk. Justin published the profile and invited all of his on-line friends to view it. News of the profile spread quickly, and most of the students at Hickory High became aware of its existence. Justin accessed the fake profile using school computers during school hours on several occasions to show the web site to fellow classmates. Dozens of other students accessed the web site at school as well. Many of these students were called out of class and questioned by school officials in an attempt to find out who was responsible for creating the web site, which interfered with their opportunity to learn. Classes were disrupted as groups of students were accessing MySpace during class to look at the fake profile prompting multiple redirections by teachers. The district’s technology coordinator spent considerable time trying to block access to MySpace. A faculty assembly was called to discuss the problem, and during the assembly, Principal Trosch became so upset he could not continue. For the last 5 days of the semester, student computer access on campus was limited to times when teachers could directly supervise students; as a result, several teachers had to adjust lesson plans. Computer programming classes were cancelled altogether. Trosch’s son, a student at the school, was also ridiculed and harassed.
The school district suspended Justin for 10 days, and then placed him in the district’s alternative educational facility for the remainder of the school year. Additionally, Justin was banned from participating in all extra-curricular activities, including graduation. The district based this punishment on a section of the district’s discipline code which prohibited “disruption of the normal school process,…harassment of a school administrator via computer/Internet with remarks that have demeaning implications,…obscene, vulgar and profane language [and] computer use violations” (p. 254). Justin’s parents filed suit claiming, among other causes of action, that the district’s actions violated Justin’s First Amendment rights of expression in violation of 42 U.S.C. § 1983. The district court denied the Layshock’s motion for a temporary restraining order and ruled in favor of the district on all counts except the Layshock’s First Amendment claim. Justin never served the full extent of the punishment as the district agreed to remove him from the alternative facility and to allow full extracurricular participation.

Legal Analysis

On appeal, the Third Circuit Court in Layshock (2010) considered the application of Tinker, Fraser, Hazelwood, and Morse and noted that it was “against this legal backdrop that we must determine whether the District's actions here violated Justin's First Amendment rights” (p. 258). Before continuing their analysis, the court foreshadowed their final decision by stating, “it is important to note that the district court found that the District could not establish a sufficient nexus between Justin's speech and a substantial disruption of the school environment” (p. 258). The court continued their analysis by citing Thomas v. Board of Education Granville Central School District (1979), a case in which the court also ruled that the expression of the student, in the construction and distribution of an underground newspaper, was off-campus speech. The court used the holding in Thomas to rule that Justin’s expression did not enter the school setting,
and as such, could not be considered on-campus speech despite the fact that he accessed the fake profile on campus and showed it to several of his classmates. The court stated that the connection between “Justin's conduct and the school is far more attenuated than in Thomas, and we will not allow the School District to stretch its authority so far that it reaches Justin while he is sitting in his grandmother's home after school” (p. 260).

Next, the court in Layshock (2010) addressed the possible application of Fraser given the fact that the Justin’s expression was vulgar, but rejected the school district’s assertion that the vulgar nature of the speech allowed them to punish Justin. According to the court, Fraser is limited to on-campus lewd and vulgar expressions. Finally, the school district cited three cases, discussed later, where courts ruled that school officials did not violate a student’s First Amendment rights: *Doninger v. Niehoff* (2008), *Wisniewski v. Board of Education of Weedsport Central School District* (2007), and *J. S. v. Bethlehem Area School District* (2002). The court in Layshock summarily dismissed the application of all three cases by stating:

> We believe the cases relied upon for the District stand for nothing more than the proposition that schools may punish expressive conduct that occurs outside of school as if it occurred inside the "schoolhouse gate," under certain very limited circumstances, none of which are present here. (p. 263)

Finally, in regard to the possible application of the Tinker substantial disruption test, the court in Layshock (2010) noted that the district court ruled that Justin’s expression did not substantially disrupt school operations and that the school district did not appeal this portion of the district’s court findings. The court held “that Justin's use of the District's web site does not constitute entering the school, and that the District is not empowered to punish his out-of-school expressive conduct under the circumstances here” (p. 263).
Application of the Identified Factors

When applying the factors identified previously, it appears as though this case was decided incorrectly. The contents of the web site in Layshock (2010) were not of a political nature concerning a matter of public interest. The expressions were not threatening, but they were defamatory and did result in a substantial disruption of school operations and a considerable amount of administrative inquiry despite the court’s ruling to the contrary. Justin’s off-campus expression interfered with the rights of other students by restricting their access to valuable educational tools and shutting down several classes for an entire week. The expressions associated with the web site, although created off campus, were accessed and communicated on campus, and the contents interfered with the rights of school officials to be let alone and to protect their reputations. Clearly, it was Justin’s intention to defame the principal of the school. In light of these factors, the decision in Layshock (2010) was incorrectly decided.

One important factor in the court’s decision in Layshock (2010) was the fact that Justin’s profile was only one of four that were created about Principal Trosch during this time, yet Justin was the only student punished. The court stated “ironically, Justin, who created the least vulgar and offensive profile, and who was the only student to apologize for his behavior, was also the only student punished for the MySpace profiles” (p. 254). This fact was cited by the court to support its ruling that the district failed “to forge a nexus between the school and Justin’s profile” (p. 259). In other words, the school could not establish that the disruptions that occurred were the result of Justin’s profile and not one of the other three fake profiles.

On the same day a three-judge panel of Third Circuit judges issued its ruling in Layshock (2010), a different three-judge panel issued a ruling in J. S. v. Blue Mountain School District (2010). The factual circumstances which gave rise to the cause of action in Blue Mountain were
almost identical to the facts in Layshock; however, the holding in Blue Mountain was completely different from the holding in Layshock. This embarrassing contradiction in judicial analysis among judges in the same federal circuit court illustrates the need for a uniform standard better than any argument this researcher could purport. When judges serving on federal circuit courts cannot adjudicate these cases with any degree of consistency, how can the public expect school administrators to operate within the confines of the law?

On April 9, 2010, Chief Judge Anthony J. Scirica issued an order vacating both the Layshock and Blue Mountain decisions and granted the petition for a rehearing en banc in both cases. The cases were argued on June 3, 2010. Hopefully, the court will reconcile the apparent contradiction between Layshock (2010) and J. S. v. Blue Mountain School District (2010). When the Third Circuit reconciles the conflict between the original decisions in Layshock and Blue Mountain, it may reach a decision that provides school authorities clearer guidance about the types of electronically delivered student speech that schools can censor.

Evans v. Bayer

Factual Background

In Evans v. Bayer (2010), a student posted a comment on Facebook and solicited other students to post comments as well concerning their feelings about a teacher. The initial comment posted by the plaintiff stated:

Ms. Phelps is the worst teacher I have ever met! To those students who have had the displeasure of having Ms. Sarah Phelps, or simply knowing her and her insane antics: here is the place to express your feelings of hatred. (p. 1367)

Three other students posted comments that supported Ms. Phelps and criticized Evans for posting the initial comment. Evans removed the posting after 2 days, and Ms. Phelps was unaware of its
existence at that time. The posting came to the attention of the principal, Bayer, after it had been removed. In response to the posting, Evans was suspended for 3 days and removed from advanced academic classes.

Legal Analysis

The main issue in front of the court in *Evans v. Bayer* (2010) was whether or not Bayer should be granted immunity from personal liability. Bayer argued that he was entitled to qualified immunity due to the fact that he was acting in his discretionary capacity (*Holloman v. Harland*, 2004). The court agreed, however, the plaintiff, Evans, could overcome the qualified immunity assertion if she could show that Bayer violated one of her constitutional rights and that this right was well established at the time of the incident. The Evans court asked whether, at the time of the events which gave rise to the suit, the state of the law provided defendants fair warning that their actions were unconstitutional.

To support his argument that the law was unsettled with regard to whether he had the authority to discipline Evans, Bayer cited *Doninger v. Niehoff* (2008), in which the Second Circuit Court stated:

> If courts and legal scholars cannot discern the contours of First Amendment protections for student Internet speech, then it is certainly unreasonable to expect school administrators, such as Defendants, to predict where the line between on- and off-campus speech will be drawn in this new digital era. (p. 224)

Nevertheless, the court in Evans (2010) was not convinced. In this case, the court ruled that Evan’s off-campus expression was not disruptive and did not constitute a likelihood of future disruptions. The comment was not threatening, lewd, vulgar, or defamatory. It did not promote drug use or incite violence. Under these circumstances, even if the expression had occurred on
campus where school officials hold more authority, it would have been protected speech under the First Amendment. From this perspective, the court reasoned that the facts of this case are distinguishable from cases such as Layshock and Doninger for which qualified immunity was awarded to the individual school administrators. The request for qualified immunity was denied *Evans v. Bayer* (2010).

The court *Evans v. Bayer* (2010) also considered whether the expression should be considered on-campus or off-campus. The court concluded that Evans never accessed the web site at school and that the expression did not create significant disruptions. Evans’ web site was completely off-campus and beyond the reach of school officials. Next, the court looked at whether or not the content of Evans’ expression fell into one of the categories of unprotected speech. The court concluded that it did not. Thus, Evans’ speech was constitutionally protected, and school authorities were in error when they punished her.

**Application of the Identified Factors**

When applying the factors identified previously, it appears as though the court in *Evans* (2010) decided this case correctly. Despite the fact that the content of the expression was apolitical and highly critical of Ms. Phelps, it was non-threatening, non-disruptive, and could not be characterized as cyber bullying or cyber harassment given the fact that it constituted a one-time event. Bayer tried to argue that the posting had “serious consequences for the potentially defamatory content and for which the teacher would be unable to properly respond” (p. 1373). However, the content of the expression in Evans did not rise to the level seen in other cases where school personnel were accused of crimes of moral turpitude, adultery, child molestation, drug addictions, homosexuality, impotence, and more. Second, student criticism of school policies and personnel is protected by a conditional privilege (*Alexander & Alexander*, 2009).
Third, Ms. Phelps did not need to respond because the three comments posted by other students went much further to protect Ms. Phelps’ reputation than anything she could have posted.

In regard to the defamation assertion, the court in Evans v. Bayer (2010) stated, “if school administrators were able to restrict speech based upon a concern for the potential of defamation, as Bayer claims, students everywhere would be prohibited from the slightest criticism of their teachers, whether inside or outside of the classroom” (p. 1373). There is a difference, however, between the “slightest criticism” and malicious defamatory expressions. In light of these factors, the actions of Bayer violated Evans’ First Amendment right of expression.

J. C. v. Beverly Hills Unified School District

Factual Background

In J. C. v. Beverly Hills Unified School District (2010), plaintiff J. C. and three of her friends constructed a video off-campus about one of their classmates, C. C. On the video, C. C. was referred to as “spoiled,” a “slut,” and “the ugliest piece of shit I’ve ever seen in my whole life” (p. 4 of an unpublished slip opinion). That evening J. C. posted the video on the YouTube Internet site where anyone can post video clips for the general public to view. J. C. also notified about 10 of her friends of the video’s existence and called C. C. herself to tell her about the video. After viewing the video, C. C. told J. C. “that she thought the video was mean” (p. 5), and J. C. asked if C. C. wanted her to remove the video. At the direction of her mother, who wanted to take the video to school officials the next day, C. C. said no.

At school the following morning, several students were already discussing the video. C. C., and her mother, met with one of the school’s counselors for about 30 minutes during which time C. C. informed the counselor that she did not want to attend class because she “faced humiliation and had hurt feelings” (p. 6). The counselor convinced C. C. to go to class and the
record indicated that this was the only time C. C. missed class as a result of the video. School official’s initiated an investigation into the video and questioned five students who were also involved. Ultimately, school officials decided to suspend J. C. for 2 days. The other students involved in the video were not punished. The plaintiff filed suit claiming that school officials violated her First Amendment rights and had no authority to regulate speech which occurred away from school or any school-sponsored event.

Legal Analysis

After reviewing the four Supreme Court cases dealing with student expression, the court in *J. C. v. Beverly Hills Unified School District* (2010) noted that although the Supreme Court has yet to hear a case dealing with off-campus student expression, several lower courts, including the Ninth Circuit, have heard such cases. According to the court in *J. C. v. Beverly Hills Unified School District*, courts that have adjudicated such cases, “have held that a school may regulate such speech under Tinker, if the speech causes or is reasonably likely to cause a material and substantial disruption of school activities” (p. 18). To support this observation, the court referenced *LaVine v. Blaine School District* (2001) in which the Ninth Circuit upheld the expulsion of a student who created a threatening poem at home and brought it to campus by concluding “that the school was reasonable to portend a substantial disruption” (p. 992). In addition, the court in *J. C. v. Beverly Hills Unified School District* (2010) identified approximately 10 additional cases, all of which have been discussed in this dissertation, to support its observation that typically courts apply the Tinker substantial disruption test without considering where the expression was originally created.

The Second Circuit Court decisions, however, represent an exception to this observation. In *Wisniewski v. Board of Education of Weedsport Central School District* (2007) and *Doninger*
v. Niehoff (2008), the Second Circuit Court applied a foreseeability test before it applied Tinker’s substantial disruption test. According to the court in Wisniewski and Doninger, it must be foreseeable for the off-campus expression to reach the school and in fact reach the campus before school officials can exercise authority over it. In both cases, the court found a sufficient nexus between the speech and the campus to permit the application of the Tinker substantial disruption test. This recognition was used by the court in J. C. (2010) to refute the arguments of the plaintiff that off-campus equals off-limits. The court stated “any speech regardless of its geographic origin which causes or is foreseeably likely to cause a substantial disruption of school activities can be regulated by the school” (p. 32). Interesting to note, the court stated “cases considering the relationship between off-campus speech and the school campus more readily find a sufficient nexus exists where speech over the Internet is involved” (p. 34). This recognition supports the arguments of this researcher. Once a student posts speech on the Internet, the student unlocks their lock-box of privacy, and it is foreseeable that the speech will come to the attention of school officials.

Next, the court turned its attention to level of disruption created by the YouTube video. The court noted that school officials are not required to wait for an actual disruption to occur (Lowery v. Euverard, 2007), but school officials must have more than an “undifferentiated fear or apprehension of disturbance” (Tinker v. Des Moines Independent Community School District, 1969, p. 508). In addition, the court noted that determining whether or not student speech produces a material or substantial disruption is “highly fact-intensive” (p. 44). School officials must be able to show more than a mild distraction occurred, but the disruption does not have to rise to the level of total pandemonium. The court was also troubled due to being unable to
identify any other cases dealing with off-campus speech targeting another student, an observation confirmed through this legal analysis.

When applying the Tinker substantial disruption test to the facts of the case, the court *J. C. v. Beverly Hills Unified School District* (2010) noted that “there was no evidence that classroom activities were substantially disrupted” (p. 45). In addition, there was no evidence that school officials could point to a foreseeable likelihood that subsequent material or substantial disruptions were imminent. As a result, the court ruled that the 2-day suspension instituted by school officials violated J. C.’s First Amendment right of expression.

Application of the Identified Factors

When applying the factors identified previously, it appears as though *J. C. v. Beverly Hills Unified School District* (2010) was decided correctly. The speech in question was apolitical, but it was non-threatening. There was no evidence to lead school officials to believe that C. C.’s safety was in jeopardy. There was no evidence that classroom activities were disrupted, and the expression did not intentionally defame school personnel. While the YouTube video was offensive to the student victim, a onetime posting does not rise to the level of cyber bullying as defined by researchers such as Patchin and Hinduja (2006). The evidence showed “that the school simply had to address the concerns of an upset parent and a student who temporarily refused to go to class….This does not rise to the level of a substantial disruption” (p. 63).
Cases Supporting School Authority to Regulate Off-campus Student Cyber Expression

*J. S. v. Bethlehem Area School District*

**Factual Background**

In *J. S. v. Bethlehem Area School District* (2002), the Pennsylvania Supreme Court heard a case involving a student who created a web site titled “Teacher Sux” (p. 644) from his home computer which contained “derogatory, profane, offensive and threatening comments directed toward one of the students’ teachers and his principal” (p. 643). The student made insulting comments about the teacher’s figure and disposition, and included a link, which when activated, showed a picture of the teacher with her face morphing into that of Adolf Hitler. The student included reasons why the teacher should die with images of her head decapitated from her body. The student also solicited donations to hire a hit man to kill the teacher. J. S. used the F word and B word hundreds of times to describe his intended victims.

J. S., while at school, told other students about the web site and showed it to at least one classmate using school technology. It was not long before school officials, and the teacher, Mrs. Fulmer, became aware of the web site. School authorities contacted the FBI, which conducted an investigation, but ultimately took no official action. Despite the decision of the FBI, the teacher was so disturbed by the web site she began to suffer from anxiety attacks and other afflictions as a result of the fear generated by the messages. She ultimately quit teaching for the remainder of the year, and the district was forced to hire three substitute teachers, “which disrupted the educational process of the students” (p. 646).

The attack on the school principal, Mr. Kartosis, included an accusation that he was having an affair with another principal from a neighboring school. This caused embarrassment as well as unnecessary stress to Mr. Kartosis and his family. In response, school officials decided to
suspend J. S. for 3 days for what it called level III offenses pending a further investigation. At the suspension hearing, the length of the suspension was increased to 10 days, and it was determined that the district would seek expulsion. Prior to the expulsion hearing, J. S.’s parents enrolled him in a different school.

Legal Analysis

The fact that the student accessed the web site at school was, for this court, enough to rule that it constituted on-campus expression. As a result, the court attempted to apply Tinker, Fraser, and Hazelwood; but according to Reeves (2008), this was difficult. The court recognized areas where all three cases could be distinguished since the expression was not silent symbolic political speech as in Tinker, was not a school sponsored publication as in Hazelwood, nor was the offensive, vulgar web site communicated at a school event with a captive audience as in Fraser. In the end, the court relied on Tinker and Fraser and ruled that the web site caused a material and substantial disruption at school and that the speech interfered with the basic mission of the school.

Application of the Identified Factors

When applying the identified factors listed previously, the decision of the court _J. S. v. Bethlehem Area School District_ (2002) seems supported by a substantial weight of evidence. The expression at issue did not involve a legitimate matter of public interest. Quite the contrary, it was a wanton, willful, and successful attempt at cyber harassment that was apparently designed to injure the reputation and well-being of a teacher and a school administrator. J. S. was not protesting a war or trying to bring attention to the need for immigration reform. He publically posted a lewd, vulgar, defamatory, and threatening message which resulted in a substantial disruption of school operations and harm to a teacher.
The reaction of school officials, however, was more analogous to that in Beussink (1998) which supported the court’s interpretation that school officials were largely motivated to act out of a desire to avoid the discomfort which typically accompanies an unpopular viewpoint. School officials twice increased the length of the disciplinary consequence all the way up to expulsion. Despite the graduating and severe consequences, the court recognized that the damage was intentionally inflicted and resulted in a substantial disruption of school operations, which justified the ultimate sanction.

The expression at issue also had a significant negative impact on the classmates of J. S. due to the fact that it took four teachers to complete one year of instruction. Mrs. Fulmer was a middle school algebra teacher with more than 100 students in her classes. Although no evidence was presented, these students likely did not learn as much as they would have as a consequence of the disruptive expression.

Requa v. Kent School District

Factual Background

In Requa v. Kent School District (2007), a case which involved off-campus expressive activities, two students filmed a teacher during class on several occasions as another student made faces behind her back, rabbit ears behind her head and pelvic thrusts from behind. They also filmed her rather large posterior in unflattering positions. They later edited the videos together, added graphics and audio in the form of a song titled “Ms. New Booty,” and posted the video on the Internet. In February of the following school year, a local reporter for a Seattle news channel discovered the video and brought it to the attention of school officials. Up to this time, no disruptions of any kind related to the video had been reported. Every student involved
received a “40-day suspension with 20 days held in abeyance” (p. 1275), pending the completion of a research paper on why their actions were wrong.

One of the students, Gregory Requa, appealed the disciplinary sanction to the school board, which upheld the decision of school officials. The Board ruled that the pelvic thrusts and the “close-up recording of Ms. M’s buttocks…both constitute activity and conduct of a sexual nature that create an intimidating, hostile, and offensive work environment for any teacher who might be subjected to such conduct by students” (p. 1276). According to the board, this constituted sexual harassment as defined by the Kent High School handbook. Unsatisfied with this decision, Gregory Requa filed suit in federal district court claiming that the actions of school officials were in violation of his First Amendment right of expression.

Legal Analysis

The court for the Western District of Washington upheld the suspension and ruled 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 substantial disruption to the work and discipline of the school. (p. 1280)

In essence, the district was not punishing the student for his expressive activities but was punishing the student for classroom conduct which created a material and substantial disruption. As a result, this case offers no precedential value or guidance in the arena of off-campus cyber expression.

Application of the Identified Factors

Application of the identified factors is partially irrelevant in light of the holding of the court. However, if the court had considered more than the actions of the students within the
classroom, and analyzed whether or not school officials would have been justified in punishing the off-campus posting of the video, the decision might have been the same. The expression was apolitical, non-threatening, and non-disruptive. It could not be characterized as cyber bullying, but it was a malicious attack on the character and reputation of a teacher.

Wisniewski v. Board of Education of Weedsport Central School District

Factual Background

In Wisniewski v. Board of Education of Weedsport Central School District (2007), an eighth grade student named Aaron produced a threatening instant messaging (IM) icon depicting a gun firing a bullet at a person’s head. The icon contained the label “Kill Mr. VanderMolen” (p. 35), who happened to be Aaron’s English teacher. Aaron created the icon at home using his parent’s computer. The icon became Aaron’s personal identifier which was displayed every time he communicated with his IM buddy list over the course of about 3 weeks. One of Aaron’s classmates informed Mr. VanderMolen and provided a copy of the threatening icon. Mr. VanderMolen, upset by the icon, contacted school officials, who in turn contacted Aaron’s parents and the local police. Police investigators decided not to pursue charges, but school officials elected to proceed with disciplinary action.

An independent hearing officer determined that Aaron’s off-campus expression violated district policy and portions of the New York State Education Code which prohibited endangering the health and welfare of students and school staff. The hearing officer ruled “that Aaron did commit the act of threatening a teacher…creating an environment threatening to the health, safety and welfare of others, and his actions created a disruption in the school environment” (Wisniewski v. Board of Education of Weedsport Central School District, 2007, p. 37). The message necessitated considerable administrative inquiry, the replacement of Mr. VanderMolen,
who no longer felt safe or comfortable teaching Aaron, and several student interviews which interrupted their opportunity to learn. As a result of the finding of the independent hearing officer, Aaron was suspended for one semester and transferred to an alternative educational facility. Aaron’s parents filed suit seeking damages under 42 U.S.C. § 1983. The district court granted a motion for summary judgment in favor of the Board and Superintendent ruling that the decision of the hearing officer was entitled to “preclusive effect” (p. 37), and as such, the message was a threat which placed it outside the penumbra of First Amendment protection. Aaron’s parents appealed the decision of the district court.

Legal Analysis

The Second Circuit Court in *Wisniewski v. Board of Education of Weedsport Central School District* (2007), began its analysis of the First Amendment claim by looking at the application of the findings in the case of *Watts v. United States* (1969), in which the Supreme Court reversed a lower court decision that convicted a participant at a small political rally of threatening to kill the President. In Watts, the Court ruled that the comments by the defendant amounted to “political hyperbole” (p. 708) and did not constitute a true threat. The Wisniewski court concluded that the application of Watts to threats made by public school children to be inappropriate and stated “we think that school officials have significantly broader authority to sanction student speech than the Watts standard allows” (p. 38). The court chose not to apply the true threat standards set forth in *Doe v Pulaski County Special School District* (2002) or *Lovell v. Poway Unified School District* (1996). Instead, the court relied upon the Tinker substantial disruption test as the standard to be applied.

In response to the fact that the web page was created off campus, the court was clear and succinct in stating “the fact that Aaron’s creation and transmission of the IM icon occurred away
from school property does not necessarily insulate him from school discipline” (p. 43). The court concluded that Aaron’s speech:

- crosses the boundary of protected speech and constitutes student conduct that poses
- reasonably foreseeable risk that the icon would come to the attention of school authorities
- and that it would materially and substantially disrupt the work and discipline of the school. (p. 42)

The court missed the opportunity to apply Tinker’s second prong. The threatening icon, which was sent every time the student communicated with his friends, interfered with Mr. VanderMolen’s right to be let alone. The evidence showed that Mr. VanderMolen became so upset that he could not effectively execute his duties as a public school teacher and that he could no longer effectively teach Aaron’s class.

In *Doe v. Pulaski County Special School District* (2002), an eighth grade boy referred to by the court as J. M., wrote two threatening, obscene letters including violent descriptions of what he was going to do to his ex-girlfriend. The letter, which was ultimately delivered to the ex-girlfriend, was filled with vulgarities, referred to the girl as a bitch, ass, slut, and whore more than 80 times, and used the F word no fewer than 90 times. In addition, as if this were not enough, the letter described how the boy was going to sodomize, kill, and rape the girl. In ruling in favor of the district, the court noted that free speech protections do not extend to certain forms of expression such as obscenities, statements which are defamatory, or fighting words. The court quoted *Chaplinsky v. New Hampshire* (1942) and stated “the speech is of such slight social value as a step to truth that any benefit is clearly outweighed by the social interest in order and morality” (p. 618).
The court in Pulaski (2002) spent some time discussing whether or not the plaintiff intended to communicate the alleged threat. The court ruled that once the boy allowed his friend to see the threatening letters that he unlocked his “lockbox of personal privacy” (p. 620). In Wisniewski (2007), the plaintiffs tried to argue that it must be foreseeable that the off-campus communication might be discovered or end up on campus before school officials can take action. The members of the court were divided whether it must be shown that it was reasonably foreseeable that the message could reach school grounds, or whether the mere fact that it did permitted the intervention of school officials. The court ultimately ruled that regardless of the decision on that particular issue, it was foreseeable that the icon in Wisniewski v. Board of Education of Weedsport Central School District (2007) would come to the attention of school authorities, and in so doing, it was foreseeable that a substantial disruption could occur. In Pulaski (2002), once J. M. showed the letter to his friend, his lockbox of personal privacy was opened and the ultimate destination was the school. In Wisniewski (2007), the court concluded that the moment the threatening icon was posted, it was foreseeable that other students or school employees would soon be aware of its existence.

Application of the Identified Factors

When applying the identified factors listed previously, the court Wisniewski v. Board of Education of Weedsport Central School District (2007) appears to have reached the correct decision. The expression in question was apolitical, but it was threatening and disruptive. The expression interfered with the right of Mr. VanderMolen to be let alone, by threatening his safety and security, and interfered with the learning opportunities of several students. The expression was an intentional attack on a teacher and undermined the teacher’s capacity to effectively carry out his duties, thereby producing a material and substantial disruption of school operations.
Doninger v. Niehoff

Factual Background

In Doninger v. Niehoff (2008), Justice Sotomayor concurred with a decision written by her colleague, Judge Livingston, who ruled in favor of a school district’s decision to disqualify a student, Avery Doninger, from running for a student council class office after she posted a vulgar, misleading, and disruptive blog. Doninger and some of her student council peers were upset that a band contest had to be rescheduled, so they urged people to contact school officials to complain. An original e-mail was composed at school on April 24th that contained incorrect information claiming the entire contest had been cancelled. Both the principal’s and superintendent’s offices were flooded with calls and e-mails and Niehoff, the school’s principal, had to be called back to her campus and away from a planned in-service seminar to deal with the complaints.

Later that day, Niehoff encountered Avery and informed her that she was upset that student council members resorted to mass e-mails containing incorrect information. Further, Niehoff expected the student council to work with school officials and to demonstrate “qualities of good citizenship at all times” (Doninger v. Niehoff, 2008, p. 45). Niehoff asked Avery to send out an e-mail to correct the inaccurate information and to inform everyone that the contest needed to be rescheduled, not cancelled. Instead, Avery posted a blog, which the court characterized as vulgar and foreseeably disruptive, that night from home. The blog referred to school officials as “douchebags,” again incorrectly stated the band contest was cancelled, and encouraged readers to contact school officials to “piss her off more” (p. 46).

The next morning, unaware of the latest inappropriate blog posting, Superintendent Schwartz, Niehoff, and several additional campus and district representatives met with the
student council to plan a later date for the band contest. It was agreed that the contest would be held in the Lewis Mills High School auditorium on June 8th. This decision was announced in the school’s newsletter and an e-mail was sent to everyone on the original e-mail list. Despite informing the community that the band contest had been rescheduled, Niehoff and Schwartz continued receiving phone calls and e-mails concerning the event for several days. It was during this time that Schwartz’s son found the vulgar and disruptive blog posting. Schwartz notified Niehoff of the blog posting. Niehoff subsequently determined that Avery’s actions “failed to display the civility and good citizenship expected of class officers” (*Doninger v. Niehoff*, 2008, p. 46) and decided that Avery would not be allowed to serve as a student council officer her senior year.

According to the record, Niehoff did not inform Avery of her decision because she did not want to interrupt Avery’s AP testing. In what seemed vindictive, Niehoff decided to wait until May 17th when Avery came to her office to accept the nomination as Senior Class Secretary. Instead of receiving the nomination, Niehoff handed Avery a copy of the vulgar and disruptive blog and instructed Avery that she was to “apologize to Schwartz in writing, show a copy of the blog post to her mother and withdraw her candidacy” (*Doninger v. Niehoff*, 2008, p. 46). Avery complied with the first two requests but not the third. As a result, Niehoff refused to endorse her candidacy, which was a requirement for holding class office. Avery could still be a member of the student council, just not as an officer. Avery’s parents filed suit claiming that the school district violated her First Amendment rights and asked the court for a preliminary injunction to void the election, or in the alternative, to award Avery the title of Senior Class Secretary.
Legal Analysis

Despite the fact the blog was constructed and posted exclusively off-campus, the Second Circuit ruled that it “was the type of student expression that could properly be prohibited on the basis that it would materially and substantially disrupt the work and discipline of the school” (*Doninger v. Niehoff*, 2008, p. 41). The court noted that Avery’s off-campus blog "was purposely designed by Avery to come onto the campus" (*Doninger v. Niehoff*, 2008, p. 50). Her original e-mail and subsequent blog encouraged readers to act in a way that produced a substantial disruption of school operations. Furthermore, even if disruptions had yet to occur, the court noted that it was foreseeable that substantial disruptions were likely to occur. Avery’s own testimony indicated that “students were all riled up and that a sit-in was threatened because students [were intentionally mislead by Avery to believe that] the event would not be held” (*Doninger v. Niehoff*, 2008, p. 51). "School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place" (*Lowery v. Euverard*, 2007, p. 596). The court in *Doninger v. Niehoff* (2008) stated: Given the circumstances surrounding the Jamfest dispute, Avery's conduct posed a substantial risk that LMHS administrators and teachers would be further diverted from their core educational responsibilities by the need to dissipate misguided anger or confusion over Jamfest's purported cancellation. (p. 51)

Finally, the court in Doninger (2008) asserted that the nature of the disciplinary consequences were significant in the outcome of the case. Avery was not denied any constitutionally protected right to an education. She was merely denied the opportunity to participate “in voluntary, extracurricular activities [which are]… a privilege that can be
rescinded when students fail to comply with the obligations inherent in the activities themselves” (p. 52).

Application of the Identified Factors

When applying the identified factors listed previously, it appears as though the decision of the court in Doninger (2008) was correct. The court characterized the blog posting as lewd and vulgar yet recognized that it was not threatening. The expression was not akin to the pure speech protected by Tinker; it could not be characterized as cyber bullying; but it was clearly defamatory. Despite the fact that the blog was created and posted off-campus, it was directed at the school and intended to produce a substantial and material disruption of school operations. Nowhere in the record does it tell how many e-mails and phone calls were received, but the court noted that both Principal Niehoff and Superintendent Schwartz “were forced to miss or arrive late to several school-related activities scheduled for April 24 and 25” (p. 46). In addition, evidence indicated that continued disruptions were planned. The consequences imposed by school officials could only be characterized as minimal. The only tangible consequences other than losing the opportunity to be a class officer was that now Avery would not be giving a nominating speech at the school assembly later in the year.

O. Z. v. Board of Trustees of the Long Beach Unified School District

Factual Background

In O. Z. v. Board of Trustees of the Long Beach Unified School District (2008), a student constructed, while at home, a threatening and graphic slide show which depicted the assassination of his seventh grade English teacher. The teacher, Ms. Rosenlof, discovered the slide show while conducting a Google search of her name. She was so disturbed by the graphic content and violent images that she contacted school officials who promptly conducted an
investigation. During the investigation, O. Z. claimed that she never intended to show the graphic, threatening slide show to anyone yet she posted to it on YouTube where it was viewable by anyone with Internet access. School officials suspended O. Z. and transferred her to another school for her eighth grade year. O. Z.’s parents filed suit seeking a preliminary injunction asking that the court require the school district to re-enroll her in her previous school.

Legal Analysis

In its analysis, the court *O. Z. v. Board of Trustees of the Long Beach Unified School District* (2008) applied the Tinker substantial disruption test and despite the fact that no disruptions were reported, it upheld the actions of school officials and denied the parents’ request for a preliminary injunction. The court noted that school officials do not have to wait for a disruption to occur and stated “it would appear reasonable, given the violent language and unusual photos depicted in the slide show, for school officials to forecast a substantial disruption of school activities” (p. 3). O. Z. claimed that the slide show was intended as a joke and not an actual threat, but the court disagreed and supported the school district’s decision to transfer O. Z. in an effort to prevent a foreseeable disruption of school operations and to protect the safety of the teacher.

Application of the Identified Factors

When applying the identified factors listed previously, it appears as though the decision of the court in *O. Z. v. Board of Trustees of the Long Beach Unified School District* (2008) was correct. The expression in question was non-defamatory but was threatening, and despite the fact that it did not produce a material or substantial disruption, the court felt that there was a foreseeable likelihood that the expression would produce a material or substantial disruption if
school officials failed to take appropriate action. School officials did not over-react, and the student was not deprived of any educational opportunities.

_Barnett v. Tipton County Board of Education_

**Factual Background**

In _Barnett v. Tipton County Board of Education_ (2009), three high school students created fake profiles of Earl LeFlore, the school’s assistant principal, and Charles Nute, a coach. The postings, which were created off campus, included “sexually suggestive comments about female … students” (p. 982). The plaintiff, Christopher Barnett, was primarily responsible for creating the profile of Mr. LeFlore. Another student, Kevin Black, was primarily responsible for creating the profile of Charles Nute, but he accepted responsibility for his malfeasance and did not pursue legal action. The web sites were brought to the attention of school officials through phone calls from a concerned parent and a local reporter who believed the fake profiles to be true. During the investigation by school officials, the third student, Gary Moses, admitted to his role in the creation of the profiles and divulged the identity of Barnett and Black. In addition, the investigation revealed that Barnett accessed the web site at school to show other students. At least one teacher reported that her classes were disrupted by students asking questions regarding the veracity of the profiles. As a result of their actions, school officials “suspended Barnett for two days and gave him an 8-day in-school suspension, gave Black an 11-day in-school suspension, and gave Moses a 2-day in-school suspension” (p. 983).

But the above does not constitute the extent of Barnett’s poor judgment. After receiving the disciplinary consequences, Barnett went home and created a wanted poster which threatened the individual responsible for divulging his identity to school officials. Eventually, Barnett confronted Moses at school, which resulted in a physical altercation. In a subsequent disciplinary
hearing conducted by the school board, it was determined that the consequences for Black and Moses were adequate, but decided to place Barnett at the district’s alternative campus for the remainder of the year. The plaintiff, Barnett, brought suit claiming that the district violated his First Amendment rights, deprived him of his right to a public education, and did so without due process. In addition, in what could only be described as preposterous irony, Barnett claimed that the school district had defamed him. The district filed a motion for summary judgment.

Legal Analysis

On the First Amendment claim, Barnett asserted that the web sites were parodies and as such should protected speech (Hustler Magazine Inc. v. Falwell, 1988). The court Barnett v. Tipton County Board of Education (2009) found no evidence to support this assertion and noted that visitors to the web sites were likely to believe that the “parodies” described actual facts. In fact, the district received calls from a concerned parent and a local newspaper reporter who believed that the web sites were true.

In regard to the due process claim, the court Barnett v. Tipton County Board of Education (2009) noted that Barnett and his parents were given notice of the charges against him and an opportunity to be heard in his own defense, both during the initial investigation and at the subsequent hearing conducted by the school board. Notice and an opportunity to be heard are the foundational requirements necessary before a person can be denied life, liberty, or property. Barnett had both. Finally, in regard to the defamation claim, the court refused to exercise jurisdiction and noted that even if it were to consider this claim, Barnett failed to offer any evidence to support it. As a result, the school district’s motion for summary judgment was awarded and Barnett’s suit was dismissed (Barnett v. Tipton County Board of Education, 2009).
Application of the Identified Factors

When applying the identified factors listed previously, it appears as though the decision of the court in *Barnett v. Tipton County Board of Education* (2009) was correct. Barnett’s web site postings were a combination of both on-campus and off-campus expression. He defamed school personnel and portrayed them as sexual predators. His wanted poster threatened the safety of another student and led to a material and substantial disruption of school operations in the form of a physical altercation.

*J. S. v. Blue Mountain School District*

Factual Background

In *J. S. v. Blue Mountain School District* (2010), the Third Circuit Court affirmed the decision of a district court that ruled in favor of a school district that gave a 10 day suspension to an eighth grade student, J. S., for posting a lewd, vulgar, and obscene parody profile of the principal of her school, James McGonigle. Apparently, J. S. was angry about the enforcement of the dress code, so she decided to create a profile of McGonigle from her parent’s home computer with the help of one of her friends, K. L., who also received a 10-day suspension for her role in creating the malicious and vulgar profile but did not file suit. The profile included a picture of McGonigle, which J. S. had copied from the district’s web site without permission. In addition, J. S. included text which made McGonigle look like a “pedophile and a sex addict” (p. 290). Some of the specific text described the principal’s interest as “being a tight ass, riding the train, spending time with my child (who looks like a gorilla),…fucking in my office, hitting on students and their parents” (p. 291). In addition, the web site included statements which referred to McGonigle as a “dick head” (p. 291) and a “fagass put on this world with a small dick” (p. 291).
The day after the profile was posted students were already discussing it at school. At least one teacher reported that he had to redirect several students on numerous occasions to stop discussing the profile and return to their assignment. One student, who was concerned about the defamatory nature of the profile, approached McGonigle and informed him of its existence. McGonigle asked the student if she could ascertain the identity of those responsible for the creation of the profile. Later that day, the student informed McGonigle that J. S. and K. L. were the responsible parties. The following morning, the concerned student brought a printout of the profile to McGonigle that contained the uniform resource locator (URL), a global address for documents and other content published on the World Wide Web. McGonigle needed the URL in order to remove the profile from MySpace.

The following day, McGonigle met with two central office administrators, one of whom was the superintendent, to discuss how to handle the situation. All three agreed that the profile violated the District’s Acceptable Use Policy and the student code of conduct which prohibited students from “making false accusations about a school staff member” (p. 293). Finally, on March 22, 5 days after the creation of the profile, J. S. and K. L. were called to McGonigle’s office where they met with McGonigle and one of the guidance counselors. J. S. initially denied any involvement in the creation of the profile, but eventually admitted that she and K. L. were responsible. McGonigle expressed his anger and embarrassment over the profile and informed the girls that they would be suspended for 10 days during which time they would not be allowed to participate in extra-curricular activities. In addition, McGonigle informed the girls and their parents that he might seek legal action. McGonigle ultimately decided not to press charges for cyber harassment, but the state police did contact both families to discuss the severity of the situation.
Legal Analysis

At trial, the school district attempted to argue that the posting created a substantial disruption of school operations. The district cited the fact that two teachers had to direct students to stop talking about the profile and to focus on class activities. One guidance counselor had to reschedule meetings to proctor an exam so the other guidance counselor could attend the meeting between J. S., K. L., and McGonigle, and the lockers of J. S. and K. L. were decorated upon their return, creating a congregation of students in the hallway. The court felt that this level of disruption did not meet the Tinker substantial disruption test. However, McGonigle also “testified that he noticed a serious deterioration in discipline in the Middle School, especially among the eighth graders, following the creation of the profile” (p. 294). This testimony supports the notion that the profile changed the culture of the school and undermined McGonigle’s capacity as a leader, at least with this group of children. The effects of the posting were much larger than the specific disruptions surrounding the event. Of importance, J. S. was not expelled, and during the term of her 10-day suspension, all of her assignments were provided so she was not denied her right to an education.

In its initial analysis, the Third Circuit Court noted that the district court held in favor of the school district despite finding that the profile “did not substantially and materially disrupt school so as to satisfy the Tinker standard” (p. 295). For the district court, it was enough that that the profile had “an effect on campus” (p. 295). Clearly, the district court was wrong by using this lower standard, a standard which has never been articulated as that which school officials can follow. The Third Circuit Court recognized this error and adopted Tinker’s substantial disruption test as the controlling standard. However, under the Tinker substantial disruption test, school officials do not have wait for a disruption to occur. They may act, under limited circumstances,
when they can provide evidence “which might reasonably have led school authorities to forecast a substantial disruption of or a material interference with school activities” (Tinker, 1969, p. 514). The court cited several cases, decided by other circuits, which have recognized the authority of school officials to prevent disruptions from occurring in the first place (Doninger v. Niehoff, 2008; LaVine v. Blaine School District, 2001; Lowery v. Euverard, 2007). The court noted some disruption of school operations, but characterized these disruptions as “minor inconveniences” (p. 286). Nevertheless, the court ruled that the posting posed a “reasonable possibility” (p. 286) of future disruptions, and it was only through the decisive actions of school officials that these likely disruptions were avoided. The court concluded that this was enough to meet the limitations of Tinker’s substantial disruption test. The court in J. S. held “that off-campus speech that causes or reasonably threatens to cause a substantial disruption of or material interference with a school need not satisfy any geographical technicality in order to be regulated” (p. 301).

Although not specifically recognizing Tinker’s second prong, the Third Circuit Court included language which indicated a recognition of the damage that can be inflicted through the online posting of malicious, defamatory expressions. The court stated:

The Constitution allows school officials the ability to regulate student speech where, as here, it reaches beyond mere criticism to significantly undermine a school official's authority in challenging his fitness to hold his position by means of baseless, lewd, vulgar, and offensive language. (J. S. v. Blue Mountain School District, 2010, p. 308)

Application of the Identified Factors

When applying the identified factors listed previously, it appears as though the decision of the court in J. S. v. Blue Mountain School District (2010) was correct. The expression was
apolitical and non-threatening. Although the court characterized the actual disruptions as “minor inconveniences” (p. 286), it recognized that there was a “reasonable possibility” (p. 286) of future disruptions which satisfied Tinker’s substantial disruption test. The expression could not be characterized as cyber bullying, but it was an intentional and successful attempt to defame school personnel. McGonigle testified that he experienced “stress-related health problems as a result of the profile and this litigation” (p. 294). This posting interfered with McGonigle’s right to be let alone and his capacity to do his job effectively. As a result of his efforts to enforce the approved dress code of the district, a vengeful, unsupervised child, and her accomplice, launched a malicious public attack on his character and reputation.

The holdings in *J. S. v. Blue Mountain* (2010) and *Layshock v. Hermitage School District* (2010) provide the perfect illustration of the need for a uniform standard. Decisions concerning the balance between students’ off-campus First Amendment expression rights and the need for school officials to maintain a safe and orderly learning environment appear to be almost as arbitrary as the policies they overturn. Perhaps, the Third Circuit Court acted deliberately by publishing contradictory rulings in an effort to bring this issue before the entire court.

**Lessons Learned from this Review of Lower Court Decisions**

This chapter analyzed all the published cases in which school districts attempted to sanction students for off-campus, electronically delivered speech. This analysis shows that students won most of these cases. Of the 19 cases reviewed, students prevailed in 12 of them, and school authorities prevailed only seven times, with one case being decided on the basis of on-campus activity, not off-campus expression (*Requa v. Kent School District*, 2007). Even when analyzed in light of this researcher’s identified factors, students would still have prevailed in a majority of the cases. As discussed previously, the three cases which would have been...
decided differently when applying the identified factors were Layshock v. Hermitage School District (2010), Killion v. Franklin Regional School District (2001), and Beidler v. North Thurston School District No. 3 (2000). In light of this observation, the application of the identified factors recognized by this researcher would still arguably achieve an acceptable balance between the protection of the First Amendment rights of student off-campus expression and the need for school officials to maintain a safe, orderly and effective learning environment. It would, however, offer some desperately needed remedies for school personnel who find themselves publically humiliated and defamed by misguided children who mistakenly believe that they can post anything they want on the Internet.

In the vast majority of the cases analyzed, courts relied primarily on the Tinker disruption standard as the basis for their rulings, at the exclusion of Tinker’s second prong. In several of the cases, the courts asked whether the student’s electronically delivered speech created a substantial disruption or whether the expression was likely to create a substantial disruption on the school campus. If the answer to that question was no, the student generally prevailed. However, as was noted in this chapter, the courts disagreed about what constitutes a material and substantial disruption, and this lack of consistency in applying the substantial disruption standard largely explains the inconsistency in case outcomes. For example, in Layshock, the court ruled that the cancellation of classes for an extended period of time, emergency faculty meetings at which a school official broke down emotionally, and several days of time devoted by the district’s technology coordinator did not constitute a substantial disruption. In Doninger, however, the numerous phone calls and e-mails to school officials interrupting planned meetings were considered to be enough to constitute a material and substantial disruption of school operations, despite the fact that classes were not disrupted.
The severity of the punishment implemented by school officials also appears to have been an important factor in the outcome of these cases, with the courts being more sympathetic to a student when the court viewed the school authorities’ punishment as draconian. For example, in the Beussink (1998) case, the school principal’s imposition of a 10-day suspension caused the student to fail the school term, and the court ruled in favor of the student. In Latour (2005), school officials imposed a 2-year expulsion for the creation of four rap songs that contained vulgar and obscene language, and the court ruled in favor of the student. In Coy (2002), school officials instituted an 80-day expulsion for a student who did little more than access a web site that was created at home and which contained some mildly crude remarks and photos, and the court ruled in favor of the student. In Doninger (2008), however, the school principal imposed a very mild penalty on the student who denigrated school authorities and the court ruled in favor of the district. What is clear from this analysis is that the disciplinary measures instituted by school officials must not be disproportionate to the alleged offense.

Two very recent cases, the Layshock case and the Blue Mountain case, both out of the Third Circuit, are significant developments in the jurisprudence on the First Amendment rights of students to engage in off-campus electronically delivered speech. The facts in the two cases were virtually identical, but the outcomes were different, and taken together, the two cases clearly illustrate the ambiguous nature of Tinker’s substantial disruption test and the need for a uniform standard. The Third Circuit Court of Appeals will redecide both cases en banc, perhaps in a single opinion. The Third Circuit’s new opinion, when issued, may provide a clearer standard for dealing with an area of the law that is characterized by inconsistency and confusion.

One noteworthy point, many of the cases involved speech that ridiculed teachers and principals, often through rude and hurtful comments about the sexuality or sexual behavior of a
professional educator. Undoubtedly, many of these sexual comments were defamatory, but courts refused to rely on defamation as the basis for their decisions about the students’ constitutional right to engage in such speech. In one case, however, *J. S. v. Blue Mountain School District* (2010), the court considered the impact of a fake MySpace profile of a principal on his ability to be an effective school leader and concluded that the fake profile’s negative impact on the principal’s effectiveness to lead the school was evidence of substantial disruption.

An additional finding from this analysis of lower court cases involves the fact that only one case was identified which dealt with student-to-student cyber bullying. Every other case involved student off-campus expression which was critical of school personnel. Why do the vast majority of all the cases dealing with off-campus student cyber expression involve situations in which students used the Internet to harass school personnel? One possible explanation might be that school officials and not fellow classmates are the most frequent targets of cyber harassment, but this explanation makes little sense in light of the research on the incidence of cyber bullying where a substantial percentage of children surveyed indicate they themselves have been the victims of cyber attacks. A more likely explanation may be that cyber bullying of a student usually impacts only one person, the student who is the target of the cyber attack. Disrupting the educational opportunities of one student does not equate to a material and substantial disruption of school operations and, as such, would not meet the requirements of the Tinker substantial disruption test. Cyber harassment of school personnel, however, can undermine the ability of teachers and principals to effectively execute their duties which can produce a disruptive consequence that impacts not just the target of the cyber attack but many others as well. This consequence was demonstrated in *Wisniewski* (2007) and *Bethlehem* (2002).
Finally, whether Tinker’s second prong could ever constitute the basis for the imposition of disciplinary consequences for off-campus cyber expression must be considered. In two cases, Wisniewski (2007) and J. S. v. Bethlehem (2002), the courts ruled in favor of the school district when it was shown that the students’ cyber expression undermined the ability of school personnel to execute their duties as public employees. Both courts ruled that this constituted evidence of a substantial and material disruption of school operations, but this disruption was a collateral consequence created by off-campus expressions which interfered with the rights of school employees to be free from malicious attacks on their reputations. In other words, the outcome of both cases would have been the same had the court applied Tinker’s second prong rather than Tinker’s substantial disruption test.

What seems clear from the analysis of cases dealing with off-campus student cyber expression is that courts, school officials, students, and parents need a uniform standard and practical guidance to allow schools to effectively respond to the growing problem of cyber bullying and cyber harassment. As the analysis in this chapter has shown, Tinker’s substantial disruption standard has been applied inconsistently and has not been adequate to address situations in which students engage in electronically delivered speech that is hurtful, malicious, or defamatory but which does not clearly create a disruption in the school environment. As illustrated in Chapter IV, it may be time to consider the application of the Tinker’s second prong, which would allow school authorities to censor student speech that interferes with the rights of others.
CHAPTER IV

RECOMMENDATIONS FROM OTHER COMMENTATORS REGARDING THE STANDARDS USED TO REGULATE OFF-CAMPUS STUDENT CYBER EXPRESSION

The Need for a New Standard

Based upon the inconsistent holdings of lower courts in cases dealing with off-campus student cyber expression and the absence of guidance from the Supreme Court, the legal landscape is ripe for a plethora of proposed standards. An examination of the law review articles with analyses of student off-campus cyber expression revealed that commentators have divided their findings into three divergent orientations. One orientation views school officials as overbearing intruders into protected First Amendment territory (Calvert, 2009a; Lei, 2009; Tuneski, 2003). The second orientation argues that the only time school officials can proscribe off-campus student cyber expression is in the case of actual threats or when the expression satisfies the first prong of the Tinker test (Pisciotta, 2000; Verga, 2007). The third orientation calls for more school authority because of the recognition of the damage often inflicted by children who harass, bully, and defame classmates and school personnel through the use of electronic communication devices (Auerbach, 2009; Cronan, 2008; McCarthy, 2009, Schiffhauer, 2010). Ellison (2010) and Reeves (2008) composed useful analyses of these divergent orientations by identifying and describing multiple tests that commentators have recommended and courts have utilized to adjudicate cases involving off-campus student expression. Many of the recommendations parallel the identified factors identified in Chapter III.

Ellison (2010) noted that although commentators have proposed a variety of approaches, all appear to agree on two points. First, when it comes to off-campus student expression, lower courts are, “in a state of total disarray” (Ellison, 2010, p. 821). This disarray was illustrated by the analysis of case holdings discussed in Chapter III, especially the divergent holdings in
Layshock (2010) and Blue Mountain (2010). Second, all commentators “agree that there must be some connection between the speech and the school campus” (Ellison, 2010, p. 821) before courts will uphold sanctions against a student. Kemerer (2010) recognized the same need for a connection when he stated “the linkage between student misuse of their own ECDs [electronic communication devices] off campus and the legitimate interests of the school must be clearly established for discipline to be imposed” (p. 5). The problem lies in establishing the degree of linkage necessary to permit school intervention while still protecting legitimate forms of First Amendment expression. One common thread among most commentators is that virtually all agree on the need for a new standard. However, the proposed standards are almost as inconsistent and divergent as the cases they cite.

The Burden of Proof

Rational Relationship

For some, the legal landscape is in such a state of disarray and confusion that they hesitate to propose any standard other than arguing for or against school intervention. Braiman (2009), for example, called for the expansion of school authority and noted that, “students are continuing to use the First Amendment as a sword rather than as a shield against teachers and school officials” (p. 472). Braiman (2009) added, however, “it is difficult…to discern a clear standard for when schools may sanction students for messages and other forms of expression that they post on the Internet” (p. 473). Nevertheless, this difficulty must not stand in the way of protecting children and public employees from the attacks of cyber bullies. Technology is not going away, and the use of electronic communication devices to harass, bully, and defame others is likely to continue and even increase in frequency. Braiman (2009) ultimately recommended that courts follow the standard applied in Blau v. Fort Thomas Public School District (2005),
where a student challenged the constitutionality of a school’s dress code.

The specific factors identified by the court in Blau (2005) are not easily applicable to off-campus student cyber expression, but the underlying rationale could make a significant difference in the outcome of cyber bullying cases. Under the approach recommended by Braiman (2009), students should be expected to abide by the rules promulgated by school officials, those rules should be presumptively constitutional, and the burden of proving otherwise should rest with the party challenging their validity. According to Braiman (2009), under this approach, it would no longer be the obligation of school officials to show that the expression constituted a true threat or created a material or substantial disruption. It would be the obligation of the student, or his parents, to show that the school rule was arbitrary or capricious. Shifting the burden of proof would not automatically mean that any and every attempt by school officials to punish off-campus expression would be supported by the courts. The actions of school officials would still have to be, at a minimum, rationally related to a legitimate state objective. Under the lowest standard of review, also known as the rational relations test, there would have to be, at a minimum, a rational relationship between the governmental action and some legitimate governmental interest. Under this standard of review, unless the government acts in an arbitrary or capricious fashion, the actions of school officials are likely to withstand the scrutiny of the court (Alexander & Alexander, 2009).

Fundamental Rights

Protected forms of expression are considered fundamental rights. A well-established legal principle explicates when the government attempts to interfere with fundamental rights, it may do so only if a compelling governmental interest is present and the means utilized is narrowly tailored to accomplish the compelling interest (Chemerinsky, 2006). This standard known as the
strict scrutiny standard is highly restrictive on governmental action. When the strict scrutiny standard is applied, the government must carry a heavy burden, and as a result, is likely to lose such cases (Alexander & Alexander, 2009). Judges, who are staunch proponents of First Amendment expression rights, will often refer to the following statement from *Thomas v. Board of Education of Granville Central School District* (1979): “School officials ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith” (p. 1051). What these judges do not say is that even at this “zenith,” not all forms of expression are protected. Consequently, attempts by school officials to regulate these forms of unprotected speech do not require the application of the strict scrutiny analysis, and school officials would be supported in their attempts to regulate these forms of expression (Ianelli, 2010; Verga, 2007).

Despite the fact that these forms of expression fall outside the protective umbrella of the First Amendment, the government still has to show that the policies drafted to address the problems associated with cyber bullying and cyber harassment are neither vague or overbroad. The policies would have to clearly and specifically define the limited circumstances under which school officials could regulate off-campus student expression in order to provide fair notice to students and parents as to which types of behaviors are prohibited and to limit the application of the policy or statute relative to the law's legitimate sweep (*Saxe v. State College Area School District*, 2001). From this argument, school officials should approach this problem from the perspective of the impact of the expression rather than on the content of the expression.

**Content v. Impact**

Some commentators have argued that schools officials can avoid strict scrutiny analysis by asserting that what schools punish students for is not the content of the expression but the
impact of the expression. Braiman (2009), for example, argued that the principal in Morse (2007) did not punish Joseph for the content of the expression on his banner. Joseph was punished for his refusal to dispose of the banner when asked by his principal. This argument has merit in light of the fact that the other students who were assisting Joseph complied with the principal’s request and received no disciplinary consequence. In essence, Joseph was not punished for the content of his expression, but for his refusal to comply with an administrative directive. From this perspective, a strict scrutiny analysis would not be applied in light of the fact that principal’s actions were not directed at the content of an expression; they were directed at potentially disruptive and dangerous actions.

If school officials limit the scope of their authority to expressions which constitute true threats, create a material or substantial disruption, pose a foreseeable likelihood of creating material or substantial disruption, or interfere with the rights of others, then they are not punishing the content of the off-campus student expression but the impact of the off-campus expression. Probably the most well known description to illustrate this position comes from the case of Schenck v. United States (1919), in which Justice Holmes stated, “the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic” (p. 52). If no one were present in the theater, then the individual could yell fire to his heart’s content because the likelihood of damaging consequences would be nonexistent. In other words, the limitation on First Amendment expression rights articulated by Justice Holmes is not based upon the content of the expression but upon the potential for injury. Similarly, students are free to express themselves off campus as long as their expressions do not create or pose a likelihood of creating a material or substantial disruption of school operations or interfere with the rights of fellow classmates and school personnel to be free from bullying, harassment, and
defamatory comments which undermine their reputations or capacity to effectively carry out their responsibilities.

Intermediate Scrutiny

Readers well versed in constitutional law should be aware that courts have developed an intermediate level of scrutiny typically applied when analyzing statutes or polices that make distinctions on the basis of gender (U. S. Legal, 2010). Under this intermediate level of judicial scrutiny, classifications by gender must serve important governmental objectives and must be substantially related to achieving those objectives (Craig v. Boren, 1976). O’Connor (2009) recommended that this level of intermediate scrutiny could be applicable to schools in light of the special nature of the school environment. If this assertion is true and courts adopt this level of judicial scrutiny, then a more appropriate balance between individual rights and institutional needs might be achieved. Regulations promulgated by school officials to address the growing problem of cyber bullying and harassment certainly are attempting to serve an important governmental objective, which is the protection of the learning environment and those within it. Policies which clearly describe and define the circumstances under which school officials could proscribe off-campus student cyber expression would be substantially related to the achievement of those objectives if the policies were limited to true threats, speech that created a substantial disruption in the school environment, or speech that interfered with the rights of others. Additional justifications for the full application of both of Tinker’s standards are discussed later in this chapter.

From yet another perspective, the application of judicial scrutiny may not be necessary at all depending on the content of the off-campus expression. Ianelli (2010) noted that any time courts are forced to apply a balancing test, such as that called for under the intermediate level of
scrutiny, inconsistency will be the result. Ianelli stated “balancing tests breed disorder among courts because of their inherent uncertainty and because lower courts have shown a systematic inability to calibrate their constitutional analysis to the relative strengths of the speech and regulatory interests involved” (p. 895). Ianelli continued the analysis by recognizing that courts have traditionally given deference to the disciplinary decisions made by school officials. School officials deserve this deference in light of the fact that each day hundreds of decisions are made which implicate disciplinary consequences. Courts are not equipped with the time or expertise to oversee each of these decisions. Consequently, Ianelli (2010) concluded, “courts should not undermine this deference by construing the First Amendment to require an unnecessary and unprecedented level of scrutiny of school officials' decisions to punish unprotected speech” (p. 906).

For those arguing for increased school authority to regulate off-campus student cyber expression, the suggestions from Ianelli (2010) are attractive. As a point of fact, not all forms of expression are protected by the First Amendment. Threats, fighting words, and defamation are just a few examples of nonprotected speech. Since these forms of expression fall outside the protective umbrella of the First Amendment, there should be no need to apply any form of judicial scrutiny typically seen in cases where governmental policies interfere with constitutionally recognized rights. If any level of scrutiny is applied, the only purpose would be to ensure that the decisions of school officials are not arbitrary, capricious, or discriminatory. Short of these limitations on school authority, school officials should be free to punish off-campus cyber bullying and cyber harassment when such expression can be classified as true threats or satisfies either prong of the Tinker test. The punishment, however, must not be disproportionate to the offense. Complete cessation of educational services through expulsion
would implicate other fundamental rights found in the Fifth and Fourteenth Amendments and return heightened standards of review to the table.

Recognized Approaches

The Intent-Based Approach

Most of the standards proposed by other commentators for the most appropriate way to deal with off-campus student cyber expression can be divided into five categories: (1) the intent-based approach, (2) the nexus-based approach, (3) the off-campus equals off-limits approach, (4) the public employee approach, and (5) the Tinker first and second prong approach.

Under the intent-based approach, Tuneski (2003) recommended that online, off-campus student expression should lie outside the limits of the authority of school officials unless the student “intended his speech [to] reach campus” (p. 177). Reeves (2008) also identified and described an intent-based approach and used the arguments of Tuneski (2003) to define when an off-campus student expression could be considered on-campus. Under this standard, intent could be seen when the student opens his web page at school, invites other students to view the website, or sends the expression to other students via school e-mail accounts. Lei (2009) argued that adding this additional criterion would permit “a speaker to decide whether she wishes to subject herself to the jurisdiction of school officials” (p. 36). Simply posting something on the Internet does not satisfy the intent test; however, it would undermine any reasonable expectation of privacy.

This intent-based test raises obvious problems due to being too restrictive on school officials and permitting students to defame school personnel, cyber bully classmates, disrupt school operations, and threaten the safety of others as long as their subjective intent was to keep their posting secreted from school authorities. Utilizing this test would afford students First
Amendment protection for off-campus expressions that have never been afforded protection by the courts. It would elevate the rights of students above and beyond the rights of adults in public forums. It would artificially erect a wall of protection around constitutionally unprotected speech simply as a function of geography. This wall of protection exists nowhere else in Western society. Reeves (2008) used the posting of Eric Harris and Dylan Klebold as an example to show Tuneski’s intent-based standard “results in too little authority for administrators to take action in some of the most critical situations” (p. 1150).

The Nexus-Based Approach

The second category identified by Ellison (2010) is the nexus-based test. According to Ellison, this approach requires a multifactor test to measure the connection between the off-campus expression and the campus. For example, Adamovich (2008) recommended that courts look at four factors: (1) whether the speaker intended his message to reach campus, (2) the number of people exposed to the expression, (3) the connection of the expression to school operations, and (4) the amount of disruption caused by the expression. Under this test, student off-campus speech would still be afforded some protection, yet school officials would have the authority to punish student speech intentionally directed at the school, viewed by more than just a few people, and either disrupted school operations or was likely to disrupt school operations. However, in light of the fact that the intention of the speaker is still a consideration, this test would suffer from the same limitations as the previously discussed intent-based approach. In addition, protecting children and school employees from cyber bullying and cyber harassment would not be permissible since Tinker’s second prong is not even considered in the test. The only speech to fall under the authority of school officials under the recommendation of Adamovich (2008) would be speech intentionally designed to produce a substantial or material
disruption of school operations and that was widely publicized. Since many forms of cyber bullying are directed at only one victim, Adamovich’s (2008) recommendations would seem to be ineffective and under inclusive.

Brenton (2008) and Hader (2009) proposed an approach similar to that expressed in the legal principal that a state has the authority to exercise personal jurisdiction over out-of-state residents that avail themselves of the privileges of that state. Any business or person that conducts affairs inside the borders of a state has availed themselves of the privileges of the state, and as such, would be subjected to the jurisdiction of the state. For example, if a lawn mower manufacturer headquartered in Ohio, sells defective equipment in Illinois resulting in injury to an Illinois resident, that resident can bring suit against the Ohio manufacturer in Illinois and the courts can exercise jurisdiction over the out-of-state manufacturer. In the context of the school environment, Brenton’s (2008) argument would permit school officials to punish off-campus speech if the district could show that the student directed his speech at the school with the intent that it would cause a material or substantial disruption or interfere with the rights of students or school personnel.

Servance (2003) also recommended a multi-factor approach but eliminated any considerations of intent or geographic distinction while adding a consideration analogous to Tinker’s second prong. Under Servance’s proposed test, schools could punish off-campus cyber expression if they could establish a nexus, or connection, to the campus which produced a material or substantial disruption or had a negative or foreseeable negative impact on the subject of the expression. In essence, the test proposed by Servance, would permit school officials to punish speech whether it originated on-campus or off-campus if that speech interfered with the rights of fellow students or school personnel to be free from malicious harassment and bullying.
This standard addresses the concerns and recommendations of this researcher and many others who recognize that under the current legal landscape innocent children and school employees are forced to endure the malicious attacks on their character without any immediate remedy. If schools could implement proportionate punishments against the perpetrators of malicious cyber attacks, the effort would accomplish two important objectives. First, proportionate punishments would afford a desperately needed remedy for those who are defamed; and second, and perhaps more importantly, the punishments would send an appropriate and legally sound message to students that they are not free to defame others through online technology. As profoundly recognized and articulated in Fraser, schools must teach children more than the adopted curriculum, because schools must also teach children the boundaries of socially appropriate behavior. The use of the Internet to defame, harass, and bully others could hardly be described as socially appropriate behavior.

Although public schools are governmental institutions, they occupy a position unique from almost every other governmental agency. Braiman (2009) uses the term sui generis to describe the unique role of public schools. Sui generis is a Latin term with a literal meaning “of its own kind.” As the result of this unique position, school officials and teachers, at one time, were granted broad powers virtually equivalent to those held by parents. The term used to describe this position is in loco parentis, which means “in place of the parent.” This concept has eroded over the years but not to the point of complete irrelevance. Schools still occupy a unique position where they serve as an intermediary between the family and the realities of adult responsibility. Erb (2008) argued that allowing school officials to punish students for off-campus cyber bullying and cyber harassment would enable schools to continue to serve as a mediating institution in which innocent students and teachers can be protected and perpetrators can learn
the limits of their expression rights without risking criminal prosecution or long, protracted civil litigation. Permitting school officials to punish limited and clearly articulated forms of off-campus student expression would actually serve to protect children and their parents from costly and time-consuming civil litigation as well as from the potential for criminal prosecution.

Pike (2008) argued that the constitutionality of restrictions placed on off-campus student expression depends on several factors. “First, it must be determined whether the challenged speech took place under the school’s purview. If not, then the school may only be able to discipline a student if the speech falls into a traditionally unprotected class” (Pike, 2008, p. 975). Defamatory speech, the likes of which were illustrated in cases such as Beidler (2000), Layshock (2010), Blue Mountain (2010), and Bethlehem (2002), falls into a traditionally unprotected class of speech. As a result, Pike (2008) should be in agreement that the students in these cases could have been disciplined without violating their constitutional rights, and in fact, it was indeed Pike’s position. Pike stated, “schools are not violating a student’s rights when they take disciplinary action against unprotected expression—regardless of where the expression took place” (p. 976).

If the speech took place under the school’s purview, as described by Pike (2008), this would mean that the speech took place either on-campus, at a school-sponsored event, or within a school-sponsored publication. Under any of these circumstances, school officials would have greater authority due to the fact that on-campus speech garners less protection than off-campus speech and the application of the four Supreme Court cases dealing with student expression would provide adequate guidance for school officials. This means the on-campus speech could be proscribed if it was lewd, vulgar, or obscene (Fraser, 1986), promoted illegal drug use (Morse, 2007), considered school-sponsored and the school had a legitimate pedagogical interest in its
regulation (Hazelwood, 1988), or produced or was likely to produce a material or substantial disruption or interfered with the rights of others (Tinker, 1969). If the expression did not fall under the schools’ purview then it would be protected by the First Amendment unless the expression could be characterized as an unprotected class of speech such as fighting words, a “true threat,” or defamation.

The nexus-based approach recognized by Ellison (2010) and suggested by Brenton (2008) and Servance (2003) has already been adopted by some courts in one form or another. For example, the Third Circuit Court, in both Layshock (2010) and Blue Mountain (2010), used a nexus-based approach where the connection of the off-campus expression to the campus was measured as a function of several factors. However, despite applying a nexus-based approach under virtually identical factual circumstances, incongruent holdings were produced. This being the case, a nexus-based approach may not produce the consistency necessary for achieving a uniform standard. Another simpler option might be the better approach for this purpose.

Ellison (2010) ultimately proposed a standard very similar to the intent-based approach. Under Ellison’s (2010) approach, there are two questions school officials and courts should consider. The first question asks whether the speech, electronic or otherwise, has reached the campus. If the speech has reached campus, school officials would then ask whether the speaker intended the expression to reach campus. If so, school officials would be permitted to punish the student if the expression fell into one of the recognized categories of limitation on student expression including true threats and expressions which create or are likely to create a material or substantial disruption of school operations. This test, while apparently simple, fails to offer the type of protection necessary to address problems with cyber bullying and defamation of school personnel. Kerkhof (2009) noted that under the intent test, a student could find protection due to
the fact that the Internet permits anonymous cyber attacks. In addition, Kerkhof (2009) noted that the intent test would not permit school officials to take action against a cyber bully even when the off-campus speech produced “negative effects so long as the speech was created off-campus and the student did not intend for it to be brought on-campus” (p. 1644).

Kerkhof (2009) asserted that Tinker’s substantial disruption test places too heavy a burden on school officials. Kerkhof noted that in most cases, off-campus cyber bullying of classmates and harassment of school personnel is typically targeted toward an individual victim, which precludes the application of a rule requiring a material or a substantial disruption of school operations. On an individual level, however, cyber bullying and cyber harassment often times produce a material and substantial disruption to the learning or working environment for the intended victim. This is why courts must be willing to apply Tinker’s second prong to protect the rights of targeted individuals. Kerkhof (2009) pervasively argued for “the victimized student's right to feel secure somewhere he or she is compelled to be, and the school's obligation to provide that environment, [which] clearly outweigh the student speaker's right to free expression” (p. 1652). Cronan (2008) suggested that the standard of review, when courts consider the off-campus First Amendment rights of students, should focus less on a geographic distinction and more on the harmful effects of the speech. Although the speech may have been created off campus, the effects are seen at school where students and teachers find themselves in close proximity to their cyber assailant. Cronan (2008) additionally argued that “an additional exception to traditional student speech precedent should be made for student cyber speech that…threatens to harm students and interfere with the educational objectives of the public school system” (p. 153).
The Off-Campus Equals Off-Limits Approach

The Student Press Law Center filed an amicus brief in Layshock (2010) and argued that if a student’s speech does not occur on school grounds, at an event sponsored by the school, or through the use of school resources, then a school cannot punish the student without violating First Amendment rights. Lei (2009) supported this off-campus equals off-limits approach by concluding “drawing a bright line between on-campus speech and Internet speech would provide better guidelines for courts and school officials on the scope of the First Amendment” (p. 39). Verga (2007) stated that “school officials are either unclear about the legal boundaries of their powers or refuse to accept the idea that they cannot control or punish off-campus student expression” (p. 729). This extreme position would insulate cyber bullies from any attempts by school officials to protect school operations and the rights of students and school personnel.

Calvert (2009a) argued that the application of Tinker to off-campus expressions which disrupt school operations or interfere with the rights of others is an abuse of Tinker’s free speech standard for students. Calvert (2009a) contended that Tinker “was never designed to be applied to off-campus speech scenarios” (p. 6). Indisputably, Tinker and the other Supreme Court cases examined student expression rights under circumstances within which the expression occurred on campus or at a school related event. Justice Fortas clearly and expressly wrote:

Conduct by the student, in class or out of it, which for any reason--whether it stems from time, place, or type of behavior--materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech (Tinker v. Des Moines Independent School District, 1969, p. 513).

Arguably, in this quote Justice Fortas contemplates the possibility that school authority
can, in some circumstances, reach beyond the school-house gate when censoring student speech. Coupled with the numerous state statutes that give school officials the authority to proscribe off-campus behavior, off-campus clearly does not equal off-limits. The off-campus equals off-limits proponents have proposed indefensible arguments in their zeal to protect the rights of students to defame and harass their classmates, teachers, and administrators. For example, Li (2005) argued that if school officials are permitted to punish off-campus student expression this action would curtail a student’s opportunity to participate in a democratic society. Li (2005) argued that “individuals must be able to think for themselves in order to exercise...political rights in a democratic society” (p. 89). While statements such as this are laudable, the nature of the speech in question requires consideration. If students are protesting against a war or social injustices, then their speech should be protected. However, to apply the essential protections of the First Amendment in an effort protect defamatory, hurtful insults directed at classmates and school personnel does not advance the principles of any democratic society.

The on-campus versus off-campus argument draws the attention of many commentators due to the belief that if the speech is considered to be on-campus then the recognized Supreme Court limitations on speech will be applied. If the speech is considered to be off-campus then many assert it will be beyond the reach of school officials (Calvert, 2009a; Li, 2005). What types of actions might change the off-campus classification to on-campus? If the publisher accesses his web site at school and shows others, it should be classified as on-campus speech (J. S. v. Bethlehem Area School District, 2002). If the publisher tells others about the web site and encourages them to act in ways that disrupt the educational environment then it should be classified as on-campus (Doninger v. Niehoff, 2008). If the content of the web site is directed at the school or fellow classmates and intended to be viewed by fellow classmates then the
expression should be classified as on-campus (J. C. v. Beverly Hills Unified School District, 2010). However, if the content of the web site merely expresses frustration with school practice or policy and another student brings the web site onto the campus without the knowledge of the designer, then they should not be subjected to school discipline; the party responsible for its dissemination should be accountable.

Calvert (2009b) cited language from Thomas v. Board of Education of Granville Central School District (1979) and Klein v. Smith (1986), where a student used his middle finger to communicate with a teacher off campus, asserted “that parents, not school authorities should police off-campus conduct of minors” (p. 224). While this sentiment contains some wisdom, it must be recognized that a significant percentage of parents do not police the Internet activity of their children. In a survey conducted by the National Cyber Security Alliance, 82% of parents surveyed indicated that they monitor their child’s Internet activity (StaySafeOnline, 2010). While this percentage is relatively high, it is misleading. Self report surveys are notoriously unreliable, especially when concerning issues of social desirability (Podsakoff & Organ, 1986). In addition, even if 82% of the surveyed parents actively and frequently monitored their child’s Internet activity, millions of school-aged children remain free to post anything they want about their classmates, teachers, or school administrators. Schiffhauer (2010) concurred: “arguments that [the] regulation of student expression is solely the province of parents go too far” (p. 762).

Edwin Darden, an attorney for the National School Board Association, stated that there are basically three types of student cyber-expression cases (Welch, 2002). “The first are offensive, obnoxious and insulting, the second are all that plus some sort of veiled threat of violence, or of destruction of property, and the third contain an outright blatant threat” (Welch, 2002, p. 3). Darden recognized that the school must act when confronted with the third type of
student expression which contains outright threats. Darden further suggested that the second type should be handled with a parent teacher conference. As for the first type of student speech, school officials just have to ignore it and “develop a thick skin” (p. 3). In other words, Darden claimed that students have the right to defame the character and reputation of school personnel without any fear of school intervention. This approach is probably not acceptable to students or school administrators who have been demeaned, ridiculed, or defamed on the web, and this type of malicious expression is not protected in any other venue. Off-campus should not equal off-limits.

Calvert (2009a) noted that school officials who are defamed by off-campus Internet postings already have a remedy at their disposal in the form of libel suits. While this observation is certainly true, to suggest that since other remedies exist, schools should not have concurrent authority is to ignore both policy and practice. If a student retaliates against a school employee off campus by setting fire to the employee’s home or vandalizing the employee’s car, then the employee has civil and criminal remedies at their disposal, but most jurisdictions would also permit school officials to punish the child and in some circumstances, mandate that these students be removed to an alternative educational facility.

Calvert (2001) suggested that schools and courts should permit students to vent their frustrations online by defaming their classmates, teachers, and administrators. Otherwise, frustrated students may be more likely to act out violently. This seems to be polemical and to assume that students are unable to control themselves and must be allowed some sort of safety valve to prevent them from engaging in violent behavior. But the mission of the schools, as articulated in the Supreme Court’s Fraser decision, is to inculcate civic values and to teach students to engage in civil forms of speech. Most educators would probably agree that students
can reasonably be expected to refrain from demeaning and defamatory communications directed at classmates or school personnel.

The Public Employee Approach

Adamovich (2008) and Reeves (2008) argued that students should be viewed in a similar light to that of a public employee when it comes to off-campus expression. If this approach were adopted, what would it look like in public schools? Three cases would guide the analysis and potential application of this standard, Connick v Myers (1983), Pickering v Board of Education (1968), and Garcetti v. Ceballos (2006). In Pickering (1968), the Court established a “balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs” (p. 568). To measure this balance, courts should consider first whether the employee is speaking out about a matter of public concern. Public employee “speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection” (Connick v. Myers, 1983, p. 145). However, given the content of the expression in Connick (1983), the Court held:

When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency. (p. 147)

If the court determines that the public employee has spoken about a matter of public interest, the court should then look to whether the expression interfered with “either discipline by immediate superiors or harmony among coworkers” (Pickering v. Board of Education, 1968, p. 570). In essence, even when speaking about a matter of public concern, a public agency’s interest
in protecting the effectiveness of its workplace can trump the First Amendment rights of an employee if the impact of the expression disrupts the capacity of co-workers to work together in a productive manner. This perspective was captured by the eloquence of Justice Holmes when he wrote, “A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman” (*McAuliffe v. Mayor of New Bedford*, 1892, p. 517).

The latest word from the Supreme Court on the First Amendment speech rights of public employees can be found in *Garcetti v. Ceballos* (2006), in which the Court held “that when a public employees makes statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline” (p. 1960). This holding gave governmental employers broader powers to regulate the speech of employees and undermined the First Amendment protections recognized in *Pickering* (1968).

The application of this standard to public school children in the context of off-campus cyber expression seems straight forward. If a student posts off-campus comments on the Internet, pursuant to their status as a student, and those comments undermine the effectiveness of the school by creating or posing a likelihood of a material and substantial disruption, the school could discipline the student. If a student posts off-campus comments on the Internet, pursuant to his or her status as a student, which interferes with “either discipline by immediate superiors [teachers and administrators] or harmony among coworkers [fellow students]” (*Pickering v Board of Education*, 1968, p. 570), the school should be able to discipline the student. However, if the student is speaking about a matter of public interest which neither creates nor is likely to create a material or substantial disruption, with speech that is non-threatening, or with speech that does not interfere with the rights of others, then the student’s speech should be protected.
While the application of this standard seems logical and practical, it would require treating students as adults. If courts are going to recognize First Amendment protections for minor children, then allowing school officials to punish students for the inappropriate exercise of those rights should be concomitant. One of the main functions of the public school system is to prepare students for future obligations, one of which is the use of appropriate forms of expression. If children are taught that school officials are precluded from issuing any disciplinary consequence for off-campus cyber bullying or harassment imagine their shock and dismay when they are terminated from their jobs later in life for using the same forms of expression against fellow employees or their supervisors.

Tinker’s First and Second Prongs Approach

As referenced on numerous occasions throughout this analysis, the complete application of Tinker’s first and second prongs could solve each and every issue related to off-campus student cyber expression and make every other multi-factor, intent based, nexus searching, and geography limiting standard unnecessary. It is actually quite simple. If administrators and courts return to the language originally articulated in the most notable case in student expression jurisprudence, legitimate off-campus student expression will be protected, and schools will be able to maintain a safe, orderly, and effective learning environment while protecting the rights of others. Doering (2009) recognized this same simplified approach when she stated:

Tinker readily establishes that, so long as school authorities do not act upon unqualified fear of disruption--presumably to avoid educators stating such an unsubstantiated fear as a basis for suppressing unpopular, unpleasant speech--but rather can articulate some reasonable basis for finding that student speech will disrupt the school environment or invade the rights of others, school authorities' rights to develop and impose appropriate
discipline will outweigh the dissident's rights to harass and annoy other students who are simply seeking to obtain an education. (p. 631)

No additional descriptions or articulations are necessary to limit overzealous administrators from interfering with student off-campus First Amendment expression rights. By applying both prongs of the Tinker test, school officials would not be permitted to proscribe any speech, whether on or off campus, unless they could articulate objective facts which would demonstrate that the expression created, or was likely to create, a substantial disruption of school operations or interfere with the rights of others. This standard would cover cases involving true threats that interfere with the rights of others, fighting words that pose a likelihood of a substantial or material disruption, cyber bullying that interferes with the rights of classmates to be free from pervasive harassment and defamation or that interferes with the rights of students, and school personnel to be free from malicious attack on their character and reputation. Lewd and vulgar off-campus speech would still be protected, provided it did not fall into one of the recognized categories described above. Legitimate criticism of school policy or practice would still be protected, provided the criticism was not a malicious attempt to injure the reputation of another person.

Doering (2009) was joined by other commentators who recognized the applicability of Tinker’s first and second prongs. May (2009) reported that “Tinker's easy adaptability provides courts with an analytical structure for students' off-campus Internet speech” (p. 1105). Pike (2008) found that “when the Tinker test is properly applied…the equitable result can be as simple as it obvious” (p. 994). McCarthy (2009) stated, “courts should give more credence to Tinker’s second prong” (p. 1). McCarthy concluded regarding both the Wisniewski (2007) and Bethlehem (2002) cases for which the decisions were not based upon Tinker’s substantial
disruption standard, “a more compelling justification might have been grounded in the second prong of the Tinker standard because the actions interfered with individuals’ rights to be let alone” (p. 10). McCarthy also imparted that language found in Doninger (2008) indicated a recognition by the court that students and school personnel should be protected from the expressions of students interfering with the right to be let alone. Shiffhauer (2010) observed the courts’ reliance on Tinker’s substantial disruption test to analyze the response of school officials to Internet harassment “has left students vulnerable to punishment for Internet expression that was merely disagreeable or offensive” (p. 763). To avoid this constitutional infringement, Shiffhauer (2010) asserted that “Tinker’s rights of others prong can provide the necessary middle-ground and prevent courts from rendering the substantial disruption prong meaningless” (p. 763).

Doering (2009) claimed that the courts should de-emphasize focus on where the speech originated. Given the technological innovations over the last decade, the distinction between on-campus and off-campus expressions has virtually disappeared. This is not to suggest that an expression could not be limited to being either completely off-campus or completely on-campus, but in many cases, disruptive, defamatory, or threatening expression that originates off-campus quickly finds its way inside the school-house gate. Once present on the school grounds, no matter the avenue of dissemination, the impact can be malignant. The rights of others recommendation parallels the arguments made by this researcher during the analysis of the foreseeability issue articulated in Wisniewski (2007) and the recognition by other commentators such as Servance (2003) and May (2009) who argued that “a simple geographical definition of student speech is not so clear” (p. 1105). Once a student posts content on the Internet, foreseeably, the expression will come to the attention of school officials, especially if it is
directed at the school or those who work at the school or are required to attend the school. Markey (2007), despite arguing for greater protection of off-campus student cyber speech, recognized “when a student posts information on the Internet, this information may be accessed by anyone, both inside and outside the schoolhouse gates” (p. 149). Doering (2009) argued that Fraser’s rationale concerning the fact that students at school are a captive audience should be considered in cases of cyber bullying and cyber harassment. Doering (2009) correctly asserted that “aside from students' rights to transfer to another school or to attend private school, and a teacher's right to find work elsewhere; it is difficult to imagine a more captive audience than public school students and teachers” (p. 661).

Would strict adherence to the Tinker standard protect students from the harmful effects of cyber bullying? Would it protect school personnel from the damaging impact of defamation? Would it protect students from over-zealous administrators who exceeded their legitimate authority? Is there any need to further muddy the waters by adding additional factors to the analysis? Commentators who argue for more protection of off-campus student expression many times have cited the portion of the Tinker decision where Justice Fortas stated “undifferentiated fear of apprehension of disturbance is not enough to overcome the right to freedom of expression” (p. 508). Fortas coupled this quote with another and stated:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. (Tinker v. Des Moines Independent Community School District, 1969, p. 509)
If followed, these two quotes place appropriate limitations on the authority of school officials to punish protected First Amendment expressions. However, punishing a child for intentionally humiliating and bullying fellow classmates or intentionally attacking the reputation of school officials with malicious lies in the most public of forums goes beyond the mere desire to avoid the discomfort and unpleasantness that accompanies an unpopular viewpoint. It is designed to protect the rights of others to be free from public humiliation and defamation. This noble intention is far from undifferentiated fear. The tragic effects are clearly demonstrable. Through the full application of Tinker’s first and second prongs an appropriate balance can be achieved between students’ constitutional right to free speech and the interests of schools in protecting school personnel and other students from cyber bullying, defamation, and abuse.

Additional Proposed Standards

Effect-Based Approach

Seminski (2001) proposed a more restrictive standard on student expression due to the unique nature of the Internet. Reeves (2008) argued that the Internet is so “vastly different from any other medium of communication that courts have faced, there exists a strong argument that the precedent developed under Tinker,…has no application to the Internet” (p. 1151). Seminski (2001) proposed that courts should initially determine if the speech had a negative impact on the school, not the geographic origination point or the intent of the speaker. Only after the effect on the school or those who attend has been investigated should the First Amendment rights of the speaker be considered. This approach places the compelling interest of the state in maintaining safe, orderly, and effective learning environments and the rights of others to be let alone ahead of the inaccurately proclaimed rights of students to harass and bully their classmates and school personnel. In addition, the content of the expressions found in the cases decided in favor of
school authorities and the three cases that this researcher found to be decided incorrectly involved student speech not worthy of constitutional protection.

Reeves (2008) argued the application of the effect based approach proposed by Seminski (2001) would be a function of the sensitivity of the intended victim. As a matter of fact, some people have different sensibilities than others, but these differences do not preclude the enforcement of a multitude of civil and criminal actions. One example can be found in the doctrine of the “thin-skulled plaintiff.” Under this doctrine of tort law, when a person’s action produces the type of injury that is expected or foreseeable, the person’s action is still a proximate cause of that injury, even if the amount of the injury is greater than one would expect (Bahr & Graham, 1982). If a bully decides to use the Internet to harass and defame a fellow classmate by posting a series of lies and severe misrepresentations in a continuous, pervasive manner and the victim ultimately commits suicide, then the bully is at a minimum partially responsible for the victim’s death even if the victim was prone to depression.

Treating Children and Adults Differently Approach

More than one commentator has asserted that schools should have more authority to punish student off-campus speech intended to attack classmates than they should have to punish student off-campus speech intended to attack teachers and school administrators. Zande (2009), for example, favored applying Tinker’s second prong but only to protect students. Tabor (2009) argued that although “schools may punish students for off-campus cyberspeech that attacks their fellow students, it is unconstitutional for schools to do the same where the student speech targets teachers, administrators, or the school itself” (p. 561). Based upon the holdings in Bethlehem (2002) and Blue Mountain (2010), this assertion seems unsupportable.
What are the legitimate justifications for such a distinction? The answer may be that children may be more sensitive to the attacks of cyber bullies in light of the probability that they have not developed the skills necessary to deal with unfounded criticism or malicious attacks in a healthy manner. Patchin and Hinduja (2007) and David-Ferdon and Hertz (2007) indicated that the victims of cyber bullying suffer several forms of psychosocial problems as the result of their public humiliation. To date, no studies have been conducted which measure the psychosocial impact of cyber harassment on adults, but there is no reason to believe that adults are somehow immune to the negative effects of cyber harassment and defamation.

Given the unique relationship between students and the adults that work in public schools, permitting students to defame school personnel can only serve to undermine close working relationships. The need for close productive working relationships has been recognized in other venues related to First Amendment expression rights, for good reason. When anyone defames, humiliates, or verbally attacks the credibility or competence of a co-worker in a public forum, virtually certain is that the working relationship between the coworkers will be impacted negatively. When this negative impact undermines the effectiveness of the employee and as a result the effectiveness of the enterprise, employers can step in to take corrective action (Garcetti v. Ceballos, 2006).

Conclusions

Despite the plethora of proposed tests from numerous commentators, addressing the problems created by off-campus student cyber speech may be as simple as the full application of Tinker’s first and second prongs. The consistent application of Tinker’s substantial disruption test and the utilization of Tinker’s second prong should enable school administrators to find an appropriate balance between a student’s constitutional right to free speech and the interests of
schools in protecting school personnel and other students from cyber bullying, defamation, and abuse. The education of children in effective learning environments is too important to permit unnecessary disruptions from student off-campus cyber speech. Furthermore, both students and school personnel have the rights to be let alone and to protect their reputations. Off-campus student expression which threatens or defames other students or school personnel interferes with these rights. The legitimate application of Tinker’s second prong would give school officials the authority they need to address these issues without the fear of protracted and expensive lawsuits. All other off-campus speech would be analyzed under Tinker’s first prong, the substantial disruption test. If a student’s off-campus cyber expression was not defamatory or threatening, then it would protected, unless school officials could show that it created or was likely to create a material and substantial disruption. School policies that clearly define the circumstances under which school officials can exercise authority over off-campus student expression would provide fair notice to students as to the types of off-campus expression which could subject them to school discipline while also defining the limits of school authority.
CHAPTER V

POLICY RECOMMENDATIONS, PREDICTIONS, AND CONCLUSIONS

Policy Recommendations

As discussed in Chapter III, several cases were decided on the basis of policy construction. In both Coy (2002) and Killion (2001), the courts ruled that the policies relied upon by school officials to punish off-campus student cyber expression were vague and overbroad. To review, school policies must be described in enough detail so students and parents have fair notice as to which types of behaviors are prohibited and so school officials know the limits of their authority. In addition, policy developers should avoid using terms such as “abuse,” “disrespect,” “inappropriate,” “offensive,” and “hurtful.” Use of such ambiguous and subjective terms would permit the policy to reach a number of impermissible applications beyond the legitimate scope of the state’s interest and permit the possibility of arbitrary and discriminatory enforcement.

To pass constitutional scrutiny, policies which grant school officials authority over off-campus student expression must be narrowly tailored to cover well-defined, limited types of speech. Policy makers must keep in mind that what they seek to regulate is not the content of the expression but the impact of the expression. A great place to start the construction of such a policy includes the language used in Tinker, including Tinker’s second prong (Zande, 2009). For example, a school district could adopt a policy which stated: Any student whose expressions, on campus or off campus, produce a material or substantial disruption of school operations or pose a foreseeable likelihood of creating a material or substantial disruption of school operations can be subjected to disciplinary measures. Any student whose expressions, on campus or off campus, that threaten the safety of fellow classmates or school personnel can be subjected to disciplinary
measures. Any student whose expressions, on campus or off campus, that interfere with the rights of fellow classmates or school personnel can be subjected to disciplinary measures.

Several additional definitions and clarifications would be necessary to make sure students understood the types of expression which would subject them to school discipline. Examples would need to be listed so students understood what a material or substantial disruption looked like and what conditions would make it foreseeable that a material and substantial disruption would be likely to occur. The rights of fellow students and school personnel would need to be listed and defined so students would understand which types of expression could subject them to school discipline. Terms such as “bully,” “defamation,” “malice,” and “harass” would need to be clearly articulated so students would be put on notice that while legitimate criticisms of school policy and practice are protected speech, intentionally attacking the character and reputation of fellow classmates and school personnel with expressions that are known to be false are not protected speech.

As a part of the uniform standard suggested by this researcher, a school district wanting to address the growing problems created by off-campus student cyber expression should include language that prohibits cyber bullying as defined by researchers such as Patchin and Hinduja (2006), Beckstrom (2008), and the Cyberbullying Research Center (2008). The Cyberbullying Research Center defines cyber bullying as the “willful and repeated harm inflicted through the use of computers, cell phones, or other electronic devices” (p. 1). This definition contains several factors that must be present before a student’s off-campus cyber expression could be considered cyber bullying. The expression must be deliberate and repeated, not simply a onetime accidental posting. In addition, the definition would consider the viewpoint of the victim, not the perpetrator, thereby removing the possibility that a student could avoid responsibility by
claiming to be only kidding or not to have intended to cause any harm. One must consider the totality of the circumstances to determine if the behavior in question constitutes cyber bullying. The onetime occurrence of an inappropriate comment, although offensive, is not enough to constitute cyber bullying. For courts to find that cyber bullying exists, the actions leading to complaints must be severe and pervasive enough “that the victim-students are effectively denied equal access to an institution's resources and opportunities” (Davis v. Monroe County Board of Education, 1999, p. 651). Finally, the communication would have to take place using electronic communication devices, such as computers or cell phones.

Policy makers should clearly articulate a reasonable and graduated schedule of possible disciplinary consequences. For onetime minor infractions, disciplinary consequences should be limited to conferences between the parents, student, and school officials. The student should be asked to remove the expression at issue and to post, in its place, a public apology to the victim. Schools could consider issuing assignments where the child is asked to read about the tragic consequences of cyber bullying and the disruptive influence of cyber harassment and respond with a reflective report. Students could be assigned to speak with a school counselor to help them understand why their actions were wrong. For more severe infractions, short term suspensions may be appropriate, but expulsion should be limited to either repeated violations or clear threats where school officials believe the child’s continued presence on campus poses a danger to other students or school personnel.

The Supreme Court

As mentioned numerous times, the Supreme Court has yet to hear any case dealing with off-campus student cyber expression. However, this state of affairs is likely to change. The possibility is very real that the outcome of the Third Circuit Court’s reconciliation of the
dichotomous holdings in Layshock (2010) and Blue Mountain (2010) will be appealed to the Court regardless of the outcome with the circuit court. If this prediction does indeed come to fruition, what might the Court hold? What clues as to the positions of the various Justices, in regard to this issue, are available? Although this researcher would like to argue that the Supreme Court would support the efforts of school officials to regulate off-campus student cyber expression in limited circumstances, this prediction is about as reliable as predicting the weather. From an analysis of the way each current Justice rules regarding First Amendment jurisprudence, each decision is clearly factually contingent. Decisions in many cases depend on whether the particular Justice feels that the government has a compelling interest and whether or not the regulations authorizing governmental intervention is narrowly tailored to accomplish the compelling governmental interest. As a result, each case stands on its own merits.

Given the fact that cases dealing with off-campus student expression are largely fact specific, the positions of the Justices are likely to be malleable as a function of specific case circumstances. From a review of holdings in cases involving the First Amendment, it appears as though three factors can be determinative. First, the Court will look to the motivation of the governmental intervention. Can the motivation be described as content neutral and based upon a compelling governmental interest? If so, then the regulation passes one of the hurdles imposed by the Court. Second, is the policy or statute narrowly tailored to meet a compelling governmental interest or is it vague and overbroad? Third, are there any political implications which would sway members of the Court? These identified factors produce variable outcomes. However, some clues are present based upon previous opinions.

For example, Justice Thomas in his concurring opinion in Morse (2007) wrote, “as originally understood, the constitution does not afford students a right to free speech in public
schools” (p. 2630). Thomas also cited the language from Chaplinsky (1942) and Justice Black’s dissent in Tinker to support his view that the primary function of schools—the education and protection of children—must be supported even if this function interferes with the First Amendment’s right of expression. However, Justice Thomas has established a record of defending First Amendment rights. Thomas joined Justice Kennedy in *Texas v. Johnson* (1989) where the Court ruled that a Texas statute which made it a crime to desecrate the U. S. Flag violated the right of expression under the First Amendment. In *Texas v. Johnson* (1989), however, the actions of the flag burner did not create a substantial or material disruption of school operations and did not interfere with the rights of others. In a case involving off-campus student cyber expression, there is a good chance that Justice Thomas would support school authority.

Elena Kagan is the newest member of the Court and has never served as a judge at any level. As a result, Kagan’s record in specific cases dealing with First Amendment jurisprudence is nonexistent. However, Justice Kagan has written extensively as a law professor. Kagan (1996) argued that the role of judicial review in freedom of expression cases is to focus on the motives of the governmental intrusion through an analysis of the motive behind the policy or law regulating or limiting speech that “determines the content and category of rules that constitute First Amendment Doctrine” (p. 423). Based on this observation, as long as the government has a compelling motive, such as protecting the rights of others or protecting the learning environment from unnecessary and substantial disruptions, governmental interference with First Amendment expression rights would be permissible, provided the policy authorizing governmental authority is content neutral and neither vague nor overbroad. This being the case, this researcher would
argue that Justice Kagan, in the right factual situation, would support school authority to regulate off-campus student cyber expression.

According to Collins (2005), Justice Breyer’s voting record, when it comes to First Amendment cases, is the least protective on the Court. This description is supported by Breyer’s opinion in Morse (2007) where he concurred with the holding, but for different reasons. Breyer stated:

Students will test the limits of acceptable behavior in myriad ways better known to school teachers than to judges; schools need a degree of flexible authority to respond to disciplinary challenges; and the law has always considered the relationship between teachers and students special. Under these circumstances, the more detailed the Court’s supervision becomes, the more likely its law will engender further disputes among teachers and students. Consequently, larger numbers of those disputes will likely make their way from the schoolhouse to the courthouse. Yet no one wishes to substitute courts for school boards, or to turn judge’s chambers into the principal’s office. (p. 2640)

In light of this statement, it seems likely that Breyer would be inclined to support school authority over off-campus student cyber expression that satisfied either of Tinker’s prongs.

Based upon her concurrence in Doninger v. Niehoff (2008), it appears as though Justice Sotomayor would support school authority over off-campus student cyber expression in limited circumstances. As a reminder, the Second Circuit Court in Doninger (2008), supported the decision of school officials to punish Avery for her misleading and disruptive off-campus blog, but the nature of the consequences enforced were exceptionally mild. If school officials attempted to impose more severe consequences, how Sotomayor would rule is not clear, but for
the purposes of this analysis, Sotomayor should be placed on the side supporting the intervention of school officials in limited circumstances.

If these four Justices would indeed support the intervention of school officials into the realm of off-campus student cyber expression, in limited circumstances, then only one additional Justice would be needed as the swing vote. Justice Kennedy is probably the most ardent supporter of First Amendment rights on the bench (Collins, 2005). As a result, he would be the least likely to support school intervention. Kennedy wrote in Ashcroft v. Free Speech Coalition (2002), a case which overturned a federal statute banning not only the creation, possession, and distribution of child pornography, but any images where the participants appear to be minors, as follows:

First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought. (p. 253)

This leaves Justices Alito, Ginsburg, Scalia, and Roberts as the potential swing votes. Justice Alito concurred with the decision in Morse (2007), but was more reserved in recognizing that schools can limit certain forms of speech. Alito wrote, “a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use… [but not ] speech that can plausibly be interpreted as commenting on any political or social issue” (p. 2636). Justice Alito concluded that the previous decisions of the Court already provide public schools with greater authority to intervene when student speech meets the standards articulated in Tinker (1969), Fraser (1986), and Hazelwood (1988) but stated that the decision in Morse (2007) stands “at the far reaches of what the First Amendment permits” (p. 2639). In light of this limiting
language, Justice Alito would potentially limit school intervention of off-campus student cyber speech to Tinker’s first prong thereby leaving individual victims without any protection by school officials. However, in most cases of cyber bullying and cyber harassment, the speech at issue does not involve political or social matters. In most cases, the speech at issue is defamatory and malicious. Defamatory and malicious speech is not designed to stimulate political or social debate but to damage the reputation of an innocent victim using comments made with a reckless disregard for the truth.

In *Saxe v. State College Area School District* (2001) then Circuit Judge Alito used language suggesting, under certain circumstances, he would support the authority of school officials to regulate off-campus cyber speech by including a specific reference to Tinker’s second prong. Nonetheless, Alito noted that the application of Tinker’s second prong, at that time, was unclear. Alito cited *Stotterback v. Interboro School District* (1991) as an example of a case which ruled that Tinker’s second prong may be used to punish defamatory speech as well as speech which was intended to cause emotional distress. Since most cases of cyber bullying and cyber harassment are defamatory and designed to intentionally inflict emotional distress through the publication of hurtful, malicious language, Alito might be inclined to apply Tinker’s second prong to protect students and school personnel as long as the speech in question was not related to a matter of public interest. In addition, Alito was the lone dissenter in *United States v. Stevens* (2009) a case in which the other eight Justices ruled that a federal statute barring the creation, possession, and sale of depictions of animal cruelty (18 U.S.C. §48) violated the First Amendment. If Alito views the innocent victims of cyber bullying in the same way he viewed depictions of innocent baby kittens being suffocated, he could be inclined to support school intervention in cases of off-campus cyber bullying and cyber harassment.
Justice Ginsberg’s record appears to be one of staunch support for First Amendment expression rights. For example, Justice Ginsburg was a dissenting member of the Court in a decision that supported the authority of the Federal Communications Commission to sanction television and radio stations for spontaneous utterances of unscripted expletives (*FCC v. Fox Television Stations Inc.*, 2009). Ginsburg felt that granting this authority violated the First Amendment. In addition, Justice Ginsburg, writing for a unanimous Court, ruled in favor of First Amendment protections for telemarketers engaged in charitable solicitations (*Illinois ex. rel. Madigan v. Telemarketing Associates*, 2003). Finally, in Morse (2007), Justice Ginsberg joined then Justice Stevens in a dissenting opinion in which Stevens argued that the banner displayed by Joseph failed to satisfy either prong of the Tinker test. Cyber bullying and cyber harassment, however, could satisfy either or both prongs of Tinker. Justice Ginsburg’s record on First Amendment cases indicates that she would not be inclined to limit off-campus student First Amendment expression rights.

Chief Justice Roberts has developed a reputation of being a strong supporter of First Amendment rights. In *Citizens United v. Federal Elections Commission* (2010), Chief Justice Roberts wrote a rather scathing response to Elena Kagan’s brief to the court in her role as Solicitor General. Kagan was urging the court to allow the government to prohibit political speech by corporations. Roberts wrote that permitting this type of political censorship would interfere with vibrant political discussion which is the basis of democracy. Despite writing the majority opinion in *Morse* (2007), Roberts stated “there is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents” (p. 2624).

Justice Roberts also wrote the majority opinion in *United States v. Stevens* (2009), in which the court ruled that a federal statute that made it a crime to create, possess, or sell “crush
videos” was a violation of the First Amendment. However, in his opinion, Justice Roberts argued that expression which are defamatory, obscene, incite violence, or encourage criminal activity are not protected by the First Amendment. If the facts of the case that ultimately makes it to the Supreme Court are indicative of intentional, malicious, defamation of classmates or school personnel, Justice Roberts might be inclined to support school intervention. In *Garcetti v. Ceballos* (2006), Justice Roberts placed a strong emphasis on the need for governmental efficiency. If school officials can show that the off-campus cyber expression created a material or substantial disruption of school operations, Justice Roberts might support school intervention. In light of these possibilities, under the right circumstances, Justice Roberts might support school authority over student off-campus cyber expression.

Justice Scalia has been described as an originalist when it comes to First Amendment jurisprudence (Stone 2007). Originalists, such as Justice Scalia and Justice Thomas, typically limit First Amendment protection to speech involving political issues or other matters of public concern. Justice Scalia’s record confirms exactly that. In every case involving sexual expression, Justice Scalia has ruled not to provide First Amendment protection. In *United States v. Playboy Entertainment Group* (2000), Justice Kennedy, writing for the majority, ruled that a federal law, which required cable operators who provided sexually-oriented programming either to scramble fully or to limit their transmissions to between the hours of 10:00 pm and 6:00 am, was content-based and as such had to meet strict scrutiny analysis. Justice Kennedy concluded that the federal law failed to meet this standard because a less restrictive alternative was available. Justice Scalia dissented and argued that the content of the programming was by its very nature obscene and hence not protected by the First Amendment. It appears to be safe to argue that Justice Scalia would support school regulation of off-campus student cyber expression when the expression at
issue is threatening, defamatory, or likely to create a substantial disruption of school operations.

It appears from a review of their records that Justices do not vote consistently when it comes to enforcing the protections guaranteed by the First Amendment. Each decision appears to be fact specific. This being the case, any prediction is just that, a prediction. If the losing party in either Layshock (2010) or Blue Mountain (2010) appeals the decisions of the Third Circuit Court to the Supreme Court, and the Supreme Court grants certiorari, This researcher predicts that the Court, in a 7-2 opinion with Justice Ginsburg and Justice Kennedy dissenting, will support the intervention of school officials as long as school officials can show that their actions are based upon the impact of the speech and not its content. School officials would have to show that the off-campus expression created, or was likely to create, a material or substantial disruption of school operations or that the expression threatened the safety or defamed the reputations of school personnel or fellow students. The policy upon which school officials justified their actions would have to be carefully constructed representing neither vague nor overbroad elements and the ultimate sanction imposed would have to be proportionate to the offense. Draconian punishments would not be viewed favorably by the Court.

Conclusions

From the discussion and analysis in the previous four chapters, we know the following. The Internet is a marvelous technological innovation and has had a transformative impact on virtually every aspect of society (Hardmeier, 2005; Laser, 2010). Despite this recognition, the Internet is being used for several forms of malfeasance, one of which is its use to bully, defame, and harass others (Bradshaw, 2010). Depending on the source reporting the figures, approximately 1 in 3 students has been bullied and harassed online. In addition, the technological advances in electronic communication devices has blurred the distinction between on-campus
and off-campus student speech to the point that several commentators have advocated for courts to ignore the origins of the expression and focus solely on its destination (Markey, 2007; May 2009).

Virtually every commentator that has researched this legal quagmire agrees that cyber bullying and cyber harassment are problems that must be addressed. Children are being bullied and intentionally humiliated to the point of suicide (Archer, 2010; Halligan, 2009; Meyer, 2009). School operations are being materially and substantially disrupted, and school personnel are being defamed to the point that their professional effectiveness is being compromised (Doninger v. Niehoff, 2008; J. S. v. Bethlehem Area School District, 2002; Wisniewski v. Board of Education of Weedsport Central School District, 2007). In an attempt to address this growing problem, states have passed legislation (Neis, James, & Netter, 2010; Vaznis, 2009); the U. S. Department of Education recently held a multi-day summit to search for reasonable solutions (U. S. Department of Education, 2010); and news organizations have devoted considerable resources to bring this problem to the attention of the general public (CNN, 2010).

The Supreme Court has yet to hear a case dealing with off-campus student cyber expression. As a result, no uniform standard currently exists to protect legitimate forms of off-campus student cyber expression while simultaneously permitting school officials to protect the learning environment, and those within it, from the harmful effects of cyber bullying and cyber harassment. Commentators argue for and courts apply a wide variety of standards producing disjointed, unpredictable outcomes (Starrett, 2009). This leaves school officials, students and parents guessing as to which forms of off-campus expression are protected by the First Amendment and which forms of expression are not. The lack of a uniform standard produces a situation ripe for costly and protracted litigation and two unfortunate outcomes. The first
unfortunate occurs when school officials over step their constitutional boundaries and implement harsh consequences for off-campus student expression that deserves protection (Coy v. Board of Education of North Canton Schools, 2002; Latour v. Riverside Beaver School District, 2005). The second occurs when school officials fail to act, leaving innocent victims with few avenues of recourse. As Kemerer (2010) reflected, “there are some lessons here for both the construction and application of student discipline rules to avoid expensive and time-consuming litigation” (p. 12) and to protect the victims of cyber bullying and cyber harassment.

Freedom of expression is a fundamental yet qualified right, and not all forms of expression are protected (Chaplinsky v. New Hampshire, 1942; Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 1985; Doe v. Pulaski County Special School District, 2002; Virginia v. Black, 2003). In addition, the rights of children are not coextensive with the rights of adults (Bethel School District No. 403 v. Fraser, 1986). As a result, students clearly do not have the constitutional right to say anything they want about fellow classmates and school personnel and then seek protection from the First Amendment. While the very preservation of the United States’ constitutional republic depends on the ability of the people to speak about matters of public concern without fear of governmental sanction, this right, like all others, must be exercised in a manner which does not interfere with the rights of others or the compelling interests of the state. Malicious off-campus student cyber expression designed to disrupt the educational environment or to humiliate and defame fellow students and school personnel does not deserve and should not receive First Amendment protection.

Based on the analysis of the identified cases in Chapter III, most courts rely exclusively on Tinker’s first prong, the substantial disruption test, when analyzing issues involving off-campus student cyber expression. However, the inconsistent application of the standard has
produced contradictory outcomes. The utilization and application of Tinker’s second prong to protect the victims of cyber bullying and cyber harassment would alleviate the inconsistent application of Tinker’s first prong, the substantial disruption test. Several cases were decided on the basis of policies deemed as vague and overbroad. Therefore, policies drafted by state legislatures and local educational agencies designed to address the growing and destructive impact of cyber bullying and cyber harassment, must be carefully tailored with clear and unambiguous language, and must be directed at the impact of the expression, not the expression’s content.

Of the 19 cases identified and analyzed in Chapter III, 18 dealt specifically with student off-campus cyber expression directed at school employees. Only one, *J. C. v. Beverly Hills Unified School District* (2010), involved off-campus student cyber speech directed at another student. Despite this finding, this researcher included the impact of the expression on fellow students as one of the factors that courts consider as they analyze these cases. This factor is still an important consideration as off-campus student cyber expressions, even if not directed at fellow students, can still disrupt the learning environment by undermining the professional effectiveness or the esteem in which a teacher or school administrator is held. In light of the incidence of cyber bullying reported by researchers and organizations such as Patchin and Hinduja (2006) and Cyber Bully Alert (2008), it seems reasonable to assume students are just as likely, if not more likely, to be targeted by cyber bullies as are school officials. If this is indeed true, why do a significant majority of the cases dealing with student off-campus cyber expression involve communications directed at school personnel?

Additional research is needed to explore this phenomenon, but there are several possible explanations. First, student off-campus cyber expression directed at school personnel, as opposed
to fellow students, has a greater likelihood of creating a disruptive influence on campus. If a teacher feels threatened, or so humiliated that he or she cannot effectively execute their duties, the learning environment for more than just one student will be impacted. In *Wisniewski v. Board of Education of Weedsport Central School District*, (2007) and *J. S. v. Bethlehem Area School District*, (2002), teachers had to be replaced and these cases represent perfect illustrations of this observation. In secondary schools, where most cases of cyber bullying and cyber harassment take place, when a teacher is the target, the learning opportunities for 150 students or more can be negatively impacted.

If the target of the cyber harassment is a school administrator, it can negatively impact the culture of the entire school. This impact was specifically mentioned in *J. S. v. Bethlehem Area School District*, (2002), and although not specifically mentioned, probably present in *J. S. v. Blue Mountain School District* (2010) and in *Layshock v. Hermitage School District* (2010), where large portions of the student body were aware of the defamatory postings and the responses of school officials which resulted in litigation. The larger negative impact of off-campus student cyber expressions directed at school personnel may explain the unbalanced ratio of student cyber speech cases targeting school personnel as opposed to those targeting other students.

Another reasonable explanation for this unbalanced ratio may be the possibility that school officials are more sensitive when they are the targets as opposed to students. If this is indeed true, then something must be done to increase administrators’ empathy and make them more responsive to the individualized impact of cyber bullying directed at students. What may be needed is the codification of a uniform standard which gives school officials the authority to address off-campus student cyber speech in clearly defined, limited circumstances. The problems
created by student-on-student cyber bullying may need to be dealt with in a similar manner to the way issues of student-on-student sexual harassment are handled. If school officials, who are in the position to take corrective measures, are aware that student-on-student sexual harassment is occurring yet act with deliberate indifference, they can be held personally liable (*Davis v. Monroe County Board of Education*, 1999). The threat of liability for inaction coupled with the protection of a uniform standard may make school administrators more responsive, which in turn, may save the lives of children who find themselves the victims of cyber bullies.

In utilizing the standard recommended by this researcher which involves the complete application of both of Tinker’s prongs, a majority of the cases would still have been decided in favor of student expression rights. Only three cases, Layshock (2010), Beidler (2000), and Killion (2001) would have had a different outcome if Tinker’s second prong was seriously considered and applied. In each of these cases, the student’s off-campus expression did not concern a matter of public interest nor were the expressions legitimate complaints about school policy or practice. The expressions at issue were intentionally designed to humiliate and defame school personnel and defamation is not protected by the First Amendment. The Third Circuit Panel, which issued the initial ruling in *J. S. v. Blue Mountain School District* (2010), recognized this limitation when it stated:

> The Constitution allows school officials the ability to regulate student speech where, as here, it reaches beyond mere criticism to significantly undermine a school official's authority in challenging his fitness to hold his position by means of baseless, lewd, vulgar, and offensive language. (p. 308)

If we consider the admonitions of Justice Black in his dissenting opinion in Tinker (1969), what we find is the visionary warning of today where children believe they can say
whatever they want about their teachers and fellow classmates without any fear of consequence. Black described a future where students, granted with the expression rights of adults, yet lacking the ability to recognize their duty to exercise those rights responsibly, would result in a situation where they would deliberately defy school authority by saying outrageous things then file suit when school officials attempted to protect the school environment and those within it. Justice Black warned that the decision in Tinker would “subject all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest students” (Tinker v. Des Moines Independent School District, 1969, p. 525). This foreshadowing has clearly arrived, but it was not caused by the permissive ruling of Tinker. The culture described by Justice Black is the result of those who have taken Tinker and twisted it beyond its intended purpose. The decision in Tinker protected political, symbolic, non-disruptive speech; not vulgar, threatening, defamatory speech designed for one purpose and one purpose alone, the humiliation of class mates or school personnel in the most public of forums.

Allowing school officials to administer reasonable, proportionate consequences for off-campus cyber attacks on students and school personnel will provide the opportunity for schools to help children learn the limits of constitutionally protected speech. It will also allow schools to continue to serve a mediating function between children and the true consequences of the adult world. If these lessons are not learned when the opportunity arises, while students are still minors, what is to stop the students years later from blasting co-workers and supervisors only to later find themselves without a job, or worse, facing criminal prosecutions and civil litigation? Allowing school officials to administer reasonable and proportionate consequences for off-campus cyber attacks on students and school personnel will serve to protect the innocent victims of cyber bullying and cyber harassment.
What is clear is that school officials can no longer ignore this epidemic. The safety of children and the effectiveness of schools are in danger as the result of the misuse of electronic communication devices. No longer can protective barriers be erected around electronic forms of expression that garner constitutional protection in no other forum. Carefully constructed policies must be put in place that provide school officials the authority to intervene, in limited circumstances, with proportionate consequences which promote the appropriate balance between individual rights and institutional needs. The time has come to apply the full meaning of Tinker’s first and second prongs.
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