

**Cyberspace Off-Campus Student Rights  
A Legal Frontier For School Administrators**

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# CYBERSPACE OFF-CAMPUS STUDENT RIGHTS A LEGAL FRONTIER FOR SCHOOL ADMINISTRATORS

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Schools and, more specifically, school administrators, have been charged with balancing the expressive rights of students while maintaining a safe school environment. Recently, student created websites have become the chosen method in which students have voiced their opinions about schools, teachers and school administrators. Many school administrators have been quick to discipline students for off-campus Internet speech because they feel the content may be socially inappropriate. Quite simply, the shootings at Columbine gave school administrators all the reasons they needed to trounce the First Amendment rights of public school students in the name of preventing violence. Absent, however, of any “true” threat or substantial disruption to the educational environment, student off-campus Internet speech is protected under the First Amendment. In some of the litigated cases, there were out of court settlements as well as summary judgments that included significant costs to the school district.

There is a great need for descriptive guidelines to assist school administrators when dealing with off-campus First Amendment Internet speech issues. This dissertation analyzes Lower Court case law pertaining to student off-campus Internet free speech. A Reasonable Forecast Tool, developed from

historical U.S. Supreme Court First Amendment case law, is used to analyze the Lower Court cases and to help create the descriptive guidelines. These guidelines enable the administrator to conduct a comprehensive investigation which includes the application of the substantial disruption standard used by most Lower Courts as proscribed by Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). The guidelines provide the administrator with the ability to make a well informed decision ensuring the protection of student expressive rights while being able to maintain a safe learning environment.

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## **Chapter I THE LITERATURE**

### **Introduction**

The need to maintain order and discipline for a safe school environment conducive to learning, without ignoring or belittling the rights of students, long has led to a delicate balancing act for school administrators. In recent years, however, that task has been complicated because it has become harder to locate what is and what is not the school.

The School Code, 24 PS. 1317, gives a teacher, vice principal or principal “the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes...” as their parents or guardians would have. This provision recognizes that the relationship between the school and pupil extends beyond the walls of the schoolhouse.

Cyberspace and virtual reality rewrite the boundaries of physical space and student location, forcing new considerations on those who must maintain student discipline while respecting rights. What makes the balancing act even more precarious is that “cyberspace” inevitably involves speech and other expressive activities. That, in turn, means respecting individual rights that are among those most cherished in the American tradition, the expressive rights protected by the First Amendment. (Levin, 2003)

The First Amendment to the United States Constitution states:

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

The U.S. Supreme Court made it clear in Tinker v. Des Moines Independent School District 393 U.S. 503 (1969) that “First Amendment rights, applied in the light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to Freedom of Speech or Expression at the schoolhouse gate.” However, the Supreme Court also acknowledged that school districts have more control over student curricular speech than student independent speech, when they opined in Bethel School District No. 403 v. Fraser 478 U.S. 675 (1986), that “the Constitutional right of students in public schools are not automatically coextensive with the rights of adults in other settings.”

What does this mean for student rights? Many students now have turned to personal websites on the Internet to express a variety of viewpoints, including criticism of school teachers and officials. The U.S. Supreme Court in Reno v. ACLU 521 U.S. 844 (1997) has said that speech on the Internet is accorded the highest of protection on par with the print medium. Students expressing themselves via the Internet has become a much more complex issue since the tragic 1999

events of Littleton Colorado and the copycat weapons incidents that have since occurred throughout the country. Rightly or wrongly, the events in Littleton created a sense of urgency about how students use the Internet because Eric Harris, one of the Columbine shooters, had a website on which he described in detail the explosives that he and Dylan Klebold had constructed or were planning to construct (Harpaz, 2000). Quite simply, the shootings at Columbine gave school administrators all the reasons they needed to trounce the First Amendment rights of public school students in the name of preventing violence (Calvert, 2003). Because of Columbine, school administrators have become too quick to respond and overreact to an Internet speech issue before investigating its connection to First Amendment rights.

### **The Internet: A Problem Emerges**

Evidence of this overreaction comes in the form of two recent cases regarding First Amendment rights of public school students. In Killion v. Franklin Regional School District 136 F. Supp. 2d 446 (2001), Zachariah Paul, a student at Franklin Regional High School published a “top ten” list at home on his computer about the athletic director, which included statements regarding the director’s appearance and sexual proclivity. This list was e-mailed to several of Paul’s friends from his home computer. Several weeks later, the list found its way into

the Franklin Regional High School teachers' lounge. An undisclosed student had reformatted Paul's original e-mail and distributed it on school grounds. Paul was subsequently suspended for ten days for "verbal/written abuse of a staff member." Mrs. Killion, Paul's mother, quickly filed suit seeking his reinstatement stating that the suspension violated Paul's First Amendment of free speech because the school had no business disciplining his home activities.

Federal judgment in this case was for the Plaintiff. Given the out of school creation of the list and the fact that Paul was not responsible for bringing the list on school grounds, and absent of any kind of substantial disruption in school (Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)), the school district could not suspend Paul without violating his First Amendment free speech rights. The court also found that the policy, which allowed administrators to suspend Paul, was unconstitutionally vague and overbroad. This finding is very important and very relevant to the second case involving First Amendment rights of public school students.

In Flaherty v. Keystone Oaks School District 247 F. Supp. 2d 698 (2003), Jack Flaherty, Jr., a student at Keystone Oaks High School posted four messages, three from his home computer and one from a school computer, on a website message board regarding an upcoming volleyball game with another high school. The student handbook prohibited speech that was abusive, harassment,

inappropriate, and offensive. The court found that the breadth of the student handbook, which included board policies, were over reaching in that they were not linked within the text of speech that substantially disrupted school operations (Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)). Because the terms abuse, offend, harassment, and inappropriate, were not defined in any significant manner, the policies as stated in the student handbook did not provide the students with adequate warning of conduct that is prohibited and thus were vague. The policies were overreaching in that the policy could be read to cover speech that occurs off the school's campus and not school related.

Although the facts differ slightly in these cases described, collectively they raise a very timely and critical question of constitutional importance: ***When, if ever, is on-campus punishment appropriate for off-campus speech (Calvert, 2003)?***

The interrelationship between the Internet and the First Amendment rights of public school students is a complex topic (Harpaz, 2000). The wide accessibility of the Internet blurs the lines between on-and-off campus speech, making traditional First Amendment analysis of student speech very difficult. Not surprisingly, this subject has recently become the focus of much debate and uncertainty in school board meetings, principal offices, classrooms and the courts (SPLC Cyberguide,

2001). The issue of students' rights to free speech in content transmitted through the Internet will arise in a number of ways (Willard, 2002):

- Student speech in public, discussion group messages
- Student speech in private e-mail messages
- Student speech posted on a district web site, including material posted in classroom sections, the school newspaper, and, if allowed by the district, material posted on an individual student web page or on an extracurricular organization web page.
- Student speech posted on another web site that has been accused through the district system
- Student speech that pertains to the school, teachers, or other students and that appears on a personal web site or is transmitted through personal e-mail accounts.

Analysis of speech is easiest and most limiting when students are in school, using school computers and working within the school's curriculum. If a student creates a web site on a computer provided by the school, in this context, the school is free to restrict speech that is inconsistent with the policies and procedures set forth by the district and its educational objectives. The school is able to restrict foul language, sexual references and insulting language as they see appropriate for the lesson. Difficulties arise as the speech moves away from

having a direct connection to the school's curriculum (Harpaz, 2000). Students may have access to school computers during the after school hours to use for personal projects. This may present a problem if students were disciplined for the content of a web site created under these circumstances. The school may be able to claim some attachment to the creation of the site but challenges under the First Amendment may surface. The most difficult of situations is when the Internet use is completely disassociated with the school or its curriculum.

When school officials attempt to discipline students for inappropriate Internet use off-campus, the schools are charged with finding a connection or nexus and demonstrating a substantial disruption (Tinker v. Des Moines Independent School District 393 U.S. (1969)). If schools fail to do this, the speech used will be protected by the First Amendment as shown in Killion (2001), and Flaherty (2003).

In order to fully understand the range of First Amendment issues raised by school efforts to discipline students for Internet use, this study will first examine both Supreme Court and Lower Court precedent involving student speech outside the Internet context (Harpaz, 2000)

## **Historical Overview Of Case Law**

### **The U.S. Supreme Court Cases**

Three U.S. Supreme Court decisions have established the standards or framework in which First Amendment claims of public school students can be evaluated. The court has addressed student expression in schools in three contexts: what students are allowed to wear to school as a form of expression, what students may say during school assemblies, and what editorial control schools may exercise over student newspaper articles. Together, these cases provide the U.S. Supreme Court's standard for school control of student expression (Drake Law Review, 2000). In Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the Court found that a public school building was not off-limits to free speech rights. This case surfaced in the context of the Vietnam War. Mary Beth Tinker and a group of other students wore black armbands at school to protest the war. School authorities adopted a rule banning these arm bands and Mary Beth and her friends were quickly suspended. When the case came before the U.S. Supreme Court, the court stated, "It can hardly be argued that either students or teacher shed their constitutional rights to freedom of speech or expression at the schoolhouse gate". A significant part of this case that has been used time and time again to substantiate or dissolve other First Amendment claims is that in order to justify punishment of speech it must be demonstrated that "engaging in the forbidden

conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” A school could not have “an undifferentiated fear or apprehension of disturbance,” but must have evidence that such a disruption had occurred or is “highly likely to occur.” The U.S. Supreme Court found that this form of speech, which was akin to “pure speech,” was protected under the First Amendment.

Statements made in the Tinker case have become the benchmark for many First Amendment claims. Cases are put up against the “Tinker test” to see if the specific speech that had occurred is protected based on many of the above statements. Tinker, however, did not resolve all issues of students’ rights to free speech (Harpaz, 2000). The Tinker ruling did not license students to say or write anything they wish but it did broaden the boundaries of student expression and clarify the need to write good school policies, including Internet use policies (Goodman, 2003).

Several years later in Bethel School District v. Fraser, 478 U.S. 675 (1986), the U.S. Supreme Court revisited the issue of First Amendment claims of public school students. In Fraser (historically, this case has been referred to as Fraser instead of Bethel), the Plaintiff, a high school student was disciplined for a speech nominating a classmate for student government. The speech was delivered at an official high school assembly in front of 600 students, ages 14 to 18. The speech

included yelling, mimicry, bewilderment and embarrassment. The next day the student was informed he violated a school disciplinary rule that prohibited the use of obscene or profane language or gestures, which materially and substantially interfered with the educational process.

In *Fraser*, the Court stated that public education was to “prepare pupils for citizenship in the Republic...It must inculcate the habits and manners of civility.” The Court also stated “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” With these two statements, the Courts ruled in favor of the school district and concluded that “schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct.”

Finally, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the court upheld, against a First Amendment challenge, a principal’s decision to delete student articles on teen pregnancy from a school-sponsored newspaper. The court noted that the school had not opened the newspaper as a public forum and therefore could “exercise editorial control over the style and content of student speech in school-sponsored expressive activities as long as its actions are reasonably related to legitimate pedagogical concerns.” The U.S. Supreme Court referenced both *Tinker* and *Fraser* to establish the benchmarks for the decisions in

Hazelwood. Civil libertarians saw Hazelwood as a rollback of student rights. At the same time, many educators viewed the decisions as a reinforcement of common sense – student speech rights were simply not identical to the rights of adults in public. Either way, the case provided new limitations on student free speech. However, because the Court ruled that schools could censor content that was created as part of an official educational activity, it left open the argument that student free speech that wasn't connected to official educational activities would still be protected. In other words, as long as students produced content that was not affiliated with a classroom activity and directly disrupted school activities, their rights to produce that content would still be protected (Carvin, 2000).

In analyzing First Amendment rights of public school students, Sperry et al. (1998) connect the three landmark cases of Tinker, Bethel and Hazelwood in this way: (Gooden, 2003)

**First, “vulgar or plainly offensive speech (Fraser-type speech) may be prohibited without a showing of disruption or substantial interference with the school’s work. Second, school-sponsored speech (Hazelwood-type speech) may be restricted with limitations reasonably related to legitimate educational concerns. Third, speech that is neither vulgar nor school-sponsored (Tinker-type speech) may only be prohibited if it causes a material disruption of the school’s operation (Gooden, 2003).**

## Lower Court Cases – On Campus

In the light of these landmark cases, many questions still remain. The U.S. Supreme Court has certainly defined a continuum in which on end is political expression and at the other lies sexual innuendo (Harpaz, 2000). The Supreme Court, however, does not define where it would place on that continuum speech that is insulting and critical of teachers and administrators. More importantly, the U.S. Supreme Court does not yet define if the decisions set forth in these cases are limited to speech on campus or if schools have the authority to control speech that is off campus but disruptive to the school environment. This question, as well as others, has been left to the lower courts.

In Poling v. Murphy, et. al. 872 F. 2d 757 (1989), the United States Court for the Sixth Circuit, decided a case in which Dean Poling, a student at Unicoi High school, was removed from a school election due to rude and discourteous remarks made during a school assembly. The district court granted summary judgment in favor of the school district. Dean Poling challenged that decision, however, the Court of Appeals affirmed. The Court of Appeals held that the school district had the right to restrict speech at the school assembly because the election and the election assembly were school-sponsored activities. The court also held that the district could have exercised editorial control over the content of Poling's speech because their actions were reasonably related to the legitimate

pedagogical concern of civility. The main question presented in this case is whether the Federal Constitution gives a high school student license to make admittedly “discourteous” and “rude” remarks about the administration in the course of a speech delivered at a school sponsored assembly. Interestingly, the court turned to Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988), to answer this question. Using the Hazelwood standard, “educators do not offend First Amendment rights by exercising editorial control over the style and content of student speech in school sponsored expressive activities so long their actions are reasonably related to pedagogical concerns.”

In 1996, a second case out of the Supreme Judicial Court of Massachusetts asks a very important question; “Do high school students in public schools have the freedom under Massachusetts General Law, chapter 71, 82 (1994), to engage in non-school sponsored expression that may reasonably be considered vulgar, but causes no disruption or disorder?” In Pyle v. South Hadley School Committee 423 Mass. 283 (1996), Jeffrey Pyle and his brother wore many different and controversial t-shirts to school. After being disciplined, the students brought an action against the school officials of South Hadley claiming that the school’s dress code violated their freedom of speech. The dress code prohibited the wearing of apparel that had comments, pictures, slogans, or designs that were vulgar. The court found that under Massachusetts state law, the students had the freedom to

engage in non-school sponsored expression that may have been reasonably considered vulgar but caused no disruption. The clear and unambiguous language of the state law protected the students rights limited only by the requirement that “expression be non-disruptive within the school and included the expression of views through speech and symbols without limitation”. The decision in this case took the courts through the trilogy of Tinker (1969), Bethel (1986), and Hazelwood (1988). Even though it seemed clear to the court that the students had worn t-shirts to school that administrators found unacceptable and prohibited under the school dress code, the court was unable to identify any disruption or disorder caused by this action.

The Ninth Circuit Court of Appeals addressed this issue of disorder and disruption in Chandler v. McMinnville School District, 978 F. 2d 524 (1992). In this case, several high school students of striking school teachers wore “scab” buttons to school with such statements as “Students united for fair settlement.” School officials demanded that they remove the buttons while other students were permitted to wear such buttons. The students felt that this action violated their rights under the First Amendment to freedom of expression and freedom of association. A District Court dismissed the action, however, on appeal; the Appellate Court reversed the dismissal and concluded that the “scab” buttons were improperly suppressed. There was nothing in the complaint or in the district

court's analysis that substantiated the conclusion that the buttons were inherently disruptive. A connection to both *Tinker* (1969) and *Hazelwood* (1988) can be drawn from this case that is critical to the historical development of this case law. In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the U.S. Supreme Court described the speech in this case as "pure speech" because it was "silent, passive, expression of opinion, unaccompanied by any disorder or disturbance. In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the U.S. Supreme Court found the "students cannot be punished merely for expressing their personal views on the school premises....unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights or other students." Both cases require schools to demonstrate that given speech is disorderly or causes a substantial or material disruption.

### **Threats**

Threats, critically distinct from other forms of speech, are not protected by the Constitution. In *Watts v. United States*, 394 U.S. 705 (1969), the U.S. Supreme Court stated that threats are not a form of protected speech, though the Court did not offer criteria for determining whether specific speech constitutes a threat. The Court did, however, examine the use of an objective "test" which stated

that “no actual intent to carry out the threat is required; all that is needed is the defendant know what the statement means and say it voluntarily (Andrews, 1999). The Supreme Court heard another threat case in Rogers v. United States 422 U.S. 35 (1975). The U.S. Supreme Court in this case developed a more narrower and subjective threats “test” which would require proof, in light of circumstances under which the statement was made that: 1) the defendant intended that his statement be taken as a threat, even if the defendant had no intent of actually carrying out the threat; and 2) the statement made was in fact threatening (Andrews, 1999). There is currently no consensus on what constitute an appropriate test for determining when speech is a true threat. Andrews, in her paper from the UCLA Online Institute for Cyberspace Law and Policy, suggests that a “test” contain both an objective and subjective element. Andrews states: a defendant should be held liable for making a threat if the plaintiff proves that: 1) a reasonable person hearing the speech would perceive the speech as a threat to identifiable individuals or entities, in light of the relevant factual context, and 2) the speaker intended the speech to be taken as a threat, regardless of whether the speaker intended to actually carry the threat out. School officials often have a difficult task of assessing the threat value of student speech, and weighing the value against a student’s protections under the First Amendment (Hurley, 2002).

A threat is the focus point in the case of Lovell v. Poway Unified School District, 90 F.3d 367 (1996). In 1993, Sarah Lovell, a student at Mt. Carmel High School, visited her guidance counselor requesting that changes be made to her schedule. The counselor informed Sarah that she may not be able to make these changes. Sarah, making a comment which is the basis of the suit, commented “I’m so angry, I could just shoot someone,” however the counselor stated that the statement was more like “If you don’t give me this schedule change, I’m going to shoot you!” The counselor said that Lovell was “angry, serious and emotionally out of control when the statement was made,” and that she felt threatened. The student was suspended for three days. The family quickly filed suit claiming Sarah’s First Amendment rights have been violated and that the school did not provide appropriate procedural due process. The court found that the school district did provide appropriate due process rights, however, held that the Poway Unified School District had violated Sarah Lovell’s free speech rights because her statements did not constitute “the requisite ‘threat’ required by law, under either contention as to the exact words spoken, to allow infringement on her right of free speech.” The district, in this case, appealed this decision. The Court found that Lovell had the burden to prove the school district violated her free speech rights, and she did not carry out that burden. The Court also found that the statement, as characterized by the counselor, was not entitled to First Amendment protection.

These cases identify several important varieties of speech that can be punished by a school even if the student's comments are not part of a school-sponsored activity and even if the school can produce no evidence of disruption or other inference with its educational program. Both circumstances are likely to be significant in the context of the Internet (Harpaz, 2000).

### **Lower Court Cases – Off Campus**

Discipline for off-campus speech must be supported by evidence that the speech has a nexus to the school – a causal link that the speech had a detrimental effect on school activities, students, or employees (The Council of School Attorneys, 2003). The lower courts have settled many cases that begin to set the guidelines for schools to discipline students for off-campus speech. In Klein v. Smith, 635 F. Supp. 1440 (1986), a student, Jason Klein, was in a parked car outside of a restaurant. A teacher pulled up beside him and the student extended his middle finger. As a result of the incident, the student was suspended for vulgar or extremely inappropriate language or conduct directed toward a staff member. The student sought an immediate injunction. The Court prevented the school from suspending the student and held that “any possible connection between the student's act to a person who happened to be one of his teachers and the proper and orderly operation of the school's activity was far too attenuated to support

discipline”. The court stated “the First Amendment protection of freedom of expression may not be made a casualty of the effort to force-feed good manners to the ruffians among us”. The court found that this discipline violated the student’s free speech under the First Amendment of the Constitution of the United States.

In 1995, the Courts revisited a First Amendment claim in the case of Donovan v. Ritchie, 68 F. 3d 14 (1995). In September of 1994, 15 students gathered in a home to develop a list that was, according to the high school principal, harmful and degrading to other students. The list found its way into the school and the principal immediately asked for students to provide information as to the perpetrators. Three students, including the plaintiff, came to the principal’s office the next day to claim that they had photocopied the list, but that the photocopying took place off school property. The student was suspended and excluded from all school activities. The Court found that the student’s procedural due process rights as well as his First Amendment rights were not violated by the suspension.

This case is similar in context to Doe v. Pulaski County Special School District, 306 F. 3d 616 (2002), in which a document was created off campus but found its way on school grounds. A young boy recently broke up with his girlfriend and subsequently drafted two letters that were violent, misogynic and obscenity-laden expressing his desire to molest, rape and murder the girl. He

prepared both letters at home and never delivered them. One of his friends took the letter, with the boy's permission, and delivered it to the girl at school at the beginning of the school year. The school district expelled the boy for the entire school year. The Court concluded that the boy intended to communicate the letter; the fact that the boy did not personally deliver the letter did not dispel its threatening nature. The Court went on to hold that most, if not all, normal 13 year old girls would be frightened by the message and tone in the letter and would fear for their physical well-being if they received it. Since the letter amounted to a "true threat", the school did not violate the boy's First Amendment rights by initiating disciplinary action. Cases involving threats and First Amendment rights are always challenging to school officials. This case, like others, focus on the nature of the concept of "true threat". If a threat falls under the category of a "true threat," then it certainly, as defined by the Courts, is not protected speech. The charge in this case was to determine this as a "true threat." Two legal standards of review were referenced. First, in Watts v. United States, 394 U.S. 705 (1969), the Supreme Court recognized that threats of violence also fall within the realm of speech that the government can proscribe without offending the First Amendment. The Courts in Watts did set an objective "test", however, did not set forth a particular definition or description of a true threat that distinguishes an unprotected threat from protected speech. Secondly, in R.A.V. v. City of St. Paul, 505 U.S.

377 (1992), two important statements were generated: “Free speech protections do not extend, however, to certain categories or modes of expression, such as obscenity, defamation, and fighting words” and “the government has an overriding interest in protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatening violence will occur.

Finally, at the essence of students’ First Amendment rights, comes a case out of Seventh Circuit Court of Appeals, Boucher v. The School Board of the School District of Greenfield, 134 F. 3d 821 (1998). The student, in this case, published an article in an underground newspaper containing information enabling classmates to disrupt the school’s computer system. This paper, identified as not the official school newspaper, was developed off campus and distributed in bathrooms, locker rooms and the cafeteria at Greenfield. When the student responsible for the article was identified, he was suspended and recommended for expulsion by the school administration. The school board heard the case and expelled him for one school year. The court attempted to draw the Tinker standard into this case stating the “hacking” into the school’s computer system would substantially and materially disrupt the school environment. The court also attempted to use the Hazelwood standard (from Tinker) that “students in the public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” They cannot be punished merely for expressing their

personal views on the school premises unless school authorities have reason to believe that such expression will “substantially interfere with the work of the school or impinge upon the rights of other students.” The court concluded that the article advocates on-campus activity thus permitting the district to discipline the student and not violating the student’s First Amendment right.

The critical component for deciding whether a school has authority to discipline students for off-campus speech is determining if the speech has a connection to the school. A school must also show that the speech caused a substantial disruption at school (or that the school reasonably believed that such a disruption would occur) or presented an on-campus danger. In general, for schools to discipline speech that is merely lewd or vulgar, the speech must occur in school (The Council of School Attorneys, 2003). The cases summarized here, heard by the Lower Courts related to off-campus speech, begin to guide the courts in answering the following question: *Do schools have the authority to control off-campus Internet speech that could disrupt the school environment?*

### **Internet Speech**

Since a district’s Internet system has been established for an educational purpose, it should be considered a limited forum similar to a school publication where the school has maintained editorial control. Speech that occurs on or

through the district's Internet system would be governed by the standards set forth in Hazelwood (Willard, 2002). However, districts that provide a significant amount of open access may find that they have established a public forum for their students. In such cases, the ability to govern student speech may be more limited. Student speech that occurs on personal web sites clearly would be considered speech that occurs in a public forum, thus the ability of a district to intervene or discipline a student appearing on a personal website or transmitted through a personal e-mail account is extremely limited. The standards set forth in Tinker would apply to such speech.

In order to answer the question pertaining to the authority of schools controlling off-campus Internet speech, several significant cases begin to set the boundaries for this critical issue. Schools obviously have some interest in student speech that constitutes a "true threat." School officials must distinguish between student speech that is truly threatening and student speech that is merely offensive. Offensive, non-threatening speech receives First Amendment protection (Hudson, 2000). As you will see, school officials, however, have shown a history of seeking to regulate student Internet speech that is merely offensive.

## **The Need for Administrative Guidelines**

In the age of the Internet, school officials will continue to be faced with issues surrounding First Amendment rights of school students. Issues, however, regarding free speech and the Internet are surfacing at an alarming rate. Coupling that with the burden of keeping schools safe in the light of many school shootings, school officials, mainly principals, are faced with an incredible task. As we've seen, principals are eager to quickly discipline students without careful analysis of First Amendment case law. This not only puts principals at an incredible disadvantage in order to make an informed and appropriate decision, it would take an enormous amount of time. This study begins with a historical journey through the analysis of student free speech case law that sets the framework for guidelines to be developed and used by administrators when faced with a free speech issue, specifically off-campus Internet speech. Administrators need a simple and user-friendly document to guide them in understanding how case law can help "forecast" the outcome of a speech issue, both, ultimately saving the district financially while protecting student speech rights.

## **Reasonable Forecast Tool (TBH Framework)**

The trilogy of Supreme Court cases (Tinker, Bethel and Hazelwood or TBH), coupled with “true threat” case law, present a framework or “tool” for dealing with First Amendment scenarios involving the rights of students and, for the purpose of this study, allow for the analysis of off-campus internet speech. Any new case involving a First Amendment speech issue and public school students will likely guide Courts through an analysis that involves at least one of these historical and precedent cases, specifically the substantial disruption test from Tinker. This trend has, without exception, been seen so far in cases that involve student’s Internet speech (Gooden, 2003). The Reasonable Forecast Tool has been generated from the analysis of historical case law within this study. With only a few exceptions, most of the cases were “tested” against the Tinker, Bethel and Hazelwood standards while some used Watts, as well as others, for specific threat analyses. As each case was examined, the facts of the case, decision of the court and standard of review was outlined. Knowing this, the Reasonable Forecast Tool will then be used in careful analysis of current student Internet speech cases to create governing guidelines that help administrators in their decision making when contemplating discipline of a student for inappropriate Internet speech, at least preliminarily. School officials need a solid foundation for knowing that a particular issue has the potential to be litigated, and ultimately, won or lost. As

more and more Internet speech cases surface, the more there is a need for guidelines to assist principals and other school officials in the arena of First Amendment rights.

The Reasonable Forecast Tool on the following page graphically represents both the historic and recent First Amendment case law. This tool will be used to identify common fact patterns and court rulings from recent First Amendment Internet cases in order to create the governing guidelines.

**(TBH) REASONABLE FORECAST TOOL**

1. Does the speech constitute a “true threat?”  
Watts v. U.S. (1969)  
Rogers v. U.S. (1975)

Off- Campus  
“Beussink” Precedent  
Political or Socially-offensive  
Beussink v. Woodland R-IV  
School District (1998)

Tinker v. Des Moines SD. (1969)

1. Did the speech cause a material or substantial disruption of any school operation or activity?
2. Can you reasonably predict, in advance that a material or substantial disruption is highly likely to occur?
3. Does the speech invade or collide with the rights of others?

**NO**

**SPEECH MAY BE  
PROTECTED**

**YES**

**SPEECH MAY  
NOT BE  
PROTECTED**

Figure 1. Reasonable Forecast Tool

## **Chapter II METHODOLOGY**

### **Overview**

The issue of First Amendment speech in schools and how school officials deal with student speech is not a new one. Students have long fought for their First Amendment rights and now they are fighting for them in a new forum...the Internet. More than a decade after the Supreme Court's Hazelwood decision gave high school officials the right to censor many school newspapers and yearbooks, an increasing number of students are choosing to express themselves off-campus in cyberspace – a free speech zone that they hope will be far removed from the reach of school officials' red pen (SPLC Cyberguide, 2001).

Traditionally, off-campus student speech has been considered censor-proof. Unfortunately, the events at Columbine in 1999 created a sense of urgency with respect to school safety and changed the reactive nature of school officials that are increasingly punishing students for outside-school expression. Historically, the Courts have set forth many decisions, which define the boundaries of the school and the authority of school administrators to discipline students for unprotected speech. The Courts have also attempted to set boundaries to preserve the First Amendment rights of students when student speech falls under protected speech. The Internet blurs these boundaries.

School officials are left with a delicate balancing act attempting to create a safe school environment while protecting students' right to free speech. Even though the courts have long recognized the distinction between school-sponsored speech that occurs on campus and independent speech that occurs off campus, school administrators still struggle with this distinction. Schools and school administrators continue to ask questions that need to be answered. Once students leave school, do they enjoy the same First Amendment protections as any other citizen engaged in private speech activities? Or are they, simply because of their student status along with the unlimiting boundaries of the Internet, creating a nexus that is always subject to at least some oversight by school authorities?

### **Purpose of the Study**

The purpose of this study is to analyze both U.S. Supreme Court and Lower Court case law (1969 – 2004) related to the First Amendment rights of school students. The decisions of these cases and legal standards used to make those decisions will be used to develop specific guidelines which can assist school administrators in the decision making process when faced with a student Internet free speech issue.

## **Elements of the Study**

1. An analysis of recent Lower Court off-campus Internet case law will be done in order to study student speech issues and to identify Court decisions and the legal standards of review used to make those decisions.
2. The landmark student speech U.S. Supreme Court decisions and legal standards in *Tinker* (1969), *Bethel* (1986), and *Hazelwood* (1988), along with other precedent case law including *Watts* (1969) and *Rogers* (1975), defining “true threats,” will help develop a tool in which First Amendment Internet student speech cases will be analyzed.
3. What criteria can be used to analyze recent student Internet speech cases in the Lower Courts?
4. The use of these criteria along with Lower Court First Amendment Internet speech case law will lead to the development of practical guidelines for school administrators to use when analyzing such incidents to determine if discipline is warranted.

## **Development of Guidelines for School Leaders**

From the analysis of relevant U.S. Supreme Court and Lower Court First Amendment case law, a tool consisting of a flow chart containing questions (specific to the precedent cases), will be developed and used to analyze data in the form of fact patterns responsible for Lower Court decisions of recent off-campus public school Internet First Amendment speech cases.

**For each Lower Court off-campus public school Internet First Amendment case:**

2. Using Watts v. U.S., 394 U.S. 705, (1969), Rogers v. U.S. 422 U.S. 35, (1975), and “true” threats test as prescribed by Andrews (1999), it will be determined if the speech in question constitutes a true threat (not protected by the First Amendment).
3. Speech that is not a “true” threat will then be identified by its type (political or socially-offensive) and location (school sponsored, non-school sponsored or off-campus). This study will focus on off-campus non-school sponsored speech. Careful attention to a causal link or “nexus” to the school will also be identified.
4. The speech will then be “tested” against a series of questions developed from the Court rulings of the Bethel School District v. Fraser 478 U.S. 675, (1986), Hazelwood v. Kuhlmeier 484 U.S. 260, (1988) and Tinker v.

Des Moines Independent Community School District, 393 U.S. 503,  
(1969). For off-campus Internet speech, Tinker’s substantial disruption  
test will be used extensively.

5. Data will be collected which will include:
  - A. Information collected from the Reasonable Forecast Tool for each student Internet speech case.
  - B. The fact patterns which will include the background facts, the constitutional question raised and the application of the Tinker standard for each case, as well as a causal link or “nexus” of those fact patterns, to any function of the school.
  - C. The final Court ruling for each case will be analyzed against the stated facts for each case to determine if certain fact patterns are predictors of case outcomes.
6. A draft of **Guidelines for Off-Campus Internet Speech Issues** will be developed from the data.
7. Feedback on the proposed guidelines in the form of a questionnaire will be acquired from both a building level principal and one school solicitor and incorporated into the final document.

## **Delimitations of the Study**

1. Precedent U.S. Supreme Court decisions related to First Amendment rights of school students (1969-1988)
2. Lower Court decisions related to First Amendment rights of school students (1989-2004)
3. Current literature including journal articles, and law reviews related to First Amendment rights of school students and the Internet.

## Chapter III DATA COLLECTION AND ANALYSIS

### Procedural Questions

For this study, data were collected by analyzing case law related to student Internet free speech using the Reasonable Forecast Tool. For each case, a determination was made as to whether the speech in question fell into the category of a true threat. Other background facts were then identified including: mode of communication (website), location of speech (on-campus or off-campus) and type of speech (political or socially offensive). The most important part of the data collection and analysis was found in the court's legal explanation of the judgment. In that, the standard or "test" used in each case was described with a note as to why that standard is most applicable. Finally, the court's ruling was documented along with any other facts related to the summary judgment.

In the landmark case Tinker vs. Des Moines Independent School District, 393 U.S. 503 (1969), the U.S. Supreme Court recognized that the First Amendment rights of students are somewhat abridged inside of schools. The U.S. Supreme Court, in its ruling, according to some, makes a distinction between speech that takes place off-campus and speech that takes place on campus. In Tinker, the Court set fourth the "substantial disruption test" by saying that "expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally

permissible.” Thus, schools were limited in their ability to punish speech if the punishment was based on “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” If expression of a student substantially disrupts the function of a school, however, a school district can punish the student in order to maintain discipline and order (Tuneski, 2003). Two other key U.S. Supreme Court cases, Bethel School Board No. 403 v. Fraser, 478 U.S. 675 (1986) and Hazelwood School District v. Kuhlmeier, 484 U.S. 258 (1988), stand in contrast to Tinker, as both allow for discipline for student speech at school (Hoffman, 2004).

The “substantial disruption test” is very critical when examining case law dealing with student free speech and the Internet. The Lower Courts have, without many exceptions, used the “substantial disruption test” for cases involving off-campus student Internet speech. Many questions arise as to whether Tinker provides the appropriate “test” arguing that the majority of cases truly evolve off-campus and should be out of the reach of school administration jurisdiction.

The Reasonable Forecast Tool, which was developed from U.S. Supreme Court and Lower Court case law, will be used in the analysis current Internet free speech cases. An important part of the analysis that needs to be addressed at the beginning is the analysis of student threats. Student threats can be part of the Internet free speech issue, however, for this study, most of the cases do not contain

the element of a “true” threat. A “true” threat is not protected by the First Amendment, thus obviating the need for application of First Amendment analysis. A decision that a student’s statement does not constitute a true threat does not end the inquiry as to whether to discipline is permissible pursuant to the First Amendment. Even where the statement is not a true threat, a student may be disciplined without running afoul of the First Amendment, as long as First Amendment standards are met (Hoffman, 2004).

In order to study the case law pertaining to student Internet free speech, there are several questions that will be used to evaluate Court findings. First, because the case law will be dealing with presumably off-campus scenarios, only the off-campus location of the TBH or Reasonable Forecast Tool will be used. This study will involve analysis using the standards set forth in Tinker (assuming we are not dealing with a threat) and will ask the following questions:

- a. Where did the speech take place?
- b. Did the speech cause a material or substantial disruption of any school operation or activity?
- c. Can a reasonable person predict, in advance that a material or substantial disruption is highly likely to occur?
- d. Does the speech invade or collide with the rights of others?

Identifying the geographical location of the speech is critical to this study. Tinker, according to some, never address the concept of off-campus speech only ruling on speech that takes place on-campus but at different locations. Schools continue to attempt to create a nexus or causal link between off-campus Internet expression and school operations, thus leaving the door open for student discipline. Faced with a void of guidance from the U.S. Supreme Court, Lower Courts have adopted three contrasting approaches to address student Internet speech cases. The first approach looks at student Internet speech as having taken place on-campus, thus subject to the Fraser and Hazelwood standard as well as the Tinker substantial disruption test. A second approach treats student Internet speech as protected because it is off-campus expression. A final approach applies the Tinker substantial disruption test under all circumstances, even if the speech is identified as off-campus.

### **Does Internet Speech Occur Off-Campus?**

As with many distinctions, there will be borderline cases where it becomes difficult to categorize student conduct as on-campus or off-campus. Which category best describes material posted on the Internet? The rapid emerging consensus among the Courts and attorneys is that Internet speech should be treated as if it occurs off-campus (Caplan, 2003). Most of the argument so far has been on the heels of the U.S. Supreme Court decision of Reno v. American Civil Liberties

Union, 521 U.S. 844, (1997), holding that the Internet should be treated as a public forum for unpopular discourse, like newspapers, books, streets and parks. The Court stated that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium,” so the most speech protective rules apply. Some courts have stated that schools can punish students for inappropriate Internet use that proves to be disruptive if the school’s computers provided the Internet access. Most schools have an Acceptable Use Policy, which governs what students can and cannot access while in school. A student who violates this policy could be subject to discipline specified by the infraction.

The U.S. Supreme Court has not decided a case considering the ability to punish students for their off-campus expression. The three Supreme Court cases outlined in the Reasonable Forecast Tool and addressing student speech all involved speech that occurred on-campus, well within the jurisdiction of school officials. The Lower Courts, however, have extrapolated these decisions that off campus speech may also be subject to the domain of the school (Tuneski, 2003).

As stated, no U.S. Supreme Court decision states that off-campus speech is subject to the substantial disruption test referred to in Tinker v. Des Moines Independent Community School District 393 U.S. 503 (1969). The Court also acknowledged that although student’s First Amendment rights are somewhat limited in schools, “students in school as well as out of school are “persons” under

our Constitution. The overall tone of *Tinker* thus strongly respected the expressive rights of students outside of the special context of the school environment (Dupre, 1996). In addition, neither Bethel School District No. 403 v. Frazer 478 U.S. 675 (1986) nor Hazelwood School District v. Kuhlmeier 484 U.S. 260 (1988) suggested that schools have the authority to reach beyond campus except for school sponsored events occurring away from school. In *Fraser*, Justice Brennan noted that if Matthew Fraser, “had given the same speech outside the school environment, he could not have been penalized simply because school officials considered his language to be inappropriate; the Court’s opinion does not suggest otherwise.” This statement suggests that speech that occurs off-campus has not been addressed or considered by the U.S. Supreme Court.

Despite these observations, many lower courts have assumed that cases not falling under *Fraser* or *Hazelwood* fall under the general rule of *Tinker*. Under these circumstances, most of the following Internet speech cases were tested under the material and substantial disruption test as directed by *Tinker*. Schools, in order to justify their discipline continue to attempt to find a nexus or causal link, connecting the speech to some aspect of the school environment with demonstration of a disruption.

In the 2002 decision of J.S. v. Bethlehem Area School District, 807 A.2d 847 (Pa. 2002), the Pennsylvania Supreme Court held that “where speech that is

aimed at a specific school and / or its personnel is brought to the school campus will be considered on-campus speech.” In other words, the virtual location of expression in cyberspace can be said to be on campus if it has two characteristics; one, which indeed is dependent on the “community of interests” image so prevalent in the discussion of the Internet world, and one, which remains tied to the physical world. In other words, the content of the communication in cyberspace helps to determine its location. It is on campus in part because it is meant to be read by people who are at the school (Levin, 2003).

The content of the communication is only part of what it takes to locate this particular part of cyberspace on campus, though. The second of the two criteria cannot be overlooked. The courts have emphasized the importance of physical location of the speech. Courts have stated that there must be actual access at school. Moreover, that access must be foreseeable to the originator of the speech. Exactly how far the originator must go in encouraging that access, however, must be left to the overall circumstances. Two recent Internet speech cases mentioned within the literature piece of this study begin to define how the Lower Courts are holding the line on Tinker. First, in Killion v. Franklin Regional School District 136 F. Supp. 2d 446 (2001), the United States District Court For the Western District of Pennsylvania ruled that the discipline the student received for publishing an inappropriate “top ten” list about some of the faculty and staff on his

computer was a violation of his First Amendment rights. The court argued that the overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker* and found that applying *Tinker*, the defendants failed to adduce any evidence of actual disruption. There was no evidence that the teachers were incapable of teaching or controlling their classes. The speech was found to be non-threatening and did not cause any faculty member to take a leave of absence as in *J.S. v. Bethlehem Area School District*, 757 A 2d. 412 (Pa. Commw. Ct. 2000). Although the intended audience was undoubtedly connected to Franklin Regional High School, with the absence of a threat or actual disruption lead the Court to conclude that the suspension was improper.

Similarly in *Flaherty v. Keystone Oaks School District* 247 F. Supp 2d 698 (2003), school officials learned the price of free speech when they partially settle a lawsuit with a high school student for \$60,000. The student posted four offensive messages on an Internet bulletin board, three from home and one from school. The Court found in favor of the student using the *Tinker* standard that punishment for speech is limited to those situations where the expression actually interferes with the orderly functioning of school activities. The *Flaherty* Court held, nothing in the *Keystone Oaks* handbook required administrators “to make an assessment of whether the speech is substantially disruptive so as to justify employing policies that would limit speech”. *Flaherty*’s on line messages did not cause any disruption.

In fact, the only evidence of disruption arguably came when the coaches quit the volleyball team after Judge Ambrose ordered Flaherty to be reinstated.

These two cases are very significant to this study as they begin to set “geographic boundaries” on the authority of a school district. Geographic boundaries can effectively limit the ability of school officials to punish students for expression deemed away from school premises. Both rulings also found that the breadth of the student handbooks, where policies and guidelines are identified, were “overreaching in that they are not linked within the text to any geographical boundary.” Simply put, there was no specific limitation as to where the authority of the school officials begins and ends.

### **Precedent Internet Speech Case Analysis**

Case law has been fairly consistent in determining that students attending public schools do enjoy First Amendment protection for off-campus speech, provided that speech is not brought on-campus (nexus or causal link) by the student who created it and does not cause a “substantial disruption” of school activities. Some of the cases analyzed resulted in an out of court settlement between the plaintiff and defendants without having an official Court ruling. It is very important to recognize them for several reasons. First, these cases will show that a growing number of students are being disciplined for off-campus Internet

use. School administrators and school districts are spending a great deal of time and money reacting to issues that many of the Courts have said is out of their jurisdiction. Secondly, these cases will show the eagerness of schools to settle a matter out of court realizing that the situation may have been handled with haste and may have violated a student's First Amendment Rights. These particular cases, as well others established in case law are at the very essence of why administrative guidelines are so urgently needed.

In 1995, one of the first cases involving the off-campus website of a public school student came to light. An ACLU press release stated that in the winter of 1995, Paul Kim, a National Merit finalist with a 3.8 grade point average at Newport High School in Bellevue, Washington, posted a spoof of his high school on a "home page" on the World Wide Web, which he created on his own time on a computer at home. Included were links to other Internet sites, which had sexually explicit material. Despite obvious disclaimers that the parody was not an official school publication, Newport administrators objected to the use of the school's name of Kim's home page. Kim responded by moving his parody to a less accessible area of the Internet and later taking it off. However, without prior notice to Kim, the principal faxed a letter to National Merit officials withdrawing the school's endorsement of him; the principal also contacted seven colleges to which he had applied and revoked any recommendations. Kim did not receive the

Merit scholarship and was not admitted to Harvard (his first choice), though he was ultimately accepted to Columbia University, which he attended.

The American Civil Liberties Union of Washington and the Bellevue School District reached an out-of-court settlement of claims stemming from punitive actions taken against Paul Kim. ACLU-W Executive Director stated: “This is an important settlement because it protects the rights of students to engage in free speech on the Internet at home. The district recognized that the principal had no authority to discipline a student for expressing his opinions on his own time on a home computer” The standard used in this case, though not the Tinker standard of substantial disruption, was a 1988 ACLU case Burch v. Barker, 861 F. Supp. 1149 (9<sup>th</sup> Circuit Court 1998) involving an unofficial publication by students at Renton’s Lindbergh High school. The Ninth Circuit Court of Appeals upheld the right of public school students to publish their own newspapers – even if the content offends or embarrasses school officials. The Bellevue school district apologized to Mr. Kim and agreed to pay him \$2,000 and sought to have him reinstated as a National Merit finalist.

In O’Brien v. Westlake City School Board of Education, No. 1: 98CV 64 (E.D. Ohio 1998), Sean O’Brien, a 16 year old junior at Westlake High School, created a website in March 1998 that criticized his band teacher. His webpage “raymondsucks.org” contained several unflattering comments about this teacher.

Predictably, O'Brien's website did not amuse school administrators. After school administrators used school computers to access the material, an assistant principal determined that O'Brien violated the Student Conduct Handbook. The handbook contained a statement stating: "a student shall not physically assault, threaten to assault, vandalize, damage, or attempt to damage the property of a school employee or his/her family or demonstrate physical, written or verbal disrespect or threat. O'Brien was suspended for ten days. As a result of his suspension, his grades were substantially affected. O'Brien sued the board of education. O'Brien and his attorneys contended that school officials do not have the authority to regulate students' non-threatening speech that was created off campus. A U.S. District Court Judge heard the case and agreed with Sean's attorney who stated that school officials do not have the authority to regulate speech made by students' off-campus grounds and granted O'Brien a temporary restraining order. This court found that Tinker standard did not apply based on the absence of a nexus to the school environment and out of school creation of the site. School officials were required to "forthwith restore him as a student in good standing." School officials settled with O'Brien by agreeing to pay him \$30,000, expunging the suspension from his record and writing a letter of apology. In part of the letter, the Superintendent of Schools stated, "the Board recognized that this right to freedom

of speech extends to students who, on their own time and with their own resources, engage in speech on the Internet.

Also in 1998, a major precedent was set in the case of Beussink v. Woodland R-IV School District, 30 F. Supp. 2d 1175 (E.D. Mo 1998). Brandon Beussink created his own webpage on his own computer at his home. The homepage was “highly critical” of the school administration and included vulgar language in his opinions of teachers and the principal. Another student showed Beussink’s page at school in the presence of another teacher, who then informed the principal. The teacher was upset by the content of the website. The principal suspended Beussink for five days because he was offended by the content but later extended the suspension to 10 days. A District Judge analyzed this case using the Tinker standard. The principal testified at the preliminary injunction hearing that he made the determination to discipline Beussink immediately upon seeing the webpage. He was upset that the message had found its way into a school classroom. The principal’s testimony does not indicate that he disciplined Beussink based on a fear of disruption or interference with school discipline (Tinker). Under the Tinker standard, disliking or being upset by the content of a student’s speech is not an acceptable justification for limiting a student speech. According to the District Judge, school administrators “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.” The judge relied on the principal’s testimony stating he was upset by the page’s content, not because it caused any substantial disruption at school. The District Judge also noted, “The public interest is not only served by allowing Beussink’s message to be free from censure, but also by giving the students at Woodland High School this opportunity to see the protections of the United States Constitution and the Bill of Rights at work.” The Judge concluded that Beussink’s webpage “did not materially and substantially interfere with school discipline. Further, there is no evidence to support a particularized reasonable fear of such interference. Beussink was disciplined for engaging in speech that this Court believes may be constitutionally protected speech.” The two sides settled on undisclosed terms. Because this case taps into the very core of our most basic freedom, this case has become the preeminent case for student web pages.

Also in 1998, an eighth grader in McKinney, Texas, Aaron Smith, created a home website called “Chihuahua Haters of the World”, or CHOW, that include humorous suggestions on how Chihuahuas could be killed. After a Chihuahua breeder complained to the Superintendent, Aaron was ordered to take the site down. He refused, and was then disciplined with a one-day suspension and removal from his Emerging Technology class. School administrators accused Aaron of creating an “animal hate group” and said he violated the school’s Internet

Acceptable Use Policy. The school made the following statement: “We have checked into this situation and have found that the site was not created in our computer lab and is not endorsed by any employees of the McKinney Independent School District. Because there seems to be an off-campus creation of the site, the Tinker standard would not apply. This, however, seems in direct contrast to a statement made by a school administrator. The school administrator stated that the CHOW site was “indirectly linked” to the McKinney Independent School District and violated the district’s Internet Acceptable Use Policy. It appears that the school, in order to justify the discipline, attempted to create a nexus to the school even when school administrators stated there was no connection. After the ACLU intervened, the school decided not to pursue any additional legal action and Aaron was reinstated in his Emerging Technology class.

A fifth case is Emmett v. Kent School District No. 415, 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000). In the Emmett case, a student posted a web page on the Internet from his home computer entitled the “Unofficial Kentlake High Home Page.” Important to note from a legal standpoint, the website included a disclaimer that the site was not sponsored by the school and was for entertainment purposes only. The home page included two mock “obituaries” of two of his friends. The site also allowed web page visitors to vote on who would die next. Controversy began as a news story arose depicting this site as having a “hit list” of people to be

killed. Emmett immediately removed his site from the Internet; the principal placed him on emergency suspension for harassment, intimidation, disruption to the educational environment and copyright violation. The suspension was later changed to a five-day suspension. Emmett sued in Federal Court, contending that the suspension violated his First Amendment free-expression rights.

The District Judge issued a restraining order against the district, arguing that the school had exceeded its boundaries by punishing Emmett for content produced off school grounds and began the analysis of this case using *Tinker*. The judge distinguished this case from *Bethel* (school assembly speech), saying that Emmett's speech "was not at a school assembly" and *Hazelwood* (school sponsored speech), stating, "Emmett's speech was not in a school sponsored newspaper." He also wrote that "Emmett's website was not produced in connection with any class or school project. Although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside the school's supervision and control."

An important statement by this District Judge indicated that school administrators are operating in a post-Columbine world, writing, "the defendant argues, persuasively, that school administrators are in an acutely difficult position after recent school shootings in Colorado, Oregon, and other places." Reflecting back to *Tinker*, the judge noted that school administrators failed to present any

“evidence that mock obituaries and voting on this website were intended to threaten anyone, or manifested any violent tendencies whatsoever.” The school district later settled by agreeing to pay one dollar and attorney fees, and remove the suspension from Emmett’s record. Aaron Caplan, a Washington ACLU staff attorney who represented Emmett commented and said, “The Court recognized that school officials do not have the authority to punish students for exercising their freedom of speech outside of school. School administrators need to learn that they can’t discipline students who create satires on the Internet”.

A sixth case comes out of Little Rock Arkansas ACLU in a lawsuit filed in Federal Court on behalf of the parents of a 15 year old Justin Redman. Justin was expelled from Valley View Junior High School in Jonesboro for creating a website from his home computer that parodied the official school website and insulted some of the school administrators, teachers and students. School administrators suspended Justin, who has had no history of school discipline problems, apart from a one-day in-school suspension, for “inappropriate “ use of the Internet and for use of “abusive, vulgar, obscene, and sexually explicit material.” Later, the school added the charge of causing “disturbance in the school and disrupting the learning environment.” The lawsuit claims that the school violated Justin’s right to freedom of speech under the First Amendment when it punished him for the content of his personal website. Using the Reasonable Forecast Tool, it appears clear that the

speech took place off-campus, however, again the school is attempting to create a nexus and testing this case first under Fraser and then, more importantly, under Tinker. The Judge in this case blocked the school's suspension, citing a Federal Court ruling that student distribution of non-school sponsored material cannot be prohibited "on the basis of undifferentiated fears of possible disturbances or embarrassment to school officials." Applying Tinker, the school district attempted to bring the speech back on-campus but was unable to identify a substantial disruption to the school environment.

As the Beussink case, as well as others, begin to set the standard for off campus Internet speech issues, another precedent case arises in which the plaintiffs contend the case is "remarkably similar" to Beussink. In Beidler v. North Thurston School District No. 3, No. 99-2-00236-6 at 3 (Wash. Super. Ct. July 18, 2000), Karl Beidler created a web page entitled "Lehnis Web", a parody of assistant principal Mr. David Lehnis. The site depicted the assistant principal participating in a Nazi book burning, drinking beer and spray-painting graffiti on a wall. The principal placed Beidler on emergency suspension and told him the teacher felt uncomfortable about having Beidler in class due to the content of the website. The principal also testified that the site was "personally appalling" and "real inappropriate."

The plaintiff argued that the school district has no authority to police students' off campus or Internet speech and that the website caused no substantial disruption as prescribed in *Tinker*. A Washington trial court judge granted summary judgment to Beidler on his First Amendment Claims. The judge noted that the First Amendment rights of public school students remain constant even in the age of the Internet. "Today, the First Amendment protects student speech to the same extent as in 1979 or 1969, when the U.S. Supreme Court decided *Tinker*." The Court found that even if the school had the authority to regulate Internet speech, Beidler's speech did not cause a substantial disruption under the *Tinker* standard. The court also rejected the school district's arguments under the *Hazelwood* and *Fraser* decisions. The Judge reasoned that *Hazelwood* only applies to school-sponsored speech and thus "provides no support for defendants." The court also rejected the argument that *Fraser* empowered the school to regulate Beidler's vulgar and offensive speech. "Fraser might provide support for disciplining Beidler if the defendants could show that the circumstances of his speech were in any way analogous to the circumstances of *Fraser*." The Judge properly concluded that Beidler's speech was off-campus, not on-campus, and rejected the application of the *Fraser* standard. The Judge also ruled that the school district was not justified in punishing Beidler even if his speech was defamatory.

The Judge reasoned that even if the speech was defamatory, “that action is not this action” and “the First Amendment does not permit such a result.”

With the rapid growth of Internet use by students, schools, as indicated by the previous cases, have increasingly taken action against students for off-campus computer use that they disapprove of. Many of the cases have shown to be a violation of the students’ First Amendment right to free speech unless the speech causes a “substantial “disruption within the school as established by Tinker.

Another precedent case is Coy v. Board of Education of the North Canton City Schools 205 F. Supp. 2d 791 (2002), in which the student claimed the school district violated his First Amendment Rights by disciplining him for creating, publishing and maintaining a website which contained some offensive material. Before March 2001, Jon Coy created a website on his home computer and on his own time. No part of the website was created using school equipment or during school hours. The website contained pictures and biographical information of Coy and his friends, quotes attributed to Coy and his friends, and a section entitled “losers.” The “loser” section contained the pictures of three boys who attended North Canton Middle School. Most objectionable was a sentence describing one boy as being sexually aroused by his mother. While somewhat crude and juvenile, the website contained no material that could remotely be considered obscene. A teacher in the building was told by several other students about the website. When

the website was viewed by the teacher, he decided to report this to the principal. It was determined that Coy had accessed his own, unauthorized website from the school computer lab. Legally, this becomes an important fact for the Court in order to determine whether this violation took place on-campus or off-campus. Coy was suspended for four days for violation of the student conduct code dealing with obscenity, disobedience and inappropriate action or behavior. The suspension letter also mentioned that Coy was being referred to the Superintendent for expulsion. Using *Tinker*, the Court first stated that “students do not shed their constitutional rights to freedom at the schoolhouse gate.” The Court, similar to the *Reasonable Forecast Tool*, distinguished *Fraser* and *Hazelwood* from *Tinker* in their analysis. While Coy accessed the website on a school computer in the school’s computer lab, the Court found the circumstances of the case nearer to *Tinker* than *Fraser*. Most importantly, Coy accessed his own website, a website he created on his own time and with his own equipment. At the time that Coy was expelled, there was no evidence that he had displayed the information contained on the website to any other student. The Court used the *Tinker* test and stated that it is only appropriate to regulate “silent, passive expression of opinion” only when the speech would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” This Court referenced that

the Tinker standard is appropriate in reviewing a school's decision to discipline two students for wearing Confederate flag t-shirts in violation of the dress code.

The trend thus far has been summary judgments in favor of the student mostly based on schools not being able to satisfy the standard set forth on Tinker that the speech in question materially and substantially disrupted the school operation and environment. The only reported exception to this trend is J.S. v. Bethlehem Area School District, 569 Pa. 638; 807 A.2d 847 (2002), which upheld an expulsion based on a student's website, created off-campus, that mocked teachers and school administrators. In this case, an eighth grade student created a web page on his home computer that made many derogatory remarks directed toward his algebra teacher, the principal and others. The site contained vulgar comments and "a threat." The principal and teacher initially considered the material to be a "true" threat and notified law enforcement officials, including the FBI. The student voluntarily removed the website. The student went unpunished but the school eventually decided to suspend the student three days in July but later extended the suspension to ten days. The school district commenced expulsion hearings and voted to permanently expel the student from its schools.

The student appealed the decision, but the Court of Common Pleas affirmed the decision of the school district. The student then appealed to the Commonwealth Court of Pennsylvania, which also ruled in favor of the school

district. The Courts applied the Tinker standard, citing cases establishing that schools can punish students for off campus expressive conduct (Donovan v. Ritchie, 68 F. 3d 14 (1<sup>st</sup> Cir. 1995, Fenton v. Stear, 423 F. Supp. 767 (W.D. Pa. 1976) & Beussink v. Woodland R-IV School District, 30 F. Supp 2d. 1175 (E.D. Mo. 1998)). The Court wrote, “Thus, from the cases noted above, it is evident that the Courts have allowed school officials to discipline students for conduct occurring off of school premises where it is established that conduct materially and substantially interferes with the educational process.” The application of Tinker may be appropriate however out of the three cases cited, only one, the Fenton case, seem to analyze the standard correctly. In the Fenton case, the court upheld discipline against a student who, in a public place over the weekend, referred to his teacher in a loud voice with an inappropriate comment. The court felt that J.S.’s website “materially disrupted the learning environment,” because students discussed the website at school and at school sponsored activities. The court reiterated, “Courts recognize the authority of school officials to discipline students for off campus activity where the activity materially and substantially interferes with the education process.” A concluding fact very important to this case was that the teacher ridiculed on the website felt this to be a “true threat” and had to take a medical leave for the rest of the school year. The judge, however, stated that school administrators concluded that this speech was not “true threat” and that only “true

threats” receive no First Amendment protection (Watts v. United States, 394 U.S. 705 (1969)). In this study, this case is very significant. Given the off-campus nature of this case, the Court, using Tinker, was able to determine that because an individual teacher was affected by this, this constitutes a material and substantial disruption. This has not been seen in any of the other cases.

In Mahaffey v. Waterford School District 236 F. 2d 779 (2002), two claims were set forth, one being a First Amendment claim and the other a discrimination claim. For the purposes of this study, only the First Amendment claim was analyzed. This case arises from when Joshua Mahaffey, a student in the Waterford School District, was suspended after school administrators learned of a website to which he had contributed. The website was created by another student in the Waterford schools. According to Mahaffey, the website was created “for laughs” because they were bored and “wanted something to do.” The website in question was entitled “Satan’s Web page and listed “people I wish would die,” “people that are not cool,” “movies that rock,” “music I hate,” and “music that is cool.”

A parent of the Waterford Kettering High school student notified the police about the website. The police notified the school about the website. After being interviewed by the police, Mahaffey admitted to contributing to the website and stated that the school computers “may have been used to create the website.” School administrators suspended Mahaffey for his contributions to the website.

School officials decided to expel Mahaffey for this conduct, however, rather than reenrolling a later date, Mahaffey decided to enroll in a different district.

This Court, again, decided to use the Tinker substantial disruption test for this case. The Court stated; The Tinker Court dealt with student activities that occurred on school property. The only evidence put forth by the school district in support of activity occurring on school property was the statement made to the police by Mahaffey that some of the website creation “may have” taken place on the high school computers. School administrators did not investigate this statement any further by examining school computers, or by any other means. It was the Court’s opinion that even looking at the Mahaffey’s statement in the light favorable to the defendants, the evidence simply does not establish any of the conduct occurred on school property. Even assuming that the conduct in question did occur on school property, the Court stated; school administrators may only punish Mahaffey for his speech on the website if that speech “substantially interfered with the work of the school or impinged upon the rights of other students.” (Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) There was no evidence that Mahaffey communicated the statements on the website to anyone. There did not appear to be any threat made against any student, teacher or school administrator as well. The Court concluded that the school’s regulation of Mahaffey’s speech on the website without any proof of disruption to

the school or on campus activity in the creation of the website was a violation of his First Amendment rights.

### **Summary of Findings**

Since Tinker, Courts have attempted to recognize the power of schools to regulate speech. Tinker requires schools to show a reasonable belief that the speech in question will substantially and materially disrupt school operations or substantially interfere with the rights of others. Speech, however, that is silent or passive expression or political opinion, is most directly protected by Tinker. As seen in the cases analyzed in this study, in only one, J.S. v. Bethlehem Area School District, 757 A.2d 412 (Pa. Commw. 2000), did the Court find that the speech caused a “substantial and material disruption” under Tinker. In all of the cases, including Flaherty and Killion, the Courts began their analysis using the concept of geographical distinction. In order to apply the Tinker substantial disruption test, the Courts must first determine where the speech took place. There have been many inconsistencies with this process. Schools continue to try and find a “nexus” or causal link from the Internet speech back to school environment so that the Court might deem the speech on-campus, punishable under Fraser or Hazelwood. This, as depicted in the rulings of the cases cited, has met with a lot of resistance from the courts. Some of the Courts immediately identified the speech as off-

campus as in Emmett v. Kent School District No. 415, 92 F. Supp. 2d. 1089, 1090, (W.D. Wash. 2000) and Coy v. Board of Education of the North Canton City Schools, 205 F. Supp. 2d 791 (2002), in which it was found that the schools overstepped their authority. Other courts have decided not to even bother with geographic distinction and apply the Tinker substantial disruption test, regardless of where the speech took place. This was evident in the precedent case of Beussink v. Woodland R-IV School District. The Court utilized the Tinker test in finding for the student, even though the website was not distributed at school nor did it advocate any “on-campus activity.”

From these recent Internet cases, several conclusions can be drawn. Schools continue to struggle with the delicate balancing act between protecting student’s First Amendment rights and the ability to maintain appropriate conduct and discipline in the school environment. Courts continue to interpret free speech case law in a variety of different ways, which leads to many different judicial opinions. Courts have differed with respect to the geographic distinction, whether on-campus or off-campus, as to where to classify the speech. Courts continue to rely on the Tinker substantial disruption test, if speech is deemed on-campus, to determine if the speech in question substantially and materially disrupted the school operation or environment. Given this, Courts have attempted to set some definitive guidelines for First Amendment Internet speech. The Honorable Robert E.

Simpson, Judge of the Court of Common Pleas, Northhampton County, Pennsylvania, commented in his Law Review article that speech would not be protected if:

a. Language in a student website created at school or home that causes a material disruption at school or if a material disruption at school can be reasonably forecasted.

b. Language in a student website created at school or home that advocates violence against others, threatens others, or contains “fighting words” likely to provoke school-related confrontation.

c. Vulgar and plainly offensive non-political expression in a student website created at home or at school is not protected if it is accessed significantly at school, regardless of proof of material disruption. The significance of the website’s presence on campus will be critical element of proof.

d. Student speech, which “materially and substantially interferes with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others,” is not constitutionally protected. In order to prohibit such speech, there must be a rational basis for prohibiting.

Two questions that arise from the decisions of the precedent Internet speech cases are the following: Given the lack of physical borders of the Internet and potential harm caused by information found on websites, is it relevant to consider

geographic distinctions between on-campus and off-campus when dealing with an Internet speech issue?

Because the U.S. Supreme Court has not decided a case involving the ability of a school to punish students for off-campus expression, should off-campus speech be subject to the Tinker Substantial Disruption Test?

### **Is Tinker the Appropriate Test?**

Based on the findings, this study will argue that Tinker's substantial disruption test should not be used to determine the outcome of cases involving off-campus speech. To answer the first question from above, it is very appropriate for the Courts to distinguish geographic distinctions when deciding an Internet speech case. It is understood that students are not afforded the same protection for speech while under the supervision of school authorities during the school day or while participating in school related activities. Understanding that if a student used a school computer while in a class during the school day for something other than school curricular issues, it may be regulated by school administrators and fall under the category of on-campus speech. School administrators are charged with maintaining order and discipline with the boundaries of the school in order to provide students with the best possible educational experience. Difficulty arises when school officials begin to assert jurisdiction over speech that was created off-

campus on a computer at a student's home. Because the Internet blurs the boundaries of what constitutes "the school," administrators have been quick to punish students for speech that may have or may not have been accessed on a school computer, deeming it on-campus. It seems that based on the case law presented here, and the lack of guidance from the Supreme Court, that schools should draw clear lines between on-and off-campus speech in order to ensure that off-campus speech is fully protected. This recognition that off-campus speech warrants greater protection than on-campus speech would be useless if the courts fail to separate the two categories of speech. This lack of distinction has led to many inconsistencies among the Courts dealing with First Amendment speech issues. Many of the cases cited in this study failed to even analyze the on-campus / off-campus location of the speech. An example of this would be the Beussink v. Woodland IV School District, 30F Supp. 2d 1175 (E.D. Ohio 1998) in which the Court assumed without analysis that the speech on the website occurred on-campus since it was not linked to any school related activity. Similarly, in the Killion v. Franklin Regional School District, 136 F. Supp 2d 446 (W.D. Pa. 2001) case, the Court felt that since another student brought the speech to school it was sufficient to render it on-campus, subject to the Tinker test. Conversely, the Courts in J.S. v. Bethlehem Area School District, 757 A2d. 412 (Pa. Commw. 2000) and Emmett v. Kent School District No. 415, 92F. Supp 1088, 1090 (W.D. Wash. 2000) did not

have any trouble identifying that the websites hosted and created out of school were off-campus. It seems logical that speech that is created off-campus and directed to a general audience away from the school should be deemed off-campus speech. Similarly, speech that occurs on a website that originates from an on-campus computer, disseminated using school accounts and servers or is directed toward a specific audience should be considered on-campus speech. As more and more cases are litigated under an on-campus venue that truly fall under off-campus, even if the Courts have overturned many of the reactive punishments from school administrators, this action may begin to silence student expression that should be fully protected. Rather than relying on a host of case law decisions, which has led to many inconsistencies, a clear distinction must be made by the courts to guide school administrators.

Based on the fact that off-campus expression should demand a higher standard of First Amendment protection, schools that attempt to punish students for off-campus speech should be subject to a more precise rule than the “substantial disruption” as proscribed under *Tinker*. The case law has shown that *Tinker* provides adequate protection for on-campus speech, however, this study shows that it is quite difficult to demonstrate a substantial disruption while granting a great deal of flexibility for schools to restrict student speech. What exactly is a “substantial disruption?” This *Tinker* standard does not provide a great

deal of guidance as to define what this means. More importantly, this standard most likely has been misinterpreted and taken out of context in which the authors intended. Tinker states: “a student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during unauthorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without “materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others... This is the only phrase in the entire decision that could possibly suggest the Court would suggest applying the substantial disruption test to off-campus speech. When read in context with the entire decision, it is clear that it is meant for speech found within the “gates of the schoolhouse.”

In Tinker, the Court was concerned with riots breaking out within classrooms over the controversial subject of the Vietnam war. Today, the degree of disruption noted by the Courts, have been all over the place. Looking at these cases cited in this study might suggest that some Courts have considered disruptions a great deal less than “substantial.” This is evident in the J.S. v. Bethlehem Area School District, 757 A.2d 412 (Pa. Commw. 2000), in which stated that a website suggesting that a student wanted his teacher killed was a substantial disruption. Even though the content of the website cannot be

condoned, the police concluded that the speech on the website did not constitute a true threat and that there was no threat of danger. The teacher's reaction in which a sabbatical was needed does not appear to be a foreseeable reaction. It seems that school districts are attempting to identify any disruption that may be caused by minor classroom distractions as substantial causing Courts to apply the Tinker standard.

In order to protect the First Amendment rights of students as well as keep a safe school environment, this study suggests that the Courts identify a precedent that off-campus speech is not subject to the jurisdiction of school officials. Courts should draw a clear distinction between on-and off-campus speech with respect of where the speech was created and to how it got to the school. Speech from Internet websites deemed off-campus would not be able to be regulated by schools even if a disruption occurred within the classroom environment. On-campus regulation seems to be sufficient in order to maintain the proper learning environment. School administrators could then be afforded a more clear decision making process when dealing with Internet speech. Schools, not courts, could determine the location of the speech and only react to speech that was a function of the school. Off-campus speech that might disrupt the classroom environment should be referred to the parents of the student with an appropriate discussion leading to a solution that both protects the student's right to free speech and curtail the

disruption. School administrators cannot be quick to react and punish students without a full and precise investigation leading to the determination of the location of the speech. School administrators will then have little question as to whether they are operating properly within the confines of their authority when punishing student speech. These cases cited in this case could, most likely, all be resolved without involving the Tinker substantial disruption test. As long as speech remained off-campus and that the student was not actively bringing the speech to school, the speech would and should be protected, helping school administrators maintain that delicate balance of preserving students' First Amendment rights and maintaining a safe school environment.

## **Chapter IV CONCLUSION**

### **Schools and Free Speech**

Technology today is forcing schools to cope with new questions of speech that the United States Supreme Court has yet to address. School administrators are quick to react to home created or off-campus student web sites. Case law has suggested that only when a student “brings” his or her own created website onto campus (creating a causal link or nexus to the school), either by downloading it on a school computer or by encouraging other students to do so, will the school be able to assert its authority over that student. In these cases, and only these cases, the Tinker substantial disruption test may apply. In the light of the cases examined in this study, one conclusion seems clear; a school district has little constitutional standing when disciplining students for content on private websites unless a direct threat against the school or employees is present to create a nexus. The rights of students to produce websites for private use seem firmly protected by the First Amendment. Again, unless created using school equipment in connection with a school related purpose, the site must be substantially disruptive for the school to discipline the student. Although web pages and chat room discussions potentially reach many people, ultimately blurring the boundaries of where the “schoolhouse gate” begins and ends, the school must demonstrate and document the disruption to the school environment. It is difficult to imagine a webpage, absent of a true

threat, so strongly worded that it would substantially disrupt the school's education mission. As a result, the Tinker standard is difficult to meet.

Because there is both a tendency of administrative overreaction to student off-campus websites resulting in litigation and the extreme difficulty in meeting the Tinker substantial disruption standard during litigation, there is a great need for guidelines to assist administrators in their decision-making processes. The purpose of this study is to analyze both U.S. Supreme Court and Lower court case law related to the First Amendment rights of school students. Also, this study will examine the Court decisions and legal standards used in those decisions. From this, guidelines will be developed to assist administrators when ultimately faced with a student Internet free speech issue.

### **Internet Speech Guidelines**

Guidelines must begin with good, appropriate policy. Internet use policies are written rules and regulations that are often used in school settings to inform students and their parents about their rights and privileges associated with school computer use. They are clear rules and regulations that are often developed by the school district with the approval of school board members. An Internet use policy is a general policy that often applies to all computer use by students in the district. Parents and students are usually required to sign Internet use policy forms before

students are permitted to use the school's computers. Policies must not be vague and overbroad. In Flaherty v. Keystone Oaks School District, 247 F Supp. 2d 698 (W.D. Pa. 2003), the parents brought action against the school district on behalf of their son, alleging that certain policies in the student handbook were unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments and the state constitution. The District Court held that the breadth of handbook policies relating to discipline, student responsibility, and technology were overreaching in violation of student's free speech rights and were unconstitutionally vague in definition and as it applied; the Court also found that the overbroad and vague handbook policies did not geographically limit school official's authority to discipline expressions that occurred on school premises or at school related activities, thus violating the students' First Amendment free speech rights.

Similarly, policies must be relevant. In Coy v. Board of Education of the North Canton City Schools, 205 F. Supp. 2d. 791 (2002), the Court noted that while the district had initially disciplined the student for the website's content, it now argued that the discipline was for accessing the site at school. While the site's content was crude and juvenile, the court found that it contained no obscene material and that there was evidence that the student was viewing the website in a way that drew almost no attention to himself. As a result, school administrators

were attempting to discipline him for the content of the site. The Court made a note that if the district could show that it actually expelled the student for viewing the site in violation of the school Internet policy, it might still prevail in a later Court proceeding before a jury.

(A.) First, the guidelines will allow the administrator to become very familiar with an Acceptable Use Policy that governs computers and ultimately the Internet in a particular school district. It is recommended that the administrator be part of the team that creates the Acceptable Use Policy for this begins to set the understanding of what is appropriate and what is not. To begin, here, based on information provided by case law dealing with Internet free speech, are some basic reasonable education based restrictions for a district to impose related to the use of the Internet by students on-campus: (in preparation for the Acceptable Use Policy to govern both on-campus and off-campus)

The following is a list of reasonable education based restrictions schools can impose on students related to Internet use:

1. Criminal speech and speech in the course of committing a crime. Threats; instructions on breaking in computer systems; child pornography; drug dealing; purchase of alcohol; gang activities; etc.

2. Speech that can cause harm to another. Online harassment; personal attacks, including prejudicial or discriminatory attacks; or false or defamatory material about a person or organization

3. Speech that is inappropriate in an educational setting or violates district rules necessary to maintain a quality educational environment. Restrictions might include:

a. Inappropriate language. Obscene, profane, lewd, vulgar, rude, disrespectful, threatening or inflammatory language.

b. Dangerous information. Information that if acted upon could cause damage of presents a danger or disruption.

c. Violations of privacy. Revealing personal information about others.

d. Abuse of resources. Inappropriate use of district group distribution lists through “spamming” chair letters, etc.

e. Copyright infringement or plagiarism. Transmission of material in violation of copyright or for the purposes of plagiarism.

f. Violations of personal safety. Revealing personal contact information or engaging in communication that could place the student in personal danger.

**(B.)** Threats, as mentioned before in this study, are not protected by the First Amendment. Threats must be part of an Acceptable Use Policy, however, off-

campus threats via websites can pose a problem for school administrators. These guidelines recommend that school administrators go through a series of steps when a student makes an identifiable “true” threat against the school, school personnel or another student from an off-campus website;

1. Once the threat has been assessed and validated as a “true threat,” notify the appropriate law enforcement officials.
2. Notify the student’s parents concerning the threat
3. Notify the victim or victim’s parents (if it is a student) concerning the threat.
4. Explain to the student the effect that this threat could have or is having on others.
5. Have the student evaluated (if appropriate) by a trained psychologist or counselor
6. Take all appropriate steps to eliminate any school involvement if the threatening speech involves the use of school computers or is on school time

Administrators must find the answers to these questions:

Were the threatening remarks gratuitous comments made in a serious vein, or were the comments made during a literary work or a creative essay in class?

Were there prior incidents involving this student?

What information can be obtained from faculty or other students about this student?

(C.) An Acceptable Use Policy (AUP) is an important element of any school's technology plan. Guidelines for dealing with off-campus internet speech begin with an Acceptable Use Policy. From both a review of a current West Law Reporter dealing with Internet use in public schools and data obtained from the case law in this study, the AUP should include the above information as well as the following:

Scope of Use – Each school or district must determine the scope of use it will allow for students and staff members.

Rules for Usage – The AUP should state that the Internet and e-mail use is a privilege, not a right, for students and staff members and a violation of the AUP may result in termination of usage and/or appropriate discipline.

Prohibited Uses – The AUP should state that the school condemns any illegal use of the school's computer system, including software pirating, hacking, copyright violations, harassment or threats, and defamation.

Liability – The AUP should include a provision that the school does not guarantee the reliability of the data connection and does not verify the accuracy of the information found on the Internet.

Property/privacy statement – The AUP should state that all information sent or received from a school computer – including e-mail messages – is school district property, should not be considered confidential, and may be accessed by school personnel at any time.

Training sessions – Some schools have experimented with mandatory training sessions for students and staff before allowing them to access to the Internet.

Agreement provision – It is recommended that students and staff members sign a document indicating that they have read and understand the AUP and agree to abide by the terms and conditions contained therein.

Parent permission for student use – Many schools also require parent approval before students are allowed to use the Internet or school's e-mail system. It is also recommended that any parental permission slip should also contain a statement

where by the parent agrees not to hold the school, school district or school personnel responsible for any material the student accesses or transmits via the school's computer system.

(D.) Another aspect of the guidelines is in the form of questions.

Administrators should consider several factors before punishing students for the creation of off-campus websites. Questions that should be asked should include:

**Was the content created as part of the school curriculum, such as a class project or school newspaper?**

**Was the content created on school computers?**

If the answer is yes to the first question, administrators have the authority, using the Hazelwood standard; to discipline the student for material delivered at home.

The U.S. Supreme Court in Hazelwood held that "school officials can exercise greater control of student expression than students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."

**Is the student's website linked to the school's website?**

In Beussink, the court noted, "Beussink's homepage also contained a hyperlink that allowed a reader to access the school's homepage from Beussink's homepage." The court in this case, however, did not find this to be very probative and, instead, used the substantial disruption standard under Tinker for analysis.

**Did the student distribute the website content at school?**

If the student actively distributes the website content material at school, it may give the administrators greater control over the student expression similar to the underground newspaper case. (Bystrom v. Fridley High School Independent School District, 822 F.2d 747 (9<sup>th</sup> Circuit 1987))

**Did the student advocate disruption within the school using the website content?**

In Boucher v. School Board of the School District of Greenfield 134 F. 3d 821 (7<sup>th</sup> Circuit 1998), the court applied the Tinker standard to say that school administrators could prohibit a publication containing an article about hacking into the school's computer system. The court felt that the Tinker substantial disruption test applied mainly because the article was distributed on campus and advocated an "on-campus" activity.

The guidelines become more difficult if the Internet content is created completely off-campus and was not distributed on-campus or did not create any substantial disruption at school. If an administrator is able to document a substantial disruption based on the website content, then the administrator should feel confident that the student could be disciplined without fear of violating the First Amendment. Administrators must realize, however, that if no substantial

disruption occurs, they do not have full discretion to censor non-threatening speech because they disagree with the content.

(E.) Finally, other proactive education and intervention strategies should also be considered when dealing with an Internet speech issue. The following suggestions are recommended:

1. Providing students with education about responsible speech, harmful speech and criminal speech is highly recommended. The more likely students understand the consequences of harmful and criminal speech, the less likely they may be to engage in such speech.
2. Providing parent education can probably be an even more helpful strategy to address off-campus speech. Parents must understand the liability that may stem from inappropriate speech posted on the Internet by their child.

Other ways of responding to inappropriate Internet speech, which might be effective, are:

1. Keep in mind that the student that created the speech may be a victim of on-campus bullying or harassment by other students or may be feeling abused by school staff. Sometimes inappropriate Internet speech may be disguised as a cry for help.

2. Distinguish between legitimate, discomfort-provoking, protest speech that is challenging authority and truly harmful speech. Protest speech can provide an excellent “teachable moment” for school administrators.

This type of speech can provide an opportunity to see the school through the eyes of a student and can provide insight into the quality of the school environment.

3. Take prompt actions to have harmful speech removed from the Internet. Most service providers prohibit inappropriate speech and do not want to be associated with this type of speech. Before having the website removed, however, make a copy of the pages as evidence.

4. Talk to the parents of the student and ask their help in resolving the matter.

Many parents are not fully aware of the actions of their children on the Internet.

5. Support the victim of such speech to seek appropriate resolution. Speak to them regarding legal resources. The school can sometimes be the conduit between the creator of the content and the victim and parents.

## Summary of Internet Speech Guidelines

For school administrators, a definite distinction should be made between on- and-off-campus expression. Student Internet speech that originates and is disseminated from an off-campus location should not fall within your jurisdiction or the jurisdiction of the school district unless the original author of the expression takes a purposeful step to direct it towards the school. (Tuneski, 2003)

- I. Review the Internet Acceptable Use Policy for your school district.
- II. Identify if the speech in question is a “true threat.”
  - A. Would a reasonable person hearing the speech perceive it to be a threat to identifiable individuals or entities, in light of the relevant factual content?
  - B. Did the speaker intend for the speech to be taken as a threat, regardless of whether the speaker intended to actually carry the threat out?
  - C. If, from answering the questions above, it is determined the speech in question constitutes a “true threat”, the administrator should:
    1. Notify the appropriate law enforcement officials
    2. Notify the student’s parent concerning the threat and discuss the potential consequences.

3. Notify the victim's parents (if applicable) concerning the threat.
4. Explain to the student the effect that the threat could have or is having on others.
5. Have the student evaluated by a psychologist.

II. Non-threatening Speech – Answer the following questions while conducting your investigation:

- A. Was the content created as part of the school curriculum, such as a class project or school newspaper?
- B. Was the content created on school computers?
- C. Is the student's website linked to the school website?
- D. Did the student distribute the website content at school?
- E. Did the student advocate disruption within the school using the website content?

(A Yes answer to any of these questions could create a possible nexus to on-campus activity.)

(A No answer to all of these designates off-campus activity and is protected speech.)

IV. Other issues to consider while conducting the investigation:

- A. Is the student that created the speech a victim of on-campus bullying or harassment?
- B. Is the speech legitimate, discomfort-provoking, protest speech that is challenging authority or truly harmful speech?
- C. Take prompt action to have harmful speech removed from the Internet
- D. Talk to the parents of the student and ask for their help in resolving the matter.
- E. Support the victim in order to seek appropriate resolution

V. Provide educational follow-up strategies:

- A. Provide all students with information about responsible speech, harmful speech and criminal speech.
- B. Provide parent education so that parents understand the liability that stems from inappropriate speech posted on the Internet.

## **Implications for Guidelines**

The guidelines were given to a certified school administrator and an attorney for review and feedback. It was important for this study to have some initial feedback from two professionals that would be dealing directly with the possible application of the guidelines. Feedback, as viewed here through two very different lenses, can provide better and user-friendlier guidelines to assist school administrators in their decision-making processes when dealing with student Internet expression.

Two areas that seem to be very beneficial to the school administrator are the reasonable education restrictions and guidelines for the Acceptable Use Policy. School administrators continue to look for ways to be pro-active when dealing with student rather than re-active. The school administrator feedback also included the practicality of having a step process to review in order to rule out a “true” threat. Identifying a “true” threat from parody or socially inappropriate speech is one of the most difficult things an administrator has to do. The most valuable part of the guidelines was the questions to be asked before disciplining a student. The school administrator stated that these would best direct the investigation down the correct path leading to appropriate action.

The attorney reviewing the guidelines agreed that the guidelines were in accordance with case law. The guidelines made reference to the Tinker case in

accordance with the data compiled from the research. Almost all of the Internet speech cases used the Tinker standard of substantial disruption to examine the facts set forth. It was important that school administrators know this standard and exactly what it means. The attorney commented, however, that it would be important to detail the facts of each case used in the guidelines. The school administrator would be able to use the facts of each of cases as a comparison to facts of a current situation. The attorney stated that this would better help the school administrator and put an emphasis on the facts of the situation rather than the administrator's feelings about the speech.

The attorney viewed the guidelines as structured and easy to follow allowing for a more pro-active approach to protecting the First Amendment rights of students. A critical piece to these guidelines is the way that they might enable the school administrator to determine the difference between protected speech and non-protected speech. The attorney commented that the format was good and easy to follow and did include enough information in order to identify the speech in question.

## **Future Studies**

After reviewing a great number of cases dealing with Internet free speech in schools, there are many other issues that would be very appropriate to investigate to help school administrators. Specifically related to Internet free speech, a viable study would compare how the various Circuit Courts have treated Internet free speech cases. This study found that mostly all of the Circuit Courts were involved. Most of the Courts were consistent in their application of the Tinker standard but not all were identified and the language specific to that Circuit Court has not yet been thoroughly examined.

Another study might include reviewing Internet free speech case law from the state criminal law perspective. The most interesting conflict on the horizon is that of Ian Lake, a former student at Milford High School in Beaver, Utah, who actually was jailed for seven days and charged with criminal libel for creating a parody website that called the principal “a town drunk.” Lake was the first person under Utah’s criminal libel statute since 1987, and the first Internet publisher anywhere to face a charge.

Many of the other aspects related to First Amendment rights of students is an area that is wide open for careful analysis, especially when analyzing case law and its impact on school policy. Areas such as dress codes, k-12 yearbooks and newspapers, underground newspapers, hate speech, book censorship, clubs and the

pledge of allegiance in schools, are all other areas of the First Amendment that could be studied. Many of the policies governing the rules and regulations focused on the above issues have been put together before any studies have been done to see how the Courts have dealt with such issues. Having this kind of information in front of a policy maker or administrator can keep a district out of senseless litigation. Having multiple guidelines to assist administrators in their decision-making processes can be extremely valuable to the day-to-day operations of the school. Data from these studies could also assist school boards in the creation of pro-active policies that can create a safe learning environment yet still preserve the rights of our young citizens while in school.

**Appendix A.** Implication Feedback Sheet (Attorney)

- a. From your knowledge of First Amendment law, do these administrative guidelines seem in accordance with case law?
  
- b. In your opinion, are the administrative guidelines clear and precise enough to allow administrators to make appropriate decisions with regard to discipline and still protect the First Amendment rights of students?
  
- c. Do the guidelines provide enough information to help the administrator determine what speech is protected and what speech is not protected?
  
- d. What changes, if any, would you recommend to the administrative guidelines from a legal perspective to better serve the school administrator in the decision making process when dealing with off-campus Internet free speech.

**Appendix B.** Implication Feedback Sheet (School Administrator)

- A. Given the following scenario, answer the following questions based on the Administrative guidelines provided:

You, the administrator, find out about a student created website making fun of the official school's website. The website is very critical of administrators including the use of vulgar terms about you and other faculty in the building. You find out that this website was created completely off-campus using the student's home computer, however, several students were able to access it from a school's computer. What do you do?

- B. Do the guidelines provide enough information for you, the administrator, to make an informed decision about whether to discipline the above student?
- C. Do the guidelines give you, the administrator, enough legal information to forecast, if you decide to discipline, whether you will violating a student's First Amendment rights to free speech
- D. What additional information, if any, would you need to feel confident that you have made the appropriate decision when dealing with a First Amendment Internet free speech issue.

## Definition of Terms

***Affirmed*** – to assert (as a judgment or decree) as valid or confirmed

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

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

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

***Cyberspace*** – the online world of computer networks

***Disclaimer*** – a denial or disavowal of legal claim

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

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

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

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

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

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

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

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

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

*On-campus speech* – any form of communication that is educationally connected to the school or done on school property

*Plaintiff* – a person who brings legal action

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

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

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

*Schoolhouse gate* – the door or entrance to a school

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

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

*Summary judgment* – a formal decision given by the court

*Trilogy of Supreme Court cases* – The Tinker (1969) case, the Bethel (1986) case and the Hazelwood (1988) case.

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

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- Burch v. Barker, 861 F. Supp. 1149 (9<sup>th</sup> Circuit Court 1998)
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- Doe v. Pulaski County Special School District, 306 F. 3d 616, (2002). (8<sup>th</sup> Circuit Court)
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- Emmett v. Kent School District No. 415, 92 F Supp. 2d 1089, 1090, (W.D. Wash. 2000).
- Fenton v. Stear, 423 F. Supp. 767, (W.D. Pa. 1976).
- Flaherty v. Keystone Oaks School District, 247 F. Supp. 2d 698, (2003). (U.S. District Court for the Western District of Pa.)
- Hazelwood v. Kuhlmeier, 484 U.S. 260, (1988). (U.S. Supreme Court)
- J.S. v. Bethlehem Area School District, 569 Pa. 638, (2001). (Supreme Court of Pa.)
- Killion v. Franklin Regional School District, 136 F. Supp 2d 466, (2001). (U.S. District Court for the Western District of Pa.)
- Klein v. Smith, 635 F. Supp. 1440, (1986). (U.S. District Court Maine) Lovell v. Poway Unified School District, 90 F. 3d 367, (1996). (9<sup>th</sup> Circuit Court)
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<b>Case</b>	<b>Background Facts</b>	<b>Constitutional Question Raised</b>	<b>Was the Tinker Standard Applied?</b>	<b>Court's Ruling</b>
<u>Killion v. Franklin Regional School District</u> (2001)	W, NT, S Off-campus (Policy in question)	First Amendment Free Speech Violation? (Y)	Yes (No substantial disruption identified)	Judgment for the Student
<u>Flaherty v. Keystone Oaks School District</u> (2003)	W, NT, S 3 Off-campus 1 On-campus (Policy in question)	First Amendment Free Speech Violation? (Y)	Yes (No substantial disruption identified)	Judgment for the Student
<u>Paul Kim &amp; Newport High School</u> (No official case ruled on) (1995)	W, NT, S Off-campus (*Had disclaimer)	First Amendment Free Speech Violation? (Y)	No (Burch v. Barker used as the standard)	Out of court settlement - \$ 2000 School district apology to student
<u>O'Brien v. Westlake City School Board of Education</u> (1998)	W, NT, S Off-campus (Handbook policies in question)	First Amendment Free Speech Violation? (Y)	No (Determined to be completely off-campus – No nexus identified)	Judgment for the Student \$30,000 settlement and apology to student
<u>Beussink v. Woodland R-IV School District</u> (1998)	W, NT, S Off-campus	First Amendment Free Speech Violation? (Y)	Yes (No substantial disruption identified)	Judgment for the Student Settlement - undisclosed

Figure 2. Student Internet Case Law

Figure 2. (continued)

<b>Case</b>	<b>Background Facts</b>	<b>Constitutional Question Raised</b>	<b>Was the Tinker Standard Applied?</b>	<b>Court's Ruling</b>
<u>Aaron Smith &amp; McKinney Independent School District</u> (No official case ruled on) (1998)	W, NT, S Off-campus	First Amendment Free Speech Violation? (Y)	No (Determined to be completely off-campus – no nexus identified)	No additional legal action taken Student reinstated in school
<u>Emmett v. Kent School District</u> (2000)	W, NT, S Off-campus (*had disclaimer)	First Amendment Free Speech Violation? (Y)	Yes (Distinguished Tinker from Fraser and Hazelwood)	Judgment for the Student
<u>Justin Redman &amp; Valley View School District</u> (No official case ruled on) (2000)	W, NT, S Off-campus	First Amendment Free Speech Violation? (Y)	Yes (No substantial disruption identified)	Case settled out of Court – Court issued a temporary restraining order against the school district
<u>Biedler v. North Thurston School District No. 3</u> (2000)	W, NT, S Off-campus	First Amendment Speech Violation? (Y)	Yes (No substantial disruption identified)	Judgment for the Student
<u>Coy v. Board of Education of the North Canton</u> (2002)	W, NT, S Off-campus (Accessed from school computer)	First Amendment Speech Violation? (Y)	Yes (No substantial disruption identified)	Judgment for the Student

Figure 2. (continued)

<b>Case</b>	<b>Background Facts</b>	<b>Constitutional Question Raised</b>	<b>Was the Tinker Standard Applied?</b>	<b>Court's Ruling</b>
<u>J.S. v. Bethlehem Area School District</u> (2002)	W, NT, S Off-campus	First Amendment Speech Violation? (N)	Yes (A substantial disruption was identified)	Judgment for the School District
Mahaffey v. Waterford School District (2002)	W, NT, S Off-campus	First Amendment Speech Violation? (Y)	Yes (No substantial disruption identified)	Judgment for the Student