The Tinker Standard as Applied to

Off-Campus Use of Social Media by Students:

Substantial Disruption, Actual Threat or Non-Actionable Offensive Speech?

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First Amendment concerns arising from school discipline for off-campus speech via YouTube, FaceBook and other online social media have been percolating up from the Circuits for the last several years. Earlier this year the U.S. Supreme Court declined to step into the explosion of social networking and social media-related litigation involving off-campus activities of high school students whose online communications and resulting disciplinary actions by their school authorities triggered constitutional challenges in which the students claimed their First Amendment rights to freedom of expression were violated.

The Court’s collective response to the burning question whether student speech outside the school setting is governed by Tinker and its progeny was the judicial equivalent of a big yawn. In a post-Tinker world, the concept of the “schoolhouse gate” has given way to the pervasive impact of the Internet on student speech and schools. Yet the essence of the Tinker standard that authorizes school disciplinary action based on the content and effect of student speech remains in a clear majority of the circuits. These are the circuits which recognize that schools can regulate student speech which causes a material and substantial disruption, or that school officials can reasonably forecast will result in such disruption, even if the speech was made off campus.


The seminal case dealing with student speech, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969), provides the backdrop for examining cases involving student speech. In Tinker, the Supreme Court stated at 513:

[C]onduct by the student, in class or out of it, which for any reason-whether it stems from time, place, or type of behavior-materi ally disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”
Under *Tinker*, moreover, a school district must make a “showing that the students’ activities would materially and substantially disrupt the work and discipline of the school” in order to justify suppression of student expression. *Id.*


A denial of certiorari effectively leaves standing the lower court’s decision. Thus, in order to grasp the full significance of the precedential chasm that remained following the Supreme Court’s inaction in these three cases, let us examine the facts and legal reasoning in each case as it was decided at the Court of Appeals level.

**Hermitage School District v. Layshock**

Justin Layshock used his grandmother’s computer to create a fake MySpace profile page of his Hickory High School principal. Layshock testified that the profile was meant to be a parody, that he did not intend to hurt anyone. He meant it to be funny. The principal claimed that the profile was degrading, demeaning, demoralizing, and shocking. He was concerned about his reputation though he testified he was not concerned about his safety. The school district found that Layshock had violated the Hermitage School District Discipline Code, and gave him a ten-day out-of-school suspension, as well as being placed in an alternative education program for the rest of the school
year. The 3rd Circuit found that the school district could not establish a sufficient nexus between Justin Layshock’s speech and a substantial disruption of the school environment.

*Blue Mountain School District v. Snyder*

*Blue Mountain School District v. Snyder* was combined with *Layshock* once the two cases reached the Supreme Court. Snyder was a middle school student who created a MySpace profile that “made fun of” her principal. The profile contained adult language and sexually explicit contexts. Snyder was suspended from school as a result of the profile. Her parents sued the school district under 42 U.S.C. Section 1983 and State law, alleging that the suspension violated Snyder’s First Amendment free speech rights, that the school district’s policies were unconstitutionally overbroad and vague, that the school district violated her parents’ Fourteenth Amendment substantive due process right to raise their child, and that the school district acted outside of its authority in punishing the child for out-of-school speech. The profile did not identify the principal by name, school, or location.

The 3rd Circuit found that while disturbing, the profile was so outrageous that no one took its contents seriously. The child testified she intended the profile to be a joke between herself and her friends and that she created the profile because she thought it was “comical” insofar as it was so “outrageous”. The 3rd Circuit also found that the presence of the profile did not create a material and substantial disruption in the school. There was evidence of “general rumblings” in the school regarding the profile, but that was it. The 3rd Circuit also found that the facts did not support a conclusion that the posting forecast that a substantial disruption was reasonable either.

The students were suspended by their respective school districts in both *J.S. v. Blue Mountain School District* and *Layshock v. Hermitage School District*, for creating offensive MySpace parodies of their school principals. The students in both cases created parody profiles
during non-instructional hours and on personal equipment. The Third Circuit found in each case that the creation of the fake profiles could not reasonably cause a disruption in the schools, and thus concluded that the suspensions did not survive constitutional muster.

The Fourth Circuit took a decidedly different approach in Kowalski v. Berkeley County Schools.

Kowalski v. Berkeley County Schools

Kowalski brought a First Amendment lawsuit against Berkeley County Schools for disciplining her after she created a webpage on her computer away from school to form a MySpace group “S.A.S.H.” - Students Against Sluts Herpes – targeting another student and creating a foreseeable disruption. Like Layshock and Snyder, Kowalski created a MySpace page. She also encouraged other students to post offensive comments about the targeted fellow student. Her suit was dismissed by the Fourth Circuit Court of Appeals on the ground that such conduct could reasonably cause a disruption to the work and discipline of the school, and upheld the school system’s disciplinary action based on the deferential reason that the school system had a legitimate pedagogical reason for punishing the student who created the “S.A.S.H.” site on MySpace. The school district won in the district court and in the court of appeals, and denial of certiorari meant that the decision of the 4th Circuit handed down in July 2011 was left standing. This decision is a real gem for school districts and was written by Judge Niemeyer, a solid conservative. The most pertinent part of this decision was this passage:

Even though Kowalski was not physically at the school when she operated her computer to create the webpage and form the "S.A.S.H." [Students Against Sluts Herpes”]. MySpace group and to post comments there, other circuits have applied Tinker to such circumstances. To be sure, it was foreseeable in this case that Kowalski's conduct would reach the school via computers, smartphones, and other electronic devices, given that most of the "S.A.S.H." group's members and the target of the group's harassment were Musselman High School students. Indeed, the
"S.A.S.H." webpage did make its way into the school and was accessed first by Musselman student Ray Parsons at 3:40 p.m., from a school computer during an after-hours class. Furthermore, as we have noted, it created a reasonably foreseeable substantial disruption there.

The Fourth Circuit relied on Tinker to conclude that the school was authorized to discipline Kowalski “because her speech interfered with the work and discipline of the school.” In Kowalski, the student’s off-campus computer communication through a MySpace site did make its way into the school and, according to the Fourth Circuit, created a reasonably foreseeable, substantial disruption. Layshock and Snyder both centered on off-campus communications by students under circumstances that led the Third Circuit to conclude that the communications did not cause or foreseeably lead to any disruption on the school campus.

In its Amicus Brief filed in the consolidated Layshock/Snyder appeals by the National School Boards Association and other organizations, the NSBA pleaded with the U.S. Supreme Court to hear these cases and "... remedy the legal confusion felt by school boards and administrators across the country as they attempt to draft and implement policy that adheres to legal and community expectations regarding bullying and harassing speech, and fulfill their duty to teach students the bounds of civil discourse, without running afoul of the First Amendment."

That dilemma is one in which school officials understandably cannot wait for further directives from the highest court, and it is now a matter to be thrashed out in the lower courts until the Court decides, if ever, to address the reach of its landmark Tinker decision in cases involving off-campus student communications through social media which foreseeably come to the attention of school authorities and from which school officials can reasonably forecast that material and substantial disruption of school work, school activities and the educational mission of the school
may ensue. That dilemma was addressed recently by the U.S. District Court for the Northern District of Mississippi.

**Tinker’s Progeny: Bell v. Itawamba County School Board**

Against the backdrop of the Supreme Court’s January 17, 2012 cert. denial in the Layshock/Snyder/Kowalski trio of cases is a First Amendment student Internet speech case that was decided in 2011 and is now awaiting decision by the U.S. Court of Appeals for the Fifth Circuit. At the time of the incident, Taylor Bell was a senior at Itawamba Agricultural High School. Bell wrote, sang, and published in two public forums via the Internet (Facebook and YouTube) a rap song which specifically targeted two Itawamba employees. The lyrics of “The Song” state that Coach Wildmon is “a dirty ass nigger”, is “fucking with the whites and now fucking with the blacks”, is a “pussy nigger” and “fucking with the students he just had a baby”, “fucking around cause his wife ain’t got no titties”, that Coach Wildmon tells students they “are sexy”, and the reason that Plaintiff quit the basketball team is because Coach Wildmon “is a pervert”. The lyrics go on to say that Coach Rainey is another Bobby Hill, is a “pervert”, that he is “fucking with juveniles”, that Coach Rainey came to football practice “high”, and that he is 30 years old and is “fucking with students at the school” and that Bell is going to “hit ya with my Ruger.”. “The Song” goes on to state that one of the coaches is “kissing” a student and “looking down girl’s shirts, drool running down your mouth” and turning the lights off while girls are in the locker room. The last two verses include the phrases “Fucking with the wrong one gonna’ get a pistol down your mouth” and “middle fingers up if you wanna cap that nigga.” Bobby Hill was an Itawamba Agricultural High School assistant football coach who was arrested and accused of sending sexually explicit material to a minor via text message in 2009.
Once this song came to the attention of school officials after being posted in the two separate public domains of Facebook and YouTube, the Disciplinary Committee of the Itawamba County School Board heard the issue. The Committee found the conduct of Plaintiff constituted “harassment and intimidation of teachers and possible threats against teachers”. Bell appealed the finding of the Disciplinary Committee to the Itawamba County School Board. The School Board, acting through its minutes, again found that Bell “threatened, harassed, and intimidated school employees”. The attorney for Defendant Itawamba County School Board, Michele Floyd, sent a letter dated February 11, 2010, to Plaintiff Dora Bell, mother of Plaintiff Taylor Bell, memorializing the findings of the School Board, specifically: (1) that Taylor Bell’s seven day out-of-school suspension be upheld; (2) beginning January 27, 2011, Bell will be placed in the Itawamba County Alternative School for the remainder of the current nine week grading period; (3) while in Alternative School, Bell will not be allowed to attend any school functions and will be subject to all rules imposed by the Alternative School; and (4) Bell will be given time to make up any work missed while suspended or otherwise receive a “0”, pursuant to school policy. Bell and his mother subsequently filed their Complaint on February 24, 2011, alleging (1) placement in Alternative School violated Taylor Bell’s First Amendment rights; (2) punishment for Taylor’s speech violated Dora’s parental rights under the 14th Amendment; (3) that the speech was a matter of public concern; and (4) punishment for Taylor’s speech violates Mississippi law.

The School District answered on March 4, 2011. A Preliminary Injunction Hearing was held on March 10, 2011, during which the Plaintiffs and Defendants presented testimony and introduced exhibits. The Case Management Conference was held on May 9, 2011, during which all parties agreed that there were no remaining factual disputes and that this issue was ripe for summary judgment. As a result, the District Court was charged with the task of determining which party was
entitled to a judgment as a matter of law. On March 15, 2012, the District Court granted summary judgment for Itawamba and school officials and denied it for Bell and his mother based on evidence and testimony that Bell’s song: (1) was intended to reach the school; (2) caused an actual disruption at school; (3) was reasonably foreseeable to cause disruption; (4) that even if of a matter of public concern, Bell failed to demonstrate that his speech overrides the well-established Tinker test in matters of public school speech by children; (5) that individual Defendants were entitled to qualified immunity; and (6) that the mother’s 14th Amendment claim failed.

**Relevant Facts of Bell**

The core holding of the District Court in Bell was that a senior high school student's rap song on Facebook and YouTube targeting two of his high school's coaches as having had improper contact with female students and threatening that “messing with wrong one/ going to get a pistol down your mouth” was not protected by the First Amendment. *Bell v. Itawamba County School Board*, 2012 U.S. Dist. LEXIS 34839 (N.D. Miss. March 14, 2012) (Biggers, J.).

Senior U.S. District Judge Neal Biggers reasoned that the U.S. Supreme Court's landmark 1969 decision on student speech rights, *Tinker v. Des Moines Indep. Community Sch. Dist.*, authorized school officials to regulate off-campus conduct that caused substantial or material disruption at school. The court agreed with school authorities that the song threatened, harassed, and intimidated school employees, and that the rap song caused a "material and/or substantial disruption" at school. One of the coaches targeted in the song testified in an earlier preliminary injunction hearing "he felt threatened by the references to killing him in the song." In this case, Taylor Bell clearly intended to publish to the public the content of the song as evidenced by his posting of the song on Facebook.com with at least 1,300 “friends”, many of whom were fellow students, and to an unlimited, worldwide audience on YouTube.com. Accordingly, the *Tinker*
standard applies to Taylor Bell's song without regard to whether it was written, produced, and published outside of school.

**Foreseeable and Substantial Disruption**

The core issue at the trial and appellate level in *Bell* was whether it was reasonably foreseeable that Bell's song would cause a material and substantial disruption at school or would be reasonably foreseeable to cause a material and substantial disruption at school. Speech that would receive full Constitutional protection if used by an adult in public discourse may, consistent with the First Amendment, give rise to disciplinary action by a school. Itawamba had notice that Bell's speech caused an immediate material and substantial disruption and acted reasonably by suspending Bell for seven days and placing him into alternative school for the rest of the grading period. Schools have a duty to be proactive, not reactive. There were three separate evidentiary findings that Bell's speech caused a material and substantial disruption. Bell named his teachers, particular students, and used the school's logo as the thumbnail on his Facebook page. Bell made no efforts at disassociation from Itawamba in his speech. Bell admits that a song accusing coaches of inappropriate conduct with vulgar language would certainly impact the operations of the school. That is exactly what the song did, thus the ruling of the District Court should be affirmed.

**Reasonable Foreseeability That "The Song" Would Reach the School**

Bell posted the song in two public places and used the school logo as the link tag. He admitted he knew once he put it on Facebook and YouTube that it was open to the public. Bell cannot in good faith argue that he did not realize that the song would make it onto campus in this electronic age. Though he made the song off-campus using his personal equipment, Bell's geography-based argument unquestionably fails. *Tinker* applies to on-campus and off-campus speech. Student speech which can reasonably be perceived as a threat of school violence can and
should be regulated by schools. It is untenable in the wake of Columbine and Jonesboro that any reasonable school official who came into possession of Bell's song would not have taken some action based on its violent and disturbing content. Bell's alternative argument that his speech should receive heightened protection because it was about a "matter of public concern" fails because Bell admits he never attempted to inform anyone about his allegations of sexual misconduct, refused to cooperate as part of any investigation, and states that it was meant as "hyperbole and metaphor". The Tinker test is an objective one, focusing on the reasonableness of the school administration's response, not on the intent of the student. Itawamba’s response was reasonable and consistent with Bell’s constitutional rights.

Ample precedent supports the argument that it is reasonably foreseeable that a public high school student’s song (1) that levies charges of serious sexual misconduct against two teachers using vulgar and threatening language which (2) is published on Facebook.com to at least 1,300 “friends,” many of whom are fellow students, and the unlimited Internet audience on YouTube.com, could cause a material and substantial disruption at school.

The burden is on school authorities to meet Tinker's requirements to abridge student First Amendment rights. Nonetheless, a school district need not prove with absolute certainty that substantial disruption will occur. Cuff v. Valley Cent. Sch. Dist., 677 F.3d 109 (2nd Cir. 2012)(focus is on reasonableness of response, not intent of student); Doninger v. Niehoff, 527 F.3d 41, 51 (2nd Cir. 2008) (holding that Tinker does not require "actual disruption to justify a restraint on student speech"); Lowery v. Euverard, 497 F.3d 584, 591-92 (6th Cir. 2007) ("Tinker does not require school officials to wait until the horse has left the barn before closing the door.... [It] does not require certainty, only that the forecast of substantial disruption be reasonable."); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001) ("Tinker does not require school officials to
wait until disruption actually occurs before they may act."). Tinker does not prescribe a uniform, "one size fits all" analysis. The Court must consider the content and context of the speech, and the nature of the school's response.

While students do not "shed their Constitutional rights to freedom of speech or expression at the schoolhouse gate," Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), the Constitutional rights of students in public school "are not automatically coextensive with the rights of adults in other settings," Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986). Instead, these rights must be applied in a manner consistent with the "special characteristics of the school environment." Tinker at 506. Thus, school administrators can prohibit student speech where there is a reasonably foreseeable risk that such speech may "materially and substantially disrupt the work and discipline of the school." Id. at 513. Because schools have a responsibility of "teaching students the boundaries of socially appropriate behavior," Fraser, 478 U.S. at 681, offensive speech that would receive full Constitutional protection if used by an adult in public discourse may, consistent with the First Amendment, give rise to disciplinary action by a school. Id. at 682. The Supreme Court has recognized that schools have a "compelling interest in having an undisrupted school session conducive to the students' learning." Grayned v. City of Rockford, 408 U.S. 104, 119, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972).

**Relevant Post-Tinker Precedent**

The decision by the District Court in Bell was not made in a vacuum. The same must be said of the decisions rendered by the Third and Fourth Circuits in Layshock, Blue Mountain, and Kowalski. Ample precedent was available, moreover, to guide each of these courts.
**Bethel School District No. 403 v. Fraser**

In *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986), a high school student was suspended for delivering a nominating speech at a school assembly using “an elaborate, graphic, and explicit sexual metaphor.” *Id.* at 678. In upholding the suspension, the Court engaged in a balancing act and resolved that “it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the “fundamental values” of public school education.” *Id.* at 685-86. The Court stated:

> [T]hese “fundamental values” must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences. *Id.* at 681.

The Supreme Court recognized that “[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected.”

**Bystrom v. Fridley High School**

In *Bystrom v. Fridley High School*, 686 F. Supp. 1387, 1391 (D. Minn. 1987), the district court analyzed an underground newspaper distributed on campus during lunch under the rubric of student speech. While this test, whether speech published off-campus was brought on-campus, is not as easily suited to intangible situations like the internet, ultimately some guise of it will control.

The Third Circuit in *J. S. v. Blue Mountain School District* suggested that the test would be whether the speech is directed at a particular audience, an approach that would be simpler to apply but would prohibit students from publishing a newspaper off-campus aimed at other students and
distributing that paper off-campus, a scenario which was decided in favor of the students in *Thomas v. Board of Ed., Granville Central School Dist.*, 607 F.2d 1043, 1045 (2d Cir. 1979).

The district court in *Bystrom* reasoned that while this test is not unsound, any test is going to be over or under inclusive, hence the question should be whether the fact that student’s speech was arguably aimed at a particular audience at the school is enough by itself to label the speech on-campus speech. This leaves open the possibility for speech made off-campus and accessed on-campus as capable of being handled as on-campus speech.

*Kubany v. The School Board of Pinellas County*

In *Kubany v. The School Board of Pinellas County*, 839 F. Supp. 1544 (M.D. Fla. 1993), a principal was sued for taking disciplinary action against a high school student who violated a school board policy against drinking alcohol. *Id.* at 1546. The student drank a beer and then attended a school football game. *Id.* The school had a policy in place prohibiting students from being under the influence of alcohol at school-sponsored events. *Id.* *Kubany* was not a free speech case, but was a due process and equal protection case in which the student actually participated in a school-sponsored event and was properly disciplined, according to the court. *Id.* at 1546-47.

*Boucher v. Sch. Board of the Sch. Dist. of Greenfield*

In *Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 829 (7th Cir. 1998), the Seventh Circuit determined that an underground school newspaper, although unaffiliated with the school and printed off campus, was on campus student speech because the newspaper was distributed on school grounds and the article in question advocated on-campus activity.

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

In *J. S. v. Bethlehem Area School District*, 807 A.2d 847 (Pa. 2002), the court was confronted with a website created by a student at home. The website was titled “Teacher Sux” and
“consisted of a number of web pages that made derogatory, profane, offensive and threatening comments, primarily about the student’s algebra teacher” and principal.  Id. at 851.  The student told other students about the website and showed it to another student at school.  Id. at 852.  The Court found that the speech was on-campus because:

“J. S., . . . facilitated the on-campus nature of the speech by accessing the web site on a school computer in a classroom, showing the site to another student, and by informing other students at school of the existence of the web site.”  Id. at 865.  The court also found it important that the “web site was aimed not at a random audience, but at the specific audience of students and others connected with this particular School District.”  Id. Therefore, the court held as follows: “[W]here speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.”  Id. at 865.

Generally, this decision follows a line of early cases that have determined that student speech concerns are implicated when speech published off-campus is brought on-campus.


In *Porter v. Ascension Parish School Bd.*, 393 F.3d 608 (5th Cir. 2004), this Court, while finding that a student drawing composed off campus, displayed only to members of his own household, stored off-campus, and not purposefully taken by him to school or publicized in a way certain to result in its appearance at the school was protected by the First Amendment, still found that a reasonable school official facing this question for the first time would find no “pre-existing” body of law from which he could draw clear guidance and certain conclusions.  Rather, this Court held that a reasonable school official would encounter a body of case law concerning First Amendment protection of student speech that sends inconsistent signals on how far school authority to regulate student speech reaches beyond the confines of the campus.  Id. at 620.

*Porter* made it clear that even if the student’s rights were clearly established at the time of his expulsion, the principal’s determination that the drawing was not entitled to First Amendment
protection was objectively reasonable. Porter shows that even when student speech is deemed protected by the First Amendment, school officials authorizing disciplinary action in response to it and thereafter sued for violation of constitutional rights can still be granted qualified immunity.

_Latour v. Riverside Beaver Sch. Dist._

In _Latour v. Riverside Beaver Sch. Dist._, 2005 U.S. Dist. LEXIS 35919 (W.D. Pa. 2005), The District Court for the Western District of Pennsylvania found at a preliminary injunction hearing that rap songs created by a high school student in that case were “just rhymes”, and also found that (1) students who were targets of the song all testified they did not feel threatened, so no “true threat” existed, and (2) school officials testified that there was no evidence that classroom instruction was disrupted, therefore no material or substantial disruption occurred. _Id._ at *5. See _Wisniewski_, 494 F.3d at 36, 40 (affirming summary judgment in favor of school administrators for regulating student's speech even though the student protested that his creation of the "buddy icon" was only meant as a joke); see also _Doe v. Pulaski Cnty. Special Sch. Dist._, 306 F.3d 616 (8th Cir. 2002) ("In determining whether a statement amounts to an unprotected threat [under the First Amendment], there is no requirement that . . . the speaker was capable of carrying out the purported threat of violence.").

**School Administrators in Best Position to Assess Potential for Harm and Act Accordingly**

This is a good point to pause and reflect on the judicial role in such First Amendment litigation. First, it is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. _Wisniewski_, 494 F.3d at 40 (quoting _Wood v. Strickland_, 420 U.S. 308, 326, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975)); see also _Bethel Sch. Dist. No. 403 v. Fraser_, 478 U.S. 675, 683, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986) ("[I]t is a highly appropriate function of public school education to prohibit the use of vulgar and
offensive terms in public discourse" and "[t]he determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board."). The Constitution does not compel "school officials to surrender control of the American public school system to public school students." Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 686, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986)(quoting Tinker, 393 U.S. at 526 (Black, J., dissenting)). Second, it is most certainly the role of federal courts to vindicate and provide redress for victims of unconstitutional deprivations of fundamental rights of freedom of speech and freedom of expression protected under the First Amendment.

The limitation on students' First Amendment rights derives from the mission of the public school system. "The primary duty of school officials and teachers . . .is the education and training of young people. . . . Without first establishing discipline and maintaining order, teachers cannot begin to educate their students." New Jersey v. T. L.O., 469 U.S. 325, 350, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (Powell, J., concurring). Public schools are necessarily not run as a democracy. Schools exist to provide a forum whereby those with wisdom and experience (the teachers) impart knowledge to those who lack wisdom and experience (the students). Unlike our system of government, the authority structure is not bottom-up, but top-down. The authority of school officials does not depend upon the consent of the students. To threaten this structure is to threaten the mission of the public school system. Lowery v. Euverard, 497 F.3d 584, 588-89 (6th Cir. 2007).

While schools are required to provide students with some level of due process, "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." Bethel School Dist. No. 403 v. Fraser, 478 U.S. at 686 (quoting New Jersey v. T.L.O., 469 U.S. 325, 340, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985)). Moreover, schools require this
flexibility because they "need... to control such a wide range of disruptive behavior." Sypniewski v. Warren Hills Regional Bd. of Educ., 307 F.3d 243 (3d Cir. 2002). In other words, "the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." Fraser, 478 U.S. at 686.

**Wide Leeway Given to School Administrators: Communications That Threaten Violence**

Practical considerations underscore the deference accorded school authorities in this context, particularly in light of the zero-tolerance policies that flourished in the wake of Columbine. School administrators must be permitted to react quickly and decisively to address a threat of physical violence against their students or staff, without worrying that they will have to face years of litigation, second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance. See, e.g., Boim, 494 F.3d at 981, 984 (finding that school officials did not violate a student's First Amendment rights when they suspended her for writing a narrative depicting her shooting her math teacher); Ponce, 508 F.3d at 772 (applying the analytical standard of Morse v. Frederick, 551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007) to a student's speech threatening a "Columbine shooting attack" on a school, and finding that "such specific threatening speech to a school or its population is unprotected by the First Amendment"); Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 626 n.4 (8th Cir. 2002) (finding it "untenable in the wake of Columbine and Jonesboro that any reasonable school official who came into possession of [the student's letter in which he described how he would rape and murder a classmate] would not have taken some action based on its violent and disturbing content," and holding that the letter constituted a "true threat" under Watts v. United States, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 983-92 (9th Cir. 2001) (evaluating "the recent spate of school
shootings," the "potential for school violence," and the "care when evaluating a student's First Amendment right of free expression against school officials' need to provide a safe school environment," the court held the school did not violate a student's First Amendment's rights when it expelled him for his poem filled with imagery of violent death and suicide and shooting of fellow students).

These considerations regarding deference and accountability of school authorities were at the core of the 11th Circuit’s decision in a non-internet student freedom of expression case.

**Boim v. Fulton County School District**

In Boim v. Fulton County School District, 494 F.3d 978 (11th Cir. 2007), a student wrote a story in her notebook about a dream she had of shooting her teacher and then gave the notebook to another student while at school. Her teacher, the target of the story, gained possession of the story while in class and discussed it with a school administrator shortly after school. On the next day, the teacher brought the story to the administrator who then consulted the school's police officer. The school pulled the student from class and called her parents. At the meeting, the student denied the story was serious, and her parents supported her. The school sent the student home. The principal continued the investigation out of concerns of prior violence in other schools such as Columbine. During this investigation, the teacher was shown the narrative and said he felt threatened. The school suspended the student for ten days and then expelled her. The district superintendent, however, overturned the expulsion but upheld the suspension. *Id.* at 983.

The facts in Boim and Bell were similar. The Eleventh Circuit in Boim observed that there is "no First Amendment right allowing a student to knowingly make comments, whether oral or written, that reasonably could be perceived as a threat of school violence, whether general or specific, while on school property during the school day." Boim, supra at 984. Thus, in Boim, the
substantial or material disruption was that the content of the student's speech reached the school, at
least one other student, and ultimately the threatened teacher and school officials. No evidence was
cited by the Court in Boim of any further disruption at school, e.g., panic among students or
teachers, calls by parents, closing of school, etc. In a nutshell, the student’s speech in Boim was
construed as a threat of school violence. End of story. A public school has a duty to protect its
students and teachers, and under Boim, it has no duty to allow a material or substantial disruption
to further develop into a concrete instance of school violence before administering discipline.

Today’s tech-savvy students with constant accessibility to i-phones, droids and other portals
to the internet continue to blur the distinction between on- and off-campus speech. The once-certain
“schoolhouse gate” in Tinker is virtually nonexistent in the age of the Internet, and indeed, “the
Internet has become a school’s bathroom wall.” Other courts analyzing off-campus speech
subsequently brought to campus or to the attention of school authorities have applied Tinker’s
substantial disruption test without regard to the geographic location where the speech originated,
whether off-campus or on-campus. See generally Karl Zande, When the School Bully Attacks in the
Living Room: Using Tinker to Regulate Off-Campus Cyberbullying, 13 Barry L. Rev. 103, 131 n.
230 (Fall 2009). Clay Calvert, Punishing Public School Students for Bashing Principals, Teachers
and Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve, 7 First
Amend. L. Rev. 210, 217 n. 31 (Spring 2009); Carolyn Joyce Mattus, Is It Really My Space? Public
Schools and Student Speech on the Internet After Layshock v. Hermitage School District and Snyder
Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (applying Tinker to a website
created by a student off-campus that contained mock obituaries). These legal principles serve as
clear notice to the student whose off-campus online “speech” is brought to campus by specifically
naming the school, its teachers, its students, and knowingly posting it in a public forum, that the
First Amendment cannot provide a constant shield for student expressive conduct, regardless of its
geographical point of origin.

The 11th Circuit’s Boim decision was also consistent with the 2d Circuit’s decision that same
year in a case involving a threatening I.M. sent to a student’s classmates.


In Wisniewski v. Board of Educ. of Weedsport Cent. School Dist., 494 F.3d 34, 38-39 (2d
Cir. 2007), a student sent outside of school an instant message to some friends, portraying an icon
with a pistol shooting a bullet and text about killing his English teacher. Another student discovered
it and took it to the English teacher. School authorities notified the police, suspended the student,
and proposed a long-term suspension. In deciding whether the student's First Amendment rights had
been violated, the Second Circuit chose not to “pause to resolve” whether the student's internet
transmission was a “true threat”, for it considered the Tinker standard to be the more appropriate
test. There was no dispute that the messages had in fact reached the school and the panel
unanimously agreed that it had been “reasonably foreseeable that the [instant messaging] icon would
come to the attention of the school authorities and the teacher” and that it would “create a risk of
substantial disruption within the school environment.” The First Amendment claim was dismissed.

Student speech which can reasonably be perceived as a threat of school violence cannot be
protected by the First Amendment. Since Tinker, many circuits have found that off-campus student
speech which can reasonably be perceived as a threat of school violence can be regulated by a
School District, an approach that appears to have been adopted by the 5th Circuit.


In Ponce v. Socorro Independent School Dist., 508 F.3d 765 (5th Cir. 2007), the Fifth Circuit
upheld a student’s transfer to alternative school based on the content of his journal, which threatened a Columbine-style shooting attack on school. The student's speech posed a direct threat to the physical safety of the school population and was therefore unprotected. Id. The student in Ponce kept an extended notebook diary, written in the first-person perspective, in which he detailed the “author's” creation of a pseudo-Nazi group on the Montwood High School Campus, and at other schools in the district. Kowalski v. Berkeley County Schools, 652 F.3d 565 (4th Cir. 2011), cert. denied, 2012 WL 117817 (Jan. 17, 2012) (off campus blog about another student’s sexual activity caused material and substantial disruption); Doninger v. Niehoff, 527 F.3d 41 (2nd Cir. 2008) (vulgar and misleading blog); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2nd Cir. 2007) (instant messaging on the Internet at home a picture displaying a drawing of a pistol firing a bullet at a person's head and beneath was the word "kill" followed by the name of the student's English teacher); Boim v. Fulton County School District, 494 F.3d 978, 983 (11th Cir. 2007) (Student wrote a story about killing her teacher in her notebook, took to school, and gave the notebook to another student while at school - teacher felt threatened); D.J.M. ex rel D.M. v. Hannibal Public School District No. 60, 647 F.3d 754 (8th Cir. 2011) (high school student communicated threats against fellow students to a friend via internet instant messaging). Id. The notebook described several incidents involving the pseudo-Nazi group, including one in which the author ordered his group “to brutally injure two homosexuals and seven colored” people and another in which the author described punishing another student by setting his house on fire and “brutally murder[ing]” his dog. Id. At several points in the journal, the author expressed the feeling that his “anger has the best of [him]” and that “it will get to the point where [he] will no longer have control.” This Court stated "we therefore find it untenable in the wake of Columbine and Jonesboro that any reasonable school official who came into possession of [student’s diary] would not have
taken some action based on its violent and disturbing content.” Id.

Most of the early cases post-Tinker revealed a struggle by the courts with the situs or geographic point of origination of the student speech at issue. The Supreme Court’s first opportunity to weigh in on the question of Tinker’s applicability to student speech originating off-campus came in 2007, in a non-internet speech case that brought chuckles from members of the Court during oral argument. This was the “BONG HiTS 4 JESUS” case.

**Morse v. Frederick**

While Tinker dealt with on-campus speech, Morse v. Frederick, 551 U.S. 393 (2007), dealt with student off-campus speech, albeit during the Olympic torch relay in Juneau, Alaska. During a school-sponsored event as the bearer of the Olympic torch was running past the bleachers across from the school, high school senior Joseph Frederick unfurled his banner that read "BONG HiTS 4 JESUS." The Court in Morse held that student speech at off-campus, school sponsored activities is subject to limitations. Though generally protected, student off-campus speech could be subject to analysis under the Tinker standard as well if the speech raises on-campus concerns. The physical site where the speech occurs should be determined at the outset in order to decide whether the “unique concerns” of the school environment are implicated. Frederick’s principal told him to take the banner down. Frederick refused and was ultimately suspended. The Ninth Circuit held that the principal’s actions violated the First Amendment, and that Frederick could sue the principal. The principal appealed, and the Supreme Court reversed. In holding that the speech was not protected because it could reasonably be viewed as promoting illegal drug use, the Supreme Court found that the student’s speech, which took place off school property, was on-campus speech because it occurred during a school-sponsored event. Id. at 400-01, 408. The Supreme Court recognized that there is some
uncertainty at the outer boundaries as to when courts should apply school-speech precedents. *Id.* at 401. The event occurred during normal school hours as the school’s principal had let students out early so that they could watch the relay. However, the Court reasoned that the facts were such that there was no uncertainty in that instance - teachers and administrators were interspersed among the students and charged with supervising them, and the high school band and cheerleaders performed.

While *Morse* offers little aid in solving the specific issue of student speech published on the Internet, it does make clear that the operative test is not a simple one of geography. Where the speech is published is not the only question that needs to be asked. Justice Alito alluded to this point in his discussion of the special characteristics of the school setting and public schools as potential places of special danger. In his concurring opinion in *Morse v. Frederick*, 127 S. Ct. 2618, 2638 (2007), Justice Alito said:

> [A]ny argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. The special characteristic that is relevant in this case is the threat to the physical safety of students. School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate. Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger. *Id.* at 2638.

**Doninger v. Niehoff**

In a case involving off-campus conduct that resulted in disruption on-campus, *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008), a group of four student sent an email, and then one of them
posted a derogatory message on a blog, encouraging students to call and email the district superintendent to urge that a school event go on as scheduled. In the blog entry, the student complained that a school activity was cancelled “due to douchebags in central office” and encouraged students to contact the office in order to “piss [the district superintendent] off more.” Id. at 45. The student was prohibited from running for senior class secretary and then sought injunctive relief allowing her to run for office.

The Second Circuit affirmed the district court’s denial of relief because the student’s out of school conduct “created a foreseeable risk of substantial disruption to the work and discipline of the school.” Id. at 53.

Indeed, the student herself admitted that a sit-in was possible as the students were all “riled up.” Id. at 51. The principal and superintendent actually received an “influx” of phone calls that required their attention. Id. at 46. The court also found that the blog posting directly invited an on-campus response in the form of disrupting the school with emails and phone calls.

**O.Z. v. Board of Trustees of Long Beach Unified Sch. Dist.**

In O.Z. v. Board of Trustees of Long Beach Unified Sch. Dist., 2008 U.S. Dist. LEXIS 110409, 2008 WL 4396895, *4 (C.D. Cal. 2008), student discipline was upheld under Tinker where a student created a video off-campus during spring break that depicted a graphic dramatization of a teacher's murder and then posted the video on the Internet.

**J.C. v. Beverly Hills Unified Sch. Dist.**

In J.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094 (C.D. Cal. 2010), while at a restaurant, the student, J.C., recorded a four-minute thirty-six second video of her friends talking about a classmate, C.C. The video was recorded on J.C.’s personal video-recording device. One
of J.C.’s friends, R.S., calls C.C. a "slut," says that C.C. is "spoiled," talks about "boners," and uses profanity during the recording. R.S. also says that C.C. is "the ugliest piece of shit I've ever seen in my whole life." In the evening on the same day, Plaintiff posted the video on YouTube from her home computer. The subject of the video, C.C., saw it and came to the School with her mother on May 28, 2008, specifically to make the School aware of the video. The video was viewed at least two times on the school campus, once by a teacher and once by R.S. and her father in the administration offices. The Court found that J.C.’s geography-based argument - i.e., that the School could not regulate the YouTube video because it originated off-campus - unquestionably failed. Id. at 1108. First, under the majority rule, and the rule established by the Ninth Circuit in LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001), the geographic origin of the speech is not material; Tinker applies to both on-campus and off-campus speech. Id.


The Eighth Circuit addressed threatening student internet speech in D.J.M. v. Hannibal Pub. Sch. Dist., 647 F.3d 754 (8th Cir. 2011), where a student had sent instant messages from his home to a classmate in which he talked about getting a gun and shooting some other students at school. The Eighth Circuit found the student’s actions constituted both a “true threat” under Watts as well as material and substantial disruption under Tinker. The District Court concluded that D.J.M. "had the requisite intent to communicate his threat because he communicated his statements to another student at the school" and that he "should have reasonably foreseen that his statements would have been communicated to his alleged victims" since a reasonable person should be aware that electronic communications can now be easily forwarded. Id. at 762. Although D.J.M. did not communicate any threatening statements to the teenagers targeted in his messages, he intentionally communicated them to C.M., a third party. Since C.M. was a classmate of the targeted students, the Eighth Circuit
found that D.J.M. knew or at least should have known that the classmates he referenced could be
told about his statements. Id. The Eighth Circuit found that the School District was given enough
information that it reasonably feared D.J.M. had access to a handgun and was thinking about
shooting specific classmates at the high school. The opinion noted that in light of the District's
obligation to ensure the safety of its students and reasonable concerns created by shooting deaths
at other schools such as Columbine and the Red Lake Reservation school, the District did not violate
the First Amendment by suspending the student under a “true threat” analysis for speech made off
campus. Id. at 764. The Eighth Circuit did not stop there. The D.J.M. opinion also conducted a
Tinker analysis as to whether it was reasonably foreseeable that D.J.M.'s threats about shooting
specific students in school would be brought to the attention of school authorities and create a risk
of substantial disruption within the school environment. Id. at 766. The Eighth Circuit reiterated
that the First Amendment does not require the District to wait and see whether D.J.M.'s talk about
taking a gun to school and shooting certain students would be carried out. Id. at 764. The
suspension and placement of D.J.M. in alternative school was upheld on this basis as well.

In Doninger v. Niehoff, 642 F.3d 334 (2nd Cir. 2011), the Second Circuit concluded, after
a student applied for a preliminary injunction in a factual circumstance not unlike the one at hand,
that a school could discipline a student for an out-of-school blog post that included vulgar language
and misleading information about school administrators, as long as it was reasonably foreseeable
that the post would reach the school and create a substantial disruption there. See Doninger, 527
F.3d at 48-49. The Doninger court explained, "a student may be disciplined for expressive conduct,
even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of
substantial disruption within the school environment,' at least when it was similarly foreseeable that
the off-campus expression might also reach campus." See also Boucher v. School Board of School
District of Greenfield, 134 F.3d 821, 829 (7th Cir. 1998) (a student was not entitled to a preliminary injunction prohibiting his punishment when the student wrote articles for an independent newspaper that was distributed at school).

**N. D. J. M. Ex Rel. D. M. V. Hannibal Public School Dist., No. 60**

In D. J. M. Ex Rel. D. M. v. Hannibal Public School Dist., No. 60, 2011 WL 3241876 (8th Cir. 2011), a student sent instant messages from his home to a classmate in which he talked about getting a gun and shooting some other students at the school. The student referred to targeted classmates as “midgets, fags, and negro bitches” and specifically named five (5) classmates who “would go” or “would be the first to die,” and described a .357 Magnum that he could borrow from a friend. These statements caused a third party student to contact a trusted adult who then contacted the school principal.

The Eighth Circuit analyzed this case both under the “true threat” analysis of *Watts v. United States*, 394 U.S. 705, 707-08 (1969) and the “foreseeable material and substantial disruption” test of *Tinker*. It found under both tests that the speech was not protected by the First Amendment.

The Eighth Circuit went on to say:

. . . that in light of the District's obligation to ensure the safety of its students and reasonable concerns created by shooting deaths at other schools such as Columbine and the Red Lake Reservation school, the district court did not err in concluding that the District did not violate the First Amendment by notifying the police about the threatening instant messages and subsequently suspending him.

Most importantly, the First Amendment did not require the District to wait and see whether D. J. M.’s talk about taking a gun to school and shooting certain students would be carried out.

Because the District had reason to be alarmed upon hearing the almost contemporaneous concerns brought to it by another student and a trusted adult, it appropriately intervened by referring the matter to the police. School officials eventually suspended D. J. M. for the remainder of the
year. In short, the Eighth Circuit found that D. J. M.’s actions constituted a “true threat”. D. J. M.’s conduct was created off campus in a more limited forum than Facebook or YouTube.

The Court nonetheless found that D. J. M’s statements to a third party student via computer "instant messaging" were sufficiently serious to be perceived as both "true threats" and caused a "substantial disruption" within the school. The Court found that none of the speech was protected under the First Amendment for purposes of his section 1983 challenge to his suspension.

**Morgan v. Swanson**

In **Morgan v. Swanson**, 659 F.3d 359 (5th Cir. 2011) (en banc), cert. denied, 2012 U.S. LEXIS 4361 (U.S. June 11, 2012), a qualified immunity appeal involving the question of whether Defendant school principals violated clearly established law when they restricted an elementary student from distributing written religious materials while at school, the Fifth Circuit noted that no federal court of appeals has ever denied qualified immunity to an educator in the First Amendment context:

We hold today that the principals are entitled to qualified immunity because clearly established law did not put the constitutionality of their actions beyond debate. When educators encounter student religious speech in schools, they must balance broad constitutional imperatives from three areas of First Amendment jurisprudence: the Supreme Court’s school-speech precedents, the general prohibition on viewpoint discrimination, and the murky waters of the Establishment Clause. They must maintain the delicate constitutional balance between student’s free-speech rights and the Establishment Clause imperative to avoid endorsing religion. “The many cases and the large body of literature on this set of issues” demonstrate a “lack of adequate guidance,” which is why no federal court of appeals has ever denied qualified immunity to an educator in this area. We decline the plaintiff’s request to become the first.

**Cuff v. Valley Cent. Sch. Dist.**

In **Cuff v. Valley Cent. Sch. Dist.**, 677 F.3d 109, 114 (2nd Cir. 2012), the Second Circuit upheld a minor student’s six day suspension after he created a drawing that depicted an astronaut
and expressed a desire to blow up the school with the teachers in it. The Second Circuit found that whether the minor intended his "wish" as a joke or never intended to carry out the threat is irrelevant, as was the minor’s lack of capacity to carry out the threat expressed in the drawing. Id. at 113.

**Finding A Way To Harmonize the Student Internet Speech Cases**

It is difficult to find a common thread in these cases, particularly when the Circuits are so clearly conflicted. This much is clear. We have come a long, long way from “potty mouth” as one of the more opprobrious forms of juvenile conduct. Cyber-speech cases of recent vintage provide an accurate picture of the legal landscape with respect to on-campus and off-campus student speech. These cases cover instances where the speech may be offensive but protected, and those in which the speech conveys either a direct threat or foreseeably results in disruption at the school. Given the U.S. Supreme Court’s reluctance to enter this fray, as shown in January 17, 2012, by its denial of certiorari in three cases with conflicting legal standards for assessing off-campus student speech, school districts and school personnel need to know the soundest, safest and constitutionally secure approach that can be taken. From the standpoint of a school district seeking to provide a rational, enforceable and meaningful policy governing student use of the social network and all of its iterations, from blogs and Tweets to texting and sexting, that approach must include verification that you are in one of the Circuits that recognizes the *Tinker* disruption standard’s applicability to off-campus communications. Until the Supreme Court decides to enter this developing area of First Amendment jurisprudence that is as much legal certainty school districts can hope for.

**Conclusion**

In a post-*Tinker* world, the concept of the “schoolhouse gate” has given way to the pervasive impact of the Internet on student speech and schools. Yet the essence of the *Tinker* standard that
authorizes school disciplinary action based on the content and effect of student speech remains. Schools can regulate student speech which causes a material and substantial disruption, or that school officials can reasonably forecast will result in such disruption, even if the speech was made off campus.

In light of recent holdings in social media student speech cases, a public school board will likely err on the side of caution before it violates a student’s constitutional rights in administering discipline consistent with school district policy. The omnipresence of online social media dictates that a realistic assessment of student speech originating off-campus - and the propriety of school discipline triggered by disruptive effects of such speech - be based on more than geography, property lines or physical boundaries. Where there is a substantial nexus between a student’s off-campus “speech” and foreseeable disruption that ensues on campus, school administrators should be accorded reasonable deference in assessing the potential for harm and act accordingly. Courts have allowed wide leeway to school administrators disciplining students for writings or other conduct threatening violence, consistent with precedent involving student speech that causes a material and substantial disruption in school.