Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech

Rita J. Verga
POLICING THEIR SPACE: THE FIRST AMENDMENT PARAMETERS OF SCHOOL DISCIPLINE OF STUDENT CYBERSPEECH

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Abstract

This article details the First Amendment parameters of student cyberspeech. It was developed out of research into several factual situations of particular concern to the teacher-members of the Pennsylvania State Education Association, a union representing public school employees. Specifically, this article addresses whether and when disciplinary action may be taken against public school students who engage in both on- and off-campus cyberspeech. Potential civil and criminal causes of action are not discussed.

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I. INTRODUCTION

"Kids look at the Internet as today's restroom wall."¹

An increasing number of young people are choosing to express themselves in cyberspace. Many assume that this is a forum removed from adult awareness and/or control, and particularly from the reach of school officials. This increase may be, in part, attributable to the fact that the Internet has opened up a forum outside of school which fills a void left by U.S. Supreme Court decisions which restrict on-campus and school-sponsored student expression.²

Of course, much student cyberspeech probably could not have been expressed on-campus or through school-sponsored forums even before the U.S. Supreme Court's restrictive decisions. Students express opinions about fellow students and teachers on their personal websites or MySpace pages.³ They create satire and parody profiles and websites concerning teachers and schools and other subjects.⁴

². See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503 (1969); Emily Wax, Censored Students Post Their Exposes Online: Sites Pose Dilemma for School Officials, WASH. POST, Sept. 19, 2000, at B1 (“Thousands of high school students across the country have discovered the same way around school censorship. Just post the stories on the Web and spread the word.”). The grant of certiorari in Frederick v. Morse, 439 F.3d 1114 (9th Cir. 2006) cert. granted, 75 U.S.L.W. 3293 (U.S. Dec. 1, 2006) (No. 06-278), will be the first time in nearly twenty years that the U.S. Supreme Court directly addresses student speech rights. See infra note 14 and accompanying text.
³. See generally RateMyTeachers.com, Teacher Ratings By Students and Parents, http://www.ratemyteacher.com (last visited Nov. 4, 2006) (allowing middle and high school students to rate their teachers and administrators anonymously in the categories of easiness, clarity, helpfulness and popularity).
⁴. See, e.g., Layshock ex rel. Layshock v. Hermitage Sch. Dist., 412 F. Supp. 2d 502, 504 (W.D. Pa. 2006); Leora Harpaz, Internet Speech and the First Amendment Rights of Public School Students, 2000 BYU EDUC. & L.J. 123, 150 (2000). Harpaz’s article discusses a case in which a 13-year-old and his friends created a spoof club called Chihuahua Haters of America and a website called Chihuahua Haters of the World, which contained humorous attacks on Chihuahuas. Id. The student was eventually disciplined for “creating a Web page implicating a Dowell [Middle School] animal hate group.” Id. After the ACLU intervened he was reinstated to his computer class and his disciplinary suspension was expunged from his record. Id. See also ACLU.org, ACLU of Ohio Defends High School Student Expelled over Parody Profile on MySpace.com, http://www.aclu.org/freespeech/youth/25343prs20060425.html (last visited Oct. 6, 2006); ACLU.org, ACLU of Ohio Successfully Defends Student’s Free Speech, http://www.aclu.org/freespeech/youth/25381prs20060427.html (last visited Oct. 6, 2006); No Status Quo, ACLU of Washington Settles Internet Parody Case; Student Gets Second Chance at
And a small number even impersonate teachers and school officials, or threaten others.5

Often citing concerns about school safety in the wake of incidents of school violence, school officials are increasingly punishing students for expression created outside of school.6 While courts generally have ruled in favor of students' First Amendment rights on the Internet,7 the recent proliferation of cases involving discipline of students for cyberspeech demonstrates that school officials are either unclear about the legal boundaries of their powers or refuse to accept the idea that they cannot control or punish off-campus student expression.8 Academic sanctions and disciplinary punishments doled out by overzealous or misinformed administrators are often overturned or settled months or years later, after significant damage has been done.9

Of course, the blame does not rest entirely with school officials. As they are inclined to do, young people test boundaries, express frustration with those in power, and mimic popular culture

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5. See, e.g., J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist. (J.S. I), 757 A.2d 412 (Pa. Commw. Ct. 2000), aff'd, 807 A.2d 847 (Pa. 2002); Georgia East, Web Threats May Yield More Arrests, ASBURY PARK PRESS, Nov. 10, 1999, at A1 (describing a case in which a high school freshman was arrested for making death threats on his website that included a list called "the losers I would love to shoot, and freshman girls I would love to kill."); Harpaz, supra note 4, at 151-52 (discussing several cases in which students threatened teachers and classmates).

6. See, e.g., Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) ("The defendant argues, persuasively, that school administrators are in an acutely difficult position after recent school shootings in Colorado, Oregon, and other places. Web sites can be an early indication of a student's violent inclinations, and can spread those beliefs quickly to like-minded or susceptible people."); J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist. (J.S. II), 807 A.2d 847, 860 (Pa. 2002) ("[T]he Court of Appeals for the Ninth Circuit has specifically noted that school officials are justified, given the modern rash of violent crimes in school settings, in taking very seriously student threats against faculty or other students. We too appreciate that in schools today violence is unfortunately too common and the horrific events at Columbine High School, Colorado remain fresh in the country's mind." (citation omitted)); J.S. I, 757 A.2d at 422 ("Regrettably, in this day and age where school violence is becoming more commonplace, school officials are justified in taking very seriously threats against faculty and other students."). See also Anna Boksenbaum, Shedding Your Soul at the Schoolhouse Gate: The Chilling of Student Artistic Speech in the Post-Columbine Era, 8 N.Y. CITY L. REV. 123, 126 (2005).

7. See infra Part II.B.

8. Harpaz, supra note 4, at 145 ("In December, 1998, a federal court for the first time issued a decision in a case involving a public high school's discipline of a student based on the student's use of the Internet." (discussing Beussick v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998))). See also infra Part II.B.

9. See Harpaz, supra note 4, at 124 n.5. See also infra Part II.B.
(sometimes all at the same time). For these reasons, students need to understand that there are some clear-cut lines they cannot cross, and some areas where they should tread with caution. As administrators and students come to better understand each other's perspectives and respective legal rights and responsibilities, they may avoid potential conflicts and their frequently damaging consequences. It is with this goal in mind that this article sets forth the current state of the law of student cyberspeech.

This article will discuss the free expression rights of students in public schools, including the law governing on-campus and off-campus speech. It will review recent court cases applying free speech standards to cyberspeech, and sketch the permissible limits on and discipline of student expression that occurs off school grounds.

II. THE FIRST AMENDMENT LAW OF STUDENT CYBERSPEECH

A threshold question in determining the free expression rights of public school students is whether the student's expression is characterized as on-campus or off-campus speech. Some commentators argue that school officials cannot punish any off-campus student expression. They take the position that such speech is a matter for parental discipline or even civil or criminal charges, but not for school discipline. While there are court decisions that support this position, most courts that have examined off-campus cyberspeech have applied the same legal standards as are applied to on-campus speech. That is, most lower courts have applied the Supreme Court's Tinker standard to off-campus speech. Accordingly, this article will first review the Supreme Court's decisions concerning on-campus speech, and then review lower court decisions addressing public schools' power to punish off-campus, student cyberspeech.

10. The First Amendment to the U.S. Constitution provides: "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." U.S. CONST. amend. I. (emphasis added).


A. On-Campus Speech

The U.S. Supreme Court has decided a trilogy of cases that establish the framework for evaluating the First Amendment claims of public school students. In *Tinker v. Des Moines Independent Community School District*, the Court ruled that the suspension of students for wearing black armbands in school to object to the hostilities in Vietnam violated their First Amendment free speech rights. The Court's ruling established that public school teachers and students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and imposed on schools the burden to justify punishment of speech by demonstrating "that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' . . ." According to the Court, in the absence of evidence that a disruption had occurred, a school must provide evidence that it was reasonable to believe that a disruption was likely to occur. The Court emphasized that it was not constitutionally adequate for the school to rely on "undifferentiated fear or apprehension of disturbance . . ."
Next, the Court revisited on-campus student speech in *Bethel School District Number 403 v. Fraser*, wherein it ruled that a school could discipline a high school student who nominated another student for office through a speech containing explicit sexual metaphor.\(^20\) Departing from its emphasis on student rights in *Tinker*, the Court stressed that the purpose of public education was to "prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility . . . ."\(^21\) The Court emphasized that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."\(^22\) The Court then 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 . . . ."\(^23\)

Finally, in *Hazelwood School District v. Kuhlmeier*, the Court ruled that a school could exercise editorial control over the contents of a high school newspaper produced as part of a school’s journalism curriculum.\(^24\) The Court held that when speech was school sponsored, the school could regulate the speech on the basis of any legitimate pedagogical concern.\(^25\)

Thus, under *Bethel School District Number 403 v. Fraser*, a school may categorically prohibit lewd, vulgar or profane language on school property.\(^26\) Under *Hazelwood School District v. Kuhlmeier*, a school may regulate school-sponsored speech (i.e., speech that a reasonable observer would view as the school’s own speech) on the basis of any legitimate pedagogical concern.\(^27\) And under *Tinker*, "[s]peech falling outside of these categories . . . may be regulated only if it would substantially disrupt school operations or interfere with the right of others."\(^28\)

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21. *Id.* at 681 (internal quotation marks omitted).
22. *Id.* at 682.
23. *Id.* at 683 (emphasis added).
25. *Id.* at 273.
26. Fraser, 478 U.S. at 685 (holding that the "School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.").
27. Kuhlmeier, 484 U.S. at 273.
B. Off-Campus Speech

As is the case outside of the public school setting, there are narrow categories of speech, including off-campus student cyberspeech, which may be regulated because they are likely to inflict unacceptable harm. These narrow categories of unprotected speech include "'fighting words'; speech that incites others to imminent lawless action; obscenity; certain types of defamatory speech; and 'true threats.'"

This article does not review in great detail the cases applying the standards for "fighting words," speech that incites, obscenity, defamatory speech, and "true threats" because such speech is not exclusive to the school setting. Rather, it merely highlights relevant cyberspeech cases. This article also reviews a number of lower court decisions addressing the issue of whether public schools possess the power to punish off-campus, student cyberspeech. Although the U.S. Supreme Court has not ruled on the issue, lower courts have reached the consensus that Tinker's substantial disruption standard governs such speech.

1. "True Threats"

Schools can regulate student expression on web pages or in emails if they pose a serious or "true threat" to a person or group. A "true threat" is a statement "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals ..." To determine if a statement is a true threat, courts will consider "the speaker's intent, how the intended victim reacted to the alleged threat, whether it was communicated directly to [the] victim, whether the

33. Latour, 2005 WL 2106562, at *1 (internal quotations omitted).
threat was conditional, and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.”

In Latour v. Riverside Beaver School District, the school district argued that rap songs created by middle-school student Anthony Latour were either “true threats” or that the songs caused a material and substantial disruption under Tinker. Latour put rap music and lyrics he wrote, which contained profanity and violent imagery, on the Internet. He did not bring any of his four songs to school. The songs included: (1) a song mentioning another middle school student (Jane Smith); (2) a track titled “Murder, He Wrote;” (3) a battle rap song with John Doe titled “Massacre;” and (4) a battle rap song uploaded to his personal website titled “Actin Fast ft. Grimey.”

The school expelled Latour for two years. Latour sought a preliminary injunction enjoining his expulsion, and a federal judge ordered his return to school.

In deciding that the songs were not true threats, the District Court for the Western District of Pennsylvania noted that rap songs are metaphors, and that those songs that contain violent imagery do not actually intend violence. The court went on to say that because Latour did not directly communicate the songs to either Jane Smith or John Doe, and because neither of them felt threatened (though Jane Smith’s mother testified that the girl was “humiliated and broken hearted”), Latour was likely to prevail on the issue of whether the songs were true threats.

In J.S. ex rel. H.S. v. Bethlehem Area School District, a Pennsylvania student was expelled for creating a webpage from home

34. Id. See also J.S. II, 807 A.2d at 858.
37. Id. at *1.
38. Id.
41. Id. at *3.
42. Id. at *2.
43. Id.
listing reasons to kill his math teacher, including a request for money to hire a hitman. The Commonwealth Court of Pennsylvania affirmed the expulsion, holding that the student’s speech was not protected because it seriously threatened the teacher and disrupted the school. The Pennsylvania Supreme Court upheld the expulsion, but concluded that the student’s speech did not constitute a true threat.

While the student’s website, called “Teacher Sux,” was created at home, it was accessed by the student at school and shown to a fellow student. It consisted of several web pages that made derogatory comments about an algebra teacher, Kathleen Fulmer, and a principal, A. Thomas Kartsotis. The website referred to Fulmer as a “Stupid Bitch,” a “fat fuck,” and a “fat bitch” who “shows off her fat fucking legs.” The site featured “a diagram of Mrs. Fulmer with her head cut off and blood dripping from her neck.” The student asked, rhetorically, why Fulmer should die and then asked visitors to “give me $20.00 to help pay for the hitman.”

The Commonwealth Court suggested that the student’s speech constituted a true threat, even as it remarked that the solicitation for twenty dollars could be both physically and emotionally disturbing, “whether serious or otherwise.” In another seemingly contradictory comment, the court added “[i]t is of no significance that the local authorities and the FBI chose not to pursue the matter.” This statement by the court is curious since presumably, had the student presented a true threat, the authorities would have pursued criminal prosecution. Thus, it appears that the court may not have actually believed that the

45. Id. at 421, 426.
47. Id. at 851, 865.
49. Id. at 416. See also Clay Calvert, Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground, 7 B.U. J. SCI. & TECH. L. 243, 246 (2001).
51. Id.
52. Id. at 421 (emphasis added).
53. Id. at 425.
54. See id. at 426-29 (Friedman, J., dissenting). Both the local police and FBI conducted investigations but declined to pursue criminal charges. Id. at 415 n.2 (majority opinion). It should also be noted that the teacher in J.S. ex rel. H.S. v. Bethlehem Area School District sued the student for defamation, interference with contractual relations, invasion of privacy, and loss of consortium. The case was settled on undisclosed terms. See J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist. (J.S. II), 807 A.2d 847 (Pa. 2002).
student's speech constituted a true threat, and that it upheld the discipline on the grounds of creating a material and substantial disruption.\textsuperscript{55}

2. "Fighting Words"

Another type of off-campus cyberspeech that is unprotected by the First Amendment is known as "fighting words."\textsuperscript{56} Fighting words "by their very utterance inflict injury or tend to incite an immediate breach of the peace."\textsuperscript{57} In Chaplinsky v. New Hampshire, the U.S. Supreme Court explained that fighting words are of such slight social value that any benefit derived from the words is clearly outweighed by the social interest in order and morality.\textsuperscript{58} Fighting words are "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."\textsuperscript{59}

The circumstances surrounding words are crucial in determining whether they constitute "fighting words."\textsuperscript{60} The words "must do more than bother the listener; they must be nothing less than 'an invitation to exchange fisticuffs.'"\textsuperscript{61} "Profane" words alone, unaccompanied by any evidence of violent arousal, are not "fighting words."\textsuperscript{62}

At the time of this writing, there were no reported cyberspeech cases involving fighting words. However, it would seem that such speech could be an issue in the context of instant or text messaging, or devices allowing for handheld email. Such technologies would allow words to be communicated directly and immediately be provocative.

\textsuperscript{55} See infra Part II.B.3.a. See also Emmet v. Kent Sch. Dist., 92 F. Supp. 2d 1088 (W.D. Wash. 2000) (holding that the District did not present any evidence that mock obituaries and voting actually threatened other students, that the student intended to intimidate or threaten anyone, or that the student manifested any violent tendencies, and enjoining his suspension).

\textsuperscript{56} Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1941).

\textsuperscript{57} Id. See also Commonwealth v. Mastrangelo, 414 A.2d 54, 58 (1980).

\textsuperscript{58} Chaplinsky, 315 U.S. at 572. See also Commonwealth v. Pringle, 450 A.2d 103, 107 (Pa. Super. Ct. 1982) (holding that profanities directed at police officers were fighting words and therefore constituted unprotected speech).

\textsuperscript{59} Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

\textsuperscript{60} See, e.g., Commonwealth v. Hock, 728 A.2d 943, 943, 946 (Pa. 1998) (the Pennsylvania Supreme Court, holding that a "single profane remark" did not constitute fighting words, overturned the defendant's breach of the peace conviction).


\textsuperscript{62} See id. (citing Cohen v. California, 403 U.S. 15, 20 (1971); Brockway v. Shepherd, 942 F. Supp. 1012, 1017 (M.D. Pa. 1996) ("[S]tanding alone, profane or vulgar language is not itself obscene and does not amount to fighting words.").
3. Materially and Substantially Disruptive Speech

As discussed above, the First Amendment does not protect off-campus speech if the speech causes a material and substantial disruption to the educational process or interferes with the rights of others. 63

a. Speech that causes emotional injury manifesting physical symptoms in a teacher, offense to a principal, and lowered morale in staff is a substantial disruption

As discussed in the context of "true threats," the Pennsylvania Supreme Court in J.S. ex rel. H.S. v. Bethlehem Area School District affirmed the Commonwealth Court's conclusion that a School District did not violate the constitutional rights of an eighth grade student when it expelled him for creating a website which contained threatening, derogatory, and offensive material that hindered the educational process through its effect upon employee targets and upon other students. 64 The student created a site entitled "Teacher Sux," which included allegations that the principal was engaged in an extramarital affair and which posted a picture of a teacher with her head severed and dripping blood. 65 Another picture of the teacher morphed into a picture of Adolph Hitler. 66 In addition, the student requested that visitors to the site send him money to pay for the teacher's execution. 67 Throughout the site, the student used obscene and inflammatory language. 68

The teacher suffered serious physical and psychological problems, including headaches, "stress, anxiety, loss of appetite, loss of sleep, loss of weight, and a general sense of lost well-being." 69 She took Zantac as an anti-anxiety/anti-depressant, found herself unable to return to school at the end of the academic year, and ultimately applied for a medical sabbatical for the following year. 70 The site also

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63. See supra Part II.B.
64. See supra notes 44-55 and accompanying text.
68. Id.
69. Id.
70. Id. at 416-17. See also Calvert, supra note 49, at 247.
offended the principal\textsuperscript{71} and demoralized the school community and other staff members.\textsuperscript{72} The Board voted to expel the student pursuant to a policy prohibiting threats and harassment to students and teachers.\textsuperscript{73}

The court considered whether the student’s speech materially and substantially interfered with the educational process, and concluded that the website hindered the educational process particularly with regard to the physical and emotional injury to the teacher which left her unable to teach.\textsuperscript{74}

\textit{b. Speech that proximately causes teachers to be unable to teach classes is a substantial disruption}

In \textit{Layshock v. Hermitage School District}, the District Court for the Western District of Pennsylvania held that school officials did not violate the First Amendment rights of Justin Layshock by punishing him for posting a parody profile on MySpace.com.\textsuperscript{75} Layshock used his grandmother’s computer during non-school hours to create and post an online “parody profile” of the school principal.\textsuperscript{76} With the exception of a photo of the principal copied from the school’s website, no school resources were used to create the parody.\textsuperscript{77} In answering the website’s profile template, Layshock focused on the theme of “big.”\textsuperscript{78} His answers included: “big fag,” “big hard-on,” “big keg behind my desk,” “big blunt,” and “too drunk to remember.”\textsuperscript{79}
The court found that although the profile was non-threatening and non-obscene, it was substantially disruptive of school operations under *Tinker* because it was so popular with students who accessed it from school that the school shut down the computer system for five days.\(^{80}\) The court assumed *arguendo* that Layshock’s initial creation of the parody was conduct protected by the First Amendment, but still found that the parody profile caused actual disruption of the day-to-day operation of the high school for nine days.\(^{81}\) The court stated that “[t]he lack of access to the computer system caused the cancellation of several classes and interfered with students’ ability to use the computers for their school-intended purposes.”\(^{82}\) The school’s technology coordinator was required to devote approximately 25% of his time to dealing with the disruption, including attempting to block addresses from which students were attempting to access the profiles, and installing additional firewall protections on the school’s computer system.\(^{83}\) In addition, the co-principal testified that he dedicated “at least 25% to 30% of his time to dealing with the disruptions and the investigation into the source of the parodies.”\(^{84}\)

In upholding the discipline, the court noted that “Justin also appears to have violated the school’s computer policy by misappropriating [the principal’s] picture and posting it on the parody, and by his attempt to access the parody numerous times while using a computer in his Spanish teacher’s classroom (after the ban on student computer use was in effect).”\(^{85}\) Finally, the court observed that although the punishment inflicted upon Layshock was arguably excessive, it was not empowered to second-guess the appropriateness of the school’s actions absent an underlying violation of his legal rights.\(^{86}\) It stated that the public interest was best served by allowing school officials “to administer their high school and discipline their students as they determine, despite the Court’s reservations regarding the appropriateness of Justin’s punishment.”\(^{87}\)

\(^{80}\) *Id.* at 508.
\(^{81}\) *Id.*
\(^{82}\) *Id.*
\(^{83}\) *Id.*
\(^{84}\) *Id.*
\(^{85}\) *Id.*
\(^{86}\) *Id.* at 509.
\(^{87}\) *Id.*
4. Speech That is Not Substantially Disruptive

The *Latour* case, introduced in the context of "true threats," also provides an example of off-campus speech that is not substantially disruptive.\(^8^8\) In *Latour*, the District argued that Latour's rap songs constituted true threats and were substantially disruptive.\(^8^9\) However, the District Court for the Western District of Pennsylvania found that Latour's rap songs did not cause a material and substantial disruption to the school day nor did the District have a reasonable fear of substantial disruption.\(^9^0\)

The evidence showed that Latour's songs did not cause any disruptions prior to his expulsion.\(^9^1\) The District argued that the disruption consisted of: (1) the withdrawal of students; and (2) the wearing of protest t-shirts by other students.\(^9^2\) The court discredited the District's argument that it feared losing the three students who were apparently the subjects of Latour's songs.\(^9^3\) The court noted that other factors, including Latour's punishment by the District and the fear of retribution for that punishment, contributed to two students' withdrawal and to the wearing of the "Free Accident" t-shirts.\(^9^4\) Finally, the court suggested that even if students' wearing of t-shirts and talking about the expulsion had been a result of the songs, these occurrences would not rise to the level of a substantial disruption.\(^9^5\)

In *Emmet v. Kent School District No. 415*, the District Court for the Western District of Washington issued a temporary restraining order prohibiting the school from suspending a high school student for creating a webpage from his home without using school resources or time.\(^9^6\) The site contained commentary on the school administration and faculty, and mock "obituaries" of at least two of the student's friends.\(^9^7\) The site allowed visitors to vote on who would be the subject of the next mock obituary.\(^9^8\) Interestingly, the District

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89. *Id.*
90. *Id.* at *3.
91. *Id.* at *2.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
97. *Id.*
98. *Id.*
became aware of the webpage only after an evening television news story characterized the student’s website as featuring a “hit list” of people to be killed.99 The night of the broadcast, the student removed his site from the Internet.100 The next day, he was placed on “emergency expulsion for intimidation, harassment, disruption to the educational process, and violation of Kent School District copyright.”101 The expulsion was subsequently modified to a five-day suspension.102

The court held that the student had a substantial likelihood of success on the merits of his claim that the school violated his First Amendment rights, noting that “[t]he obituaries were written tongue-in-cheek, inspired, apparently, by a creative writing class last year in which students were assigned to write their own obituary.”103 The court further held that the plaintiff had a substantial likelihood of success on the merits since the speech occurred off-campus, the District did not present any evidence that the mock obituaries and voting actually threatened any student or that Plaintiff intended to intimidate or threaten anyone, and there was no evidence manifesting any violent tendencies.104

Off-campus cyberspeech that is merely rude, abusive, and demeaning is not a substantial disruption. Under Bethel School District No. 403 v. Fraser, school officials may punish on-campus explicit, indecent, or lewd speech “to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the ‘fundamental values’ of public school education.”105 However, Justice Brennan’s concurring opinion specifically states that “[i]f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate . . . .”106

In Killion v. Franklin Regional School District, a high school student e-mailed friends a David Letterman-type “Top Ten” list from

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99. Id.
100. Id.
101. Id.
102. Id.
103. Id.
104. Id. at 1089-90.
106. Id. at 688 (Brennan, J., concurring) (citation omitted).
his home computer.\textsuperscript{107} The District argued that the list contained several lewd and vulgar statements, including: "[H]e's just not getting any . . . . Because of his extensive gut factor, the 'man' hasn't seen his own penis in over a decade . . . . Even if it wasn't for his gut, it would still take a magnifying glass and extensive searching to find it."\textsuperscript{108} Although the District Court for the Western District of Pennsylvania agreed that several passages from the list were lewd, abusive, and derogatory, it held that because the list was created out of school, and was not brought onto school grounds by the student, he could not be disciplined for it.\textsuperscript{109} The \textit{Killion} court noted that "[d]isliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under \textit{Tinker}."\textsuperscript{110} It further noted \textit{Tinker}'s holding that "the mere desire to avoid 'discomfort' or 'unpleasantness' is not enough to justify restricting student speech . . . ."\textsuperscript{111}

Finally, in \textit{Beussink v. Woodland}, the District Court for the Eastern District of Missouri held that a website which was highly critical of a high school and included crude and vulgar language to convey opinions regarding teachers, the principal, and the school's own webpage was likely protected by the First Amendment.\textsuperscript{112} Beussink invited readers to contact the school principal about their opinions regarding the high school, and included a hyperlink to the school site.\textsuperscript{113}

The court enjoined the high school from disciplining Beussink for an article he posted on his personal website where the site was created off-campus, during non-school hours, using a program found online.\textsuperscript{114} Although several students saw the homepage in school, no material and substantial interference to classes occurred.\textsuperscript{115} Moreover, the court noted that "there was no evidence to support a particularized
reasonable fear of such interference."

The court concluded that "[s]peech within the school that substantially interferes with school discipline may be limited. Individual student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection."  

5. Off-Campus Cyberspeech That is Unintentionally Brought On-Campus By Others

Courts have applied the Tinker substantial disruption test where off-campus speech makes its way onto the school campus, whether by the communicating student or others to whom the message was communicated. As discussed previously, in Killion, a high school student was suspended for 10 days for sending an e-mail from his home computer to eighty friends with a David Letterman-type "Top Ten" list making fun of the school athletic director's size. Someone else printed the list and brought it to school. The school suspended the student who had created the list. The District Court for the Western District of Pennsylvania ordered the student reinstated, ruling that even though the school would have been justified in punishing the author if he had brought the list to school, they could not do so under the circumstances.

Where a communicating student creates a website off-campus, and then privately views that site on-campus, Fraser's prohibition on lewd, indecent, or offensive on-campus speech is not triggered. In Coy ex rel. Coy v. Board of Education of the North Canton City School, the student created a website on his home computer and the

116. Id. at 1181.
117. Id. at 1182 (emphasis added).
119. Id. at 449.
120. Id.
121. Id. at 458. See also Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000); Beussink, 30 F. Supp. 2d at 1180; LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001) (analyzing a student poem composed off-campus and brought onto campus by the composing student under Tinker); Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 827-28 (7th Cir. 1998) (student disciplined for an article printed in an underground newspaper that was distributed on school campus); Bystrom v. Fridley High Sch., 686 F. Supp. 1387, 1392 (D. Minn. 1987) (student disciplined for writing article that appeared in an underground newspaper distributed on school campus); Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1071, 1075-77 (5th Cir. 1973) (student punished for authoring article printed in an underground newspaper distributed off-campus, but near school grounds).
school did not like the contents of the website.\textsuperscript{122} The website described a number of students as “losers” and contained what the District Court for the Northern District of Ohio described as crude and juvenile material.\textsuperscript{123} However, it contained “no material that could remotely be considered obscene.”\textsuperscript{124} No part of the website was created using school equipment or during school hours.\textsuperscript{125} However, the student had privately viewed the site at school.\textsuperscript{126}

The student claimed that the District disciplined him for the content of his website in violation of his freedom of expression.\textsuperscript{127} The District initially explained that its discipline resulted from the creation of the website, and then later claimed that it disciplined the student because he violated the District’s Internet policy and displayed vulgar speech at school.\textsuperscript{128}

The student argued that since no speech took place on-campus, neither \textit{Fraser} nor \textit{Tinker} applied.\textsuperscript{129} In a careful analysis, the court declined to apply \textit{Fraser} because the student had only privately viewed his website at school.\textsuperscript{130} Moreover, the court noted that the school did not sanction the student’s expressive activity.\textsuperscript{131} The court also noted that the school did not knowingly provide any materials to support the expression.\textsuperscript{132} The court applied \textit{Tinker}’s holding that “it is only appropriate to regulate ‘silent, passive expression of opinion’ when the speech would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school’ . . . .”\textsuperscript{133} The court held that summary judgment was inappropriate, but added that if the school disciplined the student purely because they did not like the content of the website, the student would prevail.\textsuperscript{134} Moreover, the court stated that “no evidence

\begin{itemize}
\item \textsuperscript{122} Coy ex rel. Coy v. Bd. of Educ. of N. Canton City Sch., 205 F. Supp. 2d 791, 795, 800 (N.D. Ohio 2002).
\item \textsuperscript{123} \textit{Id.} at 795.
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{Id.} at 795-96, 800.
\item \textsuperscript{127} \textit{Id.} at 797.
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{Id.} at 799.
\item \textsuperscript{130} \textit{Id.} at 800.
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} \textit{Id.} at 801.
\end{itemize}
suggests that Coy’s acts in accessing the website had any effect upon the school district’s ability to maintain discipline in the school.\textsuperscript{135}

In \textit{Flaherty v. Keystone Oaks School District}, Flaherty, a high school student-athlete posted three messages from home and one from school on an Internet bulletin board.\textsuperscript{136} The trash-talking messages were directed at the volleyball players from another school, and included some profanity and criticism of a District teacher.\textsuperscript{137} Specifically, the student said: “PS Bemis . . . from Baldwin: you’re no good and your mom . . . is a bad art teacher,” adding “P.S. My dog can teach art better than Bemis’ mom.”\textsuperscript{138} The School District kicked Flaherty off the volleyball team and suspended his computer privileges.\textsuperscript{139} The District Court for the Western District of Pennsylvania reversed the punishment, ruling that Flaherty’s speech, which was created outside of school, could not be punished by the school’s overbroad and vague policies.\textsuperscript{140}

Although student handbook policies relating to discipline, student responsibility, and technology permitted students to be disciplined for “abusive,” “offensive,” “harassing,” or “inappropriate” behavior, the court held that the policies were unconstitutionally overbroad and vague in violation of students’ First Amendment free speech rights.\textsuperscript{141} The court stated:

\textsuperscript{135} \textit{Id.}
\textsuperscript{137} \textit{Id.} at 700 n.1.
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.} at 701. See also ACLU of Pennsylvania, supra note 39, at 11.
\textsuperscript{140} Flaherty, 247 F. Supp. 2d at 704-05.
\textsuperscript{141} An overbroad statute “is one that is designed to punish activities that are not constitutionally protected, but which prohibits protected activities as well.” \textit{Id.} at 702-03 (quoting Killion v. Franklin Reg’l Sch. Dist., 136 F. Supp. 2d 446, 458 (W.D. Pa. 2001). The void for vagueness doctrine prohibits a government regulation that (1) fails to give a person adequate warning that this conduct is prohibited, or (2) fails to set out adequate standards to prevent arbitrary and discriminatory enforcement. \textit{Id.} at 703. In a facial challenge to overbreadth and vagueness of a law, “a court must determine whether the enactment reaches a substantial amount of constitutionally protected conduct.” \textit{Id.}

In \textit{Saxe v. State College Area School District}, the school’s policy did not limit itself to prohibiting lewd, offensive or school-sponsored speech, and, therefore, a significant amount of the speech prohibited under the policy was protected. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 216 (3d Cir. 2001). Since there was insufficient evidence of substantial disruption or interference caused by this broad range of prohibited protected speech, the court found that the policy was unconstitutionally overbroad. \textit{Id.}

Further, in \textit{Coy ex rel. Coy v. Board of Education of the North Canton City School}, the school district’s student conduct code catch-all section, which explicitly allowed school officials to discipline students for activity which school officials found inappropriate, was
The policy could be (and is) read by school officials to cover speech that occurs off school premises and that is not related to any school activity in an arbitrary manner. Consequently, I find the Student Handbook policies at issue to be unconstitutionally overbroad and vague because they permit a school official to discipline a student for an abusive, offensive, harassing or inappropriate expression that occurs outside of school premises and not tied to a school related activity.\(^\text{142}\)

The court went on to explain that school policies which are not limited to speech that causes, or is likely to cause, a substantial disruption with school operations, as set forth in \textit{Tinker}, are unconstitutionally overbroad.\(^\text{143}\) Moreover, policies which do not contain any geographic limitations and can be read to arbitrarily prohibit speech that occurs off the school’s campus that is unrelated to school activities are unconstitutionally overbroad and vague.\(^\text{144}\)

6. Off-Campus Cyberspeech That Creates an Expectation of Substantial Disruption

Although “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression,”\(^\text{145}\) “if a school can point to a well-founded expectation of disruption – especially one based on past incidents arising out of similar speech, the restriction may pass constitutional muster.”\(^\text{146}\)

For example, in \textit{Killion}, the District attempted to support its discipline of the top-10 list creator by arguing that the student had created such lists in the past, and had been warned that he would be punished for distributing similar lists in the future.\(^\text{147}\) However, the court held that the District failed to present any evidence that the earlier lists had caused disruption that would have supported a belief that substantial disruption would follow from the list.\(^\text{148}\) The District offered evidence that the teacher who was the subject of the current

\(^{142}\) \textit{Flaherty}, 247 F. Supp. 2d at 706.

\(^{143}\) \textit{Id.}

\(^{144}\) \textit{Id.}


\(^{146}\) \textit{Killion}, 136 F. Supp. 2d at 455 (citing \textit{Saxe}, 240 F.3d at 212).

\(^{147}\) \textit{Id.}

\(^{148}\) \textit{Id.}
list was upset and had a hard time doing his job, and that a librarian who was the subject of a previous list was almost in tears. The court nevertheless held that "these events do not rise to the level of substantial disruption, and do not support an expectation of disruption defense."

III. CONCLUSION

Although the law concerning in-school discipline of student cyberspeech continues to evolve, there are some bright-line rules of which administrators, teachers, and students should be aware.

Generally, cyberspeech which is created on the school campus or using school resources is subject to much greater restriction than speech created off-campus. A school may categorically prohibit lewd, vulgar, or profane language on school property, and may regulate school-sponsored speech (i.e., speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern.

Because school safety and school operation are such compelling interests, students may also face school discipline for on- or off-campus cyberspeech if their speech constitutes a "true threat," is materially and substantially disruptive of school operations or interferes with the right of others, or is otherwise in violation of a constitutionally valid school policy.

Specifically, recent caselaw and settlements concerning parody websites and profiles make clear that such speech is protected by the First Amendment, as long as it does not create a material and substantial disruption to the educational process or interfere with the rights of others. Speech that causes emotional injury manifesting physical symptoms in a teacher has been held substantially disruptive, as has speech that proximately causes teachers to be unable to teach classes.

149. Id. at 456.
150. Id.
151. See supra note 4 and accompanying text.
Although online impersonation has not been dealt with in the caselaw, it appears that the courts would treat such speech in the same manner as opinion and commentary. That is, it would be constitutionally protected as long as it did not create a material and substantial disruption to the educational process or interfere with the rights of others.

Traditionally, courts have been reluctant to permit restriction of student speech that occurs off school grounds, unless it creates a substantial disruption to the educational environment. With the growth of the Internet as a means for students to interact, many teachers and administrators see a connection between off-campus expression and on-campus disruption to the learning environment. Such disruptions are particularly apparent when students insult and bully other students.

However, the disruptions that teachers and administrators perceive as a result of student expression, some of which is crude and sophomoric, does not always rise to the level which is legally required in order to curb student speech. Moreover, teachers and administrators seem to fail to fully understand that the Internet is merely the latest forum, albeit a widely accessible one, through which students vent frustrations and amuse each other, as they have always done.

As teachers, administrators, and students come to better understand each others' perspectives and the boundaries of their respective legal rights, conflicts over student cyberspeech and their damaging effects should occur less frequently, but are unlikely to cease completely.