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## OMNIPRESENT STUDENT SPEECH AND THE SCHOOLHOUSE GATE: INTERPRETING *TINKER* IN THE DIGITAL AGE

WATT LESLEY BLACK, JR. PH.D.\*

### INTRODUCTION

Historically, school authorities rarely took note of student expression that occurred outside of the school setting, but the times have changed. Technological advances have broadened the scope and reach of student speech in ways that were difficult to imagine twenty years ago. Students are using technology to threaten, bully, and harass not only their classmates, but also school employees. School administrators face enormous pressure to effectively address these issues, but they must also consider the First Amendment rights of students when deciding how and when to discipline them for what they say online while off campus.

The United States Supreme Court has provided clear guidelines for dealing with student speech on campus. In the landmark 1969 decision *Tinker v. Des Moines*, the Court established that, absent a showing that their speech would materially or substantially disrupt school or invade the rights of others, students enjoy the protection of the First Amendment.<sup>1</sup> In *Bethel v. Fraser* and *Morse v. Frederick*, the Court carved out exceptions that allow school administrators to discipline students for speech that is lewd, vulgar, or that advocates the use of illegal drugs.<sup>2</sup> But the Supreme Court has yet to deal

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1. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). This has come to be known as the “*Tinker Standard*” for analyzing student speech.

2. *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (creating an exception that allows school officials to regulate student speech that could reasonably be seen as advocating the use of illegal

specifically with electronic student speech that originates off the school campus. Therefore, school administrators continue to struggle to appropriately balance the school's interest in safety, order, and discipline against the First Amendment rights of students.

This Article will examine the legal implications of disciplining students for cyber-speech that occurs off campus by analyzing recent federal decisions, paying particular attention to the issue of whether and how circuit courts have been willing to extend the reach of *Tinker* beyond the schoolhouse gate. Section I will outline two Second Circuit cases from 2007 and 2008 that required the court to consider *Tinker's* applicability to off-campus electronic speech. Section II will examine a rift between the judges of the Third Circuit that emerged in 2011 as they struggled with the same dilemma. Section III will review the most recent decisions from other circuits dealing with off-campus cyber-speech and how these circuits handled the *Tinker* question. Section IV will drop to the district level to briefly review how lower courts have applied *Tinker* to off-campus electronic student speech. Section V will pull out common threads from the case law in order to highlight critical considerations for school administrators who may be facing these issues in practice.

#### I. CYBER-SPEECH AND THE *TINKER* TEST IN THE SECOND CIRCUIT

In 2007, the Second Circuit heard the case of Aaron Wisniewski, an eighth-grader who was disciplined for creating an instant message icon with disturbingly violent imagery.<sup>3</sup> The icon featured a pistol firing bullets into a head, punctuated with blood splatters.<sup>4</sup> The phrase "Kill Mr. VanderMolen" (a reference to Aaron's English teacher) was inscribed on the image, which appeared on the screen as a means of identification whenever Aaron communicated with anyone on his "buddy list."<sup>5</sup> The icon was visible for three weeks, long enough for one of Aaron's classmates to give a printout of the drawing to the English teacher.<sup>6</sup> Distressed, Mr. VanderMolen forwarded the information to school authorities, who then alerted law enforcement.<sup>7</sup> When questioned over the matter by school administrators, Aaron admitted that he had created the icon.<sup>8</sup> He was suspended for five days, pending a hearing to

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drugs); *Bethel v. Fraser*, 478 U.S. 675, 683 (1986) (creating an exception allowing school officials to regulate student speech that is vulgar or lewd).

3. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35 (2d Cir. 2007).

4. *Id.* at 36.

5. *Id.* Aaron's "buddy list" comprised around fifteen people, a number of whom were classmates. *Id.*

6. *Id.*

7. *Id.*

8. *Wisniewski*, 494 F.3d at 36.

discuss a long-term suspension.<sup>9</sup> Mr. VanderMolen, at his own request, was relieved of his teaching assignment in Aaron's English class.<sup>10</sup>

Simultaneously, a police inquiry was closed and criminal proceedings abandoned after an investigator concluded that the icon was not a threat, but intended as a joke.<sup>11</sup> A psychologist interviewed Aaron and concurred with the police investigator that he posed no danger.<sup>12</sup> Nevertheless, a school district hearing officer believed that the image constituted a threat and recommended Aaron's removal from school for a semester.<sup>13</sup> After completing his alternative placement, Aaron returned to his home school. However, citing a hostile environment, the family eventually moved from the district.<sup>14</sup>

Aaron and his parents filed a 42 U.S.C. § 1983 lawsuit against the school board and the superintendent alleging that Aaron's speech did not constitute a "true threat," and therefore, it was protected speech under the First Amendment.<sup>15</sup> They claimed that the school's actions were in retaliation for Aaron's exercise of a protected right. The district court agreed with the school that the icon represented a true threat, granting summary judgment.<sup>16</sup>

On appeal, the Second Circuit declined to rule on whether or not the icon constituted a true threat and instead chose to examine Aaron's speech under the *Tinker* standard.<sup>17</sup> The Second Circuit's interpretation of *Tinker* would allow schools to sanction speech in cases where material and substantial disruption occurs or can reasonably be forecast to occur, irrespective of where the speech originates.<sup>18</sup> In splitting with his colleagues, Judge John Walker theorized that "a school may discipline for off-campus expression that is likely to cause a disruption on campus only if it was foreseeable to a reasonable adult, cognizant to the perspective of a student, that the expression might reach campus."<sup>19</sup> Judge Walker was advocating an additional prong to *Tinker* for cases involving off-campus speech: a threshold question of reasonable foreseeability that the speech would reach the school. Although he was the sole advocate of this modified *Tinker* test, all three judges were in agreement that, even if they were to apply the additional prong, the school was still justified in disciplining Aaron: "The potentially threatening content of the icon and the extensive distribution of it, which encompassed 15 recipients, including some

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9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Wisniewski*, 494 F.3d at 37.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 38.

18. *Wisniewski*, 494 F.3d at 39.

19. *Id.* at 39 n.4.

of Aaron's classmates, during a three-week circulation period, made this risk at least reasonably foreseeable to a reasonable person, if not inevitable," the court explained.<sup>20</sup> Once having reached the school, the court concluded administration could reasonably predict a heightened risk of a material and substantial disruption.<sup>21</sup>

A year later, the Second Circuit addressed the issue of off-campus cyber-speech again.<sup>22</sup> Avery Doninger was an eleventh grader at Lewis Mills High School in Burlington, Connecticut, and a junior class student council officer.<sup>23</sup> Four days before a student council-sponsored battle of the bands (known as "Jamfest") was scheduled to take place, student council members were informed that the teacher who was to run the sound and lights in the newly constructed theatre had a conflict.<sup>24</sup> Jamfest could not happen in the theatre without this particular staff member present. Therefore, the event would have to be rescheduled or moved to the school cafeteria.<sup>25</sup> Student council members worried that rescheduling might cause some of the bands to drop out.<sup>26</sup> As an alternate venue, the cafeteria was problematic because it did not have an adequate sound system and would have forced the bands to perform acoustically.<sup>27</sup>

Avery and three other students gathered in a school computer lab to write an email, which she sent out *en masse*, alleging that school authorities had forbidden the students from holding Jamfest in the new theatre.<sup>28</sup> They encouraged readers to register their displeasure by calling Superintendent Paula Schwartz.<sup>29</sup> Both Schwartz and LMHS Principal Karissa Niehoff were soon inundated with phone calls and emails regarding the controversy.<sup>30</sup> Niehoff was off campus at a professional meeting and was summoned by Schwartz to return to campus where she confronted Avery in the hallway later that day.<sup>31</sup> Niehoff challenged Avery's assertion that the school would not allow them to use the new theatre and reiterated that the students were free to use the theatre on an alternate date.<sup>32</sup> She requested that Avery and her friends

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20. *Id.* at 39–40.

21. *Id.* at 40.

22. *Doninger v. Niehoff*, 527 F.3d 41, 43 (2d Cir. 2008).

23. *Id.* at 44.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Doninger*, 527 F.3d at 44.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Doninger*, 527 F.3d at 44–45.

send an email correcting the misleading information.<sup>33</sup> Rather than heeding Niehoff's counsel, Avery wrote a blog, further expressing her displeasure.<sup>34</sup> Her online editorial included references to certain central office employees as "douchebags" and accused them of unilaterally cancelling the event.<sup>35</sup> Again, she encouraged readers to write to the superintendent to voice their complaints in order to "piss her off more."<sup>36</sup>

The next day, the student council met with its faculty sponsor and agreed upon a rescheduled date, but Schwartz and Niehoff continued to receive complaints even after the issue was resolved.<sup>37</sup> It was not until early May that Schwartz and Niehoff became aware of Avery's blog.<sup>38</sup> As a result of her actions, Niehoff determined that Avery should be disqualified from eligibility to run for student council office.<sup>39</sup> She explained that Avery's failure to heed her advice "regarding the proper means of expressing disagreement with administration policy" played a role in her decision to bar Avery from seeking a leadership position within the student council.<sup>40</sup> As a write-in candidate, Avery still received the most votes, but Niehoff refused to allow her to take office, instead naming the second place candidate as the senior class secretary.<sup>41</sup>

Avery's mother filed a complaint on her daughter's behalf with the Connecticut Superior Court, claiming that her daughter's rights under both the First Amendment of the Federal Constitution and analogous state law had been violated.<sup>42</sup> Niehoff and Schwartz successfully had the case moved to the federal district court, where Doninger sought and was denied injunctive relief to prevent the school from imposing the discipline.<sup>43</sup>

On appeal, the Second Circuit chose to apply the *Tinker* standard to the speech, despite the fact that it had occurred off campus.<sup>44</sup> It is significant that, in this case, the Second Circuit applied the two-pronged framework that was a point of disagreement in *Wisniewski*—adding a test of reasonable foreseeability that the speech would reach campus—before considering whether Avery's speech had created a material or substantial disruption.<sup>45</sup>

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33. *Id.* at 45.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Doninger*, 527 F.3d at 45–46.

38. *Id.* at 46.

39. *Id.*

40. *Id.*

41. *Id.* at 46.

42. *Doninger*, 527 F.3d at 46–47.

43. *Id.* at 47.

44. *Id.* at 48.

45. *Id.*

Citing *Wisniewski*, Circuit Judge Debra Ann Livingston explained that the off-campus character of student expression “does not necessarily insulate the student from school discipline,” especially when it was “reasonably foreseeable” that the student expression would ultimately come to the attention of the school, and that it would present a risk of material and substantial disruption.<sup>46</sup> The court found that Avery knew or should have known that her blog would come to the attention of school authorities—in essence, she had written it with that in mind—targeting both the principal and the superintendent directly.<sup>47</sup> Further, it was reasonably foreseeable that Avery’s online conduct would materially or substantially disrupt the school.<sup>48</sup> Her public urging of family and friends to contact school authorities and her use of offensive language undermined the administration’s efforts to resolve the conflict.<sup>49</sup> The content of Avery’s posts, Judge Livingston concluded, was either misleading or false and contributed to documented threats of a sit-in by students who believed that Jamfest had been cancelled.<sup>50</sup> In consideration of all of these circumstances, Avery’s expression had materially and substantially disrupted the school environment.

Taken together, these two Second Circuit decisions established the applicability of *Tinker* to cases involving off-campus student speech. Perhaps more importantly, however, they gave rise to a two-pronged approach to *Tinker* for use in such cases, requiring the school administrator to first consider whether it was reasonably foreseeable that the speech would reach the school before assessing its disruptive impact.

## II. DISAGREEMENT OVER *TINKER* IN THE THIRD CIRCUIT

In the summer of 2009, the Third Circuit applied *Tinker* to a case involving off-campus speech, but not without significant disagreement between the circuit judges over whether it was appropriate to do so.<sup>51</sup> Both *Layshock v. Hermitage*<sup>52</sup> and *J.S. v. Blue Mountain* involved students who created fraudulent MySpace profiles in their principals’ names. Both students were subjected to school discipline as a result, and each of them challenged their discipline on First Amendment grounds.<sup>53</sup> These two cases led to a split within the judges of the Third Circuit that is intriguing to say the least, and could

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46. *Id.* at 50.

47. *Doninger*, 527 F.3d at 50.

48. *Id.* at 51.

49. *Id.*

50. *Id.*

51. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 295, 308, 311–13, 316 (3d Cir. 2010).

52. *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207 (3d Cir. 2011).

53. *Id.*; *Snyder*, 593 F.3d at 295.

potentially have ramifications in how future courts handle cases involving student cyber-speech that originates off campus.

J.S. was an honor student at Blue Mountain Middle School in West Brunswick, Pennsylvania and had a clean disciplinary record until Principal James McGonigle, on two separate occasions, disciplined her for dress code infractions.<sup>54</sup> Apparently upset over her encounters with school authority, J.S. used a home computer to create a fake MySpace profile for McGonigle.<sup>55</sup> Though she did not mention him by name, the site featured McGonigle's picture, which J.S. had misappropriated off of the official school website.<sup>56</sup> J.S. gave McGonigle the pseudonym "M-Hoe" and described him as being a "fagass," a "sex addict," and "put on this world with a small dick."<sup>57</sup> Included among other implications on the profile was the suggestion that McGonigle enjoyed sexual activities with both students and parents.<sup>58</sup>

In nearby Hermitage School District, Hickory High School student Justin Layshock created a profile of his principal, Eric Trosch, in which he lampooned his large physical stature, disparaged his masculine endowment, questioned his sexual orientation, and accused him of abusing drugs and alcohol.<sup>59</sup> Also featuring a photograph that was stolen from the school's website, the profile became well-known among students at the school and spawned a small number of copycat sites that were reportedly even more off-color than Justin's site.<sup>60</sup>

The two cases were heard by separate three-judge panels, each issuing conflicting rulings—with the *Blue Mountain* panel ruling in the school's favor and the *Layshock* panel ruling in the student's favor.<sup>61</sup> As a result of this conflict, the two decisions were vacated and reheard *en banc*. Ultimately, the Third Circuit ruled in both cases that the schools had violated the First Amendment.<sup>62</sup>

In *Blue Mountain*, whether and how to apply *Tinker* was a central question, and one on which the Third Circuit was divided.<sup>63</sup> Eight of the judges decided the school's actions had violated the First Amendment, but only three relied on *Tinker* in order to make that determination. Judges Michael Chagares, Thomas

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54. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011).

55. *Id.*

56. *Id.*

57. *Id.* at 920–21.

58. *Id.* at 920.

59. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 208 (3d Cir. 2011).

60. *Id.* at 207–08.

61. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 290 (3d Cir. 2010); Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 252, 264–65 (3d Cir. 2010).

62. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011); Layshock, 650 F.3d at 207.

63. Snyder, 650 F.3d at 936, 941.



Amber, and Joseph Greenway applied *Tinker*, but stopped short of fully endorsing it as the standard in such cases. Judge Chagares authored the opinion, in which he explained that “[t]he Supreme Court established a basic framework for assessing student free speech claims in *Tinker*” and that it would “assume, without deciding, that *Tinker* applies to J.S.’s speech in this case.”<sup>64</sup> In a footnoted comment, he acknowledged there was “some appeal” to the argument that *Tinker* only applies to on-campus speech, but explained that he “need not address it to hold that the School District violated J.S.’s First Amendment free speech rights.”<sup>65</sup> In Judge Chagares’s view, the record didn’t support their contention that, absent disciplinary action against J.S., material and substantial disruption would have occurred.<sup>66</sup> “The profile was so outrageous that no one could have taken it seriously, and no one did,” he explained.<sup>67</sup> Therefore, even under the *Tinker* standard, the school had acted in violation of the First Amendment.

Judge Brooks Smith wrote a concurring opinion, in which four other judges joined, agreeing with the “Chagares Three” that the school district had acted illegally.<sup>68</sup> Judge Smith differed, however, on the question of whether *Tinker* should apply to off-campus speech: “I would hold that it does not,” he wrote, “and that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large.”<sup>69</sup> Justice Smith reasoned that the *Tinker* holding is tied specifically to the “special characteristics of the school environment” and the interest of school authorities in maintaining safety and discipline inside the schools.<sup>70</sup> While he acknowledged that *Tinker* references student speech “in class or out of it,” he contended that when read in context, the phrase refers to non-instructional settings at school, such as lunch or recess, and not to speech that occurs off campus.<sup>71</sup> “Had the Court intended to vest schools with the unprecedented authority to regulate students’ off-campus speech,” he argued, “surely it would have done so unambiguously.”<sup>72</sup>

Judge Smith described a hypothetical situation in which a student posts an online editorial in favor of marriage equity, and subsequent to his expression, a

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64. *Id.* at 926. Note: in *A Dictionary of Modern Legal Usage*, Bryan Garner writes that presumptions are “more probably authoritative than mere assumptions” and “[p]resumptions lead to decisions, whereas assumptions do not.” BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 84 (2d ed. 1995).

65. *Snyder*, 650 F.3d at 926 n.3.

66. *Id.* at 928.

67. *Id.* at 930.

68. *Id.* at 936.

69. *Id.*

70. *Snyder*, 650 F.3d at 937.

71. *Id.* at 937 n.1.

72. *Id.*

significant disruption occurs at school.<sup>73</sup> Assuming that *Tinker* applies to off-campus speech, Justice Smith suggested, the school could not only punish the students who were involved in the disruption, but also the student whose expression elicited the disruptive reaction.<sup>74</sup> “That cannot be, nor is it, the law” he concluded. Judge Smith worried that this would “create a precedent with ominous implications,” including the possibility that schools could ultimately sanction *adult* expression within the community.<sup>75</sup>

The six dissenting judges saw things quite differently, applying the *Tinker* standard to J.S.’s website and determining that the school was justified in taking disciplinary action against her.<sup>76</sup> Authored by Judge Michael Fisher, the dissenting opinion forcefully maintained that, had McGonigle not taken swift action, material and substantial disruption would have occurred: “[s]uch accusations interfere with the educational process by undermining the authority of school officials to perform their jobs,” explained Judge Fisher.<sup>77</sup> He also expressed concern that if parents had become aware of the content of J.S.’s webpage, district resources would have likely been redirected from the educational mission in order to reassure the community of McGonigle’s fitness to continue as principal.<sup>78</sup> This diversion of resources, he suggested, would constitute a material and substantial disruption.<sup>79</sup>

Judge Fisher was sympathetic to McGonigle and other educators who might find themselves the subjects of disparaging online student speech and even cited social science research suggesting that there are “tangible effects” on school employees who are the targets of such harassment.<sup>80</sup> He pointed out that these educators often suffer anxiety and depression and are more likely to either leave the profession or lose effectiveness as a result.<sup>81</sup> These concerns might have proven prescient in McGonigle’s case, as his administrative career in Blue Mountain ISD was interrupted during the fall of 2012, when the district suspended him without pay following a DUI arrest.<sup>82</sup> In addition to the suspension, McGonigle was required by the district to enter rehab and

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73. *Id.* at 939.

74. *Id.* Judge Smith’s hypothetical illustrates a situation often referred to as the “Heckler’s Veto,” in which the government stifles protected speech as a result of actual or anticipated disruptions from those who disagree with the speaker’s point of view. *Hill v. Colorado*, 530 U.S. 703, 733–34 (2000).

75. *Snyder*, 650 F.3d at 939.

76. *Id.* at 941, 945–46 (Fisher, J., dissenting).

77. *Id.* at 945.

78. *Id.*

79. *Id.* at 946.

80. *Snyder*, 650 F.3d at 946.

81. *Id.*

82. Stephen J. Pytak, *Blue Mountain Middle School Principal Accepts District Suspension*, REPUBLICAN HERALD, (Sept. 29, 2012), <http://republicanherald.com/news/blue-mountain-middle-school-principal-accepts-district-suspension-1.1380517>.

participate in anger management sessions after it was reported that he resisted the arresting officer.<sup>83</sup> When he returned to Blue Mountain Middle School in January of 2013, McGonigle offered a contrite statement to the community that was posted on the district's website in which he acknowledged having exercised "terrible judgment" that led to his arrest and attributed it to grief over the death of a close family member.<sup>84</sup> Whether or not McGonigle's personal and professional troubles were in any way related to the stress of J.S.'s webpage and the ensuing legal battle is merely speculation, but it is an interesting development in light of Judge Fisher's dissenting opinion.

In the *Layshock* case, the applicability of *Tinker* was not an issue. The school district argued that, by taking Trosch's picture off the school website, Justin had entered school property, thus making it a case of on-campus, rather than off-campus speech.<sup>85</sup> The school also offered the theory that they could punish Justin based upon the *Fraser* exception for lewd or vulgar speech.<sup>86</sup> The court rejected both arguments.<sup>87</sup> The school did not contend that Justin's speech had caused a substantial or material disruption; therefore, the court did not have to address the question of whether or not *Tinker* should apply to off-campus speech.<sup>88</sup>

Though the *Tinker* question was not directly addressed in *Layshock*, the rift between the judges did bubble to the surface in a concurring opinion authored by Judge Kent Jordan, in which he was joined by Judge Thomas Vanaskie (both members of the *Blue Mountain* dissent).<sup>89</sup> Judge Jordan unambiguously asserted his arguments in favor of applying *Tinker* to off-campus speech and his objections to Judge Smith's *Blue Mountain* concurrence, particularly criticizing what he viewed as an inappropriate focus on the physical location of the speaker.<sup>90</sup> "For better or worse," he explained, "wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the

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83. *Id.*; Stephen J. Pytak, *Blue Mountain Principal Charged with DUI*, REPUBLICAN HERALD, (Sept. 8, 2012), <http://republicanherald.com/news/blue-mountain-middle-school-principal-charged-with-dui-1.1369878>.

84. Statement from James McGonigle to Blue Mountain School District Community (Jan. 11, 2013), available at <http://www.bmsd.org/wp-content/uploads/2013/01/Statement-by-James-McGonigle.pdf>.

85. *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 215 (3d Cir. 2011).

86. *Id.* at 216.

87. *Id.*

88. *Id.*

89. *Id.* at 219.

90. *Layshock*, 650 F.3d at 221.

physical boundaries of a school campus a recipe for serious problems in our public schools.”<sup>91</sup>

The split within the court makes any analysis of *Blue Mountain* a tricky exercise. In sum, three judges assumed that *Tinker* extends off campus and then relied upon it to strike down the school action.<sup>92</sup> Six others fully endorsed the application of *Tinker* to off-campus speech and used it to uphold the school district’s actions.<sup>93</sup> Another five judges declared that *Tinker* should never apply to off-campus speech.<sup>94</sup> So while it can accurately be said that a majority of Third Circuit judges extended *Tinker*’s reach off campus, it should not be forgotten that three members of that majority applied *Tinker* through an assumption, as opposed to an actual finding of applicability.

TABLE 1: THE THIRD CIRCUIT *BLUE MOUNTAIN* SPLIT<sup>95</sup>

Judge	Did the School Violate the First Amendment?	Does Tinker Apply to Off-Campus Speech?
Michael Chagares	Yes	Assumed yes, without deciding
C.J. Theodore McKee	Yes	No
Dolores Sloviter	Yes	No
Thomas Ambro	Yes	Assumed yes, without deciding
Julio Fuentes	Yes	No
Brooks Smith	Yes	No
Thomas Hardimann	Yes	No
Joseph Greenaway	Yes	Assumed yes, without deciding
Michael Fisher	No	Yes
Anthony Scirica	No	Yes
Marjorie Rendell	No	Yes
Kent Jordan	No	Yes
Thomas Vanaskie	No	Yes
Maryanne Barry	No	Yes

91. *Id.* at 220–21.

92. *See* Judge Chagares’ opinion, in which he is joined by Judges Ambro and Greenaway. *Compare* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920, 926, 931 (3d Cir. 2011), *with id.* at 936 (Smith, J., concurring).

93. *See Snyder*, 650 F.3d at 941–52 (Fisher, J., dissenting).

94. *See id.* at 936 (Smith, J., concurring).

95. *See id.* at 920, 941.

III. APPLYING *TINKER* IN OTHER CIRCUITS POST-*BLUE MOUNTAIN*

In 2011, shortly after the Third Circuit issued its opinions in *Blue Mountain* and *Layshock*, the Fourth Circuit weighed in on the issue of off-campus student cyber-speech.<sup>96</sup> Kara Kowalski was a senior at Musselman High School in Berkeley County, West Virginia.<sup>97</sup> In December of 2005, Kara created a MySpace group called “S.A.S.H.,” which targeted a classmate named “Shay” for harassment. Kara invited approximately one hundred of her classmates to join “S.A.S.H.,” which was an acronym for “Students Against Shay’s Herpes.”<sup>98</sup> The same day that Kara created the page, students began to upload content.<sup>99</sup> One of the first images to appear on the page was a photograph of two boys holding their noses while displaying a sign that read “Shay Has Herpes.”<sup>100</sup> Among other photographs that appeared on the site was a digitally altered picture of Shay with the phrase “[e]nter at your own risk” imposed over her crotch.<sup>101</sup> Students were able to add comments to the page, many of which were derogatory towards Shay.<sup>102</sup>

Shay, along with her parents, arrived at the school the following morning to file a complaint.<sup>103</sup> They met with an assistant principal who would later investigate the complaint along with Principal Ronald Stephens.<sup>104</sup> In the meantime, Shay left school with her parents, not feeling comfortable attending classes that day.<sup>105</sup> Stephens consulted with the central office and conducted an investigation which included meetings with Kara as well as other students who had posted comments on the website.<sup>106</sup> Ultimately, Stephens concluded that Kara had violated the school policy on “harassment, bullying, and intimidation” and issued a ten-day out-of-school suspension accompanied by a “social suspension” of ninety days.<sup>107</sup> The social suspension meant that Kara would be barred “from attending any school-related events in which she was not a direct participant.”<sup>108</sup> In addition, Kara was removed from the cheerleading squad for the remainder of the year and barred from participation

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96. *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 567 (4th Cir. 2011).

97. *Id.*

98. *Id.* Kara claimed that S.A.S.H. was an acronym that stood for “Students Against Sluts Herpes,” but others suggested that the second “S” signified “Shay” rather than “Sluts.” *Id.*

99. *Id.* at 568.

100. *Id.*

101. *Kowalski*, 652 F.3d at 568.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Kowalski*, 652 F.3d at 568.

107. *Id.* at 568–69.

108. *Id.* at 569

in the “Charm Review.”<sup>109</sup> Ironically, as the reigning “Queen of Charm,” Kara would have had the responsibility of crowning her replacement.<sup>110</sup>

Kara’s parents challenged the school’s actions, arguing that the punishment unnecessarily isolated her from her peers, adversely impacted the treatment she received from faculty and staff, and contributed to a depression.<sup>111</sup> The Fourth Circuit found *Tinker* to be the controlling standard: “[T]he language of *Tinker*,” the court explained, “supports the conclusion that public schools have a ‘compelling interest’ in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying.”<sup>112</sup> With regard to the issue of the speech occurring off campus, the court took an interesting approach, raising the “metaphysical” question of whether or not Kara’s speech should even rightly be considered to have occurred off campus.<sup>113</sup> Kara may have “pushed her computer’s keys in her home,” the court explained, “but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment.”<sup>114</sup> The court even suggested that if Kara’s speech could rightly be considered to have occurred on campus, it could also be regulated under *Fraser*.<sup>115</sup> Ultimately, however, the Fourth Circuit relied upon the same two-tiered version of *Tinker* that the Second Circuit developed in *Wisniewski*—a reasonable foreseeability that the speech would reach the school environment coupled with a reasonable foreseeability that when it did, a material and substantial disruption of the school environment would result.<sup>116</sup>

Clearly, the court believed that Kara knew her webpage would reach the school community—and they also believed that, due to the “harassing character” of the speech, the disruption that ensued was substantial. “[T]he creation of the ‘S.A.S.H.’ group forced Shay N. to miss school in order to avoid further abuse,” Judge Niemeyer pointed out, “[m]oreover, had the school not intervened, the potential for continuing and more serious harassment of Shay N. as well as other students was real.”<sup>117</sup>

On August 1, 2011, the Eighth Circuit also weighed in on the issue of off-campus cyber-speech, issuing a decision supporting school discipline of a

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109. *Id.*

110. *Id.*

111. *Kowalski*, 652 F.3d at 569.

112. *Id.* at 572.

113. *Id.* at 573.

114. *Id.*

115. *Id.*

116. *Kowalski*, 652 F.3d at 574.

117. *Id.*

student who sent threatening instant messages during non-school hours.<sup>118</sup> In the fall of 2006, D.J.M. was a sophomore at Hannibal High School in Hannibal, Missouri. One afternoon, he was at home engaging in a chat session with a female friend.<sup>119</sup> During the chat, D.J.M. expressed his desire to bring a gun to school and named specific students whom he wanted to kill.<sup>120</sup> The friend expressed concern to a trusted adult about the content of D.J.M.'s messages.<sup>121</sup> She explained that D.J.M. had told her that he had access to a gun, that he wanted to "shoot everyone he hates," that he was suicidal and on multiple medications, and that he wanted Hannibal High School to be "known for something."<sup>122</sup> D.J.M.'s chat partner and her adult confidant shared this information with Principal Darren Powell, who contacted Hannibal superintendent Jill Janes.<sup>123</sup> They immediately alerted the police, who went to D.J.M.'s home and took him into custody later that same evening.<sup>124</sup> He was placed in juvenile detention before being referred and eventually admitted into a psychiatric hospital.<sup>125</sup>

D.J.M. was initially suspended for ten days but the suspension was soon extended for the remainder of the year.<sup>126</sup> His parents challenged the disciplinary action via the district's appeal process, but the Hannibal School Board unanimously upheld the suspension, at which point the parents took the district to court.<sup>127</sup> The district court granted summary judgment to the school on the First Amendment claim, finding that D.J.M.'s speech constituted a true threat and was therefore unprotected by the First Amendment.<sup>128</sup> Additionally, the district court found that the "disruptive impact" of D.J.M.'s speech justified the school district intervention, even though the speech occurred off campus.<sup>129</sup>

D.J.M. and his parents appealed the grant of summary judgment to the Eighth Circuit, claiming that he had not expressed a serious intent to harm anyone, and that because the speech had occurred off campus that it was not within the bounds of the school's authority.<sup>130</sup> The district's primary argument was that D.J.M.'s speech constituted a true threat.<sup>131</sup> The district also claimed

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118. D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 756–57 (8th Cir. 2011).

119. *Id.* at 757.

120. *Id.* at 758.

121. *Id.* at 757.

122. *Id.* at 758.

123. *D.J.M.*, 647 F.3d at 759.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *D.J.M.*, 647 F.3d at 760.

129. *Id.* at 760.

130. *Id.*

131. *Id.*

its actions were defensible under the *Tinker* standard.<sup>132</sup> Citing the considerable time that school administrators had to spend alleviating the safety concerns of stakeholders as a result of D.J.M.'s expression, the circuit court agreed with the district court's conclusion that a substantial disruption to the school environment had occurred, therefore justifying the school's actions under the *Tinker* standard.<sup>133</sup>

The Eighth Circuit relied heavily on its 2002 decision in *Doe v. Pulaski* in examining the issue of whether or not D.J.M.'s speech constituted a true threat.<sup>134</sup> "*Doe* defined a true threat as a 'statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another' . . . 'if the speaker communicates the statement to the object of the purported threat *or to a third party*.'"<sup>135</sup> D.J.M. asserted that his expressions were meant as jokes and were nothing more than venting of teen angst prompted by the goading of his chat partner. The Eighth Circuit rejected that contention, pointing out that he had "mentioned suicide in connection with a potential school shooting" and "identified a specific type of gun he could use and listed a number of specific individuals he planned to shoot."<sup>136</sup> The court concluded that these factors, "[c]ombined with his admitted depression, his expressed access to weapons, and his statement that he wanted Hannibal 'to be known for something,'" were adequate to satisfy the *Doe* true threat test.<sup>137</sup>

In October of 2012, the Eighth Circuit revisited the issue in *S.J.W. v. Lee's Summit*.<sup>138</sup> In this particular case, twin high school brothers had created a blog with the expressed purpose to "discuss, satirize, and 'vent' about events" at their high school.<sup>139</sup> The blog contained racist language and discussions regarding violent incidents that had occurred at school.<sup>140</sup> Additionally, there were sexually graphic comments about female students who were identified by name on the posts.<sup>141</sup> An investigation quickly led school authorities to the Wilson brothers, who were issued ten-day suspensions, which were later converted to 120-day reassignments to an alternative campus.<sup>142</sup> The Wilsons challenged the school's actions in federal district court, seeking an injunction, claiming that they would suffer irreparable harm if they were forced to attend

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132. *Id.*

133. *D.J.M.*, 647 F.3d at 766.

134. *Id.* at 757, 761.

135. *Id.* at 762 (citing *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 624 (8th Cir. 2002)).

136. *Id.* at 763.

137. *Id.*

138. *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012).

139. *Id.* at 773.

140. *Id.*

141. *Id.*

142. *Id.* at 774.



the alternative school and denied the opportunity to take the advanced academic and fine arts offerings at their home school.<sup>143</sup> The Western District of Missouri sided with the Wilsons and issued an injunction preventing the school from imposing the consequences on the boys.<sup>144</sup> The school district appealed to the Eighth Circuit, which reversed the decision of the district court.<sup>145</sup>

The district court had determined that the Wilsons had a likelihood of success on the merits, but the Eighth Circuit disagreed, citing their own decision in *D.J.M.* The court also cited *Doninger, Wisniewski, and Kowalski* as examples of other circuits applying *Tinker* to off-campus student expression. The court pointed out that the majority of the Third Circuit in *Blue Mountain* followed *Tinker*, even though three of the judges had only assumed that it applied.<sup>146</sup> J.S. had prevailed in her challenge against Blue Mountain Middle School because her parody of McGonigle was not materially or substantially disruptive, unlike the Wilson brothers' blog.<sup>147</sup> Based upon this, the Wilsons were "[u]nder *Tinker* . . . unlikely to succeed on the merits," and were denied injunctive relief.<sup>148</sup>

In late August 2013, the Ninth Circuit became the most recent appeals court to tackle the issue of off-campus student cyber-speech with *Wynar v. Douglas County School District*.<sup>149</sup> The case involved Landon Wynar, who was a sophomore at Douglas High School in Douglas County, California.<sup>150</sup> Landon, an avid gun collector, regularly communicated with his friends via instant messaging.<sup>151</sup> His favored chat topics included his guns, shooting, World War II, and the heroic attributes of Adolph Hitler.<sup>152</sup> As his sophomore year progressed, his messages became increasingly violent.<sup>153</sup> He wrote in detail about his plan to engage in a school shooting on April 20th of that year, the anniversary of both Columbine and Hitler's birthday.<sup>154</sup> He made specific references to his guns and ammunition and expressed a desire to set a record for body count.<sup>155</sup> Landon's friends became more and more alarmed by his messages until they confided to one of their coaches at the high school, who in

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143. *Wilson*, 696 F.3d at 774–75.

144. *Id.* at 775.

145. *Id.* at 775, 780.

146. *Id.* at 778.

147. *Id.*

148. *Wilson*, 696 F.3d at 778.

149. *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1064 (9th Cir. 2013).

150. *Id.* at 1065.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Wynar*, 728 F.3d at 1065.

155. *Id.* at 1066.

turn notified the principal.<sup>156</sup> Landon was suspended pending a formal hearing and expulsion.<sup>157</sup> Along with his father, he sued the district, including administrators and trustees, alleging a First Amendment violation.<sup>158</sup> The district court granted summary judgment to the school district, and Landon and his father appealed to the Ninth Circuit.<sup>159</sup>

In her opinion, Ninth Circuit Judge Margaret McKeown briefly referenced the findings of other circuits, noting the inherent complexity in determining the proper standard in such cases: “One of the difficulties with the student speech cases is an effort to divine and impose a global standard for a myriad of circumstances involving off-campus speech,” she explained.<sup>160</sup> Ultimately, Judge McKeown applied *Tinker*, but not before distinguishing the character of Landon’s speech from the speech at issue in *Blue Mountain*, pointing out that “[a] student’s profanity-laced parody of a principal is hardly the same as a threat of a school shooting, and we are reluctant to try and craft a one-size fits all approach.”<sup>161</sup> By making such a distinction, Judge McKeown narrowly endorsed *Tinker* as the standard for threatening student speech, while leaving the question open as to whether it would apply in all circumstances.<sup>162</sup> Judge McKeown concluded, “[W]hen faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*.”<sup>163</sup>

Landon’s expression, in the court’s view, unquestionably met the requirements of *Tinker*.<sup>164</sup> The “alarming and explosive” nature of the messages, reasoned the court, made it reasonable for the school district to interpret them as a real safety risk.<sup>165</sup> In the view of the court, Landon’s fascination with previous school shootings, access to weapons, and the details he expressed about his plan made it prudent for the district to take the messages seriously, even if he had intended them as jokes.<sup>166</sup> His clean prior disciplinary record was unpersuasive to the court, as Judge McKeown pointed out that according to U.S. Department of Education statistics, two-thirds of school gunmen had clean disciplinary records prior to their shootings.<sup>167</sup>

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156. *Id.*

157. *Id.*

158. *Id.*

159. *Wynar*, 728 F.3d at 1067.

160. *Id.* at 1069.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Wynar*, 728 F.3d at 1070.

165. *Id.*

166. *Id.* at 1071. Landon had consistently maintained that his messages were only jokes. *Id.* at 1066.

167. *Id.* at 1070 n.8.

In the wake of the *Blue Mountain* holding, the decisions from these three different circuits are both interesting and informative. Each of the decisions endorsed the notion of *Tinker*'s application to off-campus speech. As a group, all three decisions provide helpful context on what courts are likely to consider a material and substantial disruption in terms of off-campus speech. Both *D.J.M.* and *Wynar* underscore the willingness of judges to support school administrators responding to reasonably threatening speech. However, *Wynar* distinguishes "threatening" off-campus expression as inherently different from off-campus speech that is merely offensive, profane, or derogatory, and holds open the question of whether *Tinker* should apply to the latter.

#### IV. REVIEW OF DISTRICT COURTS' APPLICATION OF *TINKER* TO OFF-CAMPUS SPEECH

The discussion in this Article has principally been limited to federal circuit court cases, but it should also be noted that over the last fifteen years, a number of district courts have applied *Tinker* in cases involving off-campus student cyber-speech. As was illustrated in the Third Circuit's decision in *Blue Mountain*, however, analysis of off-campus student speech under *Tinker* does not necessarily guarantee that school disciplinary action will pass constitutional muster. A review of these district court cases demonstrates that, even when analyzed under *Tinker*, off-campus student speech is less likely to be viewed by the courts as materially and substantially disruptive than speech that occurs on campus.

In 1998, a federal district judge in Missouri applied the *Tinker* test in a case that involved a student who was suspended after creating a webpage that was critical of his school's administration.<sup>168</sup> Student Andrew Beussink composed the webpage from his home, where a friend using his computer saw it and in turn shared it with school authorities.<sup>169</sup> Beussink was first suspended for five days, but after further consideration, Principal Yancy Poorman lengthened the suspension to ten days.<sup>170</sup> Though the court held that *Tinker* did apply, it still granted Beussink an injunction.<sup>171</sup> In ruling against the school, the court reasoned that the webpage had not created a material or substantial disruption and that Principal Poorman had disciplined Beussink purely for the content of his speech.<sup>172</sup>

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168. *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177, 1180 (E.D. Mo. 1998).

169. *Id.* at 1177–78. The friend reportedly argued with Beussink after viewing the page and wanted to exact revenge by reporting it to school authorities. *Id.*

170. *Id.* at 1179.

171. *Id.* at 1180.

172. *Id.*

In western Pennsylvania in 2001, a federal district court sided with a student who emailed a “top ten” list disparaging the district’s athletic director to select friends.<sup>173</sup> Although the student, Zachariah Paul, intended his list to reach only a limited audience, one of his friends reformatted the email, printed hard copies, and distributed it at school.<sup>174</sup> The list soon turned up in the teachers’ lounge, and predictably, Zachariah found himself facing school disciplinary measures.<sup>175</sup> The court applied *Tinker*, but found that the “top ten” list did not satisfy the test of material or substantial disruption.<sup>176</sup> Two years later, the same district court again ruled in favor of a student who was kicked off the volleyball team after posting critical comments about an art teacher online.<sup>177</sup> The court found that the district code of conduct’s prohibition of “inappropriate, harassing, offensive, or abusive” speech was unconstitutionally overbroad because it allowed the school district to punish students for non-disruptive speech in violation of *Tinker*.<sup>178</sup>

In 2009, a central California federal district court ruled against a school district that suspended an eighth grade girl (J.C.) who posted a video of herself and friends “talking smack” about a classmate (C.C.) on YouTube.<sup>179</sup> The video was shot after school and uploaded that evening from J.C.’s home computer.<sup>180</sup> That evening, J.C. contacted C.C. and let her know that the video was on YouTube.<sup>181</sup> J.C. offered to remove the video from the site, but C.C. declined at the urging of her mother, who wanted to ensure that the video would be online and available for viewing by school authorities the next day.<sup>182</sup> C.C. was still in distress when she arrived at school the following morning, but after a 20–25 minute session with the counselor, she was able to successfully return to class for the day.<sup>183</sup> The court applied *Tinker* but found that the video did not cause a disruption sufficient enough to merit school disciplinary action.<sup>184</sup>

Most recently, in a southern Florida case, Federal Magistrate Judge Barry Garber denied a school principal’s motion for qualified immunity after being

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173. *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 448, 448, 460 (W.D. Pa. 2001).

174. *Id.* at 448–49.

175. *Id.*

176. *Id.* at 455.

177. *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 700, 706 (W.D. Pa. 2003).

178. *Id.* at 702 (citing Brief for Plaintiff at 7–8, *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698 (W.D. Pa. 2003) (No. 01-586))(quotation marks omitted).

179. *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1094, 1098, 1099 (C.D. Cal. 2010).

180. *Id.* at 1098.

181. *Id.*

182. *Id.*

183. *Id.*

184. *J.C.*, 711 F. Supp. 2d at 1116.

sued by a high school student who was disciplined for posting a Facebook page that was critical of one of her teachers.<sup>185</sup> The page was created from the student's home, contained no threatening language, and was removed after only two days.<sup>186</sup> In the process of finding that the student had a clearly established constitutional right at stake, Judge Garber applied the *Tinker* test to the fact circumstances and held that the speech did not cause a material or substantial disruption at school.<sup>187</sup>

As of this writing, no district court has yet seized upon the Smith concurrence from *Blue Mountain*, which argued that *Tinker* should never apply to off-campus student speech. In 2011, however, a federal district judge in Indiana adopted the language of "assumption" utilized by Judge Chagares in *Blue Mountain* and "assumed without deciding" that *Tinker* applies to off-campus speech.<sup>188</sup> Despite applying *Tinker*, the district court ruled in favor of high school girls who were challenging their discipline after posing for risqué photos at an off-campus slumber party and then posting them online.<sup>189</sup> It is worthy to note that the judge viewed both the taking of the pictures and the posting of them to be separate acts of expression that are protected under the First Amendment.<sup>190</sup> Any disruption that ensued, according to the court, was nothing more than "petty" disagreements between team members and did not rise to the level of a material or substantial disruption.<sup>191</sup>

In contrast to the above-referenced decisions, a 2012 decision from the Northern District of Mississippi provides an interesting example of off-campus speech that was deemed sufficiently disruptive to the school to justify disciplinary action.<sup>192</sup> A Mississippi high school student recorded a rap song featuring vulgar language, racial epithets, and accusations aimed at two high school coaches.<sup>193</sup> The words also suggested that the coaches had engaged in sexual contact with female students and included the ominous sounding line "going to get a pistol down your mouth."<sup>194</sup> The student made the video available to his 1300 Facebook friends, and posted it on YouTube, where it was available to the general public.<sup>195</sup> Citing the potentially threatening and intimidating lyric as well as the breadth of its distribution, the court held that it was foreseeable that the song would indeed create a material and substantial

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185. *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1367–68 (S.D. Fla. 2010).

186. *Id.* at 1367.

187. *Id.* at 1374, 1376–77.

188. *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch.*, 807 F. Supp. 2d 767, 781 (N.D. Ind. 2011).

189. *Id.* at 772, 790.

190. *Id.* at 778–79.

191. *Id.* at 783.

192. *Bell v. Itawamba Cnty. Sch. Bd.*, 859 F. Supp. 2d 834, 840 (N.D. Miss. 2012).

193. *Id.* at 836.

194. *Id.*

195. *Id.*

disruption to the school environment.<sup>196</sup> These district court decisions highlight that while there is a consensus that *Tinker* is the applicable standard for evaluating student speech whether it occurs on campus or off campus, there is less consensus on exactly what constitutes a material and substantial disruption. It is apparent, however, that the standard of material and substantial disruption, when applied to off-campus speech, can be a difficult one for school administrators to meet.

#### V. KEY CONSIDERATIONS FOR SCHOOL ADMINISTRATORS

In a forum where students regularly and publicly voice dissent with or disdain for school policies, practices, and people, how should well-intended principals recognize and react to off-campus electronic student speech that is actually or potentially disruptive to the school? How can they protect their students and their staff members from cyber-bullying and harassment while still respecting the First Amendment rights of students? This section will suggest some key questions and considerations for school administrators who face these issues in practice.

##### A. *Reasonable Foreseeability That the Speech Would Reach the School*

A fairly stable consensus has emerged in the case law that *Tinker* can appropriately be applied to off-campus student speech. Therefore, the same guiding question should dictate administrative action in all student speech cases: did the student expression in question cause a real or nascent material or substantial disruption? However, this is not the only question school administrators should ask when dealing with cases involving off-campus student cyber-speech. Before analyzing the real or potential disruptive impact of student speech, it is advisable for administrators to pause and consider whether or not a student should have reasonably known that his speech would come to the attention of the school.

The Second, Fourth, and Eighth Circuits all considered the question of the reasonable foreseeability that a student's off-campus speech would reach the school before extending *Tinker* to off-campus speech. The Third Circuit, however, did not consider this question. A two-tiered *Tinker* test for off-campus expression is a more conservative approach in making disciplinary decisions and shows greater deference to the First Amendment rights of students. As one legal scholar explains:

Because the first step of the *Wisniewski* inquiry provides additional protection for students whose off-campus expression could not reasonably have been foreseen to reach the school environment, it is likely that the Third Circuit approach will permit more schools to discipline students for off-campus

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196. *Id.* at 840.

expression in the future; in contrast, the Second Circuit approach would likely uphold a student's free speech rights given similar facts, despite the particular outcomes in *Wisniewski*, *Doninger*, and *J.S. IV*.<sup>197</sup>

Consider, for example *Porter v. Ascension*, a Fifth Circuit decision from 2004 in which a student had drawn a sketch depicting his school under a violent attack.<sup>198</sup> He made the drawing at home and kept it in a sketchbook in his closet.<sup>199</sup> Two years later, his younger brother found the sketchbook and took it to school.<sup>200</sup> The drawing was discovered and the artist was identified and punished.<sup>201</sup> The Fifth Circuit ruled in the child's favor, finding that he did not intend, nor could he reasonably have foreseen, that the drawing would ever be taken to the school.<sup>202</sup> It is duly noted that *Porter* involved a more traditional form of student expression, and it is difficult to imagine similar circumstances involving electronic speech.

When evaluating the foreseeability that the speech would reach the school, administrators should consider how the student shared the content. Did he post it on a site that was accessible to the public or members of the school community? Did he send it to members of the school community via email or other types of messaging services? Did he talk about or access the content at school, or did he encourage others to do so?

It could be argued that whenever a student posts online, he or she knows (or should know) that his expression might eventually be shared with members of the school community. It is not beyond the realm of possibility, however, that a student would communicate electronically in a way that he reasonably expected would remain private or confidential; and through no fault of his own, the content was disseminated to school authorities or the wider school community. In such a situation, under the two-pronged *Tinker* test, the school would have no legal justification for discipline and there would be no need to proceed to the question of disruption. If, however, there was a reasonable foreseeability that the student's speech would reach the campus, the school administrator may then turn to an analysis of the real or potentially disruptive impact of the speech.

#### *B. Disparagement of School Employees Has Low Disruptive Potential*

Disparaging or disrespectful remarks directed at school employees are commonly grounds for discipline when they occur in the classroom, on

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197. Paul Easton, *Splitting the Difference: Layshock and J.S. Chart a Separate Path on Student Speech Rights*, 53 B.C. L. REV. 17, 28–29 (2012).

198. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d. 608, 611 (5th Cir. 2004).

199. *Id.*

200. *Id.*

201. *Id.* at 612.

202. *Id.* at 615.

campus, or at school activities. Generally, the supporting rationale for disciplining students in these circumstances is that such expression undermines the authority of school employees and their ability to maintain discipline within the school environment. It is questionable whether that rationale would equally apply to off-campus speech.

Consider the principal in *Blue Mountain*, McGonigle, who felt unfairly targeted by J.S.'s MySpace profile. He was angry and embarrassed by its content. Had he not taken swift and certain disciplinary action against J.S., he likely reasoned a material and substantial disruption would have resulted. Parents might have seen the profile, his reputation may have been tarnished, and his fitness to continue as principal may have been scrutinized. Further, a failure to discipline J.S. would have undermined his authority and encouraged other students to engage in similar behavior. Had J.S. made her comments in the school setting, this rationale would have certainly been sufficient to justify taking disciplinary action. But the Third Circuit viewed J.S.'s profile as absurd, unlikely to be seen as authentic by any objective reader. Nothing in the record indicated that any adult in the community had seen the profile and taken it seriously. The disruption that occurred as a result was essentially limited to the time that administrators spent investigating—an activity that is routine in the daily life of a school administrator. McGonigle's feelings of anger and embarrassment, while unpleasant, did not rise to the level that would constitute a material or substantial disruption of school, nor was it reasonable to forecast such a disruption.

In the *Doninger* case, by contrast, the Second Circuit determined that, as a result of Avery's email and blog post, both the superintendent and the principal of the school had been overwhelmed with phone calls from angry and concerned parents. Principal Niehoff had to leave an off-campus meeting to return to campus and attend to the controversy. Even after the issue had been resolved to the satisfaction of all parties, the administrators continued to receive phone calls. Student unrest was high, and there were threats of demonstrations. Considering all this, the court felt that the school had demonstrated satisfactorily that a material and substantial disruption had been the result of Avery's off-campus expression.

In sum, when a student engages in off-campus speech that disparages a school employee, school administrators should objectively evaluate the impact of the speech. Was the expression widely seen and believed by members of the school community? Was the fitness of the employee brought into question? Did the employee's performance suffer as a result of the speech? Did the expression generate unrest within the school community that required a significant redirection of district time or resources? Was the content widely accessed by students at school? Unless an administrator can answer affirmatively to one of more of these questions, or document circumstances suggesting that such would be the case absent disciplinary action, it is unlikely



that disparaging remarks directed at school employees would meet the standard of material and substantial disruption.

*C. Disparagement of Students Has High Disruptive Potential*

Generally speaking, speech that targets students has a high potential for serious disruption. Online bullying or harassment can often cause students to have problems academically or socially at school, and in many cases can cause students to miss school entirely. The Fourth Circuit's *Kowalski* decision highlights that the only way for Shay to escape the harassment of her classmates was to stay home. This was a determinative factor in the court's decision. School administrators should keep in mind, however, that while courts have been more likely to uphold school disciplinary action for off-campus electronic speech that targets a student, there are no guarantees. Recall that in *J.C. v. Beverly Hills*, the court did not see evidence of a material and substantial disruption despite the fact that a student was the target of the online video. The targeted student returned to class and functioned well for the rest of the day after only a short session with her counselor.

Administrators should objectively consider the impact of the speech both on the targeted student and on the school community in general. Was the speech widely accessed by students at school? Does the "target" suffer a decline in school performance or participation as a result of the speech? Does he or she experience problems with peers or increased anxiety at school as a result of the speech? Does the speech inspire other students to tease or harass the targeted student? Was the content of the speech so provocative that it resulted in disruptive or violent confrontations between students at school? If there are affirmative answers to any of these questions, or if an administrator can document circumstances suggesting that a failure to take disciplinary action would lead to these types of problems, there is a strong case for disciplinary action.

It bears mentioning that laws regarding bullying vary from state to state, and it is important for school administrators to be aware of and to follow their state laws and local policies regarding bullying. Unfortunately, when it comes to cyber-bullying, which frequently occurs off campus, state laws might not always provide a great degree of guidance. In fact, fewer than half of the states specifically address cyber-bullying in their statutes.<sup>203</sup>

*D. Threats to Students or Employees Have the Highest Disruptive Potential*

When student cyber-speech crosses the line from harassing to threatening, then there is a high potential for disruption. Recall the messages sent to a

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203. Sameer Hinduja & Justin Patchin, *State CyberBullying Laws*, CYBER BULLYING RES. CTR. (July 2010), [http://www.cyberbullying.us/Bullying\\_and\\_Cyberbullying\\_Laws.pdf](http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf).

friend by D.J.M., in which he referenced bringing a gun to school and shooting specific individuals. When the school was made aware of the content of D.J.M.'s messages, it caused officials enough alarm that they were forced to make significant adjustments to the school's security protocols and communicate those changes to parents. Additionally, once community members had learned of the threats, it was reasonable to forecast that major anxiety within the community would ensue. In the Eighth Circuit's view, this met the test of material or substantial disruption.<sup>204</sup>

The First Amendment does not protect true threats and in many cases they are criminally prosecutable. Not all speech that might be construed as threatening, however, constitutes a true threat. The Eighth Circuit concluded that D.J.M.'s instant messages met their standard for true threats—a “statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another...if the speaker communicates the statement to the object of the purported threat *or to a third party*.”<sup>205</sup>

Theoretically, the school could legally sanction a student who makes a true threat, irrespective of whether or not it caused a disruption. Truly threatening speech directed at students or staff, however, will almost always give rise to material and substantial disruption, especially if unaddressed by school authorities. If a school administrator can clearly make the case that a student has engaged in a true threat, then he or she will likely have multiple legally defensible grounds to justify disciplinary action. The law surrounding true threats is murky, however, and varies from circuit to circuit. Therefore, when assessing student speech that might be threatening, school administrators would be wise to consult with local law enforcement officials or school district attorneys.

It is also prudent to consider that, while it bolsters the case for discipline when speech meets the test for a true threat, speech need not qualify as a true threat in order to merit discipline. Remember that the Second Circuit in *Wisniewski* and the Ninth Circuit in *Wynar* upheld school disciplinary action based upon *Tinker*, without considering whether the speech qualified as a true threat. In fact, the Ninth Circuit endorsed something akin to an “airport security” mentality, suggesting that even if messages were intended as jokes, the school was reasonable in treating them seriously.

#### E. “Undifferentiated Fear or Apprehension” of Disruption Is Not Enough

School administrators who impose discipline without careful consideration of the impact of student speech, irrespective of where it occurs, run the very real risk of invoking the Heckler's Veto, unconstitutionally silencing student

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204. D.J.M. v. Hannibal Pub. Sch. Dist., 647 F.3d 754, 760 (8th Cir. 2011).

205. *Id.* at 762.

speech based upon real or anticipated negative reactions of those who may disagree with the speaker's point of view. Justice Fortas warned in *Tinker* that "undifferentiated fear or apprehension of disturbance" is not a sufficient reason for school administrators to sanction student expression.<sup>206</sup> As he eloquently explained:

Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.<sup>207</sup>

The hypothetical raised by Third Circuit Judge Smith in the *Blue Mountain* case, in which students react to an online editorial advocating marriage equity, is illustrative of this potential pitfall for school administrators seeking to apply the *Tinker* guidelines in practice, particularly in cases dealing with off-campus speech. In Judge Smith's scenario, the onus would be upon the school to adequately address the behavior of the heckler, underscoring the principle that the robust exchange of ideas, including those with which one does not agree, is part of the educational experience.

Finally, a word of caution—while all the circuits dealing with off-campus electronic student speech have relied upon *Tinker*, only five circuits have actually heard such cases. The Third Circuit's reliance on *Tinker* might be described as tenuous in consideration of the deep divisions between the circuit judges. The Ninth Circuit applied *Tinker* narrowly to student speech that threatens violence and left the question of whether it applies to other forms of off-campus student speech unanswered. The fact that there is technical agreement between the circuits on this issue may have, at least so far, dissuaded the Supreme Court from stepping into the fray.<sup>208</sup> However, future cases involving off-campus cyber-speech must be watched closely by the community of legal scholars. It is possible that other judges will begin to adopt the language used by Third Circuit Judge Michael Chagares, "assuming, but not deciding" that *Tinker*'s reach extends to off-campus speech. It is also possible that other jurisdictions will begin to embrace the rationale expressed by Third Circuit Judge Brooks Smith that speech occurring off school property is generally beyond the reach of school discipline. Perhaps the recent opinion of Ninth Circuit Judge McKeown, which advocated different standards for different types of student expression, will influence future decisions. What is

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206. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

207. *Id.* at 508–09.

208. The Supreme Court has denied cert. in the following cases: *Blue Mountain Sch. Dist. v. J.S.*, 132 S. Ct. 1097 (2012); *Wisniewski v. Bd. of Educ.*, 552 U.S. 1296 (2008); *Doninger v. Niehoff*, 132 S. Ct. 499 (2011); *Kowalski v. Berkeley Cnty. Sch.*, 132 S. Ct. 1095 (2012).

certain is that, as long as students communicate electronically, schools will continue to struggle with how to balance their First Amendment rights against the need for safety, order, and discipline. Should future cases create disharmony between the circuits, it will increase the likelihood that the Supreme Court will ultimately have the last word on this issue.

