

Clearing Up the Confusion:

School Response to Student Off-Campus Harmful Speech

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There is a significant amount of confusion about the legal standards governing when school officials can respond to student off-campus, online harmful speech. This document will outline the current legal standards and provide recommendations, based on the case law, for how districts and principals can proceed. This document does not provide specific legal guidance.

Courts have consistently held that school officials can formally respond, that is discipline a student, in response to off-campus harmful speech if that speech has, or there are good reasons to believe it will, cause a substantial disruption at school or interference with the rights of students to be secure. But the manner in which this standard is applied will differ greatly based on whether the student has targeted a staff member or another student.

Historical Underpinnings of Free Speech

It is helpful to frame the discussion of student free speech rights with an analysis of the historical underpinnings of the free speech provision in the First Amendment. According to Leonard Levy, in his excellent book, *The Emergence of a Free Press* (New York: Oxford University Press. (1985)), there is considerable disagreement about exactly what the framers of the Bill of Rights were thinking in terms of free speech. (*Id.* at 268.) It is probable that some framers of the First Amendment were thinking in terms of Blackstone's English common law notion of freedom of speech. (*Id.* at 281.) The English common law notion of freedom of speech prohibited prior restraints on the press, but did not preclude civil or criminal prosecution, after the fact, for obscene, blasphemous, libelous, or seditious speech. (*Id.* at 12.)

Levy noted that there is an alternative perspective on the historical basis for freedom of speech. (*Id.* at 110-111.) This is the natural rights philosophy advocated by John Locke, who was revered by many of the early leaders. Writing under the pseudonym, Cato, Trenchard and Gordon expressed the natural law perspective as follows:

Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as Publick Liberty, without Freedom of Speech: Which is the Right of every Man, as far as by it he does not hurt and control the Right of another; and this is the only Check which it ought to suffer, the only Bounds which it ought to know. (No. 15, Feb 4, 1720, in *Cato's Letters* (6th ed., 1755), 1:96.)

The essential difference in these two philosophies is that under the English common law approach, government has the authority to determine what speech is contrary to the public good, including such social values as order, morality, and religion. In contrast, under the natural rights philosophy, the role of government is to enforce the fundamental rights of other individuals, if those rights are injured by the exercise of speech by another.

While neither the U.S. Supreme Court, nor lower federal courts, have referenced this historical basis in cases addressing school authority in the context of student speech, it appears that the courts have created standards that are grounded in both philosophies, as will be discussed below. Understanding this distinction can assist in gaining a better understanding of the situations under which school officials have the constitutional authority to formally respond to off-campus student speech.

It is argued that while school officials have the right to restrict student on-campus speech based on standards that are grounded in either English common law and natural rights, when students are off-campus, school officials may only restrict speech under a standard that is grounded in natural rights. Specifically, school officials may only restrict student off-campus speech in situations where such speech has, or reasonably could, significantly interfere with the important rights of other students to be safe and receive an education.

The Background Case Law

In the case of *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969), the Court acknowledged “the special characteristics of the school environment” (*Id.* at 505) by permitting school officials to prohibit student speech if that speech “would substantially interfere with the work of the school or impinge upon the rights of other students,” including the right “to be secure.” (*Id.* at 513.) The standard in this case appears to be ground in the natural rights theory, therefore it is important to consider the harm or potential harm to another.

In another case involving student free speech, *Bethel School District v. Fraser*, 478 U.S. 675 (1986), the Court enunciated a different standard—that school officials could respond to student speech that was lewd, vulgar plainly offensive, and contrary to the school’s educational mission. In a concurring opinion, Justice William Brennan noted that “if [the] 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.” (*Id.* at 688.) Note this standard is ground in the common law.

When addressing off-campus, online, hurtful speech, the courts have consistently adopted the *Tinker* standard. Thus, it is important to consider what rights must be balanced against students’ free speech rights. Based on prior case law, there appear to be three key student rights or interests: 1) to be in an environment where their safety is protected; 2) the right of all students to receive an education in an environment that is free from disruption of instruction or school operations; and 3) the individual right of a student that there is not a significant interference with his or her education.

Student Safety and the Threat of Violence

The student safety issue has been raised in many cases related to student dress code, including T-Shirts and Confederate symbols. Several cases have addressed public schools’ attempts to restrict displays of the Confederate flag under *Tinker*. Where there have been racial problems involving the Confederate flag, courts have found such bans constitutional. See *Melton v. Young*, 465 F.2d 1332 (6th Cir.1972). In the absence of such evidence, courts have concluded that school authorities have failed to establish a sufficient likelihood of disruption to support banning the flag. See *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243 (3rd Circuit 2002).

The school safety issue was also raised in the case of *Morse v. Frederick*, 551 U.S. 393 (2007). This case involved student display of a sign that read “Bong Hits 4 Jesus,” that could be interpreted as advocating illegal drug use, but the situation did not present any concerns of violence or imminent drug abuse. The majority opinion noted the concerns of drug abuse and the various federal and state initiatives to address this concern. In his concurring opinion, Justice Samuel Alito emphasized the importance of the focus on student safety with respect to student speech:

[A]ny argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. The special characteristic that is relevant in this case is the threat to the physical safety of students. But due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence. And, in most cases, *Tinker*’s “substantial disruption” standard permits school officials to step in before actual violence erupts. (*Id.* at 423.)

Thus, there is ample reason to believe that if student speech, regardless of the geographical origin, raises a threat to student safety or could contribute to school violence, the Courts will support the authority of school officials to respond in a formal manner to restrict such speech.

Disruption of Instruction or School Operations

Issues related to the disruption of instruction or school operations have frequently come up in cases involving off-campus student newspapers. (e.g. *Shanley v. Northeast Independent School District*, 462 F.2d 960 (5th Cir.1972)). The analysis of these cases also proceeded in a predictable manner. The Courts would initially address the question of the application of the *Fraser* standard and immediately dismiss this because the speech was off-campus. Then the court considers whether there was any evidence of a substantial disruption to the overall operations of the school or the threat of such disruption. If such overall disruption was a possibility, the courts would uphold a disciplinary consequence.

An example of this was a situation where a student published information on how to hack into the school's computer system. *Boucher v. School Board of the School District of Greenfield*, 134 F. 3d 821 (7th Circuit, 1998). Thus, if a student's off-campus speech can be predicted to cause a substantial disruption that interferes with school operations or the instruction of students, the courts will also likely uphold a formal disciplinary response.

Bullying or Harassment

Several helpful cases have applied the *Tinker* standard in the context of bullying and harassment policies with a focus on on-campus activities: *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001) ; *Sypniewski*; and *DeJohn v. Temple Univ.*, 537 F.3d 301, 319-20 (3d Cir. 2008):

The State College Area School District's anti-harassment policy had been challenged on the basis that it was overbroad and could impact speech that someone might find merely offensive. Then-Judge Alito did find some provisions were overbroad. But in discussing various provisions of the policy, he stated as follows:

We agree that the Policy's first prong, which prohibits speech that would "substantially interfere with a student's educational performance," may satisfy the *Tinker* standard. The primary function of a public school is to educate its students; conduct that substantially interferes with the mission is, almost by definition, disruptive to the school environment. (*Id.* at 217.)

Sypniewski also considered the constitutionality of an anti-bullying and harassment policy. The Court stated:

Intimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to control or prevent. There is no constitutional right to be a bully. On the other hand, confining prohibited speech to that which constitutes "harassment" is not alone sufficient to ensure constitutionality. ... Thus, in this case, a particular form of harassment or intimidation can be regulated by defendants only if it meets the requirements of *Tinker*; that is, if the speech at issue gives rise to a well-founded fear of disruption or interference with the rights of others. (*Id.* at 264.)

Note specifically the use of the term "a" or "one" student – which leads to the conclusion that school officials can respond to student speech that interferes with the rights of any other individual student to receive an education, not an overall disruption at school.

DeJohn, which involved an anti-harassment policy at the college level, the court also noted the importance of a requirement that the speech be severe and pervasive.

Thus, there is ample precedent to support the conclusion that in situations where a student's speech goes beyond merely offensive and is significantly interfering with the ability of another student to receive an education that courts will support a formal disciplinary response. However, in

these situations it is very important to determine and document the egregiousness of such speech and its damaging impact on the targeted student.

Off-Campus Online Speech Cases

It is exceptionally important for educators and school attorneys to distinguish between court decisions where the student had targeted a school staff member from those where the target was a student because this is directly related to the rationale that has been expressed in the prior cases. When a student has targeted another student, this will raise concerns of student safety or interference with the ability of a student to receive an education. But these concerns are not raised if a student has targeted a staff member.

The only time that a school is likely able to punish a student for off-campus speech that has targeted a staff member is if the school can demonstrate that there was an overall disruption of school operations or the delivery of education to students, or a "true threat." Unfortunately, the courts have been inconsistent in the manner in which they evaluate whether such disruption has occurred.

Situations Where Student Targeted a Staff Member

In one early case, *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002), the Pennsylvania high court determined there was sufficient basis to find that the overall education of students had been disrupted. The targeted teacher was so distraught that she took a leave of absence and the students finished the year with a substitute teacher. This kind of factual demonstration of disruption has not been present in most other cases.

At this point in time, the greatest conflict in the case law related to the degree of disruption necessary appears to be between the Second and Third Circuits. In a Second Circuit case, *Doninger v. Niehoff*, 527 F.3d 31 (2d Cir. 2008), a student leader who was very upset that the school had cancelled student jazz festival she had been coordinating, just one week prior to the event, posted a message on a blog expressing her distress. This message, which used a slur against the superintendent, was not read until after the controversy at the school had been resolved. There was no evidence that the message had caused any disruption. Ignoring the very obvious lack of reasonableness in predicting a severe and pervasive disruption in response to a posting after the fact, when no disruption had occurred, the Second Circuit upheld the punishment.

The recent en banc decisions in *Layshock v. Hermitage Sch. Dist.* No. 07-4465, 2011 WL 2305970 (en banc, 3d Cir. June 13, 2011, cert. denied, U.S., Jan. 17, 2012) and *J.S. v. Blue Mountain Sch. Dist.* No. 08-4138, 2011 WL 2305973 (en banc, 3d Cir. June 13, 2011, cert. denied, U.S., Jan. 17, 2012), place the Third Circuit more in line with the prior case law, with the exception of the questionable decision in *Doninger*. Both of these cases involved a profile created by a student that presented very nasty images and comments directed at the principal.

In *Layshock*, the school district agreed that there had been no substantial disruption, but argued that Layshock's speech was vulgar, lewd and offensive, and "not shielded by the First Amendment because it ended up inside the school community." (*Id.* at slip 28.) The Court concluded, "*Fraser* does not allow the School District to punish Justin for expressive conduct which occurred outside of the school context." (*Id.* at slip 33.) The Court also specifically noted concerns about the Second Circuit's decision in *Doninger*.

In *J.S.*, the school district also based an argument on the *Fraser* standard, which the court determined was not applicable. Additionally, the school district argued that while there was not a substantial disruption at school such disruption was reasonably foreseeable. The Court determined that the facts did not support the conclusion that a substantial disruption was reasonably foreseeable because the profile had been created as a joke and was so juvenile that no one would ever take it seriously.

Thus, when the situation involves an attack on a staff member by a student, the case law is somewhat conflicting. The position of some educational leadership organizations is that *Fraser* should also apply to off-campus speech that is contrary to the educational mission of the school and impacts the school community, including staff. They can be expected to continue to raise this argument, but thus far this argument has been unpersuasive.

Principals are advised to obtain legal guidance before imposing discipline in response to material posted online that targets a staff member and to be prepared to demonstrate, based on the facts, how the operations of the school and/or the instruction of students was substantially disrupted or there are reasons to believe that such disruption is reasonably foreseeable. Keep in mind the standards of "material and substantial" and "severe and pervasive" in making this determination. These standards must be applied to the impact, not the character of the materials. If it is not possible to demonstrate such disruption, then a formal disciplinary response is ill-advised.

However, the fact that a school official cannot respond with formal discipline does not mean that this situation should simply be ignored. School officials may reasonably be concerned that the student is emotionally distraught and is facing challenges at school or in learning. Or there may be conflict between the staff member and the student that must be resolved. It is also possible that the staff member may have engaged in behavior that was disrespectful or abusive or was perceived as such by the student.

The actions of the student are sufficient to raise concerns that must be investigated and addressed. However, there should not be an immediate assumption that the student is the only one who is at fault. Where there is conflict between the student and the staff member, both should be encouraged to acknowledge the harm that they have caused and reconcile the differences. If the staff member is the one who is being disrespectful or abusive, the staff member is the one who must be held accountable.

Most districts have established a process to engage in an effective threat assessment that can determine the legitimacy of the threat and factors that may be significantly interfering with the student's emotional well-being. A similar fair, full, and objective investigation of this situation is advisable in any situation where a student has attacked a staff member online. It is essential that this investigation be done by someone who is not closely aligned with the school. This investigation can provide the basis for a restorative intervention that would not constitute a formal disciplinary response.

Situations Where Student Targeted Another Student

There have been two recent decisions where the situation involved a student targeting another student: *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010) and *Kowalksi v. Berkeley Count Sch.*, 652 F. 3d 565 (4th Cir. July 27, 2011, cert. denied, U.S., Jan. 17, 2012).

J.C., involved a situation where a student posting a video where two other students were denigrating a student. The District Court indicated it had some difficulty determining the appropriate standard. It does not appear that the Court was adequately briefed on the *Saxe* and *Sypniewski* decisions which specified that the *Tinker* standard applies in situations where only one student has been targeted. However, as the situation involved a one-time incident that was addressed quite rapidly, it was reasonable to conclude that the situation did not meet the standard of being sufficiently severe and pervasive.

The more recent Fourth Circuit decision in *Kowalski* involved a situation where a student set up profile where students were repeatedly posting harmful material directed at another student, leading this student to suffer severe emotional distress. The Court specifically affirmed that school officials have the authority to respond to student off-campus online speech in situations of bullying or harassment. Here is key language from the decision:

Thus, the language of *Tinker* 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. See *DeJohn v. Temple Univ.*, 537 F.3d 301, 319-20 (3d Cir. 2008).

According to a federal government initiative, student-on-student bullying is a "major concern" in schools across the country and can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide. See [StopBullying.gov](http://www.stopbullying.gov), available at www.stopbullying.gov (follow "Recognize the Warning Signs" hyperlink). Just as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use, see *Morse*, 551 U.S. 393, schools have a duty to protect their students from harassment and bullying in the school environment, cf. *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007) ("School Officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place"). Far from being a situation where school authorities "suppress speech on political and social issues based on disagreement with the viewpoint expressed," *Morse*, 551 U.S. at 423 (Alito, J., concurring), school officials must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning.

We are confident that Kowalski's speech caused the interference and disruption described in *Tinker* as being immune from First Amendment protection. (*Id.* at slip 12.)

Note that the second paragraph above follows the same pattern of analysis that the Supreme Court used in the *Morse* case--noting the serious concerns and damaging impact of drug abuse or bullying and harassment and state and local initiatives to prevent such harm.

Looking at this situation from a different perspective, ask this question: If students are not able to obtain assistance from the school if another student is attacking them in a manner that is severe and persistent, what are the other options for these students? There appear to be two: 1) refuse to come to school and thus be denied an education; and/or 2) take matters into their own hands, which could result in a violent attack at school.

The Due Process/Lack of Notice Issue

Another issue raised in the *J.C.* and *Kowalski* cases merits some attention. This is the question of due process related to lack of notice. In both of these situations, neither the state statute nor the district policy specifically referenced the authority of school officials to respond to off-campus speech. In *J.C.*, the Court determined that there was lack of due process, because of this lack of notice. In the *Kowalski* case, the Court held that there was sufficient notice. Thus, there is a conflict between these decisions related to the degree of notice that is necessary.

At this time, thirteen states have added language to their state bullying prevention statutes that specifically allows for school disciplinary intervention if a student's off-campus speech has caused a hostile environment at school for another student. Statutory language from New Hampshire provides an excellent example:

RSA 193-F:3 I.(a) "Bullying" means a single significant incident or a pattern of incidents involving a written, verbal, or electronic communication, or a physical act or gesture, or any combination thereof, directed at another pupil which: (1) Physically harms a pupil or damages the pupil's property; (2) Causes emotional distress to a pupil; (3) Interferes with a pupil's educational opportunities; (4) Creates a hostile educational environment; or (5) Substantially disrupts the orderly operation of the school.

193-F:3 II. "Cyberbullying" means conduct defined in paragraph I of this section undertaken through the use of electronic devices.

RSA 193-F:4 I. Bullying or cyberbullying shall occur when an action or communication as defined in RSA 193-F:3: (a) Occurs on, or is delivered to, school property or a school-sponsored activity or event on or off school property; or (b) **Occurs off of school property or outside of a school-sponsored activity or event, if the conduct interferes with a pupil's**

educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event.

Other states that have added electronic harassment to their bullying prevention statutes have not added a specific reference to off-campus speech because of the confusion over the constitutional standards. However, in these states, the state statute can be interpreted as setting forth the minimum requirements for districts--thus the addition of reference to off-campus speech that is now clearly supported by the recent *Kowalski* case, should be considered an appropriate addition to school policy.

Many districts have added reference to off-campus speech that is deemed to be significantly interfering with the ability of another student's education or presenting a safety concern. This policy addition offers several advantages: 1) clear notice to students and parents; 2) avoidance of many potential arguments with students and/or their parents; and 3) increasing the potential that students who are being attacked online will report to the school, rather than the other alternatives of avoiding coming to school or engaging in violence.

Recommendations for School Officials

A checklist for schools consider in responding to student off-campus speech:

- Notice. Does the district policy provide notice that the school has authority to respond to off-campus harmful speech?
- School nexus or impact. Is there a nexus between the off-campus online speech and the school community and an impact that has occurred, or is foreseeable, at school?
- Reasonably Foreseeable. If an impact has not occurred, can you point to specific reasons why an impact at school is reasonably foreseeable?
- On-campus. Have you asked about associated on-campus hurtful actions and checked the time when postings were made or messages were sent to determine whether these were made by students while at school?
- Disruption of school or interference with rights of students. Has, or could, the impact interfere with important rights or interests of other students, specifically, to receive an education and to be safe at school? If the speech has targeted a staff member, has there been an impact on the delivery of instruction to students, or is this reasonably foreseeable?
- Material and substantial. Has the impact on the other student or students been severe and pervasive, or is this reasonably foreseeable?
- Fair, full, and objective investigation. Have you conducted a fair, full, and unbiased investigation, including an assessment of the possibility that the student who posted the hurtful material online has been the recipient of hurtful behavior at school? If a staff member has been targeted, has the investigation been conducted by someone who is not aligned with the school?
- Restorative Intervention. Is the proposed intervention grounded in restoration and directed at ensuring that all parties involved get back onto a healthy positive track?

About the Author and Embracing Digital Youth

Nancy Willard, M.S., J.D. has been addressing issues of youth risk in the digital age, including legal issues and risk prevention and intervention, since 1995. She is author of *Cyberbullying and Cyberthreats: Responding to the Challenge of Online Social Cruelty, Threats, and Distress* (2007, Research Press) and *Embracing Digital Safety and Civility* (2011, Corwin Press). *Embracing Digital Youth* promotes approaches that will best ensure all young people become cyber savvy and that seek to address youth risk in the digital age in a positive and restorative manner.