Hurtful Speech v. Free Speech

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Embrace Civility in the Digital Age

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Schools must effectively balance their efforts to protect students from hurtful speech in a manner that also respects the rights of students to speak freely, including on controversial issues. This document will outline basic principles of student free speech, which will then be applied to situations of disparaging speech and off-campus speech.

Basic Principles

Between a "Rock and a Hard Place"

Poway High School has the dubious distinction of being the "poster child" for schools caught between a "rock and a hard place" on the issue of the balancing students' rights to an education versus students' rights of free speech.

The Rock

Donovan v. Poway

In June 2005, a San Diego jury found that Poway High School had failed to engage in appropriate actions to protect two students from harm related to harassment grounded in sexual orientation.[1] These students were awarded damages of $300,000. In October 2008, the Court of Appeal of the State of California upheld this verdict.

The Hard Place

Harper v. Poway

In April 2003, while the prior case was pending, Poway High School permitted a student group called the Gay-Straight Alliance to hold a "Day of Silence" at the school, to reinforce the importance of tolerance of others. This led to numerous altercations between students. In 2004, on the day following the "Day of Silence," Poway High School student Harper wore a T-shirt to school with anti-homosexuality statements. The school restricted Harper from wearing this shirt in the school building.

Harper filed a lawsuit alleging violation of his First Amendment rights of freedom of speech, free exercise of religion, and establishment of religion. In 2006, the Ninth Circuit upheld the school's right to restrict Harper's speech.[2] However, this decision was vacated by the Supreme Court, an unusual move, because Harper had graduated.

History and The Balance

It is helpful to frame this discussion with an analysis of the historical underpinnings of the free speech provision in the First Amendment. There is considerable disagreement about exactly what the framers of the Bill of Rights were thinking.[3] However, the natural rights philosophy advocated by John Locke, who was revered by many early leaders, was likely influential. The natural law perspective was expressed 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, a**s 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.*[4]

An excellent contemporary discussion of these issues from the perspective of schools was recently set forth in a document entitled, *Harassment, Bullying and Free Expression: Guidelines for Free and Safe Public Schools*:

> *It is important to distinguish between speech that expresses an idea, including religious or political viewpoints — even ideas some find offensive — and speech that is intended to cause, or school administrators demonstrate is likely to cause, emotional or psychological harm to the listener.* ***Words that convey ideas are one thing; words that are used as assault weapons quite another****.*[5]

Note the great similarity. Essentially, the line at which students' free speech rights crosses over to speech that can be restricted in school is when such speech intrudes with other important student rights that schools must also protect, specifically the right to receive an education.

Right to Receive an Education

Brown v. Board of Education

The need to protect students' right to receive an education was emphasized in *Brown v. Board of Education*.[6]

> *Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. ... In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.*

Free Speech Case Law

There have been four Supreme Court cases addressing student free speech rights. Three of these relate to situations that could be involved when considering student speech that disparages other students, *Tinker v. Des Moines Ind. Comm. Sch. Dist., Bethel School District v. Fraser,* and *Morse v. Frederick*.[7]

Tinker v. Des Moines

The *Tinker* case involved the right of students to wear black arm bands to protest the war in Vietnam.

The Court made strong statements related to the protection of students' free speech rights, but also indicated schools may restrict student speech if there are reasons to believe it could cause a substantial disruption or a significant interference with other students. Some key comments from the case:

> *It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. ...*
>
> *In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.*
>
> *There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.*

A key federal court case that applied the *Tinke*r standard in the context of a bullying policy is *Saxe v. State College*.[8]

Saxe v. State College

In *Saxe*, the 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. The objections to the school's bullying policy had been raised by the legal guardian for two students who believed that this policy would restrict the ability of students to speak out about their religious beliefs, including their belief that homosexuality is a sin.

The district's policy that was challenged stated, in part:

> *Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.*

The Third Circuit Court, in an opinion by then-Judge Alito, initiated the discussion with the following statement:

> *There is of course no question that non-expressive, physically harassing conduct is entirely outside the ambit of the free speech clause. But there is also no question that the free speech clause protects a wide*

variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs.

In other words, there are no concerns with respect to statutory bullying prevention restrictions against hurtful physical conduct. The free speech concerns are associated with provisions that impact student speech.

In discussing the first prong of the school district's policy, the Court 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.

While the Court did not directly reference the *Brown* decision, clearly the mission of the school to educate its students and therefore the right of students to receive such education is the issue that must be balanced against students' free speech rights. The point at which such speech crosses that line, is the point at which school administrators can impose restrictions.

Note also that the Court essentially equated the *Tinker* concept of "substantial disruption" with "interference with a student's educational performance." Note also the use of the terms "a" student, meaning the disruption does not have to be school-wide. The interference may be of one other student.

In another location in the decision, the Court also stated that it was appropriate to assess this distress based both on the subjective perspective of the student bullied, as well as an objective perspective looking at all of the circumstances, including frequency and severity and degree of interference.

However, the Court did find the second prong to be unconstitutional because it included the term "offensive." The Court stated:

In any case, it is certainly not enough that the speech is merely offensive to some listener. ... Because the Policy's "hostile environment" prong does not, on its face, require any threshold showing of severity or pervasiveness, it could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone. This could include much "core" political and religious speech: the Policy's "Definitions" section lists as examples of covered "negative" or "derogatory" speech about such contentious issues as "racial customs," "religious tradition," "language," "sexual orientation," and "values." Such speech, when it does not pose a realistic threat of substantial disruption, is within a student's First Amendment rights.

Reflecting on this decision, if the district had used the term "and" rather than "or" this provision would likely have passed review.

Bethel v Fraser

The next Supreme Court case addressing student free speech was *Fraser*, which involved student speech during an assembly that presented an explicit sexual metaphor.

While the Court again reinforced the importance of respecting students' free speech rights, it also noted that the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." The Court determined that school administrators could respond to student speech that was "lewd, vulgar, plainly offensive, and contrary to the school's educational mission."

In discussing the importance of the authority of school administrators to restrict certain speech, the Court noted the following:

[P]ublic education must prepare pupils for citizenship in the Republic. ... It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

This language is in line with the previous discussion related to natural rights and the balance between free speech and protecting the rights of others. However, this passage also raises attention to the important role of schools in inculcating civic values and helping students learn how to express unpopular or controversial views in a manner that is considerate of others.

An important statement also appeared in the *Fraser* case, in the concurring opinion of Justice Brennan. This statement relates directly to the issue of off-campus speech. Justice Brennan stated:

If 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.

Thus, the *Fraser* standard provides support for school administrators in inculcating habits and manners of civility, but this only applies to on-campus student speech.

Morse v. Frederick

The case of *Morse* involved student display of a sign that read "Bong Hits 4 Jesus" at what the Court considered to be a school event, where students were watching the Olympic torch passing the school.

In its argument, the school district indicated the principal restricted this speech because the banner could be interpreted as advocating illegal drug use. There was no evidence that the situation presented any concerns of a significant disruption, threat to the security of other students, or that the sign was going to influence students to engage in drug abuse.

The manner in which the Supreme Court approached its analysis in *Morse* focused on student safety. As such, this decision is directly applicable to the situation involving speech that could harm other students, including situations involving bullying.

Laying the groundwork for the concern of drug use, the Court quoted from the *Vernonia* case, where it had upheld school-based drug searches and spoke extensively on the dangers of youth drug abuse. Then the Court engaged in an extensive discussion of the need and demand for school-based efforts to address drug abuse. The Court's process of analysis was:

The problem (of drug abuse) remains serious today. (Citing several sources of supporting data.) ...

Congress has declared that part of a school's job is educating students about the dangers of illegal drug use. ... (Referencing such statutory efforts.)

Thousands of school boards throughout the country ... have adopted policies aimed at effectuating this message. Those school boards know that peer pressure is perhaps "the single most important factor leading schoolchildren to take drugs," and that students are more likely to use drugs when the norms in school appear to tolerate such behavior. Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school administrators working to protect those entrusted to their care from the dangers of drug abuse.

The concurring opinion in *Morse*, Justice Alito, along with Justice Kennedy, should also be viewed as influential. In this opinion, Justice Alito focused on the issue of student safety:

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

... [D]ue to the special features of the school environment, school administrators must have greater authority to intervene before speech leads to violence.

Application of these Standards

Two lower court cases illustrate how the standards of *Tinker* and *Morse,* and sometimes *Fraser,* have been applied in situations of bullying and speech that disparages others and thus contributes to a "culture of bias."

Kowalski v. Berkeley County

A recent Fourth Circuit case, *Kowalski v. Berkeley County Sch.,* addressed a situation involving off-campus cyberbullying involving hurtful speech directed at one student by another student.[9]

Because this speech was off-campus, the Court declined to rely on the *Fraser* standard. The Court made its determination supporting the disciplinary actions of the school based on the *Tinker* substantial disruption standard, noting the evidence of how the student's off-campus actions had interfered with the bullied student's learning.

However, in discussion the Court also set forth an analysis approach that was very similar to the manner in which the Supreme Court approached its decision in *Morse*:

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. ... [Schools have a duty to protect their students from harassment and bullying in the

school environment ... Far from being a situation where school authorities suppress speech on political and social issues based on disagreement with the viewpoint expressed, ... school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning.

Thus, in this case, we can see the reliance on *Tinker*, but strong support from a *Morse*-based analysis related to student safety.

Sapp v. Alachua County

Another example is the Federal District Court case of *Sapp v. School Bd of Alachua Cnty*.[10] In this situation, after a number of incidents of students wearing clothing with anti-Islamic slogans, the school enacted a policy that banned clothing or accessories that "denigrate or promote discrimination for or against an individual or group on the basis of age, color, disability, national origin, sexual orientation, race, religion, or gender."

This new policy was challenged by those seeking the right to express their religious-based viewpoint. In an initial analysis, the Court stated:

"Islam is of the Devil" presents a highly confrontational message. It is akin to saying that the religion of Islam is evil and that all of its followers will go to hell. The message is not conducive to civil discourse on religious issues; nor is it appropriate for school generally. "Part of a public school's mission must be to teach students of differing races, creeds and colors to engage each other in civil terms rather than in terms of debate highly offensive or highly threatening to others."

This is a *Fraser*-based analysis, however, the Court cited other lower case decisions that had interpreted *Fraser*.

Then, the Court reviewed the local evidence of actual disruption, which supported the school administrators' reasonable prediction of further disruption and expressed a *Tinker*-based conclusion:

In this case, school administrators had a reasonable fear that the t-shirts were likely to interrupt school activities and "appreciably disrupt appropriate discipline in the school."

In evaluating the constitutionality of the policy provision, the Court's response also appeared to be grounded in a combination of *Morse* and *Fraser*:

[The policy] furthers important governmental and pedagogical concerns. (Citing Morse.) ... 'The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities. (Quoting from Davis.) Given our diverse society, American schools have a particularly compelling interest in teaching students 'the habits and manners of civility as values conducive to both happiness and to the practice of self government.' (Citing Fraser.)

Considerations

The manner in which the Supreme Court analyzed the situation in *Morse* can be readily followed when supporting the important role of schools in effectively addressing the concerns of bullying or disparaging student speech:

- The problems associated with bullying have been well-documented through research. These concerns include long-term emotional harm, school avoidance and failure, and suicide ideation.[11]
- In its interpretation of numerous civil rights statutes, the The U.S. Department of Education's Office for Civil Rights has declared that part of a school's job is preventing discriminatory harassment of students.[12]
- The Federal Government has launched a broad-based initiative to reduce bullying in schools.[13]
- Throughout this country, schools are required by state statutes to have bullying prevention policies in place and to respond to reports of bullying.[14]
- The freedom to advocate unpopular or controversial views in schools must be balanced against the school's role in teaching students the boundaries of socially appropriate behavior and the "habits and manners of civility," including the need to treat others with respect.[15] (However, do not attempt to use this argument to justify restriction of student off-campus speech.)
- If school administrators and teachers tolerate student speech that disparages their peers, this will pose a major challenge in the ability of schools to protect students who have been entrusted to their care.
- Failure to restrict such speech could also lead to liability for discriminatory harassment because such speech could contribute to a hostile environment or "culture of bias" against certain students.[16]

Disparaging Speech on Campus

Restricting Disparaging Speech

It is necessary for schools to be able to restrict and respond to disparaging speech to ensure that the school does not allow an underlying "culture of bias" against typically targeted students that may reenforce more egregious, continuing bullying or harassment.

Clearly, to ensure a school climate that supports all students, schools must restrict instances of disparagement that may not reach the level of bullying or harassment, but could, in a cumulative manner, support and sustain a hostile environment. Interventions in this regard should, as best as possible, be instructional in nature.

To do so, schools must be able to restrict speech that includes derogatory terms, symbols that have historically been associated with the oppression of a group of people, or statements that communicate an opinion of the inherent inferiority of a student, group of students, or group of people which may include students. This kind of speech will be referred to as disparaging speech.

Dress Code Cases

Most of the cases addressing the authority of schools to restrict disparaging speech have been in situations involving student dress codes. These cases have not specifically focused on situations involving bullying or harassment.

Some of these kinds of cases have involved what could be viewed as lewd or vulgar speech.[17] The courts have generally upheld the authority of schools to restrict such speech relying on the standards expressed in *Fraser*.

In most, but not all, cases the courts have upheld schools' decisions to prohibit the Confederate flag at school, under *Tinker*, because past racially charged incidents allowed the officials to predict that the display of the Confederate flag foreseeably could substantially disrupt the schools. By way of example are these cases:

- *Melton v. Young.*[18] In the four years since the high school was racially integrated, the school had experienced significant racial tension.
- *West v. Derby Unified Sch. Dist.*[19] There had been actual fights at school involving racial symbols, particularly the Confederate flag.
- *Scott v. Sch. Bd. of Alachua County*.[20] The school had a history of racial tensions including racially based altercations.

However, a different decision was made in *Castorina ex rel. Rewt v. Madison County School Board*.[21] In this case, the Sixth Circuit reversed the District Court's grant of summary judgment to the school.

The Court noted the lack of evidence suggesting that a ban on the Confederate flag was needed to prevent disruptions and emphasized that the Confederate flag appeared to have been specifically targeted by school administrators, who let other potentially divisive racial symbols go unpunished. The reasons for this will be discussed further below.

In cases where the issue has been anti-homosexual speech based on religious objections or anti-Islamic speech, the decisions have been more varied. By way of example are these cases:

- *Nixon v. Northern Local School District Board of Education*.[22] A Federal District Court upheld the right of a student to wear a T-Shirt that stated: Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!
- *Zamecnik v. Indian Prairie School Dist. #204.*[23] The Seventh Circuit upheld the right of students to wear a T-shirt stating: "Be Happy, Not Gay."
- *Harper v Poway*.[24] In 2006, the Ninth Circuit upheld the school's right to restrict Harper's anti-homosexuality speech, but this decision was vacated on appeal by the Supreme Court.
- *Sapp v Alachua*.[25] A Federal District Court supported the decision of a school in a suit brought by students who were prohibited from wearing t-shirts stating: "Islam is of the Devil."

Evidence of Substantial Disruption

Determining why these decisions were different requires a focus on the quality of the evidence presented by the school to justify its decision to restrict such speech. To restrict such speech requires that schools are able to reasonably forecast of disruption at the school or interference with the rights of other students.

Basis of the Requirement for Local Evidence

By way of background on the issue of local evidence forecasting substantial disruption, consider the statements made in several key cases. In *Tinker*, the Supreme Court stated:

> *[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with*

school activities, and no disturbances or disorders on the school premises in fact occurred.[26]

In *Saxe*, the Third Circuit noted:

However, if a school can point to a well-founded expectation of disruption--especially one based on past incidents arising out of similar speech--the restriction may pass constitutional muster.[27]

Justice Alito's concurring opinion in *Morse*, stated:

[I]n most cases, Tinker's "substantial disruption" standard permits school administrators to step in before actual violence erupts.[28]

Failed to Meet Evidentiary Requirement

The following are statements from court decisions regarding the sufficiency of the evidence in cases where the school's restriction of student speech was not supported.

Castorina v. Madison County

In *Castorina*, the above-mentioned Confederate flag case, the Sixth Circuit stated the following in regards to the sufficiency of the evidence:

If the students' claims regarding the Malcolm X-inspired clothing (i.e. that other students wore this type of clothing and were not disciplined) and their claims that there were no prior disruptive altercations as a result of Confederate flags are found credible, the court below would be required to strike down the students' suspension as a violation of their rights of free speech as set forth in Tinker. In addition, even if there has been racial violence that necessitates a ban on racially divisive symbols, the school does not have the authority to enforce a viewpoint-specific ban on racially sensitive symbols and not others. Conversely, if the students cannot establish their factual claims, then the principal and school board may have acted within their constitutional authority to control student activity and behavior. In either circumstance, the facts are essential to the application of the legal framework discussed herein. Accordingly, the summary judgment is reversed and the case remanded to the district court for trial.[29]

Nixon v. Northern Local

In similar manner in *Nixon*, the anti-homosexual, anti-abortion, anti-Islam T-shirt case, the Court expressing its opinion of the sufficiency of the evidence as follows:

Defendants concede that James' shirt did not cause any disruptions at school. ... They do assert, however, that the shirt had the potential to cause a disruption. This is presumably based on the fact that the school includes students and/or staff members who are Muslims, homosexuals, and those who have had abortions. The mere fact that these groups exist at Sheridan Middle School, and the fact that they could find the shirt's message offensive, falls well short of the Tinker standard for reasonably anticipating a disruption of school activities.[30]

Zamecnik v. Indian Prairie

In *Zamecnik,* an anti-homosexual T-shirt case, the Court explained that the three forms of evidence the school submitted were entirely deficient, noting:

*To justify prohibiting their display the school would have to present "facts which might reasonably lead school administrators to forecast substantial disruption." ... Such facts might include a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school-**but the school had presented no such facts in response to the motion for a preliminary injunction.***[31]

The Court rejected the school's evidence of prior incidents of harassment as negligible because the single school administrator who presented testimony about these incidents was unable to confirm any details about any incidents. He reportedly was relying on comments made by other unidentified school administrators, based on unconfirmed statements, made by unidentified students.

The school had also submitted evidence of incidents of harassment by students against Zamecnik, the student who wore the T-shirt. The Court determined that the school could not rely on retaliatory conduct by persons who are offended by speech to prohibit such speech.

Finally, the school had offered expert testimony, which the Court described as follows:

There is nothing in the report to indicate that Russell knows anything about Neuqua Valley High School, for there is no reference to the school in the report. No example is given of "particularly insidious" statements about homosexuals. No example is given of a "homophobic slur" or "derogatory remark" about them that has ever been uttered in any school, or elsewhere for that matter. Though the report calls "be happy, not gay" particularly insidious, it does not indicate what effects it would be likely to have on homosexual students. It gives no indication of what kind of data or study or model Russell uses or other researchers use to base a prediction of harm to homosexual students on particular "negative comments." No methodology is described. No similar research is described.

... Dr. Russell is an expert, but fails to indicate, however sketchily, how he used his expertise to generate his conclusion. Mere conclusions, without a "hint of an inferential process," are useless to the court. ... Russell's is as thin an expert-witness report as we've seen.[32]

The focus on local evidence in these three cases makes it clear that what courts will pay attention to the most is not the substance of the speech itself, but the quality of the local

evidence presented to justify restricting such speech based on the foreseeability of interference with rights of other students at that particular school.

Met the Evidentiary Requirement

Compare the lack of evidence in the above cases to that which was submitted in *Harper* and *Sapp,* where the authority of the school to restrict disparaging speech in a specific incident and in a policy, was upheld.

Harper v. Poway

In *Harper*, the school provided information about a series of incidents and altercations occurred on the school campus as a result of anti-homosexual comments that were made by students, including a confrontation that required the principal to separate students physically.[33]

The school also provided extensive research insight that demonstrated the academic underachievement, truancy, and dropout of homosexual youth that were the probable consequences of violence and verbal and physical abuse at school. Further, it was known that this case was occurring in the context of litigation that had been brought against the district for failure to prevent the harassment of students based on sexual orientation.

Sapp v. Alachua County

In *Sapp*, the school district also provided extensive local evidence of disruption.[34] This included a number of student altercations related to the disparaging speech, and significant disruption of student events. Additional evidence was that parents had contacted the school expressing concerns about the safety of their children. Four administrators testified about how, in their professional experience, such speech was offensive and demeaning and could lead to a hostile environment that was interfering with the delivery of instruction.

Sufficiency of Local Evidence is KEY!

Thus, the decisions in support of the students' disparaging speech in *Castorina, Nixon,* and *Zamecnik* were quite clearly based on lack of sufficient local evidence to demonstrate that the school had a well-founded expectation that the speech could foreseeably cause a significant interference in the rights of other students to receive an education. The decisions were not based on the character of the speech itself.

In fact, the Court in the decision in *Zamecnik* went to such great lengths outlining the insufficiency of the evidence, one could reasonably "read between the lines" in this decision that the Court wanted to rule in the opposite manner and was frustrated by the lack of evidence that would support its doing so.

Essentially, this decision provided extensive instruction by the Court to schools on the evidence necessary to support a conclusion upholding a school restriction of student speech that disparages others.

Educational leaders should note that advocacy groups are now using the decision in *Zamecnik* as the basis to threaten schools that seek to place restrictions on disparaging student speech.

In an incident reported in the NSBA's Legal Clips, officials in a Connecticut school district backed down in a fight over free speech rights, when it decided to permit a student to wear a T-shirt bearing an anti-homosexuality message after receiving a letter from the American Civil Liberties Union that used the *Zamecnik* decision in its argument to the school:

> *The school's actions in requiring Seth to remove his tee-shirt,* ***absent evidence of material and substantial interference, or invasion of the rights of others,*** *violate the First Amendment to the United States Constitution .... The present matter is on all fours, not only with Tinker (in that Seth's tee-shirt is indistinguishable from Mary Beth Tinker's anti-war armband), but, even more saliently, with the ... unanimous Seventh Circuit decision in Zamecnik v. Indian Prairie School Dist. No. 204, 636 F.3d 874 (7th Cir. 2011).*[35]

The key to being able to successfully sustain a restriction against disparaging speech, including in situations where an advocacy group is threatening litigation, is identified in the text highlighted in bold above: "evidence of material and substantial interference, or invasion of the rights of other." Having such evidence is imperative.

Recommendations

To restrict student speech that disparages other students without facing the threat of litigation for free speech, school district must ensure that they have local data, backed up by research and/or expert analysis, to justify their conclusion, that similar speech has created, and therefore can be reasonably expected to create conditions at school that significantly interfere with the rights of other students to receive an education and participate in school activities.

Schools are advised to obtain such local evidence on a regular basis. As noted in the *Anoka-Hennepin Consent Decree*, there is a requirement that the schools conduct an annual survey of students and hold focus groups with students who are typically targeted.[36] This survey and focus groups are the perfect vehicle to obtain sufficient evidence of the negative impact of cumulative disparaging statements on students' well-being, learning, and participation.

The following strategy is recommended:

- Gather all following evidence and prepare a report addressing the findings of the negative impact of disparaging speech on students' ability to learn and participate in school activities that includes.
  - Data from an annual survey of students.
  - Focus group data from students that are likely targeted that focuses on specific incidents involving disparaging speech, as well as the cumulative negative effect of such speech on their emotional well-being and the resulting impact on their ability to learn and participate in school activities.
  - Stories that document occasions when such students have avoided school, classes, or school activities due to the expressions of disparaging speech by other students. Focus on the cumulative effect of such disparaging speech.
  - Data from actual incidents to back up the presence and negative impact of such speech.
- Back up the validity of these findings with academic published studies.
  - If there is an expectation of a contentious response to any restrictions or a threat of litigation, arrange for an external expert to review this report to provide additional credibility to the findings.
- Emphasize that any school response to these situations will focus on instruction, and not punishment.
  - Focus attention on the important role of schools to impart the habits and manners of civility that are essential to a democratic society which includes tolerance of divergent political and religious views, but also must take into account the sensibilities of other students. Incorporate language from *Brown, Tinker,* and *Fraser.*
- Have students who are typically targeted present this report to any policy body, such as the school board or a site council.
- This report can justify any necessary changes in policy related to disparaging speech or information for students or parents about school standards.
- If the above has not been done and contention arises in the context of litigation or threatened litigation, quickly prepare the above documentation.

Student Off-Campus Speech

This section will address issues related to the authority of school administrators to formally respond to harmful off-campus student speech.

The rise in the use of digital technologies by students has unfortunately brought with it a rise in the use of digital technologies by students for hurtful purposes. Generally, these activities occur when students are off-campus, but can also occur when students use cell phones at school. The harmful impact, as well as other harmful activities, can negatively impact students at school.

Use of digital technologies by students has changed the playing field for bullying prevention. Schools are not creating the rules for sites or apps, school staff are not present to supervise, and an even greater percentage of students do not report digital harm to adults. Further, if adults respond to either on-campus or digital situations in a way that stimulates retaliation, digital retaliation can be accomplished anonymously and engage participants who are outside of the authority of the school.

Further, when using digital technologies, students may also attach, speak out against, or express their feelings about, school staff in a very public and non-complimentary manner. However, it is important to note that given the percentage of students who report being bullied or disparaged by school staff, and the obvious difficulties in reporting such concerns, schools must not immediately dismiss the presence of harmful material directed at staff as entirely the fault of the student.

Recent Cases

In January 2012, the Supreme Court denied review in three student hurtful Internet speech cases, *J.S. v. Blue Mountain Sch. Dist., Layshock v. Hermitage Sch. Dist*., and the aforementioned *Kowalksi* case.[37]

In each of these cases, a student had posted offensive material online, while off-campus. In two of the cases, *J.S.* and *Layshock*, the target was the principals. In *Kowalski*, the target was another student. The principals disciplined the students for posting this speech, which resulted in lawsuits based violation of student's free speech rights.

In *J.S.* and *Layshock,* the Third Circuit, sitting en banc, ruled against the schools. In *Kowalski,* the Fourth Circuit upheld the disciplinary actions of the school.

After the press announcement that the Supreme Court had denied review in all three cases, Francisco M. Negrón Jr., general counsel of NSBA stated:

We've missed an opportunity to really clarify for school districts what their responsibility and authority is. This is one of those cases where the law is simply lagging behind the times.[38]

The courts have actually quite consistently held that schools can respond to student off-campus speech that meets the *Tinker* substantial disruption standard and that the *Fraser* standard does not apply.

However, an important issue in determining the degree of such disruption is whether the disruption is of the education of students.

The right that is to be balanced against students' free speech rights is students' rights to receive an education. The harmful impact of the off-campus speech must reach the level where students' educational activities have been disrupted.

One key reason for the difference in these decisions is related to the status of the target, staff member or student, and the resulting impact on students' right to receive an education.

Speech that Targets Staff

Disruption of Staff Generally Does Not Satisfy Requirement

Schools are only able to formally discipline a student for off-campus speech that has targeted a staff member if they can demonstrate that there was an overall substantial disruption of school operations and the delivery of education to students, a reasonably foreseeable prospect thereof, or a "true threat."

Unfortunately, the courts have been inconsistent in the manner in which they evaluate whether such disruption has occurred. The greatest conflict in the case law related to the degree of disruption necessary is between the Second and Third Circuits.

Doninger v. Niehoff

In an earlier Second Circuit case, *Doninger v. Niehoff*, a student leader was very upset that the school had cancelled a student jazz festival she had been coordinating, just one week prior to the event. She posted a message on a blog expressing her distress.[39] 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 itself had caused any disruption.

Ignoring the obvious lack of reasonableness in predicting a substantial disruption in response to this posting, which was discovered after the fact, when no disruption related to the posting had actually occurred, the Second Circuit upheld the punishment. Notably however, the punishment did not result in a suspension, only restrictions on extracurricular activities.

J.S. v. Blue Mountain and Layshock v. Hermitage

The more recent Third Circuit en banc decisions in *J.S.* and *Layshock*, provide the more solid guidance to follow, especially recognizing the fact that the Supreme Court declined to review these opinions.

Both of these cases involved a profile created by a student that presented very nasty images and comments directed at the respective principals.

In *J.S.*, the school district based one argument on the *Fraser* standard, which the Court determined, relying on Justice Brennan's comment, was not applicable because this was off-campus speech.

The Court held the *Tinker* standard was the appropriate standard in these cases. The school district had argued that while there was no factual evidence that a substantial disruption had occurred at school, such disruption was reasonably foreseeable.[40]

On the first appeal, a 3-judge panel of the Third Circuit did find that the profile threatened to cause a substantial disruption because it tarnished the reputation of the principal. The en banc 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, access to the profile was limited, and the profile was so juvenile that no one would ever take it seriously.

In *Layshock*, the factual finding at the District Court level was that there was no substantial disruption at school. The school district did not pursue an argument based on *Tinker* on appeal. Instead, the school district argued that there was a sufficient nexus with the school, and that because of this nexus, the school should be allowed to respond under the *Fraser* standard.[41]

The school argued that since the student used a photo of the principal taken from the school web site, the hurtful fake profile was aimed at the school community, and was reasonably foreseeable it would come to the attention of the school and the principal, this established a sufficient nexus to the school that this should be considered in-school speech, thus allowing the application of the *Fraser* standard.

The Court determined that none of these circumstances led to the conclusion that this was in-school speech and, thus, the *Fraser* standard was not appropriate. The Court noted:

... [O]ur willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate.

As is evident in these cases, schools cannot rely on a *Fraser* argument to impose discipline for off-campus activities. If relying on *Tinker,* schools must have clear factual evidence of significant actual disruption of the students at school or very good reasons to foresee such disruption of the education of the students.

Despite the fact that there was certainly a disruption in the lives of the principals in the *J.S.* and *Layshock* situations, there was no evidence of a disruption of student learning. Thus, the school's disciplinary actions were deemed not to have met the *Tinker* standard. Because this was off-campus speech, *Fraser* was not applicable.

Important Consideration

However, another important consideration must be made in situations where a student has attacked a staff member online. The hurtful online postings should raise a "red flag" that something is not right in the relationship between the staff member and the student.

It could be that the student is having significant learning challenges that are not being met. This may be a situation of conflict. But it may also be that the staff member has been disrespectful or abusive to the student, or was perceived as being so. There should never be an immediate decision that the student was the only one who is at fault.

Getting to the bottom of the situation should be a high priority. A fair and objective investigation is advisable in any situation where a student has posted hurtful materials targeting a staff member online. It is advisable that this investigation not be conducted by someone who is closely aligned with the school. It is further suggested that an "ally" be appointed to assist the student during this investigation.

Speech that Targets Students

Significant Interference with Student's Right to Receive an Education Required

There have been two significant court decisions where the situation involved a student targeting another student: *J.C. v. Beverly Hills Unified Sch. Dist*., and the aforementioned *Kowalksi* case.[42] When a student has targeted another student this will raise concerns of student safety or interference with the ability of the targeted student to receive an education.

J.C. v. Beverly Hills

J.C., involved a situation where one student posted a video in which two other students were seen denigrating another student. The District Court indicated it had some difficulty determining the appropriate standard, however ultimately determined that the case should be decided based on *Tinker*.[43] However, as the situation involved a one-time incident that was addressed quite rapidly, the Court concluded that the situation did not meet the standard of being sufficiently disruptive.

Unfortunately, in this case, the Court dismissed the expressed opinion of the principal that, based on her experience, if she had not responded to this reported situation as soon as it was reported, it was reasonably foreseeable that it would have been disruptive to the targeted student.

This raises attention to the issue of evidence. If significant interference with a student's learning cannot be clearly documented, schools must have greater evidence of the potential for such interference than simply one administrator's opinion.

Also, however, the Court appeared to think that the *Tinker* standard only applied in situations where there was a substantial disruption to the entire school body. The Court's decision did not reference the afore-quoted statement in *Saxe*, which clearly established that a significant interference in instruction of "a" student constitutes a substantial disruption. It is possible that an analysis based on the *Saxe* decision was not presented to the Court in the arguments by the school.

In any legal proceeding where a school must justify the discipline of a student for cyberbullying another student use of the language from *Saxe* decision that a significant interference in the education of "a" student constitutes substantial disruption is imperative.

Kowalski v. Berkeley County

The more recent Fourth Circuit decision in *Kowalski* involved a situation where Kowalski set up a hurtful Facebook profile and encouraged other students to repeatedly post hurtful material directed at one student. This led the targeted student to suffer severe emotional distress that had interfered with her learning.

The Fourth Circuit relied on the *Tinker* standard and specifically affirmed that school administrators have the authority to respond to student off-campus online speech in situations of bullying or harassment where there has been a significant interference with the ability of the bullied student to receive an education.

The key language from the *Kowalski* decision was set forth earlier. This powerful analysis has essentially set forth what is now the strongest standard supporting school actions against students who cyberbully other students.

Notice Issue

Another issue raised in the *J.C.* and *Kowalski* cases also merits attention. This is the question of due process related to notice. In both of these situations, neither the state statute nor the district policy specifically referenced the authority of school administrators 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 in the school district policy that is necessary.

The 2011 *USED Analysis* noted that only thirteen states had 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.[44]

Other states that have added electronic harassment to their bullying prevention statutes have not added a specific reference to off-campus speech. Clearly, it would be preferable for this language to be added to every state statute, as a requirement for inclusion in district policies.

Sometimes, when such language has been proposed, objections have been raised from advocacy groups that this would grant school administrators authority over students outside of school, which intrudes on the rights of parents.

It is important to make it clear that the only time school administrators can impose formal discipline is when the harmful impact is interfering with the rights of another student to receive an education. Thus school officials are not intruding into parents' authority, they are only addressing the challenges that are being presented within the school environment.

Considerations

The following approach is recommended for addressing issues of student off-campus hurtful speech:

- Ensure effective notice in the district policy that the school has the authority to respond to off-campus harmful speech of students that, or foreseeably could, create a substantial disruption at school or significantly interfere with another students' right to receive an education.
  - If there is no language in the state statute related to off-campus speech, upon approval by local counsel, schools could interpret the state statute as setting forth the minimum requirements for districts. Thus, the addition of appropriate reference to off-campus speech that has or could cause a substantial disruption at school or a significant interference with a student's right to receive an education could be added to district policies because this is in accord with the case law.
- After the school administrator has saved all of the postings, seek to have harmful postings removed by the web site by filing an abuse report on the web site.
  - If there is a possibility that criminal action might be taken, allow law enforcement to collect the evidence.
- Document that there is a clear nexus between the off-campus online speech and the school community and that an impact that has occurred, or is reasonably foreseeable, at school.
  - Ask about and document associated on-campus hurtful actions, however minor. In the vast majority of these situations, the hurtful acts are likely occurring both online and at school. The off-campus speech can be considered to have "melded" with the on-campus hurtful acts, making it possible to address all aspects of the situation.
  - Check the time when postings were made or messages were sent to determine whether these were made by students while at school.
- If the person creating the hurtful materials has done so anonymously, but appears to be someone who knows the bullied student, the following steps are suggested:
  - Ask the bullied student what has happened in his or her relationships with other students.
  - Review the postings and the history of the postings carefully. Other students, who are identifiable have likely responded. The initial posts, will likely be primarily from a group of students who were alerted to the site by the one who created it. Determine if a key member of this group is curiously absent.
  - Conduct interviews with some of the lesser involved students, acting as though you have already identified the instigating student and are now simply seeking affirmation and letting them know their confidential assistance in resolving the situation will be taken into account when determining what school action to take against them.
  - If arguably a criminal matter, law enforcement can file a subpoena with the company to obtain identification information.
  - Be alert to the possibility of self-cyberbullying.. Students who are engaging in self-cyberbullying should be considered at high mental health risk. If suspected, the potential of such risk should provide sufficient justification for law enforcement to obtain a subpoena to obtain identification information from the company or may be able to conduct an analysis of the student's computer. Mental health personnel must be involved in the intervention.
- Document evidence of disruption of school that significantly interferes with many students or interference with an individual student's right to receive an education, or how it is reasonably foreseeable that it will be so.
  - This requires an assessment of the degree of distress experienced by a bullied student or students as

subjectively reported by these students, or overall disruption with student learning.

- If the speech has targeted a staff member, the school must demonstrate how this speech has, or reasonably could, interfere with the delivery of instruction to students or substantially disrupted the school environment from the perspective of the students.
  - Given the potential for an adverse legal action, it is advisable for a school administrator to discuss the situation with a district-level administrator or the school's legal counsel prior to disciplining any student who has targeted a staff member online.
- If a harmful impact has not occurred, identify reasons why the school has a well-founded expectation it could.
  - This might include an assessment of the situation, including the material posted, the extent of distribution, the parties involved, past experiences with these or other students in similar situations.
- Conduct a fair and unbiased investigation.
  - Assess the possibility that the student who posted the hurtful material online has been the recipient of hurtful behavior at school and the online postings have been in an attempt to get this to stop. Watch for concerns of retaliation.
  - Be alert to the possibility of impersonation where a student(s) have created a profile or have broken into a student's account and have sent hurtful materials in an effort to get this student into trouble.
  - In any situation where a staff member has been attacked online, investigate the well-being of the student and the relationship between the student and the staff member by someone who is not directly aligned with the school.
- Respond to these situations in a restorative manner that will stop the harm, but not result in a permanent disciplinary report for the student who was hurtful. This may help to keep parents from contacting an attorney.

1 *Donovan v. Poway Unified School District* (2008) 167 Cal.App.4th 567.

2 *Harper v. Poway United School District,* 445 E3d 1166 (9th Cir. 2006), vacated as moot, 127 S. Ct. 1484 (2007).

3 Levy, L. (1985) *The Emergence of Free Press.* (New York: Oxford University Press. (1985).

4 Trenchard and Gordon, *No. 15, Feb 4, 1720, in Cato's Letters* (6th ed., 1755), 1:96. (emphasis added).

5 American Jewish Committee and Religious Freedom Education Project/First Amendment Center. (2012) *Harassment, Bullying and Free Expression: Guidelines for Free and Safe Public Schools*. http://www.firstamendmentcenter.org/madison/wp-content/uploads/2012/05/FAC-Harassment-Free-Expression-BROCHURE.pdf. (emphasis added).

6 *Brown v. Board of Education* 347 U.S. 483 (1954).

7 *Tinker v. Des Moines Ind. Comm. Sch. Dist* 393 U.S. 503 (1969); *Bethel School District v. Fraser* 478 U.S. 675 (1986); *Morse v. Frederick* 551 U.S. 393 (2007). *Hazelwood School District v. Kuhlmeier* 484 U.S. (1988), related to student speech in school publications and is therefore not discussed.

8 *Saxe v. State College* 240 F.3d 200 (3d Cir. 2001), see also *Sypniewski v. Warren Hills Regional Board of Education* 307 F. 3d 243 (3rd Circuit 2002).

9 *Kowalski v. Berkeley County Sch*. 652 F. 3d 565 (4th Cir. July 27, 2011, cert. denied 132 S. Ct. 1095 (2012).

10 *Sapp v. School Bd of Alachua Cnty No. 09-242* (N.D. Fla. Sept. 30, 2011).

11 American Educational Research Association, *supra*.

12 *2010 OCR Dear Colleague Letter, supra*.

13 The Federal Partners' web site is at http://StopBullying.gov.

14 Stuart-Cassel, et. al. *supra*.

15 *Fraser, supra*.

16 *Davis, supra*.

17 See example, *Boroff v. Van Wert City Bd. of Educ*. 220 F.3d 465, 466 (6th Cir. 2000), cert. denied, 149 L. Ed. 2d 286, 121 S. Ct. 1355 (2001).

18 *Melton v. Young* 465 F.2d 1332 (6th Cir. 1972).

19 *West v. Derby Unified Sch. Dist.* 206 F.3d 1358 (10th Cir. 2000).

20 *Scott v. Sch. Bd. of Alachua County* 324 F.3d 1246 (11th Cir. 2003), cert. denied, 540 U.S. 824 (2003).

21 *Castorina ex rel. Rewt v. Madison County School Board* 246 F.3d 536 (6th Cir. 2001).

22 *Nixon v. Northern Local School District Board of Education* 83 F. Supp. 2d 956 (S.D. Ohio 2005).

23 *Zamecnik v. Indian Prairie School Dist.* #204 636 F.3d 874 (7th Cir. 2011).

24 *Harper, supra*.

25 *Sapp, supra*.

26 *Tinker, supra*.

27 *Saxe, supra*.

28 *Morse, supra*.

29 *Castorina, supra*.

30 *Nixon*, *supra.*

31 *Zamecnik, supra*.

32 *Zamecnik, supra*.

33 *Harper*, *supra*.

34 *Sapp*, *supra*.

35 http://legalclips.nsba.org/2013/02/28/connecticut-district-allows- student-to-wear-t-shirt-with-anti-gay-rights-message-after-aclu-threatens-lawsuit/#sthash.WWhq5SgS.dpuf.

36 *Anoka-Hennepin Consent Decree*, supra.

37 *J.S. v. Blue Mountain Sch. Dist* 650 F.3d 915 (3d Cir. 2011), cert. denied 132 S. Ct. 1097 (2012); *Layshock v. Hermitage Sch. Dist*. N650 F.3d 205 (3rd Cit. 2011), cert. denied 132 S. Ct. 1097 (2012); Kowalksi, *supra*.

38 http://legalclips.nsba.org/2012/01/19/breaking-news-supreme-court- denies-cert-in-student-internet-speech-cases/

39 *Doninger v. Niehoff* 527 F.3d 31 (2d Cir. 2008), cert. denied 132 S. Ct. 499 (2011).

40 *Tinker*, *supra*.

41 *Tinker*, supra and *Fraser*, *supra*.

42 *J.C. v. Beverly Hills Unified Sch. Dist*. 711 F. Supp. 2d 1094 (C.D. Cal. 2010); *Kowalski, supra*.

43 *Tinker*, *supra*.

44 Stuart-Cassel, et.al., *supra*.