Bullying prevention legal issues

The new Massachusetts bullying statute and regulations contain some language that may very well give rise to legal disputes in the future. The statutory clauses include the following:

Bullying, pursuant to M.G.L. c. 71, § 37O, means the repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim's property; (ii) places the victim in reasonable fear of harm to himself or herself or damage to his or her property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school. Bullying shall include cyberbullying.

Cyberbullying, pursuant to M.G.L. c. 71, § 37O, means bullying through the use of technology or any electronic communication, which shall include, but not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyberbullying shall also include: (i) the creation of a web page or blog in which the creator assumes the identity of another person, or (ii) the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying. Cyberbullying shall also include the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that

may be accessed by one or more persons, if the distribution of posting creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying.

The proposed regulations include the following:

603 CMR 49.00 governs the requirements related to the duty of the principal or leader of a public school, approved private day or residential school, collaborative school, or charter school to notify the parents or guardians of a victim and a perpetrator when there is a report of bullying or retaliation, and to notify the local law enforcement agency when criminal charges may be pursued against the perpetrator of bullying or retaliation. The regulation also addresses confidentiality of student record information related to notification of bullying and retaliation.

603 CMR 49.05(4) A principal's notification to a parent about a report of bullying or retaliation must comply with confidentiality requirements of Massachusetts Student Records Regulations 603 CMR 23.00, and the Federal Family Educational Rights and Privacy Act Regulations, 34 CFR Part 99, as set forth in 603 CMR 49.07, below.

General legal principles

Students certainly do have free speech protections under the First Amendment to the U.S. Constitution. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). However, student speech can be restricted at school more than if the student was not physically on campus. A large body of case law has established that schools can discipline students, and restrict their speech at school, as necessary to maintain an appropriate learning environment (see, for example, *Bethel School District v. Fraser*, 478 U.S. 675 (1986) and *Hazelwood School District et al. v. Kuhlmeier et al.*, 484 U.S. 260 (1988). The case law from the U.S. Supreme Court has focused on limiting the ability of educators to restrict speech to only that which occurs on school grounds (see *Thomas v. Board of Education, Granville Central School District*, 607 F.2d 1043 (2nd Cir. 1979).

The seminal Supreme Court case dealing with student speech, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), established the backdrop for examining cases involving student speech. Tinker stated:

> [C]onduct by the student, in class or out of it, which for any reason-whether it stems from time, place, or type of behavior-materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Id. at 513. A "showing that the students' activities would materially and substantially disrupt the work and discipline of the school" is necessary to justify suppression of student expression. Id.

Tinker, however, dealt only with on-campus speech. More recently, the Supreme Court has also ruled that student speech at off-campus, school sponsored activities, is subject to limitations. See *Morse v. Frederick*, 551 U.S. 393 (2007). Student off-campus speech, though

generally protected, could be subject to analysis under the Tinker standard as well if the speech raises on-campus concerns. See, e.g., J.S. v. Blue Mountain School Dist., No. 08-4138, 2010 WL 376186 (3d Cir. Feb. 4, 2010); Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008); Wisniewski v. Board of Educ. of Weedsport Cent. School Dist., 494 F.3d 34, 38 -39 (2d Cir. 2007). Where the speech occurs should be determined at the outset in order to decide whether the "unique concerns" of the school environment are implicated. J.S. v. Bethlehem Area School District, 807 A.2d 847 (Pa. 2002).

The new Massachusetts anti-bullying statute is, to some extent, goes beyond the school grounds. And some civil-liberties lawyers are concerned that the laws are too vague. The Massachusetts law, for instance, defines one form of bullying as "repeated use'' of a written, verbal, or physical act that "causes physical or emotional harm to the victim.'' But by that standard, said Gavi Wolfe, legislative counsel for the American Civil Liberties Union of Massachusetts, a student who calls another student "loser'' twice on the school bus and hurts the youngster's feelings could qualify as a bully.

In crafting policy, the School Committee should consider the myriad of legal cases and balance the issues surrounding bullying prevention efforts with constitutional limitations on school offocials. Consider this, for example: one morning in May 2008, an eighth-grader walked into her school counselor's office at a Beverly Hills school crying. She was upset and humiliated and couldn't possibly go to class, the girl told the counselor. The night before, a classmate had posted a video on YouTube with a group of other eighth-graders bad-mouthing her, calling her "spoiled," a "brat" and a "slut." Text and instant messages had been flying since. This incident, according to **a story in the Los Angeles Times**, is all too familiar to school officials throughout the country. It's referred to as cyber-bullying, and it highlights the much-

debated problem of identifying and limiting the authority that a school has over the online expression of its students. In the Beverly Hills incident, disciplinary action was taken by the school district resulting in the suspension of the girl responsible for posting the offensive video online. The suspended student took the case to federal court, saying her free speech rights were violated.

Judge Stephen V. Wilson of Federal District Court found that the off-campus video could be linked to the school: J. C. told perhaps 10 students about it; the humiliated C. C. and her mother showed it to school officials; educators watched it and investigated. But the legal test, was whether J. C.'s video had caused the school "substantial" disruption. In his **60 page opinion**, Judge Wilson said the school went too far:

> To allow the school to cast this wide a net and suspend a student simply because another student takes offense to their speech, without any evidence that such speech caused a substantial disruption of the school's activities, runs afoul (of the law). . . . The court cannot uphold school discipline of student speech simply because young persons are unpredictable or immature, or because, in general, teenagers are emotionally fragile and may often fight over hurtful comments.

This legal test comes from a 1969 Supreme Court case, Tinker v. Des Moines Independent Community School District, in which a school suspended students for wearing black armbands to protest the Vietnam War. The court overturned the suspension, but crafted a balance between a school's authority and a student's freedom of expression. When a student's speech interferes substantially with the school's educational mission, a school can impose discipline.

A murky trail of legal cases and decisions have left school officials wondering what to do. But in several cases, the courts have told schools to back off because cyber-bullying, while it may be offensive, constitutes protected speech. We will attempt to whittle through those cases

and issues in this chapter of the Task Force report. We also recognize that these are evolving issues, and that we should endeavor to teach students to properly use resources, including online tools. Those policies reflect the spirit of the words of Supreme Court Justice John Paul Stevens in **New Jersey v. T.L.O.,** 469 U.S. 325, 385−86 (1985): "The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life."

Here is a collection of cases which have dealt with the legal issues involved in bullying prevention. They are summarized below, but the case materials are attached and hyperlinked in this memo.

Evans v. Payer

Complete text of court ruling

Copy of complaint and exhibits filed with court

Katherine Evans, a former student at Pembroke Pines Charter High School, filed a federal lawsuit against the school's principal, alleging that he violated her First Amendment rights by suspending her for creating a Facebook group in which she criticized one of her teachers. According to her complaint, Evans posted a photograph of her Advanced Placement English teacher on November 9, 2007, after school hours and from her home computer, in order to create a group for students to express their opinion about the teacher. Evans herself wrote that the teacher is "the worst teacher I've ever met!" She also asked classmates to "express your feelings of hatred" by posting comments on the page.

In copies of the comments attached as an exhibit to the complaint, it appears that three of her classmates posted comments, all of which praised the teacher and criticized Evans for creating the group. "Mrs. Phelps is one of the most amazing teachers I've ever had and there's plenty of people who agree with me," one student wrote. "Whatever your reasons for hating her are, they're probably very immature." Two days after posting the information, Evans took it down.

When Principal Peter Bayer learned of the Facebook group, he suspended Evans for three days, stating that she had engaged in "cyber-bullying harassment towards a staff member" and "disruptive behavior," according to Evans' complaint. As a result, Evans claims that the school pulled her from her advanced placement classes and forced her into "lesser-weighted honors classes [and] unjustifiably besmirched Plantiff's academic record."

Evans, who is represented by the ACLU of Florida, argues that Bayer's actions violated her First and Fourteenth Amendment rights and that her rights may be redressed pursuant to 42 U.S.C. §1983. She seeks an injunction enjoining Bayer from maintaining records relating to the suspension on her permanent school record and revoking, nunc pro tunc, the three-day suspension. Evans is also seeking nominal damages for the deprivation of her First and Fourteenth Amendment rights, as well as attorneys' fees and costs.

The school district attempted to have the case dismissed, but Magistrate Barry Garber of Florida denied that request noting: "It was an opinion of a student about a teacher, that was published off-campus, did not cause any disruption on-campus, and was not lewd, vulgar, threatening, or advocating illegal or dangerous behavior." In its ruling, the court made these observations about the constitutional issues. The speech clause of the First Amendment protects two rights: (1) the right to freedom of expression, and (2) the right to be free from compelled

expression. *Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004). But while these rights exist in public schools, they are there curtailed. "The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Morse v. Frederick*, 551 U.S. 393, 396-97 (2007) (quoting Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

The Evans case is still pending as of today.

Layshock v. Hermitage School District

(click here for full Appeals Court opinion)

(click here for full lower court opinion)

Snyder v. Blue Mountain School District

(click here for full opinion)

The *Evans* decision came two weeks after the nation's first two appellate opinions from Pennsylvania differed on the matter of whether students have a First Amendment right in the online world beyond the schoolyard gates. Those conflicting decisions are the closest within the Supreme Court's reach for review. Dozens of similar cases dot the legal landscape.

One of the cases (*Layshock*) favoring student speech concerned a senior honors student. In 2005, the Pennsylvania high school student was suspended 10 days after he created a mock MySpace profile of his principal. The profile said the principal took drugs and kept beer at his desk. It also referred to the principal as a "big steroid freak," and a "big whore," among other things, and stated that he was "too drunk to remember" the date of his birthday. The appeals court and a federal judge overturned the suspension, ruling the fake profile was not created at school and did not create a "substantial disruption" at school. In the lower court decision,

District Court Judge Terrence McVerry found that even though the profile was unquestionably "lewd, profane and sexually inappropriate," the school did not have the right to restrict the student's speech because school officials were not able to establish that the profile caused enough of a disruption on campus. "The mere fact that the Internet may be accessed at school does not authorize school officials to become censors of the world-wide web," he wrote.

The other case (*Snyder*), also decided by the 3rd U.S. Circuit Court of Appeals the same day, went against a 14-year-old Pennsylvania junior high student. She also mocked her principal with a fake MySpace profile. The 2007 profile insinuated the principal was a sex addict and pedophile. J.S. and another student, identified as K.L., posted a profile on MySpace in March 2007 that showed a photo of principal James S. McGonigle they had taken from the district's Web site. The profile didn't use the principal's name, but identified the person pictured as a "principal," and described him as a 40-year-old married, bisexual man whose interests included "being a tight ***," "******* in my office" and "hitting on students and their parents." On appeal, the 3rd Circuit noted that teachers complained that, among other things, the profile disrupted the classroom because students were talking about the profile rather than paying attention to class. "We decline to say that simply because the disruption to the learning environment originates from a computer located off campus, the school should be left powerless to discipline the student," the three-judge circuit panel wrote.

The lower court's opinion distinguished the Supreme Court's decision in Tinker v. Des Moines. Tossing Tinker aside, the court focused on other cases, including Bethel School District v. Fraser, in which the Court upheld a suspension imposed on a student who used "an elaborate, graphic, and explicit sexual metaphor" during a speech at a school assembly. In *Fraser*, the justices held that "it is a highly appropriate function of public school education to prohibit the

use of vulgar and offensive terms in public discourse," and that limits on sexually explicit, indecent or lewd speech can be appropriate where the audience includes children.

These differing opinions seemingly left everyone wondering what the standard really is. But, as in all of these cases, it came down to whether or not the speech resulted in a substantial disruption at school.

Doninger v. Niehoff

(click here for full opinion)

Administrators barred a Connecticut high school student from running in a student election after the student criticized administrators online for their handling of a student festival. In the spring of 2007, Jamfest, a yearly music festival at a Connecticut high school, experienced a series of planning setbacks that threatened to postpone or cancel the event. When Avery Doninger – a junior and incumbent class secretary – was unable to meet with the school's principal, Karissa Niehoff, to talk about the event she and three other students sent a mass e-mail asking members of the community to speak to administrators about putting the event back on schedule. Doninger and Niehoff later had a discussion in the hallway, during which she says Niehoff informed her that the event had been cancelled.

That night, Doninger wrote a Livejournal blog post criticizing the school officials' handling of the issue. In the post, she called the school officials "douchebags" and asked her fellow students and their parents to complain to school superintendent Schwartz in order "to piss [Schwartz] off more" than the mass e-mail had.

In response to her blog post, the school barred Doninger from running for reelection as Class Secretary for her senior year. At the class election, school officials prevented a group of

students from wearing “Team Avery” t-shirts. According to school principal Niehoff, the t-shirt ban was intended to prevent electioneering by candidates and supporters who could afford such merchandise.

Avery's mother, Lauren Doninger, attempted to convince school officials to consider alternative forms of punishment. She also tried to establish whether or not the incident would appear in Avery's school record. When a resolution could not be reached on these issues, the Doningers filed suit in Connecticut state court against Niehoff and Schwartz. The defendants removed the case to the federal court in Connecticut.

The Doningers' complaint for injunctive relief alleged violations of Connecticut free speech laws, intentional infliction of emotional distress, and violations of Avery's constitutional rights to free speech, due process, and equal protection under the Civil Rights Act (Title 42 U.S.C. § 1983, 1988). The complaint sought to enjoin the defendants on seven different counts. All told, the complaint would prevent defendants from installing anyone as Class Secretary until an election was held with Avery on the ballot; from maintaining negative remarks related to this incident in Avery's school record; from punishing students for wearing t-shirts bearing slogans related to the incident; from preventing Avery from addressing her class in assemblies; and from punishing or intimidating Avery, her mother, or any students who subsequently might vote for Avery in the new election.

The district court found that Avery met the initial “irreparable harm” standard required for a preliminary injunction through her showing that her speech may have been chilled because she voluntarily chose not to wear a "Team Avery" t-shirt at school, limited her e-mail and blog communications to prevent a similar incident, and restricted her Livejournal account to “private.” However, the court denied the Doningers' motion, finding that she had not demonstrated a

likelihood of success on the merits as to her constitutional claims. In addressing the Doningers' claims, the court divided its discussion into First Amendment and Equal Protection issues.

The court determined that Avery's blog post constituted on-campus speech for First Amendment purposes, regardless of the fact that she wrote it off campus, because "the blog was related to school issues, and it was reasonably foreseeable that other LMHS students would view the blog and that school administrators would become aware of it." Slip op. at 28. The court then noted that school administrators have the right, in certain situations, to restrict on-campus speech to promote school-related goals. The court also ruled that Avery does not have a First Amendment right to run for voluntary office.

Considering these two concepts together, the court determined that the defendants may have had the right to prevent Avery from running for office as punishment for her statements in order to promote civility in school functions, thus making an injunction inappropriate. The court had more serious misgivings about the denial of the right to wear “Team Avery” t-shirts, which it related to the black armbands in the famous Tinker school speech case. However, it decided to reserve that issue until the parties have had a chance to develop the record as the case goes forward.

The Second Circuit U.S. Court of Appeals affirmed the lower court judgment. In its ruling it noted that Avery, by all reports, is a respected and accomplished student at LMHS. “We are sympathetic to her disappointment at being disqualified from running for Senior Class Secretary and acknowledge her belief that in this case, “the punishment did not fit the crime.” Doninger, 514 F. Supp. 2d at 202 (internal quotation marks omitted). We are not called upon, however, to decide whether the school officials in this case exercised their discretion wisely. Local school authorities have the difficult task of teaching “the shared values of a civilized social

order" — values that include our veneration of free expression and civility, the importance we place on the right of dissent and on proper respect for authority. *Fraser*, 478 U.S. at 683. Educators will inevitably make mistakes in carrying out this delicate responsibility. Nevertheless, as the Supreme Court cautioned years ago, "[t]he system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members," and we are not authorized to intervene absent "violations of specific constitutional guarantees." *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

R.C. v. R.R. (Los Angeles, CA)

(click here for full opinion)

A 15-year-old high school student was pursuing a career in entertainment and maintained a Web site for that purpose. Several of his fellow students posted messages at the Web site, making derogatory comments about his perceived sexual orientation and threatening him with bodily harm.

The aggrieved student and his parents filed this action against the other students and their parents, alleging a statutory claim under California's hate crimes laws (Civ. Code, §§ 51.7, 52.1) and common law claims for defamation and intentional infliction of emotional distress. In response, one of the student-defendants and his parents filed a special motion to strike, contending that the action was a ―strategic lawsuit against public participation (SLAPP) (Code Civ. Proc., § 425.16; all undesignated section references are to that code unless otherwise indicated). The student-defendant had posted a message stating in part: ". . . I want to rip out your fucking heart and feed it to you. . . . I've . . . wanted to kill you. If I ever see you I'm . . . going to pound your head in with an ice pick. Fuck you, you dick-riding penis lover. I hope you

burn in hell." The trial court denied the anti-SLAPP motion on the ground that the lawsuit did not arise out of a statement made in connection with a public issue. Defendants appealed.

The appeals court affirmed because defendants did not make the requisite showing that plaintiffs' complaint is subject to the anti-SLAPP statute. In particular, defendants did not demonstrate that the posted message is protected speech. Further, defendants contend the message was intended as ―jocular humor. Assuming the message was a joke played by one teenager on another it does not concern a public issue under the statute.

Massachusetts case

Parsons, et. al., vs. Town of Tewksbury, et. al.

(click here for full opinion)

The case, *Parsons, et. al., vs. Town of Tewksbury, et. al*., involved a Tewksbury Middle School student and his parents who sued the Town of Tewksbury and school personnel for negligence, and other counts, in not intervening to protect this student from repeated bullying by other classmates at the school. The case begins in April 2006 with young Nicholas Parsons, a student at Tewksbury's Wynn Middle School, who was being repeatedly assaulted and battered by a group of other students at this school. Nicholas reportedly had fallen out of friendship with a group of male students who made it a practice of harassing and threatening weaker students. Parsons told the school guidance counselor, Adam Colantuoni (who was also named as one of the defendants in the suit,) that these bullies had been harassing him repeatedly. The plaintiffs' suit alleges that Colantuoni took little to no action to halt the assaults. Not long after Parsons had reported the problem to Colantuoni (the school's "guidance counselor") the leader of the bullying group, a student by the name of Tyler Willette, ordered another student to

slam Parsons' head with a book. Not only did this other student carry out this order, he did it in the presence of a teacher, who sent the attacking student to the school's "behavior management facilitator," a man by the name of Robert Ware (who was also a named defendant in this suit). By all credible accounts, Ware neglected to discipline the assaulting student, instead merely ordering the boys to apologize to each other.

When Parsons' mother learned of this inaction by Robert Ware to in any way discipline the student who attacked her son, she called the school to complain. The school took no action to discipline this student or take any other measures to stem this violent behavior. During the school's April vacation break, Tyler Willette (the bullying leader, who originally ordered another student to hit Parsons in the head with a book) reportedly tried to start two fistfights with Parsons near his home, and then tried to provoke an additional fight upon their return to school. Initially, Parsons declined to fight, but after another teacher (this time, a gym teacher,) failed to discipline Willette for violently charging Parsons in a gym class, Parsons decided he had no choice but to take corrective and defensive action on his own. Reluctantly, he agreed to face Willette in a 'scheduled' fight, in the hope that doing so would stop future harassment. News of the fight, set to take place on April 26 2006 inside a boys' bathroom, spread among the student body, as also did a threat by Willette, that he would break Parsons' leg with a karate strike. Even though both Robert Ware and Adam Colantuoni were observed monitoring a boys' bathroom on the day of the fight, (an activity that neither man typically engaged in, and which was evidence that both men knew this fight was going to take place) neither man reportedly undertook any effort to intervene in the fight. An English teacher, after learning from other students that the two boys were absent from class because of the fight taking place during that class period, did nothing to alert school administrators.

In the boys' bathroom, Willette attacked Parsons, shoving him, then kicking him in the legs with special katate moves as he had threatened to do, in the process fracturing Parsons' femur. Then, as Parsons lay on the floor with a broken leg, Willette punched him in the head twice. With Parsons crying out in pain, in a show of mercy, Willette and a friend then reportedly took Parsons to the school nurse. When Robert Ware arrived at the nurse's office, Parsons, who had been crying, was unable to lift his swollen leg below the knee. Ware's response (as recounted in the plaintiff's complaint): *He swore at young Parsons, telling him to "walk it off" and to follow him out of the nurse's office.* The nurse intervened, demanding that Ware be placed in a wheelchair, and she summoned an ambulance to transport Parsons immediately to the hospital.

Parsons and his parents subsequently sued the town, Ware and Colantuoni in Superior Court for negligence, intentional infliction of emotional distress and violations of the Massachusetts Declaration of Rights. Again, the school district attempted to have the case dismissed. But the Superior Court ruling denying the motion suggests that public school officials may have a duty under the state constitution to protect students from bullying, potentially opening up an avenue of liability that traditionally has been considered blocked by the absence of a statutory remedy, civil rights attorneys say. The judge first dismissed the plaintiffs' negligence claims, finding that the MTCA gave the defendants sovereign immunity absent a showing that they acted affirmatively to create the situation leading to harm. The judge also rejected the intentional infliction of emotional distress claim, determining that while the defendants may have "mishandled and underestimated the seriousness of the situation" between the boys, their conduct was not, as a matter of law, extreme and outrageous, as required to state such a claim. Regarding the plaintiffs' constitutional claims, Fishman noted that no

Massachusetts appellate court had conclusively addressed whether a party could bring a damages action based exclusively on the Declaration of Rights absent a statutory vehicle. However, the Supreme Judicial Court and the Appeals Court had given "some indication" in prior caselaw that such an action might be recognized, the judge said.

This case is still pending in the Massachusetts court system and may provide guidance when ultimately considered in the appellate courts of the Commonwealth.

Other resources

Closer to home, five Miscoe Hill School (Mendon, MA) students were suspended after officials pegged them as participants in a Facebook group devoted to slapping a school official. You can read the full report from the Milford Daily News by clicking **here**.

An in-depth article from the Boston College Law Review analyzes recent cases on the issue and argues that courts should apply a “control and supervision” test, derived from the analysis used in negligent supervision cases and Title IX cases for student-on-student sexual harassment, to determine whether a school has the authority to discipline a student for his or her online speech.

Does the conduct arise to a violation of Title IX (sexual harassment)?

Excerpt from *Direct From the Field: A Guide to Bullying Prevention*
By Laura Parker-Roerden, David Rudewick, and Donald Gorton

While all schools have a general legal and moral obligation to keep students safe, several specific legal issues deserve particular attention, because bullying frequently implicates civil and criminal law violations of students’ civil rights. Harassment and hate crimes require an

appropriate response that includes, in certain instances, contacting law enforcement. Bullying can also give its victims recourse to private civil litigation.

In general, civil rights violations occur in school when a student's or adult's behavior, or inappropriate language, creates a hostile school environment. Repeated bias-related harassment that creates a hostile environment unlawfully denies a student the "advantages and privileges" of attending school. G.L. c.76, § 5.

A hostile environment exists whenever one individual experiences repeated harassment, threats, or intimidation that make a young person fear for his or her safety. A single incident, depending on its severity, may constitute illegal harassment. Under Federal law Title IX, students are protected from harassment, including disparaging remarks, gestures, and threats that are related to the target's sex, race/ethnicity, religion, or disability status. Repeated language of a sexually graphic nature usually gives rise to unlawful sexual harassment and the remedies against it provided under federal law. Such harassment additionally may rise to the level of a hate crime.

A hate crime is a criminal offense committed against a person, property, or society that is motivated, in whole or in part, by an offender's bias against an individual's or a group's race, religion, ethnic/national origin, sex, age, disability or sexual orientation. Massachusetts has a Hate Crime Penalties Act and a battery of criminal and civil law protections for civil rights.

Hate crimes resulting in victim injury can amount to double or triple felony violations. They also give rise to various civil law remedies. Note that hate crime definitions encompass not only violence against individuals or groups, but also crimes against property such as arson or vandalism. The Massachusetts Hate Crimes Reporting Act of 1990 calls for the reporting of all

potential hate crimes to law enforcement, who in turn report incidence data to the Crime Reporting Unit of the State Police. G.L. c.22C, §32 et seq.

Applicable Laws

Following is a summary of key, potentially applicable laws.

Criminal Harassment: G.L. Chapter 265, Sec. 43(A)

Harassment is considered a crime if:

- Over a period of time the defendant knowingly engaged in a pattern of conduct or series of acts involving at least three incidents directed at the alleged victim.
- Those acts were a kind that would cause a reasonable person to suffer substantial emotional distress.
- Those acts did cause the alleged victim to become seriously alarmed (not just annoyed).
- The defendant did the harassing actions in a willful and malicious manner (an act is willful if it is done intentionally, not by mistake. An act is done maliciously if it is done out of cruelty, hostility, revenge, or other wrongful motive.)

Guarantee of Non-Discrimination: G.L. Chapter 76, § 5: Statutory guarantee of non-discrimination in obtaining the advantages, privileges and courses of study in a public school on account of race, color, sex, religion, national origin, or sexual orientation

Civil Rights Criminal Statute: G.L. Chapter 265, § 37: Whoever, by force or threat of force willfully injures, intimidates, interferes with, oppresses, or attempts to injure, intimidate, or interfere with a person in the exercise of a right secured by constitution or statute stands subject to 10 years in state prison and a $10,000 fine with bodily injury, or 1 year in a house of correction and a $1,000 fine without injury.

Action by Attorney General for Civil Injunction: G.L. C.12, SEC. 11H: Whenever any person(s) interfere(s) with or attempt(s) to interfere with, by threats, or intimidation, or coercion, any other person(s) in the exercise of a right secured by constitution or statute, the Attorney General may apply to Superior Court for injunction to protect peaceable exercise or enjoyment of rights.

The Hate Crimes Penalties Act: G.L. C.265, SEC. 39: As applicable to violence against persons: Whoever commits an assault and/or battery with the intent to intimidate a person because of race or ethnicity, religion, national origin, sexual orientation, or disability stands subject to 5 years in a state prison and a $10,000 fine with bodily injury or 2.5 years in a house of correction and a $5,000 fine without injury.

Private Action for Injunction and Monetary Damages: G.L. C.12, SEC. 11I: Any person whose exercise or enjoyment of rights secured by constitution or statute has been interfered with, or attempted to be interfered with, by threats, intimidation, or coercion may apply to Superior Court for injunctive or other equitable relief, compensatory money damages, and award of attorneys' fees and costs.

Required School Policies: MGL Chapter 71: Section 37H: Policies relative to conduct of teachers or students; student handbooks:

> Each school district's policies pertaining to the conduct of students shall include the following: disciplinary proceedings, including procedures assuring due process; standards and procedures for suspension and expulsion of students; procedures pertaining to discipline of students with special needs; standards and procedures to assure school building security and safety of students and school personnel; and the disciplinary measures to be taken in cases involving the possession or use of illegal substances or weapons, the use of force, vandalism, or violation of other student's civil rights. Codes of discipline, as well as procedures used to develop such codes shall be filed with the department of education for informational purposes only.

Title IX case and bullying

Patterson v. Hudson (click here for full opinion)

On July 1, 2010, a federal district court in Michigan granted a school district's motion for judgment as a matter of law in a Title IX peer sexual harassment suit, and dismissed the suit. The court overturned the jury's $800,000 verdict in favor of a student who was found to have been subjected to student-on-student sexual harassment throughout middle school and continuing into high school in violation of his rights under Title IX. After recounting the salient facts established during the jury trial, the judge broke the objectionable conduct down into three categories: name calling, other acts, such as offensive drawings posted on the plaintiff's locker, and one locker room assault. While the district court agreed that the conduct by the student's classmates detailed during the trial was inappropriate, offensive, and socially unacceptable, it found that the evidence did not prove that the plaintiff was subjected to such conduct on the basis of sex, sexual orientation, or perceived sexual orientation. The court concluded that because "the harassment to which Plaintiff was subjected in sixth, seventh and ninth grade constituted bullying, not sexual harassment," and "Title IX protects [against] only harassment or discrimination based on sex," it must as a matter of law dismiss plaintiff's cause of action.

Alternatively, the district court found that even if the plaintiff had satisfied the other elements of a Title IX claim, he had failed to prove that the school district was deliberately indifferent to known acts of harassment. Specifically, it found that the facts did not support a jury finding that the school district's response to such known acts was "clearly unreasonable." It pointed out that school officials had responded to every known incident proactively: "the uncontroverted evidence is that Defendant's teachers and administrators responded to each and

every incident of harassment of which they had notice. . . . More critically, the Court concludes that, as a matter of law, there was no evidence whatsoever presented that Defendant was aware that adverse consequences from its action or inaction were certain or substantially certain to cause harm … and that Defendant decided to act or not act in spite of that knowledge."

Finally, the district court addressed what it believed was the main reason that the U.S. Court of Appeals for the Sixth Circuit (MI, OH, KY, TN) remanded the case for trial after the district had granted the school district summary judgment: "that the evidence, taken in a light most favorable to Plaintiff, demonstrated that resource room services were not available to Plaintiff during his ninth grade year." Conceding the issue was not clearly addressed at the time the motion for summary judgment was considered, the district court found that the undisputed evidence at trial established that the "Defendant did not discontinue the use of the resource room for Plaintiff during his ninth grade year."

Hudson schools, like most school districts, has an anti-bullying policy, and it took action against individual students when the bully could be identified. But Terry Heiss, attorney for Patterson, says the district failed to stop the pattern of abuse. For example, the school could have done more anti-bullying education, instituted more monitors or other measures to stop the pattern. The Patterson case initially was dismissed by the lower court in Detroit. The United States Court of Appeals for the Sixth Circuit reversed that decision, saying the family had demonstrated that there was enough of a question of whether the district's response was adequate to go forward with the trial.

Relying on Patterson school officials cannot become complacent and assume that there is zero liability if they ignore bullying that affects their learning environment and interferes with the rights of students to feel safe at school. Here a couple of examples: In Vance v. Spencer

County Public School District (2000), a jury ordered the school to pay the target of student-on-student sexual harassment $220,000. In a similar case (Theno v. Tonganoxi Unified School District, 2005), another jury ordered the school district to pay the target $250,000 for being deliberately indifferent to, once again, student-on-student sexual harassment occurring at school.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-61952-CIV-GARBER

KATHERINE EVANS,
Plaintiff,

v.

PETER BAYER, in his individual capacity,
Defendant.

_____/

ORDER

THIS CAUSE is before the Court on defendant Peter Bayer's Motion to Dismiss [DE 6]. The Court has received plaintiff Katherine Evans's Response in Opposition [DE 8], and Peter Bayer's Reply [DE 13].

Background

Katherine Evans ("Evans") was a senior at Pembroke Pines Charter High School in November 2007. Peter Bayer ("Bayer") was principal at that time. During the evening of November 9, 2007, Evans created a group on Facebook, a social networking website, entitled, "Ms. Sarah Phelps is the worst teacher I've ever met." The group's purpose was for students to voice their dislike of the Ms. Phelps. Evans posted the following:

> Ms. Sarah Phelps is the worst teacher I've ever met! To those select students who have had the displeasure of having Ms. Sarah Phelps, or simply knowing her and her insane antics: Here is the place to express your feelings of hatred.

Three postings appeared on the page from other students supporting Ms. Phelps and debasing Evans for creating the group. The page included Ms. Phelp's photograph. The posting did not contain

threats of violence. This posting was made after school hours and from Evans's home computer. Ms. Phelps never saw the posting and it did not disrupt school activities. Evans removed the posting after two days. After its removal, the posting came to the attention of Bayer.

Bayer, as principal, suspended Evans from school for three days and forced her to move from her advanced placement ("AP") classes into lesser weighted honors courses. Evans's "Notice of Suspension" states that she was suspended for, "Bullying/Cyber Bullying/Harassment towards a staff member" and "Disruptive behavior." See DE 1 at Exh. B. Evans alleges that she engaged in an off-campus activity in a non-violent and non-threatening public forum and that her punishment resulted in an unjustified stain on her academic reputation and good standing.

Evans argues that Bayer's actions violated her First and Fourteenth Amendment rights and that her rights may be redressed pursuant to 42 U.S.C. §1983. She seeks an injunction enjoining Bayer from maintaining records relating to the suspension on her permanent school record and revoking, *nunc pro tunc*, the three-day suspension. Evans is also seeking nominal damages for the deprivation of her First and Fourteenth Amendment rights, as well as attorneys' fees and costs.

Standard

In considering a motion to dismiss pursuant to Federal Rule 12(b)(6), all factual allegations must be taken as true and in the light most favorable to plaintiff. *See Erickson v. Pardus*, 551 U.S. 89 (2007). Federal Rule of Civil Procedure 8 allows for a liberal pleading requirement. It does not require a plaintiff to plead with particularity every element of a cause of action. *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir.2001). However, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v.*

Twombly, 550 US 544, 555 (2007) (internal citations omitted).

Analysis

Bayer's primary argument is that qualified immunity shields him from litigation. Second, Bayer claims that even if he is not immune, he was acting pursuant to a school's right to discipline students for potentially disruptive behavior. Last, Bayer claims that even if he acted inappropriately by his actions, the relief sought against Bayer can only be granted in his official capacity, not his individual. The Court will discuss Bayer's arguments as they apply to each request for relief.

I. Injunction

The law is clear: Qualified immunity does not shield Bayer from an action for injunctive relief. *D'Aguanno v. Gallagher*, 50 F.3d 877, 879 (11th Cir. 1995). This has been categorical. Bayer, however, argues that the Eleventh Circuit and other courts have been too blinkered in their view. Bayer cites the following language describing qualified immunity from the Supreme Court in support: "the consequences with which we were concerned in *Harlow* are not limited to money damages; they also include the general costs of subjecting officials to the risks of trial – distraction of officials from their government duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell v. Forsyth*, 472 U.S. 511, 524–25 (1985). Thus, Bayer argues, because a suit for injunctive relief also subjects officials to trial, qualified immunity should be available. Bayer's argument fails for two reasons. First, the Supreme Court was not examining the issue of injunctive relief when it chose its language; it was deciding that a determination on the question of qualified immunity should be immediately appealable. The Supreme Court reasoned that as qualified immunity is the right from suit, it would be lost if a rejection was not appealable until disposition of the action. Second, regardless of the interpretation someone may make of such language in isolation, the Eleventh Circuit has ruled to the contrary.

An issue remains, however, concerning whether injunctive relief can be sought against a defendant in his individual capacity if the act must be in his official capacity to have official consequences. The Court finds the answer to be no. Evans argues that the Court can compel Bayer to destroy the records in question and sanction those who inhibit his action. Bayer contends that the Court cannot compel him to act in violation of his employer's policies or state law. Bayer's first premise is dubious, his second may have merit. But in either event, the Court need not untangle this knot. Even if the Court could compel Bayer to act in his individual capacity, the compelled action would have no official consequences. The only decision the Court has found on point agrees. The District Court of the Eastern District of Pennsylvania wrote, "[w]e do not see how a court can order an officer in his personal capacity to take an official act." *Barrish v. Cappy*, No. 06-837, 2006 WL 999974, at *4 (E.D. Pa.. Apr. 17, 2006). Accordingly, Evans's demand for an injunction is DISMISSED WITHOUT PREJUDICE. Evans has leave to file an amended complaint naming the proper parties.

II. Nominal Damages

Plaintiff also sues Bayer for nominal damages. An official who is sued in his personal capacity may be shielded from damages by qualified immunity. *D'Aguanno*, 50 F.3d at 879 However, determining whether qualified immunity applies requires an official to demonstrate that he was acting in his discretionary capacity. *Holloman v. Harland*, 370 F.3d 1252, 1263-64 (11th Cir. 2004). An official is acting in his discretionary capacity if he was "(a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his power to utilize." *Id*. at 1265. The Court looks to the "general nature of the defendant's action . . . putting aside the fact that it have been" unconstitutional. *Id*. at 1266. Bayer was clearly acting in a discretionary capacity. His discretionary duties include the administration of discipline. *Id*. at 1267. Clearly, suspending a student falls within a principal's "arsenal of powers" that he may use to

accomplish his goal. *Id*. Once it has been established that an official "was engaged in a discretionary function, then the burden shifts to the plaintiff to show that the defendant is *not* entitled to qualified immunity." *Id*. at 1264.

To overcome qualified immunity, the plaintiff must show (1) that the defendant violated a constitutional right, and (2) that this right was clearly established at the time of the alleged violation. *Id*. (citing *Wilson v. Layne*, 526 U.S. 603, 609 (1999)). Bayer claims that the right, in the form of a group posting on the internet by a student about a teacher, was not clearly established at the time he set the three day suspension. The Court examines each prong in turn.

i. Constitutional Right

The speech clause of the First Amendment protects two rights: (1) the right to freedom of expression, and (2) the right to be free from compelled expression. *Holloman*, 370 F.3d at 1264. But while these rights exist in public schools, they are there curtailed. "The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Morse v. Frederick*, 551 U.S. 393, 396-97 (2007) (quoting *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 682 (1986)).

The seminal Supreme Court case dealing with student speech, *Tinker v. Des Moines Independent Community School Dist.*, established the backdrop for examining cases involving student speech. 393 U.S. 503 (1969). *Tinker* stated:

> [C]onduct by the student, in class or out of it, which for any reason-whether it stems from time, place, or type of behavior-materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Id. at 513. A "showing that the students' activities would materially and substantially disrupt the work and discipline of the school" is necessary to justify suppression of student expression. *Id.* *Tinker*, however, dealt only with on-campus speech. More recently, the Supreme Court has also

ruled that student speech at off-campus, school sponsored activities, is subject to limitations. *See Morse v. Frederick*, 551 U.S. 393 (2007).

Student off-campus speech, though generally protected, could be subject to analysis under the *Tinker* standard as well if the speech raises on-campus concerns. *See, e.g., J.S. v. Blue Mountain School Dist.*, No. 08-4138, 2010 WL 376186 (3d Cir. Feb. 4, 2010); *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008); *Wisniewski v. Board of Educ. of Weedsport Cent. School Dist.*, 494 F.3d 34, 38 -39 (2d Cir. 2007). Where the speech occurs should be determined at the outset in order to decide whether the "unique concerns" of the school environment are implicated. *J.S. v. Bethlehem Area School District*, 807 A.2d 847 (Pa. 2002). Thus, to decide what level of protection, if any, Evans's speech is entitled, the Court must determine whether her speech occurred on- or off-campus. We start with the Supreme Court's most recent decision addressing student speech.

During the Olympic torch relay, Joseph Frederick, a high-school senior, unfurled a banner that read "BONG HiTS 4 JESUS" across the street from his school. *Morse v. Frederick*, 551 U.S. 393 (2007). His principal told him to take the banner down; Frederick refused and was ultimately suspended. The Ninth Circuit held that the principal's actions violated the First Amendment, and that Frederick could sue the principal. The principal appealed, and the Supreme Court reversed. In holding that the speech was not protected because it could reasonably be viewed as promoting illegal drug use, the Supreme Court found that the student's speech, which took place off school property, was on-campus speech because it occurred during a school sponsored event. *Id*. at 400-01, 408. The Supreme Court recognized that there is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents. *Id*. at 401. The event occurred during normal school hours as the school's principal had let students out early so that they could watch the relay. However, the Supreme Court reasoned that the facts were such that there was no uncertainty in that instance—teachers and administrators were interspersed among the students and charged with

supervising them, and the high school band and cheerleaders performed.

While the *Frederick* decision offers little aid in solving the specific issue of student speech published on the internet, it does, however, make clear that the operative test is not a simple one of geography. Where the speech is published is not the only question that needs to be asked.

In *J.S. v. Bethlehem Area School District*, the court was confronted with a website created by a student at home. 807 A.2d 847 (Pa. 2002). The website was titled "Teacher Sux" and "consisted of a number of web pages that made derogatory, profane, offensive and threatening comments, primarily about the student's algebra teacher " and principal. *Id.* at 851. The student told other students about the website and showed it to another student at school. *Id*. At 852. The Court found that the speech was on-campus because "J.S., . . . facilitated the on-campus nature of the speech by accessing the web site on a school computer in a classroom, showing the site to another student, and by informing other students at school of the existence of the web site." *Id*. at 865. The court also found it important that the "web site was aimed not at a random audience, but at the specific audience of students and others connected with this particular School District." *Id*. And so the court held as follows: "[W]here speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech." *Id*. at 865.

Generally, this decision follows a line of early cases that have determined that student speech concerns are implicated when speech published off-campus is brought on-campus. In *Boucher v. School Board of the School District of Greenfield*, the Seventh Circuit determined that an underground school newspaper, although unaffiliated with the school and printed off campus, was on campus student speech because the newspaper was distributed on school grounds and the article in question advocated on-campus activity. 134 F.3d 821, 829 (7th Cir. 1998). In *Bystrom v. Fridley High School*, the court analyzed an underground newspaper distributed on campus during lunch

under the rubric of student speech. 686 F.Supp. 1387, 1391 (D. Minn. 1987). While this test, whether speech published off-campus was brought on-campus, is not as easily suited to intangible situations like the internet, ultimately some guise of it will control.

The other possibility, referenced in *J.S.*, would be whether the speech is directed at a particular audience. This in some ways would be much more simple, but, would prohibit students from publishing a newspaper off-campus aimed at other students and distributing that paper off-campus, a scenario which has been decided in favor of the students. *See Thomas v. Board of Ed., Granville Central School Dist.*, 607 F.2d 1043, 1045 (2d Cir. 1979). Of course, there is nothing fundamentally unsound about this test, and any test is going to be over or under inclusive.

Thus, the question is whether the fact that Plaintiff's speech was arguably aimed at a particular audience at the school is enough by itself to label the speech on-campus speech. While further development of the facts may result in a different determination, the Court finds that it is not. This is not to suggest that speech made off-campus and accessed on-campus cannot be handled as on-campus speech. As noted, this is not a novel situation and has been dealt with by other courts. But here we have speech that was made off-campus, never accessed on-campus, and was no longer accessible when the Defendant learned of it.

One of the most recent decisions regarding internet student speech is instructive. In *Layshock v. Hermitage School District*, the Third Circuit examined whether a school district can punish a student for expressive conduct that originated outside of the classroom, when that conduct did not disturb the school environment and was not related to any school sponsored event. Nos. 07-4465, 07-4555, 2010 WL 376184, at *1 (3d Cir. Feb. 4, 2010). Justin Layshock created a fictitious profile of his school's principal on Myspace, another social networking website. Layshock used the principal's photo from the school website and gave fake answers to various questions. The profile was created after school hours and off-campus, at Layshock's grandmother's house. The page was

accessed by Layshock and other students during school. Some teachers also reported disruption in their classes which involved students congregating and talking about the page, as well as the cancellation of computer programming classes. As punishment, Layshock received a ten day suspension.

The district court entered summary judgment in favor of Layshock and against the school district for Layshock's First Amendment claim. On appeal, the school district argued that it was allowed to regulate the plaintiff's conduct because there was a "sufficient nexus " between the creation and the distribution of the profile. This is because the "speech" initially began on-campus, with the misappropriation of the picture from the school's website, the speech was aimed at the school district community and the principal, and was accessed on-campus by Layshock. The school district also argued that it was "reasonably foreseeable that the profile would come to the attention" of the district and the principal. *Id*. at *7.

The Third Circuit was not persuaded. It found the relationship between Layshock's conduct and the school too attenuated to allow the school district to "stretch its authority so far that it reaches Justin while he is sitting in his grandmother's home after school." *Id*. at *8. The court explained:

> It would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child's home and control his/her actions there to the same extent that they can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in using his grandmother's computer while at his grandmother's house would create just such a precedent and we therefore conclude that the district court correctly ruled that the District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression.

Evans's speech did not occur at a school sponsored activity, nor did she even go as far as the plaintiff in *Layshock*, and access the profile at school. Therefore, the Court finds that Evan's speech—her publication of the Facebook page—is off-campus speech.

But, the inquiry does not end because schools can discipline off-campus speech if it is unprotected speech. For example, in *Fenton v. Stear*, a student called a teacher a "prick" in the parking lot of a shopping center. 423 F.Supp. 767 (D.C. Pa. 1976). The student was given a three-day in-school suspension. The court found that the student's comments were 'fighting words', or "words . . . which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id*. at 771. However, the school's authority is far less reaching where the speech involved is off-campus. In *Thomas v. Board of Ed., Granville Central School Dist*., a group of students created a satirical publication that was largely created and distributed outside of school. 607 F.2d 1043, 1045 (2d Cir. 1979). The students stored the publication in a closet at school and occasionally used school resources to type articles. The Second Circuit found that the activity in the school itself was "De minimus" and held, "because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena." *Id*. at 1049-51. The court found that the situation at hand was a factual context distinct from that envisioned by *Tinker* and its progeny. *Id*. at 1051. Indeed, if Evans had run an editorial in the publication at issue in *Thomas* with the same subject matter as her Facebook group, the outcome of *Thomas* would not have changed.

Bayer argues that under a *Tinker* standard, Evans's speech would not be protected. Bayer contends that the manner in which Evans disparaged Ms. Phelps "has serious consequences for the potentially defamatory content and for which the teacher would be unable to properly respond." DE 6 at 14. It is "this type of disruption" that school officials are entitled to protect against. *Id*. Bayer relies on *Layshock v. Hermitage School District*, for the proposition that "school administrators need not wait until a 'substantial disruption' has already occurred prior to taking action." 496 F.Supp.2d 587, 597 (W.D. Penn. 2007) (internal citations omitted).

However, the key is whether the school administrators have a well-founded belief that a "substantial" disruption will occur. *Tinker,* 393 U.S. at 514; *J.S. v. Blue Mountain School Dist*., No. 08-4138, 2010 WL 376186, at *9 (3d Cir. Feb. 4, 2010). "A mere desire to avoid discomfort or unpleasantness will not suffice….[T]he government may not prohibit student speech based solely upon the emotive impact that its offensive content may have on the listener. *Layshock*, 496 F.Supp. 2d at 597. A showing of past incidents arising out of similar speech may pass muster. *Blue Mountain School Dist*., 2010 WL 376186, at *9.

Nothing in the Complaint indicates that a well founded expectation of disruption was present. Perhaps as more facts develop, this will come to light, but at this point, no expectation has been demonstrated. Moreover, if school administrators were able to restrict speech based upon a concern for the potential of defamation, as Bayer claims, students everywhere would be prohibited from the slightest criticism of their teachers, whether inside or outside of the classroom. Regarding Bayer's other premise, the Court is not convinced that whether a teacher is available to properly respond is a proper inquiry for a First Amendment claim and Bayer has not cited precedent to the fact.

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

> [T]hese "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and

> classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

Id. at 681. While the Court agrees that a school should not condone the use of vulgar or lewd language, quite simply, the case at hand does not involve the same type of speech as *Fraser*, nor is it in the same context. Evans's Facebook group does not undermine the "fundamental values" of a school education. Fraser's First Amendment rights were circumscribed in light of the school environment in which the speech occurred. *Morse v. Frederick*, 551 U.S. 393, 405 (2007). For the Court to equate a school assembly to the entire internet would set a precedent too far reaching. Furthermore, the Supreme Court has recognized that "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected." *Id*.

Bayer, seemingly, also argues that Evans's speech is not protected because it is libel and could trigger a defamation action. Libel or defamation is indeed an exception from that speech that is protected by the First Amendment. Florida courts follow the Restatement Second of Torts as to defamation actions. *Barnes v. Horan*, 841 So.2d 472, 476 (Fla. Dist. Ct. App. 2002). A statement of pure opinion does not give rise to a defamation action. *Scott v. Busch*, 907 So.2d 662, 667-68 (Fla. Dist. Ct. App. 2005). But, if an opinion infers a factual basis for it, that is a mixed-opinion, which may give rise to a defamation action. RST Torts 566. A student calling a "teacher her worst teacher ever" is clearly opinion. Bayer argues that to discipline Evans, the teacher does not have to have a viable defamation complaint merely a putative one. Bayer cites no case to justify this distinction, and the Court cannot find one. Moreover, the Court finds the concept incredible that First Amendment protection would ebb and flow with the willingness of plaintiffs to pay a court filing fee.

Regardless of the standard used, Evans's speech falls under the wide umbrella of protected speech. It was an opinion of a student about a teacher, that was published off-campus, did not cause

any disruption on-campus, and was not lewd, vulgar, threatening, or advocating illegal or dangerous behavior. Therefore, the Court finds that Evans had a constitutional right. The next inquiry is whether it was a clearly established right.

ii. Clearly Established

"It is . . . appropriate for a district court to grant the defense of qualified immunity at the motion to dismiss stage if the complaint 'fails to allege the violation of a clearly established constitutional right.'" *Gonzalez v. Reno*, 325 F.3d 1228, 1233 (11th Cir. 2003) (citing *Chesser v. Sparks,* 248 F.3d 1117, 1121 (11th Cir.2001). To be clearly established, "there is no need that the 'very action in question have previously been held unlawful.'" *Stafford Unified School District et al., v. Redding*, 129 S.Ct. 2633, 2643 (2009) (quoting *Wilson v. Layne*, 526 US 603, 615 (1999). Rather, the question is whether "'the state of the law [at the time of the events in question] gave respondents fair warning that their alleged treatment of [the plaintiff] was unconstitutional.'" *Holloman*, 370 F.3d at 1278 (quoting *Hope v. Pelzer,* 536 U.S. 730, 741 (2002)) (internal edits removed). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741.

Bayer argues that there is no established rule on student internet speech. This confusion certainly exists as to a number of questions (e.g., whether the speech was on campus or off; and the level of disruption or distraction tolerable). As one court has stated: "If courts and legal scholars cannot discern the contours of First Amendment protections for student internet speech, then it is certainly unreasonable to expect school administrators, such as Defendants, to predict where the line between on- and off- campus speech will be drawn in this new digital era." *Doninger v. Niehoff*, 594 F.Supp.2d 211, 224 (D. Conn. 2009).

Bayer relies on *Doninger v. Niehoff*, 527 F. 3d 41 (2d Cir. 2008), and *Kubany v. The School Board of Pinellas County*, 839 F.Supp. 1544 (M.D. Fla. 1993), for the proposition that the right was

not clearly established. However, these cases involved off-campus conduct that resulted in disruption on-campus. While they establish certain parameters of unprotected speech, the speech at issue here is categorically different. Each case will be discussed in turn.

In *Doninger*, a group of four student sent an email, and then one of them posted a derogatory message on a blog, encouraging students to call and email the district superintendent to urge that a school event go on as scheduled. 527 F.3d at 43. In the blog entry, the student complained that a school activity was cancelled "due to douchebags in central office" and encouraged students to contact the office in order to "piss [the district superintendent] off more." *Id*. at 45. The student was prohibited from running for senior class secretary and then sought injunctive relief allowing her to run for office. The circuit court affirmed the district court's denial of relief because the student's out of school conduct "created a foreseeable risk of substantial disruption to the work and discipline of the school." *Id*. at 53. Indeed, the student herself admitted that a sit-in was possible as the students were all "riled up." *Id*. at 51. The principal and superintendent actually received an "influx" of phone calls that required their attention. *Id*. at 46. Most significant in this instance, is that the court found that the blog posting directly invited an on-campus response in the form of disrupting the school with emails and phone calls. Evans, on the other hand, did not attempt to engage other students in any on-campus behavior.

Kubany involved a principal being sued for taking disciplinary action against a high school student who violated a school board policy against drinking alcohol. *Kubany*, 839 F.Supp at 1546. The student drank a beer and then attended a school football game. *Id*. The school had a policy in place prohibiting students from being under the influence of alcohol at school sponsored events. *Id*. First, the Court notes that *Kubany* is not a free speech case. Rather, it is a due process and equal protection case. *Id*. at 1546-47. While Bayer uses this case to bolster his contention that he was operating under his discretion to interpret a school board policy, Bayer's discretion does not stretch

so far beyond the schoolhouse gate. In *Kubany*, the student actually participated in a school sponsored event. Moreover, while "cyber bullying," "bullying," "harassment of a staff member," and "disruptive behavior" may indeed be offenses that Bayer has discretion to punish, the pleadings alone do not establish the definitions of these offenses.[1] Therefore, the Court is not in a position to determine whether Evans's conduct was in violation of a school policy. Furthermore, even if Bayer were enforcing school policies, Evans's comments do not amount to the type of speech that courts have found to be unprotected. Surely Bayer uses his discretion in deciding what constitutes cyber bullying, bullying, harassment, or disruption.

While the controlling precedent may be unclear, this confusion cannot save Bayer when his actions do not even comport with the requirements for the regulation of on-campus speech. *Tinker* requires established prerequisites. As discussed, there must be an indication of disruption, future or present. While subsequent development of the facts may establish such disruption; the facts as pled, do not. In fact, the time line they establish contravenes even the implication. According to the alleged facts, Plaintiff created her page, received some negative comments from other students, and removed her page. Only after the page was removed, did the defendant learn of the page and discipline the student. In short, the potential spark of disruption had sputtered out, and all that remained was the opportunity to punish. If Defendant believed that Evans's speech was on-campus there is clear precedent as to what standards Defendant was to apply. However, as determined, nothing about Evans's speech gives the appearance of being on-campus.

Faced with a similar time line in *Layshock*, the District Court of the W.D. of Pennsylvania

[1]The Court notes Bayer's additional argument that conflicting allegations in the Complaint exist between the allegations in the Complaint and an exhibit to the Complaint. The Notice of Suspension is attached to the Complaint. It lists the reasons for the suspension as: "Bullying/Cyber Bullying/Harassment towards a staff member" and "Disruptive behavior." DE 1 at Exh. B. Bayer contends that the Notice is evidence that Evans broke the school's policy and is contradictory of allegations in the Complaint. In the Court's view, this is not interpreted as an admission or proof that Evans engaged in those acts. Rather, the Court perceives it as evidence of the punishment Evans received.

found the officials were entitled to qualified immunity because while the school's discipline failed under the *Tinker* test, it was unclear what the test would be for off-campus student speech. 496 F.Supp.2d 587, 603-04 (W.D. Pa. 2007). This Court respectfully disagrees with that court's logic. A school's action would fail a more lenient standard for off-campus speech if it failed the more stringent *Tinker* test, as in the instant case. This Court finds that the facts are such that under any form of the *Tinker* test, Evans's actions cannot be construed as even remotely disruptive, nor was her speech in any way lewd, vulgar, defamatory, promoting drug use or violence as seen in other cases. Furthermore, unlike *Layshock*, the profile was never accessed at school, as it was removed before the students returned to school from an extended weekend. There was no disruption in classes, and as alleged, no teachers were involved in quieting students or missing classes. Therefore, the Court finds that the right in question was clearly established. Accordingly, Bayer's Motion to Dismiss is DENIED as to Evans's demand for nominal damages.

III. Attorneys' Fees

Having determined that Bayer does not have qualified immunity, he is subject to the possibility of paying attorneys' fees if Evans prevails pursuant to 42 U.S.C. §1988. Section 1988 states:

> [T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

Accordingly, Bayer's Motion to Dismiss is DENIED as to Evans's demand for attorneys' fees. It is hereby

ORDERED that Defendant's Motion to Dismiss is GRANTED IN PART AND DENIED IN PART as set forth above. Plaintiff's request for an injunction is hereby DISMISSED WITHOUT PREJUDICE. Plaintiff has leave to file an amended complaint.

DONE AND ORDERED in Chambers at Miami, Florida this 12th day of February, 2010.

BARRY L. GARBER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No: 08-61952-CIV-GARBER

KATHERINE EVANS,

Plaintiff,

v.

PETER BAYER, individually, and in his official capacity
as Principal of Pembroke Pines Charter High School,

Defendant.

_____/

PLAINTIFF'S FIRST AMENDED COMPLAINT

COMES NOW, Plaintiff, KATHERINE EVANS, by and through undersigned counsel, and hereby files this First Amended Complaint for nominal damages, injunctive relief and declaratory relief against Defendant PETER BAYER for violation of her rights under the First and Fourteenth Amendments to the United States Constitution. On February 12, 2010, this Court granted Evans "leave to file an amended complaint naming the proper parties." DE 30 at p. 4. *See also id*. at p. 16 ("Plaintiff has leave to file an amended complaint."). Accordingly, Evans alleges as follows:

Introduction

1. Katherine Evans, while a senior at Pembroke Pines Charter High School in 2007, was suspended for three days for engaging in protected off-campus speech. The suspension removed her from her critical senior year of Advanced Placement ("AP") English class, stained her academic record and violated her First Amendment rights. Her only "offense" was to create a "Facebook" page that criticized one of her teachers as "the worst teacher she had ever had,"

and solicited comments about that teacher. She also posted a photo of that teacher from a prior year's school yearbook. After receiving three comments, all of which berated *her* and supported the teacher, Evans removed the page from Facebook.

2. The retaliatory and disciplinary acts taken by Defendant against Ms. Evans for the internet posting violated Evan's freedom of speech guaranteed by the First and Fourteenth Amendments. The unjustifiable three-day suspension cast a pall on Ms. Evans' academic record. Accordingly, Katherine Evans seeks relief against Defendant Principal Peter Bayer, individually, and in his official capacity as Principal of Pembroke Pines Charter High School. Evans asks this Court to order the redaction or expungement of her disciplinary record on this matter by Bayer in his official capacity and to award nominal damages, costs and attorneys' fees against Bayer individually, and in his official capacity.

Jurisdiction

3. Plaintiff brings this action pursuant to 42 U.S.C. § 1983 for violation of her rights under the First and Fourteenth Amendments to the United States Constitution.

4. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202, and injunctive relief pursuant to Fed R. Civ. P. 65.

Parties

5. At all times material hereto, Plaintiff, KATHERINE EVANS, ("Evans") was a high school student in her senior year at Pembroke Pines Charter High School located in the City of Pembroke Pines, Florida.

6. At all time material hereto, Defendant, PETER BAYER ("Bayer") was the Principal of Pembroke Pines Charter High School.

7. Plaintiff sues Defendant Bayer in his individual capacity, as well as in his official capacity as Principal of Pembroke Pines Charter High School. As Principal, Bayer was vested with the final decision-making authority to administer the disciplinary actions alleged in this First Amended Complaint.

Facts

8. In November 2007, Evans was a senior at Pembroke Pines Charter High School. Her AP English teacher was Sarah E. Phelps, who is not a party to this action.

9. During the evening of Friday November 9, 2007 [Veterans' Day weekend], after school hours and from her home computer, Evans posted on Facebook a photograph of Ms. Phelps, from a prior year's school yearbook. The posting sought to create a group to express students' opinions about the teacher. Evans only expressed her own opinion that Ms. Phelps was the "worst teacher" she had ever met, and invited **others** to "express their hatred." Evans used no profanities and stated no threats.

10. Evans' posting was, verbatim:

> Ms. Sarah Phelps is the worst teacher I've ever met! To those select students who have had the displeasure of having Ms. Sarah Phelps, or simply knowing her and her insane antics: Here is the place to express *your feelings of hatred*.

Exhibit A (emphasis added).

11. In response, three postings appeared that supported the teacher, lauded Ms. Phelps and derided and debased Evans for creating the Facebook group. *See* Exhibit A.

12. The posting had been up for only two days, over the weekend, and was not seen by the teacher while it was on Facebook.

13. Plaintiff herself removed the posting from Facebook as soon as she was able to. Upon learning of Evan's posting on Facebook, Defendant Bayer suspended Evans for three days

for the stated reasons of "Bullying / Cyber Bullying Harassment towards a staff member" and "Disruptive behavior." The suspension notice indicated that "Katie [Evans] had posted an inappropriate site regarding her teacher on Facebook. *See* Exhibit B.

14. Plaintiff's posting contained no threats of violence, veiled or explicit. Defendant only became aware of the posting after Plaintiff had removed it from Facebook. Although the posting did not disrupt school activities, Defendant's discipline of Ms. Evans forcibly removed her from school for three days, removed her from her AP classes and forced her into the lesser-weighted honors classes.

15. Moreover, the posting gave rise to a spirited exchange of opinions by students who disagreed with Evans, who ultimately proved her wrong in her assessment of the teacher. The posting and its aftermath thereby accomplished one of the goals of the First Amendment: the free and unfettered exchange of ideas and opinions in the public arena.

16. Defendant Bayer's acts that are the subject of this complaint were taken under color of state law.

17. Defendant Bayer's acts that are the subject of this complaint were taken pursuant to the custom, practice or policy of Pembroke Pines Charter High School, which is a public charter preparatory high school owned and operated by the City of Pembroke Pines, Florida. Specifically, Defendant Bayer's acts that are the subject of this complaint were taken pursuant to the disciplinary code of Pembroke Pines Charter High School and its policy against "Cyber Bullying" and "harassment." Defendant Bayer was vested with the final decision making authority to administer the disciplinary action complained of herein.

18. Defendant Bayer's three-day suspension of Evans for expressing her opinions and soliciting the opinions of others in off-campus activity and in a non-violent, non-threatening forum unjustifiably besmirched Plaintiff's academic record.

19. Plaintiff has no adequate remedy at law, because the denial of Plaintiff's Constitutional rights cannot be remedied through legal relief.

20. Unless enjoined by this Court, Defendant's suspension of Evans for three days will stand as part of her permanent school record, unjustifiably staining her academic reputation and good standing; removal of the suspension and any records relating to it is required to redress the violation of Evans' constitutional rights.

21. Plaintiff is therefore entitled to an order from this Court enjoining Defendant Bayer, in his official capacity, from maintaining any records relating to the Facebook posting in Plaintiff's permanent school record and ordering Bayer to revoke, *nun pro tunc*, the three-day suspension.

CAUSE OF ACTION

22. Defendant Bayer's three-day suspension of Evans for expressing her opinions and soliciting the opinions of others in off-campus activity and in a non-violent, non-threatening public forum violated Evans' clearly established First Amendment right to freedom of speech.

23. The violation of Evans' constitutional rights may be redressed pursuant to 42 U.S.C. §1983.

Demand for Relief

WHEREFORE, Plaintiff, KATHERINE EVANS, respectfully requests this Court to:

A. Assume jurisdiction of this matter.

B. Declare that Defendant PETER BAYER'S action in suspending Plaintiff violated her First and Fourteenth Amendment rights.

C. Enjoin Defendant PETER BAYER, in his official capacity, from maintaining any records relating to the suspension in Plaintiff's permanent school record and revoking, *nunc pro tunc*, the three-day suspension.

D. Award Plaintiff nominal damages for the deprivation of her First Amendment and Fourteenth Amendment rights.

E. Award Plaintiff her attorneys' fees and costs for bringing this action pursuant to 42 U.S.C. § 1988.

F. Enter all other relief that the court deems just and proper.

Dated this 23rd day of February, 2010

Respectfully submitted by:

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 23, 2010, I electronically filed the foregoing with the Clerk of Court pursuant to the Administrative Procedures for Electronic Filing in Civil and Criminal Cases of the Southern District of Florida by using the CM/ECF system, which will send a notice of electronic filing to the following: Carlos E. Mustelier, Esq - cmustelier@florida-law.com.

/s/*Maria Kayanan*
Maria Kayanan
mkayanan@aclufl.org

xmpt! - Microsoft Internet Explorer

27 blocked | Check | Autolink | Send to

Profile | Edit | Friends | Networks | Inbox | Home | Account | Privacy | Logout

Ms. Sarah Phelps is the worst teacher I've ever met!

Group

Information

Group Info

Name: Ms. Sarah Phelps is the worst teacher I've ever met!

Type: Student Groups - Classes & Departments

Description: To those select students who have had the displeasure of having Ms. Sarah Phelps, or simply knowing her and her insane antics, here is the place to express your feelings of hatred.

Contact Info

Office: Pembroke Pines Charter High School

Street: 17189 Sheridan Street

City/Town: Pembroke Pines, FL

Join this Group

Reject Invitation

Share +

Photos

No one has uploaded any photos.

Videos

No one has uploaded any videos.

Posted Items

No one has posted any items.

Discussion Board

There are no discussions.

Members

Related Groups

mr cunningham is a fucking spartan
Just for Fun · Inside Jokes

I Went To Charter School...Bitch.
Organizations · Religious Organizations

Classes of 2008 worldwide (High School)
Student Groups · Classes & Departments

I Wish I Were Your Derivative So I Could Be Tangent To Your Curves!
Just for Fun · Facebook Friends

I'm an honors kid...I procrastinate and use sparknotes and don't do

PLAINTIFF'S EXHIBIT A

yer mail - Microsoft Internet Explorer

27 blocked Check Autolink Send to

Message · Report

Fiorella Andrea Bazan (FSU) wrote
at 1:24am

Seriously, was this group necessary, katie?
& putting up the school's information, really?
You're only asking for trouble with this "group" of yours.

You may think she's a terrible teacher, but you could never imagine how much she's taught me, anam, & all her other students who are looking at this group with disgust.

Message · Report

Anam Ismail (Nova Southeastern University) wrote
at 11:17am

wow katie,
the only reason i joined this group is tell you how wrong you are.
ms.phelps is one of the most amazing teachers ive ever had, and theres plenty of people who agree with me.
whatever your reasons for hating her are, they're probably very immature, and more importantly, probably your own fault.
clearly, you cant handle a heavy workload, one which requires REAL thinking, and if that is the case you probably should not be taking AP classes.
so i would love to hear how you justify calling her the "worst" teacher, besides the fact that you cant suck up to her and get your A...?

Message · Report

Report Group

Facebook © 2007

Advertisers Businesses Developers About Facebook Terms Privacy Help

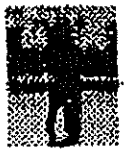
Microsoft...

Microsoft Internet Explorer

27 Blocked Check Send to

Members

This group has 3 members. See All



Katie Evans

Fernando Yemal

Francisco Velasco

The Wall

Displaying 3 wall posts. See All

Alexis M Andres (FSU) wrote:
at 3:26am

ok sooo here's the deal.

i think that you created this group b/c phelps is the only teacher that wont give you a good grade for having your lips against their ass. she expects you to work, and yes her classes might be crazy and she might do weird things but all of these weird things help you remember what syneccdoche is in your ENC1101 class almost 6 months later.....

so quit bitching and just suck it up! not everything in life is easy....

by the way I LOVE MRS. PHELPS!!!!

Messages • Report

Fiorella Andrea Barrera (FSU) wrote:
at 3:21am

Seriously, was this group necessary, katie? & putting up the school's information, really? You're only asking for trouble with this "group" of yours.

You may think she's a terrible teacher, but you could

I'm all thinks so... I plan ahead and use sparknotes and don't do homework

Student Browse – Classes & Departments

Group Type

This is an open group. Anyone can join and invite others to join.

Admins

- Katie Evans (Pembroke Pines Charter) (creator)

PEMBROKE PINES CHARTER HIGH SCHOOL

NOTICE OF SUSPENSION OF UP TO TEN DAYS

DATE: 11/15/07

STUDENT: Katherine Evans

ID [redacted] DOB 02/26/90

GRADE 12
RACE H
SEX F

Dear Parent or Guardian,

We regret to inform you that in accordance with School Board of Broward County Policy #5006: Katherine has been suspended for a period of 3 days. The reason for the suspension is as follows:

- Bullying / Cyber Bullying / Harassment towards a staff member
- Disruptive behavior

Katie posted an inappropriate site regarding her teacher on facebook.

Suspension from school days: 11/16/07 – 11/20/07

☐ Recommended For Expulsion.

☐ Pending Further Investigation A Recommendation For Expulsion May Be Forthcoming.

While on suspension a student may not attend any Pembroke Pines Charter School function or be on any school grounds. Students who are externally suspended and who attend alternatives to suspension programs are allowed to makeup classwork. Students who elect not to participate in alternatives to suspension programs will not be allowed to make up work. Classwork is due two days after the day of the student's return.

☐ With Prior Hearing (Student Conference and Parent In-School Conference)
A hearing was held pursuant to Policy 5006 during which time the student was advised of the alleged violation(s) and given an opportunity to present his/her version of the incident. At the conclusion of the hearing it was decided Board Policy was violated and the suspension was justified.

Without Prior Hearing (Student Conference)
Because of the nature of the alleged violation(s) or circumstance surrounding the violation(s) it was impossible to hold a hearing prior to the suspension.

This letter is to advise you concerning the nature of the allegation(s) and to inform you that a hearing concerning the allegation(s) has been set for _____ _____ at _____
Time Date Address

_____ to advise _____
Address Name

concerning the nature of the allegation(s) as well as to permit him/her version of the incident. We trust that you will be able to attend the hearing with _____
Name

in order that we may work together in his/her best interests. If the above scheduled hearing date and /or time is not convenient for you please contact this office so that it may be rescheduled.

_____
Phone Number

Should (name) _____ fail to appear for this hearing/conference we have no alternative but to extend the period of suspension to _____ days.

Your student will be expected to return to school on Wednesday, November 21, 2007

Steve Bruns, Behavior Specialist

Peter Bayer, Principal

PLAINTIFF'S EXHIBIT B

☐ SRO Contact

Pembroke Pines Charter High School
ADMINISTRATION OFFICES- 17189 SHERIDAN STREET, PEMBROKE PINES, FL 33331

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-4465

JUSTIN LAYSHOCK, a minor,
by and through his parents;
DONALD LAYSHOCK;
CHERYL LAYSHOCK, individually
and on behalf of their son

v.

HERMITAGE SCHOOL DISTRICT
KAREN IONTA, District Superintendent;
ERIC W. TROSCH, principal Hickory High School
CHRIS GILL, Co-Principal Hickory High School, all in their
official and individual capacity

Hermitage School District,

Appellant

No. 07-4555

JUSTIN LAYSHOCK, a minor, by and through his parents;
DONALD LAYSHOCK; CHERYL LAYSHOCK,
individually and on behalf
of their son

v.

HERMITAGE SCHOOL DISTRICT;
KAREN IONTA, District Superintendent;
ERIC W. TROSCH, principal Hickory High School;
CHRIS GILL, Co-Principal Hickory High School, all
in their official and individual capacity

Donald Layshock; Cheryl Layshock,

Appellants

Appeal from the United States District Court
for the Western District of Pennsylvania
(Civ. No. 06-cv-00116)
District Judge: Hon. Terrence F. McVerry

Argued: December 10, 2008

Before: McKEE, SMITH and ROTH,
Circuit Judges

(Opinion filed: February 4, 2010)

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OPINION

McKEE, *Circuit Judge*.

In this appeal and cross-appeal, we are asked to determine if a school district can punish a student for expressive conduct that originated outside of the classroom, when that conduct did not disturb the school environment and was not related to any school sponsored event. We are also asked to determine the extent to which this school district's response to a student posting on the internet interfered with the substantive due process rights of the student's parents.

It all began when Justin Layshock used his grandmother's computer to access a popular social networking internet web site where he created a fake internet "profile" of his high school

principal, Eric Trosch. His parents filed this action under 42 U.S.C. § 1983, after the School District punished Justin for that conduct. The suit alleges, *inter alia*, that the District's punishment violated Justin's First Amendment rights of expression and the parents' Fourteenth Amendment substantive due process rights in the care and nurturing of their son. The district court granted summary judgment in favor of Justin on his First Amendment claim, but ruled in favor of the School District on his parents' due process claim. For the reasons that follow, we will affirm the district court.

I. FACTUAL BACKGROUND

In December of 2005, Justin Layshock was a seventeen-year old senior at Hickory High School which is part of the Hermitage School District in Hermitage, Pennsylvania. Sometime between December 10 and 14, 2005, while Justin was at his grandmother's house during non-school hours, he

used her computer to create what he would later refer to as a "parody profile" of his principal, Eric Trosch. The only school resource that was even arguably involved in creating the profile was a photograph of Trosch that Justin copied from the school district's website. Justin copied that picture with a simple "cut and paste" operation using the computer's internet browser and mouse. Justin created the profile on "MySpace."[1] MySpace is a popular social-networking website that "allows its members to create online 'profiles,' which are individual web pages on which members post photographs, videos, and information about their lives and interests." *Doe v. MySpace, Inc.*, 474 F. Supp.2d 843, 845 (W.D. Tex. 2007).[2]

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[1] MySpace is found at: http://www.myspace.com.

[2] Social online networking sites allow members to use "their online profiles to become part of an online community of people with common interests. Once a member has created a profile, she can extend 'friend invitations' to other members and

Justin created the profile by giving bogus answers to survey questions taken from various templates that were designed to assist in creating an online profile. The survey included questions about favorite shoes, weaknesses, fears, one's idea of a "perfect pizza," bedtime, etc. All of Justin's answers were based on a theme of "big," because Trosch is apparently a large man. For example, Justin answered the "tell me about yourself" questions as follows:

> Birthday: too drunk to remember
>
> Are you a health freak: big steroid freak
>
> In the past month have you

---

communicate with her friends over the MySpace.com platform via e-mail, instant messaging, or blogs." *Doe*, 474 F. Supp.2d at 846.

smoked: big blunt[3]

In the past month have you been on pills: big pills

In the past month have you gone Skinny Dipping: big lake, not big dick

In the past month have you Stolen Anything: big keg

Ever been drunk: big number of times

Ever been called a Tease: big whore

Ever been Beaten up: big fag

Ever Shoplifted: big bag of kmart

Number of Drugs I have taken: big

Under "Interests," Justin listed: "Transgender, Appreciators of Alcoholic Beverages." Justin also listed "Steroids International"

[3]Justin explained that a "blunt" was a marijuana cigarette.

as a club Trosch belonged to.

Justin afforded access to the profile to other students in the District by listing them as "friends" on the MySpace website, thus allowing them to view the profile. Not surprisingly, word of the profile "spread like wildfire" and soon reached most, if not all, of Hickory High's student body.[4]

During mid-December 2005, three other students also posted unflattering profiles of Trosch on MySpace. Each of those profiles was more vulgar and more offensive than Justin's. Trosch first learned about one of the other profiles from his daughter who was in eleventh grade. On Monday, December 12, 2005, Trosch told Co-Principal Chris Gill and District Superintendent Karen Ionta about this other profile and

---

[4] Justin later explained that he made the profile to be funny, and did not intend to hurt anyone. However, there was obviously nothing "funny" about the profile in the eyes of the school administration.

asked Technology Director Frank Gingras to disable it. However, despite the administration's best efforts, students found ways to access the profiles. Trosch discovered Justin's profile on Thursday evening, December 15, and a fourth profile on Sunday, December 18.

Trosch believed all of the profiles were "degrading," "demeaning," "demoralizing," and "shocking." He was also concerned about his reputation and complained to the local police. Although he was not concerned for his safety, he was interested in pressing charges against those responsible for the bogus profiles, and he discussed whether the first profile he discovered might constitute harassment, defamation, or slander. However, no criminal charges were ever filed against Justin or any of the other student authors of profiles.

On December 15, Justin used a computer in his Spanish classroom to access his MySpace profile of Trosch. He also

showed it to other classmates, although he did not acknowledge his authorship. After viewing the profile, the students logged off of MySpace. Justin again attempted to access the profile from school on December 16, purportedly to delete it. School district administrators were unaware of Justin's in-school attempts to access MySpace until their investigation the following week. Teacher Craig Antush glimpsed the profile in his computer lab class and told the students who were congregating around a computer and giggling to shut it down.

The school district administrators were not able to totally block students from visiting the MySpace web page at school because Gingras, the Technology Coordinator, was on vacation on the 16th. Instead, student use of computers was limited to labs or the library where it could be supervised. School officials continued to limit computer use from December 16 until December 21, which was the last day of school before

Christmas recess, and computer programming classes were cancelled.

According to the district court, the school district's investigation revealed how many students had accessed MySpace before access to the site at school was disabled, but the school could not determine how many students actually accessed any of the Trosch profiles, or which Trosch profiles had been viewed while a student was on the MySpace website.

School district officials first learned that Justin might have created one of the Trosch profiles on December 21. On that day, Justin and his mother were summoned to a meeting with Superintendent Ionta and Co-Principal Gill. During that meeting, Justin admitted to creating a profile, but no disciplinary action was then taken against him. After the meeting, without prompting from anyone, Justin went to

Trosch's office and apologized for creating the profile.[5]

Justin's parents were understandably upset over Justin's behavior. They discussed the matter with him, expressed their extreme disappointment, "grounded" him, and prohibited him from using their home computer.

On January 3, 2006, the school district sent a letter to Justin and his parents giving them notice of an informal hearing that was to be held. The letter read, in pertinent part as follows:

> Justin admitted prior to the informal hearing that he created a profile about Mr. Trosch.
>
> This infraction is a violation of the Hermitage School District Discipline Code: Disruption of the normal school process; Disrespect; Harassment of a school administrator via computer/internet with remarks that have demeaning implications; Gross misbehavior; Obscene, vulgar and profane language; Computer

---

[5] Trosch later testified that he found Justin's apology respectful and sincere. Justin followed up with a written letter of apology on January 4, 2006.

> Policy violations (use of school pictures without authorization).

The school district subsequently found Justin guilty of all of those charges.

In addition to a ten-day, out-of-school suspension; Justin's punishment consisted of (1) being placed in the Alternative Education Program (the "ACE" program) at the high school for the remainder of the 2005-2006 school year;[6] (2) being banned from all extracurricular activities, including

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[6]Students assigned to ACE meet in a segregated area of the high school for three hours each day. The program is typically reserved for students with behavior and attendance problems who are unable to function in a regular classroom.

Prior to creating the Myspace profile, Justin was classified as a gifted student, was enrolled in advance placement classes, and had won awards at interscholastic academic competitions. The record does not reveal how the school district determined that it was appropriate to place such a student in a program designed for students who could not function in a classroom.

Academic Games and foreign-language tutoring;[7] and (3) not being allowed to participate in his graduation ceremony.[8] The Layshocks were also informed that the district was considering expelling Justin. Ironically, Justin, who created the least vulgar and offensive profile, and who was the only student to apologize for his behavior, was also the only student punished for the MySpace profiles.

II. DISTRICT COURT PROCEEDINGS.

The Layshocks initiated this action on January 27, 2006, by filing a three count complaint pursuant to 42 U.S.C. § 1983 individually, and on Justin's behalf, against the Hermitage School District, Karen Ionta, Eric Trosch, and Chris Gill, in their official and individual capacities (hereinafter collectively

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[7]Justin had been a French tutor to middle school students.

[8] Justin did graduate in 2006 and went on to attend a university in New York City.

referred to as the "School District" or "District"). The Layshocks also filed a motion for a temporary restraining order and/or preliminary injunction. Count I of the complaint alleged that the District's punishment of Justin violated his rights under the First Amendment. Count II alleged that the District's policies and rules were unconstitutionally vague and/or overbroad, both on their face and as applied to Justin. Count III alleged that the District's punishment of Justin interfered with the Layshocks' parental right of determining how best to raise, nurture, discipline and educate their child.

The district court denied the request for a temporary restraining order, *Layshock v. Hermitage Sch. Dist.*, 412 F. Supp.2d 502, 508 (W.D. Pa. 2006), and the Layshocks withdrew their motion for a preliminary injunction pursuant to

the district court's efforts at mediation.[9] On March 31, 2006, the district court denied the District's motion to dismiss the Layshocks' claim. The court ruled that the parents may assert a claim for a violation of their own due process right to "raise, nurture, discipline and educate their children" based on a school district's punishment of their child for speech the child uttered in the family home.

After discovery, both sides moved for summary judgment, and the court thereafter entered summary judgment in favor of Justin and against the School District only on the First Amendment claim.[10] The court concluded that a jury trial

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[9] The Layshocks agreed to withdraw their motion for a preliminary injunction in exchange for the District's agreement to remove Justin from the ACE program, reinstate him to his regular classes, allow him to participate in Academic Games and attend his graduation.

[10] The court ruled that Trosch was entitled to summary judgment on all counts because he was not involved

was necessary to determine compensatory damages and attorneys' fees. *See* id. at 607.

Thereafter, the district court denied the District's motion for entry of judgment pursuant to Fed.R.Civ.P. 54(b) or, in the alternative, for the issuance of a certificate of appealability pursuant to 28 U.S.C. § 1292(b).

The parties subsequently filed a joint motion in which they stipulated to damages and requested entry of final judgment while preserving all appellate issues pertaining to liability. The district court then entered a consent judgment, and this appeal and cross- appeal followed. The School District appeals the district court's entry of summary judgment

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disciplining Justin. It also held that Ionta and Gill were entitled to summary judgment on Justin's First Amendment claim based on qualified immunity, and that all of the defendants were entitled to summary judgment on the vagueness/overbreadth challenge and the parents' substantive due process claims.

in Justin's favor on his First Amendment claims (No. 07-4465), and the Layshock parents cross-appeal the district court's entry of summary judgment against them on their Fourteenth Amendment due process claims (No. 07-4555).

III. STANDARD OF REVIEW.

"Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Bjorgung v. Whitetail Resort, LP*, 550 F.3d 263, 268 (3d Cir. 2008) (citation and internal quotations omitted). In ruling on a motion for summary judgment, the district court must view the facts in the light most favorable to the non-moving party. *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 788 (3d Cir. 2000). However, "the mere existence of *some* alleged factual dispute between the

parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "As our review of a grant of summary judgment is plenary, we operate under the same legal standards as the District Court." *Bjorgung*, 550 F.3d at 268.

IV. DISCUSSION

A. The School District's Appeal (No. 07-4465).

1. The First Amendment's Application in Public Schools.

In the landmark case of *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), a group of high school students decided to wear black arm bands to school to protest the war in Vietnam. When school officials learned of the planned protest, they preemptively prohibited students from wearing armbands, and several students who ignored the ban and wore armbands to school anyway were suspended. *Id.* at 504. Those students then brought an action through their

parents under 42 U.S.C. § 1983, alleging that their First Amendment rights had been violated. The district court rejected that claim and upheld the constitutionality of the school officials' action finding that it had been reasonable to prevent disturbance of school discipline. *Id*. 504-505. The district court's decision was affirmed without opinion by an equally divided court of appeals sitting *en banc*. *Id*. at 505.

The Supreme Court ultimately held that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." *Id*. at 513. The Court concluded that the students before it were doing nothing more than engaging in political speech, and wearing armbands to express "their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them." *Id*. at 514. The

school district's only interest in banning the speech had been the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" or "an urgent wish to avoid the controversy which might result from the expression." *Id*. at 509-10. The Court held that that interest was not enough to justify banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Id*. at 508. In one of its most famous passages, the Court explained:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

Id. at 506.

Although the Court concluded that the First Amendment did reach inside the "schoolhouse gate," it also recognized that

the unique nature of the school environment had to be part of any First Amendment inquiry. The Court explained that it "ha[d] repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id*. at 507.

The Court next addressed the scope of the First Amendment in the context of student speech in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). There, the Court upheld the school's suspension of a high school student for delivering a nominating speech at a school assembly using "an elaborate, graphic, and explicit sexual metaphor." *Id*. at 678. The Court explained:

> [t]he schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by

> [Fraser].[11]

Id. at 683. In reaching this conclusion, the Court distinguished its prior holding in *Cohen v. California*, 403 U.S. 15 (1971). There, the Court had struck down an adult's conviction for disorderly conduct based on his having worn a jacket in a courthouse that bore an obscenity pertaining to the draft. The *Fraser* Court explained:

> [i]t does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in public school. . . . [T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.

Id. at 682 (citation and internal quotation marks omitted). The

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[11]In *Saxe v. State College Area School District*, 240 F.3d 200, 213 (3d Cir. 2001), we interpreted *Fraser* as establishing that "there is no First Amendment protection for 'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech in school."

Court concluded that the school could punish Fraser for his offensive nominating speech during a school assembly because the First Amendment does not prevent schools from encouraging the "fundamental values of 'habits and manners of civility'" *id*. at 681, by "insisting that certain modes of expression are inappropriate and subject to sanctions." *Id*. at 683. Thus, "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Id*.

Similarly, in *Hazelwood School District. v. Kuhlmeier*, 484 U.S. 260 (1988), the Court held that a principal's deletion of student articles on teen pregnancy from a school-sponsored newspaper did not violate the First Amendment. The Court distinguished *Tinker* by noting that since the school had not opened the newspaper up as a public forum in the case before it, the school could "exercis[e] editorial control over the style

and content of student speech in school-sponsored expressive activities so long as [its] actions are reasonably related to legitimate pedagogical concerns." *Id*. at 273. The Court explained:

> The question whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored . . . expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. . . . Educators are entitled to exercise greater control over this second form of student expression.

Id. at 270-71.

The extent to which First Amendment protections apply in the public school context was most recently addressed in

Morse v. Frederick, 551 U.S. 393 (2007). There, at a school-sanctioned and school-supervised event, a high school principal [Morse] saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use." *Id*. at 396. The banner read: "BONG HiTS 4 JESUS." *Id*. at 397. "Consistent with established school policy prohibiting such messages at school events, [Morse] directed the students to take down the banner." *Id*. at 396. Frederick, one of the students who brought the banner to the event, refused to remove it, and Morse "confiscated the banner and later suspended [Frederick]." *Id*. Frederick sued Morse and the school district pursuant to 42 U.S.C. § 1983, alleging a violation of his First Amendment right of expression. The district court granted summary judgment to the school district and Morse, holding that they were entitled to qualified immunity and that they had not infringed Frederick's First

Amendment rights. *Id*. at 399. The Court of Appeals for the Ninth Circuit reversed.

The Supreme Court granted *certiorari* to determine "whether Frederick had a First Amendment right to wield his banner, and, if so, whether that right was so clearly established that the principal may be held liable for damages." *Id*. at 400.[12] The Court "resolve[d] the first question against Frederick," and, therefore, did not have to reach the second. *Id*. The Court explained that its Fourth Amendment jurisprudence recognized that "deterring drug use by schoolchildren is an important – indeed, perhaps compelling interest." *Id.* at 407 (citation omitted). The "special characteristics of the school environment, and the governmental interest in stopping student drug abuse allow schools to restrict student expression that they

[12] The court of appeals had ruled that the principal was not entitled to qualified immunity.

reasonably regard as promoting such abuse." *Id*. at 408. Thus, "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." *Id*. at 402. The Court rejected Frederick's claim that since he was across the street from the school and not on school property, he was not inside *Tinker*'s "schoolhouse gate," and school officials therefore had lost authority over him. The Court reasoned that the event where the banner was unfurled occurred during school hours, and it had been approved by the school's principal as a school event. *Id*. at 400. School events and field trips off school grounds were subject to the school's rules for student conduct. *Id*. at 400-01.

It is against this legal backdrop that we must determine whether the District's actions here violated Justin's First Amendment rights, and whether the District's actions violated

the substantive due process rights afforded his parents under the Fourteenth Amendment.

At the outset, it is important to note that the district court found that the District could not "establish[] a sufficient nexus between Justin's speech and a substantial disruption of the school environment[,]" *Layshock*, 496 F. Supp. 2d at 600, and the School District's does not challenge that finding on appeal. Rather, the District argument is twofold. The District argues that:

> a sufficient nexus exists between Justin's creation and distribution of the vulgar and defamatory profile of Principal Trosch and the School District to permit the School District to regulate this conduct. The "speech" initially began on-campus: Justin entered school property, the School District web site, and misappropriated a picture of the Principal. The "speech" was aimed at the School District community and the Principal and was accessed on campus by Justin. It was reasonably foreseeable that the profile would come to the attention of the School district and the Principal.

District's Br. at 9.

2. Justin's "Entry" Onto the District's Web Site.

The School District's attempt to forge a nexus between the school and Justin's profile by relying upon his "entering" the District's web site to "take" the District's photo of Trosch is unpersuasive at best. The argument equates Justin's act of signing onto a web site with the kind of trespass he would have committed had he broken into the principal's office or a teacher's desk; and we reject it. *See Thomas v. Board of Educ.*, 607 F.2d 1043 (2d Cir. 1979).

We find the reasoning in *Thomas v. Board of* Education, 607 F.3d 1043 (2d Cir. 1979), far more persuasive.[20] *Thomas* involved a group of students who were suspended for

[20]*Thomas* was decided after *Tinker* but before *Fraser*.

producing "a satirical publication addressed to the school community." *Id*. at 1045. The articles included such topics as masturbation and prostitution, as well as more standard fare such as "school lunches, cheerleaders, classmates, and teachers." *Id*. "Some of the initial preparation for publication occurred after school hours in the classroom" of a teacher whom the students consulted "for advice on isolated questions of grammar and content." *Id*. In addition, "an occasional article was composed or typed within the school building, always after classes," and the finished magazine was stored in a "classroom closet" with the classroom teacher's permission. *Id.*

However, the students were very careful to distribute the periodical only after school and off campus, and the vast majority of their work on the publication was done "in their homes, off campus and after school hours." *Id.* The school

principal learned of the magazine when a teacher confiscated a copy from another student on campus, and "following consultation with the Board of Education," the principal imposed penalties that included: a five-day suspension of the students involved.[21] The punishment was based on the students' publication of "an allegedly 'morally offensive, indecent, and obscene,' tabloid." *Id*. at 1050 n.12.

The students brought a suit under 42 U.S.C. § 1983 against the school board and other school officials "seeking injunctive and declaratory relief from alleged deprivations of their First and Fourteenth Amendment rights." *Id*. at 1046. The district court denied the students' request for injunctive relief

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[21] The principal and Superintendent of Schools had initially decided to take no action pending assessment of the publication's impact. However, they ultimately decided to act after being contacted by the President of the Board of Education. *Thomas*, 607 F.2d at 1045-46.

based upon its conclusion that the publication "was potentially destructive of discipline in [the school], and therefore not protected by the First Amendment." *Id*. at 1047.

The Court of Appeals for the Second Circuit concluded that the students' conduct was not sufficiently related to the school to justify the school's exercise of authority. The court explained:

> [A]ll but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate. Indeed, the [students] diligently labored to ensure that [the magazine] was printed outside the school, and that no copies were sold on school grounds. That a few articles were transcribed on school typewriters, and that the finished product was secretly and unobtrusively stored in a teacher's closet do not alter the fact that [the magazine] was conceived, executed, and distributed outside the school. At best, therefore, any activity within the school itself was De minimis.

Id. at 1050.

The court reached that conclusion even though the

students there actually stored the offending publication inside a classroom and did some minimal amount of work on the periodical in school using school resources. Here, the relationship between Justin's conduct and the school is far more attenuated than in *Thomas*, and we will not allow the School District to stretch its authority so far that it reaches Justin while he is sitting in his grandmother's home after school.

We realize, of course, that it is now well established that *Tinker*'s "schoolhouse gate" is not constructed solely of the bricks and mortar surrounding the school yard. Nevertheless, the reach of school authorities is not without limits. In *Morse*, the Court held that the First Amendment does not prevent a principal from "restrict[ing] student speech *at a school event*, when that speech is reasonably viewed as promoting illegal drug use." 551 U.S. at 403 (emphasis added). Nevertheless, the Court was careful to note that "[h]ad [the student] delivered the

same speech in a public forum outside the school context, it would have been protected." 551 U.S. at 404.

It would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child's home and control his/her actions there to the same extent that they can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in using his grandmother's computer while at his grandmother's house would create just such a precedent and we therefore conclude that the district court correctly ruled that the District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression.

3. The District Can Not Punish Justin Merely Because His Speech Reached Inside the School.

As noted above, the School District also claims that

Justin's speech can be treated as "on-campus" speech because it "was aimed at the School District community and the Principal and was accessed on campus by Justin [and] [i]t was reasonably foreseeable that the profile would come to the attention of the School District and the Principal."

The district court held that the School District's punishment of Justin was not appropriate under *Fraser* because "[t]here is no evidence that Justin engaged in any lewd or profane speech while in school." *Layshock*, 496 F. Supp.2d at 599-600. It also held that Justin's punishment was not appropriate under *Tinker* because the School District did "not establish[] a sufficient nexus between Justin's speech and a substantial disruption of the school environment." *Id*. at 600.

The School District does not dispute the district court's finding that its punishment of Justin was not appropriate under *Tinker*. However, it rests its argument on the Supreme Court's

analysis in *Fraser*. In the School District's view, Justin's speech - his MySpace profile of Trosch - was unquestionably vulgar, lewd and offensive, and therefore not shielded by the First Amendment because it ended up inside the school community.[22] Similarly, the School District argues that under our decision in *Saxe*, *see* n.11, *supra*, there is no First Amendment protection for lewd, vulgar, indecent or plainly offensive speech in schools.

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[22] The District's argument in this regard is not crystal clear as its brief suggests that it can react to Justin's profile merely because it was lewd and vulgar. For example, the District summarizes one of its arguments as follows:

> The School District did not violate the First Amendment by punishing Justin for engaging in conduct which interfered with the School District's "highly appropriate function . . . to prohibit the use of vulgar and offense terms in public discourse."

District's Br. at 10 (ellipsis in original).

However, we reject out of hand any suggestion that schools can police students' out-of-school speech by patrolling "the public discourse." Accordingly, we will assume that the District is arguing that it can control lewd and vulgar speech as authorized under *Fraser*.

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The District rests this argument primarily on three cases which it claims allow it to respond to a student's vulgar speech when that speech is posted on the internet. The District cites *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002); *Wisniewski v. Bd. of Educ. of Weedsport Central Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007); and *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008). However, as we will explain, each of those cases involved off campus expressive conduct that resulted in a substantial disruption of the school, and the courts allowed the schools to respond to the substantial disruption that the

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[23] In *Saxe*, we did state: "Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language." 240 F.3d at 214. However, when read in context, it is clear that we were there referring only to in school speech. Thus, we summarized the holding in *Fraser* as follows: "[a]ccording to *Fraser*, . . . there is no First Amendment protection for 'lewd,' 'vulgar,' indecent,' and 'plainly offensive' speech *in school*." *Id*., at 213 (emphasis added).

student's out of school conduct caused.

In *J.S.,* an eighth grade student created a threatening web site aimed at his algebra teacher that went so far as to explain "[w]hy Should She Die," and requested money to "to help pay for the hitman." 807 A.2d at 851. The site frightened several students and parents and the algebra teacher was so badly frightened that she ended up having to take medical leave from her teaching responsibilities. As a result of her inability to return to teaching, "three substitute teachers were required to be utilized which disrupted the educational process of the students." *Id*., at 852. "In sum, the web site created disorder and significantly and adversely impacted the delivery of instruction." *Id*., at 869. The Supreme Court of Pennsylvania concluded that the resulting disruption of instruction and the educational environment allowed the school to punish the student for his expressive conduct even though the student

created the web site from his home.[24]

Similarly, the school suspended the student in *Wisniewski*, for creating an image on the internet from his home computer that depicted a pistol firing a bullet at a teacher's head with dots representing splattered blood above the head. 494 F.3d at 36. The words: "Kill Mr. VanderMolen" were printed beneath the drawing. VanderMolen was the student's English teacher. The student created the image a couple of weeks after his class was instructed that threats would not be tolerated at the school, and would be treated as acts of violence. The court of appeals affirmed the district court's grant of summary judgment in favor of the school district in a suit alleging a violation of the

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[24] The district court believed that *J.S.* was "on point" but "respectfully reache[d] a slightly different balance between student expression and school authority." *Layshock*, 496 F. Supp. 2d at 602. However, we do not think *J.S.* is "on point" or the least bit helpful because there is no comparison between the impact of the conduct there and the impact of the conduct here.

First Amendment based on the school's suspension of the student for the out of school conduct. The court reasoned that "[t]he fact that [the student's] creation and transmission of the icon occurred away from school property [did] not necessarily insulate him from school discipline." 494 F.3d at 39. The court reasoned that "even if [the student's] transmission of an [image] depicting and calling for the killing of his teacher could be viewed as an expression of opinion within the meaning of *Tinker*," it was not protected by the First Amendment because "it cross[ed] the boundry of protected speech and pose[d] a reasonably foreseeable risk [of] materially and substantially disrupting the work and discipline of the school". *Id*., at 38-9 (internal quotation marks omitted).

Finally, in *Doninger*, a student who was a class officer

posted a message on her publicly accessible web log or blog[25] that resulted in school authorities not allowing her to participate in an election for class office. *Id*. at 43. In her message, she complained about a school activity that was cancelled "due to douchebags in central office," and encouraged others to contact the central office to "piss [the district superintendent] off more." *Id*. at 45. When the principal learned of the student's posting, she prohibited her from running for senior class secretary "because [the student's] conduct had failed to display the civility and good citizenship expected of class officers." *Id.,* at 46. The student and her parents then sought injunctive relief in

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[25]"A blog (a contraction of the term 'web log') is a type of website, usually maintained by an individual with regular entries or commentary, descriptions of events, or other material such as graphics or video. . . . 'Blog' can also be used as a verb, *meaning to maintain or add content to a blog*." (http://en.wikipedia.org/wiki/Blog) (last visited November 19, 2009).

the form of a court order allowing her to run for class office. The court of appeals affirmed the district court's denial of relief because the student's out of school expressive conduct "created a foreseeable risk of substantial disruption to the work and discipline of the school." *Id*. at 53.[26] " [The student] herself testified that . . . students were 'all riled up' and that a sit-in was threatened." *Id*. at 51. Accordingly, the court of appeals held that the student's mother "failed to show clearly that [the student's] First Amendment rights were violated when she was disqualified from running" for class office. *Id*. at 53.

However, for our purposes, it is particularly important to note that the court in *Doninger* was careful to explain that it "[had] no occasion to consider whether a different, more serious

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[26] The blog had resulted in numerous calls and emails to the principal, and the court of appeals noted that the blog also used inaccurate and misleading information to rally those who read it to contact the school principal.

consequence than disqualification from student office would raise constitutional concerns." *Id*. at 53. Of course, Justin's consequences were more serious; he was suspended. Moreover, in citing *Doninger*, we do not suggest that we agree with that court's conclusion that the student's out of school expressive conduct was not protected by the First Amendment there. Rather, we cite *Doninger* only to respond to the School District's contention that that case supports its actions against Justin here.

As noted earlier, the District's January letter to the Layshocks advising them of Justin's suspension reads, in relevant part, that it was punishing Justin because: "Justin admitted prior to the informal hearing that he created a profile about Mr. Trosch." Although the letter also mentions disruption, the District does not now challenge the district court's finding that Justin's conduct did not result in any

substantial disruption. Moreover, when pressed at oral argument, counsel for the School District conceded that the District was relying solely on the fact that Justin created the profile of Trosch. We have found no authority that would support punishment for creating such a profile unless it results in foreseeable and substantial disruption of school.

We believe the cases relied upon for the District stand for nothing more than the proposition that schools may punish expressive conduct that occurs outside of school as if it occurred inside the "schoolhouse gate," under certain very limited circumstances, none of which are present here.

As the court of appeals explained in *Thomas*: "[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." 607 F.2d at 1045. We need not now define

the precise parameters of when the arm of authority can reach beyond the schoolhouse gate because, as we noted earlier, the district court found that Justin's conduct did not disrupt the school, and the District does not appeal that finding. Thus, we need only hold that Justin's use of the District's web site does not constitute entering the school, and that the District is not empowered to punish his out of school expressive conduct under the circumstances here.

Based on those two conclusions, we will affirm the district court's grant of summary judgment to Justin on his First Amendment Claim.[27]

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[27]The District argues in the alternative that it did not violate the First Amendment by punishing Justin because his speech was defamatory and not protected by the First Amendment. The Layshocks respond by arguing that Justin's profile is a parody that cannot constitute defamation. However, whether or not we accept the characterization of a "parody," the issue before us is limited to whether the District had the authority to punish Justin for expressive conduct outside of school that the District

B. The Layshock Parents' Appeal (No. 07-4555).

As noted, earlier, in Count III of the complaint, Justin's parents alleged that the District's punishment of Justin for conduct he engaged in in his grandmother's home interfered with their right to determine how to best raise, nurture, discipline and educate their children. As also noted, the district court granted summary judgment to the District on that claim. The parents stated in their depositions that they brought their Due Process claim because they did not believe that the District had a right to punish Justin for creating the profile outside of school. The district court did not believe the parents had explained how the District's punishment of Justin interfered with their ability to discipline their son. The court therefore concluded that the parental claim the parents

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considered lewd and offensive.

were asserting was merely "duplicative of Justin's First Amendment claim," *Layshock*, 496 F. Supp.2d at 606, and not an independent claim of their own.

The Due Process Clause of the Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. The Due Process Clause "guarantees more than fair process," it also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citations and internal quotation marks omitted). Indeed, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 67. In fact, "the interest of parents in the care, custody, and

control of their children [] is perhaps one of the most fundamental liberty interests recognized" by the Supreme Court. *Id*. at 65. Thus, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

However, in *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 182 (3d Cir. 2005), we noted that "[t]he Supreme Court has never been called upon to define the precise boundaries of a parent's right to control a child's upbringing and education," and those boundaries remain undefined. Nevertheless, despite the rather ambiguous nature of those boundaries, we agree that the parents have not shown how the School District's action in any way interfered with their ability to control Justin's "upbringing [or] education." Although we can envision

situations where a school's reaction to a student's conduct could interfere with the parents' ability to exercise appropriate control and authority over their child and his/her upbringing and education, nothing on this record would support such a finding here. Here the parental assertion of a due process violation is based on nothing more than the parents' conclusory allegations of interference. They rest their claim on these assertions even though it appears that they were able to take the action they thought necessary to communicate their displeasure with their son's actions and the inappropriateness of his behavior. We therefore fail to see how the school's inappropriate response to Justin's actions in any way interfered with the Layshocks' liberty interest in raising their son.

Accordingly, although a child's constitutional rights will not always be coterminous with his/her parents' liberty interest, we believe the district court correctly concluded that the

Layshocks have not shown how their liberty interest was infringed by the School District's violation of their son's First Amendment right of expression.

V. CONCLUSION

For the reasons we have set forth above, we will affirm the district court's grant of summary judgment to Justin on his First Amendment claim and the district court's grant of summary judgment to the District on Justin's parents' Fourteenth Amendment Claim.[28]

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[28] The School District makes several other arguments in response to both the First Amendment claim, and the parents' substantive due process claim. However, we conclude that they are without merit and do not warrant further discussion given our analysis of the First Amendment claim.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-4138

J.S., a minor, through her parents;
TERRY SNYDER; STEVEN SNYDER,
Appellants

v.

BLUE MOUNTAIN SCHOOL DISTRICT;
JOYCE ROMBERGER; JAMES McGONIGLE

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 07-cv-00585)
District Judge: Honorable James M. Munley

Argued June 2, 2009
Before: FISHER and CHAGARES, *Circuit Judges*,
and DIAMOND,[*] *District Judge*.

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[*]Honorable Paul S. Diamond, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

(Filed: February 4, 2010)

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OPINION OF THE COURT

FISHER, *Circuit Judge*.

This appeal presents a challenge to J.S.'s suspension from Blue Mountain Middle School after she created from her home computer a MySpace.com Internet profile featuring her principal, James McGonigle. The profile did not state McGonigle's name, but included his photograph from the website of Blue Mountain School District (the "School District"), as well as profanity-laced statements insinuating that he was a sex addict and pedophile. On appeal, J.S. and her parents assert that the District Court erred in granting summary judgment in favor of the School District, arguing that the School District violated J.S.'s First Amendment free speech rights by punishing her for creating the profile; the School District violated J.S.'s parents' fundamental right to direct the upbringing of their child by regulating her out-of-school conduct; Pennsylvania law does not permit school districts to discipline students for out-of-school conduct; and the School District's disciplinary and computer-use policies were unconstitutionally vague and overbroad. Because we believe school authorities could reasonably have forecasted a substantial disruption of or material interference with the school as a result

of the MySpace profile, as defined by *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), we conclude that the School District did not violate J.S.'s First Amendment free speech rights by disciplining her for creating the profile. We also reject J.S.'s additional arguments and, therefore, we will affirm.

I.

A. Factual History

In Spring 2007, J.S. was a fourteen-year-old eighth grader at Blue Mountain Middle School (the "Middle School") in Orwigsburg, Pennsylvania, where she lived with her two parents, Terry and Steven Snyder (the "Snyders"). She was an honor roll student and had faced discipline at school only in the form of two or three dress code violations, the most recent of which occurred on February 20, 2007.

On Sunday, March 18, 2007, J.S. and her friend K.L., another eighth grader at the Middle School, created a fictitious profile on MySpace.com from J.S.'s house using a computer belonging to J.S.'s parents.[1] The profile's direct URL was

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[1]MySpace.com is "a social networking platform that allows Members to create unique personal profiles online in order to find and communicate with old and new friends." Terms & Conditions, MySpace.com, http://www.myspace.com/index.cfm?fuseaction=misc.terms (last visited Aug. 17, 2009).

http://www.myspace.com/kidsrockmybed. Although J.S. and K.L. were at their respective houses, the two girls communicated over AOL Instant Messenger, and took turns adding to the profile from their separate locations. The profile featured McGonigle's photograph, which the students had copied and pasted from the website of Blue Mountain School District (the "School District"). The profile did not identify McGonigle by name, school, or location, but instead created the page to appear to be a self-portrayal of a middle school principal named "m-hoe=]." The profile's owner described himself as a married bisexual forty-year-old man, a Virgo, and a "[p]roud parent" who lived in Alabama with his wife and child. His "Interests" section read as follows:

General	detention. being a tight ass. riding the fraintrain.[2] spending time with my child (who looks like a gorilla). baseball.my golden pen. fucking in my office. hitting on students and their parents.
Music	i love all kinds. favorite is techno.
Television	almost anything. i mainly watch-

[2]This appears to be a reference to McGonigle's wife, Debra Frain, a guidance counselor at the Middle School. Also, next to McGonigle's picture on the profile is a quote that reads as follows: "fraintrain- it's a slow ride but you'll get there eventually." (App. at 38.)

the playboy channel on directv.
OH YEAH BITCH!

Heroes myself. ofcourse.

(App. at 38 (all text and formatting as in original).) Another section, entitled "About me," stated:

HELLO CHILDREN
yes. it's your oh so wonderful, hairy, expressionless,
sex addict, fagass, put on this world with a small dick
PRINCIPAL
I have come to myspace so i can pervert the minds of other
principal's to be just like me. I know, I know, you're all
thrilled
Another reason I came to my space is because- I am
keeping an eye on you students
(who i care for so much)
For those who want to be my friend, and aren't in my school
I love children, sex (any kind), dogs, long walks on the
beach, tv, being a dick head, and last but not least my
darling wife who looks like a man (who satisfies my needs)
MY FRAINTRAIN
so please, feel free to add me, message me whatever

Id. (all text and formatting as in original). J.S. testified before the District Court at a preliminary injunction hearing that she created this profile because she was "mad" at McGonigle due to the way he treated her during her February 20, 2007 dress code violation, stating that she believed he handled the situation inappropriately and yelled at her unnecessarily, and that the

profile was simply a joke between her and her friends. She stated that she included in the profile things she had heard other students say about McGonigle. At her later deposition, J.S. testified that she and K.L. created the profile thinking "it would be comical" because "it's outrageous," and not really for any other reason.

J.S. and K.L. initially set the MySpace profile as "public," which made it accessible by anyone who knew the URL or found it by searching MySpace for a term the profile contained. At school on Monday, March 19, 2007, the day after the profile was created, numerous friends at the Middle School approached J.S. to talk about the profile, generally saying they found it funny. J.S. testified that she made the profile "private" after school that evening, so it could be viewed only by those people whom she and K.L. invited to be "m-hoe=]'s" MySpace online friends. The two students then granted "friend" status to approximately twenty-two other students. Because the Middle School computers block access to MySpace, students could have viewed the profile only from an off-campus location. McGonigle testified that he first learned of the profile on that Monday.

On the morning of Tuesday, March 20, 2007, a student, B, approached McGonigle, informed him of the profile, and told him it contained disturbing comments about him. McGonigle asked B to try to find out who created the profile, and afterwards attempted to find the profile himself from his office computer, which did not block access to MySpace. Unable to locate the profile, McGonigle called MySpace, Inc., which told him it could not direct him to a specific profile without the URL. By

Tuesday afternoon, B returned to McGonigle and advised him that J.S. had created the profile. McGonigle asked B to bring him a printout of the MySpace profile.

B brought a printed copy of the profile to McGonigle at the Middle School on the morning of Wednesday, March 21, 2007. To the best of McGonigle's knowledge, this was the only copy of the profile that entered the school. Because the printout contained the profile's URL, McGonigle apparently was able to open and view the profile directly from the MySpace website, despite the students having made it private. J.S. was absent from school on that particular day, so McGonigle was unable to discuss the profile with her at that time. McGonigle then approached Superintendent Joyce Romberger and Director of Technology Susan Schneider-Morgan. The three met for approximately ten or fifteen minutes, reviewed the profile, and concluded that it violated the School District's Acceptable Use Policy ("AUP") because it violated copyright laws in misappropriating McGonigle's photograph from the School District's website without permission. *See id.* at 39-55. Romberger and Schneider-Morgan did not discuss whether the statements in the profile were true. Although Romberger was required to report any misconduct by the principal to the Board of School Directors, she did not disclose any of the allegations in the profile because she believed it consisted of "lies" and "malicious comments" made by students angry at McGonigle.

McGonigle next showed the profile to two guidance counselors, Debra Frain (his wife) and Michelle Guers. He contacted MySpace, Inc. a second time to inquire whether he could learn the identity of the profile's creator based on the

URL, and MySpace informed him that he could not, absent a court order. By the end of Wednesday, McGonigle sought to discipline the students responsible for the profile's creation and had decided that, in making false accusations about a school staff member, the profile was a level-four infraction under the Middle School's discipline code, as contained in the 2006 – 2007 Student – Parent Handbook (the "Handbook"). *Id.* at 65-66. McGonigle testified that he did not believe the profile launched accusations against him, but rather that it was an imposter profile, purporting to be created by him.

On Thursday, March 22, 2007, J.S. returned to school and McGonigle called her and K.L. to his office to meet with him and Guers regarding the profile. Although J.S. initially denied creating the profile, she ultimately admitted her role. McGonigle explained to the girls that he "was very upset and very angry, hurt, and [he] c[ould]n't understand why [they] did this to [him] and [his] family," and "told them that [he] would be looking to take legal action against them and their famil[ies]." J.S. and K.L. remained in McGonigle's office while he contacted their parents and waited for both of their mothers to arrive at the school. McGonigle met with J.S. and her mother, Terry Snyder ("Snyder"), and showed her the profile. He informed them that he was punishing J.S. and K.L. with a ten-day out-of-school suspension, which prohibited attendance at school functions, and again threatened legal action against them. J.S. and Snyder apologized to McGonigle, and J.S. followed this in-person apology with a subsequent apology letter to McGonigle and Frain.

Shortly after J.S. and Snyder left his office, McGonigle called MySpace, Inc., provided it with the appropriate URL, and requested that it promptly remove the profile, which it did. McGonigle contacted Romberger to inform her of the punishment he imposed on J.S. and K.L. and, despite her ability to overrule his disciplinary decisions, she concurred with his decision to suspend the students for ten days. Next, McGonigle contacted the police to look into a criminal action against J.S. and K.L. The local police referred him to the state police, and he invited a state police officer to the Middle School to look at the profile. The officer told McGonigle he could press criminal harassment charges, but that they would likely be dropped, and McGonigle then declined to press charges, although he did file a formal report. The officer asked McGonigle whether he wanted him to call J.S., K.L., and their parents to the police station to "let them know how serious [the situation] was." McGonigle responded in the affirmative and, on Friday, March 23, 2007, the officer summoned J.S., K.L., and their mothers to the police station to discuss the profile. The same day, McGonigle sent J.S.'s parents a disciplinary notice stating that J.S. had been suspended for ten days. The next week, Romberger denied Snyder's request to overrule the suspension, and J.S. apparently never appealed her suspension to the Board of School Directors. During the ten-day suspension, J.S.'s school assignments were brought to her home. Snyder testified that, in addition to the suspension, the Snyders punished J.S. "for a very long time" for her role in creating the profile.

Because our legal analysis turns on the interaction between the profile and the Middle School, we will detail the relevant facts regarding the effect of the profile on the school.

Before the District Court, the School District argued that the profile disrupted school because (1) two teachers, Randall Nunemacher and Angela Werner, had to quiet their classes while students talked about the profile; (2) one guidance counselor had to proctor a test so another administrator could sit in on the meetings between McGonigle, J.S., and K.L.; and (3) two students decorated J.S. and K.L.'s lockers to welcome them back upon their return to school following the suspension, and students congregated in the hallway at that time.

Specifically, Nunemacher testified that on Thursday, March 22, 2007, when McGonigle called J.S. and K.L. into his office, a group of six or seven students disrupted his second period eighth-grade Algebra class by talking about the profile and the girls' suspensions during their unstructured classroom work time and by continuing to talk after he told them several times to stop. Nunemacher quieted them nicely two or three times, and finally, after he raised his voice, the talking stopped; the entire incident lasted five or six minutes. Nunemacher also testified that he overheard at least two students talking about the profile on Wednesday, March 21, 2007, in his sixth period class. The students talked for a minute or two, and then quieted down once he asked them to stop talking. Nunemacher stated that he typically asks students to quiet down during class about once a week. In addition to these two incidents, Nunemacher reported that he heard general "rumblings" that week indicating that students were discussing the profile, but he did not yet fully understand the situation when he overheard the comments, and could not give any specific details about these rumblings.

Werner testified that during her Skills for Adolescents class, some eighth-grade girls approached her after the lesson was finished to tell her about the profile. They mentioned that they were concerned about some specific comments in the profile regarding McGonigle and his family. Additionally, Guers was scheduled to administer a makeup test on the morning McGonigle met with J.S., K.L., and their mothers, but had to sit in on the meetings with McGonigle and the girls instead, and therefore asked Frain to supervise the testing for twenty-five to thirty minutes. Frain then had to cancel some student counseling appointments in order to do so. The students with whom Frain cancelled her meetings would have proceeded to their normal classes instead, and rescheduled these meetings with her.

McGonigle also testified that, upon J.S. and K.L.'s return from suspension, some students decorated the girls' lockers to welcome them back with "construction paper with confetti and ribbons and bows and stuff like that," and the decorations stated "congratulations." McGonigle said these locker decorations "created quite a buzz and a stir in the eighth grade hallway with about 20 to 30 students in a circle that had to be broken up by teachers." As a result, he "severely reprimanded" the two students who had decorated the lockers, and called their parents to inform them of the incident. These two students told McGonigle they had decorated the lockers to "congratulat[e J.S. and K.L.] on what they did." McGonigle stated that the students who decorated the lockers "didn't mean to hurt me, but they didn't think it was right, the fact that I suspended [J.S. and K.L.]." The students who merely congregated in the hall were not reprimanded. Finally, McGonigle testified that he noticed

a severe deterioration in discipline in the Middle School, especially among the eighth graders, following the creation of the profile, his corresponding discipline of J.S. and K.L., and J.S. and the Snyders' filing of this lawsuit. He attributed this change to a new culture of students rallying against the administration. McGonigle also mentioned that he had stress-related health problems as a result of the profile and this litigation.

B. Procedural History

J.S. and her parents filed this 42 U.S.C. § 1983 civil rights action on March 28, 2007, against the School District, Superintendent Romberger, and Principal McGonigle. They argued that the ten-day suspension violated J.S.'s First Amendment free speech rights, her due process rights, her rights under Pennsylvania state law, and her parents' Fourteenth Amendment substantive due process rights. J.S. and her parents filed a motion for a temporary restraining order and/or preliminary injunction, which the District Court denied on March 29, 2007. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2007 WL 954245 (M.D. Pa. Mar. 29, 2007).

Following discovery, both parties moved for summary judgment on November 21, 2007. In January 2008, J.S. and the Snyders stipulated to the dismissal of McGonigle and Romberger as defendants in the suit. On September 11, 2008, the District Court denied summary judgment as to J.S. and the Snyders, but granted it as to the School District. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517, *9 (M.D. Pa. Sept. 11, 2008). The District Court

acknowledged that J.S. created the profile at home, *id.* at *1, and determined that it did not substantially and materially disrupt school so as to satisfy the *Tinker* standard, although it did cause some disruption, *id.* at *4, *7. However, the District Court ultimately held that, based on the facts of the case and "because the lewd and vulgar off-campus speech had an effect on-campus," the School District did not violate J.S.'s First Amendment rights by disciplining her. *Id.* at *7-8. The District Court rejected J.S.'s additional claims, holding that, because the School District's discipline was appropriate and J.S.'s First Amendment claim failed, her other claims must also fail. *Id.* at *8-9. J.S. and her parents filed a timely notice of appeal.

II.

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. We exercise jurisdiction over the instant appeal pursuant to 28 U.S.C. § 1291.

Our review of the District Court's grant of summary judgment is plenary, and we apply the same standard as the District Court. *See*, *e.g.*, *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 95 n.7 (3d Cir. 2009); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Del. Co.*, 998 F.2d 1224, 1230 (3d Cir. 1993). Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the [School District] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "In reviewing the District Court's grant of summary judgment, we view the facts in a light most favorable to the nonmoving party,"

which, here, is J.S. *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 235 n.5 (3d Cir. 2008) (internal quotation marks omitted).

III.

A. First Amendment Freedom of Speech

At issue in the instant appeal is whether the School District's punishment of J.S. for her role in creating the MySpace profile offends the free speech protections of the First Amendment. We thus begin with a brief overview of the four Supreme Court cases that provide the applicable body of law for determining when school administrators can restrict student speech although, notably, the Court has not yet spoken on the relatively new area of student internet speech. In outlining the overarching principles regarding student speech, the Court has noted that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. Nevertheless, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.* at 507.

In *Tinker*, school officials learned of some students' plans to wear black armbands to express their objection to the United States' involvement in the war in Vietnam. *Id.* at 504. In response, the officials adopted a policy that any student wearing a black armband to school would be asked to remove it and, if he refused, he would be suspended until he returned

without the armband. *Id.* The Court, in response to the students' subsequent lawsuit, stated that wearing the armbands was "closely akin to 'pure speech'" entitled to First Amendment protection, *id.* at 505-06, and also noted that this action espoused a political opinion, *id.* at 510-11. Despite school officials advancing prevention of disruption as their justification for the armband policy, the Court explained that "[c]ertainly 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." *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). The Court then found that the record did not contain any facts that indicated the wearing of the armbands "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, [that] no disturbances or disorders on the school premises in fact occurred," *id.* at 514, and the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students," *id.* at 508-09. Therefore, it held that the policy violated the students' First Amendment free speech rights. *Id.* at 514.

"Since *Tinker*, the Supreme Court has carved out a number of narrow categories of speech that a school may restrict even without the threat of substantial disruption." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001). First, the Court created an exception in a case in which a high school student delivered a speech full of "pervasive sexual innuendo" in front of approximately six hundred high school students at an in-school assembly while nominating another student for a

student government position. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677-78, 683 (1986). Following the assembly, a school official notified the student that the school considered his speech a violation of its rule prohibiting "obscene, profane language," suspended him for three days, and removed his name from a list of candidates for student graduation speaker. *Id.* at 678. The Court noted in its opinion that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Id.* at 682. Pointing out that the role of public education is to "prepare pupils for citizenship in the Republic" by "inculcat[ing] the habits and manners of civility," *id.* at 681 (internal quotation marks omitted), the Court stated that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission." *Id.* at 685. It then held that, even without engaging in a substantial disruption analysis, "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-86. We have subsequently interpreted *Fraser* as establishing that "there is no First Amendment protection for 'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech in school." *Saxe*, 240 F.3d at 213; *accord Sypniewski, Jr. v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 253 (3d Cir. 2002).

The Supreme Court further limited the application of the First Amendment in the context of student speech in a case involving a principal's decision to withhold two pages of a high school student-run newspaper from publication. *Hazelwood*

Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262-64 (1988). The Court recognized that schools "are entitled to exercise greater control" over speech that appears to be school-sponsored and held that the *Tinker* substantial disruption standard does not apply in such a scenario. *Id.* at 270-73. Thus, school officials "do not offend the First Amendment by exercising editorial control over . . . student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

Finally, the Supreme Court recently explored whether a principal violated a student's First Amendment rights in forcing him to take down a fourteen-foot banner, unfurled at a school-sanctioned and school-supervised event, that read "BONG HiTS 4 JESUS." *Morse v. Frederick*, 551 U.S. 393, 396-97 (2007). The Court found that the principal reasonably believed the banner was advocating the use of illegal drugs despite its admittedly unclear language, noted schools' important interest in deterring illegal drug use by schoolchildren, and held that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." *Id.* at 400-03, 407-10.

1. Student Speech

In the instant appeal, J.S. argues initially that the First Amendment protects her speech, even if it was lewd and offensive pursuant to *Fraser*, because it occurred entirely

outside the Middle School.[3] The First Amendment generally protects lewd, offensive, and vulgar speech outside the school context. *See Cohen v. California*, 403 U.S. 15, 16, 25-26 (1971) (holding that a state may not make the wearing of a jacket bearing the words "Fuck the Draft" a criminal offense). *But see Fraser*, 478 U.S. at 682 ("'[T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.'" (quoting *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring))). The District Court characterized the MySpace profile as "lewd and vulgar," a finding J.S. does not dispute, and we agree fully with this characterization.[4] *J.S. ex rel. Snyder*, No. 3:07cv585, 2008 WL 4279517, at *7. However, J.S. argues that the District Court erred in concluding

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[3]It is well-established that J.S.'s status as a minor does not affect her First Amendment rights. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976), *overruled on other grounds in part by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); *Anspach v. City of Phila., Dep't of Pub. Health*, 503 F.3d 256, 261 (3d Cir. 2007) (same).

[4]The District Court also stated that the profile contained "potentially illegal" speech, and both parties dispute on appeal whether the profile consisted of criminal harassment or tortious defamation under Pennsylvania law.

that, because the profile was lewd and vulgar under *Fraser* and had an effect on campus, McGonigle was free to discipline her for its creation. *See id.* at *6-7. We decline today to decide whether a school official may discipline a student for her lewd, vulgar, or offensive off-campus speech that has an effect on-campus because we conclude that the profile at issue, though created off-campus, falls within the realm of student speech subject to regulation under *Tinker*.[5] Indeed, we have held previously that "[s]peech falling outside of [the narrow *Fraser* and *Kuhlmeier* exceptions] is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others." *Saxe*, 240 F.3d at 214. Thus, we need not employ the two-step test the District Court used to determine, first, whether the speech came on-campus due to its effect on the Middle School and then, only if factor one is satisfied, whether the School District infringed on J.S.'s First Amendment rights in punishing her for creating the profile. Instead, we proceed directly to a *Tinker* inquiry.

2. Substantial Disruption

Under *Tinker*, we must determine whether J.S.'s speech created a significant threat of substantial disruption in the Middle School. *Tinker* states that "conduct by the student, in

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[5]We may affirm the District Court on alternate grounds, provided that the record supports the judgment. *Rodriguez v. Our Lady of Lourdes Med. Ctr.*, 552 F.3d 297, 303 (3d Cir. 2008); *Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 761 n.1 (3d Cir. 2004).

class or out of it [while still under school control][6], which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." 393 U.S. at 513. However, this disruption must be substantial because "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508. School officials may not limit student speech solely on account of a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. Yet, school authorities need not wait until a substantial disruption actually occurs in order to curb the offending speech if they are able to "demonstrate any facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities." *Id.* at 514. We have further clarified that "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." *Saxe*,

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[6]We cannot accept the Dissent's suggestion that Tinker's "in class or out of it" language is intended to only allow school discipline for those disruptions occurring on the school campus. Electronic communication allows students to cause a substantial disruption to a school's learning environment even without being physically present. We decline to say that simply because the disruption to the learning environment originates from a computer located off campus, the school should be left powerless to discipline the student.

240 F.3d at 212; *cf. Sypniewski*, 307 F.3d at 253-57 (holding that a school could not prohibit students from wearing a Jeff Foxworthy "Top 10 reasons you might be a Redneck Sports Fan" T-shirt under its racial harassment policy, which arose out of earlier incidents of racial hostility at the school, because school authorities failed to demonstrate that the language on the shirts bore anything more than a "mere" or "general association" with the earlier precipitating events as opposed to a "particular and concrete basis" indicating the potential for future disruption).

Our sister courts of appeals offer further support for the notion that a school may meet its burden of showing a substantial disruption through its well-founded belief that future disruption will occur. *See Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008) (characterizing as "misguided" the notion "that *Tinker* requires a showing of actual disruption to justify a restraint on student speech"); *Lowery v. Euverard*, 497 F.3d 584, 591-92, 596 (6th Cir. 2007) ("*Tinker* does not require school officials to wait until the horse has left the barn before closing the door. . . . [It] does not require certainty, only that the forecast of substantial disruption be reasonable. . . . [As such, s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place."); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) ("*Tinker* does not require school officials to wait until disruption actually occurs before they may act. . . . [Thus, we look] to all of the circumstances confronting the school officials that might reasonably portend disruption.").

Nevertheless, we balance this exception based on substantial disruption or invasion of the rights of others against the protected nature of off-campus student speech. *See Morse*, 551 U.S. at 405 ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected."); *Fraser*, 478 U.S. at 688 (Brennan, J., concurring) ("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 . . . ."); *Saxe*, 240 F.3d at 216 n.11 (stating that the notion that a school's policy could be applied to students' off-campus speech "would raise additional constitutional questions").

3. Application of Law to the Facts of the Instant Case

The School District advances, and the District Court focused on, specific examples of *actual* disruption that occurred at the Middle School as a result of the profile, as elicited from McGonigle's, Nunemacher's, and Werner's deposition testimony. Were we examining the facts merely for evidence of a "substantial disruption of or material interference with school activities" that had already taken place, *see Tinker*, 393 U.S. at 514, we would have no trouble concluding, as the District Court did, that these incidents did not amount to a substantial disruption of the Middle School sufficient to discipline the students for their speech. The minor inconveniences associated with the profile, including McGonigle's meetings related to it, students talking in class for a few minutes, and some school officials rearranging their schedules to assist McGonigle, may have resulted in some disruption, but certainly did not rise to a

substantial one. It is also difficult to separate the effects that the profile itself had on the school from the effects attributable to McGonigle's investigation of the profile and subsequent punishment of J.S. and K.L.

However, the School District also argues that, given the immediate impact of the profile on the Middle School, absent McGonigle's quick corrective actions to curb its effect, the profile's potential to cause a substantial disruption of the school was reasonably foreseeable. It is apparent that the underlying cause for McGonigle's concern about the profile was its particularly disturbing content, not a petty desire to stifle speech critical of him, and we proceed with our analysis with this in mind. Therefore, we are sufficiently persuaded that the profile presented a reasonable possibility of a future disruption, which was preempted only by McGonigle's expeditious investigation of the profile, which secured its quick removal, and his swift punishment of its creators. We are especially concerned about the profile's blatant allusions to McGonigle engaging in sexual misconduct, such as: the profile's URL containing the phrase "kidsrockmybed"; "m-hoe=]'s" interests including "fucking in my office," "hitting on students and their parents," and "mainly watch[ing] the playboy channel on directv"; and an "About me" section in which "m-hoe=]" describes himself as a "sex addict," states "I have come to myspace so i [sic] can pervert the minds of other principal's [sic] to be just like me," and says "I love children[] [and] sex (any kind)." (App. at 38.) J.S. and K.L. directly targeted McGonigle when they misappropriated his photograph from the School District's website by pasting it into the profile, identifying "m-hoe=]" as a principal even though the profile did not state his name, and focusing their "jokes" around

"m-hoe=]'s" sexual proclivities, including activities clearly inappropriate for a Middle School principal and illegal for any adult. Moreover, the girls disseminated the profile and allowed other students in the School District's community (as well as anyone else who came across it) to access and view the profile freely initially, and subsequently allowed others to view the profile by becoming MySpace friends with "m-hoe=]." We find it doubtful that the connection between the profile's sexual innuendo and McGonigle's role and duties as principal was lost on J.S. and K.L. or their target audience of other students of the Middle School and, in any event, it is not lost on us. The girls embarrassed, belittled, and possibly defamed McGonigle. They created the profile not as a personal, private, or anonymous expression of frustration or anger, but as a public means of humiliating McGonigle before those who knew him in the context of his role as Middle School principal. Indeed, several facts the School District elicited during depositions further support our conclusion regarding the profile's effect and its potential for future disruption: Werner testified that some eighth-grade girls approached her to express their concern about some specific comments in the profile pertaining to McGonigle and his family; B originally informed McGonigle of the profile to convey that it contained disturbing comments about him; and, most significantly, McGonigle testified that he noticed a severe deterioration in discipline in the Middle School, and particularly among the eighth graders, following the publication of the profile and the punishment of J.S. and K.L.

Undoubtedly, students have made fun of or made distasteful jokes about school officials, free from the consequences of school punishment, either out-of-earshot or

outside the school context since the advent of our modern educational system. However, due to the technological advances of the Internet, J.S. and K.L. created a profile that could be, and in fact was, viewed by at least twenty-two members of the Middle School community within a matter of days. *Cf. Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 617-18 (5th Cir. 2004) (holding that a violent drawing concealed in a student's night stand for two years, and only inadvertently taken to school by the student's brother, removed the speech from the realm of *Tinker* because it was not created on-campus or directed at campus). Students discussed the profile in-school and undoubtedly talked about it out-of-school as well. It is also reasonable to infer that some students initiated conversation about or shared the profile with their parents, or that parents overheard their children discussing the profile. We find it just as likely that students and parents inevitably would have begun to question McGonigle's demeanor and conduct at school, the scope and nature of his personal interests, and his character and fitness to occupy a position of trust with adolescent children, on account of the profile's contents.[7] We thus cannot overlook the

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[7]The Dissent contends this point is not supported by the record. Dissenting Op. at Part II.A, n.3. It is inevitable, however, that as more students and parents learned of the MySpace profile, greater disruption to the learning environment would have taken place. There would have been greater concern with McGonigle's fitness to continue in his job. While Superintendent Romberger, who knew McGonigle, may have quickly concluded the profile was a series of lies, parents unfamiliar with McGonigle almost certainly would have raised

context of the lewd and vulgar language contained in the profile, especially in light of the inherent potential of the Internet to allow rapid dissemination of information. Accordingly, J.S.'s argument for a strict application of *Tinker*, limited to the physical boundaries of school campuses, is unavailing. *See Doninger*, 527 F.3d at 48-49 ("'[T]erritoriality is not necessarily a useful concept in determining the limit of [school administrators'] authority.'" (alteration in original) (quoting *Thomas*, 607 F.2d at 1058 n.13)). Instead, we hold that off-campus speech that causes or reasonably threatens to cause a substantial disruption of or material interference with a school need not satisfy any geographical technicality in order to be regulated pursuant to *Tinker*.[8]

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questions about his supervision over their children. The time spent by McGonigle and other school and district administrators alleviating these concerns certainly would have been a substantial disruption to the educational mission of the school.

The dissent blames the School District's response to the MySpace profile for the disruptions that did occur at the Middle School. Whatever disruption that resulted from punishing the students who created the profile was mild compared to the substantial disruption that would have occurred when 50 or 100 students, as opposed to only 22, gained access to the profile and parents, acting out of concern for their children's safety challenged McGonigle's fitness.

[8]We disagree with our dissenting colleague's assertion that under our standard a school district could punish two students "for using a vulgar remark to speak about their teacher

The District Court also found that the profile contained "potentially illegal" speech.[9] Regardless of whether J.S.'s

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at a private party." Dissenting Op. at Part II.B. The dissent's hypothetical could be correct had we used *Fraser*'s vulgarity test as the basis for this opinion. Because unlike the District Court we rely on *Tinker*, not *Fraser* as the basis of our opinion, there is a principled difference between the dissent's hypothetical and this case. Our opinion, reached by applying *Tinker*, only allows school discipline when there is a significant risk of substantial disruption at the school. Since we are expressly not applying *Fraser* to conduct off school grounds, there is no risk that a vulgar comment made outside the school environment will result in school discipline absent a significant risk of a substantial disruption at the school.

[9]*Tinker* leaves open a further avenue for schools to regulate student speech when it "involves . . . invasion of the rights of others." 393 U.S. at 513. The United States Court of Appeals for the Eighth Circuit has "read this phrase as including only that speech [which] could result in tort liability." *Bystrom v. Fridley High Sch.*, 822 F.2d 747, 752 (8th Cir. 1987) (alteration in original) (internal quotation marks omitted); *see also* 22 Pa. Code § 12.9(c)(1) ("Students have the responsibility to obey laws governing libel and obscenity and to be aware of the full meaning of their expression."). The parties vigorously dispute whether J.S.'s speech amounted to criminal harassment or tortious defamation. Because we have already determined that J.S.'s speech presented a reasonable threat of substantial disruption to the Middle School, we need not reach these

creation of the profile satisfied the elements of criminal harassment or defamation, we hold that the potential impact of the profile's language alone is enough to satisfy the *Tinker* substantial disruption test. Though student speech that is critical of school officials is protected and not something we wish to censor generally, we distinguish such speech from the profile in the instant case that contained undoubtedly offensive, potentially very damaging, and possibly illegal language, including insinuations that strike at the heart of McGonigle's fitness to serve in the capacity of a middle school principal. We simply cannot agree that a principal may not regulate student speech rising to this level of vulgarity and containing such reckless and damaging information so as to undermine the principal's authority within the school, and potentially arouse suspicions among the school community about his character.[10]

This outcome is in accord with several nonbinding cases that we find persuasive regarding circumstances under which

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arguments to resolve this appeal and thus decline to do so.

[10]Contrary to the dissent's characterization, our description of the vulgarity of the MySpace page is not an indication that we are basing any part of our reasoning on *Fraser*. Dissenting Op. at Part II.A. Instead we mention vulgarity as one reason why J.S.' conduct was likely to cause a substantial disruption at the school. It is the significant risk that the conduct would cause a substantial disruption, however, not the vulgarity of the MySpace page, that serves as the basis for our opinion.

schools can regulate students' off-campus Internet speech. *See Doninger*, 527 F.3d at 45, 48-49 (permitting a school to prevent a student from holding a class officer position because she posted a message on her public weblog that referred to school authorities as "douchebags in central office" and contained potentially misleading information about a school concert, explaining that her speech was vulgar and offensive under *Fraser*, but ultimately deciding that it was punishable under *Tinker* because it presented a risk of substantial disruption); *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 36, 39-40 (2d Cir. 2007) (allowing school punishment of a student who had an online chat icon depicting a pistol firing a bullet at someone's head with the caption "Kill [the student's teacher]," because school authorities learned of the off-campus use of the icon, the icon contained threatening content, and it created a foreseeable risk of substantial disruption at school); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850, 865, 869 (Pa. 2002) (holding that there was a "sufficient nexus" between a student's website, on which he made "derogatory, profane, offensive, and threatening" comments about his teacher and correspondingly caused her significant health problems, and the school, so as to bring the speech on-campus, where it then satisfied the applicable *Tinker* substantial disruption test).[11]

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[11]A separate appeal dealing with school discipline of a student who created a MySpace profile of his principal was filed simultaneously in our Court. *See Layshock v. Hermitage Sch. Dist.*, Nos. 07-4465 & 07-4555, slip op. (3d Cir. Feb. 4, 2010). However, upon review of the holding in that case, as set forth in

The dissent argues that the "profile was so outrageous that no one could have taken it seriously, and no one did" and therefore it was not reasonable for the school district to foresee a significant disruption. Dissenting Op. at Part II.A. While those who knew McGonigle may not have taken the profile seriously, as the MySpace page spread to concerned parents who may have had little interaction with McGongile, some would have believed the principal was unfit to care for their children. The disruption that would have resulted from the meetings necessary to alleviate these parents' concerns and the strong possibility that some parents would choose to keep their children away from McGonigle and the school until they could be assured he was not a threat likens this case to the others cited

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that panel's opinion, we find the two cases distinguishable. Unlike the instant case, the school district in *Layshock* did not argue on appeal that there was, under *Tinker*, a nexus between the student's speech and a substantial disruption of the school environment. *Id.* at Part IV.A.1. This nexus, under *Tinker*, is the basis of our holding in the instant case. Rather, the *Layshock* panel held that the school district failed to establish that a sufficient nexus existed between the student's creation and distribution of the profile and the school district so that the district was permitted to regulate the student's conduct. *Id.* at Part IV.A.2. That panel also held, under *Frazer*, that the student's speech could not be considered "on-campus" speech just because it was targeted at the Principal and other members of the school community and it was reasonably foreseeable that school district and Principal would learn about the MySpace profile. *Id.* at Part IV.A.3.

where a significant likelihood of a substantial disruption was found.

The dissent attempts to distinguish these cases by arguing that J.S. "did not even intend for the speech to reach the school – in fact, she took specific steps to make the profile 'private' so that only her friends could access it." Dissenting Op. at Part II.A. Rather than showing J.S. did not intend for the speech to reach the school, the fact that she took action to allow only chosen Blue Mountain Middle School students to see the profile demonstrates that her behavior directly targeted the school. Additionally, McGonigle was able to access the profile by typing in the URL even after J.S. set the profile to private. Anyone else who learned the URL would presumably have also been able to access the profile notwithstanding the private setting.

Admittedly, no similar events involving Internet speech had occurred previously at the Middle School that might have led McGonigle to ascertain the threat of a substantial disruption based on past incidents, as occurred in *Sypniewski*. However, we find the speech in *Sypniewski* factually dissimilar from the profile at issue here because the language on the T-shirts in *Sypniewski* was not vulgar or offensive itself, but only in relation to other students' prior speech. *See* 307 F.3d at 254-57. Thus, the school authorities in *Sypniewski* had to demonstrate a well-founded fear of future disruption based primarily on the T-shirts' relationship to past disruptive incidents at the school. In contrast, J.S.'s speech was vulgar, lewd, and offensive on its face and McGonigle did not need to associate it with prior conduct to perceive its potential for future disruption. We

therefore conclude, based on the profile's nature and its threat of substantial disruption of the Middle School, that the School District did not offend J.S.'s First Amendment free speech rights by punishing her for creating the profile.[12]

B. Interference with Parental Rights

The Snyders argue that the School District interfered with their Fourteenth Amendment substantive due process right to direct the upbringing of their child free from government intervention. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000)

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[12]The dissent argues that J.S. speech was protected by the First Amendment and therefore the school district was prohibited from punishing her while contending that it "do[es] not pass upon the viability of other measures the appellees could have pursued. Dissenting Op. at ¶ 2. One of the options the dissent raises is pressing criminal charges. It is difficult to see how this speech would be protected on First Amendment grounds in the context of school discipline, but unprotected in the context of a criminal charge, particularly because "the First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings and must be applied in light of the special characteristics of the school environment." *Hazelwood*, 484 U.S. at 266 (citations omitted). If this speech is protected under a weaker level of First Amendment protection for school students, then it must be protected under the more stringent First Amendment protections granted to those facing prosecution for their speech.

("[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Anspach*, 503 F.3d at 261 ("The Supreme Court has long recognized that the right of parents to care for and guide their children is a protected fundamental liberty interest."). Schools maintain authority over their students in acting in loco parentis because, "for some portions of the day, children are in the compulsory custody of state-operated school systems. In that setting, the state's power is 'custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.'" *Gruenke v. Seip*, 225 F.3d 290, 304 (3d Cir. 2000) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)). We have further stated that:

> During this custodial time, in order to maintain order and the proper educational atmosphere, at times, those authorities 'may impose standards of conduct that differ from those approved of by some parents.' Where these standards collide, a court will require the State to demonstrate a compelling interest that outweighs the parental liberty interest in raising and nurturing their child.

Anspach, 503 F.3d at 266 (citation omitted) (quoting *Gruenke*, 225 F.3d at 304).

The Snyders argue that the District Court erred in holding that if the School District did not violate J.S.'s First Amendment rights, it could not have violated the Snyders' parental rights because these are two separate constitutional rights, worthy of

separate analyses. The Snyders argue specifically that the School District infringed on their rights when it reached into the family home to punish J.S.'s conduct, and the School District cannot overcome this with any compelling interest.

The School District, in response, notes that parental rights are not without limits or beyond regulation: "Courts have held that in certain circumstances the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment." *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 182 (3d Cir. 2005). We agree that the instant appeal presents such a case. Contrary to *Gruenke*, but similar to *C.N.*, we conclude here that McGonigle's suspension of J.S. did not "deprive[] [the Snyders] of their right to make decisions concerning their child," but that it "simply . . . complicated the making and implementation of those decisions." *C.N.*, 430 F.3d at 184. Further, we note on a practical level that the School District did not usurp the Snyders' authority to discipline their daughter, because they testified that they also punished her "for a very long time" for creating the profile. In conclusion, we hold that McGonigle appropriately disciplined J.S. because, as discussed above, he properly determined that her creation of the profile was conduct subject to school regulation given that it violated school rules and threatened to create a substantial disruption in the school.

C. Pennsylvania Law

J.S. argues that Pennsylvania law, in limiting schools' ability to regulate students' conduct, makes clear that her

creation of the profile was not subject to punishment by the School District. The relevant Pennsylvania statute states:

> The board of school directors in any school district may adopt and enforce such reasonable rules and regulations as it may deem necessary and proper, . . . regarding the conduct and deportment of all pupils attending the public schools in the district, *during such time as they are under the supervision of the board of school directors and teachers*, including the time necessarily spent in coming to and returning from school.

24 Pa. Cons. Stat. § 5-510 (emphasis added). J.S. argues that the Pennsylvania Commonwealth Court has interpreted the emphasized provision to mean that a school district may not punish a student for out-of-school conduct. *See D.O.F. v. Lewisburg Area Sch. Dist. Bd. of Sch. Dirs.*, 868 A.2d 28, 30-31, 35-36 (Pa. Commw. Ct. 2004) (holding that § 5-510 did not allow for school punishment of a student who purchased marijuana off campus, then returned to a school playground after school hours to smoke it, where he was caught by police, because he was not under the school's supervision at the time and the school board did not establish a "sufficient nexus between the incident and the Board's supervisory authority"); *Hoke v. Elizabethtown Area Sch. Dist.*, 833 A.2d 304, 310-11 (Pa. Commw. Ct. 2003) (holding that a public school could not punish a student who, at the time of the event in question, was not enrolled in the school district). Because J.S. created the profile from her home, and was not under school supervision at

that time, she argues that the School District's relevant disciplinary and computer policies do not allow for school punishment of her off-campus speech pursuant to the Middle School's statutory authority under § 5-510.

However, as the School District argues, we find *D.O.F.* and *Hoke* distinguishable from the instant appeal. J.S. was enrolled in the School District at the time she created the profile, in contrast to the facts of *Hoke*, and, as previously discussed, McGonigle punished J.S. "to prevent interference with the educational process," which the Pennsylvania Commonwealth Court has explicitly held is authorized under § 5-510. *See D.O.F.*, 868 A.2d at 36. J.S. has not cited any case law that persuades us that students in Pennsylvania have greater free speech rights under the Pennsylvania Constitution than under the U.S. Constitution. *See Saxe*, 240 F.3d at 202 n.1. Nor do we read § 5-510 as an exhaustive description of all occasions under which school officials are statutorily authorized to punish students for infractions of school policies. Accordingly, we do not believe the statute necessarily excludes school regulation of out-of-school conduct that threatens to materially interfere with the educational process. Therefore, because the profile created the possibility of a substantial disruption of the Middle School, the School District did not exceed its statutory authority in punishing J.S. for creating it.

D. Facial Challenge: Overbreadth and Vagueness

J.S. argues that the School District's disciplinary policy, as contained in the Handbook, and its computer use policy, as contained in the AUP, are unconstitutionally vague and

overbroad.[13] Specifically, J.S. challenges the Handbook's language that states "maintenance of order applies during those times when students are *under the direct control and supervision of the school district officials*," arguing that it fails to authorize the punishment she received for her off-campus creation of the profile. (App. at 58 (emphasis added).) In contrast, the School District argues that this clause provides a sufficient limit over the school's control of students. The AUP incorporates by reference the Handbook, *id.* at 55, through which we infer that the AUP is also subject to the Handbook's limiting language regarding the school's reach over student conduct.

"A regulation is unconstitutional on its face on overbreadth grounds where there is a [sic] 'a likelihood that the statute's very existence will inhibit free expression' by 'inhibiting the speech of third parties who are not before the Court.'" *Saxe*, 240 F.3d at 214 (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984)). "To render a law unconstitutional, the overbreadth must be 'not only real but substantial in relation to the statute's plainly legitimate sweep.'" *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Additionally, "a policy can be struck down only if no reasonable limiting construction is available that would render the policy constitutional." *Sypniewski*, 307 F.3d at 259 (citing *Saxe*, 240 F.3d at 215). We have also noted that, in light of the special characteristics of the school

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[13]At oral argument, J.S.'s counsel conceded that the overbreadth argument is perhaps derivative of the other claims on appeal.

environment, "the overbreadth doctrine warrants a more hesitant application in this setting than in other contexts," particularly with respect to student speech subject to proscription or regulation under *Tinker* due to its disruptive nature. *Id.*

We have no trouble concluding that the Handbook is not overbroad on its face. The School District's policy is reasonably limited to allowing regulation of speech and behavior only when its students are "under the direct control and supervision of the school district officials," and *Sypniewski* expressly encourages judicial restraint in this area when the student speech presents the possibility of substantially disrupting school under *Tinker*. Further, we read the Handbook in conjunction with a Pennsylvania regulation that states: "Students shall have the right to express themselves unless the expression materially and substantially interferes with the educational process, threatens serious harm to the school or community, encourages unlawful activity or interferes with another individual's rights." 22 Pa. Code § 12.9(b). The fact that we also concluded that McGonigle did not violate J.S.'s First Amendment free speech rights in punishing her for creating the profile off-campus in light of its potential for future disruption of the school only underscores the conclusion that the Handbook's language does not present a chilling effect on free expression, nor is it unconstitutionally overbroad.

We also reject J.S.'s vagueness argument. A regulation can be void for vagueness in either of two ways: (1) by "fail[ing] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits"; or (2) by "authoriz[ing] and even encourag[ing] arbitrary and

discriminatory enforcement." *City of Chi. v. Morales*, 527 U.S. 41, 56 (1999); *see also Sypniewski*, 307 F.3d at 266. Regarding notice, "'[i]t is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.'" *Morales*, 527 U.S. at 56 (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966)). Further, overcoming vagueness "'require[s] that a legislature establish minimal guidelines to govern . . . enforcement.'" *Id.* at 60 (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). Specific to the school context, we have noted that "courts have been less demanding of specificity than they have when assessing the constitutionality of other regulations." *Sypniewski*, 307 F.3d at 266. Accordingly, "because schools need the authority to control such a wide range of disruptive behavior, 'school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.'" *Id.* (quoting *Fraser*, 478 U.S. at 686).

McGonigle testified that he believed J.S.'s conduct violated the AUP because it ran afoul of copyright laws in misappropriating his picture from the School District's website. (App. at 44.) Also, prior to punishing J.S., he concluded that the creation of the profile was a level-four disciplinary infraction according to the Handbook because it made false accusations about a school staff member. *Id.* at 65-66. Under the Handbook, a level-four infraction is punishable by suspension or expulsion. J.S. argues that the Handbook is vague because it states that the Middle School may discipline its students only when the offending behavior occurred while the student was "under the direct control and supervision" of school officials.

Examining J.S.'s vagueness challenge for proper notice, we conclude that the Handbook and AUP provide ample information about student behavioral expectations and the consequences of breaking rules. We have stated that "school disciplinary rules will be struck down on this basis only when the vagueness is especially problematic," *Sypniewski*, 307 F.3d at 266, and we do not deem the Middle School's disciplinary rules to be "especially problematic" here. J.S. had ample notice that school policies prohibited the misappropriation of School District property in violation of copyright laws, and that the school would not tolerate false accusations against a school official. Moreover, we are not concerned here with the overregulation of off-campus student speech because the profile exhibited numerous qualities that compel us to conclude that it presented the reasonable possibility of causing a substantial disruption of the Middle School. We again reject J.S.'s arguments for a strict physical or geographical limit to a school's authority because it is simply not feasible, given the possibility of school trips, extracurricular activities or sporting events, after-hours on-campus events, and, now, the reach of Internet activity. Because the School District's students have sufficient notice of the applicable disciplinary and computer policies, and the rules are adequately precise so as to prevent school officials from arbitrarily enforcing them, we cannot agree with J.S. that they are vague. Therefore, we conclude that the Handbook and AUP policies are not unconstitutionally overbroad or vague.

IV.

We hold that *Tinker* applies to student speech, whether on- or off-campus, that causes or threatens to cause a substantial disruption of or material interference with school or invades the rights of other members of the school community. Therefore, because J.S.'s Internet profile featuring her principal alluded to his interest or engagement in sexually inappropriate behavior and illegal conduct, we conclude that it threatened to substantially disrupt the Middle School regardless of whether J.S.'s role in creating the profile was criminal or tortious. While we maintain great respect for students' First Amendment free speech rights, we are also cognizant that school officials are tasked with making difficult decisions and bear significant responsibility in educating our children. We conclude that the Constitution allows school officials the ability to regulate student speech where, as here, it reaches beyond mere criticism to significantly undermine a school official's authority in challenging his fitness to hold his position by means of baseless, lewd, vulgar, and offensive language. We also conclude that the School District did not violate the Snyders' Fourteenth Amendment rights to direct and control the upbringing of their child; that Pennsylvania permits school authorities to discipline students for conduct akin to J.S.'s creation of the profile; and that the Middle School's policies under which J.S. was punished were not unconstitutionally vague or overbroad. For all of these reasons, we will affirm the order of the District Court.

J.S. v. Blue Mountain School District

No. 08-4138

CHAGARES, Circuit Judge, concurring in part and dissenting in part.

J.S. was suspended from school for speech that took place outside the schoolhouse gates, during non-school hours, and that indisputably caused no substantial disruption in school. Because I believe that the School District's actions violated J.S.'s First Amendment free speech rights, I respectfully dissent from the majority's conclusion to the contrary.[14] Neither the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored and that caused no substantial disruption at school. I would follow the logic and letter of these cases and reverse the

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[14] I agree with my colleagues' conclusion that the School District's policies were not overbroad or void-for-vagueness, and that the District Court correctly determined that the School District did not violate the Snyders' Fourteenth Amendment substantive due process rights. As discussed infra note 11, however, I disagree with my colleagues that 24 Pa. Cons. Stat. § 5-510 did not bar the School District from punishing J.S. for her off-campus speech.

District Court's grant of summary judgment in favor of the School District and denial of J.S.'s motion for summary judgment on her free speech claim. The majority's opposite holding significantly broadens school districts' authority over student speech; I believe that this holding vests school officials with dangerously overbroad censorship discretion.

In reaching this conclusion, I recognize the comprehensive authority of schools and school officials to prescribe and regulate conduct within schools. Nonetheless, people of all ages are entitled to the freedoms guaranteed by the First Amendment and such freedoms must be respected. I further recognize that speech such as that employed in this case – even made in jest – could damage the careers of teachers and school administrators. Aggrieved schools and school officials may well seek redress through civil lawsuits and perhaps even by pressing criminal charges. I conclude only that the punitive action taken by the School District in this case violated the First Amendment rights of J.S. I do not pass upon the viability of other measures the appellees could have pursued.

I.

J.S., an Honor Roll eighth grade student, was punished for creating a fake profile of her middle school principal, James McGonigle, which she and her friend, K.L., posted on MySpace, a social networking website. J.S. and K.L. created the profile on

Sunday, March 18, 2007, from J.S.'s house, using a computer belonging to J.S.'s parents. The profile did not identify McGonigle by name, school, or location, though it did contain his official photograph from the School District's website. J.S. testified that she intended the profile to be a joke between herself and her friends. Appendix ("App.") 190.

The profile contained crude content and vulgar language, ranging from nonsense and juvenile humor to profanity and personal attacks aimed at the principal and his family. Particularly disturbing were the profile's references to pedophilia. However, the record indicates that the profile was so outrageous that no one took its content seriously. In fact, McGonigle himself acknowledged that he believed the students "weren't accusing me. They were pretending they were me." App. 327. Moreover, McGonigle showed the profile to Superintendent Joyce Romberger, who was required to report any suspected misconduct by the school principal to the Board of School Directors. As the majority acknowledges, however, Romberger took no such action "because she believed [the profile] consisted of 'lies' and 'malicious comments' made by students angry at McGonigle." Majority Op. 8.

Initially, the profile could be viewed in full by anyone who knew the URL or who otherwise found the profile by searching MySpace for a term it contained. The following day, however, J.S. made the profile "private" after several students

approached her at school, generally to say that they thought the profile was funny. App. 194. By making the profile "private," J.S. limited access to the profile to people whom she and K.L. invited to be a MySpace "friend." J.S. and K.L. granted "friend" status to about twenty-two Blue Mountain School District students.

Notably, the School District's computers block access to MySpace, so no Blue Mountain student was ever able to view the profile from school. Moreover, as the majority acknowledges, the only printout of the profile that was ever brought to school was one brought at McGonigle's specific request. Majority Op. 8. McGonigle then used the URL on the printout to view the profile from his office computer, which did not block access to MySpace.

After meeting with J.S., K.L., and their parents, and informing them that the children would receive a ten-day out-of-school suspension for creating the profile, McGonigle also contacted the police and asked about the possibility of pressing criminal charges against the students. The local police referred McGonigle to the state police, who informed him that he could press harassment charges, but that the charges would likely be dropped. McGonigle chose not to press charges, and instead completed a formal report and asked the police to speak to the students to let them know how serious the situation was.

In an attempt to justify punishment, the School District asserts that the profile disrupted school. As the majority concedes, the School District only points to three instances of alleged "disruptions":

> (1) two teachers, Randall Nunemacher and Angela Werner, had to quiet their classes while students talked about the profile; (2) one guidance counselor had to proctor a test so another administrator could sit in on the meetings between McGonigle, J.S., and K.L.; and (3) two students decorated J.S. and K.L.'s lockers to welcome them back upon their return to school following the suspension, and students congregated in the hallway at that time.

Majority Op. 11. Notably, Nunemacher acknowledged that the talking in class was not a unique occurrence, and admitted that he had to tell his students to stop talking about various topics approximately once a week. Similarly, Werner stated that the incident she was involved in did not disrupt class because the students spoke to her during the portion of the class when students were permitted to work independently. The substitution of a guidance counselor to proctor a test also did not cause any major inconveniences in school because the meetings only lasted about twenty-five to thirty minutes, and the student

counseling appointments that had to be cancelled during that time were all rescheduled.

The majority also notes that McGonigle testified that when J.S. and K.L. returned from suspension, some students decorated the girls' lockers to welcome them back to school, which created "a buzz and a stir" in the hallway. McGonigle punished the two students who decorated the lockers. The majority also emphasizes McGonigle's testimony that he "noticed a severe deterioration in discipline in the Middle School . . . following the creation of the profile, his corresponding discipline of J.S. and K.L., and . . . this lawsuit," and that "he had stress-related health problems as a result of the profile and this litigation." Majority Op. 13. I believe that this testimony is irrelevant to the issues before this Court because these disruptions did not arise out of the creation of the profile itself, but rather, were the direct result of the School District's response to the profile and the ensuing litigation. This testimony, therefore, is not relevant to determining the level of disruption that the profile caused in the school.

After analyzing the above facts, the District Court granted the School District's summary judgment motion on all claims, though specifically acknowledging that Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), does not govern this case because no "substantial and material disruption" occurred. App. 10-12 (refusing to rely on

Tinker); App. 17 (concluding that "a substantial disruption so as to fall under Tinker did not occur"). Instead, the District Court drew a distinction between political speech at issue in Tinker, and "vulgar and offensive" speech at issue in a subsequent school speech case, Bethel School District v. Fraser, 478 U.S. 675 (1986). App. 11-12. The District Court also noted the Supreme Court's most recent school speech decision, Morse v. Frederick, 551 U.S. 393 (2007), where the Court allowed a school district to prohibit a banner promoting illegal drug use at a school-sponsored event.

Applying a variation of the Fraser and Morse standard, the District Court held that "as vulgar, lewd, and potentially illegal speech that had an effect on campus, we find that the school did not violate the plaintiff's rights in punishing her for it even though it arguably did not cause a substantial disruption of the school." App. 15-16. The Court asserted that the facts of this case established a connection between off-campus action and on-campus effect, and thus justified punishment, because: (1) the website was about the school's principal; (2) the intended audience was the student body; (3) a paper copy was brought into the school and the website was discussed in school; (4) the picture on the profile was appropriated from the School District's website; (5) J.S. created the profile out of anger at the principal for disciplining her for dress code violations in the past; (6) J.S. lied in school to the principal about creating the profile; (7) "although a substantial disruption so as to fall under Tinker did not occur . . . there was in fact some disruption

during school hours"; and (8) the profile was viewed at least by the principal at school. App. 17 (emphasis added).

The District Court then rejected several other district court decisions where the courts did not allow school punishment of speech that occurred off campus, including the decision in Layshock v. Hermitage School District, 496 F. Supp. 2d 587 (W.D. Pa. 2007), aff'd, Nos. 07-4465, 07-4555 (3d Cir. Feb. __, 2010), a case substantially similar to the one before us today. See App. 17-20. In distinguishing these cases, the District Court made several qualitative judgments about the speech involved in each of the cases. See, e.g., App. 18 (asserting that the statements in Flaherty v. Keystone Oaks School District, 247 F. Supp. 2d 698 (W.D. Pa. 2003), were "rather innocuous compared to the offensive and vulgar statements made by J.S. in the present case"); App. 19 (contending that "[t]he speech in the instant case . . . is distinguishable" from the speech in Killion v. Franklin Regional School District, 136 F. Supp. 2d 446 (W.D. Pa. 2001), because of, inter alia, "the level of vulgarity that was present" in the instant case); App. 20 (claiming that as compared to Layshock, "the facts of our case include a much more vulgar and offensive profile").

Ultimately, the District Court held that although J.S.'s profile did not cause a "substantial and material" disruption under Tinker, the School District's punishment was

constitutionally permissible because the profile was "vulgar and offensive" under Fraser and J.S.'s off-campus conduct had an "effect" at the school. In a footnote, the District Court also noted that "the protections provided under Tinker do not apply to speech that invades the rights of others." App. 16 n.5 (citing Tinker, 393 U.S. at 513).

II.

Although the precise issue before this Court is one of first impression, the Supreme Court and this Court have analyzed the extent to which school officials can regulate student speech in several thorough opinions, all of which compel the conclusion that the School District violated J.S.'s First Amendment free speech rights when it suspended her for speech that took place outside the school, during non-school hours, and that caused no substantial disruption in school.

Unquestionably, the First Amendment protects the free speech rights of students in school. Morse, 551 U.S. at 396 ("Our cases make clear that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" (quoting Tinker, 393 U.S. at 506)). The exercise of First Amendment rights in school, however, has to be "applied in light of the special characteristics of the school

environment," Tinker, 393 U.S. at 506, and thus the constitutional rights of students in public schools "are not automatically coextensive with the rights of adults in other settings," Fraser, 478 U.S. at 682. Since Tinker, courts have struggled to strike a balance between safeguarding students' First Amendment rights and protecting the authority of school administrators to maintain an appropriate learning environment.

The Supreme Court established a basic framework for student free speech claims in Tinker, holding that "to justify prohibition of a particular expression of opinion," school officials must demonstrate that "the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Tinker, 393 U.S. at 509 (quotation marks and citation omitted) (emphasis added). This burden cannot be met if school officials are driven by "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." Id. Moreover, "Tinker requires a specific and significant fear of disruption, not just some remote apprehension of disturbance." Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 211 (3d Cir. 2001). Although Tinker dealt with political speech, the opinion has never been confined to such speech. Cf. id. at 215-17 (holding that the school's anti-harassment policy was overbroad because it "appears to cover substantially more speech than could be prohibited under Tinker's substantial disruption test"). See also Killion, 136 F. Supp. 2d at 455-58 (holding that the school overstepped its constitutional bounds underTinker when it suspended a student for making "lewd" comments about the

school's athletic director in an e-mail the student wrote at home and circulated to the non-school e-mail accounts of several classmates).

As this Court emphasized, with then-Judge Alito writing for the majority, Tinker sets the general rule for regulating school speech, and that rule is subject to several narrow exceptions. Saxe, 240 F.3d at 212 ("Since Tinker, the Supreme Court has carved out a number of narrow categories of speech that a school may restrict even without the threat of substantial disruption."). The first exception is set out in Fraser, which we interpreted as prohibiting "'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech in school." Id. at 213 (emphasis added); see also Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 253 (3d Cir. 2002) (quoting Saxe's narrow interpretation of the Fraser exception). The second exception to Tinker is articulated in Hazelwood School District v. Kuhlmeier, which allows school officials to "regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern." Saxe, 240 F.3d at 214 (citing Kuhlmeier, 484 U.S. 260 (1988)).

The Supreme Court recently articulated a third exception to Tinker's general rule in Morse. Although, prior to the instant case, we have not had an opportunity to analyze the scope of the Morse exception, the Supreme Court itself emphasized the

narrow reach of its decision. In Morse, a school punished a student for unfurling, at a school-sponsored event, a large banner containing a message that could reasonably be interpreted as promoting illegal drug use. 551 U.S. at 396. The Court emphasized that Morse was a school speech case, noting that "[t]he event occurred during normal school hours," was sanctioned by the school "as an approved social event or school trip," was supervised by teachers and administrators from the school, and involved performances by the school band and cheerleaders. Id. at 400-01 (quotation marks and citation omitted). The Court then held that "[t]he 'special characteristics of the school environment,' Tinker, 393 U.S.[] at 506 [], and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use." Id. at 408.

Notably, Justice Alito's concurrence in Morse further emphasizes the narrowness of the Court's holding, stressing that Morse "stand[s] at the far reaches of what the First Amendment permits." 551 U.S. at 425 (Alito, J., concurring). In fact, Justice Alito only joined the Court's opinion "on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions," or restrictions outside of those recognized by the Court in Tinker, Fraser, Kuhlmeier, and Morse. Id. at 423. Justice Alito also noted that the Morse decision "does not endorse the broad argument . . . that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.' This argument can easily be

manipulated in dangerous ways, and I would reject it before such abuse occurs." Id. at 423 (citations omitted). Moreover, Justice Alito engaged in a detailed discussion distinguishing the role of school authorities from the role of parents, and the school context from the "[o]utside of school" context. Id. at 424-25.

Here, the majority declines to decide whether the School District could have punished J.S.'s speech under the Fraser standard, Majority Op. 20, but concludes that the School District did not violate J.S.'s First Amendment rights because "school authorities could reasonably have forecasted a substantial disruption of or material interference with the school as a result of the MySpace profile, as defined by Tinker," id. 4. Because I do not believe that either Tinker or Fraser justifies the School District's actions in this case, I dissent.

A.

I believe that the District Court correctly concluded that the School District's suspension of J.S. was unlawful under Tinker. There is no dispute that J.S.'s speech did not cause a substantial disruption in the school. The School District's counsel conceded this point at oral argument, the District Court explicitly found that "a substantial disruption so as to fall under Tinker did not occur," App. at 17, and the majority has "no

trouble concluding . . . that [the specific examples of actual disruption that the School District points to] did not amount to a substantial disruption of the Middle School sufficient to discipline the students for their speech," Majority Op. 23. Yet, the majority attempts to overcome this considerable hurdle by adopting the standard put forth by several of our sister courts of appeals, which allows schools to meet the Tinker test by showing that a substantial disruption was "reasonably foreseeable." Id. 22 (citing Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008) (holding that Tinker does not require "actual disruption to justify a restraint on student speech")); Lowery v. Euverard, 497 F.3d 584, 591-92, 596 (6th Cir. 2007) ("Tinker does not require school officials to wait until the horse has left the barn before closing the door. . . . [It] does not require certainty, only that the forecast of substantial disruption be reasonable."); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001) ("Tinker does not require school officials to wait until disruption actually occurs before they may act.")).

I assume, without expressing an opinion, that the "foreseeability" standard is consistent with Tinker;[15]

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[15] The question of whether Tinker's "substantial disruption" standard applies to off-campus speech in the first place is not settled. I submit that the majority of the courts answered this question in the affirmative, often citing the following passage in Tinker: "conduct by the student, in class or out of it, which for any reason – whether it stems from time,

place or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." 393 U.S. at 513 (emphasis added). I note, however, that the phrase "in class or out of it" does not necessarily indicate the Supreme Court's approval of the application of Tinker to restrict speech that takes place off-campus and that is not sponsored by the school. Instead, it appears that Tinker was referring to on-campus student speech that occurs outside of the actual classroom, like Fraser's speech at a student assembly. See id. at 514 (concluding that "the 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 disturbance or disorders on the school premises in fact occurred," even though the students "caused discussion outside of the classrooms" (emphasis added)).

Interestingly, the majority appears to concede that Tinker's reference to "out of class" speech only encompasses speech that occurs when a student is "still under school control." Majority Op. 21. Here, conversely, J.S. was not under "school control" when she created the profile on her parents' computer on a Sunday. Moreover, in Saxe, this Court emphasized the importance of "geographical and contextual limitations" in confining school districts' authority over student speech. Saxe, 240 F.3d at 216 & n.11 (concluding that the school's anti-harassment policy was constitutionally overbroad because, *inter alia*, "the Policy does not contain any geographical or contextual

nevertheless, I believe that to justify the School District's punishment of J.S. under this test is contrary to Tinker itself. I also believe that the cases on which the majority relies are distinguishable from the instant case. Ultimately, I submit that the facts here do not support the conclusion that a forecast of substantial disruption was reasonable, and I respectfully disagree with my colleagues' conclusion to the contrary.

In Tinker, the Supreme Court held that "our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands [to protest the Vietnam War] would substantially interfere with the work of the school or impinge upon the rights of other students." 393 U.S. at 509. Given this holding, it is important to consider the record before the Supreme Court in Tinker and compare it to the facts of this case. The relevant events in Tinker took place in December 1965, the year that over 200,000 U.S. troops were deployed to Vietnam as part of Operation Rolling Thunder. Justice Black dissented in Tinker noting that "members of this Court, like all other citizens, know, without being told, that the disputes over the wisdom of the

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limitations" and could "even be read to cover conduct occurring outside the school premises . . . . [which] would raise additional constitutional questions"). I do not believe we have to answer the difficult question of whether J.S.'s speech constitutes school speech to hold that the School District violated her First Amendment rights in this case.

Vietnam war have disrupted and divided this country as few other issues ever have." Id. at 524 (Black, J., dissenting). In fact, the Tinker majority itself noted the school authorities' concern about the effect of the protest on friends of a student who was killed in Vietnam. See id. at 509 n.3. Justice Black also emphasized the following portions of the record:

> the [] armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically 'wrecked' chiefly by disputes with [a protesting student] who wore her armband for her 'demonstration.'

Id. at 517-18 (Black, J., dissenting). Based on these facts, Justice Black disagreed with the Tinker majority's holding that the armbands did not cause a substantial disruption in school: "I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war." Id. at 518; see also id. at 524 ("Of course students, like other people, cannot concentrate on lesser issues when black armbands are being ostentatiously displayed

in their presence to call attention to the wounded and dead of the war, some of the wounded and the dead being their friends and neighbors.”).

This was the record in Tinker, and yet the majority in that case held that “the 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 thus that the school violated the students’ First Amendment rights. Id. at 514 (emphasis added). Now I turn to our record. J.S. created the profile as a joke, and she took steps to make it “private” so that access was limited to her and her friends. Although the profile contained McGonigle’s picture from the school’s website, the profile did not identify him by name, school, or location. Moreover, the profile, though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously,[16] and the record clearly demonstrates that no one did. See, e.g., App. 327 (demonstrating that McGonigle recognized that the students “weren’t accusing me”); Majority Op. 8 (acknowledging that Romberger had a duty to

[16] I reject the majority’s assertion that “students and parents inevitably would have begun to question McGonigle’s demeanor and conduct at school, the scope and nature of his personal interests, and his character and fitness to occupy a position of trust with adolescent children, on account of the profile’s contents.” Majority Op. 26 (emphasis added). This contention is simply not supported by the record.

report suspected misconduct, but that she believed the profile was full of "lies and malicious comments" (quotation marks omitted)). Also, the School District's computers block access to MySpace, so no Blue Mountain student was ever able to view the profile from school. And, the only printout of the profile that was ever brought to school was one that was brought at McGonigle's express request. Thus, beyond general rumblings, a few minutes of talking in class, and some officials rearranging their schedules to assist McGonigle in dealing with the profile, no disruptions occurred.[17]

My colleagues acknowledge that the "actual disruption[s]" that the School District points to are no more than "minor inconveniences." Majority Op. 23. They also concede that it is "difficult to separate the effects that the profile itself had on the school from the effects attributable to McGonigle's investigation of the profile and subsequent punishment of J.S. and K.L." Id. 24. Yet the majority concludes that a substantial disruption was reasonably foreseeable, given the content of J.S.'s speech. I

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[17] My colleagues also emphasize that McGonigle "noticed a severe deterioration in discipline in the Middle School . . . following the publication of the profile and the punishment of J.S. and K.L." Majority Op. 25. The facts that McGonigle cites to support this proposition, see supra, pp. 3-4, demonstrate that these disruptions were not ones that arose out of the creation of the profile itself, but rather, were the direct result of the School District's response to the profile and the ensuing litigation. As set forth earlier, I do not believe that the deterioration in discipline that followed McGonigle's punishment of J.S. and K.L. is relevant to determining the level of disruption that the profile caused, or could reasonably have been expected to cause, in the school.

disagree. In comparing our record to the record in Tinker, I do not believe that this Court can apply Tinker's holding to justify the School District's actions in this case. As my colleagues acknowledge, an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Tinker, 393 U.S. at 508. If Tinker's black armbands – an ostentatious reminder of the highly emotional and controversial subject of the Vietnam war – could not "reasonably have led school authorities to forecast substantial disruption of or material interference with school activities," id. at 514, neither can J.S.'s profile, despite the unfortunate humiliation it caused for McGonigle.

Moreover, I believe that a comparison of our record to that of Tinker demonstrates that to apply the foreseeability standard adopted by our sister courts of appeals in a principled manner, courts need to define "foreseeability" in a way that is harmonious with Tinker. That is, courts must determine when an "undifferentiated fear or apprehension of disturbance" transforms into a reasonable forecast that a substantial disruption or material interference will occur. The majority cites several cases where courts held that a forecast of substantial and material disruption was reasonably foreseeable. See, e.g., Doninger, 527 F.3d at 50-51 (holding that punishment was justified, under Tinker, where a student's derogatory blog about the school was "purposely designed by [the student] to come onto the campus," to "encourage others to contact the administration," and where the blog contained "at best misleading and at worst false information" that the school "need[ed] to correct" (quotation marks and alteration omitted)); Lowery, 497 F.3d at 596 (holding that punishment was justified, under Tinker, where students circulated a petition to fellow football players calling for the ouster of their football coach, causing the school to have to call a team meeting to ensure "team unity," and where not doing so "would have been

a grave disservice to the other players on the team"); LaVine, 257 F.3d at 984, 989-90 (holding that the school district did not violate a student's First Amendment rights when it expelled him on an emergency basis "to prevent [] potential violence on campus" after he showed a poem entitled "Last Words" to his English teacher, which was "filled with imagery of violent death and suicide" and could "be interpreted as a portent of future violence, of the shooting of [] fellow students").

The majority likens this case to the above cases by contending that the profile was accusatory and capable of "arous[ing] suspicions among the school community about [McGonigle's] character" because of the "profile's blatant allusions to McGonigle engaging in sexual misconduct." Majority Op. 24, 29. As explained above, however, this contention is simply not supported by the record. The profile was so outrageous that no one could have taken it seriously, and no one did. Thus, it was clearly not reasonably foreseeable that J.S.'s speech would create a substantial disruption or material interference in school, and this case is therefore distinguishable from the student speech at issue in Doninger, Lowery, and LaVine.

Moreover, unlike the students in Doninger, Lowery, and LaVine, J.S. did not even intend for the speech to reach the school – in fact, she took specific steps to make the profile "private" so that only her friends could access it. The fact that her friends happen to be Blue Mountain Middle School students is not surprising, and does not mean that J.S.'s speech targeted the school. Finally, the majority's suggestion that "absent McGonigle's quick corrective actions to curb [the profile's] effect," a substantial disruption would occur, Majority Op. 24, is

directly undermined by the record. If anything, McGonigle's response to the profile exacerbated rather than contained the disruption in the school. See id. (admitting that it is "difficult to separate the effects that the profile itself had on the school from the effects attributable to McGonigle's investigation of the profile and subsequent punishment of J.S. and K.L.").

Finally, I am particularly troubled by the majority's "hold[ing] that the potential impact of the profile's language alone is enough to satisfy the Tinker substantial disruption test." Majority Op. 29. This statement is disconcerting because it sounds like an application of the Fraser standard rather than the Tinker standard. Specifically, the majority appears to be more concerned with the level of vulgarity of J.S.'s speech, than its potential impact. See id. ("We simply cannot agree that a principal may not regulate student speech rising to this level of vulgarity . . . ." (emphasis added)).[18] In light of the facts of this case – and, specifically, the fact that the profile was so outrageous that no one could have taken it seriously – to focus on the vulgarity of the language is to allow the Fraser exception to swallow the Tinker rule.

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[18] To draw distinctions based on "levels of vulgarity" is generally antithetical to the First Amendment. See Cohen v. California, 403 U.S. 15, 25 (1971) (noting "one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style largely to the individual."); see also Morse, 551 U.S. at 409 (declining to extend Fraser to cover all speech deemed "offensive" and noting that "much political and religious speech might be perceived as offensive to some.").

The facts simply do not support the conclusion that the School District could have reasonably forecasted a substantial disruption of or material interference with the school as a result of J.S.'s profile. Under Tinker, therefore, the School District violated J.S.'s First Amendment free speech rights when it suspended her for creating the profile.

B.

Because Tinker does not justify the School District's suspension of J.S., the only way for the punishment to pass constitutional muster is if we accept the School District's argument – and the District Court's holding – that J.S.'s speech can be prohibited under the Fraser exception to Tinker.[19] The majority notes that the exceptions to Tinker are "narrow," and yet it "decline[s] [] to decide whether a school official may discipline a student for her lewd, vulgar, or offensive off-campus speech that has an effect on-campus" under Fraser. Majority Op. 20. I submit that this question has already been decided by the Supreme Court – Fraser does not apply to off-campus speech. Specifically in Morse, Chief Justice Roberts, writing for the majority, emphasized that "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected." 551 U.S. at 405 (citing Cohen).[20] The Court's citation

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[19] Indisputably, neither Kuhlmeier nor Morse governs this case.

[20] Notably, in Morse, Chief Justice Roberts also cited Justice Brennan's concurrence in Fraser, which noted, "[i]f respondent had given the same speech outside of the school

to the Cohen decision is noteworthy. The Supreme Court in Cohen held that a state may not make a "single four-letter expletive a criminal offense." 403 U.S. at 26. Accordingly, Chief Justice Roberts's reliance on the Cohen decision reaffirms that a student's free speech rights outside the school context are coextensive with the rights of an adult, such as Cohen.

Thus, under the Supreme Court's precedent, the Fraser exception to Tinker does not apply here. In other words, Fraser's "lewdness" standard cannot be extended to justify a school's punishment of J.S. for use of profane language outside the school, during non-school hours.[21]

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environment, he could not have been penalized simply because government officials considered his language to be inappropriate." Fraser, 478 U.S. at 688 (Brennan, J., concurring) (citing Cohen).

[21] The School District notes that the courts in Doninger and Bethlehem Area School District suggested that Fraser applies to vulgar off-campus speech. See Doninger, 527 F.3d at 49 ("It is not clear . . . [whether] Fraser applies to off-campus speech."); Bethlehem Area Sch. Dist., 807 A.2d at 867 ("[W]e are not convinced that reliance solely on Tinker is appropriate."). These cases are not only not binding on this Court, but also both Doninger and Bethlehem Area School District ultimately relied on Tinker, not Fraser, in upholding school censorship. Thus, the courts' suggestion that the Fraser standard may apply to off-campus speech is dicta. Most importantly, that dicta is undermined directly by Chief Justice Roberts's statement in Morse: "Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected." 551 U.S. at 405 (citing Cohen, 403 U.S.

The fact that McGonigle caused a copy of the profile to be brought to school does not transform J.S.'s off-campus speech into school speech. The flaws of a contrary rule can be illustrated by extrapolating from the facts of Fraser itself. As discussed above, the Supreme Court emphasized that Fraser's speech would have been protected had he delivered it outside the school. Presumably, this protection would not be lifted if a school official or Fraser's fellow classmate overheard the off-campus speech, recorded it, and played it to the school principal.[22] Similarly here, the fact that another student printed J.S.'s profile at the express request of McGonigle does not turn J.S.'s off-campus speech into on-campus speech.

Under these circumstances, to apply the Fraser standard to justify the School District's punishment of J.S.'s speech is to adopt a rule that allows school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is about the school or a school official, is brought to the attention of a school official, and is deemed "offensive" by the prevailing authority. Under this standard, two students can be punished for using a vulgar remark to speak about their teacher at a private party, if another student overhears the remark, reports it to the school authorities, and the school authorities find the remark

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at 15)). The most logical reading of Chief Justice Roberts's statement prevents the application of Fraser to speech that takes place off-campus, during non-school hours, and that is in no way sponsored by the school.

[22] Note that the question of whether a school has the authority to punish a student who brings vulgar speech into school is separate from whether the school can punish the source of that speech.

"offensive." There is no principled way to distinguish this hypothetical from the facts of the instant case.

Accordingly, I conclude that the Fraser decision did not give the School District the authority to punish J.S. for her off-campus speech.[23]

III.

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[23] I disagree with the majority's holding that 24 Pa. Cons. Stat. § 5-510 did not bar the School District from punishing J.S. for her off-campus speech. Section 5-510 limited the authority of the School District to:

> adopt and enforce such reasonable rules and regulations . . . regarding the conduct and deportment of all pupils attending the public schools in the district, during such time as they are under the supervision of the board of school directors and teachers, including the time necessary spent in coming to and returning from school.

Id. (emphasis added). The Pennsylvania Commonwealth Court has interpreted this provision to prohibit a school district from punishing students for conduct occurring outside of school hours – even if such conduct occurs on school property. See D.O.F. v. Lewisburg Area Sch. Dist. Bd. of Sch. Dirs., 868 A.2d 28 (Pa. Commw. Ct. 2004).

All of the integral events in this case occurred outside the school, during non-school hours. Accordingly, I believe that § 5-510 barred the School District from punishing J.S.

For the foregoing reasons, I would reverse the District Court's judgment and grant summary judgment to J.S. on her First Amendment free-speech claim.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2007

(Argued: March 4, 2008 Decided: May 29, 2008)

Docket No. 07-3885-cv

LAUREN DONINGER, P.P.A as Guardian and Next Friend of AVERY DONINGER, a minor,
Plaintiff-Appellant,

-v.-

KARISSA NIEHOFF, PAULA SCHWARTZ,
Defendants-Appellees.

Before: SOTOMAYOR, LIVINGSTON, *Circuit Judges*,
and PRESKA, *District Judge*.*

Parent of public high school student brought action against school principal and district superintendent alleging a violation of her daughter's free speech and other rights. The United States District Court for the District of Connecticut (Kravitz, J.) denied a motion for a preliminary injunction, and plaintiff appealed.

Affirmed.

JON L. SCHOENHORN, Jon L. Schoenhorn & Associates, LLC, Hartford, Connecticut, *for Plaintiff-Appellant*.

THOMAS R. GERARDE (Katherine E. Rule, *on the brief*), Howd & Ludorf, LLC, Hartford, Connecticut, *for Defendants-Appellees*.

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*The Honorable Loretta A. Preska, United States District Judge for the Southern District of New York, sitting by designation.

Martin Margulies, Quinnipiac University School of Law, Hamden, Connecticut (Lauren Henault, Legal Intern, Quinnipiac University School of Law, Hamden, Connecticut, and Daniel J. Krisch, Horton, Shields & Knox, P.C., Hartford, Connecticut, *on the brief*), *for* Amicus Curiae, *The Center for First Amendment Rights, Inc.*, *in support of Plaintiff-Appellant*.

Robert M. O'Neil (J. Joshua Wheeler, *on the brief*), Charlottesville, Virginia, *for* Amicus Curiae, *The Thomas Jefferson Center for the Protection of Free Expression*, *in support of Plaintiff-Appellant*.

LIVINGSTON, *Circuit Judge*:

Plaintiff-Appellant Lauren Doninger ("Doninger") appeals from the August 31, 2007 order of the United States District Court for the District of Connecticut (Kravitz, J.) denying her motion for a preliminary injunction. *Doninger v. Niehoff*, 514 F. Supp. 2d 199 (D. Conn. 2007). Doninger sued Defendants-Appellees Karissa Niehoff and Paula Schwartz, respectively the principal of Lewis Mills High School ("LMHS") and the superintendent of the district in which LMHS is located, when her daughter, Avery Doninger ("Avery"), was disqualified from running for Senior Class Secretary after she posted a vulgar and misleading message about the supposed cancellation of an upcoming school event on an independently operated, publicly accessible web log (or "blog"). Doninger, alleging principally a violation of her daughter's First Amendment rights, moved for a preliminary injunction voiding the election for Senior Class Secretary and ordering the school either to hold a new election in which Avery would be allowed to participate or to grant Avery the same title, honors, and obligations as the student elected to the position, including the privilege of speaking as a class officer at graduation. The district court denied the motion, concluding that Doninger had failed to show a sufficient likelihood of success on the merits. Because Avery's blog post created a

foreseeable risk of substantial disruption at LMHS, we conclude that the district court did not abuse its discretion. We therefore affirm the denial of Doninger's preliminary injunction motion.

Background

LMHS is a public high school located in Burlington, Connecticut. At the time of the events recounted here, Avery Doninger was a junior at LMHS. She served on the Student Council and was also the Junior Class Secretary.

This case arises out of a dispute between the school administration and a group of Student Council members at LMHS, including Avery, over the scheduling of an event called "Jamfest," an annual battle-of-the-bands concert that these Student Council members helped to plan. The 2007 Jamfest, which had been twice postponed because of delays in the opening of LMHS's new auditorium, was scheduled for Saturday, April 28, in this newly constructed venue. Shortly before the event, however, Avery and her fellow students learned that David Miller, the teacher responsible for operating the auditorium's sound and lighting equipment, was unable to attend on that date. The students proposed that LMHS hire a professional to run the equipment or that a parent supervise student technicians, so that Jamfest could still take place on April 28 in the auditorium. At a Student Council meeting on April 24, however, the students were advised that it would not be possible to hold the event in the auditorium without Miller, so that either the date or the location of the event would need to be changed.

This announcement distressed the Student Council members responsible for coordinating preparations, for they believed there were few dates remaining to reschedule Jamfest before the end of the school year. The students were also concerned that changing the date of the event for a third time might cause some of the bands to drop out. Holding the event in the proposed alternative venue,

the school cafeteria, was not an acceptable solution because the bands would have to play acoustic instead of electric instruments. The students also feared there was not enough time for the bands to make the necessary modifications to their sets that this change of instrumentation would require.

Four Student Council members, including Avery, decided to take action by alerting the broader community to the Jamfest situation and enlisting help in persuading school officials to let Jamfest take place in the auditorium as scheduled. The four students met at the school's computer lab that morning and accessed one of their fathers' email account. They drafted a message to be sent to a large number of email addresses in the account's address book, as well as to additional names that Avery provided. The message stated, in substance, that the administration had decided that the Student Council could not hold Jamfest in the auditorium because Miller was unavailable. It requested recipients to contact Paula Schwartz, the district superintendent, to urge that Jamfest be held as scheduled, as well as to forward the email "to as many people as you can." All four students signed their names and sent the email. The message was sent out again later that morning to correct an error in the telephone number for Schwartz's office.

Both Schwartz and Niehoff received an influx of telephone calls and emails from people expressing concern about Jamfest. Niehoff, who was away from her office for a planned in-service training day, was called back by Schwartz as a result. Later that day, Niehoff encountered Avery in the hallway at LMHS. Avery claimed that Niehoff told her that Schwartz was very upset "and that[,] as a result, Jamfest had been cancelled." *Doninger*, 514 F. Supp. 2d at 205. The district court found otherwise, however, crediting Niehoff's testimony denying that she ever told Avery the event would not be held.

According to Niehoff, she advised Avery that she was disappointed the Student Council

members had resorted to a mass email rather than coming to her or to Schwartz to resolve the issue. She testified that class officers are expected to work cooperatively with their faculty advisor and with the administration in carrying out Student Council objectives. They are charged, in addition, with "demonstrat[ing] qualities of good citizenship at all times." *Id*. at 214. The district court found that Niehoff discussed these responsibilities with Avery in their conversation on April 24. She told Avery that the email contained inaccurate information because Niehoff was, in fact, amenable to rescheduling Jamfest so it could be held in the new auditorium. Niehoff asked Avery to work with her fellow students to send out a corrective email. According to Niehoff, Avery agreed to do so.

That night, however, Avery posted a message on her publicly accessible blog, which was hosted by livejournal.com, a website unaffiliated with LMHS. The blog post began as follows:

> jamfest is cancelled due to douchebags in central office. here is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. we have so much support and we really appriciate it. however, she got pissed off and decided to just cancel the whole thing all together. anddd so basically we aren't going to have it at all, but in the slightest chance we do it is going to be after the talent show on may 18th. andd..here is the letter we sent out to parents.

The post then reproduced the email that the Student Council members sent that morning. The post continued:

> And here is a letter my mom sent to Paula [Schwartz] and cc'd Karissa [Niehoff] to get an idea of what to write if you want to write something or call her to piss her off more. im down.—

Avery then reproduced an email that her mother had sent to Schwartz earlier in the day concerning the dispute.

Avery testified before the district court that "im down" meant that she approved of the idea

of others contacting Schwartz to "piss her off more." She stated that the purpose of posting the blog entry was "to encourage more people than the existing e-mail already encouraged to contact the administration" about Jamfest. The district court concluded that the content of the message itself suggested that her purpose was "to encourage her fellow students to read and respond to the blog." *Id.* at 206. The district court also noted that "[s]everal LMHS students posted comments to the blog, including one in which the author referred to Ms. Schwartz as a 'dirty whore.'" *Id.* at 206-07.

The following morning, Schwartz and Niehoff received more phone calls and email messages regarding Jamfest. The pair, along with Miller, Jennifer Hill, the students' faculty advisor, and David Fortin, LMHS's building and grounds supervisor, met with the Student Council members who sent the email the day before. They agreed during this meeting that Jamfest would be rescheduled for June 8, 2007. Niehoff announced this resolution in the school newsletter and the students notified the recipients of the April 24 email. In her testimony before the district court, Avery denied that Schwartz and Niehoff also spoke to the students during this meeting about the impropriety of mass emails in this context and the proper conduct of student officers in resolving disputes with the administration. According to the district court, however, Schwartz and Niehoff "at the very least, made clear to the students that appealing directly to the public was not an appropriate means of resolving complaints the students had regarding school administrators' decisions." *Id*. at 207. The district court also found that, as a result of the Jamfest controversy, both Schwartz and Niehoff were forced to miss or arrived late to several school-related activities scheduled for April 24 and April 25. *Id.* at 206.

The April 25 meeting resolved the dispute over Jamfest's scheduling. Indeed, Jamfest was successfully held on June 8, with all but one of the scheduled bands participating. Even after this

resolution, however, Schwartz and Niehoff, unaware of Avery's blog post, continued to receive phone calls and emails in the controversy's immediate aftermath. According to Schwartz's testimony, she learned of Avery's posting only some days after the meeting when her adult son found it while using an Internet search engine. Schwartz alerted Niehoff to the blog post on May 7, 2007. Niehoff concluded that Avery's conduct had failed to display the civility and good citizenship expected of class officers. She noted that the posting contained vulgar language and inaccurate information. In addition, Avery had disregarded her counsel regarding the proper means of addressing issues of concern with school administrators. After researching Connecticut education law and LMHS policies, Niehoff decided that Avery should be prohibited from running for Senior Class Secretary. Because Avery had Advanced Placement exams at that time, however, Niehoff chose not to confront her immediately.

On May 17, Avery came to Niehoff's office to accept her nomination for Senior Class Secretary. Niehoff handed Avery a printed copy of the April 24 blog post and requested that Avery apologize to Schwartz in writing, show a copy of the post to her mother, and withdraw her candidacy. Avery complied with the first two requests, but refused to honor the third. In response, Niehoff declined to provide an administrative endorsement of Avery's nomination, which effectively prohibited her from running for Senior Class Secretary, though Avery was permitted to retain her positions as representative on the Student Council and as Junior Class Secretary. According to the district court, Niehoff explained that her decision was based on: (1) Avery's failure to accept her counsel "regarding the proper means of expressing disagreement with administration policy and seeking to resolve those disagreements"; (2) the vulgar language and inaccurate information included in the post; and (3) its encouragement of others to contact the central office "to piss [Schwartz] off

more," which Niehoff did not consider appropriate behavior for a class officer. *Id*. at 208.

As a result of Niehoff's decision, Avery was not allowed to have her name on the ballot or to give a campaign speech at a May 25 school assembly regarding the elections. Apart from this disqualification from running for Senior Class Secretary, she was not otherwise disciplined. Even though she was not permitted to be on the ballot or to campaign, Avery received a plurality of the votes for Senior Class Secretary as a write-in candidate. The school did not permit her to take office, however, and the second-place candidate became class secretary for the Class of 2008.

Lauren Doninger filed a complaint in Connecticut Superior Court asserting claims under 42 U.S.C. § 1983 and state law. She principally alleged violations of her daughter's rights under the First Amendment to the United States Constitution and analogous clauses of the Connecticut Constitution. She also alleged violations of Avery's due process and equal protection rights under the Fourteenth Amendment, and asserted a cause of action for intentional infliction of emotional distress under state law. Doninger sought damages and an injunction requiring, among other things, that school officials hold new class secretary elections in which Avery would be allowed to run, and that Avery be permitted, as a duly elected class officer, to speak at the 2008 commencement ceremony.

Schwartz and Niehoff removed the action to the District of Connecticut. Doninger filed a motion for a preliminary injunction. The district court developed the facts outlined here from exhibits, affidavits, deposition testimony, and the hearing testimony of ten live witnesses, including students, faculty, administrators, and parents. The district court concluded that a preliminary injunction was not warranted because Doninger did not show a sufficient likelihood of success on the merits. This appeal followed.

Discussion

A party seeking a preliminary injunction ordinarily must show: (1) a likelihood of irreparable harm in the absence of the injunction; and (2) either a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation, with a balance of hardships tipping decidedly in the movant's favor. *Sunward Elecs., Inc. v. McDonald*, 362 F.3d 17, 24 (2d Cir. 2004). When the movant seeks a "mandatory" injunction — that is, as in this case, an injunction that will alter rather than maintain the status quo — she must meet the more rigorous standard of demonstrating a "clear" or "substantial" likelihood of success on the merits. *Id*. at 24-25. We review the denial of a preliminary injunction for abuse of discretion. *Id*. at 24. Because Doninger seeks the vindication of First Amendment rights, however, "subject to the provision of Federal Rule of Civil Procedure 52(a) that '[f]indings of fact . . . shall not be set aside unless clearly erroneous,' we . . . make a fresh examination of crucial facts" and independently examine the record to do so. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567-68 (1995) (alteration and first omission in original); *accord Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996).

The loss of First Amendment freedoms, for even minimal periods of time, normally constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349 (2d Cir. 2003). Even when a complaint alleges First Amendment injuries, however, our case law suggests that at least in circumstances in which a plaintiff does not allege injury from a rule or regulation that directly limits speech, irreparable harm is not presumed and must still be shown. *See Bronx Household of Faith*, 331 F.3d at 349-50. The district court assumed that Doninger had adequately demonstrated that Niehoff's actions had or were likely to

have a chilling effect on speech in light of Avery's assertion that she has limited her email and blog communications in an effort to avoid similar conflict with school administrators in the future. *Doninger*, 514 F. Supp. 2d at 211. We, too, assume for the purposes of this appeal that Doninger met her burden of showing irreparable harm and proceed to address whether she also demonstrated a clear or substantial likelihood of success on the merits.

I. The First Amendment Claim

We begin with some basic principles. It is axiomatic that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). It is equally the case that the constitutional rights of students in public school "are not automatically coextensive with the rights of adults in other settings," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), but must instead be applied in a manner consistent with the "special characteristics of the school environment," *Tinker*, 393 U.S. at 506. Thus, school administrators may prohibit student expression that will "materially and substantially disrupt the work and discipline of the school." *Id*. at 513. Vulgar or offensive speech — speech that an adult making a political point might have a constitutional right to employ — may legitimately give rise to disciplinary action by a school, given the school's responsibility for "teaching students the boundaries of socially appropriate behavior." *Fraser*, 478 U.S. at 681. Similarly, so long as their actions are "reasonably related to legitimate pedagogical concerns," educators are entitled to exercise editorial control over school-sponsored expressive activities such as school publications or theatrical productions. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). Such controls "assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be

inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Id*. at 271. Finally, given the special nature of the school environment and the "serious and palpable" dangers posed by student drug abuse, public schools may also "take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." *Morse v. Frederick*, 551 U.S. —, 127 S. Ct. 2618, 2622, 2629 (2007).

The Supreme Court has yet to speak on the scope of a school's authority to regulate expression that, like Avery's, does not occur on school grounds or at a school-sponsored event. We have determined, however, that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct "would foreseeably create a risk of substantial disruption within the school environment," at least when it was similarly foreseeable that the off-campus expression might also reach campus. *Wisniewski v. Bd. of Educ*., 494 F.3d 34, 40 (2d Cir. 2007), *cert. denied*, 128 S. Ct. — (2008).[1] We are acutely attentive in this context to the need to draw a clear line between student activity that "affects matter of legitimate concern to the school community," and activity that does not. *Thomas v. Bd. of Educ*., 607 F.2d 1043, 1058 n.13 (2d Cir. 1979) (Newman, J., concurring in the result). But as Judge Newman accurately observed some years ago, "territoriality is not necessarily a useful concept in determining the limit of [school administrators'] authority." *Id*. True enough in 1979, this observation is even more apt today, when students both on and off campus routinely participate in school affairs, as well as in other expressive

[1]The *Wisniewski* panel divided on the question whether it was necessary in that case to show that it was reasonably foreseeable that the expression at issue would reach school property. Two panel members concluded that the undisputed fact that it did so "pretermit[ted] any inquiry as to this aspect of reasonable foreseeability." 494 F.3d at 39.

activity unrelated to the school community, via blog postings, instant messaging, and other forms of electronic communication. It is against this background that we consider whether the district court abused its discretion in concluding that Doninger failed to demonstrate a clear likelihood of success on the merits of her First Amendment claim.

A.

If Avery had distributed her electronic posting as a handbill on school grounds, this case would fall squarely within the Supreme Court's precedents recognizing that the nature of a student's First Amendment rights must be understood in light of the special characteristics of the school environment and that, in particular, offensive forms of expression may by prohibited. *See Fraser*, 478 U.S. at 682-83. As the Supreme Court explained in *Fraser*, a school may regulate "plainly offensive" speech — that is, speech that is "offensively lewd and indecent" — in furtherance of its important mission to "inculcate the habits and manners of civility," both as values in themselves and because they are indispensable to democratic self-government. *Id.* at 681, 683, 685. As the Court noted, "[t]he undoubted freedom to advocate unpopular and controversial views in schools must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.* at 681. It is thus "a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Id.* at 683.

To be clear, *Fraser* does not justify restricting a student's speech merely because it is inconsistent with an educator's sensibilities; its reference to "plainly offensive speech" must be understood in light of the vulgar, lewd, and sexually explicit language that was at issue in that case. We need not conclusively determine *Fraser*'s scope, however, to be satisfied that Avery's posting — in which she called school administrators "douchebags" and encouraged others to contact

Schwartz "to piss her off more" — contained the sort of language that properly may be prohibited in schools. *See id. Fraser* itself approvingly quoted Judge Newman's memorable observation in *Thomas* that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Fraser*, 478 U.S. at 682-83 (quoting *Thomas*, 607 F.2d at 1057 (Newman, J., concurring in the result)); *cf. Cohen v. California*, 403 U.S. 15 (1971) (holding that adult could not be prosecuted for wearing jacket displaying expletive). Avery's language, had it occurred in the classroom, would have fallen within *Fraser* and its recognition that nothing in the First Amendment prohibits school authorities from discouraging inappropriate language in the school environment.

B.

It is not clear, however, that *Fraser* applies to off-campus speech. Doninger's principal argument on appeal is that because Avery's posting took place within the confines of her home, it was beyond the school's regulatory authority unless it was reasonably foreseeable that the posting would create a risk of substantial disruption within the school environment — the standard enunciated in *Tinker* and *Wisniewski*, and a standard, Doninger argues, that the present record does not satisfy. Appellees argue, in contrast, that the *Tinker* test is not the only standard for determining whether school discipline may properly be imposed for off-campus expressive activity. They contend that in *Wisniewski*, we implicitly affirmed that schools may regulate off-campus offensive speech of the sort in which Avery engaged, so long as it is likely to come to the attention of school authorities. We reject appellees' broad reading of *Wisniewski* on the ground that we had no occasion to decide in that case whether *Fraser* governs such off-campus student expression. We agree, however, with appellees' alternative argument that, as in *Wisniewski*, the *Tinker* standard has been

adequately established here.[2] We therefore need not decide whether other standards may apply when considering the extent to which a school may discipline off-campus speech.

Tinker provides that school administrators may prohibit student expression that will "materially and substantially disrupt the work and discipline of the school." *Tinker*, 393 U.S. at 513. In *Wisniewski*, we applied this standard to an eighth grader's off-campus creation and Internet transmission to some fifteen friends of a crudely drawn icon that "depict[ed] and call[ed] for the killing of his teacher." 494 F.3d at 38. We recognized that off-campus conduct of this sort "can create a foreseeable risk of substantial disruption within a school" and that, in such circumstances, its off-campus character does not necessarily insulate the student from school discipline. *Id*. at 39. We determined that school discipline was permissible because it was reasonably foreseeable that the icon would come to the attention of school authorities and that it would create a risk of substantial disruption. *See id*. at 39-40.

Applying the framework set forth in *Wisniewski*, the record amply supports the district court's conclusion that it was reasonably foreseeable that Avery's posting would reach school property. Indeed, the district court found that her posting, although created off-campus, "was purposely designed by Avery to come onto the campus." *Doninger*, 514 F. Supp. 2d at 216. The blog posting directly pertained to events at LMHS, and Avery's intent in writing it was specifically "to encourage her fellow students to read and respond." *Id*. at 206. As the district court found, "Avery knew other LMHS community members were likely to read [her posting]." *Id.* at 217. Several

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[2] In reaching this conclusion, we acknowledge that the district court did not expressly rely on *Tinker* to determine that Doninger was unlikely to succeed on her First Amendment claim. We nevertheless may "affirm the district court's judgment on any ground appearing in the record, even if the ground is different from the one relied on by the district court." *ACEquip, Ltd. v. Am. Eng'g Corp*., 315 F.3d 151, 155 (2d Cir. 2003).

students did in fact post comments in response to Avery and, as in *Wisniewski*, the posting managed to reach school administrators. *See Wisniewski*, 494 F.3d at 39. The district court thus correctly determined that in these circumstances, "it was reasonably foreseeable that other LMHS students would view the blog and that school administrators would become aware of it." *Doninger*, 515 F. Supp. 2d at 217.

Contrary to Doninger's protestations, moreover, the record also supports the conclusion that Avery's posting "foreseeably create[d] a risk of substantial disruption within the school environment." *Wisniewski*, 494 F.3d at 40. There are three factors in particular on which we rely to reach this conclusion. First, the language with which Avery chose to encourage others to contact the administration was not only plainly offensive, but also potentially disruptive of efforts to resolve the ongoing controversy. Her chosen words — in essence, that others should call the "douchebags" in the central office to "piss [them] off more" — were hardly conducive to cooperative conflict resolution. Indeed, at least one LMHS student (the one who referred to Schwartz as a "dirty whore") responded to the post's vulgar and, in this circumstance, potentially incendiary language with similar such language, thus evidencing that the nature of Avery's efforts to recruit could create a risk of disruption.

Second, and perhaps more significantly, Avery's post used the "at best misleading and at wors[t] false" information that Jamfest had been cancelled in her effort to solicit more calls and emails to Schwartz. *Doninger*, 514 F. Supp. 2d at 202. The district court found that Avery "strongly suggested in her [post] that Jamfest had been cancelled, full stop, despite the fact that Ms. Niehoff, even according to Avery's own testimony, offered the possibility of rescheduling Jamfest later in the school year." *Id.* at 214. This misleading information was disseminated amidst circulating rumors

of Jamfest's cancellation that had already begun to disrupt school activities. Avery herself testified that by the morning of April 25, students were "all riled up" and that a sit-in was threatened because students believed the event would not be held. Schwartz and Niehoff had received a deluge of calls and emails, causing both to miss or be late to school-related activities. *Id.* at 206. Moreover, Avery and the other students who participated in writing the mass email were called away either from class or other activities on the morning of April 25 because of the need to manage the growing dispute, as were Miller, Hill, and Fortin. It was foreseeable in this context that school operations might well be disrupted further by the need to correct misinformation as a consequence of Avery's post.

Although Doninger argues that *Tinker* is not satisfied here because the burgeoning controversy at LMHS may have stemmed not from Avery's posting, but rather from the mass email of April 24, this argument is misguided insofar as it implies that *Tinker* requires a showing of actual disruption to justify a restraint on student speech. As the Sixth Circuit recently elaborated, "[s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place." *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007); *see also LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) ("*Tinker* does not require school officials to wait until disruption actually occurs before they may act."). The question is not whether there has been actual disruption, but whether school officials "might reasonably portend disruption" from the student expression at issue. *LaVine*, 257 F.3d at 989; *see also Nuxoll v. Indian Prairie Sch. Dist.* #204, — F.3d —, 2008 WL 1813137, at *5 (7th Cir. 2008).[3] Here, given

[3]This "reasonable forecast" test applies both to instances of prior restraint, where school authorities prohibit or limit expression before publication, and to cases like this one, where Avery's disqualification from student office followed as a consequence of the post she had already made available to other students. *See Boucher v. Sch. Bd. Of Greenfield*, 134 F.3d 821, 828 (7th Cir. 1998); *see also Wisniewski*, 494 F.3d at 40 (applying "foreseeable risk of

the circumstances surrounding the Jamfest dispute, Avery's conduct posed a substantial risk that LMHS administrators and teachers would be further diverted from their core educational responsibilities by the need to dissipate misguided anger or confusion over Jamfest's purported cancellation.

Finally, the district court correctly determined that it is of no small significance that the discipline here related to Avery's extracurricular role as a student government leader. The district court found this significant in part because participation in voluntary, extracurricular activities is a "privilege" that can be rescinded when students fail to comply with the obligations inherent in the activities themselves. *Doninger*, 514 F. Supp. 2d at 214. We consider the relevance of this factor instead in the context of *Tinker* and its recognition that student expression may legitimately be regulated when school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." *Tinker*, 393 U.S. at 513. More specifically, Avery's conduct risked not only disruption of efforts to settle the Jamfest dispute, but also frustration of the proper operation of LMHS's student government and undermining of the values that student government, as an extracurricular activity, is designed to promote. *Doninger*, 514 F. Supp. 2d at 215; *cf. Hazelwood*, 484 U.S. at 273 (holding that educators may exercise control over school-sponsored expressive activities "so long as their actions are reasonably related to legitimate pedagogical concerns").

In this way, the instant case bears similarity to *Lowery v. Euverard*, which involved a group of high school football players who were removed from the team after signing a petition expressing

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substantial disruption" test where student was disciplined for expression that had already been disseminated to other students and reached the school).

their hatred of the coach and their desire not to play for him. The players lodged a First Amendment claim and the Sixth Circuit determined that the relevant question under *Tinker* was whether it was reasonable for school officials "to forecast that the petition would disrupt the team" — meaning that the petition might foreseeably frustrate efforts to teach the values of sportsmanship and team cohesiveness through participation in sport as an extracurricular activity. *Lowery*, 497 F.3d at 593, 596. The court noted that the players had not been suspended from school or even prevented from further criticizing the coach: "[T]hey are free to continue their campaign to have Euverard fired. What they are not free to do is continue to play football for him while actively working to undermine his authority." *Id.* at 600 (emphases omitted). The court held that there had been no First Amendment violation.

Similarly, Avery was disqualified from running for Senior Class Secretary after school administrators determined that her behavior was not "consistent with her desired role as a class leader" — meaning in this context that it was inconsistent with LMHS school policy providing that student government should teach good citizenship and that any student who does not maintain a record of such citizenship may not represent fellow students. *Doninger*, 514 F. Supp. 2d at 215. The district court determined not only that Avery's posting was offensive and misleading, but also that it "clearly violate[d] the school policy of civility and cooperative conflict resolution." *Id.* at 214. The court credited Niehoff's testimony that class officers are expected to "work toward the objectives of the Student Council, work cooperatively with their advisor and with the administration, and promote good citizenship both in school and out." *Id.* The court explicitly found, moreover, that Niehoff advised Avery of these responsibilities during their conversation on April 24, and that she told Avery that the original Jamfest email and its approach to conflict resolution with the

administration were inappropriate. *Id.* As the district court observed, "[u]nderstandably, then, Ms. Niehoff testified that a factor of particular relevance in her disciplinary decision was the fact that Avery posted her blog entry" — which reproduced the email Niehoff had criticized — "the very evening of the day on which that conversation occurred." *Id.*

Given the cumulative effect of these findings, clearly supported by the record, we conclude that the district court did not abuse its discretion in determining that Doninger failed to demonstrate a sufficient likelihood of success on her First Amendment claim. We are mindful that, given the posture of this case, we have no occasion to consider whether a different, more serious consequence than disqualification from student office would raise constitutional concerns. *See Wisniewski*, 494 F.3d at 40. We decide only that based on the existing record, Avery's post created a foreseeable risk of substantial disruption to the work and discipline of the school and that Doninger has thus failed to show clearly that Avery's First Amendment rights were violated when she was disqualified from running for Senior Class Secretary.

II. The Additional Claims

We similarly conclude that the district court did not abuse its discretion in finding that Doninger failed to establish a clear likelihood of success on her equal protection claim. Doninger proceeds on a "class-of-one" theory, arguing that Schwartz and Niehoff intentionally singled Avery out for punitive treatment because she exercised her First Amendment rights. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). She argues that Avery was similarly situated to the other Student Council officers who signed the mass email but who were not disqualified from running for office. However, a class-of-one plaintiff must show, among other things, an "extremely high degree of similarity between [herself] and the persons to whom [she] compare[s] [herself]" in

order to succeed on an equal protection claim. *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006). It is undisputed that Avery was disqualified from running for Senior Class Secretary because of her April 24 posting on livejournal.com. There is no evidence that any other of the Student Council members who signed the email participated in composing the blog post or authored any other message like it. The record therefore supports the district court's conclusion that Doninger "failed to make a clear or substantial showing of likelihood of success regarding her *Olech* equal protection claims." *Doninger*, 514 F. Supp. 2d at 220.

Finally, Doninger argues that the Connecticut Constitution affords broader protections than those of the First Amendment and that, as a result, Connecticut students may "retain the ability to engage in 'vibrant public speech' that may exceed even that permitted under *Tinker*." Brief of Plaintiff-Appellant at 51. She concedes, however, that she can cite "no Connecticut cases that expressly find broader speech rights for students than are available under the federal constitution." *Id*. The district court did not rule on the issue whether Doninger is entitled to interim relief under Connecticut law, and for this reason we ordinarily would remand to permit the court to do so. *See Motorola Credit Corp. v. Uzan*, 322 F.3d 130, 137 n.4 (2d Cir. 2003). But given Doninger's failure to bring relevant Connecticut case law to our attention and that a timely ruling is of the essence, we conclude that at this juncture in the litigation, Doninger has not demonstrated a sufficient likelihood of success on this claim to support the mandatory injunction that she seeks. *See AIDS Action Comm. of Mass., Inc. v. Mass. Bay Trans. Auth.*, 42 F.3d 1, 7 (1st Cir. 1994) (noting propriety of considering First Amendment issue not addressed by district court where doing so would "further[] the interest of judicial economy by avoiding the remand of a question over which we eventually will exercise full review" and "serve[] the interest of expediency" on a question requiring a timely ruling); *see*

also Necchi S.p.A. v. Necchi Sewing Mach. Sales Corp., 348 F.2d 693, 697 (2d Cir. 1965) (reaching issue not addressed by district court because "no useful purpose would be served by leaving the question to be resolved by the District Court upon further proceedings, and in order to expedite this litigation").

Conclusion

Avery, by all reports, is a respected and accomplished student at LMHS. We are sympathetic to her disappointment at being disqualified from running for Senior Class Secretary and acknowledge her belief that in this case, "the punishment did not fit the crime." *Doninger*, 514 F. Supp. 2d at 202 (internal quotation marks omitted). We are not called upon, however, to decide whether the school officials in this case exercised their discretion wisely. Local school authorities have the difficult task of teaching "the shared values of a civilized social order" — values that include our veneration of free expression *and* civility, the importance we place on the right of dissent *and* on proper respect for authority. *Fraser*, 478 U.S. at 683. Educators will inevitably make mistakes in carrying out this delicate responsibility. Nevertheless, as the Supreme Court cautioned years ago, "[t]he system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members," and we are not authorized to intervene absent "violations of specific constitutional guarantees." *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

The judgment of the district court is therefore affirmed.

Filed 3/15/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

D.C., a Minor, etc., et al., Plaintiffs and Respondents, v. R.R., a Minor, etc., et al., Defendants and Appellants.	B207869 (Los Angeles County Super. Ct. No. BC332406)

APPEAL from an order of the Superior Court of Los Angeles County, Ernest M. Hiroshige, Judge. Affirmed.

Rex Julian Beaber for Defendants and Appellants.

Robert S. Gerstein; and Jennifer L. Lynch for Plaintiffs and Respondents.

A 15-year-old high school student was pursuing a career in entertainment and maintained a Web site for that purpose. Several of his fellow students posted messages at the Web site, making derogatory comments about his perceived sexual orientation and threatening him with bodily harm.

The aggrieved student and his parents filed this action against the other students and their parents, alleging a statutory claim under California's hate crimes laws (Civ. Code, §§ 51.7, 52.1) and common law claims for defamation and intentional infliction of emotional distress. In response, one of the student-defendants and his parents filed a special motion to strike, contending that the action was a "strategic lawsuit against public participation" (SLAPP) (Code Civ. Proc., § 425.16; all undesignated section references are to that code unless otherwise indicated). The student-defendant had posted a message stating in part: ". . . I want to rip out your fucking heart and feed it to you. . . . I've . . . wanted to kill you. If I ever see you I'm . . . going to pound your head in with an ice pick. Fuck you, you dick-riding penis lover. I hope you burn in hell." The trial court denied the anti-SLAPP motion on the ground that the lawsuit did not arise out of a statement made in connection with a "public issue." (See § 425.16, subds. (b)(1), (e)(3).) Defendants appealed.

We affirm because defendants did not make the requisite showing that plaintiffs' complaint is subject to the anti-SLAPP statute. In particular, defendants did not demonstrate that the posted message is protected speech. Further, defendants contend the message was intended as "jocular humor." Assuming the message was a "joke" — played by one teenager on another — it does not concern a "public issue" under the statute. (See § 425.16, subds. (b)(1), (e)(3).)

I

BACKGROUND

The following allegations and evidence are taken from the pleadings and the papers submitted in the trial court with respect to the anti-SLAPP motion.

D.C., the student-plaintiff, attended Harvard-Westlake School (Harvard-Westlake), a private educational institution in Los Angeles. D.C. filed this action against

several other students through a guardian ad litem, his father. D.C.'s father and mother also pleaded claims in their own right. (We will refer to D.C. and his parents collectively as plaintiffs.) Plaintiffs also named as defendants the parents of each student-defendant; the parents were sued as guardians ad litem and individually for their child's conduct (see Civ. Code, § 1714.1). (We refer to the student-defendants and their parents collectively as defendants.) Harvard-Westlake, its board of directors, and three school employees were also sued. The claims against them were arbitrated pursuant to an arbitration provision in the school's enrollment contract. (See *D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836.)

A. Complaint

Plaintiffs commenced this action on April 25, 2005. A first amended complaint (complaint) was filed on June 8, 2005, and alleged as follows.

While a student, D.C. pursued a career as a singer and an actor. He had a record album with a planned release date, had broadcast a song worldwide via satellite radio, and had played the leading role in a feature film presented at an internationally acclaimed film festival. He had also toured under the auspices of a nationally recognized radio network.

D.C. maintained a Web site to promote his entertainment career. The site allowed any member of the public to post comments in a "guestbook." Several students at Harvard-Westlake went to the Web site and posted threats against D.C. and made derogatory comments about him. One post read, "Faggot, I'm going to kill you." Another read, "[You need] a quick and painless death." One student wrote, "Fuck you in your fucking fuck hole." Another commented, "Fucking ass clown. Nigga what?" One post announced, "You are now officially wanted dead or alive." Another threatened, "I will personally unleash my manseed in those golden brown eyes."

The students who posted the threats sought to destroy D.C.'s life, threatened to murder him, and wanted to drive him out of Harvard-Westlake and the community in which he lived. They were motivated by a misperception of D.C.'s sexual orientation.

When D.C.'s father read the threats at the Web site, he immediately informed Harvard-Westlake of the problem, believing that some of its students were responsible. The father also contacted the Los Angeles Police Department (LAPD), which, in turn, notified the Federal Bureau of Investigation.

On the advice of the police, D.C. withdrew from Harvard-Westlake. He and his family moved to Northern California, where he went to a different educational institution. The Harvard-Westlake student newspaper, The Chronicle, ran at least two articles on the matter. One article disclosed D.C.'s new residential location and the name of the school he was attending. The article also disclosed that posts at the Web site had referred to D.C. as a "faggot." Harvard-Westlake did not suspend or expel any of the students who admitted posting the threats.

As a consequence of defendants' conduct, plaintiffs suffered personal and emotional injury, loss of income, the payment of medical expenses, the cost of moving, expenses for traveling back and forth from their new residential location to Los Angeles in order to support D.C.'s professional career commitments, and the related cost of housing while staying in Los Angeles.

The complaint contained five causes of action against defendants, only three of which are relevant here. First, plaintiffs alleged that defendants had violated their right under the state hate crimes laws to be free from "threat[s] of violence" motivated by perceived sexual orientation. (See Civ. Code, §§ 51.7, subd. (a), 52.1.)[1] Second, in a defamation claim, plaintiffs asserted that defendants had libeled D.C. by calling him a homosexual. Third, plaintiffs alleged a claim for intentional infliction of emotional distress, contending that defendants' conduct was outrageous and had caused plaintiffs to suffer severe emotional distress. All three of these causes of action were based on the posted threats and their effect on plaintiffs.

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[1] We express no view as to whether D.C.'s parents were proper parties to the hate crimes claim.

Plaintiffs named as defendants six students and their parents. Among those sued were R.R., a student, and his parents (collectively the R.'s).

B. Anti-SLAPP Motion

On July 20, 2005, the R.'s filed an anti-SLAPP motion, contending that R.R.'s posted message was protected speech or, more specifically, a written statement or writing made in a public forum in connection with an issue of public interest. (See § 425.16, subd. (e)(3).) The motion was supported by several declarations, including ones from R.R. and his father. In opposing the motion, plaintiffs relied primarily on a declaration from D.C.'s father. Both sides submitted declarations from law enforcement personnel.

R.R. posted the following message on D.C.'s Web site: "Hey [D.C.], I want to rip out your fucking heart and feed it to you. I heard your song while driving my kid to school and from that moment on I've . . . wanted to kill you. If I ever see you I'm . . . going to pound your head in with an ice pick. Fuck you, you dick-riding penis lover. I hope you burn in hell."

Posts by other students included: (1) "I hate fags. . . . diefags@yahoo.com. . . . gays are evil.com. . . . Hey fucker. . . . You are real gay"; (2) "Faggot, I'm going to kill you"; (3) "You are an oversized faggot. . . . I just want to hit you in the neck — hard. . . . [G]o to the 405 [freeway] bridge and jump"; (4) "I hate fags. . . . You need to be stopped"; (5) "I am looking forward to your death"; and (6) "Not only are you a massive fagmo, but must absolutely quit showing your face at my school. You are now officially wanted dead or alive."

1. Declaration of D.C.'s Father

By way of background, D.C.'s father explained: "[D.C.], without exception, uses the pseudonym 'Danny Alexander' in his entertainment career.

". . . Nowhere on the subject website . . . nor in any publicity material, album packaging, or on film credits has [D.C.] been identified by his legal name.

". . . Like many other aspiring entertainers, [D.C.] deliberately chose to use a stage name precisely so he could enjoy a 'dual life,' one which afforded him the luxury of anonymity outside the entertainment industry. [¶] . . . [¶]

“. . . Of the thirty-four (34) outrageously offensive original postings made on [D.C.’s Web site] that are the subject of this lawsuit, twenty-three (23) falsely identify [D.C.] as a homosexual.

“. . . I am informed, believe, and thereon allege that those twenty-three (23) postings regarding sexual preference originated from no less than ten (10) distinct computer systems.

“. . . The website . . . was permanently removed from the Internet . . . the same day the postings were discovered. [¶] . . . [¶]

“. . .The LAPD disagreed with [a school administrator’s] ‘intuition’ that the school posed no danger to [D.C.] and therefore advised me to have [D.C.] stay home from school until a thorough investigation had been completed. [D.C.] did attend a PSAT exam at the school with great trepidation and only after I discussed the matter with the administration and stayed on site to watch him throughout the testing without causing any disturbance to students sitting for the college entrance examination. Other than that one examination, [D.C.] did not return to the school due to fear for his life. If the threats were nullified, it would have been our preference to have him continue to attend Harvard-Westlake and remain in Beverly Hills.

“. . .We waited . . . for an outcome to the investigation through the school and the authorities, but without obtaining the information necessary to insure our son’s safety we were compelled to enroll [D.C.] . . . at another school in order to salvage what was left of his first semester of his critical junior year. Despite this enrollment we would have sought to have him return if we had been assured that he was safe from the vicious threats of violence and taunting as shown in the posts. I had to commute to Los Angeles from [Northern California] during the week and be away from my family which was incredibly stressful for the entire family and caused additional stress on . . . my wife over the concern for [D.C.] and his safety while I was gone.

“. . . Of the thirty-four (34) offensive postings originally posted, six (6) were perceived [as] death threats by me and my family. These included the one[] admitted to by [R.R.] . . . . [¶] . . . [¶]

“. . . [R.R.’s message] in particular was the most evil and malicious of the postings and looked to come from a parent rather than a student. My family was terrified and made physically nauseous from the threat. We feared for the life of our fifteen year old child. The fact that others wanted to ‘one-up’ each other as [R.R.] asserts in his declaration furthers our belief that the boys worked in concert to terrify my family like a gang of thugs driving us to pull our son from school and move. There was nothing ‘playful’ in the post, and the fact that [R.R.] still believes this is alarming and renews our concerns for persons that offend him by sexual orientation or otherwise. [¶] . . . [¶]

“. . . Because [D.C.] was uprooted mid-semester in his junior year of high school, and because of the threat of death, its impact on his family, and continued stress, his school life and career were adversely affected. Further, due to the threats and gay vulgar lies posted [D.C.] started to suffer from frequent and severe panic attacks which required medical attention, and from which he still suffers occasionally to this date. For the first time in his life after the postings people approached [D.C.] to discuss what was posted and asked him about being gay. It was clear that others that read the posts believed the comments about his sexual orientation and felt concern for him and his safety. This also added to [D.C.’s] embarrassment and to his distress.

“. . . [O]ur family suffered: emotional distress; anxiety; sleeplessness; physical pain; insecurity; fear; pain and suffering; payment of attorneys’ fees; payment of medical expenses; payment of moving expenses; payment of traveling and housing expenses to and from Los Angeles to support our business endeavors; [and] [D.C.]’s lost income . . . .

“. . . [D.C.] suffered poor academic performance during his junior year, which compelled our family to hire a tutor and education therapist, and which ultimately resulted in his continued suffering from emotional distress and anxiety, and adversely affecting his self-esteem, school life and earning potential. In fact, the movie ‘Steal Me’ [(Cineville & Picture Entertainment Corp. 2005)] in which [D.C.] had the lead was not released to the public until well after the malicious postings had occurred.

“The LAPD advised my family that [D.C.] should not return to school at [Harvard-Westlake] until a thorough investigation had been completed.”

2. R.R.'s Declaration

R.R. explained at length why he posted the message: "Prior to my sending of an email posting to [D.C.] . . . , I had no relationship with [him], and, . . . to my knowledge, I had seen him at Harvard Westlake from a distance on several occasions, walking through the halls, but never had verbal or physical contact with him. Prior to the email incident . . . , I attended a PSAT preparatory session which was attended by approximately seven students. I knew [D.C.] was one of these students. We did not interact with each other in any manner during this PSAT session. I had not met [D.C.] before that session; we had never been in the same class; and, to my knowledge, we never participated in the same school activities. Moreover, I had not heard anything about him. I had no knowledge of his acting or singing involvement, did not know his interests or habits, and was unaware of who his friends were at school. Prior to the . . . email incident, I had no opinion about [D.C.] whatsoever. I did not like or dislike him and certainly had no views about his gender identity, sexual orientation, or skills as a singer or actor. Likewise, I had never heard any fellow student convey any opinion about him generally, or with regards to any aspect of his life, including his sexual orientation. I certainly did not harbor any ill will against him or his family, and, in fact, the only reason I knew his name is that our school is very small and I know the name of almost every student in my class. . . .

". . . Sometime after I first saw [D.C.] at the PSAT session . . . , while I was at Harvard Westlake School, a fellow student suggested that I should 'check out' the website of a fellow student, i.e. [D.C.] The student did not tell me the content of the website; did not ask me to post any messages on the website; did not tell me that he was going to post any messages on the website; and did not give me any information about [D.C.] My fellow student, did, however, suggest I look at the site in a tone of voice suggesting that there was something weird, strange, or far out about the website. My fellow student did not invite me to participate in any 'conspiracy' and made no suggestion that I do anything but just take a look at the site.

“. . . After that school day, I returned home at my regular time. When I turned on my computer, I received an instant message from the fellow student providing me with an Internet link to the [D.C.] website. The instant message did not suggest that I post messages, or provide any suggestions about how I should respond to the website. In fact, at the time I received this message I was completely unaware that the site provided for the posting of messages. . . .

“. . . Almost immediately after receiving the instant message, I used the link to see [D.C.’s] website because I was curious about what the interest was in the website. When I first entered [D.C.’s] website, I was greeted by a picture of him with music and singing playing in the background. When I surveyed the site with its links, it immediately revealed more pictures, that were very posed, and a biography of [D.C.’s] alleged accomplishments. In the site, [D.C.] describes himself in the way products are advertised. He described his eyes as ‘Golden Brown.’ He describes his hair as ‘Midnight Brown.’ . . . After listing his accomplishments, he is pictured with a shirt that prominently displays the word ‘SUCCESSFUL.’ The site then links the viewer to [D.C.’s] fan mail which to this day includes obsequious fan messages that appear calculated to give the impression that [D.C.] is a person of extraordinary fame and talent. . . . [¶] . . . [¶]

“The messages refer to [D.C.] as ‘Danny Alexander’ because the website itself uses a pseudo name rather than his real name, making it unclear as to whether the whole site is a spoof.

“. . . My initial response to the site was to be offended and put off by its ‘I am better than you’ attitude and its blatant bragging and self promotion. In the past, I had spent time studying Buddhism, and in light of the Buddhist tradition of quiet understatement, the website’s distinctly narcissistic tone was disturbing. On the other hand, I was a bit entertained by [the] weird, possibly satirical, tone of the site. I certainly appreciated why a fellow student would want me to ‘check this out.’

“. . . [D.C.’s] website also had a link that allowed a viewer to post public messages and to view the posting made to the website. The website invited postings. The postings

included messages from admirers writing as if he were a famous movie star and singer. [D.C.] portrayed himself as a public figure. I then began looking at the posted messages. There were many messages, apparently from fellow students, that were hostile and derogatory, albeit jesting. I did not know the identity of the posting persons. I did, however, suspect that at least some of the messages were from Harvard Westlake students because the messages referred to Harvard Westlake.

"... I sensed that the other writers had a similar emotional response to the site that I had. As these postings became increasingly bizarre and weird, it became apparent to me that everyone was competing to see who could be the most outrageous. For example, one poster suggested that he was an 'official' representative of the student body and that [D.C.] was wanted dead or alive. I thought the postings were funny, and I certainly didn't think that [D.C.], or any other rational person, would believe that he was wanted dead or alive. Likewise, another posting referred to [D.C.] as a 'Nigga.' Of course, [D.C.] was obviously not a black American. Yet another posting referred to the poster's wish to 'unleash my manseed in those golden brown eyes.' This appeared to be an obvious satire of [D.C.'s] own self description as the wonder boy with 'golden brown' eyes.

"... That afternoon, I was in a playful mood and I decided to add my own message to the Internet graffiti contest that was apparently going on. I posted a message which stated: 'Hey [D.C.], I want to rip out your fucking heart and feed it to you. I heard your song while driving my kid to school and from that moment on I've ... wanted to kill you. If I ever see you I'm ... going to pound your head in with an ice pick. Fuck you, you dick-riding penis lover. I hope you burn in hell.'

"... My motivations in sending this email had nothing to do with any perception of [D.C.'s] sexual orientation, and certainly did not reflect an intention to do him physical harm. As set forth above, I had no personal knowledge or belief about [D.C.'s] sexual orientation. No one ever told me he was gay, and I had no thoughts on the subject matter. My message is fanciful, hyperbolic, jocular, and taunting and was motivated by [D.C.'s] pompous, self aggrandizing, and narcissistic website — not his sexual orientation. My

only other motivation, a bit more pathological, was to win the one-upmanship contest that was tacitly taking place between the message posters. Everything about the message is fanciful. I assumed that any rational person would understand that I was just inarticulately and offensively saying, 'I am repulsed by your self promotional style.' I certainly did not think anyone would believe that they could eat their own heart after it was taken from their body. I assumed that a 10 year old child would understand that you would be dead if your heart was removed. I obviously didn't have school age children and I had never listened to any of [D.C.'s] songs. Paradoxically, my message states that my motivation was a hatred of [D.C.'s] song, not his sexual orientation, i.e., my message itself . . . belies the allegation in the complaint.

". . . The complaint alleges that my motivation was my perception that [D.C.'s] sexual orientation was gay. As set forth above, I had no opinion regarding [D.C.'s] sexual orientation. More importantly, I wouldn't care less if he was gay. I have no animosity towards gays, and . . . even if I thought [D.C.] was gay, it couldn't be a basis for any hatred or threat. . . . [O]ne of my favorite relatives is openly homosexual and I have been quite vociferous in defending this relative from fundamentalist views that characterize homosexuality as a disease. In fact, one [of] my good friends at school is a member of the Gay-Straight Alliance. I have made my views clear that I think this student's involvement is 'cool.' Likewise, I have walked side by side with gay couples in the AIDS walk, supporting their position, and I have worked through a church at a soup kitchen for AIDS patients, many of whom are gay. . . . I am not homophobic and the basis of my conduct was childishness and some repulsion to [D.C.'s] grandiose style — not his sexual orientation.

". . . The next day after the offensive postings, at school, I heard students talking about the posts. The students expressed the view that the posts were a funny gag. No one took the posts seriously as a death threat or an accusation of homosexuality. The posts were treated as a goof. I did not participate in these conversations because I was ashamed of my participation. In retrospect, my conduct felt infantile, immature, and was

beneath me. I felt ashamed that I would allow the desire for peer approval, 'peer pressure,' to induce me into acting like an idiot.

". . . Shortly after sending these messages, I again saw [D.C.] at the PSAT preparation class. He was not acting as if he were afraid that he was going to be killed. He appeared calm and participated in exactly the same manner as the preparation session before the Internet graffiti contest. We did not interact at all. . . . [¶] . . . [¶]

". . . I wrote a letter of apology to [D.C.] and his family. The school provided me with the address of [D.C.'s] father and I sent the letter to that address. In that letter, I admit my email transmission and state: 'I want you to know that I never intended to harm you or your family, and that I respect your career and what you are trying to do with your life.' At the end of that letter I stated: 'If there is anything else I can do to atone for my actions, please let me know.' I never received a response to this letter. After sending this letter to [D.C.], I sent a copy to the Harvard Westlake School . . . ."

3. Declaration of R.R.'s Father

R.R.'s father stated in part: "My son [R.R.] is 17 years old. Approximately two years ago, I purchased a computer for my son and gave it to him for his personal use as a gift. My son needed a computer to do school research and to be able to draft papers. Our family considered the computer essential to be able to communicate with teachers and other personnel regarding school work and school related affairs. Sometime shortly after I purchased this home computer, I counseled my son to be careful about being appropriate in his use of the computer. I have learned from my son that he used his home computer to send one of the messages which are referenced in the law suit.

". . . [R.R.'s] computer is located in his bedroom. I do not have a password to any of his accounts, and . . . my son uses an account for emails different than the one that I use. . . . [T]here is no way for me to know the content of any email sent or received by [my] son unless he happens to tell me. Prior to my son's communication which is the subject of this lawsuit, I was not aware that he sent any messages with accusatory, threatening, or content. I never saw any such messages; my son never reported sending such messages; I never received any complaint about any such messages. Contrary to the

allegations in the complaint, I never allowed or permitted my son to engage in the conduct alleged. I had no idea that he sent such messages; never suspected he sent such messages; and, because I did not have his password[,] I did not have any ability to read his emails. Had I known that [R.R.] sent this kind of message, I would have counseled him not to do so. I would have offered such counseling, and would have barred his access to the Internet if he did not agree to abstain, because I find the communications offensive — not because they might be technically illegal or subject to civil liability.

". . . In fact, as soon as my wife . . . and I discovered the conduct alleged in the complaint, we terminated [R.R.'s] access to the Internet, instituted various punishments including grounding, no cell phone use (except for emergencies), [and] no car use and had him evaluated by a psychiatrist in a further effort to insure that such conduct was never repeated and the root cause, if any, was dealt with immediately . . . . [¶] . . .

". . . Prior to this episode [R.R.] has never been the subject of any criminal complaint or juvenile complaint of any kind. . . . Our family (including [R.R.]) cooperated with the police investigation immediately without asserting our legal right to remain silent. They reported to us their conclusion that they did not regard [R.R.'s] statement as a real threat and did not intend to seek the filing of any kind of criminal case. [R.R.] has not been charged with a crime or any wrongdoing by any law enforcement entity . . . .

". . . I have never heard [R.R.] make any negative, derogatory, or hostile statements about homosexuals. . . . [¶] . . .

". . . I have observed [R.R.] to be compassionate, well grounded, with many friends. To my knowledge, [R.R.] has never once gotten into a physical fight with anyone and he has never threatened to hurt anyone. [R.R.] is somewhat introverted and gentle, and he has an artistic fondness for music. . . . [R.R.'s] proclivity to humanistic and non-violent approaches to the human condition has been reflected in his past interest and practice of Buddhism and being a vegetarian."

4. Declaration of Another Student

The R.'s submitted a declaration from another Harvard-Westlake student who described some of the messages posted at D.C.'s Web site. For example, one post read in part: "You are so fucking orgasmic. I'm wet. . . . Oops I peed my pants. You look exactly like Britney. . . . Your career is bound to go nowhere." One student wrote: "You are the biggest fag in the HW class . . . . [T]hank you though. . . . [T]his will give everyone laughs for a long long time." In a second post, the same student said: "Hey [D.C.], I'm so excited to finally speak to you. We here at KY Jelly . . . wanted to know if [you] would be the spokesperson for our new anal lube. . . . Fucking ass clown. Nagga what?"

5. Law Enforcement Declarations

The deputy district attorney assigned to the criminal investigation submitted a declaration on behalf of the R.'s, stating that, based on the evidence, the district attorney's office declined to prosecute any of the students who had posted messages on D.C.'s Web site.

The police detective conducting the investigation also submitted a declaration in support of the motion, explaining that the LAPD "determined that [the] annoying and immature Internet communications did not meet the criteria for criminal prosecution." In a follow-up police report, the LAPD "determined that the emails were an expression of 1st Amendment rights and no crime."

Plaintiffs submitted a declaration from an employee in Harvard-Westlake's security department who had previously been an officer with the LAPD for 20 years. In the former officer's opinion, R.R.'s message constituted "a clear and specific threat of death" in violation of Penal Code section 653m. That statute provides: "Every person who, with intent to annoy, . . . makes contact by means of an electronic communication device with another and addresses to . . . the other person any threat to inflict injury to the person . . . is guilty of a misdemeanor." The former officer stated that the Web site posts "depict in my opinion a group attempting to antagonize the victim and evidence a group behavior to work in concert together to harass, annoy, and at times threaten with violence

and intimidation a boy perceived to be gay. The fact that many discussed it at school and then were able to read others' comments and add additional posts over a two day period . . . furthers my belief that they worked together to intimidate the victim and his family."

C. Trial Court's Ruling

The anti-SLAPP motion was heard on March 12, 2008, and taken under submission. By minute order dated May 6, 2008, the trial court denied the motion, concluding that the case did not involve a public issue. (See § 425.16, subds. (b)(1), (e)(3).) The R.'s appealed.

II

DISCUSSION

We review de novo the trial court's ruling on an anti-SLAPP motion. (See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

The R.'s argue that R.R.'s posted message was "jocular humor" entitled to First Amendment protection under the anti-SLAPP statute. We disagree for two reasons. First, the R.'s evidence as to whether R.R.'s message was protected speech is self-contradictory. Accordingly, we cannot say they demonstrated that the message is protected speech. Second, assuming that R.R.'s message was a "joke" and thus constitutionally protected, it was not a statement made in connection with a "public issue" as that term is used in the anti-SLAPP statute. (See § 425.16, subds. (b)(1), (e)(3).) Rather, it was merely part of a "joke" among teenagers.

A. Protected Activity Under the Anti-SLAPP Statute

"'Litigation which has come to be known as SLAPP is defined by the sociologists who coined the term as "civil lawsuits . . . that are aimed at preventing citizens from exercising their political rights or punishing those who have done so." . . . [¶] . . . [¶]

"'SLAPP suits are brought to obtain an *economic* advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. . . . [O]ne of the common characteristics of a SLAPP suit is its lack of merit. . . . But lack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's

underlying objective. . . . As long as the defendant is forced to devote its time, energy and financial resources to combating the lawsuit its ability to combat the plaintiff in the political arena is substantially diminished.'" (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 891.)

Under the anti-SLAPP statute, "[a] cause of action against a person *arising from* any act of that person in furtherance of the person's right of petition or *free speech* under the United States or California Constitution in connection with a *public issue* shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1), italics added.) The statute is to "be broadly construed to encourage continued participation in free speech and petition activities." (*Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi* (2006) 141 Cal.App.4th 15, 22; see § 425.16, subd. (a).)

"'The Legislature enacted the . . . statute to protect defendants . . . from interference with the valid exercise of their constitutional rights, particularly the right of freedom of speech and the right to petition the government for the redress of grievances.'" (*Contemporary Services Corp. v. Staff Pro Inc*. (2007) 152 Cal.App.4th 1043, 1052.)

1. Free Speech

"'The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." The hallmark of the protection of free speech is to allow "free trade in ideas" — even ideas that the overwhelming majority of people might find distasteful or discomforting. . . . [T]he First Amendment "ordinarily" denies a State "the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence." . . . The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech. . . .

"'The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. . . . The First Amendment permits "restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" . . .

"'. . . [A] State may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." . . . Furthermore, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." . . . And the First Amendment also permits a State to ban a "true threat." . . .

""'True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur. . . . [Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.]"' *Virginia v. Black*, 538 U.S. 343, [358–360], 123 S.Ct. 1536, 1547-48, 155 L.Ed.2d 535 (2003).

"The United States Court of Appeals for the Fifth Circuit has articulated the rationale underlying the removal of true threats from first amendment protection. 'The notion that some expression may be regulated consistent with the first amendment . . . starts with the already familiar proposition that expression has special value only in the context of dialogue: communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or

refusing to take action on the basis of one's beliefs. . . . It is not plausible to uphold the right to use words as projectiles where no exchange of views is involved.' . . . *Shackelford v. Shirley*, 948 F.2d 935, 938 (5th Cir. 1991) . . . .

"That court further stated that, '[a]s speech strays further from the values of persuasion, dialogue and free exchange of ideas the first amendment was designed to protect, and moves toward threats made with specific intent to perform illegal acts, the state has greater latitude to enact statutes that effectively neutralize verbal expression.' *Shackelford v. Shirley*, *supra*, 948 F.2d at 938. Finally, that court concluded that, 'as expansive as the first amendment's conception of social and political discourse may be, threats made with specific intent to injure and focused on a particular individual easily fall into that category of speech deserving no first amendment protection.' *Id*. . . . [W]e must distinguish between true threats, which, because of their lack of communicative value, are not protected by the first amendment, and those statements that seek to communicate a belief or idea, such as political hyperbole or a mere joke, which are protected. . . .

"In the context of a threat of physical violence, '[w]hether a particular statement may properly be considered to be a threat is governed by an objective standard — whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. . . . Although a threat must be distinguished from what is constitutionally protected speech . . . this is not a case involving statements with a political message. A true threat, where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amendment.' . . . Moreover, '[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners.' . . ." (*State v. DeLoreto* (Conn. 2003) 827 A.2d 671, 679–681, citations omitted; accord, *Corales v. Bennett* (9th Cir. 2009) 567 F.3d 554, 563–564; *Smithfield Foods v. United Food and Commercial* (E.D.Va. 2008) 585 F.Supp.2d 789, 804.)

Under an objective standard, the court's inquiry focuses on whether a reasonable person would foresee that the speaker's or author's statement would be interpreted by the recipient as a serious expression of intent to inflict bodily harm. (See *Fogel v. Collins* (9th Cir. 2008) 531 F.3d 824, 831; *State v. DeLoreto*, *supra*, 827 A.2d at p. 680.) The objective standard is sometimes called the "reasonable recipient" standard. (See *U.S. v. Parr* (7th Cir. 2008) 545 F.3d 491, 499; *U.S. v. Fulmer* (1st Cir. 1997) 108 F.3d 1486, 1491.) Some courts, however, apply a subjective standard. Under that approach, a true threat requires proof that the speaker or author intended the speech as a threat of bodily harm. (See *Fogel v. Collins*, *supra*, 531 F.3d at pp. 831–833; *U.S. v. Parr*, *supra*, 545 F.3d at pp. 498–502.) "[T]he true threat determination is informed by but not limited to what the recipient or target of the alleged threat knew about the defendant. Contextual information — especially aspects of a defendant's background that have a bearing on whether his statements might reasonably be interpreted as a threat — is relevant and potentially admissible regardless of whether the recipient or targeted victim had full access to that information." (*U.S. v. Parr*, *supra*, 545 F.3d at p. 502.) The subjective standard may appropriately be called the "actual intent" standard. (See *U.S. v. Patillo* (4th Cir. 1970) 431 F.2d 293, 298, affd. on rehg. en banc (4th Cir. 1971) 438 F.2d 13; *U.S. v. Ogren* (C.A.A.F. 2001) 54 M.J. 481, 486.)

Federal courts are divided on whether the applicable standard should be objective or subjective. (See *U.S. v. Parr*, *supra*, 545 F.3d at pp. 498–500 & fn. 2; *State v. Johnston* (Wash. 2006) 127 P.3d 707, 710, fn. 5.) This split of authority is attributable to the Supreme Court's decision in *Virginia v. Black*, *supra*, 538 U.S. 343, and has been acknowledged in California (see *Levin v. United Airlines, Inc.* (2008) 158 Cal.App.4th 1002, 1019, fn. 21). But our courts have not resolved the issue. (Compare *In re M.S.* (1995) 10 Cal.4th 698, 710 ["When a reasonable person would foresee that the context and import of the words will cause the listener to believe he or she will be subjected to physical violence, the threat falls outside First Amendment protection"] and *USS-Posco Industries v. Edwards* (2003) 111 Cal.App.4th 436, 444–446 [First Amendment does not protect threats that cause listeners to fear for their safety] with *Levin v. United Airlines*,

Inc., *supra*, at pp. 1019–1025 & fn. 21 [noting split of authority but declining to resolve issue where plaintiff who brought suit for false imprisonment had been arrested for making false bomb report, not threat of bodily harm].) We need not decide which standard is the correct one because we apply both of them. (See pt. II.B, *post*; *Fogel v. Collins*, *supra*, 531 F.3d at p. 831.)

2. Public Issue

The anti-SLAPP statute applies where "[a] cause of action against a person aris[es] from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a *public issue*." (§ 425.16, subd. (b)(1), italics added.)

As used in the statute, "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a *public issue*' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) *any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest*; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e), italics added; see *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117–1118, 1123 [discussing types of statements covered by anti-SLAPP statute].) The R.'s contend that plaintiffs' complaint falls within the third clause of section 425.16, subdivision (e).

The anti-SLAPP statute contains no definition of "public issue" or "public interest." That might be attributable to an assumption that """no standards are necessary because [judges and attorneys] will, or should, know a public concern when they see it."""" (*Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1122,

fn. 9; see *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 117.)

"'"The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability — and whether that activity constitutes protected speech or petitioning." . . .'" (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1478, citation omitted; accord, *Navellier v. Sletten* (2002) 29 Cal.4th 82, 91–93.)

"'"The definition of 'public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity. . . ." . . . "Although matters of public interest include legislative and governmental activities, they may also include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals." . . .'" (*Kurwa v. Harrington, Foxx, Dubrow & Canter, LLP* (2007) 146 Cal.App.4th 841, 846, citations omitted; accord, *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479.)

In general, "[a] public issue is implicated if the subject of the statement or activity underlying the claim (1) was a person or entity in the public eye; (2) could affect large numbers of people beyond the direct participants; or (3) involved a topic of widespread, public interest." (*Jewett v. Capital One Bank* (2003) 113 Cal.App.4th 805, 814; accord, *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1573; *Century 21 Chamberlain & Associates v. Haberman* (2009) 173 Cal.App.4th 1, 9.) "[T]o satisfy the public issue/issue of public interest requirement in situations where the issue is of interest only to a limited, but definable portion of the public, such as a private group, organization, or community, 'the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance.'" (*Hailstone*

v. Martinez (2008) 169 Cal.App.4th 728, 738; accord, *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc., supra*, at pp. 1572–1573.)

"'The fact that "a broad and amorphous public interest" can be connected to a specific dispute is not sufficient to meet the statutory requirements' of the anti-SLAPP statute. . . . By focusing on society's general interest in the subject matter of the dispute instead of the specific speech or conduct upon which the complaint is based, defendants resort to the oft-rejected, so-called 'synecdoche theory of public issue in the anti-SLAPP statute,' where '[t]he part [is considered] synonymous with the greater whole.' . . . In evaluating the first [step] of the anti-SLAPP statute, we must focus on 'the *specific nature of the speech* rather than the generalities that might be abstracted from it. . . .'" (*World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc., supra,* 172 Cal.App.4th at p. 1570, citations omitted; accord, *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132; *Commonwealth Energy Corp. v. Investor Data Exchange, Inc*. (2003) 110 Cal.App.4th 26, 34.)

3. Parties' Burdens on the Motion

"[The anti-SLAPP statute] requires the [trial] court to engage in a two-step process. First, the court decides whether the defendant has made a *threshold* showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67, italics added.)

Put another way, "a defendant seeking to strike a plaintiff's complaint under section 425.16 has the burden of making a *prima facie* showing that the plaintiff's

allegations are subject to that section. . . . *Only if* the defendant satisfies that burden, will it then fall to the plaintiff to establish the required 'probability' of success. . . . The defendant's burden requires that it demonstrate that the plaintiff's cause of action arose from some act of the defendant that was taken in furtherance of the defendant's *constitutional rights of petition or free speech*." (*Gallimore v. State Farm Fire & Casualty Ins. Co*. (2002) 102 Cal.App.4th 1388, 1397, italics added & omitted; accord, *Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 315–316.)

"'The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish [his or] her actions are constitutionally protected under the First Amendment *as a matter of law*. If this were the case then the [secondary] inquiry as to whether the plaintiff has established a probability of success would be superfluous.'" (*Navellier v. Sletten*, *supra*, 29 Cal.4th at pp. 94–95, italics added; accord, *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 740.)

Under the first step, the defendant must make a showing that the complaint is based on protected activity. (See *Equilon Enterprises v. Consumer Cause, Inc*., *supra*, 29 Cal.4th at p. 67; *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc*., *supra*, 172 Cal.App.4th at p. 1568.) Some courts have described the requisite showing as "prima facie"; some have referred to it as "threshold"; and some have used "prima facie" and "threshold" interchangeably. (See, e.g., *Rezec v. Sony Pictures Entertainment, Inc*. (2004) 116 Cal.App.4th 135, 139 [prima facie showing]; *Manhattan Loft, LLC v. Mercury Liquors, Inc*. (2009) 173 Cal.App.4th 1040, 1049 [same]; *Equilon Enterprises v. Consumer Cause, Inc*., *supra*, 29 Cal.4th at p. 67 [threshold showing]; *Episcopal Church Cases* (2009) 45 Cal.4th 467, 477 [same]; *Club Members for an Honest Election v. Sierra Club*, *supra*, 45 Cal.4th at pp. 315–316 [prima facie showing and threshold showing]; *Gallimore v. State Farm Fire & Casualty Ins. Co*., *supra*, 102 Cal.App.4th at pp. 1396–1397 [same].) The term "prima facie" can be a source of confusion because it has several meanings. (See, e.g., *Koch v. Specialized Care Services, Inc*. (D.Md. 2005) 437 F.Supp.2d 362, 378–380; *Dolan v. Powers* (Mo.Ct.App. 2008) 260 S.W.3d 376, 385; *Berry v. State* (Fla.Ct.App. 1984) 453 So.2d 197, 198; *In re Napp Technologies, Inc.*

(N.J.Super.Ct. 2000) 768 A.2d 274, 279 & fn. 3; Black's Law Dict. (8th ed. 2004) p. 1228, cols. 1, 2 [defining "prima facie" and "prima facie case"].) The anti-SLAPP statute itself does not use either "prima facie" or "threshold," but simply states that "a cause of action" is "subject to a special motion to strike" if it "*aris[es] from* any act . . . in furtherance of the person's right of petition or free speech . . . in connection with a public issue." (§ 425.16, subd. (b)(1), italics added.) Regardless of whether "prima facie" or "threshold" is the judicially created term of choice, the result should be the same.

Although we "generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address [that] issue in the second step of the analysis, if necessary" (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1089), the general presumption is not appropriate where, as here, the "statement or writing" (§ 425.16, subd. (e)(3)), on its face, is a threat of bodily harm, and all of the causes of action are based on the same statement or writing.

Accordingly, to prevail on the first step under the anti-SLAPP analysis, the R.'s must demonstrate that R.R.'s posted message is protected speech *and* that it was made in connection with a public issue. We conclude the R.'s failed in both respects.

B. Free Speech Under the Anti-SLAPP Statute

As noted, the First Amendment does not protect true threats — "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." (*Virginia v. Black*, *supra*, 538 U.S. at p. 359.) "The speaker need not actually intend to carry out the threat." (*Id.* at pp. 359–360.) "'A true threat is a serious one, not uttered in jest, idle talk, or political argument.'" (*U.S. v. Fuller* (7th Cir. 2004) 387 F.3d 643, 646.) The First Amendment protects parody, rhetorical hyperbole, and loose, figurative, or hyperbolic language. (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 849; *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 21 [110 S.Ct. 2695]; *Hustler Magazine v. Falwell* (1988) 485 U.S. 46, 51, 56 [108 S.Ct. 876].)

As a preliminary matter, we note that "[o]nline bullying, called cyberbullying, happens when teens use the Internet, cell phones, or other devices to send or post text or

images intended to hurt or embarrass another person. [¶] . . . [¶] Contrary to what cyberbullies may believe, cyberbullying is a big deal, and can cause a variety of reactions in teens. . . . [¶] . . . [¶] Many youth experience a variety of emotions when they are cyberbullied. Youth who are cyberbullied report feeling angry, hurt, embarrassed, or scared." (National Crime Prevention Council, *Cyberbullying*: *Cyberbullying FAQ For Teens* <http://www.ncpc.org/cyberbullying> [as of Mar. 15, 2010], italics added.) "Children have killed each other and committed suicide after having been involved in a cyberbullying incident. [¶] Cyberbullying is usually not a one time communication, unless it involves a death threat or a credible threat of serious bodily harm." (Stop Bulling Now <http://www.stopcyberbullying.org/what_is_ cyberbullying_exactly.html> [as of Mar. 15, 2010].) "In studies of middle and high school students, . . . the most common way that children and youth reported being cyberbullied was through instant messaging. Somewhat less common ways involved the use of chat rooms, emails, and *messages posted on Web sites*." (*Cyberbullying* <http://www.stopbullyingnow.hrsa.gov/ adults/cyber-bullying.aspx> [as of Mar. 15, 2010], italics added.)

"Cyberbullying has increased in recent years. In nationally representative surveys of 10–17 year-olds, twice as many children and youth indicated that they had been victims and perpetrators of online harassment in 2005 compared with 1999/2000." (*Cyberbullying* <http://stopbullyingnow.hrsa.gov/adults/cyber-bullying.aspx> [as of Mar. 15, 2010].)

1. Reasonable Recipient Standard

Under the objective standard for true threats, we begin our analysis with the text of R.R.'s posted message: "Hey [D.C.], I want to rip out your fucking heart and feed it to you. I heard your song while driving my kid to school and from that moment on I've . . . wanted to kill you. If I ever see you I'm . . . going to pound your head in with an ice pick. Fuck you, you dick-riding penis lover. I hope you burn in hell."

This message is unequivocal. A serious expression of intent to inflict bodily harm is conveyed no less than three times by the phrases "rip out your fucking heart," "want[] to kill you," and "pound your head in with an ice pick." That these words produce

grotesque and exaggerated images does not lessen the gravity of the threat. An intent to harm the recipient is also shown by the use of "fuck you," "burn in hell," and "dick-riding penis lover," indicating that the author is angry. The message does not even hint that it is the result of the author's reaction to the recipient's Web site.

The threat in this case was not merely a few words shouted during a brawl; it was a series of grammatically correct sentences composed at a computer keyboard over a period of at least several minutes. Even after the message was typed, the author still had to decide whether to send it. He placed his cursor over "send" and clicked the mouse or touchpad. Thus, the content of the message and its transmission show deliberation on the part of the author.

The R.'s contend that the reference to the use of an ice pick and the biological impossibility of eating one's own heart make clear that the message was a joke. They also argue that, on its face, the message indicates that the underlying motivation was a dislike of the recipient's song, not his perceived sexual orientation. These contentions are unpersuasive or irrelevant. The true threat analysis does not require that a speaker intend to inflict bodily harm in the precise manner described in a threat. Nor does the speaker have to intend to kill his victim. Rather, if the threat conveys a serious expression of an intent to inflict bodily harm *at all or in any manner*, it is not constitutionally protected. Further, a reasonable person would not interpret the threat here as being motivated by a dislike of the recipient's song. That a one-time hearing of a song on the radio could generate so vitriolic a reaction defies reason. Moreover, this was a threat made by a high school student to a fellow student. Was it reasonably foreseeable to the teenage speaker that the message would be interpreted by another teenager as a threat of bodily harm? We think so. A high school bully might well use similar words. In addition, the true threat analysis focuses on *intent*, not *motive*. Whether a misperception of D.C.'s sexual orientation motivated R.R. is relevant in determining liability under the hate crimes statutes (see Civ. Code, §§ 51.7, 52.1) but not in resolving the First Amendment issue.

Other evidence supports the conclusion that a reasonable person would foresee that R.R.'s message would be viewed as a threat of bodily harm. D.C.'s father closed down the Web site immediately upon seeing the derogatory and threatening posts and contacted the police. The police thought it prudent that D.C. not return to Harvard-Westlake until their investigation was completed and so advised D.C.'s father. D.C. returned to the school only once — for a PSAT class under the watchful eye of his father. When the police investigation dragged on, D.C., who was in his junior year, withdrew from Harvard-Westlake to avoid missing more classes. Plaintiffs moved to Northern California, where D.C. attended another school. D.C.'s father had to travel back and forth from the family's new residence to Los Angeles for business purposes.

It was not until sometime after plaintiffs discovered the posts that they learned the names of the students who were responsible. Consequently, the way in which plaintiffs reacted to the posts was not affected by information about the specific characteristics, beliefs, or charitable activities of any of the students. Under a standard of reasonableness, plaintiffs were not required to know that the author of R.R.'s message was in a self-described "playful mood" or that he was an exemplary individual.

Many of the posts at D.C.'s Web site did not constitute threats of any kind, and plaintiffs admit as much, stating that they perceived only six of the 34 derogatory posts as serious threats of bodily harm. That the majority of posts may have been nonthreatening does not lessen the effect of R.R.'s post. The law did not obligate plaintiffs to view all of the posts as having the same purpose or intent. In the opinion of D.C.'s father: "[R.R.'s message] was the most evil and malicious of the postings and looked to come from a parent rather than a student. My family was terrified and made physically nauseous from the threat." Accordingly, plaintiffs sued only six students.

The R.'s emphasize that D.C. did not *see* the messages posted *at the Web site*. That is beside the point. He subsequently learned about the messages and reacted with fear for his own safety, eventually requiring medical attention for panic attacks. "[A] prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the

possibility that the threatened violence will occur.'" (*Virginia v. Black*, *supra*, 538 U.S. at p. 360.) Similarly, that students *other than* R.R. found the posts *as a whole* to be funny or amusing does not suggest how plaintiffs should have viewed R.R.'s post in particular.

As reported by his father, D.C. was approached by people who "discuss[ed] what was posted and asked [D.C.] about being gay. It was clear that *others [who] read the posts* believed the comments about his sexual orientation and *felt concern for him and his safety*." (Italics added.)

Thus, a reasonable person would foresee that R.R.'s post would be interpreted by D.C. and his parents as a serious expression of an intent to inflict bodily harm. It follows that the R.'s failed to make a sufficient showing of First Amendment protection under an objective standard for identifying true threats.

2. Actual Intent Standard

Under the subjective standard, we first examine the content of R.R.'s post, as recited verbatim in his declaration: "'Hey [D.C.], I want to rip out your fucking heart and feed it to you. I heard your song while driving my kid to school and from that moment on I've . . . wanted to kill you. If I ever see you I'm . . . going to pound your head in with an ice pick. Fuck you, you dick-riding penis lover. I hope you burn in hell.'"

On its face, this post would not support a finding of jocular intent. The tone is serious, not humorous. The message describes violent conduct the author "wants" to commit, expresses the author's feelings of anger and hatred, and indicates the author will physically attack the recipient if he ever sees him. The content of the message shows it was written with deliberation. An intent to harm is evident.

For their part, the R.'s rely primarily on the evidence in the declarations of R.R. and his father describing R.R.'s good character and conduct on *other* occasions and with respect to *other* people. But R.R. also stated in his declaration that, when he posted the message, he was attempting "to win the one-upmanship contest that was tacitly taking place," and, after posting the message, he felt "ashamed" he had allowed "the desire for peer approval, 'peer pressure,' to induce [him] into acting like an idiot."

As our Supreme Court commented in recognizing the need to supervise high school students: "Supervision . . . is required, in part, so that discipline may be maintained and student conduct regulated. Such regulation is necessary precisely because of the commonly known tendency of students to engage in aggressive and impulsive behavior which exposes them and their peers to the risk of serious physical harm. High school students may appear to be generally less hyperactive and more capable of self-control than grammar school children. Consequently, less rigorous and intrusive methods of supervision may be required. Nevertheless, adolescent high school students are not adults and should not be expected to exhibit that degree of discretion, judgment, and concern for the safety of themselves and others which we associate with full maturity. . . . '[W]e should not close our eyes to the fact that . . . boys of seventeen and eighteen years of age, particularly in groups where the herd instinct and competitive spirit tend naturally to relax vigilance, are not accustomed to exercise the same amount of care for their own safety as persons of more mature years.'" (*Dailey v. Los Angeles Unified Sch. Dist*. (1970) 2 Cal.3d 741, 748, fn. omitted.) R.R.'s declaration suggests he succumbed to a "'herd instinct'" — "the commonly known tendency of students to engage in *aggressive* and impulsive behavior which exposes them *and their peers* to the risk of *serious physical harm*." (*Ibid.*, italics added.) It is irrelevant, for First Amendment purposes, that R.R. may not have intended to carry out his threat. (See *Virginia v. Black*, *supra*, 538 U.S. at pp. 359–360.)

Even assuming R.R. believed that his message was humorous, he may still have intended it as a threat. Self-amusement and wrongful conduct are not mutually exclusive. As explained by the National Crime Prevention Council: "Cyberbullying is a problem that affects almost half of all American teens. . . . [¶] . . . [¶] When teens were asked why they think others cyberbully, 81 percent said that *cyberbullies think it's funny*." (National Crime Prevention Council, *Cyberbullying*: *Cyberbullying FAQ For Teens* <http://www.ncpc.org/cyberbullying> [as of Mar. 15, 2010], italics added.) "'[T]he peculiar sense of humor attributable to this defendant does not lessen the seriousness of the legal consequences of his acts.'" (*State ex rel. RT* (La. 2001) 781 So.2d 1239, 1245, fn. 9.)

"[I]ndividuals of a completely distorted sense of humor or pranksters with juvenile minds have . . . induced fear by [their] acts." (*Ibid.*; accord, *United States v. Silver* (E.D.Pa. 1961) 196 F.Supp. 677, 678.) "[W]e reject [R.R.'s] argument that his statements were not 'true threats' because they were merely 'jests to show toughness and to establish a position among other [students].'" (*U.S. v. Stewart* (9th Cir. 2005) 420 F.3d 1007, 1019, fn. 9.)

Further, the actions taken by R.R.'s parents in response to his message contradict the assertion that R.R. intended to play a mere joke. They terminated his access to the Internet, grounded him, prohibited his use of cell phones except for emergencies, and took away his driving privileges. They had him evaluated by a psychiatrist to ensure his "conduct was never repeated and the *root cause*, if any, was dealt with immediately." (Italics added.) This evidence suggests that R.R.'s parents thought the "root cause" of his behavior was something other than his sense of humor.

Under the subjective standard, we inquire into whether R.R. intended that his message be interpreted as a threat. (See *Fogel v. Collins*, *supra*, 531 F.3d at pp. 831–833; *U.S. v. Parr*, *supra*, 545 F.3d at pp. 498–502.) The message itself implies he did. His statements about one-upmanship, peer pressure, and idiocy imply he did. The actions of his parents imply he did. The statements about his jocular intent, good character, and specific behavior on other occasions imply he did not. Thus, the R.'s have presented conflicting evidence on the subject of intent. It is a conflict borne of self-contradiction: The material facts and inferences drawn from portions of R.R.'s and his father's declarations are inconsistent with the material facts and inferences drawn from other portions of the same declarations. Because we cannot weigh the R.'s evidence, we cannot resolve the conflicts.

We therefore conclude that the R.'s did not make a sufficient showing of protected speech under the subjective standard of the true threat analysis. (See, e.g., *In re Holm* (9th Cir. 1991) 931 F.2d 620, 623 [creditor's claim in bankruptcy is prima facie valid if it sets forth necessary facts *without* self-contradiction]; *City of Colorado Springs v. Forance* (Colo. 1989) 776 P.2d 1107, 1110–1111 [defendant's conflicting evidence failed

to establish prima facie case]; *Center Candy, Inc. v. CJB Food Mart, Inc*. (2008) 50 A.D.3d 723, 724 [854 N.Y.S.2d 317, 318] [plaintiff failed to establish prima facie case based on conflicting evidence]; *Mohan v. Westchester County Medical Center* (1988) 145 A.D.2d 474, 475 [535 N.Y.S.2d 431, 432] [difference of opinion among experts does not provide basis for prima facie case of medical malpractice]; *King v. Brasington* (Ga. 1984) 312 S.E.2d 111, 112–113 [self-contradictory evidence failed to establish prima facie case]; *Jones v. Sears Roebuck & Co*. (Wis. 1977) 259 N.W.2d 70, 72 [defendant moving for summary judgment fails to establish prima facie defense if undisputed facts give rise to conflicting inferences]; *Metromedia, Inc. v Mandel* (1964) 21 A.D.2d 219, 222–223 [249 N.Y.S.2d 806, 809–810] [conflicting assertions as to defendants' motive and intent precluded plaintiff from establishing prima facie tort], affd. (1964) 15 N.Y.2d 616 [203 N.E.2d 914, 255 N.Y.S.2d 660]; *Boyas v. Raymond* (Mass. 1939) 20 N.E.2d 411, 412 [where two pieces of evidence are, by statute, to be given prima facie effect but that evidence is conflicting, no prima facie effect is given]; *Kilgore v. Gannon* (Ind. 1916) 114 N.E. 446, 448 [prima facie presumption of testator's soundness of mind, which arises from probate of will, does not apply where evidence of testator's sanity is in conflict].)

Our conclusion under both the objective and subjective standards is compelled in part by the purpose of the first step in the anti-SLAPP analysis — to determine whether "the operative complaint is 'within the class of suits *subject*' *to* the special motion to strike procedure." (*Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal.App.4th 324, 331, italics added; see *id.* at pp. 329–331.) If a complaint is subject to the anti-SLAPP statute, that is, if the defendant makes the requisite showing that the complaint is based on protected speech or petitioning activity, the plaintiff must then offer *evidence*, typically at the pleading stage, to demonstrate a probability of prevailing on the merits. (*Id.* at p. 328; see § 425.16, subds. (f), (g) [anti-SLAPP motion should be filed within 60 days of service of complaint unless court permits otherwise; upon filing notice of motion, all discovery is stayed].) If the plaintiff fails in that regard, the complaint is dismissed and the plaintiff is liable for the defendant's attorney fees. (See § 425.16, subd. (c).)

Thus, the two steps serve different purposes: The first step determines whether the complaint comes within the scope of the anti-SLAPP statute (see *Flatley v. Mauro*, *supra*, 39 Cal.4th at pp. 313–318; *Navarro v. IHOP Properties, Inc*. (2005) 134 Cal.App.4th 834, 843), while the second step ensures "'that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited'" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821).

In a case alleging statutory hate crimes and related common law claims, the courts should ensure that the anti-SLAPP statute does not discourage victims from seeking relief. That undesired effect would be likely if (1) the communication at issue appears on its face to be an intentional threat of bodily harm and was reasonably interpreted as such by the recipient, but (2) the trial court, in ruling on an anti-SLAPP motion, concludes the defendant has satisfied the first step of the analysis based on conflicting evidence of intent. If the defendant's burden at the first step were so easily met in a case like this one, victims would often be put to the task, early in the litigation, of proving a probability of success on the merits. "'These [would be] . . . grossly unfair burdens to impose on a plaintiff who is himself the victim of the defendant's [wrongful] activity.'" (*Flatley v. Mauro*, *supra*, 39 Cal.4th at p. 318.) And efforts to enforce the hate crimes laws would be chilled. (See *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal.App.4th 343, 357–358 [if plaintiffs who challenge governmental conduct were routinely subject to anti-SLAPP motions and required to show merit at the pleading stage, their use of petitions for writ of mandate to review legislative and administrative decisions would be chilled].)

We do not suggest that R.R.'s message was illegal as a matter of law. (See *Flatley v. Mauro*, *supra*, 39 Cal.4th at p. 317 [anti-SLAPP statute "cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition"].) Nor do we require the R.'s to show as a matter of law that R.R.'s message was protected speech. (See *id.* at pp. 314, 319–320; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th

260, 286.) Nevertheless, "it would eviscerate the first step of the two-step inquiry set forth in the statute if the defendant's mere assertion that his underlying activity was constitutionally protected sufficed to shift the burden to the plaintiff to establish a probability of prevailing . . . . While a defendant need only make a prima facie showing that the underlying activity falls within the ambit of the statute, clearly the statute envisions that the courts do more than simply rubber stamp such assertions before moving on to the second step. . . . '[I]t is fundamentally fair that before putting the plaintiff to the burden of establishing probability of success on the merits the defendant be required to show imposing that burden is justified by the nature of the plaintiff's complaint.'" (*Flatley*, at pp. 317–318, citation omitted.) "[T]he plaintiff . . . has no obligation to demonstrate [a] probability of success if the defendant fails to meet [his] threshold burden [at the first step]." (*Gallimore v. State Farm Fire & Casualty Ins. Co.*, *supra*, 102 Cal.App.4th at p. 1396.)

Where a plaintiff seeks relief based on a threat of bodily harm, the author of the threat should not be able to satisfy his burden under the anti-SLAPP statute by talking out of both sides of his mouth. The courts should apply the statute to protect the rights of free speech and petition (see § 425.16, subd. (b)(1)), not to chill the pursuit of claims under the hate crimes laws and the common law.

Finally, in applying the First Amendment, we do not defer to the legal conclusions of the parties or other persons on that subject. (See *In re George T*. (2004) 33 Cal.4th 620, 632–634.) For example, the decisions of the LAPD and the district attorney's office are not controlling under the true threat analysis. Further, those decisions related to a *criminal* investigation ending in no prosecution while the present case concerns *civil* liability. Although plaintiffs' statutory claim is denominated one for hate *crimes*, their cause of action is based on statutes imposing civil liability. (See Civ. Code, §§ 51.7, 52.1.)

Nothing we have said will chill free speech. We have not suggested the R.'s will be found liable on any of plaintiffs' causes of action. A trier of fact may ultimately find that R.R.'s message was not a true threat. The narrow question on appeal is whether the

R.'s may rely on the First Amendment to *dismiss* this lawsuit by way of an *anti-SLAPP motion*. As discussed, they may not. (See *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1250–1258 [where plaintiff's harassment claim was based on reports posted by defendants on Web site, anti-SLAPP motion was properly denied because First Amendment does not protect credible threats of violence].)

In sum, in light of the allegations in the complaint and the evidence submitted by both sides, the R.'s did not demonstrate that R.R.'s message was protected by the First Amendment. In statutory terms, the R.'s failed to show that plaintiffs' causes of action "aris[e] from any act . . . in furtherance of the [R.'s] right of . . . free speech." (§ 425.16, subd. (b)(1).)

C. Public Issue Under the Anti-SLAPP Statute

In attempting to meet the statutory requirement that the complaint arise from speech made in connection with a public issue, the R.'s contend that D.C. was a "public figure" or a "limited public figure" and that anything said publicly about such a person necessarily involves a public issue. We conclude the complaint does not involve a public issue.

"'Web sites accessible to the public . . . are "*public forums*" for purposes of the anti-SLAPP statute.'" (*Nygård, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1039, italics added; accord, *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4.) But not every Web site post involves a public issue. (See § 425.16, subd. (e)(3) [requiring that speech be made in a public forum *and* in connection with an issue of public interest].) "[M]ere publication . . . on a Web site[] should not turn otherwise private information . . . into a matter of public interest." (*Du Charme v. International Brotherhood of Electrical Workers, supra*, 110 Cal.App.4th at p. 117.)

No authority supports the R.'s broad proposition that anything said or written about a public figure or limited public figure in a public forum involves a public issue. Rather, as stated, the California cases establish that generally, "[a] public issue is implicated if the subject of the statement or activity underlying the claim (1) was a person

or entity in the public eye; (2) could affect large numbers of people beyond the direct participants; or (3) involved a topic of widespread, public interest." (*Jewett v. Capital One Bank, supra,* 113 Cal.App.4th at p. 814; *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc., supra,* 172 Cal.App.4th at p. 1573; *Century 21 Chamberlain & Associates v. Haberman, supra,* 173 Cal.App.4th at p. 9.) And where the issue is of interest to only a private group, organization, or community, the protected activity must occur in the context of an ongoing controversy, dispute, or discussion, such that its protection would encourage participation in matters of public significance. (*Hailstone v. Martinez, supra,* 169 Cal.App.4th at p. 738; *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc., supra,* 172 Cal.App.4th at pp. 1572–1573.) None of those factors applies here.

In *Nygård, Inc. v. Uusi-Kerttula, supra,* 159 Cal.App.4th 1027, a former employee of Nygård, Inc., and Nygård International Partnership gave an interview to a Finnish magazine about his work experiences. The resulting article included negative comments about the companies' founder and chairman of the board, Peter Nygård. The companies filed suit against the magazine in California and were met with an anti-SLAPP motion. The trial court found that the magazine had satisfied the first step of the statutory analysis "because [the] evidence showed that the [employer] and its founder, Nygård, 'are internationally known public figures who spend a great deal of money and effort to promote their business, success, wealth and lifestyle.' Further, [Nygård's companies] employ over 12,000 employees worldwide. Thus, the court said, the statements . . . published by the magazine involved highly visible public figures and issues of public interest." (*Id.* at p. 1034.)

The Court of Appeal affirmed for different reasons, explaining: "[The] cases and the legislative history . . . suggest that 'an issue of public interest' within the meaning of section 425.16, subdivision (e)(3) is any issue in which the public is interested. In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute — it is enough that it is one in which the public takes an interest. Judged by this standard, the trial court correctly concluded that the statements on which the present suit is based

concern an issue of public interest. According to *evidence introduced by defendants* in support of their motions to strike, there is 'extensive interest' in Nygård — 'a prominent businessman and celebrity of Finnish extraction' — among the Finnish public. Further, *defendants' evidence* suggests that there is particular interest among the magazine's readership in 'information having to do with Mr. Nygård's famous Bahamas residence which has been the subject of much publicity in Finland.' The . . . article was intended to satisfy that interest." (*Nygård, Inc. v. Uusi-Kerttula*, *supra*, 159 Cal.App.4th at p. 1042, italics added & omitted.)

"In *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, plaintiff was one of 50 contestants in the television program *Who Wants To Marry A Multimillionaire*. . . . A San Francisco radio show mocked plaintiff's participation in the show, and plaintiff sued the radio station for slander and other torts. . . . The Court of Appeal held that the suit was subject to a special motion to strike. Among other things, it held that the offending comments were made '"in connection with an issue of public interest"': 'The offending comments arose in the context of an on-air discussion between the talk-radio cohosts and their on-air producer about a television show of significant interest to the public and the media. This program was a derivative of *Who Wants to Be a Millionaire*, which had proven successful in generating viewership and advertising revenue. . . . By having chosen to participate as a contestant in the Show, plaintiff voluntarily subjected herself to inevitable scrutiny and potential ridicule by the public and the media.' . . . .

"The court reached a similar result in *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226. There, plaintiff[, Donald Sipple,] was a *nationally known* political consultant who had developed advertising campaigns for *major* political candidates. . . . He brought a suit for defamation and other torts after defendant . . . published an article about a custody dispute between Sipple and his second wife. Among other things, the article discussed Sipple's first and second wives' testimony at the custody trial that he had physically and verbally abused them. . . . The trial court struck the complaint under the anti-SLAPP statute and the Court of Appeal affirmed, holding

that the article concerned a matter of public interest. It [stated]: 'Central to the article . . . are the allegations of physical and verbal abuse against a *prominent media strategist* by two former wives. . . . In 1994, appellant devised media strategy based on gender-based advertising against domestic violence for the gubernatorial races of Pete Wilson in California, George W. Bush in Texas and Jim Edgar in Illinois. Ironically, the custody dispute occurred while appellant was running the media strategy for Bob Dole's 1996 presidential campaign based on morality issues. In other words, appellant was able to capitalize on domestic violence issues in order to further his career.' . . . Accordingly, the court concluded, '[T]he details of appellant's career and appellant's ability to capitalize on domestic violence issues in his advertising campaigns for politicians *known around the world*, while allegedly committing violence against his former wives, are public issues, and the article is subject to the protection of section 425.16.'" (*Nygård, Inc. v. Uusi-Kerttula*, *supra*, 159 Cal.App.4th at pp. 1042–1043, citations omitted, italics added.)

And in *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, the Court of Appeal held that the producers of a television program could not be sued for airing an interview with Marlon Brando's housekeeper, Blanche Hall, who was named as a beneficiary in Brando's living trust. The court concluded that the anti-SLAPP statute barred suit, stating: "The *public's fascination with Brando* and *widespread public interest in his personal life* made Brando's decisions concerning the distribution of his assets a public issue or an issue of public interest. Although Hall was a private person and may not have voluntarily sought publicity or to comment publicly on Brando's will, she nevertheless became involved in an issue of public interest by virtue of being named in Brando's will. Defendants' television broadcast contributed to the public discussion of the issue by identifying Hall as a beneficiary and showing her on camera." (*Id.* at p. 1347, italics added.)

As noted, "[i]n evaluating the first [step] of the anti-SLAPP statute, we must focus on 'the *specific nature of the speech* rather than the generalities that might be abstracted from it. . . .'" (*World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.*, *supra*, 172 Cal.App.4th at p. 1570.) Here, the R.'s liability is premised on a Web site

message from one teenager to another. The message does not mention a public issue. Rather, it combines a threat of bodily harm with derogatory language.

Further, the public was not fascinated with D.C., nor was there widespread public interest in his personal life. There is no evidence that he was a nationally known singer or actor even under his pseudonym, Danny Alexander. Indeed, R.R. stated in his declaration that, before seeing D.C.'s Web site, "I had not heard anything about [D.C.] I had no knowledge of his acting or singing involvement [and] did not know his interests or habits . . . ." In short, D.C. was no Brando.

Admittedly, *as alleged in the complaint*, D.C. had a record album with a planned release date, had broadcast a song worldwide via satellite radio, and had played the leading role in a feature film presented at an internationally acclaimed film festival. He had also toured under the auspices of a nationally recognized radio network. But unlike the defendants in other cases (see *Nygård, Inc. v. Uusi-Kerttula*, *supra*, 159 Cal.App.4th at p. 1042; *Sipple v. Foundation for Nat. Progress*, *supra*, 71 Cal.App.4th pp. 231–234, 239–240; *Seelig v. Infinity Broadcasting Corp.*, *supra*, 97 Cal.App.4th at pp. 801, fn. 1, 807, fn. 5), the R.'s did not offer any *evidence* to show that the plaintiff — here, D.C. — was known to the public or was in the public eye. D.C.'s use of a Web site in pursuing an entertainment career did not, ipso facto, put him in the public eye. Millions of teenagers use MySpace, Facebook, and YouTube to display their interests and talents, but the posting of that information hardly makes them celebrities. In addition, D.C.'s record album was released after the posting of the messages, so it did not create any public interest in him at the relevant time. Similarly, the film in which D.C. had the lead, Steal Me, had not yet been released. Absent evidence on the point, we cannot say that, as of the date of R.R.'s message, D.C.'s stint in entertainment had garnered public attention.

As the R.'s would have it, R.R.'s message, like the rest of the posted messages, was part of a joke played on D.C. by other teenagers. Assuming the message was a joke, it did not implicate a public issue. (See *Polish American Congress v. F.C.C.* (7th Cir. 1975) 520 F.2d 1248, 1250, 1253–1256 [television broadcast of derogatory Polish jokes did not involve a public issue or an issue of public importance]; *Shub v. Westchester*

Community College (S.D.N.Y. 2008) 556 F.Supp.2d 227, 244–246 [professor's comments about college president's inappropriate use of sexual jokes did not relate to an issue of public concern]; *Pereira v. Commissioner of Social Services* (Mass. 2000) 733 N.E.2d 112, 116 & fns. 8 & 9, 118–119 [employee's racist joke did not constitute speech on a matter of public concern].)

Nor is the posted message in this case analogous to a magazine article that *discusses* a celebrity or to a television interview or radio show *about* a celebrity. (See *Nygård, Inc. v. Uusi-Kerttula*, *supra*, 159 Cal.App.4th 1027 [magazine article]; *Sipple v. Foundation for Nat. Progress*, *supra*, 71 Cal.App.4th 226 [magazine article]; *Hall v. Time Warner, Inc.*, *supra*, 153 Cal.App.4th 1337 [television interview]; *Seelig v. Infinity Broadcasting Corp.*, *supra*, 97 Cal.App.4th 798 [radio show].) R.R.'s message is devoid of any information *about* D.C. The message stated in part, "I heard your song while driving my kid to school and from that moment on I've . . . wanted to kill you." But R.R. admitted in his declaration that "[he] *obviously* didn't have school age children and [he] had *never listened* to any of [D.C.'s] songs." (Italics added.) Plainly, R.R. did not intend that his message be interpreted as an opinion about D.C.'s singing ability. In contrast to the articles and broadcasts in *Nygård*, *Sipple*, *Hall*, and *Seelig*, the message in this case was *to*, not *about*, a person, and the *content* of the communication added nothing to any public discourse or interest.

Simply put, R.R.'s message did not concern a person in the public eye, conduct that could directly affect large numbers of people beyond the participants, or a topic of widespread public interest. (See *Jewett v. Capital One Bank*, *supra*, 113 Cal.App.4th at p. 814; *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.*, *supra*, 172 Cal.App.4th at p. 1573; *Century 21 Chamberlain & Associates v. Haberman*, *supra*, 173 Cal.App.4th at p. 9.) And, if the message was of interest to only a private group, organization, or community, it was not part of an ongoing controversy, dispute, or discussion, such that its protection would encourage participation in matters of public significance. (See *Hailstone v. Martinez*, *supra*, 169 Cal.App.4th at p. 738; *World*

Financial Group, Inc. v. HBW Ins. & Financial Services, Inc., *supra*, 172 Cal.App.4th at pp. 1572–1573.)

Finally, it appears that the R.'s have borrowed the term "public figure" from First Amendment jurisprudence. In that context, "[the] designation [of public figure] may rest on either of two alternative bases. In some instances an individual may achieve such *pervasive fame or notoriety* that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a *particular public controversy* and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." (*Gertz v. Robert Welch, Inc*. (1974) 418 U.S. 323, 351 [94 S.Ct. 2997], italics added.) D.C. did not achieve pervasive fame or notoriety, and he was not in the midst of a particular public controversy. (Cf. *Carlisle v. Fawcett Publications, Inc*. (1962) 201 Cal.App.2d 733 [actress Janet Leigh was a public figure]; *Carafano v. Metrosplash.com Inc*. (C.D.Cal. 2002) 207 F.Supp.2d 1055, 1070–1072 [actress who had prominent role in *Star Trek* series and had extensive history of appearances on television, in motion pictures, and in advertising is a public figure], affd. (9th Cir. 2003) 339 F.3d 1119.)

In conclusion, because the R.'s did not satisfy their burden with respect to the first step of the anti-SLAPP analysis, we do not consider whether plaintiffs demonstrated a probability of prevailing on the merits of their claims. (See *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80–81.) The trial court properly denied the R.'s anti-SLAPP motion.

III

DISPOSITION

The order denying the special motion to strike is affirmed.

CERTIFIED FOR PUBLICATION.

MALLANO, P. J.

I concur:

JOHNSON, J.

ROTHSCHILD, J., Dissenting.

The majority affirms the denial of the anti-SLAPP motion on the grounds that R.R.'s post (1) was a "true threat" and therefore was not constitutionally protected, and (2) was not in connection with an issue of public interest. I disagree with both conclusions and with the majority's reasoning, which alters the legal landscape to the severe detriment of First Amendment rights.

In deciding that the post was unprotected, the majority holds defendants to an evidentiary standard that conflicts with controlling California Supreme Court precedent, disregards defendants' evidence on the basis of invalid factual inferences and unsupported legal theories, and ignores the relevant case law by failing to consider the entire factual context in which R.R.'s post occurred. The majority does all of this in the name of protecting hate crime victims (maj. opn. *ante*, at p. 32), but the majority acknowledges that because this lawsuit is still at the pleading stage, it may turn out that the suit does not involve a hate crime at all (maj. opn. *ante*, at pp. 32, 33).

I share with the majority the view that R.R.'s post, like many that preceded and followed it, was vulgar, nasty, offensive, and disgusting. But, as Justice Harlan wrote in *Cohen v. California* (1971) 403 U.S. 15, 24-25, although "the immediate consequence of [free speech rights] may often appear to be only verbal tumult, discord, and even offensive utterance[,] . . . [w]e cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values [of freedom of speech] are truly implicated."

In concluding that the post was not in connection with an issue of public interest, the majority fails to follow relevant precedent and ignores the substantial evidence that D.C. was a person in the public eye. The majority also creates a broad and groundless exception to the protections of the anti-SLAPP statute, holding that for purposes of the statute, jokes do not constitute communications in connection with issues of public interest. (Maj. opn. *ante*, at pp. 2, 15, 38.) That is not the law.

Application of the correct legal standards to the relevant facts and evidence demonstrates that defendants have carried their initial burden in support of the special motion to strike. I therefore dissent.

I. The Prima Facie Showing Standard

A defendant bringing an anti-SLAPP motion needs to make only a prima facie showing that the plaintiff's claims arise from constitutionally protected conduct. (See, e.g., *Rezec v. Sony Pictures Entertainment, Inc.* (2004) 116 Cal.App.4th 135, 139.) The moving defendant need only introduce evidence that, if credited, would be sufficient to sustain any factual findings necessary to support the claim of constitutional protection.

The majority mentions the prima facie showing standard but does not actually apply it, instead requiring defendants to show that their conduct is constitutionally protected *as a matter of law*. The majority's opinion thus conflicts with controlling Supreme Court precedent and alters the law in a manner harmful to First Amendment rights.

"'The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law. If this were the case then the [secondary] inquiry as to whether the plaintiff has established a probability of success would be superfluous.'" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 94-95 [hereafter *Navellier*], quoting *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 305; see also *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 286 [hereafter *Soukup*] ["There is no . . . requirement that the defendant initially demonstrate his or her exercise of constitutional rights of speech or petition was valid as a matter of law"].) "Instead, under the statutory scheme, a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary. [Citation.] Otherwise, the second step would become superfluous in almost every case, resulting in an improper shifting of the burdens." (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1089; see also *Navellier*, *supra*, 29 Cal.4th at p. 95 [citing with approval this portion of

Chavez v. Mendoza]; *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 458.)

According to California's anti-SLAPP case law, a prima facie showing is merely a presentation of sufficient "facts to sustain a favorable judgment if the evidence submitted [in support of those facts] is credited." (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548; see *Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714; *Soukup, supra*, 39 Cal.4th at p. 291; *Navellier, supra*, 29 Cal.4th at pp. 88-89.) The case law is clear on how a court should determine whether the requisite prima facie showing has been made: The court employs a "summary-judgment-like procedure" (*Taus v. Loftus, supra*, 40 Cal.4th at p. 714) and "'does not weigh the credibility or comparative probative strength of competing evidence'" (*Soukup, supra*, 39 Cal.4th at p. 291, italics omitted). (See also *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 20; *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741, fn. 10.) Rather, as long as the record contains "evidence that, if credited, would be sufficient to sustain a favorable judgment" (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 108), the prima facie showing standard has been met.[2]

Instead of discussing the California case law explaining what constitutes a prima facie showing in the context of California's anti-SLAPP statute, the majority cites cases from Maryland, Missouri, Florida, and New Jersey for the proposition that the phrase "prima facie" is ambiguous. (Maj. opn. *ante*, at pp. 23-24.) Also, although the majority notes that at the first step the moving defendant need only make a prima facie showing of constitutional protection, the majority asserts that "prima facie" is just another way of

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[2] The cases developing and explaining the prima facie showing standard for purposes of an anti-SLAPP motion do so in the context of the second step of the analysis. (See, e.g., *Soukup, supra*, 39 Cal.4th at p. 291.) The case law is nonetheless uniform in holding that at both the first step and the second step only a prima facie showing is required. There is no reason—and the majority provides none—to believe that at the first step of the analysis of an anti-SLAPP motion "prima facie showing" means something different from what it means at the second step.

saying "threshold," adding that "[r]egardless of whether 'prima facie' or 'threshold' is the judicially created term of choice, the result should be the same." (Maj. opn. *ante*, at pp. 23-24.) If the choice of terminology is really of no consequence, however, it is difficult to understand why the majority even brings up the term "threshold." The only apparent explanation is that the majority wants to treat neither "prima facie" nor "threshold" as determining the *standard* that the showing must meet. Rather, for the majority the terms "prima facie" and "threshold" indicate only *when* the showing must be made—for the majority, a "prima facie" or "threshold" showing is simply an *initial* showing, or a showing *made at the beginning*. But the question remains: What standard must the moving defendant meet in order to have made the requisite showing? The majority never says.

That gap in the majority's reasoning is particularly troubling because *plaintiffs themselves have expressly conceded that defendants' showing was sufficient*. In their respondents' brief, plaintiffs state that "[a]s to each of the elements of a 'true threat' as defined in [federal case law] . . . *there is here conflicting evidence*." (Italics added.) That is, plaintiffs concede that defendants have introduced evidence that supports their position on every element of the true threat theory. Thus, according to plaintiffs themselves, defendants have made a prima facie showing that R.R.'s post was not a true threat.

We are not, of course, bound by plaintiffs' concession. Plaintiffs might be wrong—the record might actually contain *no evidence* sufficient to support defendants' position on the true threat theory. But the majority never says that either. On the contrary, the majority expressly concedes with respect to the subjective test that the record contains "conflicting evidence on the subject of intent." (Maj. opn. *ante*, at p. 30.) (The analysis presented in Parts III and IV of this dissent likewise confirms that the record contains sufficient evidence to support defendants' position.) The majority's statement that it has not required defendants "to show as a matter of law that R.R.'s message was protected speech" (maj. opn. *ante*, at pp. 32) therefore cannot be correct—the majority acknowledges that the record contains sufficient evidence to support

defendants' position, but the majority still concludes that defendants' showing was inadequate. It follows that the majority must be requiring something more than a prima facie showing, namely, a demonstration as a matter of law.

In addition, instead of acknowledging that the presence in the record of conflicting evidence establishes that defendants have made a prima facie showing, the majority states that "we cannot resolve the conflicts" in the evidence (maj. opn. *ante*, at p. 30), so defendants lose. In determining whether defendants have made a prima facie showing, however, the court should have no occasion to resolve conflicts in the evidence—the court is supposed to employ a "summary-judgment-like procedure" (*Taus v. Loftus*, *supra*, 40 Cal.4th at p. 714) and "'does not weigh the credibility or comparative probative strength of competing evidence'" (*Soukup*, *supra*, 39 Cal.4th at p. 291, italics omitted).[3]

I conclude that the majority has in reality required defendants to show that R.R.'s conduct was protected as a matter of law, contrary to the Supreme Court's repeated holdings that no such showing is required. The majority has thus accomplished precisely the "improper shifting of the burdens" that the case law warns against (*Chavez v. Mendoza*, *supra*, 94 Cal.App.4th at p. 1089), to the detriment of the free speech rights that Code of Civil Procedure section 425.16 was meant to safeguard.[4]

II. The Subjective Test and the Objective Test

The majority states that "[f]ederal courts are divided on whether the applicable standard [for true threats] should be objective or subjective." (Maj. opn. *ante*, at p. 19.) But the subjective test is, in fact, constitutionally required according to a United States Supreme Court case, *Virginia v. Black* (2003) 538 U.S. 343, which is controlling

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[3] The majority's reasoning on this point is also based on the "self-contradiction" theory, which I discuss in Part III, *post*.

[4] For example, constitutional protection of speech often depends upon the intent of the speaker. As a result, the majority's opinion will often make it impossible for defendants to get past the first step of the anti-SLAPP analysis because it will rarely, if ever, be possible to establish the speaker's intent as a matter of law.

authority on issues of federal law. (See, e.g., *McLaughlin v. Walnut Properties, Inc.* (2004) 119 Cal.App.4th 293, 297.)

Virginia v. Black involved a First Amendment challenge to a Virginia statute that criminalized cross burning. (538 U.S. at p. 347.) In the consolidated appeals of three defendants convicted under the statute, the Supreme Court of Virginia held that the statute was unconstitutional on its face, and the United States Supreme Court affirmed in part, vacated in part, and remanded. (*Id.* at pp. 348, 351, 367-368.) The statute prohibited cross burning only if done "with the intent of intimidating any person or group of persons," but the statute also provided that cross burning itself "shall be prima facie evidence of an intent to intimidate a person or group of persons." (*Id.* at p. 348.)

The case generated a number of opinions from the justices of the United States Supreme Court. None was joined in its entirety by a majority, although Justice O'Connor's opinion did gain majority support in part and was the plurality opinion as to the remainder. But with the possible exception of Justice Thomas, the differences among the justices did not involve any disagreement about the principle that a "true threat" is unprotected only if it is made with intent to threaten (that is, with the intent that the communication be taken as a threat). In other words, *at least eight of the nine justices agreed that subjective intent to threaten is constitutionally required*.

According to the Supreme Court majority, "'[t]rue threats' encompass those statements where the speaker *means to communicate a serious expression of an intent to commit an act of unlawful violence* to a particular individual or group of individuals." (*Virginia v. Black, supra*, 538 U.S. at p. 359, italics added.) Similarly, according to the majority, "[i]ntimidation *in the constitutionally proscribable sense of the word* is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent of placing the victim in fear of bodily harm or death*." (*Id.* at p. 360, italics added.) The significance of these statements by the Supreme Court majority is clear: In order for a communication to be an unprotected "true threat," it must have been made with intent to threaten (i.e., the speaker must have subjectively intended that it be taken as a threat).

Examination of the separate opinions of eight of the nine justices bears out that interpretation. The plurality opinion concluded that because the statute allowed the trier of fact to infer intent from the cross burning itself, *the statute effectively relieved the government of the burden of proving the defendant's intent and therefore was unconstitutional*. (*Virginia v. Black*, *supra*, 538 U.S. at pp. 364-365 (plur. opn.) [the statute "strips away the very reason why a State may ban cross burning with the intent to intimidate"].) The separate opinion of Justice Scalia (who was not a member of the plurality) expressly endorsed that principle, observing that the plurality found the statute "constitutionally problematic because 'a burning cross is not always intended to intimidate'" and agreeing that "[t]he plurality is correct in all of this." (*Id.* at p. 372 (conc. & dis. opn. of Scalia, J.).) Justice Scalia disagreed only with the plurality's facial invalidation of the statute, reasoning that instead the Court should have allowed case-by-case challenges to convictions if the statute had in fact operated to relieve the prosecution of its burden to prove intent. (*Id.* at pp. 372-373 (conc. & dis. opn. of Scalia, J.).) Justice Souter, joined by Justices Kennedy and Ginsburg, likewise agreed that the speaker's subjective intent to intimidate is what makes the conduct "proscribable." (*Id.* at pp. 385-386 (conc. and dis. opn. of Souter, J.).) Justice Souter disagreed only with the plurality's decision to leave open the possibility that the Virginia courts could, on remand, interpret the statute in such a way as to save it from unconstitutionality (*id.* at p. 367 (plur. opn.)); in Justice Souter's view, no such saving interpretation was possible. (*Id.* at p. 387 (conc. and dis. opn. of Souter, J.).)

Thus, eight justices of the United States Supreme Court (the four-justice plurality, plus Justices Scalia, Souter, Kennedy, and Ginsburg) all agree that for a true threat to be constitutionally unprotected, it must be made with subjective intent to threaten (i.e., subjective intent that it be taken as a threat), and the Supreme Court's majority opinion defines unprotected true threats as statements in which "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" or speaks "with the intent of placing the victim in fear of bodily harm or death." (*Virginia v. Black*, *supra*, 538 U.S. at pp. 359-360.)

I conclude that in order for speech to be an unprotected true threat, the speaker must subjectively intend that the speech be taken as a threat. Only one published federal appellate decision has analyzed *Virginia v. Black* in detail, and it reached the same conclusion. (*United States v. Cassel* (9th Cir. 2005) 408 F.3d 622, 624, 630-633 ["We are therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat"]; see also *United States v. Magleby* (10th Cir. 2005) 420 F.3d 1136, 1139; *Ward v. Utah* (10th Cir. 2005) 398 F.3d 1239, 1249.)[5] Moreover, in their briefs on appeal, *both plaintiffs and defendants take the position that the subjective test is required*.

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[5] In a later Ninth Circuit case in which the defendant was convicted of threatening the President of the United States, the court interpreted the relevant federal statute in terms of the objective test; the court did not reach the issue of whether the subjective test was constitutionally required, *because the defendant did not raise any First Amendment issues*. (*United States v. Romo* (9th Circuit 2005) 413 F.3d 1044, 1051, fn. 6.) As a result, subsequent Ninth Circuit cases have treated the issue as a matter of intra-circuit conflict and have applied both the subjective test and the objective test. (See *United States v. Stewart* (9th Cir. 2005) 420 F.3d 1007, 1017-1018; *Fogel v. Collins* (9th Cir. 2008) 531 F.3d 824, 831.)

I also note that the federal decisions have not always characterized *Virginia v. Black* accurately. The Seventh Circuit, for example states that the Supreme Court's "plurality offered a new definition of true threats" and then quotes the definition requiring that "'the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence'" and acts "'with the intent of placing the victim in fear of bodily harm or death.'" (*United States v. Parr* (7th Cir. 2008) 545 F.3d 491, 499, italics omitted.) But that new definition was not offered by a mere plurality—it appears in Part III of Justice O'Connor's opinion and thus is part of the majority opinion of the Supreme Court. (See *Virginia v. Black*, *supra*, 538 U.S. at pp. 347, 359-360 [Justice O'Connor "delivered the opinion of the Court with respect to Parts I, II, and III"].) Justice O'Connor's opinion was joined in its entirety by Chief Justice Rehnquist and Justices Stevens and Breyer, and it was joined as to Parts I through III by Justice Scalia. (*Id.* at p. 368 (conc. and dis. opn. of Scalia, J.) ["I join Parts I-III of the Court's opinion"].) Parts I through III—including their new definition of true threats—are therefore the opinion of the Court and binding on all state and lower federal courts.

According to plaintiffs, "[i]t is the law that a threat cannot be penalized unless it is subjectively intended to intimidate and would put a reasonable person in fear of bodily harm."

Because the subjective test is constitutionally required, this court must first determine whether defendants have made a prima facie showing that R.R.'s post did not constitute a true threat under that test. If they have, then application of the objective test is irrelevant.

III. Defendants' Evidence and the Self-Contradiction Theory

In his declaration filed in support of defendants' anti-SLAPP motion, R.R. explains that he intended the post merely as a joke. If that is true, then he did not intend the post to be taken as a serious expression of intent to commit an act of unlawful violence, so it could not be a true threat under the subjective test. Defendants have therefore made a prima facie showing of constitutional protection, because R.R.'s declaration constitutes "evidence that, if credited, would be sufficient to sustain a favorable [ruling]." (*McGarry v. University of San Diego*, *supra*, 154 Cal.App.4th at p. 108.)

As already noted, however, the majority concedes that the record contains "conflicting evidence on the subject of intent" but claims "[i]t is a conflict borne of self-contradiction" which "we cannot resolve," so defendants lose. (Maj. opn. *ante*, at p. 30.) The majority's conclusion thus depends entirely on the validity and application of this self-contradiction theory.

There is indeed a doctrine relating to self-contradiction under California law, but it has nothing to do with this case. "[W]hen discovery has produced an admission or concession on the part of the party opposing summary judgment which demonstrates that there is no factual issue to be tried," a contrary declaration submitted by that party may be disregarded. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22 [hereafter *D'Amico*].) Under the *D'Amico* rule a party cannot defeat a summary judgment motion by submitting a declaration that retracts the factual admissions that the party made in discovery. "In a nutshell, the rule bars a party opposing summary

judgment from filing a declaration that purports to impeach his or her own prior sworn testimony." (*Scalf v. D.B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1522.)

That rule has no application here. The self-contradiction rule applies only when one sworn statement contradicts another sworn statement. (See, e.g., *Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1613 [deposition testimony]; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 593 [interrogatory answers]; Code Civ. Proc., § 2033.410, subd. (a) [responses to requests for admissions].) The record contains no discovery responses or other sworn statements from R.R. admitting that he intended that the post be taken as a threat. His declaration under penalty of perjury that he intended it as a joke therefore does not contradict anything he has previously stated under oath.

The majority, however, finds "self-contradiction" in three different places: (1) in R.R.'s post, (2) in R.R.'s "statements [in his declaration] about one-upmanship, peer pressure, and idiocy," and (3) in "[t]he actions of [R.R.'s] parents." (Maj. opn. *ante*, at p. 30.) The *D'Amico* rule cannot apply to the post, because it is an unsworn statement. The rule also cannot apply to the actions of R.R.'s parents, because they are unsworn, they are actions rather than statements, and they are not even R.R.'s actions (so they cannot possibly give rise to *self*-contradiction). But in addition to all of those dispositive problems, the more fundamental failing in the majority's argument is that none of the statements and conduct cited by the majority contradicts R.R.'s sworn declaration that he meant the post as a joke.

The majority contends, to the contrary, that this really is a matter of *self*-contradiction in *sworn* statements because "[t]he material facts and inferences drawn from portions of R.R.'s and his father's declarations are inconsistent with the material facts and inferences drawn from other portions of the same declarations." (Maj. opn. *ante*, at p. 30.) I disagree for two reasons. First, as a purely procedural matter, unsworn statements and conduct are not transformed into sworn statements merely by being *quoted* or *described* in a sworn declaration. R.R.'s post, for example, is an unsworn

statement. It does not become a sworn statement merely because R.R. quoted and discussed it in his declaration.[6] The same point applies to R.R.'s parents' prelitigation conduct. Second, as a substantive matter, the insuperable obstacle again confronting the majority's reasoning is that there are no self-contradictions here at all.

R.R.'s father does not contradict himself. He does not say, for example, both that he did and that he did not take R.R. to a psychiatrist, or that R.R. both has and lacks good character. Rather, R.R.'s father says that he took R.R. to a psychiatrist, and the majority *infers* that R.R.'s father believed R.R. intended the post to be taken as a genuine threat of violence, which according to the majority is "inconsistent" with the evidence R.R.'s father presents concerning R.R.'s good character. But there is absolutely no contradiction or inconsistency here, because *the majority's inferences are not the only possible or reasonable inferences*. It is perfectly consistent for R.R.'s father to maintain that (1) he took R.R. to a psychiatrist as a result of the post, but (2) he never believed R.R. meant the post to be taken as a genuine threat of violence, and (3) R.R. has engaged in conduct for years that indicates he is a person of good and nonviolent character who holds no negative attitudes towards homosexuals or homosexuality.

The consistency is obvious. R.R.'s parents punished him and had him evaluated by a psychiatrist, but that does not necessarily mean they believed he intended the post to be interpreted as a genuine threat of violence. Rather, they may have been punishing him for making such an offensive and repulsive joke, and they may have consulted a psychiatrist to learn what could have led their son to make such an offensive and repulsive joke, so that they could "insure that such conduct was never repeated and the root cause, if any, was dealt with immediately." None of this shows that they believed R.R. intended the post to be interpreted as a threat. Moreover, they might have been particularly surprised by R.R.'s having made such an offensive and repulsive joke

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[6] To illustrate: R.R. has never executed a declaration stating "I want to kill D.C. I declare under penalty of perjury that the foregoing is true and correct."

because, to their knowledge, R.R. had never before "engage[d] in inappropriate verbal behavior" and, on the contrary, had generally exhibited exemplary behavior in the past. Again, there is absolutely no contradiction or inconsistency.

Similar analysis applies to the purported inconsistencies in R.R.'s declaration. The majority infers from R.R.'s "statements about one-upmanship, peer pressure, and idiocy" that R.R. intended his post to be interpreted as a threat, but no such inference is necessary. On the contrary, those statements are naturally and reasonably read as indicating the opposite. The declaration states that R.R. viewed the posts that preceded his as "jesting," that he believed the authors of the posts were "competing to see who could be the most outrageous," and that he "decided to add [his] own message to the internet graffiti contest that was apparently going on." The declaration later refers to "one-upmanship" and R.R.'s regrets about having allowed "peer pressure" to make him "act[] like an idiot," but those statements refer back to the "competing" and "contest" that were described earlier in the declaration. They thus are fully consistent with R.R.'s "statements about his jocular intent." (Maj. opn. *ante*, at 30.) In effect, they confirm that he intended the post not as a threat but rather as an entry in a joke contest, which he idiotically entered as a result of the desire for peer approval. Here too, there is absolutely no contradiction or inconsistency.

On this score, the inferences that the majority draws from R.R.'s "statements about one-upmanship, peer pressure, and idiocy" merit careful scrutiny. First, the majority finds that R.R.'s statements "suggest[] he succumbed to a '"herd instinct."'" (Maj. opn. *ante*, at p. 29, quoting *Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741, 748 (hereafter *Dailey*).) Next, the majority claims that the Supreme Court has equated the "herd instinct" with "'the commonly known tendency of students to engage in *aggressive* and impulsive behavior which exposes them *and their peers* to the risk of *serious physical harm*.'" (Maj. opn. *ante*, at p. 29, italics in maj. opn., quoting *Dailey*, *supra*, 2 Cal.3d at p. 748.) Putting it all together, the majority infers that R.R.'s statements about peer pressure show that he was driven by a herd instinct and hence was engaging in aggressive behavior that exposed his peers to serious physical harm, so he

must have intended that his post be taken as a genuine threat of violence, which contradicts his own statements that he intended the post as a joke. (Maj. opn. *ante*, at pp. 29-30 [R.R.'s "statements about one-upmanship, peer pressure, and idiocy imply" that he "intended that his message be interpreted as a threat"].)

The majority's reasoning suffers from the following three defects, each of which is independently dispositive. First, the majority's own quotation from the Supreme Court, read in its entirety, demonstrates that the Court did *not* equate the "herd instinct" with "the commonly known tendency of students to engage in aggressive and impulsive behavior which exposes them and their peers to the risk of serious physical harm." (See *Dailey*, *supra*, 2 Cal.3d at p. 748; maj. opn. *ante*, at p. 29.)

Second, if the majority wants to understand what R.R. meant by "peer pressure," it need look no further than R.R.'s own declaration, which expressly (and correctly) defines it as "the desire for peer approval." The desire for peer approval can lead people (young or old) to do all sorts of things (such as making offensive jokes) that have nothing whatsoever to do with violence, threats of violence, aggression, or risks of physical harm. Consequently, R.R.'s statement that he gave in to peer pressure has *no tendency at all* to show that he intended his post to be taken as a genuine threat of violence. It shows only that he was motivated by the desire for peer approval—he wanted to impress his peers by entering a *really* offensive joke in the offensive joke contest that they were conducting.

Third, even if the Supreme Court had equated the "herd instinct" with "the commonly known tendency of students to engage in aggressive and impulsive behavior which exposes them and their peers to the risk of serious physical harm" (which it did not), and even if R.R. meant to incorporate that definition when using the term "peer pressure" in his declaration (which he did not), that would still have no tendency to show that he intended his post to be taken as a genuine threat of violence, because the definition speaks of the tendency to engage in "aggressive *and impulsive* behavior" that creates a "*risk* of serious physical harm." Impulsively chasing a soccer ball into the street, without first looking both ways for oncoming traffic, would be an example of this

tendency. That is, the "herd instinct" (or "peer pressure"), so defined, does not necessarily have anything to do with *aggressive, threatening, or violent intent*.

The majority's "herd instinct" discussion, based on R.R.'s "statements about one-upmanship, peer pressure, and idiocy," is the majority's sole basis for finding that R.R.'s declaration is self-contradictory, which in turn is the majority's basis for disregarding R.R.'s "statements about his jocular intent." (Maj. opn. *ante*, at p. 30.) In reality, there is no contradiction or inconsistency, and hence no self-contradiction, so the entire argument collapses.[7]

As support for its version of the self-contradiction theory, the majority does not cite *D'Amico* or cases applying it, or any California authorities at all. Instead, the majority cites a Ninth Circuit bankruptcy case and cases from Colorado, New York, Georgia, Wisconsin, Massachusetts (decided in 1939), and Indiana (decided in 1916). (Maj. opn. *ante*, at pp. 30-31.) Those authorities, whether taken separately or together, are inadequate to establish a point of California procedural law.

For all of the foregoing reasons, I conclude that the majority's self-contradiction analysis is erroneous and cannot support the majority's conclusion that defendants have failed to make a prima facie showing of constitutional protection under the subjective test. In short, the majority has not shown that R.R.'s post was an unprotected true threat, because the record contains evidence that, if believed by the trier of fact, would demonstrate that the post was not intended as a threat.

IV. The Factual Context and the Objective Test

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[7] Both in its discussion of the subjective test and elsewhere, the majority relies on various factual claims about "cyberbullying," which the majority has collected from various Web sites. (Maj. opn. *ante*, at pp. 24-25, 29.) No party has advanced the factual contentions on which the majority relies, no party has introduced the evidence (i.e., the Web sites) from which the majority derives those facts, no party has requested judicial notice of any of that material, and it is unlikely that it would be judicially noticeable even upon request. (See Evid. Code, §§ 451, 452.)

Under the objective test for true threats, the court must determine "whether it is 'reasonably foreseeable . . . to a speaker that the listener will seriously take his communication as an [expression of] intent to inflict bodily harm. This suffices to distinguish a "true threat" from speech that is merely frightening.'" (*Fogel v. Collins* (9th Cir. 2008) 531 F.3d 824, 831, quoting *Planned Parenthood v. Amer. Coalition of Life* (9th Cir. 2002) 290 F.3d 1058, 1076.) Applying that test, the majority finds that it was indeed reasonably foreseeable that R.R.'s post would be interpreted as an expression of intent to inflict bodily harm. Although I show below that the majority errs in concluding that the post was a true threat under the objective test, I emphasize that even if the majority were correct on this point, the failure of the majority's analysis under the subjective test would still be fatal to its decision.

Although the majority acknowledges that "[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners" (*United States v. Orozco-Santillan* (9th Cir. 1990) 903 F.2d 1262, 1265; see maj. opn. *ante*, at p. 18), in applying the objective test for true threats, the majority focuses on the language of R.R.'s individual post and the reaction of D.C.'s parents. (Maj. opn. *ante*, at pp. 25-28.) When R.R.'s post is viewed in light of the *entire* factual context, however, it becomes clear that no reasonable person would have foreseen that it would be interpreted as a serious expression of intent to inflict bodily harm. At a minimum, applying the prima facie showing standard, the record contains evidence that is sufficient to sustain a ruling in defendants' favor. Thus, under the objective test, defendants should prevail.

Plaintiffs' opposition to the special motion to strike included a declaration by plaintiffs' counsel, to which a number of exhibits were attached. The declaration describes one of the exhibits as "a true and correct copy of sequential posts provided by [plaintiffs] to Harvard-Westlake[.]" All of the quotations in the discussion below are taken from that exhibit, and all typographical and other errors are in the original. It should be emphasized at the outset that one need not find the posts funny, in good taste, or even excusable in order to recognize them as jokes and as protected speech.

The first post is from "dozer" and reads: "i think you are very sexy and i like the way you distinguis between your midnight brown hair and your golden brown eyes. However, your hair is black. Everything at midnight looks black you fool. H" No reasonable person would believe that the author of the post meant to be expressing a genuine belief that D.C. was "very sexy" or that the author genuinely liked the way D.C.'s Web site distinguished between his "midnight brown" hair and his "golden brown" eyes. The post is mocking and farcical from start to finish. It is a joke, and no alternative interpretation is reasonable.

The next post is from "dub": "like dub dozer has already said, i find you extremely good looking. your intro gets me off and you need to update your gallery so i have more pictures to jack off to . . . ill continue to visit this site every free period i have." The post is signed "secret admirer" and concludes "P.S. I am a boy." This post is the first to introduce the theme of homosexuality, though it does not suggest that "Danny Alexander" is gay. Rather, the post mockingly indicates that "Danny Alexander" is very attractive, but to "a boy." Again, it is obviously a joke.

The next post is from "Hoostain": "You are so gosh darn hot! Please meet me on the corner of sunset and bellagio at 1:34 a.m. tonight. You look so great in your pictures by the way. Call me [phone number omitted]. SEXY!!!!" The post is signed "that guy that hates you." Next, from "yourgay@aol.com": "you are a total fag, how does that cock feel in your butt." Next, from "HW Student": "Everyone knows about this webpage and were never going to live it down AHAHAHAHAHAHAHAHHAHSAHAHAHAHAHAHAHHA"

By this point, the running joke has changed from the suggestion that men are sexually attracted to "Danny Alexander" to the suggestion that "Danny Alexander" is attracted to men. Again, all of the posts are obviously just jokes making fun of "Danny Alexander." No reasonable person would believe, for example, that "Hoostain" (a.k.a. "that guy that hates you") was seriously proposing a rendezvous at Sunset and Bellagio.

Nor would a reasonable person conclude that "that guy that hates you" really hates D.C. The entire thread of posts is obviously a farce.[8]

One could reasonably conclude from just those first five posts, however, that at least some of the authors were Harvard-Westlake students. The second post appears to be from a student ("every free period i have"), and the fifth purports to be from "HW Student" and says "Everyone" (presumably everyone at school) "knows about this." At a minimum, the authors of the posts knew that "Danny Alexander" was somehow connected with Harvard-Westlake, and anyone who knew that D.C. was a student there would reasonably infer that the authors of the posts were students there as well. That is indeed the inference that D.C.'s parents correctly drew—they contacted the school the day after discovering the posts on D.C.'s Web site.

The next post is from "Hairy Back of the Legs Man" and reads: "Oh my god! OHHHHHHHHHHH! You are so fucking orgasmic. I'm wet . . . oops i peed my pants. You look exactly like Britney! EXACTLY! Your career is bound to go NOWHERE . . . but up A BUTT! In conclusion, you suck nuts. Have a fruity." After a brief and unintelligible post, the next is from "penewanker": "I am just stunned at how well you have been doing [D.C.]. I can't wait until your first hit single comes out in whenever. I have always known since the day your mom and dad had sex that you or they would be a star. Obviously . . . I was wrong but I still hope you can keep it on the FREAKY SIDE![9] You got what it takes girlfriend . . . shoot your stuff at the world."

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[8] I am not unmindful of the emotional harm that this kind of mockery can cause, particularly when done en masse by the target's schoolmates. The issue here, however, is not whether D.C. suffered emotional harm as a result of the posts. (Evidence in the record (see *post*) indicates that he did not.) The issue is whether a reasonable person would have anticipated that R.R.'s post would be interpreted as a genuine threat of violence.

[9] Later posts appear to indicate this is a reference to a song by "Danny Alexander" entitled "Freakyside" (or "On the Freaky Side").

Again, the farcical nature of these posts hardly needs to be pointed out. No reasonable reader could have interpreted them as anything but jokes.

After two inconsequential posts, the next is from "Fuck You Queer Bitch": "Is this kid for serious . . . you take it in the ass just about every minute of every day. Your music sucks and you eat the big wang. Next feature film by this kid is gonna be a gay porno." Next, from "you eat weiner": "BOYS!!! THAT is what you like. i don't get it man . . . on ur website, it says ur name is Danny Alexander, but i thought it was Fruity McGayGay? oh yeah, did i say you like boy penis?" Next, from "You Love Cock": "You are the biggest fag in the hw class of 06 exept for [names omitted], or so we thought. . . . this definetly puts u over the top as undeniabley the biggest cocksucker at hw maybe in the schools history, thank you though . . this will give everyone laguhs for a long long time [D.C.], you're the man (that likes men)." Next, from "[D.C.]smokespole@hotmail.com": "[D.C.], I really enjoy all of your work. You are an inspiration to all and your lyrics are truely amazing. Your loose caboose accounts for your mastry of sword swallowing. I think you should change your name from danny alexander to meat-pole tarzan because you are a man who understands the needs of a man," signed "Fuck you in your fucking fuckhole, me."

Up to this point, there is no denying that all of the posts, however unfunny, sophomoric, and repulsive, are nothing but farce. The next post, from "Disturbed Senior," steps up the level of nastiness: "Hey [D.C.], i was reading some of these posts, and it looks like your off to a great start as far as collecting a fan club goes, your career is going really well . . . anyways i did some research and the bridge that goes over the 405[10] just below mulholland gives you enough height to make a it a quick and nearly painless death . . . i really hope things work out for you . . ." Two more posts follow, from "I

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[10] The "405" is a freeway in the Los Angeles area.

HATE FAGS," which simply repeat the words "HEY FUCKER" and "YOU ARE REAL GAY."

The next post, from "DAN JUSTICE," is the first to raise the rhetoric to a level that could, when considered out of context, be construed as a threat. It says "HEY [D.C.], I KNOW A GOOD FAG WHEN I SEE ONE. I LIKE WHAT I SEE, LET'S GO GET SOME COFFEE. faggot im gonna kill you" and is signed "H-W student."

There is no question that the words "faggot i[']m gonna kill you," when considered in isolation, are threatening. But one could say the same thing about the words of the defendant in *Watts v. United States* (1969) 394 U.S. 705, who was convicted of threatening the life of the President of the United States with the words: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." (*Id.* at p. 706.) The Supreme Court concluded, however, that the statement was mere "political hyperbole," particularly when considered in light of "the reaction of the listeners," all of whom "laughed after the statement was made." (*Id.* at pp. 707-708.)

So how did the audience react to the purported threat from "DAN JUSTICE"? The posts quoted so far indicate that at least some of the authors had read prior posts before writing their own, and later posts confirm that pattern. Moreover, any number of other Harvard-Westlake students who did not post might nonetheless have been reading the thread of posts. How did they all react? Not one of them posted any message of alarm concerning the post. No one said "Did you see that death threat? Somebody better warn [D.C.]," or anything of the kind. Similarly, the record contains no evidence that any Harvard-Westlake students contacted the school's administration to alert them to the purported death threat, even though the thread of posts was obviously being read and at least partially written by Harvard-Westlake students, and even though "DAN JUSTICE" himself (or herself) signed the post "H-W student." Indeed, as noted already, the connection between the posts and Harvard-Westlake students was sufficiently obvious that D.C.'s parents contacted the school the day after discovering the posts. But *no one who actually participated in the thread of posts ever manifested any concern that any of the threatening language might be serious*. In short, there is no evidence that any writers

of any of the posts, or any readers other than D.C.'s parents (and the purported expert witness they have retained in this litigation[11]), perceived it as a genuine threat. Everyone could tell it was a joke—tasteless, repulsive, and not at all funny, but still a joke.

Accordingly, rather than manifesting any kind of shock, alarm, or even concern, the posts following the one by "DAN JUSTICE" continued the farcical and jesting approach of their predecessors. The next is from "body": "Dear [D.C], Hi!!! im the representative for the student body at harvard westlake, and on behalf of my fellow classmates, I personally feel that it is my duty to tell you how i respond to your life. You, my friend, just might fall under the category of highly unstraight. Not only are you a massive fagmo, but must absolutely quit showing your face at my school. You are now officially wanted dead or alive, and when we find you, we will pounce on that like ur [name omitted]. Bottom line is that you need to be stopped, and if you resist, i will personally unleash my manseed in those golden brown eyes that you value so greatly. I hope you take what I say with the highest regard, and I am looking forward to your death. Thanks." Again, certain hyperbolic themes are sounded ("quit showing your face at my school," "wanted dead or alive," "I am looking forward to your death"), but the post as a whole makes it clear that it is all a joke. The author is obviously not writing as a representative of the Harvard-Westlake student body and, for example, does not really intend to "unleash [his] manseed" in anyone's eyes if "Danny Alexander" fails "to be stopped." The entire post, however repellant and unfunny, is mere juvenile mockery and absurd rhetoric. Again, no one (other than D.C.'s parents) appeared concerned or alarmed.

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[11] It is not clear that expert testimony would be admissible on this issue at all. The question of whether a reasonable person would interpret the post as a genuine threat is a quintessential jury question, and there is no reason to believe that plaintiffs' retained witness has any more expertise than the jurors concerning the manner in which a reasonable person would interpret the post.

The next post purported to be from a woman and states "[D.C.], youre the shit, keep drawing scratch board pics of me in art class . . love you." Next, from "Music Pro": "Hey [D.C.], I'd say by the looks of it, all those 'fag' posts were written by the same pitifully untalented pimply-faced loser blow-hole and that you should not let it (meaning the asshole) bother you in the least. Just keep on doing your thing and let the jealous losers rant. He is obviously wishing he had your talent and craving a little man meat himself." Now the joke has gone from (1) men find "Danny Alexander" attractive, to (2) "Danny Alexander" is gay, to (3) the people who are criticizing "Danny Alexander" are gay (and jealous of his talent).

The next four posts all appear to be parodies of fan mail. From "Kandy Kane": "Hi [D.C.]! UR the best! So KOOOL. My friend & I luv ur voice. I so totally don't think you look gay cuz ur so KUTE! UR like one of my favorite singers! Along with Justin, of course. Love, Kandy." From "Mandy": "Hi [D.C.]! I saw you on your disney tour! I can't wait for your next movie to come out. Is is gonna be in real live theatres? Im gonna buy it on video when it comes out. I hope you like hollywood. Maybe Ill move there somedday and be a singer too. I love to sing. Maybe you could give me some ttips one day. Say hi to the boy from sleepover for me. He is really dreamy. but not as dreamy a syou. I love uyou [D.C.]. love mandy (p.s. Is alexander your middle name or your last name? if its your middle name would you please tell me your last name?)" From "eLiZaBeTh": "I LOVE YOU I LOVE YOU." From "MEGHAN": "FREADYSIDE IS MY FAVORITE SONG EVEERRRRR!!!!!!!!!!!! i LOVE YOU! I REALLY HOPE YOU ARENT REALLY GAY I DONT THINK YOU ARE BUT I THINK YOUR THE BEST. i AGREEE WEITH MANDY I CNAT WAIT FOR YOUR MOVIE TO COME OUT I LOVE YOU I LOVEYOU I LOVE YOU AND I ALSO AGREE WITH THE OTHER PERSOIN WHO SAID THAT <u>ONE</u> GUY WHO SAID ALL THOSE MEAN THINGS IS JEALOUS. IT CANT BE A BUNCH OF DIFFERENT PEOPLE BECAUSE TEY ALL SOUND THE SAME HES SO STUPID DONT LET IT GET TO YOU AT LEAST I LOVE YOU AND A LOT OF MY FFREINDS LIKE YOU A LOT TOO. \I LOVE YOU DISNEY IS SO SMART FOR

RECONGINZING YOUR TALENT YOUR SO COOL LOVE LOVE LOOVE YOU [D.C.]"

The next post continues the theme of mockery through feigned admiration: "seriously [D.C.], you are such an amazing and talented person. i love you so much and when you get sick of singing and acting you should be an artist because you are unbelievable at that too. especially scratch board pictures of [name omitted] and large breasted prostitutes. ;-) this weekend we're chilling for sure. love, [name omitted]."

Then, at last, comes a post from an author identified only as "Person," who we now know was R.R.: "Hey [D.C.], I want to rip out your fucking heart and feed it to you. I heard your song while driving my kid to school and from that moment on I've wanted to kill you. If I ever see you I'm going to pound your head in with an ice pick. Fuck you, you dick-riding penis lover. I hope you burn in hell." Like most of the earlier posts, this one is vulgar and repulsive. Although it echoes the purportedly threatening themes found in some earlier posts, it also resembles its predecessors in that it was not reasonably foreseeable that the post would be taken seriously. The author of the post purports to be a father who has wanted to kill "Danny Alexander" ever since hearing his song on the radio. The majority agrees that it would be unreasonable to interpret the post as a genuine threat motivated by dislike of the song, but the majority fails to explain how any interpretation of the post as a genuine threat could be reasonable, given the context in which it occurred.

No subsequent posts manifest any concern or alarm about the purportedly threatening character of R.R.'s post. Again, there is no evidence that anyone (other than D.C.'s parents) thought it necessary to alert the school or the police that D.C. might be in danger. Instead, the posts continue in exactly the same manner as before, joking and making fun of "Danny Alexander."

The next post is from "G-miK": "Your worse than Won-G . . . . . you don't have a music video with hot bitches you probably made this site yourself you dont have golden or midnight bullshit eyes it seems like your growing a white-man afro . . . pukeen me salat! (translation: nigga plz!) your juss a silly lil cracka that needs a couple bullets in the

chest 50-cent style go eat cock." The next post, from "anonymous-G," continues in a similar vein: "correction pukeen me salat is toss my salad niega pagousta = nigga please but ur still a faggot . . . . . i like that call me [phone number omitted] P.S i am a man."

The immediately following posts confirm the complete and incessant lack of seriousness shown throughout the thread of posts. The next post is from "hoo flung pu": "hello sir. i am from the hw gay-straight alliance, and we were wondering where you were on the club day? you didnt sign up like last year . . . were you singing? you have a lovely voice. were you acting? your midnight brown hair is so captivating . . . We missed you! well we all wanted to know, are you still taking [male name omitted] to semiformal? you two make such a delicious combo! delicious like cock in your mouth, boy. my beard is longer than your dick. asian guys be walkin around like 'DAMN HE HAS A SMALL PENIS'."

Next, from "Sorry": "[D.C.], I am that guy who made all of these hate posts. I now realize after reading Music Pro and meghan's posts that i am just a fat, pimply looser craving the cock mystef. So, with that i wanted to say i'm sorry; sorry you're such a boner-biting brown-clown. You are a highly revered flagpole sitter for the balogne cavalry. You are a rump-ranger, uphill gardener, ring-raider, anal pressure washer, cum dumpster. You always enjoy getting a clap from the back row. Hope you continue to put the shmock on your cock cuz you don't want to get those speed bumps. P.S. Call me for a nice little game i call hide the meat in the fridge P.P.S. These posts are all from different people."

The next post, from "cell phone addiction," makes fun of D.C. for allegedly being "Glued to [his] cell phone" and also reveals his real name. The next is from "crazed fan" and consists of over-the-top adoration ("ive always loved your work" etc.) punctuated with parenthetical accusations of homosexuality and expressions of hostility ("you are an oversized faggot" and "i just want to hit you in the neck . . . hard" etc.). The next, from "A Secret Admirer" likewise mocks D.C.'s cell phone use. The next post says merely "you damn democrat!"

The next, from "hw," appears to be a piece of sincere encouragement: "dear [D.C.], i just wanted to say that dont listen to anything that these mean kids at our school are writing. you are one of the sweetest boys at school and its really cool that you are goign after your dreams. the best of luck to you!" Again, it is noteworthy that even this (apparently) sympathetic author, who had clearly read the earlier posts, showed no alarm or concern regarding the putative threats they contained and did not contact the Harvard-Westlake administration or the police to warn them about any danger to D.C.

The next post, from "yo," returned to the mockery and taunting: "nope dont listen to her [D.C.] end it now." The next post is from "God": "[D.C.], this isn't why I created man. Stop ruining my plan, gayass." A later post, from "Mr. Manager," purported to be from "Danny Alexander's" manager, who claimed to be tired of lying about how good "Danny's" voice is. Another post purported to be from "Clive Davis" (a legendary figure in the popular music industry), claiming he wanted to sign "Danny Alexander" and asking for a call back at "(213) You-Are-Totally-Fucking-Gay." The final post on the printout is from "Ky Jelly Representative": "Hey [D.C.], im so excited to finally speak to you. We here at Ky Jelly we wanted to know if would be the spokesperson for our new anal lube. You obvisouly get fucked in the ass more than anyone else on earth. So who better to be a spokesperson than you. fucking ass clown. nigga what?"

Reading the sequence of posts from beginning to end, no reasonable person would foresee that any of it would be taken as a serious threat of violence. No reasonable person would believe that (at least) four people were sincerely threatening to take D.C.'s life. Taken together, all of the posts amount to nothing but a lot of adolescent sex-obsessed hyperbolic derision, sarcasm, and repulsive foolishness—"Your music is sooo good and I love you sooo much," "You're a really attractive guy—to boys!", "You're gay," "No, the people who are calling you gay are gay," "You have a small penis," and so forth. Even the authors of sympathetic posts, like "hw" and "Music Pro," did not manifest any belief that D.C. might actually be in peril. Rather, they merely advised him to ignore the mockery ("dont listen to anything that these mean kids at our school are

writing"). Again, there is no evidence that anyone but D.C.'s parents contacted the school's administration or the police to warn of any potential danger to D.C.

Indeed, the record contains evidence that D.C. himself did not take any of the posts seriously. A declaration submitted in support of an anti-SLAPP motion filed by a different defendant states that D.C. "has been in Los Angeles openly socializing with friends in Westwood" and that D.C. admitted to a friend "*that he was not traumatized by the incident and . . . thought that his father was crazy for making a big deal of the episode when he didn't care*." Viewing R.R.'s post in the entire factual context, including the reaction of the entire audience, no reasonable person could have foreseen that the post would have been taken as a serious expression of intent to commit an unlawful act of violence. It was just one more vile joke in a string of vile jokes.

The majority's analysis fails to support a contrary conclusion. The first part of the majority's analysis dwells exclusively on the language of the post itself, ignoring the context. (Maj. opn. *ante*, at pp. 25-26.) No rebuttal of that analysis is necessary, because the majority concedes that "[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." (*United States v. Orozco-Santillan*, *supra*, 903 F.2d at p. 1265; see maj. opn. *ante*, p. 18.)

Next, the majority relies on D.C.'s father's reaction to the posts as evidence that R.R.'s post constituted a true threat, but such reliance is misplaced. The majority mentions that D.C.'s father shut down the Web site and contacted the police, who in turn advised him to keep D.C. out of school until an investigation was completed. First, the evidence does not reveal precisely what the father told the police that prompted their recommendation. Second, the police later concluded that the posts, including R.R.'s, did not constitute genuine threats.[12] D.C.'s parents allowed D.C. to return to Harvard-

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[12] The majority states that the conclusions reached by the police "are not controlling under the true threat analysis." (Maj. opn. *ante*, at p. 33.) Although the police's opinion

(footnote continued on next page)

Westlake for only one class before withdrawing him from the school and enrolling him in a school in northern California, to which the entire family then moved. The majority says D.C.'s parents took such drastic measures only "[w]hen the police investigation dragged on" (maj. opn. *ante*, at p. 27), but D.C.'s father's own declaration states that they enrolled D.C. in his new school *just one week* after informing Harvard-Westlake and the police about the posts—D.C.'s father reported the posts on October 8, and D.C. was enrolled in his new school in northern California on October 15. The majority also mentions that "D.C.'s father had to travel back and forth from the family's new residence to Los Angeles for business purposes." (Maj. opn. *ante*, at p. 27.) D.C.'s father's overreaction to the post does not change it from a bad joke into a true threat, however, and the hardships borne by D.C.'s father are not relevant to the true threat analysis.

Regarding the rest of the factual context, the majority argues that although "the majority of posts may have been nonthreatening," that "does not lessen the effect of R.R.'s post," because "[t]he law did not obligate plaintiffs to view all of the posts as having the same purpose or intent." (Maj. opn. *ante*, at p. 27.)[13] Also, according to the

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(footnote continued from previous page)
that the post was protected speech is not controlling, it does constitute evidence that a reasonable person would not have thought the post was a genuine threat of violence.

[13] After acknowledging that plaintiffs admit "they perceived only six of the 34 derogatory posts as serious threats of bodily harm," the majority states that "[a]ccordingly, plaintiffs sued only six students." (Maj. opn. *ante*, at p. 27.) Plaintiffs, however, sued at least one student whose posts, *according to D.C.'s father*, "do not look threatening," and D.C.'s father states that "[s]ome of the postings including threats of violence still do not have identified authors." Also, in addition to the six named student defendants, plaintiffs sued "STUDENT DOES 1 through 50" and "PARENT OF STUDENT DOES 1 through 100," and the complaint describes at length the discovery plaintiffs intend to conduct in order to identify everyone involved in the Web site incident. Thus, contrary to the majority's implication, plaintiffs did not sue only the people who (purportedly) threatened D.C. Plaintiffs sued everyone they could identify, including students who plaintiffs admit did not threaten anyone, and plaintiffs expressed the intention of using discovery to widen the net still further.

majority, "that students *other than* R.R. found the posts *as a whole* to be funny or amusing does not suggest how plaintiffs should have viewed R.R.'s post in particular." (Maj. opn. *ante*, at p. 28.) The objective test, however, has nothing to do with how *plaintiffs* should have viewed (or were "obligate[d]" to view) R.R.'s post. Rather, the test asks whether a *reasonable person*, considering R.R.'s post in its entire factual context, would foresee that it would be interpreted as a serious threat of violence. Moreover, the other posts are relevant not just because most of them are, even when considered out of context, unambiguously nonthreatening. They are also relevant because they show that *no one involved in the thread of posts viewed R.R.'s post as a serious threat*.

As the majority recognizes and the case law reflects, the law requires this court to consider R.R.'s post in its full factual context, including the reaction of the audience, in determining whether the communication was a true threat under the objective test. (See, e.g., *United States v. Orozco-Santillan*, *supra*, 903 F.2d at p. 1265.) The majority's own analysis implicitly adopts that approach by inferring from the reaction of D.C.'s parents that it was reasonably foreseeable that R.R.'s post would be taken as a threat. That analysis, however, neglects both the content of the other posts and the reaction of everyone who read them (other than D.C.'s parents). When viewed in light of the entire context (as it must be), R.R.'s post appears as just one more link in a chain of vulgar, adolescent rants, and no one but D.C.'s parents appears to have had any trouble figuring that out. No reasonable person would have foreseen that the post would be taken as a genuine threat, and the extreme reaction of D.C.'s parents (pulling their son out of school and enrolling him in a different school hundreds of miles away, just one week after discovering the posts), which D.C. himself described as "crazy," does not constitute evidence to the contrary.

Moreover, the majority at most succeeds in showing that the record contains evidence that, if credited, would be sufficient to sustain a ruling in plaintiffs' favor on the issue. That would mean that plaintiffs have made a prima facie showing that R.R.'s post is *not* protected, but it would *not* mean that defendants have failed to make a prima facie showing that the post *is* protected. The central point is that, under the prima facie

showing standard, it does not matter whether the record contains some evidence that might support the conclusion that the speech is unprotected. Defendants do not need to prove that the speech is protected as a matter of law. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at pp. 94-95; *Soukup*, *supra*, 39 Cal.4th at p. 286.) Rather, they need only make a prima facie showing of constitutional protection. The presence in the record of evidence that might support a contrary inference does not mean they have failed to carry that burden, and consideration of the entire factual context shows that they have carried it. And again, plaintiffs expressly concede that "[a]s to each of the elements of a 'true threat' . . . there is here conflicting evidence."[14]

The record contains evidence from which a reasonable trier of fact could conclude that it was not reasonably foreseeable that R.R.'s post would be taken as a serious expression of intent to inflict bodily harm. I therefore conclude that defendants have carried their burden of making a prima facie showing of constitutional protection under the objective test for true threats.

V. Hate Crimes and Attorney's Fees

Toward the end of its free speech analysis, the majority explains the rationale for its decision as follows: A defendant who prevails on an anti-SLAPP motion is entitled to

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[14] Some of plaintiffs' evidence might eventually turn out to be difficult to credit. For example, the majority relies on D.C.'s father's statements that "after the postings people approached [D.C.] . . . and asked him about being gay" and that "[i]t was clear that others that read the posts believed the comments about his sexual orientation and felt concern for him and his safety." The declaration says nothing more about any of this, about who these "people" and "others" are, what they said, or how it was "clear" that they believed D.C. was gay and in danger. D.C.'s father's declaration also states that D.C. "started to suffer from frequent and severe panic attacks." What is notably absent from the current record, however, is a declaration from D.C. himself. As already noted, the record contains a declaration indicating that D.C. has admitted he "was not traumatized by the incident" and "thought that his father was crazy for making a big deal of the episode when he didn't care." (Italics omitted.) And it is difficult to believe that any reasonable person reading the posts on D.C.'s Web site could have taken them as serious, credible, or accurate reports of his sexual orientation.

an award of attorney's fees, but "[i]n a case alleging statutory hate crimes and related common law claims, the courts should ensure that the anti-SLAPP statute does not discourage victims from seeking relief." (Maj. opn. *ante*, at p. 32.) Thus, according to the majority, in order to avoid deterring hate crime victims from seeking redress for their injuries, "[i]n a case alleging statutory hate crimes" the court should place a thumb on the scale against granting an anti-SLAPP motion and consequent award of attorney's fees. Moreover, according to the majority, a court "in a case like this one" should endeavor to make sure that the anti-SLAPP motion is denied *at the first step of the analysis*, so that the plaintiffs are not put to the "'grossly unfair burdens'" of showing that their claims are prima facie meritorious. (Maj. opn. *ante*, at p. 32, quoting *Flatley v. Mauro* (2006) 39 Cal.4th 299, 318 (hereafter *Flatley*).) I conclude that the majority's rationale fails on multiple levels.

It would make no sense to accord preferential treatment to every plaintiff who merely *alleges* a hate crimes claim, because anyone can *allege* any claim, including a hate crimes claim, regardless of whether the claim has any merit. Those who allege meritless claims, including hate crimes claims, do not deserve any special solicitude from the courts. On the contrary, the Legislature has provided that those who allege meritless claims targeting speech in connection with issues of public interest deserve to be stopped in their tracks and forced to pay their opponents' attorney's fees. (See Code Civ. Proc., § 425.16.)

Presumably aware that a rule of preferential treatment for every plaintiff who alleges a hate crimes claim would be insupportable, the majority qualifies its rationale in the following way: In "a case like this one," where "the communication at issue appears on its face to be an intentional threat of bodily harm and was reasonably interpreted as such by the recipient," the court's analysis at the first step of an anti-SLAPP motion should disregard evidence that the defendant's innocent intent made his speech constitutionally protected. (Maj. opn. *ante*, at p. 32.) Thus, not *every* hate crime plaintiff is entitled to avoid the second step (at which point the plaintiff would be required to make a prima facie showing of merit) by having the court disregard the defendant's evidence of

intent at the first step. Rather, that special protection is accorded only to plaintiffs like those in this case, because "the communication at issue appears on its face to be an intentional threat of bodily harm and was reasonably interpreted as such by the recipient." (Maj. opn. *ante*, at p. 32.)

The problem with the majority's approach is this: *How does the majority know those conditions have been met?* What standard of proof is being applied? To what evidence? Who has what burden?

The difficulties with the majority's approach become clearer if we consider each condition—(1) "the communication at issue appears on its face to be an intentional threat of bodily harm" and (2) the recipient "reasonably interpreted" it as a threat—in more detail. Is the "communication at issue" being considered in context or out of context? The phrase "on its face" presumably means "considered out of context," but why should a court be interested in considering the communication out of context? For purposes of interpreting purportedly threatening speech, context is everything. "I'm going to kill you" could be a death threat or a piece of friendly banter, depending on context. As a result, a plaintiff could easily base a frivolous hate crimes claim on a communication taken out of context. It is consequently impossible to understand why, *before reaching even the first step of the analysis*, a court should consider the communication *out of context* and then, if it appears to be a threat, use that as a basis to favor the plaintiff in the remainder of the analysis.[15]

The majority's approach to the second condition—that the recipient "reasonably interpreted" the communication as a threat—raises even more serious concerns. Putting aside the issue of reasonableness, which is ordinarily a question of fact (see, e.g., *Smith v.*

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[15] I say that the majority does all of this "before reaching even the first step" because the majority relies on these conclusions—that the communication on its face appears to be a threat and was interpreted as such by the recipient—as the basis for its approach to the first step (namely, disregarding R.R.'s evidence concerning his intent).

Selma Community Hospital (2008) 164 Cal.App.4th 1478, 1509), how does the majority know that D.C. interpreted R.R.'s post as a threat of bodily harm? *The record contains no declaration from D.C.*, so how does the majority know? The majority cannot be relying on the allegations of the complaint, because, again, anyone can allege anything. The only other possible basis for the majority's conclusion is the declaration of D.C.'s father, who states that (1) apart from attending one class period, D.C. "did not return to the school due to fear for his life," and (2) "due to the threats . . . [D.C.] started to suffer from frequent and severe panic attacks which required medical attention, and from which he still suffers occasionally to this date." Although those statements might contain some ambiguity, they do seem to say that, according to D.C.'s father, D.C. believed his life was threatened. I will therefore assume the statements do mean D.C. interpreted the post as a threat, so they do constitute evidence that supports the majority's conclusion.

The problem is that *the record contains contrary evidence as well*. As already noted, the record contains a declaration stating that D.C. told a friend (identified by name) that "he was not traumatized by the incident and . . . thought that his father was crazy for making a big deal of the episode when he didn't care." (Italics omitted.) Those statements might contain some ambiguity as well, but they do seem to say that D.C. did not believe his life was threatened.

So we have a conflict. According to D.C.'s father, D.C. believed he was threatened. According to a friend of D.C.'s (identified by name), D.C. said he did not believe he was threatened. Faced with that conflict, the majority concludes that D.C. did in fact interpret R.R.'s post as a threat. And that is the majority's rationale for disregarding, *at the first step of the anti-SLAPP analysis*, R.R.'s evidence concerning his intent. (Maj. opn. *ante*, at p. 32.) The bottom line is that the majority believes D.C.'s father, so the majority reasons that it need not take seriously what R.R. says.

As the foregoing discussion illustrates, the source of the difficulties with the majority's approach is that *the majority is engaging in a partial evaluation of the merits before even getting to the first step of the analysis*. The majority concludes that the post "appears on its face to be an intentional threat of bodily harm" (a merits issue) and "was

reasonably interpreted as such by the recipient" (also a merits issue), and the majority then relies on those conclusions to shape its analysis of the first step by disregarding R.R.'s evidence of his intent. But that approach turns the well-established procedure for analyzing anti-SLAPP motions on its head, because the evaluation of the merits of the plaintiff's claims is supposed to take place at the *second* step, not at the first (or before the first). (See, e.g., *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Moreover, the merits evaluation that is conducted at the second step is itself subject to well-established rules—the plaintiff has the burden of introducing evidence that, if credited, would be sufficient to support a favorable judgment. (See, e.g., *Taus v. Loftus*, *supra*, 40 Cal.4th at pp. 713-714.) For the majority's pre-first-step partial evaluation of the merits in an alleged hate crimes case, however, there are no such well-defined procedural constraints.

One final observation concerning the majority's discussion of its rationale: In explaining the purportedly undesirable consequences of taking seriously the defendant's evidence of intent "in a case like this one," the majority quotes the Supreme Court as stating that to require a plaintiff, this early in the litigation, to make a prima facie showing of merit would constitute "'grossly unfair burdens to impose on a plaintiff who is himself the victim of the defendant's [wrongful] activity.'" (Maj. opn. *ante*, at p. 32, alteration in maj. opn., quoting *Flatley*, *supra*, 39 Cal.4th at p. 318.) The quotation, however, is from *Flatley*, *supra*, in which the Supreme Court explained that it would be "grossly unfair" to force the plaintiff, early in the litigation, to make a showing of prima facie merit *if the conceded or conclusively established facts already showed the defendant's conduct was illegal as a matter of law*. (*Flatley*, *supra*, 39 Cal.4th at pp. 317-318, 320.) The Supreme Court never suggested that the burdens imposed at the second step of the anti-SLAPP analysis would be grossly unfair—or unfair at all—in any other circumstance. The majority's quotation from *Flatley* in this context thus strongly suggests that, before reaching the first step of the analysis, the majority has assumed that

R.R.'s conduct was unlawful and, hence, that plaintiffs' claims have (at least partial) merit.[16]

I conclude that the majority's rationale for its approach does not succeed. A merely *alleged* hate crimes claim cannot possibly serve as a basis to alter the analysis in plaintiffs' favor, and any evaluation of the claim's merits should take place at the second step, as the Supreme Court has repeatedly held. In sum, defendants' anti-SLAPP motion should stand or fall on its intrinsic merits, not on the basis of procedural shortcuts created by the judiciary to favor certain types of claims.

VI. Speech in Connection with an Issue of Public Interest

The majority concludes that defendants have also failed to show that R.R.'s post was in connection with an issue of public interest. (Maj. opn. *ante*, at p. 34.) Again, I disagree.

As the majority acknowledges, the anti-SLAPP statute expressly provides that it "shall be construed broadly." (Code. Civ. Proc., § 425.16, subd. (a); see also *Nygård, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1039-1042 [hereafter *Nygård*]; *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 236.) In keeping with that statutory command, the case law sets an extremely low threshold for meeting the requirement that the speech be in connection with an issue of public interest. For purposes of the statute, an issue of public interest is "*any issue in which the public is*

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[16] In other ways, however, the majority opinion reflects recognition that *Flatley* does not apply here. Plaintiffs have argued both in the trial court and on appeal that defendants' anti-SLAPP motion should be denied under *Flatley* on the ground that the conceded or conclusively established facts show that R.R.'s post was illegal. If the majority agreed with that argument, then the majority's entire true threat analysis would be superfluous. But instead of agreeing with plaintiffs' argument, the majority never mentions it, presumably because the majority understands that the conceded and conclusively established facts do not show that R.R.'s post was illegal. As a result, the majority's own reasoning shows that *Flatley* and its remarks about "grossly unfair burdens" have nothing to do with this case.

interested." (*Nygård, supra*, 159 Cal.App.4th at p. 1042.) "In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest." (*Ibid.*) As a result, issues of public interest include matters that could be described as mere "'celebrity gossip'" or "'tabloid' issues." (*Id.* at pp. 1039, 1042.) As the majority also acknowledges, "[a] public issue is implicated if the subject of the statement or activity underlying the claim . . . was a person or entity in the public eye[.]" (*Jewett v. Capital One Bank* (2003) 113 Cal.App.4th 805, 814; see maj. opn. *ante*, at pp. 34-35.)

Two cases illustrate the point. In *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798 (hereafter *Seelig*), the plaintiff had been one of 50 contestants on the television show *Who Wants to Marry a Multimillionaire*. (*Id.* at p. 801.) "During her time on the air, she stated only her name, that she was from San Francisco, and that she worked in sales at KFRC, a San Francisco radio station. Her total participation in the television broadcast lasted less than one minute." (*Ibid.*, fn. omitted.) The hosts and producer of a morning radio show made derisive comments about the plaintiff, who then sued. (*Id.* at pp. 802-806.) The Court of Appeal concluded that the plaintiff, by participating in the television show, had "voluntarily subjected herself to inevitable scrutiny and potential ridicule by the public and the media." (*Id.* at p. 808.) Because "[t]he offending comments arose in the context of an on-air discussion . . . about a television show of significant interest to the public and the media," the comments were in connection with an issue of public interest. (*Id.* at pp. 807-808.)

Similarly, in *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337 (hereafter *Hall*), the plaintiff was the elderly former housekeeper of Marlon Brando. (*Id.* at p. 1342.) When Brando died and reports revealed that he had named the plaintiff in his will, a reporter for the television show *Celebrity Justice* visited her (she resided in a retirement home and "had been suffering from dementia and Alzheimer's disease for several years") and videotaped an interview with her, part of which was included in a segment broadcast that evening. (*Ibid.*) The entire segment lasted "approximately three minutes." (*Ibid.*) Because "[t]he public's fascination with Brando and widespread public interest in his

personal life made Brando's decisions concerning the distribution of his assets a public issue or an issue of public interest," the plaintiff "became involved in an issue of public interest by virtue of being named in Brando's will." (*Id.* at p. 1347.)

Given that legal background, the majority's analysis of whether R.R.'s post was in connection with an issue of public interest is not easy to understand. The majority concedes that according to plaintiffs themselves "D.C. had a record album with a planned release date, had broadcast a song worldwide via satellite radio, and had played the leading role in a feature film presented at an internationally acclaimed film festival. He also toured under the auspices of a nationally recognized radio network." (Maj. opn. *ante*, at p. 38.) But the majority nonetheless concludes that "[t]here is no evidence that [D.C.] was a nationally known singer or actor even under his pseudonym, Danny Alexander." (Maj. opn. *ante*, at p. 38.) There are two problems with that claim. First, the facts just described do constitute circumstantial evidence that D.C. was a nationally (and perhaps internationally) known singer or actor. Second, the majority is again holding defendants to an incorrect legal standard—there is no requirement that in order for a communication to be in connection with an issue of public concern, the subject of the communication must be *nationally* known. Rather, as the majority elsewhere concedes, it is sufficient for the subject of the communication to be "a person or entity in the public eye." (*Jewett v. Capital One Bank, supra*, 113 Cal.App.4th at p. 814; see maj. opn. *ante*, at pp. 34-35.) The evidence about D.C.'s accomplishments as a singer and actor shows that he was indeed a person in the public eye.

For identical reasons, the majority's observation that "D.C. was no Brando" (maj. opn. *ante*, at p. 38) is of no consequence. The case law does not require that he be Brando. It requires only that he be a person in the public eye. Moreover, contrary to the majority's suggestion, R.R.'s admission that he knew nothing about D.C.'s involvement in singing and acting until he saw D.C.'s Web site is not evidence tending to show that D.C. was not a person in the public eye. (Maj. opn. *ante*, at p. 38.) There are surely countless persons in the public eye of whom R.R. has never heard. D.C.'s accomplishments in the entertainment industry show that he is a person in the public eye,

and R.R.'s previous ignorance of those accomplishments does not constitute evidence to the contrary.

The majority adds that "D.C.'s use of a Web site in pursuing an entertainment career did not, ipso facto, put him in the public eye." (Maj. opn. *ante*, at p. 38.) I agree that the Web site did not, by itself, make D.C. a person in the public eye. Rather, the Web site merely added to the evidence that R.R. was a person in the public eye. It was not just a Web site (or MySpace or Facebook page) of a teenager who aspired to be an entertainer—it was the Web site of a singer/actor who had played the leading role in a feature film presented at an internationally acclaimed film festival, who had toured under the auspices of a nationally recognized radio network, who had a song broadcast worldwide via satellite radio, and who had a record album with a planned release date.

The majority also claims that because R.R.'s post "is devoid of any information *about* D.C.," it is not "analogous to a magazine article that *discusses* a celebrity or to a television interview or radio show *about* a celebrity." (Maj. opn. *ante*, at p. 39.) In a similar vein, the majority reasons that, according to R.R., his post "was part of a joke played on D.C. by other teenagers," but if the post was indeed a joke then "it did not implicate a public issue." (Maj. opn. *ante*, at p. 38; see also maj. opn. *ante*, at pp. 2, 15.) The problem with both arguments is that a joke can be made in connection with an issue of public concern. That is, communications in connection with issues of public concern do not exclude jokes and are not limited to informative discussions in magazine articles or television or radio shows. If they were, *Seelig* might well have been decided differently—it is not clear how calling someone a "big skank" (*Seelig*, *supra*, 97 Cal.App.4th at pp. 803, 811) and ridiculing her for refusing to appear on a morning radio show provides information about her or is anything more than a mere joke targeting someone in the public eye. The majority's emphasis on the age of those involved here ("teenagers") is likewise of no moment. There is nothing legally or factually impossible about a teenager being "a person . . . in the public eye" (*Jewett v. Capital One Bank*, *supra*, 113 Cal.App.4th at p. 814) or engaging in speech (including jokes) in connection with an issue of public interest.

The majority offers no argument or explanation in support of its sweeping exclusion of jokes from the category of communications in connection with issues of public interest for purposes of California's anti-SLAPP statute. As authority, the majority cites a Seventh Circuit case, a New York federal district court case, and a Massachusetts case, none of which involved California law. (See maj. opn. *ante*, at pp. 38-39.) Those cases held, in different contexts and under different standards, that certain jokes were not about matters of public concern. (See *Polish American Congress v. F.C.C.* (7th Cir. 1975) 520 F.2d 1248, 1250, 1253-1256; *Shub v. Westchester Community College* (S.D.N.Y. 2008) 556 F.Supp.2d 227, 244-246; *Pereira v. Commissioner of Social Services* (Mass. 2000) 733 N.E.2d 112, 116 & fns. 8 & 9, 118-119.) Those cases are irrelevant. *Not every* joke is in connection with an issue of public concern, but that does not mean that *every* joke is *not* in connection with an issue of public concern. Some jokes are (such as jokes about persons in the public eye), and some jokes are not (such as the purely private jokes in the cases cited by the majority). I conclude that there is no basis for the majority's holding that every joke, just because it is a joke, is not in connection with an issue of public concern (maj. opn. *ante*, at pp. 2, 15, 38), a holding that is profoundly hostile to First Amendment rights.

D.C. was a singer and actor who had achieved significant successes in both fields, making him much more of a person in the public eye than the plaintiff in *Seelig*. A joke or other communication about him is therefore in connection with an issue of public interest.

The majority states that "[n]othing we have said will chill free speech" because "[t]he narrow question on appeal" concerns only an anti-SLAPP motion, leaving open the possibility that, after a full trial on the merits, defendants will not "be found liable on any of plaintiffs' causes of action." (Maj. opn. *ante*, at p. 33.) The Legislature sees things differently. Before the anti-SLAPP statute was enacted, it was always possible for defendants to prevail on the merits at trial. But in enacting the anti-SLAPP statute, the Legislature found that the possibility of prevailing on the merits at trial was not good enough, because the burdens of defending meritless litigation were in fact having a

chilling effect on speech in connection with issues of public interest. (See, e.g., *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192; Code Civ. Proc., § 425.16, subd. (a).) The Legislature enacted the anti-SLAPP statute to enable defendants to terminate such litigation early, thereby limiting defense costs and counteracting the chilling effect that those costs created. (See, e.g., *Varian Medical Systems, Inc. v. Delfino*, *supra*, 35 Cal.4th at p. 192.) It is therefore incorrect to say that because this is merely an anti-SLAPP case it will not "chill free speech." (Maj. opn. *ante*, at p. 33.)

As I have explained, the majority opinion alters the law in multiple ways—forcing defendants to show their conduct is protected as a matter of law, creating new legal rules that allow courts to disregard defendants' evidence, and holding that jokes are not communications in connection with issues of public interest—that drastically tilt the playing field against defendants who bring anti-SLAPP motions. In so doing, the majority has weakened the anti-SLAPP statute and thus strengthened the chilling effect that the statute was intended to curtail.

For all of the foregoing reasons, I disagree with all of the majority's substantive conclusions. Defendants have made a prima facie showing that R.R.'s post was protected speech and was made in connection with an issue of public interest. I therefore dissent.

ROTHSCHILD, J.

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Nicholas Parsons et al. [1] v. Town of Tewksbury et al. [2]

1 By his mother and next friend, Donna Parsons, Gary Parsons, and Donna Parsons.
2 Robert Ware, Adam Colantuoni, Tyler Willette, Timothy Willette, and Doreen Willette.

Opinion No.: 110738, Docket Number: 09-1595

SUPERIOR COURT OF MASSACHUSETTS, AT MIDDLESEX

26 Mass. L. Rep. 555; 2010 Mass. Super. LEXIS 67

January 19, 2010, Decided

JUDGES: [*1] Kenneth J. Fishman, Justice of the Superior Court.

OPINION BY: Kenneth J. Fishman

OPINION

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT TOWN OF TEWKSBURY, ROBERT WARE AND ADAM COLANTUONI'S MOTION TO DISMISS

The plaintiffs' ("the Parsons") claims arise from an altercation between plaintiff Nicholas Parsons ("Nicholas") and the defendant Tyler Willette ("Tyler") at the John W. Wynn Middle School in Tewksbury, Massachusetts ("Wynn School"), and the events preceding the altercation. The Parsons brought suit against the defendants Town of Tewksbury, Robert Ware, and Adam Colantuoni (collectively, "the defendants" or "the municipal defendants") for negligence (Count I), intentional infliction of emotional distress (Count VI), and negligent infliction of emotional distress (Count VII); Nicholas brought suit against the defendants for violations of the Massachusetts Declaration of Rights Preamble and Articles I, X, XI, XII, and CVI (Count II); and the plaintiffs Gary and Donna Parsons brought suit against the defendants for loss of consortium (Count IX). The municipal defendants have moved to dismiss all claims against them pursuant to *Mass.R.Civ.P. 12(b)(6)*. For the following reasons, the defendants' Motion to [*2] Dismiss is *ALLOWED.*

BACKGROUND

The following facts are taken from the complaint and accepted as true. Nicholas and Tyler were students at the Wynn School at all times material. Tyler led a small group of boys who harassed and threatened other students. For some period of time prior to April 2006, Nicholas was a member of Tyler's group. However, Nicholas disassociated himself from Tyler's group after being designated "the dunce." Nicholas told defendant Colantuoni, the school's guidance counselor, that Tyler's group had mistreated and harassed him. Colantuoni did not address the situation, failed to respond to Nicholas' actual notice of Tyler's misconduct, failed to deter student intimidation, failed to make clear the consequences of bullying, and failed to employ community resources to prevent violence.

One day at the Wynn School, Tyler told another

member of his group, Brendan Weiss ("Brendan"), to "discipline" Nicholas by slamming his head with a book. Brendan did so, in front of a Wynn School teacher. The teacher sent Brendan to see defendant Ware, the school's Behavior Management Facilitator. Ware called Nicholas to his office and asked the boys to apologize to each other, although [*3] Nicholas had not done anything to provoke Brendan. Nicholas' mother, Donna Parsons, learned of the incident, and called the school to complain about Ware's failure to discipline Brendan. In violation of School Committee policies, the school did not take additional measures to address Brendan's violent behavior. As a result of the incident with Brendan, Mrs. Parsons decided to keep Nicholas home from school the Wednesday before April vacation.

Over April vacation, Tyler provoked two fist fights with Nicholas on the street near the Parsons' residence. Both fights ended without a resolution, but neither fight resulted in injury to either boy. Upon returning to school after vacation, Tyler again tried to provoke a fight with Nicholas. A friend warned Nicholas that Tyler intended to hurt Nicholas if he did not agree to fight Tyler. Nicholas declined to fight Tyler. Then, in gym class, Tyler charged Nicholas during a game of kickball. The gym teacher asked the boys what was going on, but did not discipline Tyler. Because the school failed to respond to Tyler's bullying and harassment, Nicholas decided to fight Tyler. Nicholas believed it was the only way to stop Tyler's harassment.

The fight [*4] was originally to be held in the locker room of the Wynn School after class on April 26, 2006. The boys relocated the fight to a boys' bathroom because the gym teacher was in the locker room at the time they were supposed to fight, and they did not want to get caught. News of the fight spread around the school, as did Tyler's threat to break Nicholas' leg with a karate move. On the day of the fight, Ware and Colantuoni were seen monitoring a boys' bathroom, which they do not usually do. No teacher, however, approached Nicholas to ask him about the fight or otherwise intervened. Although the boys' English teacher noticed that the two were missing and learned from other students that they were likely fighting, she did not attempt to intervene nor did she call an administrator to report the fight. As the English class started, Tyler confronted Nicholas in the boys' bathroom on the second floor of the school. Tyler pushed and shoved Nicholas. Tyler then kicked his legs between Nicholas' legs, striking and fracturing Nicholas' femur. Nicholas could not get up due to the injury. As Nicholas lay on the floor, Tyler punched him in the head twice. Tyler and a friend then carried Nicholas to [*5] the nurse's office.

The nurse evaluated Nicholas and saw that he was crying, his right leg was swollen at and above the knee, he could not lift his leg below the knee, and his forehead and the left side of his face were red. The nurse called Ware to her office. When he arrived, he swore at the students and told Nicholas to "walk it off" and come with him. The nurse intervened and told Ware that Nicholas was staying in her office. She put him in a wheelchair and called an ambulance. Nicholas was transported to Saints Memorial Hospital by ambulance.

As a result of the fight, Tyler was suspended for a short time. The Wynn School declined to expel him from the Tewksbury School system. Nicholas underwent multiple surgeries and hospital stays, and his injuries required physical therapy.

At all relevant times, the Wynn School was subject to the control and direction of the Tewksbury School Committee. The School Committee, pursuant to state law, had enacted policies, procedures, rules and regulations for school administrators and teachers to address the safe and efficient education of students and operation of Tewksbury public schools. One policy, entitled "Safe Schools," was promulgated to provide [*6] a "safe learning and working environment for all students and staff," and "to prevent, address, and punish those responsible for school-related violence and other behavior that is not conducive with attendance in a public school." The School Committee also enacted a "bullying policy," stating the school department's zero-tolerance on bullying. The policy required "administrators and supervisors to make clear to students and staff that bullying . . . will not be tolerated and will be grounds for the disciplinary action up to and including suspension and expulsion for students . . . [t]he district will investigate allegations of harassment, including bullying." The School Committee had many additional policies pertaining to school safety, student welfare, and discipline.

DISCUSSION

When evaluating the sufficiency of a complaint pursuant to *Mass.R.Civ.P. 12(b)(6)*, the court must accept as true the well-pled factual allegations of the complaint

and make any reasonable inferences that can be drawn therefrom in the plaintiff's favor. *Eyal v. Helen Broad. Corp., 411 Mass. 426, 429, 583 N.E.2d 228 (1991)*, and cases cited. The moving party's burden at the 12(b)(6) stage has been eased to an extent by the Supreme [*7] Judicial Court's decision in *Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-36, 888 N.E.2d 879 (2008)*. Under the new standard, a claimant must provide "more than labels and conclusions . . . [f]actual allegations must be enough to raise a right to relief above the speculative level . . ." *Iannacchino, 451 Mass. at 636*, quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

The defendants claim that the tort-based counts, negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, and loss of consortium, are barred by the Massachusetts Tort Claims Act, *G.L.c. 258, § 10(j)* ("MTCA"). The defendants argue that the count alleging that they have violated the Massachusetts Declaration of Rights fails to state a claim because the essence of the constitutional violation is the state's failure to protect, which is not a recognized cause of action under the Massachusetts Constitution. In the alternative, the defendants argue that even if the Parsons maintain such a claim under the state constitution, they have not pled facts sufficient to meet the standard for an actionable violation.

I. Applicability of the MTCA to the Parsons' Tort Claims

A. Negligence-based [*8] *Claims*

The MTCA provides a waiver of sovereign immunity in limited circumstances. *Anderson v. Gloucester, 75 Mass.App.Ct. 429, 433, 914 N.E.2d 926 (2009)*. *Section 10(j)*, however, retains sovereign immunity for "any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer . . ." *G.L.c. 258, § 10(j)*. The purpose of *§ 10(j)* is to immunize public employees for harm caused by a third person that the public employee failed to prevent. *Brum v. Dartmouth, 428 Mass. 684, 692, 704 N.E.2d 1147 (1999)*. Under *§ 10(j)*, immunity is only removed "where 'the condition or situation' was 'originally caused by the public employer.'" *Id.*, quoting *G.L.c. 258, § 10(j)*.

Brum is recognized as requiring an "affirmative act" by a public employer in order to show that the employer originally caused the condition or situation that led to the plaintiff's harm. See *Kent v. Commonwealth, 437 Mass. 312, 318, 771 N.E.2d 770 (2002)*; *Parker v. Chief Justice of Admin. and Manag., 67 Mass.App.Ct. 174, 178, 852 N.E.2d 1097 (2006)*; *Audette v. Commonwealth, 63 Mass.App.Ct. 727, 732, 829 N.E.2d 248 (2005)*. It is not enough for a plaintiff [*9] to simply "recast the failures as affirmative acts." *Audette, 63 Mass.App.Ct. at 733*, quoting *Brum, 428 Mass. at 693*. Rather, the plaintiff must show that the public employer's act "materially contributed to creating the specific 'condition or situation' that resulted in the harm." *Kent, 437 Mass. at 319*.

Here, the Parsons have not alleged any affirmative act by the defendants that materially contributed to creating the specific condition or situation that caused Nicholas' injuries. Rather, throughout the complaint, the Parsons claim that the defendants failed to discipline Tyler, failed to intervene, failed to properly train teachers and staff, and failed to implement School Committee policies. In an attempt to circumvent *§ 10(j)*, the Parsons suggest that the defendants' "half-hearted" intervention "emboldened" Tyler, and therefore materially contributed to the condition or situation that caused Nicholas' harm. As evidenced by the other allegations in the complaint, this "act" is actually no more than a failure to intervene recast as an affirmative act. This is precisely the type of failure to prevent harm by a third person for which *§ 10(j)* provides governmental immunity. Accordingly, [*10] the MTCA bars the Parsons' claims for negligence, negligent infliction of emotional distress and loss of consortium. See *Sena v. Commonwealth of Mass., 417 Mass. 250, 264, 629 N.E.2d 986 (1994)* (viable tort claim required to succeed on loss of consortium claim). Counts I, VII and IX must be dismissed.

B. Intentional Infliction of Emotional Distress

As a preliminary matter, the Parsons concede that they cannot bring an intentional tort claim against the Town of Tewksbury, because such claims are barred by *G.L.c. 258, § 10(c)*. *Section 10(c)*, however, does not, bar intentional tort claims against individual public employees. To assert a claim for intentional infliction of emotional distress against Ware and Colantuoni, the Parsons must show: 1) the defendants intended to cause, or should have known their conduct would cause, emotional distress; 2) the conduct was extreme and outrageous; 3) the conduct caused the plaintiffs' distress; and 4) the plaintiffs suffered severe distress. *Jones v.*

Maloney, 74 Mass.App.Ct. 745, 750, 910 N.E.2d 412 (2009). Extreme and outrageous conduct is that which is "beyond all bounds of decency and . . . utterly intolerable in a civilized community." *Sena, 417 Mass. at 264*. Whether the alleged [*11] tortious conduct meets this standard may be determined as a matter of law. *Id.*

Defendants Ware and Colantuoni's conduct was not, as a matter of law, beyond all bounds of decency and utterly intolerable in a civilized community. Although they appear to have mishandled and underestimated the seriousness of the situation between Tyler and Nicholas, their conduct as alleged in the complaint does not rise to the level of intentional infliction of emotional distress. Therefore Count VI must be dismissed.

II. Cause of Action under Massachusetts Declaration of Rights

The Parsons claim that the defendants violated Articles I, X, XI, XII and CVI, as well as the Preamble of the Massachusetts Declaration of Rights. [3] No Massachusetts appellate court has conclusively addressed the question of whether a party may bring a cause of action for damages based solely on the Declaration of Rights in the absence of a statutory vehicle. See, e.g., *Layne v. Superintendent, Mass. Corr. Inst., Cedar Junction, 406 Mass. 156, 159-60, 546 N.E.2d 166 (1989)* (noting that there may be a cause of action for state constitutional violations even in absence of statute), quoting *Phillips v. Youth Devel. Prog., 390 Mass. 652, 657-58, 459 N.E.2d 453)*; see [*12] also *Martino v. Hogan, 37 Mass.App.Ct. 710, 720, 643 N.E.2d 53 (1994)* (recognizing, in claim for money damages under state constitution, that no decision on viability of such a claim has been reached; court did not rule on the issue). [4]

3 The complaint states that the defendants deprived Nicholas "of his right to enjoy in safety and tranquility his natural rights and the blessings of life and liberty; of his right of enjoying and defending his life and liberty; of his right of seeking and obtaining safety and happiness; of his right to be protected by society in the enjoyment of his life, liberty and property according to standing laws; of his right to find remedy by having recourse to the laws for all injuries and wrongs which he has received to his person, property or character; and of his right not to be put out of the protection of the law or deprived of liberty or estate but by the judgment of his peers and the law of the land . . ."

4 Justices of this court have declined to address the unsettled issue of independent claims under the Declaration of Rights at the motion to dismiss stage. See, e.g., *Jackson v. Verdini, 2005 WL 1457748 *8 n.3 (Mass.Super. 2005) [19 Mass. L. Rptr. 539]*; *Moore v. McManus, 1998 WL 77904 *11 (Mass.Super. 1998) [8 Mass. L. Rptr. 263]*. [*13] It is appropriate in this case to decide the issue at this stage because the remaining counts against the municipal defendants have been dismissed, and the parties are in agreement that this question of law is ripe for determination.

There is, however, some indication that such an action would be recognized. In *Layne*, the Court stated,

"[A] person whose constitutional rights have been interfered with may be entitled to judicial relief even in the absence of a statute providing a procedural vehicle for obtaining relief." *Phillips v. Youth Dev. Program, Inc., 390 Mass. 652, 657-58, 459 N.E.2d 453 (1983)*. Certainly a State may not violate a person's constitutional rights and then fairly assert that no redress can be had because the State has not provided a statutory means of enforcing those rights.

406 Mass. at 159-60. In *Martino*, the court recognized that,

There has been discussion of grounding a cause of action on the State Constitution for violation of its provisions where no statutory avenue for enforcement has been fashioned and made available . . . To be considered before such a step is taken is the fact of the existence of *Section 1983* and the State analogue, our Civil Rights Act, *G.L.c. 12, [§§]11H* [*14] & *11I*: these may be thought, as it were, to occupy the field.

37 Mass.App.Ct. at 720. At least one justice of the Superior Court has also indicated that claims brought directly under the Declaration of Rights should be permitted. See *McClure v. East Brookfield, 1999 WL 1323628 *2 (Mass.Super. 1999) [9 Mass. L. Rptr. 680]* (denying defendant's motion for summary judgment on plaintiff's claim under Declaration of Rights). Here, unlike the cases cited above, this Court must decide whether the Parsons can maintain their claim under the state constitution, having decided that the MTCA does not provide a cause of action under the circumstances present. In light of the Supreme Judicial Court's

indication that a cause of action is likely viable for violations of the state constitution in situations where there is no statutory vehicle for relief, and recognition that constitutional violations may occur even where there are no acts of threats, coercion or intimidation, see *G.L.c. 12, §§ 11H* & *11I*, this Court finds that, as a general proposition, a cause of action can, in certain circumstances, be brought directly under the Massachusetts Declaration of Rights in the absence of a statutory vehicle [*15] for obtaining relief.

The question remains whether the Parsons have articulated a violation of the state constitution. Count II of the complaint in this action alleges violations of Nicholas' substantive due process right to safety and protection. [5] In analyzing the state constitutional claim, this Court recognizes that the Declaration of Rights "may afford greater protection of rights than the *due process clause* [under Federal law]," however, "[the Supreme Judicial Court's] treatment of due process challenges adheres to the same standards followed in Federal due process analysis." *Cote-Whiteacre v. Department of Pub. Health, 446 Mass. 350, 366 n.15, 844 N.E.2d 623*; see also *Centrangelo v. Lloyd, 61 Mass.App.Ct. 1117, *2, 811 N.E.2d 524 (2004)* (Rule 1:28 decision) (where plaintiff brought claims under federal and state constitutions for state's failure to protect, court dismissed both claims pursuant to federal standard). Under Federal jurisprudence, the *due process clause* does not guarantee citizens that they will be protected by the government from non-governmental actors. *Brum, 428 Mass. at 698*, citing *DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 196-97, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989)*. "[A] State's failure to protect [*16] an individual against private violence simply does not constitute a violation of the [federal] *Due Process Clause*." *DeShaney, 489 U.S. at 197*, quoted by *Brum, 428 Mass. at 698*.

5 The Parsons' opposition memorandum refers to the alleged civil rights violations as a violation of Nicholas' rights to due process. See also note 3, *supra*.

In limited circumstances, however, state inaction may give rise to liability. Heretofore, those circumstances have arisen in prisoner cases and involuntarily committed mental patients, where the state has mandated confinement and a duty to protect is imposed on the state. See *Hasenfus v. LaJeunesse, 175 F.3d 68, 71 (1st Cir. 1999)*. A failure of that duty may be vindicated under the federal civil rights act, *42 U.S.C. § 1983*, where the standard for a violation of constitutional rights is "deliberate indifference." *Id.* Although many plaintiffs have requested courts to extend this "duty to protect" to school children, it does not appear that any court has been willing to do so. *Id.* Even if a public school could be held liable for failing to protect students in specific, limited circumstances--such as where it fails to provide medical attention to an injured student--the [*17] First Circuit has noted that the conduct required to establish a violation of substantive due process would need to be "so extreme as to 'shock the conscience.'" *Id. at 72*, quoting *County of Sacramento v. Lewis, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)* (stating the standard for substantive due process violations generally).

Although, as the plaintiff argues, the Massachusetts Declaration of Rights and the United States Constitution, are subject to different interpretations, as noted in *Cote-Whiteacre*, the Massachusetts due process provisions are generally interpreted using the Federal standards. There is simply no decisional authority presented to this Court that the Supreme Judicial Court would depart from the Federal standard and hold a public school liable for failing to protect a student from harm by a non-governmental actor. Even if the Supreme Judicial Court were inclined to make an exception for school children to the general principle that a state has no duty to protect, the standard for a violation would likely be whether the conduct "shocks the conscience." The failures of the defendants as alleged in the complaint cannot be construed, as a matter of law, to have reached this level of egregiousness. [*18] Therefore, Count II fails to state a claim upon which relief may be granted, and must be dismissed.

ORDER

For the foregoing reasons, Counts I (negligence), II (Massachusetts Declaration of Rights violations), VI (negligent infliction of emotional distress), VII (intentional infliction of emotional distress), and IX (loss of consortium), as alleged against the defendants Town of Tewksbury, Robert Ware and Adam Colantuoni, are *DISMISSED.*

By the Court,

Kenneth J. Fishman

Justice of the Superior Court Date: January 19, 2010.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DANE PATTERSON,[1]

Plaintiff,

CASE NO. 05-74439
HON. LAWRENCE P. ZATKOFF

v.

HUDSON AREA SCHOOLS,

Defendant.
_____/

OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse,
in the City of Port Huron, State of Michigan, on the 1st day of July, 2010

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This matter is before the Court on Defendant's Motion for a Judgment as a Matter of Law or, alternatively, a New Trial ("JMOL Motion") (Docket #191). Plaintiff has filed a response,[2] to which Defendant replied.[3] The Court finds that the facts and legal arguments pertinent to the JMOL

[1]When this case was filed, Dane Patterson was a minor and the original plaintiffs in this matter were his parents, David and Dena Patterson. By the time this case went to trial, however, Dane Patterson was 19 years old. Therefore, the Court determined that Dane Patterson was the real party in interest and ordered that the caption be amended to reflect that Dane Patterson alone had the right to pursue this action (Docket #157).

[2]The Court hereby GRANTS Plaintiff's Ex Parte Motion to Exceed Brief Page Limitation (Docket #198), for the reasons set forth therein.

[3]After (1) Defendant stipulated to a one-week extension with respect to the deadline for Plaintiff to file his response to the JMOL Motion, (2) the Court permitted Defendant to file a 46-page brief, and (3) Plaintiff filed a 45-page response brief, Plaintiff filed a Motion to Strike (Docket #203) Defendant's reply brief as excessive and untimely because it was 15 pages and filed one day late. Defendant responded to Plaintiff's Motion to Strike, and Plaintiff filed a reply. In light of the number of pages in the initial brief filed by Defendant and the response brief filed by Plaintiff, as well as the one-week extension of time within which Plaintiff could file his response brief, the Court hereby DENIES Plaintiff's Motion to Strike (Docket #203) and shall consider Defendant's reply brief.

Motion are adequately presented in the parties' papers, and the decision process will not be aided by oral arguments. Therefore, pursuant to E.D. Mich. Local R. 7.1(e)(2), it is hereby ORDERED that the JMOL Motion be resolved on the briefs submitted, without this Court entertaining oral arguments. For the reasons that follow, Defendant's JMOL Motion is GRANTED and Plaintiff's cause of action is dismissed.

II. THE FACTS

A. Introduction

In this Court's November 28, 2007, Opinion and Order granting Defendant's motion for summary judgment, the Court extensively set forth and considered the "facts" in a light most favorable to Plaintiff, as it was required to do. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In deciding a motion for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure, the Court must analyze the facts in the same manner. *See* Section III, *infra*. Significantly, however, (1) undisputed trial testimony and trial exhibits exposed a number of critical facts that were not discussed in the parties' briefs addressing Defendant's motion for summary judgment; (2) undisputed trial testimony and trial exhibits revealed that certain key "facts" discussed by the Court in its November 28, 2007, Opinion and Order (and/or by the Sixth Circuit when deciding Plaintiff's appeal of this Court's November 28, 2007, ruling[4]) were not true; and (3) no evidence was offered to support certain key "facts" discussed by the Court in its November 28, 2007, Opinion and Order. Accordingly, the Court sets forth in this Section II the pertinent evidence admitted at trial. Again, to the extent that competing evidence on a particular issue was introduced,

[4]*Patterson v. Hudson Area Schools*, 551 F.3d 438 (6th Cir. 2009).

the Court considers the facts in a light most favorable to Plaintiff.

B. Sixth Grade

Plaintiff testified that, while attending Hudson Middle School for sixth grade, other students began teasing him and calling him names (including "gay," "fag" and "faggot"). Plaintiff and his parents testified that they reported the name calling to his teachers, Mrs. Fitch and Mrs. Riley, as well as the Hudson Middle School principal, Greg Rozeveld ("Principal Rozeveld"). Gretchen Warwick, PhD ("Dr. Warwick"), a psychologist Plaintiff utilized, testified Plaintiff was distraught, anxious and angry due to school-related issues when she resumed seeing him in May 2002, at the conclusion of Plaintiff's sixth grade year.

C. Seventh Grade

Plaintiff and his parents testified that, while in seventh grade at Hudson Middle School, Plaintiff experienced: (1) daily name calling, including such things as "fag," "faggot," "gay," "queer," and "man boobs" (a term referring to an enlargement of Plaintiff's breast area because he had put on 40 pounds of weight over the summer due to taking medication); (2) in the second half of his seventh grade year, being called "Mr. Clean" on a regular basis; (3) being slapped by a seventh grade girl named Brittany when Plaintiff attempted to intervene on behalf of a girl being teased and taunted by Brittany; and (4) on the same day Brittany slapped Plaintiff, being teased by a teacher, John Redding ("Mr. Redding"), in front of the class, who said to Plaintiff: "Patterson, how did it feel to be slapped by a girl?"

Plaintiff and his parents testified that, as a result of and in order to escape the name calling, in particular the "man boobs" teasing, Plaintiff resorted to eating his lunch in the band room during his seventh grade year. Plaintiff and his parents also testified that, by the end of the first semester

of seventh grade, Plaintiff wanted to quit school. About that time, David Patterson contacted Principal Rozeveld about Plaintiff's struggles. It is undisputed that: (a) Principal Rozeveld offered to meet with Plaintiff at the end of each day to help Plaintiff with his struggles, and (b) an arrangement for Principal Rozeveld and Plaintiff to meet at the end of the day was agreed upon, but that arrangement ended soon after it began. Plaintiff and his parents testified that they discussed issues Plaintiff was encountering during his seventh grade year with Hudson Middle School personnel, as follows:

a. With school counselor Susan Mansfield ("Ms. Mansfield") in November and/or December 2002.

b. With several teachers for the purpose of discussing Plaintiff's anxiety about being (i) bullied and teased, (ii) the victim of the name calling, and (iii) pushed into lockers.

c. With Principal Rozeveld just before Christmas 2002 about Plaintiff not wanting to come back to school because of teasing, bullying and being called "gay," "fag" and "queer." Plaintiff's parents explained to Principal Rozeveld the impact that teasing had on Plaintiff's schooling, Plaintiff's feelings of being ostracized and Plaintiff's suffering grades. Names of perpetrators were provided. The related incidents of Brittany slapping Plaintiff and Mr. Redding teasing Plaintiff also were discussed.

d. During the second semester of seventh grade, Plaintiff's parents discussed with Ms. Mansfield and other staff problems Plaintiff was experiencing.

e. Plaintiff's parents communicated with school staff throughout Plaintiff's seventh grade year regarding academic and social issues. Plaintiff's parents asked school staff what, if anything, Plaintiff was doing to cause his peers to tease and taunt him. Plaintiff's parents testified that they were told consistently that Plaintiff was doing nothing wrong.

School records reflect that Plaintiff's grades fluctuated while he was in seventh grade. His progress reports often contained poor or failing grades, but his final grades were much higher.

D. Eighth Grade

The trial testimony regarding the time from the conclusion of Plaintiff's seventh grade year through his eighth grade year is undisputed. At the end of Plaintiff's seventh grade year, as the result of conversations with Dena Patterson, Ms. Mansfield contacted Lenawee Intermediate School District Social Worker Tammy Cates ("Ms. Cates") about conducting a special education review. Ms. Mansfield and Ms. Cates filled out a referral form, and Dena Patterson signed it. Ms. Cates and Brian Moeckel, a school psychologist for Defendant ("Mr. Moeckel") conducted an evaluation of Plaintiff in June 2003 (after school was out). At the beginning of Plaintiff's eighth grade year, a Multi-Disciplinary Evaluation Team evaluated Plaintiff for special education services and concluded that Plaintiff was emotionally impaired ("EI") under the Individuals with Disabilities Educational Act. An Individual Educational Program ("IEP") team (which included Plaintiff's parents but did not include Plaintiff) convened and an IEP was developed for Plaintiff. As part of Plaintiff's eighth grade IEP, an IEP with which Plaintiff's parents agreed, Plaintiff was assigned to teacher Ted Adams' ("Mr. Adams") for five to ten hours per week. Plaintiff's eighth grade IEP required that Plaintiff be physically present in Mr. Adams' EI resource room during sixth hour (the last hour) each day. With the aid of Mr. Adams, Plaintiff enjoyed a successful eighth grade year, a year which was free of the name calling and problems that Plaintiff experienced in seventh grade.

E. Ninth Grade

Before Plaintiff started ninth grade at Hudson High School, the IEP team met to determine what type of IEP to implement for Plaintiff's ninth grade year. Again, David and Dena Patterson were members of the IEP team but Plaintiff was not (though he was invited to his IEP meeting). David and Dena Patterson both requested that Plaintiff continue to be assigned to Mr. Adams and

receive the same services provided to Plaintiff during his eighth grade year.[5] As a ninth grade student, however, Plaintiff could no longer be assigned to Mr. Adams' resource room because Mr. Adams was a middle school teacher. The IEP team discussed other options, including assigning Plaintiff to the ninth grade EI resource room at Hudson High School. David Patterson testified that "they" (meaning at least he and Dena Patterson) did not want Plaintiff assigned to the ninth grade EI resource room; rather, they only wanted Plaintiff assigned to Mr. Adams. David Patterson acknowledged that, had Plaintiff utilized the ninth grade EI resource room teacher, Plaintiff may have been able to achieve success equal to that enjoyed in eighth grade, however, "they" (again, at least he and Dena Patterson) were not willing to try that arrangement.

Ultimately, after Mr. Adams volunteered to be available to provide services for Plaintiff during Plaintiff's ninth grade year, the IEP team developed an IEP for Plaintiff. David and Dena Patterson expressly agreed to the terms of Plaintiff's ninth grade IEP, which provided that:[6]

1. Plaintiff was assigned to Mr. Adams' resource room for "20-30 minutes per week";

2. Plaintiff assigned to social work counselor "1-2 times per month as need[ed]; 20-30 min session";

3. Plaintiff had access to Mr. Adams' "resource room for crisis intervention" on a "daily as needed" basis; and

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[5]Hudson Middle School and Hudson High School are housed in the same building.

[6] David and Dena Patterson acknowledged that they signed off on the IEP for Plaintiff's ninth grade year. The IEP document itself, in the same block where David and Dena Patterson signed their names to reflect their agreement with the terms of the IEP, contains several small boxes. Next to each box, there is a statement that indicates the level of familiarity and agreement with the terms of the IEP. The student/parent/guardian signatory to the IEP is to check all boxes for which the corresponding statement is applicable. The statements are: (1) Understand the contents of this plan; (2) Have been informed of my rights (procedural safeguards via written document); (3) Agree with this plan; (4) Do not agree with this plan *but* will allow it to be used; (5) Do not agree with this plan and request: ○ Mediation, *and/or* ○ an impartial due process hearing; (6) Have been given sources (names & phone numbers) to contact to obtain assistance; and (7) Agree that the student is not eligible for special education. David and/or Dena Patterson checked the boxes next to (1), (2) and (3).

4. Plaintiff was permitted to use an "alternate site for tests/quizzes" in resource room "as needed throughout school day."

It is undisputed that Mr. Adams provided Plaintiff with resource room services for ninth grade pursuant to the terms of the implemented IEP. It also was the undisputed testimony of witnesses that Plaintiff saw Mr. Adams each week and that Plaintiff had the ability to access Mr. Adams' resource room as he desired.

In early September of Plaintiff's ninth grade year (*i.e.*, right after school started), an incident occurred where Billy H., Sheila K. and Kelly W. asked Plaintiff if Plaintiff remembered being called "Mr. Clean" in middle school. Plaintiff reported this incident to Ms. Mansfield, who is a counselor for both Hudson Middle School and Hudson High School. After speaking with Plaintiff, Ms. Mansfield promptly: (a) summoned Billy H., Sheila K. and Kelly W. to her office to discuss the incident, (b) explained to them that Plaintiff was hurt by their "Mr. Clean" comments, and (c) verbally reprimanded all three of them. Ms. Mansfield then called Plaintiff back into her office, with Billy H., Sheila K. and Kelly W. still present. It is undisputed that the three students apologized to Plaintiff, but that Plaintiff: (1) refused their request for forgiveness, (2) told them that "it was their problem," and (3) left the meeting. Plaintiff testified that he never had a problem with Billy H., Sheila K. or Kelly W. again. Plaintiff and his parents testified that this occurred simultaneously with a number of students calling Plaintiff "gay," "fag" and "queer" on a near daily basis, and Dena Patterson testified that she reported this name-calling to Hudson High School administrators.

Plaintiff and/or his parents reported several incidents to Defendant's administrators in December 2004 (his ninth grade year). On or about December 10, 2004, Joe R. and Jeff L. defaced multiple pages of Plaintiff's daily planner. The single page admitted as evidence included the following terms/drawings: "I love [in the form of a heart] penis," "I lick it in the ass," "I'm a

MaMMa's boy," "I suck on her nipple" and a diagram of a penis being inserted into a rectum with the word "cock" written underneath. Principal Osborne verbally reprimanded Joe R. and Jeff L. for their conduct. The undisputed testimony was that Plaintiff had no problems with Joe R. thereafter. Jeff L. harassed Plaintiff one more time - four days later. On December 14, 2004, Plaintiff returned to his locker to find a poster of "Mr. Clean" taped to his hall locker, an act was perpetrated by Jeff L. and Kyle M.[7] Jeff L. was given a one-day suspension for this act because of his previous transgression against Plaintiff. Kyle M. was verbally reprimanded because he had not previously been disciplined for harassing Plaintiff. Plaintiff testified that he had no problems with either Jeff L. or Kyle M. after they were disciplined for the December 14, 2004 "Mr. Clean" poster incident.

Within a week or two of the December 14, 2004 "Mr. Clean" poster incident, another student, Sabin E., gave an oral presentation in Mr. Reincke's history class. Sabin E. wrote the words "Dane is a fag" on one note card or on four note cards (it is undisputed that those four words were written in that order, regardless of how many cards were used) and made the words visible to the class, including Plaintiff. After class ended, Plaintiff reported the note card incident to Ms. Mansfield. Ms. Mansfield and Mr. Reincke promptly met with and verbally reprimanded Sabin E. Sabin E. apologized to Plaintiff, and Ms. Mansfield followed up with Plaintiff to ensure that there were no further problems with Sabin E. Plaintiff testified that he had no further problems with Sabin E.

The next month, in January 2005, Plaintiff entered the school one morning to find the inside and outside of his hall locker defaced with black permanent marker and paint. The defacement

[7]On another (unspecified) occasion in December 2004, another Mr. Clean poster was taped to Plaintiff's hall locker. No one was identified by Plaintiff or anyone else (including Defendant's administrators) as being responsible for that incident.

included the phrases "I like penis" and "man boobs" and a picture of a penis inserted into an anus. Plaintiff did not know who was responsible for defacing his hall locker, but he and/or David Patterson reported this incident to Tom Durbin, the assistant principal of Hudson High School ("AP Durbin") very shortly after Plaintiff saw his defaced locker. AP Durbin immediately had the locker cleaned by a custodian and conducted an investigation of the incident. AP Durbin's investigation included interviewing potential student witnesses, including those students who had lockers in the vicinity of Plaintiff's locker. The perpetrators responsible for this incident were never identified. A month later, in February 2005, someone spelled out "FAG" in shaving cream in large letters on Plaintiff's gym locker room while he was in gym class. Although this incident was reported to Defendant's administrators, the perpetrator was never identified.

F. The Locker Room Assault

In the spring of his ninth grade year, Plaintiff played on the Hudson High School junior varsity baseball team. The coach of the junior varsity baseball team was Plaintiff's brother, Andy Wade ("Mr. Wade"). In late May 2005, following a Friday afternoon practice, Plaintiff was assaulted in the boys locker room. One student, Nick H., blocked Plaintiff's exit from the locker room. Another student, Lance P., who was naked, climbed on top of Plaintiff. Lance P. proceeded to rub his penis and scrotum against the back of Plaintiff's neck and side of Plaintiff's face before the assault ended. Mr. Wade was not in the locker room when the assault occurred, and Plaintiff did not tell Mr. Wade (or any other person associated with Defendant) that the assault had occurred before Plaintiff went home with David Patterson. At home that Friday evening, Plaintiff told his parents about the assault. Plaintiff's parents then informed Mr. Wade of the incident later that same night. Plaintiff's parents told Mr. Wade not to contact anyone at Hudson High School about the

incident because they did not want Mr. Wade to get involved. Neither Mr. Wade, Plaintiff nor his parents contacted any Hudson High School administrators or the police about the assault on that Friday, nor did Mr. Wade ever initiate any communication about the assault with Hudson High School administrators.

The next day, a Saturday, the junior varsity team had a scheduled doubleheader. Neither Plaintiff or his parents requested that Mr. Wade permit Plaintiff to skip the games or that Mr. Wade not permit Lance P. to play. As such, both Plaintiff and Lance P. started and played in both games of the doubleheader. At some point during the doubleheader, Dena Patterson informed Principal Osborne about Lance P.'s assault of Plaintiff the previous afternoon. On Monday (the first day of school after the locker room incident occurred and two days after Dena Patterson notified Principal Osborne about the incident), Principal Osborne and AP Durbin began conducting a formal investigation into the allegations. Before the end of school that Monday, Principal Osborne had suspended Lance P. for the remainder of the school year (eight days). As neither Plaintiff nor his parents complained about Nick H.'s role, Principal Osborne did not suspend Nick H.

Plaintiff's parents filed a complaint against Lance P. with the Hudson Police Department two or three days later, and the Hudson Police Department conducted a criminal investigation which eventually resulted in Lance P. pleading guilty to a misdemeanor. Defendant's administrators cooperated with the Hudson Police Department with respect to its investigation, including sharing the results of Defendant's internal investigation. Prior to the commencement of classes in the fall of 2005, Lance P. was expelled from the Hudson Area Schools. Defendant denied Lance P.'s subsequent application for re-entry into the Hudson Area Schools.

No evidence was introduced that any of Defendant's administrators had been notified, or had

reason to believe, that Lance P. had engaged in any misconduct of a sexual nature prior to the locker room assault. Plaintiff testified that he had: (1) never had any problems with Lance P. prior to the locker room assault, and (2) no reason to think that Lance P. would assault him. Likewise, the junior varsity baseball team coach, Mr. Wade, who lived with Plaintiff and taught at Hudson Middle School during Plaintiff's ninth grade year, testified that he was not aware of any occasion when Lance P. had harassed Plaintiff prior to the locker room assault. Mr. Wade also testified that he had no reason to believe Lance P. would assault Plaintiff in the manner Lance P. did. Mr. Wade further testified that he did not believe Plaintiff was at risk of encountering danger, or that Plaintiff needed additional protection or attention, while in the locker room.

At some point soon after the incident, the varsity baseball coach, Mr. Beal, convened a team meeting of junior varsity and varsity players and commented (with Plaintiff present) that players should only joke with men who can take it.

G. Completion of Plaintiff's High School Education

After the locker room incident but prior to the commencement of Plaintiff's tenth grade year, Plaintiff's IEP was modified to allow him to receive off-site services at Sacred Heart School for his tenth grade year. Plaintiff and his parents testified that Plaintiff had a poor tenth grade year. As a result, Plaintiff's IEP was modified to allow him to take his eleventh grade and twelfth grade classes through college placement courses, which were paid for by Defendant. Plaintiff graduated from Hudson High School a year early, and he has taken some college courses, primarily online. Plaintiff and his parents testified that Plaintiff psychologically has been unable to enter, and has not entered, any Defendant building since the spring of 2005.

III. LEGAL STANDARD

Judgment as a matter of law is appropriate where, after a party has been fully heard on an issue, there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. Fed. R. Civ. P. 50(a); *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 236 (6th Cir. 2003). When reviewing a motion for judgment as a matter of law based on insufficiency of the evidence, the court should not "weigh the evidence, evaluate the credibility of witnesses, or substitute its judgment for that of the jury." *Arban v. West Publishing Corp.*, 345 F.3d 390, 400 (6th Cir. 2003). Rather, the court "views the evidence in a light most favorable to the party against whom the motion is made and gives that party the benefit of all reasonable inferences." *Id.* The motion should be granted "only if a complete absence of proof exists on a material issue in the action, or if no disputed issue of fact exists upon which reasonable minds could differ." *Karam v. Sagemark Consulting, Inc.*, 383 F.3d 421, 426-27 (6th Cir. 2004) (quoting *LaPerrier v. Int'l Union UAW*, 348 F.3d 127, 132 (6th Cir. 2003)). Judgment as a matter of law must be entered for the moving party, however, "if in viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in the favor of the moving party." *Gray v. Toshiba Am. Consumer Prods., Inc.*, 263 F.3d 595, 598 (6th Cir. 2001).

IV. ANALYSIS

Plaintiff alleges that Defendant violated Title IX of the Education Amendments of 1972 (hereafter "Title IX"), which provides, in relevant part:

> No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to

> discrimination under any educational program or activity receiving Federal financial assistance . . .

20 U.S.C.A. §1571(a) (emphasis added).

In *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 653 (1999), the Supreme Court held that recipients of federal funds (such as Defendant) may be liable for damages under Title IX for student-on-student sexual harassment. In *Davis*, the Supreme Court established that Title IX may support a claim for student-on-student sexual harassment when the plaintiff can demonstrate the following elements:

> (1) Plaintiff was subjected to harassment based on sex;
>
> (2) The sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school;
>
> (3) The funding recipient had actual knowledge of the sexual harassment; and
>
> (4) The funding recipient was deliberately indifferent to the harassment.

Vance v. Spencer Cty. Pub. Sch., 231 F.3d 253, 258 (6th Cir. 2000).

A. No Denial of Benefits or Discrimination on the Basis of Sex

As Plaintiff notes in his response brief, the Court gave the jury the following instructions with respect to the first element of Plaintiff's claim:[8]

> With respect to the first element of Plaintiff's claim, he has the burden of proving by a preponderance of the evidence that the offending student's actions were motivated by [Plaintiff]'s sex or gender.

---

[8]The parties agreed to the following language given to the Court as the first required element of proof for Plaintiff's Title IX claim:

> Plaintiff was subjected to harassment because of his sex or gender through the intentional conduct of other students consisting of sexual orientation conduct and/or conduct of a sexual nature in the school program or environment.

> Plaintiff must prove that the offending student(s) intentionally harassed Plaintiff on the basis of sex or gender, which simply means that his sex or gender must have been a motivating factor in the offending student's actions or decision even though other factors may also have motivated them.
>
> The term "motivating factor" means a "substantial factor" or a "significant factor."
>
> Harassment is not discrimination based on sex merely because the words or gestures used have a sexual content or connotation, or are based upon gender, sexual orientation or perceived sexual orientation. The harassment must be more than slightly colored with offensive sexual connotations and must actually constitute harassment based upon gender, sexual orientation or perceived sexual orientation.

1. Name-Calling

In this case, Plaintiff testified that other students regularly called him "gay," "fag" and "queer" in sixth, seventh grade and ninth grade. Plaintiff further testified that, in seventh grade and ninth grade, students also called him "Mr. Clean" and directed comments at him such as "man boobs." There was no evidence introduced, however, that would allow a reasonable finder of fact to determine that those terms were based on Plaintiff's sex, sexual orientation or perceived sexual orientation.[9]

First, Plaintiff testified that he is not gay, and no evidence was offered that any of the persons who harassed Plaintiff were gay. Second, no evidence was introduced that anyone perceived Plaintiff to be gay or that any of those persons who harassed Plaintiff were perceived to be gay. Third, no evidence was introduced that any of the harassment stemmed from, or that any of the persons who harassed Plaintiff had: (1) any sexual desire for Plaintiff, (2) a general hostility toward

[9] *See Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1988) (a Title VII case).

male students, or (3) treated female students differently/better than male students. *See Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80-81 (1988); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 765 (6th Cir. 2006).

Fourth, no evidence was introduced that Plaintiff was called "gay," "fag," "queer," "Mr. Clean" or "man boobs" because of Plaintiff's sex, sexual orientation or perceived sexual orientation. To the contrary, Plaintiff and his parents testified that the "man boobs" comments began after Plaintiff gained about 40 pounds between the latter part of Plaintiff's sixth grade year and the beginning of his seventh grade year. Such teasing is not sufficient to establish a Title IX claim. *See Davis*, 526 U.S. at 652:

> It is not enough to show, as the dissent would read this opinion to provide, that a student has been "teased," ... or "called ... offensive names[.]" Comparisons to an "overweight child who skips gym class because the other children tease her about her size," the student who "refuses to wear glasses to avoid the taunts of 'four-eyes,'" and "the child who refuses to go to school because the school bully calls him a 'scaredy-cat' at recess," ... are inapposite and misleading.

As to the "Mr. Clean" teasing, although Plaintiff testified that he understood it to be a reference to a lack of pubic hair, no other witness testified that anyone who called Plaintiff "Mr. Clean" or put up a "Mr. Clean" poster intended to connote that meaning. In fact, Plaintiff did not even indicate that someone had communicated such a meaning to him. Likewise, Ryan Hobbs ("Mr. Hobbs"), a former Hudson Area Schools student called as a witness by Plaintiff testified that: (1) he had used the terms "gay," "fag" and "queer" while he attended the Hudson Area Schools, (2) he did not consider any of those words to be sexually discriminatory or sexually harassing, and (3) he did not use those terms in a sexual way. Even the two "school-related" witnesses called by Plaintiff, Glen Stutzky ("Mr. Stutzky") and Angela Johnston ("Ms. Johnston"), testified that school-aged

children often use words such words as "gay," "fag" and "queer" without understanding their meanings or that those words can be hurtful. Mr. Stutzky and Ms. Johnston, as well as many other witnesses, also testified that school-aged children often use those words as part of their vernacular to describe a variety of things or people, in a nonsexual manner. No witness testified, and no evidence was introduced, that any person who called Plaintiff those names intended them in a sexual manner.

2. Other Acts

Aside from the verbal name calling described above and the locker room assault discussed below, there were few other incidents to which Plaintiff was subjected. In seventh grade, there was one such incident, which did not involve student-on-student harassment; that is, when Mr. Redding made fun of Plaintiff in class by stating something to the effect of "Patterson, how does it feel to be hit by a girl?" In December of his ninth grade year, several incidents occurred within days of each other: Plaintiff's planner was defaced with sexually explicit terms and drawings, a "Mr. Clean" poster was taped to Plaintiff's locker and the note card incident in history class (another reference to Plaintiff being a "fag"). In January, unidentified persons put words such as "gay," "fag" and "queer," as well as a pictorial display of a penis being inserted into a rectum, on the outside of his locker, and the inside of his locker was vandalized with sexual comments. In February, someone wrote "FAG" with shaving cream on his gym locker. Finally, there were the comments made by Mr. Beal, the varsity baseball coach, about only playing a joke on someone who can take it (again, this did not involve student-on-student harassment).

Many of these "acts" simply constituted another form of name calling (*i.e.*, "gay," "fag," "queer" and "Mr. Clean" in a written form is no different from a verbal occurrence). Thus, there

were but four incidents (the planner, some of the locker defacement, the comments of Mr. Redding and the comments of Mr. Beal) which arguably included sex-based content. Significantly, however, as noted above and as the jury was instructed:

> Harassment is not discrimination based on sex merely because the words or gestures used have a sexual content or connotation, or are based upon gender, sexual orientation or perceived sexual orientation. **The harassment must be more than slightly colored with offensive sexual connotations and must actually constitute harassment based upon gender, sexual orientation or perceived sexual orientation.**

Although each of these four incidents may be been colored with offensive sexual connotations, no evidence was introduced that the "harassment [was] based upon gender, sexual orientation or perceived sexual orientation" of Plaintiff.

3. Locker Room Assault

Lance P.'s assault of Plaintiff clearly constituted an offensive, sexual touching. As with the other instances in this case, however, there was no evidence offered that the actions of Lance P. were based upon the gender, sexual orientation or perceived sexual orientation of Plaintiff - or Lance P., for that matter. Rather, while the evidence demonstrated that Lance P.'s actions were unbelievably stupid, cruel and hurtful to Plaintiff, there was no evidence presented that Lance P.: (1) acted out of sexual desire for Plaintiff, (2) had any general hostility toward males, or (3) treated males differently than females. The Court in no way condones the behavior of Lance P., but the Court concludes that Lance P.'s conduct did not constitute discrimination or harassment on the basis of sex for which Title IX provides a legal remedy.

4. Conclusion

Although the Court finds the harassment in this case deplorable and is sympathetic to

students who are subjected to such behavior, the harassment directed at Plaintiff was typical of middle school and high school behavior. As stated by the U.S. Supreme Court:

> Whether gender-oriented conduct rises to the level of actionable "harassment" thus "depends on a constellation of surrounding circumstances, expectations, and relationships," *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), including but not limited to, the ages of the harasser and the victim and the number of individuals involved, see OCR Title IX Guidelines 12041-12042. Courts, moreover, must bear in mind that schools are unlike the adult workplace. **Children may regularly interact in a manner that would be unacceptable among adults.** See, *e.g.*, Brief for National School Boards Association et al. As *Amici Curiae* 11 (describing "dizzying array of immature ... behaviors by students"). Indeed, at least early on, **students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it.** Damages are not available for simple acts of teasing and name-calling among children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive it denies its victims the equal access to education that Title IX is designed to protect.

Davis, 526 U.S. at 651-52 (emphasis added).[10]

More significantly, the Court notes that although this case was brought as a Title IX case, which requires discrimination or harassment on the basis of sex, Plaintiff consistently argued and presented a case on bullying. Plaintiff seized on the theme that he was harassed because he did not

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[10] The Court's instructions to the jury regarding whether the alleged sexual harassment was "severe, pervasive, and objectively offensive" included numerous portions of the *Davis* Court's language quoted above:

> Schools are unlike the adult workplace. Children may regularly interact in a manner that would be unacceptable among adults. Simple acts of teasing and name-calling among children do not constitute sufficiently severe, pervasive, and objectively offensive sexual harassment, even when those comments target differences in gender. The sexual harassment must have been so severe, pervasive and objectively offensive that it had the effect of denying Plaintiff equal access to educational opportunities or benefits provided by Defendant.

conform to the stereotypical male in the Hudson Area Schools. This theme was promoted at every opportunity: in his opening statement, throughout his case-in-chief, in his closing argument and even in his response brief. As stated in his response brief, it is Plaintiff's position (and the Court accepts it as true for purposes of deciding this JMOL Motion), that: (a) Hudson Area Schools had "a highly charged environment where the common perception of a male gender was the aggressive male football player and wrestler[,]" and (b) Plaintiff, "a person of slight build," was the subject of "attacks on [his] gender and the perception he is not a man."

In furtherance of this theme, Plaintiff response brief identifies some of the trial testimony of Mr. Hobbs and Dr. Warwick:

> Mr. Hobbs also testified, contrary to the Defendant's claim, that male football players and wrestlers were given high social status within the Hudson school environment and that male students who did not fit the aggressive male model for football and wrestling were treated or subjected to treatment that demeaned them as males or young men. These non-stereotypical males were viewed as not truly "male" and were frequently singled out for treatment in the form of harassment.
>
> Dr. Gretchen Warwick, who had much familiarity and understanding of the Hudson community, and as a licensed psychologist, testified that football was the most important activity in Hudson community. Intellectual values for males was not Hudson's strong point. In her opinion, the valuing of athletic ability related to physical aggressiveness, as opposed to a male student preferring intellectual ability over football, created a lower social status level for the male students who favored academics and increased risk of their being targeted for bullying or harassment.

In fact, Mr. Hobbs also testified that Plaintiff was teased because Plaintiff participated in socially unpopular activities, such as Science Olympiad, rather than football or wrestling. As Plaintiff's arguments and the testimony of Mr. Hobbs and Dr. Warwick, among others, exemplify, the basis of Plaintiff's case (and the harassment to which he was subjected) really is the byproduct of the

social status or structure in schools. For good or bad, in the Hudson Area Schools, like many schools, that means the successful athletes (jocks) are at the top level of social status structure and the scholars are at a lower social status level. Title IX does not, however, protect students against being teased or harassed because of their social status; it only protects against harassment or discrimination on the basis of sex.

For the reasons set forth above, the Court concludes that the harassment to which Plaintiff was subjected in sixth, seventh and ninth grade constituted bullying, not sexual harassment. As Title IX protects only harassment or discrimination based on sex, the Court finds that Plaintiff's cause of action must be dismissed as a matter of law.[11]

B. No Deliberate Indifference

Assuming, for purposes of this section of this Opinion and Order only, the other elements of Plaintiff's Title IX claim have been satisfied, the Court finds that, as a matter of law, Defendant was not deliberately indifferent.

A federal assistance "recipient is liable for damages only where the recipient itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to known acts of harassment." *Vance*, 231 F.3d at 259-60 (citing *Davis*, 526 U.S. at 642). More specifically, "the Supreme Court stated that a plaintiff may demonstrate defendant's deliberate indifference 'only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.'" *Vance*, 231 F.3d at 260 (quoting *Davis*, 526 U.S. at 648). The *Vance* court continued:

[11]The Court also concludes that, to the extent that there was any actionable Title IX harassment, such harassment was not "so severe, pervasive, and objectively offensive that it could be said to deprive [Plaintiff] of access to the educational opportunities or benefits provided by [Defendant]."

> The recipient is not required to "remedy" sexual harassment nor ensure that students conform their conduct to certain rules, but rather, "the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable." *Davis*, 526 U.S. at 648-49, 119 S.Ct. 1661. The deliberate indifference standard "does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action." *Id*. at 648, 119 S.Ct. 1661. The standard does not mean that recipients must expel every student accused of misconduct. *See id.* Victims do not have a right to particular remedial demands. *See id.* Furthermore, courts should not second guess the disciplinary decisions that school administrators make. *See id.*
>
> "The Supreme Court has pointedly reminded us, however, that this is 'not a mere "reasonableness" standard' that transforms every school disciplinary decision into a jury question." *Gant [v. Wallingford Bd. of Educ.*], 195 F.3d [134,] 141 [(2d Cir.1999)] (quoting *Davis*, 526 U.S. at 649, 119 S.Ct. 161). In an appropriate case, there is no reason why courts on a motion for directed verdict could not identify a response as not "clearly unreasonable" as a matter of law. See *Gant*, 195 F.3d at 141.

Vance, 231 F.3d at 260. The instant case presents exactly the kind of case where it is appropriate for a court to grant a motion for judgment as a matter of law because Defendant's response was not "clearly unreasonable" (*i.e.*, deliberately indifferent) as a matter of law.

When discrimination such as sexual harassment has been determined to occur, the responsible party has a duty to take reasonable, timely, age appropriate and effective corrective action. *See Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 288 (1998). As the Court instructed the jury in this case:

> With respect to the fourth element of Plaintiff's Title IX claim, "deliberate indifference" is not a mere "reasonableness" or "negligence" standard. Rather, it means that Defendant's response to the alleged harassment, or lack of response, was clearly unreasonable in light of all the known circumstances.
>
> "Deliberate indifference" also means more than mere

> "recklessness" on the part of Defendant. "Recklessness" requires only proof that a reasonable person would have appreciated the great degree of risk of harm to Plaintiff. In order for an act to be "deliberate," Defendant must have been shown to have been aware that adverse consequences from its action or inaction were certain or substantially certain to cause harm. Before you can find that Defendant was deliberately indifferent, Plaintiff must prove Defendant was aware that a particular act or inaction was certain or substantially certain to cause Plaintiff harm and that Defendant decided to act or not act in spite of that knowledge.
>
> A school district is not required to "remedy" sexual harassment nor ensure that students conform their conduct to certain rules. Defendant need only respond to known peer harassment in a manner that is not clearly unreasonable. The deliberate indifference standard does not mean that Defendant can avoid liability only by purging its schools of actionable peer harassment or that administrators must engage in particular disciplinary action. The standard does not mean that Defendant must expel every student accused of misconduct. Victims do not have a right to any particular remedial demands.
>
> Where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.

Relying on and quoting from Davis, 526 U.S. at 648-49; *Paint Valley*, 400 F.3d at 367; *Vance*, 231 F.3d at 260, 261, 263-64.

In the instant case, the Court finds that the uncontroverted evidence is that Defendant's teachers and administrators responded to each and every incident of harassment of which they had notice. More critically, the Court concludes that, as a matter of law, there was no evidence whatsoever presented that Defendant "was aware that adverse consequences from its action or inaction were certain or substantially certain to cause harm ... and that Defendant decided to act or

not act in spite of that knowledge." *Vance*, 231 F.3d at 263-64. In other words, the Court finds, as a matter of law, that Defendant "responde[d] to known peer harassment in a manner that [was] not clearly unreasonable." *Davis*, 526 U.S. at 649.

First, the undisputed testimony was that Ms. Mansfield initiated the process to qualify Plaintiff for resource room consideration after hearing complaints from and having discussions with Dena Patterson regarding Plaintiff's struggles in seventh grade at Hudson Middle School. The evidence also uniformly established that Defendant's employees (Ms. Mansfield, Ms. Cates and Mr. Moeckel) put in time over their summer vacations to evaluate Plaintiff's eligibility for resource room services so that Plaintiff could be assigned to a resource room from the first day of his eighth grade year. Second, the witnesses consistently testified that, in Plaintiff's eighth grade year, he was not subjected to harassment of the nature he had been in sixth and seventh grade.

Third, the witness uniformly attributed Plaintiff's successful eighth grade year to Plaintiff's assignment to Mr. Adams' resource room, an assignment that resulted from efforts initiated by Defendant's employees. As Plaintiff and his parents testified that the harassment to which Plaintiff was subjected in sixth and seventh grade disappeared when Plaintiff was in eighth grade (and no evidence to the contrary was offered), the Court finds that there is no genuine issue of material fact that Defendant's response was adequate and effective in addressing the harassment to that point. As such, the Court finds that, as of the time Plaintiff entered ninth grade at Hudson High School, Defendant's response was not clearly unreasonable (*i.e.*, deliberately indifferent) as a matter of law.

With respect to the harassment in ninth grade about which Plaintiff and/or his parents complained to Defendant's administrators, the undisputed testimony was that:

1. Defendant's administrators investigated each incident promptly after being notified of the incident;

2. In cases where the perpetrator(s) was/were identifiable, Defendant's administrators reprimanded the perpetrator(s) and imposed the punishment the administrator(s) deemed appropriate under the circumstances;

3. In most instances, the punishment imposed was a verbal reprimand of the perpetrator(s) and/or extracting an apology from the perpetrator(s);

4. In only one instance did a student who was verbally reprimanded subsequently harass Plaintiff (*i.e.*, other than the subsequent harassment by Jeff L., discussed in parts 5 and 6 below, Plaintiff admitted that all students verbally reprimanded by Defendant's administrator(s) never harassed him again);

5. Jeff L. was the only recidivist student;

6. Jeff L. harassed Plaintiff for a second time when he participated in taping a Mr. Clean poster to Plaintiff's locker only days after being verbally reprimanded for participating in the defacement of Plaintiff's planner;

7. In response to Jeff L.'s second offense, Defendant suspended Jeff L. for a day and, thereafter, Jeff L. never harassed Plaintiff again;

8. Prior to the locker room assault, Lance P. had never harassed Plaintiff and neither Plaintiff, Mr. Wade, nor any administrator or teacher at Hudson Area Schools had reason to believe that Lance P. would assault Plaintiff (or anyone else);

9. On the first school day after the locker room assault, Principal Osborne and AP Durbin conducted an investigation and, on that same day, Principal Osborne suspended Lance P. from school for the duration of the school year;

10. Defendant's administrators cooperated with the Hudson Police Department and law enforcement officials in the criminal investigation of Lance P.;

11. Defendant expelled Lance P. from the Hudson Area Schools prior to the commencement of the next school year; and

12. Defendant subsequently denied his request for re-admission.

As is clear from the foregoing, the undisputed responses by Defendant (some of which are set forth in greater detail in Section II) were prompt and effective. On the one occasion that a student harassed Plaintiff following the initial form of discipline, Defendant increased the punishment from a verbal reprimand to a suspension. This form of graduated punishment, one typically used in a

school setting (as well as in the criminal justice arena), proved effective.

The evidence introduced at trial also revealed that Defendant had policies in place and promoted activities that address sexual harassment, notwithstanding Plaintiff's assertions and the suggestion of Sixth Circuit majority to the contrary. First, in 2002, Defendant's school board adopted a three-page policy prohibiting harassment, including sexual harassment.[12] This policy was in place while Plaintiff attended Hudson Middle School and Hudson High School. Second, each student is given a student handbook on the first day of school each year. The student handbook contains a code of conduct. The student handbook also defines sexual harassment, states that sexual harassment is prohibited and instructs students to report sexual harassment to school administrators. Third, students were instructed on these policies and acceptable conduct while attending Hudson Area Schools, including by their teachers, who spend a portion of the first day of class discussing the student handbook, including the student code of conduct, with students.

Fourth, prior to the time Plaintiff completed his ninth grade year, Defendant hosted or

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[12] The policy provided, in part:

> Harassment of students is prohibited, and will not be tolerated.
>
> * * * * *
>
> Harassment is defined as inappropriate conduct that is repeated enough, or severe enough, to negatively impact a student's educational, physical or emotional well being. This would include harassment based on any legally protected characteristics, such as sex, ..."
>
> * * * * *
>
> Sexual Harassment may include, but is not limited to:
>
> A. verbal harassment or abuse;
> B. pressure for sexual activity;
> C. repeated remarks with sexual or demeaning implications;
> D. unwelcome touching;
> E. sexual jokes, posters, cartoons, etc.;
> F. suggesting or demanding sexual involvement, accompanied by implied or explicit threats concerning one's grades, safety, job, or performance of public duties.

maintained a number of programs which, according to Mr. Stutzky, addressed, at least in part, sexual harassment: the "Flirting and Hurting Program" initiated by Ms. Mansfield, "Bang, Bang, You're Dead," "Positive Peers" and "Concerned About Teen Sexuality." Fifth, beginning in 2000, a student conduct component was added to the Health class curriculum, and this component specifically addressed issues of sexual harassment.

Sixth, while Plaintiff attended Hudson Area Schools, Defendant had specific policies regarding hallway, lunchroom, and locker room supervision. These policies require supervision at all times by teachers and administrators based on shifts. School district administrators and teachers were advised of, and trained on, the above policies. During in-service training sessions held at the beginning of the school year, the Hudson Middle School and Hudson High School staff were provided with copies of Defendant's policies regarding student conduct and spent time discussing appropriate student conduct, including what sexual harassment means.

The Court now turns to what appeared to be a, if not the, key reason this case was remanded to this Court for trial: the Sixth Circuit's belief that the evidence, taken in a light most favorable to Plaintiff, demonstrated that resource room services were not available to Plaintiff during his ninth grade year.[13] At the time the summary judgment motion was briefed before this Court, this Court

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[13]The Sixth Circuit stated:

> One key difference between *Theno* and this case is that Hudson did at one point employ a system that successfully combated the harassment of [Plaintiff], i.e., the use of the resource room during eighth grade. In the instant case, a reasonable jury could thus conclude that Hudson was not only aware of what did not work, but also was aware of what had worked to insulate [Plaintiff] from the harassment. **However, in ninth grade, Hudson discontinued the use of the resource room**. The cycle of harassment then intensified, and Hudson's only response was to employ the same type of verbal reprimands that it had used unsuccessfully in response to the sixth- and seventh-grade harassment. **Given that Hudson knew that its methods were ineffective, but did not change those methods, "a reasonable jury certainly could conclude that at some point during the ... period of harassment[,] the school district's standard**

was not presented with evidence of how Plaintiff's IEP services for ninth grade evolved or were resolved. At trial, however, the undisputed testimony was that, at the IEP team meeting preceding Plaintiff's ninth grade year, one of the IEP options discussed for Plaintiff's ninth grade year was for him to receive services in the ninth grade EI resource room. There was absolutely no testimony whatsoever that Defendant discontinued the use of the resource room or that Defendant did not make a resource room available to Plaintiff. In fact, there was testimony that the ninth grade EI resource room was operational during Plaintiff's ninth grade year. In other words, the undisputed evidence is that Defendant **did not discontinue** the use of the resource room for Plaintiff during his ninth grade year.

Moreover, the undisputed testimony is that **David and Dena Patterson** did not want Plaintiff in the ninth grade EI resource room; rather, they wanted Plaintiff to be placed in a middle school resource room, even though Plaintiff was in high school. The testimony is further undisputed that David and Dena Patterson **agreed** to have Plaintiff's IEP set up such that Plaintiff would report to their preferred teacher, Mr. Adams, for resource room 20-30 minutes a week and on a daily basis, as needed. As described in Section II.E. (including footnote 6), David and Dena Patterson affirmatively expressed their agreement with that arrangement when signing the IEP document for Plaintiff's ninth grade year.

Although the ninth grade IEP may not have been exactly what Plaintiff (or his parents) desired, and while Defendant's actions may not have yielded the results Plaintiff (or his parents)

> **and ineffective response to the known harassment became clearly unreasonable.**" *Theno* [*v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F.Supp.2d 952, 966 (D.Kan. 2005)].

Patterson, 551 F.3d at 448-49 (emphasis added).

hoped for, applicable law provides that Plaintiff (and his parents) did not "have a Title IX right to make particular remedial demands." *See Davis*, 526 U.S. at 648. Likewise, the law is well-established that "courts should refrain from second-guessing the disciplinary decisions made by school administrators." *Davis*, 526 U.S. at 648 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985). Thus, this Court must adhere to the standard of review set forth by the *Davis* Court, *i.e.*, the Court simply is to determine whether Defendant acted "clearly unreasonable in light of known circumstances." *Vance*, 231 F.3d at 260 (quoting *Davis*, 526 U.S. at 648). Based on the undisputed responses of Defendant's administrators to reported incidents of harassment, as well as the implementation of an eighth grade IEP and the efforts to create and implement an IEP satisfactory to Plaintiff (and his parents) for the ninth grade year, the Court finds, as a matter of law, that Defendant did not act clearly unreasonably or with deliberate indifference to the known acts of harassment directed at Plaintiff.[14]

For the foregoing reasons, the Court holds that Defendant was not deliberately indifferent to the alleged sexual harassment against Plaintiff because Defendant's actions were not clearly unreasonable in light of known circumstances. Accordingly, the Court concludes that Plaintiff's Title IX claim fails as a matter of law, and therefore GRANTS Defendant's JMOL Motion, on this basis as well.

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[14] The Court also notes that, in addition to the disciplinary reprimands and punishments imposed on students for the incidents described above (all of which resulted in Plaintiff being left alone by those students), Defendant's administrators took a number of steps to assist Plaintiff in dealing with the issues he faced in their schools. For example, although Defendant and/or its employees had no obligation to provide many services to Plaintiff, even as a student receiving IEP services, Plaintiff and/or his parents acknowledged at trial that the following were true: (1) while Plaintiff was in seventh grade, Principal Rozeveld offered to meet with Plaintiff at the end of each day, (2) Ms. Mansfield repeatedly offered to have Plaintiff participate in a group meeting at the school that allowed students to discuss/work through issues, and (3) in ninth grade, Mr. Adams continued to be available to Plaintiff, even though Mr. Adams continued to work at the middle school and did not have to be available to Plaintiff.

C. Conditional Ruling on a Motion for a New Trial

Pursuant to Rule 50(c) of the Federal Rules of Civil Procedure, the Court must conditionally rule on Defendant's Rule 59 motion for new trial in the event the Court's grant of Defendant's JMOL Motion is vacated or reversed. A new trial is warranted under Rule 59(a) when a jury has reached a "seriously erroneous result," as evidenced by the verdict being against the great weight of the evidence. *Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). As the Sixth Circuit has stated:

> In ruling upon a motion for a new trial based on the ground that the verdict is against the great weight of the evidence, a district judge must compare the opposing proofs and weigh the evidence . . . and "it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence. . . ."
>
> * * * * *
>
> "Courts are not free to reweigh the evidence and set aside the jury verdicts merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Bruner v. Dunaway, 684 F.2d 422, 425 (6th Cir. 1982) (citations omitted).

For the reasons set forth above, the Court concludes that the jury verdict was against the great weight of the evidence. More specifically, the Court finds that the great weight of the evidence did not support a finding that: (1) Plaintiff was subjected to harassment based on sex; (2) even if the harassment was based on sex, it was severe, pervasive, and objectively offensive; or (3) Defendant was deliberately indifferent to the harassment. The Court therefore concludes that the jury verdict in favor of Plaintiff on his Title IX claim should be set aside. Accordingly, should the Court's grant of Defendant's JMOL Motion be vacated or reversed, the Court grants Defendant's alternative motion for a new trial.

V. CONCLUSION

Accordingly, and for the reasons set forth above, IT IS HEREBY ORDERED that Defendant's Motion for Judgment as a Matter of Law (Docket #191) is GRANTED. Plaintiff's cause of action is therefore DISMISSED WITH PREJUDICE. IT IS FURTHER ORDERED that all motions not addressed in this Opinion and Order are hereby DENIED AS MOOT.

Concurrent with the issuance of this Opinion and Order, the Court is entering an Order to Strike the Judgment entered by this Court on March 30, 2010. A new Judgment dismissing Plaintiff's cause of action shall be entered accordingly.

IT IS SO ORDERED.

s/Lawrence P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Dated: July 1, 2010

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Order was served upon the attorneys of record by electronic or U.S. mail on July 1, 2010.

s/Marie E. Verlinde
Case Manager
(810) 984-3290

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 09a0002p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAVID PATTERSON and DENA PATTERSON,
Plaintiffs-Appellants,

v.

HUDSON AREA SCHOOLS and KATHY MALNAR,
Defendants-Appellees.

No. 08-1008

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 05-74439—Lawrence P. Zatkoff, District Judge.

Argued: October 23, 2008

Decided and Filed: January 6, 2009

Before: MOORE and WHITE, Circuit Judges; VINSON, District Judge.*

COUNSEL

ARGUED: Terry E. Heiss, LAW OFFICE OF TERRY E. HEISS, Ada, Michigan, for Appellants. Timothy John Mullins, GIARMARCO, MULLINS & HORTON, Troy, Michigan, for Appellees. **ON BRIEF:** Terry E. Heiss, LAW OFFICE OF TERRY E. HEISS, Ada, Michigan, for Appellants. Timothy John Mullins, GIARMARCO, MULLINS & HORTON, Troy, Michigan, for Appellees.

MOORE, J., delivered the opinion of the court, in which WHITE, J., joined. VINSON, D. J. (pp. 20-34), delivered a separate dissenting opinion.

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*The Honorable C. Roger Vinson, United States District Judge for the Northern District of Florida, sitting by designation.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiffs-Appellants David Patterson and Dena Patterson (collectively referred to as "the Pattersons"), appeal the district court's grant of summary judgment in favor of Defendant-Appellee Hudson Area Schools ("Hudson") on the Pattersons' claim that Hudson violated Title IX by allowing their son, DP,[1] to be harassed by other students. The Pattersons' sole argument is that the district court erred in finding that, as a matter of law, Hudson was not deliberately indifferent to the alleged sexual harassment of DP.

Because we believe that the Pattersons have established that there is a genuine issue of material fact as to whether Hudson was deliberately indifferent to the student-on-student sexual harassment of DP, we **REVERSE** the grant of summary judgment and **REMAND** for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURE

Because this case involves a motion for summary judgment, we will detail the facts in the light most favorable to the nonmoving party, the Pattersons. DP was a student of Hudson schools during all relevant time periods. Beginning in 2002, during DP's sixth-grade year, various classmates of DP began teasing DP, calling him names, and pushing and shoving him in the hallways. DP was pushed into lockers and called names such as "queer," "faggot," and "pig" by various students on a daily basis. Joint Appendix ("J.A.") at 668-70 (DP Dep. at 28-30). DP reported at least some of these instances to the school and was told "kids will be kids, it's middle school." J.A. at 672 (DP Dep. at 33). DP also began receiving psychological treatment from Dr. Gretchen

[1]All individuals who were minors during the events described herein will be referred to by initials.

Warwick, Ph.D.[2] According to Dr. Warwick, this harassment caused DP to be distraught, anxious, and angry.

The type of harassment DP faced in sixth grade escalated during DP's seventh-grade year, when he was called names such as "fat," "faggot," "gay," "queer," "pig," and "man boobs" on a daily basis. J.A. at 672-74 (DP Dep. at 33, 36-37). DP believes he was called these names more than 200 times during his seventh-grade year. He also was frequently pushed in the hallways. Additionally, DP was called "Mr. Clean" by his peers, a derogatory term that referred to DP's supposed lack of pubic hair.

On one occasion, DP attempted to stop a female classmate, BC, from tormenting another student. In response, BC slapped DP. Though, upon learning about the incident, band teacher Crystal Bough, told DP she "w[ould] take care of it," the Pattersons were never contacted by the school, nor did Ms. Bough report the incident to the principal. J.A. at 678-79 (DP Dep. at 44-45). The Pattersons learned from DP that he had been assaulted at school. This incident led to further teasing, including teasing from geography teacher John Redding, who asked DP later that same day in front of a full class of students: "[H]ow does it feel to be hit by a girl[?]" J.A. at 680 (DP Dep. at 46). The class laughed at DP.

DP wanted to quit school by the end of the first semester of seventh grade. Principal Greg Rozeveld[3] offered to mentor DP through this hard time. However, according to Mrs. Patterson, when DP first began to meet with Principal Rozeveld, DP was released from class early to attend the meeting. The first visit went smoothly, but Principal Rozeveld was not in his office when DP arrived for the next three visits. On these occasions, DP would return to class, which caused the teacher to decide to stop sending DP early to meet with Principal Rozeveld. Instead, she waited until she released the problem students to go to the office to have their planners signed at the end of the

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[2] Dr. Warwick also treated DP when he was ten years old for problems stemming from his family life. DP was no longer suffering from those problems when the teasing began in sixth grade.

[3] The principal's name is repeatedly misspelled in Hudson's brief and the depositions as "Roosevelt."

school day. After only a couple of weeks, DP expressed to Mrs. Patterson that he no longer wanted to go with the problem students because other students were beginning to think he was a trouble-maker. DP stopped going to meet with Principal Rozeveld shortly thereafter.

These incidents caused DP to withdraw to the point that he began eating lunch in the bandroom by himself to avoid his tormentors. His interim grades were also low; however, DP did receive higher final grades.

The Pattersons and DP repeatedly reported several incidents of harassment to Hudson. As the district court accurately detailed, DP and the Pattersons reported the following incidents:

1. Sixth Grade:

    a. Dave Patterson spoke to a teacher about teasing directed at [DP] and how [DP] felt upset and humiliated.

    b. [The Pattersons] attended parent teacher conferences to talk about the name calling, etc.

    c. [The Pattersons] met with Principal Rozeveld to discuss the pushing, shoving and name calling of [DP].

2. Seventh Grade:

    a. [The Pattersons] and school counselor Susan Mansfield ("Ms. Mansfield") discussed the fact that [DP] was having a hard time at school in November and/or December, 2002.

    b. [The Pattersons] and several teachers met to discuss [DP]'s anxiety about being (i) bullied and teased, (ii) the victim of sexually offensive name calling, and (iii) pushed into lockers.

    c. [The Pattersons] met with Principal Rozeveld just before Christmas 2002 about [DP] not wanting to come back to school because of teasing, bullying, and being called "gay", "fag", "queer." [The Pattersons] also discussed the impact of those things on [DP]'s schooling, his feelings of being ostracized and his suffering grades. Names of perpetrators allegedly were provided. They

> also discussed the incident of [DP] being slapped by [BC] and Mr. Redding teasing [DP] about it.
>
> d. During the second semester of seventh grade, [the Pattersons] discussed problems [DP] endured with Ms. Mansfield and other staff.
>
> e. [The Pattersons] communicated with school staff throughout [DP]'s seventh grade year over academic and social issues. The [Pattersons] asked staff what, if anything, [DP] was doing to cause his peers to tease and taunt him. [The Pattersons] claim that they were told consistently that [DP] was doing nothing wrong.

Patterson v. Hudson Area Schools, No. 05-74439, 2007 WL 4201137, *1-2 (E.D. Mich. Nov. 28, 2007) (unpublished opinion and order).

During the summer between seventh grade and eighth grade, Ms. Mansfield, along with social worker Tammy Cates, filled out a referral form to have DP evaluated for special education services. This evaluation established that DP is emotionally impaired as defined by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. An Individual Education Placement Team was convened and an individual education program was developed. Pursuant to the program, DP was assigned to attend teacher Ted Adams's resource room during one period of the day for all of the eighth-grade year. Mr. Adams was helpful in teaching DP how to cope with his peers. All parties agree that DP had a successful eighth-grade year; by using the resource room, DP was able to learn effectively.

However, DP's ninth-grade year was not successful. DP's individual education program was altered by Hudson. Notably, Hudson High School Principal Michael Osborne refused to allow DP to continue in Mr. Adams's resource room because Mr. Adams was a middle-school resource-room teacher. Because DP's eighth-grade year was so successful, the Pattersons begged Hudson to allow DP to continue in Mr. Adams's resource room, and even offered to have DP go to the middle school to meet

with Mr. Adams in Mr. Adams's room, but this request was to no avail.[4] Principal Osborne also "didn't think that [the high school resource room] was the place for [DP]." J.A. at 856 (Mrs. Patterson Dep. at 138). Thus, DP was not placed in any resource room for his ninth-grade year.

The beginning of his ninth-grade year brought a return of the type of harassment DP faced in sixth and seventh grade. DP was again called names such as "gay," "fat," "fag," and "queer" and was pushed and shoved in the hallways on a near daily basis. J.A. at 729-30 (DP Dep. at 106-07). That fall, DP also was called "Mr. Clean" by three students. Those students were forced to meet with DP and Ms. Mansfield. The students apologized, but DP did not think their apology was sincere. Those three students never bothered DP again.

DP also experienced new types of harassment during his ninth-grade year. During oral presentations in history class, a fellow student, SE, wrote a series of words on the back of his note cards. These words created the phrase: "[DP] is a fag." J.A. at 708 (DP Dep. at 85). The entire class saw this phrase as the student used the cards for his presentation, which caused the students to laugh at DP. SE was reported to Ms. Mansfield and the history teacher, both of whom verbally reprimanded SE. SE never bothered DP again.

Shortly after the oral presentation incident, another student, JR, defaced DP's planner with the sexual phrases "I ❤ penis," "I lick it in the Ass," "I ❤ cock," and "I'm a mamma's boy/I suck on her Nipple" and drawings of buttocks and a penis. J.A. at 311 (Planner); J.A. at 721-24 (DP Dep. at 98-101). DP reported this incident to both the teacher and Principal Osborne. JR was verbally reprimanded by Ms. Mansfield and did not bother DP again after this incident.

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[4] Though Mr. Adams worked for the middle school, the middle school and high school are housed in the same building, segregated into separate wings. According to DP, it was possible for him to stop by and meet with Mr. Adams in Mr. Adams's room even after DP began high school. Mr. Adams did volunteer to counsel DP for 25-30 minutes per week after DP began his ninth-grade year.

In March 2005, unknown students broke into DP's gym locker, removed his clothes and urinated on them, and threw his tennis shoes in the toilet. The locker was also "covered with shaving cream spelling out sexually oriented words." J.A. at 152 (TW Aff. ¶ 14). Later that spring, two students, KM and JL, hung a "Mr. Clean" poster on DP's locker in the main hallway. Principal Osborne verbally reprimanded KM, and suspended JL for one day. JL's tougher punishment was due to the fact that he had previously violated school rules in a manner unrelated to the "Mr. Clean" incident. Neither student bothered DP thereafter.

At some point after the "Mr. Clean" incident, DP's locker in the main hallway was vandalized by unknown students. These students used permanent markers and wrote words such as "gay," "faggot," and "queer" up and down the locker. J.A. at 805 (Mr. Patterson Dep. at 55). Additionally, a picture of a penis being inserted into a rectum was drawn on the locker. The inside of the locker was also defaced with various derogatory phrases, such as "suck your mother's tits" and "you suck dicks." *Id*. After the Pattersons reported the incident, Hudson officials cleaned the outside of the locker; DP had to ask Mr. Adams to help him clean the inside of the locker. Hudson conducted an investigation, but no individuals were ever punished.

The final incident of harassment occurred in late May 2005. After Friday night junior-varsity baseball practice, DP was sexually assaulted by a fellow teammate, LP, in the locker room. LP stripped naked, forced DP into a corner, jumped on DP's shoulders, and rubbed his penis and scrotum on DP's neck and face. While the assault was occurring, another student, NH, blocked the exit so DP could not escape. DP informed the Pattersons that evening about the attack. DP also informed Andy Wade, his older brother and coach of the junior-varsity baseball team. The Pattersons informed Principal Osborne about the event on Saturday, during a baseball double-header. Both DP and LP played in the double-header, but DP claims he participated in the game only in order to prevent the team from having to forfeit.

LP was allowed to attend school on Monday morning while Hudson officials began investigating the incident. At some point on Monday, LP was suspended for the remainder of the school year (just over eight days). However, LP was permitted to attend the annual spring sports banquet, one week after the assault. Principal Osborne told Mr. Wade "to treat [LP] like any other player, to shake his hand as [Mr. Wade] would other players and to act like nothing happened." J.A. at 233 (Wade Aff. ¶ 23). On June 10, 2005, LP was charged with assault with intent to commit a felony and criminal sexual conduct in the second degree. He ultimately pleaded guilty to disorderly conduct. He was formally expelled from Hudson in August 2005 and has not been permitted to re-enter the Hudson school system. NH was verbally reprimanded for his role in the assault. No criminal charges were filed against NH.

After the sexual assault, the varsity baseball coach, Jeremy Beal, held a team meeting with both the junior varsity and the varsity baseball players. At the meeting, Mr. Beal informed the players that they should "'not joke around with guys who can't take a man joke.'" J.A. at 153 (TW Aff. ¶ 24 (quoting Mr. Beal)). DP was present at the meeting.

Due to the continued harassment at Hudson, culminating in a sexual assault, DP claims that he has been psychologically unable to set foot into a Hudson school building since the end of his ninth-grade year. At the end of ninth grade, DP's individual education program was modified. For his tenth-grade year, "[DP] began receiving instructional services from [Hudson] in the Sacred Heart School building," a preschool-through-sixth-grade Catholic elementary school. J.A. at 160 (Johnston Aff. ¶ 36). DP's high-school teachers would visit him occasionally to discuss his assignments, even though "[DP] made numerous attempts to e-mail teachers and did not get responses." J.A. at 157 (Johnston Aff. ¶ 17). This year was not successful for DP.

For his eleventh- and twelfth-grade years, Hudson allowed DP to take college placement courses at the local college. Originally, Hudson decided that one semester of college coursework would equal one semester of high school course work. However, after Hudson was required to pay tuition, "[t]he standard changed to one semester college class equals one year high school class . . . ." J.A. at 197 (Mrs. Patterson Aff. ¶ 7). This facilitated DP's early graduation.

The Pattersons filed suit against Hudson and Kathy Malnar, Superintendent of Schools for Hudson, in the United States District Court for the Eastern District of Michigan on November 22, 2005. The complaint alleged the following federal claims: (1) Hudson violated Title IX of the Education Amendments of 1972; (2) Hudson violated DP's equal-protection rights; and (3) Ms. Malnar "failed to implement and enforce meaningful procedures to ensure compliance with federal law and the policies of [Hudson] and failed to ensure the proper education and training of staff as to harassment issues." J.A. at 17 (Compl. ¶¶ 28-30). The complaint also alleged various state claims.

Hudson and Malnar moved for summary judgment with respect to all claims, which the district court granted. *Patterson*, 2007 WL 4201137, at *13. With respect to the Title IX claim against Hudson,[5] the district court applied the three-part test expressed in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), as articulated by this court in *Vance v. Spencer County Public School District*, 231 F.3d 253 (6th Cir. 2000). *Patterson*, 2007 WL 4201137, at *12. The district court determined that the Pattersons had met their burden with regard to the first two parts of the test, but that the Pattersons failed to show, as a matter of law, that Hudson's responses to DP's reported attacks were "clearly unreasonable in light of known circumstances." *Id*. The district court concluded that, absent such a showing, the Pattersons could not prove that Hudson was "deliberately indifferent to the alleged sexual harassment," and thus summary judgment was appropriate. *Id*. The district court stressed that each time DP or the Pattersons reported an incident and Hudson knew who the perpetrators were, Hudson

[5]The district court dismissed the Title IX claim against Superintendent Malnar with the observation that "there is no individual liability for a Title IX claim." *Patterson*, 2007 WL 4201137, at *5 n.2. The Pattersons do not appeal this dismissal.

reprimanded or punished those individuals, who later did not bother DP. *Id*. at *8-9. The district court further credited Hudson with implementing several proactive programs to combat harassment and bullying and with "assist[ing DP] in dealing with the issues he faced in their schools." *Id*. at *10. The Pattersons timely appealed, arguing only that the district court erred in determinating that, as a matter of law, Hudson was not deliberately indifferent. Thus, on appeal, we consider only the Title IX claim against Hudson.

II. ANALYSIS

A. Summary Judgment Standard of Review

We review de novo a district court's grant of summary judgment. *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004). Under Rule 56(c), summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "In deciding upon a motion for summary judgment, we must view the factual evidence and draw all reasonable inferences in favor of the non-moving party." *Nat'l Enters., Inc. v. Smith*, 114 F.3d 561, 563 (6th Cir. 1997). "'We examine the grant of summary judgment to determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *DiCarlo*, 358 F.3d at 414 (quoting *C.T. Massey v. Exxon Corp.*, 942 F.2d 340, 342 (6th Cir.1991)) (second set of internal quotation marks omitted).

B. Title IX Claim

Title IX provides that, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681. Title IX can support a cause of action for a student's claim of student-on-student sexual harassment against a recipient of federal funds.

Davis, 526 U.S. at 633. To establish a prima facie case of student-on-student sexual harassment, the plaintiff must demonstrate each of the following elements:

> (1) the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school,
>
> (2) the funding recipient had actual knowledge of the sexual harassment, and
>
> (3) the funding recipient was deliberately indifferent to the harassment.

Vance, 231 F.3d at 258-59 (quoting *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999) (citing *Davis*, 526 U.S. at 633)).

The district court found that the Pattersons met their burden with regard to parts one and two of the test, but that, as a matter of law, the Pattersons did not establish that Hudson was "deliberately indifferent to the alleged sexual harassment against [DP]." *Patterson*, 2007 WL 4201137, at *12. The only issue on appeal is whether Hudson's actions require us to hold, as a matter of law, that Hudson has not acted with deliberate indifference. We conclude that, viewing the evidence in the light most favorable to the

Pattersons,[6] the Pattersons have demonstrated a genuine issue of material fact regarding whether Hudson's actions were deliberately indifferent.

A recipient of federal funds that remains "deliberately indifferent to known acts of harassment" is liable for damages under Title IX. *Vance*, 231 F.3d at 260. "[T]he deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." *Id*. (quoting *Davis*, 526 U.S. at 645) (first alteration in *Vance*, second alteration in *Davis*). "[A] plaintiff may demonstrate [a] defendant's deliberate indifference to discrimination 'only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.'" *Vance*, 231 F.3d at 260 (quoting *Davis*, 526 U.S. at 648). A recipient need not "[purge its] schools of actionable peer harassment" or "engage in particular

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[6]This is a diametrically different approach than the one taken by the dissent. Although the dissent professes to be using the correct legal standard, it repeatedly weighs evidence and decides controverted issues in favor of Hudson, the moving party. *See, e.g.*, Dissent at 24-25 (deciding that the resource room is nothing more than "the equivalent of study hall" and, therefore, could not cause a reduction of harassment); 25-26 (belittling the Pattersons' evidence in regard to the lack of and effectiveness of proactive programs). When we review a grant of summary judgment, we are forbidden to weigh the evidence or to draw the inferences the dissent insists upon drawing. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are *jury functions*, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." (emphasis added)). Our job is to look at the facts and consider them in the light most favorable to the nonmoving party, regardless of our own personal views of how much credence we would give a particular piece of evidence if we were on a jury. The dissent's steadfast determination to act as a juror is contrary to Supreme Court precedent.

A clear example of the dissent's misunderstanding and misapplication of the governing standard is found in the assertion that the undisputed facts support a conclusion that the resource room itself did nothing to reduce the harassment of DP. The record clearly shows and both parties admit that, when the resource room was used, DP suffered less harassment. Whether it was the use of the room or the person who ran the room that caused this undisputed decreased harassment is a question of interpretation. Because we must draw all inferences in favor of the nonmoving party, it is legally incorrect for the dissent to infer that Mr. Adams himself, and not the use of the resource room in general, aided DP. This same evidence supports the inference that it was the use of the resource room itself that was beneficial to DP and, because that inference favors the Pattersons, that is the inference the Supreme Court demands we draw. The dissent's repeated claim, unsupported by the record, that all the inferences it draws in Hudson's favor are "established by the undisputed facts," *see, e.g.*, Dissent at 24, does not magically give the dissent carte blanche to view controverted issues in the light most favorable to Hudson.

Furthermore, even assuming that the inference that the dissent insists upon drawing was legally permissible, we believe that a reasonable juror could still find that Hudson was deliberately indifferent. Although Mr. Adams worked for the middle school, the middle school and the high school were housed in the same building, "connected by a short hall." J.A. at 697 (DP Dep. at 74). DP testified that, during his ninth-grade year, it was possible for him to meet Mr. Adams on the same basis he did while in middle school. Additionally, Mrs. Patterson testified that the Pattersons "begged" Hudson to allow DP to meet with Mr. Adams and even offered to have DP meet with Mr. Adams in Mr. Adams's room in the middle school. J.A. at 855 (Mrs. Patterson Dep. at 137). Given the effectiveness of the eighth-grade resource room and the willingness of the Pattersons to have DP go back to the middle school to utilize Mr. Adams's services, a reasonable juror could conclude that Hudson's refusal to continue the resource room program for DP constitutes deliberate indifference.

disciplinary action" to avoid Title IX liability. *Vance*, 231 F.3d at 260. "Furthermore, courts should not second guess the disciplinary decisions that school administrators make." *Id*. at 260. However:

> where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. *Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.*

Id. at 261 (emphasis added).

Relying on this language, one district court determined that, where a student suffered four years of harassment from various other students, a school district's "tactic of merely talking to and warning students who harassed plaintiff," with occasional investigation into "some of the more significant incidents and even eventually proactively sp[eaking] to students and teachers in an effort to prevent further incidents . . . raised a genuine issue of material fact sufficient to withstand summary judgment." *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 966 (D. Kan. 2005). *Theno* is illustrative. In *Theno*, the plaintiff was repeatedly harassed beginning in his seventh-grade year and ending only when he left school during his eleventh-grade year. *Id*. at 954-61. The harassment consisted of name calling ("faggot," "queer," "pussy," "jack-off boy," etc.), persistent joking regarding plaintiff being caught masturbating in the school bathroom (which was untrue), and some physical altercations (pushing, shoving, tripping, fistfights). *Id*. Most student harassers were merely given verbal warnings or reprimanded by the school; however, a few of the more serious offenders were more severely disciplined. *Id*. Importantly, "each time the school disciplined a known harasser, to the best of the school's knowledge that particular harasser ceased harassing plaintiff (with limited exceptions)." *Id*. at 965. The school also began to speak proactively with students and teachers regarding harassment during the plaintiff's tenth-grade year. *Id*. at 959-60.

The school district in *Theno* argued that, as a matter of law, its responses could not be deemed clearly unreasonable. *Id*. at 965. The district court disagreed, stressing that

> this is not a case that involved a few discrete incidents of harassment. It involved severe and pervasive harassment that lasted for years, with other students engaging in the same form of harassment after those who were counseled had stopped, and the school rarely took any disciplinary measures above and beyond merely talking to and warning the harassers.

Id. at 966. Though the school took more aggressive measures in the later years of the harassment, the district court noted that

> [b]y that time, the harassment had been going on for a number of years without the school handing out any meaningful disciplinary measures to deter other students from perpetuating the cycle of harassment. While the court recognizes that the school was not legally obligated to put an end to the harassment, *a reasonable jury certainly could conclude that at some point during the four-year period of harassment the school district's standard and ineffective response to the known harassment became clearly unreasonable*.

Id. (emphasis added). The district court cited *Vance* to support this determination. *Id.* It also concluded that *Vance* supported a finding that "whether the school's belatedly stepped-up efforts were 'too little, too late' is a question for the jury." *Id*.

Theno's reliance on *Vance* is persuasive.[7] In *Vance*, when confronted with a post-trial motion for judgment as a matter of law, the district court upheld the jury verdict in favor of the plaintiff, a female student who suffered harassment over many school years perpetrated by various students, and we affirmed. *Vance*, 231 F.3d at 256-58. The school district responded to the plaintiff's harassment complaints by talking to the perpetrators, to no avail. *Id*. at 262. We rejected the defendant's argument that a

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[7]Contrary to the dissent's assertion, we rely on *Vance* in making our holding. However, one cannot escape the striking similarities between the instant case and *Theno*, a case that also relied on *Vance*. The dissent's attempt to minimize the usefulness of district court opinions does not change this fact. We therefore believe that *Theno* is a helpful tool to illustrate why the holding in *Vance* supports our holding today.

More important, the case the dissent cites as "very similar and persuasive," Dissent at 29, *Doe v. Bellefonte Area School District*, 106 F. App'x 798 (3d Cir. 2004), an unpublished Third Circuit opinion, is different from this case in two material respects. First, in *Doe*, the school district did more to prevent the systematic harassment of Doe than Hudson did in instant case. Specifically, the school district gave Doe "a special means of reporting any additional harassment," circulated memoranda specific to Doe's harassment issues to the faculty in the hopes of preventing future harassment, and "held assemblies and enacted policies addressing peer-to-peer harassment." *Doe*, 106 F. App'x at 800. As outlined above, when viewing the facts in the light most favorable to the Pattersons, we observe that Hudson did not perform any of these services during DP's ninth-grade year. Thus, *Doe* is distinguishable from the instant case by the effort the school district devoted to preventing future harassment.

Second, and of greater weight, is the fact that the Third Circuit is not bound by *Vance*, and thus *Doe* is of little value. Moreover, the dissent's contention that *Doe* tacitly rejected our interpretation of *Vance* is unavailing, given that the actual opinion in *Doe* makes no mention of *Vance*. Therefore, even if the *Doe* panel thoroughly considered and rejected this interpretation of *Vance*, *Doe* provides no reasoning regarding why it hypothetically rejected that interpretation that we may consider and evaluate.

Furthermore, the dissent's assertion that "a decision of a three-judge panel from a sister court of appeals has to be more persuasive than a single district judge's opinion from outside this circuit," Dissent at 29 n.7, is completely unfounded and demeaning to district court jurists. Under such a theory, a decision from Learned Hand while sitting on the bench in the Southern District of New York would be categorically inferior to any differing opinion rendered by a random three-judge panel from any circuit. Judges and cases differ, and such a bright-line rule that imports inferiority without regard to the depth of analysis present in an opinion or to the similarity of facts with the case at bar is unwarranted and disrespectful to the numerous talented district judges.

Additionally, the dissent's reliance on *S.S. v. Eastern Kentucky University*, 532 F.3d 445 (6th Cir. 2008), is misplaced. *S.S.* involved a student claiming peer-on-peer harassment in violation of the Americans with Disabilities Act and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The panel applied the *Davis* test to the claim and held that the school district was not deliberately indifferent as a matter of law. However, the school district in *S.S.*, like the school district in *Doe*, did more than Hudson did in this case to prevent future harassment: The school district "arrang[ed] for outside speakers to talk to the students about name-calling, identif[ied] related topics for discussion at school assemblies and in small groups," "call[ed] the police," and "call[ed] the other students' . . . parents to discuss the disciplinary problems." *S.S.*, 532 F.3d at 455. The dissent insists that both *Doe* and *S.S.* are factually identical to this case, claiming that Hudson has done everything that the school districts in those two cases have done. Dissent at 29-33 & n.8. However, that is true only if one views the evidence in the light most favorable to Hudson, not when one views the evidence in the light most favorable to the Pattersons. Because the latter is the legally correct view, Hudson is not on par with the school districts in *Doe* and *S.S.*

Moreover, the panel in *S.S.* stressed that "[e]ven viewing the record in the light most favorable to S.S., proof is lacking as to what [the defendant] could have or should have done differently in order to bring the peer-on-peer harassment to a stop." *Id*. As explained below, that is not the case in the instant appeal; it is undisputed that Hudson was fully aware that use of the resource room in eighth grade impacted the amount of harassment that DP suffered and discontinuing the resource room in ninth grade correlated with a return to high levels of harassment. Hudson Br. at 8-22. Thus, a reasonable jury could find that Hudson knew how to combat the harassment of DP and simply chose not to implement that known method of success. Thus, *S.S.* is distinguishable.

school district is not deliberately indifferent "as long as a school district does something in response to harassment," *id*. at 260, emphasizing that "once [a school district] had knowledge that its response was inadequate, it was required to take further reasonable action in light of the circumstances to avoid new liability," *id*. at 262. We believe this language makes clear that, even though a school district takes some action in response to known harassment, if further harassment continues, a jury is not precluded by law from finding that the school district's response is clearly unreasonable. We cannot say that, as a matter of law, a school district is shielded from liability if that school district knows that its methods of response to harassment, though effective against an individual harasser, are ineffective against persistent harassment against a single student. Such a situation raises a genuine issue of material fact for a jury to decide.

Furthermore, when viewing the facts in the light most favorable to the Pattersons, we conclude that there are striking similarities between the instant case and *Theno*. Here, as in *Theno*, DP was repeatedly harassed over a number of years. Hudson responded to this harassment largely by giving verbal reprimands to the perpetrators. Though typically reprimands largely stopped harassment by the reprimanded student, they did not stop other students from harassing DP. This pervasive harassment escalated to criminal sexual assault. Moreover, Hudson was aware that the verbal reprimands regarding a few students were not stopping the overall harassment of DP; it is undisputed that DP continued to have problems with other students, even after some were reprimanded or even disciplined, and DP reported those continuing problems to Hudson. Hudson Br. at 8-22 (detailing DP's reported harassment).

One key difference between *Theno* and this case is that Hudson did at one point employ a system that successfully combated the harassment of DP, i.e., the use of the resource room during eighth grade. In the instant case, a reasonable jury could thus conclude that Hudson not only was aware of what did not work, but also was aware of what had worked to insulate DP from the harassment. However, in ninth grade, Hudson discontinued the use of the resource room. The cycle of harassment then intensified, and Hudson's only response was to employ the same type of verbal reprimands that it had

used unsuccessfully in response to the sixth- and seventh-grade harassment. Given that Hudson knew that its methods were ineffective, but did not change those methods, "a reasonable jury certainly could conclude that at some point during the . . . period of harassment[,] the school district's standard and ineffective response to the known harassment became clearly unreasonable." *Theno*, 377 F. Supp. 2d at 966.

Hudson makes several arguments claiming that its actions were not clearly unreasonable as a matter of law, none of which are persuasive. Notably, Hudson does not attempt to distinguish *Theno* from the instant case, but rather cites four different district court cases it believes are more instructive. Each of these cases is distinguishable from the instant case or espouses law contrary to our precedent.[8]

The thrust of Hudson's argument is that Hudson dealt successfully with each identified perpetrator; therefore, it asserts that it cannot be liable under Title IX as a matter of law. This argument misses the point.[9] As explained above, Hudson's success with individual students did not prevent the overall and continuing harassment of DP, a fact of which Hudson was fully aware, and thus Hudson's isolated success with individual perpetrators cannot shield Hudson from liability as a matter of law. *Theno*,

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[8] *Johnson v. Independent School District No. 47*, 194 F. Supp. 2d 939 (D. Minn. 2002), involved an inappropriate phrase ("one time at band camp") placed next to a picture in the school yearbook of plaintiff playing her flute. *Id.* at 941-43. When the school became aware of the sexual nature of the phrase, it attempted to cover the phrase with nonremovable stickers, a technique that was successful in the past. *Id.* at 942-43. Unfortunately, the stickers proved to be easily removable. *Id*. *Johnson* is distinguishable from the instant case because Hudson, when confronted with harassment of DP in ninth grade, implemented a system that it knew from past experience did not work.

Hudson also cites *Johnson* and *Wilson v. Beaumont Independent School District*, 144 F. Supp. 2d 690 (E.D. Tex. 2001), for the proposition that so long as a school district takes some action, that is enough to show that the school district was not deliberately indifferent. Hudson Br. at 30-31. We rejected this proposition in *Vance*. *Vance*, 231 F.3d at 260.

Finally, Hudson cites *KF's Father v. Marriott*, No. CA 00-0215-C, 2007 WL 228353 (S.D. Ala. Feb. 23, 2001), and *Vaird v. School District of Philadelphia*, No. CIV. A. 99-2727, 2000 WL 576441 (E.D. Pa. May 12, 2000), as examples of what does not constitute deliberate indifference; however, these cases are both distinguishable because both involved only one perpetrator, not harassment by several individuals aimed at a single student. *KF's Father*, 2007 WL 228353, at *16; *Vaird*, 2000 WL 576441, at *1.

[9] The dissent likewise misses this point. On four separate occasions, the dissent claims that Hudson was "100% effective" in dealing with the harassment of DP. Dissent at 22, 28, 29, 33. However, one can make such a statement only if he ignores the realities of DP's situation. The reprimands of a few individual harassers did not stop harassment by the many, and it is undisputed that Hudson was aware of this fact. Hudson Br. at 8-22 (detailing DP's reported harassment). *Vance* teaches that, in such circumstances, a jury may legally find that a school district has "failed to act reasonably in light of the known circumstances." *Vance*, 231 F.3d at 261.

377 F. Supp. 2d at 966. It is for a jury to decide whether Hudson's actions were "clearly unreasonable." *Davis*, 526 U.S. at 649.

Hudson also asserts that it proactively dealt with the issue of harassment and bullying through a sexual-harassment policy in the student handbook, from which teachers and students were instructed, and school-wide programing dealing with harassment and bullying. However, viewing the facts in the light most favorable to the Pattersons, we cannot consider any of Hudson's claimed programs.[10]

Although Hudson's brief and oral argument before us attempted to minimize the harassment suffered by DP, Hudson does not argue that the district court improperly found that the Pattersons had met their burden of showing that the harassment of DP was severe and pervasive. Thus, we do not consider this issue. Therefore, we hold that, because Hudson had knowledge that its methods for dealing with the overall student-on-student sexual harassment of DP were ineffective, but continued to employ only those methods, the Pattersons have shown a genuine issue of material fact as to the third part of the *Davis* test that is sufficient to defeat Hudson's motion for summary judgment.

We emphasize that, at this stage of the litigation, the Pattersons are not required to prove that Hudson is actually liable for the continued harassment of DP (i.e., that Hudson's actions were clearly unreasonable), but only that there is a genuine issue of material fact as to whether Hudson was deliberately indifferent to the harassment. In

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[10] First, the Pattersons presented evidence that the sexual-harassment policy was not explained to every student and teacher. *See, e.g.*, J.A. at 145 (Kline Aff. ¶ 10); J.A. at 228 (Wade Aff. ¶¶ 9.a-9.b). Second, of the programs listed by Hudson—"Character Counts," "40 Developmental Assets," "Bang, Bang, You're Dead," the speakers series, the individual and group counseling sessions, "Flirting and Hurting Program," "Concerned About Teen Sexuality ('CATS') Program," "Peer Mediation Program," and "Positive Peers"—the only ones that actually dealt with student-on-student sexual harassment and bullying (as opposed to sexual relationships between males and females) and were actually implemented were "Bang, Bang, You're Dead" and "Flirting and Hurting." *See* J.A. at 285 (Stutzky Aff. ¶ 7.c.vii); J.A. at 493-98 (Mansfield Dep. at 27-32). Third, the Pattersons' expert explained that one-time events such as "Bang, Bang, You're Dead," "no matter how powerfully presented, have not been demonstrated to have a significant lasting impact on a school's climate or culture or reducing or eliminating bullying or harassment." J.A. at 285 (Stutzky Aff. ¶ 7.c.viii). Fourth, the Pattersons presented evidence that the "Flirting and Hurting" program was not always taught to students. *Compare* J.A. at 228-230 (Wade Aff. ¶¶ 9 and 9.e) (stating that Wade taught health during the 2004-2005 school year and did not teach the "Flirting and Hurting" program), *with* J.A. at 495-97 (Mansfield Dep. at 29-31) (explaining that "Flirting and Hurting" was integrated into health classes in the 2003-2004 school year). Thus, when viewing these programs in the light most favorable to the Pattersons, we must assume that Hudson was not engaged in any proactive activities.

other words, the Pattersons must show only that a reasonably jury *could* find that Hudson violated Title IX. Viewing the facts in the light most favorable to the Pattersons, we believe the Pattersons have met this burden.

III. CONCLUSION

Because we conclude that the Pattersons have demonstrated that there is a genuine issue of material fact as to whether Hudson's responses to DP's reported student-on-student sexual harassment were clearly unreasonable in light of the known circumstances, we **REVERSE** the grant of summary judgment and **REMAND** for further proceedings consistent with this opinion.

DISSENT

VINSON, District Judge, dissenting. I disagree. The single issue in this appeal is whether there is a genuine issue of material fact as to whether the defendant, Hudson Area Schools, was deliberately indifferent to the harassment directed at DP. A school district is not deliberately indifferent unless it knows of and disregards an excessive risk to the student's health or safety. *See Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).[1] It must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and, further, it must actually draw that inference. *See id.* Deliberate indifference presupposes that the school knows of a Title IX violation, but it "refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation." *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 290, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998); *see also, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651, 654, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999) (deliberate indifference established when school district knows of peer harassment, but it "refus[es] to take any action" and "ma[kes] no effort whatsoever" to end the harassment); *accord Horner v. Kentucky High School Athletic Ass'n*, 206 F.3d 685, 692 (6th Cir. 2000) (noting that deliberate indifference is shown when "school officials are aware of the misconduct *but do nothing to stop it*. . .") (emphasis added).

This standard "does not mean a collection of sloppy, or even reckless, oversights; it means evidence showing an obvious, deliberate indifference to [the] abuse." *See Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 508 (6th Cir. 1996). Ultimately, a Title IX recipient is deliberately indifferent to peer-on-peer harassment "only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *See Davis, supra*, 526 U.S. at 648. The response must be of

[1] *Farmer* is an Eighth Amendment prisoner case, but the standard is "applicable to the school context." *Williams ex rel. Hart v. Paint Valley Local School Dist.*, 400 F.3d 360, 368 (6th Cir. 2005).

such a degree that it facilitated or "subjected" the victim to harassment. *See id.* at 644-47. Although this is a sad case, the plaintiffs have clearly not met the high legal standard for deliberate indifference. *See Gebser, supra,* 524 U.S. at 304 (Stevens, J., dissenting) (noting that only "few Title IX plaintiffs . . . will be able to recover damages under this exceedingly high standard").[2]

The relevant inquiry in determining whether the school district was deliberately indifferent is to examine its responses to the *known* instances of harassment. DP claims that he was harassed almost every day, but the record reflects that he did not report much of the harassment.[3] When he did report the harassment at times throughout the years, he sometimes could not identify the harassers.[4] Obviously, the school district is not responsible for failing to stop harassment of which it was not made aware, nor can it be held responsible for failing to punish harassment by unknown individuals.

When DP complained and the harassers were identified, however, the defendant responded to each incident with action appropriate to the nature and severity of the harassment. The students who called DP "Mr. Clean" were taken to the school counselor's office for a meeting with DP, where they were counseled and then apologized. The student who wrote the offensive remarks on the back of his note cards

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[2]The Supreme Court has emphasized that courts "must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. Indeed, at least early on, students are still learning how to interact appropriately with their peers." *See Davis, supra,* 526 U.S. at 651 (citation omitted). I do not minimize the harassment at issue for it was very serious, but it appears that at least some of DP's peer-related problems were caused by his heightened sensitivity to the unfortunate reality that "in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it." *See id.* at 651-52. According to his teachers, DP was at times highly sensitive and had poor social skills which made it difficult for him to "distinguish[] between camaraderie and being picked on," which, in turn, alienated him from the other students. *See* Joint Appendix ("J.A.") at 553-54; *accord id.* at 102. It should be noted that these socialization and peer-related problems existed long before he entered the Hudson school district, apparently even dating back to daycare. *See id.* at 532.

[3]To point to one example, the majority states that DP was teased, called names, and pushed and shoved "on a daily basis" while he was in the sixth grade. Maj. Op. at 2. Despite the daily nature of this harassment, DP admits that he made only "a total of a couple reports regarding [the] incidents that took place" during that school year: one or two reports to Principal Greg Rozeveld and teacher Gwen Marry. *See* J.A. at 648.

[4]DP was unable to say, for example, who vandalized his hall locker. The school conducted an investigation into the matter, as the majority acknowledges, *see* Maj. Op. at 7, but it was unable to determine who was responsible.

was swiftly reprimanded and he, too, apologized. The student who defaced DP's planner was orally reprimanded, while a student who taped the "Mr. Clean" poster to his locker was suspended from school for one day. With respect to the locker room assault after baseball practice, NH was reprimanded and his parents were notified (even though DP told the authorities that NH was only "playing around"), and LP was suspended for the rest of the school year, criminally prosecuted, and formally expelled. Significantly, as the district court observed, and as the majority appears to recognize, no identified perpetrator ever harassed or caused problems for DP after being disciplined by the school. There were no repeat offenders, so the only reasonable conclusion from the undisputed facts in the record is that the school's actions, with respect to those offenders, were 100% effective.[5]

In addition to investigating all the reported claims of harassment and punishing the offenders so that they never once re-offended, the defendant took additional steps to help DP. For example, his science teacher, Ted Adams, agreed to be extra vigilant in looking out for him. *See* J.A. at 825. DP's mother testified that this gave her "a new sense of relief" because "Mr. Adams was always in the hall watching for [DP], keeping an eye out for him." *Id.* Other teachers agreed to keep watch on him as well. *Id.* at 761, 813. Another of his teachers offered suggestions on how to help DP better cope with his peer-related problems, such as enrolling in extracurricular social programs like band, science olympiad, and other activities. *Id.* at 525, 817. School counselor Susan Mansfield invited DP to attend both group and individual counseling sessions for students having problems with their peer relationships. *Id.* at 470-71. The school district also took the unusual step of sending a school social worker and psychologist to his home to meet and evaluate him during his (and their) summer break. *Id.* at 374, 570. He was given extra time to take his exams, he was given seating preferences to avoid

[5]The incident that took place in the seventh grade when DP intervened in a dispute between two female students and, in the process, was slapped by one of the girls, *see* Maj. Op. at 3, does not give rise to an inference of deliberate indifference. He told the teacher what occurred, but he claims that nothing was done. Assuming that to be true, it is apparent that the slap was unrelated to the type of harassment at issue in this case. By his own testimony, DP was not the intended victim --- he got involved because he was defending the other girl --- nor does it appear that this incident was in any way related, or similar, to the harassment which is the subject of this litigation. Indeed, he never had any other problems with the girl. *See* J.A. at 677-79.

students with whom he might have problems, and he was referred to a social worker for counseling several times each month. *See id.* at 42. The school provided DP with an individualized evaluation program following his ninth grade year. He earned As and Bs, and, as part of his curriculum, he took college courses (at school district expense) which allowed him to take advanced classes, to become fluent in Japanese, and to graduate early from high school.

The school took additional steps that warrant closer review and discussion. First, Principal Greg Rozeveld offered to meet DP every day to provide assistance while he was in middle school, but the majority seems to fault the school district for the timing and circumstances under which these meetings occurred. *See* Maj. Op. at 3-4. When DP was in the seventh grade, the Pattersons spoke to Principal Rozeveld and told him that they were planning to withdraw DP from school. The parties had a very long meeting during which, according to Ms. Patterson, Mr. Rozeveld said that he "really hated to lose the good ones, the good kids," and he asked if there was "anything he could do to help." He offered to meet and counsel DP every day and "start interceding himself." DP's mother explained that Principal Rozeveld offered to meet with DP for two interrelated reasons: he wanted to help him academically, and he wanted to "build[] the trust" so that DP would not feel like he was "all alone." The Pattersons were "grateful for somebody offering to help," so they accepted Principal Rozeveld's offer and kept DP in school. DP's mother testified that the first time DP met Principal Rozeveld it was "very nice." However, the next two or three times that DP went to his office, Mr. Rozeveld was in a meeting or otherwise unavailable. DP's mother explained to DP that "sometimes that is going to happen, emergencies come up." It appears that because Principal Rozeveld (as head of the middle school) could not always be guaranteed to be in his office at the time DP's teachers sent him down during class, it was decided that DP would be sent down at the end of the day along with the students who were having their planners signed. DP did this and met with Principal Rozeveld for a number of weeks, but DP then decided he did not want to continue going because he was concerned the other students might start to think he was a "problem student." *See* J.A. at 844-850. That was his choice. It is undisputed that Principal Rozeveld offered to, and did, regularly meet with

and counsel DP until DP stopped the sessions. It is also undisputed that Principal Rozeveld did this to keep DP in school, to improve his grades, to build his trust, and to prevent him from feeling alienated. That DP might have preferred to meet with Mr. Rozeveld at a different time and under different circumstances does not take away from the fact that --- rather than being deliberately indifferent --- Mr. Rozeveld was unquestionably trying to help DP through this difficult time.

Second, the school district placed DP in a "resource room" for part of each day while he was in the eighth grade which, everyone agrees, worked very well for him. The majority states that the resource room reduced the actual amount of harassment directed at DP, *see* Maj. Op. at 15-17, n.7, and it faults the school district for discontinuing that room once DP entered high school. *See id.* at 5-6, 15-17. The undisputed facts do not support such an inference. It is true that the resource room was available to DP for one hour each day while he was in the eighth grade. He went there to meet his science teacher, Mr. Adams, and "just kind of wind my day down with him, do my homework." *See* J.A. 621-22. It was the equivalent of study hall. Because DP claims that the harassment occurred in his classes, in between his classes, in the hallways, at lunch, and in the locker areas, it simply does not follow that a study hall for an hour each day could have reduced the harassment to an appreciable degree. In fact, not even DP claims that it did. Rather, he testified that eighth grade was "going good" on its own, and he had "no clue" what caused this positive turnaround. *See id.*[6] What is established by the undisputed facts is that the time spent with Mr. Adams helped DP cope with his peers which, in turn, helped him better deal with the harassment and learn more effectively. Indeed, DP testified that even though he was sometimes picked on and called names in the eighth grade, the harassment did not "bother" him during the time that he was meeting regularly with Mr. Adams. *See* J.A. at 622. This distinction between meeting

[6] I emphasize that it was DP himself who testified that the resource room was the equivalent of a study hall ("I would just kind of wind my day down with [Mr. Adams], do my homework"), and, furthermore, not even he claims that it reduced the actual harassment ("Q: What happened to cause that turnaround? A: I have no clue."). J.A. at 621-22. DP explained that other students in the resource room needed help with their homework, but he "just needed Mr. Adams in there in case I needed him." DP thus benefitted from time in the resource room because Mr. Adams was his "go-to person" and "one of the only staff members at the school that I felt like I could trust." *See* DP's Depo. at 67-69.

with Mr. Adams and being in the resource room is important, for there is nothing in the record to indicate that the resource room itself reduced the actual amount of harassment, as the majority suggests. Rather, it appears that the resource room was effective because of Mr. Adams. DP could not continue getting daily assistance from Mr. Adams once he entered high school, however, because Mr. Adams worked exclusively for the middle school. Nevertheless, even though he did not work for the high school, the defendant granted Mr. Adams special authorization to meet with DP for 20-30 minutes each week (which he did), even after DP entered the ninth grade. *See* J.A. 854-57. If the defendant was deliberately indifferent to DP and his situation, surely it would not have authorized the middle school science teacher to meet and counsel him every week after he started high school. No reasonable finder of fact could find that there was deliberate indifference with respect to Mr. Adams and the resource room.

And lastly, the school district had various policies and programs dealing with harassment and bullying. All students were well aware that such conduct would not be tolerated. The student athletic code, for example, provided that students were expected to "behave appropriately in the locker room. Horseplay and vandalism will not be tolerated by the coaches or the athletic department." *See* J.A. 54. Violations of this policy were punishable as provided for under the code. The student handbook (which applied to all students, not just athletes) prohibited vandalism, physical confrontation, and inappropriate language, and it also provided for punishment to violators. *See id.* at 82-88. There were two school-wide programs implemented which dealt specifically with peer harassment and bullying, "Bang, Bang, You're Dead" and "Flirting and Hurting." The majority refuses to consider the policies and programs because it finds evidence that they were "not explained to every student and teacher." *See* Maj. Op. at 18 n.10. For this, the majority cites an affidavit from a former student and classmate of DP's who, although she recalls the teachers reviewing the student code of conduct with students, does not "recall ever receiving any *serious instruction* about bullying, teasing or harassment of other students." *See* J.A. at 145 (emphasis added). The majority next relies on an affidavit by a temporary substitute teacher (DP's brother) who taught at DP's middle school for less than four months and who affirms that he did not receive

instruction on the policy for bullying and harassment. *See* J.A. at 228. The majority also cites to an affidavit signed by the plaintiffs' expert witness who has opined that, in any event, "no matter how powerfully presented, [one-time programs such as "Bang, Bang, You're Dead"] have not been demonstrated to have a significant lasting impact on a school's climate or culture or reducing or eliminating bullying or harassment." *See* Maj. Op. at 18 n.10. Although this evidence (accepted as true for purposes of the summary judgment motion) may speak to the overall effectiveness of the policies and programs, and may be relevant if negligence were the standard, its relevance to the issue of deliberate indifference is questionable. *Cf. Sanchez v. Alvarado*, 101 F.3d 223, 229 (1st Cir. 1996) (defendant had an inefficient and ineffective anti-harassment policy and "leisurely" responded to harassment complaints; whether the policy could have been more effective and better-implemented may have some bearing on whether defendant was negligent, but noting *that is not the standard for deliberate indifference*). The affidavits relied on by the majority do not create a genuine issue of material fact on the issue of deliberate indifference. The majority has not cited any case law, and my own research has uncovered none, holding that good faith (although inefficient) policies and programs addressing peer harassment and bullying may be considered in the deliberate indifference context only if the students subjectively perceive them to be "serious instruction;" only if temporary substitute teachers are aware of them; and only if they have been first shown to have "significant lasting impact."

In light of the above, it seems to me that the district judge properly found that there were no genuine disputed issues of material fact and that, as a matter of law, the school was not deliberately indifferent. As already noted, deliberate indifference is a high standard to meet, and the analysis is very deferential to schools. Relying on *Davis*, *supra*, the Sixth Circuit has described the appropriate legal standard as follows:

> The recipient is liable for damages only where the recipient itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to known acts of harassment. *See Davis*, 526 U.S. at 642, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (discussing *Gebser v. Lago Vista School Dist.*, stating liability arose from recipient's official decision not to remedy the violation). "[T]he deliberate indifference must, at a minimum,

> 'cause [students] to undergo harassment or make them liable or vulnerable' to it." *Davis*, 526 U.S. at 645, 119 S. Ct. 1661, 143 L. Ed. 2d 839.

Vance v. Spencer County Pub. School Dist., 231 F.3d 253, 260 (6th Cir. 2000). The Sixth Circuit's language is particularly on point in this case:

> The recipient is not required to "remedy" sexual harassment nor ensure that students conform their conduct to certain rules, but rather, "the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable." *Davis*, 526 U.S. at 648-649. The deliberate indifference standard "does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action." *Id.* at 648. The standard does not mean that recipients must expel every student accused of misconduct. *See id.* Victims do not have a right to particular remedial demands. *See id.* Furthermore, courts should not second guess the disciplinary decisions that school administrators make. *See id.*
>
> "The Supreme Court has pointedly reminded us, however, that this is 'not a mere "reasonableness" standard' that transforms every school disciplinary decision into a jury question." *Gant*, 195 F.3d at 141 (quoting *Davis*, 526 U.S. at 649). In an appropriate case, there is no reason why courts on motion for a directed verdict could not identify a response as not "clearly unreasonable" as a matter of law. *See Gant*, 195 F.3d at 141.

Id. The majority glosses over this high legal standard rather quickly, *see* Maj. Op. at 12-13, and it seizes upon the following additional language in *Vance*:

> [W]here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.

231 F.3d at 261. The majority seems to interpret these two sentences to mean that even if the school district takes disciplinary action in response to all known harassment, and even if that action is 100% effective against the individual harassers, it may be liable if there is subsequent harassment by new offenders. There is no authoritative case law to support such an interpretation. For this sweeping expansion of *Vance*, the majority relies heavily on a single out-of-circuit *district* court case, *Theno v. Tonganoxie Unified School*

Dist. No. 464, 377 F. Supp. 2d 952 (D. Kan. 2005). The district judge in that case did, indeed, reach the same conclusion as the majority. However, there are two reasons why it cannot be relied upon.

First, it is merely one district judge's opinion and has no authoritative value. Indeed, this very same panel recently noted that *intra*-circuit district court cases are of limited value. *See United States Student Ass'n Foundation v. Land*, 546 F.3d 373, 383 n.8, 385 n.10 (6th Cir. 2008). It seems to me, then, that the opinion of a single district court judge from *outside* this circuit is an even thinner reed upon which to base an expansion of this court's jurisprudence.

Second, and more significantly, it is not persuasive regarding the applicable legal standard. I do not believe the district judge's opinion in *Theno* and the majority's opinion today are justified by the Sixth Circuit's analysis in *Vance*, nor are they otherwise consistent with any circuit's case law. The harassment in *Vance* was far more egregious, and the response thereto was far less appropriate, than in this case. The student in *Vance* was subjected to widespread harassment and physical abuse. She was the victim of frequent and vulgar name-calling ("whore" and "gay girl," etc.), and she was touched inappropriately in almost every class. She was stabbed in the hand with a pen during one assault, and, on another occasion, two students held her down and tried to rip off her clothes while another student took off his pants and said that he was going to rape her. School officials "talked to" the offenders, but, incredibly, did not take any further disciplinary action against them. The harassing conduct not only continued, but it increased. In fact, the offenders confronted her *after* they had been "talked to" specifically in order to harass her again. Even though "'talking to the offenders' produced no results, [the school] continued to employ this ineffective method." *See* 231 F.3d at 262. It was this factual background which led this court to conclude that if a school district "has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances." *Id.* at 261. *Vance* thus confronted the situation where the harassing students *re-offended after they were disciplined* (*i.e.*, the discipline

"produced no results"), yet the school knowingly continued to use the same ineffective method. This conclusion has no application whatsoever to the present case where the reprimands and other forms of discipline were extraordinarily effective as to the known offenders. The facts of this case are plainly distinguishable from *Vance*. Again, the defendant here investigated DP's complaints, and the offending students were counseled, reprimanded, suspended, and/or expelled, depending on the nature of their specific misconduct. No student who received discipline ever bothered DP again. The undisputed facts thus establish that the school district's actions were 100% effective with respect to those students.

On this point, a decision out of the Third Circuit is very similar and persuasive. *See Doe v. Bellefonte Area School Dist.*, 2003 WL 23718302 (M.D. Pa. Sept. 29, 2003), *aff'd* 106 Fed. Appx. 798 (3d Cir. Aug. 4, 2004).[7] The student there was ridiculed and harassed by his fellow students for years. He was called "queer," "gay boy," "pixie," "faggot," and "peter-eater," among other things. He was pushed at school and physically assaulted at the bus stop. He reported some (but not all) of the bullying and harassment, and the school took varying degrees of disciplinary action when the harassment was reported. Some of the offenders were given verbal warnings and reprimands, some were counseled about the seriousness of the harassment, some were given detention, and others were suspended. Notably, every time the school warned or disciplined an offender, "that perpetrator never bothered Doe again. The School District's method of dealing with specific, identified perpetrators involving Doe was one hundred percent effective." 2003 WL 23718302, at *9. Based on the 100% success rate with the individual offenders, coupled with the school agreeing to be extra "vigilant" of the problems and having an anti-harassment policy, the district court granted summary judgment in favor of the school district because "no reasonable finder of fact could conclude that the School District was deliberately indifferent to the harassment of Doe,

[7] Although this is an unpublished case and has no precedential value in this circuit, a decision of a three-judge panel from a sister court of appeals has to be more persuasive than a single district judge's opinion from outside this circuit.

or that its responses to the harassment of which it was aware were clearly unreasonable." *Id.* at *9-10

The plaintiff appealed, arguing, as the plaintiffs do here, that the school "should have treated the pattern of harassment as a systemic problem," and its failure to do so was deliberate indifference. 106 Fed. Appx. at 799. He argued that the school's response was clearly unreasonable in light of the known circumstance that the harassment continued, even though "each subsequent incident involved a student other than the student that had been disciplined in any of the prior incidents of harassment directed at Doe." *Id.* In affirming, the Third Circuit relied upon the Supreme Court's guidance to lower courts in *Davis,* and held:

> The relevant inquiry for purposes of evaluating whether the School District here was deliberately indifferent to known circumstances of harassment is to review its response to reported incidents of harassment. *Each and every time Doe complained, the School District responded with reasonable actions which eliminated further harassment between Doe and the student(s) involved in each incident.* Students were suspended and others were given warnings and counseled regarding the seriousness of harassment. In addition, the School District circulated memoranda to faculty and staff putting them on notice of the reported harassment of Doe and requesting assistance to prevent further incidents. Doe was provided with a special means of reporting any additional harassment through the school psychologist, whom he knew personally. The School District also held assemblies and enacted policies addressing peer-to-peer harassment. Such actions are not clearly unreasonable.
>
> Nor was the School District deliberately indifferent because it did not undertake the specific remedial action that Doe desired given what he perceived to be the "systemic nature of the harassment." *Davis* does not require school districts to purge their schools of actionable peer harassment or to engage in particular disciplinary action. *Id.* at 648. *We will refrain from second-guessing the disciplinary decisions made by the School District which effectively eliminated each reported source of harassment.* We do not minimize the unfortunate verbal abuse that Doe was subjected to during his high school years, but *the School District was not deliberately indifferent because additional harassment occurred under new and different circumstances.* We will affirm the judgment of the district court.

Id. at 800 (emphasis added).[8]

More importantly, it seems to me that the majority's decision today is inconsistent with a recent decision from this court. The plaintiff in *S.S. v. Eastern Kentucky Univ.*, 532 F.3d 445 (6th Cir. 2008), who had physical and mental disabilities, was harassed by fellow students. The harassment was systemic and it lasted for three years. Among many other things, the students called him "gay," "queer," "bastard," and "retard;" they pushed and tackled him in the hallway and lunchroom; they threw paper towels at him that had been soaked with water or urine; they threw bleach on him in science class; and they slammed his head into a glass sneeze-guard, the latter incident necessitating a trip to the hospital and treatment for a sprained neck. On one occasion, a student sexually assaulted the plaintiff by grabbing plaintiff's genitals and saying "Now I'll see if you are a woman." After a fight between the plaintiff and "one of his frequent attackers," the police were called to the school.[9] When these incidents were reported, "they were investigated, and responsive action was taken." *See S.S. v. Eastern Kentucky Univ.*, 431 F. Supp. 2d 718, 728 (E.D. Ky. 2006). The school responded to the incidents of which it was made aware by conducting interviews to decide who was at fault and disciplining those who were; instructing S.S.'s classmates not to taunt him; speaking to the students about the name-calling; adding extra monitoring; at times

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[8] *Bellefonte*, as noted, is quite similar to this case. The Third Circuit found it significant that the offending students were given warnings and counseled about the seriousness of their actions; each time the school took action the harassment by that particular student stopped; the teachers were advised and agreed to be vigilant about future harassment; the plaintiff was given the means to report harassment through a faculty member whom he knew and trusted; and the school district had an anti-harassment policy. Each of these factors is present here. I also note that in deciding *Bellefonte*, the Third Circuit impliedly rejected the interpretation of *Vance* suggested by the majority today, even though it was urged by the appellant on appeal. *See generally* 2004 WL 3759879, at *20-21, *25-28 (appellant's brief) (interpreting and citing *Vance* for the view that if a school district discovers that its response to known harassment is inadequate against "systemic harassment" (even though it may be effective against the individual harassers), then the school must take "additional actions" to avoid "new liability").

[9] These facts are set forth in the district court opinion granting summary judgment for the defendant, 431 F. Supp. 2d 718 (E.D. Ky. 2006), which the Sixth Circuit stated was "an accurate description of the numerous incidents that underlie S.S.'s claims." *See S.S., supra*, 532 F.3d at 449. Although there was a dispute as to whether all of the events happened as the plaintiff described, or whether he was himself responsible for initiating many of the confrontations, the court assumed, as it was required to do on summary judgment, that the plaintiff's evidentiary assertions were true. *See, supra*, 431 F. Supp. 2d at 727-28.

separating S.S. from students with whom he had problems; assisting the police in regards to the fight noted above; and contacting the parents of students involved.

Despite these efforts, the harassment continued, and S.S. filed suit against the school under the Americans with Disabilities Act.[10] He argued, in relevant part, that the school did not adequately respond to, and end, the harassment. The district court granted summary judgment in favor of the school, and, on appeal, the Sixth Circuit confined its analysis to the deliberate indifference issue. To illustrate the distinction between when the issue should be left for the jury to decide, and when it can be decided on summary judgment, this court discussed two district court cases that it believed were "instructive," *K.M. v. Hyde Park Cent. School Dist.*, 381 F. Supp. 2d 343 (S.D.N.Y. 2005); *Biggs v. Board of Educ. of Cecil County, Maryland*, 229 F. Supp. 2d 437 (D. Md. 2002).[11] In *K.M.*, the student endured peer harassment for years. The school had notice of the harassment, but it took no steps to help or protect him and no one was disciplined. On those particular facts, the district court properly denied summary judgment for the school. *Biggs*, by contrast, involved similar peer-on-peer harassment, but in that case the school took action whenever there was a reported incident, including counseling the victim, meeting with the offenders and threatening them with suspension, notifying the parents, and alerting teachers to the problem. Because such responses established that the school district was not deliberately indifferent, the district court properly granted summary judgment for the school. The Sixth Circuit observed that the facts of *S.S.* "closely mirrored" *Biggs* and it went on to conclude that the school was not deliberately indifferent as a matter of law, even though its efforts were unsuccessful and even though the widespread harassment continued. This court explained that "meeting with the students, communicating with parents, and disciplining the offending students" simply did not "give rise to an inference that [the school] was deliberately indifferent to S.S.'s

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[10] Although the action was not filed under Title IX, the Sixth Circuit evaluated the ADA claim pursuant to, and applied the deliberate indifference standard under, the framework set forth in *Davis*. *See* 532 F.3d at 453-54.

[11] I note that the Sixth Circuit looked to these out-of-circuit district court cases merely for illustrative purposes and not, as the majority apparently does with *Theno*, as a significant basis for its holding.

situation or that it had an attitude of permissiveness that amounted to discrimination." *See* 532 F.3d at 455-56. Insofar as the defendant here took essentially the same action (investigating, counseling, extra monitoring by staff, seating preferences to separate DP from problem students, meeting with and disciplining the students found at fault, contacting parents, and assisting the police --- the sum of which was 100% effective against the individual harassers), this case is a close fit to the scenario in *S.S.*

That is not to say, of course, that a school may avoid liability merely by taking some action, however minor, in response to known harassment. *See Vance, supra,* 231 F.3d at 260 (rejecting the argument that as long as a school district "does *something* in response to harassment," then it has not acted with deliberate indifference) (emphasis added). The pertinent inquiry is whether the response was appropriate under the particular circumstances. Quoting the Title IX guidelines, *Vance* described an "appropriate response" to known harassment as follows:

> [Schools] should take immediate and appropriate steps *to investigate or otherwise determine what occurred* and take steps reasonably calculated to *end* any harassment, *eliminate* a hostile environment if one has been created, and *prevent* harassment from occurring *again*.

Id. at 261 n.5 (emphasis added). Thus, a school acts appropriately if it investigates what has already occurred, reasonably tries to end any harassment still ongoing by the offenders, and seeks to prevent the offenders from engaging in such conduct again. That is exactly what happened in this case. It is manifestly unreasonable to read the guidelines and *Vance* as holding that a school district may be responsible for not preventing *future* harassment by *entirely separate and new* harassers. To suggest otherwise, as the majority does, comes extremely close to requiring that schools be "purged" of all offensive behavior and be completely harassment-free, which the Supreme Court and Sixth Circuit have unequivocally held is not required --- or possible. *See Vance, supra,* 231 F.3d at 260-61 (citing and quoting *Davis*).

Whether the defendant, from an objective viewpoint, could have (or should have) done more to stop the harassment is not the appropriate inquiry. "Lack of objective reasonableness, *i.e.*, a failure to act as a reasonable person would have acted, does not

by itself equal deliberate indifference." *See Brooks v. Celeste*, 39 F.3d 125, 129 (6th Cir. 1994). Nor does liability turn upon whether the school successfully remedied the harassment. The only question is whether the school "*intentionally acted in clear violation of Title IX* by remaining deliberately indifferent *to known acts of harassment*," and whether its response was so "clearly unreasonable" and inadequate that it facilitated and subjected DP to harassment. *Vance, supra*, 231 F.3d at 260; *see also Davis, supra*, 526 U.S. at 642-47. Based on the undisputed facts in the record, any reasonable juror would have to answer that question "No." Therefore, as a matter of law, the district court properly held that the defendant was not deliberately indifferent.

For these reasons, I believe the district court's decision should be affirmed and I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

J.S., a minor, by and through her parents, TERRY SNYDER and STEVEN SNYDER, individually and on behalf of their daughter, **Plaintiffs**	:	**No. 3:07cv585**
v.	:	**(Judge Munley)**
BLUE MOUNTAIN SCHOOL DISTRICT; DR. JOYCE E. ROMBERGER, Superintendent Blue Mountain School District; and JAMES S. MCGONIGLE, Principal Blue Mountain Middle School, both in their official and individual capacities, **Defendants**	:	

MEMORANDUM

Before the court for disposition are cross-motions for summary judgment in this civil rights action based upon a school's discipline of a student for creating a false internet profile purporting to be her school principal. The matter has been fully briefed and argued and is ripe for disposition.

Background

On March 18, 2007, a personal profile appeared on the website MySpace.com with the picture of James McGonigle, principal of Defendant Blue Mountain Middles School, which indicated, *inter alia,* that he is a pedophile and a sex addict. (Doc. 36, MySpace Profile Page). This imposter profile had been created by Plaintiff J.S., a fourteen-year old eighth grade student at Blue Mountain Middle School and her friend K.L., also a student. (Doc. 33-2, Def. Statement of Facts (hereinafter "Def. Facts") at ¶ 6).[1] The students created the profile from the home computer

[1]We will cite to the Plaintiffs' or Defendants' "Statement of

owned by J.S.'s parents during non-school hours. (Doc. 35, Pl. Statement of Facts (hereinafter "Pl. Facts") at ¶ 21). The profile did not identify McGonigle by name, but it identified him as a principal and included his picture which had been taken from the school district's website. (Pl. Facts ¶ 17).

The profile described its subject as a forty year old, married, bisexual man living in Alabama. His interests were described as: "detention, being a tight ass, riding the fraintrain, spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, hitting on students and their parents." It also indicated that he likes television and mainly watches "the playboy channel on directv, OH YEAH BITCH!" (emphasis in original). (Doc. 36, MySpace Profile Page). A statement on the profile has the heading "HELLO CHILDREN." It reads:

> yes. It's your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL I have come to myspace so I can pervert the minds of other principals to be just like me. I know, I know, you're all thrilled. Another reason I came to myspace is because I am keeping an eye on you students who I care for so much) For those who want to be my friend, and aren't in my school, I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN so please feel free to add me, message me whatever"

(Id.).

The address or " url" for the profile includes the phrase "kids rock my bed." (Id.). Although the students created the profile at J.S.'s home, news of it soon spread to the school. The next day students were already

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Uncontested Facts" for facts that are not controverted.

discussing the website at school, and K.L. told five to eight students about the profile. (Def. Facts ¶ ¶ 28, 30). Additionally, five to six students approached K.L. and inquired about the profile. (Def. Facts ¶ 29). Discussion of the website continued through the day, and there was a general "buzz" in the school with quite a few people knowing about it. (Def. Facts ¶ ¶ 31-32).

Plaintiff J.S. asserts that approximately a day after the profile was created it was set to "private." A MySpace profile set to "private" may only be viewed by those who receive permission from the profile's creator. (Pl. Facts ¶ 18). After it was made private, J.S. and K.L. granted access to twenty-two individuals to view the profile. (Pl. Facts ¶ 19). Plaintiff asserts that the profile was set to private "approximately" one day after it was created. One day after its creation would have been Monday, March 19, 2007. McGonigle, however was evidently able to access the site on his work computer on Wednesday, March 21, 2008. (McGonigle Dep. At 54-55).

The subject of the imposter profile, McGonigle, heard about it first on Monday, March 19, 2007. (Def. Facts ¶ 33). The next day, he was informed that the profile contained very disturbing comments about him. (Def. Facts ¶ 34). On that same day, at least one teacher approached McGonigle to inform him that students were discussing the profile in class. (Def. Facts ¶ 35).

On the following day, Wednesday, March 20, 2007, a student provided McGonigle with a printout of the profile. (Def. Facts ¶ 37). McGonigle also learned on that day that J.S. and K.L. were involved with the creation of the profile. (Def. Facts ¶ 36).

J.S. was absent from school on March 21, 2007. (Def. Facts ¶ 38). The next day, McGonigle called her to the office and met with her in the presence of the guidance counselor, Michelle Guers. (Def. Fact ¶ ¶ 39-40). Initially, J.S. denied any involvement with the imposter profile. Eventually, however, she admitted that she had created it with K.L. (Def. Facts ¶ ¶ 41-42). McGonigle then spoke with the parents of both J.S. and K.L. regarding the profile. (Def. Facts ¶ 43). He also contacted MySpace.com to have the profile removed. (Def. Facts ¶ 44).

Based upon the creation of the imposter profile, McGonigle determined that J.S. had violated the school discipline code which prohibits the making of false accusations against school staff members. (Def. Facts ¶ 51). He found it was also a violation of the district's computer use policy which informs students that they cannot use copyrighted material without permission from the agency or website from where they obtained it. (D.Facts ¶ ¶ 51, 46).[2] This policy was violated according to the district because the students had obtained the photo of McGonigle from the school's website and the district has the sole permission to use and display photographs contained on that website. (Def. Facts ¶ 53).

Plaintiff received a ten (10) day out-of-school suspension because she had created the website. (Def. Facts ¶ 54).[3] During the suspension, J.S.'s school assignments were brought to her home. (Def. Facts ¶ 57).

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[2]In fact, in the letter sent to J.S.'s parents regarding the suspension, McGonigle indicated that the discipline was for making false accusations against him and for violating copyright laws. (Pl. Ex. H).

[3]K.L received the same punishment but is not involved in the instant lawsuit. (D.Facts 55).

Prior to this incident, J.S.'s only other discipline had been in December 2006 and February 2007, for dress code violations. (Pl. Facts ¶ 14). Plaintiff had the opportunity to appeal the discipline she received to the school superintendent and the school board. (Def. Facts ¶ 62). She evidently did not take advantage of this opportunity.

Plaintiffs instead instituted the instant case. They aver that the First Amendment precludes the school district from excluding a student from classes for two weeks for the profile which is non-threatening, non-obscene and a parody. They claim that the Constitution prohibits the school district from disciplining a student's out-of-school conduct that does not cause a disruption of classes or school administration. They further allege that the defendants' actions violate Plaintiff Terry and Steven Snyder's rights as parents to determine how best to raise, nurture, discipline and educate their children in violation of their rights under the Fourteenth Amendment to the United States Constitution. The plaintiffs bring suit pursuant to the Civil Rights Statute of 1964, 42 U.S.C. § 1983.

Upon filing the complaint plaintiffs also filed a motion for temporary restraining order and preliminary injunction. We denied the motion for temporary restraining order and preliminary injunction on March 29, 2007, and the case proceeded through discovery. (Doc. 7, Doc. 26). At the close of discovery, both the plaintiffs and the defendants moved for summary judgment, bringing the case to its present posture. During the briefing of the motions for summary judgment, the plaintiffs stipulated to the dismissal of the two individual plaintiffs, McGonigle and Romberger. Thus, the only defendant remaining is the school district. (Doc. 48).

Jurisdiction

As this case is brought pursuant to 42 U.S.C. § 1983 for constitutional violations we have jurisdiction under 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

Standard of review

Granting summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Knabe v. Boury, 114 F.3d 407, 410 n.4 (3d Cir. 1997) (citing FED. R. CIV. P. 56(c)). "[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original).

In considering a motion for summary judgment, the court must examine the facts in the light most favorable to the party opposing the motion. International Raw Materials, Ltd. v. Stauffer Chemical Co., 898 F.2d 946, 949 (3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence is such that a reasonable jury could not return a verdict for the non-moving party. Anderson, 477 U.S. at 248 (1986). A fact is material when it might affect the outcome of the suit under the governing law. Id. Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's

burden of proof at trial. Celotex v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings, and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. Id. at 324.

Discussion

The parties' arguments fall into the following three general categories: A) Did the school violate the plaintiff's first amendment rights? B) Are the school district's policies unconstitutionally vague and overbroad? and C) Did the school district violate the Snyders' parental rights? We will address these issues *in seriatim*.

I. First Amendment issues

Plaintiffs' argument with regard to the First Amendment issues centers on the United States Supreme Court case of Tinker v. Des Moines Ind. Comm. Sch. Dist., 393 U.S. 503 (1969). Plaintiffs argue that based upon Tinker, in order to restrain J.S.'s speech, the school must establish that her speech caused, or was likely to cause, a substantial and material disruption at the school. Because no such disruption occurred, nor was one likely to be caused, plaintiffs argue that defendant erred in restraining J.S.'s speech. After a careful review, we find plaintiffs' analysis of Tinker and its progeny to be unconvincing.

The seminal case concerning freedom of speech in a public school setting is indeed Tinker. In Tinker, a group of students decided to wear black armbands to school to protest the Viet Nam war. Id. at 504. The school administration learned of the plan and adopted a policy that indicated that student's wearing such armbands would be asked to remove

them. If the students refused, they would be suspended until they returned to school without the armbands. Id. Several of the students brought suit to restrain the school district from disciplining them for wearing the armbands. Id. The Supreme Court indicated that students and teachers do have First Amendment rights in school. Id. at 506. It explained that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Id.

The Court held that a student may express his opinions during school hours, "if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others. . . . But conduct by the student, in class or out of it, which for any reason-whether it stems from time, place, or type of behavior - materially disrupts class-work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." Id. at 513 (internal citation, quotation marks and parenthesis omitted).

To prohibit political speech of the kind addressed in Tinker, thus, the school had to demonstrate more justification than merely a desire to "avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." Id. at 738. The school district had not established facts that would lead to a "forecast" of "substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." Id. 514. The plaintiffs did not interfere with work, cause disorder or interfere with the rights of others. Id. Thus, the prohibition of their speech was unconstitutional. Id. The type of speech involved in Tinker is political speech. In the instant case, the

speech is not political; rather, it was vulgar and offensive statement ascribed to the school principal. Therefore, we must look further into the case law to determine the standard we must use.

Tinker was not the United States Supreme Court final discussion of free speech in the school setting. In Bethel School Dist v. Fraser, (hereinafter"Fraser") the Court once again addressed this issue. 478 U.S. 675 (1986). In Fraser, a student gave a speech at a school assembly nominating another student for student elective office. Id. at 677. The speech referred to the candidate "in terms of an elaborate, graphic, and explicit sexual metaphor." Id. at 678. The student received a suspension from school for several days and was removed from the list of candidates to be a speaker at graduation because school officials found the speech to be a violation of the school's rule against "obscene, profane language or gestures." Id. The student brought a civil rights action asserting that the school had violated his First Amendment Freedom of Speech rights. Id. at 679. Without applying the analysis found in Tinker, the court upheld the school's decision. Instead of the Tinker analysis, the court focused on the speech itself, that is its vulgar and lewd nature.

The Court indicated that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. . . . Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the work of the schools." Id. at 683 (internal quotation marks and citation omitted). The court further noted that limits on sexually explicit, indecent or lewd speech can be appropriate where the audience includes children. Id. at 684. The Court

emphasized that unlike Tinker, the speech in Fraser was unrelated to any political viewpoint. Id. at 685. The school acted appropriately "to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the fundamental values of public school education. Id. at 686. The Fraser Court quoted favorably from Justice Black's dissent in Tinker that the federal Constitution does not "compel the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." Id. (quoting Tinker, 393 U.S. at 526 (Black, J., dissenting)). The Third Circuit Court of Appeals has acknowledged that Fraser establishes that "there is no First Amendment protection for 'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech in school." Saxe v. State College Area School Dist., 240 F.3d 200, 213 (3d Cir. 2001).

The Supreme Court next addressed freedom of speech in public schools in Hazlewood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988). The issue in this case was whether the school district censoring of the school newspaper violated the First Amendment rights of student staff members of the newspaper. The Court distinguished this case from Tinker in that Tinker addressed whether a school should tolerate particular student speech and this case deals with whether the school must affirmatively promote particular student expression in school-sponsored publications. Id. at 270-271. The Court concluded that the Tinker analysis was not applicable in this situation. The Court held that the standard is: "[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech so long as their actions are reasonably related to legitimate pedagogical concerns." Id. at

273 (footnote omitted).

The most recent Supreme Court to address freedom of speech in the public school setting is Morse v. Frederick, - - U.S. - - ; 127 S.Ct. 2618 (2007). Morse involves a school sponsored social event/class trip to view the Olympic torch relay. Id. at 2622. As the torchbearer and television cameras covering the event approached, several students unfurled a banner that read "BONG HiTS 4JESUS." Id. "Bong hits" is a reference to a manner of smoking marijuana. Id. at 2623. Morse, the school principal, instructed the students to take the banner down. They did, except for Frederick. She later suspended him for ten days from school. Id. at 2622. She explained that she ordered the banner taken down because she felt it encouraged illegal drug use. Id. at 2622-23. The school prohibits public expression that advocates the use of substances that are illegal to minors. Id. at 2623. Frederick brought suit alleging that the school's action violated his First Amendment rights. The Court framed the issue of the case as "whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." Id. at 2625. The court held that she may. Id. The Court again emphasized the facts of Tinker, that the political speech in that case implicated "concerns at the heart of the First Amendment." Id. at 2626. The Court further indicated that Fraser established that the Tinker analysis is not "absolute" because in that case, there was no "substantial disruption" analysis. Id. at 2627. The Court found that the banner was reasonably viewed as promoting illegal drug use. The promotion of illegal drug use was against the school's policy. The Court held that "[t]he First Amendment does not require schools to

tolerate at school events student expression that contributes to [the dangers of illegal drug use]." Id. at 2629.

These cases inform us that the Tinker analysis - -the standard that the plaintiff asserts we should apply - - is not always applicable to freedom of speech in public school settings. A school can validly restrict speech that is vulgar and lewd and also it can restrict speech that promotes unlawful behavior. In the instant case, there can be no doubt that the speech used is vulgar and lewd. The profile contains words such as "fucking," "bitch," "fagass," "dick," "tight ass," and "dick head." The speech does not make any type of political statement. It is merely an attack on the school's principal. It makes him out to be a pedophile and sex addict. This speech is not the Tinker silent political protest. It is more akin to the lewd and vulgar speech addressed in Fraser. It is also akin to the speech that promoted illegal actions in the Morse case. The speech at issue here could have been the basis for criminal charges against J.S. Additionally, the state police indicated to McGonigle that he could press harassment charges based upon the imposter profile. (Dep. McG, 98- 99). McGonigle indicated that he would not press charges, but asked the police officer to contact the students involved and their parents to inform them of the seriousness of the situation. (Dep. McG at 99, 163-64). The officer summoned the students and their parents to the state police station and discussed the seriousness of the profile and that McGonigle would not press charges. (Terry Snyder dep at 20-22). Thus, as vulgar, lewd, and potentially illegal speech that had an effect on campus, we find that the school did not violate the plaintiff's rights in punishing her for it even though

it arguably did not cause a substantial disruption of the school.[4]

The plaintiff discusses whether she can be punished for the website at school although she created it off campus.[5] We find that she can. In Fenton v. Stear, 423 F. Supp. 767 (W.D. Pa. 1976), on a Sunday afternoon, a student was seated in a car with some friends parked at a shopping center. One of his teachers drove by. One of the students friends said "There's Stear." Plaintiff replied, "He's a prick." Id. at 769. 769. The court held that: "It is our opinion that when a high school student refers to a high school teacher in a public place on a Sunday by a lewd and obscene name in such a loud voice that the teacher and others hear the insult it may be deemed a matter for discipline in the discretion of the school authorities." Id. at 772.[6]

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[4]Moreover, the protections provided under Tinker do not apply to speech that invades the rights of others. Tinker, 393 U.S. at 513. In the instant case, the speech at issue affected McGonigle's rights. As a principal of a school, it could be very damaging to have a profile on the internet indicating that he engages in inappropriate sexual behaviors.

[5]We acknowledge that the line between on-campus and off-campus speech is blurred with increased use of the internet and the ability of students to access the internet at school, on their own personal computers, school computers and even cellular telephones. As technology allows such access, it requires school administrators to be more concerned about speech created off campus - - which almost inevitably leaks onto campus- - than they would have been in years past.

[6]On similar facts the United States District Court for the District of Maine made the opposite conclusion. In Klein v. Smith, 635 F. Supp. 1440 (D.Me. 1986), the plaintiff sued under the First Amendment after he received punishment at school for making a vulgar gesture at a teacher off school grounds and after school hours. The court reasoned that: " The conduct in question occurred in a restaurant parking lot, far removed from

The facts that we are presented with establish much more of a connection between the off-campus action and on-campus effect. The website addresses the principal of the school. Its intended audience is students at the school. A paper copy of the website was brought into school, and the website was discussed in school. The picture on the profile was appropriated from the school district's website. Plaintiff crafted the profile out of anger at the principal for punishment the plaintiff had received at school for violating the dress code. (Def. Ex. G., Notes of Testimony of Preliminary Injunction Hearing at 12). J.S. lied in school to the principal about the creation of the imposter profile. Moreover, although a substantial disruption so as to fall under Tinker did not occur, as discussed above, there was in fact some disruption during school hours. Additionally, the profile was viewed at least by the principal at school and a paper copy of the profile was brought into school. On these facts, and because the lewd and vulgar off-campus speech had an effect on-campus, we find no error in the school administering discipline to J.S.

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any school premises or facilities at a time when teacher Clark was not associated in any way with his duties as a teacher. The student was not engaged in any school activity or associated in any way with school premises or his role as a student. Any possible connection between his act of "giving the finger" to a person who happens to be one of his teachers and the proper and orderly operation of the school's activities is, on the record here made, far too attenuated to support discipline against Klein for violating the rule prohibiting vulgar or discourteous conduct toward a teacher. " Id. at 1441 (internal footnotes omitted). Admittedly, neither Klein nor Fenton are directly on-point with our case, and neither applies a rule of law set down from a higher court. Although, Klein does discuss Tinker in a footnote addressing the defendant's argument that the gesture had an "in school" effect. Id. at 1442 n.4. 4

Plaintiffs cite several district court cases from within the Third Circuit in support of their position. We are unpersuaded by any of these cases. Plaintiffs cite Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 698 (W.D. Pa. 2003). In this case, the defendant school district punished the plaintiff student for posting internet messages on a website message board regarding an upcoming volleyball game. Id. at 700. The comments cast aspersions on volleyball team players and the school art teacher who was the mother of a volleyball player. The messages indicated that she is a bad art teacher and that a "dog" could teach art better. Id. at 701. This speech is simply not of the same type as is present in this case. The statements are rather innocuous compared to the offensive and vulgar statements made by J.S. in the present case. We thus find this case inapplicable to our analysis.

Plaintiffs also cite to Latour v. Riverside Beaver Sch. Dist., No. Civ.A. 05-1076, 2005 WL 2106552 (Aug. 24, 2005). In this case, a student was punished for four rap songs he wrote and recorded in his home over a two-year period. The school found the songs threatening to other students at the school. He was expelled from school for a two-year period. Id. at *1. In this case, the issue was whether the songs at issue constituted true threats or caused a material substantial disruption at the school. Id. at * 2 - 3. The court found that although rap songs may include violent imagery/language, no actual violence is necessarily intended. Id. at 2. This case, therefore, deals with threatening speech, not vulgar and offensive speech, which as set forth above is provided a separate analysis.

Killion v. Franklin Regaional Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001). In this case, the speech at issue was a "Top Ten" list regarding

the school's athletic director that remarked upon his appearance including the size of his genitalia. Id. at 448. The plaintiff student e-mailed the list to his friends from his home computer but did not bring it on school premises. Id. Another student, however, printed the list and distributed it at the school. Id. at 449. The student received a ten-day suspension and was precluded from participating in school-related activities. Id. In this case, the court applied the Tinker substantial disruption test to find that the school overstepped constitutional bounds. Id. at 455. As noted above, we find that while Tinker is the seminal United States Supreme Court case in this area, its standard is not a good fit for every school speech situation. This conclusion is bolstered by the findings of the three school free speech cases that the Supreme Court has decided since Tinker, none of which apply the Tinker standard. Thus, we are not convinced by plaintiff's reliance on Killion.

Killion also addresses whether the school could discipline for the speech because it was "lewd and vulgar." The court concluded that the school could not punish for speech that occurred within the confines of the student's home far from any school premises or facilities and he was not engaged in any school activity or associated in any way with his role as a student when he complied the list. Id. 457. The speech in the instant case, however, is distinguishable with the level of vulgarity that was present, the effect that it did have on the school and the fact that the speech could have supported criminal charges against the plaintiff. To the extent that Killion stands for the proposition that a school can never discipline a student for lewd and vulgar speech made off of the school campus, we simply disagree, and Killion is not binding on this court.

Lastly, the plaintiff cites, Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007). The facts of this case are perhaps more similar to the facts of the instant case than in the other three district court cases discussed above. In Layshock, the student created an imposter profile of the school's principal and utilized a picture of the principal obtained from the school profile. Id. at 591. The profile included "nonsensical answers to silly questions . . . [and] crude juvenile language." Id. The court found that the school district did not have authority to punish the plaintiff for creating the profile. In making this decision, however, the court indicated that it was a "close call." Id. at 601. We find that the facts of our case include a much more vulgar and offensive profile, and we come out on the other side of what the court deemed to be a "close call."

Accordingly, we find that plaintiff cannot establish a First Amendment violation, and summary judgment will be granted to the defendant.

2) Defamation/parody

Defendant argues that the speech at issue is not protected by the First Amendment because it is defamatory. Plaintiffs assert that it is not defamatory because it is parody. We need not address the parties' arguments on these points because we have found above that the J.S.'s discipline was appropriate and this holding applies whether the material was defamatory or parody.

II. Vague and Overbroad policy

Plaintiffs also argue that the policies that J.S. was charged with violating –the Blue Mountain Student/Parent Handbook ("Handbook") and the Acceptable Use of the Computers, Network, Internet, Electronic Communications Systems and Information Policy – are vague and

overbroad because they can be read to allow punishment for out of school conduct. As we have found that J.S.'s discipline was appropriate, we cannot find that the policies that plaintiff was found in violation of are vague and overbroad. Accordingly, judgment will be granted to the defendant on this issue.

Even if we were to address the issue, the language of the Handbook is sufficiently narrow. Plaintiffs' argument is that the policies lack limiting language to confine the policy to school grounds and school-related activities. We disagree. The Handbook provides that "Maintenance of order applies during those times when students are under the direct control and supervision of school district officials." (Def. Ex. J, p. 39). The other policy at issue, the Acceptable Use of the Computers, Network, Internet, Electronic Communications Systems and Information Policy - incorporates the handbook. (Def. Ex. D, pg. 17 "This policy incorporates all other relevant School District policies, such as, but not limited to, the student and professional employee discipline policies . . ."). Thus, both are limited to situations where the school has direct control and supervision of students – regardless of whether they were applied correctly in the present case.[7]

III. Parental rights

Parents have a fundamental right "to make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 66 (2000). The plaintiffs argue that when school officials insert

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[7]Plaintiffs also argue that the policies are vague and overbroad because they do not limit punishment of speech to that speech which creates a substantial and material disruption. As set forth above, however, this standard is not necessarily the standard applicable to all student speech.

themselves into a student's home or personal life, the action intrudes on this fundamental right of parents to direct the upbringing of their children.

Under Pennsylvania law, school districts can punish students only "during such times as they are under the supervision of the board of school directors and teachers, including the time necessarily spent in coming to and returning from school." 24 PENN. STAT. § 5-510. Plaintiffs cast J.S.'s actions as occurring at home; and therefore, the school could not properly punish her for them. We have found above, however, that the school did not err in disciplining J.S., and her actions were not merely personal home activities. Discipline that was appropriately applied cannot support plaintiffs' claim that their parental rights were violated. Thus, summary judgment will be granted to the defendant on this point.

Conclusion

For the reasons set forth above, summary judgment will be denied to the plaintiffs and granted to the defendant. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

J.S., a minor, by and through her parents, TERRY SNYDER and STEVEN SNYDER, individually and on behalf of their daughter,	:	**No. 3:07cv585**
Plaintiffs	:	**(Judge Munley)**
v.	:	
BLUE MOUNTAIN SCHOOL DISTRICT; DR. JOYCE E. ROMBERGER, Superintendent Blue Mountain School District; and JAMES S. MCGONIGLE, Principal Blue Mountain Middle School, both in their official and individual capacities,	:	
Defendants	:	

ORDER

_____**AND NOW**, to wit, this 11th day of September 2008, the plaintiffs' motion for summary judgment (Doc. 34) is **DENIED**, and the defendants' motion for summary judgment (Doc. 33) is **GRANTED**. The clerk of court is directed to close this case.

BY THE COURT:

s/ James M. Munley
JUDGE JAMES M. MUNLEY
United States District Court

BOSTON COLLEGE LAW

BOSTON COLLEGE LAW SCHOOL

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RESEARCH PAPER 149
October 20, 2008

Student Speech Rights in the Digital Age

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Assistant Professor of Law, Boston College Law School

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STUDENT SPEECH RIGHTS IN THE DIGITAL AGE

*Mary-Rose Papandrea**

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* Assistant Professor, Boston College Law School. I would like to thank David Ardia, John Garvey, Diana Pullin, Ronaldo Rauseo-Ricupero, Diane Ring, Geoffrey Stone, and the workshop participants at Boston College Law School and the University of Cincinnati Law School for their thoughtful comments and suggestions. Thomas Hernandez, Daniel McFadden, Marques Tracy, and Andrew Willems provided invaluable research assistance. A summer research grant from the Boston College Law School Fund made this project possible.

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Abstract

For several decades courts have struggled to determine when, if ever, public schools should have the power to restrict student expression that does not occur on school grounds during school hours. In the last several years, courts have struggled with this same question in a new context—the digital media. The dramatic increase in the number of student speech cases involving the Internet, mobile phones, and video cameras begs for a closer examination of the scope of school officials' authority to censor the expression of minors as well as the scope of juvenile speech rights generally. This Article takes a close look at all the various justifications for limiting juvenile speech rights and concludes that none of them supports granting schools broad authority to limit student speech in the digital media, even with respect to violent or harassing expression. Furthermore, this Article argues that the tests most courts and commentators have applied to determine whether a school may control student speech grant schools far too much authority to restrict juvenile speech rights. The Article concludes that the primary approach schools should take to most digital speech is not to punish or restrict such expression, but instead to educate students about how to use digital media responsibly.

I. INTRODUCTION

Last year, the Supreme Court missed an opportunity to determine whether public schools have authority to restrict student speech that occurs off school grounds. In *Morse v. Frederick*,[1] Joseph Frederick unfurled a banner proclaiming "BONG HiTS 4 JESUS" during the Olympic torch relay as it passed through his hometown in Alaska.[2] Although the Court noted that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents," it paid little attention to Frederick's argument that the school lacked authority to restrict his speech because he displayed his sign on a public sidewalk, off school property, at

1. 127 S. Ct. 2618 (2007).
2. *Id*. at 2622.

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an event attended by the general public.[3] Instead, the Court accepted the school's contention that Frederick was under its authority at the time of the parade because the students attended the parade as part of a school-sanctioned activity.[4]

The Court's refusal to address Frederick's argument was unfortunate. For several decades lower courts have struggled to determine when, if ever, public secondary schools should have the power to restrict student expression that does not occur on school grounds during school hours.[5] Until recently, most of these cases involved underground newspapers that students wrote, published, and distributed off school property.[6] In the last several years, however, courts have struggled with this same question in a different context—the digital media. Around the country, increasing numbers of courts have been forced to confront the authority of public schools to punish students for speech on the Internet. In most cases, students are challenging punishments they received for creating fake websites mocking their teachers[7] or school administrators[8] or for making offensive comments on websites or in instant messages.[9]

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3. *Id.* at 2622, 2624.

4. *Id.* at 2624.

5. This Article does not concern the speech rights of private school students. Because the protections of the First Amendment do not apply unless the entity restricting the freedom of expression is a state actor, private school students cannot claim that their schools have infringed upon their free speech rights under the U.S. Constitution. *See, e.g.*, Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (noting that the Constitution applies only to state actors). This Article also does not concern the First Amendment rights of public university students. As adults, they are entitled to the full protection of the First Amendment, and courts have rejected as unconstitutional attempts to restrain student speech rights in hate speech codes. *See, e.g.*, UWM Post, Inc. v. Bd. of Regents, 774 F. Supp. 1163, 1166, 1181 (E.D. Wis. 1991); Doe v. Univ. of Mich., 721 F. Supp. 352 (E.D. Mich. 1989). This Article addresses only the rights of public secondary school students.

6. *See infra* notes 245–55 and accompanying text.

7. *See, e.g.*, M.K. v. Three Rivers Local Sch. Dist., No. 1:07CV1011 (S.D. Ohio Dec. 28, 2007) (granting preliminary injunction to students who were expelled for creating and posting a parody profile of a teacher on Facebook.com); Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272, 1273–74 (W.D. Wa. 2007) (rejecting student's request for a temporary injunction enjoining his school from suspending him for posting video mocking his teacher on YouTube.com).

8. Snyder v. Blue Mountain Sch. Dist., 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008) (rejecting First Amendment claims of student who created fake personal profile for principal on MySpace.com); Layshock v. Hermitage Sch. Dist., 496 F. Supp.2d 587 (W.D. Pa. 2007) (granting summary judgment in favor of student who claimed school violated his First Amendment rights by punishing him after he created an unflattering mock profile of his principal on MySpace.com); *see also* Moriah Balingit, Ind. High School Student Punished for Calling Administrator an "Ass" on Facebook, Student Press Law Center (Oct. 12, 2007), *available at* http://splc.org/newsflash_archives.asp?id=1627&year=2007.

9. *See, e.g.*, Doninger v. Niehoff, 514 F. Supp. 2d 199, 202, 206 (D. Conn. 2007) (upholding punishment of student who called school principal a "'douchebag[]'" on her social networking website); *see also* Wisniewski v. Bd. of Educ., 494 F.3d 34, 35 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008) (upholding the suspension of student based on a crude but threatening sketch

Permitting school officials to restrict student speech in the digital media expands the authority of school officials to clamp down on juvenile expression in a way previously unthinkable. For young people today, digital media is an essential part of their everyday lives. Almost all of them are accessing websites on the Internet; many have social networking sites, produce and edit videos to post on YouTube.com and elsewhere, and engage in instant messaging. In addition, the use of cell phones—particularly sending text messages and taking photographs and video footage—has become an increasingly important way in which young people communicate with each other. The importance of these new technologies to the development of not only their social and cultural connections but also their identities should not be underestimated.

Although *Morse* provided little guidance to lower courts confronting off-campus student speech cases, it did continue the trend of the Court to move away from the robust vision of student speech rights it embraced in *Tinker v. Des Moines Independent School District*[10]—rights that could be overcome only in the most compelling of circumstances—in favor of emphasizing the need to defer to school authorities.[11] In *Morse*, the Court held that it was constitutional for a school to restrict Frederick's "BONG HiTS 4 JESUS" banner because the school had reasonably regarded the sign as promoting illegal drug use.[12] Although the Court explicitly stated that its decision was limited to student speech concerning illegal drug use,[13] as a theoretical matter it is difficult to accept such a narrow view of the holding. Instead, the decision emphasizes the control and responsibility schools have over their students and the need for courts to defer to the decisions of school officials.[14]

The decision in *Morse*, as well as the dramatic increase in the number of student speech cases involving the digital media, begs for a closer examination of the scope of school officials' authority to censor the expression of minors as well as the scope of juvenile speech rights generally. Permitting schools to restrict student speech in the digital media would necessarily interfere with the free speech rights juveniles enjoy when they are outside the schoolhouse gates. Those scholars who support

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of his teacher that the student attached to the instant messages that he sent only to his friends); J.S. *ex rel* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002) (upholding school's decision to expel student for website he created titled "Teacher Sux").

10. 393 U.S. 503, 509 (1969) ("In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution.").

11. Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007) ("The First Amendment does not require schools to tolerate at school events student expression that contributes to [the dangers of illegal drug use].").

12. *Id.* at 2622, 2624–25.

13. *Id.* at 2629.

14. *Id.* at 2628–29.

censorship to protect children do not contend that children fall entirely outside the protection of the First Amendment, but some have argued that they are entitled to lesser or reduced rights.[15] Some point to the line of Court decisions upholding efforts to protect minors from sexually explicit expression as evidence that minors have limited speech rights.[16] Others contend that the theoretical justifications for the First Amendment—the promotion of self-government, the search for truth in the marketplace of ideas, and the fostering of autonomy and self-fulfillment—apply with limited force to minors and warrant reduced protection.[17] For their part, various members of the Supreme Court have suggested that the need to defer to school officials outweighs student speech rights due to the importance of supporting parental decision-making, the in loco parentis doctrine, the inherent differences between children and adults, and the so-called "special characteristics" of the school environment.[18]

This Article takes a close look at all these justifications for limiting juvenile speech rights and concludes that none of them supports granting schools broad authority to limit student speech in the digital media. Furthermore, the tests that most courts and commentators have applied to determine whether student speech falls within a school's authority to act grant schools far too much authority to restrict juvenile speech rights in general.

Part II discusses how young people today use digital media and the important role that it plays in their lives. Part III discusses the Supreme Court's jurisprudence with respect to the First Amendment rights of juveniles at school. Part IV reviews the various approaches courts around the country have taken to student speech cases involving digital media. Part V examines the possible theoretical justifications for limiting juvenile speech rights on or off campus. Part VI concludes that schools should generally not be permitted to punish students for speech in the digital media. Instead, schools should focus on educating their students about using digital media responsibly and largely leave the business of punishing juveniles for their digital expression to parents and to the civil and criminal justice systems.

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15. *See* Alan Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 579–81 (2005) (addressing the arguments of child-protection censorship proponents).

16. *Id.* at 568–71.

17. *Id.* at 580.

18. *See infra* Part V.B.2–5.

II. ADOLESCENTS AND DIGITAL MEDIA

Digital technology is part of almost every aspect of a teenager's life.[19] Computers, mobile phones, and the Internet play critical roles in their social and cultural development.[20] Given their dependence on and expertise with digital media, this generation of teenagers is frequently referred to as the "'Net Generation,'" "'Digital Generation,'" and "'cyberkids.'"[21]

Adolescents use technology to communicate with one another and with the general public through both computer-mediated communications (such as e-mail, instant messaging, online chatrooms, video sharing, and social networking sites) and mobile telephony (live conversations, text messaging, and video sharing). Of course, not all young people have cell phones or access to computers at home or school, and not all of those who have such access have become engaged users of the technology.[22] But it cannot be denied that rapidly increasing numbers of young people have become dependent upon their computers and cell phones to communicate with each other and with the world at large. In 2004, the Pew Research Foundation reported that eighty-seven percent of people aged twelve to seventeen had some Internet access;[23] undoubtedly that percentage has increased in the last four years.

Social networking sites are extremely popular with teenagers. Generally, social networking sites have similar features: they permit users to post profiles, contribute public comments, and publicly display lists of persons in the network identified as "friends."[24] In addition, many have bulletin boards for displaying messages to friends as well as a sort of

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19. This Article does not advocate that a school's authority to punish student speech varies based on the age of the student. That said, as a practical matter it is generally (although not always) junior high and high school students who bring cases challenging school speech restrictions. Accordingly, from time to time this Article refers to "teenagers" and "young adults." This terminology is not intended to be exclusionary.

20. Laura M. Holson, *Text Generation Gap: U R 2 Old (JK)*, N.Y. TIMES, Mar. 9, 2008, at BU1.

21. Susan Herring, *Questioning the Generational Divide: Technological Exoticism and Adult Constructions of Online Youth Identity*, *in* YOUTH, IDENTITY, AND DIGITAL MEDIA 71, 71 (David Buckingham ed., 2008); Susan McKay, Crispin Thurlow & Heather Toomey Zimmerman, *Wired Whizzes or Techno-Slaves? Young People and Their Emergent Communication Technologies*, *in* TALKING ADOLESCENCE 185, 185 (Angie Williams & Crispin Thurlow eds., 2005).

22. McKay, Thurlow & Zimmerman, *supra* note 21, at 187–89 (discussing how race, ethnicity, and socioeconomic background can affect access to and use of emerging technologies).

23. AMANDA LENHART, MARY MADDEN & LEE RAINIE, PEW INTERNET & AMERICAN LIFE PROJECT, TEENS & THE INTERNET: FINDINGS SUBMITTED TO THE HOUSE SUBCOMMITTEE ON TELECOMMUNICATIONS & THE INTERNET 2 (2006), http://www.pewinternet.org/ppt/Pew%20Internet%20findings%20-%20teens%20and%20the%20internet%20-%20final.pdf.

24. Danah Boyd, *Why Youth ♥ Social Network Sites: The Role of Networked Publics in Teenage Social Life*, *in* YOUTH, IDENTITY, AND DIGITAL MEDIA, *supra* note 21, at 119, 123–24.

instant messaging feature.[25] A very popular way of communicating within social networks is by posting messages on another user's profile or by sending a bulletin or group message to a number of people within the network.[26] The profile template, which is modeled on the style of profiles from dating services, typically contains demographic details (such as name, sex, location), a photograph, and lists of likes and dislikes (favorite books and bands, interests, etc.).[27] Many users post highly personal information on their profiles, including blow-by-blow accounts of their love lives and pictures of themselves and their friends. Some websites allow their users to be very creative in the way they develop their profiles, leading one commentator to remark that at times profiles bear resemblance to the stereotypical messy teenage bedroom.[28] Other profiles contain more incriminating information and pictures, such as photographs of the user and friends engaging in drug use or underage drinking.[29] A recent survey reported that fifty-five percent of teens aged twelve to seventeen with Internet access use social networking sites, and that sixty-four percent of teens aged fifteen to seventeen had profiles.[30]

Social networking sites serve many functions for young people. On the surface, these websites allow users to keep in touch with their "offline" friendships as well as to expand their social circles.[31] While adult users of social networks tend to enjoy using their social network sites to connect with strangers, younger users seem to prefer to connect with friends they

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25. *Id.* at 124 n.20.

26. AMANDA LENHART & MARY MADDEN, PEW INTERNET & AMERICAN LIFE PROJECT, SOCIAL NETWORKING WEBSITES AND TEENS: AN OVERVIEW 6 (2007), http://www.pewinternet.org/pdfs/PIP_SNS_Data_Memo_Jan_2007.pdf.

27. Boyd, *supra* note 24, at 123.

28. *Id.*

29. Alex Koppelman, *MySpace or OurSpace?*, SALON, June 8, 2006, http://www.salon.com/mwt/feature/2006/06/08/my_space/.

30. LENHART & MADDEN, *supra* note 26, at 1, 3. MySpace.com is the most popular social networking site in the United States, attracting more traffic than either eBay.com or Google.com. Press Release, Nielsen//Netratings, User-Generated Content Drives Half of U.S. Top 10 Fastest Growing Web Brands, According to Nielsen//Netratings (Aug. 10, 2006), http://www.nielsen-netratings.com/pr/PR_060810.PDF. In June 2008, Facebook.com overtook MySpace.com in the number of unique visitors to the website worldwide. Press Release, comScore.com, Inc., Social Networking Explodes Worldwide as Sites Increase Their Focus on Cultural Relevance (Aug. 12, 2008), http://www.comscore.com/press/release.asp?press=2396. Other popular social networking sites include Xanga.com, TaggedIn.com and Bebo.com. *See, e.g.*, Press Release, comScore, Inc., Social Networking Goes Global (July 31, 2007), http://www.comscore.com/press/release.asp?press=1555; Press Release, FTC, Do You Know Who Your Kids Are Talking To? (May 9, 2006), http://www.ftc.gov/opa/2006/05/socialnetworking.shtm.

31. McKay, Thurlow & Zimmerman, *supra* note 21, at 191. Ninety-one percent of users report using social networks to make plans with friends they see often; eighty-two percent report that they use social networks to keep in touch with people they see less often. LENHART & MADDEN, *supra* note 26, at 2.

already know from the "offline" world as well as with various celebrities.[32] As some social scientists have suggested, social networking sites in many ways serve as a replacement for the dwindling numbers of available offline social hangouts;[33] teenagers hang out on the Internet and their mobile phones just like "they used to hang out on street corners before."[34]

Social networks are not the only way in which adolescents engage with digital media. Some young people have produced online magazines in which they create text to share with their peers and frequently the broader public.[35] Others have created web logs, or blogs, that typically resemble a diary in which the creator and author chronicles his or her daily activities, displays photographs, and discusses favorite movies, books, and stores.[36] Blogs and home pages provide young people an opportunity to engage in autobiographical expression and "cathartic storytelling"[37] that can promote self-realization and self-reflection. Some students may turn to social networking sites to find a community of like-minded individuals they cannot find at school. Oftentimes students who have difficulty finding a community at school seek a community on the Web. Self-proclaimed "nerds" have discussed the importance of having a forum to deal with the often demoralizing experience of school.[38]

Teenagers also frequent video- and photo-sharing websites, such as YouTube.com and Flickr.com. YouTube.com is a free video-sharing website where users post and view movies, television clips, advertisements, music videos, and video blogs.[39] The materials available on YouTube.com range widely, from major network television shows, to amateur videos and cartoons, to images taken on a cell phone.[40] Flickr.com similarly permits users to engage in media and content sharing.[41]

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32. Boyd, *supra* note 24, at 122 (noting the popularity of MySpace.com due to a function that allows fans and popular musicians to communicate).

33. *Id.* at 134–35.

34. Richard Harper, *From Teenage Life to Victorian Morals and Back: Technological Change and Teenage Life*, *in* THUMB CULTURE: THE MEANING OF MOBILE PHONES FOR SOCIETY 101, 102 (Glotz et al. eds., 2005).

35. McKay, Thurlow & Zimmerman, *supra* note 21, at 192.

36. *Id.*

37. *Id.*

38. Henry Jenkins, *Introduction to Jon Kate Book Based on His "Voices from Hellmouth" Columns*, Henry Jenkins Blog, http://web.mit.edu/cms/People/henry3/Intro-Katz.html (last visited Sept. 20, 2008) (arguing that there is "something fundamentally wrong with a school system" that legally requires students to attend school and withstand abuse from their classmates while at the same time giving the students "no space to speak back to [their] abusers").

39. *See* YouTube Home Page, http://www.youtube.com.

40. *See, e.g.*, Chloe Albanesius, *Who Needs a TV? Web Video Viewing Doubles*, EXTREMETECH.COM, Sept. 4, 2008, *available at* http://www.extremetech.com/article2/0,2845,2329476,00.asp; Denise Martin, *MTV Gives Video Music Awards New Life*, L.A. TIMES, Sept. 4, 2008.

41. *See, e.g.*, Jefferson Graham, *Flickr Rules in Photo Sharing, As Video Tiptoes In*, USA

In the last couple of years, text messaging—the use of a cell phone to send a message—has become an increasingly popular form of electronic communication among teenagers.[42] Social scientists theorize that text messages have become popular with young people not merely because of the ease and immediacy of the medium, but also for a variety of complex psychological reasons.[43] Parents tend to entrust their children with cell phones in the name of safety and immediate access, but paradoxically many young people find their mobile phones provide them with independence from their parents and a sense of control over their own lives.[44] They enjoy communicating with abbreviations and expressions that are often incomprehensible to adults.[45] In addition, text messaging is a less conspicuous method of communication; students report that they enjoy the ability to text each other even while in class or in the library without being noticed and without causing a disruption.[46] While some adults have expressed concern that young people are ruining the English language through the lingo they use in text messages,[47] other social scientists have admired the creative means that young people are using to make new technology work best for them.[48]

Adults tend to have conflicting reactions to children and digital media. On the one hand, there is a push to promote computer literacy. Efforts to provide computers in every classroom across the country and indeed the world are applauded as the public embraces efforts to equip students to work on computers and the Internet so that they "will be able to ride the new e-commerce economy into better jobs and new educational opportunities, that they may be able to fulfill the utopian dreams of global communication and democratic decision-making."[49] On the other hand, the public worries that the Internet is exposing our children to all sorts of bad influences, from scammers to pornographers.[50]

The current hysteria about children and digital media reflects the same historical tendency of adults to work themselves up into a panic in the face of cultural change. As one author has described it, "[h]abits adopted by young people are frequently the targets of moral panic, with each generation of the middle-aged lamenting the downfall of the nation's

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TODAY, May 7, 2008, at 3B.

42. *See* Holson, *supra* note 20.

43. McKay, Thurlow & Zimmerman, *supra* note 21, at 195.

44. *Id.*

45. Crispin Thurlow, *Generation Txt? Exposing the Sociolinguistics of Young People's Text-Messaging*, DISCOURSE ANALYSIS ONLINE, 2003, at 14, http://extra.shu.ac.uk/daol/articles/v1/n1/a3/thurlow2002003.html.

46. McKay, Thurlow & Zimmerman, *supra* note 21, at 196.

47. Herring, *supra* note 21, at 74.

48. McKay, Thurlow & Zimmerman, *supra* note 21, at 197.

49. Jenkins, *supra* note 38.

50. *Id.*

teenagers and the perceived deviation from a better past."[51] In generation after generation, the media consumption of the young has been blamed for diminished performance in school and general apathy.[52] Thus, in the 1950s, there were efforts to ban crime and horror comic books, which were blamed for causing juvenile delinquency.[53] In 1954, the U.S. Congress Subcommittee on Juvenile Delinquency held hearings on the harm comic books were causing American youth.[54] An anti-comic book crusader testified before Congress that children should not be permitted to read *Superman* because it generated "'phantasies of sadistic joy in seeing other people punished . . . while you yourself remain immune.'"[55] In the 1960s, the FBI tried to figure out whether sadistic lyrics could be heard if a 45-RPM record of "Louie Louie" were played backward;[56] the hysteria about hidden lyrics continued through the rise of heavy metal music. More recently, Tipper Gore campaigned against rap music[57] and Joe Lieberman crusaded against violent movies.[58] Henry Jenkins has written about testifying before Congress in hearings concerning violence in the media where "[s]enators were discussing with shock and outrage films they hadn't seen, television shows they'd never watched, games they'd never played, and music they'd never listened to, based on precise scribbles on little index cards provided to them by congressional staffers."[59]

Although social networks, blogs, and text messaging are relatively new technologies, what young people do with them is, at bottom, not that much different from what prior generations did without technology. Not surprisingly, young people commonly use digital media to discuss school—their teachers, the school administrators, their fellow students, and the events of their daily lives. The difference is that instead of keeping a handwritten diary, they keep blogs. Instead of talking on landline phones, they talk on cell phones and use text messaging and instant messaging. Instead of speaking in "pig Latin" or using some other code, they use abbreviations and other creative forms of language to signal their "in-group identity."[60] Instead of gossiping about their teachers and fellow students at the soda shop or while walking around the mall, they send each

51. Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 115 (2003).

52. McKay, Thurlow & Zimmerman, *supra* note 21, at 197.

53. Caplan, *supra* note 51, at 115.

54. *Id.*

55. *Id.* (quoting MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH 52–54 (2001)).

56. *Id.* at 115–16.

57. *Id.* at 116.

58. *Id.*

59. Jenkins, *supra* note 38.

60. Herring, *supra* note 21, at 77.

other e-mails, instant messages, or text messages.[61] For many young people, the technology is beside the point; what matters is what they do with it. And for most of them, what they do with it is the same thing young people have been doing for generations.[62]

Cases and news articles indicate that adolescents use digital media for various forms of expressive activity. Much of the expression that has been the subject of litigation seems quite harmless and at worst tasteless. Other adolescent speech, however, is not as innocuous. The death of Megan Meier, who committed suicide after she was tormented on MySpace, has brought national attention to the problem of cyber-bullying and harassment.[63] Rather than harass their classmates in the locker room, hallways, and bathrooms, students engage in "electronic aggression," often in the form of malicious rumors or humiliating or threatening speech spread on social networking sites, e-mails, instant messages, chat rooms, text messages, and blogs.[64] In Pennsylvania, for example, law enforcement officials have been investigating the dissemination of pornographic videos and photographs of two high school girls transmitted by cell phones to dozens of the girls' classmates and to other members of the general public.[65]

Poking fun at teachers and harassing other students is not new conduct. Rather, what is new in the digital age is that adults can see what minors are saying much more easily. Before the Internet, in order to obtain access to the inner thoughts of the younger generation school officials would have to confiscate passed notes, illicit underground newspapers, or the occasional personal diary inadvertently brought to school. Now, school officials can simply log onto the Internet to see those same inner thoughts, and when they see something they do not like, many of them react by punishing the student responsible. As a result, much student expression that would have escaped the attention of school officials in another time now is the subject of suspensions, expulsion, and other forms of significant punishment. The challenge facing courts is how much authority schools should have to punish students for speech in the digital media.

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61. *Id.* Or they videotape their conversations and post them on YouTube. In Los Angeles, a school suspended a student for two days after he posted on YouTube a conversation among eighth graders in which the students called one of their classmates a "'slut'" and a "'spoiled brat.'" Victoria Kim, *Suit Blends Internet, Free Speech, School*, L.A. TIMES, Aug. 3, 2008, at B1.

62. Herring, *supra* note 21, at 77.

63. Christopher Maag, *When the Bullies Turned Faceless*, N.Y. TIMES, Dec. 16, 2007, § 9, at 9.

64. Tara Parker-Pope, *More Teens Victimized by Cyber-Bullies*, N.Y. TIMES, Nov. 27, 2007, http://well.blogs.nytimes.com/2007/11/27/more-teens-victimized-by-cyber-bullies/?scp=1-b&sq=cyber-bullies&st=nyt (Nov. 27. 2007, 3:41 EST); *see also* Renee Servance, Comment, *Cyberbullying, Cyberharassment, and the Conflict between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1216–24 (2003) (listing examples of cyber-bullying and harassment).

65. Michael Rubinkam, *Cell Phone Porn Scandal Hits U.S. School*, MSNBC.COM, Jan. 25, 2008, http://www.msnbc.msn.com/id/22840727/print/1/displaymodel/1098/.

III. STUDENT SPEECH RIGHTS

When the Court first approached student speech right cases, it did so with the understanding that minors were entitled to full constitutional rights that might need to be adjusted slightly given the context of the school environment. The Court tended to emphasize the role of parents, rather than the public schools, in inculcating democratic values. In its more recent student speech cases, the Court has retreated from its defense of student speech rights in favor of emphasizing deference to school authorities.

A. *The Early Cases*

In its earliest cases addressing student speech rights—*West Virginia Board of Education v. Barnette*[66] and *Tinker v. Des Moines Independent Community School District*[67]—the Court gave schools little authority to restrict student expression. The Court first recognized students' freedom of thought and expression in *West Virginia Board of Education v. Barnette*, which challenged the constitutionality of a resolution passed by the West Virginia State Board of Education during World War II requiring all students to salute the flag as a means of expressing national unity and of teaching citizenship during the "formative" period of their youth.[68] Anyone who failed to salute the flag was considered insubordinate and expelled.[69] A group of Jehovah's Witnesses brought a successful challenge to the law under the speech and religion clauses of the First Amendment (as incorporated to apply to the states through the Fourteenth Amendment).[70] Although the Court recognized that it lacked expertise in school administration, it nevertheless declared that "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[71] The Court recognized that schools "have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."[72]

The Court continued to offer students strong speech right protections in *Tinker v. Des Moines Independent Community School District* in 1969.[73] John

66. 319 U.S. 624 (1943).
67. 393 U.S. 503 (1969).
68. *Barnette*, 319 U.S. at 626 & n.2.
69. *Id.* at 629.
70. *Id.* at 629, 637, 642.
71. *Id.* at 637.
72. *Id.*
73. 393 U.S. 503, 513–14 (1969).

Tinker, who was fifteen years old, his sister Mary Beth, who was thirteen years old, and their friend Christopher Eckhardt, sixteen years old, had decided, together with their parents, to wear black armbands to symbolize their objections to the Vietnam War.[74] The principals in the Des Moines school district got wind of this plan and adopted a policy prohibiting any student from wearing armbands to school.[75] The students, aware of this new policy, wore their armbands to school anyway and were promptly suspended until they agreed to take them off.[76] The students, through their fathers, brought a lawsuit seeking nominal damages and an injunction restraining the schools from enforcing their anti-armband policy.[77]

The Supreme Court viewed the case as a conflict between the speech rights of students and the need for schools to control conduct in schools.[78] On the one hand, the Court explained, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[79] To support this point, the Court cited *Barnette* as well as a long line of due process clause decisions striking down statutes that interfered with the liberty of teachers, parents, and students.[80] On the other hand, the Court recognized the need "for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[81]

The Court ultimately struck the balance in favor of the students, holding that there was "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."[82] Although outside the classrooms a few students made hostile remarks to the students wearing armbands, no violence or threats of violence occurred on school premises.[83] Citing *Terminiello v. City of Chicago*,[84] the Court explained that schools cannot repress student speech based on "undifferentiated fear or apprehension of disturbance,"[85] even though "[a]ny 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."[86]

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74. *Id.* at 504.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 507.
79. *Id.* at 506.
80. *Id.* at 506–07.
81. *Id.* at 507.
82. *Id.* at 508.
83. *Id.*
84. 337 U.S. 1 (1949).
85. *Tinker*, 393 U.S. at 508.
86. *Id.*

In perhaps the most strongly worded portion of the majority opinion, *Tinker* declared that schools cannot be "enclaves of totalitarianism" with "absolute authority over their students."[87] Instead, "[s]tudents in school as well as out of school are 'persons' under our Constitution" who "are possessed of fundamental rights."[88] Accordingly, states should not regard students as "closed-circuit recipients" of only the information the states wish to communicate; nor can the expression of students "be confined to the expression of those sentiments that are officially approved."[89] Instead, student speech, whether in the classroom or on the playground, is an important part of the "marketplace of ideas,"[90] and "personal intercommunication among the students" is "an important part of the educational process."[91] The Court expressed particular concern in *Tinker* that the school's regulation was aimed at a particular viewpoint on a particular subject—in this case, opposition to the Vietnam War.[92]

The Court tempered its broad defense of student speech rights by recognizing that such rights must be "applied in light of the special characteristics of the school environment."[93] The Court gave schools leeway to restrict student speech rights if the speech at issue would cause "material and substantial interference with schoolwork or discipline,"[94] or "invasion of the rights of others."[95] The Court concluded that the school failed to prove that the "silent, passive" wearing of black armbands met this standard.[96] Although the armbands provoked discussion, they did not cause a disruption.[97]

The concurring and dissenting opinions filed in *Tinker* plainly revealed that not all the Justices believed that students were entitled to such strong speech rights. Justice Stewart contributed a concurring opinion in which he noted that he "cannot share the Court's uncritical assumption that,

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87. *Id.* at 511.

88. *Id.*

89. *Id.*

90. *Id.* at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

91. *Id.*

92. *Id.* at 510–11. Although some courts have interpreted *Tinker* as condemning only those school speech restrictions that are viewpoint-based, *see, e.g.*, Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 442 (5th Cir. 2001), this is not a sustainable reading of the decision. Nothing in *Tinker* indicates whether the school permitted students to express pro-war views. For more discussion of this issue, see Jacobs v. Clark County Sch. Dist., 526 F.3d 419, 431–32 & n.26 (9th Cir. 2008), which noted that *Tinker* applies to any content-based speech restriction, even if not viewpoint-based, because content-based speech restrictions are "equally pernicious," and Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 677 (7th Cir. 2008) (Rovner, J., concurring), which noted that *Tinker* should be seen as "a discussion about subject matter discrimination."

93. *Tinker*, 393 U.S. at 506.

94. *Id.* at 511.

95. *Id.* at 513.

96. *Id.* at 514.

97. *Id.*

school discipline aside, the First Amendment rights of children are co-extensive with those of adults" because they are "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[98] Justice Stewart cited the Court's then-recent decision in *Ginsberg v. New York*,[99] where the Court declared that a "[s]tate may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[100]

In dissent, Justice Black argued that although he believed the government has no authority to regulate the content of speech, he had "never believed that any person has a right to give speeches or engage in demonstrations where he pleased and when he pleases,"[101] and that students are sent to public school "to learn, not teach."[102] He viewed the black armbands as significantly disruptive to the school day; even though the students wearing the armbands did not make obscene remarks or behave in a boisterous manner, they provoked comments and warning from other students, they "practically 'wrecked'" a mathematics class, and they certainly diverted the students' attention from their classwork.[103] In addition, Justice Black emphasized the importance of school discipline as "an integral and important part of training our children to be good citizens—to be better citizens."[104] He argued that by striking down the armband regulation, the Court had inappropriately taken into its own hands the control of the school environment that should rest in the discretion of school officials.[105]

Justice Black predicted that by giving students rather than teachers the right to control schools, students in schools across the country "will be ready, able, and willing to defy their teachers on practically all orders," especially since students "all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins."[106] Echoing Justice Black, Justice Harlan argued in a short separate dissent that "school officials should be accorded the widest authority in maintaining discipline and good order in their institutions."[107] Justice Harlan suggested that school speech restrictions should be tolerated unless a challenger can

98. *Id.* at 514–15 (Stewart, J., concurring).

99. 390 U.S. 629 (1968). In *Ginsberg*, the Court rejected a challenge to a state law that criminalized the distribution of obscene material to minors under age seventeen. *Id.* at 631, 636–37.

100. *Tinker*, 393 U.S. at 515 (quoting *Ginsberg*, 390 U.S. at 649–50).

101. *Id.* at 517 (Black, J., dissenting).

102. *Id.* at 522.

103. *Id.* at 517–18.

104. *Id.* at 524.

105. *Id.* at 517–20.

106. *Id.* at 525.

107. *Id.* at 526 (Harlan, J., dissenting).

prove that the restriction "was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view . . . ."[108]

Courts have applied *Tinker*'s "substantial disruption"[109] standard with varying levels of scrutiny. Most seem to agree that a school can act to restrict speech before there is evidence that the expression at issue caused an actual disruption. As discussed below in Section IV.B.4, the level of disruption a court requires can make a big difference on whether restrictions on electronic expression can satisfy *Tinker*.

Although virtually all the student speech cases applying *Tinker* have focused on its material-and-substantial-disruption[110] prong, it is possible that the alternative prong of *Tinker*—interference with the rights of others[111]—will become more important, particularly in the context of harassing or demeaning speech. Although courts have generally ignored this alternative justification for restricting student speech,[112] the Ninth Circuit recently gave this theory new life in a case involving anti-gay T-shirts.[113] In *Harper v. Poway Unified School District*, the court held that it was constitutional for a school to prohibit a student from wearing a T-shirt that stated "HOMOSEXUALITY IS SHAMEFUL" because it undermined "the rights of other students."[114] The court explicitly refused to rely on *Tinker*'s substantial disruption standard in reaching its decision.[115] Rejecting the argument that the phrase "rights of others" meant

108. *Id.*

109. *Id.* at 514 (majority opinion).

110. *Id.* at 513.

111. *Id.*

112. *See* Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005) (stating that it is unaware of any court decision relying solely on the "invasion of rights of others" prong of *Tinker* to uphold a student speech regulation); Emily Gold Waldman, *A Post-*Morse *Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 477 (2008) (noting that until recently no court had applied the "invasion of rights" justification of *Tinker*); Brian J. Bilford, Note, *Harper's Bazaar: The Marketplace of Ideas and Hate Speech in Schools*, 4 STAN. J. C.R. & C.L. (forthcoming) (same); *see also* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001) ("The precise scope of *Tinker*'s 'interference with the rights of others' language is unclear . . . .").

113. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006), *vacated*, 127 S. Ct. 1484 (2007). The Supreme Court vacated the judgment and remanded the case to the Ninth Circuit for dismissal of the appeal of the preliminary injunction as moot because in the meantime the district court had entered final judgment against plaintiff. *Harper*, 127 S. Ct. at 1484. Accordingly, the Ninth Circuit dismissed the appeal as moot. Harper v. Poway Unified Sch. Dist., 485 F.3d 1052, 1052 (9th Cir. 2007). For subsequent litigation on a motion for reconsideration, see *infra* note 219.

114. Harper, 445 F.3d at 1171, 1178 (quoting *Tinker*, 393 U.S. at 508).

115. *Id.* at 1175 ("Although we, like the district court, rely on *Tinker*, we rely on a different provision—that schools may prohibit speech that 'intrudes upon . . . the rights of other students.'" (quoting *Tinker*, 393 U.S. at 508)). The court specifically distinguished its decision from *Saxe*, 240 F.3d at 217, where the Third Circuit suggested that harassing speech may not be restricted under *Tinker* unless it causes substantial disruption. *Harper*, 445 F.3d at 1179 n.21. The Ninth Circuit stated that "[t]he two *Tinker* prongs are stated in the alternative." *Id.* It is unlikely that the Ninth

simply that schools could protect students against assault, defamation, invasion of privacy, extortion, and blackmail,[116] the court declared that under *Tinker* schools are entitled to restrict any speech that undermines "their right to learn."[117] The court cited studies demonstrating that the relatively weaker academic performance of gay students is most likely due to the abuse and harassment they receive from their peers.[118]

In an apparent attempt to limit its potentially sweeping ruling and to protect the ability of students "to engage in full and open political expression, both in and out of the school environment,"[119] the court declared that its holding was limited to "instances of derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation."[120] Although its holding would expressly permit schools to engage in viewpoint-based speech restrictions, the court concluded that such restrictions are permissible because "'[a] school need not tolerate student speech that is inconsistent with its basic educational mission, [ ] even though the government could not censor similar speech outside the school.'"[121] Accordingly, the court explained, "public schools may permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred."[122]

The *Harper* decision has been heavily criticized,[123] and other courts appear reluctant to follow its lead.[124] As Judge Kozinski argued in his

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Circuit's decision could have stood on the substantial disruption prong given the lack of evidence that the plaintiff's T-shirt materially disrupted school activities. *See id.* at 1193–94 (Kozinski, J., dissenting). If anything, the speech that the school promoted on the "Day of Silence," when students were permitted to tape their mouths to symbolize the silencing effect of intolerance upon gays and lesbians, seems at least as disruptive to the work of the school (if not more so) than the plaintiff's passive wearing of a T-shirt. *See id.* at 1171 (majority opinion).

116. *Harper*, 445 F.3d at 1178 n.18.

117. *Id.* at 1180.

118. *Id.* at 1178–79.

119. *Id.* at 1182.

120. *Id.* at 1183. The court specifically noted that it was not reaching the issue of whether its holding would reach comments based on gender, even though it recognized that gender discrimination existed in all levels of education. *Id.* at 1183 n.28.

121. *Id.* at 1185 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (second alteration in original)).

122. *Id.*

123. *See, e.g.*, Douglas D. Frederick, *Restricting Student Speech that Invades Others' Rights: A Novel Interpretation of Student Speech Jurisprudence in* Harper v. Poway Unified School District, 29 U. HAW. L. REV. 479, 480 (2007) (arguing that Ninth Circuit should have applied *Tinker*'s "substantial disruption" test instead of the "invasion of others' rights" test); Waldman, *supra* note 112, at 476–78 (arguing that *Harper* did not adequately explain why the verbal bullying of minority students is more disruptive to the educational experience than bullying generally); John E. Taylor, *Tinker* and Viewpoint Discrimination 53 (working paper, Social Science Research Network draft), *available at* http://ssrn.com/abstract=1137909 (arguing that *Harper* opens the door to rampant viewpoint-based speech discrimination).

124. *See, e.g.*, Nuxoll v. Indian Praire Sch. Dist. #204, 523 F.3d 668, 672 (7th Cir. 2008)

scathing dissent, the acceptance of homosexuality is, unfortunately, very much subject to "political disagreement and debate."[125] As proof of this debate, Judge Kozinski cited the controversy surrounding San Francisco Mayor Gavin Newsom's decision to issue same-sex marriage licenses.[126] Instead of banning speech pertaining to just one side of the debate, he suggested it would be preferable to ban discussion of the subject entirely.[127] In addition, Judge Kozinski noted that "[t]he interaction between harassment law and the First Amendment is a difficult and unsettled one because much of what harassment law seeks to prohibit, the First Amendment seems to protect."[128] In order to bridge the gap between the two, Judge Kozinski suggested that perhaps the school's authority to limit harassing speech could be "limited to those situations where the speech is so severe and pervasive as to be tantamount to conduct," and not extended to include "'simple acts of teasing and name-calling.'"[129] He called into question the majority's conclusion that the plaintiff's T-shirt had any meaningful psychological effect on other students because his speech was part of a broader political "give-and-take" during the Day of Silence.[130] Judge Kozinski also criticized the court's holding that schools can restrict speech that undermines the educational experience of minority students only.[131] He asked, "if interference with the learning process is the keystone to the new right, how come it's limited to those characteristics that are associated with minority status?"[132] He noted that students could have their self-esteem bruised as a result of any number of comments that do not pertain to their minority status, such as being poor, overweight, or suffering from an acne problem.[133] In addition, he noted the difficulties of defining "minority group" for purposes of the majority's new approach.[134]

It is unclear whether the Ninth Circuit would apply its expansive rights-of-others analysis to cyberspeech. At several points in its opinion,

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(rejecting the argument that schools can prohibit derogatory comments in order to "protect the 'rights' of the students against whom [they] are directed").

125. Harper, 445 F.3d at 1197 (Kozinski, J., dissenting).

126. *Id.*

127. *Id.*

128. *Id.* at 1198.

129. *Id.* (quoting Davis v. Monroe County Bd. of Educ., 562 U.S. 629, 658 (1999)). In *Nuxoll v. Indian Prairie School District #204*, Judge Posner also seems to reject the *Harper* majority's broad interpretation of *Tinker*'s "rights" prong. 523 F.3d 668, 672 (7th Cir. 2008). Although Judge Posner did not mention *Harper* directly, he did reject the school district's argument that its policy banning derogatory comments that refer to race, ethnicity, religion, gender, sexual orientation, or disability was constitutional because "all it [did was] protect the 'rights' of the students against whom" such comments were made. *Id.* Judge Posner explained that "people do not have a legal right to prevent criticism of their beliefs or for that matter their way of life." *Id.*

130. *Harper*, 445 F.3d at 1200 (Kozinski, J., dissenting).

131. *Id.* at 1200–01.

132. *Id.* at 1201.

133. *Id.*

134. *Id.*

the court emphasized that public schools have the authority to restrict speech at school that the government could not restrict outside school.[135] On the other hand, the school policy at issue in the case does not appear to have much in the way of geographic restrictions.[136] In his dissent, Judge Kozinski asked whether the majority would permit a student to "post criticism of the Day of Silence on his MySpace page,"[137] but that question goes unanswered.

B. *From* Fraser *to* Morse

In its more recent student speech cases, the Court has retreated from its broad protection of student speech rights in *Barnette* and *Tinker* and has instead become increasingly deferential to school officials who punish students for their expressive activities.

In *Bethel School District No. 403 v. Fraser*,[138] the Court took a much more restrictive view of student speech rights than it had in *Tinker* and gave great deference to school officials to censor student speech in the name of promoting "socially appropriate behavior."[139] In that case, Chief Justice Burger, writing for the majority, upheld a school's decision to discipline a high school student who had given a speech with a sexual metaphor and suggestive innuendos when nominating a fellow student for elective office at a school assembly.[140] The school suspended the student,

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135. *See, e.g.*, *id.* at 1176 (majority opinion) ("Harper's shirt embodies the very sort of political speech that would be afforded First Amendment protection outside of the public school setting . . . ."); *id.* at 1185 ("'A school need not tolerate student speech that is inconsistent with its basic educational mission, [ ] even though the government could not censor similar speech outside the school.'" (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (alteration in original))).

136. *See id.* at 1203–05 (Kozinski, J., dissenting) (noting the policy's "vast and uncertain geographic sweep").

137. *Id.* at 1206.

138. 478 U.S. 675 (1986).

139. *Id*. at 681.

140. *Id.* at 677–78, 685. Although Chief Justice Burger described Fraser's speech as containing an "elaborate, graphic, and explicit sexual metaphor," *id.* at 678, the speech did not seem to warrant any of those three adjectives, *see id.* at 689 n.2 (Brennan, J., concurring) ("Indeed, to my mind, [Fraser]'s speech was no more 'obscene,' 'lewd,' or 'sexually explicit' than the bulk of programs currently appearing on prime time television or in the local cinema."). The content of Fraser's speech was as follows:

> 'I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.'

Matthew Fraser, pursuant to a school policy providing that "'[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.'"[141] The school considered his speech to fall within the policy's meaning of obscene[142] (although, as Justice Steven's dissent points out, that assertion was far from clear[143]).

Although the Court majority gave lip service to *Tinker*'s declaration that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'"[144] *Fraser* was less concerned with students' free speech rights than with deferring to the school's "basic educational mission"[145] to inculcate the "'fundamental values necessary to the maintenance of a democratic political system.'"[146] The Court explained that although democratic values include "tolerance of divergent political and religious views," they also include "teaching students the boundaries of socially appropriate behavior."[147] The Court majority emphasized that in this case, unlike *Tinker*, "the penalties imposed . . . were unrelated to any political viewpoint."[148] Famously stating that "'the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket,'"[149] the Court made clear that the free speech rights of students were not co-extensive with the rights of adults.[150] The Court also stated that federal courts should defer to the school board's determination of what speech is appropriate in a school assembly.[151]

Although the Court noted that some students in the audience "hooted and yelled" and "graphically simulated the sexual activities pointedly alluded to in respondent's speech," and that one teacher was required to devote part of her lecture to a discussion of the speech,[152] its decision did

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Id. at 687.

141. *Id.* at 677–78 (majority opinion).

142. *Id.* at 679.

143. *Id.* at 694 (Stevens, J., dissenting) (noting that not only does the rule apply to "conduct" and not "speech," but also that "even if the language of the rule could be stretched to encompass the nondisruptive use of obscene or profane language, there is no such language in respondent's speech").

144. *Id.* at 680 (majority opinion) (quoting *Tinker*, 393 U.S. at 506).

145. *Id.* at 685.

146. *Id.* at 681 (quoting Ambach v. Norwick, 441 U.S. 68, 76–77 (1979)).

147. *Id.*

148. *Id.* at 685.

149. *Id.* at 682–83 (quoting Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)). In *Cohen v. California*, the Court upheld the right of an adult to wear a jacket proclaiming "Fuck the Draft." Cohen v. California, 403 U.S. 15, 16–17 (1971).

150. *Fraser*, 478 U.S. at 682.

151. *Id.* at 683.

152. *Id.* at 678.

not rest on an application of *Tinker*'s substantial disruption standard.[153] Instead, the *Fraser* decision echoed the concurring and dissenting opinions in *Tinker* almost twenty years earlier. The *Fraser* majority opinion followed Justice Black's argument in his *Tinker* dissent that the Court must give school officials deference to maintain discipline in their institutions; indeed, the Court even cited a lengthy passage from Justice Black's dissent to support its argument.[154] The *Fraser* majority also drew on Justice Stewart's *Tinker* concurrence,[155] citing a series of decisions from *Ginsberg v. New York* to *FCC v. Pacifica Foundation* to support its argument that schools should play an important role in protecting minors from sexually explicit, indecent, or lewd speech.[156] The Court held that Fraser's speech was "plainly offensive to both teachers and students—indeed to any mature person," "acutely insulting to teenage girl students," and "seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality."[157]

Justice Brennan wrote a concurring opinion to make clear that he joined the Court's judgment only on the narrow, fact-specific ground that "school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly."[158] Justice Brennan correctly explained that Fraser's speech did not fall into the unprotected category of "obscene" speech,[159] and was "to my mind, . . . no more 'obscene,' 'lewd,' or 'sexually explicit' than the bulk of programs currently appearing on prime time television or in the local cinema."[160] He also questioned the Court's assumption that the speech was "'insulting'" to female students and was "'seriously damaging'" to other fourteen-year-olds when there was no evidence in the record to support either conclusion.[161] Brennan specifically noted, citing *Cohen*, that "[i]f respondent had given the same speech outside of the school environment,

153. The Court confirmed this in *Hazelwood School Disrict. v. Kuhlmeier*, 484 U.S. 260, 271 n.4 (1988).

154. *Fraser*, 478 U.S. at 686 (quoting *Tinker*, 393 U.S. at 526) (Black, J., dissenting)). *Fraser* also echoed Justice Harlan's dissent in *Tinker*. *See Tinker*, 393 U.S. at 526 (Harlan, J., dissenting) (arguing that "school officials should be accorded the widest authority in maintaining discipline and good order in their institutions" and that student speech restrictions should be tolerated unless "a particular school measure was motivated by other than legitimate school concerns").

155. *Tinker*, 393 U.S. at 515 (Stewart, J., concurring) (arguing that it is appropriate to limit student speech rights at least in some instances because a child, similar to a member of a captive audience, may not be capable of making an individual choice).

156. *Fraser*, 478 U.S. at 684–85. See detailed discussion of these cases *infra* Part V.A.

157. *Fraser*, 478 U.S. at 683.

158. *Id.* at 689 (Brennan, J., concurring).

159. *Id.* at 688.

160. *Id.* at 689 n.2.

161. *Id.*

he could not have been penalized simply because government officials considered his language inappropriate."[162]

In a dissenting opinion, Justice Marshall criticized the Court for not requiring the school to satisfy *Tinker*'s materially disruptive standard. He stated that although "the school administration must be given wide latitude to determine what forms of conduct are inconsistent with the school's educational mission . . . where speech is involved, we may not unquestioningly accept a teacher's or administrator's assertion that certain pure speech interfered with education."[163] Justice Stevens also filed a dissent, in which he argued, among other things, that the student's speech was not disruptive to the school's educational mission.[164] Quoting the lower court, Stevens elaborated that "'a noisy response to the speech and sexually suggestive movements by three students in a crowd of 600 fails to rise to the level of material interference with the educational process . . . .'"[165] In addition, Stevens contended that the speech did not amount to an "obvious impropriety."[166] While recognizing that the speech would be inappropriate in the classroom and other more formal settings, it would most likely be regarded as "routine comment" in a school locker room or in the school hallways.[167] Given this, Justice Stevens reasoned, it is hard to imagine the student should have known that he would be punished for the same speech delivered to an audience of his peers.[168]

Recently, the Supreme Court made the remarkable concession that "[t]he mode of analysis employed in *Fraser* is not entirely clear."[169] This is an understatement; the Court's analysis was a dramatic deviation from the Court's treatment of First Amendment rights generally and from *Tinker* specifically. In *Fraser*, the Court did not find that the speech was materially disruptive nor did it find that the speech interfered with the rights of other students, as *Tinker* would seem to require.[170] Noting the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content" of Fraser's speech, the Court seemed to read *Tinker* as narrowly applying only to restrictions of political speech,

162. *Id.* at 688 (citing Cohen v. California, 403 U.S. 15 (1971)).

163. *Id*. at 690 (Marshall, J., dissenting).

164. *Id.* at 693–94 (Stevens, J., dissenting).

165. *Id.* at 694 (quoting Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1360 (9th Cir. 1985), *rev'd*, 478 U.S. 675 (1986)).

166. *Id.* at 696.

167. *Id.*

168. *Id.*

169. Morse v. Frederick, 127 S. Ct. 2618, 2626 (2007).

170. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (reasoning that the students "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others" and therefore the Constitution did not permit the state to deny the students their expression).

particularly when viewpoint-based.[171] And in a subsequent case, the Court conceded that had Fraser made the same speech in a public forum, his speech would have enjoyed complete constitutional protection, even though it was sexually suggestive.[172]

In its next student speech case, *Hazelwood School District v. Kuhlmeier*,[173] the Court upheld a public school's decision to censor a student newspaper, created as part of a journalism class, that contained articles about pregnant students and the effect of divorce on students at the school.[174] The Court held that schools had broad authority to restrict the "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[175] The Court made it clear that the school's authority to curb such speech was not limited to expression that substantially interfered with its work or with the rights of other students.[176] Instead, drawing on *Fraser*'s broad language suggesting that federal courts should defer to school administrators' decisions to restrict speech that is "inconsistent with its 'basic educational mission,'"[177] the Court held that educators are permitted to control student speech in school-sponsored activities provided that "their actions are reasonably related to legitimate pedagogical concerns."[178] The Court said that this conclusion was consistent with its longstanding view that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."[179] Justice Brennan, joined by Justices Marshall and Blackmun, authored a lengthy dissent in which he attacked the majority for abandoning the fundamental principles of *Tinker*.[180] Among other things, Justice Brennan noted that in *Tinker* the Court rejected the argument that school officials should be able to censor any speech that offends them or that might be incompatible with the school's pedagogical mission.[181] In addition, Justice

171. *Fraser*, 478 U.S. at 680.

172. *Morse*, 127 S. Ct. at 2626 (citing Cohen v. California, 403 U.S. 15 (1971); *Fraser*, 478 U.S. at 682–83); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (noting that under the Court's analysis in *Fraser*, "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school" (citation omitted)); *Fraser*, 478 U.S. at 688 (Brennan, J., concurring) ("If [Fraser] 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 . . . .").

173. 484 U.S. at 260.

174. *Id.* at 276.

175. *Id.* at 271.

176. *Id*.

177. *Id.* at 266–67 (citing and quoting *Fraser*, 478 U.S. at 683, 685).

178. *Id.* at 273.

179. *Id.*

180. *Id.* at 277–91 (Brennan, J., dissenting).

181. *Id.* at 280–81.

Brennan argued that the Court could not rest its decision on the distinction between personal student speech and school-sponsored speech, when this distinction had never before appeared in the Court's jurisprudence.[182]

In *Morse v. Frederick*,[183] the Supreme Court's first student speech case in twenty years, the Court continued to erode student speech rights when it held that it is constitutional for a school to restrict student speech that is reasonably regarded as promoting illegal drug use.[184] In this case, high school senior Joseph Frederick unfurled a banner proclaiming "'BONG HiTS 4 JESUS'" during the Olympic Torch Relay as it passed by the school.[185] The Court conceded that the meaning of the banner was "cryptic," and that it might be "offensive to some, perhaps amusing to others."[186] Frederick, the student who made the banner, testified that the words were intentionally nonsensical and designed to catch the attention of the television cameras covering the relay.[187] The Court dismissed his explanation as going merely to his motive for holding up the sign, not to its meaning.[188] The Court concluded that even though the phrase might be "[g]ibberish," the principal's interpretation of the banner as promoting illegal drug use was "plainly a reasonable one,"[189] particularly given its "undeniable reference to illegal drugs."[190] It was also "reasonable," the Court held, for the principal to believe that failing to react to the sign "would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use."[191] Similar to its decision in *Fraser*, the Court rejected arguments that the principal had restricted speech conveying a political or religious message, proclaiming that "this is plainly not a case about political debate over the criminalization of drug use or possession."[192]

In reaching its conclusion, the Court made clear that *Tinker*'s materially disruptive analysis was not the only governing standard for permissible restrictions of student expression.[193] Instead, the Court emphasized that the important principle flowing from *Tinker* and *Fraser* is that students in public schools simply do not enjoy the same level of constitutional rights as adults due to the "'special characteristics of the

182. *Id.* at 281–82.
183. 127 S. Ct. 2618 (2007).
184. *Id.* at 2629.
185. *Id.* at 2622.
186. *Id.* at 2624.
187. *Id.*
188. *Id.* at 2625.
189. *Id.* at 2624–25.
190. *Id.* at 2625.
191. *Id.* at 2629.
192. *Id.* at 2625.
193. *Id.* at 2627.

school environment.'"[194] To support its finding, the Court cited its recent Fourth Amendment cases in which it upheld various searches of students in school that would be otherwise unconstitutional.[195] In these cases, the Court has emphasized that Fourth Amendment rights, like First Amendment rights, are lesser in public schools than elsewhere, and that courts "'cannot disregard the schools' custodial and tutelary responsibility for children.'"[196] Given the school's "important—indeed, perhaps compelling" interest in preventing drug use, the principal's decision to punish Frederick for his banner did not arise out of an "abstract desire to avoid controversy," which the Court suggested would have been unconstitutional.[197] To support its point, the Court pointed to statistics concerning drug use among young people as well as Congress's support for state and local drug-prevention programs.[198]

While the school won the case, it did not win on all its legal arguments. The school and several of its supporting amici had argued for an expansion of *Fraser* that would permit public schools to restrict not just lewd or obscene speech but any student expression that they might determine to be offensive to the school's educational mission.[199] In rejecting this argument, the majority expressed concern that "much political and religious speech might be perceived as offensive to some."[200]

Although Chief Justice Roberts's opinion had five votes, three Justices who joined that opinion also filed or joined important concurrences. Justice Thomas's concurring opinion argued that rather than create another exception to *Tinker*, the Court should simply overrule that case.[201] Drawing on cases from colonial times and from the nineteenth century in which schoolmasters were given broad, discretionary power to control their pupils,[202] Justice Thomas argued that "[a]s originally understood, the Constitution does not afford students a right to free speech in public schools."[203] Justice Thomas's position harkened back to Justice Black's dissenting opinion in *Tinker*, and in fact Justice Thomas quoted Justice

194. *Id.* at 2626–27 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

195. *Id.* at 2627–28 (quoting New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) and citing Bd. of Educ. v. Earls, 536 U.S. 822, 829–30 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995)).

196. *Id.* at 2627–28 (quoting *Earls*, 536 U.S. at 829–30 (quoting *Vernonia*, 515 U.S. at 656)).

197. *Id.* at 2628–29.

198. *Id.* at 2628.

199. *Id.* at 2629; *see also id.* at 2637 (Alito, J., concurring).

200. *Id.* at 2629 (majority opinion).

201. *See id.* at 2634 (Thomas, J., concurring).

202. *Id.* at 2630–33.

203. *Id.* at 2634.

Black at length.[204] Throughout his concurrence, Justice Thomas emphasized the in loco parentis principle, by which parents who send their children to public school are deemed to have granted the school the power to act in their stead.[205] Justice Thomas argued that parents have a choice whether to send their children to public or private schools, and to the extent they do not approve of how a public school disciplines its students, the parents can advocate for change through political bodies, send their children to private school, home school the children, or "simply move."[206] Justice Thomas's draconian view that public school students should have no free speech rights at all appeared to have no support from any other member of the Court.

Justice Alito, joined by Justice Kennedy, authored a concurring opinion that placed important limitations on the potentially broad scope of the majority opinion. Justice Alito emphasized that the holding of the majority's opinion was narrow and that nothing it said should be construed to permit a school to restrict unpopular religious or political speech simply because it was in tension with the school's "'educational mission.'"[207] Justice Alito argued that permitting schools to prohibit speech that conflicts with their self-defined educational mission "would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed,"[208] a proposition that would undermine the very core of the First Amendment. This part of Justice Alito's opinion seems aimed directly at decisions like the Ninth Circuit's decision in *Harper v. Poway Unified School District*,[209] discussed above, that permitted schools to restrict anti-gay speech on the ground that such speech is inconsistent with the school's educational mission.[210]

Justice Alito also emphasized that any theory permitting greater restriction of student expression cannot be based on a premise that parents have delegated their authority to the schools, as Justice Thomas argued,[211] because most parents have little choice but to send their children to public schools.[212] Instead, Justice Alito argued, the constitutionality of speech restrictions in public secondary schools must rest on "some special

204. *Id.* at 2633–34 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 522, 525, 526 (1969) (Black, J., dissenting)).

205. *Id.* at 2631–33.

206. *Id.* at 2635.

207. *Id.* at 2637 (Alito, J., concurring) (quoting Brief of Petitioner at 21, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278)).

208. *Id.*

209. 445 F.3d 1166 (9th Cir. 2006).

210. *Id.* at 1171–72, 1185 (9th Cir. 2006); *see also supra* notes 113–37 and accompanying text.

211. 127 S. Ct. at 2635 (Thomas, J., concurring).

212. *Id.* at 2637 (Alito, J., concurring).

characteristic of the school setting."[213] Although Justice Alito had rejected reliance on the in loco parentis principle, he emphasized that "schools can be places of special danger," and parents are unable to protect their children from "threatening individuals and situations."[214] He concluded that Frederick's banner posed a "threat to the physical safety of students" that was "just as serious" as a threat of actual violence because it advocated illegal drug use.[215] Justice Alito argued that schools must have the authority to intervene "before speech leads to violence," and that the *Tinker* "substantial disruption" standard allows them to do just that.[216] Justice Alito did not explain how Frederick's sign posed anything more than an "undifferentiated fear or apprehension" that students will use illegal drugs, a basis that under *Tinker* is insufficient for restricting student speech.[217]

Although the Court emphasized that its holding in *Morse* was limited to speech concerning illegal drug use,[218] it is hard to accept such a narrow view of the holding as a theoretical matter. Indeed, some lower courts have held that a school may now restrict the expression of its students whenever school officials reasonably believe that the speech is harmful or threatening to the students. For example, a federal district court in California recently held that *Morse* permits a school to prohibit its students from wearing T-shirts that condemn homosexuality on the grounds that such speech may reasonably be considered "harmful" to its students.[219] And the Courts of Appeals for the Fifth and Eleventh Circuits have similarly read *Morse* broadly to permit school administrators to punish speech that threatens harmful activity, without evaluating the potential for material disruption under *Tinker*.[220]

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213. *Id.* at 2638.

214. *Id.*

215. *Id.*

216. *Id.*

217. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) ("[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.").

218. *See Morse*, 127 S. Ct. at 2628–29.

219. Harper v. Poway Unified Sch. Dist., No. 04-CV-1103, slip op. at 9 (S.D. Cal. Feb. 11, 2008). The district court rejected the plaintiff's motion to reconsider the decision granting summary judgment to the school that had prohibited a student from wearing a T-shirt declaring "Homosexuality is shameful. Romans 1:27." *Id.* at 2, 10. Previously, the Ninth Circuit had affirmed the denial of the plaintiff's motion for preliminary injunction; later, after the district court granted summary judgment to the defendants, the Supreme Court vacated the Ninth Circuit's decision as moot due to the summary judgment. *Id.* at 2; *see also supra* note 113. Subsequently, the district court considered the present motion for reconsideration on limited remand from the Ninth Circuit. *Harper*, No.04-CV-1103, slip op. at 3. In ruling on the motion for reconsideration, the district court relied on the findings in the Ninth Circuit's vacated case as the law of the case. *Id.*

220. *See* Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 770 (5th Cir. 2007) (finding that Justice Alito's concurring opinion makes it clear that "speech advocating a harm that is

IV. LOWER COURT TREATMENT OF STUDENT SPEECH IN THE DIGITAL MEDIA

The Court's school cases provide little direct guidance to the lower courts concerning the authority of school officials to punish student speech involving the digital media. On the one hand, all the Court's school speech cases to date have involved speech on school grounds or during a school-sponsored activity; this fact arguably renders all their cases inapplicable to digital speech, which typically is created, shared, and viewed off the school grounds.[221] On the other hand, the Court's increasing deference to school administrators indicates that the Court is willing to give schools wide berth when it comes to disciplining their students for their expression, regardless of which medium they use. As a result of the lack of clear guidance from the Court, it is perhaps not surprising that the lower courts have reached different conclusions on student speech rights in the digital age.

A. *Guidance—or Lack Thereof—from the Supreme Court*

All four of the Court's student speech cases involve situations where the student expression at issue either took place on school grounds or during a school-sanctioned activity off campus (*Morse*, *Fraser*, and *Tinker*)[222] or was considered school-sanctioned speech (*Hazelwood*).[223] Furthermore, because most digital speech cases do not have a geographic nexus to the school, there is a necessary disconnect between the challenged expression and any actual disruption to the classroom or learning environment.

Although in *Morse* the Court had an opportunity to offer some guidance on schools' authority to restrict speech outside school grounds, it dodged the issue. In that case, the student had argued that the school lacked authority to restrict his speech because he displayed his sign on a public sidewalk, off school property, at an event attended by the general public.[224] The Court gave short shrift to this argument and instead accepted the school's contention that the students were participating in a school-

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demonstrably grave and that derives that gravity from the 'special danger' to the physical safety of students arising from the school environment is unprotected"); Boim v. Fulton County Sch. Dist., 494 F.3d 978, 984 (11th Cir. 2007) (reasoning that the rationale of *Morse* "applies equally, if not more strongly, to speech reasonably construed as a threat of school violence").

221. *See* Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 269–70 (2001) (noting that none of the Supreme Court's student speech cases involve off-campus speech).

222. *Morse*, 127 S. Ct. at 2624; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986); *Tinker*, 393 U.S. at 504.

223. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

224. *Morse*, 127 S. Ct. at 2622.

sanctioned activity with adult supervision and that accordingly it was a typical school speech case.[225] At the same time, the majority recognized that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents, but not on these facts."[226] Only Justice Alito's concurring opinion suggested that a distinction between on-campus and off-campus speech might be warranted. He argued that the reason schools have greater leeway to regulate student expression is that parents are not present during school hours to protect and guide their children, who "may be compelled on a daily basis to spend time at close quarters with other students who may do them harm."[227] In contrast, Justice Alito argued, when students are away from 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."[228]

Morse effectively expanded the school's authority to punish student expression, and this holding could have ramifications for speech on the Internet. The speech at issue in that case did not cause any material disruption to the school's activities or to the rights of others.[229] And the Court conceded that *Hazelwood* had no application because "no one would reasonably believe that Frederick's banner bore the school's imprimatur."[230] Instead, *Morse* gave tremendous deference to school officials' interpretation of the meaning and likely effect of student speech.[231] The Court's apparent willingness to continue to erode student speech rights and to expand the power of school officials to punish student

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225. *Id.* at 2624. In a footnote, Justice Stevens remarked that Frederick may not have realized that the school policy governing student expression applied to his speech because it did not take place on school premises and did not occur at a school social event or class trip, as the school policy appears to require. *Id.* at 2647 n.2 (Stevens, J., dissenting). But Justice Stevens's comments appear directed only at how to interpret the school policy, not the jurisdiction of the school over student speech.

226. *Id.* at 2624 (majority opinion) (citation omitted).

227. *Id.* at 2638 (Alito, J., concurring).

228. *Id.*

229. *Id.* at 2627–29 (majority opinion) (pointing out that the *Tinker* framework for analyzing school speech restrictions is not absolute and concluding that schools could restrict student speech that is reasonably interpreted as speech promoting drug use).

230. *Id.* at 2627.

231. As Justice Stevens persuasively argued in his dissent, it was not very reasonable to interpret the phrase "BONG HiTS 4 JESUS" as expressly advocating illegal drug use. *Id.* at 2646 (Stevens, J., dissenting). Justice Stevens conceded that some high school students are "dumb," but "most students know dumb advocacy when they see it," and no reasonable student would be persuaded to engage in illegal drug use as a result of seeing this banner. *Id.* at 2649. Justice Stevens accused the Court of "abdicat[ing] its constitutional responsibility," *id.* at 2647, pointing to a long line of Supreme Court cases in which the Court has been unwilling to accept the subjective interpretation of expression by either a listener or a legislature, *id.* at 2647–50. In this case, even if it is unclear what the message means, Stevens argued that "the tie would have to go to Frederick's speech, not to the principal's strained reading of his quixotic message." *Id.* at 2649.

expression indicates that, at least on a theoretical basis, the Court might be willing to give schools broader authority to punish student speech in the digital media.

B. *Various Approaches of the Lower Courts*

Given that all the Supreme Court's student speech cases involve speech on campus or during a school-sponsored activity,[232] it is not surprising that some lower courts confronting a student speech issue first ask whether the expression at issue can be considered on-campus or off-campus speech.[233] Among those courts grappling with this question, two general approaches to answering it have developed. The first is to consider whether the speech at issue is physically on campus, which can mean that it was accessed by someone electronically on campus or that a copy of the speech at issue was brought onto campus.[234] The second, more expansive approach is to consider whether the speech is either "aimed" at the school or whether it should have been "reasonably foreseeable" to the student that the speech would come to the attention of the school authorities.[235]

Interestingly, most courts to confront student speech cases—including those that have taken a more restrictive view of a school's jurisdiction over student speech—have suggested that they might be willing to apply *Tinker* in any student expression case, even if the student speech is plainly off campus, as long as the speech causes a substantial disruption at the school.[236] At the same time, most courts have been unwilling to apply *Fraser* to off-campus student speech.

1. Territorial Approach

Many courts confronting a student speech case first consider whether the student-speaker used school computers or servers to create, print, or view the expression, or whether they or other students brought hard copies of the material onto the school's campus.[237]

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232. *See supra* notes 222–23 and accompanying text.

233. *See* Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 n.22 (5th Cir. 2004) (listing cases that involve on-campus speech, off-campus speech later brought onto campus, and Internet speech). This is also the approach courts have generally taken to student speech rights cases that do not involve digital media, such as cases involving "underground" or unofficial student newspapers distributed off campus. *See infra* notes 245–55 and accompanying text.

234. *See infra* Part IV.B.1.

235. *See infra* Part IV.B.2. At least one commentator has argued that because the Internet can be accessed anywhere, and because students frequently talk about material posted on the Internet while they are at school, speech on the Internet is "'virtually' on campus." *See* Susan Kosse, *Student Designed Home Web Pages: Does Title IX or the First Amendment Apply?*, 43 ARIZ. L. REV. 905, 920 (2001). Not surprisingly, no court has taken this approach.

236. *See infra* Part IV.B.3.

237. *See* Boucher v. Sch. Bd., 134 F.3d 821, 828–29 (7th Cir. 1998) (holding that Supreme

Most courts taking this sort of territorial approach make clear that it must be the student-speaker himself—and not another pupil or school administrator—who has accessed the speech at school or otherwise caused the speech or a copy of it to physically appear on campus.[238] In other words, for these courts the speech cannot become on-campus speech simply whenever a third party or a school official brings or accesses the material on the Internet at school.[239] This approach has its roots in cases involving diaries and underground newspapers circulating in hard copy. For example, in *Porter v. Ascension Parish School Board*,[240] the Fifth Circuit held that a school district lacked authority to punish a student for a violent sketch contained in a notebook that had been brought to campus unwittingly by the student's younger brother, after it had been sitting in a closet for two years.[241] The court emphasized that the sketch was "never intended by [the student] to be brought to campus" and that "[h]e took no action that would increase the chances that his drawing would find its way to school."[242] The court concluded that under such circumstances, the speech was "not exactly speech on campus or even speech directed at the campus."[243] That the sketch clearly concerned the school—it depicted his school under siege by a gasoline tanker truck, missile launcher, and armed persons, contained disparaging remarks about the principal, and depicted a brick being hurled at him[244]—made no difference to the court's analysis.

Court's student speech cases applied in case where unofficial student newspaper was distributed on campus, especially since it advocated hacking into the school's computers); Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1071, 1072, 1074–75 (5th Cir. 1973) (holding that school had authority to punish student for underground newspaper published off campus that was distributed near campus); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 850–51, 865 (Pa. 2002) (holding as a threshold matter that a student website created off campus called "'Teacher Sux'" constituted "on-campus speech" because he had accessed the website at school, showed it to a fellow student and had informed other students of the existence of the website). *But see* Layschock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 591–92, 599–601 (W.D. Pa. 2007) (applying *Fraser* and *Tinker* tests and holding that school lacked authority to punish student for creating fake MySpace.com profile for principal even though student had showed the profile to other students and accessed the profile from school twice); Calvert, *supra* note 221, at 265–67 (arguing that if a student downloads or otherwise "'brings'" his off campus website to school, "schools may properly act as a quasi-official third arm of the justice system and punish that expression").

238. One exception to this general rule is *Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008). In that case, the court held that there was a sufficient connection between the website at issue and the school campus because, in addition to other factors, a student had brought a paper copy of it to school. *Id.* at *7. There is no indication in the court's opinion that the student who created the website brought it to school himself. *See id.* at *2 (noting that "a student" gave the principal a copy of the website).

239. *See* Calvert, *supra* note 221, at 266.

240. 393 F.3d 608 (5th Cir. 2004).

241. *Id.* at 615.

242. *Id.*

243. *Id.*

244. *Id.* at 611.

A panel of the Second Circuit took a similar approach in *Thomas v. Board of Education*.[245] *Thomas* involved the publication to the school community of a satirical underground newspaper that contained some vulgar and offensive content.[246] In that case, the students did most of the publication work after school hours in a classroom where they occasionally asked a teacher grammatical and other questions.[247] Although the students sold the paper in town, they stored extra copies of the newspaper in the classroom closet.[248] The Second Circuit held that the school lacked authority to restrict the newspaper because "all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate."[249] The *Thomas* court declared that the "limited abrogation of First Amendment guarantees" that the Supreme Court has permitted in cases like *Tinker* "is wholly out of place here for in those cases all activities were conducted on school property."[250] Instead, the Second Circuit declared that a schoolmaster's authority "does not reach beyond the schoolhouse gate," and that accordingly any school restrictions on off-campus speech had to meet the same standards any government actor restricting speech must meet.[251] The court discussed the dangers inherent in giving a well-meaning school official broad authority to act as "both prosecutor and judge"; the court explained that "[the school official's] intimate association with the school itself and his understandable desire to preserve institutional decorum give him a vested interest in suppressing controversy."[252] Although the court explained it was resigned to accepting this discretion with respect to on-campus speech, it rejected "the imposition of such sanctions for off-campus expression."[253] The court seemed particularly concerned that if schools were given deference to regulate off-campus speech, they would be in danger of intruding upon the role of parents: "Parents still have their

245. 607 F.2d 1043 (2d Cir. 1979).

246. *Id.* at 1045.

247. *Id.*

248. *Id.*

249. *Id.* at 1050. After being warned to keep the paper off the school grounds, the students made efforts to sever the publication's connection to the school. *Id.* at 1045. Among other things, the students added a disclaimer, produced the paper at a local community business, and sold it to classmates at a local store. *Id.* Although the students did not distribute the newspaper at school, they did store copies in a teacher's closet, with his permission. *Id.* The Second Circuit did not find it significant that the students occasionally used school typewriters to transcribe articles or that they stored unsold copies of the newspaper in the teacher's closet. *Id.* at 1050.

250. *Id.* at 1049–50

251. *Id.* at 1044–45; *see also* Klein v. Smith, 635 F. Supp. 1440, 1440–41 (D. Me. 1986) (holding that a school lacked authority to discipline a student who had made a vulgar gesture to a teacher after school hours and off school grounds, and holding that the connection between the gesture and the orderly operation of the school was "too attenuated").

252. *Thomas*, 607 F.2d at 1051.

253. *Id.*

role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of *parens patriae*."[254] The court ultimately concluded that the best approach would be to declare that schools had no authority to restrict speech that takes place off school grounds.[255]

In *J.S. v. Bethlehem Area School District*,[256] the Pennsylvania Supreme Court applied the territorial approach to a website. The court held that speech will be considered on-campus speech "where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator."[257] Applying this rule to the case before it, the court concluded that a student's website was on-campus speech because although the student had created the objectionable "Teacher Sux" website off campus, he had accessed the website at school, shown it to another student, and told other students about his website.[258]

2. More Expansive "Directed" and "Foreseeable" Approaches

Other courts have been willing to conclude that student speech constitutes on-campus speech whenever the student has directed his speech to campus, or when it is reasonably foreseeable that the speech will come to the attention of school authorities.[259]

A panel of the Second Circuit took this expansive approach in *Wisniewski v. Board of Education*.[260] Led by Judge Newman,[261] the panel

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254. *Id.*; *see also id.* at 1052 n.18 (expressing concern about interfering with the role of parents and noting that parents who had no objections to the paper would be powerless against the imposed sanctions).

255. *Id.* at 1052.

256. 807 A.2d 847 (Pa. 2002).

257. *Id.* at 865.

258. *Id.* In addition, the court noted that school officials were able to access the site because it was not password-protected, and the subject matter of the website concerned teachers at that school. The court concluded that "it was inevitable that the contents of the web site would pass from students to teachers, inspiring circulation of the web page on school property." *Id.*

259. Some commentators have advocated for variations of this approach. *See* Caplan, *supra* note 51, at 163 ("An exception to the rule against treating off-campus speech that affects school as if it occurred on-campus may exist for conduct that is directed exclusively at the school (as opposed to the world at large), that is maliciously intended for the purpose of disrupting school, and that has a high likelihood of succeeding in its purpose."); Servance, *supra* note 64, at 1239 (arguing that schools should have authority to punish cyberbullying or harassment when it has an impact on campus and proposing a test for determining whether such impact occurred).

260. 494 F.3d 34 (2d Cir. 2007), *cert. denied*, 127 S. Ct. 1741 (2008).

261. Judge Newman had written a concurring opinion in *Thomas* criticizing the Second Circuit for adhering to a rigid territoriality principle, Thomas v. Bd. of Educ., 607 F.2d 1043, 1058 n.13 (Newman, J., concurring). In *Thomas*, Judge Newman argued that a school should have the authority to restrict student speech that is "aimed at students of a particular school, is sold exclusively to students of that school, and is distributed near the school grounds" because such speech clearly concerns the school community. *Id.*

held that a school can apply the *Tinker* standard to student speech on the Internet as long as there is a "reasonably foreseeable risk that [the speech] would come to the attention of school authorities . . . ."[262] Judge Newman held that it was constitutional for a public school to punish eighth-grade student Aaron Wisniewski for sending instant messages from his home computer to fifteen friends (some of whom were classmates) with an icon depicting a pistol firing a bullet at a person's head and the words "'Kill Mr. VanderMolen,'" Wisniewski's English teacher.[263] Although Wisniewski did not IM his teacher or any other school official, VanderMolen learned about his icon when another student heard about the icon and told the teacher about it.[264] The teacher in turn informed school officials, who contacted the police, the superintendent, and Wisniewski's parents.[265] VanderMolen said that the icon scared him and made him feel sick to his stomach; the school agreed to remove him from teaching Wisniewski's class.[266] The police concluded after an investigation that Wisniewski posed no threat to VanderMolen or any school official; the psychologist who evaluated Wisniewski also concluded that Wisniewski meant the icon as a joke and had no violent intent.[267] Despite these findings, the Board of Education approved a one-semester suspension for threatening a teacher in violation of student handbook regulations and for creating a disruption in the school environment.[268] After serving out his suspension, Wisniewski returned to school for a term, but due to school and community hostility, the family later moved out of town.[269]

Wisniewski's family filed a lawsuit on his behalf, arguing among other things that the icon was protected speech under the First Amendment and did not constitute a "'true threat.'"[270] The district court granted the summary judgment to the school,[271] and the Second Circuit upheld the decision on appeal.[272] Judge Newman, writing for the panel, emphasized that "[t]he fact that [the student]'s creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline."[273] Judge Newman explained that the *Tinker*

262. *Wisniewski*, 494 F.3d at 38.

263. *Id.* at 35–36, 40.

264. *Id.* at 36. The student-informant did not receive the icon from Wisniewski himself; he learned about the icon from another student. Wisniewski v. Bd. of Educ., No. 5:02-CV-1403, 2006 WL 1741023, at *1 (N.D.N.Y. June 20, 2006), *aff'd*, 494 F.3d 34 (2d Cir. 2007).

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

266. *Wisniewski*, 2006 WL 1741023, at *3.

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

268. *Id.* at 36–37.

269. *Id.* at 37.

270. *Id.*

271. *Wisniewski*, 2006 WL 1741023, at *9.

272. *Wisniewski*, 494 F.3d at 40.

273. *Id.* at 39.

standard governed because it was "reasonably foreseeable" that Wisniewski's icon would come to the attention of school authorities and that it would "'materially and substantially disrupt the work and discipline of the school.'"[274] The icon disrupted school operations because it diverted the attention of school officials, required the replacement of the threatened teacher (who refused to teach Wisniewski any more), and required officials to interview students during class time.[275] Given this, the court ruled, it was irrelevant whether the student's icon constituted a true threat because "we think that school officials have significantly broader authority to sanction student speech than the [Supreme Court's true threat] standard allows."[276]

Judge Newman did not spend much time outlining the contours of his novel "reasonably foreseeable" test. He did note that the panel disagreed about whether it would be necessary to consider the reasonable foreseeability of speech reaching the school in cases like this one, in which it is undisputed that the speech did in fact reach the school.[277] It is hard to understand how a panel would not be required to determine whether it was in fact reasonably foreseeable whether Wisniewski's IM icon would come to the attention of school officials, given that the icon appeared only on private communications Wisniewski sent to his friends, he did not use a school computer to send these communications, and the icon came to the school's attention only weeks later when another student, who had not received an e-mail from Wisniewski himself,[278] told the teacher about it.[279]

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274. *Id.* at 38–39 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

275. *Id.* at 36.

276. *Id.* at 37–38.

277. *Id.* at 39. Judge Newman wrote:

> In this case, the panel is divided as to whether it must be shown that it was reasonably foreseeable that Aaron's IM icon would reach the school property or whether the undisputed fact that it did reach the school pretermits any inquiry as to this aspect of reasonable foreseeability. We are in agreement, however, that, on the undisputed facts, it was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot.

Id. One judge was concerned that an irrebutable presumption of reasonable foreseeability, arising once a message actually reaches the school authorities, would lead to punishment in situations when a student hides a message and another student steals it and brings it to the attention of the school, analogous to the one that occurred in *Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004). *Id.* at 39 n.4.

278. Wisniewski v. Bd. of Educ., No. 5:02CV1403, 2006 WL 1741023, at *1 (N.D.N.Y. June 20, 2006).

279. *Id.* It is impossible to reconcile *Wisniewski* with *Thomas*, the Second Circuit's 1979 opinion concerning off-campus newspapers. In that case, the students did some work on the papers at school, occasionally consulted with a teacher, and left some copies of the papers in a school

In a subsequent case, another panel of the Second Circuit refined this "reasonably foreseeable" test. In *Doninger v. Niehoff*,[280] junior class secretary Avery Doninger was frustrated with a decision of school officials regarding a music festival she had been planning and wrote about her concerns on her blog at Livejournal.com.[281] On this publicly accessible website, she called school officials "'douchebags'" and asked students and parents to call the school to complain.[282] When school officials learned about the comments Doninger had made on her website, they punished her by disqualifying her from running for class secretary during her senior year.[283]

The district court rejected her claim on two separate grounds. First, the district court concluded that because Doninger was not suspended or expelled from school but simply barred from participating in an extracurricular activity, neither *Tinker* nor *Fraser* applied.[284] Instead, the district court explained, school officials are given broad latitude to decide whether students are permitted to participate in extracurricular activities because such participation is a privilege rather than a right.[285] Here, the court held, Doninger's blog "clearly violate[ed] the school policy of civility and cooperative conflict resolution" and was inconsistent with her role as a student leader.[286]

Second, in an alternative holding, the district court concluded that the school had broad authority to restrict Doninger's blog because it could be considered on-campus speech under *Wisniewski*'s "reasonably foreseeable" test.[287] The court reasoned that

> the content of the blog itself indicated that Avery knew other [high school] community members were likely to read it. After all, she chose the blog as a means of communicating her displeasure with the administration's decisions and encouraging others to contact school officials with their own opinions, a choice that would have been senseless if no other students were likely to receive her message.[288]

Given that the blog could be considered on-campus speech, the court held

closet. Thomas v. Bd. of Educ., 607 F.2d 1043, 1045 (2d Cir. 1979). Of course, Judge Newman wrote a concurring opinion in *Thomas*, *id.* at 1053 (Newman, J., concurring), while in *Wisniewski* he drafted the majority opinion, *Wisniewski*, 494 F.3d at 35.

280. 527 F.3d 41 (2d Cir. 2008).

281. *Id.* at 44–45.

282. *Id.* at 45.

283. *Id.* at 46.

284. Doninger v. Niehoff, 514 F. Supp. 2d 199, 213 (D. Conn. 2007).

285. *Id.* at 213–14.

286. *Id.* at 214–15.

287. *Id.* at 216–17.

288. *Id.* at 217.

that the school could restrict it under *Fraser* because it interfered with the school's "'highly appropriate function . . . to prohibit the use of vulgar and offensive terms in public discourse.'"[289]

The district court did not discuss whether the school could also punish Doninger under *Tinker*. Apparently recognizing the breadth of its holding, the district court attempted to limit it to the facts of the case, noting that it "would be reluctant to find no First Amendment violation in other factual contexts or if the discipline imposed on Doninger were different."[290] The court also stated that because Doninger's punishment for her blog was simply prohibition of running for student office during her senior year, the court "need not—and does not—decide whether . . . and when a school can suspend, discipline, or remove a student because of the content of a blog or email the student prepared off-campus."[291]

On appeal, the Second Circuit affirmed the district court's decision, but on more narrow grounds.[292] Holding that the *Tinker* standard was sufficient to resolve the case, the court declined to determine whether off-campus student speech could be restricted under *Fraser*.[293] Like the district court, the Second Circuit first concluded that it was "reasonably foreseeable" that Doninger's blog posting, although created off-campus, would reach the campus."[294] This preliminary holding would appear to limit the broad scope of *Wisniewski*, where the panel had declined to determine whether it was necessary to decide whether it is reasonably foreseeable that off-campus speech would reach campus.[295] After concluding that it was reasonably foreseeable that Doninger's speech would reach campus, the court concluded that the school could punish her under *Tinker* because it was foreseeable that her post would create a risk of substantial disruption at the school.[296] The court explained that there were three factors that supported its conclusion.[297] First, her language was not merely offensive but "potentially disruptive of efforts to resolve the ongoing controversy" with school officials.[298] Second, the court highlighted that Doninger's post contained misleading, if not false, information that Jamfest had been canceled, when in fact school administrators simply wanted to reschedule

289. *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (alteration in original)).

290. *Id.*

291. *Id.* at 212.

292. Doninger v. Niehoff, 527 F.3d 41, 54 (2d Cir. 2008).

293. *Id.* at 49–50.

294. *Id.* at 50.

295. *Id.* at 48 n.1 ("The *Wisniewski* panel divided on the question whether it was necessary in that case to show that it was reasonably foreseeable that the expression at issue would reach school property."); *see also supra* note 277 and accompanying text.

296. *Doninger*, 527 F.3d at 50–51.

297. *Id.* at 50.

298. *Id.* at 50–51.

it.[299] The court concluded that "[i]t was foreseeable in this context that school operations might well be disrupted further by the need to correct misinformation as a consequence of Avery's post."[300] Finally, the court reasoned that because Doninger was a student leader, her speech risked frustrating "the proper operation of [her high school]'s student government and undermining of the values that student government, as an extracurricular activity, is designed to promote."[301] Like the district court, the Second Circuit hedged the scope of its decision by noting that it had "no occasion to consider whether a different, more serious consequence than disqualification from student office would raise constitutional concerns."[302]

At least one federal district court recently engaged in a more expansive analysis of off-campus speech. In *Snyder v. Blue Mountain School District*,[303] the district court held that an "off-campus" MySpace.com parody profile of the principal had a sufficient connection with the campus because the website concerned the principal of the school, students at the school were the intended audience, a paper copy of the website was brought to school, and the website was discussed at school.[304]

3. Direct Application of School Speech Cases

Although some courts ask as a threshold matter whether the student speech at issue constitutes on-campus or off-campus expression, others skip this inquiry and simply apply *Tinker*'s material disruption test directly. Thus, for example, in *Killion v. Franklin Regional School District*,[305] a federal district court held that *Tinker* applied to student e-mail containing offensive remarks about a faculty member even though the student "did not print or copy the list to bring it on school premises" and even though an unknown student brought a copy of the e-mail to campus.[306] To add to the confusion, some courts that do make a point of

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299. *Id.* at 51.

300. *Id.*

301. *Id.* at 52.

302. *Id.* at 53.

303. No. 3:07cv585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008).

304. *Id*. at *7.

305. 136 F. Supp. 2d 446 (W.D. Pa. 2001).

306. *Id.* at 448–49; *see also* Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 974–75 (5th Cir. 1972) (implicitly suggesting that school can exercise authority over off-campus expression if it causes or may foreseeably cause substantial disruption on campus); Emmett v. Kent Sch. Dist., 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (applying Supreme Court's student speech cases to website created off campus); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177–78, 1180 (E.D. Mo. 1998) (applying *Tinker* to student's home page created off campus but concluding that standard was not met under facts of the case; mentioning but not discussing significance of facts that student did not intend the home page to be accessed or viewed at his school, and that the student who brought the web page to the school's attention did so without the

asking as a threshold matter whether speech is on- or off-campus expression nevertheless leave open the possibility that the *Tinker* test could apply regardless of the answer to that question.[307]

4. Inconsistent Application of *Tinker*

The lower courts are all over the map in the way in which they apply *Tinker*'s requirement that the expression cause a material-and-substantial disruption or interfere with the rights of others. This confusion indicates that one key to determining whether schools can restrict student expression is to decode *Tinker* itself.

Some courts conclude that *Tinker*'s material-and-substantial disruption standard is met when other students distribute, read, and react to the material at issue, or even when only the school administration reacts to the speech. For example, in one Minnesota case, a district court concluded that the school had demonstrated that an underground newspaper distributed in the school lunchroom caused a substantial disruption of school activities when students other than the plaintiffs disrupted the classes that followed "by passing around, reading, and reacting to plaintiff's paper."[308] In *Wisniewski*, the recent Second Circuit case discussed above,[309] the court found that an icon attached to instant messages sent to some students outside school was materially disruptive to the school merely because the school administrators had to spend time investigating it, including time interviewing students during class time, and the teacher who was the subject of the icon refused to teach the student ever again.[310] Following *Wisniewski*, a federal district court held that it was constitutional for a school to suspend a fifth grader for writing on one of his assignments that he would "'blow up the school with all the teachers in it,'" even though only the teacher saw the assignment and there was no indication that the student intended to do any violence to the school or its students.[311] Instead,

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creator's authorization or knowledge); Fenton v. Stear, 423 F. Supp. 767, 769 (W.D. Pa. 1976) (upholding school punishment of student who called teacher a "'prick'" in an off-campus parking lot on a Sunday, holding that "[t]o countenance such student conduct . . . could lead to devastating consequences in the school").

307. *See, e.g.*, Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979) (stating that the Supreme Court's student speech cases do not apply to off-campus speech, but leaving open the possibility of applying *Tinker* in a case where off-campus speech causes substantial on-campus disruption); J.S. *ex rel* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 864 n.11 (Pa. 2002) ("Although not before our court, we do not rule out a holding that purely off-campus speech may nevertheless be subject to regulation or punishment by a school district if the dictates of *Tinker* are satisfied.").

308. Bystrom v. Fridley High Sch., 686 F. Supp. 1387, 1392 (D. Minn. 1987).

309. *See supra* notes 259–78 and accompanying text.

310. Wisniewski v. Bd. of Educ., 494 F.3d 34, 36 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008).

311. Cuff v. Valley Cent. Sch. District, 559 F. Supp. 2d 415, 417, 420–21 (S.D.N.Y. 2008).

the court said that school officials "could reasonably have viewed [the student]'s writing as a general indication of violent intention or propensity, notwithstanding the fact that he might have been unable to perform the specific violent act he threatened."[312] The court added that it was irrelevant that the student's speech did not actually disrupt the functioning of the school in any way.[313]

Other courts have applied the material disruption standard much more strictly.[314] For example, in *Klein v. Smith*,[315] a student gave a teacher the finger at a restaurant parking lot after school hours.[316] A district court in Maine rejected the teacher's claim, supported by his colleagues, that this gesture undermined the ability of the teacher to discipline students at school.[317] The court explained:

> The Court cannot do these sixty-two mature and responsible professionals the disservice of believing that collectively their professional integrity, personal mental resolve, and individual character are going to dissolve, willy-nilly, in the face of the digital posturing of this splenetic, bad-mannered little boy. I know that the prophecy implied in their testimony will not be fulfilled. I think that they know that, too.[318]

Similarly, another district court rejected a school's argument that an e-mail containing offensive remarks about a faculty member met the *Tinker* standard because the e-mail interfered with the school's ability to discipline its students.[319] The court responded: "We cannot accept, without more, that the childish and boorish antics of a minor could impair the administrators' abilities to discipline students and maintain control."[320] Some district courts have taken a similar approach in cases involving parody profiles of teachers and school administrators on the Internet. In *M.K. v. Three Rivers Local Sch. Dist.*,[321] for example, a federal district court rejected the school's claim that "decreased morale among the teachers, the loss of valuable administrative time on the matter, and

312. *Id.* at 422.

313. *Id.* at 422 n.3.

314. *See, e.g.*, Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1178–80 (E.D. Mo. 1998) (finding *Tinker* standard not met where principal made decision to discipline student "*immediately* upon seeing the homepage" because the principal was upset by its content, not because he had a reasonable fear of substantial disruption, and noting that only disruption in classroom was caused by delivery of disciplinary notices to the student).

315. Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986).

316. *Id.* at 1440–41.

317. *Id.* at 1141 & n.4.

318. *Id.* at 1441 n.4.

319. Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 448, 456 (W.D. Pa. 2001).

320. *Id.* at 456.

321. No. 1:07CV1011, slip op. at 5–6 (S.D. Ohio Dec. 28, 2007).

teachers' uneasiness and anxiety about being the target of similar attacks by students" constituted material-and-substantial disruption under *Tinker*. In *Layshock v. Hermitage School District*,[322] another federal district court likewise concluded that administrators' efforts to shut down student access to the profile on school computers and the student "buzz" about the profile resulted in a "rather minimal" disturbance and did not satisfy the *Tinker* standard.[323]

Unfortunately, most courts that apply the *Tinker* standard are far too deferential to the schools' claims that the speech at issue caused a reasonable fear of a substantial disruption.[324] In addition, courts generally permit the unreasonable reaction of teachers and school officials to constitute a disturbance. In several cases, teachers have refused to teach in the face of speech that would be protected speech if uttered by anyone other than a student.[325] Given that teachers are arguably public figures,[326] the willingness of courts to give credence to such thin-skinned behavior is striking.

Since the Columbine High School Massacre in 1999 that left twelve students and one teacher dead,[327] almost no school has demonstrated tolerance of student speech that contains even the slightest reference or depiction of violence. For example, in *LaVine v. Blaine School District*,[328] the Ninth Circuit upheld the expulsion of a student who had brought his teacher a poem he had written entitled "'Last Words'" that depicted the shooting of fellow students.[329] The teacher passed along the poem to school officials and the school contacted police.[330] Law enforcement and

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322. 496 F. Supp. 2d 587 (W.D. Pa. 2007).

323. *Id.* at 600.

324. *See, e.g.*, Cuff v. Valley Centr. Sch. Dist., 559 F. Supp. 2d 415, 420 (S.D.N.Y. 2008) (noting deferential approach of courts to First Amendment challenges to schools disciplining students); Bystrom v. Fridley High Sch., 686 F. Supp. 1387, 1389–92 (D. Minn. 1987) (noting that deference to school officials is not limitless, yet concluding that school could punish student even though distribution of underground newspaper did not disrupt any regular school activity).

325. *See, e.g.*, *Bystrom*, 686 F. Supp. at 1390 (noting that one teacher named in an underground newspaper "left the school grounds altogether rather than face the students' reaction to the article"); J.S. *ex rel* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 852, 859, 869 (Pa. 2002) (finding that website caused substantial disruption on campus because teacher who was subject of offensive speech was unable to return to school for the rest of the school year and received medical leave for the following year, even though, by court's own admission, the website was "a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody . . . [that] did not reflect a serious expression of intent to inflict harm").

326. Sewell v. Brookbank, 581 P.2d 267, 270 (Ariz. Ct. App. 1978); Kelley v. Bonney, 606 A.2d 693, 709–10 (Conn. 1992); Johnston v. Corinthian Television Corp., 583 P.2d 1101, 1102–03 (Okla. 1978). *But see* True v. Ladner, 513 A.2d 257, 262–64 (Me. 1986).

327. Evelyn Nieves, *Terror in Littleton: The Mourning; Long Week of Funerals Finally Comes to an End*, N.Y. TIMES, Apr. 30, 1999, at A26.

328. 257 F.3d 981 (9th Cir. 2001).

329. *Id.* at 983–84.

330. *Id.* at 984–95.

mental health professionals interviewed the student and concluded that he had no access to weapons and was not a danger to himself or his community.[331] Notwithstanding this conclusion, the school decided to expel the student, and the Ninth Circuit held that this decision was constitutional.[332] Recognizing that "schools cannot expel students just because they are 'loners,' wear black and play video games," the court concluded that the school officials in this case had struck the proper balance between "protecting the safety and well-being of their students and respecting those same students' constitutional rights."[333] In *Bystrom v. Fridley High School*,[334] a federal district court similarly permitted a school to punish students who distributed on campus an underground newspaper that advocated violence against teachers (the opinion contained no specifics of this advocacy) even though the newspaper "[fell] far short of the standards by which adults could be punished for advocating violence."[335] The court reasoned that because the Supreme Court in *Fraser* permitted schools to regulate indecent speech that would otherwise be protected speech, deferring to the authority of the school officials to maintain order and inculcate traditional values, "this court must conclude that the Supreme court would defer to the school authorities in the same manner with respect to their decision to discipline the plaintiff students for advocating violence against their teachers."[336]

As discussed above,[337] the Court's recent decision in *Morse v. Frederick* serves only to confirm this prediction. Indeed, the Fifth Circuit recently decided a case in which it relied heavily on *Morse* in rejecting a challenge to the expulsion of a student who wrote about a violent fantasy of engaging in Columbine-style violence at the school.[338] The court reasoned that under *Morse*, it was unnecessary to consider the intent of the student in creating his diary (he said it was just a fantasy)[339] and that the school must be given wide latitude to act to protect students from potentially great harms without having to satisfy *Tinker*'s substantial disruption test.[340]

Courts rarely recognize that there are limits to the authority of schools to punish expression that contains some threatening elements. In one such case, a student created a website in which he included mock obituaries of his classmates, and as part of the website asked visitors to vote on who should "'die'" next—in other words, who should be the subject of the next

331. *Id.* at 985.
332. *Id.* at 983.
333. *Id.* at 987.
334. 686 F. Supp. 1387 (D. Minn. 1987).
335. *Id.* at 1392–93.
336. *Id.* at 1393.
337. *See supra* Part IV.A.
338. Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 766 (5th Cir. 2007).
339. *Id.* at 771 n.3.
340. *Id.* at 769–70.

mock obituary.[341] A federal district court in Washington State held that the student was likely to succeed on his claim challenging his suspension for this website despite the school's claims that students felt threatened.[342] The court reasoned that students could not be punished for non-school-sponsored speech "'on the basis of undifferentiated fears of possible disturbances or embarrassment to school officials,'"[343] especially since the student did not intend to threaten anyone and had not "manifested any violent tendencies whatsoever."[344]

5. Hesitancy to Apply *Fraser*

One interesting wrinkle in many of the digital student speech cases is that several courts that are perfectly willing to extend *Tinker* to digital speech have been hesitant to apply *Fraser* to the same expressive activity.[345] For example, in *Killion v. Franklin Regional School District*,[346] a district court found that the *Tinker* standard applied equally to on-campus and off-campus speech,[347] but that the *Fraser* prohibition against profanity did not apply to speech that "occurred within the confines of [the student]'s home, far removed from any school premises or facilities."[348] The court in *Layshock v. Hermitage School District* took the same approach. Although it was willing to apply the *Tinker* test to a parody profile of the principal on MySpace.com, the court concluded that *Fraser* does not give schools authority to punish lewd and profane speech

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341. Emmett v. Kent Sch. Dist., 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000).

342. *Id.* at 1090.

343. *Id.* (quoting Burch v. Barker, 861 F.2d 1149, 1159 (9th Cir. 1988)).

344. *Id.*; *see also* Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 782, 786 (E.D. Mich. 2002) (finding that school lacked authority to punish student for website that suggested that the reader should kill someone for no reason and in the process rejecting school's argument that website was unprotected true threat because there was no evidence that the student had communicated the statements on the website to anyone else, the website contained no threat against any of the students, and the website contained a disclaimer indicating that he did not wish anyone to die).

345. Not all courts share this reluctance. In *Snyder v. Blue Mountain School District*, No. 3:07cv585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008), for example, the court did not hesitate to apply *Fraser* to uphold the suspension of student who posted an unflattering parody of his principal on MySpace.com that admittedly did not cause a substantial disruption under *Tinker* because it considered the parody to be particularly offensive and vulgar. *See id.* at *6–8. Interestingly, the court suggested that schools do not have unlimited authority to punish their students for lewd and offensive speech on the Internet but rather that they have such authority when the expression is particularly offensive. *See id.* (noting repeatedly that the website at issue in the case was especially lewd, vulgar, and offensive).

346. 136 F. Supp. 2d 446 (W.D. Pa. 2001).

347. *Id.* at 445. The court ultimately concluded that the school had failed to demonstrate that the speech at issue created a substantial disruption or reasonable fears of such a disruption. *Id.* at 455–56.

348. *Id.* at 456–57.

that occurs off campus.[349] In *Coy v. Board of Education*,[350] an Ohio federal district court held that *Fraser* did not apply to a website containing indecent language when the school administration, at the time the student was expelled, did not have any evidence that any other student viewed the student's website; unlike *Fraser*, the court explained, there was no captive audience.[351] The Supreme Court of Pennsylvania voiced similar concerns in *J.S. v. Bethlehem School District*,[352] where it noted that the case, which involved offensive speech on the Internet, was not "on all fours" with *Fraser* because the website "was not . . . expressed at any official school event or even during a class, subjecting unsuspecting listeners to offensive language."[353] Instead, the court required the school to satisfy *Tinker*'s substantial disruption test.[354]

Although these courts do not provide a detailed analysis of their reasoning, it may be that courts are more reluctant to apply *Fraser* to off-campus speech than *Tinker* because at least *Tinker* requires a showing that the expression disrupted or could reasonably be expected to disrupt school activities; *Fraser* does not.[355] In other words, courts must recognize that even if they conclude that the *Tinker* test applies to off-campus speech, that test still requires schools to meet the substantial disruption standard prong of *Tinker*. As a result, some courts applying *Tinker* to Internet speech have nevertheless rejected the authority of school officials to regulate that speech when officials fail to demonstrate that it materially disrupted the school.[356] *Fraser*, in contrast, does not require the school to make any showing that the offensive language disrupted the school's activities;[357] as a result, schools could restrict any indecent speech by a student, anywhere regardless of where he engages in it, without any additional showing. The idea that schools could regulate offensive speech on the Internet without showing any harm to the school would give school officials almost limitless authority to police their students' expression.

349. 496 F. Supp. 2d 587, 599 (W.D. Pa. 2007).

350. 205 F. Supp. 2d 791 (N.D. Ohio 2002).

351. *Id.* at 799–800, 799 n.3.

352. 807 A.2d 847 (Pa. 2002).

353. *Id.* at 866.

354. *Id.* at 868; *see also* Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 nn.17–18 (2d Cir. 1979) (stating in one footnote that it would consider the possibility of applying *Tinker*'s substantial disruption test to off-campus speech, but indicating in the following footnote that it would not permit a school to regulate off-campus speech solely because it is indecent).

355. *Compare* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (noting that the school authorities failed to introduce any evidence that would lead to an expectation of substantial disruption or that any disruption actually occurred), *with* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding that the school acted permissibly under the First Amendment when it sanctioned the student for speech it considered "lewd" and "indecent").

356. Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455–56 (noting that the school had failed to satisfy the *Tinker* test as it failed to show either that school activities were actually disrupted or that the school could expect disruption).

357. *See supra* note 356 and accompanying text.

When applied vigorously, *Tinker*'s material-and-substantial-disruption test provides an important—although, as I will argue below,[358] ultimately insufficient—check on this authority.

V. POSSIBLE JUSTIFICATIONS FOR RESTRICTING JUVENILES' FIRST AMENDMENT RIGHTS

This Part begins with an examination of how the Court has treated the free speech rights of juveniles outside the school context. This inquiry is essential because permitting schools to exercise authority over student speech in the digital media would have dramatic ramifications for minors' speech rights generally. Accordingly, at the heart of the student-speech rights debates lies a deeper dispute about the constitutional rights children enjoy. In order to determine the scope of a school's authority to punish students for their digital speech, it is essential to examine closely the various justifications the Court has given for restricting the speech rights of minors both on school grounds and off.

A. *Speech Rights Outside School*

The Supreme Court has frequently held that the government has a right to protect children outside school from exposure to certain kinds of expression. The Court has been most willing to uphold restrictions on children's access to sexually explicit expression. Notably, the Court has ceded to state and local governments this authority without much analysis of the reasoning for restricting minors' rights in this way. Typically the Court assumes, with little analysis, that the speech restriction at issue—which almost always involves sexually explicit or indecent speech—is necessary to protect the emotional and moral development of children.

The Supreme Court first confronted the balance between the freedom of speech and the state's asserted interest in protecting children in *Ginsberg v. New York*,[359] which involved a challenge to a state law that criminalized the distribution to anyone under age seventeen of publications that were obscene for minors.[360] It was undisputed that the materials at issue in the case were not obscene for adults, and the law did not bar the storeowner from selling the magazines to adults.[361] The defendant argued that it was unconstitutional for the government to prohibit minors from receiving sexually explicit material that was otherwise permissible for adults.[362] The Court rejected this argument, concluding that the law did not

358. *See infra* Part VI.B.
359. 390 U.S. 629 (1968).
360. *Id.* at 631.
361. *Id.* at 634–35.
362. *Id.* at 636.

infringe the First Amendment rights of minors.[363] The Court emphasized that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'"[364] At the same time, the Court recognized the primary role parents have in controlling the right of children to access sexually explicit speech and noted that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."[365] The Court regarded the New York law as one that supported, but did not interfere with, the ability of parents to regulate the morals of their children, emphasizing that "'[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'"[366] The Court concluded that it was "not irrational" for the New York legislature to conclude that the material condemned by its law was harmful to the ethical and moral development of young people, even though, as the Court recognized, such a conclusion was hardly a scientifically proven fact.[367]

In a concurring opinion, Justice Stewart noted that "[a] doctrinaire, knee-jerk application of the First Amendment would, of course, dictate the nullification of this New York statute."[368] Nevertheless, he believed the law withstood constitutional scrutiny because the protections of the First Amendment presupposed a capacity to choose:

> I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.[369]

This explanation—that some restrictions on the constitutional rights of minors is permissible because children lack the emotional and intellectual experience and judgment to make rational decisions—has been used to justify other restrictions on minors' constitutional rights.[370]

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363. *Id.* at 637.
364. *Id.* at 638 (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)).
365. *Id.* at 639.
366. *Id.* (quoting *Prince*, 321 U.S. at 166).
367. *Id.* at 641–42.
368. *Id.* at 648–49 (Stewart, J., concurring).
369. *Id.* at 649–50 (footnotes omitted).
370. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 635 (1979) (noting the different treatment of

In dissent in the *Ginsberg* case, Justice Douglas, joined by Justice Black, remarked that if lack of rationality is the basis for the law, "then [he could] see how modern Anthony Comstocks could make out a case for 'protecting' many groups in our society, not merely children."[371] Justice Douglas said he had no problem with parents and religious organizations getting involved in censoring speech, but as he "read[s] the First Amendment, it was designed to keep the state and the hands of all state officials off the printing presses of America and off the distribution systems for all printed literature."[372]

In *FCC v. Pacifica Foundation*,[373] the Court permitted the regulation of indecent speech on broadcast television and radio.[374] Although the Court conceded that much indecent speech was entitled to full constitutional protection, it held that the FCC's regulations were justified for two primary reasons. First, the Court regarded broadcast media as "a uniquely pervasive presence" that reaches citizens even in "the privacy of the home."[375] Second, broadcast media were "uniquely accessible to children."[376] The Court noted that "[a]lthough Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant."[377] The Court cited *Ginsberg* to support its conclusion that "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression."[378] In a concurring opinion, Justice Powell agreed that the law was a permissible means of providing support for parents to control the moral upbringing of their children; the FCC's regulation, Powell argued, "leav[es] to parents the decision as to what speech of this kind their children shall hear and repeat . . . ."[379]

The FCC's indecency regulations and the Court's decision in *Pacifica* have been significantly criticized.[380] As one commentator noted, he was

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due process rights of juvenile offenders in the criminal justice system). The Court has also used the limited cognitive development of minors to justify the need to protect minors from generally applicable laws, such as the death penalty. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569–70, 578 (2005) (holding that the execution of individuals who were under age eighteen at the time of their crimes is unconstitutional under the Eighth and Fourteenth Amendments due to the differences between children and adults). *See infra* Part V.B.2.

371. *Ginsberg*, 390 U.S. at 655 (Douglas, J., dissenting).

372. *Id.*

373. 438 U.S. 726 (1978).

374. *Id.* at 750–51.

375. *Id.* at 748.

376. *Id.* at 749.

377. *Id.* The Court was referring to the message "'Fuck the Draft,'" printed on the back of Cohen's jacket. *See* Cohen v. California, 403 U.S. 15, 16 (1971).

378. *Pacifica*, at 749–50 (quoting Ginsberg v. New York, 390 U.S. 629, 639, 640 (1968)).

379. *Id.* at 758 (Powell, J., concurring).

380. *See, e.g.*, Robert E. Riggs, *Indecency on the Cable: Can It Be Regulated?*, 26 ARIZ. L.

"amused" by the Court's decision in that case "that it was all right to make sure children didn't hear the word 'shit' on the radio, because the eight-year-old who cuts my grass knows even better ways to get the mower started."[381] Minors are exposed to bad language simply walking down the street, and often pick it up from their own parents. In his *Pacifica* dissent, Justice Brennan suggested that by upholding the indecency regulations, the Court permitted the government to regulate culture in a way that would be plainly impermissible if the government had not invoked the need to protect the children.[382] Justice Brennan argued that

> [t]oday's decision will thus have its greatest impact on broadcasters desiring to reach, and listening audiences composed of, persons who do not share the Court's view as to which words or expressions are acceptable and who, for a variety of reasons, including a conscious desire to flout majoritarian conventions, express themselves using words that may be regarded as offensive by those from different socio-economic backgrounds. In this context, the Court's decision may be seen for what, in the broader perspective, it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking.[383]

The government has not always won its argument that censorship laws must be upheld in order to protect children. In some cases, the Court has emphasized that government regulations must not only support, but also not interfere with, the right of parents to control the moral and ethical upbringing of their children.[384] As a result, the Court has struck down regulations that would make it impossible for parents to expose their children to indecent expression if they so chose.[385] In addition, the Court has also been reluctant to restrict the dissemination of information to children when the methods employed would unduly restrict the dissemination of information to adults, particularly when more narrowly tailored means of protecting children were available.[386] The Court has

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REV. 269, 286 & n.143 (1984) (listing sources).

381. John H. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 321 (1979).

382. *Pacifica*, 438 U.S. at 767 (Brennan, J., dissenting).

383. *Id.* at 776–77 (footnote omitted).

384. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 865, 878 (1997).

385. *Id.* at 864–65, 885 (1997) (invalidating a provision of the Communications Decency Act that would apply even in cases where parents consented or even participated in providing their children with access to the indecent prohibited material); Bellotti v. Baird, 443 U.S. 622, 637–39 (1979) (emphasizing the importance of deferring to parental control).

386. *See, e.g.*, United States v. Playboy Entm't Group, 529 U.S. 803, 806, 826–27 (2000) (striking down law requiring cable broadcasters either to fully scramble or to redirect to late-night hours sexually explicit programming); Sable Commc'ns, Inc. v. FCC, 492 U.S. 115, 117, 131

never, however, questioned the assertion that the government has a compelling interest in protecting minors from indecent and sexually explicit speech as well as profanity.[387]

The Court's child-censorship cases clearly conflict with the rest of its free-speech jurisprudence. In case after case, the Court has rejected attempts to suppress speech on the basis of its "offensive" nature. In *Brandenburg v. Ohio*,[388] the Court held that plainly offensive racist speech must be tolerated unless it constituted imminent incitement to violence.[389] In *Texas v. Johnson*,[390] the Court struck down a flag desecration statute, declaring that "the government may not prohibit the expression of an idea simply because society finds the idea . . . offensive or disagreeable."[391] Even sexually explicit speech cannot be censored unless it meets the definition of "obscenity."[392] In *Cohen v. California*,[393] the Court demanded that any bystanders offended by the language on Cohen's jacket ("'Fuck the Draft'") should bear the burden of simply "averting their eyes."[394] Similarly, in *Bolger v. Youngs Drug Products Corp.*,[395] the Court noted

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(1989) (striking down federal law that prohibited indecent or obscene pre-recorded telephone messages); Butler v. Michigan, 352 U.S. 380, 383 (1957) (striking down law banning all distribution of material harmful for minors, regardless of the medium; the Court explained that the government may not "reduce the adult population . . . to reading only what is fit for children").

387. *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 215 (2003) (Kennedy, J., concurring) (noting that "all Members of the Court appear to agree" that protecting minors from indecent material is a "compelling" government interest); Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 743 (1996) (noting that the Court has often concluded that the "need to protect children from exposure to patently offensive sex-related material" is a compelling government interest); *Sable*, 492 U.S. at 126 (observing that protecting minors from literature that is not obscene by adult standards is a compelling interest); *see also* MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH 125–26 (Rutgers Univ. Press 2007) (discussing the Court's general acceptance that government has a compelling interest in protecting youth from indecent or sexually explicit speech).

388. 395 U.S. 444 (1969).

389. *Id.* at 446–49.

390. 491 U.S. 397 (1989).

391. *Id.* at 400, 414, 419–20.

392. *See generally* Miller v. California, 413 U.S. 15, 17–25 (1973) (noting that the state may legitimately restrict sexually explicit material only if it is obscene and proceeding to define obscene material as material that portrays sexual conduct in a patently offensive way, that appeals to the prurient interest and that lacks literary, political or scientific value).

393. 403 U.S. 15 (1971).

394. *Id.* at 16, 21; *see also* Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975) ("[T]he burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" (quoting *Cohen*, 403 U.S. at 21) (alteration in original)). Although the *Pacifica* Court distinguished *Pacifica* from *Cohen* on the ground that broadcast media intrudes upon the privacy of the home, this distinction hardly holds water. *See* FCC v. Pacifica Found., 438 U.S. 726, 748–49 & 749 n.27 (1978). There is no reason to assume the audience for broadcast television and radio is any more a captive audience than the public who had to stand in line at a California courthouse looking at Cohen's provocative jacket.

395. 463 U.S. 60 (1983).

that if homeowners received mail they regarded as offensive, they should simply make the "'short, though regular journey from mail box to trash can.'"[396]

Notably, none of the Court's cases addressing the speech rights of children concerns the right of minors to speak; instead, they all focus on protecting children from hearing or receiving speech that is regarded as harmful. Although there are plenty of reasons to question whether minors are indeed harmed by exposure to indecent speech, such concerns are even less persuasive when it is the minor speaking. Furthermore, all of the Court's cases involve indecent or sexually explicit expression. It is by no means clear that the Court would extend its protectionist approach to violent speech or to other kinds of expression that are not indecent or profane.

B. *An Examination of the Various Justifications*

Courts and commentators offer at least five different justifications for permitting schools to restrict the speech rights of their students: (1) First Amendment theory; (2) the differences between adults and children; (3) the need to provide support to parents; (4) the in loco parentis doctrine; and (5) the "special characteristics" of the school environment. A close examination of these various theories reveals that none of them can support broad authority of a school to restrict student speech in the digital media.

1. First Amendment Theory

The theoretical bases for a right to freedom of expression do not logically exclude minors from the First Amendment's purview or even explain why minors, particularly adolescents, are entitled to lesser or weaker free speech rights on or off school grounds.[397] Granting minors free speech rights promotes the principles animating the right to free speech under the First Amendment: (1) the promotion of democratic self-government;[398] (2) the search for truth in the marketplace of ideas; and

396. *Id.* at 72 (quoting Lamont v. Comm'r of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2d Cir. 1967) (per curiam)).

397. No one suggests that somehow the text of the First Amendment itself justifies restrictions on children's free speech rights. *See* DAVID MOSHMAN, CHILDREN, EDUCATION, AND THE FIRST AMENDMENT 25 (1989) ("[T]he language of the First Amendment provides no indication that it applies only—or even more strongly—to adults."). In addition, to the extent the framers did not intend the First Amendment to apply to children, it is far more likely that they simply assumed that children would be under the guidance of their parents, and that the government would have little occasion to exercise authority over them. *Id.* at 26.

398. KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 21 (2003).

(3) the fostering of autonomy and self-fulfillment.[399] All three ideas justify robust free speech rights for adolescents.[400]

To some, minors have a weak claim to free speech rights under the self-government rationale of the First Amendment for the simple reason that they cannot vote and therefore are not meaningfully involved in democracy. For example, Kevin Saunders has argued that

> [t]he importance of free speech to self-government is that those who are able to make the decisions have all the information and will be able to convince each other of the wisest course. Children are not among those who make the decisions, so it is at least questionable how strongly the First Amendment, at least on this justification, applies to children.[401]

There are several responses to this objection. First, political arguments minors make can have much more influence on the democratic process than other forms of adult speech that receive full constitutional protection, such as artistic speech.[402] Politically aware young people can have an impact on the political dialogue and influence the way their parents and other adults vote.[403] Students are particularly likely to provide their parents and other adults with useful information regarding the operation of their schools and their educational experience. Although students may not have the right to vote themselves, they certainly can play an important part in educating adults who do.

In addition, one goal of public education should be to prepare minors to be political actors by training them to think rationally and critically. Without some education about how to exercise their free speech rights, students would enter the adult world without the necessary skills to contribute to the political world.[404] As Judge Posner explained in a case

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399. MOSHMAN, *supra* note 397, at 28–29.

400. *Id.* at 29.

401. SAUNDERS, *supra* note 398.

402. Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 380 (2004).

403. Indeed, denying young people the right to freedom of expression could undermine the right of adults to receive their speech. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976) (noting that the First Amendment protects both the right to communicate as well as the right to receive communications from others). *But see* Garvey, *supra* note 381, at 344 ("Except in the case of the most exceptional prodigy, it is undeniable that children's debates about adult issues serve no immediate social purpose.").

404. Garvey, *supra* note 381, at 326–27; Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 28–31 (1984) (pointing out that compulsory public education is one of the mechanisms through which children are indoctrinated with dominant societal agendas); R. George Wright, *Free Speech Values, Public Schools, and the Role of Judicial*

granting preliminary injunction against a violent video game law, "it is obvious that [minors] must be allowed the freedom to form their political views . . . *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise."[405] In addition, public schools play an important role in preparing students to be democratic actors. As Justice Stevens argued in his dissenting opinion in *New Jersey v. T.L.O.*, "[t]he schoolroom is the first opportunity most citizens have to experience the power of government. . . . The values they learn there, they take with them in life."[406]

Granting young people free speech rights can also promote stability by providing an outlet for dissenters. Justice Brandeis perhaps expressed this best in his concurrence in *Whitney*, where he stated that "[t]hose who won our independence . . . [knew] that fear breeds repression; that repression breeds hate; that hate menaces stable government; [and] that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."[407] Much student expression involves speech that poses some challenge to school authority. By calling school officials "douchebags" or creating a video mocking a teacher, the students vent their frustrations with the authority figures in their lives.

Allowing the marketplace of ideas to flourish at school and on the Internet helps prepare students to be participants in democracy that cherishes the free exchange of ideas and diversity of viewpoint.[408] Given that young people spend the bulk of their time in school acquiring knowledge and developing their belief systems, the theory of the

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Deference, 22 NEW ENG. L. REV. 59, 61 (1987) (arguing that a public school student has "a presently enforceable free speech right prohibiting restrictions imposed by the school in such a way as to significantly impair, inhibit, or otherwise 'stunt' the development of the student's future free speech-relevant capacities as an adult").

405. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577, 579–80 (7th Cir. 2001). More recently, Judge Posner has stepped away from his strong defense of children's speech rights, arguing that "[t]he contribution that kids can make to the marketplace in ideas and opinions is modest and a school's countervailing interest in protecting its students from offensive speech by their classmates is undeniable." Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 671 (7th Cir. 2008). Judge Posner's apparent change of heart seems at least in part due to low regard for the anti-homosexual speech at issue in the *Nuxoll* case. *See id.* ("Nor . . . is uninhibited high-school student hallway debate over sexuality . . . an essential preparation for the exercise of the franchise.").

406. New Jersey v. T.L.O., 469 U.S. 325, 385–86 (1985) (Stevens, J., dissenting).

407. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled on other grounds*, Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

408. *See* Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1441 (1976) (arguing that freedom of speech is needed so that schools can prepare students for life in a heterogeneous society by carrying out "their collectivist functions of academic achievement and socialization").

marketplace of ideas has particularly strong currency for them.[409] Communication among young people and with adults plays an important role in their development.[410] Children would be "ill-equipped to participate in the marketplace" of ideas without childhood exposure to a variety of views and practice in sifting through them to determine the truth.[411]

In a recent case involving a school's decision to punish a student for wearing an anti-gay T-shirt to school, Judge Posner declared that "[t]he contribution that kids can make to the marketplace in ideas and opinions is modest."[412] As an empirical matter, it seems extraordinary to conclude that all adolescent expression is low-value speech that is not entitled to full constitutional protection. Indeed, it is even debatable whether anti-gay speech can be properly labeled low-value speech. Judge Kozinski, who dissented in the Ninth Circuit's decision in *Harper*, certainly would disagree.[413] Even if we could accept Judge Posner's sweeping condemnation of student speech, depriving First Amendment protection to speech on the basis that is it low-value speech would be inconsistent with the Court's free expression jurisprudence.[414]

Finally, the role of the freedom of expression in promoting autonomy and self-fulfillment has even more resonance with respect to minors than with adults.[415] Adolescence is a time of tremendous growth, self-awareness, and personality development. Allowing students to express themselves in the digital media promotes the development of their individuality.[416] As discussed in Part II, teenagers use digital media to connect with friends, engage in autobiographical expression and cathartic storytelling that directly promotes self-realization and self-reflection.[417]

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409. Buss, *supra* note 402, at 380.

410. *Id*.

411. C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL'Y REV. 343, 350–51 (1989).

412. Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 671 (7th Cir. 2008) (arguing that the anti-gay student speech at issue in the case is not essential to public debate).

413. *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1197 (9th Cir. 2006) (Kozinski, J., dissenting), *vacated*, 127 S. Ct. 1484 (2007) (noting that the acceptance of homosexuality is subject to "political disagreement and debate").

414. *See*, *e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 393-94 (1992) (holding unconstitutional a law that banned fighting words on the basis of race, gender, or religious preference). Judge Posner appears to recognize this inconsistency, but nevertheless concludes that restricting offensive student speech is permissible because students are especially sensitive to derogatory speech. *See Nuxoll*, 523 F.3d at 671.

415. Buss, *supra* note 402, at 380–81; *see also* Dienes & Connolly, *supra* note 411, at 352–53 ("For children, self-expression is the means of growing into autonomous adults capable of employing free speech to pursue self-government and to search for truth.").

416. *See* Garvey, *supra* note 381, at 347 (arguing that permitting the students in *Tinker* to wear black armbands promoted the development of their individuality).

417. *See supra* Part II.

2. Differences Between Children and Adults

Another popular justification for curtailing the free speech rights of minors rests on the inherent cognitive and developmental differences between children and adults.[418] Everyone has had experience with children and, based on these experiences, has formed some intuitive ideas about the differences between children and adults.[419] Upon closer examination, however, the differences between children and adults are not entirely clear, particularly when the focus is on the differences between adolescents and adults.

As a descriptive matter, the Court has been wildly inconsistent in its consideration of the argument that differences between adults and minors warrant different treatment for juveniles.[420] On the one hand, courts have upheld laws restricting the rights of minors to get married, buy alcohol or cigarettes, gamble, possess firearms, or to serve on juries or vote.[421] On the other hand, the Court held in *Planned Parenthood of Central Missouri v. Danforth*[422] that minors unable to obtain parental consent to have an abortion must be given an opportunity to prove they are mature enough for the procedure.[423] In addition, although many laws distinguish between children and adults at age eighteen, sometimes the line is drawn at different ages. For example, in most states children can get a license to drive at age sixteen, be tried as an adult for certain offenses at age fourteen, and are prohibited from buying alcohol until age twenty-one.[424]

The Court's most detailed and recent analysis of the differences between juveniles and adults came in *Roper v. Simmons*,[425] in which the Court held that the execution of minors under the age of eighteen at the

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418. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 641–42 (1968) (concluding that it was "not irrational" for the New York legislature to conclude that indecent material was harmful to the ethical and moral development of young people, even though, as the Court recognized, such a conclusion was hardly a scientifically proven fact); *id.* at 649–50 (Stewart, J., concurring) (noting that censorship was warranted given that minors are "not possessed of that full capacity for individual choice").

419. Moshman, *supra* note 397, at 30.

420. Donald L. Beschle, *Cognitive Dissonance Revisited:* Roper v. Simmons *and the Issue of Adolescent Decision-Making Competence*, 52 WAYNE L. REV. 1, 5 (2006) (remarking that political actors do not consistently view adolescents as responsible or irresponsible, but instead change their views depending on the context); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 3–4 (1986) (noting the inconsistent treatment of minors in the law).

421. *See* Minow, *supra* note 420, at 3–4.

422. 428 U.S. 52 (1976).

423. *Id.* at 75.

424. Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 286 (2006).

425. 543 U.S. 551 (2005).

time of their crimes was unconstitutional.[426] The Court cited numerous scientific and sociological studies that appeared to confirm what "any parent knows"—that adolescents are immature, reckless, and irresponsible.[427] In addition, the Court noted studies showing that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and that "the character of a juvenile is not as well formed as that of an adult."[428] Given these differences, the Court concluded that the conduct of juveniles is less morally reprehensible than the conduct of adults and therefore should not be subject to the death penalty.[429] The Court recognized that drawing the line for the death penalty at age eighteen is in some ways arbitrary, given that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18," and that "some under 18 have already attained a level of maturity that some adults will never reach."[430] Nevertheless, the Court concluded that the age of eighteen was the appropriate place to draw the line because it "is the point where society draws the line for many purposes between childhood and adulthood."[431]

In dissent, Justice Scalia attacked the majority for relying on scientific and sociological studies that were never entered into evidence or challenged in an adversarial proceeding.[432] He contended that the majority was guilty of "look[ing] over the heads of the crowd and pick[ing] out its friends."[433] Justice Scalia pointed out that the American Psychological Association, which in this case had argued that persons under eighteen lack moral culpability, had submitted a brief in 1989 in a parental notification abortion case arguing just the opposite: that by middle adolescence (age fourteen to fifteen), the ability of young people to engage in reasoning about moral dilemmas and to understand social rules was comparable to that of adults.[434] Justice Scalia added that even if the sociological studies the majority cited were reliable, none of them indicated that all teenagers are unable to comprehend that murder is wrong.[435] He cited the Court's reasoning in *Stanford v. Kentucky*,[436] the prior case on the juvenile death penalty that *Roper* overruled:

426. *Id.* at 578.
427. *Id.* at 569.
428. *Id.* at. 569–70.
429. *Id.* at 570, 578.
430. *Id.* at 574.
431. *Id.*
432. *Id.* at 617 (Scalia, J., dissenting).
433. *Id.*
434. *Id.* at 617–18.
435. *Id.* at 618.
436. 492 U.S. 361 (1989), *overruled by Roper*, 543 U.S. 551.

> [I]t is 'absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards.'[437]

At first blush, the assertion that there are important differences between children and adults that could justify the restriction of children's speech rights seems noncontroversial. Certainly if by "children" we mean persons from birth to age eighteen, claims that children are emotionally and mentally less mature and more vulnerable than adults are obvious.[438] Most of the students asserting their free speech rights, however, are not pre-school or elementary school students. Instead, almost all plaintiffs in student speech cases are at least twelve years old, and the vast majority are in high school.[439] Thus, when considering the free speech rights of students, in practical terms the discussion is about the free speech rights of adolescent students.[440] The emotional, developmental, and cognitive differences between high school students—who are minors and given fewer rights—and recent high school graduates—who are typically eighteen or older and enjoy full constitutional rights—is not so obvious.

But even assuming that there are real differences between teenagers and young adults, the deficits arguably common in adolescent thinking suggest that students would benefit from robust First Amendment rights in most circumstances. Adolescence is the primary time of identity formation.[441] This observation does not suggest that people are not engaged with identity formation throughout their lives, from infancy to old age, but adolescence is the time when the quest to determine "'Who am

437. *Roper*, 543 U.S. at 619 (Scalia, J., dissenting) (citing Stanford, 492 U.S. at 374).

438. Garfield, *supra* note 15, at 603; Garvey, *supra* note 381, at 323 ("We are accustomed to thinking that the physical, mental, and emotional immaturity of children in some way makes them ineligible to possess rights.").

439. *See, e.g.*, Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007) (involving a high school student's free speech rights at a school-sponsored event); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988) (concerning editorial control over a high school newspaper); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986) (ruling on a high school student's free speech rights at a school assembly); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969) (involving the rights of three students, aged thirteen, fifteen, and sixteen to wear a black armband to school); Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 669 (7th Cir. 2008) (concerning a high school student's right to make negative comments about homosexuality at school).

440. Adolescence is considered the bridge between childhood and adulthood and is commonly considered to begin at age ten or eleven and continue to age eighteen or nineteen. *See* Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469, 476 (2000).

441. Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 329 (2007).

I?'" takes center stage.[442] Since adolescents lack a fixed sense of character or personal identity, granting them relatively unrestricted speech rights may encourage the formation and permanence of character traits that are essential to democratic self-governance, such as an interest in public affairs and toleration for unpopular viewpoints.[443] In addition, it is preferable to encourage adolescents who feel compelled to explore the boundaries of socially acceptable conduct or to seek novel sensations to do so through relatively harmless mechanisms, such as speech, rather than through reckless activity. Furthermore, since adolescents tend to underestimate risk, discount unpleasant consequences, and succumb to peer pressure when making decisions, perhaps permitting unrestricted discussion of outcomes and alternatives will improve the adolescent's understanding of likely consequences and thereby improve the overall quality of adolescent judgment.

3. Protecting Parents' Choices

Some scholars have suggested that the custodial relationship between parents and their children justifies some restrictions on the rights of minors.[444] Until children reach the age of majority, they are subject to extensive parental control. The government frequently argues that laws restricting the free speech rights of minors are necessary to support the ability of parents to raise their children as they wish.[445]

Parental freedom has played an important role in the Court's jurisprudence. In *Pierce v. Society of Sisters*,[446] the Court held that parents have a constitutional right to send their children to private rather than public schools,[447] and in *Wisconsin v. Yoder*,[448] the Court upheld the right of an Amish family to withdraw the children from school entirely after the eighth grade.[449]

Although the Court has occasionally cited the need to support parents in upholding speech restrictions aimed at children,[450] the government's

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442. *Id.* at 329–30.

443. *See* Garfield, *supra* note 15, at 580–81.

444. Garvey, *supra* note 381, at 323 ("[T]he complex of moral rights and obligations that characterize the parent-child relationship plays a part in shaping whatever fundamental rights children have.").

445. *See* Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 473–83 (2000) (pointing out, in the context of regulation of speech aimed at children, that governmental bans on speech in fact undermine parental preferences and parental authority).

446. 268 U.S. 510 (1925).

447. *Id.* at 534–35.

448. 406 U.S. 205 (1972).

449. *Id.* at 234.

450. The Court's decisions in *Pacifica* and *Ginsberg* upheld censorship laws with the stated purpose of helping parents protect their children from the undesirable influence of lewd and indecent expression. FCC v. Pacifica Found., 438 U.S. 726, 749–50 (1978); Ginsberg v. New York,

reliance on this justification has met with mixed results and rests on shaky ground.[451] Permitting the government to suppress student speech on the theory of supporting parents would give the government almost limitless control over juvenile speech rights.[452] It is also not even clear such government support is necessary given that parents maintain extensive authority to control the cultural exposure of their children, particularly in their pre-teen years.[453] Furthermore, government speech restrictions can more often than not actually interfere with the choices some parents have made regarding their children's upbringing.[454] Not all parents want this sort of government assistance.[455] As Justice Brennan noted in his *Pacifica* dissent, "some parents may actually find Mr. Carlin's unabashed attitude towards the seven 'dirty words' healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words."[456] Permitting schools to act in the name of supporting parental rights is a false legal fiction that simply grants school officials broad authority to engage in censorship of speech that they do not like.[457]

Certainly the right of parents to force schools to alter their curriculum, textbooks, and extracurricular activities is limited. For example, arguments that schools should not be permitted to engage in sex education or distribute condoms have largely been unsuccessful.[458] But granting schools authority to restrict the expression of children in digital media is a much greater intrusion on parental rights because it limits the ability of parents to direct their children's upbringing even when they are at home.

4. The in loco parentis Doctrine

In some decisions, especially in the Fourth Amendment context, the Court has suggested that students have diminished or even nonexistent constitutional rights when they are in school because school officials act

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390 U.S. 629, 639 (1968).

451. *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656, 669–70 (2004) (affirming grant of preliminary injunction against the enforcement of the Child Online Protection Act on grounds that voluntarily installed filters may be a more effective method of protecting children; the Court noted that Congress must assume that parents lack the ability, not the will, to protect their children, and filters could give them the ability they desire).

452. Leon Letwin, *Regulation of Underground Newspapers on Public School Campuses*, 22 UCLA L. REV. 141, 203 (1974).

453. Garfield, *supra* note 15, at 616–17.

454. *Id.* at 618.

455. *Id.*

456. FCC v. Pacifica Found., 438 U.S. 726, 770 (1978) (Brennan, J., dissenting).

457. *See* Letwin, *supra* note 452, at 203 ("[S]ince school authorities, not parents, would make the actual decisions, this rationale would merely end up expanding the effective power of school authorities by patent fiction.").

458. Lau, *supra* note 441, at 344.

in loco parentis. Blackstone's *Commentaries* are often cited in support of this doctrine:

> [The parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis,* and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.[459]

Of course when Blackstone was writing, there were no public schools; he was writing about the relationship among parents, students, and their private tutors. At that time, parents had greater rights than they have today to control how schoolmasters disciplined children; nowadays, if a parent objects to the way a school official treats his child, it is "of little constitutional moment."[460] In addition, even Blackstone limited the delegation of authority from parent to tutor to that which "may be necessary to answer the purposes for which he is employed."[461] At the same time, courts were unclear whether the doctrine created a strict in-school versus out-of-school dichotomy concerning the scope of a tutor's authority. Some courts held that a tutor had no power to control the conduct of his pupils once the pupils leave classes,[462] while others were willing to permit a tutor to punish a student for conduct outside the classroom that had a "direct and immediate tendency" to undermine the authority of the teacher.[463]

In most decisions, the Supreme Court seems to understand that compulsory attendance laws make it difficult to swallow the argument that school officials are simply acting in loco parentis and therefore outside the Constitution.[464] After all, given that parents have no real choice but to send

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459. 1 WILLIAM BLACKSTONE, COMMENTARIES 441.

460. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 681 n.1 (1995) (O'Connor, J., dissenting).

461. BLACKSTONE, *supra* note 459, at 441. Thus, for example, one court held in 1942 that a teacher who harms a student by negligently treating his wounded finger cannot use the doctrine of in loco parentis to escape liability. Guerrieri v. Tyson, 24 A.2d 468, 469 (Pa. Super. Ct. 1942). For a comprehensive discussion of the limits of Blackstone's conception of the doctrine of in loco parentis, see Stephen Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373, 377–84 (1969).

462. *See, e.g.*, Hobbs v. Germany, 49 So. 515, 517 (Miss. 1909) ("When the schoolroom is entered by the pupil, the authority of the parent ceases, and that of the teacher begins," but "[w]hen sent to his home, the authority of the teacher ends, and that of the parent is resumed.").

463. *See.*, *e.g.*, Lander v. Seaver, 32 Vt. 114, 120 (1859); *see also* Goldstein, *supra* note 461, at 383–84.

464. Morse v. Frederick, 127 S. Ct. 2619, 2637–38 (2007) (Alito, J., concurring); New Jersey v. T.L.O., 469 U.S. 325, 336 (1985) ("[P]ublic school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies."); Ingraham v. Wright, 430 U.S. 651, 662 (1977)

their children to public schools, it would add insult to injury to assume that they have willingly given schools full authority to act in their stead. In addition, as commentators have pointed out, assuming that school officials are acting like parents does not square with reality. When a school threatens to use its power against a student, it is typically not acting with "genuine parental protective concern" but rather as a form of law enforcement seeking to protect the general student body from the harms of conduct regarded as antisocial.[465] Furthermore, allowing schools to discipline children on the basis that they are acting in the place of their parents would give school officials virtually unbridled authority to restrict student speech in any way they wished.[466]

5. The "Special Characteristics" of the School Environment

Rather than rely on a problematic in loco parentis theory, the Court has instead tended to rest its student-speech decisions on the so-called "special characteristics" of the elementary and secondary school environment.[467] Although the Supreme Court has largely applied strict scrutiny to content-based speech restrictions, the Court has relaxed the applicable standard of review in four specific settings: the military,[468] prisons,[469] public employment,[470] and schools. In each context, the Court has stated that the

("Although the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view—more consonant with compulsory education laws—that the State itself may [act] . . . as is reasonably necessary 'for the proper education of the child and for the maintenance of group discipline.'" (quoting 1 HARPER & JAMES, LAW OF TORTS § 3.20 (1956) (footnote omitted)); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637–38 (1943) (noting that West Virginia State Board of Education is a government actor that must abide by the limitations of the Bill of Rights). *But see Morse*, 127 S. Ct. at 2631–36 (Thomas, J., concurring) (arguing for a revival of the in loco parentis doctrine because parents choose to send their children to public school, rather than to private or parochial schools).

465. *See* William G. Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 768 (1974).

466. Indeed, when the doctrine of in loco parentis held sway in court, school disciplinary decisions were frequently upheld after only minimal scrutiny for reasonableness. *See* Project, *supra* note 408, at 1456 n.470 (citing cases).

467. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.").

468. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. . . . [T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.").

469. *See, e.g.*, Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 126 (1977) (concluding that it is appropriate for the judiciary to defer to the decisions of prison administrators "[b]ecause the realities of running a penal institution are complex and difficult" and "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform" (quoting Procunier v. Martinez, 416 U.S. 396, 405 (1974))).

470. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) ("Government employers, like private

special circumstances of these institutions warrant broad deference to the decision to restrict speech.

The Court has not been entirely clear about what special circumstances justify treating speech restrictions in public secondary schools so differently from speech restrictions in most other contexts. The claim that the special circumstances of schools warrant deference seems to embrace many of the justifications already discussed—and rejected—above, including the age of the students, a purportedly voluntary waiver of their free speech rights, and the low value of their speech. Allowing public schools to restrict the expression of their students due to their age would seem to justify broader government restrictions on adolescent speech rights generally, but it seems clear that adolescents outside school are entitled to the same free speech rights as adults.[471] The waiver argument might make a modicum of sense in the context of prisons, the military, or even public employment, but it makes no sense in the context of public schools, where—Justice Thomas's assertion in *Morse* to the contrary notwithstanding[472]—most students have no choice but to attend. Declaring adolescent speech to be low-value expression entitled to less protection is a highly questionable justification. As a factual matter, it is not always true—take the student speech at issue in *Tinker* as just one example.[473] And even if not all student expression is core political speech, the Court appears to be extremely reluctant to withhold First Amendment protection from speech on the grounds that it is "low value."

The strongest justification for allowing public schools to restrict their students' free speech rights is not based on their age, a notion of waiver, or the content of their speech, but rather on the particular needs of the institution.[474] Frequently the Court refers to its lack of competence to second-guess the need for speech restrictions at "authoritarian institutions"[475]—prisons, armed forces, and schools. Although these institutions are different in many ways, they share several key

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employers, need a significant degree of control over their employees' words and actions . . . .").

471. *See supra* Part V.A. This claim is certainly true with respect to the right to speak; the Court has affirmed restrictions only on the indecent speech minors might receive.

472. Morse v. Frederick, 127 S. Ct. 2618, 2634–36 (Thomas, J., concurring).

473. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969) (addressing speech protections for three students who wore black armbands to school as a protest against the Vietnam hostilities).

474. Richard W. Garnett, *Can There Really Be "Free Speech" in Public Schools?*, 12 LEWIS & CLARK L. REV. 45, 50 (2008). *See generally* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005) (discussing an approach to First Amendment theory based on institutional demarcations).

475. *See* Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 441 (1999) ("[T]he Court has consistently refused to follow usual constitutional principles and protect individual rights in what I will term 'authoritarian institutions': prisons, military, and schools.").

characteristics: the individuals are usually not voluntarily present, the institutions are not democratically operated, a "rigid hierarchy of authority" prevails, and in each the Court has declared itself incompetent to second-guess the decisions of the governing authority.[476]

Granting school administrators some deference to determine what speech is materially disruptive makes sense with respect to speech occurring during school hours. The educational process requires quiet and order, and school officials do have expertise regarding the conduct of a classroom. They generally have to make quick decisions about what to tolerate and what to condemn. In addition, while students are in school, their teachers and school administrators are exercising a form of custody over them. In classrooms and at other school events students are required to attend, they might be properly considered a 'captive audience,' which might warrant some limitations on their classmates' expressive rights that would otherwise not be tolerated. When it comes to digital media, however, it becomes much more difficult to conclude that students are forced—aside from perhaps peer pressure—to view their classmates' speech.

Some have argued it would undermine the mission of public education to permit students to have unbridled free speech rights on school grounds. Indeed, the trend in the Court's jurisprudence granting schools more authority to regulate student speech indicates that the Court feels that certain kinds of speech—although fully protected outside the school environment—are entitled to no protection in the school environment. As many commentators have noted, it is virtually impossible for schools to avoid some viewpoint discrimination in their curriculum decisions and perhaps also in the student speech they tolerate on campus.[477] Thus, schools should not have to tolerate lewd speech in the classroom or harassing and demeaning speech that interferes with another student's ability to learn. In *Morse*, Justice Alito's concurrence explicitly disavowed any reliance on the educational mission theory, most likely because the more conservative members of the Court feared that schools would then be given license to censor any speech that they felt inconsistent with the school's mission[478] (including anti-gay speech, like that at issue in *Harper*).[479] But to the extent the Court's school speech jurisprudence is

476. *Id.* at 442.

477. *See, e.g.*, Dienes & Connolly, *supra* note 411, at 381 (noting that "[v]alue neutral education is simply not possible" because "school officials inevitably make choices that lend government support to particular viewpoints or ideas"); Garnett, *supra* note 474, at 59 ("[W]e all do well to remain skeptical about the compatibility of government-run education with the freedom of speech."); Taylor, *supra* note 123, at 18 & n.78.

478. Morse v. Frederick, 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring).

479. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1170–72 (9th Cir. 2006), *vacated*, 127 S. Ct. 1484 (2007) (finding that student who was disciplined for wearing T-shirt with an anti-gay message was not likely to succeed on the merits in his First Amendment claim against the

based on the "special circumstances" of the school environment—and not on the age of their students—it must at bottom rest on the sense that schools have a mission, and that offering students full speech rights would interfere with that mission.

As Justice Alito recognized in his *Morse* concurrence, however, giving schools broad authority to suppress speech in the name of promoting their educational mission is dangerous. Given that public students already face compulsory attendance laws, the risk of improper governmental indoctrination is high.[480] Granting schools broad authority to censor the digital speech of their students would unnecessarily exacerbate this risk and prove a grave threat to the speech rights of adolescents generally. Allowing schools to invoke their educational mission as a basis for restricting their students' speech wherever it occurs would permit public schools to exercise unbridled censorship authority over youth expression. Nothing about the special characteristics of the school environment warrants such broad and unchecked power.

VI. RETHINKING STUDENT SPEECH RIGHTS IN THE DIGITAL AGE

Allowing school officials to have the authority to punish students for expression that they create on digital media, typically when they are away from school, begs the question what sort of free speech rights juveniles in our society enjoy generally. Although minors are plainly subject to the control of their parents, it does not necessarily follow that they should also be subject to the control of their schoolmasters. Certainly, as discussed above, one cannot simply declare that school officials serve in loco parentis and leave it at that.

Determining whether school officials have the authority to punish digital student expression would not be so difficult if we decided that minors simply do not enjoy full speech rights outside the schoolhouse gates; however, the Court has never taken this position and it lacks a sound basis in constitutional law.[481] Although the Court has tolerated some speech restrictions that serve to protect students from certain kinds of speech—typically indecent or sexually explicit speech—it has never sanctioned restrictions on juvenile expression itself. Indeed, in most student speech cases, members of the Court have pointedly noted that the expression at issue would be plainly protected had it occurred in the fabled town square. In the absence of any sort of captive audience that might justify the restriction of juvenile speech—or anyone's speech, for that matter—restrictions on student speech rights cannot stand on the premise that juveniles simply do not enjoy full First Amendment protection.

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school).

480. Dienes & Connolly, *supra* note 411, at 383.

481. *See supra* Part V.B.I.

In student speech cases involving the digital media, courts have typically focused on whether the speech at issue could be considered on-campus speech, or they have simply applied *Tinker*'s material-and-substantial disruption test. Because digital speech is generally nowhere and everywhere at the same time, permitting school officials to restrict such speech simply because it is accessed on school grounds, because it is somehow directed to the school grounds, or because it was reasonably foreseeable that it would come to the attention of school officials gives schools far too much authority to restrict the speech of juveniles generally. Applying the *Tinker* test to all speech, whether digital or not, has some intuitive appeal, but this approach is likewise unsatisfying because it gives schools far too much authority to restrict juvenile speech rights.

This Article concludes that schools have very little authority to punish students for their speech in the digital media. At the same time, however, it urges schools to educate their students about the use of digital media, both before and after any offensive digital speech comes to their attention.

A. *Criticism of Territorial Approaches*

As discussed in Part IV.B, many courts facing a student speech case ask as a threshold matter whether the speech can be considered on-campus or off-campus expression. In making this determination, some courts consider whether the digital speech was accessed on campus, whether the speech was directed to campus, or whether it was reasonably foreseeable that the speech would come to the attention of school authorities. All three approaches give schools too much authority to restrict juvenile speech rights generally.

It makes sense to declare that schools lack authority to restrict student speech that is plainly off-campus. All the Supreme Court's student speech cases to date involve expression that takes place on school grounds or during school-sanctioned activities. As a bright-line rule, courts should continue to declare that speech that lacks any sort of physical connection to the school should fall outside the school's jurisdiction.

Most commentators concerned about student speech rights concede, however, that schools should have authority to regulate digital expression that is somehow physically present on campus. For example, one leading article concedes that if a student uses school computers to create, view, or print digital expression, then the school may exercise its authority to restrict that expression.[482] This approach concedes too much. Taking a strict territorial approach like this one is troubling because digital speech, unlike traditional media, is uniquely pervasive.[483] The mere incidental

482. Calvert, *supra* note 221, at 264–67.

483. *See* David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996) ("Cyberspace radically undermines the relationship between

usage of school computer facilities, or the use of a personal electronic device on campus, should be insufficient to trigger school censorship authority.[484] Under an incidental-use analysis, a school should not have authority to regulate student expression on the Internet merely because the student accesses his website from a school computer.[485] The mere fact that a student can retrieve his expression on campus, without more, should not grant school authorities the power to control his off-campus expressive activities. If schools are concerned about the mere use of digital media while students are in school, they can restrict access to the school computers or ban the use of cell phones and other electronic devices during school hours without running afoul of the First Amendment.[486] In contrast, if a student sends an e-mail to other students on school computers, texts other students using his cell phone during school time, or posts offensive content on a school-sponsored website, a school should have authority to restrict that expression.

Although permitting schools to restrict digital student speech whenever it has some sort of physical connection to campus is troubling, far more disconcerting are the expansive territorial approaches that permit schools to punish student speech whenever it is directed to campus, or when it is reasonably foreseeable that it will come to the attention of school authorities.[487] These approaches grant schools virtually unbridled discretion to restrict juvenile speech generally. Students' speech frequently concerns topics related to their school and classmates. Given this reality, it is hard to imagine when it would not be directed to campus, or when it

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legally significant (online) phenomena and physical location.").

484. *See supra* Part IV.B.1.

485. Recognizing that a school has no authority to punish student speech that makes incidental use of school property is consistent with the decision in *Thomas v. Board of Education*, a pre-digital age decision where the appellate court held that a school lacked the power to punish students for an underground newspaper that had been stored on school grounds because "all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate." Thomas v. Bd. of Educ., 607 F.2d 1043, 1050 (2d Cir. 1979). There, the student-authors of the newspaper had used a classroom after school hours to edit their articles and to store extra copies of their publication. *Id.* at 1045.

486. Banning cell phones or restricting access to personal websites during the school day would not run afoul of the First Amendment because such measures would be permissible content-neutral time, place, and manner regulations. Under First Amendment jurisprudence,

> [t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citation omitted).

487. *See supra* Part IV.B.2.

would not be reasonably foreseeable that students' digital expression would come to the school's attention. For example, in *Wisniewski*, the Second Circuit held that it was reasonably foreseeable that an instant message icon Aaron Wisniewski sent to fifteen classmates would come to the attention of school officials.[488] Because Wisniewski did not send the message to any school officials or even make his icon generally available on the Internet, it is hard to imagine why it should have been reasonably foreseeable to Wisniewski that his school would find out about it. Indeed, the school learned about the icon only after one of Wisniewski's schoolmates tattled on him.[489] Accordingly, it appears that under the *Wisniewski* test, schools are given authority to punish student expression whenever the speech concerns the school in some way. Indeed, a federal district court applied the test in this way when it concluded that it was reasonably foreseeable that a blog would come to the attention of school authorities because "the content of the blog itself indicated that [the student] knew other [school] community members were likely to read it."[490]

The unbridled, unduly expansive nature of the Second Circuit's approach becomes clear when one attempts to apply it to non-digital expression. Permitting school officials broad authority to punish student speech whenever it comes to their attention would grant them the power to punish students who engage in a political protest in the town square, write a letter to the editor in the local newspaper, or simply speak to their friends while walking around the mall. It is hard to understand why schools should be given more authority to restrict digital speech than they would have to punish non-digital expression.

B. *Application of* Tinker *is Inappropriate*

The application of *Tinker*'s materially and substantially disruptive standard to all digital speech is also a tempting but ultimately unsatisfying approach. As a threshold matter, lower courts applying the *Tinker* standard have tended to give substantial deference to a school's determination that the challenged expressive activity was in fact substantially and materially disruptive. As a result of this deference, schools are engaging in the sort of standardless discretion that is anathema to the First Amendment.[491] But

488. Wisniewski v. Bd. of Educ., 494 F.3d 34, 39 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1741 (2008).

489. *Id.* at 36.

490. Doninger v. Niehoff, 514 F. Supp. 2d 199, 217 (D. Conn. 2007).

491. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 (1992) (striking down parade and assembly ordinance because it permitted too much discretion); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 153 (1969) (noting that unfettered discretion permits government officials "to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in

even if courts rigorously applied *Tinker*'s materially disruptive standard, a fundamental problem would remain: the *Tinker* approach to student speech is ill-suited to deal with off-campus expression.

The *Tinker* standard came about in the context of speech occurring during school hours in a manner visible to all students and the teacher. In that context, it makes sense to consider whether that very public speech disrupts the classroom, a school assembly, or other school event. Clearly, a teacher leading a physics lesson may restrict the students' discussion of the political issues of the day. In this way, permitting schools to sanction speech that disrupts their work closely resembles the ability of, say, courtroom deputies to enforce rules of conduct while the court is in session. For the most part, however, digital communications do not intrude into the public space, and therefore by their very nature cannot cause an immediate disruption to the work of the school.

More fundamentally, applying *Tinker*'s disruption standard to digital speech permits school officials to exercise too much control over juvenile expression generally. Lots of off-campus speech and conduct can distract students from their schoolwork.[492] Students may be just as distracted by the new Harry Potter book or X-Man movie or an episode of *Gossip Girl* or a new video game or a new website as they will be by the message someone has posted on their social networking site. These other cultural influences could also have a much more profound educational effect on the students than someone's e-mail icon or website. It would be unthinkable to permit school officials to control their students' access to television shows, movies, public libraries, and other materials on the Internet.

School officials frequently assert that all student speech falls within their control because it has the capacity and the potential to affect the school. Most courts have accepted this argument, and by doing so, they have extended beyond recognition the rationale for school control over student speech. Students use electronic technology to express themselves. Allowing schools to restrict speech there is akin to allowing schools to restrict speech anywhere. Communicating through digital media is the way students deal with their lives and how they deal with authority. Students are going to be talking about their teachers and their classmates anyway; now they are simply using digital media to do it. Most student speech does not involve unprotected speech but rather unpleasant speech that offends school officials or makes them uncomfortable.[493]

In addition, as the Court in *Tinker* recognized, school administrators often seek to repress student speech in order to avoid controversy and

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question on the 'welfare,' 'decency,' or 'morals' of the community").

492. Caplan, *supra* note 51, at 163.

493. *See* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 542–44 (2000) (listing lower federal court cases addressing student speech).

protect the reputation of the school.[494] In *Tinker*, the Court noted that the school officials tried to prevent students from wearing black armbands not because they caused any real disruption to the school, but rather because they had "an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam."[495] Not surprisingly, schools are now punishing students for parodies that poke fun at teachers and school administrators on the grounds that they are disruptive to the work of the school.[496] In *Thomas v. Board of Education*, the Second Circuit noted the inherent conflict of interest that arises when school officials are given broad authority to act as "both prosecutor and judge" with respect to student speech rights.[497]

As of this writing, no court has invoked *Tinker*'s rights-of-others prong as the sole basis for upholding restriction on student speech in the digital media.[498] As discussed above, it is unclear whether this relatively obscure aspect of *Tinker* should play a role in any student speech cases, digital or not, given how amorphous and ill-defined it is.[499] Certainly, permitting schools to invoke the Ninth Circuit's broad and rather standardless approach to *Tinker*'s rights-of-others prong in digital media cases would obviously pose an even greater threat to juvenile speech rights than *Tinker*'s materially disruptive standard.

C. *The Problem of Harassing Speech*

Harassing speech poses perhaps the most difficult challenge to any argument limiting the power of schools to punish student expression. Peer-to-peer harassment is hardly new behavior, but many students engage in such speech through the digital media. As with more traditional harassment and bullying, cyber-harassment can cause serious psychological damage to students, severely undermine their ability to learn and succeed at school, and at times lead to truancy, violence, and suicide.[500] Although it is tempting to permit schools to punish students for

494. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509–10 (1969).

495. *Id.* at 510.

496. *See supra* note 324 and accompanying text.

497. *Thomas*, 607 F.2d at 1051. *See also* text accompanying footnotes 243–53 (discussion of *Thomas*).

498. In *Snyder v. Blue Mountain School District*, a federal district invoked *Tinker*'s right-of-others prong in a footnote as an apparent alternative basis for its holding that a student did not have a First Amendment right to post a parody profile of his school principal on MySpace.com. No. 3:07cv585, 2008 WL 4279517, at *6 n.4 (M.D. Pa. Sept. 11, 2008). The court explained that the profile "affected [the principal]'s rights" because "[a]s principal of a school, it could be very damaging to have a profile on the internet indicating that he engages in inappropriate sexual behaviors." *Id.*

499. *See supra* notes 112–37 and accompanying text.

500. *See* Servance, *supra* note 64, at 1216–17.

any digital expression that harasses or bullies another student, granting schools this authority is not necessary and would pose a grave threat to juvenile speech rights.

Some have suggested that schools must be given authority to punish cyber-harassment because they could be held liable for civil damages under Title IX if they fail to do so. Among other things, Title IX prohibits any school that receives federal funds from subjecting a student to discrimination on the basis of sex.[501] Although no court has addressed whether a school could be liable for Title IX harassment in a case involving the digital media, a closer examination of the requirements for liability indicate that they could not be.

In *Davis v. Monroe County Board of Education*,[502] a sharply divided Supreme Court held that a school could be held liable for a classmate's sexual harassment of a student that occurred on school grounds.[503] In that case, one of LaShonda Davis's classmates subjected her to repetitive harassing comments and gestures during school hours and on school grounds.[504] His conduct included comments like "'I want to feel your boobs'" as well as attempts to touch LaShonda's breast and genitals.[505] LaShonda claimed that as a result of this harassment, her grades dropped and she was unable to concentrate on her studies.[506] Although her classmate was ultimately charged with, and pled guilty, to sexual misconduct, LaShonda also sought to hold the school liable under Title IX for failing to take disciplinary action against her harasser.[507]

The Court made clear that the school could be held liable only in the most extreme circumstances.[508] The Court declared that in order to hold a school liable for peer-to-peer harassment, the school must (1) have had adequate notice that it could be held liable for the conduct at issue; (2) have acted with deliberate indifference to known acts of harassment; (3) exercise substantial control over the harasser and the context where the known harassment occurs; and (4) moreover, the reviewing court must find that the harassment is so "severe, pervasive, and objectively offensive" that it effectively bars the victim's access to an educational opportunity or benefit.[509] In *Davis*, the Court concluded that the plaintiff's

501. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a) (2006).

502. 526 U.S. 629 (1999).

503. *Id.* at 633.

504. *Id.*

505. *Id.*

506. *Id.* at 634.

507. *Id.* at 634–36.

508. *Id.* at 642.

509. *Id.* at 644–50.

case against her school under Title IX could go forward because she could conceivably prove facts sufficient to entitle her to relief.[510]

In most cyber-harassment cases, however, it is highly unlikely that a plaintiff could adequately allege all the necessary elements for a Title IX claim.[511] Specifically, a plaintiff would have great difficulty satisfying the requirement that the school has "substantial control over both the harasser and the context in which the known harassment occurs." This requirement will generally not be met in cases involving digital speech, unless the digital expression has more than an incidental connection with the school grounds.[512] When the harassing speech occurs at school, school officials have "significant control over the harasser" in light of their custodial role, as well as significant control over the context of the expression.[513] Students engaging in digital expression away from school, however, are not within the control of the school, but rather in the control of their parents. Similarly, schools do not typically have control over the context of digital speech. In *Davis*, the Court made clear that liability was possible because schools have control over the context of harassment that occurs "during school hours, and on school grounds."[514] Cyber-harassment frequently occurs outside school hours and off school grounds.[515] Schools might be liable for harassing digital speech that occurs during school hours and on school grounds, but in such cases the use of digital media would be more than incidentally on campus and fall within the school's regulatory authority.

Of course it is one thing to say that schools cannot be held liable for harassment if they fail to intervene to stop it; it is quite another to say that they are not *permitted* to intervene if they wish.[516] Courts and commentators disagree when schools should have authority to restrict harassing, intimidating, or otherwise hurtful speech even when it plainly occurs on school grounds. One reason for this lack of consensus is that the First Amendment does not categorically exclude harassing or intimidating

510. *Id.* at 654.

511. For a brief discussion about the potential difficulties of holding schools liable for cyber-harassment under Title IX, see Susan H. Kosse, *Student Designed Home Web Pages: Does Title IX or the First Amendment Apply?*, 43 ARIZ. L. REV. 905, 919–25 (2001).

512. Under the approach this Article advocates, schools would have authority to punish digital student speech that has more than an incidental connection to the school grounds. *See supra* Part VI.A.

513. *Davis*, 526 U.S. at 646.

514. *Id.*

515. *See, e.g.*, Servance, *supra* note 64, at 1218 ("In this cyber-age, Internet websites, chat rooms, anonymous electronic bulletin boards, instant messaging, and other web devices quickly and widely disseminate harassing content.").

516. *See* Waldman, *supra* note 112, at 500 ("[T]he notion that schools can prohibit only the speech that they *must* prohibit, and that there is no room for educational discretion below that line, is inappropriately cabined.").

speech from its protections. Indeed, the Court has made clear that individuals must tolerate speech that denigrates their racial or ethnic background or religious beliefs if the expression falls short of incitement or fighting words.[517] Anti-discrimination laws applicable to the workplace, such as Title VII, already exist in some tension with the First Amendment because they are plainly content- and viewpoint-based.[518] In the public secondary school setting, courts have disagreed about whether schools can prohibit speech that would not be covered by federal anti-discrimination law. For example, the Ninth Circuit held in *Harper* that a school could restrict anti-gay speech even if it is non-disruptive and not directed specifically at another student.[519] On the other hand, the Third Circuit has struck down a similar anti-harassment policy as unconstitutionally overbroad, holding instead that schools can restrict harassing speech only when it satisfies *Tinker*'s substantial disruption standard.[520] For all the reasons Judge Kozinski gave in his *Harper* dissent, the Ninth Circuit's approach seems highly questionable even with respect to speech on school grounds.[521] It would be intolerable to extend that approach to student speech in the digital media.

Any authority schools might be afforded to intervene in cases of cyber-harassment must be carefully and narrowly restricted to avoid giving schools license to restrict too much speech. As the dissent in *Davis* noted, "schools that are the primary locus of most children's social development are rife with inappropriate behavior by children who are just learning to interact with their peers."[522] Name calling, teasing, and the use of vulgarities are commonplace in juvenile expression.[523] Holding schools liable for cyber-harassment would pose a tremendous risk that school officials would punish speech that might be offensive and irritating but hardly so severe and pervasive so as to deprive a student access to an educational benefit or opportunity.

Limiting the ability of schools to punish harassing speech except in extreme circumstances does not mean that schools are powerless to act. Some schools have been experimenting with anti-bias and anti-bullying programs intended to reduce harassment, defamation, racism, homophobia,

517. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (finding that advocacy of controversial views is not proscribable unless it is directed at inciting illegal action and is in fact likely to result in such action); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) (noting that no assault, threat of bodily harm or person occurred).

518. For a lengthier discussion of this tension, see Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1799–807 (1992).

519. *See supra* notes 113–22 and accompanying text.

520. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001).

521. *See supra* notes 123–34 and accompanying text.

522. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 672 (1999) (Kennedy, J., dissenting).

523. *Id.* at 673.

and other offensive speech before it occurs.[524] When harassment does occur, schools can always attempt to counsel the students involved about the harm their speech is causing and seek assistance from law enforcement officials when appropriate.

D. *Nonpunitive Methods for Responding to Digital Speech Issues*

The conclusion that schools have little authority under the First Amendment to punish digital student speech does not mean that schools are helpless to act. This Article argues, however, that the primary approach that schools should take to most digital speech is not to punish their students, but to educate their students about how to use digital media responsibly.

In many of the recent cases involving digital speech, students were suspended, expelled, or barred from certain school activities for writing rather trivial and innocuous things on the Internet. Many of the students embroiled in school speech cases—at least the ones that make their way into the court system—are top students angling for good grades and college admission. Although courts like to characterize students on the Internet as problem students, often the students who become embroiled in free speech disputes are quite outstanding. For example, although Chief Justice Burger characterized Matthew Fraser (the plaintiff in *Fraser*) as a "confused boy,"[525] Justice Stevens, in dissent, pointed out that in fact Fraser "was an outstanding young man with a fine academic record. The fact that he was chosen by the student body to speak at the school's commencement exercises demonstrates that he was respected by his peers."[526] In *Emmett v. Kent School District No. 415*,[527] the student who created a website with fake obituaries had a grade-point-average of 3.95, served as co-captain of the school's basketball team, and had a clean disciplinary record.[528] Such an approach is much more beneficial than simply punishing students the moment they engage in controversial speech.

Schools should first begin to address perceived problems with student speech in the digital age by educating their students about safety and civility on the Internet and in digital media generally even before problems begin. Such an approach could begin with some education about the First Amendment generally, but then continue to a broader discussion about safety and responsible use of digital media. For example, students could

524. *See, e.g.*, Gerri Hirshey, *Pushing Back at Bullying*, N.Y. TIMES, Jan. 28, 2007, § 14 at 1 (describing anti-bullying programs and noting that twenty-nine states have adopted anti-bullying or anti-harassment statutes).

525. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

526. *Id.* at 692 (Stevens, J., dissenting).

527. 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

528. *Id.* at 1089.

be taught about how to guard against predators on the Internet, particularly on social networking websites. In addition, schools might want to discuss the problems of anonymous speech and the real harms that offensive speech can cause. Sometimes these lessons could take the form of practical exercises. To take one example, Kevin Metcalf, a government teacher in upstate New York, does an experiment with his students to show how damaging and misleading a single still picture taken on a cell phone can be.[529] He asks the students to take out their cell phones while he puts his head down on his desk.[530] He then asks the students what people would think of him as a teacher if they had taken a picture of him with their phones and posted it on YouTube.[531] Inevitably, the students say that he would be regarded as "'lazy'" and as a teacher who "'doesn't care'" about his students.[532] He says that this lesson helps drive home the message of how pictures on cell phones can misrepresent the truth and have serious consequences.[533]

When students engage in digital speech that concerns school officials, the officials should resist their impulse to punish such speech and instead use the incident as an opportunity to teach important lessons about digital speech. For example, Joseph Frederick, the plaintiff in *Morse v. Frederick*, offered to settle his case if the school agreed to invite the ACLU and school board members to give an assembly at which student speech rights would be discussed.[534] The school refused and missed out on a golden opportunity to teach students about the breadth—and limits—of their free speech rights.[535]

This proposal does not suggest that some monitoring of teenagers' speech is inappropriate. School officials can and should alert the police if they come across violent speech that they believe poses a threat to the safety of its students.[536] Indeed, law enforcement officials report that they are already searching social networking sites as well as other websites as part of their efforts to investigate criminal activity.[537] A police officer in Illinois revealed, "We patrol the Internet like we patrol the streets. . . .

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529. Vaishali Honawar, *Cellphone Taping a Classroom Threat*, TCHR. MAG., Nov. 7, 2007, http://www.teachermagazine.org/tm/articles/2007/11/07/ew_videotape_web.h19.html.

530. *Id.*

531. *Id.*

532. *Id.*

533. *Id.*

534. Nat Hentoff, *Joe Frederick, First Amendment Idol*, VILLAGE VOICE, Mar. 27, 2007, http://www.villagevoice.com/2007-03-27/news/joe-frederick-first-amendment-idol/ (citing report from Nina Totenberg).

535. *Id.*

536. *See* Calvert, *supra* note 221, at 268.

537. *See* Wendy Davis, *Teens' Online Postings are New Tool for Police*, BOSTON GLOBE, May 15, 2006, at A1 (reporting that social networking sites "are fast becoming a crucial source of evidence in crimes involving young people ranging from pornography to drugs to terrorist threats").

We'll go in on a MySpace or a Xanga, we'll pick out our area and we'll just start surfing it, checking it, seeing what's going on."[538] Although much of the content of social networking sites is innocuous, the officer said that from time to time they have found pictures of people standing proudly by graffiti they have just created or with the drugs that they are dealing.[539] As the cases demonstrate, law enforcement is much better at assessing the likelihood that violent expression poses a real danger to the safety of the school.

Although it is understandable that school authorities want at all costs to avoid another Columbine massacre, punishing students for speech with any violent or threatening elements is an inappropriate—and unconstitutional—overreaction. That teenagers would use violent themes and images in their expression is unremarkable. As discussed above, schools have shown little tolerance for student speech that contains even the slightest reference to or depiction of violence, even when law enforcement has declared it innocuous.[540] Permitting schools to punish violent digital speech would expand school authority over juvenile speech exponentially. When there is a concern that a student might be troubled or likely to act out his violent fantasies, it would be far more productive to counsel the student, contact his parents, and, when appropriate, call in the police for assistance.

Restricting the authority of schools to punish online speech does not mean that the student speech goes unpunished; instead, students still would face possible criminal prosecution and civil liability. School officials should continue to report threatening or otherwise disturbing speech to law enforcement authorities who could in turn take appropriate action. For example, school officials in Allentown, Pennsylvania, contacted law enforcement when it came to their attention that pornographic images of two female students had been disseminated via cell phones to at least forty of their classmates.[541] The District Attorney's Office intervened and required those students who received the images to show their phones to the police to make sure that the images, which constituted child pornography, were removed.[542] Likewise, if the speech contains actionable

538. Koppelman, *supra* note 29 (quoting officer James McNamee, a member of the Barrington, Ill., police department's Special Crimes Unit).

539. *Id.* The officer noted, however, that when police officers came across a website that declared "'We Hate Barrington Police Department,' they simply had a good laugh and let the posters vent." *Id.*

540. *See supra* Part IV.B.4.

541. Michael Rubinkam, *Cell Phone Porn Scandal Hits U.S. School*, MSNBC.COM, Jan. 25, 2008, http://www.msnbc.msn.com/id/22840727/print/1/displaymodel/1098/.

542. *Id.*

defamatory statements or otherwise violates the law, the offended party can seek redress in the judicial system.[543]

Finally, it is worth mentioning that parents continue to play an important role in policing the activities of their children. A recent study reported that Internet use is the subject of household rules in the majority of homes.[544] Commonly, parents limit the amount of time their children can spend online and also restrict the websites they can visit. Sixty-five percent of parents report checking what websites their children view after they get offline, and seventy-four percent know whether their children have a profile on a social networking site.[545] Schools should make their best efforts to educate their students' parents about the harms and benefits of digital media and encourage them to be more proactive in the supervision of their children's digital speech activities.

VII. CONCLUSION

The rise of student speech in the digital media provides a perfect opportunity to reconsider the free speech rights of minors and the authority of school officials to restrict their expression. The three primary justifications given for the protection of the freedom of speech—the promotion of democratic self-government, the search for truth in the marketplace of ideas, and the fostering of autonomy and self-fulfillment—all point in the direction of protecting adolescent speech on and off school grounds.

The common justifications for allowing schools to restrict student speech do not hold water. The developmental differences between adults and adolescents are simply not clear enough to warrant stripping young people of their free speech rights. The notion that school officials are free to restrict student speech rights because they operate in loco parentis makes little sense given the compulsory education laws requiring parents to place their children in the hands of public officials. In addition, allowing school officials to restrict students' expression in the digital media—which largely takes place off school grounds—would significantly undermine the

543. For example, in one case where a student created a website at home called "Teacher Sux," the teacher who was the subject of the website sued its student-creator for defamation, interference with contractual relations, invasion of privacy, and loss of consortium. Kathleen Parrish, *Teacher Sues Over Derogatory Web Site*, ALLENTOWN MORNING CALL, Nov. 6, 1998, at B1. The student, who was expelled from school, took his case against the school authorities all the way to the Pennsylvania Supreme Court, which found no violation of the First Amendment. J.S. *ex rel* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 852–53, 869 (Pa. 2002); *see also supra* notes 255–59 and accompanying text.

544. ALEXANDRA RANKIN MACGILL, PEW INTERNET & AMERICAN LIFE PROJECT, PARENT AND TEENAGER INTERNET USE 2 (2007), http://www.pewinternet.org/pdfs/PIP_Teen_Parents_data_memo_Oct2007.pdf.

545. *Id.* at 5.

authority of parents to direct the upbringing of their children. Finally, reliance on the "special circumstances" of the schoolhouse setting may make some sense when a student disrupts a class or a school assembly, but it is much less persuasive when digital speech is at issue.

Having concluded that minors are entitled to robust speech rights, this Article argues that schools should have very little authority to restrict student speech in the digital media. Most courts confronting a student speech case ask as a threshold question whether the speech at issue can be considered "on-campus" speech. Some courts apply a territoriality test that asks whether the speech literally appeared on school grounds. Although such an approach has the benefit of forbidding a school to restrict the bulk of student speech in the digital media, its rigidity has led some courts to reject it. Instead, recently some courts have held that student speech can be considered on-campus speech whenever it is reasonably foreseeable that it will come to the attention of school officials. This approach threatens to grant schools virtually unlimited authority to restrict student expression because it is arguably foreseeable that virtually any speech that concerns the school, its personnel, or its students will come to the attention of school officials.

The application of *Tinker*'s materially disruptive standard—regardless of whether it is preceded with an inquiry into whether the speech is properly labeled "on-campus" or "off-campus" speech—provides little protection to students' expressive rights. First, many courts are far too deferential to schools' assertions that the challenged expressive activity was substantially and materially disruptive to schoolwork or discipline. Second, and more importantly, the *Tinker* test is ill-suited to speech in the digital media. Many off-campus events and activities can distract students from their work, but it would make no sense to permit schools to serve as a cultural censor. Schools plainly lack authority to prevent their students from watching the latest television show or playing the newest video game; schools should likewise have no authority to restrict the distracting expression their students create.

Computers, mobile phones, and cameras play an integral role in the way young people communicate with each other and the world at large. Students have always made fun of their teachers and harassed their classmates, but school officials generally did not learn about it. Now school officials frequently find this material simply by logging onto the Internet. Speech that in another time would escape the school's notice now has become the basis for suspensions, expulsions, and other significant punishment. Rather than punish their students, schools must instead become more tolerant of speech that they do not like and focus more on educating their students to use digital media responsibly.

Direct From the Field:
A Guide to Bullying Prevention

By Laura Parker-Roerden, David Rudewick, and Donald Gorton

A Joint Project of
The Governor's Task Force on Hate Crimes,
The Massachusetts Commission on
Gay, Lesbian, Bisexual and Transgender Youth,
and the Massachusetts Department of Public Health

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Commonwealth of Massachusetts

Acknowledgements

The publishers gratefully acknowledge everyone who participated in making this Guide possible. The primary author of the initial draft was Laura Parker Roerden. Her project director, principal collaborator, and co-author was David Rudewick, the Student Civil Rights Director of the Governor's Task Force on Hate Crimes. Editing, supplementation, and other pre-publication work were done by Donald Gorton, Co-Chair of the Massachusetts Governor's Task Force on Hate Crimes. Sarah Farmer, consultant to the Massachusetts Department of Public Health revised, proofread, and reformatted the Guide for publication in 2007. Sarah Farmer also developed the section on "Helping Kids with Disabilities." Legal information was contributed by Donald Gorton, who is a lawyer in Massachusetts. Graphic design work was done by David Rudewick, Donald Gorton, and Sarah Farmer.

After a long delay following initial completion, Commissioner John Auerbach of the Massachusetts Department of Public Health brought the Guide to publication in 2007. Assisting in the lengthy process of completing this project were Kathleen Henry, Chair of the former Massachusetts Governor's Commission on Gay and Lesbian Youth; Carlene Pavlos, Director of Violence Prevention of the Massachusetts Department of Public Health; Paula Tessier of the Safe Spaces for GLBT Youth program of DPH; Susan Prosnitz, Co-Chair of the Governor's Task Force on Hate Crimes; Assistant Commissioner John Bynoe of the Department of Education; and Jim Brinning of the Governor's Task Force on Hate Crimes. Principal funders were the Governor's Task Force on Hate Crimes and the Department of Public Health. Support was also provided by the Massachusetts Gay and Lesbian Anti-Violence Project and the Boston Gay Rights Fund. Assisting with review and proofreading were Ron Donaghe, Carlene Pavlos, Paula Tessier, David Gallagher, Larry Dean Hamilton, Richard Scramstad, Mark Roeder, Ken Clark, Bryan Fithian, and Mary Tittman. Finally, cooperating schools throughout the Commonwealth of Massachusetts provided the source information from which the content for this endeavor was derived.

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A Guide to Bullying Prevention

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Introduction

You must be the change you wish to see in the world.

Mohandas Gandhi

Evidence-based research gleaned from respected institutions, media reports, and the hallways of our nation's schools all point to the same truth: Bullying has devastating effects. Just a quick look at statistics reveals the depth of the problem:

- Analysis of high-profile school shootings such as Santana, Columbine, and Virginia Tech reveals that that up to 71 percent involved attacker(s) who felt bullied, persecuted, attacked, or injured.[1]
- Around 160,000 school children stay home from school each day out of fear, often without telling their parents why.[2]
- Children targeted by bullies experience higher than normal levels of insecurity, anxiety, depression, low self-esteem, and physical and mental symptoms.[3]
- Adults who were bullies as children have higher rates of substance abuse, domestic violence, and other violent crimes.[4]
- The percentage of students who report being bullied rose 50% from 1983 to 2003.[5]

In short, bullying is an act that cannot be ignored if we are to safeguard our nation's schools and young people.

Prevention and Intervention

While the problem is prevalent—up to 80 percent of adolescents report being bullied during their school years—students report that 71 percent of teachers or other adults in the classroom ignore bullying incidents.[6] Adults often either justify their lack of action with long-held myths ("bullying is a part of growing up") or are simply unprepared to intervene effectively.

Equipping administrators and teachers to respond more effectively is part of the answer, but the problem is complex and defies simple solutions. The majority of bullying incidents happen outside of the eyes and ears of school personnel—on buses, on sidewalks on the way home, at sporting events, and in bathrooms and locker rooms. Complicity among young people not to share knowledge of incidents of bullying with adults is common, often due to fear of retaliation. Ironically, while targets are disempowered by this code of silence, bullies gain power and prestige from it.

A joint study of the U.S. Secret Service and the U.S. Department of Education titled "The Safe School Initiative" (2002)[7] points to the need to create an environment in which students feel safe enough to break the code of silence—thus giving voice to the silent majority of bystanders who disapprove of the bully's actions.

Multiple national studies show it is critical to create an environment of caring and respect in the classroom and school—an environment where children and adults have zero tolerance

for acts of disrespect. A culture of caring and respect is fundamental, and to create such a culture, character education and teaching of pro-social values like tolerance, altruism, and empathy, and self-assertiveness are essential. And to ensure students' emotional and physical safety, administrators and teachers can learn effective classroom management and discipline techniques.

Goals of This Guide

This Guide*, Direct from the Field,* was developed to help you create a bullying prevention program that meets the unique needs of your site, your teachers, your students, and their families.

Many research-based bullying prevention programs exist, and while we draw from these resources and their insights, this guide goes beyond the simple matching of a site to a pre-packaged program. In discussions with educators across the Commonwealth, we've seen that some of the best solutions to bullying and its destructive consequences are home-grown. This guide includes the collective wisdom of schools across Massachusetts that have discovered ways to make the culture of their classrooms and schools one of caring and respect. From their failings and successes comes the body of knowledge presented here.

Both traditional research about bullying and the experiential wisdom of actual schools are combined here to highlight practical classroom and school-wide strategies for administrators and teachers to:

- Nurture pro-social skills in children—including conflict resolution, appreciation for diversity, communication, cooperation, and assertiveness—that are related to intervening in acts of bullying.
- Utilize character education and put the culture of caring into action through service learning and other moral action models.
- Intervene in acts of harassment and bullying with strategies for working with targets and strategies for working with bullies.
- Work effectively with both families of targets and families of bullies.
- Involve families and school personnel in supporting a culture of respect.
- Develop appropriate consequences for bullies and complicit bystanders.
- Widen the circle of caring and involvement to include your larger community.

How This Guide Was Developed

We surveyed every middle school in Massachusetts and visited elementary and middle schools, both public and independent, to learn about:

- Programs in bullying prevention they have used or developed
- Strategies and tools
  - ⇒ developed onsite to deal with specific issues and meet goals
  - ⇒ that have been most effective (and why)
  - ⇒ that have been least effective (and why)

- The nature of the problem at their sites
- Progress made in addressing bullying problems.

We spoke with principals, professional development coordinators, health educators, guidance counselors, bullying prevention coordinators, classroom teachers, bus monitors, parents, and students. Some sites had been doing this work for years, while others were just starting out. Some sites were using a comprehensive program, while others were using components of different programs or had tailored their own solutions. At some schools, this work fell under violence prevention efforts, and at other sites it was part of character education. Some sites were rural, others suburban or urban. Some had grant money to address this issue, while others were trying to launch efforts without much fiscal support. While there was great diversity in sites and solutions, many common themes emerged.

In general, young people said a better job could be done at keeping them safe at school, pointing to places in schools they avoid, such as bathrooms, certain hallways, and parts of the cafeteria. They worry the adults in the building don't understand the full scope of the problem. Most said they thought the adults cared about them, but they speculated that the adults lack the knowledge and resources to address an issue as complex as bullying. Bullying from a young person's perspective can feel like a problem one simply has to deal with alone.

Adults reported being worried that despite their best efforts, a culture of ridicule and disrespect prevails outside the building. They said change comes slowly and stressed the importance of buy-in from all school stakeholders, including often neglected constituents such as bus drivers, cafeteria workers, and parents. Teachers and administrators doing this work see progress is possible—that efforts to teach children pro-social skills pay off. But they worry about how to fit bullying prevention into a day already crowded with competing goals driven by high-stakes testing. They point with frustration to grants that launch programs that are difficult to sustain once monies have run out.

Still, an atmosphere of hope prevails. Young people and educators across the State believe in the vision of caring and respectful schools. And they believe their efforts to create such a community will pay off.

Research That Informs This Guide

The strategies, tools, and processes presented in this Guide come from two sources:

- Traditional research on social and emotional learning, including the fields of bullying prevention, violence prevention, and character education
- Knowledge collected from the field through an action research model

The action research model is likely something you use all the time. We all learn from experience, and action research is an inquiry-based method of research that relies on:

- Self-reflection
- Reflection on one's social system to develop specific action plans

By asking educators across the State to reflect on what has, and what has not, been working in their bullying prevention efforts, we can offer you a practical knowledge base from which to design your own efforts.

How to Use This Guide

The tools and features presented in this guide are designed to lead you through a process of discovery. This Guide will help identify roadblocks to your success and plan strategies to overcome them. Examples of policies, activities, and other tools and stories from schools across the State are offered, along with guidelines for customizing these tools to meet your schools' needs. Throughout the text you will also find the following features:

Reflections: Questions for reflection are provided. They are meant to heighten your awareness and help your staff share their knowledge and insights about bullying. The refections can be used privately or as staff training activities.

Things to Think About: These sections include considerations relevant to fine-tuning and customizing your efforts and gathering support from key players in your school and wider community.

Delve Deeper: Resources are offered for further exploration of many topics. Many of these resources are URLs for web-based information free of charge.

School Spotlights: Real illustrations and insights shared by educators and sites across the State are interposed throughout the text.

By the Numbers: This feature links practice to research and provides hard data to support your efforts.

Home Connections: Included throughout are ideas for bridging the gap between home and school and boosting parental support of your efforts.

Chapter-by-Chapter Overview

Chapter 1 presents:

- Common bullying myths such as "it's all part of growing up," "being a target of bullying builds character," and "kids can work it out among themselves."
- The real cost of bullying to schools, young people, and society.
- What the growing body of research on bullying tell us about what it takes to prevent this unnecessary "rite of passage."
- Ways to address varying types of bullying, including harassment directed at gay, lesbian, bisexual, and transgender youth; sexual harassment; hate crimes; cyberbullying; and hazing.

Chapter 2 presents:

- Ingredients and tools for successful bullying prevention practice.
- Ways to create a caring school culture.

- Proven bullying prevention strategies.
- Discussion about how bullying prevention links to character education
- The legal obligations related to harassment
- Ways to tie together all of your prevention efforts
- Recommended bullying prevention programs and criteria for selecting a program.

Chapter 3 presents:

- Tools for classroom teachers to help young people develop the pro-social skills, including constructive discipline tips and classroom management techniques.

Chapter 4 presents:

- Effective intervention strategies: What should you do when you witness a bullying incident? How can teachers, administrators, and parents work with a target, bystander, and bully to leverage the teachable moment and repair damage before it gets out of hand.

Chapter 5 presents:

- Information for young people, including tools for students to explore the power dynamics of bullying at their school and ways become an ally to targets.

The Importance of Language

Throughout this guide the term **"target**" is used to describe those who are victims of bullying. The term "victim" can be problematic for those at risk for internalizing the victimization and seeing themselves as weak and ineffectual, so the term is avoided.

With other forms of violence, the term "survivor" is often used. However, the term survivor carries with it the assumption of distance from the act—something that cannot be assumed in the context of bullying. The word "target" is also problematic; it is a view through the eyes of the bully and does not give voice to the experience of the person being bullied. We have, however, chosen to use the word "target" for expediency and because no better alternative exists.

Similarly, we use the term "**bully**" for ease of reference. In the spirit of separating the person from the behavior, it's helpful in your own efforts to avoid such labels and refer to "bullies" as "perpetrators of bullying," and "victims" or "targets" as "people who have been bullied." This language is particularly important when addressing complex cyberbullying behaviors; given that the speed of the message and the invisibility of the bully can engage other participants, it is often difficult to determine the message's originator, and the message gains momentum when other people choose to respond.

It is most constructive to identify the behaviors of the participants and to avoid viewing the roles of bully, bystander, and target as fixed personality traits.

Throughout the Guide we use the term "**parents**" to refer to all legal guardians, family members, and significant adults in young people's lives.

A Word Before You Get Started

The real experts on bullying at your school are the students, your staff, and you. Take what we offer here, add your own wisdom and experience, and make it your own. At the heart of best practices in bullying prevention are authenticity, self-direction, and determination. As you refine your practice and learn what works at your site, find ways to share your experience with others—direct from the field.

This Guide was researched in 2002-03, and a rough draft completed in 2003. Following a loss of funding, the Guide was edited and prepared for publication by Don Gorton over the period 2005-07. While the Guide has been updated to reflect newly developed information that became available after the initial research and write-up, it is important to note that cyber-bullying has taken on larger and more troubling dimensions in the first decade of the 21st century. Educators, parents, and students alike should take notice of this phenomenon and ensure that anti-bullying practices respond to harassment effected over the Internet or by use of cellphone and other portable communication devices. Cyberbullying is specifically addressed at Chapter 1.

Chapter 1: Understanding Bullying

> "Live the questions now. Perhaps then, someday far in the future, you will gradually, without even noticing it, live your way into the answer."
>
> — **Rainer Maria Rilke**, *Letters to a Young Poet*.

Common Myths About Bullying

Myth #1: "Bullying is just a part of growing up."

Sadly, this observation holds true for most young people, and for many of the adults in young people's lives whose childhoods were marred by bullying. But it need not be true. In fact, one of the greatest obstacles to children's development of pro-social skills is the belief by important adults in their lives that a certain amount of abuse of young people from their peers is a normal fact of life.

Some adults even believe bullying can be beneficial—in toughening up children or helping them to learn to stand up for themselves—mistakenly thinking abuse somehow leads to the development of character and social skills. Research does not support this belief; in fact, it shows the opposite. Children who either witness or are subjected to physical and emotional abuse over time, without the caring intervention of adults, may perpetuate those behaviors in their dealings with others—in extreme cases leading to dramatic acts of violence such as those witnessed at Columbine High. These children also may turn their anger inward and manifest symptoms of depression, an inability to cope with life's challenges, and low self-esteem. In extreme cases, targets may resort to suicide.

Children who are targets often exhibit poor social skills, opening them up to further isolation and torment. Such isolation and taunting begin a downward spiral where a target's plummeting self-esteem and lack of social support deprive him or her of the means necessary to improve his or her social and emotional health.

By the Numbers

- **60**% of students said they agree bullying helps students become tougher.[8]
- **30–45%** felt bullying taught others about unacceptable group behavior.[9]

Reflection

Many of us are not consciously aware of how our beliefs about bullying and teasing affect our interactions with young people.

- When you were a child, what were the messages you received from adults in your life about bullying and teasing?
- In your work with young people, think back to a time when you did not intervene in a bullying or teasing incident that you now wish you had.
- To what do you attribute your lack of action?

- What would you like to say to that target now?
- What would you like to tell the bully now?

Myth #2: "Bullying affects a small number of kids"

Studies documented in *The Bullying Prevention Handbook* reveal 75 to 90 percent of adolescents report being bullied during their school years.[10]

While this figure alone is compelling, all students in a school climate where emotional safety is not assured suffer a diminished capacity to learn. [11] In his book *Emotional Intelligence*, Daniel Goleman discusses emotional hijacking—a state where we are flooded by our emotions when an event resonates with other painful emotional events in our past. Brain research shows that during moments of emotional flooding, we are unable to engage cognitively or to learn.[12] Further research presented by James Garbarino and Ellen deLara in their book *And Words Can Hurt Forever: How to protect adolescents from bullying, harassment, and emotional violence* shows the level of pain and humiliation felt by both targets and bystanders can be deep and long-lasting.[13]

In *The Bullying Prevention Handbook: A guide for principals, teachers, and counselors,* John Hoover and Ronald Oliver note that students in schools that don't effectively address bullying form negative views about school, school personnel, and even learning. These students then grow to be adults with similar feelings about school, pass those biases on to their children, and become more reluctant to get involved in their children's schooling.[14] It's a negative cycle affects future generations of students.

It's important to realize bullying does not merely affect individuals. Taunting, exclusion, and other acts of aggression contaminate the whole school environment. It's vital that prevention and intervention efforts be aimed not merely at the individual bullies and targets, but at the entire school culture.

Reflection

Think back to when you were in middle school

- Describe a time when you either witnessed or were part of a bullying incident (either as a target or bully).
- How did it make you feel?

By the Numbers

- **22%** of 4th–8th graders felt their academic difficulties were related to peer abuse.[15]

Myth #3: "Kids can work it out themselves or just tell an adult who will take care of it."

> "I really believe strongly that it's adults' responsibility, not the responsibility of the victim certainly, and not just of the student body, to deal with bullying. It's an adult responsibility."
>
> —**Dr. Susan Limber**, Bullying Expert, Clemson University[16]

The Maine Project Against Bullying found that students report 71 percent of the teachers or other adults in the classroom ignored bullying incidents.[17]

Much bullying happens outside of the ears and eyes of caring school personnel—on sidewalks on the way to and from school, in the schoolyard, on buses, in bathrooms, and on playing fields. All bullying prevention programs must find ways for adults to step up supervision and intervention (including training school personnel to identify and then effectively intervene in bullying), but only a small portion of the problem can be addressed solely by increased adult intervention. It is more critical to shift the culture of the school to a caring environment, one where students are less likely to taunt or isolate other students and where student bystanders intervene on behalf of targets.

For anti-bullying programming to work it must have the participation and investment of the entire school community. This is not to imply in any way that children are responsible for keeping a school safe—that responsibility rests on the shoulders of adults. But children need to be invested as partners in creating a caring culture.

Many adults assume children will not "tattle" on other children who bully, but research shows this is incorrect. Children who believe adults will intervene effectively on their behalf are willing to share critical information regarding bullying events. It's therefore critical that adults learn to effectively handle incidents of bullying—with targets, bullies, bystanders, and their families—in a way that maintains everyone's physical and emotional safety. (**See** Chapter 4 on interventions for more information.)

Myth #4: "Our schools are safe."

In many ways our schools are safer than most Americans think. A survey presented in *Youth Today* reported that 71 percent of Americans believe a shooting is likely in local schools, while in reality children have a 1 in 2,000,000 chance of being killed while at school.[18]

But ask any child if s/he feels safe at school and you are likely to hear the answer "no." Children feel at risk from all sorts of hurtful conduct—from peers and certain teachers. Even if they aren't actual targets of abusive conduct, children who witness the abuse of others fear they might be next.

Young people often go to great lengths to avoid school bathrooms, locker rooms, certain hallways, or the floor or domain of upper classman for fear of abuse. And our efforts to ensure children's safety—from the installation of metal detectors to disaster response drills—ironically have the opposite effect if they are not handled sensitively.

Children, like adults, often perceive the threat to their physical safety as greater than it is in actuality. Strikingly, a study by Garbarino and deLara revealed that children who were asked what made them feel most unsafe at school most commonly answered "teachers."[19]

While many of our prevention efforts seek to correct the children, it's clear that one important place to start is with the adults in the building. Any efforts to bully-proof our schools must also address both real and perceived threats to young people and their emotional and physical safety.

By The Numbers

- Bullying appears to be on the rise. A follow-up study of bullying by Dan Olweus in 2002 showed the percentage of victimized students **had increased by 50%** since 1983. Serious bullying (in both degree and frequency) was **up by 65%.**[20]
- Bullying begins in elementary school and **appears to peak in middle school**.[21]

Myth #5: "Most targets are kids who are overweight, odd looking, or have some sort of physical problem."

Research has established that overweight and special needs youth are indeed at higher risk for being targets of bullying.[22] But so are gifted children[23], and overweight youth are just as likely to be perpetrators of bullying as they are its victims. The physical characteristic which puts children most at risk is being physically smaller and weaker than their peers.[24] But the social dynamics of bullying transcend obvious physical differences between bully and target, and center on perceived power imbalance. Those who bully choose verbal harassment or violent behaviors that exploit existing systemic inequalities in our society, such as those relating to race, gender traits, biological sex, disabilities, sexual orientation, and economic disadvantage. (For more information on strategies for teachers in dealing with youth with special needs, see Chapter 3, page 96.)

By the Numbers

The number one reason adolescent boys and girls give for being targeted for abuse is "I just didn't fit in."[25]

A study in *School Psychology International* reported that 60 percent of students agree with the statement that targets of bullying "brought it on themselves"—even some targets felt that way.[26] The tendency in our culture to blame the victim has clearly been internalized by many children. For this reason, the focus should always be on the bullying behavior, not the presumed attributes of the people targeted. The most effective and long-lasting strategy to eliminate bullying is to create a school climate intolerant of harassment and disrespectful behavior. All students can learn to contribute to the school community in ways that widen their social support networks. And everyone can benefit from social learning that builds self-esteem and confidence, skills that will empower youth throughout their lives.

Reflection

Think about the variety of ways young people express themselves and develop unique opportunities for students to contribute to a positive school environment.

Myth #6: "Bullies have low self-esteem."

Studies by leading bullying researcher Dan Olweus show bullies are generally as popular and possess similar levels of self-esteem and intelligence as more well-adjusted young people.[27] While the prevalence of bullying peaks in middle schools, many researchers believe the tendencies to such aggression arise in early childhood and are then reinforced through the early grades. By the time bullies are in middle school, they have already established clear patterns of abuse.[28] Rewarded for their aggression by small clusters of peers and others (and often the victims themselves), many bullies have an inflated sense of their own power and worth.

The roots of bullying are complex, and research indicates a combination of factors are involved. While the temperament a child is born with is a risk factor, the majority of the contributing factors for bullying are related to socialization. Bullies are not born bullies—they learn bullying behavior. Many bullies learn to be aggressive from the way they are treated by bigger or more powerful people in their lives—usually their parents or other authority figures, but also peers.

Bullies tend to come from families characterized by what Olweus calls "too little love and care and too much freedom." These families' parenting is usually characterized by inconsistencies. Parenting that relies on freedom where there should be guidance, and physical punishment or violent outbursts where there should be consequences and calm instruction, leaves children confused, at risk for similar outbursts, and dependent on power assertion to get their needs met. Research shows children are born with the capacity for empathy, but erratic and unsympathetic parenting and the resulting anxious attachments to their caregivers can inhibit its development. Many bullies seem to show little concern for their victims, are unable to take the perspective of others, and lack the everyday filters of conscience that keep other young people from hurting others. Many bullies also tend to misinterpret social cues from other children, seeing the threat of aggression in neutral acts. A brush against someone in the hall can feel like a threat to a bully and therefore serve as a justification for his or her behavior, beginning a pattern of abuse and leading to a proclivity to blame the victim: "He had it coming to him." [29] Research reported the *Journal of Abnormal Child Psychology* suggested bullies are sometimes created by peer pressure that repeatedly reinforces their aggressive behaviors.[30]

Widening out from the immediate context of peers and family surrounding the bully are the cultural messages from wider society. Popular music, TV shows, movies, and video games often glorify violence and aggression and reinforce a bully's actions. Racism, sexism, ageism, classism, homophobia, and other institutionalized forms of oppression are also common themes in pop culture, and in turn are often part of the dynamic between bullies and their targets. Such power dynamics may arise at the most insidious and unconscious levels, making it difficult for adults and children to name and address what is really happening in many

incidents of bullying and harassment. (See "Is it a Hate Crime?" on page 20 for more information.)

Sometimes even otherwise well-behaved children engage in bullying behavior. Research shows this is more likely to happen when certain group dynamics are in place:

- Students have seen bullying modeled and rewarded.
- Students' sense of individual responsibility is decreased because other young people are also doing it. (That is, joining in with a group tends to ease each person's sense of guilt—spreading it across the group.)[31]

Reflection

"Environmental factors including the attitudes, beliefs, and actions of adults in schools can determine the extent to which bullying problems manifest themselves."

—**Dan Olweus**, bullying reseacher

Myth #7: "Once a bully, always a bully"

> "When I stopped, I felt bad, and I thought to myself, next time I've got to stop and think about what I'm doing." — **from a bully**

Research shows that without intervention, myth #7 is often a reality—bullies who are identified by around age eight are at risk of a lifetime of bullying[32]. But prevention and intervention efforts can make a difference.

Because bullies learn to be bullies, they can also learn alternative pro-social skills. Many bullies get locked into their behaviors by their own lack of skills and the expectations of others. They need help finding a way out. While it's true that in many cases bullies lack a sense of remorse for their actions, other bullies (and bystanders who join in on the abuse) express discomfort about their actions. Some bullies are actually seeking social connection through their actions, and underlying their behavior is the need for acceptance from peers and the approval of others. We can teach bullies alternate ways to meet these needs by:

- Intervening immediately with constructive discipline
- Creating opportunities for bullies to feel powerful in positive ways (e.g., making a difference in the life of others, protecting more vulnerable youth)
- Nurturing empathy
- Teaching pro-social skills (e.g., communication, expression of feelings, problem solving, nonviolent conflict resolution)

(**See** Chapter 4, "Interventions for Helping Bullies, Targets, and Their Families.")

Reflection

Think about the bullies in your school. What are the common characteristics among them? What social skills could you help them acquire? How can you help them acquire such skills?

Myth #8: "Boys will be boys"

Like all gender stereotypes, myths abound when it comes to who does the bullying in schools. When many people hear the term bullying, their first image is that of physical violence and intimidation by boys. But studies show girls are involved in bullying almost as often as boys. Girls are more likely to suffer from cyberbullying.[33] A study reported in *Educational Leadership* showed some differences—girls' bullying is more often related to social aggression such as exclusion and gossip and boys' to physical aggression[34]—but it's important that stereotypes about who bullies are be challenged whenever possible.

Our expectations for young people can be powerful self-fulfilling prophecies. Many schools ignore the more indirect forms of bullying girls engage in, instead creating policies that only address physical aggression and violence. But research shows indirect bullying can have effects just as devastating on their targets as more direct forms.[35]

Inherent to this myth is what William J. Pollack, M.D., calls "The Boy Code."[36] His book *Real Boys: Rescuing Our Sons from the Myth of Boyhood* explains that boys are socialized into a narrow range of behaviors that glorify aggression, violence, and toughness. Much of bullying and teasing in middle school centers on children's attempts to enforce the "Boy Code" among their peers. Boys whose behavior or appearance falls outside of this narrow definition of masculinity are mercilessly shamed.

Girls have their own narrow definition of acceptable behavior and shame to contend with for behavior or physical appearance outside the norm. For adolescents grappling with sexual and gender identities, teasing of this type can be particularly painful, creating a legacy of humiliation that is carried into adulthood. Psychologists believe it is these adults with a legacy of shame and unresolved issues who most strongly reinforce such stereotypes for young people.

By the Numbers

Researchers J. B. Kupersmidt and C. J. Patterson found that boys with low self-esteem who were not accepted by their peers were at greatest risk for bullying; and girls who were unpopular with their friends and were aggressive were most likely to bully.[37]

Delve Deeper

See *Odd Girl Out: The Hidden Culture of Aggression in Girls* by Rachel Simmons (Harcourt, 2002) and *Real Boys: Rescuing Our Sons from the Myths of Boyhood* by William Pollack (Random House, 1998) for more information about the impact of gender and gender stereotypes on bullying.

How Bullying Affects Young People

There are high costs for everyone involved in bullying. In schools where there is rampant bullying, a culture of shame and fear permeates.

Young people quickly learn that to be different or to speak up in defense of another opens them to the risk of being targeted. Some students have compared the feeling of being in such schools to walking on eggshells. They are ashamed of their own inability to act when faced with the humiliation of others. And they frequently voice their belief that adults in the building either "don't know what's going on" or "will do nothing to change it." Faced with such a lack of effective adult intervention, a sort of self-regulating system develops within the group: a system whereby young people maintain and police the prevailing norms and values themselves. Only the smallest percentage of students at the top of the social order benefit from this system. Rigid rules develop that dictate aspects such as dress, appearance, interests, and manner of speech. At the very least, a lack of adult intervention results in what is called "learned helplessness." Students describe themselves as resigned to the prevailing adolescent social pressures. The difficulty is that they do not always possess the skills or resources needed to be resilient.

The line between target and bully blurs as the cycle of shame is perpetuated. A 2002 *Washington Post* article stated that 30 percent of students reported being somehow involved in bullying, and 6 percent of students reported they were both a target and a bully.[38] Researchers are often most worried about the last population—one that may be at risk for violent outbursts such as those evidenced in high-profile school shootings. It isn't known which comes first, being a target or being a bully; but many researchers concur that these bullies are most likely passing along behaviors they experience from important adults in their lives or from peers.

The Effect on Targets

- Approximately 160,000 school children stay home each day out of fear, often without telling their parents why.[39]
- Targets of bullying experience higher than normal levels of insecurity, anxiety, depression, low self-esteem, and other physical and mental symptoms.[40]
- The stress brought on by chronic bullying leads to a diminished ability to learn.[41]
- In extreme cases, targets can resort to violence and suicide.

The Effect on Bystanders

- 75% of students report feeling ashamed when they witness bullying.[42]
- 48% of students agreed that coming to the aid of a victim reduces their social standing.[43]
- Being exposed to violence and maltreatment is associated with "increased depression, anxiety, anger, post-traumatic stress, alcohol use, and low grades."[44]

The Effect on Bullies

- Adults who bullied as children have higher rates of substance abuse (including alcohol, drugs, and cigarettes), domestic violence, and other violent crime.[45]
- Bullies identified by age 8 are six times more likely to be convicted of a crime by the time they reach age 24 and five times more likely to end up with a serious criminal record by age 30.[46]
- Bullies achieve less academically, occupationally, and personally.[47]
- Bullies can be quite popular in middle school, but by the time they get to high school bullies are less popular. In adulthood, they tend to have few friends and appear to perpetuate the cycle of violence in their children by rewarding aggression.[48]
- Bullies have more negative attitudes about school and tend to pass those attitudes on to their children.[49]
- One study showed bullies have higher rates of suicide than their targets.[50]

How Do You Know It's Bullying?

Barbara Coloroso, in her book *The Bully, the Bullied, and the Bystander*, identifies four markers for bullying:

- Imbalance of power between target and bully
- Intent to harm
- Threat of further aggression
- Creation of an atmosphere of terror.[51]

Dan Olweus defines bullying as repeated exposure, over time, to negative actions from one or more other students. Negative actions can include physical, verbal, or indirect actions that are intended to inflict injury or discomfort upon another including hitting, intimidation, taunting, exclusion, or spreading rumors.

While one-time incidents of taunting, exclusion, or aggression between young people who are peers tear at the fabric of your community, they do not in themselves constitute bullying. As you launch your bullying prevention efforts, it's helpful to explore what constitutes bullying with administrators, students, parents, and all involved constituents so everyone has a common definition.

Is it a Hate Crime?

Hate crime is a criminal offense committed against persons or property, motivated, in whole or in part, by an offender's bias against an individual's or a group's race, religion, ethnic/national origin, sex, age, disability, or sexual orientation.[52] Law enforcement agencies, reporting groups, government agencies, and other victim assistance organizations use a number of guidelines to determine whether hate motive is involved in an incident or attack; these are referred to as "bias indicators." Below are some of the more common factors to consider.

Massachusetts law states: "In some instances, one bias indicator may be sufficient to support an inference that a crime was motivated by bias or bigotry (*e.g.,* bias-related epithets or markings). In other cases, more than one bias indicator may be necessary to warrant such an inference."[53]

Things to Think About

- Were the offender and victim of different racial or religious groups, ethnic/national origin, or sexual orientation?
- Did the victim appear to be a member of a particular race, religion, ethnic/national origin, or sexual orientation, even though s/he in fact is not part of that group?
- Were there bias-related comments, written statements, or gestures made by the offender?
- Were bias-related drawings, markings, symbols, or graffiti left at the incident scene?
- Were certain objects, items, or things that represent bias used or left behind at the incident scene (e.g., hoods, Confederate flags, burning crosses, swastikas)?
- Has the offender been previously involved in similar hate incidents, or is the offender a member of a hate group?
- Does the perpetrator have an understanding of the incident's impact on the victim, the victim's family, or the community?
- Did the victim's family recently move into the area? Is the victim's family acquainted with their neighbors and local community groups?
- Was the victim a member of a race, religion, ethnic/national origin, or sexual orientation that is overwhelmingly smaller than other groups where the victim lives or the incident took place? This factor may lose some significance with the passage of time (i.e., it is the most significant when the victim first moves into the neighborhood, becoming less significant as time passes without incident).
- Was the victim visiting a neighborhood where previous hate crimes have been committed against other people of his or her race, religion, ethnic/national origin, or sexual orientation?
- Was the victim engaged in past or current activities promoting his or her race, religion, ethnic/national origin, or sexual orientation?
- Although the victim may not be of the targeted races, religions, ethnic/national origins, or sexual orientation, was s/he a member of an advocacy group supporting the precepts of the victim's group?
- Did the incident coincide with a holiday relating to, or a day of particular significance to, a race, religion, ethnic/national origin, or sexual orientation?
- Have there been other incidents occurring in the same locality, at or about the same time, and have the victims all been of the same race, religion, ethnic/national origin, or sexual orientation?

- Has the victim or victim's community been subjected to repeated attacks of a similar nature?
- Does a substantial portion of the community where the incident occurred perceive the incident was motivated by bias?
- What was the manner and means of attack? For example, does the color of paint, the use of particular words or the spelling of words, or the use of symbols or signs suggest a possible hate motive?
- Does the incident indicate possible involvement by an organized group? For example:
  - ⇒ Has a specific hate group claimed responsibility for the crime?
  - ⇒ Is there printed literature involved?
  - ⇒ Does the name of the group in the literature suggest hate motivation?
  - ⇒ Does the name of the group suggest a "copy-cat" syndrome?
  - ⇒ Is there documented or suspected organized group activity in the area?
  - ⇒ Was this group actually involved, or was this a fear or scare tactic?
  - ⇒ Are there historical animosities existing between groups comprising the victim's and the offender's race, religion, ethnic/national origin, or sexual orientation?
- Is there an ongoing neighborhood problem that may have initiated or contributed to the incident? Could the incident be retribution for some conflict with a group in the community, or a segment of the population?
- Has there been prior or recent news coverage of incidents of a similar nature?[54]

By the Numbers

- **24%** of students reported witnessing race-related bullying now and then or often.[55]
- **13%** of students aged 12–18 have been called a derogatory word related to race, ethnicity, religion, disability, sex, or sexual orientation within a period of 6 months.[56]
- **36%** of students aged 12–18 have seen hate-related graffiti at school.[57]
- The **majority** of students ages 7–13 rejected the view that it was okay to exclude peers from an activity because of their biological sex or race.[58]

Delve Deeper

For more information about hate crimes, see **www.adl.org/combating_hate**.

The Time is Ripe: Adolescence and Bullying

While all middle school and high school teachers have expertise about adolescents, it's useful to think about some of the characteristics of both males and females in this age group before you begin to tailor your prevention program. The following is an excellent activity for a staff meeting.

Adolescents Are...

	Male	Female
What are they like?		
What is important to them?		
What do they want?		
What do they need?		
What is happening with them developmentally?		

Risks and Opportunities Related to Adolescence

Adolescents are constantly and quickly changing, and normal developmental shifts can leave young people at particular risk for bullying. Parents, adults involved in schools and sports programs, and other caring adults may unknowingly exacerbate the problem by assuming adolescents need less support and guidance than they actually do. Adolescents often become reluctant to ask for help, but it doesn't mean they no longer need it.

Parents and other caring adults may misinterpret a young person's withdrawal from them and feel they are giving a young person the space s/he needs. And while a certain amount of withdrawal from the world of adults and into the world of their peers is an important part of adolescence, depending on the severity of the withdrawal, it can actually be a sign that everything is <u>not</u> okay. Adolescence can be confusing time for everyone.

Fortunately, in addition to risks, adolescence also presents educators and parents with opportunities for nurturing pro-social behaviors. The degree to which teaching efforts are developmentally-tailored will greatly determine whether or not particular characteristics of adolescence can be leveraged as opportunities, rather than risks. The guidance of caring adults in an adolescent's life can make an enormous difference.

Remember, most adolescents are:

- Preoccupied with group conformity and peer acceptance
- Acutely aware of differences
- Struggling with issues of dependence and independence
- Socially curious
- Focused on sorting out right from wrong (mostly through testing their and others' values)
- Self-conscious about the physical changes in their body (which to varying degrees can greatly affect their self-esteem)
- Potentially great leaders and problem solvers

Characteristic	Opportunity	Risk
Moving from concrete to abstract thinking	Can think more clearly about abstractions such as civil liberties, democracy, social justice, fairness, honesty; are able to take the perspective of others	Development and learning differ from child to child, and misunderstandings are common
Moving from authoritarian values to democratic tolerances	Ripe for political thought; able to construct group agreements that represent rights and responsibilities of community living	Some children will make bad choices if left to their own devices.
Focused on sorting out right from wrong	Open to examining their values; focused on justice and fairness	May be susceptible to unhealthy influences
Moving from individual focus to community focus; struggling with issues of dependence and independence	Beginning to put aside own needs for the good of the group; are responsive to adults' respect for their growing autonomy and abilities	Can be very influenced by their peers to join in behaviors they might not really condone; will resist authoritarian means of controlling their behavior
Becoming more independent and able to problem solve	Able to contribute meaningfully to a community, serve as leaders, and be co-creators of a caring community	Adults may underestimate young people's need for guidance and support

Maturing physically at different rates (may be awkward, different size from their peers, or more sexually developed)	May be used as an opportunity to nurture appreciation for differences	Sexual harassment; self-conscious about their bodies; greater potential for stronger adolescents to abuse those who are weaker
Preoccupied with fitting in	Can be used as an opportunity to explore issues of sameness and difference	Can be non-tolerant of differences; hate crimes; prejudices and discriminatory behaviors
Defining self in relationship to peers, rather than adults; needy for peer approval	Can think for themselves; can begin to act from their own values and beliefs	Easily influenced by peers; can be threatening to be seen as different in any way; any rejection by peers can lower self-esteem

Gender Oppression and Adolescent Girls

Researchers describe a phase around age of 11 or 12 when formerly self-confident and forthright girls start censoring their thoughts, insights, and feelings. Sexism and gender oppression in society affect girls and women, but they can be particularly challenging during early adolescence.

It is important to support girls as they deal with sexism, heterosexism, and other sources of stress by encouraging them to voice their opinions, take leadership roles, and express their feelings. It is equally important to interrupt any power imbalances in the classroom that might spill over from power imbalances inherent in society. If unchecked, power imbalances can be exploited and give rise to verbal and physical bullying. Sexual harassment, for example, is a form of bullying based on gender oppression. Staff training is crucial in creating and maintaining a classroom that is welcoming and conducive to learning for all students.

Things to Think About

- Provide opportunities for school personnel to explore gender assumptions and stereotypes and how they affect interactions with youth.
- Encourage students to understand gender stereotyping and offer alternative visions.
- Help students decode the "mask of masculinity" and the "mask of femininity." William Pollock states in his book *Real Boys* that the mask of masculinity is when a boy/man hides his genuine self to conform to society's expectations of males, such being unemotional or acting tough. The mask of femininity refers a girl/woman hiding her true self to conform to society's expectations of females.
- Include diverse role models in history, science, mathematics, and the arts so students recognize the contributions of women, people of color, people who are gay, lesbian, bisexual or transgender, and people with disabilities.
- Provide opportunities for youth of different backgrounds to work together on group projects and rotate leadership roles.

Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth Issues

As early as elementary school most children start hearing the phrase "that's so gay" used as a disparaging remark, though these young students may not even know what the term gay means. Students in middle school reported remarks about someone's presumed homosexuality or gender identity as one of the most common forms of verbal harassment. An aggressor's perception that a target is violating stereotypical gender roles is a "bias indicator" suggestive of a gender identity bias motive for harassment or violence.

Many schools have Gay Straight Alliances (GSAs)—supportive clubs that create a safer climate for all students. Research has shown less harassment occurs in schools that have GSAs. Schools have a legal obligation to ensure the environment is safe and supportive for all young people. Staff and student training can reduce homophobia and heterosexism in the school environment and make it easier for young LGBT students to develop a positive identity.

By the Numbers

- Youth who are LGBT are **five times more likely** to skip school because they are feeling unsafe on route to, or at, school.[59]
- **6%** of all high school students describe themselves as gay, lesbian, or bisexual and/or report same-sex contact.[60]
- **18%** of LGBT students skip school at least once a month.[61]
- **97%** of all high school students hear anti-gay slurs daily. (The average student hears 25 such slurs a day.) Verbal harassment affects the health and safety of LGBT students.
- When compared to heterosexual peers, LGBT youth are **more than five times more likely** to have attempted suicide.
- **28%** of LGBT students have been threatened or injured with a weapon over the last year (four times the average for non-LGBT youth).
- **40%** of LGBT students have never seen anyone intervening in an instance of anti-gay harassment at school.

Verbal and physical violence aimed at LGBT youth creates an unsafe environment for all students and exacerbates power imbalances in society. All such bullying needs to be addressed promptly and consistently. In Massachusetts, anti-gay and gender-related harassment are violations of students' civil rights.[62] School discipline and behavior codes must include "sexual orientation" and "gender" as protected categories. (See "Legal Issues Related to Bullying" on page 62 in Chapter 2.)

Teachers and other staff need training: to learn about the LGBT community; to understand the legal rights of LGBT students and their peers; and to develop understanding for the unique difficulties sexual minority students face.

Things to Think About

Together with parents, students, and your school faculty and personnel, you can develop new approaches that create a safer environment for all youth. Your school can provide training for staff on interventions that eliminate harassment and improve awareness of students' legal rights. Some approaches to preventing anti-gay harassment include:

- Challenge anti-gay harassment consistently—don't let name-calling go uncorrected.
- Include examples of LGBT people in discussions of contemporary life.
- Support LGBT cultural activities and celebrations; post events on school bulletin boards.
- Include LGBT and heterosexual examples when discussing emotional, social, and economic issues in relationships or family life.
- Focus intervention on creating safety and equality in the school. The actual sexual orientation and/or gender identity of the bully and the person being bullied are irrelevant.
- Recognize that LGBT youth, like other minorities, may feel isolated in the school and have no one to turn to who understands their experience.
- Support the establishment of gay-straight alliances (GSAs).
- Invite members of Parents, Families and Friends of Lesbians and Gays (PFLAG) to your school to speak to students.
- Support gay and lesbian teachers who are open about their identity.
- Make events such as high school dances more inclusive by allowing students to invite a guest regardless of their sexual or gender orientation or expression.

Resources for LGBT Youth and Educators

The Gay, Lesbian, Bisexual and Transgender Youth Support Project (GLYS Project)

Internet: www.hcsm.org/glys.htm

Phone: 1-800-530-2770

The Gay Lesbian Straight Education Network (GLSEN)

Internet: www.glsenboston.org

Phone: (617) 536-9669

Greater Boston Parents, Families and Friends of Lesbians and Gays (PFLAG)

Internet: www.gbpflag.org

Phone: 781-891-5966

GLAD (Gay and Lesbian Advocates and Defenders)

Internet: www.glad.org/rights/school.shtml – offers expert legal information about the rights of gay, lesbian, bisexual and transgender students

Legal hotline: 1-800-455-GLAD

Email: gladlaw@glad.org.

Flirting or Hurting: Sexual Harassment at School[63]

"I've always said, not every bully is a sexual harasser, but every sexual harasser is a bully."— **Sylvia Cedilla**, expert on sexual harassment[64]

Many teachers report that the most common type of verbal abuse they hear, even from younger children, consists of sexually graphic or derogatory language. This behavior can escalate in middle school, where physical changes and emerging issues of gender and sexual identity can make students particularly vulnerable to such comments. Physical sexual harassment is also rampant in our nation's schools, and can lead to serious physical and emotional harm.

The American Association of University Women has defined sexual harassment as "unwanted and unwelcome sexual behavior that interferes with your life. Sexual harassment is not behaviors that you like or want (for example wanted kissing, touching, or flirting)."[65] Sexual harassment is illegal under Title IX of the Education Amendments of 1972, which provides that no person, on the basis of sex, can be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

For a comprehensive guide about your responsibilities as a school official, see *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* published by the Department of Education's Office for Civil Rights, available for download at **www.ed.gov/offices/OCR/archives/shguide/index.html.**

By the Numbers

- **40%** of 5th–8th graders say they have experienced sexual harassment by their peers.[66]
- **81%** of teens say they had been harassed during school time.
- **38%** said teachers and other school employees have sexually harassed them.[67]

Things to Think About

- Develop and publicize a sexual harassment policy that clearly states sexual harassment will not be tolerated and that explains what types of conduct will be considered sexual harassment—mention same-sex sexual harassment.

- Develop and publicize a specific grievance procedure for resolving complaints of sexual harassment.
- Develop methods to inform new administrators, teachers, guidance counselors, staff, and students of the school's sexual harassment policy and grievance procedure.
- Conduct periodic sexual harassment awareness training for all school staff, including administrators, teachers, and guidance counselors.
- Establish discussion groups where students can talk about what sexual harassment is and how to respond to it in a school setting.
- Survey students to find out whether sexual harassment is occurring at the school.
- Conduct periodic sexual harassment awareness training for parents and teachers.
- Work together with parents and students to develop and implement age-appropriate, effective measures for addressing sexual harassment.[68]
- Address all reports of sexual harassment immediately and involve law enforcement, when appropriate.

Cyberbullying

As a school professional or parent, you already know Internet and cell phone use is pervasive among youth. New technologies have revolutionized communication and information sharing, and at the same time have created new opportunities for bullying and harassment. Cyberbullying may seem like the same old behavior using a different means, but there are several unique differences in how the terms **bully**, **bystander**, and **target** are defined. First, the "bully" can be the originator of an offensive text message—someone invisible and not limited to a geographical context. Recipients of a message could be considered "bystanders" if they do not send the message to others or "bullies" if they forward the message onward. The "target" of the message may or may not receive the message directly.

Cyberbullying has been defined by the Center for Safe and Responsible Internet Use to mean "being cruel to others by sending or posting harmful material using the Internet or a cell phone."[69] It can take various forms:

- **Flaming**—online verbal attacks or fights via electronic messages, (e.g., in chat rooms) and using hostile and vulgar language
- **Harassment**—repeated messages of an offensive or derogatory nature directed to a target
- **Cyberstalking**—repeated messages of an intimidating character that make a person feel afraid for his or her physical safety
- **Denigration**—online "put-downs," including sending or posting hurtful gossip or rumors to cause the target embarrassment
- **Impersonation**—using someone's e-mail account to send out messages, supposedly from the accountholder, that reflect badly on that person and may cause trouble, shame, or embarrassment

- **Outing and Trickery**—disclosure of someone's private information online, sending or posting embarrassing images, or deceptions leading another person to reveal personal details about him or herself
- **Exclusion**—deliberately keeping someone out of an online group such as a buddy list or game[70]

Cyberthreats are online communications that pose a risk of physical danger to someone. They can be simple threats made against a target electronically, or distressing material posted by someone online that suggests s/he may be at risk for perpetrating violence against him or herself or others. Cyberbullying and cyberthreats can appear in various contexts—a personal web page, a blog, an email or instant message, a text or image message via cellphone, and chat room discussions. The cyberbully can be someone the target knows or a complete stranger. Cyberbullying can be anonymous, can draw in unknown others, and can go on around the clock—all day, every day. Additionally, cyberbullying appears to be on the rise. In 2000, 6% of internet users ages 10-17 said they had been subjected to online harassment; by 2005, the percentage had risen to 9%--an increase of 50%.[71]

Most perpetrators of cyberbullying are high school teens and middle school students. Because much of the content of cyberbullying is sexually graphic, this activity can also be sexual harassment. Failed relationships or fights within a relationship can be fertile ground for cyberbullying. For example, retaliatory disclosure of embarrassing personal information or images can follow the demise of a relationship. A cyberbully can also send seemingly random, abusive language and images or gather more personal information and images about the "target."

The anonymous nature of the Internet, combined with the ability to reach mass audiences, is a potent tool for the bully. Language can be especially vicious and inflammatory because the perpetrator feels less personally responsibility for what is written online. Bystanders, who are also anonymous, might feel less social pressure to intervene, particularly if they encounter cyberbullying in a chat room or in a similar context. Moreover, hateful comments online can be broadcast around the world. Instead of a few people overhearing the abuse, now hundreds or thousands might. In addition, because 90 percent of youth receive their email at home, a cyberbully has in effect reached his or her tentacles into a target's home. Now there is nowhere the target can go and not feel at risk for bullying.

Like many types of harassment, cyberbullying is usually not reported. Some teens may not connect cyberbullying with school, or they may fear their Internet and cellphone use will be restricted. Most schools have anti-harassment policies and provisions for addressing this form of student abuse. Here are a few suggestions for addressing cyberbullies.

Things to Think About

- Include cyberbullying in your general discussions with students, staff, and parents about bullying prevention
- Include protocols for reporting and addressing cyberbullying and create anti-harassment policies.
- Recommend that all emails and electronic communications of harassment be saved.

- Educate bystanders about cyberbullying in chat room conversations and how best to intervene.
- Educate parents about how to block certain email addresses from instant messaging and chat and how to report complaints to the ISP of the bully.
- If the harassment continues, the target may need to change his or her email address.
- If threats are violent or sexual in nature, parents should contact the local police, and report it to CyberTipline**:** **www.missingkids.com/cybertip** or 1-800-843-5678.
- Go to **www.netsmartz.org** for extensive information and resources for adults concerned about the health and safety of young Internet users.

Hazing: The "Wrongs" of Passage

Forms of initiation that rely on humiliation and other types of abuse—referred to as hazing––are a form of bullying. While hazing is more prevalent in high schools, middle schools also report hazing. In Massachusetts, hazing is a crime.[72] Student groups at secondary institutions must be given a copy of sections 17 to 19 of Chapter 269 of the General Laws, and those groups must give a copy of the law to members of, or applicants to, their group.

The general bullying prevention strategies discussed in this guide will help with hazing prevention. Experts like Professor Richard Signal of the County College of Morris, NJ also recommend a few other ways to specifically address hazing. See http://www.guidancechannel.com/default.aspx?index=1366&cat=1

School Spotlight: North Brookfield

North Brookfield Middle–High School has as part of its hazing policy the complete text of G.L. c. 269, §§ 17-19.

(**See** **www.nbschools.org/hs/handbook/stu_handbook8.html#code.**)

Delve Deeper

Researchers have looked at hazing and how to stop it. For more information, visit **www.alfred.edu/hs_hazing/docs/hazing__study.pdf**

By the Numbers

- **48%** of high school students report having been subjected to hazing, according to the Alfred University study available at **www.alfred.edu/hs_hazing/docs/hazing__study.pdf**.

Things to Think About

- Help meet students' need for initiation rites in healthy ways. Offer ceremonies, mentoring programs, and other ways to welcome young people into a new school, onto a team, or into a group or activity.
- Be sure to have adult supervision at all group activities.
- Help educate young people about what hazing is and why it is wrong: Just because it's a tradition doesn't mean it's right.
- Include hazing in your discussions of bullying and in any written student agreements.
- Ask faculty supervisors of all activities to discuss hazing with their groups and to be on the lookout for hazing behaviors.

Reflection

- What traditions do we have at our school to mark rites of passage?
- What positive traditions could we start?

Chapter 2: Bullying Prevention Practice

> "Research indicates that creating a supportive school climate is the most important step in preventing harassment. A school can have policies and procedures, but these alone will not prevent harassment."
>
> —a statement endorsed by the **National School Boards Association**[73]

Keys to Bullying Prevention

Research shows the best bullying prevention efforts are comprehensive in nature and address changing the culture of a school. Schools where bullying is less likely to happen and, when it does, more likely to be reported and corrected, are schools that promote caring, compassion, and a sense of responsibility among students and adults.

Changing a school's culture is systemic in nature. Rather than trying to "fix" individual students, best practices in bullying prevention span the school community, involve all adults and students in the building, and reach beyond the school setting into the wider community. While individual interventions with targets, bystanders, and bullies are still necessary, this chapter focuses on prevention. (**See** Chapter 4 for more information about intervening in bullying.)

This chapter's aim is to give administrators the tools and habits they need to change the culture of their school through:

- **Ingredients for Success:** including frameworks for what works both school-wide and at the individual level.
- **Tools at the Ready:** including tools and strategies to infuse into your practice.

Through reflection on your community and your needs, you can customize prevention efforts and then refine your practice as you learn from your efforts. By using a process that relies on reflection and dialogue, you will facilitate the individual commitments necessary to create and sustain progress on the difficult path to change.

Just as we might use a whisk to combine eggs, butter, and flour to make a cake, the tools presented here are to be used with the ingredients for success to create the school and classroom you and your staff envision.

Some schools may prefer to use an established bullying prevention program; there are many from which to choose. Whether or not you intend to employ an established bullying prevention program, these ingredients and tools will help you successfully implement any program and make it your own. Included in this chapter are examples of successful bullying prevention programs and suggestions for choosing a program. No single recipe for success exists, but the suggestions here will help you create a dynamic and ever-evolving community.

This chapter further looks at how bullying prevention efforts relate to character education and offers advice to tie together all your prevention efforts to optimize resources and effectiveness.

Tip: Start Early!

Coordinate your bullying prevention efforts across all schools in your district, beginning with the youngest students. As mentioned earlier, research shows that when a child reaches age 8, aggressive tendencies may already be firmly in place. The earlier you begin bullying prevention efforts the better.

Ingredients for School-wide Success

Essentials for Principals: Creating Emotional and Physical Security in Schools, a study from the National Association of Elementary School Principals (2002), co-authored by the Educational Research Service, outlines some of the ingredients common to successful anti-bullying and violence prevention programs. While many of the "ingredients" apply to all prevention efforts and good teaching, it is the combination of ingredients that helps lead to successful programming.

Ingredients for Success	Examples
Activities fostering school norms against violence, aggression, and bullying	▪ Developing clear policies and procedures addressing bullying and harassment ▪ Using consistent, fair, and non-punitive consequences for violations of policies ▪ Reaching agreement on group policies with students (both classroom and school-wide) ▪ Posting school-wide rules in prominent places and places where bullying is identified as most common. ▪ Using a suggestion box or other anonymous instrument for reporting incidents ▪ Positively reinforcing pro-social behavior (prominently posting photos or testimonials of positive stories)
Comprehensive Approach (family, peer, media, and community)	▪ Developing student public service announcements (PSAs) for local cable access that discourage bullying ▪ Encouraging participation of local politicians in school events ▪ Discussing how widely to spread bullying prevention efforts (e.g., at sporting events) ▪ Placing articles in news media promoting prevention efforts ▪ Developing community/school partnerships such as in-school DARE officers or community policing models

	▪ Partnering with parents to identify solutions; providing training and information to families about how to help targets and how to help bullies ▪ Including parents, family members, and community members on task forces ▪ Holding a whole community kick-off and follow-up events ▪ Sharing information about the problem and solutions that are working with key personnel in your community ▪ Giving concrete examples to community members about how they can help develop protective factors in children ▪ Aligning other prevention efforts with your bullying prevention plans (**See** "Integrating Prevention Efforts" on page 35 for more information)
Physical and Administrative Changes to promote positive school climate.	▪ Having school personnel meet buses every day ▪ Changing the layout of your schoolyard to increase supervision by adults ▪ Increasing lunch room supervision ▪ Improving how halls are monitored or staggering class times to reduce congestion ▪ Improving lighting in dark areas of the school ▪ Hiring or designating an administrator to head up the bullying prevention efforts ▪ Clarifying discipline code related to bullying/harassment ▪ Creating positive school-wide rituals and rites of passage ▪ Focusing on community building across students and staff
A minimum of 10–20 classroom sessions during first year; and 5–10 booster sessions in 2 succeeding years	▪ Using an established research-based bullying prevention curriculum ▪ Aligning bullying prevention curricula to school standards ▪ Infusing skill lesson topics into standard subject areas such as literature, government, and history ▪ Sustaining efforts beginning in early grades and throughout adolescence

Skills Training based on sound theoretical underpinnings such as **Social Learning Theory**	▪ Training of teachers, families, and all school personnel ▪ Sustaining technical support of faculty, staff, and families through coaching, peer mentoring, and other intensive and ongoing relationships ▪ Training students in anger management, conflict resolution, perspective taking, active listening, "I"-messages, hate crimes, prejudice, racism, sexual harassment, and the role of bystanders
Interactive Pro-social Teaching	▪ Employing group work, cooperative learning, discussions, and role plays for modeling of pro-social skills
Developmentally Tailored	▪ Being sensitive to risks and opportunities of adolescence
Culturally Sensitive Material	▪ Having sensitivity to different cultures and needs of families when planning events and home/school partnerships ▪ Using curricula that look at issues of institutionalized oppression and "isms," and that encourages appreciation of differences ▪ Employing inclusive classroom practice (e.g., giving a voice to all students; using pedagogy that appeals to different cultures, learning styles, and intelligences) ▪ Training teachers to adapt curricula to their population

What is Social Learning Theory?

According to social learning theory, understanding behavior requires consideration of both the individual (his or her life history of learning and experiences) and their environment (the stimuli the person is responding to). Social learning theory and associated research hold that if one changes the way a person thinks, or changes the environment s/he is responding to, behavior will change.[74]

Reflection

Communities may arise whether intended or not. The challenge is to intentionally create the kind of community that promotes safe and healthy values. Reflect with your staff about the core values that inform their vision of education:

- What do they feel are the most important things for students to learn during their time at school?

- What skills, understanding, and behaviors would they like the young people in your school to have?
- How these values might be reflected in your "common-unity"?

For example, if one school community's value is "respect for others," what rules or expectations might all participants agree to uphold? Would teasing be tolerated? How would you define teasing? How might you incorporate these expectations into your school's daily routine?

Tip

Have students identify the core values of your school using their own words. Their thoughts can later become the basis for fashioning group agreements about what constitutes "acceptable behavior."

More Ingredients for Success: Developing Student Assets

> "Destructive behaviors develop in part from a complex web of familial, economic, and cultural circumstances. These factors are part of the fabric of life and difficult to attack. Yet strategies that help children develop the resilience to cope adaptively with modern-day stresses can be effective, and it is there schools need to focus their efforts."
>
> **— Collaborative for the Advancement of Social and Emotional Learning**[75]

What are the building blocks for developing caring and responsible young people? Research shows that even populations at-risk for violence and other behavior or health problems can be greatly helped by enhancing protective factors. The Search Institute, at **www.search-institute.org,** has outlined 40 research-based assets as playing a potential role in healthy youth development. Both internal and external assets have been identified and indicate that all levels of relationships - with peers, family, school, and the wider community - are significant in the positive development of young people.

EXTERNAL ASSETS: Support

- **Family support**: A young person's family life provides high levels of love and support.
- **Positive family communication**: A young person and his or her parent(s) communicate positively, and the young person is willing to seek advice and counsel from parent(s).
- **Other adult relationships**: A young person receives support from three or more non-parent adults.
- **Caring neighborhood**: A young person experiences caring neighbors.
- **Caring school climate**: School provides a caring, encouraging environment.
- **Parental involvement in schooling**: Parent(s) are actively involved in helping a young person succeed in school.

EXTERNAL ASSETS: Empowerment

- **Community values youth**: A young person perceives that adults in the community value youth.
- **Youth as resources**: A young person is given useful roles in the community.
- **Service to others:** A young person serves in the community 1 hour or more per week.
- **Safety**: A young person feels safe at home, at school, and in the neighborhood.

EXTERNAL ASSETS: Boundaries and Expectations

- **Family boundaries**: Family has clear rules and consequences and monitors a young person's whereabouts.
- **School boundaries**: School provides clear rules and consequences and monitors students' whereabouts.
- **Neighborhood boundaries**: Neighbors take responsibility for monitoring young people's behavior.
- **Adult role models**: Parent(s) and other adults model positive, responsible behavior.
- **Positive peer influence**: A young person's best friends model responsible behavior.
- **High expectations**: Both parent(s) and teachers encourage the young person to do their best.

EXTERNAL ASSETS: Constructive Use of Time

- **Creative activities**: A young person spends 3 or more hours per week in lessons or practice in music, theater, or other arts.
- **Youth programs**: A young person spends 3 or more hours per week in sports, clubs, or organizations at school and/or in community organizations.
- **Religious community**: A young person spends 1 hour or more per week in activities in a religious institution.
- **Time at home**: A young person is out with friends "with nothing special to do" two or fewer nights per week.

INTERNAL ASSETS: Commitment to Learning

- **Achievement motivation**: A young person is motivated to do well in school.
- **School engagement**: A young person is actively engaged in learning.
- **Homework**: A young person reports doing at least 1 hour of homework every school day.
- **Bonding to school**: A young person cares about her or his school.
- **Reading for pleasure**: A young person reads for pleasure 3 or more hours per week.

INTERNAL ASSETS: Positive Values

- **Caring**: A young person places high value on helping other people.
- **Equality and social justice**: A young person places high value on promoting equality and reducing hunger and poverty.
- **Integrity**: A young person acts on convictions and stands up for her or his beliefs.
- **Honesty**: A young person tells the truth, even when it is not easy.
- **Responsibility**: A young person accepts and takes personal responsibility.
- **Restraint**: A young person believes it is important not to be sexually active or to use alcohol or other drugs.

INTERNAL ASSETS: Social Competencies

- **Planning and decision making**: A young person knows how to plan ahead and make choices.
- **Interpersonal competence**: A young person has empathy, sensitivity, and friendship skills.
- **Cultural competence**: A young person has knowledge of and comfort with people of different cultural, racial, and ethnic groups.
- **Resistance skills**: A young person can resist negative peer pressure and dangerous situations.
- **Peaceful conflict resolution**: A young person seeks to resolve conflict nonviolently.

INTERNAL ASSETS: Positive Identity

- **Personal power**: A young person feels s/he has control over "things that happen to me."
- **Self-esteem**: A young person reports having a high self-esteem.
- **Sense of purpose**: A young person reports that "my life has a purpose."
- Positive view of personal future: **A young person is optimistic about her or his personal future.**

Supporting Assets through School Practice

With your faculty and staff, brainstorm some of the ways you might improve your school's policies or practices to support the development of the listed external and internal assets. Consider each asset individually or assign types of assets to a task force to create recommendations.

Developing Youth Assets at School

Asset Category	Asset Name	School Policy/Practice to Support Asset

It Takes a Village: Widening the Circle

Central to the developmental assets is the notion that the whole community has a stake in a child's upbringing. The influence of adults in all aspects of a young person's life is critical. It's important to think about ways to involve all key members of your community who have the power to influence young people. This outreach might include everyone from members of faith-based communities, to public officials creating youth services programming, to neighbors or community members a young person regularly sees—such as a local store owner, a librarian, a police officer, or a crossing guard.

Reflection

Brainstorm with your staff and students to identify key people in your community who have influence in your students' lives. Then strategize ways to reach those individuals with concrete suggestions about how they can make a contribution to excellence in the education and healthy development of your community's youth.

Developing Student Assets in the Community

Key Community Members	How to Reach Them

Key Messages to Share	Action Plan

Tools at the Ready: Creating a Caring School Community

Community is the glue that holds your school together. By being part of a community, young people learn how to treat one another and about their rights and responsibilities.

Eric Schaps' article "Creating a School Community" reported that students in schools with a strong sense of community derive multiple benefits, including learning to be:

- More academically motivated
- More likely to act ethically
- Better in emotional and social competencies
- Less likely to engage in problem behaviors, including violence
- More pro-social[76]

The article further states that schools that foster a sense of connection and belonging assure emotional and physical safety, nurture students' sense of autonomy and competence, and fulfill important psychological needs in young people—needs that underlie young people's motivations. When these important needs are met, young people become increasingly committed to the school's norms, values, and goals.[77]

Things to Think About

- What is the "common-unity" of your school?
- How do you want young people to treat one another?
- What will they value?
- How will those values get expressed through their actions?
- How do you create the type of community you want in your school?

Reflection

The following assessment is from the Developmental Studies Center (**www.devstu.org**), an organization that stresses the development of community in schools.

Ask students to agree or disagree with such statements as:

- My class is like a family.
- Students in my class help one another learn.
- I believe I can talk to the teachers in this school about things that are bothering me.
- Students in my class can get a rule changed if they think that it is unfair.

Further Reflection

The above exercise can be adapted for use with faculty and other school personnel to get a gauge on how well you are doing with building a sense of community among staff. **Do they agree or disagree with such statements as**:

- The staff and faculty at my school are like a family.
- My colleagues help one another learn
- My colleagues are supportive of one another.
- I believe I can talk to the staff in this school about things that are bothering me.
- I believe I can talk to the administration in this school about things that are bothering me.
- I have meaningful input into the rules and policies of this school.

Group Agreements for Behavior

One way to promote a positive school community is to establish patterns of behavior that students can engage in and rely on.

A useful framework centers on "agreements" your staff and students together develop to set expectations for behavior. Many bullying prevention programs include a pledge against bullying behaviors or a pledge to commit to inclusive and caring behaviors. The pledge or code would then be given to students and parents. It can be very effective to create your own pledge or code with students. This process can communicate to young people that school is their community, and that to function effectively within it, they must take responsibility for creating the type of community they want.

By involving students in crafting group agreements for behavior, students will be more invested in them. They are motivated not just by a set of external rules, but by their own commitment to a vision of how they want their community to be. Students agree to participate in their community because they understand that it benefits them and that certain rights and benefits come with responsibilities.

Of course students should not be left to define communal norms of conduct by themselves, and group agreements for behavior cannot replace student codes of conduct. The leadership of teachers and administrators is essential. There are excellent activities to structure development of such agreements in many curricula. (See, *e.g.,* the "Caring Being" activity which is included in Operation Respect's *Don't Laugh at Me* program referenced on page 66 for an example.) Generally, the process entails the following components:

- Dialogue with students about what rights every student has (e.g., to feel safe, to learn, to participate in school life).
- Dialogue with students about what behaviors threaten those rights or that students simply do not want in their community.
- Dialogue with students about what behaviors support those rights (e.g., what helps one to feel safe) or that students desire for their community.
- Dialogue and a group process to construct agreements from this brainstormed list of behaviors.
- Action where students signify their commitment to the agreements (by signing agreements or some other active way of saying "I agree to live by this").
- Dialogue about consequences for not adhering to the agreement (what should happen when someone makes a mistake and acts outside of the agreement).

- Ongoing dialogue and process for updating and amending the agreements (regular consideration of how things are going and new ideas, through group meetings).
- Creative ways to post or remind students of the agreements (e.g., catchy slogans posted around the school; identify with students places where the rules most need to be visible.)

The process is not democratic, but should be consensual; that is, the majority does not rule, but all should agree to the outcome. The art of the facilitative process is moving the group toward consensus. To help achieve this goal, you might ask, "Can everyone agree with this?" rather than, "Does everyone agree with this?" It also helps to manage the process so everyone has input.

It's also important to help students be specific and concrete about what they mean. A group might say that a behavior they want from others is respect, but what does respect involve? What behaviors communicate respect (or a lack of respect)?

This process can be done at the classroom level or school-wide. If you go school-wide, you might start by having students work in small groups, posting their ideas on poster paper around the room so everyone can see all the ideas being generated. In going over suggestions, look for common themes; use those themes to derive the specific agreements in your school-wide pledge. Post your school's student agreements in places where bullying has been identified as most rampant, such as on buses, in bathrooms, and in hallways. If you cannot post on buses, think about other ways you can communicate to young people that you will not tolerate bullying on school buses.

Your Role as Facilitator

- Help move students toward consensus
- Help students define terms and be concrete and specific
- Include your own needs (with explanation)
- Be sure that everyone has a voice
- Communicate your respect for student's ideas
- Compliment young people's thinking

School Spotlight: Gloucester

One school in Gloucester, MA, has an adult greet every bus each morning to find out if there were any incidents needing follow-up. This approach has proven extremely effective in helping to reduce bullying on the bus.

Beyond the reach of formal policies directly regulating bullying and harassment, behavior management practices can help create social norms and communicate important values to young people. With effective anti-bullying strategies students are influenced away from hurtful conduct the first time it occurs. The following questions can guide your work with young people and staff to develop policies:

Things to Think About

- What behaviors do you want to encourage?
- What behaviors do you want to discourage?
- Is there frequent disruptive behavior at your school? What types of behaviors are most frequent?
- When do problems most often occur? Are there any patterns?
- In what ways might you reinforce young people's/peers positive behaviors?
- What types of limits need to be set to create an environment where your school's values are able to flourish?
- In what ways could behavior be remedied by a revision of your school's structure, extracurricular offerings, or schedule? *Note*: Behavior problems often disappear when young people are kept involved and active.
- What types of discipline methods does your school support? What types of discipline need to be avoided? Why?
- In what ways can adults encourage young people to solve problems for themselves (i.e., peer leadership, bystander responsibility)?
- What are the best ways to empower young people to take initiative to improve the school climate?
- How can you create an environment that helps facilitate young people solving problems for themselves?
- How are agreed rules of conduct created? How can students participate? Staff?
- How will you train staff to skillfully deal with the guidance, discipline, and behavior management needs of young people?

(**See** "Constructive Disciplining" on page 76 in Chapter 3 for more information.)

Anti-Bullying and Harassment Policies

In addition to group agreements about behavior, create and communicate policies that specifically prevent bullying and harassment and address civil rights concerns; then share the policies with key stakeholders. Such policies are typically created at the district level. They are the more formal version of the group agreements you make with students and they must address any relevant legal factors, including definitions and formal complaint procedures.

Maintain Policies That Are Effective

At a minimum, a school's governing authority should adopt and disseminate written policies that:

- Set forth the school's commitment to protect students from harassment, bullying, and violence and to maintain a non-hostile environment
- Identify the types of harassment prohibited by the policy and give examples
- Require staff to report harassment they see or learn about

- Explain how to report harassment and to whom to report it
- Describe the various steps the school will take to respond to reported incidents
- Include formal complaint procedures
- Protect those who report harassment, or who participate in related proceedings, from retaliation
- Ensure that all members of the school community are aware of their rights and responsibilities

Student codes of conduct and personnel policies should also be examined to ensure they contain rules of behavior, offense categories, and disciplinary procedures to address violations of the district's anti-harassment policies appropriately and in line with Massachusetts state law. (See pages 63-64 for legal requirements for school policies.)

Respond Appropriately

All staff and administrators should be taught how (accurately and sensitively) to tell students and parents reporting harassment about the relevant school policies and the options for stopping the harassment. In all instances, students and parents reporting harassment should be told how to file a formal complaint. Reporting procedures should be easy to use and well publicized. At least one employee should be formally designated and trained to receive complaints. The names and positions of the people designated should be made known to all members of the school community.

Require all staff to report to a designated school official who has authority to take corrective action with any harassment students or employees report. School personnel should not overlook incidents that, viewed alone, may not rise to the level of unlawful harassment. Consistent enforcement of disciplinary rules and meaningful interventions by staff to teach appropriate behavior tend to discourage more severe misconduct and help achieve an atmosphere of respect and courtesy. Consider all available resources to address instances of inappropriate behavior, including increased parental involvement.

Consider the nature of the conduct, and the age and identity of the perpetrator and the target of harassment, when responding to incidents of varying levels of severity, persistence, and pervasiveness. Top school officials or a designated coordinator may wish to screen all allegations of harassment to make sure an appropriate course of action is taken.

In responding to incidents of harassment, schools should pay close attention to the possibility that harassers, and their friends and associates, may try to retaliate against the people who reported the harassment. Retaliation or reprisals can include threats, bribes, unfair treatment or grades, and further harassment such as ridicule, taunting, bullying, and organized ostracism.

Take Complaints Seriously

A formal complaint process is necessary in addition to the various other mechanisms districts should use to address all incidents of harassment. The district should provide formal complaint procedures that ensure students and their parents have a means of obtaining corrective action if they prefer to file an official complaint or are dissatisfied with the district's response to alleged harassment.

Federal laws prohibiting sex and disability discrimination require prompt and equitable complaint procedures that incorporate due process standards. Such procedures are also recommended to address complaints of race-, national origin-, and sexual orientation-related discrimination, and other types of discrimination addressed by a district's policy. The term "grievance procedures" is also used to refer to formal complaint procedures; this Guide uses the two terms interchangeably.

Formal complaint procedures should include:

- Notice given to students, parents, and employees about the process, including how and where complaints can be filed
- An opportunity for a prompt, thorough, and impartial investigation, including the opportunity to present witnesses and other evidence
- Confidentiality for the complainant, the alleged harasser, and any witnesses, to the extent possible
- Notification to the complainant of the outcome of the complaint consistent with any legally required privacy restrictions
- Effective remedies when civil rights violations are found

Promote Tolerance and Mutual Respect for Differences

Consensus is rising among educators that the best way to protect students from harassment is to establish a secure environment that expects appropriate behavior and promotes tolerance, sensitivity to others' views, and cooperative interactions among students. Effective anti-harassment programs offer students curricula, teaching methods, and school activities that discourage stereotypes and respond to the concerns of students of different races and cultural backgrounds.

The district should regularly communicate its policies against harassment to all members of the school community— including students, staff, parents, and school visitors—and make it clear the policies will be enforced. The district should also take steps to ensure students are able to identify harassment, understand its causes and effects, and feel safe when reporting instances of harassment.

The school environment and activities should be regularly monitored to ensure harassment is not occurring. All instances of alleged or suspected harassment, whether or not substantiated, should be documented. Documentation should include all disciplinary incidents in which race, national origin, sex, sexual orientation, disability, or other subjects of district concern are a factor.

Successful anti-harassment efforts generally provide opportunities for students to overcome ignorance, mistrust, and biases. Age-appropriate prejudice reduction and sexual-respect concepts and examples can be included in social studies, literature, and other classes.

Examples of teaching strategies that can help to reduce prejudices include modeling unbiased behavior, improving students' critical thinking skills, helping students to develop empathy, and encouraging cooperative learning.

Student activities, such as civil rights teams that encourage students of different backgrounds and both sexes to work together on shared projects, can contribute to intergroup understanding. Many schools use trained student mediators to resolve personal conflicts that

could lead to harassment. In some schools, student volunteers are trained to discuss diversity issues with their peers or younger students in the classroom.

Policies should be developed to cover the following:

- Bullying
- Unlawful harassment (harassment based on race, color, national origin, ethnicity, sex, disability, sexual orientation, and religion) (**See** "Legal Issues Related to Bullying" on page 62)
- Cyberbullying
- Hazing

Think about how you'd like to structure these policies. Many schools create separate policies for each, while others include everything under the umbrella of "harassment." Whatever approach you take, it's helpful to avoid confusion by using the same grievance procedure for all policies.

Things to Think About

- What behaviors are you committing to eliminate?
- What are the legal requirements for the policy?
- What definitions and examples of behaviors can you offer?
- What will be your standards for determining whether or not the behavior is bullying or harassment?
- What are your specific procedures for reporting and addressing complaints?
- What are the protocols for staff to follow if they witness an incident?
- What are the actions school officials will take when they learn of an incident?
- What are the options for responding to incidents of varying severity, persistence, and pervasiveness for both perpetrators and targets?
- What effect will the age of the parties have? What effect will the context of the behavior have?
- How can you ensure the safety of people making reports?
- How can you ensure all members of your school community are aware of their rights and responsibilities?
- When does conduct need to be reported to law enforcement?
- Who on staff will be responsible for compliance?
- How can you support these policies with staff training?
- How will you encourage the involvement of parents?
- What ways can you team with outside agencies to implement your policy?
- What resources are available to support your policy?
- What are the free speech (i.e., First Amendment) implications of your policy?

- What other policies are affected by anti-bullying rules? (e.g., transportation policies, discipline codes, acceptable use of the Internet)?
- How will you handle staff violations of the policy?

Just as important as creating policies is communicating the expectations set for everyone in the school community. Many schools have found staff sometimes associate policies with only the most extreme cases. Staff training is essential, especially in how to identify incidents of harassment and when to report them.

Delve Deeper

For a complete discussion of how to create an anti-harassment program and address hate crimes see the web site of Massachusetts Attorney General Martha Coakley **http://www.mass.gov/?pageID=cagosubtopic&L=4&L0=Home&L1=Community+Safety&L2=Schools+%26+Youth&L3=Safe+Schools+Initiative&sid=Cago**.

Home Connections

Make parents aware of your policy. Encourage parents to let you know when their son or daughter has been targeted. Many parents feel reporting an incident will adversely affect their children. They need reassurance that all incidents will be handled effectively. Work with your staff to ensure coordinated responses to bullying, and let parents know the entire school is working toward a community where their children can be safe and thrive.

A Clear System of Consequences

Mistakes are part of growing and learning, but young people need to receive the guidance necessary to improve their skills and understanding so they can learn from experience. Your policies, behavior codes, and system of consequences can be constructed in a way that supports what you are trying to teach young people. Try to create consequences that teach something positive; a prescribed consequence of a young person engaging in name-calling, for example, might be that she must reflect on her actions through a worksheet, plan for a way to make amends to the person s/he hurt, and then recommit to the agreements s/he violated. Another way is to require a young person who puts damaging graffiti on a wall to remove it and publicly apologize for his impact on the community and target.

As discussed in "Group Agreements" it can be helpful to involve students in constructing consequences for breeches of group agreements that do not involve a threat to a student's physical safety.

Research from the Olweus Bullying Prevention Program notes that a clear system of consequences that communicates firm limits about unacceptable behaviors is fundamental to your bullying prevention efforts.[78] What will be your system of consequences for violation of behavior codes and agreements? You can develop a customized system through discussions with staff, students, and families. Consequences should reflect the following considerations:

Things to Think About When Setting Consequences

- The number of infractions
- The degree or severity of the infraction (e.g., name-calling vs. physical threats)
- Whether or not the target's physical safety was compromised
- Whether or not the civil rights of the target have been violated (see "Is it a Hate Crime" on page 20 in Chapter 1 for more information)
- Whether or not the action is harassment (based on race, color, national origin, ethnicity, sex, disability, sexual orientation, gender, or religion)
- The values your consequences communicate
- What your consequences teach
- How simple your consequences are to understand and to implement
- How consistent your consequences are with other school policies
- When to involve parents
- What documentation is necessary (both as required by law and as helpful to your bullying prevention practice)

Delve Deeper

In looking at high-profile school shootings the U.S. Secret Service found that 70 percent of the attackers felt "bullied, persecuted, or injured by others prior to that attack." Because many of these attackers did not exhibit threatening behaviors prior to the attack, prevention is key. For more information about preventing the most extreme forms of school violence, see *The Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in the United States* (2002) online at **www.secretservice.gov/ntac/ssi_final_report.pdf** and *Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates* (2002) **www.secretservice.gov/ntac/ssi_guide.pdf.**

Communicate Your Policies to Stakeholders

Many schools ask students, and their parents or guardians, to agree to the system of consequences by signing off on them. This is a good way to get buy-in and support from families and communicate that your school is taking the issue very seriously.

School Spotlight: Lowell

"I had to tell teachers that there are different styles of discipline in this world. And there's a clear cut difference between discipline and punishment. And if they were focusing all their energies on external discipline, perhaps they were working very hard, but at the wrong thing." —**Paul Hutton**, **Principal, James P. Sullivan School**, Lowell, MA[79]

The Role of Rituals

The value of rituals can be underestimated. While young children's lives are often structured by rituals, many of the rituals that originally marked their days (e.g., naps, circle time, snacks) have been abandoned by the time they reach adolescence. Yet adolescents and the adults who work with them also need rituals.

Rituals help young people anticipate and prepare for what is coming next. Rituals create moments where everyone is united in a shared experience. They communicate a group's values and preserve a school's history. No should be excluded from a ritual. In fact, knowing a community's rituals is one way young people can feel included. The best rituals reinforce the values the school holds.

Rituals can be very useful in creating a smooth transition between events, such as classes, arrival at school on bus and coming into the building, and the end of lunch and return to class. These are often times when students are most at risk for bullying. Providing structure during such times helps to link everyone together and establish common understandings of behavior.

A ritual doesn't need to be formal. Any activity that is carried out in a prescribed or scripted way can be a ritual. It can be as simple as a "check-in" at the beginning of every class where students offer one word that reflects how they are feeling that day. Daily rituals can help build a sense of community and focus the group.

Rituals are particularly important for marking major events, such as the end of a school year, an important anniversary, or a celebration of accomplishments. One school uses the ritual of floating a toy boat down a river with messages of students' hopes and aspirations for the coming year as a way to mark the end of the school year. Another school marks the close of a year with an appreciation ritual, where every student is given a small token that signifies something positive about his or her growth that year. Include students and staff in designing your school's rituals. Develop a few rituals that communicate your school's values and mission particularly well.

School Spotlight: Lowell

The James F. Sullivan Middle School in Lowell, MA, recites its school pledge every morning after the Pledge of Allegiance. The pledge was introduced shortly after a teacher died due to injuries sustained while breaking up a student fight on school grounds.

James F. Sullivan Middle School Pledge

I shall use my hands for peace,
not pain.
I shall use my heart for love,
not hate.
I shall use my voice for song,
not slurs.
I shall strive each day to grow and learn.
I shall live my life so all will gain.

Delve Deeper

For more information about the use of rituals in promoting a caring culture in schools, see Rachel Kessler's *The Soul of Education* (ASCD, 2000), and the *Shaping School Culture Fieldbook* by Terrence Deal and Kent Peterson (Jossey-Bass, 2002). Or read about Kent Petterson's work on positive school culture at **www.nsdc.org/library/publications/jsd/peterson233.cfm** .

Ritual Planning Sheet

Value to Communicate	Transition or Event	Ritual

Positive Reinforcement and Role Modeling

Research from the Olweus Bullying Prevention Program shows the important role caring adults have in bullying prevention. Young people need adults who can act as authorities and positive role models, and who can reinforce positive behaviors.[80] Young people pick up cues about how to behave from those around them; yet adults' efforts to control young people's behaviors may model the very types of behaviors they are trying to eliminate, such as shaming, ridicule, put-downs—all of us who work in schools have had days when our knee jerk response to a problem falls short of the expectations we have for young people. But such shaming and similar measures are not only ineffective, they also tend to escalate undesirable behaviors.

Instead, adults should use positive, consistent, and firm guidance that both models and teaches the sought-after behaviors. Such an approach can drive your discipline and management policies. But holding up an example is most important in your daily interactions with students. Positive role modeling and reinforcement can trickle down through all aspects of classroom management and infuse the curriculum. Figures in politics, history, or literature are all fodder for rich discussion about the positive and/or negative values or behaviors they reflect.

One way some schools specifically provide positive reinforcement for sought-after behaviors are "halls of fame," where regular postings acknowledge students' acts of kindness toward one another. Or rewards can be more informal—a pat on the back and a well-timed

compliment can make a young person's day. It is important to be as descriptive as possible when giving praise—saying "nice job" means less than if you say "I was really impressed by the way you handled that problem with your friend." Young people need to know what specifically they did right.

While it is helpful to reward individual efforts, it can also be highly effective to reward the group for its collective actions. One school uses popcorn parties to celebrate a good week when a class exhibited notably positive behavior. This sort of practice can help create a system of positive peer pressure toward good behavior.

Peer Feedback on Role Modeling and Reinforcement

Much of what we model and reinforce is automatic, so it can be helpful to have teachers peer evaluate. Give teachers time to reflect on what they want to model in their interactions and what that means to their everyday practice. Faculty peer groups can collectively identify the values and behaviors they want to encourage in their students and set goals. Then, using the Peer Feedback Form, each teacher can be observed by a peer(s) and receive feedback about how well s/he is doing at meeting goals. After the observation, faculty can meet to discuss what the peer observer saw and formulate new goals for the next round. Encourage constructive feedback rather than negative critiques. Point out what they are doing well, along with aspects they could work on.

Peer Feedback Form: Positive Modeling and Reinforcement

Date: _____ Peer Advisor: _____

Goals I Have	Times I Met My Goal	Times I Didn't

Date of Peer Meeting:

New Goals:

Next check-in (date):

Encourage Supportive and Sincere Relationships

The heart of being positive role models is building the relationship between students and teachers. Students can sense when teachers or school personnel truly care about them. Educators offer valuable support when they call attention to how a student is doing on a given day, give extra encouragement, or strive to be fair. The teachers who are seen as positive role models by young people are not usually those who are most lenient with students, but those who are always fair and caring. They communicate their respect for young people and for themselves with their high expectations, their belief in young people's goodness, their interest in young people's thoughts and opinions, and their encouragement of youth to give their best efforts. They help create a safe environment for learning, are honest, and are receptive to feedback. While these skills can be reinforced and modeled through training, teachers should also be given time for self-reflection.

Such qualities can be reinforced at your school by making caring and support of young people a criterion in teacher evaluations. And you can create safe systems for students to give feedback to teachers about how they are doing. Administrators can also model caring and concern in interactions with staff, as the school atmosphere is often set by them.

Give Students a Voice in the School

In addition to having students contribute to developing school or classroom agreements, it is important to involve students in different yet meaningful ways of improving school life.

Adolescents are often ready to assume ownership and leadership and can have insightful ideas and problem-solving abilities. In order to receive respect, you must give it. You communicate your respect for young people by including them in important decisions that affect them. And such involvement helps them to develop their core competencies and leads to a growing sense of autonomy, efficacy, and investment in the outcome. You will also be teaching young people important skills that can be applied in academics and later in life. One might say the young people in any school are the true experts on bullying and should be consulted as such.

School Spotlight: Springfield

When asked what the number one thing they would do to reduce bullying and teasing in their public school in Springfield, MA, a group of middle school students said that they would institute a policy of wearing school uniforms.

Class Meetings

One way to harness youth as a resource in your school is by holding class meetings. Class meetings are democracy in action, teaching important tools for civic engagement such as brainstorming, problem solving, listening to others, stating your case, and respecting different perspectives.

Class meetings can be held at short notice to deal with specific problems, but they should also be held at regular intervals to check in on how things are going; establish norms, and values, and group agreements; set goals; and plan activities.

Delve Deeper

Classroom teachers benefit from training on how to facilitate class meetings. The Developmental Studies Center **www.devstu.org** has some excellent resources about holding class meetings.

Cultivate Peer Leaders

Another way to involve youth meaningfully is to have student representation on task forces with an ongoing charge to address the issue of bullying. These task forces can be mixed groups of key stakeholders who are responsible for:

- Understanding the scope of the bullying problem at your school
- Planning prevention efforts
- Networking with families and the wider community
- Getting the word out about your efforts

Other worthwhile practices include using youth as peer mentors; options include pairing a less popular kid with a more popular one, pairing a special needs student with a mainstream peer, and pairing students across grades to provide important guidance and support.

Peer mediation programs can also be highly effective in improving school climate.[81] However, peer mediation is **not** an appropriate way to deal with bullying incidents where there is a clear pattern of abuse and power imbalance. Intervention from adults is necessary in such instances. It is usually best to avoid direct confrontation between the bully and target. Still, peer mediation can be an effective prevention strategy.

School Spotlight: Holyoke

"We recommend you engage students actively in creating and sponsoring violence prevention school-wide activities, doing community service, and nurturing peer leaders."— **Peck Middle School**, Holyoke, MA

By the Numbers

Research from the National Resource Center for Safe Schools showed the incidence of aggression and bullying is reduced in mixed-aged groupings.[82]

Break the Code of Silence

Maintaining open lines of communication with students about bullying is critical in prevention efforts. Students can also be given a way to communicate anonymously with adults about bullying. Some programs include the use of a locked suggestion box for students to report incidents of bullying or give ideas for improving school safety. Once students feel confident that adults will intervene effectively on their behalf, they will be more eager to share what is really happening.

Make it a Habit

Don't work from a rote list of ways to involve students; instead cultivate a practice of involving them. Once seeking student input becomes a habit of mind, the possibilities for engaging young people in meaningful ways are endless.

Teach Pro-social Skills

A successful bullying prevention effort should include a curricular component that teaches pro-social skills and awareness.

Some of the skills that students need to learn and have modeled include:

- Communication skills (I-messages, active listening, self-assertion)
- Diversity education (appreciation for differences, sensitization to prejudice and discrimination)
- Emotional intelligence (anger management, empathy, perspective taking, self-talk)
- Problem-solving skills (win-win conflict resolution, conflict de-escalation)
- Active participation (social responsibility, civic engagement, decision making, cooperation)

Young people also need specific knowledge, skills, and awareness related to bullying:

- What bullying is and how it affects people
- What myths are associated with bullying
- How to be an ally to a target
- How to respond when you are targeted
- How forms of institutionalized discrimination are a factor

Along with direct skill instruction, many of these ideas lend themselves well to infusion into standard curriculum. Social studies and literature are two subjects with potential relevance to bullying, cultural issues that encourage bullying, and institutionalized discrimination. (**See** Chapter 4 for more information about skill instruction and infusion.)

A Word about Self-Esteem…

Experience shows that the best way to build young people's self-esteem is through helping them boost their achievements. Empty praise or transparent attempts to build self-esteem often have minimal effect. Instead, concentrate on teaching students skills that empower them to succeed in difficult situations. Students need ample opportunities to practice these skills in settings where it is safe to make mistakes and to learn from those mistakes.

Use Cooperative Learning Techniques

"Cooperative learning" is a common term in current educational jargon. It is a teaching strategy in which small teams, each with students of different levels of ability, use a variety of learning activities to enhance their understanding of a subject. Each team is responsible for learning what is taught and for helping teammates learn. Students work together on an assignment until all team members understand and complete it.[83]

Besides its effectiveness in developing a student's academic potential, cooperative learning builds community and character. Cooperative learning requires students to work collaboratively with others they might not normally be friends with; it can serve as a way to distribute power more evenly in a group; it can help young people to appreciate differences; and it can develop skills such as listening, cooperation, and group problem solving.

While you may already utilize cooperative learning strategies, it's worthwhile to spend some time reflecting on the techniques that best contribute to bullying prevention. Some common cooperative learning strategies include learning teams, support groups, jigsaw learning, whole and small group projects, and team testing.

Cooperative learning is most successful when:

- Students are taught the skills necessary to perform cooperatively (e.g., active listening, problem solving, conflict resolution, appreciation for differences, perspective taking, I-messages)
- Regular self-evaluation is built into activities (Ask: How did we do? What went well? What went wrong? What can we do differently next time?)
- Student assessment addresses how well they cooperate and contribute to the group
- Group roles require interdependence
- Group members are given equal power and opportunity to contribute.

Cooperative Learning Strategy	Skill/Value/Awareness Taught

Apply Action Research

An intentional process of self-reflection called action research can be used to guide your prevention efforts. By using action research you:

- Ensure that you will learn from what has worked and what has not
- Continually refine and improve your efforts

Every member of your community can become a partner in this sort of research—from students, to teachers, to administrators, to parents. Action research helps you get buy-in from key constituents who are involved, and it helps sustain your efforts over the long term.

Specific Bullying Buster Practices

In addition to your community-building efforts, which will have many additional positive benefits, here are a few practices that are common among successful bullying prevention efforts.[84] Because bullying is about power, it is important to address the power imbalance between a bully and his or her target. One way to shift the power away from the bully is to empower bystanders, who are usually the silent majority, to help support a target.

School Spotlight: Northfield

"It's critical that students have an awareness that they're not alone and where specifically to get help." — **Pioneer Valley Regional School**, Northfield, MA

Empower bystanders to:

- Include students who are excluded
- Not join in when a student is being targeted
- Join together with several students to stand up for the target or report incidents to adults

Include in your prevention plan the following:

- Training for bystanders on how to be an ally to a target
- Support for targets (e.g., self-empowerment, assertiveness skills, and social skills)
- One-on-one counseling for bullies and targets, as needed
- Re-channeling bullies' need for power into more positive directions (e.g., leadership skills training, cross-age peer mentoring)
- Effective involvement and training of parents
- Breaking the code of silence to encourage reporting to both school staff and parents
- Structural changes that reduce the risk of bullying (e.g., increased supervision in places where students are vulnerable, policies such as buddy pairing for bathroom trips)
- Ways to publicize your efforts
- Ways to involve your community

Home Connections

The possibilities for including parents do not have to be limited to your bullying prevention program. Consider creating a parent resource center, developing policies that include parents at every step, using parents as aides, and sustaining their involvement. When parents feel they are part of the school, they are more likely to support your day-to-day efforts.

The Importance of Training

Just as students need new skills and awareness to deal with bullying, so do staff and students' families. Successful bullying prevention programs stress the importance of including all key school staff in training (e.g., teachers, counselors, safety officers, cafeteria workers, custodians, and bus drivers). Families of your students can be reached through a separate training or can be integrated into a portion of your staff training.

Tip: Create Cross-Age Peer Partnerships

Bullying appears to occur less frequently in mixed-aged settings, as opposed to same-age groupings. Cross-age peer mentoring is one way to help prevent bullying. Once you've identified a target population that is vulnerable to bullying in your school, you can design an effective strategy to support that group. If 6^{h} graders are afraid of 8th graders (or avoid the 8th graders' bathroom or floor), you may find that creating 8th grade mentors for 6th graders is an effective bullying preventative strategy.

Some key topics to address in training are:

- Recognizing bullying when you see it (how to differentiate between ordinary conflict and bullying)
- Myths about bullying
- Knowing the facts about how bullying (left uncorrected) affects targets, bystanders, and bullies
- How to support targets
- How to help bystanders become allies
- How to re-channel bullies' need for power into more positive directions
- How to develop pro-social skills
- Community-building techniques
- Discipline and guidance techniques
- Policies and reporting procedures

Delve Deeper

The National Education Association (NEA) encourages bringing outside bullying prevention consultants into the school system to build up internal knowledge and capacity. The NEA can train your school staff and assist the district in developing a "Whole School Bullying Prevention/Intervention Program" at no cost. Many excellent sources for training assistance listed in this Guide's resource section on page 66.

School Spotlight: Gloucester

A school in Gloucester, MA, stressed the importance of including bus drivers and cafeteria workers in prevention efforts. They found it was the bus drivers and cafeteria workers who really knew about patterns of abuse between students.

What Does Character Have to Do with It?

> "Emotions are often the horse; (while) values and virtues (are) the rider trying to hang on."
>
> —**Rick Weissbourd**[85]

Most bullying prevention efforts stress what we need to teach students, changes we need to make to our systems, and the policies we need in place. Yet some very compelling human needs, values, and feelings simmer beneath the surface of these efforts.

Fulfilling a need such as being accepted by peers can override an adolescent's values—even an expressed value such as "bullying is wrong." A young person may choose a behavior that allows her or him to fit in, even if it is dissonant with an internal value. Strong feelings likewise have an effect; when flooded with anger or shame, even a young person with a belief in pacifism can turn to violence to solve a problem. What tends to help young people (and adults) when faced with overwhelming emotions is the opportunity to examine their beliefs and biases in a non-threatening and caring environment.

Noticing the dissonance between one's beliefs and one's actions can ignite the flame that sustains a commitment to change. It is simply not enough to tell young people they should be caring or honest or not to bully. Young people need the opportunity to:

- Connect their actions with their values
- Examine the unique gifts that they and others bring to a situation
- Feel safe admitting to mistakes they have made
- Examine their biases
- Be given the opportunity to try a different approach
- Be given positive ways to channel their needs for initiation and a sense of belonging

This observation holds true for targets, bystanders, bullies, and the adults in their lives. What supports bullying prevention—and has the by-product of building character—is the process of reflecting and questioning oneself. For motivations to be "good" they must arise internally, rather than just externally.

School Spotlight: Holbrook

"Bullying prevention is successful when you link it with a character education program and offer peer mediation, which are then integrated."

— **South School**, Holbrook, MA

The Critical Role of Adults

> "We will never greatly improve students' moral development in schools without taking on the complex task of developing adults' maturity and ethical capacities."
>
> — **Rick Weissbourd**[86]

Apart from whatever adults model for young people, children are closely attuned to the adults in their lives and the treatment they receive from them. It is the quality of the relationships that most deeply influence young people's behaviors. Character development expert Rick Weissbourd explains adults' capacity "to appreciate students' perspectives and to disentangle them from their own, their ability to admit and learn from moral error, their moral energy and idealism, their generosity, and their ability to help students develop moral thinking without shying away from their own moral authority."[87]

While most efforts to develop young people's character focus solely on them, we often ignore the adults in the building at our peril. The goal should be to support the adults in recognizing a sense of their efficacy, not in becoming "values police." Supporting teachers in dealing with stress and students' behavioral problems is critical. Give them the opportunity to reflect on hopes and dreams related to their service and to mitigate the isolation that is often endemic to teaching. This kind of support will fortify your bullying prevention efforts.

Teachers who are disillusioned and stressed can be depressed—leading to behavior that is contrary to creating a community of caring. It is difficult for depressed teachers to maintain positive qualities, but these "are exactly the qualities—empathy, patience, persistence, consistency, idealism—that are crucial for teachers to shepherd students' moral growth."[88]

Lessons from Character Education

Research into young people's character development has implications for any pro-social program you develop, including one whose purpose is to prevent bullying.

- When faced with inequities and other social problems, young people's moral action is tied to their sense of their own ability to effect a change in relation to that problem. Conversely, young people who believe they have little ability to make a difference in the world become unable to act.

- Young people need help developing the skills necessary to problem solve successfully (e.g., brainstorming, setting and evaluating goals, resolving conflicts in a group, appreciating differences, effectively communicating, and expressing feelings appropriately.)
- Young people's efforts to improve their environment are related to the degree to which they feel connected to one another and to the world as a whole.
- Young people are deeply affected by the actions of important role models such as parents and teachers.
- Finding sense and meaning in their world is an important component of young people's moral development.
- Young people naturally care about issues of fairness and the treatment of others. Character education is not instilling a list of values and behaviors in young people but rather a process of recognizing and encouraging key behaviors and values as they emerge.[89]
- Strong emotions such as anger, shame, and disillusionment can undermine the sense of caring and the development of other important character traits.[90]

Things to Think About

- Give young people an opportunity to successfully address problems in your school culture that are important to them. This means involving young people in both identifying problems and solutions in ways that are meaningful and supporting them to achieve success in meeting those goals.
- Teach young people and adults problem-solving skills.
- Foster a sense of community and connection between young people and the adults in your school.
- Allow young people opportunities and a safe environment to explore their own values and sense of purpose and meaning.
- Provide safe opportunities for teachers and school personnel to explore their own values and sense of purpose and meaning.
- Involve all the adults in your school community in revitalizing their commitment to the profession.
- Find ways to help empower adults in the school community to feel a sense of their own efficacy, manage stress, and stave off isolation. Encourage peer mentoring, sabbaticals, and offer help for teachers who might be suffering from depression.

Reflection

In a staff meeting, have groups of two teachers reflect on:

- What were your hopes and dreams about becoming a teacher?
- What do you think is most important thing to teach young people?

- How can you integrate these learning goals into the curriculum and school day?
- What are some obstacles you've encountered in teaching the above?

To process this activity you can have pairs hang up a poster board listing their learning goals and obstacles. After giving everyone an opportunity to review the lists, hold a group brainstorming session to identify ways to overcome these obstacles. Create an action plan from this session.

Tying It All Together: Integrating Prevention Efforts

Many schools have expressed their frustration with the "program du jour" approach. Prevention efforts are splintered at many sites because of the way politics and funding combine to create programs aimed at issues that one day are hot and the next day are not. Funding is planned for short intervals—2 or 3 years in many cases—a time scale inadequate to address the pressing issues they are designed to mitigate. Schools are then left wondering how to sustain their efforts once the money has run out. And teachers are pressed to meet competing demands for their already precious instructional time. Your bullying prevention efforts need not fit into this category. Your efforts can be sustained and integrated with other prevention efforts to maximize scarce resources.

The Collaborative for the Advancement of Social and Emotional Learning (CASEL) advocates for an approach that ties together prevention efforts with a focus on nurturing protective factors in youth. Many problems for youth are caused by similar risk factors. CASEL's approach gets to the psychosocial roots of the problem by placing emphasis on nurturing young people's social and emotional learning.

By focusing your efforts on creating a caring school and developing other protective factors in youth, you will simultaneously help young people deal adaptively with the multiple stresses they may encounter: drugs, alcohol, sexual experimentation, violence, and prejudice. See **www.casel.org** for advice on how to put together fragmented prevention efforts into a comprehensive whole.

Delve Deeper

Thirty-nine guidelines for providing effective social and emotional learning are presented in the book by CASEL entitled *Promoting Social and Emotional Learning: Guidelines for Educators* (ASCD, 1997).

Legal Issues Related to Bullying: Massachusetts Laws

While all schools have a general legal and moral obligation to keep students safe, several specific legal issues deserve particular attention, because bullying frequently implicates civil and criminal law violations of students' civil rights. Harassment and hate crimes require an appropriate response that includes, in certain instances, contacting law enforcement. Bullying can also give its victims recourse to private civil litigation.

In general, civil rights violations occur in school when a student's or adult's behavior, or inappropriate language, creates a hostile school environment. Repeated bias-related harassment that creates a hostile environment unlawfully denies a student the "advantages and privileges" of attending school. G.L. c.76, § 5.

- **A hostile environment** exists whenever one individual experiences repeated harassment, threats, or intimidation that make a young person fear for his or her safety. A single incident, depending on its severity, may constitute illegal harassment.

Under Federal law Title IX, students are protected from harassment, including disparaging remarks, gestures, and threats that are related to the target's sex, race/ethnicity, religion, or disability status. Repeated language of a sexually graphic nature usually gives rise to unlawful sexual harassment and the remedies against it provided under federal law. Such harassment additionally may rise to the level of a hate crime.

A hate crime is a criminal offense committed against a person, property, or society that is motivated, in whole or in part, by an offender's bias against an individual's or a group's race, religion, ethnic/national origin, sex, age, disability or sexual orientation. Massachusetts has a Hate Crime Penalties Act and a battery of criminal and civil law protections for civil rights. Hate crimes resulting in victim injury can amount to double or triple felony violations. They also give rise to various civil law remedies. Note that hate crime definitions encompass not only violence against individuals or groups, but also crimes against property such as arson or vandalism. The Massachusetts Hate Crimes Reporting Act of 1990 calls for the reporting of all potential hate crimes to law enforcement, who in turn report incidence data to the Crime Reporting Unit of the State Police. G.L. c.22C, §32 *et seq.*

Applicable Laws

Following is a summary of key, potentially applicable laws.

Criminal Harassment: G.L. Chapter 265, Sec. 43(A)

Harassment is considered a crime if:

- Over a period of time the defendant knowingly engaged in a pattern of conduct or series of acts involving at least three incidents directed at the alleged victim.
- Those acts were a kind that would cause a reasonable person to suffer substantial emotional distress.
- Those acts did cause the alleged victim to become seriously alarmed (not just annoyed).
- The defendant did the harassing actions in a willful and malicious manner (an act is willful if it is done intentionally, not by mistake. An act is done maliciously if it is done out of cruelty, hostility, revenge, or other wrongful motive.)

Guarantee of Non-Discrimination: G.L. Chapter 76, § 5

Statutory guarantee of non-discrimination in obtaining the advantages, privileges and courses of study in a public school **on account of** race, color, sex, religion, national origin, or sexual orientation

Civil Rights Criminal Statute: G.L. Chapter 265, § 37

Whoever, by force or threat of force **willfully** injures, intimidates, interferes with, oppresses, **or attempts** to injure, intimidate, or interfere with a person in the exercise of a right secured by constitution or statute stands subject to 10 years in state prison and a $10,000 fine with bodily injury, or 1 year in a house of correction and a $1,000 fine without injury.

Action by Attorney General for Civil Injunction: G.L. C.12, SEC. 11H

Whenever any person(s) interfere(s) with or attempt(s) to interfere with, **by threats, or intimidation, or coercion,** any other person(s) in the exercise of a right secured by constitution or statute, the Attorney General may apply to Superior Court for injunction to protect peaceable exercise or enjoyment of rights.

The Hate Crimes Penalties Act: G.L. C.265, SEC. 39

As applicable to violence against persons: Whoever commits an assault and/or battery with the intent to **intimidate a person because of race or ethnicity, religion, national origin, sexual orientation, or disability** stands subject to 5 years in a state prison and a $10,000 fine with bodily injury **or** 2.5 years in a house of correction and a $5,000 fine without injury.

Private Action for Injunction and Monetary Damages: G.L. C.12, SEC. 11I

Any person whose exercise or enjoyment of rights secured by constitution or statute has been interfered with, or attempted to be interfered with, by **threats, intimidation,** or **coercion** may apply to Superior Court for injunctive or other equitable relief, compensatory money damages, and award of attorneys' fees and costs.

Required School Policies: MGL Chapter 71: Section 37H

Policies relative to conduct of teachers or students; student handbooks:

Each school district's policies pertaining to the conduct of students shall include the following: disciplinary proceedings, including procedures assuring due process; standards and procedures for suspension and expulsion of students; procedures pertaining to discipline of students with special needs; standards and procedures to assure school building security and safety of students and school personnel; and the disciplinary measures to be taken in cases involving the possession or use of illegal substances or weapons, the use of force, vandalism, or violation of other student's civil rights. Codes of discipline, as well as procedures used to develop such codes shall be filed with the department of education for informational purposes only.

Cooperate with Law Enforcement

[This section is adapted from *Protecting Students Against Harassment and Hate Crimes: A Guide for Schools*, U.S. Departments of Justice and Education (1999).]

No school district or community is immune from the harm that can be done by bullying that amounts to criminal harassment or bias crime. Such crimes can happen even in schools with excellent reputations and can create or exacerbate tensions that contribute to community-wide conflicts and civil disturbances. At the same time, bias offenses committed outside of school may quickly affect the school climate and relationships among students. Schools also need to be aware of incidents in the community and become involved in preventing and addressing them.

School officials should contact law enforcement officials when civil rights crimes are committed or suspected on school property or in connection with off-site school activities. School officials should also contact law enforcement officials when they become aware of any criminal behavior that endangers the life or safety of students or other persons, whether or not the behavior occurs on school property or in school activities.

School officials should consider developing guidelines for referral of less serious incidents to appropriate authorities. Circumstances that may be considered in determining whether a referral is appropriate or necessary include the nature and seriousness of the conduct, whether a pattern of biased conduct is evident, and the risk that the conduct poses to the health, safety, or well-being of students, employees, and the public. For example, school officials should tell law enforcement officials about apparently less serious instances of harassment if these could lead to violent retaliation or serious confrontations outside of school.

Schools are encouraged to establish ongoing lines of communication with law enforcement agencies. In addition, schools with onsite security personnel should involve them in efforts to address and prevent criminal harassment and hate crimes.

Choosing a Program in Social and Emotional Learning

CASEL looked recently at programs that exhibited solid, quantifiable success in promoting social and emotional learning. Using CASEL's criteria, a program succeeds to the extent it:

- Is grounded in theory and research
- Teaches students to apply social and emotional learning skills and ethical values in daily life
- Builds connections between students and their schools
- Provides developmentally and culturally appropriate instruction
- Helps schools coordinate and unify programs
- Enhances school performance by addressing the affective and social dimensions of academic learning
- Involves families and communities as partners
- Establishes successful organizational supports and policies
- Provides high-quality staff development and support
- Incorporates continuous evaluation and improvement[91]

Delve Deeper

See *Safe and Sound: An Educational Leader's Guide to Evidence-based Social and Emotional Learning (SEL) Programs* from CASEL at **www.casel.org** for a review of 80 multi-year comprehensive programs in social and emotional learning. Included is advice about how to put together fragmented prevention efforts into a comprehensive whole and checklists of questions relevant to any program you are considering.

Recommended Bullying Prevention Programs and Resources

- **Complete No-Bullying Program Curriculum**, a comprehensive school-wide anti-bullying prevention program based on the research of Daniel Olweus. Available at Hazelden Center City, Center City, MN 55012-0176, 1-800-328-9000 or through **www.hazelden.org/OA_HTML/ibeCCtpItmDspRte.jsp?item=3824**
- **Let's Get Real**, a powerful documentary and curriculum where kids speak up about bullying, available from Women's Educational Media at **http://www.respectforall.org/lgr_teachingguide.htm**
- The **Olweus Bullying Prevention Program,** a multilevel, multicomponent program designed to reduce and prevent bully/victim problems among students at school. School staff is largely responsible for introducing and implementing the program, and their efforts are directed toward improving peer relations and making the school a safe and pleasant environment. The program, developed by Dan Olweus, was identified by the Center for the Study and Prevention of Violence (University of Colorado, Boulder) as "1 of 10 Blueprint Programs for Violence Prevention." Dr. Olweus is widely recognized as an international expert on bullying issues and the "father" of research on bullying. Available through **www.clemson.edu/olweus**
- **Open Circle Curriculum**, a classroom primary prevention program for elementary students. See **http://guide.helpingamericasyouth.gov/programdetail.cfm?id=370** for more information.
- **Operation Respect: Don't Laugh at Me,** founded by Peter Yarrow of the folk group Peter, Paul & Mary, the organization disseminates educational resources including the *Don't Laugh at Me* (DLAM) programs: one for grades 2 through 5, another for grades 6 through 8, and a third for summer camps and after-school programs. All the programs utilize inspiring music and video along with curriculum guides based on the well-tested, highly regarded conflict resolution curricula developed by the Resolving Conflict Creatively Program (RCCP) of Educators for Social Responsibility (ESR). Available through **http://www.dontlaugh.org/**

Online Resources

- **The Anti-Bullying Network**, from the Moray House Institute of Education, University of Edinburgh, Scotland, at **www.antibullying.net/index.html**
- **Bully Online**, from the UK National Workplace Bullying Advice Line at **www.successunlimited.co.uk**
- **Bullying.com**, at **www.bullying.com**
- **Bullying at School,** from the Scottish Council for Research in Education (SCRE), the University of Glasgow, Glasgow, Scotland, at **www.scre.ac.uk/bully**
- **Bullying in Schools and What to Do About It,** Ken Rigby, Adjunct Associate Professor of Social Psychology and an educational consultant based at the University of South Australia, at **www.education.unisa.edu.au/bullying**
- **Bullying Prevention Resources,** from the International Bullying Prevention Association at **www.stopbullyingworld.com/resources.htm**
- **Hardy Girls, Healthy Women/Girlfighting and Bully-Prevention Resources**, from a nonprofit aimed at empowering women and girls, at **www.hardygirlshealthywomen.org/docs/GirlfightingResources.pdf**
- **Kidpower,** offering skills-building workshops to help young people cope with bullies, at **www.kidpower.org/School-age.html**
- **Kids Against Bullying,** from the PACER Center, an agency based in Minneapolis, which serves the families of children and young adults living with disabilities, at **www.pacerkidsagainstbullying.org**
- **Kidscape**, a national charity in the United Kingdom., at **www.kidscape.org.uk/info/aboutus.shtml**
- **KidsVisionHeart,** a nonprofit corporation based in Tucson, AZ, at **www.kidsvisionheart.org/ENTER.htm**
- **National Mental Health Information Center/About Bullying**, from the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services, at **www.mentalhealth.samhsa.gov/15plus/aboutbullying.asp**
- **National Youth Violence Prevention Resource Center, Bullying Resources**, from the Centers for Disease Control and Prevention, at **www.safeyouth.org/scripts/topics/bullying.asp**
- **Stop Bullying Now!** from the Stop Bullying Project, at **www.stopbullyingnow.com**

Community-Building Programs

- **James Comer's School Development Program** at **http://info.med.yale.edu/comer/index.html**
- **Eunice Shriver's Community of Caring Program** at **www.communityofcaring.org**

- **The Northeast Foundation for Children's Responsive Classroom** at **www.responsiveclassroom.org**
- **David Hawkins's Seattle Social Development Project** at http://**depts.washington.edu/ssdp**
- **Developmental Studies Center's Child Development Project** at **www.devstu.org**

Tip: Plan for the Long Haul

Research shows that long-term programs have the greatest effect in changing students' behaviors.[92]

Chapter 3: Classroom Prevention Tools for Teachers

"To have democracy, we must live it day to day." –**Mary Parker Follett**

No Classroom is an Island

In many ways, a classroom can feel like an island—detached from the rest of the school. Once you close the door to your room, it's just you and the young people. What happens or doesn't happen there is up to you—well, to some extent.

As the famous saying goes no person—or classroom—is an island. Your classroom is a microcosm of your school, which in turn is a microcosm of society. Biases and discriminatory practices from society will be mirrored in young people's treatment of one another. Cultural problems related to disrespect, harassment, and bullying will affect your classroom's functioning—whether or not you notice.

A young person who has been targeted on his or her way to your classroom may spend the first half hour of your class worrying about the trip to the next class, or s/he may simply "check out" in response to overwhelming bad feelings. Power dynamics playing out among young people can seep into and thwart your well-designed group project. Even bystanders merely witnessing harassment of one of their classmates may avoid raising their hands or contributing at all in fear of doing something that would make them look stupid or open them up to the same abuse.

However, your classroom can also be a safe haven for young people—a place where your school's efforts to shift its culture to one of caring finds footing and expression. In the small group setting of most classrooms, young people can safely learn and practice the skills and awareness they need to be critical partners in and co-creators of a bullying-free school.

Your Role as a Leader

It is enormously helpful for your school to engage in a community-wide process to reflect on bullying and co-create agreements, policies, and other expressions of commitment to foster a caring culture. If the process is well designed, you and your students will feel the three "I"s: Involved, Invested, and Inspired.

If so, your role from here is to perpetuate the tone set by being a strong leader for young people as you together implement the action plans created to bring about a bullying-free classroom.

The Three "I"s

- **Involved**: "I am part of the process. My opinion counts. My ideas are included."
- **Invested: "**I care what happens. I can commit to change. I have a stake in the outcome."
- **Inspired: "**I have a unique vision to contribute. I have the energy for the long-haul. I will bring my heart, soul, and mind to the solution. I can make a difference."

Not every intervention to prevent bullying begins at the top. Grassroots efforts that begin with a small group of faculty members and concerned staff can be just as successful in planting the necessary seeds to create a whole-school movement to bully-proof your school. While it is critical that leaders in positions of authority commit to school-wide implementation, you'll find that positive energy and determination can be energizing and contagious.

Reflection

With a colleague or in a staff meeting consider the following:

- How can you involve young people in co-creating a bullying-free classroom?
- How will you help young people feel invested in what happens in the classroom?
- What types of inspiration can you provide to keep young people motivated throughout the process?

Offering Leadership

Classroom teachers do not always think of themselves as leaders, nor do they necessarily get treated as leaders, but they can be. A teacher may also think of his or her role as being an authority figure for young people, or a facilitator and coach. All these roles have their place in teaching. When you support children in learning a skill, you are often in the role of facilitator or coach. When you make a hard decision—such as to report something a young person told you confidentially—out of concern for a student, you are being an authority figure. When you help young people change as individuals, when you challenge their assumptions or expose conflicts in the group, when you support young people in taking responsibility for their problems and learning, when you confidently strive for growth—even when it is uncomfortable—you are being a leader.

Reflection

- When you hear the word "teacher," who and what traits do you think of?
- When you hear the word "leader," who and what traits do you think of?
- How do you feel empowered by your teaching role?

- How do you feel disempowered?
- What have you internalized about your profession that holds you back?
- Does thinking of yourself as a leader have implications for how you approach your classroom?
- In what ways might you want to change?
- What sort of support, and from what sources, would you need to make those changes?

Tip: Be a Detective

Examine the problems in your classroom. What are the underlying norms or biases inherent in each problem? What are the unmet needs being expressed? Cultivate this habit of reflection in young people and together problem solve ways to shift norms, challenge biases, and meet needs within the context of a caring school community.

Steps to Leadership: Get Out of the Trenches

A leader does not always have the answers to a problem, but rather poses the questions. Leaders expose us to uncomfortable truths about ourselves and support us in our growth. They help facilitate change by engaging the entire community in seeking solutions and cultivating leadership in others. They make it safe for us to make mistakes and help us learn from them. A leader treats the classroom as a laboratory for learning rather than a stage for performing. But what does that mean to your daily teaching practice?

Get on the Balcony

It's not enough to be in the trenches. Look at your classroom from above. Look for patterns in the problems between young people. Look at the norms, values, and biases that are expressed in your teaching practice:

- What are some of the underlying needs being met by the bullying and harassment?
- What social or institutionalized prejudices might young people be reflecting?
- Is there any history related to your classroom practices and procedures that might be relevant to supporting unhealthy norms and values?
- How might pressures on young people (e.g., testing, academics, drugs, or violence at home) contribute?

Identify the Challenge

By answering questions such as those posed above, you can begin to diagnose the dynamics in your classroom that perpetuate the behaviors you seek to eliminate.

- How would you characterize the current culture of your classroom?

- How would you like it to be?
- What do you seek to change about your classroom practice?
- Why is that a challenge?
- What obstacles do you anticipate running into as you seek to make your classroom culture more caring and inclusive?

Regulate Distress

Changing habits and behaviors can be extremely uncomfortable. One way we help young people grow is through challenging ideas and assumptions to deepen their thinking.

Critical to the success of such reflection is creating a safety zone for young people—a place where they know they will be treated with care and respect. Make it safe for everyone to make mistakes and to learn from them. Explore with students what practices make them feel cared about and respected, and which do not. You might be surprised by some of their answers.

Be Open to Multiple Viewpoints

As you explore the dynamics of your school's culture with young people, you are likely to hear multiple perspectives on the problem. Creative solutions to problems come from meaningful dialogue that welcomes multiple viewpoints.

Elicit Student Insights

Help young people develop problem-solving skills:

- How would they solve the problem of bullying at your school?
- What do they think is at the root of the problem?
- What should they learn to address the problem?

Help young people acquire the needed skills and then give them plenty of opportunity to practice problem solving for themselves (when appropriate) so you can move them along the continuum toward increased independence.

(**Note**: Serious problems touching on a young person's safety require adult intervention.)

Nurture Student Leaders

Build leadership skills in young people. Rotate leadership roles in group projects; help young people identify and then acquire the skills they need to provide leadership to others. Show young people they can feel powerful in a healthy way by making a difference in their school and community.

Leadership Steps in Summary

- Get on the balcony
- Identify the challenge

- Regulate distress
- Are open to multiple viewpoints
- Get student input
- Nurture student leaders.

Tools at the Ready: Classroom Applications

In Chapter 2 school-wide "Tools at the Ready" for building community and preventing bullying were outlined. Refer back to that discussion for more information. The same tools can be put to use in your classroom. Here are ways to think about how to customize the tools to your and your students' unique needs.

Tools for Community-Building and Bully-Proofing Schools

- Group agreements for behavior
- Disciplining for Learning
- Rituals
- Positive reinforcement and role modeling
- Empowering students
- Teaching pro-social skills
- Cooperative learning
- Action research.

Group Agreements for Behavior

Even if you have developed a school-wide pledge or group agreement for behavior, it's helpful to repeat this process in your classroom (or create a process if school-wide agreements have not been negotiated).

Your classroom agreements might be more specific or address unique circumstances. If you have a science lab, what needs to be agreed about sharing resources? What behaviors does everyone agree to for maintaining safety? What behaviors do students agree to in order to show respect for others' ideas? What specifically helps young people feel safer when they learn? Sometimes school-wide procedures do not address specific issues that come up daily in a classroom, such as teasing or certain types of exclusion.

These classroom agreements do not replace school-wide agreements; they augment them. You can use a school-wide agreement as a launching off point for the discussion. How do those school-wide agreements apply to your classroom? What does anyone want to add or expand upon those agreements? Many bullying prevention, conflict resolution, and other intergroup relationship curricula include activities for creating group agreements. A good example is the *Don't Laugh at Me* curriculum from Operation Respect available at no charge at **www.operationrespect.org**.

Group agreements can be infused into your academic curriculum by tying the process to historical and cultural content such as the influence of the Iroquois Nation on the U.S. Constitution, the role of rights and responsibilities in citizenship, or the Parliamentary meeting process.

Reflection

- What values do you want to communicate in your classroom agreements?
- What skills and understanding do you think are most important for students to take away and apply to life?

Teasing vs. Taunting

"I was only teasing!" and "Can't you take a joke?" are familiar refrains. Teasing should be given special attention as you develop your classroom agreements and policies. Some students find it helpful to make a distinction between teasing, which is good-natured and not intended to harm, and taunting, which is clearly negative and an attempt by the bully to humiliate. The line between the two can be subtle, and whether conduct is considered teasing or taunting may depend on the target's perspective and the relationship between the two people. Some students are unperturbed about being teased; others are more sensitive. And some students are closer in relationship and more secure about their standing with the teaser than others.

By the Numbers

Research by John Hoover and Glen Olson revealed teasing is the most common form of bullying young people experience. Verbal bullying can be as devastating to young people as physical abuse by peers.[93]

Not only are there differences in individual tolerances, but there are also cultural differences that should inform any teasing policy you develop. African American students might engage in playing "the dozens"—a game of escalating teasing where one party bests the other through wit and mental toughness. Likewise, teasing between two members of the same race might have a different tone than an exchange across racial lines. The line between teasing and taunting can be subtle and related to context and power, so a discussion with your students about the issue can enlighten everyone involved.

Whether or not there were witnesses to the teasing can also have an impact. Facilitate a discussion with your class to create guidelines about teasing. Stimulate students' thinking along the way by giving examples you've seen in the schoolyard or in your classroom that they may not think of. (Avoid restating derogatory names.) Some questions you might ask include:

- What is teasing?
- Is teasing ever bullying?

- When, if ever, is teasing not bullying?
- Is there any type of teasing that we feel is acceptable?
- How will we know that type of teasing when we see it?
- Is there any type of teasing that we feel is unacceptable?
- How will we know that type of teasing when we see it?
- What should bystanders do or not do when they witness acceptable teasing?
- What should bystanders do or not do when they witness unacceptable teasing?
- What can we all agree to as a policy on teasing?
- How will we handle it when someone makes a mistake and violates the policy?
- How and when will we check in on how we are doing with this policy?

Take Note

It can be very difficult for an adolescent to admit that someone's supposed good-natured teasing is hurtful. Bring up this concern with students if they suggest some forms of teasing be allowed if the target doesn't seem to mind. You might together decide that all types of teasing should be stopped, or come up with a safe way for targets to share how they feel about the teasing. As trust and a sense of community develop in your classroom, it will become increasingly possible for targets to be direct with their peers about how teasing feels.

Delve Deeper

Reseachers Hoover and Olson have looked extensively at teasing in the context of bullying. See "Sticks and Stones May Break Their Bones: Teasing As Bullying," in *Reclaiming Children and Youth* 9.2, Summer 2000, pp 87–91.

Class Meetings

Class meetings can be effective given the small group context of your classroom. You can use class meetings to get feedback from students about the success of current group agreements and to problem solve issues that come up. If you institute a weekly class meeting, for example, let students help create the meeting agendas. One way to do this is to hang up a large piece of poster paper and ask young people to add topics to be covered at the next meeting. From this process you can together create an agenda for the next meeting. Rotate roles at class meetings so different students can be note taker, timekeeper, and facilitator.

Things to Think About

- What process will we use to create and commit to our group agreements?
- How often will we check in on how we are doing in adhering to our group agreements?
- What will we do when someone does not adhere to an agreement?

- How often and through what process will we update or revise agreements?
- How will you use the process of creating and maintaining group agreements and class meetings to leverage the three "I"s? (**See** page XX in Chapter 3 for a review of the three "I"s.)
- What training and support do you need to effectively implement practices such as group agreements and class meetings?
- What skills and support will students need?

(**See** "Group Agreements for Behavior" on page 42 in Chapter 2 for more information.)

Tip

Limit class meetings to no more than 20 minutes and keep the conversation focused. Create a "parking lot" for random issues that come up or issues that are too time consuming to deal with at that moment. You can return to your parking lot items at the next class meeting.

Constructive Discipline

There are countless opportunities in classrooms to instill discipline which is conducive to growth and learning. While a school-wide discipline and behavior code guides your efforts, how you handle those teachable moments can have a major impact in setting classroom expectations.

Reflection

- When you were an adolescent and misbehaved, how did your parents handle the situation? Your teachers?
- How did their reaction make you feel?
- What do you think is the best way to address a behavioral problem with a student?
- A question I still have about behavior management is …

Punishment vs. Discipline[94]

The following chart from *The School for Quality Learning* outlines the differences between punishment and discipline.

Punishment	Discipline
▪ Expresses power of an authority; causes pain to the recipient; based on retribution or revenge; concerned with actions in the past. ▪ Arbitrary: applied inconsistently and unconditionally; does not accept or acknowledge exceptions or mitigating circumstances. ▪ Imposed by an authority with responsibility taken by the one administering the punishment and responsibility avoided by the one receiving the punishment. ▪ Closes options for the punished individual, who must pay for a behavior that has already occurred. ▪ As a teaching strategy, usually reinforces a failure identity. ▪ Essentially negative and short-term, without sustained personal involvement of either teacher or learner. ▪ Characterized by open or concealed anger; easy and expedient; a poor model of expectations. ▪ Focuses on strategies intended to control behavior of learner; rarely results in positive changes in behavior; may increase subversiveness or result in temporary suppression of behavior; at best, produces compliance.	▪ Based on logical or natural consequences that embody the reality of a social order (rules that one must learn and accept to function productively in society), concerned with the actions in the present. ▪ Consistent: accepts that the behaving individual is doing the best s/he can do for now. ▪ Comes from within, with responsibility assumed by the disciplined individual who desires that responsibility; presumes that conscience is internal. ▪ Opens options for the individual, who can choose new behavior. ▪ As a teaching strategy, is active and involves close, sustained, personal involvement of both teacher and learner; emphasizes the development of more successful behavior. ▪ Friendly and supportive; provides a model of quality behavior. ▪ Usually results in a change in behavior that is more successful, acceptable, and responsible; develops the capacity for self-evaluation of behavior.

Exploring Behavior Problems: Needs, Weeds, Seeds, and Deeds

"Needs, Weeds, Seeds, and Deeds" is a suggested process to use with young people to reflect more deeply on problem behaviors, to self reflect, or to reflect with peers and administrators on patterns of behavior problems visible in your classroom or school community:

- **Needs**: What happened and what were the underlying needs?
- **Weeds**: What, if any, were the obstacles to better behavior?
- **Seeds**: What can be learned from what happened?
- **Deeds**: What can we commit to change or do differently next time?

Discussing Behavior Problems with Young People

Use "Needs, Weeds, Seeds, and Deeds" as the foundation for a private conversation about a problem behavior between two students or with an individual student. If the problem is a group problem, use the process during a class meeting.

Important Safety Note!

Think carefully about whether or not a situation between two students should be mediated using Needs, Weeds, Seeds, and Deeds.

If harassment or intimidation is ongoing, a face-to-face meeting between a bully and target may only serve to retraumitize the target. Safety must take priority. Mediation, whether adult or peer mediated, is only effective in first-time, minor, or nonchronic situations. (**See** Chapter 4 for more information about ways to intervene with bullies and targets.)

Things to Think About

- Set and enforce ground rules: no blaming, shaming, name-calling, or interrupting.
- Listen non-judgmentally
- Paraphrase what young people have said
- Encourage the use of "I feel" messages rather than "You" messages that imply blame
- Be comfortable with silence (allow young people ample time to reflect)
- Criticize the behavior, not the person—"You are decent, but what you did was wrong"

Needs

- What happened? (Give each student a chance to say what happened from his or her perspective. Paraphrase each student's perspective and ask if you are correct in your summary.)
- Why was the behavior a problem? (Address feelings that were brought up by the behavior or any other repercussions. In framing the question, it helps to remind students that their actions, like a stone thrown into a pond, create ripples that affect the whole community.)
- What **need(s)** do you think motivated the behavior? (This question might take some time for reflection. You can give each young person a chance to write out ideas before answering. For example, a young person who spreads rumors about another young person may seem to be acting out of personal dislike. A closer look might reveal that the young person feels they need to increase his own social standing in the school by lowering another student's social standing. Students will get better at this type of reflection over time.)
- If the problem you see in your classroom is a group dynamic, like a group of students being excluded, bring the issue to a class meeting and use the "Needs, Weeds, Seeds, and Deeds" process to take a closer look at the issue. Engage the entire group in solving the problem and making a commitment to change. Does anything need to change in your classroom agreements?

Weeds

Were there any obstacles to achieving better behavior? Again, this question may be difficult for young people, but it's worth pursuing.

This step is an opportunity to think about factors that might reinforce or contribute to the problem. The emphasis here is on learning, not blaming. In the example of someone who has spread rumors about a student, an obstacle to improving behavior may be the prevalence of gossiping among students. By looking at **weeds** you can better problem solve issues related to the behavior.

Seeds

What opportunities for learning and growth exist? A young person who spreads rumors might not have foreseen how far the rumor would go or how devastating it would be for the target. Likewise, a target might not have thought about the ways the school culture encourages such rumors. This step is akin to finding the silver lining in a cloud.

Deeds

This is the part of the conversation where **deeds** (intentional acts) occur:

- Necessary reparations are made
- A commitment to better behavior is secured.

Ask the student who instigated the problem what s/he can you do to repair the damage done. (In the rumor example, the perpetrator can apologize and retract the rumor.)

Ask the target what s/he wants to happen.

Also try to problem solve ways the class can address any weeds identified. Perhaps the person who spread the rumor could write a piece in the school newspaper about why gossip is bad for everyone; or you could get students' suggestions at your class meeting.

To bring this conversation to a constructive close, it is critical to ask what the person with the problem behavior can commit to doing differently next time. Sometimes simply re-committing to a group agreement against bullying behavior might be enough; but consider getting a specific commitment from the young person beyond your classroom agreements or in addition to the agreements. (**See** Chapter 4 for more strategies for intervening in bullying events.)

Tip: Curriculum Infusion

"Needs, Weeds, Seeds, and Deeds" can be infused into the academic curricula. The subjects of history, politics, and literature are filled with opportunities to reflect on conflict using this framework. By weaving in bullying prevention ideas you'll help students gain skill reflecting on personal and social dynamics that contribute to problems.

Delve Deeper

See Alfie Kohn's provocative book about classroom management *Beyond Discipline: From Compliance to Community* (ASCD, 1996).

Review of Steps for Constructive Disciplining

1. Use the Needs, Weeds, Seeds, and Deeds framework for discussion
2. Provide choices
3. Teach responsibility
4. Stay neutral, nonjudgmental, and dispassionate
5. Respond immediately
6. Be fair and consistent
7. Implement consequences

The Power of Rituals

Many teachers use rituals in their classrooms—from the way they hand out papers to how they begin and end each class. Rituals can help create a caring community, and the best rituals are those that communicate and reinforce values your group holds and celebrates and those that prepare students for, and celebrate, life transitions.

There are endless options: You could use a relaxation technique to diffuse students' tensions before tests or you might begin a class period with a quote that is related to the topic of the day. Rituals accepted and followed by the group can help prevent conflict in a classroom and build a sense of shared community. Rituals and traditions that are ongoing have the added benefit of reminding everyone they are part of a history with strong roots and an enduring future. We are more likely to behave at our best when we feel part of something larger and more important than ourselves.

Reflection

- What rituals, if any, do I currently use in my classroom?
- In what ways do these rituals support a caring classroom? Are there ways they do not provide positive support?
- What opportunities are there for me to reinforce the values of a caring classroom through rituals?

Things to Think About

- During a normal class period, what are the moments of transition?
- Which periods of transition seem to be most difficult for students?
- What type of ritual might make that transition easier?
- What values could that ritual communicate?
- What type of rituals best communicate the values of your classroom?
- What events could be celebrated in the classroom with rituals?
- What rituals would best celebrate those events, while also communicating important values?
- How might I nurture student leadership through the development and use of rituals?
- What life transitions will my students be experiencing this year? What ritual could honor or celebrate this transition?

Tip

Involve students in creating interesting classroom rituals. Begin with the values you together want to uphold (identified in your classroom agreement process) and design the rituals from there.

Ritual Planning Sheet

Value to Communicate	Transition or Event	Ritual

Positive Reinforcement and Role Modeling

Teaching Opportunities

Look for opportunities during each class period to provide role models for young people and positively reinforce the behaviors you seek. Think about:

- What is it you want to model?
- What behaviors do you seek?
- What it is you hope to impart?
- Who might be a good role model for those qualities?
- Who would not be?
- Do you model the behaviors you seek from young people?

That last question can be difficult to answer, as it is hard to know what you are role modeling for young people without the help of an objective and trusted friend who can observe your teaching and give feedback.

Your body language, reactions under stress, ways of disciplining students, and other subtle ways of running the classroom can communicate a lot to young people about what you value. You can become more aware of what you are teaching by example through peer evaluation or simply asking a peer of friend to observe your class and offer feedback.

We can all fall into the trap of pointing out only negative behaviors, rather than positive, in our discipline approach with students. Research shows that any type of attention—including negative—can reinforce behaviors[95], so it is ideal to notice students being kind or caring and then tell them specifically what they did well.

Reflection

- Who have been the most important role models in your life?
- What was it about them you most admired?
- What behaviors or qualities do you hope to encourage in young people?
- For you, who (living or dead) best exemplifies those behaviors or qualities?
- What opportunities are there to reinforce the values of a caring classroom through rituals?

Things to Think About

- How can you weave positive role models for young people into your curriculum? Into each day?
- Who might you trust enough to give you objective advice about what you are modeling for young people—positive and negative?

- Are you ready to hear feedback? What might make you feel safer when hearing feedback? Who would you trust to give you constructive, and honest, feedback?
- What good behavior do you wish to single out for recognition?
- What mechanisms will you use to positively reinforce those behaviors?
- How might young people be involved in providing good role models and positive reinforcement for good behavior?

Empowering Students: Nurturing Acts of Conscience

In the article "Words Can Hurt Forever," authors Garbarino and deLara note that efforts to create a caring community within your classroom and school plant the seeds of social responsibility in young people. To the largest extent, young people's acts of conscience arise from a sense of being inextricably bound together with others. It is through their relationships with others and their successful navigation of differences among people that they gain clarity about their own needs and values.

Another key part of young people's character development is having the opportunity to experience a sense of their own power and efficacy. So every time you let a student take a leadership role or ask for input from your class and integrate it in meaningful ways, you are contributing to growth in young people's character. While this practice will serve your bullying prevention efforts directly, it will also well serve your students and likely make you feel better about your own efficacy in the classroom. [96]

By the Numbers

The article "Words Can Hurt Forever" reports that children who feel most connected to their schools are the ones most likely to believe and act on the conviction that it is not acceptable to treat others badly. [97]

So what does it take to help young people feel a sense of their own power? How do you widen the circle of caring to encompass your neighborhood? Your town? Your state? The world? How do you encourage service to the community? How do you help young people reach their potential and become the best they can be? *Go for the GOLD!*

G **G**oals and standards: The importance of setting and evaluating progress toward goals.

O **O**bstacles to goals: Finding ways to overcome obstacles to personal and group goals.

L **L**earning from losing and mistakes: How to recover from loss and learn from mistakes.

D **D**oing it together: The importance of team effort and wider support in bringing out our personal best.

Young people need to develop skills that help them reach their personal bests. The sense of confidence and accomplishment that comes along the way is vital to personal growth.

Help students develop the GOLD skills—particularly their efforts to help bully-proof their schools:

Young people need practice and opportunities to develop new competencies. They need permission to make mistakes and learn from them, and they need your guidance to facilitate their progress. (**See** Chapter 5 for ideas about working with students to widen the circle of caring and encourage community service projects.)

Your Role in Nurturing Student Leadership

- **Coach** young people on the tools of achievement, such as goal setting, self-assessment, learning from failure, persistence, discipline, and cooperation.
- **Lead** young people in developing a sense of their own self-worth, and identifying their unique gifts and contributions to the whole.
- **Help** young people in the classroom see themselves as members of a team, striving together for a common goal.
- **Witness** students' growth and **reflect** it back to them.
- **Champion** young people's efforts, increasing enthusiasm and buy-in, so progress in bullying-prevention spreads beyond the classroom/school and into the community.

Teaching Pro-Social Skills and Awareness

People often turn to curricula when they think of bullying prevention, but choosing a specific program is just one approach to bullying prevention. It is, however, a critical piece of a whole-school approach. Fortunately, many good bullying prevention programs exist, and there is overlap of core concepts within the fields of conflict resolution, violence prevention, anti-bias work, social and emotional learning, and character education. For that reason, the key concepts are outlined here. Feel free to draw from various sources for activities and lessons that will work best with your student population. A minimum of 10 to 20 skills lessons are recommended.

Key Bullying-Buster Concepts to Teach

- What bullying is (how to know it when you see it)
- How common myths about bullying perpetuate it
- Bullying hurts everyone (toxic environment)
- Everyone has a right to feel and be safe
- Our actions (and inactions) have consequences
- Problems can be solved nonviolently
- One of our responsibilities is to be an ally to someone who is being bullied or excluded

- Another responsibility is to be an ally to an ally
- Adults in the community are here to help you learn and keep you safe
- Telling is not tattling
- Differences among members enrich a community
- Conflict is a growth opportunity and leads to creative solutions
- Biases are often operating in our interactions, whether or not we are conscious of them
- Power dynamics and biases at work in a school culture reflect larger society's power dynamics and biases
- Expectations others have of us influence our behaviors (both positively and negatively)

Key Social Skills to Teach

- Perspective taking
- Anger management/impulse control
- Empathy
- Feelings vocabulary
- Healthy expression of feelings
- Cooperation
- How to be a friend
- Communicating needs ("I" messages)
- Active listening
- How conflict escalates
- Win-win conflict resolution
- Problem solving
- Assertiveness skills (interrupting bias and harassment)
- Positive self-talk
- Appreciation of differences

Launching the Classroom Component

A good place to begin your classroom component is a group discussion about feelings and thoughts about bullying. Most young people are not bullies, but the majority of us—adults included—have been involved in bullying, either by our silence as a witness to an event or by being party to more subtle forms of bullying such as exclusion, spreading gossip (or simply believing rumors), or teasing.

Your goals as you launch your effort are to:

- Help young people empathize with the pain of being targeted
- Explore the role of bystanders in bullying incidents
- Expand young people's definition of bullying to include more subtle forms of bullying such as gossip, exclusion, and teasing
- Address common myths related to bullying (**See** Chapter 1)

School Spotlight: Huntington

The Gateway Middle School in Huntington, MA,[98] uses the following lesson to explore attitudes and opinions about bullying. This exercise is a good way to assess baseline attitudes toward bullying at the beginning of a unit and generate discussion about how students perceive school climate.

Attitudes and Opinions About Bullying (Grade 5) Lesson Plan

1. Read "Making Sarah Cry" in *Chicken Soup for the Teenage Soul II*
2. Post three signs around the room that say "Agree," "Disagree," and "Not Sure." Ask students to move to the sign that reflects their opinion about each of the following statements:
   - Bullying is a problem at our school.
   - I see kids being picked on, or I am picked on daily.
   - I see kids being picked on less frequently than daily.
   - At least once a week I witness or experience a bullying incident.
   - I believe that there are things that I can do to help.
   - If I saw a kid being bullied, I would probably try to help.
   - I have learned skills to deal with bullies, and I use these skills when necessary.
   - I believe that everyone should feel safe coming to school every day.
   - Bullying is no big deal. It's just a part of life.
   - It's funny to pick on other kids—no one really gets hurt.
   - Kids who are bullied don't feel safe at school.
3. Facilitate a discussion. Explore how it feels to be targeted; address myths about bullying; explore the role of bystanders; and together with students create a definition of bullying.

Delve Deeper

The Broken Toy Project offers films useful in launching bullying prevention efforts. Its films feature young people talking frankly about bullying and are appropriate for both elementary and secondary school levels. Go to **http://brokentoyproject_1.tripod.com .**

Moving From Bystanders to Allies

> "It made me sad for the victim, and I wanted to help him, but I was afraid."
>
> — **from a bystander who witnessed a bullying incident**

Studies show that peer intervention is effective in stopping bullying in a majority of instances.[99] Boys and girls were equally effective, and the effectiveness of the intervention was not related to whether or not it was an aggressive strategy. This finding demonstrates that nonviolent solutions can work.

By the Numbers

Peers are present in **88%** of bullying incidents and intervene **17–19%** of the time.[100]

R. J. Hazler's article titled "Bystanders: An overlooked factor in peer on peer abuse" showed that children who do not intervene may have various reasons:

- They may be unsure of what to do
- They fear retaliation
- They worry about making it worse[101]

To combat bystanders' fears, the book *Bully proofing your school: a comprehensive approach for elementary schools* recommends teaching young people to help targets through:

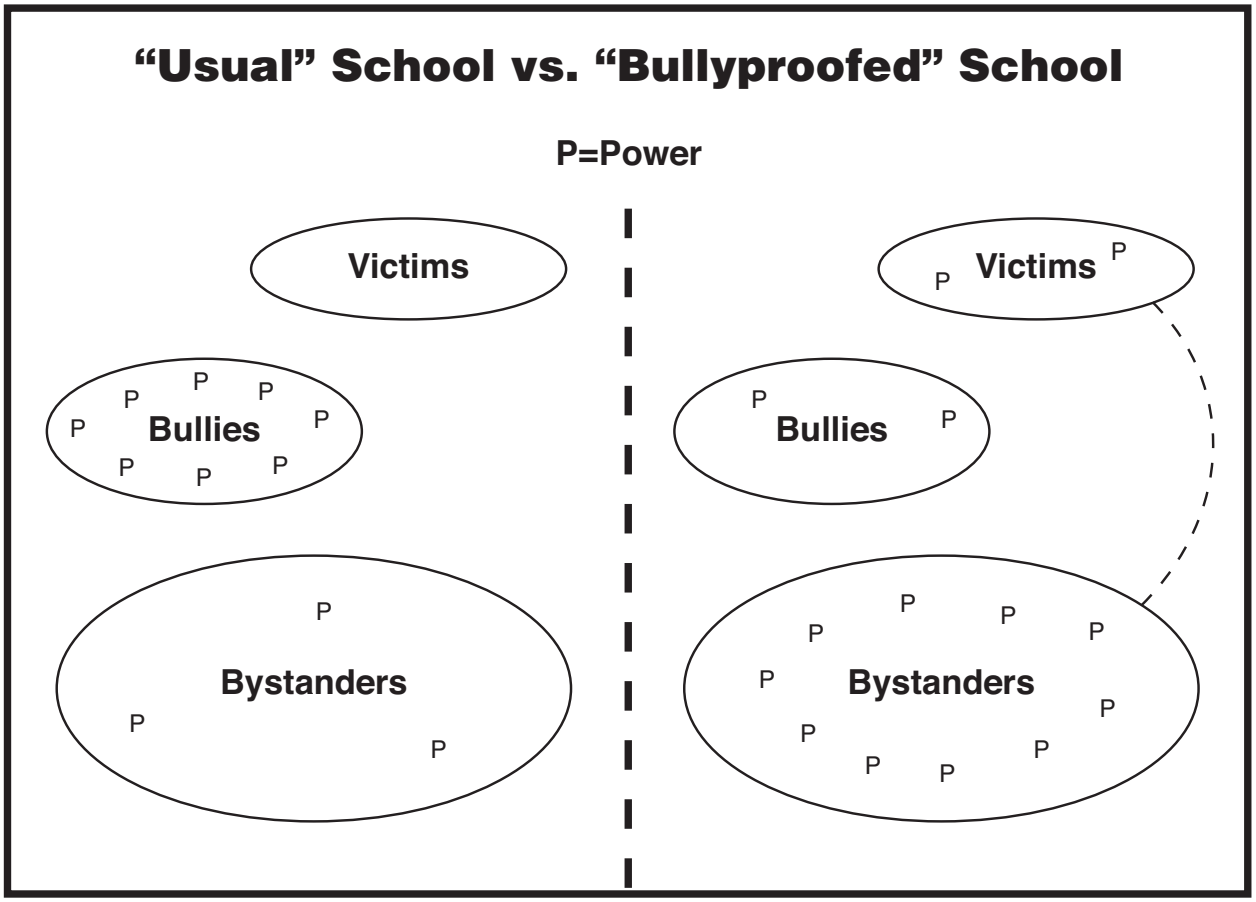
- Creative problem solving
- Seeking adult help
- Joining with the victim as an ally
- Being an ally to other allies
- Developing empathy for the victim[102]

School Spotlight: Huntington

The Gateway Middle School in Huntington, MA, uses The Power Demonstration to look at the issue of how power is transferred from the bully to the target and bystanders when bystanders learn to become allies.[103]

The Power Demonstration

1. Put the following graphic on the board.



2. Explain the terms bully, bystander, and target. Show the distribution of power in a non-bully proofed school, and how power shifts from the bully to bystanders and the target in a bully-proofed school.

3. Brainstorm ways to shift the power to bystanders. Ask: What are some agreements we might make that would shift the power away from the bully to the bystanders? (Or relate this challenge to the class or school agreements you have already made.) Some possible commitments are to become more inclusive, find ways to come to the aid of a target when s/he is being bullied, work at respecting oneself and others, and refrain from teasing.

4. Now divide students into three groups: bullies, targets, and bystanders, with the biggest groups being bullies. Take small pieces of paper with a "**P**" for power written on them. With students' permission tape (or have them tape) pieces on the bullies, a few on the bystanders, and none on the targets. Tell them, "This is a typical school."

5. Now, shift the power. Have students who are bystanders offer something they promise to do that week to help a target (e.g., include someone without friends in a game; stand up for someone being teased). For each suggestion, take a "**P**" from the bully and move it to the target or the bystander who offered the suggestion.

6. End the activity with a group "POWER" exercise. Stand in a circle holding hands, then crouch down and softly say "Power." Stand back up and finish the "Power" as loudly as possible with hands in the air.

You can explore the dynamics of power involved in a bullying situation more deeply by looking at the ways bullying reflects issues of privilege and bias that permeate our culture. (**See** "Address Issues of Privilege, Power, and Bias" on page 93 for more information.)

School Spotlight: Salem

The Collins Middle School in Salem, MA, has done extensive anti-harassment program development. Its program titled Increasing the Peace was designed by a group of faculty and students in 1998 in response to a violent incident on campus. As part of the program, students are encouraged to be allies to the ally—that is to join in when other students are supporting a target so a group of young people ends up supporting a target, rather than just one person.

Because intervening in a bullying situation to help a target is difficult for everyone—even adults—give young people plenty of opportunities to learn and practice the skills involved in intervention.

Following is one activity from the *Don't Laugh at Me* project of Operation Respect. This activity was developed jointly by Operation Respect and Educators for Social Responsibility, **www.esrnational.org.**

Be a Bullying Buster[104]

Materials Needed

- VCR and *Don't Laugh at Me* video cued to the Peter, Paul & Mary version, available for free download at **www.operationrespect.org**
- Poster paper
- One handout per student of "Five Steps for Sending Assertive Messages" on page 92 below.
- One index card per student (one third labeled "target," one third labeled "bully," one third labeled "ally")

Gather Together: Explore Caring (5–10 minutes)

- Show the *Don't Laugh at Me* video. Ask students to write down the positive or hopeful images they see in the video.
- Discuss: What do these images have in common? (Many of the images include people showing caring—either by putting an arm around someone, giving someone an award, or cheering them on.)

Introduce Bullies, Targets, Bystanders, and Allies (15 minutes)

1) Explain that the group is going to figure out what can be done when we see someone being treated unkindly or bullied.

2) Ask: What types of behavior constitute bullying? (e.g., repeated name calling; making fun of people; picking on people; hitting, kicking, shoving, pushing, pinching, or threatening people; excluding someone from a group.)

3) Ask for a show of hands of everyone in the room who has seen someone being bullied or been bullied themselves. (Likely everyone will raise their hands.) Point out that everyone in this room will—or already has at some time—be in a situation where they are either a target of bullying (the person being bullied) or a bystander (someone who witnesses the bullying). When we witness a situation in which an individual or a group is targeted, we can make a choice to be a bystander who doesn't say or do anything to change the situation. Or we can choose to be an ally— someone who works with and acts in support of a targeted person or group.

4) Explain that students will learn: 1) how to be an ally when you see someone being bullied; and 2) how to stand up for yourself if you're bullied.

5) Divide students into groups of three. Distribute cards so that in each group there is one student per role: ally, target, and bystander. Give each student 1 minute to tell about a time when s/he was an ally, a target, or a bystander (the role as assigned on their card).

6) Allow bystanders and allies a minute to respond.

7) When everyone has finished, give the groups 3 minutes to debrief (1 minute per question): What did it feel like to be the target? What did it feel like to be the bystander? What did it feel like to be the ally?

8) Brainstorm with students a list of things you can do when you or someone else is being hurt or bullied. Explain that you are looking for ideas that are nonviolent.

9) Now record ideas on chart paper in two columns: ideas that mean confronting the bully and ideas that do not. Add to the students' ideas with suggestions from the following:

   - Refuse to join in (doesn't involve confrontation).
   - Report bullying you know about or see to an adult (doesn't involve confrontation).
   - Invite the person being hurt to join your group (might involve confrontation). Then ask the person who was bullied if it's okay to have the bully join your group if the bully apologizes (does involve confrontation).
   - Speak out using an "I" message. Say, "I don't like it when you treat him like that;" "I want you to stop calling him that name;" or "I wouldn't want someone to say that to/about me" (does involve confrontation.)
   - Be a friend to the person who has been bullied by showing him you care about him.
   - Put an arm around her or him, give him a word or two of compassion (doesn't involve confrontation).

- Distract the bully with a joke or something else so her or she stops the behavior (does involve confrontation).
- Share your perspective (does involve confrontation). Say, "That sounds like an assumption to me . . ." or "From my point of view, it seems that . . ."
- Provide accurate information (does involve confrontation). "Here's what I know about (the situation/person) . . ."

10) Give students copies of the handout "Five Steps for Sending Assertive Messages" for review.

11) Go over the steps with them. One important rule to emphasize is that if students see someone being hurt physically or witness an interaction that might escalate into physical violence, they should not confront the bully. Rather, they should quickly go and get help from an adult. Discuss with students signs that might indicate such a physical threat.

Intervene in Bullying: The Bullying Buster Machine (15 minutes)

It takes courage and practice to act decisively without being mean when you or another person is being bullied. Tell the students you are going to create a Bullying Buster Machine.

1) To form the machine, have students break into two lines facing one another about 3 feet apart. They should imagine that they have switches on their arms. When you touch an arm, the Bullying Buster machine switches on. You will walk down the aisle between the students, pretending to be a bully. Once a student is "switched on," that student should give out an assertive (strong, but not mean) message to the bully.

2) Walk along the aisle between the students. Recite a scenario from the ones listed below, or act it out if you are comfortable doing that. Then choose a student randomly and switch him or her "on" with a touch on the arm for a strong bullying buster response. Practice with several students before moving on to another scenario. Some possible situations, someone:

    - Calls you a bad name. (Possible Bullying Buster Machine response: "I feel hurt and angry when you call me that name. Please don't do that.")
    - Tells you to do something you don't want to do.
    - Is calling someone else a bad name.
    - Is making fun of someone because she is disabled.
    - Wants you to call someone else a bad name.
    - Tells you that you can't sit with them at lunch.
    - Demands that you give him some money.
    - Is teasing a friend of yours and she doesn't like it.

3) Debrief the activity: What messages do you think were most effective?

Close Together (5 minutes)

Ask for a few volunteers to share the feelings they had during this activity?

Curriculum Connections

Following are a few examples of how to tie bullying into your curriculum:

Literature: Have students read Lois-Ann Yamanaka's book *Wild Meat and the Bully Burgers* (Harvest Books, 1997), the coming-of-age tale of a 12-year-old Japanese-American girl named Lovey Nariyoshi living in Hawaii. Lovey struggles to fit in in a world where it feels important to have "straight blond hair and long Miss America legs." Use this book as a launching point to discuss the various ways young people in your school who do not fit in, or are different in some way, are treated. Explore the role of peer pressure in acts of bullying, and bystander intervention as a response. Ask: "Has there ever been a time that you did something like make fun of someone else, just to fit in? How can we make being caring and appreciative of differences "cool" in our school? Any ideas?" A literary classic that addresses bullying head-on is *Tom Brown's Schooldays,* by the 19th century English author Thomas Hughes (Oxford World's Classics, 1999). The book and the 2004 BBC film based on it demonstrate the importance of peer support for targets and the vital role that engaged administrators can play in promoting caring behavior among students. The book can serve as a catalyst for a discussions of bystander responsibility, and ways in which peers can come to the aid of targets. For more suggestions on using literature as an anti-bullying tool, see Hillsberg, C. and Spak, H. (2006) Young Adult Literature as the Centerpiece of an Anti-Bullying Program in Middle School. *Middle School Journal* 38(2) 23-28 (Available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/2b/25/3e.pdf)

Writing: Have students write in their journals for 10 minutes on the following topics:

- My feelings about being an ally to someone being bullied are . . .
- Who is someone you know who is a good example of an ally? What qualities does he possess?

Have students in pairs share their entries.

History: Connect this lesson to a look at groups who have been bullied by other groups in American history; many examples exist. (e.g., African Americans during times of slavery and during the civil rights movement, Cherokee Indians and the Trail of Tears, Japanese American interment camps during World War II, the treatment of women suffragists, the stigmatization of GLBT people, and the Salem Witchcraft Trials).

Five Steps for Sending Assertive Messages

1. Prepare the "I" message. (Think about it ahead of time. Talk about it with another person. It may be a good idea to practice saying it.)
2. Give the message to the person. (Use body language and a tone of voice that reinforces the message.)
3. Wait a moment or two. (The other person may not respond immediately. When the response comes, it may be defensive—the other person may offer excuses, attack, or withdraw.)

4. Listen actively to the response; paraphrase what the other person is saying and what feelings are being reflected. (Ask questions that encourage the other person to look for a solution. Restate the problem and ask, "What do you think would be fair? What can we both do now?")
5. Look for a solution that meets both your needs.

Note: Depending on how the other person responds, you may need to go through the steps several times before reaching a solution.

Telling is Not Tattling

Discuss with students why reporting an incident of bullying to a teacher or other responsible adult is not "tattling." Explain that being in a caring classroom carries some rights and responsibilities. You might explain that everyone has the right to feel safe in the school and we all have the right to be protected. Their responsibilities as members of the school community are to help ensure that sense of safety is possible for every student. Help them understand that when someone's emotional or physical safety is at risk, it is their responsibility to tell an adult.

Address Issues of Bias, Disadvantage, and Oppression

Because bullying at school reflects power dynamics at work in society at large, explore with young people how characteristics such as a person's size, race, age, culture, or perceived sexual orientation influence whether one is targeted. Concepts such as bias, discrimination, prejudice, privilege, and internalized oppression can be explored through the lens of bullying at your school:

- Who are the targets of harassment in your school?
- What gives some students advantages over others?
- How might being told you are inferior because of some unchangeable characteristic affect someone's self-image over time?
- What is a hate crime?
- What can a student do to challenge bias?

Fortunately, there are many excellent resources to help you with this important inquiry.

Delve Deeper

Several organizations have excellent online resources, both free and available for purchase, to help you help young people fight hate. See the Southern Poverty Law Center's Teaching Tolerance project at **www.tolerance.org** and The Anti-Defamation League at **www.adl.org**.

Cooperative Learning

> The circle is a sacred symbol of life . . . Individual parts within the circle connect with every other; and what happens to one, or what one part does, affects all within the circle.
>
> **—Virginia Driving Hawk Sneve**

Reflection

- In what ways does your classroom practice reward individual efforts over teamwork?
- What changes in classroom practice could you make to encourage teamwork?

Young people can't work together if they aren't taught the skills they need to do so successfully. Many of the social skills and concepts outlined previously can be used by students in their cooperative groups.

Cooperative learning is basically working together to achieve shared goals. It is a teaching strategy in which small teams, each with students of different ability levels, use a variety of learning activities to enhance their understanding of a subject. Each team member is responsible for learning what is taught and for helping teammates learn. Students work through an assignment until all group members understand and complete it.[105]

According to David W. and Roger R. Johnson, professors and co-directors of the Cooperative Learning Center at the University of Minnesota, this style requires positive interdependence (we sink or swim together), individual accountability (we each have to contribute and learn), interpersonal skills (communication, trust, leadership, decision making, and conflict resolution), mutual beneficial success (we succeed together), face-to-face interaction, processing (reflecting on how well the team is functioning and how to function even better), and joint recognition for achievement.[106]

Cooperative learning techniques set the tone of your classroom, encourage friendships and inclusion, and help young people appreciate one another's differences. Cooperative learning is also a way to level the playing field and give each student an equal chance to contribute and take on important leadership roles.

Tip: Be Intentional in Grouping Students

- Be mindful of social dynamics when you create groups for cooperative learning. Create a seating plan to help mix young people who otherwise might not connect. That is, be sure that the most popular students are not all together, excluding less popular students, and so forth.
- Arranging your room in a circle (where space allows) will also help facilitate a sense of community and equality among students.

Action Research

For a classroom teacher, action research can be a helpful reflection tool and offer insight into what works and doesn't work in your daily practice. If you are successful in investing, involving, and inspiring students in your classroom to join in your research, the resulting synergy will advance your efforts to transform your classroom's culture

Reflection: Together Examine Your Values

Action research enables you to more closely examine your own and your students' values related to bullying. Consider ways to complete these sentences:

- Something I did that I knew was wrong…
- The reason I did it anyway was…
- I wish I could have…
- Next time, I will…
- Bullying is…

Home Connections: Violence in Media

Help parents become more aware of their childrens' exposure to violent media. Research shows that young people who are regularly exposed to media violence are apt to become desensitized to real-life violence and to behave more aggressively.[107] Homework assignments that ask young people to chart violence, prejudice, or other prominent messages in television shows, music, and video games can be, with appropriate adult supervision, an opportunity for shared parent/child experiences. Encourage parents to discuss this issue with their children and be aware of the content of what they are watching or listening to.

Here are some additional suggestions for parents who are concerned about the content of the media their children are exposed to:

- Familiarize yourself with what your son or daughter is watching or listening—music, television shows, movies, online images/videos, and video games.
- Keep the television, video, and computer in a family area.
- Limit the amount of time for media viewing.

- Teach your son or daughter to be critical of common media messages and manipulations.
- Expose your children to media that promote the values you'd like them to learn.
- Be alert to the four danger signs a young person may exhibit when overexposed to anti-social media:
  - ⇒ Desensitization to violence
  - ⇒ Numbing
  - ⇒ Imitation
  - ⇒ Intimidating behavior

- Encourage young people to get involved with peers in activities that promote creative, responsible, pro-social, and civil behaviors.

Helping Kids With Disabilities

By the Numbers

A study by LaMarsh Center for Research on Violence and Conflict Resolution at York University revealed that **38%** of special education students were bullied, as compared to **18%** of students generally.[108]

Young people with disabilities and learning differences are targeted for bullying more often than their peers. They are often also the young people who need the most help standing up for themselves and handling difficult social situations. Why are students with disabilities targeted? While many reasons exist, here are a few of the most common:

- Other students may pick on them because of their "difference," not understanding that difference to be a disability.
- Students with disabilities, particularly developmental and neurological, may not pick up on typical social cues.
- They may be thought of as "stupid" or "slow," making them more vulnerable to bullying.
- Other students may view them as easy targets, thinking the students with disabilities won't "fight back."
- Other students may feel nervous around young people with disabilities and react by bullying them.

Here are a few suggestions to stop or prevent bullying aimed at students with disabilities.

Education and Awareness

Have school-wide disability awareness education programs—include programs to educate teachers and other school personnel. Have classroom discussions about a variety of

disabilities. Awareness and education help students understand why some people look, behave, speak, or learn differently than they do and why that's OK.

Don't focus only on physical disabilities. Young people with neurological disorders and developmental delays who don't have a visible disability are frequently targets of bullying. Other students may not understand why they behave or speak differently, why they have trouble learning to read, or why they don't pick up on social cues when "they don't look disabled." Students may be less tolerant of someone's differences when they don't understand that person has a disability.

For example, certain behaviors, physical or verbal tics, anxieties, manners of speech, impulsiveness, repetitive behaviors, or needs for sensory activities may seem "weird" to the typical student.

Realization and Understanding

Help students realize that ignoring young people with disabilities is a form of bullying, even if it is unintentional. Everyone needs friends and to feel recognized and included. When young people are ignored by other students, it can lead to depression, loneliness, and low self-esteem.

When young people understand the nature of someone's disabilities, it becomes easier for them to talk with and include a student who has differences. Children with disabilities are often left out of groups and ignored by peers simply because the other students are nervous or unsure about what to say to them.

Perspective

Help students develop empathy and compassion, and to think about how students with disabilities may feel when they are bullied or left out. Ask, "How would you feel if you were ignored or ate lunch alone every day. How would you feel if you were being teased for something you couldn't change about yourself, like your skin color, eye color, or the way you walked?" Use social stories to discuss, build social skills, and role play kind behavior. Reward acts of kindness in the classroom, and create opportunities for students to "buddy up" with students who may need extra help making friends or completing a project.

Appreciation

Help students realize that children with special needs have differences, but those differences are not "wrong" or "odd;" they are simply part of what makes them unique. Find ways to celebrate and share the unique gifts of special needs students in your class. Everyone has talents, some are just not as obvious or measurable as academics or athletics. For example, the ability to be cheerful under stress, to be friendly to everyone, to show compassion, to memorize well, or to be creative are all valid talents.

Classroom Tips

- Teach students and educators to understand and tolerate differences, especially differences that are not visible. Programs such as "Kids on the Block," which uses puppets to enact problem situations, can help elementary school students with

acceptance, though they tend to focus on visible disabilities. (Information available at http://www.kotb.com/)

- Include a social skills curriculum in the school; it can be part of character education.
- Reconsider "zero tolerance policies." The behavior of children with special needs can be misunderstood and may call for a more individual response. For example, a child with a sensory disorder may bump or crash into a classmate out of a need for sensory stimulation; but the other student (and teacher) may think the child was hitting on purpose, out of malice, or to start a fight. Or an accidental bump in the hallway may cause the special needs student to believe someone hit them on purpose. A child with impulse problems (caused by, *e.g.*, ADHD, fetal alcohol syndrome, or autism) may also upset another student (or teacher) unintentionally when they do or say something without thinking about the consequences. Such situations require sensitivity and adult intervention, as the child with neurological issues may not understand why s/he is being disciplined or why s/he upset someone.
- Have adequate staffing on the playground, in the halls, and in other unstructured times and places.
- Prepare students for the introduction of students with special needs into your class or into a group activity. Knowing what to expect is the key to acceptance.
- Be inclusive in your classroom activities so physically and mentally challenged students can participate. When appropriate, give them opportunities for leadership and responsibility.
- Use verbal instructions that children with neurological disorders and developmental delays will understand. Use written or pictorial instructions whenever appropriate. Many children with neurological disorders are visual/spatial learners. They may have challenges processing auditory information and may need to hear the instructions more than once.
- Give extra help to special needs students without obviously singling them out or making them feel different from their classmates. Extra attention can embarrass young people who just want to "fit in."
- Offer opportunities for mainstream students to serve as "buddies" to students with disabilities during class, lunch, or recess, or to volunteer as a tutor for younger students with disabilities (having mainstream students tutor grade-level peers can lead to the students with disabilities feeling even more different and "slow"). Working and socializing one-on-one allows students to get to know young people with disabilities as individuals and to become invested in their success.

Social Skills and Bullying Prevention Curricula for Middle School

- *Adventures in Peacemaking: A Conflict Resolution Activity Guide for School-Age Programs* by William J. Kreidler and Lisa Furlong is available through Educators for Social Responsibility at **www.esrnational.org** or by calling 1-800-370-2515; or through Project Adventure at **www.pa.org** or by calling 978–524-4500.
- *Conflict Resolution in the Middle School* by William J. Kreidler, available through Educators for Social Responsibility at **www.esrnational.org**.

- *Don't Laugh at Me*, Grades 6–8 by Laura Parker Roerden, a joint project of Operation Respect and Educators for Social Responsibility, available free at **www.operationrespect.org**
- *Flirting or Hurting?* A Teacher's Guide on Student-to-Student Sexual Harassment in Schools by Nan Stein and Lisa Sjostrom (National Education Association 1994)

Chapter 4: Interventions That Help Bullies, Targets, and their Families

"Educators need to begin by identifying themselves as part of the solution and by searching for an effective path for helping the child to help him/herself"

— **Committee for Children, Second Step**

While this Guide's focus is prevention, there will be times when you need to intervene in bullying incidents no matter how comprehensive your plan. How do you help targets? What can you do for bullies? Will you know bullying when you see it? Some general advice for handling bullying is offered here, but every situation and each young person are unique.

We recommend you work with your counseling staff to develop protocols for effectively intervening with targets, bullies, and their families. Be on the lookout for targets and bullies who are in need of professional counseling. The effects of bullying can cut a large swath emotionally through a young person's life and working with a professional behavioral/mental health professional may be needed.

By the Numbers

One study showed that in 400 hours of videotaped episodes of bullying at school, teachers intervened in only one out of every 25 instances. [109]

Warning Signs of Bullying

Adolescents are particularly adept at holding their feelings close to their hearts. It can be difficult for a young person to share that s/he is being targeted for abuse—even with a trusted adult. They may have internalized the abuse and believe they deserve such treatment. They may also feel so disempowered by the experience that they believe there is nothing you can do to help them.

A certain amount of adolescent angst is normal, but a sudden appearance of certain symptoms in a young person is a sign that all is not right; this young person may be the target of abuse at school. Find out more about how the young person is doing by taking the time to ask and listen.

Warning signs include:

- Symptoms of depression, such as withdrawal from normally enjoyable activities, insomnia, and lack of appetite
- Bouts of anger or other emotional outbursts
- Unexplained headaches, stomach aches, or the like
- Excuses to not go to school; increased absenteeism
- A new route to school; avoiding certain students or parts of school
- Refusal to take the bus; sudden requests for rides to school

- Requests for extra money
- Missing clothing or possessions
- Unexplained drop in grades and lack of interest in school
- Avoidance of social events (in school and out of school)
- Increasing isolation from peers

Tip: Bring It Home

Make sure parents know the warning signs of bullying, because they may see many of the behaviors at home.

Responding to Bullying

What to Do

When a young person has been targeted, follow the *10 Steps to Safety*:

1. **Validate the child's right to physical and emotional safety**: "You have a right to feel emotionally and physically safe at school and we will help you be sure that you can have that."
2. **Share your own experiences with bullying when you were that age** (either as a target or bystander). It can help the child not feel so alone; they might be surprised to learn that an adult they respect could have been targeted.
3. **Give assurance that there is nothing wrong with the target:** "You've done nothing to deserve this; it's the bully who is at fault."
4. **Validate feelings**. "That must really hurt. I remember how hard that was when I was your age."
5. **Provide protection**. Provide increased adult supervision of the young person throughout his or his day; build a protective peer network around him through cross-age buddy pairing.
6. **If you're the parent, tell the school what's going on**. With the school you can develop an action plan.
7. **Talk to parents of both targets and bullies**: Talking to parents of bullies should be done by the school, not the target's parent{s}. It might escalate the behavior for a parent to go directly to a bully's parent(s).
8. **Get the target and bully help.** Counseling may be necessary for both parties. Help both parties develop social skills and learn new behaviors. Reassure the target that s/he did nothing to create the problem, but explain that are a few ways you can help him or her to be more effective in the situation and make friends and allies.
9. **Confront the bully in private**. Be firm about what is acceptable and unacceptable behavior.
10. **Intervene immediately**. Waiting to deal with a problem might be interpreted as a condoning it.

What Not To Do!

- Do not tell the person being bullied to:
  - ⇒ Toughen up
  - ⇒ Avoid the bully
  - ⇒ Fight back
  - ⇒ Try to solve the problem themselves
- Do not confront the bully or the target in front of their peers. Research shows this sort of attention might make the problem worse by elevating the bully's prestige and sense of power and diminishing the person being bullied.
- Do not ignore the incident. Inaction will be perceived as condoning it.
- Do not try to mediate the problem between a target and bully. The power imbalance makes this approach very unwise.

Targeting as a Symptom of School Climate Problems

It is important to listen to young people who have been targeted by bullying and offer appropriate resources and support. Yet it is also very important that the larger school structure address the overall power imbalances that are associated with bullying.

A school setting in which bullying is common affects the quality of the learning experience and the safety of all students, not just those most immediately involved. Episodes of bullying witnessed by adults are usually just the tip of the iceberg; it is likely there are many more manifestations of unhealthy power imbalances plaguing the school climate. A holistic approach to violence prevention is needed to build and sustain a non-violent school community where all students can learn and contribute their unique talents.

Things to Think About

- How can teachers give all students the opportunity to receive respect and appreciation for their unique talents?
- How can you facilitate learning approaches that appeal to all students and create new opportunities for participation?
- As non-violence is learned through role-modeling, practice, and a deepening understanding of the value of respect for others, what is your school doing to facilitate this learning?
- What other beneficial resources exist for students in the home or community?

Teach Assertiveness Skills to All Students

Teach youth how to respond assertively. Give young people plenty of opportunity to practice responding assertively in role-playing exercises and show them how subtle things, such as body language and tone of voice, can contribute to the message they send. (**See** Chapter 5 for more information about building skills for responding to bullying.)

Build Self-Esteem

Research shows the best ways to build young people's self-esteem is by giving them opportunities to take on challenges and meet those challenge successfully. But such success does not come without support. Top-performing athletes and others know the value of a coach, positive self-talk, practice, and hard work in developing needed skills.

Intervention programs that help young people develop a new skill—be it chess, art, music, or martial arts—can be extremely effective in developing resilience in young people to meet life's complex challenges. Draw attention to the positive qualities of students in individual and group settings, and always praise young people in a way that is concise, specific and sincere.

Tip

Debra Pepler and Wendy Craig at York University in Toronto advise that targets who have successfully learned to stand up for themselves do so in the first encounter with their bully. This way they will have intervened before the power dynamic becomes too entrenched. Once it has become entrenched, bystanders and caring adults are critical to intervention efforts.

Home Connections: Helping Families of Targets

"We had no way of knowing how much she was taunted."

– Parents of a girl who shot a classmate in retaliation for taunting

Research shows that families of targets are typically very close-knit.[110] While caring is a strong value in such families, there might be a quality of over-protectiveness to the parenting. When working with such families, draw attention to the positive aspects of the family. These same positive qualities can also be harnessed as protective factors. Families need to know that you will partner with them to do everything you can to keep their children safe at school and keep them informed every step of the way. Likewise, they need to keep you informed of any changes in their children's moods or behavior, or incidents of bullying that occur outside of school.

Things to Think About (For Families)

- Does my child have the skills s/he needs to maintain friendships or relationships?
- Do I support my child's friendships as needed (e.g., with rides, privacy as appropriate)?
- Does my child have what s/he needs to fit in with his or her peers? (While it's great to encourage individuality in a child, respond as sensitively as possible, within your financial means, to requests for specific jeans or shoes, for example. Fitting in and appearing as normal as possible can be very important for targets.)
- What interests outside of school does my child have? How can I encourage her or him to gain skills or achievement with that interest?

Working with Bullies

"Hatred deforms the hater more than the hated."—**St. Augustine**

Communicate your intolerance of bullying behavior, but not intolerance of the perpetrator. Many young people who bully are able to break out of patterns of aggression when give appropriate guidance.

Give Them Opportunity to Reflect

Bullies benefit from the chance to reflect on their actions. While this step is just one part of a comprehensive program, it is part of a bully's coming to understand that you take the incident seriously and that, while there are consequences, you believe s/he can reform. You can prompt reflection through an interview, a survey, or some other self-administered tool. Be sure to include an opportunity to reflect on:

- Why the behavior was wrong
- What the impact was on the target (Encourage empathy and perspective taking; *i.e.*, "How would you have felt?" "How do you think X felt?")
- What the intent of the comment or action was (or what was the need it was meeting in the perpetrator)
- How many incidents the student has been involved in
- What they think should be the consequence of their action. How s/he might make amends to the target. In many cases it is not a good idea to have the target and the bully confront one another; but in some cases, especially those where the problem is in its early stages or is not too severe, the bully might be able to write a note of apology or offer another non-threatening way to take responsibility for his actions.

Also include:

- An opportunity to recommit to the classroom or school agreements related to the incident
- A definition of the action (bullying, harassment, hate crime) or restatement of the policy the action violates

School Spotlight: Brookline[111]

Harassment Policy Process Sheet

(The Bay Cove Academy)

Definition: Harassment on the basis of race, gender, national origin, religion, disability, physical appearance, or sexual orientation in any form will not be tolerated. Sexual harassment is unwanted sexual attention. The range of behaviors include: verbal comments, subtle pressure for sexual activity, leering, pinching, patting, and other forms of unwanted touching.

- What was the harassing behavior?
- At whom was it directed?
- How do you think the behavior affected the other person(s)?
- What was the intent?
- What do you think the consequences of this kind of behavior would be at a job?
- How many times have you been called on this policy?

Provided by Bay Cove Academy, Brookline, MA[112]

Anti-Discrimination Process Sheet

Definition: When an individual refers to another person's nationality, race, gender, religion, sexual orientation, disability, or physical appearance negatively, in an offensive way, or with the intent to offend, consequences will occur.

1. What were your words/actions that were discriminatory?
2. What was the intent of your comment? For example:

I was mad at the person	*I wanted to hurt the person's feelings.*
To make kids laugh	*To get attention from staff*
To be cool	*I don't know*
*Other*_____	

3. How do you think your comments affect the other person(s)?
4. Has anyone ever used those words towards you?
5. How did you feel then?
6. I realize that my words were offensive in the area of nationality, religion, age, race, sexual orientation, gender, or other.
7. How many times have you been called on this policy?

Re-channel Bullies' Need for Power

Perpetrators of bullying can do well if they are placed in leadership roles that allow them to re-channel their power in positive directions. For example, when appropriate, pair them with younger students as a mentor or have them join the school safety patrol. But be honest with them about their strengths and weaknesses, and monitor their behavior to ensure the safety of other children and that positive change follows. Be sure they contribute to the school in a way that leverages their strengths and does not rely on weaknesses. What's important to them? How do they think they might best contribute?

Bullies with a chronic pattern of aggression might be paired with an older mentor (high-school students or a respected adult) who can help them develop different ways to relate to other young people. Research from the Center for the Study and Prevention of Violence shows that the "Big Brothers Big Sisters" program, which involves adults volunteering as individual mentors, has been effective in reducing violence at schools.[113]

Delve Deeper: Are They Bullies?

Screening tools such as the *Systematic Screening for Behavioral Disorders* (Walker & Severson, 1992) might be helpful in identifying young people who are having behavior problems and are in need of professional intervention.

Home Connections: Working with Families of Bullies

Parents of bullies might have difficulty believing their children are engaging in the behavior. In some instances, parents might even condone the behavior because of the many myths about bullying (e.g., the students can handle it, it's normal to bully, or the target had it coming to him).

Interventions with parents of bullies need to model the type of relationships they should be providing at home. Be clear about boundaries and expectations for behavior at your school, be consistent in your communications, and help develop a secure and understanding relationship between the school and the family.

Tips

- Affirm something the family is doing right.
- Show that you care about the student and have faith in his or her ability to change.
- Join with parents for problem solving. (Rather than being the expert and telling them what they should do, ask: "What do you think we could do to help XX learn alternative ways of relating to other students?" or "Why do you think XX might be acting like this now? Has he done this before?")
- Take a nonjudgmental, respectful attitude toward their beliefs (being open to cultural differences in child rearing).
- Correct misinformation about bullying whenever possible.

Things to Think About (for Families)

- Is there something going on in the young person's life that might be bothering him or her?
- Where might he have learned the bullying behavior? (Is there any way that you might be reinforcing the behavior)?
- How much violent media (movies, TV, computer games) is s/he exposed to?
- Have you communicated your disapproval of bullying?
- What types of supervision do you provide?
- How do you usually intervene when your child is aggressive?

Tips for Parents of Bullies

Help your son or daughter develop alternative options to aggression (and always intervene in aggression with clear, firm consequences). Ask: "How could you solve this problem differently next time?" Help your child learn problem-solving skills.
Monitor and limit exposure to violent media. Adolescents, whether or not they admit it, need limits and can feel that your efforts to protect them are a sign of caring.
Help your child address anything that might be bothering him or her: Ask how they are, then listen, listen, listen. If s/he is having problems, together create a plan for addressing the problems.
Seek counseling services, when appropriate. Nearly all young people can benefit from working with a trained therapist.
Together with your son or daughter create agreements for behavior at home and a system of non-punitive consequences. Be consistent in applying the consequences.

Responding To Hate

Here are some school-wide suggestions from the U.S. Department of Education's Office of Civil Rights for responding to hate crimes or other violations of your anti-harassment policy:[114]

- Immediately investigate all reported incidents to determine whether the alleged harassment occurred, determine the scope and severity of the behavior, identify the perpetrators, evaluate the harm to the victims, and determine the appropriate corrective action.
- Immediately refer to law enforcement authorities when the acts in question are violent or criminal in nature.
- Issue forthright announcements from school authorities condemning the harassment and promising appropriate corrective action when the incidents are well known or of public concern.
- Punish, as appropriate, harassers who violate provisions of the school's disciplinary code, such as provisions against sexual, racial, sexual-orientation-related harassment, obscene language, vandalism, other property damage, physical assault, threats and intimidation.
- Use disciplinary action, as appropriate, against employees who violate the school's policies against sexual, racial, sexual-orientation-related and other types of harassment.
- Offer ongoing remedial action intended to prevent recurrence, such as increasing adult supervision of an activity in which incidents have occurred and close monitoring of the victim's security.
- Offer emotional and psychological support as needed for the harassment victim.
- Have informal procedures for resolution, such as peer mediation or counseling, when the incident is isolated and not severe. Informal resolution is voluntarily selected by the parties, the harassment victim has full knowledge of the right to pursue the

formal complaint process, and the school determines that informal resolution is appropriate for the incident in question.

- Teach students who engage in harassing conduct more acceptable behavior, especially when the students are very young or the conduct was not intended to be harmful.

Delve Deeper:

See the free resource from **www.nssc1.org** called "Working Together to Create Safe Schools" for great ideas for working with communities (under "Free Handout").

Home Connections: Violence and Prejudice Reduction Resources

Resources abound for teaming up with parents to prevent bullying and harassment.

A useful fact sheet on preventing violence and bullying can be found at **www.yic.gov/drugfree/prevention.html**..

"What to Tell Your Child About Prejudice and Discrimination," a joint effort of the National PTA and Anti-Defamation League (ADL), is available through the ADL's Resource Center, 823 United Nations Plaza, NY, NY 10017, or by calling 212-885-7951 or visiting **www.adl.org**.

A Note for Parents

If your child is being targeted or you suspect your child might be a perpetrator of bullying, there are a few options for approaching the school. Many schools advise going directly to the school administrators with your concerns. Certainly, it's important for parents to work with the school's administration and teaching staff to address episodes of bullying.

Victim advocate and harassment lawyer Sylvia Cedillo and bullying prevention expert Susan Limber recommend that parents also join forces with other parents through their PTA or other networks to address the issue, because the nature of the problem is systemic and not likely to be confined to one child. Collectively communicated concerns are more likely to get a systemic (and therefore more effective) response.

Chapter 5: A Power Play for Peace, *Cool Tools for Students*

> "It looked like the bully thought he was more powerful."
>
> **—a young person on "what bullying looks like"**

This chapter was written with the needs of students in mind. A successful bullying prevention effort empowers young people to build a school community that makes them feel both physically and emotionally safe.

We envision this chapter being given to young people to equip them to take leadership roles in your prevention efforts. Included are tools they can use to remind themselves what to do when they are targeted or when they are a bystander to someone else being targeted. Also included is a process for planning a service learning project to widen the circle of caring into the community.

It's All About Power

True bullying involves an imbalance of power. A bully might use his or her social clout or larger size or faster wit to put someone down and then keep them down. Often, the ones who have power are given it simply because of the groups to which they belong. Because some groups enjoy unique power and status, while others are disadvantaged, someone might be harassed simply because of who s/he is. Some students have been targeted because they are, or are perceived to be, gay; because they are Latino or Middle Eastern; or because they have special needs.

By harassing someone believed to be "less than" themselves to enhance their own power, bullies help maintain and reinforce bias in the larger society. In effect, bullies spread hate and infect others who witness their harassment who may be led to believe someone of a certain race, size, or sexual orientation deserves such treatment.

Targets of such harassment can be said to be oppressed. Over time, they may begin to believe deep within themselves that they are not as good as other young people, simply because of who they are. Usually, they are being targeted for something about themselves they cannot change. Or they might be targeted for something about themselves that, to remain true to themselves, they should not change (i.e., religious identity).

Bullies can seem powerful; but bullies gain their power through the response of those who witness bullying. Our silence, laughter, or tacit encouragement of bullying gives power to a bully. The bully can be stripped of that power when someone stands up for a student being targeted; and bullying can be stopped in its tracks.

Rather than gaining power, we all—bullies, targets, and bystanders alike—are weakened by the experience of bullying. True empowerment results when everyone works together to stop bullying.

Reflection

- Which groups in your school seem to have more power and privilege?
- Which groups in your school seem to be most often targeted for bullying?
- In what ways does your school encourage inclusion?
- In what ways does your school encourage exclusion?

Delve Deeper

Challenge Day is a powerful full-day experience for young people where they can explore the devastating effects of bullying and harassment. For more information, see www.challengeday.org.

You've Got the POWER!

The next time you see someone being bullied or are targeted yourself, remember you've got the **POWER**:

Play it cool: Keep your cool; don't respond aggressively or violently.

Open to options: Seek help from an adult; know there is a way out.

Work together: Join together with others, rather than go it alone.

Eliminate hate: Stop rumors; include excluded students; challenge bias.

Resolve to solve: Commit to ending bullying now; know that you can make a difference.

Play it Cool

Bullying behavior is reinforced by the perception that the bully has caused the target distress. The target might be able to withhold that reinforcement by pretending that she or he is unruffled by the harassment. A target might shrug and say, "Whatever," or simply walk away. However, if there is the possibility of physical danger, the nearest adult should be told immediately. Whether you are a bystander or a target, never respond to a bully's aggression with aggression or violence yourself. It will only make the situation worse and may end in someone getting hurt.

Be Open to Options

Sometimes it can feel like there is no way to stop a bully. Bullies depend on people keeping silent about their bullying so they can continue it. Some targets even say, "This is just how my life is going to be." But it is important not to give in. Being a target or witnessing a bullying event can certainly feel overwhelming, but remember that you have options. As a target, you can get help from others. Tell an adult what is happening. Practice some ways to

respond in role plays with friends, teachers, and family. Bystanders can likewise find options for supporting the target and help end bullying throughout the school. (**See** "20 Things You Can Do When Someone is Being Bullied", below).

Work Together

There is safety in numbers. If you're targeted, find a few friends to walk with you in places where you feel unsafe. If you witness bullying, be an ally to an ally. Join with other students—the more the better—to stop bullying as it is happening. Say, "We don't like the way you're treating him. Stop it." Then tell an adult what happened.

Eliminate Hate

Gossip, rumors, graffiti, exclusion, name-calling, e-mails—there are so many ways hate can be spread throughout a school. Yet everyone has the ability to make a difference.

Take the high road and ask others to join you. If you see someone being targeted because of their race, gender traits, age, sexual orientation, religion, or physical or mental abilities, tell the person who did it to stop it and then tell an adult.

Resolve to Solve

It's no laughing matter when students experience harassment. It ruins your school and makes it hard for everyone to concentrate on work and enjoy school. What can *you* do to help stop bullying? One way is to start a club devoted to ending bullying or join other young people in planning ways to bully-proof your school. *You* can make a difference.

(**See** "Widening the Circle of Caring —a Student Project" on page 112 for a way to work with other students to spread the word and be a bullying buster.)

Reflection

- Think of a time when you spread a rumor, put someone down, or excluded someone. How did it make you feel?
- Why do you think you did it?
- Were there any underlying emotional needs you were trying to meet?
- What kinds of actions from others make you feel respected?

20 Things You Can Do When Someone is Being Bullied

1. Tell an adult.
2. Tell the bully that you don't like the behavior.
3. Be a buddy (walk with a targeted person in places they are likely to be targeted).
4. Include young people who are usually excluded.
5. Stop gossip in its tracks.
6. Tell a target that you don't think s/he should be treated like that.
7. Invite a target to have lunch with you and your friends.
8. Don't laugh when someone makes fun of someone—even if it has humor to it.
9. Tell a target something that you like about him or her.
10. Support other students when they stand up to a bully.
11. Tell someone who stood up to a bully for someone that you really admired what s/he did.
12. Listen to a target's story and keep it confidential from other students; (remember that it's okay to tell an adult if someone needs help.)
13. Remove graffiti from walls.
14. Surprise a target with a thoughtful gift.
15. _____
    (your idea)
16. _____
    (your idea)
17. _____
    (your idea)
18. _____
    (your idea)
19. _____
    (your idea)

Personal Bullying Buster Pledge

Everyone has a role to play in ending bullying. What will be your role?

After the following reflection, create your own pledge to end bullying.

My Bullying Buster Pledge

Beginning today, I will. . . .

1. _____

2. _____

3. _____

4. _____

5. _____

How Am I Doing With My Pledge?

My Goal For The Week:

Reflection

One of the ways I am a good friend to others is. . .

One of the ways I'd like to be a better friends to others is. . .

Widening the Circle of Caring: A Student Project

In many ways, the bullying you see in your school reflects problems in our society. What problems in your community bother *you*? Is there anything you've learned from your experience of improving your school that you'd like to share with others? Do you want to

make a difference in the lives of students in other schools, or the people in your neighborhood, city, or town?

The following process can be used with a group of other concerned students who want to widen the circle of caring beyond your school. The process can be student or adult led. It will take two sessions of about 1 hour for planning, with at least a week in between the two sessions.

It might be helpful to enlist the aid of a caring adult in supporting your efforts. But whatever you do, make it your own. This is **YOUR** project!

Reflection

A time I feel I made a difference in the lives of others was . . .

It made me feel . . .

Activity: Heal the Hate!

Session 1: What Did We Learn?

Materials needed: large sheets of paper, enough markers for everyone, tape, a few balls, and a timer.

1. Play a game of group juggle.[115] Have everyone (including the leader) stand in a large circle. For this game, everyone will need to say a word they think describes themselves that begins with the first letter of their first name—followed by their first name. For example, "Silly Sam," "Fun Fran." Be creative with this part. There's no need to be modest! What about yourself are you proud of? You'll need to listen to everyone's name and try to remember it for the next part.
2. Once you've gone around the circle and everyone has said his or her name, bring out a ball. You'll say your name and then "hello (description) (name)" to the person you will be throwing the ball to. Then throw the ball. That person then says, "thank you (description) (name)," and then "hello (description) name" and so on. The only rule is that you must throw to someone who has not yet had the ball thrown to him or her. You can throw the ball any way you want—under your leg, behind your back, with both hands, or with one hand.
3. Once everyone has had the ball thrown to him or her, stop and explain the next part. You'll be going around the circle again with the ball, but you must now remember not only the names, but throw the ball in the same order and the same manner you did the first time. Only this time the group will try to do it more quickly.
4. Once you've gone around the circle again quickly, start again, in the same order and manner. But after the second or third throw, add a second ball. While the first ball is going around the circle, the second ball will also go in the same order and in the same

manner you established. Add a third ball. And a fourth! See how quickly everyone can do this! Do it a few times and see how good at it you can get.

5. Explain that you're all here to together plan a project that brings your bullying buster efforts to someone else. You might want to do something for another school or for your town or city. You don't know what you will you do or for whom. And that's why you're all here together—to think about that. You'll have two sessions to plan your project.

6. Ask everyone to find another person they don't know very well. (Or if everyone knows everyone else well, you can count off up to half the number of people in the group twice. For example, if there are twenty people in your group, you'll count off to the number ten twice; then 1s, 2s, 3s and so on will be partners.)

7. In pairs, you will each have 2 minutes to finish a statement. (Put the statement up on poster paper so everyone can see it.) While one person is speaking, the other will merely listen and record—no commenting or interrupting. Another ground rule is that you should NOT name names of specific students or adults in your sharing. Then the partners will switch and the listener will speak and the speaker will listen. Here are the statements; assign one statement to each pair—it's okay for statements to be answered by more than one pair if you have a large group:

   - One thing I've noticed about bullying in our school is. . .
   - Ways our school has improved since we've been bullying busting. . .
   - Something important I realized or learned about bullying is. . .
   - Something I think encourages people to bully is. . .
   - If there were one thing everyone should know about bullying it would be. . .

   Tell everyone when 2 minutes have elapsed and it is time to switch who is speaking and who is listening. Ask the pairs to write down their completed statements. When you are finished, ask for a few pairs to volunteer to share what they said.

8. Now hang up the written statements around the room. There will be five stations, with the above statements on the top of the poster paper and several sheets of paper next to the statement. Students can circulate to any of the stations and add their ideas about that statement to the blank pages with a marker. The same ground rule as before applies: No naming of specific young people or adults. It's fine to talk to one another about the questions as you walk around—in fact, it's encouraged!

9. Once everyone has finished addressing the statements, the group should look at each station. Give everyone a few minutes of silence to read the answers. Then facilitate a discussion. Ask: Are there any questions anyone would like to ask about anyone's answers? Is there anything you'd like to comment on? Is there anything you'd like to add? What do you notice about the answers on these sheets? Summarize any key points made.

10. Tell the group: "Now that we've thought about what we've learned from our efforts thus far, our job is to think about some way we can spread our bullying busting beyond our school. For the next week, we're going to be like roving reporters in our

community. Our job is to look for a problem to solve or an opportunity to spread caring and heal the hate.

Pretend you are visiting here from another country. You've never been to the United States; you've never even seen American television shows or movies. What do you notice about how people treat one another? What examples of caring do you see? What examples of uncaring behavior do you see? Keep notes of what you observe. (On a sheet of paper write two columns: *Caring Behaviors* and *Uncaring Behaviors* to use for the next session). Next week you'll meet to share what we noticed."

(**NOTE**: Keep the written statements from #8 for next session.)

Session 2: It's Just Not Right That. . . .

Materials Needed: Rope cut into 3-foot lengths (one length per person); poster paper and markers; the written statements from session #1 (hang them around the room).

1. Begin with a game of "Our Island."[116] For this game, give everyone a length of rope and tell them it has magical properties. "When you step into this rope circle, you immediately are in a safe place where nothing and no one can harm you. We can create our own islands of caring." Invite everyone to become their own little island (they will put an unbroken circle on the floor with their rope and then step into it.) There is only one rule to this game: "Everyone has to be on an island (with his or her feet within a rope circle) or they will fall into the deep sea of despair."
2. "So how does it feel? Hmm. A little boring, huh? Maybe someone wants a little company?" Now (without warning) remove one rope circle from the floor. And then another. And then another. Hopefully, each person who has been left "shipwrecked" will be invited onto another island. If not, prompt the group by restating the only rule of the game: "Everyone has to be on an island (with his or her feet within a rope circle) or they will fall into the deep sea of despair."
3. Keep removing circles until there is only one circle left. (This will become a group problem-solving activity, as everyone tries to find a way to keep everyone from falling into the sea of despair.) Do not help the group problem solve, but keep restating the one rule of the game. (**NOTE**: Their feet have to be in the circle, but they do not have to be standing! Many groups have solved this problem by sitting in a circle with just their heels inside the rope circle, technically meeting the one requirement of the game.)
4. Now have a brief discussion: "How did it feel as each rope circle was removed?" "What went well?" "What could have gone better?"
5. "Give yourself a big hand for saving everyone from the sea of despair!" Explain that today you will both identify a problem in your community to solve and create a plan to solve it.
6. Have everyone bring out their "reporter notebooks" and on the poster papers chart suggested "Examples of caring behavior" and "Examples of uncaring behavior." As you chart, point out any common themes that emerge.
7. Break students into pairs to share: "Thinking of what you saw in your communities, and what you heard other young people saw, complete the statement 'A big problem

in our community is. . . .' Give each person 2 minutes to share. Announce when it's time to switch partners.

8. Ask each pair to report out about what they discussed and chart the responses. In the large group, look at the things that students identified as "really big problems" in your community. Tell students you want to choose one problem and then plan to solve it. Facilitate a discussion about which problem would be a good one to work on. Move the group to consensus about which problem they will solve together.

9. Now together follow steps 1 through 4 of the STP problem-solving process (below) for the problem you identified.

STP: A Problem-Solving Process

1. Specify the problem
2. List helping and hindering forces
3. Specify multiple solutions
4. Plan for action
5. Anticipate obstacles

10. Create a timeline for the project. Now elect various committees to plan the execution of your action plan, addressing step 5 of the STP problem-solving process.

Delve Deeper

Great resources for young people can be found at **www.bullystoppers.com**.

In Conclusion…

Bullying is characterized by an imbalance of power between target and bully; intent to harm; the threat of further aggression, and the creation of a hostile environment for one or more students. Bullying behavior which is left uncorrected harms targets, bullies, bystanders, and the overall school environment. When common myths about bullying are dispelled, students, educators, and parents alike come to realize the importance of both bullying prevention activities and interventions in episodes of bullying when they occur. This Guide provides tools useful in bringing about a systemic change in the culture of your school; a culture in which students are encouraged to be more proactive in showing care and respect for one another, and in which adults take an active interest in the safety and character development of students. It is equally important that adults and responsible bystanders intervene in bullying episodes when they become aware of them. Moreover, bullying has evolved with the advent of new technologies, so that cyberbullying is a key concern for 21st century educators, and needs to be addressed just as energetically as more physical forms of intimidation.

Everyone in a school and community has a role to play in bully-proofing the school. Students can become invested in bullying prevention through the process of co-creating "Group Agreements for Behavior" which go above and beyond the minimum standards of a student code of conduct. Students can also be nurtured as they show pro-social skills, like offering support to a target, and withdrawing the tacit permission bystanders can give to bullies with their silence. Adults provide leadership by stressing that each student is entitled to a safe place to learn, so that s/he can take full advantage of opportunities to develop his or her unique gifts and abilities. Adults can also discourage bullying behavior by ensuring that bullying is met with appropriate consequences which will help the bully understand the harm that is done and channel his or her need for power and status along more constructive paths. A school can also reduce bullying by increasing supervision of students in hallways, locker rooms, playgrounds, and cafeterias, where misconduct often goes on out of the sight of teachers and administrators. Open lines of communication between educators and students are essential, so that bullies cannot hide behind a "code of silence" that gives them shelter for wrongful conduct.

Teachers set an example for students in the way they conduct their classroom activities, with the behaviors they themselves model and the ways in which they stimulate students' moral thinking and positive behaviors. Through constructive discipline, teachers can harness teachable moments which arise when bullying comes to their attention. The objective is less to punish the bully than to help her or him modify problem behaviors through social learning. Teachers can also reduce the incidence of bullying by taking steps to alleviate the power imbalance between bully and target, and mobilizing peer support for targets.

Educators, parents, and the adults in young peoples' lives need to be alert for the warning signs of bullying. The "10 Steps to Safety" at page 100-01 provide a roadmap for effective interventions. Bullying cannot be allowed to continue and interventions must occur

as soon as possible. Inaction will likely be interpreted as condoning the behavior or suggesting that adults will do nothing about it.

Like the title character in *Tom Brown's Schooldays,* students who are allies to targets are heroes whose moral courage should be held up as an example for emulation. There are many ways bystanders can help targets out, some of which involve confronting the bully and many that can defuse situations without confrontation. The social skills and character traits that lend themselves to being an ally to a target are also the qualities prized in model citizens.

While certain students like LGBT youth and students with mental or physical disabilities are at higher risk for being targeted, bullying also cuts across traditional social boundaries. Prejudice reduction efforts can help change a school climate which might be fuelling social conflict. Yet the culture of caring and respect advocated in this Guide is a prophylactic against cruel behaviors that do not necessarily reflect divisions in the society at large.

The moral and legal responsibility schools have for the well-being and academic development of students requires that bullying be acknowledged as a problem in need of solutions. This Guide is intended to equip all the relevant actors to make a difference in bully-proofing a school. The steps outlined are not exhaustive, but they can focus a school's willingness to act with the appropriate skills and techniques that have proven effective against bullying in Massachusetts schools in actual practice. Ultimately, however, each school and community need to take ownership of their own specific problems with bullying, and tailor responses to the circumstances of their site. There is no "one size fits all" approach. Most essential to effective anti-bullying strategies are a willingness to acknowledge the problem exists, and a collective effort among students, educators, school staff, parents, and the community.

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