ENOUGH “TINKER-ING” WITH PRECEDENT:
The Time has come to Adopt a Uniform Standard Specifically Addressing
Off-Campus, Online Student Speech

I. INTRODUCTION

“Girl 2: the only people that make me mad are 7th graders who don’t move out of the way. & ugly people liike (name) (name) (name) (name)...etc.

Girl 1: I would say kill all the ugly people at school . . .

Girl 3: I wanna kill people.

Girl 2: ii wish yu wouldnt get caught, cos shiit, half thee school would be gone by now...”

This nearly 70-line Facebook conversation, which goes on to discuss the way in which the three girls would kill their fellow classmates, was ultimately shown to Griffith Public School officials by a concerned classmate’s mother. Griffith school officials suspended and later expelled the three middle school students in January 2012 for the remainder of the school year for violating school policies against bullying, harassment, and intimidation. The school officials’ decision to discipline the students has drawn a suit, brought by the American Civil Liberties Union (ACLU), based on First Amendment free speech protection. According to the suit, the posts, made after school on the girls’ personal electronic devices, not on school

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1 Sarah Tompkins, ACLU: 3 Griffith girls expelled over Facebook jokes, GRIFFITH COMMUNITY.COM, Apr. 26, 2012, available at http://www.nwitimes.com/news/local/lake/griffith/aclu-griffith-girls-expelled-over-facebook-jokes/article_4e73ae35-9815-5168-a652-4803518e1000.html. The conversation was initiated by Girl 1, who expressed her frustration over a cut she received while shaving her legs, and later resulted in one of the girls referring to herself as ugly. Id.


3 ACLU sues Indiana school, supra note 2. The Griffith School District has told each girl that they can proceed to ninth grade at Griffith High School in the fall of 2012. Id.
computers, did not represent actual threats, but were merely jokes as evidenced by the girls’ use of emoticons and Internet abbreviations for laughter, such as LOL.\textsuperscript{4} Further, the ACLU argues that the posts did not cause any disruption at school, and that the students at the Griffith public middle school did not appear distracted or otherwise affected by the content of the conversation the following day.\textsuperscript{5}

This case is yet another example of the difficult balancing act school administrators face when confronted with off-campus, online student speech. In January 2012, the United States Supreme Court declined to address the extent to which school officials may regulate this particular type of student speech, leaving lower courts largely to their own devices when determining whether school officials have in fact violated a student’s free speech rights by imposing discipline.\textsuperscript{6} Unfortunately, this has created a chaotic patchwork of precedent, leaving school officials little guidance on when discipline is appropriate as a result of off-campus, online student speech. This paper will argue that the Supreme Court must establish a workable standard in order to quell this national indecisiveness, especially given the prevalence of off-campus, online student speech that inevitably seeps into and infects the school environment.

\textbf{II. Revolution of Internet Speech: Cyberbullying, Pranks & Threats}

As access to technology continues to increase for American students, so do the cases in which electronic communications are used in disruptive and dangerous ways. An image of bullying in the twenty-first century doesn’t involve stolen lunch money or a nasty message scribbled on the bathroom stall door. Instead, bullying today has largely transcended physical

\textsuperscript{4} See Abernathy, supra note 2 (stating that according to cyber bullying experts, this so-called “emoticon defense” doesn’t fly, as it does not matter whether the intent of the girls was to joke around.).


space and morphed into the intangible form of threatening cell phone texts, malicious Facebook posts, and hurtful instant messages. Coined “cyberbullying,” this “old practice with a new twist” defies traditional boundaries and can have devastating effects on the emotional well-being of children. Home is no longer a place to feel safe for victims of cyberbullying, as omnipresent electronic threats are not limited to school hallways or playgrounds. Further, the unanimity associated with cyberspeech has also made the medium a powerful platform for students to broadcast offensive and vulgar language targeted at school officials.

The borderless nature of cyberspeech has been both a cause for concern and confusion among school districts. While states have recognized the severity of cyberbullying and have scrambled to enact legislation that criminalizes such behavior, courts have failed to provide adequate guidance on what types of specific behaviors may be regulated. Regulation of cyberbullying and students’ cyberspeech in general has perplexed school districts who fear infringing upon students’ First Amendment rights, but feel discipline is necessary to combat activity that, while originating off-campus, interferes with a safe and orderly school environment. Much of this confusion stems from the fact that it remains unclear whether and in what ways the existing Supreme Court standards regarding student free-speech are applicable to off-campus, online student speech. Lacking guidance, lower courts have inconsistently applied the following four Supreme Court precedents when considering off-campus, online student speech.

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7 See Cyberbullying Research Center, News, available at http://www.cyberbullying.us (defining cyberbullying as the “willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices.”).
8 Kevin Turbert, Faceless Bullies: Legislative and Judicial Responses to Cyberbullying, 33 SETON HALL LEGIS. J. 651, 653 (2009). Cyberbullying is similar to traditional bullying, but is arguably more dangerous because a cyberbully can remain anonymous and the interactions that occur on the internet can become a public for the world to see. Id. at 654.
### III. **Existing Framework to Analyze the Free Speech Rights of Students**

While the Supreme Court has yet to rule on the extent of school officials’ off-campus reach, the following four cases establish individual ground rules that have been adapted by lower courts facing off-campus, online student speech issues.

The Supreme Court first considered students’ first amendment rights in *Tinker v. Des Moines Independent Community School District.*\(^{10}\) In *Tinker*, the Court determined that the school district violated the First Amendment rights of students who wore black armbands in protest of the Vietnam War when they suspended them for such behavior.\(^{11}\) While the Court emphatically stated that “it can hardly be argued that students . . . shed their constitutional rights at the school house gate,” it emphasized that the First Amendment rights of students are not coextensive with the First Amendment rights of adults in a public school setting.\(^{12}\) The Court stressed that the “undifferentiated fear or apprehension of disturbance” exhibited by the Des Moines school district was insufficient to overcome the students’ right to freedom of expression but that a student’s speech may be punished if a school district reasonably forecasts that a such speech will “materially disrupt classwork or involve substantial disorder or invasion of the rights of others.”\(^{13}\)

*Bethel School District v. Fraser* enhanced the ability of a school district to discipline students for lewd, vulgar, and offensive speech during school-sponsored events.\(^{14}\) While affirming the holding in *Tinker*, the *Fraser* Court did not focus on whether the offensive speech at issue caused a material and substantial disruption.\(^{15}\) Rather, the Court focused on the fact that

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\(^{10}\) 393 U.S. 503 (1969).

\(^{11}\) *Tinker*, 393 U.S. at 504.

\(^{12}\) *Id.* at 506.

\(^{13}\) *Id.* at 513.

\(^{14}\) 478 U.S. 675 (1986). In *Fraser*, a high-school student used a sexually explicit metaphor in a speech to nominate his fellow classmate for student office. *Fraser*, 478 U.S. at 677-78.

\(^{15}\) *Id.* at 681.
school authorities are entrusted with protecting students, and therefore, must be granted latitude when determining whether offensive speech is inappropriate and ultimately punishable.\textsuperscript{16}

The Supreme Court further limited the \textit{Tinker} decision in \textit{Hazelwood School District v. Kuhlmeier} by holding that school administrators may censor “school-sponsored” speech so long as the basis for restriction rested on legitimate pedagogical concerns.\textsuperscript{17} Most recently, in \textit{Morse v. Frederick}, the Court expanded school authority by holding that school administrators may restrict student speech at a school-sponsored event when such speech can reasonably be viewed as inciting illegal drug use, even if the speech occurs outside of the “schoolhouse gate.”\textsuperscript{18} While \textit{Morse} presented the Court with the first opportunity to consider speech that originated off-campus, the Court chose to focus primarily on the severity of drug use and the role public schools play in drug prevention instead of concentrating on the fact that the speech occurred off the school’s direct campus.\textsuperscript{19}

\textbf{IV. DIVERGENT APPROACHES FOR ANALYZING OFF-CAMPUS, ONLINE STUDENT SPEECH}

The standards developed in \textit{Tinker, Fraser, Hazelwood}, and \textit{Morse} each generated from issues of student expression that were conducted on school grounds or during a school-sponsored event. Accordingly, it is uncertain whether these standards are applicable to student speech that occurs off-campus and is not connected to a school-sponsored activity. Specifically, in instances were student speech originates in the “borderless” territory of the internet, school districts have struggled to discern when disciplining off-campus, online speech is appropriate without

\textsuperscript{16} \textit{Id.} at 681.
\textsuperscript{17} \textit{484 U.S. 260} (1988). At issue in \textit{Hazelwood} was the principal’s censorship of two articles in the school newspaper that concerned teenage pregnancy and the effect of divorce on adolescents. \textit{Hazelwood}, \textit{484 U.S.} at 263.
\textsuperscript{18} \textit{551 U.S. 393} (2007). The student in Morse displayed a 14-foot banner that read “BONG HITS 4 JESUS” at the Olympic Torch Relay that took place on the street outside the school’s campus. \textit{Morse}, \textit{551 U.S.} at 393-95.
\textsuperscript{19} \textit{Id.} at 407.
disturbing the delicate balance between students’ First Amendment rights and school authority. Lower courts have disparately applied the aforementioned Supreme Court precedents to internet-related speech issues, creating a muddled body of case law that begs for the creation of a workable, uniform standard.

In *J.S. ex rel. Snyder v. Blue Mountain School District*, two eighth grade students created a MySpace page that portrayed their principal as a bisexual, a sex-addict, and a pedophile. Created exclusively on a home computer, the school district discovered the profile, and suspended each student for ten days for violating the school’s disciplinary code. While one of the suspended students claimed that such action infringed upon her First Amendment rights, the District Court disagreed, holding that although the profile did not “substantially and materially” disrupt school under the *Tinker* standard, the “lewd and vulgar off-campus speech” had some effect on campus and thereby justified her punishment under the *Fraser* standard. As further support for the holding, the District Court noted the expansion of school authorities reach in *Morse*, which allowed a school district to punish a student for a banner displayed off-campus at a school-sponsored event. Therefore, the District Court’s determination that the school

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20 650 F.3d 915 (3rd Cir. 2011).
21 *Blue Mountain Sch. Dist.*, 650 F.3d at 921. The opinion quotes the profile created by the two students, which states the following:
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 [sic] 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[m] 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....
*Id.* at 921.
22 *Id.* at 920-22. Specifically, the creation of the profile violated the school’s code prohibiting false accusations regarding staff members. *Id.* at 921.
23 *Id.* at 923.
24 *Id.*
district’s actions were permissible rested on the application of both *Fraser* and *Morse*, although neither case explicitly applied to off-campus speech.\(^{25}\)

On appeal, the a deeply divided Third Circuit reversed, relying exclusively on the methodology of *Tinker* and holding that the *Fraser* decision is not applicable to student speech that originates off-campus.\(^{26}\) Specifically, the Third Circuit emphasized that allowing the *Fraser* standard to justify the school district’s actions would condone the punishment of student speech, regardless of the time or place it occurs, if it is about the school and deemed offensive by the prevailing authority.\(^{27}\) According to the Third Circuit, who “assumed without deciding” that *Tinker* applied, the school district’s punishment must have been permissible under the “substantial and material disruption” standard.\(^{28}\) Because the profile was “so outrageous” that no one could have taken it seriously, the Third Circuit opined that it could not have been reasonably foreseeable to the school district that J.S.’s speech would create a substantial disruption or material interference in school.\(^{29}\)

In *Kowalski v. Berkeley County School District*,\(^ {30}\) a high school student was suspended for five days after school administrators discovered her MySpace page called “S.A.S.H.,” or what the plaintiff claimed stood for “Students Against Slut Herpes.”\(^ {31}\) Unlike the faculty-targeted speech in *Blue Mountain*, the webpage created by Kowalski was dedicated to ridiculing

\(^{25}\) *Id*.

\(^{26}\) *Id*. at 930-32.

\(^{27}\) *Id*. at 933.

\(^{28}\) See *id*. at 926-27 (stating that the Supreme Court “established a basic framework . . . [in] *Tinker*, and we assume, without deciding, that *Tinker* applies to J.S.’s speech in this case.”).

\(^{29}\) *Id*. at 930. The Third Circuit, somewhat humorously, contrasted the speech involved in the instant case to the speech in *Tinker*, stating, “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 material interference with school activities, neither can J.S.’s profile despite the unfortunate humiliation it cause for [the principal].” *Id*.

\(^{30}\) 652 F.3d 565 (4th Cir. 2011).

\(^{31}\) *Kowalski*, 652 F.3d at 567.
a fellow student. The webpage, which other students claimed actually stood for “Students Against Shay’s Herpes,” targeted the plaintiff’s classmate, Shay N., and quickly drew a following of nearly 100 members who uploaded pictures of Shay and posted nasty comments about her on message boards.

After receiving a complaint from Shay’s father, the school district concluded that Kowalski’s actions violated the school’s policy against harassment, bullying, and intimidation, and suspended her for 10 days. After the District Court granted summary judgment in favor of the defendants, Kowalski appealed, and on review, the Fourth Circuit stated that the relevant inquiry was whether her “activity fell within the outer boundaries of the high school’s legitimate interest in maintaining order in the school and protecting the well-being and educational rights of its students.”

The Fourth Circuit noted that student-on-student bullying is “a major concern in schools across the country,” and that schools have an affirmative duty to protect students from harassment through both preventative and punitive measures. Relying on Tinker, the opinion expressed confidence that the speech in the instant case caused the interference and disruption the Tinker standard was meant to prevent, despite the fact that the speech originated in Kowalski’s home. While recognizing that “there is surely a limit” to a school district’s reach when the speech of a student originates outside the schoolhouse gate, the Fourth Circuit declined

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32 Id.
33 Id. at 569. Kowalski was also issued a 90-day “social suspension” which prohibited her from attending school-sponsored events. Id. Kowalski’s out-of-school suspension was ultimately reduced to 5 days, but she claimed that as a result of her punishment, she became “socially isolated” and had to start taking medication for depression. Id.
34 Id. at 571.
35 Id. at 572.
36 Id. at 573-74.
to define that limit, as they were satisfied that the nexus between Kowalski’s speech and the school’s pedagogical interests were sufficiently strong to justify her punishment.  

V. THE NEED FOR A UNIFORM STANDARD

J.S. ex rel. Snyder v. Blue Mountain School District38 (combined with Layshock v. Hermitage School Dist.39) and Kowalski v. Berkeley County School District40 were submitted to the Supreme Court for review in October 2011, collectively seeking an explanation of whether the Tinker “substantial disruption” test applies to off-campus, online student speech.41 The circuit split on the issue provides compelling evidence of the need for clarification – while the Fourth Circuit in Kowalski expressly applied Tinker, a hesitant Third Circuit in Blue Mountain “assumed, without deciding” that Tinker applied to speech originating off campus.42 By contrast, the Fifth Circuit has declined to apply Tinker all together in student speech originating off campus.43

Similarly, the petitions sought clarification on whether the Fraser standard regarding lewd and offensive speech is applicable to off-campus, online student speech.44 Again, the lower courts are fractured in their analyses – while the Third Circuit in Blue Mountain issued a bright-

[37]Id. at 573.
[38]Blue Mountain Sch. Dist., 650 F.3d at 915.
[39]Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3rd Cit. 2011). Similar to the student in Blue Mountain, Layshock created a fake internet profile of the principal and was suspended for his actions. Layshock, 650 F.3d at 209. Although the parody “spread like wildfire” throughout the school, the Third Circuit held that the district’s punishment for his speech was not permissible under the First Amendment. Id. at 218.
[40]Kowalski., 652 F.3d at 565.
[41]See David L. Hudson Jr., Off-campus online student speech case is appealed to high court, FIRST AMENDMENT CENTER, Oct. 17, 2011, available at www.firstamendmentcenter.org/off-campus-online-student-speech-case-is-appealed-to-high-court (stating that Kowalski’s petition argues that should the Fourth Circuit ruling stand, the Tinker standard will be eviscerated – permitting school districts to discipline students for off-campus speech that other students may find offensive).
[42]See supra note 28 (noting the Fourth Circuit’s weariness is expressly stating that Tinker applied to off-campus speech).
line rule against the standard’s application to off-campus speech, the Fourth Circuit in *Kowalski* indicated that *Fraser* may apply to off-campus speech, but declined to specifically address the issue. Unfortunately, in January 2012, the Court denied certiorari, missing an opportunity to definitively define the limits of school administrators when it comes to punishing this behavior.

**VI. CONCLUSION**

Though dozens of cases have been decided regarding on-line student speech, *Blue Mountain* and *Kowalski* exemplify the important First Amendment questions regarding the scope of school districts’ authority to punish students for off-campus, online student speech. Specifically, the lower courts’ divergent applications of existing Supreme Court precedents illustrate the confusion and legal uncertainty that continue to muddy the waters on this important and timely issue.

Without clarification, school administrators face a “minefield of legal responsibility” when determining whether off-campus, online student speech that berates school officials or terrorizes fellow students is punishable. Unfortunately, cyberbullying and offensive and vulgar cyberspeech connected to schools is a daily occurrence, and school administrators attempting to preserve the delicate balance between school authority and students’ First Amendment rights “often feel they have little legal advice or precedent to guide them in their decision making.”

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45 *See supra* note 26 and accompanying text.
46 *Kowalski*, 652 F.3d at 573.
The divergent approaches of lower courts provide little insight into how the federal court assigned to hear the ACLU’s recent suit on behalf of the three, eighth grade Griffith Middle School students expelled for their off-campus, online speech will decide. While their speech is undoubtedly appalling, it is feasible that the court may adopt an approach similar to the Third Circuit in *Blue Mountain* and find their Facebook bantering, sprinkled with emoticons and LOLs, “so outrageous” that the speech defies any reasonable forecasting of a substantial or material disruption.\(^5\) On the other hand, if the court is more in line with the reasoning of the Fourth Circuit in *Kowalski*, the lewd, offensive, and threatening speech targeted at fellow students may provide a “sufficient nexus” to the school district’s pedagogical interest to affirm the punishment of such behavior.\(^5\) The disorder among lower courts, coupled with the severity and pervasiveness of student cyberspeech used to bully, harass, or berate others, demands the creation of a national uniform standard.

\(^5\) See *supra* note 29 and accompanying text (discussing how the Third Circuit’s determination that the MySpace page was “so outrageous” ultimately played into the holding that there was no material or substantial disruption). See *also supra* note 4 and accompanying text (stating that the girls recently expelled used LOL and emoticons in their Facebook posts, and the ACLU is using this as evidence that their posts were merely “jokes.”).  
\(^5\) See *supra* note 57 and accompanying text (noting that the Fourth Circuit found a sufficient nexus between Kowalski’s MySpace page and the school’s pedagogical interests).