

Cyberbullying: School Administrations Stuck Between a Rock and Cyberspace

Amelia Canham Eaton
School Law - Professor Kaufman
May 14, 2014

“[The internet is the] most participatory form of mass speech yet developed.”¹

One of the largest and most persistent challenges for our judicial system today is applying old rules and standards to new technology and issues.² Such is the case with our nation’s current epidemic of cyberbullying.³ For decades courts and school systems have struggled to define the appropriate reach of school administrations’ disciplinary rights. In this regard, courts have examined the extent to which a student maintains their First Amendment rights⁴ upon entering school gates⁵, and the extent to which schools may discipline students for behavior that occurs off campus⁶ without infringing upon these First Amendment rights. Defining a school’s disciplinary reach has proven to be a

¹ David L. Hudson Jr., *Cyberspeech*, First Amendment Center, 2002, at 1, available at <http://www.firstamendmentcenter.org/cyberspeech/print/> (quoting Federal Judge Stewart Daznell on the speech-enhancing medium of the internet).

² Stephen Wermiel, *SCOUTUS for law students: Student Speech and the Internet (sponsored by Bloomberg Law)*, SCOUTUSblog (Jan. 7, 2012, 4:01 PM), <http://www.scotusblog.com/2012/01/scotus-for-law-students-student-speech-and-the-internet-sponsored-by-bloomberg-law/>.

³ Nancy Willard, M.S., J.D., *Cyberbullying Legislation and School Policies Where are the Boundaries of the “Schoolhouse Gate” in the New Virtual World?*, Center for Safe and Responsible Use of the Internet, March 2007, at 1, available at <http://cyberbully.org> (defining “cyberbullying” as “being cruel to others by sending or posting harmful materials or engaging in other forms of social cruelty using the Internet or other digital technologies”). The author further specifies different forms of cyberbullying, such as: direct harassment, indirect activities intended to damage reputation of interfere with relationships of the targeted student, posting harmful material, impersonation, disseminating personal information or images, or activities that result in exclusion.

⁴ U.S. CONST. amend. I. The First Amendment States that: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”.

⁵ See generally *Tinker v. Des Moines Independent Community School District*, 89 S.Ct. 733 (1969) (Admonishing schools’ ability to shed students of their First Amendment rights at the school gates). “They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.” *Id.* at 740.

⁶ See generally *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008) (Holding that a court cannot intervene the disciplinary judgment of a school, despite the behavior occurring off-campus, unless specific constitutional guarantees are violated); *Snyder v. Blue Mountain School District*, 650 F.3d 915 (3rd Cir. 2011)

difficult task, leaving significant grey area in past decades. Today, this grey area has only grown due to advancements in technology and the Internet.⁷ The line between students' on-campus-behavior and students' off-campus-behavior has become increasingly convoluted as students now use the internet and it's social networking capabilities to communicate with classmates long after the schools' gates have been exited. Cyberbullying has subsequently gained national attention as the new battleground for the longstanding issue of students' First Amendment rights being reached by school administrations' disciplinary actions.

In order for schools to diminish cyberbullying, it first must be determined how far the schools' disciplinary jurisdictions reach. While traditional bullying takes place within school gates, clearly within school administrators' jurisdiction, cyberbullying does not stop at the school gates, forcing courts to continue their examination of how far schools' disciplinary power extends.

For decades school officials and courts have struggled with the controversy of how far a school's authority reaches.⁸ In 1976 a federal court held that school officials could punish a student for calling a high school teacher a name on a Saturday afternoon in a mall parking lot.⁹ The court held, "To countenance such student conduct even in a public place without imposing sanctions could lead to devastating consequences in the school."¹⁰ While the plaintiff's attorney was unsuccessful in court, his arguments were compelling none-the-less, and have since proved to be intermittently successful¹¹ over

⁷ H.R. 1966, 111th Cong. (2009). Four out of five U.S. children live in a home where either they or their parents access the Internet.

⁸ David L. Hudson Jr., Let Students Speak: A History of the Fight for Free Expression in American Schools 162 (2011).

⁹ *Id.* at 163.

¹⁰ *Id.*

¹¹ *Id.*

time. He argued that how a student chooses to express himself or herself on his or her own time should not be subject to a school's discipline.¹² He reasoned, "If a student engages in expressive conduct that might constitute criminal conduct then it is a matter for law enforcement. If not, then it is a matter for parents or guardians¹³... punishing students for off campus conduct or expression doesn't help to maintain discipline."¹⁴

This reasoning proved successful in a 1986 ruling, where a court held that the school administration could not punish a student for making a lewd hand gesture at a teacher, off school property, on the weekend.¹⁵ The court held that due to the location of the expressive conduct the plaintiff was neither engaged in any school activity, nor in his role as a student, and likewise the teacher was not associated in anyway with his duties as a teacher at the time of the incident.

While perplexities regarding the reach of schools' disciplinary jurisdiction exist, so does a continuum of students' freedom of speech within the context of a school environment. In 1969 the landmark case of *Tinker v. Des Moines Independent Community School District* was decided.¹⁶ *Tinker* is frequently recognized as being the first case to protect students' First Amendment rights at school. By ruling that it was within the Iowa high school students' First Amendment rights to protest Vietnam by wearing armbands at school, the Court established that students do not shed their Constitutional rights at the

¹² *Id.*

¹³ Under the 14th Amendment of due process parents have brought action against school systems claiming that punishing their child for off-campus behavior infringes upon their right to parent and discipline the child.

¹⁴ Hudson, *supra* at 163-4.

¹⁵ *Id.*

¹⁶ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

school gate, with the exception of behavior that could cause “substantial disturbance” to the school environment.¹⁷

After striving to preserve students’ First Amendment rights in *Tinker*, it wasn’t long before the Court started to limit and place conditions on these rights, transferring some power back to the disciplinary authority of school administrations.¹⁸ In 1986¹⁹ and 1988²⁰ the Supreme Court passed two decisions ruling that “The 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”²¹, and that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored activities... reasonably related to legitimate pedagogical concerns.”²² The courts have continued to reinterpret *Tinker* into recent years, perhaps most notably in the 2007 case of *Morse v. Frederick*²³. *Morse* was the third straight Supreme Court case to take *Tinker* under consideration only to rule against the protection of students’ freedom of speech. *Morse* abandoned the notion that students’ speech can be punished only if it is disruptive to school activities by ruling in favor of a

¹⁷ *Id.*

¹⁸ *Fighting for Free Speech in Schools*, Time, (May 10, 2007). After *tinker*, “Courts gave students even more rights over the next decade, but the rise of drugs and alcohol on campus made judges increasingly sympathetic to schools.” *Id.* at 2.

¹⁹ Clay Calvert, *Tinker’s Midlife Crisis: Tattered and Transgressed But Still Standing*, 58 Am. U. L. Rev. 1167, 1173 (2008-2009). Referencing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

²⁰ *Id.* at 1173-74. (arguing that schools have reasonable power to regulate lewd student speech under *Hazelwood Sch. Dist. V. Kuhlmeir*, 484 U.S. 260, 273(1988).

²¹ Calvert, *supra* at 1173. (arguing that schools have reasonable power to regulate student speech that is school-sponsored under *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).)

²² Calvert, *supra* at 1173-4 (Quoting the holding from the 1988 decision of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988).)

²³ *Morse v. Fredrick*, 127 S. Ct. 2618 (2007).

principal's right to punish a student for holding a banner, at a school-sponsored but off-campus event, that was not disruptive, yet deemed to be inappropriate.²⁴

While *Morse* is an example of a present day case examining the First Amendment rights of students with regard to schools' disciplinary jurisdictions, it did not involve the use of the Internet. Many of today's cases address the same rights, but in the context of the Internet and cyberbullying. Because the Supreme Court has yet to rule on a case specifically addressing these issues in the context of the Internet and cyberbullying, lower courts have continued to rely on pre-internet cases, such as *Tinker*, to examine today's cyberbullying cases in the same technological context as previous cases examining students' freedom of speech with regard to school disciplinary action.

Increasing instances of cyberbullying, among other student conduct issues, have forced courts to continue their examination of student cyber speech in the context of longstanding prior holdings regarding how students' First Amendment rights are impacted by schools' disciplinary power. Without a Supreme Court ruling to reference, today's courts seem equally inconsistent when exploring this issue in relation to cyberbullying as they were before the existence of the Internet. Between 2008 and 2011 three federal courts have attempted to clarify the subject matter by ruling on four separate cases²⁵ regarding schools exercising disciplinary action over students due to their online speech that likely constituted cyberbullying.

²⁴ *Id.* at 2619. In *Morse*, a high school student claimed his First Amendment rights had been violated by a ten day suspension for waving a banner that read "BONG HITS 4 JESUS" at an off-campus, school approved activity. The court held that the principal did not violate the student's rights as the banner was viewed to promote drug use.

²⁵ See *Kowalski v. Berkeley County Sch.*, 652 F.3d 565 (4th Cir. 2011); See *Doninger v. Niehoff*, 527 F. 3d 41 (2d Cir. 2008); See *Layshock v. Hermitage Sch. Dist.*, 412 F. Supp.2d 205 (W.D.Pa. 2006); See *J.S.v. Blue Mountain Sch. Dist.*, 650 F. 3d 915 (3rd Cir. 2011).

In 2011 the Fourth Circuit considered a school's ability to regulate off-campus student cyber-speech in *Kowalski v. Berkeley County Schools*.²⁶ In *Kowalski* a public high school suspended a student for five days after she created, from home²⁷, a MySpace page called "S.A.S.H." which was focused on ridiculing another student at the high school.²⁸ The Fourth Circuit affirmed the district court's decision to grant the school's motion for summary judgment that stated that the school's administration was authorized to discipline Kowalski due to the fact that her speech interfered with the work and discipline of the school.²⁹ The court was able to hold that when speech creates a disruption at school it is immune from First Amendment protection due to a reverse interpretation of *Tinker*.³⁰

In the 2008 case of *Doninger v. Niehoff* the Second Circuit also upheld a school's right to discipline a student's online behavior.³¹ Doninger, a public high school student, was prohibited from running for class secretary after creating and posting a public blog post in which she criticized the school's administration.³² The Second Circuit upheld the district court's opinion reasoning that it was foreseeable that the student's online speech would reach school grounds and create substantial disruption.³³ The court noted that had the speech taken place on-campus the *Fraser* standard of citing lewd speech as an

²⁶ *Kowalski v. Berkeley County Sch.*, 652 F.3d 565 (4th Cir. 2011)

²⁷ *Id.* at 574. The court reasoned that while Kowalski created the webpage at home she knew it would be accessible beyond her home and therefore within the school environment.

²⁸ *Id.* at 567.

²⁹ *Id.* at 577.

³⁰ *Tinker, supra*. The court in *Tinker* held that the First Amendment protects student speech that is not "substantially disruptive" to the school environment. *Kowalski* applied this reasoning in reverse to determine that the First Amendment does not protect speech, in this case cyberbullying, that is substantially disruptive to the school environment.

³¹ *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

³² *Id.* In *Doninger* a public high school student made a public blog post criticizing the school's administration for canceling a battle of the bands concert, used derogatory terms to refer to the administrators, and encouraged student to contact administrators to also express dissatisfaction.

³³ *Id.*

exception to *Tinker* would have been applied. However, rather than explore whether or not *Fraser* could be applied to off-campus speech, the Second Circuit applied the same reversal of *Tinker* seen in *Kowalski*.³⁴

While the courts in these prior cases protected the schools' authority to discipline students for their online speech, despite it being created off-campus, the next two cases³⁵ exemplify the current inconsistencies present among rulings regarding to students cyber speech and school discipline as recent examples where the Third Circuit protected the students' right to freedom of speech.

In *Layshock v. Hermitage School District* the Third Circuit ruled in favor of a public high school student who created a vulgar MySpace page, off-campus, impersonating the school's principal.³⁶ Layshock accessed the webpage from school at least once, to show it to other students. When the school's administration became aware of the website, and the fact that it had been accessed from the school, Layshock was punished.³⁷ On appeal the court reiterated the district court's finding that the school district did not establish a sufficient nexus between the student's speech and a substantial disruption at school. The school district did not challenge this point, but instead argued that Layshock's behavior originated on-campus by his use of the principal's photo from the school district's website. The court held that regardless of where the photo came from Layshock could not be punished for his expressive conduct, as no disruption was

³⁴ *Id.*

³⁵ See *Layshock v. Hermitage Sch. Dist.*, 412 F. Supp.2d 205 (W.D.Pa. 2006); See *J.S.v. Blue Mountain Sch. Dist.*, 650 F. 3d 915 (3rd Cir. 2011)

³⁷ *Layshock v. Hermitage Sch. Dist.*, 412 F. Supp.2d 205 (W.D.Pa. 2006). Layshock was suspended for ten days, placed in the high school's Alternative Education Program for the remainder of the 2005-2006 school year, banned from all extracurricular activities, and prohibited from participating in his graduation ceremony.

caused at school. This acknowledged that the *Tinker* standard can reach outside of a school's gates, but also that the administration's disciplinary reach is not unlimited.³⁸

Along with the *Layshock* decision, the Third Circuit also ruled in favor of a student's right to free speech in *J.S. v. Blue Mountain School District*.³⁹ *J.S.* proved to be very factually analogous to *Layshock*, in that a student was punished for having created a fake online profile page intended to mock the school's principal. However, instead of agreeing with the district court's ruling⁴⁰, the Third Circuit found in favor of protecting the student's freedom of speech due to the fact that the cyber speech had not caused any disruption in school, despite conflicting arguments⁴¹ as to whether disruption occurred.⁴²

While the rulings in the four cases previously discussed in this section have inconsistencies in their holdings, they all acknowledge the courts' willingness to apply the *Tinker* standard to students' cyber speech, and classify said cyber speech as off-campus speech. In *Kowalski* a variation to the *Tinker* standard was applied as relating to off-campus student speech, as long as the speech sufficiently relates to the school and creates a foreseeable risk for substantial disruption. *Doninger* also cited *Tinker* as a workable formula for defining off-campus speech and assessing its potential to create substantial disruption. Similarly, in *Layshock* and *J.S.* both holdings were based on the assumption that the *Tinker* standard applied to incidents of off-campus student cyber speech.

³⁸ *Id.* at 222. *Layshock* did not discuss exactly how far a school's disciplinary action can reach beyond school gates, relying on the main fact being that *Layshock's* behavior did not cause substantial disruption.

³⁹ *J.S. v. Blue Mountain Sch. Dist.*, 650 F. 3d 915 (3rd Cir. 2011).

⁴⁰ *Id.* at 924. The district court applied a variation of *Fraser* and *Morse* to rule that the school did not violate the student's rights by punishing her. The Third Circuit rejected this rationale citing that *Fraser* does not apply to off campus speech.

⁴¹ See Brief of Appellee. 26, E.C.F. No. 00317974758; See Reply Brief for Appellants. 16, E.C.F. No. 00318846462; See Brief for Amici Curiae. 20, E.C.F. No. 00317667429.

⁴² *Id.* The court relied on *Tinker's* reasoning that if speech does not create a reasonable forecast of substantial disruption, then it does not overcome the right of freedom of expression.

When the Supreme Court ruled in favor of a group of Iowa public high school students protesting Vietnam in 1969⁴³ it is highly unlikely that the Court realized they were influencing how the future issue of cyberbullying would be handled. However, due to the Supreme Court's reluctance to rule on a cyberbullying case to date⁴⁴, the holdings of *Tinker*, and the cases that have notably adapted *Tinker*⁴⁵, are frequently used to rule on today's issues of student's in cyberspace.⁴⁶

Just as cases began to adapt the holding from *Tinker* in pre-internet eras, cases brought after the invention of the internet, many involving instances of cyberbullying, have continued to reinterpret the 1969 landmark case. While the 1969 Supreme Court obviously did not intend their ruling to be strictly construed to cyber speech, the most important question is perhaps whether they intended their decision to be interpreted as applicable to off-campus behavior.

Whether *Tinker* was intended to extend off-campus, when considered in cyberspace begs the court to decide whether Internet speech created off-campus, but directed at school related people or issues, is truly considered off-campus, or if the very nature of the medium bridges the gap from a home computer to on-campus speech. In *Kowalski*, the court addressed the speech in question as off-campus speech, and determined that while there are limits to a school's jurisdiction in relation to off-campus speech that in this case because there was such a close nexus between the speech and the school's interest disciplinary action was permissible. By not addressing *Kowalski*'s

⁴³ *Tinker, supra*.

⁴⁴ There are currently three cases being considered by the Supreme Court, but have yet to be granted certiorari.

⁴⁵ See *Hazelwood Sch. Dist. V. Kuhlmeir*, 484 U.S. 260 (1988).; See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).; See *Morse v. Fredrick*, 127 S. Ct. 2618 (2007).

⁴⁶ See *Kowalski v. Berkeley County Sch.*, 652 F.3d 565 (4th Cir. 2011); See *Doninger v. Niehoff*, 527 F. 3d 41 (2d Cir. 2008); See *Layshock v. Hermitage Sch. Dist.*, 412 F. Supp.2d 205 (W.D.Pa. 2006); See *J.S.v. Blue Mountain Sch. Dist.*, 650 F. 3d 915 (3rd Cir. 2011)

speech as on-campus speech, the court applied *Tinker* to off-campus speech. The courts also classified students' cyber speech as being off-campus, yet punishable within reason, by the *Tinker* standard in *Doninger* and *Layshock*. However, in *J.S. v. Blue Mountain School District* the speech in question was classified as being off-campus but not punishable due to lack of substantial disruption. The concurring opinion goes one step further attempting to clarify the modern day application of *Tinker* by concluding that it never applied to off-campus speech in the first place.⁴⁷ The court reasons, "applying *Tinker* to off-campus speech would create a precedent with ominous implications. Doing so would empower schools to regulate students' expressive activity no matter where it takes place... so long as it causes a substantial disruption at school".⁴⁸

To prevent school administrators from having too much discretion in deciding whether cyber speech causes a reasonably foreseeable risk of substantial disruption, which is already a task of subjective nature, the *Tinker* standard should not be applied to cases involving online speech classified as off-campus behavior. It should be assumed that when the court ruled in *Tinker* they had no intention for the decision to be applied to any speech or behavior except that which occurs within the school gates. If a student's off-campus cyber speech can be deemed to have crossed the school gate and become on-campus speech, then an application of *Tinker* could be appropriate, but in cases where the speech is strictly classified as off-campus the *Tinker* standard should not apply.

⁴⁷ J.S., *supra*. *Tinker* was not meant to apply to off campus speech because "*Tinker*'s holding is expressly grounded in the "special characteristics of the school environment". *Id.* at 937.

⁴⁸ *Id.* at 939.

“Society traditionally entrusts teachers with the formal right and responsibility to take charge in the classroom and expects students to obey.”⁴⁹ While we do not want school administrations to be given too much power to the point where students’ Constitutional rights are at risk of being infringed upon at any time or place outside the school gates, as could be the case if *Tinker* is applied to off-campus speech, our society should limit the ability of educators to serve their traditional role and purpose in our society. While *Tinker* is viewed as empowering students, it can also be cited as a downturn in educators’ authority. Prior to the 1960’s educators exercised exclusive control within the academic setting, and it was not until the political and civil rights issues of the 1960’s that students began to assert⁵⁰ their personal constitutional rights in relation to the previously unquestioned obedience given to educators and school systems. While applying *Tinker* to off-campus Internet speech could instill school systems with too much power in relation to students’ First Amendment rights, it could be equally dangerous for society if educators are unable to instill desirable values in our nation’s children, and protect students from dangers such as cyberbullying.

With cyberspace allowing students a new medium through which to dissent from authority or popular opinion, and harass fellow classmates or administrators, one of the most pressing legal issues has become determining how far into cyberspace schools’ disciplinary rights reach. As we frequently see courts applying *Tinker*’s standard to determine whether a school has jurisdiction over behavior that could cause substantial

⁴⁹ Judith L. Pace, *Understanding Authority in Classrooms: A Review of Theory, Ideology, and Research*, American Educational Research Association (2007) 77(1), 4-27.

⁵⁰ Samantha DuPont, *Discipline Problems, Unruly Behavior Seriously Threatening Student Achievement* (May 11, 2004) www.publicagenda.org. (A study conducted by a nonprofit research organization, Public Agenda, found that “Nearly 8 in 10 teachers (78%) said students are quick to remind them that they have rights or that their parents can sue.”)

disruption to the school environment, this application is flawed due to the fact that the case was decided long before the Internet became a platform for student speech. Until the Supreme Court provides a ruling specifically addressing student cyber speech, a method of determining when cyber speech crosses the boundary from off-campus to on campus must be determined so that *Tinker* can only be applied to that speech deemed to be on campus. To protect against the growing trend of cyberbullying, cyber speech which involves any address aim at a school or one of its students in a harassing manner should be considered on-campus speech, then whether or not it falls under the school's disciplinary jurisdiction can be determined by applying the *Tinker* standard. The narrowed application of when to apply the reasoning of *Tinker* should increase the consistency among courts rulings on issues such as cyberbullying. However, until the Supreme Court chooses to hear a case on these contemporary issues school administrations will remain stuck between a rock and cyberspace.