

## US Schools and the US Constitution – A Cyberbullying Legal Guide

The First, Fourth and Fifth Amendment apply frequently to cyberbullying issues. The authority of a school to take action when off-premises and after-hours non-school conduct between or among students results in cyberbullying or violations of in-school policy, how and when the school may search student property and communications and what notices to and rights to be heard by students apply when the school takes disciplinary action are issues at the core of the cyberbullying problem. And making sure that the delicate balancing of students' rights and the school's obligation to keep students safe and maintain the proper educational atmosphere is accomplished is key to keeping schools out of court and allow for the safe and effective education of students.

### Schools and the US Free Speech Doctrine

The First Amendment of the U.S. Constitution provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. am. 1.

In 1943 the U.S. Supreme Court also recognized that students held First Amendment rights against school actions.<sup>1</sup> More than 25 years later, during the height of the Vietnam War, the U.S. Supreme Court reaffirmed that students' free speech rights were alive and well at school. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Ind. County. Sch. Dist.*, 393 U.S. 503, 506 (1969).

The U.S. Supreme Court has also held that speech on the Internet is afforded the highest level of First Amendment protection. Recognizing that both the Internet itself and students at public schools are afforded First Amendment protection, how are the rights and obligations of schools balanced with those of students' cyberspeech? How can the often competing interests of safety, security, education and ethics be juggled without dropping one of these important balls? There is no clear answer. Unfortunately, while the U.S. Supreme Court has provided guidance in some areas, there is a giant void when off-premises cyberspeech is implicated. All we can do is review the case law and hope for the best.

### Exceptions to Protected Speech

Notwithstanding its broad language, the First Amendment does not allow unfettered free speech. The U.S. Supreme Court has carved out exceptions to the First Amendment, permitting reasonable time, place, and manner restrictions that are not content-based. Restrictions based on the content, itself, are only permitted if they satisfy the "strict scrutiny test." This test requires

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<sup>1</sup> West Virginia mandated that all students salute the US flag and recite the Pledge of Allegiance. Students who were Jehovah Witnesses refused to salute the US flag or recite the Pledge of Allegiance. They offered to utter a different pledge of loyalty to the US and of allegiance to Jehovah, since the salute and Pledge of Allegiance were considered by them to be image-worship. *WV State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The Court ruled that although the school had a high level of discretion when it came to educational functions, it is still a "state actor" subject to compliance with the First Amendment through operation of the 14th Amendment when it came to students' protected speech. It was clear that the students still had First Amendment rights.

that the restriction(s) must be narrowly tailored to serve a compelling government interest. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983).

Other exceptions to free speech exist as well, including “true threats.”<sup>2</sup> In addition, when applied to a public school environment, exceptions also exist to student speech that:

- “materially and substantially disrupt[s] the work and discipline of the school.” *Tinker*, 393 U.S. 503.
- can “reasonably be regarded as encouraging illegal drug use.” *Morse v. Frederick*, 551 U.S. 393 (2007).
- is vulgar and lewd and serves to “undermine the school’s basic educational mission.” *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).
- is school-sponsored expressive content that could be seen as endorsed by the school as long as the school’s editorial control is “reasonably related to legitimate pedagogical concerns.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

### Public vs. Public vs. Limited-Public Fora

In addition to standard school speech issues, the U.S. Supreme Court has also looked at the free speech standards applying to different types of forums: public forums vs. limited-public and non-public forums. In a public forum any restriction of speech content must satisfy the “strict scrutiny test.” *Pleasant Grove City v. Summum*, 555 U.S. 1636 (2009). In limited-public forums, where governmental entities open property “limited to use by certain groups or dedicated solely to the discussion of certain subjects,” a “governmental entity may impose restrictions on speech that are reasonable and viewpoint-neutral.” *Id.*

Therefore, the ability of the school to control student speech may also turn on its role, in certain cases, as a non-public or limited-public forum. In non-public forums the school has full educational discretion. In limited-public forum roles (such as with clubs and events where school facilities or resources are used) schools may limit student speech as long as such limitations are “reasonable in light of the purposes of the forum and viewpoint neutral.” *Christian Legal Soc’y Chapter of the Univ. of CA v. Leo P. Martinez*, 561 U.S. \_\_\_\_; 130 S. Ct. 2971 (2010).

Note that this approach is consistent with the position of some Federal Circuits, but not with others.<sup>3</sup> The Fifth, Sixth, Ninth and Eleventh Circuit apply the “intermediate scrutiny” test to

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<sup>2</sup> If they are mere hyperbole (and would not be believed to be a true threat by a reasonable person), the pseudo-threatening statement may be protected by free speech doctrines. In most jurisdictions the intent of the cyberbully to cause the victim to feel threatened does not matter. If a reasonable person would have expected the victim to feel threatened, it is enough. In some jurisdictions a test for true threats has been articulated and, in the Ninth Circuit, the subjective intent of the speaker to threaten or cause the target to experience fear is required. We “conclude[d] 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.” *Fogel v. Collins*, 531 F.3d 824; 2008 U.S. App. LEXIS 13553 (9<sup>th</sup> Cir. 2007) citing *United States v. Cassel*, 408 F.3d 622, 633 (9<sup>th</sup> Cir. 2005).

<sup>3</sup> This is well summarized by *C.H., v. Bridgeton Bd. of Educ.*, which states: “[A] line of cases holds that there are essentially five grounds on which a school can regulate speech: 1) when the speech is disruptive (*Tinker*), 2) lewd (*Fraser*), 3) school-sponsored (*Hazelwood*), 4) promotes drug-use (*Morse*), or 5) when

school speech issues, ignoring *Tinker* in content-neutral speech restrictions. For example, the Sixth Circuit ruled that “because the school had done nothing to open itself up as a public forum, it was permitted to impose time, place, and manner restrictions on speech “so long as the restrictions [were] viewpoint neutral and reasonable in light of the school’s interest in the effectiveness of the forum’s intended purpose.” *C.H., v. Bridgeton Bd. of Educ.*, No. 09-5815, 2010 U.S. Dist. LEXIS 40038, (D.N.J. 2010) (citing *M.A.L. ex rel. M.L. v. Kinsland*, No. 07-10391, 2007 WL 313283 (E.D. Mich. 2007), rev’d, 543 F.3d 841 (6th Cir. 2008). In holding that *Tinker* did not apply to content-neutral restrictions on the distribution of materials during school hours and on school premises, the Sixth Circuit noted that *Tinker* only applied to view-point discrimination cases. Materials distribution restrictions can be legitimate to prevent “congestion, confusion and clutter.” *M.A.L.*, 543 F.3d at 849.

The Third Circuit, for example, refuses to draw the *Tinker* holding narrowly. At least one well-reasoned decision within the Third Circuit held that, based on its holding in *Saxe*, *Tinker* is a “catch-all speech standard,” and that *Tinker* is the “end-point” in student speech case analysis, not the “starting point.” *C.H.*, 2010 U.S. Dist. LEXIS 40038, (citing *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001); *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243, 254 (3d Cir. 2002)).

## Limited First Amendment Rights of Students

Notwithstanding *Tinker*’s famous statement that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” their rights are at least diminished at the schoolhouse gate. Unlike other governmental actors, schools act in *loco parentis* during school hours and in connection with school activities. Schools are given broad leeway to regulate certain speech in the reasonable interests of protecting the children in their care. There is a tension, however, when the school’s obligation to maintain a safe learning environment and school discipline runs up against the students’ right of free expression and to explore ideas in the course of their education.

As will be discussed further below, the fact that students do not have the same rights as their adult peers does not mean that they have no rights at all and that schools have the ability, under certain circumstances to restrict their speech.

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the regulation is viewpoint and content neutral. See *Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 509 (5th Cir. 2009), cert. denied, 130 S. Ct. 1055, 175 L. Ed. 2d 883 (2010); see also *Bar-Navon v. Brevard County Sch. Bd.*, 290 Fed. Appx. 273, 277 (11th Cir. 2008); *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 431-32 (9th Cir. 2008). This line of cases hold that if a regulation is viewpoint and content neutral, *Tinker* does not apply and the court should instead apply intermediate scrutiny. *Palmer*, 579 F.3d at 508; *Bar-Navon*, 290 Fed. Appx. at 277; *Jacobs*, 526 F.3d at 434. Under intermediate scrutiny, a viewpoint and content neutral school speech policy is constitutional if “(1) it furthers an important or substantial government interest; (2) the governmental interest is unrelated to the suppression of free expression; and (3) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Jacobs*, 526 F.3d at 434 (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 661-62, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994)). These cases limit *Tinker* review to cases involving viewpoint discrimination. See *id.* at 430.”

### In Loco Parentis

Limiting the rights of minors is not a new concept. Since early common law, unemancipated minors did not have the panoply of fundamental rights that adults do. 59 Am. Jur. 2d, Parent and Child § 10 (1987). They may not work until they reach a certain age, must attend school or a school-equivalent, may not vote or serve in the military, or marry without parental consent. Their medical and school records are under the control of their parents. They may not enter into contracts or, in many cases, open a bank account or use financial instruments without the assistance of their parents or legal guardians.

The U.S. Supreme Court reiterated this reality in a mandatory-drug-testing-for-athletes case, where the right of the school to mandate the testing was upheld. The basis for the ruling stems from the realization that schools stand in *loco parentis* over the children and are tasked with their education, discipline, and protection.

In fact, the tutor or schoolmaster is the very prototype of that status. As Blackstone describes it, a parent "may . . . 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." 1 W. Blackstone, Commentaries on the Laws of England 441 (1769).

Vernonia Sch. Dist. 47J v. Wayne Acton, 515 U.S. 646, 654-5 (1995).

### Private and Parochial vs Public Schools

Both private and public schools have the same legal rights in *loco parentis*. But public schools, unlike their private school counterparts, are also governmental agents and have rights and responsibilities as such. This includes being subject to First Amendment limits. Private and parochial schools are not deemed "governmental" entities, and therefore are not subject to First Amendment restrictions. (Note that while California's constitution may also extend free speech restrictions to acts of private institutions, this is the exception, not the rule.) Therefore, when US Constitutional issues, such as search and seizure and free speech arise, public schools' legal rights are very different from those private and parochial schools.

Private and parochial schools, while not being subject to First, Fourth or Fifth Amendment limits, are subject to the terms of the contract between parents, the students and the school. The terms of the legal contract vary considerably from school to school, but typically provide a broad authority for the school officials when it comes to student behavior on or off premises. This provides more options to private and parochial schools than to their public school counterparts in dealing with off-premises speech and activities of their students. They merely enforce their contract.

That gives them much more leeway. If parents are willing to agree and waive their rights in certain cases, it removes it from the US Constitutional realm. One private school in New York, ten years ago reserved the right to examine any home computer of their students to determine whether a cybercrime or abuse has taken place using that computer. Parents had to agree to this over-reaching policy if they wanted to enroll their children in the school.

Note that while Fifth Amendment “due process” rights don’t apply to private or parochial schools and their students, if they fail to adhere to their own articulated policies and procedures, they may be liable for breach of contract claims instead. (See “Cyberbullying Legal Issues for Schools” by Parry Aftab for the StopCyberbullying Toolkit.)

## **The Fourth and Fifth Amendments and Schools-Students Expectations of Privacy, Due Process and Rights Against Unlawful Search and Seizure**

In addition to the First Amendment, the Fourth Amendment and Fifth Amendment of the US Constitution apply differently to students in a public school. Here, again, the requirements of keeping students safe and under control in its joint educational and in *loco parentis* roles are balanced against the students’ civil rights, limiting the rights that would apply were they adults in a non-school setting.

The Fourth Amendment prohibits “unreasonable” searches and seizures. The “Due Process Clause” of the Fifth Amendment ensures notice and an opportunity to be heard. It is based on the requirements that investigations must be conducted using fundamental fairness and that targets of the investigation/charges should be provided information and evidence about the charges and an opportunity to be heard.

“Due process” is not a static standard. Procedures must allow for a level of information and process for the student to contest any claims commensurate with the level of charge(s) and penalties being faced. More serious charges and potential penalties, such as expulsion or referral for criminal proceedings, may warrant a formal hearing, discovery and the right to be represented by counsel. Less serious charges and potential penalties may be satisfied with discussions in the principal’s office with or without parents present.

While schools have the legal obligation and authority to provide a safe and secure school environment and enhanced rights to search property on school grounds or used during authorized school activities, they are not law enforcement agencies. As such, while they may be permitted to search without “probable cause” there is a line they may not cross.

The Fourth Amendment operates using a “reasonable expectation of privacy.” However, in *NJ v. TLO*, the US Supreme Court held that “students within the school environment have a lesser expectation of privacy than members of the population generally.” *NJ v. T.L.O.*, 469 U.S. 325 (1985). In a later-decided case, the Supreme Court clarified that adults and children do not share identical Fourth Amendment expectations of privacy because, “the Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as ‘legitimate.’” *Vernonia*, 515 U.S. at 654. How ‘legitimate’ is defined depends heavily on the context of the situation, whether it is at home, work, school, etc.

The Supreme Court has frequently held that minors have reduced levels of Constitutional rights than their adult counterparts. *Vernonia*, 515 U.S. at 655. *TLO* recognized that, “a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.” As early

as 1985, TLO made it clear that schools have greater search and seizure rights than other governmental entities in student (and even teacher) public school searches.

While the warrant standard or the probable causes standard apply to other governmental entities, school officials must have "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." In addition, the search must be related and limited in scope to the suspected violation. This applies equally to cyber-related violations and offline violations investigations conducted by school officials.

What does this mean for school administrators concerning search and seizure related to cyber tools? It is important for administrators to remember the court's assumption in *Tinker v. Des Moines Independent Community School District*, 1969, in that "students do not shed their rights at the schoolhouse gates." They have rights, although limited, and administrators are wise to be cognizant of those rights in regards to seizing digital devices, and when searching emails, digital records, cellphone logs and texts.

The standards of student search are pretty clear, although frequently ignored by those writing school investigation policies, especially those involving cell phones. School officials must have a reasonable suspicion (based on objective and articulable facts) that the search will provide tangible evidence that the student, whose cell phone or device is being searched, has violated either the law or an enforceable school rule. And, the scope of the search must be (a) limited to information reasonably related to the search objectives and (b) not be excessively intrusive (in light of the nature of the offense or infraction). Open-ended fishing expeditions are not permitted, merely on the expectation that something will turn up. The search must be carefully planned and carried out and detailed records of what was done and the results of the search should be kept.

Schools should conduct risk-management audits and keep a close watch on the decisions of the courts in their jurisdictions on cyber cases to avoid liability. They should make sure that searches and seizures follow the *New Jersey v. T.L.O.* standards and any rulings governing their local jurisdiction. They should also establish reporting protocols for students, staff and teachers, communicate both expectations and boundaries, teach digital citizenship and ethics to faculty and students and adopt safer networking tools and practices. Their policies and procedures must track legal updates and remain flexible enough to adapt to new technologies and risks.

But all stakeholders must understand that student cell phones, including text messages, emails, call logs, applications and digital photos and videos, may be searched by schools under carefully confined conditions. While state laws may change the local search and seizure standard, reasonable search and seizures of students' cell phone and other digital devices, in accordance with the limitations imposed by applicable state and federal law are permitted.

Several states have addressed this issue extensively. The Linden Unified School District in California adopted a broad policy allowing them to search students' cell phones. The local ACLU called them to task, articulating the standard for legal search and seizure. ([http://www.aclunc.org/docs/youth/3-03-08\\_aclu\\_ltr\\_to\\_linden\\_school\\_district.pdf](http://www.aclunc.org/docs/youth/3-03-08_aclu_ltr_to_linden_school_district.pdf), accessed

February 15, 2011.)

Similar occurrences in Washington State resulted in districts changing their policy to bring it into compliance. As a result, the Washington State School Directors Association issued an advisory to Washington State Schools covering the issue.

The US Supreme Court has made it clear that the “reasonableness” of search and privacy rights must be balanced against the schools’ “custodial and tutelary responsibility for children” for their own good and that of other students. *Vernonia*, 515 U.S. at 656.

Consider the facts of *Vernonia*, wherein the Vernonia School District adopted a Student Athlete Drug Policy which permitted the school to conduct random urinalysis drug screenings of student athletes. While random drug testing, without any suspicion of drug use, may seem like a violation of a student’s constitutional rights against searches and seizures, the end result of the case was a finding for the school district. The drug test does in fact constitute a search, however in the context of the diminished rights of children in schools the search is reasonable because it promotes a legitimate government interest. For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases.<sup>4</sup>

In *Vernonia*, the drug testing policy was permitted because schools act in loco parentis and the intrusion of the test was minimal compared to the school’s interest in preventing drug use and drug related injuries in athletic environments. *Id.* at 649.

## Understanding School Authority - the Range of the “Schoolhouse Gate”

### Tinker

In *Tinker*, the students wore black armbands to silently protest the Vietnam War. The school had set rigid restrictions against student protests of any kind and the students were suspended. The Court overturned the suspensions and articulated the most quoted standard for student free speech rights – A student’s speech must “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” to be prohibited. The school must ensure that “its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint.” *Tinker*, 393 U.S. at 509. The Court further clarified that mere fear or apprehension of a disturbance is insufficient to outweigh the students’ First Amendment rights.

While the *Tinker* ruling is often quoted for the material and substantial interference with discipline at school test, another important *Tinker* holding is essentially ignored.

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<sup>4</sup> “According to the American Academy of Pediatrics, most public schools “provide vision and hearing screening and dental and dermatological checks. . . . Others also mandate scoliosis screening at appropriate grade levels.” Committee on School Health, American Academy of Pediatrics, *School Health: A Guide for Health Professionals 2* (1987). In the 1991-1992 school year, all 50 States required public school students to be vaccinated against diphtheria, measles, rubella, and polio. U.S. Dept. of Health & Human Services, Public Health Service, Centers for Disease Control, *State Immunization Requirements 1991-1992*, p. 1.” (*Vernonia* at 656)

A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without “materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school” and without colliding with the rights of others. [citation omitted]. 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 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.

Tinker, 393 U.S. at 512-13.

### Fraser, Hazelwood and Morse

In citing student conduct, whether stemming from time, place or type of behavior, did the Court foresee expanded after-hours' speech issues?

Whether they did or not, almost twenty years passed between Tinker and the next articulation of students' free speech rights in 1986 with *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675. In Fraser, at a school assembly, a student nominated his friend for student government by using a graphically sexual metaphor.<sup>5</sup> The Court ruled for the school, holding that “vulgar and lewd speech” that would “undermine the school’s basic educational mission” and pursuant to the school’s educational mission of teaching civility may be banned. *Id.*

Following on the tail of Fraser, two years later in 1988, the U.S. Supreme Court once again ruled for the school in *Hazelwood*. 484 U.S. 260. The school censored student-authored articles in the high school newspaper that covered the effect of divorce on teens and teenage pregnancy. The *Hazelwood* Court held that “[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273.

It took another ten years before the U.S. Supreme Court turned again to student free speech in *Morse v. Frederick*, 551 U.S. 393, (often called the “Bongs Hits 4 Jesus” case). This time the issue turned on whether off-premises speech could be governed by school policies. In a tight decision (5-4 with 2 concurring opinions, three dissents and one partial concurrence and partial dissent) the US Supreme Court held that a student who, from across the street from his school, unfurled a 14-foot banner that read “Bong Hits 4 Jesus” at the passing Olympic Torch Relay could be disciplined by the school when he refused to take it down. Straying from the Tinker “substantial disruption” standard, the Court confirmed that “[t]he ‘special circumstances of the school environment’ and the governmental interest in stopping student drug abuse . . . allow[s]

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<sup>5</sup> “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.”

schools to restrict student expression that they reasonably regard as promoting illegal drug use.”  
Id.

With a narrow holding that included the need for schools to crack down on the promotion of drug use Morse disappointed many legal scholars seeking clarity on school’s rights and duties in regulating student speech. Aside from speech promoting drug use, that is lewd or substantially disruptive or which takes place at a school-sponsored event or as part of school-sponsored expression which could be misconstrued as supported by the school, where are we?

Until the U.S. Supreme Court rules clearly on the issue of a school’s authority over off-premises, after-hours and non-school-related speech, the state courts’ and lower federal courts’ will provide workable standards to guide policies. But this, by its nature, makes the laws uneven, leaving students in one jurisdiction in limbo while others understand the limits of their protected speech.

### **The Leading State and Lower-Court Federal Decisions**

Until the Supreme Court provides specific guidance as to what actions will bring physically off-campus speech on-campus for legal purposes we will have to refer to the various state and district court decisions.

In *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002) a student created a website from home. It contained lists of reasons that his algebra teacher should die and was titled “Teacher Sux.” He even added a decapitated image of his teacher with dripping blood and asked his fellow students to contribute \$20 each to help pay for a hit man. The student then talked about the site at school, accessed it from school and showed it to at least one other student. J.S. was permanently expelled.

The Pennsylvania Supreme Court ruled for the school, finding that the Tinker test was met and that the website had caused actual and substantial disruption of the school’s operations. They also found that the disruption was a direct result of the teacher’s emotional distress and other students fearing for their safety. The Court focused on the direct and measurable harm to the teacher and the fact that she had to seek professional help and was out-of-school for a period of time.

In *C.H., v. Bridgeton Bd. of Educ.*, a freshman pro-life student wished to participate in the annual Pro-Life Day of Silent Solidarity (DOSS) protest by doing four things. She explained to the Assistant Principal that she would 1) remain silent during class; 2) remain silent during the entire school day; 3) handout flyers to other students about her silence; and 4) wear a red duct tape armband with the word “LIFE” in black marker. The Assistant Principal asked the Principal for guidance who in turned contacted the Superintendent. The Superintendent stated that the student, “could not have tape on her mouth, no armband because it would violate the school’s dress code policy, no handouts because they would violate the school’s literature distribution policy, and Plaintiff could remain silent, though she risked her class participation grade.”

The Court first asks whether the Tinker standard applies. The Defendants argue that the Tinker standard does not apply because it only applies in cases of viewpoint discrimination. The Court disagrees and states, “The Third Circuit has been clear: if student speech is not lewd, school-sponsored, or advocating drug use, the standard is Tinker.” Id.

In applying this standard, the Court found that for the Defendants to prevent the student from participating in DOSS they needed to show that her speech would either “substantially disrupt or

interfere with the work of the school or the rights of other students” or based on past incidents would be likely to do so. *Saxe*, 240 F.3d at 211-2. In *K.D. ex rel. Dibble v. Fillmore*, No. 05-0336, 2005 U.S. Dist. LEXIS 33871, 2005 WL 2175166 (W.D.N.Y. 2005), a high school sophomore wore a t-shirt to school with anti-abortion messages. Abortion was compared to homicide, and the message included a reference to God. The Court in *K.D.* found that the school’s demand that the student obscure the message was unconstitutional because it violated their free speech rights. It is therefore unsurprising that in the instant case, where *C.H.* merely wanted to wear an armband with the word “Life” and remain silent that the Court found that no disruption was likely to occur and the school was enjoined from preventing her proposed participation in DOSS. The school was also unable to prove that any disruption was likely to occur because another student group had previously been permitted to alter their dress and remain silent for a day with no disruptions. *C.H.*, 2010 U.S. Dist. LEXIS 40038.

The disruption standard is set high in part because “a student whose protected speech is ‘stifled’ suffers irreparable harm. *C.H. v. Bridgeton*, quoting *Sypniewski*, 307 F.3d at 258. Furthermore, “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). This explains why the Court found for the School in *J.S.*, where there was an actual and substantial disruption, but for the students in *C.H.* and *K.D.* where no disruptions occurred.

But relying on state and lower-court decisions can be tricky, as Pennsylvania has stated that “[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.” implying that nearly all Internet speech can be considered on-campus if it is directed at school personnel or accessed there. *J.S.* 807 A.2d at 865.

On the other hand the Third Circuit (of which the federal districts constituting Pennsylvania are subject) has stated, “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. . . [because] 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.” *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249 (3d Cir. 2010).

Everyone today must pay attention to both on and off campus Internet activities and especially the content of the messages likely to incite school violence, mentally or physically harm school personnel, disrupt school activities and learning, provide a safety risk to other students or promote the use of drugs. If handled properly, public schools have more leeway here. But knee jerk reactions, made in anger or frustration will, in all likelihood will result in legal liability for schools.

## **The Legal Future – What We Expect and What You Can Do in the Meantime**

Until the US Supreme Court rules clearly on the issue of off-premises, after-hours cyberbullying and when a school has or doesn’t have jurisdiction to act and the extent of their authority, we are in legal limbo. But there are certain things we do know and can work with in the meantime:

- We know that schools have legal authority in certain cases, and are now expected to enforce the civil rights statutes under guidance from the US Department of Education. (See their Dear Colleague letter on Bullying and Harassment, October \_\_, 2010)
- We know that, although suspensions and expulsions may be tricky, lesser forms of discipline are probably permitted.
- We are seeing very good results from experienced peer-counseling programs in addressing cyberbullying.
- Cyberbullying prevention, using digital literacy programs teaching students .

The more we expand those alternatives to suspension and expulsion, the faster we will identify other viable solutions. If we expect to “arrest our way out of this problem,” we will fail. But, even if only a portion of cyberbullying falls within the school’s legal authority to address with suspension or expulsion, we can do a lot with what we already know and the rights schools already have.

States are adopting stricter and stricter “cyberbullying laws.” Some put school personnel and administrators in their cross-hairs, making them personally liable for failing to enforce the school policies. Some are designed to create negative or positive public relations for the school by awarding cyberbullying compliance “grades” that are to be posted on the school’s website. Some provide templates and mandatory professional development, and the appointment of a senior risk-management advisor or manager for the district. And the bravest of those provide authority for the school to react to off-premises, after-hours cyberbullying in the event the “substantial disruption” test is met.

In some cases, no matter how carefully drafted, these laws may be attempting to pull school legal authority up by its jurisdictional “bootstraps.” The problem with state laws trying to bootstrap jurisdiction in this way is that the decision of school authority, when the US Constitution is involved, is a federal one, not a state one. The Supreme Court has provided an indication that it may entertain a broader authority for schools when off-premises activities are closely linked to in-school activities.

The “substantial disruption” test is a difficult one, especially when most cyberbullying bleeds into the school day and all student drama is substantially disruptive. Students pass along the rumors, pictures and hype on their cellphones, will walking down the hallways and in the school buses and walk to and from school. Does this alone allow schools to reach all off-premises, after-hours cyberbullying attacks?

If and when the US Supreme Court ultimately decides this issue, Parry doesn’t believe that this will be the case. She believes that there must be an intentional targeting of the attacks by the cyberbully or cyberbullies to specifically disrupt the school environment or hurt the target in school. (Her “Midas Touch” analysis tracks cyber-jurisdictional legal standards in the non-educational world.)

But even if she is right and the school may not suspend or expel a student for all off-premises, after-hours cyberbullying, schools can mandate other lesser disciplinary measures and make sure

that parents are called in to be brought up to speed. (The more inconvenient the time set for that, Parry has learned, the more seriously the parents take their child's actions.)

Until the law becomes better settled, or unless a local cyberbullying law giving schools extended authority exists in their jurisdiction and is upheld against Constitutional challenge, the schools need to be careful before acting, seek knowledgeable legal counsel, plan ahead, and get parents involved early. In Parry's day, she reminds us, students had to write things 500 times on the blackboard. It is amazing how effective that was be when we wanted students to remember something. While we look forward to technology advances in education, let's not forget what we already know.