
Schools and Social Media: First Amendment Issues Arising From Student Use of the Internet

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The Internet is a modern day Pandora's box. It offers a forum "for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues of intellectual activity."¹ The Internet can provide meaningful learning opportunities for educators and students unimaginable to earlier generations, while raising a host of concerns for school administrators and parents over its appropriate use. Best practice questions abound concerning how to effectively and productively integrate the Internet into the educational setting while simultaneously protecting students.

The Internet has brought to the classroom's door a fundamental paradox confronting our legal and educational systems. Specifically, students using the Internet must be protected from inappropriate content or predatory practices, while the First Amendment protects the rights of those who speak, write, or convey ideas or display symbols over the Web. One of the Internet's unfortunate byproducts is that in today's digital era, school administrators are being called upon with increasing frequency to balance the use of Internet-based tools that enrich learning against the need to maintain order and a safe learning environment. Balancing these competing concerns is a complex and delicate task.²

In its now famous *Tinker* decision,³ the Supreme Court observed that students do not shed their First Amendment rights when they enter the schoolhouse gate.⁴ The *Tinker* court also recognized the need to maintain an effective learning environment. Accordingly, the Court concluded that a student's First Amendment rights are not without limitation, and must be addressed in light of the "special characteristics of the

school environment."⁵ Thus, the First Amendment rights of students in public schools "are not automatically coextensive with the rights of adults in other settings."⁶

Nonetheless, school officials are not permitted to prohibit or discipline student speech or expressive activity simply because it may be provocative or controversial, the officials disagree with the student's point of view, or the speech is crude or distasteful.⁷ Indeed, one of the core functions of the First Amendment is to protect controversial speech.⁸ In a series of decisions highlighted in the following sections, the Supreme Court has attempted to balance these competing principles, and has broadly outlined when a school lawfully can restrict or discipline a student for speech or expressive activity that would otherwise fall within the ambit of the First Amendment.

In order to understand and meaningfully evaluate the types of First Amendment issues that have arisen involving student speech and the Internet, it is important to have a basic understanding of the dynamics of the modern Web. These dynamics are shaped by the technological and cultural context in which information is distributed on the Web. Much of today's Web activity involves the creation and consumption of "social media." This term broadly describes the various ways that Internet users interact with one another online, and comprises such activities as creating and commenting on blogs, uploading and sharing user-generated content, such as video and photos, and communicating with friends through social networking sites such as MySpace or Facebook. Typically, when new members join a social networking site, they design an online profile page, which allows them to communicate with other members through email, instant messaging (IM), or electronic bulletin board postings. A member's online profile can be open to all or access can be limited only to "friends" or "buddies."

The Supreme Court has not addressed whether a school may discipline a student for off-campus speech or for statements made or symbols displayed over the Internet from the privacy of the student's home.⁹ A number of lower courts have applied the test developed in *Tinker* when addressing a student's First Amendment claim involving speech or expressive activities that initially occurred off campus but was

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later brought to school by students other than the original speaker.¹⁰ However, several other lower courts have concluded that a student's off-campus speech is entitled to full First Amendment protection even when it finds its way onto school grounds with that student's assistance.¹¹ As one district court concluded: "The mere fact that the Internet may be accessed at school does not authorize school officials to become censors of the world wide Web."¹²

Students' online activities raise particularly difficult First Amendment issues for school administrators involving off-campus speech. The Internet has expanded schools' traditional boundaries and blurred when, where, and how today's students can enter the schoolhouse gate. Indeed, there has been a proliferation of Web-based educational programs offered online to students of all ages. In today's digital era, with students participating in school activities via blog postings, instant messaging and other forms of electronic communication, a two-dimensional view of a school district's educational setting and limits of authority ignores modern reality.¹³ Has the Internet literally (and legally) moved the schoolhouse gate to a student's home computer? While school administrators may view that to be the case, until the Supreme Court addresses the issue, lower courts and school officials must look for guidance from existing Supreme Court decisions involving the First Amendment, and its decisions addressing student speech, while recognizing those decisions involved fundamentally different forms of media and arose in a markedly different context.

Before addressing the lower court decisions that have addressed the interplay of the First Amendment and student speech on the Internet, we briefly review the Supreme Court's decisions addressing categories of speech that are not protected by the First Amendment, and then its decisions involving student speech. That discussion will bring into focus the guideposts that school officials have to navigate when addressing their students' use of the Internet and social media tools.

Categories of Speech Not Protected by the First Amendment

There are certain well-defined and narrowly limited categories of speech that may be regulated because of their "constitutionally proscribable content."¹⁴ The Supreme Court has explained "that such utterances are not essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly out-weighed by the social interest in order and morality."¹⁵ When a student's speech or expressive activity fits within one of the categories outlined below, the

First Amendment generally offers no protection, and the speech or expressive activity can be prohibited or a student can be disciplined without running afoul of the First Amendment.

True Threats

The petitioner in *Watts v. United States* participated in a public rally against police brutality. In a discussion group, he complained about his draft classification and having to report for a military physical and stated: "If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J." The Supreme Court in *Watts* held that petitioner's statement was "political hyperbole" and not a "true threat." Therefore, his statement was protected under the First Amendment and he could not be prosecuted for threatening the president.¹⁶

True threats "encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals."¹⁷ Whether a student "intended to communicate a potential threat is a threshold issue, and a finding of no intent to communicate obviates the need to assess whether the speech constitutes a 'true threat.'"¹⁸ In the Seventh Circuit, "[t]he test for whether a statement is a threat is an objective one; it is not what the [speaker] intended but whether the recipient could reasonably have regarded the [speaker's] statement as a threat."¹⁹

Fighting Words

In *Chaplinski v. New Hampshire*,²⁰ a Jehovah's Witness called a city marshal "a God damned racketeer" and "a damned Fascist." After Mr. Chaplinski was convicted of violating a New Hampshire statute that prohibited directing offensive, derisive, or annoying words to another person on a street or public place, he challenged his conviction claiming the statute unreasonably restrained his freedom of speech. In affirming that conviction, the Supreme Court concluded that his statements qualified as fighting words and therefore were not protected speech under the First Amendment.²¹

The Court defined "fighting words" as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."²² The "fighting words" exception was limited by the Court's subsequent decision in *Cohen v. California*,²³ in which the defendant was convicted of disturbing the peace for wearing a jacket in a courthouse bearing the words "Fuck the Draft." The Court concluded that the state could not make "the simple public display ... of this single four-letter expletive a criminal offense."²⁴ The Court explained that, "[w]hile the four letter word displayed by Cohen in relation to the draft is not uncommonly employed

in a personally provocative fashion, in this instance it was not ‘directed to the person of the hearer.’”²⁵ In the Court’s view, “[n]o individual actually or likely to be present could reasonably have regarded the words on[Cohen’s] jacket as a direct personal insult.”²⁶

Speech That Incites “Imminent Lawless Action”

Brandenburg v. Ohio involved a criminal conviction for certain racist and anti-Semitic remarks made at a Ku Klux Klan rally calling for “revengeance.” In overturning that conviction, the Supreme Court held that the First Amendment protects the advocacy of illegal or unlawful action unless it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²⁷

Offers to Engage in Illegal Transactions

“Offers to engage in illegal transactions are categorically excluded from First Amendment protection.”²⁸ This exception is based on the rationale “that offers to give or receive what it is unlawful to possess have no social value, and thus, like obscenity enjoy no First Amendment protection.”²⁹ The Court recognizes a distinction between the “abstract advocacy of illegality” addressed in *Brandenburg* and “a proposal to engage in illegal activity” upon which many long-established criminal laws such as solicitation, pandering and conspiracy are based.³⁰

Obscenity

Obscenity has long been held to fall outside the purview of the First Amendment. For years the Supreme Court struggled to define obscenity in a way that did not impermissibly burden protected speech. In *Miller v. California*,³¹ the Court settled on a three-part test for determining if material is obscene and thus unprotected:

- (a) whether “the average person applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.³²

Child Pornography

A “related and overlapping category of proscribable speech” is child pornography, which consists of “sexually explicit visual portrayals” of children.³³ The Supreme Court affords less protection to child pornography than it does obscenity. Statutes that prohibit all child

pornography, “even material that does not qualify as obscenity,” and statutes that “criminalize the possession of child pornography,” even though the government “may not criminalize the mere possession of obscene material involving adults,” have been upheld against First Amendment challenges.³⁴

Supreme Court’s First Amendment Decisions Involving Student Speech

Assuming that a student’s speech or expressive activity falls outside of one of the above categories of unprotected speech, school officials still may prohibit that speech or subject the student to discipline without violating the First Amendment under the following circumstances:

Speech That Substantially Disrupts the Work or Discipline of the School or Invades the Rights of Others

In *Tinker v. Des Moines Independent Community School District*, students wore black armbands in silent protest of the Vietnam War, and were suspended until they returned to school without the armbands.³⁵ The Supreme Court in *Tinker* held that school officials may discipline students when their speech or expressive activity would cause “material and substantial interference with school work or discipline” or interfere with the rights of others.³⁶ The Court in *Tinker* observed that no material disruption had occurred at the school, and noted that the district had failed to present any facts that might reasonably have led school officials to predict that a substantial disruption of school activities was likely to occur. Thus, *Tinker* held that the imposition of student discipline under those circumstances violated the students’ First Amendment rights.

The *Tinker* Court explained that its “substantial disruption” test should be applied to student conduct that occurs “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 [invades] the rights of others.”³⁷ However, a student’s First Amendment rights cannot be restricted under *Tinker* merely because school administrators wish to avoid a controversy nor may school officials base a restriction on an unsubstantiated fear of disruption.³⁸ “While there must be more than some mild distraction or curiosity created by the speech, complete chaos is not required” to meet *Tinker*’s substantial disruption test.³⁹

Vulgar or Lewd Speech

Bethel School District No. 403 v. Fraser involved statements made at a high school assembly by a student who

nominated a fellow classmate for elective office.⁴⁰ That nominating speech was riddled with sexual innuendos describing his fellow classmate as “firm in his pants,” a “man who takes his point and pounds it in,” and would “go to the very end—even the climax.”⁴¹ The Court in *Fraser* rejected the student’s argument that his suspension violated the First Amendment and held that student speech that is vulgar or lewd is not protected by the First Amendment.⁴²

The *Fraser* court recognized that a school need not tolerate speech or expressive activity that would undermine its “basic educational mission”⁴³ and that one of the purposes of public education is to “prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility.”⁴⁴ The Court concluded that vulgarity is “wholly inconsistent with the ‘fundamental values’ of public school education.”⁴⁵

However, *Fraser* addressed student speech that took place on school property, at a school assembly, and did not involve off-campus speech. Justice Brennan, in his concurring opinion in *Fraser* observed: “If [the] 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.”⁴⁶ This has led one federal court of appeals to observe: “It is not clear that *Fraser* applies to off-campus speech.”⁴⁷

Speech in School-Sponsored Activities

Hazelwood School District v. Kuhlmeier involved a high school principal’s removal of two articles from a school newspaper that dealt with teen pregnancy and the impact of divorce on teenagers.⁴⁸ The newspaper was produced as part of the school’s journalism class. The Supreme Court in *Kuhlmeier* rejected the student’s claim that the principal’s editorial censorship of the school paper violated the First Amendment. The Court concluded that schools do not violate the First Amendment when exercising editorial control over the style and content of student speech in school-sponsored activities, so long as their actions are “reasonably related to legitimate pedagogical concerns.”⁴⁹

Speech Advocating Drug Use

In *Morse v. Frederik*, a school district organized a gathering of students to view the Olympic torch passing the street on which the school was located.⁵⁰ There, plaintiff and several other students unfurled a banner bearing the phrase: “BONG HiTS 4 Jesus.” A student who was suspended for 10 days challenged his suspension, arguing that the district could not suspend him for his off-campus speech. The Supreme Court summarily rejected that contention, noting that it occurred during school

hours, at a school-approved social event thereby making the district’s rules on student conduct applicable, teachers were present and charged with supervising the students, the high-school band and cheerleaders performed, and the plaintiff, who was standing across the street from his school, directed the banner towards the school making it visible to most students. The Court noted: “There is some uncertainty as to when courts should apply school-speech precedents, but not on these facts.”⁵¹

Morse is remarkable not for its holding, but for the Court’s discussion of its prior decisions involving student speech, and the efforts made to limit the opinion’s reach. The Court in *Morse* held that *Kuhlmeier* was inapplicable because the student banner did not bear “the school’s imprimatur” like the school newspaper in *Kuhlmeier*.⁵² Several justices explained that *Morse* provides no support for any restriction of student speech that arguably comments on political or social issues.⁵³ The Court in *Morse* also rejected the school district’s suggestion that “public school officials [may] censor any student’s speech that interferes with a school’s ‘educational mission.’”⁵⁴

The First Amendment and Internet Student Speech

Many courts have been slow to focus on the unique characteristics of the Internet that distinguish it from traditional modes of communication. Several of the traditional forms of communication, such as the print and broadcast media, are heavily regulated and expensive to use. Many individuals lack the resources necessary to use these forums. On the other hand, the Internet is both easy and inexpensive to use. Additionally, one of the more attractive features of the Web is that it permits the free and unfettered discussion of issues, with practically no regulation or oversight.⁵⁵ The spoken or printed word is capable of reaching a finite and limited audience. Information posted on the Internet can instantaneously reach a far larger audience potentially anywhere in the world. Moreover, social networking sites and Web-based interactive services encourage the development of affinity groups sharing common interests. As a result, messages can be easily conveyed to persons sharing the same interests or points of view. Anonymity is another feature of the Internet that makes it a preferred mode of communication for many who otherwise may be unwilling to express their views on controversial subject matters. These features make the Internet a highly popular and effective means of communicating ideas and information. However, these same features also make negative comments far more damaging and anonymous messages or threats far more menacing when made over the Internet.

Internet-related student speech decisions have involved a myriad of fact patterns, and a wide variety of social media. The decisions have addressed the creation of phony and offensive MySpace profiles of school officials; Web pages containing crude and vulgar language or mock obituaries of other students, a list of persons who the Web site creator wishes would die, and one with a drawing of a teacher with her head cut off; the use of an instant messaging (IM) icon depicting a teacher being shot; a slide show posted on YouTube dramatizing the murder of a teacher; “trash talking” on Web site message boards, and messages broadcast on publicly accessible blogs. For the most part, the students worked online from home, although their intended audience generally was other students at their school.

A number of lower courts, while sympathetic to a school district’s need to maintain a safe and orderly learning environment, nevertheless enjoined student discipline for Internet-related speech or statements made on social networking Web sites originating from the student’s home.⁵⁶ In several instances, the courts concluded that the speech did not involve a true threat⁵⁷ or was not lewd⁵⁸ or that it was lewd speech but occurred off campus⁵⁹ or that a school’s concerns over a potential disruption were overblown.⁶⁰ While a few of these decisions can be explained by a failure of proof⁶¹ or by a disagreement over the proper test for determining whether a statement qualifies as a true threat,⁶² the reasoning of several of these decisions is difficult to reconcile.⁶³

Many of the district court decisions that enjoined school districts’ disciplinary decisions were based in part upon the Second Circuit’s decision in *Thomas v. Board of Education*,⁶⁴ which held that school officials violated the First Amendment when they disciplined multiple high school students for an “off-campus” publication that had “minimal” contacts with the school.⁶⁵ However, in two recent First Amendment decisions addressing student use of the Internet and social media, *Wisniewski v. Board of Education*,⁶⁶ and *Doninger v. Neihoff*,⁶⁷ the Second Circuit restricted the scope of *Thomas*’ holding. Additionally, it should be noted that each of the district court decisions referenced in the preceding paragraph that found a First Amendment violation predated *Wisniewski* and *Doninger*.

Wisniewski involved the instant messages (IMs) of an eighth-grade student sent from his home to the home computers of other students on his buddy list. The particular instant messaging program allowed users to create an avatar or icon that could be displayed on the computer screens of those exchanging IMs. The icon identified the person sending or receiving a message. The particular icon involved in *Wisniewski* was a crude

drawing of a pistol firing a bullet at a person’s head with dots of splattered blood. Beneath the icon appeared the statement: “Kill Mr. VanderMolen,” who was the student’s English teacher. The student sent instant messages with this icon to 15 members of his buddy list over a three-week period. The icon was never sent electronically to any school official. However, the icon eventually came to the attention of other students, one of whom informed Mr. VanderMolen about it and later provided him with a copy.⁶⁸ The student was subsequently suspended for one semester and his parents sued claiming the suspension violated the First Amendment.

The Second Circuit affirmed summary judgment for the district finding no violation of the First Amendment. The *Wisniewski* court chose not to base its decision on whether the icon constituted a true threat under *Watts*, but rather based its holding on *Tinker*.⁶⁹ The Second Circuit explained:

it was reasonably foreseeable that the icon would come to the attention of school authorities and the teacher whom the icon depicted being shot...given the potentially threatening content of the icon and the extensive distribution of it, which encompassed 15 recipients, including some of [the student’s] classmates, during a three week circulation period.⁷⁰

The court further noted that, once the icon was “made known to the teacher and other school officials, [it] would create a risk of substantial disruption within the school environment.”⁷¹ In the Second Circuit’s view, it made no difference whether the student “intended his icon to be communicated to school authorities or, if communicated, to cause a substantial disruption.”⁷²

Doninger addressed a student’s statements made on her publicly accessible blog hosted by *livejournal.com*, which referred to school officials as “douche bags,” and encouraged others to write or call the school district’s superintendent “to piss her off more.” The Second Circuit in *Doninger* concluded:

a student may be disciplined for expressive conduct occurring off school grounds, when the 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 [the] campus.⁷³

Whether *Wisniewski* and *Doninger* represent a clear trend in the law remains to be seen. However, since one of the doctrinal underpinnings of the district

court decisions noted above (the Second Circuit's *Thomas* decision) has been undermined, those district court decisions should be carefully reexamined in light of the Second Circuit's subsequent holdings in *Wisniewski* and *Doninger*. Indeed, one district court rejected the application of *Thomas* in an Internet-based student speech case, finding *Wisniewski* "the more appropriate precedent in analyzing the facts" before it.⁷⁴ Recently, in *O.Z. v. Board of Trustees*,⁷⁵ another district court applied *Wisniewski* to a First Amendment claim involving a YouTube slide show depicting the murder of a school teacher where school officials only became aware of the slide show when the teacher mentioned in it ran a Google search on her name, and found it on YouTube. Although the slide show was created off-campus, because it reached the teacher and the school principal, the district court in *O.Z.* concluded that the slide show "created a foreseeable risk of disruption within the school."⁷⁶

Internet-based, off-campus student speech is an evolving area of First Amendment law producing decisions that are highly fact-specific. That trend will likely continue given the increasing popularity and sophistication of social media on the Web. School officials should always carefully address their response to off-campus or Internet-based student speech because of the complexity of the First Amendment issues presented. However, a few general principles can be gleaned from these various court decisions, which do bear mentioning.

First, a school district's position is strongest when it can demonstrate that a student's Internet posting or speech communicated what a reasonable person would view to be a true threat. As explained earlier, true threats are not protected speech.⁷⁷

Second, to the extent that a school district can establish that a student's Internet posting or speech was transmitted or brought to school or viewed at school, it should do so.⁷⁸ Several courts that have enjoined a school district's disciplinary decisions for off-campus speech have made a point of mentioning the lack of any nexus between the student's speech and the school.⁷⁹ Off-campus speech can find its way to school either by other students bringing it with them or electronically when it is viewed online at school. The disruption is the same, irrespective of the format that the speech takes at school. In *Wilson v. Hinsdale Elementary School 181*,⁸⁰ for example, a 50-day suspension of a student who wrote, sang, and burned to a CD a song that said he was "gonna kill" his pregnant teacher's baby was upheld. The student in *Wilson* gave two copies of the CD to other students, who brought the CD to school and played it for yet other students in the school's computer lab. What matters is the foreseeability of the risk

of disruption or the degree of actual disruption that the student's speech caused, and a district's ability to prove that disruption should its disciplinary decision be challenged.

Third, school districts have great leeway in regulating the use of their computers and the Internet at school. The ability of a district to establish that a student's offensive speech was accessed (or created in whole or in part) through the use of school computers or the school's computer network, which in turn violated the district's policies on computer and Internet use, should improve the likelihood that a court will uphold the discipline.

Fourth, the more outrageous or potentially dangerous the speech appears from an objective point of view,⁸¹ and the more actual or potential school disruption that can be demonstrated, the better the chances that the discipline will be upheld. While courts may not be overly sympathetic to an administrator's reaction to a boorish or disrespectful parody,⁸² they will view threats of violence or defamatory statements in a far more serious light. School districts should be prepared to present evidence concerning the emotional impact that a threat or posting had on its recipient,⁸³ be it a teacher or a student; the recipient's ability to effectively function in the school environment thereafter; the amount of administrative time and expense spent in attempting to resolve the problem; and the amount of classroom or instructional time lost as a result. Remember, judges are only human, and they invariably will take a harder look at discipline that seems out of proportion or an over-reaction to a student's speech.

Fifth, students do not enjoy a right to participate in extracurricular activities.⁸⁴ To the extent that the discipline involves a restriction on participation in extracurricular activities, it is more likely to be upheld if challenged.

Finally, the younger the student, the more discretion will be afforded a district. Remember, students have to be 13 or older to register on MySpace or Facebook under their respective terms of use.⁸⁵

A school district's policies should be clearly spelled out on these issues. Policies that fail to provide an adequate warning that certain conduct is prohibited or that fail to contain adequately defined standards to prevent their arbitrary enforcement can be challenged on vagueness or overbreadth grounds under the First Amendment.⁸⁶ For example, a student code of conduct that permitted discipline for any behavior judged by school officials "to be inappropriate in a school setting" was held unconstitutionally vague in *Coy v. Board of Education of North Canton City Schools*.⁸⁷ A school district should carefully consider all of its disciplinary

options when addressing the appropriate course for responding to a student's online activities.

Seventh Circuit's First Amendment Decisions Involving Student Speech

The Seventh Circuit recently concluded in *Nuxoll v. Indian Prairie School District*,⁸⁸ that a preliminary injunction should be entered against a school district that prevented a high school student from wearing a T-shirt bearing the phrase: "Be Happy Not Gay." The court concluded that it was highly speculative that allowing a student to wear that T-shirt would result in a substantial disruption of school activities.⁸⁹ In reviewing the Supreme Court's decisions on "substantial disruption," the Seventh Circuit explained:

From *Morse* and *Fraser*, we infer that if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or the symptoms of a sick school—symptoms therefore of substantial disruption—the school can forbid the speech.⁹⁰

The court in *Nuxoll* also reaffirmed that the younger the student, the more leeway a school district will be granted in regulating student speech. In *Baxter v. Vigo County School Corp.*,⁹¹ the Seventh Circuit had previously held that it was not clearly established that a grammar school student enjoyed a First Amendment right to wear expressive T-shirts to school and affirmed the dismissal of plaintiff's claims for money damages against school administrators based on qualified immunity.

The Seventh Circuit explained that so long as school officials "have reason to believe" that a student's expression will be disruptive, *Tinker's* standard is met.⁹² *Tinker* does not require that school officials wait until some actual disruption occurs before they act.⁹³ However, school officials still must be ready to present proof of the relevant facts on which their forecast of disruption was based.⁹⁴ In *Boucher*, the school district presented testimony from computer experts that it had retained to perform diagnostic testing on the school's computers and changed all of the passwords mentioned in the student's article that explained how to hack into the school computers. That diagnostic testing revealed signs of tampering, although the tampering could not be directly tied to the article.

First Amendment Decisions Involving Employee Speech

The Supreme Court has similarly concluded that public employees do not lose their First Amendment rights simply by virtue of their public employment.

A public employee retains a First Amendment right to speak as a private citizen on matters of public concern.⁹⁵

When an employee does not speak as a private citizen or when his or her speech does not address a matter of public concern, the employee can be disciplined without the First Amendment being violated. In *Garcetti v. Cebalos*, the Supreme Court held that when "public employees make statements pursuant to their official duties, the employees are not speaking as private citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."⁹⁶ Thus, following *Garcetti*, the first step in analyzing any First Amendment employment claim is to determine whether the plaintiff spoke as a private citizen or an employee.⁹⁷

For example, *Mayer v. Monell County Community Sch Corp.*⁹⁸ addressed a grammar school teacher's statement to her students about honking her car's horn to show support for demonstrators protesting the war in Iraq. After the parents of several students complained, the school's principal told the plaintiff not to take sides in any political controversy. Plaintiff claimed that her classroom comment led to her dismissal. The Seventh Circuit concluded that, because the teacher's statement occurred during her "current-events lesson," which was part of her assigned tasks in the classroom, *Garcetti* was applicable, and warranted the entry of judgment in the defendant's favor.

In determining whether an employee's speech addressed a matter of public or private concern, the "content, form and context" of the employee's statement must be considered, and "of those three, content is the most important" factor.⁹⁹ When statements are made in a private setting or when the employee's concerns are expressed in personal terms or for personal reasons, a court will likely find that the employee's statements do not involve a matter of public concern.¹⁰⁰

Finally, false statements that are recklessly made are not protected under the First Amendment, even when they purport to touch upon matters of public concern.¹⁰¹ Accordingly, when an employee's speech is not protected, that employee has no basis to bring a First Amendment retaliation claim for actions taken in response thereto.¹⁰²

Social Media and the Schools

Students and teachers are no different from any other Web users in that they stand to benefit from the numerous kinds of tools available to facilitate communication and collaboration. The educational experience can be streamlined, and indeed enhanced, by the use of platforms that make it easier for teachers

and students to interact with each other and among themselves. Many of the functions that one sees in the typical social networking site, like messaging, sharing links, and common collaboration spaces, can be used in the school context. Teachers can post assignments and class notes and answer frequently asked questions. Students can send messages to their teachers seeking help on particular issues. One company, for example, that has begun to leverage the tools of social media and apply them in the classroom context is Edmodo (www.edmodo.com).

State Law May Require Students to Be Taught Internet Safety

As use of the Internet in school settings expands, some state legislatures are requiring school districts to incorporate Internet safety instruction into the curriculum. In August 2007, for example, the Illinois School Code was amended to afford school districts the opportunity to establish age appropriate curriculum content in the area of Internet safety education for grades K-12. The purpose of the education was to “inform and protect students from inappropriate or illegal communications and solicitation and to encourage school districts to provide education about Internet threats and risks, including without limitation child predators, fraud, and other dangers.”¹⁰³ The overriding legislative concern was use of the Internet by sexual predators and deceptive practices that result in harassment, exploitation and physical harm.

Two hours of instruction per year was recommended, to include subjects on:

- Safe and responsible use of social networking Web sites, chat rooms, electronic mail, bulletin boards, instant messaging, and other means of communication on the Internet;
- Recognizing, avoiding, and reporting online solicitations of students, their classmates, and their friends by sexual predators;
- Risks of transmitting personal information on the Internet;
- Recognizing and avoiding unsolicited or deceptive communications received online;
- Recognizing and reporting online harassment and cyber-bullying;
- Reporting illegal activities and communications on the Internet; and

- Copyright laws on written materials, photographs, music, and video.¹⁰⁴

Starting in the 2009-2010 school year, annual Internet safety instruction will be mandatory in Illinois for grades 3 and higher, and school boards are to determine the scope and duration of the instructional program, with the above topics continuing to be recommended.

School Policies Should Address Use of Social Media for Purposes of Bullying or Other Aggressive Conduct

It is axiomatic that, for a school district to take disciplinary action against a student for misconduct involving misuse of social media, students much have some prior notice that the activity is prohibited, thereby affording the student the opportunity to conform his or her conduct accordingly.¹⁰⁵ In Illinois, schools have an obligation to intervene with students whose conduct “puts them at risk for aggressive behavior, including without limitation bullying, as defined in the [discipline] policy.”¹⁰⁶ Bullying policies, moreover, must be updated every two years and filed with the Illinois State Board of Education.¹⁰⁷ The Illinois School Code has identified the following items as being appropriate for inclusion in bullying prevention education, but does not limit a school district’s definition of bullying to these activities: intimidation, student victimization, sexual harassment, and sexual violence.¹⁰⁸

- Including cyber-bullying in your district’s definition of bullying gives school administrators a platform from which to impose appropriate consequences for use of social media to intimidate, harass, threaten, or otherwise bully others. Before taking action, you still may need to analyze the nature of the communication(s) to determine if it is protected by First Amendment free speech rights. The failure to incorporate use of the Internet or other forms of social media when defining bullying in the district’s discipline code, however, may preclude administrators from lawfully imposing disciplinary consequences for its misuse.

Prohibit the Use of Social Media for Purposes of Harassment and/or Discrimination of or by Students and/or Staff

Multiple federal, state, and local laws prohibit harassment or discrimination based on a protected category, including: race, gender, national origin, disability, religion, and sexual orientation. These prohibitions apply equally to students and employees who may venture into the use of social media sources for nefarious purposes.

- Be certain your policies and trainings addressing the prohibition of harassment and discrimination include the use of blogs or other social media as a prohibited means for engaging in such conduct for which disciplinary action may be taken.

Personal Electronic Devices in Schools

Electronic devices such as cell phones, PDAs, iPhones, and other devices provide easy access to the Internet. This expands the opportunity for students and others to engage in blogging or text messaging or to visit social networking sites throughout the school day. The more students access social media during the school day, the higher the probability disruptions will occur associated with the content posted online.

- Does your district's policy limit access to or use of personal cell phones or other electronic devices capable of accessing the Internet during some or all of the school day? Consider including misuse of personal electronic devices on school grounds or at school activities as a violation of the district's policies prohibiting, for example, bullying, discrimination, or harassment, and thereby allow corrective action under the district's discipline code.

School Supported Internet Access and Usage Policies Provide Another Avenue for Addressing Misuse of Social Media

Most schools have policies outlining the terms and conditions under which students and staff may use district-provided electronic equipment, networks, and Internet access. This is done for purposes of promoting appropriate conduct with the use of electronic media in the school setting and to meet a school district's obligations under federal laws to promote the safety of minors while using Internet services that the school provides for instructional purposes.

The Children's Internet Protection Act specifically requires school districts that receive discounted access to the Internet through the E-rate program to have policies in place that address, "the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications," among other things.¹⁰⁹ Additionally, these schools must certify that they have in place an Internet safety policy protecting minor users from visual depictions of material that is obscene, child pornography, or otherwise harmful to minors.¹¹⁰ The term "harmful to minors" is defined as any picture, image, graphic image file, or other visual depiction that:

- (a) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

- (b) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

- (c) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.¹¹¹

Federal or Illinois state legislative efforts to entirely preclude or severely limit access by minors to social networks in libraries and public schools, however, to date have been unsuccessful.¹¹²

- Three factors are critical to include in district policies for purposes of ensuring that the district is not unduly hampered in meeting its obligations in the area of monitoring Internet use and safety. First, ensure that your district's policy establishes that the user has no reasonable expectation of privacy in the information contained on or accessed through the district's electronic equipment or networks, including the Internet. Second, reserve the right to monitor use of the district's electronic equipment and networks without the consent of the user. Third, limit use of the district's electronic media to educational purposes, aligned with the district's recognized and approved educational objectives.

- Many districts also incorporate a list of "Do's and Don'ts" in guidelines regarding use of their computer networks. Another means of ensuring that school administrators and boards have the flexibility to respond to misuse of social media is to incorporate into these guidelines, limitations on access to social networks or blogging during the school day for non-educational or non-work-related purposes. Student use for educational purposes, moreover, still should be monitored by a responsible adult.

- Be reasonable in your articulation of limitations on social media in the educational setting. Many schools encourage use of email as a means of promoting parent and/or student and school communication. Web-based homework help lines also can be an efficient means of providing students with additional out-of-school assistance. Creative learning opportunities may arise by way of access to students in other countries through social networks. Allowing children to text message or email their parent (your employee) that they safely arrived home from school while the parent is still at work promotes the employee's efficiency and

sense of well being on the job. You do not want to unnecessarily inhibit use of these types of resources through overly restrictive policies and practices. What is the appropriate line to draw is one for local board consideration. And do not forget to engage in discussion with bargaining unit representatives where such limitations may impact the terms of an employee's working conditions.

Off-Campus Student Conduct

The ability of school boards and administrators to discipline students for off-campus conduct remains treacherous and highly fact-specific. In order to reach off-campus activity, the current expectation that the out-of-school conduct enters the school and causes a substantial disruption in the educational setting or interferes with the rights of others looks like it will continue to apply when such conduct takes place by way of blogs, social networks, or other forms of social media.¹¹³

- Students should have prior notice that off-campus conduct could lead to disciplinary action if a school district expects to survive a legal challenge to a suspension or expulsion associated with out-of-school conduct. This typically is achieved by reference to off-campus conduct in the district's student conduct or discipline code.
- This does not mean that schools need to ignore out-of-school conduct or behavior that might not rise to the level of taking disciplinary action. A more appropriate venue to address off-campus social media concerns at times may be through instructional classes or assembly presentations. Schools, after all, continue to be expected to teach students principals of good citizenship through character education.¹¹⁴ These principles apply as readily in social media arenas as they do in face-to-face communications, although each may have its own unique considerations.

Employee Conduct Outside of Work

A school may discipline its employees, up to and including termination, for conduct that occurred outside of the work environment. Like students' off-campus conduct, employees' conduct outside of work generally still will have to cause or be reasonably expected to cause a disruption in the school environment or otherwise affect their ability to perform their job or violate district or public policy. Employees retain a First Amendment right to speak out as private citizens on matters of public concern. Districts, therefore, need

to consider this before responding to an employee's use or misuse of social media.

However, teachers have occasionally used the Internet to lure children into inappropriate relationships or have exercised poor judgment in maintaining a professional boundary in their online communications with students, resulting in complaints from parents or peers. At least one court has upheld the non-renewal of a non-tenured teacher's contract premised on that teacher's unprofessional, peer-to-peer-like communications with students on his personal MySpace profile page, about which some students complained.¹¹⁵ In reaching that conclusion, the court stated:

It is reasonable for the Defendants to expect the Plaintiff, a teacher with supervisory authority over students, to maintain a professional, respectful association with those students. This does not mean that the Plaintiff could not be friendly or humorous; however, upon review of the record, it appears that the Plaintiff would communicate with students as if he were their peer, not their teacher. Such conduct could very well disrupt the learning atmosphere of a school, which sufficiently outweighs the value of Plaintiff's MySpace speech.¹¹⁶

That students had complained of the teacher's comments making them feel uncomfortable also weighed in on the court's decision.

- Set your employees up for success. Be sure they are apprised in advance of your expectations regarding blogging and the use of social networks or social media within the context of their jobs and/or in the school environment or at home. Make certain that you have an effective means of timely communicating policy updates or changes.
- Prohibit the use of symbols, logos, mascots, or other depictions readily identifiable with the school district on employees' personal profiles or Web pages. Require the use of a disclaimer for personal blogs or social network pages that indicates that the information posted reflects the author's personal opinions, positions, or interests and is not authorized or otherwise sanctioned by the district. This can be particularly important when the blogger is readily identified as a school employee or board member.
- Investigate and respond to social media misconduct by employees or board members using the

same considerations that you would use for other employee investigations. Keep in mind tenure protections and exceptions to the remediation rule for conduct that causes irreparable harm to the student or the district's reputation as well as collective bargaining agreement obligations, if applicable.

Confidentiality Considerations

Personally identifying information about a student, known from or contained in the student's school records, is protected from unauthorized release by the Family Educational Rights and Privacy Act (FERPA)¹¹⁷ and is also likely addressed by your state's laws. For example, Illinois has the Illinois School Student Records Act, which overlaps to a large extent with FERPA.¹¹⁸ Both of these laws broadly define school student records to include any written or recorded information about a student and by which the student may be individually identified, regardless of how or where the information is stored.¹¹⁹ School student information created, received, or stored electronically is included in this definition.

Employee information also may be protected by privacy considerations. In Illinois, the Personnel Record Review Act, for example, forbids the release of disciplinary information about an employee to third parties, persons not part of the employer organization, or employee bargaining representatives who are not representing the employee, absent written notice being timely provided to the employee.¹²⁰ Additionally, students and employees each have constitutionally protected general privacy interests under the Fourteenth Amendment that should be kept in mind when creating and distributing social media content.

- Never share electronically that which you cannot share in person or via regular US mail. With the exception of Health Insurance Portability and Accountability Act (HIPAA), which is limited to certain electronically communicated health information, most confidentiality laws do not differentiate how the protected information is shared. Instead, their focus is on whether the release of information is authorized by law and/or whether specific informed consent is required.
- Be cognizant of the level of security of the network used to share information electronically. A school administrator probably should not send an email to a parent about a student knowing that the student shares the same email password and account as the parent or that the student regularly has to assist the parent in accessing the Internet due to the parent's limited technological capabilities.

- Exercise caution in referring to students or employees by name or by other personal identifiers in electronic communications. Whenever possible, refrain from using their names at all.
- Review your district's practices regarding access to and use of student or employee information on home computers or other personal electronic devices. Are appropriate security measures in place to address maintenance of the confidentiality of personally identifying student or employee information?

Record Maintenance Considerations

Electronic records derived via social media may constitute public school records required to be maintained. In Illinois, the Local Records Act defines a public record as,

any book, paper, map, photograph, *digitized electronic material*, or other official documentary material, regardless of physical form or characteristics, made, produced, executed or received by any agency or officer pursuant to law or in connection with the transaction of public business and preserved or appropriate for preservation by such agency or officer, or any successor thereof, as evidence of the organization, function, policies, decisions, procedures, or other activities thereof, or because of the informational data contained therein.¹²¹

Such records must be retained, and may not be destroyed prior to receiving permission from the Local Records Commission.

- Identify your district's practices for determining whether staff are engaging social media sources for official business purposes, and develop a plan for ensuring appropriate maintenance and destruction of those records. Be sure that plan is communicated to staff. Do not forget to consider what may be in a teacher's personal possession at the end of the year, and at risk of being deleted as part of the classroom clean up, for example, parent communications, IEP, or Response-to-Intervention data.

Investigation Considerations

Federal law provides a robust immunity to Internet service providers for claims arising from third-party content. In 1996, Congress enacted the Communications Decency Act (CDA). Although a portion of the CDA was found unconstitutional in *Reno v. ACLU*,¹²² important provisions survived. Section 230 provides that "[n]o

provider . . . of an interactive computer service shall be treated as the publisher or speaker for any information provided by another information content provider.”¹²³ What this provision means is that an Internet service provider cannot be held legally responsible for content uploaded by its users if:

- The service provider provides “interactive computer services”;
- The legal claim (*e.g.*, defamation) seeks to treat the defendant as a publisher or speaker of information; and
- A different information content provider (*e.g.*, another site visitor) provided the information.

Most Web sites, like social networking sites, are entitled to § 230 immunity for legal claims arising from communications through those Web sites. For example, in *Doe v. MySpace*,¹²⁴ a court dismissed an action against MySpace in which the parents of a minor user of the site sued for failing to protect the minor from an assault committed by another MySpace user.

- One should use care in determining who the responsible parties are when considering legal action over content posted online. In most instances, it will be more efficient to pursue an anonymous user rather than the service provider through which offensive material was transmitted.

The major social networking sites have taken steps to reduce the risk of harm to their users. In early 2008, MySpace announced agreements that it had made with a number of state attorneys general that include actions on MySpace’s part to improve user safety.¹²⁵ These steps included restrictions on access to adult-oriented content, more rigorous sign-up procedures, and more strict protocols for who can be “friends.”

One may believe that such activities on the part of the social networking site would lead to a duty on the part of the site, the breach of which could result in a negligence claim. But § 230 anticipates as much and provides immunity. It provides “[n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily undertaken in good faith to restrict access to [objectionable content].”

MySpace has made available on its Web site: “The Official School Administrator’s Guide to Understanding MySpace and Resolving Social Networking Issues.”¹²⁶ It is a must read for all school administrators. It provides instructions on how to contact MySpace, and what information should be provided to the company

in order to remove a false or offensive profile. It also advises as to what to do when a district learns of an underage user, cyberbullying, or when threats of violence have been posted on a MySpace account. Many other social networking sites have similar policies or practices that should be investigated as appropriate in the course of responding to complaints.

Technological Expertise May Be Necessary to Appropriately Identify the Source of Online Content

Almost inevitably, persons posting offensive content online will take steps to conceal their identities. In recent years there have been a number of cases considering the competing interests involved in defamation and other types of actions in which it is necessary for a plaintiff to uncover the identity of an anonymous speaker before proceeding with legal action. Courts have grappled with how to handle the tension between, on the one hand, the rights of an anonymous Internet user to speak anonymously, and on the other hand, the right of a victim of defamation to seek recovery. A number of cases reflect a variety of standards that courts require a plaintiff to meet before having an anonymous Internet user unmasked.

One must judge the nature and severity of the offensive online content to determine whether action should be taken. Factors that one should consider are:

- The type of unlawful content at issue (*e.g.*, is it defamatory, harassing, threatening);
- Is action by the school instead of another party (*e.g.*, parents or law enforcement) appropriate;
- Was the offensive content posted and/or viewed on school computers; and
- The strength of the facts available.

Often the speaker of offensive content online cannot be identified without undertaking a technological investigation. The process requires the involvement of information technology personnel or other persons with expertise in examining the records and data accompanying Internet communications. There may be data within the school district’s computer system that will lead to the identity of the person posting the offending content.

The information contained in and accompanying email messages can be used to track down the sender of that email message. Internet emails carry the IP address of the computer from which the email was sent. This IP address is stored in an email header delivered to the

recipient along with the message. Email headers are treated like envelopes for postal mail.¹²⁷ They contain the electronic equivalent of an address and postmark that reflect the routing of mail from sender to recipient. After having interpreted email header information to ascertain the needed IP address, one can seek a court order or subpoena requiring the service provider associated with the IP address to disclose the identity of the sender of the message.

- Consult with IT staff to evaluate whether the posting of content can be traced to a particular computer on the system or to a particular email address. If not, weigh whether the nature of the communication or problem under investigation warrants engagement of outside experts.

Unmasking the Anonymous Blogger May Require Legal Action

To unmask an anonymous speaker that used a computer outside the school district's system, it is usually necessary to send a subpoena to the provider of the service through which the offensive content was posted (e.g., the social networking Web site) and the anonymous speaker's Internet service provider. Courts will require that a certain showing be made before allowing the issuance of a subpoena to identify the anonymous speaker. The offended party will have to come up with significant evidence showing that illegal conduct has occurred before the court will allow this information to be turned over. Requiring significant evidence ensures the proper balance between the right of the offended party to seek redress and the First Amendment right of the speaker to remain anonymous.

Liability of School Board for Employees' Electronic Communications

In Illinois, the Local Governmental Tort Immunity Act¹²⁸ provides school boards with immunity against liability for several types of electronic communications of their employees. Specifically, § 10/2-107 of the Act provides: "A local public entity is not liable for injury caused by any action of its employees that is libelous or slanderous or for the provision of information either orally, in writing, by computer or any other electronic transmission, or in a book or other form of library material."¹²⁹ Courts have interpreted this particular immunity provision as providing absolute protection, even if the alleged conduct is intentional¹³⁰ or if the statements were made outside of the employee's scope of employment.¹³¹ Section 10/2-106 of the Act also provides public entities with immunity against claims arising from intentional or negligent misrepresentations of their employees.¹³²

Illinois also grants public employees immunity against claims arising from "negligent misrepresentation[s] or the provision of information either orally, in writing, by computer or any other electronic transmission, or in a book or other form of library material and which occur within the scope of their employment."¹³³

- If for any reason, one of the immunity provisions ostensibly available to a public employee is held not to be applicable, then a school district will likely end up paying for the employee's electronic communications, for which the school district itself might be immune. Section 10/9-102 of the Local Governmental Tort Immunity Act obliges school districts to indemnify employees against judgments that arise out of the scope of their employment.¹³⁴ Courts have broadly interpreted the types of conduct that fall within one's scope of employment in Illinois.¹³⁵

Remember that under the Supremacy Clause of the Constitution, state or local immunities cannot trump the First Amendment or bar a § 1983 claim,¹³⁶ but they should provide protection against any associated state-law tort claims.

Notes

1. 7 U.S.C. § 230(a)(3).
2. This is due in large part to the fact that: "The loss of First Amendment freedoms, even for minimal periods of time unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).
3. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
4. *Id.* at 506.
5. *Id.* at 506-507. *See also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).
6. *Bethel Sch. Dist. No. 403 v. Frasier*, 478 U.S. 675, 682 (1986).
7. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (explaining "[c]ontent-based regulations are presumptively invalid," and that the First Amendment prevents the prohibition of speech "because of disapproval of the ideas expressed").
8. *See, e.g., Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (explaining that free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging").
9. *Doninger v. Neihoff*, 527 F.3d 41, 48 (2d Cir. 2008).
10. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004) (collecting cases).
11. *See, e.g., Thomas v. Board of Educ.*, 607 F.2d 1043, 1052 (2d Cir. 1979) (holding school officials exceeded the scope

- of their authority and violated the First Amendment for disciplining students for an “off-campus publication” modeled on the National Lampoon which contained articles on masturbation and prostitution which had minimal contacts with the school). However, as explained in a later section of this article, the Second Circuit appears to have restricted the scope of *Thomas*’ holding in several subsequent decisions addressing the First Amendment’s application to student use of the Internet and social media tools, *supra* n.9, and *Wisniewski v. Board of Educ.*, 494 F.3d 34 (2d Cir. 2007).
12. *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007) (addressing a phony MySpace profile of a school principal created by a student).
 13. *Doninger*, 527 F.3d at 48–49. *Doninger* acknowledged that “territoriality is not necessarily a useful concept in determining the limits of [school administrators] authority.” *Id.* at 49, quoting *Thomas*, 607 F.2d at 1058 n.13 (Newman, J., concurring).
 14. *R.A.V.*, 505 U.S. at 383.
 15. *Chaplinski v. New Hampshire*, 315 U.S. 568, 572 (1942).
 16. *Watts v. United States*, 394 U.S. 705, 707–708 (1969) (*per curiam*).
 17. *Virginia v. Black*, 538 U.S. 343, 359 (2003).
 18. *Porter*, 393 F.3d at 617.
 19. *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990). There is a split in the Circuits concerning the test for determining whether a statement constitutes a “true threat.” See, e.g., *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 785 n.5 (E.D. Mich. 2002) (noting: “The Ninth Circuit looks at the statement from the viewpoint of the maker whereas the Eighth Circuit looks at the statement from the viewpoint of the recipient. The Eighth Circuit’s view conflicts with the Sixth Circuit’s view . . .”).
 20. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
 21. *Chaplinsky*, 315 U.S. at 572.
 22. *Id.*
 23. *Cohen v. California*, 403 U.S. 15 (1971).
 24. *Cohen*, 403 U.S. at 26.
 25. *Id.* at 20, quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940).
 26. *Id.*
 27. *Brandenburg v. Ohio*, 395 U.S. 444, 447–449 (1969) (*per curiam*).
 28. *United States v. Williams*, —U.S.—, 128 S. Ct. 1830, 1841 (2008), citing *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 388 (1973); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).
 29. *Williams*, 128 S. Ct. at 1841.
 30. *Id.* at 1842.
 31. *Miller v. California*, 413 U.S. 15 (1973).
 32. *Miller*, 413 U.S. at 24.
 33. *Williams*, 128 S. Ct. at 1836, citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982).
 34. *Williams*, 128 S. Ct. at 1863.
 35. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
 36. *Tinker*, 393 U.S. at 511.
 37. *Tinker*, 393 U.S. at 513.
 38. *Tinker*, 393 U.S. at 508.
 39. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 868 (Pa. Cmwlth. 2002) (internal citation omitted and collecting cases).
 40. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).
 41. *Fraser*, 478 U.S. at 687 (Brennan J., concurring).
 42. *Fraser*, 478 U.S. at 685.
 43. *Id.*
 44. *Fraser*, 478 U.S. at 681.
 45. *Fraser*, 478 U.S. at 685–686.
 46. *Fraser*, 478 U.S. at 688 (Brennan J., concurring).
 47. *Doninger*, 527 F.3d at 49. See also *Layshock*, 496 F. Supp. at 599 (concluding *Fraser* “does not expand the authority of schools to punish lewd and profane off-campus speech”), *Killion v. Franklin Regional Sch. Dist.*, 136 F. Supp. 2d 446, 456–457 (W.D. Pa. 2001) (explaining students cannot be punished for lewd and obscene speech occurring off school grounds “absent exceptional circumstances”), *Coy v. Board of Educ.*, 205 F. Supp. 2d 791, 799–800 (N.D. Ohio 2002 (rejecting the application of *Fraser* because plaintiff did not compel other students to view his Web site and his “expressive activity was the private viewing of his own Web site”). However, in *J.S. v. Blue Mountain Sch. Dist.*, 2008 WL 4279517, *6 (M.D. Pa, Sept. 11, 2008), one district court appears to meld the applicable standards from *Fraser* and *Tinker*: “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 at school.”
 48. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).
 49. *Kuhlmeier*, 484 U.S. at 273.
 50. *Morse v. Frederick*, —U.S.—, 168 L. Ed. 2d 290 (2007).
 51. *Morse*, 168 L. Ed. 2d at 298 (citation omitted).
 52. *Id.* at 301.
 53. *Id.* at 311–312 (Alito J., concurring).
 54. *Id.* at 312 (Alito J., concurring).
 55. 47 U.S.C. § 230(a)(4) (noting that the Internet has flourished “with a minimum of government regulation”).
 56. See, e.g., *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000); *Killion*, 136 F. Supp. 2d at 458.
 57. *Emmett*, 92 F. Supp. 2d at 1090 (involving a student-created Web page with mock obituaries of other students that allowed visitors to vote on who should be the next to “die” and have their obituary posted on the site). The obituaries in *Emmett* were written tongue-in-cheek and were inspired by a creative writing class in which students were assigned to write their own obituaries. The court concluded that no evidence was presented that the mock obituaries and voting

- on the site were intended to threaten anyone or that anyone actually felt threatened. *See also Mahaffey*, 236 F. Supp. 2d at 785-786 (granting summary judgment on plaintiff's First Amendment claim stemming from a one semester suspension from school for creating a Web site titled "Satan's Web page" which listed "people I wish would die"). The Web site also contained "SATAN'S MISSION FOR YOU THIS WEEK" and stated: "Stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breadth, just before everything goes black, spit in their face. Killing people is wrong don't do It [sic]. Unless [sic] Im [sic] there to watch. Or just go to Detroit. Hell is right in the middle. Drop by and say hi. PS: NOW THAT YOU'VE READ MY WEB PAGE PLEASE DON'T GO KILLING PEOPLE AND STUFF THEN BLAMING IT ON ME. OK?" *Id.* at 782. The district court in *Mahaffey* concluded "a reasonable person in Plaintiff's place would not foresee that the statement on [his] Web site would be interpreted as a serious expression of an intent to harm or kill anyone on the Web site." *Id.* at 786.
58. *Coy*, 205 F. Supp. 2d at 799 (describing a student's Web page as "crude" but noting that it did not have the 'elaborate, graphic and explicit sexual metaphor[s]' at issue in *Fraser*).
59. See the decisions discussed in n.35.
60. *Beussink*, 30 F. Supp. 2d at 1180 (enjoining a student's suspension for creating a Web page critical of his high school using crude and vulgar language when the evidence revealed that the suspension was imposed not based on any fear of disruption but because the school principal was upset over the content of the Web page).
61. *Layshock*, 496 F. Supp. 2d at 600-601 (concluding "there is no evidence from which a reasonable jury could conclude this incident caused a material and substantial disruption of school operations"); *Killion*, 136 F. Supp. 2d at 455 (noting "defendants failed to adduce any evidence of actual disruption"); *Latour v. Riverside Beaver Sch. Dist.*, 2005 WL 2106562 at *2 (W.D. Pa. Aug. 24, 2005) (enjoining a student's expulsion in light of a school official's testimony that the student's violent rap songs did not cause any disruptions prior to his expulsion).
62. *See Mahaffey*, 236 F. Supp. at 785-786 (noting a conflict in the federal circuits and explaining the Sixth Circuit's true threat test is whether "a reasonable person would foresee that [a] statement would be interpreted by those to whom [it was communicated] as a serious expression of an intention to inflict bodily harm).
63. For example, contrast the holding in *Layshock* with the *Blue Mountain* decision discussed in n.63. Both cases involved phony MySpace profiles of a school principal, both involved actual photos of the principal copied from the district's Web site, and both caused disruption at their respective schools. While it can be argued that the profile in *Blue Mountain* was more vulgar and lewd than the profile in *Layshock*, the *Layshock* profile did refer to the principal as a "big fag," a "big steroid freak," a "big whore" and stated "he was too drunk to remember his birthday."
64. *Thomas v. Board of Educ.*, 607 F.2d 1043 (2d Cir. 1979) (holding school officials exceeded the scope of their authority and violated the First Amendment for disciplining students for an "off-campus publication" modeled on the National Lampoon containing articles on masturbation and prostitution and having minimal contacts with the school).
65. *See, e.g., Killion*, 136 F. Supp. 2d at 457; *Coy*, 205 F. Supp. at 799; *Layshock*, 496 F. Supp. at 598.
66. *Wisniewski v. Board of Educ.*, 496 F.3d 34 (2d Cir. 2007).
67. *Doninger v. Neihoff*, 527 F.3d 41 (2d Cir. 2008).
68. *Wisniewski*, 494 F.3d at 35-36.
69. *Wisniewski*, 494 F.3d at 37-38.
70. *Wisniewski*, 494 F.3d at 39-40.
71. *Wisniewski*, 494 F.3d at 40.
72. *Id.*
73. *Doninger*, 527 F.3d at 48, quoting *Wisniewski v. Board of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007).
74. *Doninger*, 514 F. Supp. 2d at 217 n.10.
75. *O.Z. v. Board of Trustees*, 2008 WL 4396895 (C.D. Cal. Sept. 9, 2008).
76. *O.Z.*, 2008 WL 4396895 at *4.
77. *See, e.g., Porter*, 393 F.3d at 616 (noting "speech is a 'true threat' and therefore unprotected if an objectively reasonable person would interpret the speech as a 'serious expression an intent to cause a present or future harm'").
78. *J. S. v. Blue Mountain Sch. Dist.*, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008) (addressing a phony MySpace profile of a school principal portraying him as a pedophile and a sex addict and holding the student's ten day suspension did not violate the First Amendment). The district court noted that the intended audience of the student's Web site was other students at school, a paper copy of the Web site was brought to school, the Web site was discussed at school and the picture used in creating the phony profile was cut and pasted from the school district's Web site. *Id.* at *7.
79. *See, e.g., Layshock*, 496 F. Supp. at 600 (concluding that defendants did not establish "a sufficient nexus" between a phony MySpace profile created by a student of his school principal and any disruption of the school environment).
80. *Wilson v. Hinsdale Elementary School* 181, 349 Ill. App. 3d 243, 810 N.E. 2d 637 (2d Dist. 2004).
81. *Boucher v. School Bd. of Greenfield*, 134 F.3d 821, 827-828 (7th Cir. 1998) (upholding a one year expulsion of a high school student for writing an article in an underground school newspaper explaining how to hack into the school's computers); *Bethlehem Area Sch. Dist.*, 807 A.2d at 869 (upholding student expulsion for creating a Web site with a picture of a teacher with a severed head and soliciting funds for her execution).
82. *Killion*, 136 F. Supp. 2d at 455 (addressing a Top 10 list about a school's athletic director which he created and emailed from his home computer to the home computers of several friends).
83. *Bethlehem Area Sch. Dist.*, 807 A.2d at 852 (noting that the teacher who was the object of a student's Web site began

- taking medication for anxiety and depression, was unable to return to school and was granted a medical leave the following year due to an inability to return to her teaching duties); *O.Z.*, 2008 WL 4396895 at *4 (observing the teacher who was the object of a YouTube slide show depicting her murder feared for her safety and became physically ill after watching the slide show).
84. *See, e.g.*, *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 214 (D. Conn. 2007) (citing cases and secondary authorities). The Second Circuit in *Doninger* subsequently observed “the district court correctly determined that it is of no small significance that the discipline here related to the [the student’s] extracurricular role as a student government leader.” 527 F.3d at 52. However, the Second Circuit considered the “relevance of this factor . . . in the context of Tinker” and explained that the student’s actions risked “frustration of the proper operation of [the school’s] student government and undermined the values that student government, as an extracurricular activity, is designed to promote.” *Id.* The Second Circuit also noted in *Doninger*, “we have no occasion to consider whether a different, more serious consequence than disqualification for student office would raise constitutional concerns.” *Id.* at 53.
85. Facebook terms of service <http://www.facebook.com/home.php#/terms.php?ref=pf> (last visited 1/15/2009).
86. *Chicago v. Morales*, 527 U.S. 41, 56 (1999).
87. *Coy v. Board of Educ.*, 205 F. Supp. 2d 791 (N.D. Ohio 2002). *See also Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 704-706 (W.D. Pa. 2003) (involving student discipline for “trash talking” on a Web site message board regarding an upcoming volleyball game and holding the school handbook policies were unconstitutionally vague because they prohibited a substantial amount of protected speech); *Killion*, 136 F. Supp. 2d at 458-459 (finding the school district’s “Retaliatory Policy” unconstitutionally overbroad and vague because it contained no “geographical and contextual” limitations and failed to define critical terms such as “abuse” and thereby could permit its arbitrary enforcement).
88. *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668 (7th Cir. 2008).
89. *Nuxoll*, 523 F.3d at 676.
90. *Nuxoll*, 523 F.3d at 674.
91. *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728 (7th Cir. 1994).
92. *Boucher*, 134 F.3d at 827-828 (rejecting the argument that school officials must show “actual harm” before they can act).
93. *Id.*; *see also Doninger*, 527 F.3d at 51, citing *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001); *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007) (“[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”).
94. *See Boucher*, 134 F.3d at 827-828 (overturning a preliminary injunction and upholding a high school student’s expulsion for writing an article in an underground school newspaper published off campus explaining how to hack into the school’s computers).
95. *See, e.g.*, *Pickering v. Board of Educ.*, 391 U.S. 563, 572 (1968).
96. *Garcetti v. Cebalos*, 547 U.S. 410 (2006).
97. *Sigsworth v. City of Aurora*, 487 F.3d 506, 508-509 (7th Cir. 2007).
98. *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007).
99. *Connick v. Myers*, 461 U.S. 138, 147-148 (1983); *Cliff v. Board of Sch. Comm’rs*, 42 F.3d 403, 409 (7th Cir. 1994).
100. *See, e.g.*, *Phelan v. Cook County*, 463 F.3d 773, 791 (7th Cir. 2006) (holding “speech lacks the public concern element if it concerns the subject of public interest but the expression addresses only the personal effect on the employee”).
101. *Pugel v. Board of Trustees of Univ. of Ill.*, 378 F.3d 659, 668 n.9 (7th Cir. 2004) citing *McGreal v. Ostrov*, 368 F.3d 657, 673 (7th Cir. 2004).
102. *Wernsing v. Thompson*, 423 F.3d 732, 751 (7th Cir. 2005).
103. 105 ILCS 5/27-13.3(a).
104. *Id.* at § 5/27-13.3(c).
105. *Goss v. Lopez*, 419 U.S. 565 (1975).
106. 105 ILCS 5/10-20.14(d).
107. 105 ILCS 5/27-23.7(d).
108. *See, e.g.*, 105 ILCS 5/23.7(b).
109. 47 U.S.C. § 245(l).
110. 20 U.S.C. § 6777, 47 U.S.C. § 254(h)(5).
111. 47 U.S.C. § 245(h)(7)(G).
112. *See, e.g.*, the Deleting Online Predators Act of 2006 (Introduced in House) H.R.5319.
113. *See, e.g.*, *Wilson*, 810 N.E. 2d at 646-647 (upholding student suspension for recording a song with threatening lyrics that was brought to school on CDs by other students and played in the school’s computer lab); *Jordan v. O’Fallon Twp. High Sch. Dist. No. 203*, 706 N.E. 2d 137 (5th Dist. 1999) (student athlete suspension from extracurricular activities due to off-campus alcohol consumption upheld).
114. *See, e.g.*, 105 ILCS 5/27-12.
115. *Spanierman v. Hughes*, 576 F. Supp. 2d 292 (D. Conn. 2008).
116. *Id.* at 313.
117. 20 U.S.C. § 1232g.
118. 105 ILCS 10/1, *et seq.*
119. *E.g.*, 20 U.S.C. § 1232g(a)(4); 105 ILCS 10/2(d).
120. 820 ILCS 40/7.
121. 50 ILCS 205/3 (emphasis added).
122. *Reno v. ACLU*, 521 US 844 (1997).
123. 47 U.S.C. § 230(c)(1).
124. *Doe v. MySpace*, 528 F.3d 413, 420-522 (5th Cir. 2008). *See also Green v. Am.Online*, 318 F.3d 465 (3d Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir.

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- 2003); Chicago Lawyers Committee for Civil Rights Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008). However, see Fair Housing Council of San Fernando Valley v. Roommates.com LLC, 521 F.3d 1157, 1164-1167 (9th Cir. 2008) (*en banc*) (rejecting § 230 immunity for immunity for a housing search Web site because users were required to answer a series of questions through drop-down menus addressing their sex, sexual orientation, and whether children were part of the household).
125. Caroline McCarthy, "MySpace agrees to social-networking safety plan," *CNet News*, Jan. 14, 2008, available at http://news.cnet.com/8301-13577_3-9849909-36.html (last visited Jan. 7, 2009).
126. A copy of the guide can be downloaded at www.creative.myspace.com/cms/SafetySite/documents/SchoolAdministratorsGuide.pdf.
127. Quon v. Arch Wireless Operating Co., 529 F.3d 892, 904-905 (9th Cir. 2008) (holding that for Fourth Amendment purposes, just as with the information appearing on the outside of an envelope, a person cannot claim a reasonable expectation of privacy in the information listed in an email header).
128. 745 ILCS 10/1-101, *et seq.*
129. 745 ILCS 10/2-107.
130. Horowitz v. Board. of Educ. of Avoca Sch. Dist. No. 37, 260 F.3d 602, 617 (7th Cir. 2001).
131. United Industries v. City of Chicago, 2006 US Dist. LEXIS 90032.
132. 745 ILCS 10/2-106.
133. 745ILCS 10/2-210.
134. 745 ILCS 10/9-102.
135. See *Adames v. Sheahan*, 378 Ill. App. 3d 502, 880 N.E. 2d 559, 573 (1st Dist. 2007); *Wilson v. City of Chicago*, 120 F.3d 681, 685 (7th Cir. 1997).
136. See, *e.g.*, *Howlett v. Rose*, 496 U.S. 356 (1990); *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973).

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