

Students' First and Fourth Amendment Rights in the Digital Age:
An Analysis of Case Law

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ABSTRACT

In January, 2012, the Supreme Court of the United States refused to hear three cases involving student online speech, or cyberspeech. This indicates that the Court is content with lower courts applying First Amendment jurisprudence developed over 40 years ago to a rapidly advancing digital environment where students carry the equivalent of personal computers in their pockets, have an ever-growing telepresence, and rely on cyberspeech as their primary means of communicating with the world around them.

Lower courts also are beginning to grapple with challenges to students' Fourth Amendment right to be free from unreasonable search and seizure as it relates to the digital environment described above. Recently, lower courts in Mississippi, Texas, Minnesota, and Kentucky have applied standards set forth decades ago to decide cases involving searches of students' mobile devices and Web 2.0 applications.

Given the absence of guidance from the Supreme Court, this study aims to: (1) identify and analyze trends in the current application of legal standards related to student cyberspeech and search and seizure in the digital age; (2) synthesize these findings into a set of essential guidelines for school officials to use as they navigate a legal landscape that has yet to be well defined; and (3) make recommendations to further develop the body of law.

Findings indicate that school officials have the legal authority to restrict off-campus student cyberspeech when certain conditions are met, and *Tinker* governs cases in this area. Seriously threatening, slanderous, or obscene cyberspeech is not constitutionally protected and can be restricted prior to an actual disruption. Off-campus student cyberspeech that reaches the

school can legally be restricted so long as evidence shows that it caused a material and substantial disruption.

In addition, students possess reasonable expectations of privacy in their personal mobile devices and password-protected private Web 2.0 communications. *T.L.O* governs searches of students' personal mobile devices and *Vernonia* appears to govern cases involving searches of students' Web 2.0 applications. Substantive suspicion at the outset, carefully tailored searches, and a clear governmental interest will keep school officials from violating students' Fourth Amendment protections.

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Chapter 1

Mobile devices and Web 2.0 applications are integral components of youth culture and are becoming increasingly common in the public school setting. According to research by the Pew Internet & American Life Project, 95% of teens (ages 12-17) use the internet regularly; 78% of teens own mobile phones, with almost half (47%) owning smartphones; one in four teens (23%) have a tablet computer and 74% of teens are mobile internet users, meaning they access the internet via mobile devices at least occasionally. Illustrating the always-on access to the internet, 25% of teens (50% for smartphone owners) rely on mobile phones as their primary access to the internet (Madden, Lenhart, Duggan, Cortesi & Gasser, 2013). “Students’ access to the Internet, whether at home, at the public library, at Starbucks or at school, has in fact broken the monopoly that traditional education systems have on learning” (Project Tomorrow, 2012, p. 2). Combine this data with 77% of teens bringing their mobile phones to school every day (Lenhart, Ling, Campbell & Purcell, 2010) and 80% of teens using social networking sites, with most logging on daily (Lenhart, Madden, Smith, Purcell, Zickuhr & Rainie, 2011), and you have a situation where most students have the ability to stay connected and continue their learning at all times.

Many educational stakeholders (administrators, teachers, parents and students) see the value of these technologies as tools to enhance learning and this is translating into increased integration into school culture. A report by Project Tomorrow (2011) revealed that district administrators who value the use of mobile devices for personal or professional purposes were more likely to be evaluating a bring your own device (BYOD) approach to instruction, piloting a BYOD approach, and providing mobile devices for use by students. According to a study by Lemke (2009) that surveyed school district administrators (superintendents and curriculum

directors, n=1827), respondents reported positive or highly positive impacts of Web 2.0 on students' communication skills, quality of schoolwork, interest in school, interests outside of school, self-direction in learning, sense of community and culture, peer relationships, relationships with parents and family, and homework habits. Seventy-seven percent of the respondents indicated that Web 2.0 tools have value for teaching and learning. When asked to identify their priorities for integrating Web 2.0 tools, district administrators identified keeping students interested and engaged in school, meeting the needs of diverse learners, and developing critical thinking skills as their top three. A qualitative study by EdWeb.net (2009) targeting 12 school principals indicated that most of the principals believed that Web 2.0 tools would make a substantive change in students' school experience; specifically by helping students develop a more collaborative view of learning, improving student motivation, engagement and involvement, and creating a connection to real-life learning. The principals in the study also highlighted the increased access that Web 2.0 tools provide and the importance of adjusting instruction to avoid becoming less relevant to students. About half of the principals in the study indicated that some of their teachers were, or would be comfortable, integrating Web 2.0 tools in their instruction. All of the principals in the study indicated a substantial interest in Web 2.0 tools amongst some of their students.

In their national survey, Project Tomorrow (2011) found that teachers who are mobile users indicated that the greatest benefits of integrating mobile devices into instruction would be increased engagement (83%), access to online textbooks (73%), and the extension of learning beyond the school day (63%). Project Tomorrow (2011) also found that 87% of parents indicated that the effective use of technology at school has an important impact on the success of

their children and that parents have the expectation that schools will adequately prepare their children with the 21st century skills necessary for success in the real-world.

According to a report by the Consortium for School Networking (2011), students can benefit from the use of mobile devices and Web 2.0 by allowing them to

- Bridge the gap between formal (in-school) and informal (out-of-school) learning, improving their preparation for real world experience;
- Construct their own learning environments to help them achieve academically and acquire the skills necessary for the 21st century; connect instantly with peers, experts, and information resources beyond the school walls;
- Provide real-time feedback, exchange information, and receive assessments during classroom instruction through a text message or Twitter “back channel”;
- Document their work through images taken on and off campus;
- Receive and submit homework assignments digitally; learn how to utilize mobile devices and social networking as tools for lifelong learning.

Over the past four years, high school students’ participation in online communities has doubled and their use of collaborative writing resources such as Google Docs™ has increased by 57% (Project Tomorrow, 2011). In addition, 10% of students have sent a tweet on an academic subject, 15% have informally tutored someone online, 20% have used a mobile app to organize their schoolwork, and 46% of high school students have used Facebook to collaborate on a school project (Project Tomorrow, 2011).

Unfortunately, there has been little data collected to document the potential benefits described above. When Lemke (2009) surveyed curriculum directors (n=823), 8% reported to have collected data on student achievement, 11% on interest/engagement, and 9% on 21st century

skills. While limited, the data indicate 60% positive results for academic achievement, 63% positive results for interest/engagement, and 69% positive results for 21st century skills. There were no negative results reported for any of the three categories.

Some research has shown specific educational benefits from the use of mobile devices. According to a study by Lu (2008), second language learners recognized more vocabulary words after reading the regular and brief text messages on mobile devices than when they read the more detailed paper materials. Similarly, a study by Matthews, Doherty, Sharry, and Fitzpatrick (2008) found that compliance with assigned tasks was significantly higher when students used mobile devices and it was easier to remember to complete the tasks. In a small pilot study by Engel and Green (2011) that studied the impact of using cell phones in a mathematics classroom, students showed gains in participation, reflection and assessments throughout the school year. Katz (2005) found that mobile devices in educational settings helped students reference information on the move, connect with teachers, retrieve schedule and assignment information, coordinate with other students, discuss assignments and seek help with their academics.

Despite the potential benefits of these technologies for teaching and learning, most students are currently required to check their technologies at the schoolhouse door. Even though data indicate that teachers and students are interested and engaged in mobile technologies and Web 2.0 at home and for personal use, their penetration into the school environment is limited except in hallways and common areas where individuals are able to bypass restrictions. In a survey of 12 school principals, most indicated that students did not have access to social networking sites within the school, primarily due to technology policies, filters and firewalls (edWeb.net, 2009). According to Lemke (2009), 70% of school districts ban social networking sites and 72% ban chat rooms, while allowing other Web 2.0 tools (blogs, wikis, sharing

music/video, interactive games, polls and surveys) with specific educational purposes. When asked to identify elements that need to be addressed as policies evolve to integrate these technologies into the curriculum, school principals identified preventing social contact between staff and students, freedom of speech issues, inappropriate student postings, sexting, and cyberbullying (edWeb.net, 2009). Sexting is defined as “the sending of sexually explicit messages or images by cell phone” (Sexting, 2013), and cyberbullying is defined by the Cyberbullying Research Center as “when someone repeatedly harasses, mistreats, or makes fun of another person online or while using cell phones or other electronic devices” (Hinduja, 2010). According to a 2011 report by the Pew Internet & American Life Project, 16% of teens (ages 12-17) say they have received a sexually suggestive nude or nearly nude photo or video of someone else they know, 88% of teens who use social media have seen someone be mean or cruel on social media sites, and 15% say they have been the targets of cruelty or meanness (Lenhart, Madden, Smith, Purcell, Zickuhr & Rainie, 2011). In a study by Lemke (2009), superintendents and technology directors (n=2213) identified the following problems related to Web 2.0 tools as moderate to severe in their districts.

- Wasting time/distractions (75% of respondents)
- Use of non-authoritative or biased sources (56%)
- Inappropriate or rude online social interactions (54%)
- Accessing inappropriate materials (53%)
- Students giving out personal information (53%)
- Posting inappropriate pictures or media (48%)
- Cheating/plagiarism (48%)
- Cyber bullying (45%)

- Using technology to cheat in some other way (e.g., text messaging test answers) (43%)
- Inappropriate entries/use (41%)
- Making inappropriate contacts with strangers (27%)

Obviously, these emerging technologies have the potential to facilitate negative behaviors that impact the safety and security of students and the school environment. Many of these behaviors cut to the heart of one of the primary responsibilities of school officials – maintaining a safe and secure environment for students. Safety and security is accomplished, in part, through maintaining order and discipline, which is a goal of public education long recognized by the Supreme Court (*Tinker v. Des Moines*, 1969). In addition, the courts have granted a wide range of discretion for school officials to regulate and discipline in their efforts to provide a safe and secure learning environment as long as no constitutional rights are infringed upon (*Tinker v. Des Moines*, 1969; *Wood v. Strickland*, 1975).

“Part of a school's awesome charge is to balance the exercise of rights that enrich learning with order and a safe and productive school environment” (*J. S. v. Bethlehem*, 2002, p. 651). As younger educators who are more familiar with the benefits of mobile devices and Web 2.0 mature and move into leadership roles in schools, it is highly likely that they will place new expectations on their schools to leverage these technologies to enrich learning (Project Tomorrow, 2011). Additionally, policies are evolving to close the technological gap “between how today’s students want to use technology for learning and how technology is served up to them in school” (Project Tomorrow, 2011, p. 3). Therefore, it is critical that school officials, in their efforts to maintain the delicate balance mentioned above, be knowledgeable of relevant legal guidelines so that students can have rich learning experiences within a safe learning environment where constitutional rights are honored. This study focuses on the aforementioned

legal guidelines, specifically those that govern student rights related to free speech (First Amendment) and search and seizure (Fourth Amendment).

Supreme Court Precedent

Any legal analysis of students' right to free speech or right to be free from unreasonable search and seizure must begin with an understanding of the foundational Supreme Court cases that have set the standards in these areas of jurisprudence. The standards set forth by four Supreme Court cases, *Tinker v. Des Moines Independent School District*, *Bethel School District No. 403 v. Fraser*, *Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederick* guide any analysis involving students' First Amendment right to free speech. Regarding students' Fourth Amendment right to be free from unreasonable search and seizure, *New Jersey v. T.L.O* and *Vernonia School District 47J v. Acton* provide the guiding standards.

Tinker v. Des Moines Independent School District (1969)

In December, 1965, three students decided to wear black armbands to school in protest of the war in Vietnam and to show their support for a truce. Upon hearing of this prior to the protest, a group of principals met and adopted a regulation that any student wearing a black armband would be asked to remove it and would be suspended if he or she refused. Even though they were aware of the newly adopted regulation, the three students wore the arm bands to school anyway. Upon refusing to remove their arm bands, the students were suspended from school until they agreed to remove them. The students filed suit seeking an injunction restraining the school district from disciplining them. The district court dismissed the complaint based on the grounds that the discipline was reasonable to prevent a disturbance of school discipline. The district court's decision was affirmed without opinion by a panel of the Eighth

Circuit. The U.S. Supreme Court (the Court) granted certiorari and reversed the lower court's ruling.

In reversing the lower court's ruling, the Court recognized the vital importance of protecting constitutional freedoms within the public schools. The Court held that while students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker*, 1969, p. 506), in light of the "special characteristics of the school environment" (*Tinker*, 1969, p. 506), student speech can be limited if it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school" (*Tinker*, 1969, p. 505, quoting *Burnside v. Byars*, 1966), or "collid[es] with the rights of other students to be secure and to be let alone" (*Tinker*, 1969, p. 508). The Court made it clear that students' First Amendment rights are less extensive within the school setting. The Court held that the quiet and passive wearing of armbands was not disruptive, did not impinge upon the rights of others, was akin to pure speech, and therefore was protected by the First Amendment. The Court also held that any prohibition of student speech must be supported by evidence that the prohibition was "necessary to avoid [emphasis added] material and substantial interference with schoolwork or discipline" (*Tinker*, 1969, p. 511). The Court was clear in holding that "[the State] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" (*Tinker*, 1969, p. 509). In other words, a restriction on student speech based solely on the content of that speech is unconstitutional. The Court determined that the actions of the school officials in *Tinker* "appeared to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands" (*Tinker*, 1969,

p. 510). The Court also held that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression” (*Tinker*, 1969, p. 508).

Ultimately, *Tinker* aimed to protect students’ speech rights by producing a three-pronged test to determine the constitutionality of any restriction placed on student speech and/or expression.

- 1) Did the speech cause an *actual* material and substantial disruption to the operation of the school?
- 2) Was the restriction of the speech necessary to avoid a *potential* material and substantial disruption to the operation of the school?
- 3) Did the speech impinge upon the rights of other students?

An affirmative answer to any one of these questions would indicate that the speech in question would not be “immunized by the constitutional guarantee of freedom of speech” (*Tinker*, 1969, p. 513).

Bethel School District No. 403 v. Fraser (1986)

In April, 1983, a high school student gave a nominating speech for a classmate at an assembly with about 600 students in attendance, many as young as 14 years old. The assembly was sponsored by the school and was part of an educational program in self-government. Throughout the speech the student “referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor” (*Bethel*, 1986, p. 678). The student was warned of the inappropriateness of his speech by two teachers prior to delivering it and also was warned that delivering the speech may result in “severe consequences” (*Bethel*, 1986, p. 678). The student delivered the speech anyway, was suspended for three days and had his name removed from a list of potential graduation speakers. The student filed suit claiming a violation of his First

Amendment right to freedom of speech. The district court held that the actions of the school district violated the First Amendment. In upholding the district court's ruling, a panel of the Ninth Circuit rejected the school district's arguments that the student's speech should be distinguished from the speech in *Tinker* because the school district had a responsibility to protect "an essentially captive audience of minors from lewd and indecent language" (*Bethel*, 1986, p. 680); and the school district was responsible for the curriculum and therefore had the "power to control the language used to express ideas during a school-sponsored activity" (*Bethel*, 1986, p. 680). The U.S. Supreme Court granted certiorari and reversed the lower court's ruling.

In reversing the lower court's ruling, the Court recognized the important and delicate balance between students' freedom to express themselves and society's interest in teaching socially appropriate behavior. The Court made clear that while students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker*, 1969, p. 506), "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings" (*Bethel*, 1986, p. 682). In other words, if Fraser would have delivered his speech outside of the school environment, it would have been protected. The Court distinguished the speech in *Fraser* from the speech in *Tinker*, noting that the speech in *Tinker* did "not concern speech or action that intrude[d] upon the work of the schools or the rights of other students" (*Tinker*, 1969, p. 508). The Court held that vulgar and lewd speech that occurs within the school setting can be restricted by school officials without violating First Amendment rights because such speech "is wholly inconsistent with the 'fundamental values' of public school education" and "would undermine the school's basic educational mission" (*Bethel*, 1986, pp. 685-686).

The *Fraser* ruling created the first of several exceptions to the protections provided by *Tinker*. Post-*Fraser*, student speech occurring on-campus that was deemed vulgar or lewd by school officials could be restricted, even without evidence of a material and substantial disruption. When interpreted narrowly, the *Fraser* exception gives school officials the authority to restrict vulgar or lewd student speech that occurs at a school assembly. Although no court has done so at this point and Justice Alito specifically rejected the idea in his concurring opinion in *Morse* (see below), when interpreted more broadly, *Fraser* could allow school officials to restrict any student speech that undermines the educational mission of the school (Tabor, 2009).

Hazelwood School District v. Kuhlmeier (1988)

In *Hazelwood*, a school principal censured a school newspaper that was operated by students as part of their journalism class. The decision to censure was based on the principal's concerns about two articles, one regarding teen pregnancy and the other regarding the effect of divorce on students. Because the principal believed he needed to make an immediate decision due to a lack of time to edit the newspaper and have it printed before the end of the school year, he decided to remove two pages in their entirety, including stories other than the ones he had concerns about. The students filed suit seeking injunctive relief and monetary damages, claiming that their First Amendment rights had been violated. The district court ruled in favor of the school district. On appeal, a panel of the Eighth Circuit reversed, holding that the newspaper was a public forum and, therefore, could not be censored by the school unless it was "necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others" (*Tinker*, 1969, p. 511). The U.S. Supreme Court granted certiorari and reversed the lower court's ruling.

In reversing the lower court's ruling, the Court began by reaffirming that "students in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'" (*Hazelwood*, 1988, p. 266, quoting *Tinker*, 1969, p. 506). The Court then recognized that students' First Amendment rights "are not automatically coextensive with the rights of adults in other settings" (*Bethel*, 1986, p. 682), that those rights must be applied "in light of the special characteristics of the school environment" (*Tinker*, 1969, p. 506), and that schools "need not tolerate student speech that is inconsistent with [their] 'basic educational mission' even though the government could not censor similar speech outside of school" (*Hazelwood*, 1988, p. 266, quoting *Bethel*, 1986, p. 685). Within this context, the Court held that school officials had the authority to restrict student expression "that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" (*Hazelwood*, 1988, p. 271) as long as the restriction was "reasonably related to legitimate pedagogical concerns" (*Hazelwood*, 1988, p. 273).

In distinguishing the speech in *Hazelwood* from that in *Tinker*, the Court added a second exception to the protections afforded by *Tinker*. Post-*Hazelwood*, schools have the authority to limit the speech rights of students engaged in activities such as newspapers, performing arts performances, etc., that are related to the school curriculum or could be seen as being endorsed by the school (Glenn, 2010).

Morse v. Frederick (2007)

In this most recent of the four Supreme Court cases involving student speech rights, a high school student (Frederick) displayed a banner with the message "BONG HiTS 4 JESUS" on a sidewalk across the street from his school as the Olympic Torch Relay passed by. The event occurred during normal school hours, so school officials permitted students to watch the relay as

it went by the school. When Frederick refused to take down the banner, upon the direction of the principal, the principal confiscated the banner and later suspended Frederick for violating a school policy prohibiting such messages at school events. Frederick filed suit claiming that the actions of school officials violated his First Amendment rights. The district court ruled in favor of the school district. A panel of the Ninth Circuit reversed, holding that the school district did not provide sufficient evidence to meet *Tinker's* material and substantial disruption test. The U.S. Supreme Court granted certiorari and reversed the lower court's ruling.

In reversing the ruling of the lower court, a deeply divided Court (5-4) held that even though Frederick was standing on a public sidewalk on the opposite side of the street from the school, his speech was considered on-campus because it took place during normal school hours and was sanctioned by the school administration. In addition, even though Frederick stated that the words on the banner were nonsensical and intended to grab the attention of television cameras, the Court held that the words advocated the use of illegal drugs and were in violation of school policy. Finally, by citing a "governmental interest in stopping student drug abuse" (*Morse*, 2007, p. 408), combined with logic similar to that used in *Hazelwood* – that students' First Amendment rights "are not automatically coextensive with the rights of adults in other settings" (*Bethel*, 1986, p. 682), and that those rights must be applied "in light of the special characteristics of the school environment" (*Tinker*, 1969, p. 506) – the Court held that school officials could restrict student speech that they "reasonably regard as promoting illegal drug use" (*Morse*, 2007, p. 408).

Similar to *Fraser* and *Hazelwood*, the Court added a third exception to the *Tinker* protections. Post-*Morse*, school officials can restrict student speech that they deem promotes illegal drug use, even when the showing of a material and substantial disruption is absent (Glenn,

2010). It is important to note that the majority recognized “there is some uncertainty at the outer boundaries as to when courts should apply school speech precedents” (*Morse*, 2007, p. 401), indicating that the Court has given thought, although no specific clarification, to the geographical reach of school officials’ authority to restrict student speech.

New Jersey v. T.L.O (1985)

In *T.L.O.*, a 14-year old student (T.L.O.) was caught smoking with a friend in a school restroom. When confronted by the school’s Assistant Principal (AP), T.L.O. denied smoking in the bathroom and smoking in general. The AP searched T.L.O.’s purse and found a pack of cigarettes. Upon removing the cigarettes, the AP noticed a package of cigarette rolling papers, which he associated with marijuana. The AP then continued with a more thorough search of T.L.O.’s purse and discovered a small amount of marijuana, a pipe, empty plastic bags, a substantial amount of money, an index card with a list of students who owed T.L.O. money, and two letters implicating T.L.O. in dealing drugs. Subsequently, T.L.O. was suspended by the school and charged with delinquency by the state. T.L.O. moved to have the evidence from her purse suppressed claiming that the search violated her Fourth Amendment rights. The Juvenile and Domestic Relations court ruled that the search was reasonable, denied the motion to dismiss, and sentenced T.L.O. to a year of probation. On appeal, the appellate court affirmed the trial court’s finding that there was no Fourth Amendment violation. T.L.O. appealed to the New Jersey Supreme Court. In reversing the ruling of the appellate court, the New Jersey Supreme Court held that the contents of T.L.O.’s purse had no bearing on the charges against her, that the evidence of drug use seen by the AP did not justify the continuation of the search, and that the search was not reasonable and violated the Fourth Amendment. The U.S. Supreme Court granted certiorari and reversed the lower court’s ruling.

In reversing the ruling of the lower court, the Court held that the “[Fourth] Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials” (*New Jersey*, 1985, p. 333), and that “in carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents” (*New Jersey*, 1985, p. 336). In other words, school officials cannot rely on the doctrine of *in loco parentis* to “claim the parents' immunity from the strictures of the Fourth Amendment” (*New Jersey*, 1985, p. 337). In addition, the Court held that students have legitimate expectations of privacy. However, balancing this right with the school’s need to maintain an environment that is conducive to learning “requires some easing of the restrictions to which searches by public authorities are ordinarily subject” (*New Jersey*, 1985, p. 340). Therefore, “school officials need not obtain a warrant before searching a student who is under their authority” (*New Jersey*, 1985, p. 340), and are not required to adhere strictly “to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law” (*New Jersey*, 1985, p. 341). Finally, the Court held that the legitimacy of a search by school officials is dependent on the “reasonableness, under all the circumstances, of the search” (*New Jersey*, 1985, p. 341). Reasonableness is determined by a two-part test. First, the search must be “justified at its inception” (*New Jersey*, 1985, p. 341, quoting *Terry v. Ohio*, p. 20). To satisfy this test, a search must be based on reasonable suspicion “that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school” (*New Jersey*, 1985, p. 342). Second, it must be determined that the search, as conducted, “was reasonably related in scope to the circumstances which justified the interference in the first place” (*New Jersey*, 1985, p. 341, quoting *Terry v. Ohio*, p. 20). To satisfy this part of the test, the method and extent of the search must be “reasonably

related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction” (*New Jersey*, 1985, p. 342). Based upon these standards, the Court ruled that the search of T.L.O.’s purse was reasonable and did not violate the Fourth Amendment.

This case solidified the body of law related to student searches and defined the standards for determining the legality of searches conducted by public school officials. Post-*T.L.O.*, school officials can conduct legal searches of students (and their property) as long as they have reasonable suspicion that the search will produce evidence of a violation and as long as the search is conducted in a way that reasonable in its extent and not excessively intrusive.

Vernonia School District 47J v. Acton (1995)

In *Vernonia School District 47J v. Acton*, the Court addressed circumstances that involved a more generalized search; specifically, a mandatory random drug testing program for student athletes. The program was prompted by concerns that student athletes were heavily involved in the drug culture surrounding the school and its expressed purpose was to “prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs” (*Vernonia*, 1995, p. 650). The program applied to all student athletes and required written consent from both the student and a parent/guardian. All athletes were tested at the beginning of their season, and then once per week, 10% of the athletes were selected randomly for testing. Proper procedures and safeguards, including monitors who stood at a respectful distance (for boys) or outside a closed bathroom stall (for girls), were used to avoid tampering. Access to test results was limited to the school administrators. In the fall of 1991, a student (J.A.) was denied participation when he and his parents refused to provide the proper written consent. J.A. filed suit claiming that the program violated his Fourth Amendment right

to be free from unreasonable searches and seizures. The District Court dismissed the claims and a panel of the Ninth Circuit reversed. The U.S. Supreme Court granted certiorari and reversed the lower court's ruling.

Since the factors and analysis that justified the search in *T.L.O.* did not neatly apply, the Court developed a new three-part reasonableness test that deemphasized individual suspicion and focused on balancing the governmental interest with the level of intrusion. The factors in the new test included: (1) “the nature of the privacy interest upon which the search...intrudes” (*Vernonia*, 1995, p. 655), (2) “the character of the intrusion that is complained of” (*Vernonia*, 1995, p. 659), and (3) “the nature and immediacy of the governmental concern at issue” (*Vernonia*, 1995, p. 660).

Regarding the first factor, the Court recognized that “the ‘reasonableness’ inquiry cannot disregard the schools' custodial and tutelary responsibility for children” (*Vernonia*, 1995, p. 656), and that “students within the school environment have a lesser expectation of privacy than members of the population generally” (*Vernonia*, 1995, p. 657, quoting *New Jersey v. T.L.O.*, 1969). In addition, the Court held that due to the nature of athletic participation, specifically changing and showering in a communal setting, “legitimate privacy expectations are even less with regard to student athletes” (*Vernonia*, 1995, p. 657). Finally, the Court stated that when students choose to participate in athletics, “they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally” (*Vernonia*, 1995, p. 657) and “have reason to expect intrusions upon normal rights and privileges, including privacy” (*Vernonia*, 1995, p. 657).

In its analysis of the character of the intrusion, the Court stated that “the degree of intrusion depends upon the manner in which production of the urine sample is monitored”

(*Vernonia*, 1995, p. 658), and that the conditions students were subjected to as part of the testing program were “nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily” (*Vernonia*, 1995, p. 658). Therefore, the Court held that “the privacy interests compromised by the process of obtaining the urine sample [were] negligible” (*Vernonia*, 1995, p. 658). The Court also held that the intrusiveness of the test results was not significant because “the drugs for which the samples are screened are standard, and do not vary according to the identity of the student” (*Vernonia*, 1995, p. 658), and “the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function” (*Vernonia*, 1995, p. 658).

Finally, in addressing the nature and immediacy of the governmental concern, the Court defined a compelling state interest as “an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy” (*Vernonia*, 1995, p. 661). Citing a series of studies on the negative physiologic effects of drug use and the district court’s conclusions regarding the level of the drug crisis at the school, the Court held that a relatively high degree of governmental concern existed.

Problem Statement

On January 17, 2012, the Supreme Court of the United States refused to hear three cases, *J.S. v. Blue Mountain Sch. Dist.* (2008), *Layshock v. Hermitage Sch. Dist.* (2011) and *Kowalski v. Berkeley County Sch.* (2011) involving student online speech, or cyberspeech. In each case, students were disciplined for cyberspeech directed at school officials or other students that contained offensive language. In each of the three cases, Circuit Courts of Appeal relied on

judicial standards set forth by *Tinker v. Des Moines Ind. Comm. Sch. Dist.* (1969) to decide the case. The denial of these cases by the Supreme Court indicates that the Court is content with applying jurisprudence developed over 40 years ago, in response to students wearing black armbands to protest the war in Vietnam, to a rapidly advancing digital environment where students carry the equivalent of personal computers in their pockets and have an ever-growing telepresence via social media and the internet. This telepresence allows them to affect others at a distance, blurs the line between on and off-campus speech, and ultimately causes significant difficulties in the jurisprudence of student speech (Pike, 2008).

Similarly, lower courts also are beginning to grapple with challenges to students' Fourth Amendment right to be free from unreasonable search and seizure as it relates to the digital environment described above. Recently, lower courts in Mississippi (*J.W. v DeSoto County Sch. Dist.*, 2010), Texas (*Mendoza v. Klein Ind. Sch. Dist.*, 2011), Minnesota (*R.S. v. Minnewaska*, 2012) and Kentucky (*G.C. v. Owensboro Public Schools*, 2013) have applied standards set forth decades ago by *New Jersey v. T.L.O* (1985) and *Vernonia School District 47J v. Acton* (1995) to decide cases involving searches of students' mobile devices and Web 2.0 applications.

Purpose of Study

Given the absence of guidance from the Supreme Court, this study has several purposes: (1) to identify and analyze trends in the current application of legal standards related to student speech and search and seizure in the digital age; (2) to synthesize these findings into a set of essential guidelines for school officials to use as they navigate a legal landscape that has yet to be well defined; and (3) to make recommendations to further develop the body of law. Constitutional provisions, Supreme Court and lower court rulings, law reviews and other scholarly articles will be reviewed to meet these purposes.

Methods of Research

The data for this study will be literature in the form of Constitutional provisions, case law and legal commentary. Therefore, research will be conducted based on the requirements set forth by Fink (2005) and outlined below. This methodology has been chosen “because it reflects the discipline of social science research and, being focused on literature, provides a model which can be adapted to law” (McConville, 2007, p. 23).

Selecting Research Questions

Three core questions have been established to guide the study. Answers to the questions will be provided in the corresponding chapters. The core questions are:

1. How are today’s courts applying long standing legal standards to decide student speech cases involving cyberspeech?
2. How are today’s courts applying long standing legal standards to decide search and seizure cases involving students’ mobile devices and Web 2.0 applications?
3. What are the legal guidelines for school officials (in the context of student speech and search and seizure) when navigating issues involving cyberspeech, mobile devices, and Web 2.0 applications?

Selecting Relevant Sources

The following research tools will be used systematically to gather information and sources related to the core questions.

1. **American jurisprudence** is an encyclopedia of United States law and will be used to provide an overview of the law and an initial list of legal authorities (cases or legislation).

2. The **American Digest System** is a collection of United States court cases that are indexed by topic and case name. It will be used to identify any other legal authorities related to the core questions.
3. **Legal Clips** is an awareness service of the National School Board Association Office of General Counsel and the NSBA Council of School Attorneys that provides updates and resources related to important school law issues. It will be used to identify recent cases.
4. **Shepard's Citations** is a case citator that will be used to check the status of a particular legal authority and search for other relevant authorities.
5. **Law Reviews, legal dissertations and legal textbooks** will be searched for relevant secondary sources in an effort to understand and compare varying interpretations of the law by other researchers.

Choosing Search Terms

Key words, including students' rights, free speech, student speech, online student speech, search and seizure, First Amendment, Fourth Amendment, educational technology, mobile device, cell phone, social media, Internet, Facebook and Twitter will be used to search for information using the research tools described above.

Applying Screening Criteria

Case law will be screened by decision date and hierarchically. For cases related to student speech, decisions prior to *Tinker v. Des Moines Ind. Comm. Sch. Dist.* (1969) will be excluded. For cases related to search and seizure, cases prior to *New Jersey v. T.L.O* (1985) will be excluded. Decisions made by higher courts will have priority over decisions made by lower courts. Relevant legislation will be selected based on citations in the reviewed cases. Secondary sources (law reviews, dissertations and textbooks) will be screened based on relevance and

quality and will be used to support interpretation only. The research questions guiding this study do not focus on a specific legal position. Rather, they focus on describing the current state of a body of law. Therefore, bias in the screening process should not be an issue. Nevertheless, I will reflect on the materials selected to detect whether any bias enters the selection process.

Review and Synthesis

The process of inductive reasoning will be used to review and synthesize the data. In other words, individual cases will be analyzed and generalizations will be made based on the rulings and rationales.

Selected cases will initially be coded based on fact patterns. For example, consider a case where a student created a website at home that targeted a school official, contained lewd and vulgar language, was accessed on a school computer by the website author, shown to one other student, seen by one teacher and then blocked by the school. This case would be coded based on the following facts: a) the website *originated off-campus*, b) the website *targeted a school official*, c) the website included *lewd and vulgar* speech, d) the website was *accessed on campus by the author*, and e) the website was only *viewed by a small number of individuals*.

Once all relevant cases have been reviewed and coded, they will be sorted based on similar fact patterns and reviewed again to determine the legal standard(s) relied upon by the court to make the ruling. For example, in cases with fact patterns similar to the one described above, a court could rely on *Tinker's* material and substantial disruption standard and rule that no substantial disruption occurred because the website was blocked after being viewed on campus by only a few individuals.

Finally, the relationships between fact patterns and legal standards will be analyzed to make generalizations about the current state of the law. These generalizations will be refined into a set of guidelines for school officials at the end of Chapters 2, 3, 4, and 5.

Design of Study

The second chapter of this study is a scholarly analysis of case law and legal commentary related to the guiding questions within the context of student speech. It is organized into three sections. The first section includes a brief overview of the foundational Supreme Court cases that set the legal standards that govern student speech rights (*Tinker v. Des Moines Independent School District*, *Bethel School District No. 403 v. Fraser*, *Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederick*). The second section includes a review of how courts have applied these legal standards to more recent cyberspeech cases. The final section synthesizes the rulings into a set of guidelines for school officials as they navigate issues related to student cyberspeech.

Chapter 3 is a scholarly analysis of recent cases and legal commentary related to the guiding questions within the context of search and seizure. It is also organized into three sections. The first section includes a brief overview of the foundational Supreme Court cases that set the legal standards that govern students' rights related to search and seizure (*New Jersey v. T.L.O.* and *Vernonia School District 47J v. Acton*). The second section includes an overview of how courts have applied these legal standards in more recent cases. The final section synthesizes the rulings into a set of guidelines for school officials when engaging in searches of students' mobile devices and Web 2.0 applications.

Chapters 4 and 5 were written with the educational practitioner in mind. They are focused on distilling the information in the previous two chapters and providing practical

recommendations and guidelines to inform and assist educators as they navigate challenging legal issues presented by student cyberspeech, mobile devices, and Web 2.0.

Chapter 6 attempts to tie the study together by acknowledging the social context of cyberspeech and emerging technologies, reflecting on their rapid growth (even within the time frame of this study), and making recommendations to further develop the body of law to adapt to the seemingly inevitable growth of these technologies within the public school setting.

Definitions

Certiorari: An original writ or action whereby a cause is removed from an inferior to a superior court for trial. The record of the proceedings is then transmitted to the superior court. The term is most often used when requesting the U.S. Supreme Court to hear a case from a lower court (Alexander, 2005).

Cyberspeech: Student speech that occurs on the internet (Hartung, 2008).

Freedom of speech: A constitutional guaranty under the First Amendment, and the due process clause of the Fourteenth Amendment, to the Constitution of the United States and provisions in many state constitutions, embracing the concept that free discussion is essential to the growth, development, and well-being of our free society under a democratic form of government and should be limited by regulation only to prevent abuse of the right (*Ballentine's*, 2010).

***In loco parentis*:** In place of the parent; charged with some of the parent's rights, duties, and responsibilities (Alexander, 2005).

Mobile device: A relative of the PDA, a mobile device typically runs its own operating system, allows users to install applications, frequently sports a QWERTY keyboard, and offers device owners advanced features such as e-mail, instant messaging, mobile Web browsing, office applications, expandable memory, and desktop synchronization (Kroski, 2005). Examples

include cell phones, smartphones (iPhone, Android), tablets (iPad, Samsung Galaxy) and e-readers (Kindle, Nook).

School officials: Public school administrators or their designees who deal with students in disciplinary matters (Bedden, 2006, p. 23).

Search: An examination or inspection, by authority of law, of one's premises or person, with a view to the discovery of stolen, contraband, or illicit property, or of evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which one is charged (*Ballentine's*, 2010).

Seizure: The taking of a thing into possession, the manner of taking and whether such taking is actual or constructive depending upon the nature of the thing seized (*Ballentine's*, 2010).

Slander: Defamation by spoken word (Alexander, 2005).

Social media: "Social media is defined as the set of applications for digital devices that enable the creation and exchange of user-generated content. The most widely used social media applications today are Facebook and Twitter..." (Consortium, 2011, p. 3).

Telepresence: The ability to project one's influence in space and time (Pike, 2008, p. 17).

Unreasonable search: An examination or inspection without authority of law of one's premises or person, with a view to the discovery of stolen, contraband, or illicit property, or for some evidence of guilt, to be used in the prosecution of a criminal action (*Ballentine's*, 2010).

Unreasonable search and seizure: A seizure of property discovered on an unreasonable search. A literal "search" and "seizure" is not required to constitute an unreasonable search and seizure (*Ballentine's*, 2010).

Web 2.0: "An online application that uses the World Wide Web (www) as a platform and allows for participatory involvement, collaboration, and interactions among users. Web 2.0 is

also characterized by the creation and sharing of intellectual and social resources by end users.”

Examples include blogs, wikis and social networking sites (Lemke, 2009).

Chapter 2

On May 23, 2013 a senior at a high school in New York was suspended for a Twitter post regarding the school district's failed 2013-2014 budget in which he suggested that the executive principal's position be cut. The student's post, originally intended as a joke to spark discussion about possible cuts to the budget, was in response to rumors about decreased funding for athletics and extracurricular activities. The Twitter hashtag (#shitCNSshouldcut) gained popularity among students who began posting throughout the school day. The reasons for the suspension provided by school officials included "using a cell phone in class and inciting a social media riot that disrupted the learning environment" (Moses, 2013). Whether the student will challenge the constitutionality of the actions taken by the school has yet to be determined. However, similar scenarios are regularly making their way into the judicial system. Given that the Supreme Court has yet to rule on a case involving off-campus student cyberspeech, these cases are challenging lower courts to apply long standing legal standards to circumstances where legal lines are easily blurred by students' ever-growing telepresence via emerging technologies such as digital media, Web 2.0, and mobile devices (Pike, 2008).

By analyzing relevant case law and legal commentary, this article attempts to synthesize the current body of law regarding student speech rights in the digital age into a set of guidelines for school officials. The following research questions guide the discussion, which is organized into three sections.

1. How are today's courts applying long standing legal standards to decide student speech cases involving cyberspeech?
2. What are the essential legal guidelines for school officials when navigating student speech issues involving cyberspeech?

The first section includes a brief overview of the foundational Supreme Court cases that have set the legal standards that govern student speech rights (*Tinker v. Des Moines Independent School District*, *Bethel School District No. 403 v. Fraser*, *Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederick*). The second section includes a review of how courts have applied these legal standards to more recent cyberspeech cases. The final section synthesizes the rulings and provides guidelines for school officials as they navigate challenging issues related to student cyberspeech.

Supreme Court Precedent

The standards set forth by four U.S. Supreme Court cases, *Tinker v. Des Moines Independent School District*, *Bethel School District No. 403 v. Fraser*, *Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederick* guide any court that must decide a case involving students' First Amendment right to free speech. None of the four cases involved student cyberspeech, which provides a challenge to the lower courts applying these precedents to cyberspeech cases.

Tinker v. Des Moines Independent School District involved a group of students who were suspended for wearing black armbands to school in protest of the war in Vietnam. In ruling in favor of the students, the Supreme Court (the Court) held that while students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” (*Tinker*, 1969, p. 506), in light of the “special characteristics of the school environment” (*Tinker*, 1969, p. 506), student speech can be restricted if it “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school” (*Tinker*, 1969, p. 505, quoting *Burnside v. Byars*, 1966) or “collid[es] with the rights of other students to be secure and to be let alone” (*Tinker*, 1969, p. 508). The Court also held that any prohibition of student

speech must be supported by evidence that the prohibition was “necessary to avoid [emphasis added] material and substantial interference with schoolwork or discipline” (*Tinker*, 1969, p. 511). The Court was clear in holding that “[the State] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” (*Tinker*, 1969, p. 509).

In *Bethel School District No. 403 v. Fraser*, a student was suspended from school for delivering a vulgar and lewd nominating speech to an auditorium full of students. In ruling in favor of the school district, the Court held that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings” (*Bethel*, 1986, p. 682), and that vulgar and lewd speech that occurs within the school setting can be restricted by school officials without violating First Amendment rights because such speech “is wholly inconsistent with the ‘fundamental values’ of public school education” and “would undermine the school’s basic educational mission” (*Bethel*, 1986, pp. 685-686).

In *Hazelwood School District v. Kuhlmeier*, a school principal, based on his concerns about two articles, censured a school newspaper operated by students as part of their journalism class. The students filed suit claiming that their First Amendment rights had been violated. In ruling in favor of the school district, the Court held that school officials had the authority to restrict student expression “that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school” (*Hazelwood*, 1988, p. 271) as long as the restriction was “reasonably related to legitimate pedagogical concerns” (*Hazelwood*, 1988, p. 273).

In *Morse v. Frederick*, a high school student was suspended for displaying a banner with the message “BONG HiTS 4 JESUS” on a sidewalk across the street from his school as the

Olympic Torch Relay passed by. In ruling in favor of the school district, the Court cited a “governmental interest in stopping student drug abuse” (*Morse*, 2007, p. 408), combined with logic similar to that used in *Hazelwood* – that students’ First Amendment rights “are not automatically coextensive with the rights of adults in other settings” (*Bethel*, 1986, p. 682) and that those rights must be applied “in light of the special characteristics of the school environment” (*Tinker*, 1969, p. 506) – to hold that school officials could restrict student speech that they “reasonably regard as promoting illegal drug use” (*Morse*, 2007, p. 408).

Tinker and its progeny produced a set of legal standards that govern student speech cases. School officials have the legal authority to restrict student speech in response to, or in an effort to avoid, material and substantial disruption to the operations of the school or speech that impinges on the rights of other students. In addition, school officials can restrict student speech that is vulgar or lewd or could reasonably be perceived as being endorsed by the school. Finally, school officials can restrict student speech that is perceived to be promoting the use of illegal drugs. *Figure 2-1* illustrates the Supreme Court precedent regarding student speech and how students’ speech rights have been limited over time. It is important to note that all four cases involved student speech that occurred on-campus, at a school-sponsored event, during normal school hours.

Figure 2-1. Supreme Court precedent and the limiting of students’ speech rights over time.

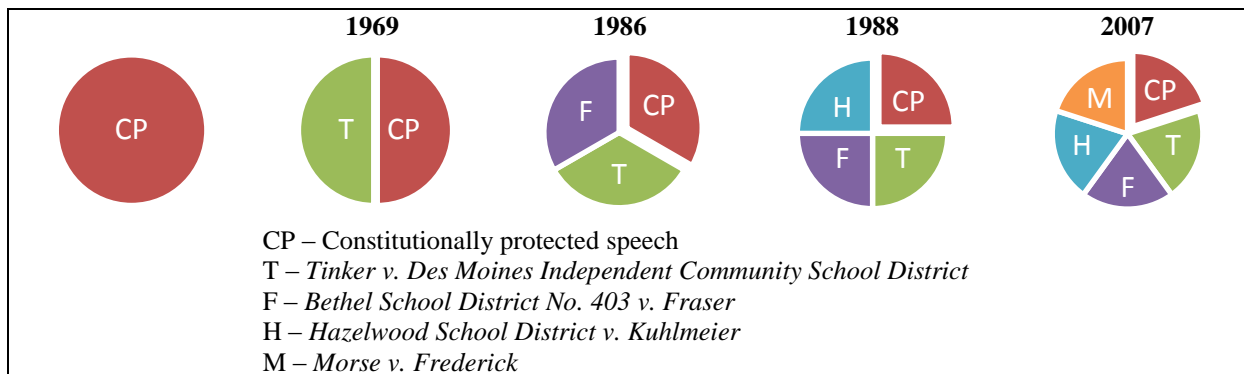


Figure 2-1. Prior to *Tinker*, students’ constitutionally protected speech (CP) was equivalent to speech on a public sidewalk. *Tinker* (1969) gave school officials the authority to restrict student speech that disrupted the operation of the school or impinged on the rights of others; *Fraser* (1986) gave school officials the authority to restrict speech deemed lewd or vulgar; *Hazelwood* (1988) gave school officials the authority to restrict speech endorsed by the school; and *Morse* gave school officials authority to restrict speech deemed to promote illegal drug use. **Note: relative sizes of the sections are not intended to indicate a suggested amount of speech rights or that each ruling impacted student speech rights equally; only that students’ constitutionally protected speech (CP) has decreased over time.**

While this set of standards appears relatively straightforward, as the following section will make clear, lower courts have struggled for consistency in applying these standards to cases involving student cyberspeech that originated off-campus. Cyberspeech blurs the line between on- and off-campus speech, can be distributed rapidly to a wide audience, can potentially be saved indefinitely, and can have a disruptive effect on the operations of the school (*Kasdan*, 2010).

Applying Supreme Court Precedent to Recent Cases

The following section discusses the courts’ application of the Supreme Court precedent described above to cases involving student cyberspeech. All of the cases involve student cyberspeech that originated off-campus. Such cases pose unique challenges for the courts, unlike cases involving student cyberspeech that originated and was disseminated on-campus because the latter fit most cleanly within the standards set by *Tinker* and its progeny. For cases

arising on-campus, *Fraser* governs cyberspeech deemed vulgar, lewd, or obscene; *Hazelwood* governs cyberspeech that could reasonably be perceived as being endorsed by the school; *Morse* governs cyberspeech deemed to promote the use of illegal drugs; and *Tinker* governs all other scenarios.

On the other hand, cases like those discussed below in which the cyberspeech originated and was disseminated off-campus, do not fit as cleanly into the standards. As will be seen, under these circumstances, courts rely primarily on *Tinker*'s material and substantial disruption test – whether an actual disruption occurred or there was a reasonably foreseeable risk of a disruption – to determine the constitutionality of speech restrictions. Therefore, the cases are discussed based on three overarching themes. The first theme includes cases where the *Tinker* standards were met based on reasonable foreseeability, with a focus on the nature of the speech. These cases are organized further to include student cyberspeech that is threatening, slanderous and accuses school officials of specific acts against minors, and speech that is extremely obscene. The second theme includes cases where the speech involved less extreme language but satisfied the *Tinker* standards based on actual disruptions to the operation of the school. Finally, the third theme includes cases that do not fit the criteria above and, therefore, the cyberspeech could not legally be restricted by the school. Table A1 (see Appendix A) provides an overview of the cases discussed in the following sections and is organized by the themes described above.

Constitutional Restrictions Based on Reasonable Foreseeability

Although not explicit, a review of recent case law reveals that the constitutionality of restrictions on student cyberspeech depends, in part, on the nature of the speech (the words themselves). The following section discusses cases where the nature of the speech led courts to uphold restrictions on student cyberspeech based primarily on reasonable foreseeability. As will

be seen, these cases involve restrictions that occurred prior to the cyberspeech reaching the school and causing an actual disruption. The cases are organized by student cyberspeech that is threatening, slanderous, or obscene.

Threatening cyberspeech. In *D.J.M. v. Hannibal Public School District #60*, a high school student (D.J.M.) was suspended for the remainder of the school year for sending a series of instant messages from his home computer to a classmate stating, among other things, that he was going to get a gun and kill specific students at school that he didn't like and that he wanted the school to be known for something. The district court ruled, and a panel of the Eighth Circuit affirmed, that D.J.M.'s speech was not protected because it rose to the level of a true threat. The panel defined a true threat as a "statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another" (*Doe*, 2002, p. 624).

In *O.Z. v. Board of Trustees of the Long Beach Unified School District*, the district court upheld the suspension and reassignment of a middle school student who created, in collaboration with a friend, a slide show depicting the killing of her teacher. The teacher found the slideshow while doing a Google search of her name and reported the video to the school principal. Facts indicated that the teacher feared for her safety, became physically ill, and lost sleep for several nights. Applying similar reasoning to that used in *Wisniewski* (see below), the court found that "it would appear *reasonable*, given the violent language and unusual photos depicted in the slide show, for school officials to forecast a substantial disruption of school activities" (*O.Z.*, 2008, p. 9).

Additionally, in *Wynar v. Douglas County School District*, a panel of the Ninth Circuit upheld the expulsion of a high school student for posting a series of increasingly violent instant messages from his home, during non-school hours, to his MySpace "friends" that included

“bragging about his weapons, threatening to shoot specific classmates, intimating that he would ‘take out’ other people at a school shooting on a specific date, and invoking the image of the Virginia Tech massacre” (Wynar, 2013, p. 3). The panel avoided deciding whether *Tinker* applied to all off-campus student speech cases, but stated that “when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*” (Wynar, 2013, p. 17). Within this context, the panel held that “it was reasonable for [the school] to interpret the messages as a real risk and to forecast a substantial disruption” (Wynar, 2013, p. 20) and that “whatever the scope of the ‘rights of other students to be secure and to be let alone,’ without doubt the threat of a school shooting impinges on those rights” (Wynar, 2013, p. 24). It is important to note that this was the first and only ruling to date to apply *Tinker’s* “rights of others” standard to a student cyberspeech case.

Takeaways. Student cyberspeech that rises to the level of a “true threat” is not protected by the First Amendment and can be restricted by school officials prior to an actual disruption to the operations of the school. In addition, student cyberspeech that is violent or threatening but does not rise to the level of a true threat can be restricted under *Tinker* as long as it is reasonably foreseeable that the speech would reach the school and cause a material and substantial disruption or impinge on the rights of others.

Slanderous cyberspeech. In *Bell v. Itawamba County School Board*, a high school student (T.B.) was suspended and reassigned to an alternative school for composing, recording and posting a rap song on Facebook and YouTube that included vulgar language, possible threats, and accused two coaches at the school of inappropriate contact with specific female students. Both coaches testified that their teaching styles were adversely affected by the song; one of them testified that he felt threatened by the references in the song. In upholding the

actions of the school district, the district court held that “[T.B.] clearly intended to publish to the public the content of the song as evidenced by his posting of the song on Facebook.com with at least 1,300 ‘friends,’ many of whom were fellow students” (*Bell*, 2012, p. 838), thus allowing the *Tinker* standard to apply. The court also held that “it was reasonably foreseeable that such a disruption would occur” (*Bell*, 2012, p. 840), based on the fact that the song levied charges of serious sexual misconduct and was published on Facebook and YouTube.

Takeaways. Student cyberspeech that targets school staff with slanderous accusations of inappropriate behavior or sexual misconduct with minors does not find favor with the courts. Restrictions on this type of speech will most likely be upheld due to possible adverse affects of the speech on the staff members’ ability to perform his/her duties effectively.

Obscene cyberspeech. In *Rosario v. Clark County School District*, a high school student (J.R.) was reassigned to a different school as a result of a series of tweets that were laced with profanity and targeted four school staff members. J.R. subsequently filed suit claiming, among other things, that the reassignment violated his First Amendment right to free speech. The school district filed a motion to dismiss J.R.’s First Amendment claim arguing that “(1) [J.R.’s] speech was obscene and therefore not entitled to First Amendment protection and (2) that schools may regulate off-campus student speech that causes a substantial disruption on-campus” (*Rosario*, 2013, p. 7). The court accepted the district’s argument that the speech was obscene and not afforded any First Amendment protection for one of the eight tweets. The tweet read “I hope Coach brown [*sic*] gets f*ck*d in tha *ss by 10 black d*cks” (*Rosario*, 2013, p. 8). Citing *Miller v. California* (1973), the court stated the criteria for obscene speech as:

- (1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
- (2) whether the work

depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (pp. 24-25)

The court also accepted the district's second argument but determined, due to factual uncertainties in the case, that J.R.'s First Amendment claim survived the motion to dismiss.

Takeaways. The courts will uphold restrictions when the cyberspeech is extraordinarily lewd, vulgar, or obscene. According to *Rosario*, student cyberspeech that targets the school and is deemed legally obscene is not protected by the First Amendment.

Constitutional Restrictions Based on Actual Disruption

Many courts have upheld restrictions on student cyberspeech based on the occurrence of actual disruptions, rather than the nature of the speech. While these cases may include speech with characteristics similar to those described above, restrictions were upheld based on evidence of actual disruptions.

In *J.S. v. Bethlehem Area School District*, the Pennsylvania Supreme Court upheld the expulsion of a middle school student who created and published a website that included "derogatory, profane, offensive and threatening comments" (*J.S.*, 2002, p. 643) targeting a teacher and the principal. The website included, among other things, a page regarding the teacher titled "Why Should She Die?" that solicited \$20 from viewers to hire a hit man. The targeted teacher experienced serious distress and was required to take a medical leave of absence. In addition, the principal testified that the website had severely disrupted the school's morale. The court determined that although the speech did not rise to the level of a true threat, based on the facts, it satisfied *Tinker's* material and substantial disruption test.

In *Wisniewski v. Board of Education of the Weedsport Central School District*, an eighth-grade student (Wisniewski) was suspended for a semester for creating and sharing an AOL Instant Messaging icon of a pistol firing a bullet at a person's head with spattered blood above it. Below the icon were the words "Kill Mr. VanderMolen." Mr. VanderMolen, Wisniewski's teacher at the time, requested and was allowed to stop teaching Wisniewski's class. In upholding the suspension, a panel of the Second Circuit chose not to apply a true threat analysis, but rather relied on *Tinker* stating that it provided "significantly broader authority to sanction student speech" (*Wisniewski*, 2007, p. 38). In a novel approach, the panel held that *Tinker* can be applied to off-campus cyberspeech if there is a "reasonably foreseeable risk that [the speech] would come to the attention of school authorities" (*Wisniewski*, 2007, p. 38). The court held that there was a reasonably foreseeable risk that the icon would find its way to the school (which it did) and that it would "materially and substantially disrupt the work and discipline of the school" (*Wisniewski*, 2007, p. 39, quoting *Tinker*, 1969).

In *Doninger v. Niehoff*, a high school student (Doninger) serving on the Student Council and as Junior Class Secretary was barred from running for Senior Class Secretary because of a blog post she made from her home on her own time. The blog post was in response to the postponement of a concert that had been planned by the Student Council and included a misleading claim that the concert had been cancelled. It also referred to school officials as "douchebags," and encouraged people to contact the school to protest the cancellation. School officials were required to miss meetings and a classroom observation to deal with the influx of calls, emails, and a group of upset students. In upholding the actions of the school, a panel of the Second Circuit relied on *Wisniewski* (decided a few months prior to the events in *Doninger*) to refute Doninger's claim that she had a clearly established right to not be disciplined for speech

that occurred off-campus. The panel, relying on *Wisniewski's* two-part test, affirmed the district court's holding that:

The undisputed facts - that Doninger's blog post directly pertained to an event at LMHS, that it invited other students to read and respond to it by contacting school officials, that students did in fact post comments on the post, and that school administrators eventually became aware of it - demonstrate that it was reasonably foreseeable that Doninger's post would reach school property and have disruptive consequences there. (*Doninger*, 2011, p. 348)

As described above, Doninger's blog post did reach the school and did have substantial disruptive effects.

Student cyberspeech that targets other students and is harassing or bullying in nature can be restricted as long as it interferes with or disrupts the work and discipline of the school. In *Kowalski v. Berkeley County Schools*, a panel of the Fourth Circuit upheld the suspension of a student (K.K.) for creating and sharing a MySpace page that included false, derogatory, vulgar and offensive comments aimed at another student (S.N.). S.N. reported it to school officials and then left school "to avoid further abuse" (*Kowalski*, 2011, p. 574) by the students that had made comments on the page. The panel also concluded that K.K.'s argument – that her speech was off-campus and outside the authority of the school – did not take into account the reality of the internet and stated that "she knew that the electronic response would be... published beyond her home and could reasonably be expected to reach the school or impact the school environment" (*Kowalski*, 2011, p. 573). Relying on *Tinker*, the court held that even though K.K.'s speech originated off-campus, it disrupted and interfered with the work of the school and, therefore, was not protected by the First Amendment. It is important to note that the court relied heavily on

S.N.’s response to the speech – leaving school to avoid further abuse – as evidence of an actual disruption. In addition, noting that the federal government has recognized student-on-student harassment and/or bullying as a major concern, the panel concluded that schools “have a ‘compelling interest’ in regulating speech that interferes with or disrupts the work and discipline of the school, *including discipline for student harassment and bullying* [emphasis added]” (Kowalski, 2011, p. 572).

In *S.J.W. v. Lee’s Summit R-7 School District*, twin high school students (the Wilsons) were suspended and reassigned to an alternative school for creating a website that included a blog for the purposes of discussing and venting about issues at the school. The Wilsons’ posts to the blog “contained a variety of offensive and racist comments as well as sexually explicit and degrading comments about particular female classmates, whom they identified by name” (*S.J.W.*, 2012, p. 773). A third student also added a racist post. Testimony by the school district’s witnesses indicated that numerous school computers were used to access the website; teachers had difficulty managing their classes; students were upset and/or distracted; local media was on campus; and parents contacted the school concerned about student safety and harassment. A panel of the Eighth Circuit relied on the lower court’s findings that the Wilson’s speech, because it targeted the school, “could reasonably be expected to reach the school or impact the environment” (*S.J.W.*, 2012, p. 778, quoting *Kowalski*) and based on the testimony of school district witnesses, substantial disruptions did indeed occur.

Takeaways. Student cyberspeech that targets the school, staff, or other students can be legally restricted so long as the evidence indicates that it caused a material and substantial disruption to the operations of the school. As is evident in the five cases discussed immediately above, the definition of substantial disruption remains somewhat unclear. Therefore, it is vital

that school officials document any/all disruptive effects and be careful not to overreact to comments that may be offensive but do not cause substantial disruption.

Unconstitutional Restrictions with Case Comparisons

A number of courts have found restrictions of off-campus student cyberspeech to be unconstitutional due to facts that did not fit those described above. In other words, the facts did not indicate a reasonable forecast of, or actual disruption to the operations of the school. This subsection reviews these cases, and makes specific case comparisons where appropriate, in an attempt to clarify the scope of school officials' authority when it comes to restricting off-campus student cyberspeech.

Cyberspeech that targets the school or staff. A series of cases involved the unconstitutional restriction of student cyberspeech that targeted and was critical of school officials. Several of the cases (*Killion, J.S. v. Blue Mountain*, and *Layshock*) included crude or vulgar language; however, the nature of the speech was less extreme than in the cases discussed above. For example, while certainly upsetting, statements made by students in jest or as parody such as "because of his extensive gut factor, the 'man' hasn't seen his own penis in over a decade" (*Killion*, 2001, p. 448), "yes. it's your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick...I love children, sex (any kind)" (*J.S.*, 2011, p. 921), and "not big dick," "big whore," and "big fag" (*Layshock*, 2007, p. 208) do not rise to the level of obscene, as was the case for the tweet made by the student in *Rosario*.

In *Beussink v. Woodland R-IV School District*, a student (Beussink) created a website at home that was highly critical of his school administration and teachers, included vulgar language, and invited viewers to contact the principal to express their opinions on the school. A friend of Beussink's accessed the website on a school computer and showed it to a teacher. The

only other student in the classroom when the website was accessed did not view the screen and there was no evidence of a disruption. Beussink was suspended immediately, without determining the extent to which the website had been accessed or viewed at the school.

In *Killion v. Franklin Regional School District*, a high school student (Paul), in response to being denied a parking permit and frustration over various rules related to athletic participation, created and disseminated via email a "Top Ten" list about the school's athletic director that included extremely derogatory statements regarding the athletic director's appearance and referenced the size of his genitals. Another student distributed the list on school grounds several weeks after it was created. The list was on school grounds for several days without being noticed by the administration and no action was taken for at least one week. Eventually, Paul was suspended for ten days for "verbal/written abuse of a staff member" (*Killion*, 2001, p. 449).

In *Evans v. Bayer*, a high school student (Evans) created and posted a Facebook group that was dedicated to sharing why a particular teacher was the worst ever. Evans removed the group after two days, which was prior to any school official becoming aware of it. When the group did come to the attention of the principal, he suspended Evans for three days and removed her from her AP level classes, which would impact the weighting of her grades for GPA purposes.

In *J.S. v. Blue Mountain School District* and *Layshock v. Hermitage School District*, which were decided on the same day by the Third Circuit, two students (J.S. and Layshock) were suspended for the creation of fake MySpace profiles targeting their school principals. J.S.'s profile made fun of the principal and included adult language and sexually explicit content that, among other things, implied that the principal was a pedophile. While significantly less vulgar,

Layshock's profile included derogatory comments and some sexual innuendo. Evidence from J.S.'s school indicated that two teachers had to stop students from talking about the profile and a small number of student counseling appointments were cancelled. At Layshock's school, student computer usage had to be limited to the library for a period of time and computer programming classes were cancelled for about one week.

Finally, in *R.S. v. Minnewaska Area School District No. 2149*, a middle school student (R.S.) was punished for two postings on Facebook. One posting expressed her hatred for one school employee and the other "expressed salty curiosity for who had 'told on her'" (R.S., 2012, p. 2) and included the f-word. The postings were only accessible to R.S.'s Facebook "friends" and came to the attention of the school when one of R.S.'s friends shared them with the school principal.

In all of these cases the courts ruled in favor of the students based on a lack of evidence supporting a substantial disruption or a reasonable forecast of substantial disruption. For example, in *Killion, J.S.*, and *Layshock*, even though the speech targeted school staff and was derogatory and mean-spirited, school officials could not legally impose disciplinary consequences because of the lack of substantial disruption to the operation of the school. It is also important to note the *R.S.* court's recognition that "the movement of student speech to the internet poses some new challenges, but that transition has not abrogated the clearly established general principles which have governed schools for decades" (R.S., 2012, p. 19-20). In addition, the *R.S.* court clearly synthesized the current body of law related to off-campus student cyberspeech:

out-of-school statements by students...are protected under the First Amendment and not punishable by school authorities unless they are true threats or are reasonably calculated

to reach the school environment and are so egregious as to pose a serious safety risk or other substantial disruption in that environment. (*R.S.*, 2012, p. 22)

Determining whether a substantial disruption has occurred is an extremely fact-based exercise. While not the only example, a comparison of these cases to *S.J.W* will help define substantial disruption. In *S.J.W.*, evidence indicated that numerous school computers were used to access the website; teachers had difficulty managing their classes; students were upset and/or distracted; local media was on campus; and parents contacted the school concerned about student safety and harassment. In contrast to the cases discussed in this section, in *S.J.W.*, the work of the school at all levels (teachers, students, parents, administrators, and other school staff) was substantially disrupted.

Takeaways. As stated by the *Beussink* court, “disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*” (*Beussink*, 1998, p. 1180). The evidence must show that the operations of the school have been disrupted beyond what could be reasonably perceived as inconveniences.

Cyberspeech perceived as threatening. In *Emmett v. Kent School District No. 415*, a high school student (Emmett) was suspended for creating and posting a website from home that included some commentary on the school administration, mock obituaries of friends, and an option for visitors to vote on who would die next. Several days after the site was posted, Emmett removed it when the local news referred to it as a hit list.

In *Mahaffey v. Aldrich*, a high school student was suspended with a recommendation for expulsion for contributing to a non-obscene website entitled "Satan's web page" (*Mahaffey*, 2002, p. 781) that was created primarily off-campus and contained a list of "people I wish would die" (*Mahaffey*, 2002, p. 782), among other lists and commentary. There was limited evidence

that some of the website was created on school computers but this was not investigated fully by the school. The website came to the attention of the school when a parent viewed it and notified the police.

In both cases, the courts determined that the cyberspeech did not rise to the level of true threats and applied *Tinker*'s disruption standard to hold that the actions of the schools did not meet constitutional muster. In *Emmett*, the district court held that "undifferentiated fears of possible disturbances" (*Emmett*, 2000, p. 1090, quoting *Burch v. Barker*, 1988) are not a sufficient basis for restricting off-campus, non-school-sponsored speech and that *Emmett*'s website was "entirely outside of the school's supervision or control" (*Emmett*, 2000, p. 1090). In *Mahaffey*, the district court held that "[the school] may only punish [the student] for his speech on the website if that speech [would] 'substantially interfere with the work of the school or impinge upon the rights of other students'" (*Mahaffey*, 2002, p. 784, quoting *Tinker*, 1969, p. 509).

Takeaways. Undifferentiated fears of possible disruption will not meet constitutional muster. In the two immediate cases, the facts indicated that the perceived threats were made in jest and the cyberspeech was restricted based on undifferentiated fears; in contrast to the reasonable forecast of disruption in *O.Z.* and *Wynar*, and the actual disruptions that occurred in *J.S. v. Bethlehem* and *Wisniewski*.

Cyberspeech that targets other students. In *J.C. v. Beverly Hills Unified School District*, a case very similar to *Kowalski*, a student (J.C.) was suspended for creating and publishing a video of a group of her classmates having a derogatory and mean-spirited conversation about one of their classmates (C.C.). Once posted to YouTube, J.C. informed 5 to

10 other students (including C.C.) of the video's existence. C.C. shared the video with school officials the following day and then resumed her normal routine at school.

The district court held, based on the nature of the speech and its accessibility to the public via the internet, that it was reasonably foreseeable that the speech would make its way to the school. However, the court determined that the actual disruptions (counseling C.C. and her mother, questioning of students) did not rise to the level of substantial as defined by *Tinker*, nor did the potential impacts of the video (gossiping, passing notes, a general buzz about the speech) meet *Tinker's* reasonably foreseeable risk of substantial disruption standard. Finally, the court declined to be the first to apply *Tinker's* rights of others test to regulate student cyberspeech that may cause emotional harm to another student.

The court's final holding regarding *Tinker's* rights of others standard demonstrates some hesitancy by the courts to get involved in off-campus disputes between students at the risk of undermining students' free speech rights. This is somewhat concerning considering that mobile devices and Web 2.0 now allow most students to bring, and often escalate, these disputes on-campus. It is also important to note that the court's reasoning regarding the lack of disruption relied, in large part, on C.C.'s response to the speech – the fact that C.C. did not confront J.C. and her friends about the video while at school. When compared with *Kowlaski*, in which the student missed an entire day of school as a result of similar speech and could have potentially missed more if the school had done nothing, it seems clear that courts at this point give weight to the level and type of response by the victim in these situations. This appears to present a challenge for school officials when dealing with student-on-student speech issues and begs the question of whether school officials must wait for a potentially serious response before acting.

Takeaways. Even though the courts have been hesitant to define the rights of others prong of *Tinker*, it appears as though they may be open to upholding restrictions on student-on-student cyberbullying or harassment if evidence of an actual disruption can be shown.

Unfortunately, this evidence is primarily based on the response of the victim of the harassment.

Cyberspeech that is neither seen nor heard by others. Finally, in *Coy v. Board of Education of the North Canton City Schools*, a middle school student was suspended and later expelled for creating and accessing at school a website that focused primarily on skateboarding and included some offensive but not obscene material. The student accessed the website on a school computer during class; he was toggling between screens while pretending to do schoolwork. Because the student discretely accessed the website and the website did not contain any obscene material, the district court determined that *Tinker* governed the case rather than *Fraser*. Relying on *Tinker's* material and substantial disruption standard, the court found no evidence to suggest that the student's actions had any effect on the school and ruled in favor of the student.

Takeaways. On-campus student cyberspeech that is neither heard nor seen by others (and is not in violation of any other school regulation) is not subject to restriction. A useful analogy presented by Glenn (2007) compares Coy's actions "to a student bringing an obscene magazine to school and reading it by himself or herself" (p. 5).

Guidelines for School Officials

The Supreme Court has yet to provide clear guidance on cases involving off-campus student cyberspeech. However, the discussion above does allow for the formulation of a set of guidelines related to student cyberspeech that can assist school officials in their efforts to effectively maintain the operation of their schools and protect the rights of the students in their

charge. The guidelines below are organized into three categories: restrictions based on reasonable foreseeability, restrictions based on actual disruptions, and other guidelines.

Reasonable Foreseeability

According to *LaVine* (2001), “*Tinker* does not require school officials to wait until disruption actually occurs before they may act,” and “*Tinker* does not require certainty that disruption will occur” (p. 989).

- School officials have the authority to restrict off-campus student cyberspeech when it is reasonably foreseeable that the cyberspeech would reach the school and would reasonably lead to a forecast of substantial disruption.
- A number of courts (*J.C., Kowalski, Bell, R.S.*) have recognized the reality of the Internet, which greatly increases accessibility to the cyberspeech in question and strengthens the case for reasonable foreseeability.
- Proving reasonable foreseeability or forecasting disruption can be difficult, especially if proactive measures were taken to prevent a disruption from occurring (Glenn, 2010). Recent rulings have given weight to the nature of the cyberspeech (threatening, slanderous, and obscene) so school officials must be careful to do the same when engaging in these types of restrictions. Restrictions on cyberspeech that the facts show to be parody, or that a reasonable person would not take as serious will not find favor with the courts.
- To uphold restrictions prior to an actual disruption, some courts (especially the Second, Fourth, and Eighth Circuits) require that a connection (or nexus) be established between the cyberspeech and the school. School officials should be able to identify this connection prior to taking action.

- School officials do not have legal authority to proactively search or monitor off-campus student cyberspeech that may be in violation of school policies or regulations.
- Student cyberspeech that rises to the level of a “true threat” is not protected by the First Amendment and can be restricted by school officials prior to an actual disruption to the operations of the school. A true threat is defined as a “statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another” (*Doe*, 2002, p. 624). Violent or threatening cyberspeech that is made in jest may be protected by the First Amendment.

Actual Disruptions

- Off-campus student cyberspeech that reaches the school can legally be restricted so long as it causes material and substantial disruption to the operations of the school. The courts have not provided a clear definition of substantial disruption and have relied heavily on the facts of each case. Therefore, it is vital that school officials document any/all disruptive effects. School officials must be careful not to overreact to comments that may be offensive but do not cause substantial disruption.
- The courts lack consistency regarding off-campus student cyberspeech that targets other students. To avoid undermining students’ First Amendment rights, the *J.C.* court shied away from getting involved in an off-campus dispute between students. On the other hand, the *Kowalski* court stated that schools have a compelling interest to regulate student-on-student speech that is harassing or bullying in nature. Even though the courts have been hesitant to define the “rights of others” prong of *Tinker*, it appears as though they may be open to upholding restrictions on student-on-student cyberbullying if an actual disruption can be shown. It is concerning that determining the existence of a

disruption appears to rely primarily on the level of reaction by the targeted student and it is possible that a student's speech would be protected when targeting someone who doesn't fight back but not protected when the targeted student defends him/herself (Glenn, 2010).

Other

- Student cyberspeech that is created and disseminated on-campus or at a school sponsored event can legally be restricted if it materially and substantially disrupts the operation of the school, would reasonably lead to a forecast of substantial disruption, impinges on the rights of others, is lewd or vulgar, is connected to the curriculum, is sponsored by the school, or promotes the use of illegal drugs.
- Courts have been hesitant to apply Tinker's "rights of others" prong with the exception of seriously threatening cyberspeech (see *Wynar*).
- Student cyberspeech that is violent or threatening but does not rise to the level of a true threat can be restricted under *Tinker* as long as:
 - the speech caused a material and substantial disruption to the work of the school or impinged on the rights of others.
 - it is reasonably foreseeable that the speech would reach the school and cause a material and substantial disruption or impinge on the rights of others (see *Wisniewski, O.Z.*, and *Wynar*).
- On-campus student cyberspeech that is neither heard nor seen by others (and is not in violation of any other school regulation) is not subject to restriction (see *Coy*). Therefore, school officials should carefully consider whether the cyberspeech has been disseminated on-campus prior to any discipline.

- Student cyberspeech that targets the school and is deemed obscene is not protected by the First Amendment and can be restricted by school officials (see *Rosario*). In *Miller v.*

California (1973), the court stated the criteria for obscene speech as:

(1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (pp. 24-25)

Conclusion

Until the Supreme Court rules on a First Amendment case involving off-campus student cyberspeech, the legal framework will remain somewhat uncertain. However, the current body of law in this area has allowed for much of this framework to take shape. It is clear at this point that school officials have the legal authority to restrict off-campus student cyberspeech when certain conditions are met, and that *Tinker* governs cases in this area.

The courts appear to analyze cases based on reasonable foreseeability (prior to actual disruption) or actual disruption. The analyses for reasonable foreseeability focus primarily on the nature of the cyberspeech, with seriously threatening, slanderous, or obscene cyberspeech receiving no constitutional protection. Recent rulings indicate that the courts may allow school officials more authority to restrict student cyberspeech prior to an actual disruption to the operation of the school (see *D.J.M. v. Hannibal Public School District #60*, *O.Z. v. Board of Trustees of the Long Beach Unified School District*, *Wynar v. Douglas County School District*, and *Rosario v. Clark County School District*). It is important to note that proving reasonable foreseeability is difficult. Prior to taking any action, school officials would be wise to examine

the facts of the case carefully to ensure that a reasonable person would conclude that the cyberspeech would “foreseeably reach the campus and cause a substantial disruption” (*Rosario*, 2013, p. 12). In addition, school officials should be able to identify and explain the specific connection between the cyberspeech and the school.

For cyberspeech involving actual disruptions, the courts have relied on *Tinker’s* substantial disruption standard. With the exception of seriously threatening cyberspeech, courts have been hesitant to apply *Tinker’s* rights of others standard. The criteria for determining whether a disruption is substantial have yet to be clearly defined; and according to *Tinker* (1969), “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression” (p. 508). Therefore, when responding to off-campus student cyberspeech that has made its way on-campus, school officials must carefully consider whether an actual disruption has occurred, as well as the nature and scope of the disruption, by reviewing the facts of each case carefully and documenting any/all disruptive effects.

Chapter 3

In September, 2010, the American Civil Liberties Union of Pennsylvania settled a lawsuit with the Tunkhannock Area School District that alleged that school officials had illegally searched a student's cell phone. The school district denied any wrongdoing but agreed to pay the student \$33,000 to resolve the suit. The suit originated in January of 2009 when the student's cell phone was confiscated, and subsequently searched, in violation of school policy. Upon searching the phone, school officials discovered semi-nude images of the student and suspended her for three days ("ACLU Settles", 2010).

In March, 2013, the American Civil Liberties Union of Washington submitted a letter to the Superintendent of Everett School District claiming that a middle school vice principal had conducted an illegal search of a student's Facebook account. According to the letter, the student was instructed to login to her Facebook account on the vice principal's computer so that he could investigate a cyberbullying incident. The vice principal found and downloaded an image from the student's account. The ACLU of Washington requested, among other things, a formal letter of apology, a draft policy on searches of social media, and that the vice principal be removed for the remainder of the school year (Moore, 2013).

Neither of the searches described above resulted in court rulings. However, they are illustrative of the current challenges presented by mobile devices and Web 2.0 that school officials and the courts must deal with on a growing basis. While school officials struggle with the rapid growth in ownership, use, and capabilities of mobile devices, the courts must wrestle with the application of a standard of reasonableness to searches of these devices and their corresponding Web 2.0 applications.

According to a study by the Pew Internet & American Life Project, 78% of teens own mobile phones, with almost half (47%) owning smartphones; one in four teens (23%) have a tablet computer and 74% of teens are mobile internet users, meaning they access the internet via mobile devices at least occasionally (Madden, Lenhart, Duggan, Cortesi & Gasser, 2013). A recent commentary by Cooke (2012) describes the current capabilities that personal mobile devices present:

Today's personal electronic devices no longer derive their sole or even their primary utility from their ability to receive and transmit mobile phone calls. Rather, personal electronic devices have a combination of capabilities, usually including text messaging, multi-media messaging, photograph and video capture, Bluetooth file transfer, WiFi connection, voicemail storage, instant messaging, and more. Much of the data created or received by the personal electronic device is archived in the device's internal storage in conversation format for easy reference...personal electronic devices now function as the hub for user access to social networking sites, cloud storage sites, and Internet browsing. With the installation of downloadable applications, these devices further serve as access points for banking and investment information and even device location. (pp. 315-316)

In addition, 77% of teens bring their mobile phones to school every day (Lenhart, Ling, Campbell & Purcell, 2010) and 80% of teens use social networking sites, with most logging on daily (Lenhart, Madden, Smith, Purcell, Zickuhr & Rainie, 2011).

Mobile devices and Web 2.0 applications are pervasive, powerful, and the primary means by which students interact with each other. As school officials across the nation work to maintain order in the school environment by investigating disputes, accusations, and suspicions (often involving serious issues such as cyberbullying, sexting, and drugs), the need to search the

content of students' mobile devices and Web 2.0 applications is growing. This need has led to a limited but growing number of challenges to searches of this nature in the courts.

Through an analysis of relevant case law and legal commentary, this article attempts to synthesize the current body of law regarding students' right to be free from unreasonable search and seizure in the digital age and provide a set of guidelines for school officials. The following research questions guide the discussion, which is organized into three sections.

1. How are today's courts applying long standing legal standards to decide search and seizure cases involving students' mobile devices and Web 2.0 applications?
2. What are the essential legal guidelines for school officials regarding the search of students' mobile devices and Web 2.0 applications?

The first section includes an overview of the foundational Supreme Court cases that set the legal standards that govern search and seizure in the public school setting (*New Jersey v. T.L.O.* and *Vernonia School District 47J v. Acton*). The second section includes a review of how courts have applied these legal standards to more recent search and seizure cases involving mobile devices and Web 2.0 applications. The final section synthesizes the rulings to provide guidelines for school officials as they engage in these types of searches.

Supreme Court Precedent

The standards set forth by *New Jersey v. T.L.O.* and *Vernonia School District v. Acton* guide any court that must decide a case involving searches within the public school setting. Although these cases did not involve mobile devices or Web 2.0, courts have relied on the reasonableness standard and the tests they produced to decide all cases involving these technologies.

In *New Jersey v. T.L.O.*, a 14-year old student (T.L.O.) was caught smoking with a friend in a school restroom. When confronted by the school's Assistant Principal (AP), T.L.O. denied smoking in the bathroom and smoking in general. The AP searched T.L.O.'s purse and found a pack of cigarettes. Upon removing the cigarettes, the AP noticed a package of cigarette rolling papers, which he associated with marijuana. The AP then continued with a more thorough search of T.L.O.'s purse and discovered a small amount of marijuana, a pipe, empty plastic bags, a substantial amount of money, an index card with a list of students who owed T.L.O. money, and two letters implicating T.L.O. in dealing drugs. Subsequently, T.L.O. was suspended by the school and charged with delinquency by the state. T.L.O. moved to have the evidence from her purse suppressed claiming that the search violated her Fourth Amendment rights. The Juvenile and Domestic Relations court ruled that the search was reasonable, denied the motion to dismiss, and sentenced T.L.O. to a year of probation. On appeal, the appellate court affirmed the ruling of the trial court. T.L.O. appealed to the New Jersey Supreme Court, which reversed the ruling of the appellate court. The U.S. Supreme Court (the Court) granted certiorari and reversed the lower court's ruling.

The Court held that the “[Fourth] Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials” (*New Jersey*, 1985, p. 333), and that “in carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents” (*New Jersey*, 1985, p. 336). In other words, school officials cannot rely on the doctrine of *in loco parentis* to “claim the parents' immunity from the strictures of the Fourth Amendment” (*New Jersey*, 1985, p. 337). In addition, the Court held that students have legitimate expectations of privacy. However, balancing this right with the school's need to maintain an environment that is

conducive to learning “requires some easing of the restrictions to which searches by public authorities are ordinarily subject” (*New Jersey*, 1985, p. 340). Therefore, “school officials need not obtain a warrant before searching a student who is under their authority” (*New Jersey*, 1985, p. 340) and school officials are not required to adhere strictly “to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law” (*New Jersey*, 1985, p. 341). Finally, the Court held that the legitimacy of a search by school officials is dependent on the “reasonableness, under all the circumstances, of the search” (*New Jersey*, 1985, p. 341).

Reasonableness is determined by a two-part test. First, the search must be “justified at its inception” (*New Jersey*, 1985, p. 341, quoting *Terry v. Ohio*, 1968, p. 20). To satisfy this test, a search must be based on reasonable suspicion “that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school” (*New Jersey*, 1985, p. 342). Second, it must be determined that the search, as conducted, “was reasonably related in scope to the circumstances which justified the interference in the first place” (*New Jersey*, 1985, p. 341, quoting *Terry v. Ohio*, 1968, p. 20). To satisfy this part of the test, the method and extent of the search must be “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction” (*New Jersey*, 1985, p. 342). Based upon these standards, the Court ruled that the search of T.L.O.’s purse was reasonable and did not violate the Fourth Amendment.

In *Vernonia School District 47J v. Acton*, the Court addressed circumstances that involved a more generalized search; specifically, a mandatory random drug testing program for student athletes. The program was prompted by concerns that student athletes were heavily involved in the drug culture surrounding the school and its expressed purpose was to “prevent

student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs” (*Vernonia*, 1995, p. 650). The program applied to all student athletes and required written consent from both the student and a parent/guardian. All athletes were tested at the beginning of their season and then once per week. Ten-percent of the athletes were selected randomly for testing. Proper procedures and safeguards, including monitors who stood at a respectful distance (for boys) or outside a closed bathroom stall (for girls), were used to avoid tampering. Access to test results was limited to the school administrators. In the fall of 1991, a student (J.A.) was denied participation when he and his parents refused to provide the proper written consent. J.A. filed suit claiming that the program violated his Fourth Amendment right to be free from unreasonable searches and seizures. The District Court dismissed the claims and a panel of the Ninth Circuit reversed. The U.S. Supreme Court granted certiorari and reversed the lower court’s ruling.

Since the factors and analysis that justified the search in *T.L.O.* did not neatly apply, the Court developed a new three-part reasonableness test that deemphasized individual suspicion and focused on balancing the governmental interest with the level of intrusion. The factors in the new test included: (1) “the nature of the privacy interest upon which the search...intrudes” (*Vernonia*, 1995, p. 655), (2) “the character of the intrusion that is complained of” (*Vernonia*, 1995, p. 659), and (3) “the nature and immediacy of the governmental concern at issue” (*Vernonia*, 1995, p. 660).

Regarding the first factor, the Court recognized that “the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children” (*Vernonia*, 1995, p. 656), and that “students within the school environment have a lesser expectation of privacy than members of the population generally” (*Vernonia*, 1995, p. 657, quoting *New Jersey v. T.L.O.*,

1969). In addition, the Court held that due to the nature of athletic participation, specifically changing and showering in a communal setting, “legitimate privacy expectations are even less with regard to student athletes” (*Vernonia*, 1995, p. 657). Finally, the Court stated that when students choose to participate in athletics, “they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally” (*Vernonia*, 1995, p. 657), and “have reason to expect intrusions upon normal rights and privileges, including privacy” (*Vernonia*, 1995, p. 657).

In its analysis of the character of the intrusion, the Court stated that “the degree of intrusion depends upon the manner in which production of the urine sample is monitored” (*Vernonia*, 1995, p. 658), and that the conditions students were subjected to as part of the testing program were “nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily” (*Vernonia*, 1995, p. 658). Therefore, the Court held that “the privacy interests compromised by the process of obtaining the urine sample [were] negligible” (*Vernonia*, 1995, p. 658). The Court also held that the intrusiveness of the test results was not significant because “the drugs for which the samples are screened are standard, and do not vary according to the identity of the student” (*Vernonia*, 1995, p. 658), and “the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function” (*Vernonia*, 1995, p. 658).

Finally, in addressing the nature and immediacy of the governmental concern, the Court defined a “compelling state interest” as “an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy” (*Vernonia*, 1995, p. 661). Citing a series of studies on

the negative physiologic effects of drug use and the district court's conclusions regarding the level of the drug crisis at the school, the Court held that a relatively high degree of governmental concern existed.

These cases helped solidify the body of law related to student searches and defined the standards for determining the constitutionality of searches conducted by public school officials. Post-*T.L.O.*, school officials can conduct legal searches of students (and their property) when reasonable suspicion exists that the search will produce evidence of a violation and so long as the search is conducted in a way that is reasonable in its extent and not excessively intrusive. Post-*Vernonia*, school officials can conduct legal searches absent individualized suspicion when the governmental interest outweighs the level of intrusion (Vorenberg, 2012).

Applying Supreme Court Precedent to Recent Cases

The following section discusses the application of the Supreme Court precedent described above to cases involving searches of students' mobile devices and Web 2.0 applications. The cases are organized into two categories based on the object of the search. The first category involves searches of students' personal mobile devices, particularly cell phones. The second category involves searches of students Web 2.0 applications, particularly Facebook and Twitter, which are the most widely used applications today. Table B1 (see Appendix B) provides an overview of the cases discussed in the following sections and is organized by the categories described above.

Searches of Students' Mobile Devices

In *Klump v. Nazareth Area School District*, a student (C.K.) had his cell phone confiscated by a teacher when it accidentally fell out of his pocket during class. The school's policy allowed students to carry cell phones but not use or display them during school hours.

The teacher and an Assistant Principal proceeded to call nine other students from the phones address book to determine if those students were in violation of the policy as well. In addition, the school officials accessed C.K.'s text messages and voicemail, and used the cell phone to engage in an instant messaging conversation with C.K.'s younger brother without identifying themselves. In a meeting with C.K.'s parents, the school officials claimed that while they were in possession of the cell phone, they received a message from C.K.'s girlfriend asking him to get her a "f***in' tampon." School officials stated that the term "tampon" referred to a large marijuana cigarette and that this message prompted their search of the phone. The parties disagreed on the timing of the drug-related text message. C.K. filed suit claiming, among other things, violation of his Fourth Amendment right to be free from unreasonable searches and seizures. The school officials filed a motion to dismiss the Fourth Amendment claim on the basis of qualified immunity.

In denying the motion to dismiss, the district court held that because C.K. was in violation of school policy, school officials were justified in initially seizing the cell phone. However, the subsequent search of the cell phone was not justified because it did not satisfy the first prong of T.L.O.'s two-part test – that a search must be justified at its inception. The court stated that "[school officials] had no reason to suspect at the outset that such a search would reveal that [C.K.] himself was violating another school policy; rather, they hoped to utilize his phone as a tool to catch other students' violations" (*Klump*, 2006, p. 640). In addition, the court also stated that "although the meaning of 'unreasonable searches and seizures' is different in the school context than elsewhere, it is nonetheless evident that there must be some basis for initiating a search" (*Klump*, 2006, p. 641), which in the court's determination, school officials did not have.

In *J.W. v. Desoto County School District*, a middle school student (R.W.) had his cell phone seized, pursuant to a school policy prohibiting cell phone possession and use during school hours, when he opened the phone during class to view a text message from his father. Once in possession of the cell phone, school officials accessed and searched the photo library and discovered a photo of one of R.W.'s friends holding a BB gun and other photos that depicted gang-related symbols. R.W. was subsequently expelled from school for the remainder of the year. R.W. filed suit claiming, among other things, that the search of the cell phone violated his Fourth Amendment right to be free from unreasonable searches and seizures. The school officials chose a defense based on qualified immunity.

In dismissing the Fourth Amendment claims against the school officials, the district court relied on *T.L.O.*'s two-part test to determine that the school official's actions had not violated a clearly established constitutional right. Citing *T.L.O.*, the court reemphasized that “the school setting ... requires some modification of the level of suspicion of illicit activity needed to justify a search,” including a relaxation of the probable cause standard which ordinarily applies to searches without a warrant” (*J.W.*, 2010, pp. 10-11, quoting *New Jersey v. T.L.O.*, 1985, p. 340), and found that “[the] law is actually quite favorable to the individual defendants in this case” (*J.W.*, 2010, p. 10). The court held that the search was justified at its inception because R.W. was caught using the cell phone in knowing violation of school policy, which diminished his expectation of privacy, and that “upon witnessing a student improperly using a cell phone at school, it strikes this court as being reasonable for a school official to seek to determine to what end the student was improperly using that phone” (*J.W.*, 2010, p. 12). The court also held that the search satisfied the second prong of *T.L.O.*'s two-part test – that the search be “reasonably related in scope to the circumstances which justified the interference in the first place” (*New*

Jersey, 1985, p. 341). The court distinguished the search of R.W.'s cell phone from that in *Klump*, stating that “the school officials in *Klump* appeared to use that accident as a pretext to conduct a wholesale fishing expedition into the student's personal life, in such a manner as to clearly raise valid Fourth Amendment concerns” (*J.W.*, 2010, p. 15), whereas “the decision by the school officials in this case to merely look at the photos on R.W.'s cell phone was far more limited, and far more justified” (*J.W.*, 2010, p. 16).

A comparison of *Klump* and *J.W.* illustrates the difference between a broad and narrow interpretation of the *T.L.O.* standards. In both cases, students' cell phones were justifiably seized in violation of a school policy. However, the two courts varied greatly in their interpretation of what the justified seizure subsequently permitted. In *Klump*, the court relied on a more narrow fact-based approach to conclude that school officials lacked any reason to suspect that the search would reveal evidence of further violations. In contrast, the *J.W.* court took a much broader approach by holding that a violation of school policy prohibiting the possession and/or use of a cell phone while at school diminished a student's expectation of privacy and, therefore, granted school officials the legal authority to search the cell phone to determine the reason it was improperly used. It is important to note that the *J.W.* court held that the search was more limited in scope than the search in *Klump*, but did not identify a specific connection between the improper use of the cell phone and the school officials' need to search the photos stored on it. As will be seen, subsequent rulings have leaned towards the more narrow fact-based analysis used in *Klump*.

In November, 2010, the Attorney General for the Commonwealth of Virginia issued an advisory opinion to clarify the “circumstances [in which] middle and high school principals and teachers may seize and search students' cellular phones and laptops” (Virginia Attorney General

Opinion, 2010, p.1). The opinion was in response to an inquiry that presented the following scenario:

a student reports to a teacher that he received a text message from another student that is either threatening or criminal or violates the school's bullying policy. You ask whether the teacher can seize the alleged bully's cellular phone and conduct a search of the outgoing text messages to investigate the claim. (Virginia Attorney General Opinion, 2010, p.2)

Recognizing the importance of a “complete and detailed set of facts” (Virginia Attorney General Opinion, 2010, p.2), that were not necessarily present in the given scenario, the opinion concluded in general that a search under these conditions would not violate the Fourth Amendment and stated that:

searches of a student's belongings - including an examination of the messages found on a cell phone or laptop - are justified if, when the search is made, the teacher or principal has “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 subsequent search must be “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” (Virginia Attorney General Opinion, 2010, p.2, quoting *New Jersey v. T.L.O.*, 1969, p. 342)

The opinion also interpreted *T.L.O.* to conclude that “once a reasonable suspicion of wrongdoing exists, a search of a student's personal belongings does not require the student's consent or the consent of his parents” (Virginia Attorney General Opinion, 2010, p.3).

In *Mendoza v. Klein Independent School District*, a student (A.M.) had her cell phone seized and searched by an Associate Principal (AP) when she was observed huddled together with a group of friends in the hallway looking at what appeared to be her cell phone. The AP suspected that A.M. was using her cell phone in violation of school policy and therefore accessed the phone to determine if any text messages had been sent during school. Once the AP determined that messages had been sent during school, she continued her search of the text messages and discovered a nude photo of A.M. When confronted about the photo, A.M. admitted to sending the photo to a male friend in response to a similar photo he had sent to her. A.M. was suspended and ultimately transferred to an alternative school for 30 days for violating school policy prohibiting incorrigible behavior. A.M. filed suit claiming, among other things, that the AP's search of her phone violated her Fourth Amendment right to be free from unreasonable searches and seizures.

A federal magistrate judge denied the school districts motion for summary judgment as to the Fourth Amendment claim against the AP. The magistrate confirmed that A.M. had an expectation of privacy regarding the contents of her phone and analyzed the search within the framework of *T.L.O.*'s two-part reasonableness test. The magistrate found that based on the AP's observations of A.M., she had a reasonable suspicion that A.M. was in violation of school policy and, therefore, the search was justified at its inception. However, because "the only justification proffered by [the AP] for the search of A.M.'s phone was to determine whether A.M. had used the phone during school hours" (*Mendoza*, 2011, pp. 25-26), which could be accomplished without opening and reading any individual messages, the magistrate found that the continued search of the text messages went beyond the reasonable scope of the search. The magistrate concluded that "a continued search must be reasonable and related to the initial reason

to search or to any additional ground uncovered during the initial search” (*Mendoza*, 2011, p. 26).

While the objects of the search in the two cases differed, the fact patterns of *Mendoza* and *T.L.O.* were very similar. What distinguishes the immediate case is the lack of reasonable suspicion to continue past the initial search. Whereas the cigarette rolling papers provided the reasonable suspicion to continue with a more thorough search in *T.L.O.*, the school official in *Mendoza* lacked any compelling evidence to justify the continued search of specific text messages and discovery of the nude photo.

In *G.C. v. Owensboro Public Schools*, an out-of-district student (G.C.) with a history of drug use, anger, depression, and suicidal thoughts had his out-of-district privilege revoked when he violated the school’s cell phone policy by using his phone to text message during class. Prior to this incident and in response to a history of disciplinary issues, the District Superintendent had decided to give G.C. one last chance for the 2009-2010 school year. G.C.’s phone was seized as a result of the texting incident and searched by one of the school’s Assistant Principals (AP). The AP claimed that she was concerned about G.C.’s wellbeing, considering his history of depression and suicidal thoughts, and therefore read four of G.C.’s recent text messages. G.C. filed suit claiming, among other things, that the search of his cell phone violated his Fourth Amendment rights. The District Court granted the school district’s motion for summary judgment on the Fourth Amendment claim. G.C. appealed and a divided panel of the Sixth Circuit reversed the ruling of the lower court.

The panel determined that *T.L.O.* governed the case and rejected the broad interpretation in *J.W.*, stating that “using a cell phone on school grounds does not automatically trigger an essentially unlimited right enabling a school official to search any content stored on the phone

that is not related either substantively or temporally to the infraction” (*G.C.*, 2013, p. 23). The panel concluded that the fact-based application of the *T.L.O.* standards used in *Klump* was a more accurate reflection of the court’s standard (*G.C.*, 2013). Within this framework, the panel held that the search of G.C.’s cell phone was not justified at its inception and stated that “general background knowledge of drug abuse or depressive tendencies, without more, [does not enable] a school official to search a student's cell phone when a search would otherwise be unwarranted” (*G.C.*, 2013, p. 25). In addition, the panel stated that “the defendants have failed to demonstrate how anything in this sequence of events indicated to them that a search of the phone would reveal evidence of criminal activity, impending contravention of additional school rules, or potential harm to anyone in the school” (*G.C.*, 2013, p. 26).

Based on the limited but growing body of law in this area, it is clear that the standards set by *T.L.O.* govern cases involving searches of students’ mobile devices. In addition, as stated in *Klump*, “although the meaning of ‘unreasonable searches and seizures’ is different in the school context than elsewhere, it is nonetheless evident that there must be some basis for initiating a search” (*Klump*, 2006, p. 641), and *G.C.*, “using a cell phone on school grounds does not automatically trigger an essentially unlimited right enabling a school official to search any content stored on the phone that is not related either substantively or temporally to the infraction” (*G.C.*, 2013, p. 23), it is clear that the courts do not look favorably on searches in which the only justification was the seizure of a mobile device in violation of school policy. Furthermore, assuming that reasonable suspicion exists to justify a search at its inception, school officials must carefully tailor the search in a way that limits the scope of the search to the circumstances that justified it in the first place (see *Klump* and *Mendoza*).

Searches of Students' Web 2.0 Applications

R.S. v. Minnewaska Area School District No. 2149 and *Rosario v. Clark County School District* provide examples of the application of the reasonableness standard, under different circumstances, to students' rights in the digital age. In *R.S.*, the Facebook page of a middle school student (R.S.) was brought to the attention of school officials when the guardian of another student informed them that his son was engaging in communication of a sexual nature with R.S. online. This was not the first time R.S.'s Facebook had gotten her noticed by school officials. In response to the immediate incident, R.S. was questioned by a school counselor and admitted to having the conversations. She was then taken to the office of the law enforcement officer assigned to the school and questioned further. During this questioning, R.S. provided the school officials the login credentials for her email and Facebook accounts under the threat of detention. The school officials accessed and searched R.S.'s public and private Facebook postings for approximately 15 minutes without requesting permission from R.S. or her parents. R.S. was not disciplined for the conversations but filed suit claiming, among other things, a Fourth Amendment violation based on an unlawful search of her Facebook account.

In denying the defendant school district's motion to dismiss based on qualified immunity, the district court relied on *T.L.O.* to first establish that "students enjoy a Fourth Amendment right to be free from unreasonable searches and seizures by school officials" (*R.S.*, 2012, p. 27). It then turned to the three-part test set in place by *Vernonia* to determine whether the search violated that right. First, the court determined that since R.S. controlled some of the items that were protected by her Facebook password until she involuntarily released them – similar to a private letter or email – she had a reasonable expectation of privacy regarding those items and messages. Second, regarding the nature of the search itself, the court stated that the school

officials conducted “an exhaustive search of R.S.'s Facebook account, and possibly her personal email account” (*R.S.*, 2012, p. 31), and concluded that there was “no indication at this stage that they tailored their search in any way” (*R.S.*, 2012, p. 31). Finally, the court could not identify any legitimate governmental interest that school officials may have had in searching R.S.’s private postings, and stated that “the [school] officials' search of R.S.'s private correspondence does not appear to have been motivated by an interest in ‘maintaining discipline in the classroom and on school grounds’ or in ‘deal[ing] with breaches of public order’” (*R.S.*, 2012, p. 33, quoting *T.L.O.*, 1985, p.339).

In *Rosario*, a high school student (J.R.) was reassigned to a different school as a result of a series of tweets that were vulgar, laced with profanity, and targeted four school staff members. School officials charged J.R. with violating the district’s policy against cyberbullying. J.R. filed suit claiming, among other things, that school officials violated his Fourth Amendment rights when they searched his Twitter account. J.R. argued that he had a reasonable expectation of privacy in his twitter postings since they were limited to his followers on Twitter.

The district court concluded that based on the nature of Twitter postings, which according to the court are the “twenty-first century equivalent of an attempt to publish an opinion piece or commentary in the New York Times or the Las Vegas Sun” (*Rosario*, 2013, p. 15), J.R. had no reasonable expectation of privacy in his tweets and, therefore, they were not protected by the Fourth Amendment. In addition, the court further concluded that no Fourth Amendment violation had occurred since school officials accessed J.R.’s tweets through the account of a friend. The court stated that “it is well-established that when a person shares information with a third party, that person takes the risk that third person will share it with the government”

(Rosario, 2013, p. 17, citing *United States v. Choate*, 1978), and that “this logic applies with equal force in the social media context.” (Rosario, 2013, p. 18)

Given that Web 2.0 applications are more akin to speech than physical possessions, it appears at this point that the courts find *Vernonia*'s three-part reasonableness test more appropriate to govern cases involving these type of searches. Under these standards, the requirement of reasonable suspicion is loosened in favor of balancing the nature of the intrusion with the level of governmental concern. Analysis in both cases began with examining students' expectation of privacy. The only area where the courts concluded a reasonable expectation of privacy existed was with R.S.'s private Facebook messages, which the court found comparable to email. More public postings (on either Facebook or Twitter), even those limited to recipients with “friend” or “follower” status are not protected by the Fourth Amendment. The claim in *Rosario* failed at this point since J.R. did not have an expectation of privacy in his tweets. On the other hand, the continued analysis in *R.S.* illustrates some key points. First, school officials must tailor searches so that they are limited in scope and not overly intrusive. According to the court, the search in *R.S.* was exhaustive and not tailored in any way. Second, school officials must be able to clearly identify the nature and immediacy of their interest in the search. School officials would be wise to connect their interest to “maintaining discipline in the classroom and on school grounds” or “deal[ing] with breaches of public order” (*T.L.O.*, 1985, p.339).

Guidelines for School Officials

The Supreme Court has yet to provide clear guidance on searches of students' mobile devices and Web 2.0 applications. However, the case law discussed above, although limited, does allow for some of the contours of the body of law to take shape. This section provides guidelines for school officials when engaging in searches of students' mobile devices and Web

2.0 applications. The guidelines are organized into two groups. The first group applies to searches of mobile devices and the second group applies to Web 2.0 applications.

Guidelines for Searching Mobile Devices

- Students have a reasonable expectation of privacy in regards to their personal mobile devices and, therefore, are protected by the Fourth Amendment from unreasonable searches and seizures.
- The probable cause standard and the warrant requirement do not apply to searches within the school setting. However, school officials must have reasonable suspicion to initiate a search of a student's personal mobile device.
- The constitutionality of a search of a student's personal mobile device is based on the "reasonableness" of the search under all circumstances. Reasonableness is determined according to *T.L.O.*'s two-part test where (1) the search must be justified at its inception; and (2) the search must reasonably relate in its scope to the circumstances that initially prompted it. Failure to meet either of these tests would result in a search that violates the Fourth Amendment.
- Recent rulings indicate that the courts do not look favorably on searches that rely on the seizure of a mobile device in violation of school policy as justification. In other words, school officials do not have the authority to conduct a search of a student's personal mobile device simply because the device was confiscated in violation of school policy. Suspicion of wrongdoing, such as cheating via images or text messages, would provide a much more solid basis for initiating a search.
- In *G.C.*, the court held that general background knowledge of a student's past behavior or tendencies was not enough to justify a search. School officials would be wise to base

their searches on more substantial suspicion such as first-hand observations or reports of wrongdoing from credible sources.

- Assuming a search is justified, to avoid a constitutional violation, school officials must tailor the search to the specific circumstances that prompted the search. In other words, school officials cannot turn a justified search into a “fishing expedition” to discover evidence of wrongdoing. According to Mendoza (2011), “a continued search must be reasonable and related to the initial reason to search or to any additional ground uncovered during the initial search.” (p. 26)
- So long as reasonable suspicion of wrongdoing exists, school officials do not need student or parent consent to search a personal mobile device.

Guidelines for Searching Web 2.0 Applications

- Similar to a private letter or email, students have a reasonable expectation of privacy in their password-protected private Web 2.0 correspondence (i.e. private Facebook messages that are not viewable by “friends” or the general public).
- Students do not have a reasonable expectation of privacy in their public Web 2.0 postings (i.e. tweets or Facebook wall postings that are viewable by “friends”, “followers”, or the general public).
- The constitutionality of a search of a student’s Web 2.0 applications is based on the reasonableness of the search under all circumstances. For these types of searches, reasonableness is determined according to *Vernonia’s* three-part test that analyzes (1) the nature of the privacy interest; (2) the nature of the intrusion; and (3) the nature of the governmental concern. When a reasonable expectation of privacy exists, the level of intrusion is balanced against the governmental concern. If the level of intrusion

outweighs the governmental concern or a governmental concern is lacking, as in *R.S.*, the search violates Fourth Amendment protections.

- When students tweet or post on Facebook, they take the risk that their “friends” or “followers” will share that information with school officials. Furthermore, school officials do not violate the Fourth Amendment when they access and search a student’s Facebook postings or tweets through a cooperating witness or third party (see *Rosario*).

Conclusion

Students possess reasonable expectations of privacy and, therefore, Fourth Amendment protections in their personal mobile devices and password-protected private Web 2.0 communications. *T.L.O* governs searches of students’ personal mobile devices and the courts are leaning towards a more narrow fact-based approach in their analyses. Substantive suspicion at the outset and carefully tailored searches will keep school officials from violating students’ Fourth Amendment protections. *Vernonia* appears to govern cases involving searches of students’ Web 2.0 applications. The courts have limited expectations of privacy to only those Web 2.0 communications that are private, password-protected, and in a student’s exclusive possession. To avoid violating constitutional protections in these types of searches, school officials should carefully weigh the intrusiveness of the search with their interest in “maintaining discipline in the classroom and on school grounds” or “deal[ing] with breaches of public order” (*T.L.O.*, 1985, p.339). Web 2.0 postings or communications that are viewable by “friends,” “followers,” or the general public are not protected by the Fourth Amendment and, therefore, open to searches by school officials.

Chapter 4

Many educators and students are experiencing the potential benefits of mobile devices and Web 2.0 applications. In a Massachusetts school, an 11th grade student engaged in a cross-curricular project in her Biology and English classes where she designed and created a website on brain cancer. The student used Facebook, Twitter, and email to share the website and gather feedback from experts (doctors at different hospitals) and laypersons (friends and family members) to assure that the content was both accurate and accessible to the user (Shein, 2014).

In another example, a technology teacher in Brooklyn, NY uses Twitter with his third-grade class to document and reflect on the learning that is going on in class. Students capture images of happenings in the lab and are required to post concise and thoughtful descriptions, with a focus on grammar and punctuation. In one instance, a college professor responded to a post about a particular species of fish referred to by one student. According to the teacher, the student was very excited that an adult had read and responded to something he wrote (Shein, 2014).

On the other hand, educators and students alike are also experiencing the downside of these technologies in the school environment. In October, 2012, eight Illinois high school students were suspended for comments they made on Twitter. The suspensions stemmed from a sexually charged tweet by one student that referred to a teacher as a “MILF” and was retweeted by three others. While investigating the incident, school officials discovered another tweet by a different student that joked about blowing up the school, which was also retweeted by three other students (Gregory, 2012).

In August, 2013, a Minnesota high school student was suspended from participation in athletics when he posted a tweet that school officials interpreted as a threat. In the tweet, the

student stated that he was going to “drill” his teammates on the following Monday (Pheifer, 2013).

In February, 2014, a Massachusetts high school student was disciplined for tweeting “f*** you” to the school’s official twitter account. The student’s tweet was in response to the school’s announcement (via Twitter) that schools were closed due to inclement weather and included the statement “See you in June!” implying that students would be making the snow day up at the end of the year (Annear, 2014).

The experiences and incidents described above are illustrative of a major challenge presented by emerging technologies that facilitate student cyberspeech. Educators and school officials are faced with finding the balance between encouraging creative and beneficial student cyberspeech and maintaining a safe and secure learning environment – primarily by restricting certain types of harmful cyberspeech. Restrictions on student cyberspeech, like those described above, have constitutional implications that cannot be ignored. As students continue to expand their telepresence – their ability to project their influence in space and time (Pike, 2008) – and rely more and more on cyberspeech as a means of communicating with the world around them, school officials across the nation will continue to experience similar scenarios. As mentioned previously, these scenarios challenge school officials to balance the need to maintain a safe, secure, and orderly learning environment with students’ First Amendment right to freedom of speech.

The Reality of Student Cyberspeech

Student cyberspeech is an aspect of society that schools and school officials have no choice but to accept and address. Cyberspeech has become the dominate means by which students interact with each other. According to Lenhart (2012), to communicate with each other

on a daily basis, 63% of teens use text messages, 29% use social media messages, and 22% use instant messages. In comparison, 35% rely on face-to-face interactions. In another study, researchers found that 80% of teens use social networking sites, with most logging on daily (Lenhart, Madden, Smith, Purcell, Zickuhr & Rainie, 2011). Clearly, the majority of today's students are relying on cyberspeech to express themselves and communicate with their peers.

The Need to Restrict Student Cyberspeech

Mobile devices and Web 2.0 applications – the technological tools that facilitate the expansion of student cyberspeech – present unique educational opportunities for teachers and students. According to a report by the Consortium for School Networking (2011), students can benefit from the use of these technologies by allowing them to

- Bridge the gap between formal (in-school) and informal (out-of-school) learning, improving their preparation for real world experience;
- Construct their own learning environments to help them achieve academically and acquire the skills necessary for the 21st century; connect instantly with peers, experts, and information resources beyond the school walls;
- Provide real-time feedback, exchange information, and receive assessments during classroom instruction through a text message or Twitter “back channel”;
- Document their work through images taken on and off campus;
- Receive and submit homework assignments digitally; learn how to utilize mobile devices and social networking as tools for lifelong learning.

Over the past four years, high school students' participation in online communities has doubled and their use of collaborative writing resources such as Google Docs™ has increased by 57% (Project Tomorrow, 2011). In addition, 10% of students have sent a tweet on an academic

subject, 15% have informally tutored someone online, 20% have used a mobile app to organize their schoolwork, and 46% of high school students have used Facebook to collaborate on a school project (Project Tomorrow, 2011).

However, student cyberspeech also presents unique challenges because it blurs the line between on- and off-campus speech, can be distributed rapidly to a wide audience, can potentially be saved indefinitely, and can have disruptive effects on the operations of the school (Kasdan, 2010). When asked to identify issues that need to be addressed as policies evolve to integrate emerging technologies that would encourage cyberspeech, school principals identified preventing social contact between staff and students, freedom of speech issues, inappropriate student postings, sexting, and cyberbullying (edWeb.net, 2009).

Sexting is defined as “the sending of sexually explicit messages or images by cell phone” (Sexting, 2013) and cyberbullying is defined by the Cyberbullying Research Center as “when someone repeatedly harasses, mistreats, or makes fun of another person online or while using cell phones or other electronic devices” (Hinduja, 2010). Sixteen percent of teens say they have received a sexually suggestive nude or nearly nude photo or video of someone else they know, 88% of teens who use social media have seen someone be mean or cruel on social media sites, and 15% say they have been the targets of cruelty or meanness (Lenhart et al., 2011).

Clearly, student cyberspeech has the potential to facilitate negative behaviors that cut to the heart of one of the primary responsibilities of school officials – maintaining a safe and secure environment for students. As long as students continue to rely more and more on cyberspeech to communicate with the world around them, there will be the need for school officials to restrict certain types of cyberspeech that impinge on this responsibility. The remainder of this article attempts to help school officials meet this need without violating students’ constitutional rights

by reviewing the legal precedent regarding student speech rights, analyzing the application of this precedent to student cyberspeech, and synthesizing the current body of law into a set of guidelines for school officials to use as they navigate a legal landscape that has yet to be well defined.

What Case Law Says

The standards set forth by four U.S. Supreme Court cases, *Tinker v. Des Moines Independent School District*, *Bethel School District No. 403 v. Fraser*, *Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederick* guide any court that must decide a case involving the restriction of students' speech.

According to *Tinker*, students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” (*Tinker*, 1969, p. 506). However, in light of the special characteristics presented by the public school environment, student speech can be restricted if it satisfies any of the following:

- 1) Did the speech cause an *actual* material and substantial disruption to the operation of the school?
- 2) Was the restriction of the speech necessary to avoid a *potential* material and substantial disruption to the operation of the school?
- 3) Did the speech impinge upon the rights of other students?

Ultimately, *Tinker* aimed to protect students' speech rights by producing this three-pronged test to determine the constitutionality of any restriction placed on student speech and/or expression.

The three subsequent Supreme Court cases each added an exception to the *Tinker* protections and, therefore, limited students' speech rights with each ruling. Post-*Fraser*, student

speech that originated on-campus and was deemed vulgar or lewd by school officials could be restricted, even without evidence of a material and substantial disruption. Post-*Hazelwood*, school officials had the authority to limit the speech rights of students engaged in activities such as newspapers, performing arts performances, etc., that were related to the school curriculum or could be perceived as being endorsed by the school (Glenn, 2010). Post-*Morse*, school officials could restrict student speech that they deemed to promote illegal drug use, even when the showing of a material and substantial disruption was absent (Glenn, 2010). *Figure 4-1* illustrates the Supreme Court precedent regarding student speech and how students’ speech rights have been limited over time.

Figure 4-1. Supreme Court precedent and the limiting of students’ speech rights over time.

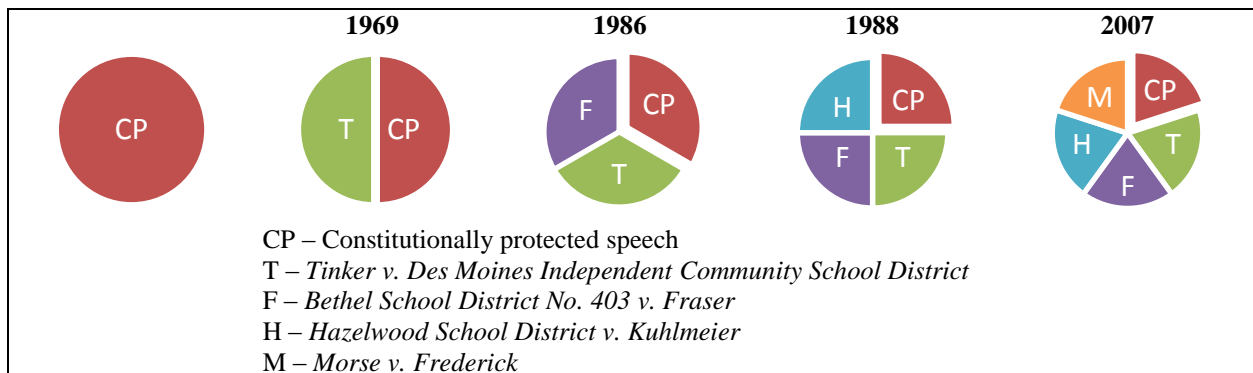


Figure 4-1. Prior to *Tinker*, students’ constitutionally protected speech (CP) was equivalent to speech on a public sidewalk. *Tinker* (1969) gave school officials the authority to restrict student speech that disrupted the operation of the school or impinged on the rights of others; *Fraser* (1986) gave school officials the authority to restrict speech deemed lewd or vulgar; *Hazelwood* (1988) gave school officials the authority to restrict speech endorsed by the school; and *Morse* gave school officials authority to restrict speech deemed to promote illegal drug use. **Note: relative sizes of the sections are not intended to indicate a suggested amount of speech rights or that each ruling impacted student speech rights equally; only that students’ constitutionally protected speech (CP) has decreased over time.**

It is important to note that none of the four Supreme Court cases involved student cyberspeech, which provides a challenge to the lower courts applying these precedents to cyberspeech cases. In addition, all of the cases subsequently discussed involve student

cyberspeech that originated and was disseminated off-campus. Such cases pose unique challenges for the courts because they do not fit cleanly into the standards described above. As will be seen, under these circumstances, courts rely primarily on *Tinker's* material and substantial disruption test – whether an actual disruption occurred or there was a reasonably foreseeable risk of a disruption – to determine the constitutionality of speech restrictions.

When analyzed as a body of law, the cases sort into three major groups. The first group includes cases where the courts upheld restrictions on cyberspeech prior to actual disruption based on reasonable foreseeability, with a focus on the nature of the speech (the words themselves). The second group includes cases where restrictions on cyberspeech were upheld due to evidence of actual disruption to the operation of the school. The third group includes cases where restrictions on cyberspeech were not upheld because the facts did not fit the previous two groups.

Upheld Based on Reasonable Foreseeability

Recent case law reveals that the constitutionality of restrictions based on reasonable foreseeability depends, in part, on the nature of the speech (the words themselves). These cases involved restrictions that occurred prior to the cyberspeech reaching the school at-large and where the cyberspeech satisfied the second prong of the *Tinker* test. The cases are organized by student cyberspeech that is threatening, slanderous, and obscene.

Threatening cyberspeech. Student cyberspeech that rises to the level of a true threat is not protected by the First Amendment and can be restricted by school officials prior to an actual disruption to the operations of the school. In *D.J.M. v. Hannibal Public School District #60*, the court upheld the suspension of a high school student who sent a series of instant messages from his home computer to a classmate stating, among other things, that he was going to get a gun and

kill specific students at school that he didn't like and that he wanted the school to be known for something. The court held that the cyberspeech was not protected because it rose to the level of a true threat and defined a true threat as a "statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another" (*Doe*, 2002, p. 624).

Student cyberspeech that is violent or threatening but does not rise to the level of a true threat can be restricted under *Tinker* as long as it is reasonably foreseeable that the speech would reach the school and cause a material and substantial disruption or impinge on the rights of others. In *O.Z. v. Board of Trustees of the Long Beach Unified School District*, the court upheld the suspension and reassignment of a middle school student who created, in collaboration with a friend, a slide show depicting the killing of her teacher. Additionally, in *Wynar v. Douglas County School District*, the court upheld the expulsion of a high school student who posted a series of increasingly violent instant messages to his MySpace "friends" that included "bragging about his weapons, threatening to shoot specific classmates, intimating that he would 'take out' other people at a school shooting on a specific date, and invoking the image of the Virginia Tech massacre" (*Wynar*, 2013, p. 3). In both cases, the courts held that it was reasonable to forecast substantial disruption based on the threatening nature of the cyberspeech. The *Wynar* court also held that the cyberspeech impinged on the rights of others.

Slanderous cyberspeech. Student cyberspeech that targets school staff with slanderous accusations of inappropriate behavior or sexual misconduct with minors does not find favor with the courts. Restrictions on this type of speech will most likely be upheld due to possible adverse affects of the speech on the staff member's ability to perform his/her duties effectively. In *Bell v. Itawamba County School Board*, the court upheld the suspension and reassignment of a high

school student who composed, recorded, and posted a rap song on Facebook and YouTube that included vulgar language, possible threats, and accused two coaches of inappropriate contact with specific female students. Based on the facts that the song levied charges of serious sexual misconduct and was published on Facebook and YouTube, the court held that it was reasonably foreseeable that a disruption would occur.

Obscene cyberspeech. Student cyberspeech that targets the school and is deemed legally obscene is not protected by the First Amendment. In *Rosario v. Clark County School District*, the court upheld the reassignment of a high school student who posted a series of tweets that were laced with profanity and targeted four school staff members. One of the tweets stated “I hope Coach brown [sic] gets f*ck*d in tha *ss by 10 black d*cks” (*Rosario*, 2013, p. 8). The court held that this tweet was obscene and not afforded any First Amendment protection. Citing *Miller v. California* (1973), the court stated the criteria for obscene speech as:

(1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (pp. 24-25)

Upheld Based on Actual Disruption

Many courts have upheld restrictions on student cyberspeech based on the occurrence of actual disruptions (*Tinker's* first prong), rather than the nature of the speech. While these cases may include speech with characteristics similar to those described above, restrictions were upheld based on evidence of actual disruptions.

Student cyberspeech that targets the school, staff, or other students can be legally restricted so long as the evidence indicates that it caused a material and substantial disruption to the operations of the school. In *J.S. v. Bethlehem Area School District*, the court upheld the expulsion of a middle school student who created and published a website that included "derogatory, profane, offensive and threatening comments" (*J.S.*, 2002, p. 643) targeting a teacher and the principal and included, among other things, a page regarding the teacher titled "Why Should She Die?" that solicited \$20 from viewers to hire a hit man. The targeted teacher experienced serious distress and was required to take a medical leave of absence.

In *Wisniewski v. Board of Education of the Weedsport Central School District*, the court upheld the suspension of an eighth-grade student who created and shared an AOL Instant Messaging icon of a pistol firing a bullet at a person's head with spattered blood above it. Below the icon were the words "Kill Mr. VanderMolen." Mr. VanderMolen, Wisniewski's teacher at the time, requested and was allowed to stop teaching Wisniewski's class.

In *Doninger v. Niehoff*, the court upheld the school's decision to bar a high school student from running for Senior Class Secretary because of a blog post she made. The blog post was in response to the postponement of a concert that had been planned by the Student Council and included a misleading claim that the concert had been cancelled, referred to school officials as "douchebags," and encouraged people to contact the school to protest the cancellation. School officials were required to miss meetings and a classroom observation to deal with the influx of calls, emails, and a group of upset students.

In *Kowalski v. Berkeley County Schools*, the court upheld the suspension of a student who created and posted a MySpace page that included false, derogatory, vulgar and offensive comments aimed at another student (S.N.). S.N. reported it to school officials and then left

school “to avoid further abuse” (*Kowalski*, 2011, p. 574) by the students that had made comments on the page.

In *S.J.W. v. Lee’s Summit R-7 School District*, the court upheld the suspension and reassignment of twin high school students who posted a blog that “contained a variety of offensive and racist comments as well as sexually explicit and degrading comments about particular female classmates, whom they identified by name” (*S.J.W.*, 2012, p. 773). Evidence indicated that numerous school computers were used to access the website; teachers had difficulty managing their classes; students were upset and/or distracted; local media was on campus; and parents contacted the school concerned about student safety and harassment.

As is evident in the five cases discussed in this subsection, a clear definition of substantial disruption is lacking. Therefore, it is vital that school officials document any/all disruptive effects and be careful not to overreact to comments that may be offensive but do not cause substantial disruption.

Not Upheld and Useful Case Comparisons

A number of courts have overturned restrictions on off-campus student cyberspeech because the cyberspeech did not satisfy any prong of the *Tinker* test. A review of these cases, with useful case comparisons will help to clarify the scope of school officials’ authority when it comes to restricting student cyberspeech.

Cyberspeech that targets the school or staff. As evident by the incidents discussed at the beginning of this article, school officials face the reality of upsetting or disturbing cyberspeech at an ever-growing rate. However, “disliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under *Tinker*”

(*Beussink*, 1998, p. 1180). Evidence must be presented that shows that the operations of the school have been disrupted beyond what a reasonable person would perceive as inconveniences.

For example, in *Beussink v. Woodland R-IV School District*, the court overturned the suspension of a student who created a website that was highly critical of his school administration and teachers, included vulgar language, and invited viewers to contact the principal to express their opinions on the school. The student was suspended immediately, without determining the extent to which the website had been accessed or viewed at the school.

In *Killion v. Franklin Regional School District*, the court overturned the suspension of a high school student who created and disseminated via email a "Top Ten" list about the school's athletic director that included extremely derogatory statements regarding the athletic director's appearance and referenced the size of his genitals. The list was on school grounds for several days without being noticed by the administration and no action was taken for at least one week.

In *Evans v. Bayer*, the court overturned the suspension and removal from AP level classes of a high school student who created a Facebook group that was dedicated to sharing why a particular teacher was the worst ever. The student removed the group after two days, which was prior to any school official becoming aware of it.

In *J.S. v. Blue Mountain School District* and *Layshock v. Hermitage School District*, which were decided on the same day by the Third Circuit, the court overturned the suspensions of two students (J.S. and Layshock) who created and posted fake MySpace profiles targeting their school principals. J.S.'s profile made fun of the principal and included adult language and sexually explicit content that, among other things, implied that the principal was a pedophile. While significantly less vulgar, Layshock's profile included derogatory comments and some sexual innuendo. Evidence indicated that reactions at J.S.'s school included two teachers having

to stop students from talking about the profile and the cancelling of a small number of student counseling appointments. Reactions from Layshock's profile included limiting student computer usage to the library and the cancelling of computer programming classes for about one week.

Finally, in *R.S. v. Minnewaska Area School District No. 2149*, the court overturned the discipline of a middle school student who made two postings on Facebook. One posting expressed her hatred for one school employee and the other "expressed salty curiosity for who had 'told on her'" (*R.S.*, 2012, p. 2) and included the f-word. The postings were only accessible to R.S.'s Facebook "friends" and only came to the attention of the school when one of R.S.'s friends shared them with the school principal.

In all of the cases in this subsection, the courts ruled in favor of the students based on a lack of evidence supporting a substantial disruption or a reasonable forecast of substantial disruption. It is important to note that in *Killion, J.S.*, and *Layshock*, even though the speech targeted school staff and was derogatory and mean-spirited, school officials could not legally impose disciplinary consequences because of the lack of evidence of substantial disruption to the operation of the school. A comparison of these cases to *S.J.W.* will help define substantial disruption. In *S.J.W.*, evidence indicated that numerous school computers were used to access the website; teachers had difficulty managing their classes; students were upset and/or distracted; local media was on campus; and parents contacted the school concerned about student safety and harassment. In contrast to the cases discussed in this subsection, in *S.J.W.*, the work of the school at many levels (teachers, students, parents, administrators, and other school staff) was substantially disrupted.

Cyberspeech perceived as threatening. Undifferentiated fears of possible disruption do not satisfy the *Tinker* test. In *Emmett v. Kent School District No. 415*, the court overturned the

suspension of a high school student who created and posted a website that included mock obituaries of friends, and an option for visitors to vote on who would die next. Several days after the site was posted, the student removed it when the local news referred to it as a “hit list.”

In *Mahaffey v. Aldrich*, the court overturned the suspension of a high school student who contributed to a non-obscene website entitled "Satan's web page" that was created primarily off-campus and contained a list of "people I wish would die.”

In both cases, the courts determined that the cyberspeech did not rise to the level of true threats and did not satisfy the *Tinker* test. The facts in each case indicated that the perceived threats were made in jest and that the cyberspeech was restricted based on undifferentiated fears.

Cyberspeech that targets other students. It appears as though restrictions on student-on-student cyberbullying or harassment will be upheld only if evidence of an actual disruption can be shown. In *J.C. v. Beverly Hills Unified School District*, a case very similar to *Kowlaski*, the court overturned the suspension of a student who created and published a video of a group of her classmates having a derogatory and mean-spirited conversation about one of their classmates. The court held, based on the nature of the speech and its accessibility to the public via the internet, that it was reasonably foreseeable that the speech would make its way to the school. However, the court determined that the actual disruptions (counseling the student and her mother, questioning of students) did not rise to the level of substantial as defined by *Tinker*, nor did the potential impacts of the video (gossiping, passing notes, a general buzz about the speech) meet *Tinker*'s reasonably foreseeable risk of substantial disruption standard.

It is important to note that the court's reasoning regarding the lack of disruption relied, in large part, on the targeted student's response to the speech – the fact that she did not confront the authors about the video while at school. When compared with *Kowlaski*, in which the student

missed an entire day of school as a result of similar speech and could have potentially missed more if the school had done nothing, it seems clear that courts give weight to the level and type of response by the victim in these situations. This presents a challenge for school officials when dealing with student-on-student speech issues and begs the question of whether school officials must wait for a potentially serious response before acting.

Cyberspeech that is neither seen nor heard by others. On-campus student cyberspeech that is neither heard nor seen by others (and is not in violation of any other school regulation) is not subject to restriction. A useful analogy presented by Glenn (2007) compares this type of cyberspeech “to a student bringing an obscene magazine to school and reading it by himself or herself” (p. 5). In *Coy v. Board of Education of the North Canton City Schools*, the court overturned the expulsion of a middle school student who created and accessed at school a website that primarily focused on skateboarding and included some offensive but not obscene material. The student accessed the website on a school computer during class; he was toggling between screens while pretending to do schoolwork. Because the student discretely accessed the website and the website did not contain any obscene material, the district court determined that *Tinker* governed the case rather than *Fraser* and found no evidence to suggest that the student’s actions had any effect on the school.

Guidelines

To avoid violating students’ constitutional rights when dealing with student cyberspeech issues, school officials should familiarize themselves with the following guidelines, which have been distilled from the rulings discussed above. The guidelines are organized into three groups. The first group applies to restrictions based on reasonable foreseeability. The second group

applies to restrictions based on actual disruptions. The third group includes other useful guidelines that don't fit neatly within the previous two groups.

Reasonable Foreseeability

- School officials have the authority to restrict off-campus student cyberspeech when it is reasonably foreseeable that the cyberspeech would reach the school and would reasonably lead to a forecast of substantial disruption.
- Proving a forecast of disruption can be difficult, especially if proactive measures were taken to prevent a disruption from occurring (Glenn, 2010). Some recent rulings have given weight to the nature of the cyberspeech (threatening, slanderous, and obscene) so school officials must be careful to do the same when considering restricting cyberspeech prior to it reaching the school.
- Restrictions on cyberspeech that the facts show to be parody, or that a reasonable person would not take as serious will not find favor with the courts.
- School officials should be able to identify a connection between the cyberspeech and the school prior to taking any action to restrict the cyberspeech.
- School officials do not have legal authority to proactively search or monitor off-campus student cyberspeech that may be in violation of school policies or regulations.
- Student cyberspeech that rises to the level of a true threat is not protected by the First Amendment and can be restricted by school officials prior to an actual disruption to the operations of the school.

Actual Disruptions

- Off-campus student cyberspeech that reaches the school can legally be restricted so long as it causes material and substantial disruption to the operations of the school.
- The courts have not provided a clear definition of substantial disruption and have relied heavily on the facts of each case. Therefore, it is vital that school officials document any/all disruptive effects and be careful not to overreact to comments that may be offensive but do not cause substantial disruption.
- Even though the courts have been hesitant to get involved in cyberspeech interactions between students that may cause some level of emotional distress, it appears as though they may be open to upholding restrictions on student-on-student cyberbullying if an actual disruption can be shown.

Other Guidelines

- Student cyberspeech that is created and disseminated on-campus or at a school sponsored event can legally be restricted if it materially and substantially disrupts the operation of the school, would reasonably lead to a forecast of substantial disruption, impinges on the rights of others, is lewd or vulgar, is connected to the curriculum, is sponsored by the school, or promotes the use of illegal drugs.
- Student cyberspeech that is violent or threatening but does not rise to the level of a true threat can be restricted under *Tinker* as long as:
 - the speech caused a material and substantial disruption to the work of the school or impinged on the rights of others.

- it is reasonably foreseeable that the speech would reach the school and cause a material and substantial disruption or impinge on the rights of others.
- On-campus student cyberspeech that is neither heard nor seen by others (and is not in violation of any other school regulation) is not subject to restriction. Therefore, school officials should carefully consider whether the cyberspeech has been disseminated on-campus prior to any discipline.
- Student cyberspeech that targets the school and is deemed legally obscene is not protected by the First Amendment and can be restricted by school officials.

Chapter 5

A school official is making his normal rounds through the halls when he notices a group of students huddled together looking intently at what appears to be a cell phone. The school official's sensitivity regarding the situation is high due to a recent conversation about cyberbullying he had with a student (Ella). When approached, the student holding the phone (Joey) quickly turns it off and puts it in his pocket. Joey denies that he and the others were looking at his phone but ultimately surrenders it upon request and moves on to class. With the cell phone in his possession, the school official completes his rounds and returns to his office to continue his investigation by searching the contents of the phone for evidence that Joey had been using it in violation of school policy.

Later that same day, the school official is approached again by Ella. Ella shares with him that she has received a series of harassing and intimidating messages on Facebook from another student in the school (Beth). She also shares that she does not feel comfortable going to her next class because Beth is in that class as well. The school official calls Beth to his office to investigate the accusations made against her.

The subsequent actions by the school official regarding the cell phone and its contents and the alleged Facebook messages have constitutional implications that cannot be ignored. As mobile devices and Web 2.0 increasingly penetrate the school environment, school officials across the nation are experiencing similar scenarios on a regular basis. These scenarios challenge school officials to balance the need to maintain a safe, secure, and orderly learning environment with students' constitutional right to be free from unreasonable searches and seizures.

The Reality of Mobile Devices and Web 2.0

Regardless of policy or perception, mobile devices and Web 2.0 are a reality in the educational setting. Seventy-seven percent of teens bring their mobile phones to school every day, 50% of students send or receive text messages during class at least several times per week, and 80% of teens use social networking sites, with most logging on daily (Lenhart, Ling, Campbell & Purcell, 2010; Lenhart, Madden, Smith, Purcell, Zickuhr & Rainie, 2011). Students rely on mobile devices to communicate with each other and their parents, access social media, capture and store images and videos, store and transfer files, and browse the internet. The growth of downloadable applications provides for even more capabilities, limited only by the pace of innovation. Mobile devices also provide a sense of security for parents and students in case of an emergency situation or an unexpected change of plans (Lenhart et al., 2010). Finally, teachers who are mobile device users themselves indicate increased engagement, access to online textbooks, and the extension of learning beyond the school day as benefits of integrating mobile devices into instruction (Project Tomorrow, 2011). It is clear that the reality of these technologies impacts all educational stakeholders in some way and cannot be overlooked.

Useful Educational Tools?

A growing number of educators and educational leaders, especially those who are more familiar with their potential benefits, are making efforts to leverage these technologies to enhance teaching and learning. Advocates for integration and a limited but growing body of research indicate that mobile devices and Web 2.0 benefit students by allowing them to

- connect formal and informal learning experiences similar to the real world;
- connect instantly with peers, experts, and information;
- develop skills necessary for the 21st century;

- retrieve and comply with schedules and assignments more effectively;
- participate and engage more fully in the learning process;
- document work through capturing images and video;
- engage in real-time assessments with immediate feedback;
- digitally receive and submit homework assignments;
- learn how to utilize mobile devices and social networking as tools for lifelong learning (Consortium, 2011; Engel & Green, 2011; Katz, 2005; Lu, 2008; Matthews, Doherty, Sharry & Fitzpatrick, 2008).

Students are also beginning to realize the benefits these technologies present for learning.

Ten percent of students have sent a tweet on an academic subject, 15% have informally tutored someone online, 20% have used a mobile app to organize their schoolwork, and 46% of high school students have used Facebook to collaborate on a school project (Project Tomorrow, 2011).

The Need to Search

While the integration of mobile devices and Web 2.0 provides some exciting potential benefits for teaching and learning, unfortunately, these technologies can be and are misused. School principals have identified inappropriate student postings, sexting, and cyberbullying as issues that must be addressed if integration is to occur (edWeb.net, 2009). Sixteen percent of teens (ages 12-17) say they have received a sexually suggestive nude or nearly nude photo or video of someone else they know, 88% of teens who use social media have seen someone be mean or cruel on social media sites, and 15% say they have been the targets of cruelty or meanness (Lenhart, Madden, Smith, Purcell, Zickuhr & Rainie, 2011). In addition, the capabilities of today's mobile devices make cheating via text messaging or image capture a real

and major concern. As school officials across the nation work to maintain safety and order in the school environment by investigating disputes, accusations, and suspicions involving serious issues such as cheating, cyberbullying, sexting, and drugs, the need to search the contents of students' mobile devices and Web 2.0 applications will continue to grow. The remainder of this article attempts to help school officials meet this need without violating students' constitutional rights by reviewing the legal precedent regarding students' right to be free from unreasonable search and seizure, analyzing the application of this precedent to searches of students' mobile devices and Web 2.0 applications, and synthesizing the current body of law into a set of guidelines for school officials to use as they navigate a legal landscape that has yet to be well defined.

What Case Law Says

The U.S. Supreme Court, in *New Jersey v. T.L.O.* and *Vernonia School District 47J v. Acton* set the standards that govern student searches. According to *T.L.O.*, students have a legitimate expectation of privacy in the noncontraband items they bring to school and the constitutionality of a search of these items is based on a standard of "reasonableness." A reasonable search is (1) justified at its inception, and (2) reasonably related in scope to the initial purpose for the search. A search is justified at its inception when reasonable suspicion exists to lead school officials to believe the search would reveal evidence of a violation of the law or school policy. To be reasonably related in scope, a search must be limited to finding evidence related to the original reason for the search. In other words, school officials cannot go "fishing" through the contents of a student's mobile device or Web 2.0 application to find evidence of wrongdoing.

In *Vernonia*, the Court developed a three-pronged test to assess the reasonableness of suspicionless searches based on: (1) the nature of the privacy interest upon which the search intrudes; (2) the character of the intrusion; and (3) the nature and immediacy of the governmental concern at issue (*Vernonia*, 1995, p. 660). In other words, when a student has a reasonable expectation of privacy (as is the case with mobile devices and some Web 2.0 communications), school officials can conduct legal searches only when the governmental interest outweighs the level of intrusion (Vorenberg, 2012).

Although the U.S. Supreme Court has not ruled on a case involving the search of a student's mobile device or Web 2.0 application, a handful of lower courts have had the opportunity and the contours of the law in this area have begun to take shape. Given that the majority of the courts have ruled in favor of students, it is clear that school officials would benefit from some clarity in this area.

Searches of Students' Mobile Devices

In *Klump v. Nazareth Area School District*, a Pennsylvania district court ruled in favor of a student whose cell phone was confiscated and subsequently searched by school officials after it had fallen out of his pocket during class. While in possession of the phone, school officials called nine students in the phone's address book, accessed the student's text and voice messages, and engaged in an instant messaging conversation with the student's brother. In its analysis, the court held that the school official's search violated both prongs of the *T.L.O.* reasonableness test.

By contrast, in *J.W. v. Desoto County School District*, a Mississippi district court upheld the expulsion of a middle school student whose cell phone was seized when he opened the phone during class to view a text message from his father. Once in possession of the cell phone, school officials accessed and searched the photo library and discovered photos that depicted gang-

related symbols. The court reasoned that the search was justified at its inception because the student was caught using the cell phone in knowing violation of school policy, which diminished his expectation of privacy. In addition, the improper use of the cell phone at school made the subsequent search of the photos reasonable in scope due to the school official's need to determine the reason that the student was using the phone (*J.W.*, 2010).

A comparison of *Klump* and *J.W.* illustrates the difference between a broad and narrow interpretation of the *T.L.O.* standards. In both cases, students' cell phones were justifiably seized in violation of a school policy. However, the two courts varied greatly in their interpretation of what the justified seizure subsequently permitted. In *Klump*, the court relied on a more narrow fact-based approach to conclude that school officials lacked any reason to suspect that the search would reveal evidence of further violations. In contrast, the *J.W.* court took a much broader approach by holding that a violation of school policy prohibiting the possession and/or use of a cell phone while at school diminished a student's expectation of privacy and, therefore, granted school officials the legal authority to search the cell phone to determine the reason it was used improperly. As will be seen, subsequent rulings have leaned towards the more narrow fact-based analysis used in *Klump*.

In *Mendoza v. Klein Independent School District*, a federal magistrate judge ruled in favor of a student whose cell phone was confiscated and subsequently searched by school officials to determine whether the student had been using the phone in violation of school policy. Once the school official determined that messages had been sent during school, she continued the search and discovered a nude photo of the student. The magistrate found that reasonable suspicion existed that the student was in violation of school policy and, therefore, the search was justified at its inception. However, because the initial intent of the search could have been

accomplished without opening and reading any individual messages, the magistrate found that the continued search of the text messages went beyond the reasonable scope of the search.

Finally, in *G.C. v. Owensboro Public Schools*, a panel of the Sixth Circuit ruled in favor of a student whose out-of-district privilege was revoked when he violated the school's cell phone policy by using his phone to text message during class. The student's cell phone was seized as a result of the texting incident and recent text messages were searched by school officials. The officials claimed they were concerned about the student's wellbeing, considering his history of depression and suicidal thoughts. The panel rejected the broad interpretation in *J.W.* and relied on the narrower, fact-based application of the *T.L.O.* standards used in *Klump* to hold that the search was not justified at its inception. According to the panel, general background knowledge of a student's past behavior or tendencies does not equate to reasonable suspicion and in this case, school officials had no reason to suspect that a search of the phone would reveal evidence of wrongdoing.

Searches of Students' Web 2.0 Applications

There have been two cases to date to rule on the constitutionality of searches of students' Web 2.0 applications (Facebook and Twitter). In *R.S. v. Minnewaska Area School District No. 2149*, a Minnesota district court ruled in favor of a student (R.S.) whose Facebook account was searched exhaustively for 15 minutes, in response to a report from the guardian of another student that his son was engaging in communication of a sexual nature with R.S. online. Relying on *Vernonia's* three-part test, the court held first that the student controlled some of the items that were protected by her Facebook password until she involuntarily released them – similar to a private letter or email – so she had a reasonable expectation of privacy regarding those items and messages. Second, the court concluded that the search was exhaustive and not tailored in any

way. Finally, the court was unable to identify any legitimate governmental interest that school officials may have had in searching the student's private postings.

In *Rosario v. Clark County School District*, a high school student was reassigned to a different school as a result of a series of tweets that were vulgar, laced with profanity, and targeted four school staff members. A Nevada district court concluded, relying on reasoning similar to part-one of *Vernonia's* three-part test, that based on the nature of Twitter postings, which the court compared to opinion pieces or commentary in a newspaper, the student had no reasonable expectation of privacy in his tweets and, therefore, they were not protected by the Fourth Amendment.

Guidelines

To avoid constitutional violations when engaging in searches of students' mobile devices and/or Web 2.0 applications, school officials should familiarize themselves with the following guidelines which have been distilled from the rulings discussed above. The guidelines are organized into two groups. The first group applies to searches of mobile devices and the second group applies to Web 2.0 applications.

Guidelines for Searching Mobile Devices

- The contents of students' personal mobile devices protected by the Fourth Amendment from unreasonable searches and seizures.
- School officials must have reasonable suspicion to initiate a search of a student's personal mobile device. Reasonable suspicion requires more than a hunch but less than probable cause. A school official should be able to put into words specific facts that lead him to believe a search will result in evidence of wrongdoing.

- A legal search of a student’s mobile device must be reasonably related in its scope (tailored) to the circumstances that initiated the search. School officials act improperly if they turn a justified search into a “fishing expedition” to discover evidence of wrongdoing.
- Any search of a student’s mobile device that goes beyond the original purpose must be related to additional evidence or information discovered during the initial search.
- School officials do not have the authority to conduct a search of a student’s mobile device based solely on the fact that the device was confiscated in violation of school policy.
- General background knowledge of a student’s past behavior or tendencies is not enough to justify a search. School officials should base their searches on more substantial suspicion such as first-hand observations or reports of wrongdoing from credible sources.
- So long as reasonable suspicion of wrongdoing exists, school officials do not need student or parent consent to search a personal mobile device.

Guidelines for Searching Web 2.0 Applications

- Similar to a private letter or email, students’ password-protected private Web 2.0 correspondence (i.e. private Facebook messages that are not viewable by “friends” or the general public) is protected by the Fourth Amendment from unreasonable search and seizure.
- Students’ public Web 2.0 postings (i.e. tweets or Facebook wall postings that are viewable by “friends”, “followers”, or the general public) are not protected by the Fourth Amendment and are subject to search at any time.

- When searching students' private Web 2.0 correspondence, school officials must balance the level of intrusion against the school's need/interest in the search. If the level of intrusion outweighs the school's need/interest, the search violates Fourth Amendment protections. School officials would be wise to connect their need/interest to maintaining discipline, the safety of students and staff, or dealing with violations of school policy.
- When students tweet or post on Facebook, they take the risk that their "friends" or "followers" will share that information with school officials. Furthermore, school officials do not violate the Fourth Amendment when they access and search a student's Facebook postings or tweets through a cooperating witness or third party.

Chapter 6

Personal mobile devices and Web 2.0 applications (e.g. social media, blogs, and wikis) are aspects of society that will continue to penetrate the public school environment. The majority of today's students carry the equivalent of a personal computer in their pockets throughout the school day. Research indicates that 77% of teens bring their mobile phones to school every day (Lenhart, Ling, Campbell & Purcell, 2010) and these devices allow them to communicate with each other and the world around them, express their thoughts and ideas, browse the internet, manage schedules, store and share data, document events in their lives through image and video capture, complete tasks and assignments, navigate the world, and much more. The capabilities of these devices seem to only be limited by the creativity of the engineers who design them and the downloadable applications that can be installed on them. Web 2.0 applications allow students to interact, collaborate, and express themselves with a seemingly limitless audience using a variety of media. Research indicates that 80% of teens use social networking sites, with most logging on daily (Lenhart, Madden, Smith, Purcell, Zickuhr & Rainie, 2011). When combined, these technological tools allow students to continually expand their "telepresence" – their ability to project their influence in space and time (Pike, 2008) – regardless of time or location. This begs the question of how this expanding telepresence will be used.

Many educational stakeholders realize the potential benefits of these technologies and are working to develop policies and practices that attempt to leverage them to enhance teaching and learning. Advocates for integration and a limited but growing body of research indicate that mobile devices and Web 2.0 benefit students by allowing them to

- connect formal and informal learning experiences similar to the real world;

- connect instantly with peers, experts, and information;
- develop skills necessary for the 21st century;
- retrieve and comply with schedules and assignments more effectively;
- participate and engage more fully in the learning process;
- document work through capturing images and video;
- engage in real-time assessments with immediate feedback;
- digitally receive and submit homework assignments;

learn how to utilize mobile devices and social networking as tools for lifelong learning (Consortium, 2011; Engel & Green, 2011; Katz, 2005; Lu, 2008; Matthews, Doherty, Sharry & Fitzpatrick, 2008).

On the other hand, these technologies seem to provide some students with a false sense of security that leads them to say and do things that they otherwise might not. Sixteen-percent of teens say they have received a sexually suggestive nude or nearly nude photo or video of someone else they know, 88% of teens who use social media have seen someone be mean or cruel on social media sites, and 15% say they have been the targets of cruelty or meanness (Lenhart, et al., 2011). Interestingly, within the timeframe of this study, two new Web 2.0 applications (ask.fm and Yik Yak) were launched that allow users to post anonymous messages to other users. This anonymity is alluring to some youth and has led to incidents of cyberbullying and bomb threats targeting schools (Valencia, 2014). Ask.fm has been blamed by parents and the media for enabling the cyberbullying that led to a series of teen suicides (Perez, 2013). Obviously, these emerging technologies have the potential to facilitate negative behaviors that impact the safety and security of students and the school environment and disrupt the operations of the school.

Within this context, school officials are challenged with “[balancing] the exercise of rights that enrich learning with order and a safe and productive school environment” (*J. S. v. Bethlehem*, 2002, p. 651). In an attempt to help school officials address this challenge, this study analyzed the current body of law related to students’ cyberspeech and search and seizure rights in the digital age. The remainder of this chapter discusses key findings from the research and recommendations to further develop the body of law.

Key Findings – Student Cyberspeech

School officials have the authority to restrict both on-campus and off-campus student cyberspeech when certain conditions are met. On-campus student cyberspeech is governed by *Tinker* and its progeny, with *Fraser* governing cyberspeech deemed vulgar, lewd, or obscene; *Hazelwood* governing cyberspeech that could reasonably be perceived as being endorsed by the school; *Morse* governing cyberspeech deemed to promote the use of illegal drugs; and *Tinker* governing all other scenarios. Off-campus student cyberspeech, the primary focus of this study, does not fit as cleanly into the standards described above. As discussed in chapters 2 and 4, when addressing off-campus student cyberspeech, courts have relied primarily on *Tinker*’s material and substantial disruption test – whether an actual disruption occurred or there was a reasonably foreseeable risk of a disruption – to determine the constitutionality of speech restrictions. When analyzed as a body of law, these types of cases sorted into three major groups.

The first group included cases where the courts upheld restrictions on cyberspeech prior to actual disruption based on reasonable foreseeability. Analysis of these cases also revealed a focus on the nature of the cyberspeech (the words themselves), with seriously threatening, slanderous, or obscene cyberspeech receiving no constitutional protection. According to these

cases, school officials have the authority to restrict off-campus student cyberspeech prior to actual disruption when it is reasonably foreseeable that the cyberspeech would reach the school and would reasonably lead to a forecast of substantial disruption. It is important to note that although the reality of the Internet increases accessibility and strengthens the case for reasonable foreseeability, proving reasonable foreseeability or forecasting a disruption can be difficult, especially if proactive measures were taken to prevent a disruption from occurring (Glenn, 2010). In addition, restrictions on cyberspeech that the facts show to be parody, or that a reasonable person would not take as serious will not find favor with the courts.

The second group includes cases where restrictions on cyberspeech were upheld due to evidence of actual disruption to the operation of the school. For these types of cases, the courts have relied on *Tinker's* substantial disruption standard. With the exception of seriously threatening cyberspeech, courts have been hesitant to apply *Tinker's* rights of others standard. According to these cases, off-campus student cyberspeech that reaches the school can legally be restricted so long as it causes material and substantial disruption to the operations of the school. As will be discussed in the following section, the courts have not provided a clear definition of substantial disruption and have relied heavily on the facts of each case. In addition, the courts lack consistency regarding off-campus student cyberspeech that targets other students. It appears as though the courts may be open to upholding restrictions on student-on-student cyberbullying if an actual disruption can be shown. However, it is concerning that determining the existence of a disruption appears to rely primarily on the level of reaction by the targeted student.

The third group includes cases where restrictions on cyberspeech were not upheld because the facts did not fit the previous two groups. Analysis of these cases highlights two key points. First, as stated in *Tinker* (1969), “undifferentiated fear or apprehension of disturbance is

not enough to overcome the right to freedom of expression” (p. 508). Second, as stated in *Beussink* (1998), “disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*” (p. 1180). Restrictions on cyberspeech that the facts show to be parody, or that a reasonable person would not take as serious will not find favor with the courts. In addition, school officials must be careful not to overreact to comments that may be offensive but do not cause substantial disruption.

Recommendations – Student Cyberspeech

While current case law has allowed for the contours of the law in this area to take shape, allowing the courts to reach some level of consistency in their rulings, two areas remain somewhat unclear and present challenges for school officials. The first involves the definition of material and substantial disruption. While not unique to cyberspeech cases, this lack of clarity makes it difficult for school officials when deciding if/when a disruption has risen to the level that will meet the standard. For instance, compare *Layshock*, where the disruption did not rise to the level of substantial, and *Donninger*, where it did. In *Layshock*, student computer usage had to be limited to the library for a period of time and computer programming classes were cancelled for about one week; whereas, in *Donninger*, where school officials were required to miss meetings and a classroom observation. Courts deciding future cyberspeech cases as well as school officials deciding whether or not to restrict cyberspeech would benefit from a clearer standard for material and substantial disruption. A detailed analysis of the facts/evidence relied upon by each court in determining whether an actual disruption met the standard is a logical next step in this research and would likely help provide the needed clarity.

The second involves student cyberspeech that targets other students. Given students’ increased reliance on cyberspeech as the primary means of communicating with each other

(Lenhart, 2012), the emergence of cyberbullying as a serious issue within the school environment (edWeb.net, 2009; Lemke, 2009; Perez, 2013), and the federal government recognizing student-on-student harassment and/or bullying as a major concern (Kowalski, 2011), it is likely that the courts will be hearing cases of this nature more frequently in the future. *Tinker's* rights of others prong would appear to be the most logical application of current legal precedent. However, as a whole, the courts have been hesitant to apply this standard with the exception of seriously threatening cyberspeech (see *Wynar*). The *J.C.* court declined to be the first to apply *Tinker's* rights of others test to regulate student cyberspeech that may cause emotional harm to another student. The courts do seem open to upholding restrictions on student-on-student cyberbullying or harassment if evidence of an actual disruption can be shown. Unfortunately, this evidence is primarily based on the response of the victim of the harassment. This presents a challenge for school officials when dealing with student-on-student speech issues and begs the question of whether school officials must wait for a potentially serious response before acting. School officials, in their efforts to maintain a safe and secure environment for students, would benefit from more clarity regarding the scope of their authority as it relates to student-on-student cyberspeech.

Key Findings – Search and Seizure

Students possess reasonable expectations of privacy and, therefore, Fourth Amendment protections in their personal mobile devices and password-protected private Web 2.0 communications. *T.L.O* governs searches of students' personal mobile devices and the courts are leaning towards a more narrow fact-based approach in their analyses. Substantive suspicion at the outset and carefully tailored searches will keep school officials from violating students' Fourth Amendment protections. *Vernonia* appears to govern cases involving searches of

students' Web 2.0 applications. The courts have limited expectations of privacy to only those Web 2.0 communications that are private, password-protected, and in a student's exclusive possession. To avoid violating constitutional protections in these types of searches, school officials should carefully weigh the intrusiveness of the search with their interest in "maintaining discipline in the classroom and on school grounds" or "deal[ing] with breaches of public order" (T.L.O., 1985, p.339). Web 2.0 postings or communications that are viewable by "friends," "followers," or the general public are not protected by the Fourth Amendment and, therefore, open to searches by school officials.

Recommendations – Search and Seizure

Based on the limited but growing body of law regarding the search and seizure of students' personal mobile devices and Web 2.0 applications, it appears as though the *T.L.O.* and *Vernonia* standards, when applied narrowly and with fidelity, allow school officials enough flexibility to investigate disputes, accusations, and reasonable suspicions without violating students' constitutional rights. One recommendation, primarily for parents and students, has emerged from the research. As mentioned previously, students seem to have a false sense of security regarding what they say and do in cyberspace. Parents and students would be wise to educate themselves in the expectations of privacy regarding students' mobile devices and Web 2.0 applications. The following guidelines will be of assistance:

- Students have a reasonable expectation of privacy in regards to their personal mobile devices and, therefore, are protected by the Fourth Amendment from unreasonable searches and seizures.
- The probable cause standard and the warrant requirement do not apply to searches within the school setting.

- So long as reasonable suspicion of wrongdoing exists, school officials do not need student or parent consent to search a personal mobile device.
- Similar to a private letter or email, students have a reasonable expectation of privacy in their password-protected private Web 2.0 correspondence (i.e. private Facebook messages that are not viewable by “friends” or the general public).
- Students do not have a reasonable expectation of privacy in their public Web 2.0 postings (i.e. tweets or Facebook wall postings that are viewable by “friends”, “followers”, or the general public).
- When students tweet or post on Facebook, they take the risk that their “friends” or “followers” will share that information with school officials. Furthermore, school officials do not violate the Fourth Amendment when they access and search a student’s Facebook postings or tweets through a cooperating witness or third party.

In closing, recent case law reveals that the application of longstanding First and Fourth Amendment precedent to student cyberspeech and search and seizure in the digital age has become more consistent over time and has allowed for a workable set of legal guidelines to take shape. For First Amendment issues, *Tinker’s* material and substantial disruption standard governs. However, two areas remain somewhat unclear. As mentioned previously, the criteria for determining when a disruption rises to the level of material and substantial has not been well defined, which presents a challenge for school officials when responding to actual disruptions or attempting to reasonably forecast a disruption. In addition, the scope of school official’s authority to address student-on-student cyberspeech that is harassing or bullying in nature appears to hinge on the response of the targeted student. This is problematic and begs the question of whether school officials must wait for a potentially serious response before acting.

For Fourth Amendment issues, the reasonableness standard set by *T.L.O.* and *Vernonia* govern, and when applied narrowly and with fidelity, allow school officials enough flexibility to maintain a safe and secure learning environment without violating students' constitutional rights.

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Wynar v. Douglas County School District, 728 F.3d 1062 (9th Cir. 2013).

Appendix A

Table A1: Recent Cyberspeech Cases Organized by Theme

Theme	Case	Date	Ruling	Rationale
Reasonable Foreseeability	<i>D.J.M. v. Hannibal Public School District #60</i>	8/1/2011	Constitutional	True threat
	<i>O.Z. v. Board of Trustees of the Long Beach Unified School District</i>	9/9/2008	Constitutional	Threatening speech led to reasonable forecast of disruption
	<i>Wynar v. Douglas County School District</i>	8/29/2013	Constitutional	Threatening speech impinged on the rights of others
	<i>Bell v. Itawamba County School Board</i>	3/15/2012	Constitutional	Slandorous speech adversely affected teacher performance
	<i>Rosario v. Clark County School District</i>	7/3/2013	Constitutional	Speech deemed legally obscene and not protected
Actual Disruption	<i>J.S. v. Bethlehem Area School District</i>	9/25/2002	Constitutional	Teacher required to take medical leave; disruption of school morale
	<i>Wisniewski v. Board of Education of the Weedsport Central School District</i>	7/5/2007	Constitutional	Teacher allowed to stop teaching student's class
	<i>Doninger v. Niehoff</i>	4/25/2011	Constitutional	School officials required to miss meetings and observations to deal with calls, emails, and upset students

(continued)

Table A1: Recent Cyberspeech Cases Organized by Theme (continued)

Theme	Case	Date	Ruling	Rationale
Actual Disruption	<i>Kowalski v. Berkeley County Schools</i>	7/27/2011	Constitutional	Student missed school to avoid further abusive speech
	<i>S.J.W. v. Lee's Summit R-7 School District</i>	10/17/2012	Constitutional	Blog was accessed on school computers; difficulty with classroom management; distracted students; local media on campus; numerous parent calls from concerned parents
Neither of the above	<i>Beussink v. Woodland R-IV School District</i>	12/28/1998	Unconstitutional	Lack of evidence supporting a substantial disruption or a reasonable forecast of substantial disruption
	<i>Killion v. Franklin Regional School District</i>	3/22/2001	Unconstitutional	Lack of evidence supporting a substantial disruption or a reasonable forecast of substantial disruption
	<i>Evans v. Bayer</i>	2/12/2010	Unconstitutional	Lack of evidence supporting a substantial disruption or a reasonable forecast of substantial disruption
	<i>J.S. v. Blue Mountain School District</i>	6/13/2011	Unconstitutional	Lack of evidence supporting a substantial disruption or a reasonable forecast of substantial disruption
	<i>Layshock v. Hermitage School District</i>	6/13/2011	Unconstitutional	Lack of evidence supporting a substantial disruption or a reasonable forecast of substantial disruption

(continued)

Table A1: Recent Cyberspeech Cases Organized by Theme (continued)

Theme	Case	Date	Ruling	Rationale
Neither of the above	<i>R.S. v. Minnewaska Area School District No. 2149</i>	9/6/2012	Unconstitutional	Lack of evidence supporting a substantial disruption or a reasonable forecast of substantial disruption
	<i>Emmett v. Kent School District No. 415</i>	2/23/2000	Unconstitutional	Not a true threat; lack of evidence supporting a substantial disruption or a reasonable forecast of substantial disruption
	<i>Mahaffey v. Aldrich</i>	11/26/2002	Unconstitutional	Not a true threat; lack of evidence supporting a substantial disruption or a reasonable forecast of substantial disruption
	<i>J.C. v. Beverly Hills Unified School District</i>	5/6/2010	Unconstitutional	Student’s response to harassing speech found to not rise to the level of “substantial” disruption (in contrast to <i>Kowalski</i>)
	<i>Coy v. Board of Education of the North Canton City Schools</i>	4/29/2002	Unconstitutional	Student cyberspeech not heard or seen by anyone, therefore, no disruption

Appendix B

Table B1: Recent Search and Seizure Cases Organized by Category

Category	Case	Date	Ruling	Rationale
Mobile Device	<i>Klump v. Nazareth Area School District</i>	3/30/2006	Unconstitutional	Not justified at inception - no reason to suspect the search would turn up evidence of wrongdoing; used search to attempt to catch other students' violations
	<i>J.W. v. Desoto County School District</i>	11/1/2010	Constitutional	Justified at inception - student was caught violating cell phone policy; reasonable in scope - search was limited to photos on phone
	<i>Mendoza v. Klein Independent School District</i>	3/16/2011	Unconstitutional	Justified at inception – accessed outgoing texts to determine if phone was used in violation of cell phone policy; not reasonable in scope – no reason to search texts further
	<i>G.C. v. Owensboro Public Schools</i>	3/28/2013	Unconstitutional	Not justified at inception – background knowledge of students' past tendencies or wrongdoing does not justify search
Web 2.0	<i>R.S. v. Minnewaska Area School District No. 214</i>	9/6/2012	Unconstitutional	Reasonable expectation of privacy in private, password-protected messages; level of intrusion outweighed governmental concern
	<i>Rosario v. Clark County School District</i>	7/3/2013	Constitutional	No reasonable expectation of privacy in tweets, therefore, not protected by 4 th Amendment