

FREE SPEECH AND PRIVACY DIMENSIONS OF STUDENT MISUSE OF THEIR OWN ELECTRONIC COMMUNICATION DEVICES IN ELEMENTARY AND SECONDARY SCHOOLS

A REVIEW OF THE ISSUES AND RELATED LAW¹

March 2013

This outline sets forth major free speech and privacy issues and concerns relating to student use/misuse of electronic communication devices (ECDs) in public schools.² The state law focus here is California, but state law is similar in many other states. In addition, because relatively few courts have decided cases involving student ECD misuse, this discussion includes case law from state and federal courts across the country.

As noted herein, the law is evolving in this area, and much uncertainty exists. Electronic communication has broken down the traditional barrier between speech at school and speech away from school. And at the same time, educators are working to capitalize on student familiarization with using ECDs by incorporating their use in teaching, learning, and communicating.

It is important to note at the outset that constitutional rights of freedom of expression and privacy normally are inapplicable in the context of private schools. However, California Education Code Section 48950 does give private secondary school students the same rights of free speech on campus as they enjoy off campus under both the federal and California constitutions. An exception is students attending religious private schools if inconsistent with the school's religious tenets.

While private secondary students have a right to free speech on campus in California, a school could ban the use of ECDs at school and school-related activities. As noted below, the same is true for public schools. However, in both instances, the ban may be difficult to enforce. Still, for private schools, the contract for private tuition may specify both the terms of admission and continuing enrollment. Failure to comply with the school's regulations could result in disciplinary action including expulsion.

There are currently no California cases dealing directly with off-campus ECD use by private school students.³ However, the Alabama Supreme Court has found that a private

¹ Note: This discussion is informational only and is not intended to take the place of expert advice and assistance from a lawyer. If specific legal advice or assistance is required, the services of a legal professional should be sought.

² For a full discussion of student expression rights in California, see pp. 221-243 in Frank Kemerer and Peter Sansom *California School Law* (Stanford University Press, 2009, second edition) and the cumulative update posted on book's website at www.californiaschoollaw.org. For Texas, see pp. 221-261 in Jim Walsh, Frank Kemerer, and Laurie Maniotis *The Educator's Guide to Texas School Law* (University of Texas Press, 2010, seventh edition) and its 2012 Supplement.

³ *D.C. v. R.R.*, a 2010 case, does revolve around issues stemming from private school students' use of speech via an ECD, however, the litigation in that case is focused on such narrow issues, it is not relevant for discussion here. A deeper look at this case is presented in sections 8-e and 8-b below.

school student who violates the terms of a school handbook may be expelled even if the violation occurs off-campus. (*S.B. v. Saint James School*, 959 So.2d 72 (2006)). In this case, two ninth grade students were expelled from a private school after emailing lewd photographs of themselves to another student. Upon enrolling in the school, each student and parent received a student handbook, which stated that “[o]ff-campus behavior which is illicit, immoral, illegal and/or which reflects adversely on Saint James” will subject a student to immediate expulsion. Each student and his or her parent signed a pledge promising to abide by the student handbook and were aware of its provisions.

Although not binding authority in states other than Alabama, this case suggests that a private school can properly discipline or expel a student for off-campus misuse of electronic communication devices, provided the student had notice of the school rules or regulations. As will become clear below, the matter is not nearly so easy to handle in public schools because, unlike private schools, public schools must recognize the constitutional right of their students (and teachers) to free speech.

This outline reflects important legal developments through March 1, 2013. It will be updated periodically.

1. Student Expression Rights Generally in Public Schools

- a. Public school students have a right to freedom of expression at school under a seminal U.S. Supreme Court decision (*Tinker v. Des Moines School District*, 393 U.S. 503 (1969)). That decision was based on the free speech clause of the First Amendment to the U.S. Constitution. The Court noted that if school officials can establish that the speech created a material disruption or substantially interfered with the rights of others, then the speech loses its protection and the behavior can be grounds for student discipline.
 - However, *Tinker* does not address student off-campus speech.
 - The students in *Tinker* were all at the secondary level. The armband rule at issue in *Tinker* applied only to secondary school students. Two elementary students who wore their armbands to school were not suspended and were not referenced in the majority opinion. Federal courts recognize that elementary students have some degree of freedom of expression, but the contours are not well defined and generally less extensive, given the age of the students.
- b. Article I, Section 2 of the California Constitution, like many state constitutions, explicitly provides protection to “every person” for freedom of speech and of the press.

- c. California Education Code (All statutory references are to the California Education Code unless otherwise indicated) Section 48950 gives secondary students at traditional public, charter, and private schools the same rights of expression on school grounds as off them but does allow imposition of discipline for harassment, threats, or intimidation “unless constitutionally protected.” As noted earlier, the statute does not apply to private schools if inconsistent with their religious tenets. The “unless constitutionally protected” clause prevents wholesale outlawing of harassment, threats, or intimidation. Mild versions of these can be merely disputatious speech. Section 48907 conveys freedom of speech and of the press to students in traditional public and charter schools, but not private schools. It provides that speech and press rights include but are not limited to the wearing of buttons and badges, distribution of printed materials, and school publications at school and does not have an age limitation. It permits districts to enact “valid rules and regulations relating to oral communication by pupils upon the premises of each school,” yet it limits prohibited expression to speech which is “obscene, libelous, or slanderous,” or that which incites pupils to commit unlawful acts on school premises or violates school regulations.
- School districts should be aware that under Section 48950 (b), students may bring a lawsuit against the school district for making or enforcing a rule that “subject[s] a high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction” by either the United States or California Constitutions. If the student’s lawsuit is successful, he or she may also recover their attorneys’ fees.
 - Section 48900 (r) provides that students who engage in bullying may be suspended or expelled. Bullying is defined to mean any severe or pervasive physical or verbal act or conduct, including communications in writing or by means of an electronic act, committed by a student or group of students that constitutes sexual harassment, hate violence, or threats or intimidation and that is directed toward one or more students. To be grounds for discipline, bullying or cyberbullying must place a student or students in fear of harm to themselves or property; cause substantial detrimental effect to physical or mental health; cause substantial interference with academic performance; or cause substantial interference with ability to participate or benefit from services, activities, or privileges provided by a school. This subsection defines “electronic act” to mean the transmission of a communication including, but not limited to, a message, text, sound, or image, or a post on a social communication network by means of an ECD. Included in this are “burn pages” which refer to

internet webpages created for the purpose, or having the effect of bullying, as described above; knowingly creating a credible impersonation of another student without their consent, or creating a false profile of a fictitious student or creating a false profile using the likeness of an actual student, all with the purpose or having the effect of bullying, as described above. This rule can be applied to students for acts related to school activity or attendance that occur at any time, including while on school grounds, going to and from school, during lunch period on or off campus, and during or coming to/from a school-sponsored activity.

- Section 48901.5 authorizes school districts to regulate the possession or use of any electronic signaling device (e.g., cell phone) by pupils while the pupils are on campus, while attending school-sponsored activities, or while under the supervision and control of school district employees, unless such device is necessary for the health of the student as determined by a licensed physician and surgeon.
- Section 51512 requires prior consent for a student or any other person to use any electronic listening device or recording device in the classroom to promote an educational purpose. Failure to comply is grounds for discipline and is classified as a misdemeanor (predates development of cell phones, but will encompass them).
- Section 51871.5 requires recipients of education technology grants to educate students and teachers in compliance with guidelines issued by the California Superintendent of Public Instruction on the appropriate and ethical use of information technology in the classroom. These include internet safety, plagiarism, and the significance of copyright law. So far, efforts to extend this law to encompass cyberbullying, sexting (the act of sending sexually explicit photos electronically) and harassment have not been successful.
- The U.S. Court of Appeals for the Ninth Circuit, whose jurisdiction encompasses California in addition to a number of other western states, has ruled that threats that can be reasonably perceived by those to whom the communication is made as a serious expression of intent to harm or assault are not protected by the First Amendment nor by Section 48950 (*Lovell v. Poway Unified School District*, 90 F.3d 367 (9th Cir. 1996)).
- While this review does not encompass criminal law, one provision of the California Penal Code directly addressed electronic communication devices. Penal Code Section 653.2 provides that

any person who through use of an ECD intends to place another person in fear for his or her safety or the safety of the person's family and, without the person's consent, electronically transmits personally identifying information such as a digital image or harassing comments to a third party for the purpose of causing unwanted physical contact, injury, or harassment to the person is guilty of a misdemeanor punishable up to a year in jail and/or a fine of not more than \$1,000 if the electronic communication likely would cause such harm.

- d. Limits for student expression on *school-owned and controlled* ECDs normally are set forth through acceptable use policies (AUPs). Students and parents must sign the AUP forms indicating they will comply with the regulations. This discussion does not encompass AUPs. These policies should be consulted directly to determine appropriate use of school-owned ECDs on and off campus.

There are significant legal concerns arising regarding the effectiveness of AUPs within the expanding context of digital learning. In the future, we plan to explore these issues and develop a model AUP that would apply to students.

- e. While school districts can control through filtering and blocking what can be accessed through the district's internet access route, students usually have access to the internet through their own cellular devices. Such access creates problems for controlling misuse on campus.

2. Limiting Use of Student-owned ECDs at Public Schools

- a. Banning ECDs from campus.
- *Is this viable?* Probably not when schools are increasingly capitalizing on student use of ECDs by incorporating them in the instructional program. Enforcing such a rule may be quite difficult.
 - *Would a ban violate parent rights to communicate with their children?* A New York appellate court has ruled that a ban on student cell phone possession at school does not infringe on parental rights. New York City schools instituted the ban because it is easier to enforce than a restriction on cell phone use on campus, given the surreptitious manner of accessing cell phones. The court noted that exceptions could be granted in certain situations (e.g., medical needs, safety issues on the way to and from school) (*Price v. New York City Board of Education*, 51 A.D.3d 277 (N.Y.A.D.1 Dept. 2008)). However, when parents insist that their children have access to ECDs at school for

reasons of safety, a complete ban may not be politically viable. Note Cal. Educ. Code Section 48901.5 above regarding a condition on complete ban of ECDs.

- b. Imposing time, place, manner rules for ECD use at school (e.g., no ECD use during classes, in bathrooms, or in locker rooms) is another way to control misuse without infringing significantly on free speech. Section 51512 prevents use of electronic listening or recording devices in classrooms without teacher knowledge and consent. Sometimes these kinds of rules are difficult to enforce because school personnel are not always present when ECDs can be accessed. Enforcement is more likely to be effective at the elementary school level than at the secondary school level.

3. Disciplining Students for Misuse of Student-owned ECDs at School

- a. Lewd, profane, indecent speech at school or school-related activities is not protected free speech under the First Amendment (*Bethel School District v. Fraser*, 478 U.S. 675 (1986)).⁴ Sexting – the act of sending sexually explicit photos electronically, primarily between cell phones – falls into this category. But note that *Fraser* focuses on speech at school or a school-related activity. It does not encompass similar speech outside of school. Indeed, in the 2007 U.S. Supreme Court’s *Morse v. Frederick* decision noted below, the majority noted that “Had *Fraser* delivered the same speech in a public forum outside the school context, it would have been protected.”
- b. Threats of physical violence on or off campus are not protected by the First Amendment nor by Section 48950 (*Lovell v. Poway Unified School District*, 9th Cir. 1996). (See Section 1-c above for citation).
- c. Messages and images advocating drug trafficking/use at school or school-related activities are not protected free speech under the First Amendment (*Morse v. Frederick*, 127 S.Ct. 2618 (2007) -- the “Bong Hits 4 Jesus” banner case). But what constitutes “advocating drug trafficking/use”? It is possible that the broader protection of free speech in California gives greater protection to student speech involving drugs (e.g., a sign or

⁴ Although the *Fraser* decision supports school districts that wish to discipline students who use lewd, profane or indecent speech at school, California highly values students’ right to free speech and this may cause inconsistency in how California courts treat similar cases. Two sections of the California Education Code in particular appear to grant broad free speech rights to students. As noted in section 1-c above, Cal. Educ. Code Section 48907 only prohibits expression that is “obscene, libelous, or slanderous” or that incites pupils to commit unlawful acts on school premises, violate lawful school regulations, or cause a substantial disruption at school. Further establishing student rights, Cal. Educ. Code Section 48950 states that a school district may not discipline a student for speech that is otherwise protected under the First Amendment. These two sections create a potential discrepancy from the Supreme Court ruling in *Fraser* that has yet to be clarified by California courts.

petition at school advocating the legalization of marijuana). The law on this point has not yet developed. Clearly, student rules and their enforcement must adhere to the strong protection given student expression under California law (see Sections 1-b and 1-c above).

- d. Expression on campus or at school-related events that creates material disruption or substantial interference with the rights of others loses constitutional protection (*Tinker v. Des Moines School District*, U.S. Sup. Ct, 1969). Student ECD misuse falls into this category when there is documented evidence to meet the conditions (e.g., taking photos in a locker room).

4. Disciplining Students for Misuse of Student-owned ECDs Off Campus

- a. Does the U.S. Supreme Court's ruling in *Bethel School District v. Fraser* apply to student lewd, indecent, and profane speech occurring off-campus? Given that students are acting as citizens away from school and normally communicate in this mode, the school risks litigation for infringing on student free speech rights by disciplining them for this form of communication. Note that *Fraser* applied only to this kind of speech occurring on campus. The U.S. Court of Appeals for the Second Circuit has expressed reservations on the matter, preferring to rely on *Tinker* instead of *Fraser*. See *Doninger v. Niehoff* (2008) in Section 5-b below.
- b. Threats of physical violence against faculty or students made off campus are not protected by the First Amendment nor by Section 48950 (*Lovell v. Poway Unified School District*, 9th Cir. 1999). (See Section 1-c above).
- c. Does the U.S. Supreme Court's *Morse v. Frederick* decision apply to student drug-use comments made on their own ECDs outside of campus? The Justices in *Morse* construed the unfurling banner to have occurred at school. Suppose, for example, a student posts a Facebook message supporting the use of marijuana and sends it to his Facebook friends. School likely cannot discipline students unless somehow it implicates the interests of the school. See the reasonable foreseeability test advanced by the U.S. Court of Appeals for the Second Circuit's *Doninger v. Niehoff* (2008) decision referenced in Section 5-b below.
- d. Since *Tinker* applied to speech at school and not off campus, the linkage between student misuse of their own ECDs off campus and the legitimate interests of the school must be clearly established for discipline to be imposed. See in particular the *Doninger v. Niehoff* analysis in Section 5-b below. It would appear that in addition to establishing reasonable foreseeability, school officials must be able to document *material* disruption and *substantial* interference with the rights of others, given that the speech did not occur on campus.

5. Selected Case Law Involving Student Misuse of Their Own ECDs Off Campus

a. ECD use off campus protected by the First Amendment

- *T. V. v. Smith-Green Community School Corp.*, 807 F.Supp. 2d 767 (N.D. Ind. 2011). In this lengthy and carefully reasoned decision, a federal district court judge ruled in favor of two tenth grade girls who were suspended from the volleyball team and one of the two from the cheerleading squad after raunchy photos of them taken at a summer sleepover surfaced at school. The two girls bought phallic-shaped rainbow-colored lollipops that they sucked on, among other things, at the sleepover. One photo bore the caption “Wanna suck on my cock.” They also displayed a toy trident in various sexually suggestive ways. One of the students posted the photos on her MySpace and Facebook accounts where they were accessible to persons she permitted access (known as “friending”). Two parents told school officials about the photos, and news about them caused some divisiveness on the volleyball team. The students through their parents sued the school district and the principal over the suspensions.

Although the judge noted that the student speech did not “call to mind high-minded civic discourse about current events,” he nevertheless ruled that, though juvenile and silly, the images of the horsing around were expressive in nature and fell within the context of the First Amendment. The uploading of the images to the social communication networks also fell within the context of the First Amendment. The school district initially argued that the speech was obscene and pornographic but later abandoned this argument. The judge agreed that the images didn’t fall into either category. Nor did the U.S. Supreme Court’s *Fraser* decision apply, given that the speech occurred outside of the school. The judge also noted that the high court’s *Tinker* ruling applies to student expression at school including athletic and extracurricular activities. And here, there was no material disruption or interference. “At most,” the judge noted, “this case involved two complaints from parents and some petty sniping among a group of 15 and 16 year olds.”

While the judge ruled in favor of the students, he did not hold either the school district or the principal liable for damages. The school district was immune under the Eleventh Amendment to the U.S. Constitution, and the principal was entitled to qualified immunity because the extent of student speech rights involving off-campus speech and the internet is still developing and not well settled.

Significantly, the judge also found the rule that the school relied upon to discipline the student to be both unconstitutionally overbroad and vague. The rule governing the extracurricular activities read in part “If you act in a manner in school or out of school that brings discredit or dishonor upon yourself or your school, you may be removed from extra-curricular activities for all or part of the year.” The judge pointed out that bringing “discredit or dishonor” could extend to protected speech such as participating in a political or social demonstration. The terms are likewise lacking in specificity to convey to students exactly what would be grounds for discipline, thus making the rule unconstitutionally vague. The judge issued an injunction against enforcement of the standard.

- *Layshock v. Hermitage School District*, 650 F.3d 205 (3rd Cir. 2011) and *J.S. v. Blue Mountain School District*, 650 F.3d 915 (3rd Cir. 2011). The litigation in these two companion cases has been extensive, resulting in final decisions involving all judges assigned to the Third Circuit.

In *Layshock*, the court upheld the district court’s decision in favor of high school senior, Justin Layshock, finding that the MySpace profile he created on a computer at his grandmother’s house in the principal’s name was protected free speech under the First Amendment. The parody centered on the word “big” and included such comments as “big fag,” “big hard-on,” “big steroid freak.” Layshock sent the profile to his MySpace friends, and word of the profile reached most students at school. Students were able to access the profile on school computers until it was eventually blocked. The school principal learned about the profile from his daughter. The district did not argue on appeal that the parody created material and substantial disruption at school. Rather, they asserted Layshock’s entry on to the school district’s website to copy the picture of the principal constituted a trespass violation. The appellate judges rejected the argument outright. Furthermore, “[i]t would be an unseemly and dangerous precedent,” the judges wrote, “to allow the state, in the guise of school authorities, to reach into a child’s home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities.” The judges also rejected the assertion that *Fraser* allowed the school district to punish Layshock for offensive expression occurring outside of school. In the absence of foreseeable and substantial disruption at school, school administrators are without justification to discipline a student for off-campus speech. Here that test from *Tinker* was not met.

In the *J.S.* case, a student and her friend used a home computer to create a parody MySpace profile of her school principal, which insinuated that the principal was a sex addict and pedophile. The page included a photo of the principal taken from the school website. Although the student allowed other students to access the profile, MySpace access was blocked on school computers, and no student viewed the profile while at school. After another student informed the principal and brought a printout of the page to school, the student and her friend were suspended for ten days. The principal declined to press charges against J.S., but he did contact the police who summoned the two students and parents to the police station to discuss the matter. The majority agreed that the suspension violated J.S.'s rights. They noted no substantial disruption at school had occurred. They also noted that J.S. had not intended for the speech to reach the school and had taken steps to limit access to the profile so that only her MySpace friends could view it. They also declined to apply the *Fraser* lewdness exception to profane speech occurring outside the school and during non-school hours. The dissenting judges asserted that while the speech did not cause material disruption, it had the potential to do so by undermining the principal's authority and by undermining classroom learning. J.S.'s limiting the profile to her internet friends still meant that twenty-two students were involved in the matter. Thus, the suspension was warranted in their view.

What is interesting about the *J.S.* decision are differences among the judges on whether *Tinker* applies to off-campus student speech in the first place and, if so, in what way. This will be a matter that the U.S. Supreme Court eventually will have to address. Note as well that the school principal in the *J.S.* case certainly caught the attention of the two students and their parents by alerting the police and consenting to have them discuss the matter with the students and their mothers. In October 2011, attorneys for the Hermitage School District and Blue Mountain School District filed a joint petition seeking review by the United States Supreme Court of the Third Circuit's decisions in both *J.S.* and *Layshock*. The petition asked the Supreme Court to clarify "whether and how *Tinker* applies to online student speech that originates off campus and targets a member of the school community" and "whether and how *Fraser* applies to lewd and vulgar online student speech that originates off campus and targets a member of the school community." Attorneys for the school districts argued that Supreme Court review was necessary because "lower courts have given conflicting answers to these questions. The legal uncertainty is generating tremendous confusion and wasting resources in thousands of school districts across the country, where these issues arise on nearly a daily basis." However, the Supreme Court refused to review

the case, without comment, thereby further delaying clarification of these issues. 132 S.Ct. 1097 (2012).

- *Evans v. Bayer*, 684 F.Supp.2d 1365 (S.D. Fla. 2010). Senior high school student Katherine Evans created a group on Facebook on her own computer after school labeling a named teacher “the worst teacher I’ve ever met.” A photograph of the teacher was included. The student invited others to join in expressing their dislike of this teacher. Three postings appeared on the page supporting the teacher and criticizing Evans for the posting. After two days, Evans removed the posting. The teacher never saw the posting, and there was no disruption of school activities. The school principal, Peter Bayer, learned about the posting and suspended Evans from school for three days for bullying/cyberbullying towards a staff member and for disruptive behavior. He also removed her from her advanced placement classes into lesser weighted honors classes. Evans opted to file a lawsuit against the principal individually and not the school district under 42 U.S.C. Section 1983, a well-known federal civil rights law that enables persons to file lawsuits in federal court over alleged constitutional rights violations. She maintained that the suspension violated her First Amendment rights. Among other remedies, she sought nominal damages from the principal and attorneys’ fees. The principal filed a motion to have the lawsuit dismissed.

The federal magistrate rejected the principal’s motion. Citing earlier decisions described below, the magistrate noted that off-campus student speech is entitled to a wide umbrella of First Amendment protection. Here, the student was expressing her own opinion about the teacher off-campus in a non-vulgar and non-threatening way. The potential for disruption at school ended when the posting was removed after two days. Thus, based on the U.S. Supreme Court’s *Tinker* decision, the speech was clearly protected, and the principal should have known this to be the case. Bayer’s motion to dismiss the student’s claim for nominal damages against him was denied. The lawsuit could proceed and, if the student were to prevail, the principal also could end up paying her attorneys’ fees. The magistrate also ruled that the student could amend her complaint to seek injunctive relief against the principal acting in his official capacity as a school principal in the district in order to have her records purged of the disciplinary action. Subsequently, the case was settled. The suspension was removed from Evans’s record, and she received \$15,000 in legal fees and \$1 in nominal damages.

The lesson here is that administrators need to be sufficiently aware of the dimensions of protected student free speech to avoid liability under 42 U.S.C. Section 1983. Being sued in one's individual capacity as Bayer was here means that any liability will be borne by the named school official if it can be shown that the school official knew or should have known that the actions violated a person's constitutional rights.

- *J.C. v. Beverly Hills Unified School District*, 711 F.Supp.2d 1094 (C.D. Cal. 2009). A federal district court ruled that school officials in this district did not have justification for suspending a thirteen-year-old student after she made a videotape outside of school containing disparaging remarks about a fellow student. On the four-minute videotape, several students labeled the student with the initials C.C. a "slut," "spoiled," and "the ugliest piece of shit I've seen in my whole life," among other things. J.C., who made the videotape, posted it on YouTube that night and invited others students to view it. She also contacted the targeted student regarding the videotape. The next day, C.C. and her mother spoke with school officials about the incident. After 25 minutes of speaking with a counselor, C.C. agreed to attend classes. Later, school officials suspended J.C. for two days. J.C., through her parents, sought to overturn the suspension and seek money damages. She was successful in securing the former, but not the latter.

The federal judge ruled against the school district, noting that there was no material or substantial disruption of school activities. Students could not access YouTube through the school computers and there was no evidence they were doing so through their cell phones at school. Significantly, the court noted that it "is not aware of any authority...that extends the *Tinker* rights of others prong so far as to hold that a school may regulate any speech that may cause some emotional harm to a student. This Court declines to be the first."⁵

⁵ Interestingly, the court did not reference a decision handed down in 1977 by the U.S. Court of Appeals for the Second Circuit. In *Trachtman v. Anker*, 563 F.2d 512, that court agreed with the school district that an optional sex questionnaire that members of the school newspaper wanted to distribute to high school students with the findings published in the newspaper would substantially interfere with the rights of immature students to develop sexual identities free from psychological pressure. Medical experts testified to support the school's position. The appellate judges ruled that under these circumstances, prohibiting distribution of the questionnaire did not violate the First Amendment rights of the newspaper editors. Of course, this case did not involve off-campus student free speech where First Amendment protection is higher. But it does suggest that the substantial interference with the rights of others test from *Tinker* would be strengthened if testimony from psychologists and medical experts were introduced. In the *J.C.* case, the judge noted that C.C., the targeted student, spent only a short time with the school counselor before returning to class. Thus, there was no substantial interference with her rights.

- *Requa v. Kent School District*, 492 F.Supp.2d 1272 (W.D. Wash. 2007). A student surreptitiously videotaped a teacher in class focusing on her buttocks, student making signs behind her, etc. The videotape with added audio and graphics was posted on YouTube outside of school. The matter came to the attention of the school community when a reporter came across the videotape on YouTube and wrote a story published in the local newspaper. The school imposed discipline on the student based on the videotaping in the classroom contrary to a school rule. The videotape also was a form of sexual harassment prohibited by a discipline rule. The school explicitly recognized that the YouTube posting is a form of protected expression, a point with which the court agreed. The judge refused to grant the student a restraining order against his suspension, noting the legitimacy of the school's disciplinary action in the context of the on-campus videotaping.
- *Latour v. Riverside Beaver School District*, 2005 WL 2106562 (W.D. Penn. 2005) (not reported—meaning that it cannot serve as a judicial precedent but nevertheless is instructive). In this unpublished case, middle school student Anthony Latour wrote and recorded rap songs in his own home, published the songs on the internet, and sold them in the community. Four of Anthony's songs were at issue. One song mentioned another student, known as "Jane Smith;" a second song was entitled "Murder, He Wrote;" the third song consisted of a battle rap with "John Doe" and was called "Massacre;" the last song was titled "Actin Fast ft. Grimey." The school board expelled Anthony for two years, banned him from attending school-sponsored events, and forbade him from being present on school grounds after hours. Anthony and his parents sought an order from the court preventing the school board from instituting the above punishment, based on Anthony's right to free speech.

The court first addressed whether the rap songs were "true threats," which are not entitled to constitutional protection. True threats are defined as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . ." The court found that Anthony did not intend actual violence in his songs, did not communicate the songs directly to Jane Smith or John Doe, neither Jane Smith nor John Doe actually felt threatened by the songs, and that because Anthony had no history of violence, the songs were not likely true threats and would likely be entitled to First Amendment protection.

The court next examined whether the songs caused a material and substantial disruption to the school day, in which case the school board could justifiably punish Anthony for his off-campus speech under the *Tinker* standard. The school district argued that the songs disrupted the school day because it feared the alleged victims would withdraw from the school, some students wore t-shirts with messages in support of Anthony, and some students talked about Anthony's expulsion. The court found that although Jane Smith did leave the district, it was due to "a multitude of issues" apart from the rap song, which was only "the straw that broke the camel's back." John Doe was kept out of school by his mother, but only because she feared that he might be hurt in school as a result of Anthony's arrest, not due to the songs themselves. Thus, the court concluded that first, any disruption that occurred at school was not substantial and second, the disruption was the result of Anthony's punishment rather than the songs that he wrote. Therefore, the court found in favor of Anthony.

This case highlights the importance of distinguishing any disruption caused by a student's speech itself from disruption caused by the school district's reaction to the speech. If any disruption on campus (such as students expressing support for the punished student or discussing the punishment of the student) was caused entirely by the school's response to the student's speech, as occurred in *Latour*, it might not be sufficient to meet the *Tinker* standard.

- *Flaherty v. Keystone Oaks School District*, 247 F.Supp.2d 698 (W.D. Penn. 2003). High school student Jack Flaherty, Jr. posted four messages to an Internet message board—three messages were sent from his parents' home and one was sent from school while he was in journalism class. The messages related to the school's volleyball team and an upcoming match against another school. Flaherty's posts insulted the opposing team and their players, calling them "purple panzies," telling them to "eat my wad ho," and claiming that the mother (a teacher at Flaherty's school) of a player on the opposing team was a bad teacher. School officials punished Flaherty for these postings, although the court opinion does not make clear the extent of punishment or how the officials found out about the postings. Flaherty was punished pursuant to provisions of the school's student handbook that directed students to "express ideas and opinions in a respectful manner so as not to offend or slander others," and to refrain from the "use of computers to receive, create or send abusive, obscene, or inappropriate material and/or messages." Flaherty sued, claiming that the handbook policies were unconstitutionally vague and overbroad in that school officials were permitted to punish students for speech that

occurred away from school and for speech that did not materially and substantially disrupt the school day, based on the *Tinker* standard.

The defendants argued that the student handbook provisions were not overbroad because they were limited by school board policies giving school district employees the authority “to control the disorderly conduct of students in all situations and in all places where such students are within the jurisdiction of this Board and when such conduct interferes with the educational program of the schools or threatens the health and safety of self or others.” The judge rejected this argument because the board policies were neither referred to nor incorporated in the student handbook. Furthermore, even if the policies had been mentioned in the student handbook, they violated the *Tinker* standard as well. The student handbook sections were also overbroad because they placed no geographical limitations on the authority to punish student speech—students could be disciplined for speech occurring outside of school premises and unrelated to any school activity. As such, the judge concluded that the student handbook provisions used to punish Flaherty were unconstitutionally overbroad.

The judge found that the handbook provisions were unconstitutionally vague as well, because the terms “abuse, offend, harassment, and inappropriate” were not adequately defined in a way that would put students on notice of the sort of conduct that was prohibited. The provisions were vague in application and interpretation such that they could be enforced arbitrarily. The principal of the school testified that he believed he could discipline a student for any speech that brought “disrespect, negative publicity, negative attention to our school and to our volleyball team,” even if it did not substantially disrupt the school as required by the *Tinker* standard.

The outcome of *Flaherty* illustrates the importance of defining and crafting policies for punishing electronic speech so that both students and staff have an understanding of what off-campus speech may be subject to discipline. Any provisions allowing for discipline must be adequately defined and limited to the *Tinker* standard.

- *Mahaffey v. Aldrich*, 236 F.Supp.2d 779 (E.D. Mich. 2002). A high school student participated in creating a website entitled “Satan’s web page.” It included names of persons “I wish would die,” persons “that are cool,” “movies that rock,” etc. At end of the webpage the student added a message that the website was just for laughs and advised readers not to go “killing people and stuff then blaming it on me, ok?” Parent learned of the website and informed police who told the school. The student was suspended. He told police that the school’s

computers may have been involved in creating the website, but the school never established that this occurred or that disruption occurred at school. The court granted the student's motion for summary judgment against the district, noting "[a]lthough other students did see the website, there is no evidence that they did so because Plaintiff 'communicated' the website to them or intended to do so. Further, other than listing the names of other students on the website, there was no threat made against any of the students." The court noted the disclaimer at the end of the posting. Thus, the website and the statement included on it were protected speech. (Note: there is no evidence here of reasonable foreseeability on the part of the student as envisioned in the *Doninger* case in the next section, 5-b below. Note also that had it been established that the student had used the school's computers and had violated a provision of the acceptable use policy (AUP), the outcome likely would have been different.)

- *Killion v. Franklin Regional School District*, 136 F.Supp.2d 446 (W.D. Pa. 2001). A disgruntled student athlete composed a "Top Ten" list about the athletic director on his home computer and emailed the list to friends. The list was very negative, including such comments as "[b]ecause of his extensive gut factor, the 'man' hasn't seen his own penis in over a decade" and "[e]ven if it wasn't for his gut, it would still take a magnifying glass and extensive searching to find it." Another student distributed the email on school grounds. The writer was suspended from school and from participating in track for violating a school rule against "verbal/written abuse of a staff member." The federal district court judge observed that "school officials' authority over off-campus expression is much more limited than expression on school grounds." While the email may have been discomforting to the athletic director, there was no evidence of material disruption at school. The judge also agreed that the school rule was vague and overbroad (e.g., "abuse" can encompass protected speech). He ordered the student reinstated.
- *Emmett v. Kent School District*, 92 F.Supp.2d 1088 (W.D. Wash. 2000). Eighteen-year-old senior with a GPA of 3.95 and no disciplinary history posted a webpage on the internet from his home using his own computer. The website was entitled "Unofficial Kentlake High Home Page" and included disclaimers that it was not school-sponsored and for entertainment only. Among other things, the website posted mock "obituaries" of several of the student's friends and asked readers to vote on who next should be the subject of a mock obituary. They were written humorously and stemmed from a creating writing class where the students were directed to write their own

obituary. The website became common knowledge at school. Then an evening TV news show featured a story about the website, characterizing it as featuring a “hit list.” The next day student removed the website from the internet. He was suspended from school for intimidation, harassment, disruption of the educational process, and copyright infringement. The student sought a temporary restraining order on enforcement of the suspension. The federal district court judge granted it, noting the student would likely prevail on the merits at trial because the school had no evidence that the mock obituaries or website voting were intended to threaten anyone or that anyone actually felt threatened. Missing four days of school and participating in the basketball team’s playoff game if the suspension were allowed constituted irreparable harm in the court’s opinion.

- *Beussink v. Woodland R-IV School District*, 30 F.Supp.2d 1175 (E.D. Mo. 1998). A high school student created a homepage on the internet on his home computer. On the homepage, he used vulgar language to convey his opinion regarding the teachers, principal, and the school’s homepage. The student had earlier been disciplined for inappropriate use of the school’s computers. He also had been banned from using them because of disrespectful comments to the school librarian. On his homepage, Beussink invited readers to contact the school principal and convey their opinions to him. He placed a hyperlink on his homepage to the school’s homepage. A female friend of the student accessed his homepage from school because she was angry with him and showed it to her teacher. There was no disturbance when this occurred. Testifying that he was upset by the contents of the posting, the principal opted to discipline Beussink by suspending him for ten days. The suspension in combination with earlier unexcused absences caused the student to fail all his classes. Noting irreparable harm for prohibition of exercise of First Amendment rights, the court overturned the student’s suspension, adding that “[d]isliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under *Tinker*” (p. 1180).

Note: The court pointed out that the principal did not cite any significant disruption or interference with the rights of others. Rather, he referenced his displeasure with the comments on the homepage. The same seems apparent from the *Killion* decision above. Compare these decisions with the *Doninger* and *Wisniewski* decisions in the next section. It appears that the key difference is convincing documentation of material disruption/substantial interference with the rights of others from *Tinker*.

b. ECD use off campus not protected by the First Amendment

- *Bell v. Itawamba County School Board*, 859 F.Supp.2d 834 (N.D. Miss. 2012). Drawing on the *Wisniewski* decision (see later in this subsection) and construing the U.S. Supreme Court's *Tinker v. Des Moines School District* decision to apply to off-campus speech, the federal district court judge upheld a school board's suspension of a high school student for a rap song the student had composed, sang, and posted on Facebook and YouTube. The rap song criticized two school coaches in vulgar language (e.g., "dirty ass nigger," "fucking," "pussy"), alleging they had improper contact with female students. The judge agreed with the findings of the Discipline Committee that the lyrics constituted harassment and intimidation of teachers and was reasonably foreseeable to cause disruption at school, particularly in that it was sent to some 1,300 "friends" on Facebook and seen by an unlimited number of people on YouTube.
- *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011). West Virginia twelfth grade student Kara Kowalski used her home computer to create a discussion group webpage on MySpace dealing with herpes and targeting a fellow student, Shay N. Some 100 persons on Kowalski's MySpace friends list were invited to join the discussion. The first student to join the discussion did so from a school computer during an after-hours program at the high school. The student uploaded a picture of himself and a friend holding their noses while displaying a sign referring to the targeted student as having herpes. Soon other photographs and messages were posted, with most focused on Shay N. Included were words like "slut" and "whore" and a photograph with a sign over the victim's pelvic area with the words "Warning: Enter at your own risk." The targeted student's father saw the website and called Kowalski, who was unable to delete it. The next day, Shay N. and her parents filed a harassment charge with the vice principal. Shay N. did not want to attend classes and left with her parents. After concluding that Kowalski had created a hate website in violation of school policy against bullying and harassment, school officials suspended her from school and from school social events. The policy applied to any school-related activity or during any education-sponsored event. A separate Student Code of Conduct stated that "a student will not bully/intimidate or harass another student." Through her parents, Kowalski sought to have the suspension overturned and the school policy declared vague and overbroad.

The appellate court affirmed the district court's decision granting summary judgment for the school district. The student-created

website, the judges noted, created the kind of interference with school operation described in *Tinker* as being immune from First Amendment protection. The court also referred to *Fraser* regarding the kinds of habits and manners of civility that schools seek to instill but did not base its decision on this case. The judges noted that Kowalski knew that her MySpace communication would become known at school, as happened. Indeed, the judges pointed out, the group's name was entitled "Students Against Sluts Herpes." Had the school not intervened, there was potential for more serious harassment against Shay N.

With regard to the challenge to the validity of the school rule, the appellate court concluded that while the prohibited conduct had to be related to the school, "this is not to say that volatile conduct was only punishable if it physically originated in a school building or during the school day. Rather, the prohibitions are designed to regulate student behavior that would *affect* the school's learning environment." Here, that internet-based bullying and harassment did disrupt the school learning environment by their effect on Shay N.

Comment: The court seemed to stretch a bit to apply the policy and Student Code of Conduct rule to off-campus speech, given that both were worded in terms of applying to school-related and school-sponsored activities. Certainly in terms of alerting students to the potential consequences of engaging in such hurtful speech as Kowalski did, it would have been preferable had both the policy and rule been worded to apply to bullying and harassment that occurs off-school but nevertheless creates material disruption or, in this case, substantial interference with the rights of others at school. Had Kowalski known explicitly of the potential consequences, she may not have created the discussion group website. See in this context of the Sample Policy and Suggested Student Discipline Rules that follows this legal summary.

In October 2011, attorneys for Kowalski sought Supreme Court review of the Fourth Circuit's opinion. Here, the issues were framed as "whether the First Amendment permits a public school to discipline a student for speech that occurs off-campus and not at a school-sponsored event, and that is not directed at the school," and "whether off-campus student speech not directed at the school satisfies *Tinker*'s 'material and substantial disruption' test merely because a single student missed one day of school and because school officials speculated that the off-campus speech might lead to 'copycat' behavior on school grounds." The Supreme Court declined the opportunity to rule on these issues on January 17, 2012, the same day that it denied review of *Layshock* and *J.S.*, above. 132 S.Ct. 1095 (2012).

- *D.J.M. v. Hannibal Public School District*, 647 F.3d 754 (8th Cir. 2011). Tenth grade male student in the Hannibal Public School District in Missouri engaged in an extensive instant messaging discussion on his home computer with C.M., another student. The discussion focused initially on the tenth grader's unhappiness at being spurned by a female student. The conversation then shifted to D.J.M.'s fantasy of obtaining a gun and, in response to the other student's prompting, naming persons he would "get rid of." These included his older brother and members of "midget[s]," "fags," and "negro bitches." He also alluded to shooting himself and said he wanted his high school to be known for something. Concerned about the threatening nature of the exchanges, C.M. alerted an adult friend and later emailed excerpts of the conversation to the school principal. The principal alerted the police and D.J.M. was arrested and placed in juvenile detention. Later he was admitted to a psychiatric hospital for a short time. The school suspended the student for the rest of the school year because of the disruptive impact of his instant messages. Through his parents, D.J.M. filed a lawsuit against the district contending that the suspension violated his First Amendment rights.

The U.S. Court of Appeals for the Eighth Circuit affirmed the federal district court's grant of summary judgment in favor of the school district. The appellate court noted that D.J.M.'s messages constituted a "true threat" (see *Latour v. Riverside Beaver School District* in section 5-a above for what constitutes a "true threat") and thus fell outside the scope of protected free speech. The judges noted that the record indicated that no one considered the student to be joking. Aside from the true threat analysis, the court also noted that the speech could be viewed as falling within the substantial disruption context of *Tinker v. Des Moines School District*. School officials were sufficiently concerned about the threatening nature of the messages and increased campus security by assigning staff to monitor entrances and public areas, limited access to school, and communicated such security changes to parents. The judges noted that it was reasonably foreseeable that the threats about shooting specific students in school would come to the attention of school officials and create a substantial disruption at school.

- *Mardis v. Hannibal Public School District*, 684 F.Supp.2d 1114 (E.D. Mo. 2010). Mardis, a sophomore, was chatting via instant messaging on his home computer with a classmate following the breakup with his girlfriend. He told the classmate that he was going to get a gun and kill certain classmates at school and then himself. The classmate

relayed the message to Mardis's ex-girlfriend and also to an adult who alerted school officials. Subsequently, Mardis was arrested for making threats and suspended from school for ten days. The suspension later was extended through the remainder of the school year. Mardis contested the suspension as a violation of his First Amendment rights, because he was communicating on his own computer off campus and neither intended to relay the message to the alleged victims, nor did he actually intend to shoot classmates. The federal trial judge rejected his arguments. The judge noted that in this digital age, a reasonable person could foresee the transmittal of internet communications from a home computer to a confidant would potentially be viewed by others. In addition, these instant messages could reasonably be viewed by alleged targets as a true threat. True threats are not a form of protected speech (the judge cited the *Lovell* decision in 1-c above). The judge also noted that knowledge of the instant message resulted in concerns expressed by many parents and students and in increased campus security. Thus, even if the speech were viewed as falling within the First Amendment, the material disruption standard from *Tinker* was satisfied.

- *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008). [See also the *Wisniewski* decision by the same court discussed below.] Student was disqualified from running for senior class secretary after she posted a vulgar and misleading message about the supposed cancelation of a battle-of-the-bands concert. She posted the message on her publicly accessible blog hosted by livejournal.com. In the blog she referred to school officials as “douchebags” and used the term “pissed off.” She also said the event had been cancelled (in reality, it had not) and included a letter sent by her mother to the principal in the event that fellow students wished to write or call the principal “to piss her off more.” Several other students posted messages on the blog, one student calling the superintendent a “dirty whore.”

The U.S. Court of Appeals for the Second Circuit noted that it previously had ruled that expressive off campus conduct may result in student discipline if it could create a foreseeable risk of substantial disruption at school. Noting that the Supreme Court had not ruled in accordance with this idea in its *Fraser* holding, the appellate judges declined to apply *Fraser*, preferring instead to rely on *Tinker*. Here it was reasonably foreseeable that the student's speech would reach school property because it was directed at fellow students and pertained to a school event. The words the student used in addition to the misleading assertion that the concert had been cancelled resulted in a foreseeable risk of substantial disruption at school.

The court also noted that the suspension from running for office was justifiable because the student's posting undermined the values that student government is intended to promote. Furthermore, the court acknowledged that running for office is a privilege, not a right. The court concluded that its ruling against the student was limited to the facts here and not applicable to a situation involving a more serious consequence [though it did not say so, the court may have been referencing a suspension or expulsion]. The court also noted it was not called upon to decide whether the school officials had acted wisely. In a later manifestation of the case, the Second Circuit decided that school officials were entitled to qualified immunity from damages because it was unclear to what extent off-campus student speech is constitutionally protected.

- *O.Z. v. Board of Trustees of Long Beach Unified School District* 2008 WL 4396895 (C.D. Cal. 2008) (not reported – meaning that it cannot serve as judicial precedent but nevertheless is instructive). During spring break, a middle school student and a fellow-classmate created a slide show later posted on YouTube depicting the killing of the student's 7th grade English teacher. The slide show was very graphic. While at home, the English teacher ran a Google search of her own name and found the slide show entitled "[O.Z.] Kills Mrs. Rosenlof." Upset and unable to sleep, the teacher notified the principal. O.Z. was transferred to another school but later the parents objected and sought a preliminary injunction. The federal district court judge rejected the claim that the First Amendment protected the student. O.Z. contended that the slide show was a joke and that she had no intention of sharing the slide show with anyone outside her home, claiming it was a fellow classmate who posted it on YouTube. Indifferent to this argument, the judge noted that since O.Z. intended to share the slide show with her friend, she could not argue she had no intention to use the slide show outside her home. Because the slide show did, in fact, come to the attention of school officials, it created a foreseeable risk of disruption at school and was not entitled to constitutional protection. Furthermore, the court did not consider O.Z.'s transfer to another school as an event that would cause irreparable harm to O.Z.

Query: What about the assertion that the student had no reason to believe that her friend would post the slide show on YouTube where it could become accessible to persons connected to the school? Here the court said the fact that she and the friend constructed it together ended any expectation of privacy. But suppose the friend decided to get O.Z. in trouble by posting the communiqué? Would the foreseeability test deter disciplining the student who posted message but not the student who forwarded it to others? This is an interesting question, and there

are as of yet no answers to it. Note that the federal district judge in the *Mardis* decision discussed above pointed out that in this digital age, those who use the internet should anticipate that transmission to others will occur. Note also the discussion of privacy in Section 6 below.

- *Wisniewski v. Board of Education of Weedsport Central School District*, 494 F.3d 34 (2nd Cir. 2007). A New York eighth grade student used AOL Instant Messaging on his parents' home computer to send an icon to 15 members of his IM buddy list showing a pistol firing a bullet at a person's head with dots representing splattered blood. Underneath the icon were the words "Kill Mr. VanderMollen," who was the student's English teacher. One student who received the icon gave the teacher a copy of the image. The perpetrator was suspended from school. The appellate court followed the Ninth Circuit's *Lovell* (1996) decision where threats like the one evident in the icon enjoy no constitutional protection. The court noted that as long as it was reasonably foreseeable that the IM icon would reach school property, discipline could be imposed if the act falls into the material disruption/substantial invasion of the rights of others rubric under *Tinker*. The U.S. Supreme Court later declined to hear the case, 552 U.S. 1296 (2008).
- *J.S. v. Bethlehem Area School District*, 807 A.2d 847 (Sup. Ct. Pa 2002). A student created a website entitled "Teacher Sux" on his home computer that included ugly remarks about his algebra teacher and some school administrators. The website showed a picture of a severed head dripping with blood, a picture of the teacher's face that morphed into Adolf Hitler's, and a solicitation of money to hire a hit man to kill the teacher. There also was a hand-drawn picture of the teacher in a witch's costume and a diagram consisting of a photograph of the teacher with various physical attributes highlighted. Below the photograph was a series of phrases, one of which listed 136 times "Fuck You (name of teacher)." The student told other students at the school about the website, and eventually the teacher and administration viewed it. The teacher who was the primary target became highly upset and took medical leave. The Supreme Court of Pennsylvania ruled that the student's conduct was materially disruptive and a substantial invasion of the rights of others. His suspension from school was upheld.

c. Peer sexual harassment

- *Drews v. Joint School District No. 393*, 2006 WL 1308565 (D. Idaho 2006) (not reported – meaning that it cannot serve as judicial precedent but nevertheless is instructive). A student claimed she quit the basketball team because of harassment by peers such as “[Name of student] called us fucking lesbian whores.” The school established that she actually hadn’t quit the team, so the case was dismissed. The federal judge noted that to impose liability on a school district for sexual harassment, it must be shown that (1) the school district must exercise substantial control over both the harassed and the context in which the known harassment occurs; (2) the harassment is so severe that the victim is deprived of access to equal educational opportunities provided by the school; (3) the school district had actual notice of the harassment; and (4) the district is deliberately indifferent. These four guidelines are based on the U.S. Supreme Court’s ruling in *Davis v. Monroe County School District*, 526 U.S. 629 (1999).

This case involved alleged sexual harassment occurring on campus, did not involve ECDs, and involved liability and not discipline. Still, what must be established to prove actionable sexual harassment under federal law is worth noting.

- *R.S. v. Board of Education of Hastings-On-Hudson Union Free School District*, 2010 WL 1407359 (2d Cir. 2010) (not reported – meaning that it cannot serve as judicial precedent but nevertheless is instructive). Plaintiff, S.S., was a ninth-grade student who sued the school district under Title IX, alleging sexual harassment. Plaintiff’s claims were based on three sexually explicit emails that she received over a ten-day period in March 2005 on an email account maintained by the school district. The emails appeared to be sent from M.X., a classmate. S.S. reported the emails to the assistant principal, who was aware of at least one other female student who had received similar emails from M.X.’s email address. School district staff questioned M.X. about the emails, but he denied sending them and claimed that other students had used his password to send the emails from his account. In May 2005, the school district changed M.X.’s password and disabled his account. S.S. claimed that the school district’s investigation was inadequate and that she suffered anxiety as a result; however, she received no further emails and successfully finished the school year with high academic honors.

Like *Drews*, above, *R.S.* is also an unpublished opinion that concerns school district liability, rather than the authority of school officials to discipline students for their speech. However, this opinion provides further guidance as to what a plaintiff must show to satisfy the *Davis* requirement regarding the severity of the harassment, suggesting that

the duration of the alleged harassment and effect on the plaintiff's life are significant factors. Here, the Second Circuit found that S.S. failed to make out a claim for sexual harassment sufficient to hold the school district liable under Title IX. The Second Circuit applied the *Davis* standard, concluding that "the trio of offensive emails here at issue, however, falls well short of the kind of harassment found actionable under Title IX."

d. Sexting

To date, case law is sparse on student misuse of ECDs through sexting. Sexting means the act of sending sexually explicit photos electronically, primarily between cell phones. The following decision is interesting but doesn't focus on disciplinary action by school officials.

- In *Miller v. Mitchell*, 598 F.3d 139 (3rd Cir. 2010), Pennsylvania school officials discovered photographs of semi-nude and nude teenage girls, many enrolled in the school district, on several cell phones that male students were using to pass images to each other. The officials confiscated the cell phones and turned them over to the county district attorney's office. The district attorney gave the students who possessed the images the option of attending an education program or being prosecuted under Pennsylvania law. The mother of a student whose photograph showing her wrapped in a white opaque towel just below her breasts opted not to have her daughter participate in the program and sought a preliminary injunction against having the district attorney file criminal charges for the daughter's not doing so.

At the appellate level, two primary contentions were addressed. First, that requiring the daughter to participate in the program where she had to write an essay explaining how her actions were wrong violated the First Amendment as compelled speech. Second, that having the daughter participate in an education program instituted not by the school district but by the district attorney about what it means to be a girl in today's society violated parental rights to direct their children's upbringing. The district court granted the injunction based on these claims, and the Third Circuit affirmed. The appellate judges noted that there was no evidence in the record that the district attorney had evidence that the daughter ever possessed or distributed the photo in question. The matter was returned to the trial court for further proceedings.

6. Student Expectations of Privacy in ECDs and Social Communication Networks

a. Website privacy protection

Some social communication websites such as Facebook provide a measure of privacy protection by allowing users to control what information is available to other individuals.⁶ However, this does not prevent persons who do have access from forwarding what is posted on the website to others. Thus, the extent of privacy protection is limited. A 2009 California case is illustrative:

- *Moreno v. Hanford Sentinel, Inc*, 91 Cal.Rptr.3d 858 (Cal. App. 2009). While the right to privacy is protected under the California Constitution and can be grounds for liability under tort law (civil wrongs by one party against another for which a court will provide a damage remedy – see Section 8 below), posting on a popular internet site such as MySpace.com opens up the posting to the public at large. Thus, there are no grounds for suing someone for invasion of privacy when a message is disseminated publicly in this manner. In this case, a student posted a derogatory message on MySpace about her hometown of Coalinga, which was forwarded to the local newspaper by the principal of the Coalinga-Huron high school. The student and her family sued the principal and school district for invasion of privacy and intentional infliction of emotional distress when her family members suffered from violent community backlash. Both the trial court and the court of appeal rejected the invasion of privacy claim, noting that information posted on social networking sites like MySpace become public information. The court of appeal did permit the lawsuit to go forward based on the tort of intentional infliction of emotional distress, a remedy available to anyone who is the target of a posted communication, but it is hard to prove. See Section 8 below.

Social networking providers like MySpace and Facebook are considered conduits for communication similar to news vendors, not publishers or speakers of posted information. Thus, seeking to hold them legally accountable for what persons post is difficult. Under the federal Communications Decency Act (CDA) of 1996,⁷ network providers and users are shielded from liability with respect to content generated entirely by third parties. In addition, the act provides immunity for any action “voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd,

⁶ For example, Facebook’s “Privacy Policy” and “Terms of Use” provide for customizable “Privacy Settings” that allow a user to choose how his or her name is displayed; who can find him or her when searching on Facebook or public search engines; and who can access contact information, personal information and content posted by or about the user. (“Facebook’s Privacy Policy,” available at <http://www.facebook.com/about/privacy/>).

⁷ 47 U.S.C. § 230.

lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.” Even if the action taken is delayed or ineffective, the network is not liable, because it is not acting as a publisher or speaker.

For a discussion, see *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009). In that case, Yahoo allegedly failed to remove in timely fashion indecent photos posted by an ex-boyfriend of his former girlfriend. When the former girlfriend (Barnes) learned about the photos, she asked Yahoo to remove them. When this did not happen as Barnes had expected, Barnes brought suit against Yahoo under CDA. The CDA claim was dismissed, because Yahoo was not acting as a publisher or speaker.

Barnes also maintained that she had a claim under Oregon promissory estoppel law. This means that if Yahoo indicated to Barnes it would remove the material, it entered into a contract-like promise to do so. Thus, if Yahoo didn’t follow through on its promise, an argument could be made that this constituted a breach of contract in violation of Oregon’s promissory estoppel law. The case was sent back to the trial court to determine whether Barnes could make such a claim.

For further discussion about civil remedies for harms inflicted by ECD misuse, see Section 8 below.

- b. Other considerations for determining extent of privacy for ECD use:
 - Whether the ECD is school-owned and user is subject to an acceptable use policy
 - Whether the ECD owned by the student is used on or off campus
 - Whether the ECD is owned by the parents of the student
 - Whether ECD misuse involves the legitimate interests of the school (e.g., disciplining a student for a sexting incident occurring outside of school)
 - Seriousness of the offense (e.g., photo of displayed weapon by a student on the playground, photo of a sex act in the locker room)
 - Confiscation of student devices. The circumstances and terms for confiscation should be set forth in the policy and student discipline rules.
7. Searches and seizures of student-owned ECDs by school officials and school security personnel

- a. For a search to be permissible under both federal and state law in most jurisdictions, there must be clearly articulated facts to conduct a search (reasonable cause) and the search must not be excessively intrusive in light of the age and gender of the student. These generally accepted standards were set forth by the U.S. Supreme Court in 1985. (*New Jersey v. T.L.O.*, 469 U.S. 325).
- b. The search that is conducted should be limited to the time frame of the alleged incident
- c. School officials/security personnel should exercise caution in uploading pictures from websites and cell phones to their own computers, because these could implicate them in the matter
- d. Emerging case law
 - *Koch v. Adams*, 2010 Ark. 131 (Ark. 2010). The Arkansas Supreme Court was faced with a challenge by a high school student after school officials seized his cell phone and retained it for two weeks. School rules prohibited possession of a cell phone at school and prescribed sanctions including two-week retention. No search of the confiscated cell phone was conducted. The student maintained that both the seizure and retention were not specified in state law as permissible actions by school officials. The high court noted that nothing in state law prevents school officials from confiscating unauthorized cell phones and from determining penalties for violating school policy. The lower court's judgment dismissing the lawsuit was affirmed.
 - *J. W. v. Desoto County School District*, 2010 WL 4394059 (N.D. Miss. 2010) (not reported—meaning that it cannot serve as judicial precedent but nevertheless is instructive). A seventh grade student in a northern Mississippi school district was using his cell phone on school grounds contrary to a school rule prohibiting possession or use of a phone. The student was using the phone to retrieve a text message from his father. A school official confiscated the phone and examined photographs stored on it. The photos depicted the student dancing in his bathroom, as well as another student holding a B.B. gun in the same bathroom. The photos also were viewed by a police officer at the school, who believed the pictures were gang-related. The student was expelled for the remainder of the school year. The student and his parents sought to overturn the expulsion on the grounds the search was

impermissible and sought damage remedies. Defendants sought dismissal of the claims.

The federal district court ruled that because the district banned cell phones from school grounds, they could be regarded as contraband. Thus, it was reasonable under *T.L.O.* for school officials to search the phone to determine why it was used. The judge pointed out that, unlike the situation in the *Klump* decision (see decision below), J.W. violated school rules by even bringing the cell phone to school and then compounded that violation by using it. Thus, there was a diminished expectation of privacy. Further, the school officials here did not conduct an intrusive search of the phone but only looked at photos stored on it. Thus, there was no Fourth Amendment violation.

While the judge granted the defendants' motion to dismiss the claims against the individual defendants, he noted that the school district had not sought dismissal from the case. Given that the allegations would likely be heard by a jury, he advised the district seriously to consider settling the case. He noted that school officials are on a slippery slope when students are expelled not for what they did but for what the district subjectively believes them to be. "The slope is even slipperier when, as here, the school district only obtained the evidence of these activities by conducting a search which, while not unconstitutional, does tread into a constitutionally sensitive area."⁸

- *Klump v. Nazareth Area Sch. Dist.*, 425 F.Supp.2d 622 (E.D. Pa 2006). School officials confiscated a student's cell phone after the student used it in class contrary to a school rule. The officials then searched the cell phone for text messages and voice mail that might implicate drug activity. The federal district court ruled that the search violated the student's Fourth Amendment right to be free from unreasonable searches. The court also ruled that it was impermissible for school officials to call other students whose numbers were listed on cell phone to determine if these students were involved in drug activity.

⁸ The district did reach a settlement in the case with the American Civil Liberties Union. While financial details were not disclosed, the district noted that it had revised its gang policy by making a list of prohibited gang signs available at school offices and on the school's website. *The Clarion-Ledger*, February 9, 2011.

8. Private civil actions available to victims of student ECD misuse.⁹
- a. In absence of statute, a parent has limited liability for civil wrongs committed by the parent's minor child. However almost all states now have civil statutes that extend parental liability. In California, Civil Code Section 1714.1 provides that any act of willful misconduct of a minor resulting in injury to or death of another person or in any injury to the property of another shall be imputed to the parent or guardian for civil damages. Joint and several liability of the parent or guardian for each civil wrong are limited to \$25,000, a figure that is adjusted periodically. In the case of injury, imputed liability is limited to medical, dental, and hospital expenses incurred by the injured person not to exceed the same amount.
 - b. The ancient tort of defamation, which protects a person's right to be free to enjoy a reputation unimpaired by damaging false assertions, may provide one avenue for relief for victims of cyberbullying. In general, defamation requires that four elements be present to create liability: (a) a false and defamatory statement concerning another, (b) an unprivileged publication to a third party, (c) fault amounting at least to negligence on the part of the publisher, and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. For a statement to be defamatory, the communication must so harm the reputation of the victim "as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." (Restatement (Second) of Torts §§ 558, 559 (1977)).

However, there are several limitations on the ability of defamation law to provide broad relief for all victims of cyberbullying. First, to be defamatory, a statement must be factual in nature or bring about a factual inference. As the U.S. Supreme Court has noted, pure expressions of opinion that cannot reasonably be interpreted as stating facts enjoy First Amendment protection and thus are not actionable. (*Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)).

Second, many cyberbullying incidents involve a private communication between the harasser and the victim. For example, a student may send an offensive or threatening message directed at another student by way of text message or email to only that student. In these situations, the victim will not be able to establish the second element necessary for liability - "unprivileged publication to a third party." (Restatement (Second) of Torts §§ 558 (1977)). Where cyberbullying involves blogs

⁹ Note: This discussion is based on California common law principles, which may or may not apply in other states.

or websites, such as Myspace and Facebook, defamation law may be applicable.

In addition, cyberbullying victims wishing to bring a defamation action against their harasser must be aware of California's anti-SLAPP statute. Anti-SLAPP motions are designed to protect free speech rights of members of the public who are speaking out on a matter of public concern. Thus, under California Civil Code Section 425.16, a defendant can defeat a lawsuit brought against him or her if the suit was designed to "chill the valid exercise of the constitutional rights of freedom of speech and participation for the redress of grievances," unless the plaintiff can establish that there is a probability that he will prevail on his original claim. The initial burden is on the defendant to prove that the matter is of public concern; then the burden shifts to the plaintiff to prove a likelihood of prevailing on his or her claim.

A recent California case provides a good illustration of how the anti-SLAPP statute is used. In *D.C. v. R.R.*, 106 Cal.Rptr.3d 399 (Cal. App. 2010), a high school student (D.C.) attending a private school and his parents sued a classmate (R.R.) and his parents under section 52.1 of the California Civil Code for actions they perceived as a hate crime, as well as for defamation and intentional infliction of emotional distress after R.R. posted derogatory and threatening comments on a website that D.C. maintained for his acting and singing career. R.R. brought an anti-SLAPP motion to compel the court to dismiss the case. Although the court did not reach a conclusion on the merits of D.C.'s claims,¹⁰ the court did have the opportunity to weigh in on whether or not R.R.'s comments were entitled to protection under the First Amendment for purposes of an anti-SLAPP motion.

Because of the public nature of D.C.'s entertainment career and website, R.R. argued that his comments were a matter of public interest and therefore entitled to anti-SLAPP protections. The court, however, determined that D.C.'s entertainment career was not sufficiently prominent to afford R.R.'s speech anti-SLAPP protections. The court pointed out that R.R.'s message "did not concern a person in the public eye, conduct that could directly affect large numbers of people beyond the participants, or a topic of widespread public interest," and therefore, the anti-SLAPP protections would not apply.

The court went on to find that there was a probability that D.C. would prevail because R.R.'s comments were "true threats"¹¹ and therefore not

¹⁰ The matter was eventually resolved through arbitration per the enrollment agreement at the private school that both D.C. and R.R. attended.

¹¹ Refer to *Latour v. Riverside Beaver School District* in section 5-a above for a discussion on what constitutes a "true threat."

entitled to First Amendment protections. The court applied both an objective and a subjective test. Under the objective test, the court determined that a reasonable person would view R.R.'s message (which included such phrases as "I want to rip out your [*expletive*] heart and feed it to you," "I want to kill you" and "I'm going to pound your head in with an ice pick") as a threat of bodily harm. Despite some conflicting evidence, the court also found under the subjective standard that R.R. intended for his message to be interpreted as a threat based on the nature of the language used as well as subsequent actions taken by his parents after the message was posted. The court did add that R.R.'s message was not illegal as a matter of law and that if D.C.'s original complaint against R.R. was heard by a jury, "a trier of fact may ultimately find that R.R.'s message was not a true threat," but that R.R. could not "rely upon the First Amendment to *dismiss* [the] lawsuit by way of an *anti-SLAPP motion*" (italics in original).

While *D.C. v. R.R.* is a very narrow case, it demonstrates the use of the anti-SLAPP statute and sets a clear boundary for cyberbullying threats which are not protected for purposes of an anti-SLAPP motion.

- c. Another avenue for redress for victims of cyberbullying lies in the tort of intentional infliction of emotional distress (IIED). To succeed on a claim of IIED, a plaintiff must show that (1) the defendant either intended to cause emotional distress or knew or should have known that his actions would result in serious emotional distress to the plaintiff; (2) the defendant's conduct was so extreme and outrageous as to go beyond all possible bounds of decency, such that it can be considered as utterly intolerable in a civilized community; (3) the actor's actions proximately caused plaintiff's psychological injury; and (4) the mental anguish suffered by plaintiff is of such a serious nature that no reasonable man could be expected to endure it. (Restatement (Second) of Torts § 46(1) (1965)).

The greatest challenge with IIED as a theory of recovery is that it requires that the conduct be so extreme as to exceed all bounds of that usually tolerated in a civilized community. (See, *Tekle v. United States*, 511 F.3d 839, 855 (9th Cir. 2007)). Mere rudeness and insensitivity does not rise to the level of extreme and outrageous conduct, nor does insulting language. (See, *Braunling v. Countrywide Home Loans Inc.*, 220 F.3d 1154 (9th Cir. 2000)). On the other hand, extreme and outrageous conduct may be found in a defendant's intent to harm the threatened party (See, *Alcorn v. Ambro Engineering, Inc.*, 86 Cal.Rptr. 88 (Cal. 1970)). Thus, while some instances of cyberbullying may rise to the required level of extremity and outrageousness, the vast majority will be seen as mere insults and will not establish of a claim for IIED.

d. A victim of cyberbullying or ECD misuse may also seek to bring a civil claim against a person who has interfered with his or her right to privacy by publicizing misleading or private information. Depending on the circumstances of the case, one of two options may be available to such a plaintiff:

- The invasion of privacy tort of false light protects a non-public person's right to privacy from publicity which puts that person in a false light to the public. To bring a claim for false light, the victim must show that (1) the conduct of the actor placed the victim before the public in a false light, (2) the false light would be highly offensive to a reasonable person, and (3) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. Although related to the tort of defamation, it is necessary for invasion of privacy that the plaintiff be defamed. It is enough that he or she is attributed characteristics, conduct, or beliefs that are false. Restatement (Second) of Torts §652E (1977).
- A litigant may also bring an invasion of privacy claim against a person who gives publicity to a matter concerning the litigant's private life. To prevail on this claim, one must show (1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern. Restatement (Second) of Torts § 652D (1977)). For purposes of this section, "publicity" means that the matter is made public by communicating it to the public at large or to so many persons that the matter is substantially certain to become one of public knowledge. (Restatement (Second) of Torts § 652D (1977)).

Courts have routinely found that the publicity element of an invasion of privacy claim is satisfied when private information is posted on a publicly accessible internet website. However, a matter that is already public or that has previously become part of the public domain, such as the internet, is not private. For example, as noted earlier in the case of *Moreno v. Hanford Sentinel, Inc.*, 172 Cal.App.4th 1125 (Cal. Ct. App. 2009), a student posted on a social networking website a journal entry which was retrieved and later submitted for republication in the local newspaper by the author's sister's high school principal. The student's family brought an action against the principal and school district for invasion of privacy. The court found in favor of the principal, noting that the entry had already become part of the public domain, and thus its disclosure did not constitute the tort of

public disclosure of private fact. Likewise, in *U.S. v. Gines-Perez*, 214 F. Supp. 2d 205 (D.P.R. 2002), the court held that a person who places a photograph on the internet intends to renounce all privacy rights to the imagery. Here, the court noted that the individual who had posted the picture had not employed any protective measures to control access to the photo.

These cases highlight the importance of exercising discretion when posting private information online or employing protective measures to control access to the posted information.

- e. In limited circumstances, a cyberbullying victim could potentially bring a claim under Section 52.1 of the California Civil Code, which was originally intended to prevent hate crimes. Section 52.1 prohibits any person from “interfere[ing] by threats, intimidation, or coercion, or attempt[ing] to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state” Any victim of such interference is authorized to bring a private civil action. Successful plaintiffs may recover damages, injunctive relief, “and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured.” In sum, to make out a claim under Section 52.1, a plaintiff must show that the defendant attempted to or actually prevented the plaintiff from doing something he or she had a right to do under law, or to force the plaintiff to do something he or she was not required to do under the law. (*Knapps v. City of Oakland*, 647 F.Supp.2d 1129 (N.D. Cal. 2009)).

However, one difficulty that cyberbullying victims might encounter in establishing a successful Section 52.1 claim is that if the claim is based solely on the defendant’s speech (which is likely the case with cyberbullying), the plaintiff must show that the speech threatened violence against a specific person or group of persons, that the person threatened reasonably feared violence would be committed against them or their property, and that the person who made the threat had the apparent ability to carry it out. (Cal. Civ. Code § 52.1(j)).

While there have been attempts to bring a lawsuit under Section 52.1, there is no conclusive case law on the subject as of yet. In *D.C. v. Harvard-Westlake School*, 98 Cal.Rptr.3d 300 (2009),¹² a student and his parents filed a 52.1 claim against the student’s private school and a classmate for threatening comments that were posted on the plaintiff’s website. Ultimately the 52.1 claim was not heard in court as the matter

¹² See the discussion of litigation related to this lawsuit, *D.C. v. R.R.*, in the section above.

was decided in arbitration per the terms of the school's enrollment agreement,¹³ and the student defendant was not party to that arbitration.

D.C. v. Harvard-Westlake School is inconclusive with regard to how Section 52.1 may be applied in a cyberbullying context, but other courts have made clear that any private individual may be held liable under Section 52.1. (*Jones v. Kmart Corp.*, 70 Cal.Rptr.2d 844 (Cal. 1998)). Alternatively, students have brought lawsuits against school districts and school officials, with the students claiming that, for example, their state constitutional right to education or right to be free from sexual harassment were violated (*Austin B. v. Escondido Union School District*, 149 Cal.App.4th 860 (Cal. Ct. App. 2007; *Doe v. Petaluma City School District*, 830 F.Supp. 1560 (N.D. Cal. 1993)).

¹³ The plaintiffs lost their case in arbitration and the applicable arbitration rules required the losing party to pay the prevailing party's attorneys' fees. It is worth noting that on appeal from the arbitration ruling, the court determined that hate crime laws such as 52.1 create unwaivable statutory rights. Thus, the plaintiffs were not required to pay the attorney fee penalty as it pertained to their 52.1 claim.