VIRGINIA COMMONWEALTH UNIVERSITY
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THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE
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CEPI Education Law Newsletter
Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

August 2015: Vol. 14-1

THE APPLICABILITY OF THE TINKER TEST TO OFF-CAMPUS CYBER-SPEECH: POLICY IMPLICATIONS

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Introduction

The Supreme Court's decision in *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 89 S.Ct. 733 (1969), set the stage for judicial analysis of student expression litigation. Under the *Tinker* standard, schools may prohibit speech that "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities" or that collides "with the rights of other students to be secure and to be let alone." *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969)).

Over the years, *Tinker* has been a vital tool for evaluating various forms of *on-campus* student expression. Recently, however, the rise of electronic communication coupled with the boom of social networking sites have created a First Amendment grey area in the realm of *off-campus* student expression. In the wake of these developments, the Court has yet to address whether *Tinker* and progeny are applicable to speech originating off school grounds. *See, e.g., Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986) (governing plainly offensive and vulgar student speech); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988) (governing school-sponsored speech); *Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007) (governing student speech encouraging illegal drug use). As a result, courts are currently faced with the daunting task of determining whether schools can regulate off-campus student speech, unrelated to the school or a school-sponsored event, and if they may, under what circumstances.

Though the Supreme Court has made clear that "student expression may not be suppressed unless school officials reasonably conclude that it will materially and substantially disrupt the work and discipline of the school," the circuit courts have taken various positions on whether the *Tinker* standard should apply to purely off-campus speech, and if so, when and how to apply it. *Morse v. Frederick*, 551 U.S. 393, 403 (2007). The aim of this policy brief is to examine the various ways United States Courts of Appeal have determined the applicability of *Tinker* to off-campus student cyber-speech and ultimately assist local school administrators in the development of student disciplinary policies.

The Second Circuit's "Reasonable Foreseeability" Test

In the past decade, the Second Circuit has developed a two-prong approach to apply *Tinker* to off-campus student speech. In *Doninger v. Niehoff*, the Second Circuit upheld a school system's disciplinary action barring a student's candidacy for class secretary after she made critical comments about the school's decision regarding a school-sponsored event. 527 F.3d 41, 48 (2d Cir. 2008). Though the comments were made from the student's home and posted on her personal blog, she encouraged students to protest the school's decision and participate in an on-campus sit-in. *Id.*

Citing *Tinker*, the court held that "student expression may legitimately be regulated when school officials reasonably conclude that it will materially and substantially disrupt the work and discipline of the school." *Id.* at 52. The court found that "Doninger's expression was reasonably regulated, despite the fact that she made the posting from an off-campus location." *Id*. at 53. In making this determination, the court considered whether it was reasonably foreseeable that the off-campus speech (which meets the *Tinker* test) would end up on school grounds. *See, e.g., Doninger v. Niehoff*, 527 F.3d 41, 48. This question—whether a reasonable person could have foreseen that the speech would reach campus—has

been adopted by the Fourth and Eight Circuits as a threshold inquiry evaluated *before* the court applies *Tinker*'s substantial and material disruption standard.

The Fourth Circuit

In *Kowalski v. Berkeley County Schools*, the Fourth Circuit upheld the school's suspension of a student for creating a MySpace page dedicated to ridiculing a classmate. 652 F.3d 565, 537 (4th Cir. 2011). In ruling for the school system, the court relied on the Second Circuit's reasonable foreseeability standard. *Id.* The court held that "public schools have a compelling interest in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying." *Id*. at 572. Because the student invited over a hundred fellow classmates to join the page, the court held that it was reasonably foreseeable that the student's off-campus speech would find its way into the classroom and disrupt the school environment. *Id.*

The Eighth Circuit

Like the Second and Fourth Circuits, the Eighth Circuit also "requires that it be 'reasonably foreseeable that the speech will reach the school community,'" before taking disciplinary action. *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1068 (9th Cir. 2013) (quoting *S.J.W. v. Lee's Summit R-7 Sch. Dist*., 696 F.3d 771 (8th Cir. 2012). In *S.J.W. v. Lee's Summit R-7 Sch. Dist*., two brothers were suspended after creating a website to discuss events occurring at their high school as well as to post racist and sexually explicit comments about their fellow classmates. *Id.* The brothers used a school computer to create the site and knowledge of its existence soon spread around campus, causing students to access the site on school computers. *Id.* at 777.

Citing *Doninger* and *Kowalski*, the court applied *Tinker* and held that it was reasonable for the students to expect the speech would reach campus and impact the school environment, thus warranting disciplinary action. *Id.* at 777-8. In making this determination, the court focused less on the offensive comments directed at students within the school and instead reasoned that by discussing school sponsored events, the speech targeted the institution which made it "reasonably foreseeable that the speech will reach the school community." *Id.*

The Third Circuit Split

Judges in the Third Circuit disagree on whether *Tinker* should apply to off-campus speech. Two cases—*Layshock v. Hermitage School District* and *J.S. ex rel. Snyder v. Blue Mountain School District*—highlight this disparity. In both cases, students were disciplined for creating fake MySpace pages for their school principles, and in each case the students brought First Amendment claims against the school systems. *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3rd Cir. 2011). Ultimately, the Third Circuit determined that both school systems violated the student's First Amendment rights by restricting the off-campus speech; however, the circuit court judges differed in their application and use of the *Tinker* standard.

In *Layshock v. Hermitage Sch. Dist.*, the Third Circuit held that the school failed to establish "a sufficient nexus between [the student's] speech and a substantial disruption of the school environment." 650 F.3d 205, 219 (3d Cir. 2011) (finding disciplinary action improper after a student created a parody

MySpace profile of the school's principle); quoting *Layshock v. Hermitage Sch. Dist.,* 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007). The court observed that the parody MySpace profile did not result in canceled classes, violent student behavior, or any widespread disruption within the school.

The *Layshock* court, however, did not address whether *Tinker* applied to off-campus speech. Because the student took the principle's photo from the school's website, made the profile public, and caused students to use school computers to access the site, the school system argued that the profile should be considered *on-campus*, not off-campus, speech instead of claiming that the profile caused a substantial and material disruption within the school, which would require the application of *Tinker*. *Id.* at 215. Thus, though the Third Circuit determined the school system violated the First Amendment by restricting the student speech on social media, they failed to answer whether *Tinker* was the controlling standard.

Unlike the *Layshock* decision, the question of whether and how to apply *Tinker* to off-campus student speech was front and center in *J.S. ex rel. Snyder v. Blue Mountain School District.* 650 F.3d 915 (3rd Cir. 2011). In *Blue Mountain,* a student's fake MySpace profile parodying her middle-school principal created "general rumblings" at the school, disrupted one instructor's class, and required a school counselor to reschedule some meetings. *Id.* at 922-23. Despite these disturbances, the Third Circuit held that the profile was so outrageous, no reasonable person would take it seriously; thus, it was unreasonable to foresee that the speech would cause "a substantial disruption of or material interference with the school." *Id.* at 931. In making this determination, however, only three of the Third Circuit judges used *Tinker* to find a First Amendment violation. *Id.* Five judges argued that *Tinker* does not apply to off-campus speech, while six judges argued that the *Tinker* standard justified the school's disciplinary action. 59 St. Louis U. L.J. 531, 539.

After examining the *Layshock* and *Blue Mountain* decisions, it is clear that a majority of Third Circuit judges advocate for *Tinker*'s application to off-campus speech. *Id.* at 541. It is worthy to note, however, that three judges in the *Blue Mountain* case assumed *Tinker* was applicable instead of actually determining *Tinker* applies to student off-campus speech. *Id.*

The Ninth Circuit

In *LaVine v. Blaine School District,* the Ninth Circuit upheld the expulsion of a student after bringing a poem to his English class that described a school shooting. 257 F.3d 981, 988 (9th Cir.2001).

The poem described the shooting in graphic detail and the student had access to guns, a history of behavioral and emotional problems, and a record of disciplinary actions at the school. *Id.* Applying *Tinker,* the court determined that the totality of circumstances made it reasonable for the school to "forecast substantial disruption of or interference with school activities" from the student's threat of violence. *Id.* at 990.

In a subsequent case, the Ninth Circuit addressed the constitutionality of restricting "off-campus communication among students involving a safety threat to the school environment and brought to the school's attention by a fellow student, not the speaker." *Wynar v. Douglas Cnty. Sch. Dist.,* 728 F.3d 1062, 1068 (9th Cir. 2013). In *Wynar,* the court determined that a student's messages sent from home via a social networking site were not protected by the First Amendment because the content of the

speech presented a real risk of substantially disrupting and interfering with school activates and students. *Wynar*, 728 F.3d at 1067 (reasoning that the detailed description of when and where the shooting would occur, the specific students targeted, and the weapons to be used, gave school officials reason to believe the student posed an actual threat of violence). Thus, the court held that "when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker." Id.* at 1069.

In another case concerning threats of school violence, the U.S. District Court for (D. Ore.) held that a student's comments about a teacher, made from their home computer when school wasn't in session, were protected speech under the First Amendment. *Burge v. Colton Sch. Dist. 53*, 2015 U.S. Dist. LEXIS 50819 (D. Or. Apr. 17, 2015). After receiving a "C" from his health teacher, a student posted comments on his Facebook account, stating, "Haha she needs to be shot." *Id.* at 2. The court in *Burge* distinguished these facts from those in *Wynar* and *LaVine*, noting that these comments were not explicitly violent, detailed or graphic. *Id.* Unlike *Lavine*, this student had no history of violent behavior or emotional issues, nor did he have a history of disciplinary issues at the school. *Id.* Furthermore, the student in *Burge* did not have access to guns, unlike the student in *Lavine. Id.*

Additionally, the comments in *Burge* caused no actual disturbance within the school. *Id.* After the comments became public, no student or employee missed school and no action was taken to contact the student's parents or the authorities. Citing *Lavine*, the court held that the comments alone were not enough for the school to reasonably forecast disruption. *Id.* at 11; *see LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (holding that the decision to discipline speech must be supported by the existence of *specific facts* that could reasonably lead school officials to forecast disruption).

The Fifth Circuit

In *Bell v. Itawamba County School Board*, the Fifth Circuit held that a school board's suspension of a student violated the First Amendment. *Bell v. Itawamba Cnty. Sch. Bd.*, 774 F.3d 280 (5th Cir. 2014). Though the song vulgarly and violently criticized two coaches of sexually harassing female students, it was written and recorded completely off-campus and the School Board did not show that the song caused a substantial disruption. *Id.* at 285. The court reasoned that the "public broadcast as a rap song, its conditional nature, and the reactions of its listeners," made it clear that no reasonable person would consider the song to be an actual threat to the coaches as evidenced by *Bell. Id.* at 305.

In making this decision, however, the court declined to hold that *Tinker*'s substantial disruption test was applicable to off-campus speech. Instead, the court decided only that, "assuming *arguendo* the School Board could invoke *Tinker* in this case, it would not afford the School Board a defense for its violation of Bell's First Amendment rights because the evidence does not support a finding, as would be required by *Tinker*, that Bell's song either substantially disrupted the school's work or discipline or that the school officials reasonably could have forecasted such a disruption." *Id.*

The Sixth Circuit

In *Nixon v. Hardin County Board of Education*, the U.S. District Court for the Western District of Tennessee declined to grant the defendant school board summary judgment on a First Amendment

claim after they suspended two students for online correspondence, made off-campus, about another student at the school. 988 F. Supp. 2d 826 (W.D. Tenn. 2013).

The online correspondence consisted of a series of Tweets between two female classmates about another girl in their class. *Id.* at 830. The Tweets included comments like "I want to 'shoot her in the face,'" among other vulgar and violent statements. *Id.* After becoming aware of the correspondence, the threatened student's mother expressed concern for her daughter's safety and school officials conducted interviews of the students before ultimately suspending them for 10 days at an alternative school. *Id.*

Comparing the present case to the facts in *Doninger*, *Kowalski*, *Wynar*, and *Lee's Summit*, the court held that "the speech had no connection to HCMS…was not made at school, directed at the school, or involved the use of school time or equipment," and no actual disruption of the school environment occurred as a result. *Id*. Thus, the school board failed to show that their motion for summary judgment should be granted. *Id.*

Suggestions for School Policies

It seems clear that a majority of circuits believe *Tinker* can be suitably applied to off-campus student speech. Thus, schools may prohibit off-campus student cyber-speech that "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities." *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969)). However, there are other considerations school administrators must take into account before disciplining students for off-campus speech.

The Second Circuit's "Foreseeability" Standard

The Second Circuit's "foreseeability" standard, also embraced by the Fourth and Eight Circuits, first considers whether the student could reasonably foresee that the speech would reach the school *before* applying the substantial disruption or material interference test from *Tinker*.

Under this foreseeability analysis, school administrators should evaluate *how* the student shared the speech by considering factors such as: (a) whether the speech was posted on a public or private site; (b) whether it was sent to members of the community or the school system; and (c) whether it was accessed on school property. One must remember, however, that the fundamental issue is whether the student could have reasonably expected the speech to remain private, or whether it was reasonably foreseeable that the speech would reach the school's campus. If the administrator finds that the speech passes the reasonable foreseeability test, the next step is *Tinker*'s substantial disruption or material interference standard.

Offensive Speech Aimed at School Employees

When evaluating offensive off-campus student cyber-speech aimed at school employees, school administrators should consider: (a) the degree to which the speech was seen by school and community members; (b) the believability of the speech; (c) whether the speech had an impact on the employee's

ability to perform their administrative duties; (d) the actual impact on school activities resulting from the speech; and (e) whether the employee's fitness as a school administrator was brought into question.

None of these questions are dispositive, however, as seen in the Third Circuit's *Blue Mountain* decision. *J.S. ex rel. Snyder v. Blue Mountain School District.* 650 F.3d 915 (3rd Cir. 2011). Though the student's fake MySpace profile parodying her middle-school principal created "general rumblings" at the school and disrupted one teacher's class, the Third Circuit held that the profile was so outrageous in nature that no reasonable person would take it seriously. *Id.* at 922-23.

Thus, unless administrators can show that a student's off-campus offensive speech aimed at a school employee actually caused a disruption in the school or would likely do so without administrative action, merely angering or embarrassing an employee is not enough to constitute a substantial or material disruption and warrant disciplinary action.

Offensive Speech Aimed at Students

When evaluating offensive off-campus student cyber-speech aimed at fellow students, school administrators should consider whether the speech: (a) was intended to be accessed by students at the school; (b) caused the targeted student to suffer increased bullying or harassment; (c) affected the targeted student's school performance or participation in school activities; or (d) caused violent conflicts between students. If school administrators can show that the off-campus speech caused any of the above circumstances to occur, it is likely the school system would have strong grounds to impose disciplinary action.

Threatening or Violent Speech Aimed at School Employees or Students

The line between offensive and threatening speech is an important one in determining whether the First Amendment protects off-campus student cyber-speech. The First Amendment never protects true threats, but what constitutes a "true threat" varies from Circuit to Circuit. The Eight Circuit, for example, considers a true threat to be "a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another…if the speaker communicates the statement to the object of the purported threat or to a third party." *D.J.M. v. Hannibal Pub. Sch. Dist.,* 647 F.3d 754, 760 (8th Cir. 2011). Though this definition of a true threat is mirrored throughout the Circuits, school administrators must seek the advice of the school system' s attorney when assessing and acting on this type of student speech.

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Note: The views expressed in this commentary are those of the author.