# MYSPACE, YOURSPACE, OURSPACE: STUDENT CYBERSPEECH, BULLYING, AND THEIR IMPACT ON SCHOOL DISCIPLINE

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*When a student engages in bullying, tensions tend to arise between that student's freedom of speech—guaranteed in the First Amendment—and the school's duty to provide its students with an environment that is safe and conducive to learning. Bullying on the Internet is no exception. Although several Supreme Court decisions address students' free speech rights, none have dealt with student speech on the Internet. Thus, lower courts have struggled to apply the Supreme Court's standards to cases involving student online speech. When called upon to determine the extent of school administrators' authority to discipline students for inappropriate online speech, lower courts do not reach consistent results. The author recognizes the interests in conflict—the interest in speaking freely, without government interference, as well as the interest in educating and protecting students—and recommends that courts apply the "material and substantial disruption" standard to best balance these interests. The author argues that it would not be suitable for courts to look to other factors—including the location of the speech and whether the student-speaker intended to bring the speech onto campus—in the context of student speech on the Internet.*

## I. INTRODUCTION

In a society as technologically dependent as the one in which we live, it is not surprising to learn that as of August 2006, over 100 million people had joined the social networking site MySpace.[1] Another popular networking Web site, Facebook, subscribed its 30 millionth user in July 2007.[2] MySpace offers subscribers the opportunity to talk with friends, meet other people, interact with family, or network with business people

1. Abbi Adest, *Rupert Murdoch Comments on Fox Interactive's Growth*, SEEKING ALPHA, Aug. 9, 2006, http://seekingalpha.com/article/15237-rupert-murdoch-comments-on-fox-interactive-s-growth.

2. Progressive Policy Institute, Facebook Added Its 30 Millionth Subscriber Yesterday, http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=108&subsecID=900003&contentID=254388 (last visited Aug. 27, 2009).

or colleagues.[3] The number of online social networking Web sites more than quadrupled from 2005 to 2007.[4] These Web sites, while designed to benefit users, provide numerous opportunities for abuse. One merely has to conduct a generic Internet search to learn some of the horrific stories associated with social networking Web sites and other Web sites created for similar purposes. In fact, some of the most prominent "Frequently Asked Questions" (FAQ) listed on MySpace's FAQ page address how to block other users, how to stop harassment, or how to recover a compromised account.[5] Indeed, one MySpace FAQ informs people how to remove an imposter profile for a teacher or faculty member.[6]

Concurrent with the surge in participation in online communities comes a rise in incidents involving online bullying by children and adults. This practice, commonly referred to as cyberbullying, occurs any time one child torments, threatens, harasses, humiliates, or embarrasses another child using the Internet, digital technology, or a mobile phone.[7] Bullying used to be a problem commonly associated with school playgrounds or classrooms. Technology, however, has extended the reach of bullying into a forum not limited to schoolmates but which can also be accessed by vast numbers of unknown people with only the click of a button.

In an effort to reduce, and possibly even eliminate, the occurrence of cyberbullying and traditional bullying, many states have begun implementing statutes that require school districts to develop and enforce policies pertaining to bullying.[8] State and federal governmental efforts to preclude bullying that occurs on a school's campus or that negatively affects a child's ability to learn should inherently lead to an expansion of a school's authority to discipline students for engaging in such destructive behavior. School districts and administrators, however, are finding their authority severely limited or subjected to heightened scrutiny due to the conflict between regulating student speech and a student's First Amendment right to free expression.

This Note uncovers the tension between a school's duty to educate and protect its pupils and the extreme importance placed on an individual's First Amendment rights. Part II provides background information regarding the four prominent cases in which the Supreme Court of the

3. About Us—MySpace.com, http://www.myspace.com/index.cfm?fuseaction=misc.aboutus (last visited Aug. 27, 2009).

4. Progressive Policy Institute, *supra* note 2.

5. MySpace, MySpace Help, http://faq.myspace.com/app/ (last visited Aug. 27, 2009).

6. MySpace, Delete an Imposter Profile, MySpace Help, http://faq.myspace.com/app/answers/detail/a_id/33/kw/faculty/c/%20/r_id/10006/ (last visited Aug. 27, 2009).

7. StopCyberbullying.org, What Is Cyberbullying, Exactly?, http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html (last visited Aug. 27, 2009).

8. *See, e.g.*, 105 ILL. COMP. STAT. 5/27-23.7 (2008); W. VA. CODE § 18-2C-3 (2008). Bully Police USA, a self-titled "Watch-dog Organization," tracks the implementation of anti-bullying policies or statutes nationwide and then assigns each state's law a letter grade pursuant to criteria adopted by the organization. BullyPolice.org, http://www.bullypolice.org (last visited Aug. 27, 2009).

United States has spoken on the breadth of a student's First Amendment rights in a public school. Part II also examines how the lower courts have struggled to apply the standards adopted by the Supreme Court when addressing the issue of student online speech. Part III recognizes the apparent conflicts between the duty of public schools to provide a safe environment that encourages learning and the highly valued right of an individual to speak without governmental interference. Part III also highlights the inconsistencies in lower court opinions addressing the extent of a school administration's authority to discipline students engaging in online speech. Finally, Part IV recommends an appropriate standard to be adopted by both schools and courts for examining situations involving a student's online speech. This Note concludes that when analyzing student online speech, courts should not focus on where the speech occurred or whether the student intended the speech to be accessed on campus. Rather, courts should apply the "material and substantial disruption" standard announced by the Supreme Court in *Tinker v. Des Moines Independent Community School District*,[9] notwithstanding where the speech occurred or what the intent of the student-creator was when engaging in the speech.

## II. BACKGROUND

Although the Constitution of the United States does not explicitly address or require education, many state constitutions require that a system of public education be available for every child.[10] Courts repeatedly declare education a fundamental right which greatly influences the success of each state.[11] Additionally, governments place the great responsibility of training young individuals to become independent, thoughtful, and productive members of society on schools. One aspect of this multifaceted task is instructing students on how to be successful members of a civil society, especially one that cherishes diversity of viewpoints and constructive discourse among its constituents. Oftentimes this duty conflicts with a school's need to maintain discipline and protect the well-being of its students. This Part examines prominent Supreme Court cases addressing the conflict between a student's right to free speech and the school's right to discipline. It then specifically explores lower courts' attempts to apply the standards utilized by the Supreme Court to situations involving student online speech.

9. 393 U.S. 503 (1969).

10. *See, e.g.*, ARIZ. CONST. art. XI, § 1; ILL. CONST. art. X, § 1.

11. *See, e.g.*, Pauley v. Kelly, 255 S.E.2d 859, 884 (W. Va. 1979) (referencing discussion about the 1863 Constitution of West Virginia, which placed significant importance on the provision of education to encourage a spirit of humanity); *see also* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 205 (Ky. 1989) (emphasizing that the constitutional debates show the delegates' cognizance of the importance of education).

### *A. Landmark Supreme Court Cases Regarding Student Free Speech*

Prior to 2007, the Supreme Court of the United States had confronted the issue of student free speech in only three cases. These three cases,[12] as well as the Court's most recent opinion handed down in the summer of 2007, *Morse v. Frederick*,[13] present multiple analyses of school officials' authority to restrict student speech. Over time, the standard announced in the Court's first student speech case has been modified piecemeal to meet the evolving definition of the role of public education.[14]

#### *1.* Tinker v. Des Moines Independent Community School District

The Supreme Court approached the tension between free speech and discipline for the first time in *Tinker v. Des Moines Independent Community School District*.[15] In this case, students and a group of adults decided to demonstrate their protest of the conflict in Vietnam by wearing black armbands throughout the holiday season.[16] School administrators in Des Moines anticipated the "demonstration" and implemented a policy allowing for the suspension of students who refused to remove armbands when asked to do so.[17] Consequently, school administrators suspended the students who arrived at school wearing the armbands, and the students did not return to school until after the holiday season passed.[18]

The Court ultimately found that the administration's decision to punish the protesting students violated the students' free speech rights.[19] Most significantly, the Supreme Court stated that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[20] In order to constitutionally restrict a student's speech, a school must show more than a simple desire to avoid the unpleasantness that accompanies an unpopular viewpoint.[21] Schools may discipline students when evidence shows that the students' actions "ma-

12. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

13. 127 S. Ct. 2618 (2007).

14. *See Tinker*, 393 U.S. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). The standard announced in the Court's first student speech case required a state to show that the student's conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" to justify restricting the student's speech. For examples of modifications to this standard, see, for example, *Morse*, 127 S. Ct. at 2622 (holding that a school may discipline a student in an effort to "safeguard those entrusted to their care from speech that can reasonably be regarded as promoting illegal drug use"), and *Fraser*, 478 U.S. at 683 (finding that a school board may determine what manner of speech in the classroom or an assembly is appropriate).

15. 393 U.S. 503 (1969).

16. *Id.* at 504.

17. *Id.*

18. *Id.*

19. *Id.* at 505–06.

20. *Id.* at 506.

21. *Id.* at 509.

terially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school."[22] In instances where a real disruption did not occur, a school's decision to discipline may be upheld if school administrators had a reasonable belief that a student's speech would interfere with the school's responsibility or intrude upon the rights of others.[23]

The Court also emphasized the fact that school administrators had failed to preclude the display of all symbols of political or controversial significance.[24] Accordingly, an administrator's decision to single out a specific opinion for prohibition is unconstitutional unless allowing expression of that opinion would cause a material and substantial disruption.[25] Moreover, the Court recognized that students are not "closed-circuit recipients of only that which the State chooses to communicate," and should be exposed to more than officially approved viewpoints or opinions.[26]

The "material and substantial disruption" standard set forth in *Tinker* has evolved into the standard under which courts analyze most student free speech cases,[27] even though the Supreme Court also briefly mentioned an "invasion of others' rights" standard.[28] Although the majority's opinion clearly states that speech should only be restricted in a limited number of circumstances,[29] a subsequent lower court decision identified *Tinker* as the "high-water mark for public school students' First Amendment rights."[30]

### *2.* Bethel School District No. 403 v. Fraser

More than fifteen years after initially addressing the extent of a student's free speech rights in public school, the Supreme Court investigated an analogous issue in a drastically divergent factual setting. Unlike the passive speech at issue in *Tinker*,[31] a high school student in *Bethel*

22. *Id.* (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

23. *Id.* In *Tinker*, the Court found no evidence that school authorities feared disruption. *Id.* Rather, the school authorities' testimony indicated that the regulation was imposed because they felt that school was not the appropriate place for such demonstrations. *Id.*

24. *Id.* at 510. The record revealed that students were allowed to wear buttons concerning national political campaigns and the Iron Cross, a symbol of Nazism. *Id.* The school had solely prohibited the wearing of armbands. *Id.* at 510–11.

25. *Id.* at 511.

26. *Id.*

27. Douglas D. Frederick, *Restricting Student Speech that Invades Others' Rights: A Novel Interpretation of Student Speech Jurisprudence in* Harper v. Poway Unified School District, 29 U. HAW. L. REV. 479, 481 (2007).

28. *Id.* at 479–80; *see Tinker*, 393 U.S. at 513. The Court itself did not expound upon the invasion of others' rights standard, focusing solely on the presence of a disruption. *See generally Tinker*, 393 U.S. 503.

29. *See Tinker*, 393 U.S. at 513.

30. Broussard v. Sch. Bd., 801 F. Supp. 1526, 1534 (E.D. Va. 1992).

31. *Tinker*, 393 U.S. at 508.

*School District No. 403 v. Fraser*[32] engaged in lewd speech during a schoolwide assembly.[33] During a nominating speech for a classmate who was running for student elective office, Fraser referred to the candidate "in terms of an elaborate, graphic, and explicit sexual metaphor" in front of approximately six hundred of his peers.[34] Pursuant to a school policy which prohibited obscene language in school, Fraser served a three day suspension and could not speak at the school's commencement ceremony.[35]

In its opinion, the Supreme Court quickly drew a distinction between the "nondisruptive, passive [political] expression" in *Tinker* and the vulgarity included in this case.[36] The Court stated that public schools have the purpose of preparing students for participation in a society that values civility as indispensable to the practice of self-government.[37] An important aspect of a democratic society is considering the personal sensibilities of others, even when participating in "heated political discourse."[38] Strikingly, the Supreme Court limited the constitutional rights of students first recognized in *Tinker* by affirming that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[39] Allowing students to engage in speech that is "highly offensive or highly threatening to others"[40] would undermine a school's "basic educational mission."[41] Thus, the *Fraser* Court found the school's decision to suspend the student "perfectly appropriate."[42]

The exception for "offensive speech" created in *Fraser* evinces a stark departure from the focus on student autonomy in *Tinker*.[43] The numerous distinctions between *Tinker* and *Fraser*, however, support a conclusion that these two cases are not inconsistent with each other.[44] Commentators read the *Fraser* decision as creating another category of speech, separate from the political speech demonstrated in *Tinker*, which has its own constitutional framework.[45] Since *Fraser*, however, the lower

32. 478 U.S. 675 (1986).

33. *Id.* at 677.

34. *Id.* at 677–78.

35. *Id.* at 678. The school policy stated that "'[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.'" *Id.* (quoting the Bethel High School disciplinary rule).

36. *Id.* at 680.

37. *Id.* at 681 (citation omitted).

38. *Id.*

39. *Id.* at 682.

40. *Id.* at 683.

41. *Id.* at 685. In fact, the Court specifically noted that the First Amendment does not prevent school administrators from banning vulgar and lewd speech on the determination that such speech is contrary to a school's educational mission. *Id.*

42. *Id.*

43. Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 BYU EDUC. & L.J. 123, 131.

44. *Id.* at 131.

45. Frederick, *supra* note 27, at 483.

courts have been inconsistent in determining whether the new standard applies to both vulgar and offensive speech or if plainly offensive speech can unilaterally invoke a school's authority to discipline.[46]

*3.* Hazelwood School District v. Kuhlmeier

*Hazelwood School District v. Kuhlmeier*[47] presented the Supreme Court with a third opportunity to balance school discipline and student First Amendment rights. The question in this case involved the school's authority to censor articles in a school newspaper.[48] The Board of Education funded the newspaper, *Spectrum*, and an advanced journalism class was responsible for its production.[49] The Principal opposed two articles scheduled for publication in the spring edition: one that detailed three students' experiences with pregnancy and one that discussed the impact of divorce on students.[50] There was not enough time to correct the disputed material in the articles, so the Principal chose to entirely eliminate them from the edition.[51]

The Supreme Court upheld the Principal's decision to withdraw the problematic material, finding that the newspaper was not a public forum but rather was part of the educational curriculum.[52] As such, the *Tinker* standard was inapplicable, and the Court reinforced a school administrator's ability to impose reasonable regulations.[53] Therefore, school officials do not violate the First Amendment by exerting control over "student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[54]

The *Tinker* standard was not applicable because the court distinguished between a school's authority to discipline for student expression and the school's ability to refuse to associate its name and resources to a dissemination of student expression.[55] Although the Court meant to preserve the standard set forth in *Tinker*, the determination that the role of education is to awaken students to cultural values and to help them adjust to their environment[56] casts doubt on the *Tinker* Court's emphasis on

46. *Id.* at 484. The Supreme Court addressed this question in *Morse v. Frederick*, 127 S. Ct. 2618 (2007), finding that *Fraser* does not apply to purely "offensive" speech. *Id.* at 2629.

47. 484 U.S. 260 (1988).

48. *Id.* at 262.

49. *Id.* at 262–63.

50. *Id.* at 263.

51. *Id.* at 264. The Principal, after reviewing the material, believed changes could not be made because a significant delay in printing would have prevented the final issue from being distributed before the end of the school year. *Id.* at 263–64.

52. *Id.* at 269.

53. *Id.* at 270.

54. *Id.* at 273.

55. *Id.* at 272–73; *see also* Harpaz, *supra* note 43, at 133; Thomas E. Wheeler II, *Lessons From* The Lord of the Flies*: Protecting Students from Internet Threats and Cyber Hate Speech*, 10 J. INTERNET L. 3, 4–5 (2006).

56. *Hazelwood*, 484 U.S. at 272 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

training students to be leaders through a "robust exchange of ideas" not constrained by authoritative selection.[57]

*4.* Morse v. Frederick

The Supreme Court's most recent opinion regarding the limits of student free speech, *Morse v. Frederick*,[58] applies yet another standard to determine whether school officials are justified in disciplining a student for his speech. In *Morse*, a group of students displayed a banner reading "BONG HiTS 4 JESUS" on school grounds while the Olympic Torch Relay passed through Juneau, Alaska.[59] The Principal of the high school approached the students and demanded that the banner be taken down.[60] One student refused to comply with the Principal's request, and the Principal subsequently suspended the student for ten days.[61] The Principal imposed the suspension pursuant to a school policy that prohibited public expression advocating the use of illegal substances.[62]

The Court began by summarily dismissing the student's argument that the speech did not occur during a school-sanctioned event.[63] It went on to state that, although the message of the banner is "cryptic,"[64] part of a school's function, as defined by Congress, is to educate students about the consequences and dangers of illegal drug use.[65] This governmental interest, in conjunction with the "special characteristics" of the school environment,[66] provides school officials with the authority to regulate student expression that is reasonably believed to promote illegal substance use.[67] The Court refused to find the student's speech "offensive" under *Fraser*, instead focusing on the concern that the speech promoted unlawful drug use.[68]

Notwithstanding the narrowness of the holding in *Morse*,[69] the majority's opinion provides insight into the Court's previous opinions con-

57. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)); *see also* Harpaz, *supra* note 43, at 135.

58. 127 S. Ct. 2618 (2007).

59. *Id.* at 2622. An issue that fractured the Court was the interpretation of the message on Frederick's banner. Frederick admitted that the words were nonsense and that the purpose of the banner was to attract the attention of the television cameras. *Id.* at 2624. Morse, conversely, felt that the banner could be interpreted as promoting illegal drug use, an interpretation the majority thought was "reasonable." *Id.*

60. *Id.* at 2622.

61. *Id.*

62. *Id.* at 2622–23. The school board policy relied on by Morse specifically prohibited "public expression that . . . advocates the use of substances that are illegal to minors." *Id.* at 2623.

63. *Id.* at 2624.

64. *Id.*

65. *Id.* at 2628.

66. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

67. *Morse*, 127 S. Ct. at 2629.

68. *Id.*

69. *Id.* at 2622 ("[S]chools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."); *see also id.* at 2636 (Alito, J., concurring) (understanding that the holding in the case goes no further than allowing a school to restrict

cerning student free speech. The majority clearly establishes that the *Tinker* standard is not absolute and thus is not the only avenue available for restricting student speech.[70] Moreover, the Court explicitly rejects applying the *Hazelwood* standard because no person could reasonably believe the banner bore the school's approval or support.[71] After *Morse*, it is arguable that the *Fraser* standard only applies to speech classified as both vulgar and offensive and cannot be extended to speech only classified as "offensive."[72]

Critics attack the majority opinion by claiming that it fails to provide a principled justification for the new exception to the First Amendment.[73] Consequently, lower courts may inconsistently apply the *Morse* standard to find other viewpoints or subject areas not protected by a student's right to free speech.[74] Because *Morse* is such a recent decision, however, few lower federal courts have been given the opportunity to implement this new exception, either in the narrow fashion envisioned by Justice Alito[75] or in the expansive fashion feared by some legal commentators.[76]

In summary, the Court's initial determination that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[77] has lost potency throughout the past four decades and may not be an insurmountable barrier to efforts of school officials to discipline students for engaging in threatening, harassing online speech. The following Section examines lower courts' attempts to apply the standards announced by the Supreme Court in *Tinker*, *Fraser*, *Hazelwood*, and *Morse* in the context of student online speech. As will become evident, lower courts have not been consistent or predictable when adjudicating the ability of school administrators to discipline students who have engaged in online speech directed at either school faculty or other students.

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speech that may reasonably be viewed as advocating illegal drug use and does not support restricting speech that is plausibly interpreted as addressing a political or social issue).

70. *Id.* at 2627.

71. *Id.*

72. *See id.* at 2629 (stating that *Fraser* should not be read to "encompass any speech that could fit under some definition of 'offensive'").

73. *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 296 (2007) [hereinafter *Leading Cases*].

74. *Id.*; *see also* Erwin Chemerinsky, *How Will* Morse v. Frederick *Be Applied?*, 12 LEWIS & CLARK L. REV. 17, 25–26 (2008) (highlighting that schools have won a majority of the constitutional claims against them involving student rights and hoping that, although *Morse v. Frederick* continues that pattern, Justice Alito's concurring opinion will limit the scope of the majority's opinion).

75. *See Morse*, 127 S. Ct. at 2637 (Alito, J., concurring) (stating that the opinion does not mean a school can regulate speech on any grounds that are not already recognized in precedent).

76. Chemerinsky, *supra* note 74, at 22 (citing Wisniewski v. Bd. of Educ., 494 F.3d 34 (2d Cir. 2007), to support a conclusion that courts already interpret *Morse* as expanding school administrator authority); s*ee also Leading Cases*, *supra* note 73, at 296.

77. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

### *B. Current Standards for Disciplining Student Online Speech*

Notwithstanding the fact that the Supreme Court has addressed the extent of students' First Amendment rights in four factually different scenarios, the applicability of the various standards to student online speech remains uncertain. All of the previously discussed cases pertain to expression that occurred while the student or students were on campus.[78] What are the appropriate guidelines for school administrators' attempts to regulate and control online student speech? Does it matter if the speech did not occur on campus, but impacted either specific students or the school community in harmful ways? Does the extent of the impact matter? Does the content of the speech affect the appropriateness of discipline?

In the absence of a Supreme Court opinion clarifying this small but essential distinction, lower federal courts have struggled to formulate a widely applicable and uniform standard. The following Section provides an overview of the various factors utilized by courts when analyzing scenarios where students have participated in online speech. Courts generally identify two pertinent factors affecting the constitutionality of disciplining student speech: (1) where the speech occurred and (2) whether the speech caused a material and substantial disruption of school activities.

#### *1. Determining Where the Speech Occurred*

In determining whether student speech can be punished, courts begin by addressing the question of where the speech occurred.[79] Historically, this was a straightforward inquiry that focused only upon the point of receipt.[80] The Internet complicates this on-campus/off-campus dichotomy because once information has been posted on a Web site or forum, people can access it anywhere without any further action by the creator.[81] Internet speech does not have a "primary locus" such as a playground or school bus,[82] which makes the determination of where the speech occurred extremely difficult. For example, if a student posts a threatening statement from his home computer, but the victim of the threat reads it at school, where did the speech take place? This inquiry has troubled lower courts, and unfortunately, courts implement different methods to determine where the speech occurred. The outcome of this inquiry impacts schools and students in a significant way. If a student engages in

78. The students in *Tinker* attempted to wear black armbands to school, *id.* at 504; the student in *Fraser* was speaking at a school assembly, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986); the students in *Hazelwood* were writing for the school newspaper, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988); and the Court in *Morse* quickly dismissed the student's argument that the case was not a school speech case. *Morse*, 127 S. Ct. at 2624.

79. Wheeler, *supra* note 55, at 7.

80. *Id.* at 7–8.

81. Harpaz, *supra* note 43, at 161.

82. Wheeler, *supra* note 55, at 7.

speech at school, administrators have greater authority to discipline; if a student engages in speech off-campus, the bounds of administrative authority are ambiguous.

a. Speech Using School Computers or Internet Resources

Courts have addressed the extent of a school administrator's authority to punish a student for expression he or she posted to the Internet while at school. If the school's curriculum sufficiently incorporates Internet service, school officials can constitutionally restrict a student's access to certain areas.[83] A school can prohibit lewd, offensive, vulgar, or even threatening language when students express such language in conjunction with a school-sponsored activity utilizing the Internet because such language contradicts the educational goals of the school.[84] Many schools have implemented technology or Internet-based policies that prohibit using such resources for noneducational purposes, and schools can reasonably discipline students for violations of that policy.[85]

b. Speech Created Using a Computer Away from School

The more difficult questions arise in situations where a student creates a Web site at home, and then the student or his or her peers subsequently access the Web site at school.[86] In these settings, the student did not create the speech at school or during a school-sponsored activity, thus giving rise to a factual circumstance that does not allow school officials to confidently impose reasonable restrictions, as done in *Hazelwood* and *Fraser*. Additionally, the "legitimate pedagogical concerns" that constituted an essential element in *Hazelwood* arguably do not extend to activities not directly related to a school's curricular objectives.[87] Courts have recognized these difficulties and the resulting opinions create an ambiguous analytical process.

Courts struggle when determining where speech occurred because students can wholly create speech while not at school, but peers, administrators, or even the student-creator can access the speech at school, making the effects of the speech realized at school. When a student posts material on the Internet, the student has limited control over who views the

83. Harpaz, *supra* note 43, at 124.

84. *Id.* at 153–54.

85. School districts must be careful, however, to adopt policies that are not overbroad and therefore unconstitutional. *See* Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 2d 698, 706 (W.D. Pa. 2003) (invalidating student discipline without addressing *Tinker* issues because the Student Handbook policies could prohibit a "substantial amount of protected speech" and did not impose significant geographical limitations on the reach of the policy).

86. *See generally* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (discussing a student's free speech rights in such a factual situation).

87. Harpaz, *supra* note 43, at 138 (discussing a Sixth Circuit case in which the *Hazelwood* standard was found to apply because the speech occurred during a school-sponsored activity).

material or where someone accesses the material.[88] Not surprisingly, the determination of where the speech occurred in these types of situations significantly impacts a school administrator's ability to impose discipline, and the courts' lack of uniformity in making this determination causes severe confusion.

Some courts have adopted a bright-line test: any speech accessed at school occurred on-campus.[89] The Pennsylvania Supreme Court, in *J.S. v. Bethlehem Area School District*,[90] upheld the disciplining of a student who created a Web site away from school that peers subsequently accessed at school. The fact that the student and his peers visited the Web site at school established a sufficient nexus between the speech and the school, allowing the court to consider the speech as occurring on-campus.[91] This approach resembles the earlier approach adopted by courts when analyzing factual scenarios involving underground newspapers eventually brought on-campus.[92]

The United States District Court for the Western District of Pennsylvania employed a different inquiry to determine where the student's speech took place. In *Killion v. Franklin Regional School District*,[93] a student developed a "Top Ten" list targeting the school's Athletic Director.[94] The student distributed the list through e-mail using a computer not affiliated with the school.[95] Although school officials later found copies of the derogatory list on school grounds,[96] the court refused to uphold the school's decision to discipline the student.[97] According to the court, since the student created the list outside of school, and no evidence established that the student was responsible for bringing the list to school or that the list caused disruption, the school administration's decision to suspend the student violated his First Amendment rights.[98]

The only clearly established rule regarding the determination of where speech occurred pertains to when a student uses school resources, such as computers or Internet connections, to create the speech. Courts have not delineated a uniform, appropriate analysis for speech created outside of school boundaries. A few courts only require school administrators to establish a reasonable nexus between the student's speech and

88. Wheeler, *supra* note 55, at 6.

89. *Id.* (discussing the J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 849 (Pa. 2002), approach to the on-campus versus off-campus distinction).

90. *J.S.*, 807 A.2d at 849.

91. *Id.* at 865.

92. *See, e.g.*, Boucher v. Bd. of Sch. Dist., 134 F.3d 821, 828–29 (7th Cir. 1998). See also the discussion of off-campus speech in Harpaz, *supra* note 43, at 142–45.

93. 136 F. Supp. 2d 446 (W.D. Pa. 2001).

94. *Id.* at 448. The list contained comments regarding the Athletic Director's appearance, including disparaging remarks about the size of his genitals. *Id.*

95. *Id.*

96. *Id.* at 448–49.

97. *Id.* at 458.

98. *Id.*

school activities.[99] Other courts approach the determination by looking at the intent or actions of the student who created the speech.[100] Notwithstanding the distinction between off-campus and on-campus speech, courts generally approach the next step in a uniform manner.[101] Courts routinely apply the *Tinker* standard of material disruption when faced with situations where a student's online speech appeared on school grounds. Courts are not uniform, however, in the conclusions they reach when applying this standard.

### *2. Establishing a Material and Substantial Disruption*

Inconsistencies and uncertainties abound in courts' attempts to decide the importance of the school establishing a "material and substantial disruption" before imposing disciplinary measures. Some courts appear to apply this standard when determining whether the speech occurred on-campus or off-campus.[102] Others apply this test only after deciding where the speech took place.[103] Still other courts suggest that it does not matter where the speech occurred, as long as the "material and substantial" standard can be established.[104] Nevertheless, courts generally agree on one idea: the *Tinker* standard should be applied in some part of the court's analysis.

The application of the material and substantial disruption standard begs the question of what constitutes a material and substantial disruption in the Internet context. A federal district court first spoke on this issue in *Beussink v. Woodland R-IV School District*.[105] In *Beussink*, a high school student created a Web site away from the high school and on his own computer.[106] The Web site used vulgar language to criticize the school, its Principal, and its teachers.[107] The student never displayed the Web site to friends at school, but a peer accessed it at school and showed it to a teacher as a way to retaliate against the student-creator.[108] The court found that the student's Web site did not actually create a disrup-

99. *See, e.g.*, J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002).

100. *See, e.g.*, *Killion*, 136 F. Supp. 2d at 458.

101. The *Tinker* standard was not, however, applied in a student online speech case heard in the Middle District of Pennsylvania. Rather than apply the *Tinker* analysis, the court found that the student's online speech was "vulgar and lewd," making it analogous to the student speech in *Fraser*. J.S. *ex rel.* Snyder v. Blue Mtn. Sch. Dist., No. 3:07cv585, 2008 WL 4279517, at *5 (M.D. Pa. Sept. 11, 2008). The district court then faced the question of whether the speech occurred on-campus and concluded that the facts established an on-campus effect from the off-campus action. *Id.* at *7.

102. Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (noting that in order to justify prohibiting speech, a school must establish that the speech would cause a material and substantial interference with appropriate discipline).

103. *J.S.*, 807 A.2d at 868–69.

104. *Killion*, 136 F. Supp. 2d at 454–55.

105. *Beussink*, 30 F. Supp. 2d 1175.

106. *Id.* at 1177.

107. *Id.*

108. *Id.* at 1177–78.

tion or a fear of disruption.[109] Rather, the Principal decided to discipline the student because he was upset by the content of the Web site.[110] The court placed a high value on student speech, recognizing that "it is provocative and challenging speech, like Beussink's, which is most in need of the protections of the First Amendment."[111]

The lack of guidelines for courts to use when determining the presence or reasonable fear of a material and substantial disruption has led one judge in a district court to reach two drastically different conclusions when examining the same set of facts.[112] In *Layshock ex rel. Layshock v. Hermitage School District*, the student created a "parody" profile on MySpace depicting the Principal of the high school.[113] The profile contained "nonsensical answers to silly questions" and "crude juvenile language."[114] The district court, in considering the student's motion for a temporary restraining order, denied the motion because it concluded that the student's parody profile "substantially disrupted school operations and interfered with the rights of others."[115] The school administration presented evidence showing it had to shut down its computer system to students, which caused the cancellation of computer classes and interfered with the students' ability to use computers for school purposes.[116] Additionally, faculty at the school reported the students were "abuzz" about the profile, and an Assistant Principal testified that he spent considerable time attending to the disruptions and investigating the incident.[117]

When the student and school administration filed cross-motions for summary judgment, however, the district court judge's evaluation of events led to a contradictory conclusion.[118] Considering the same facts, the court found there were "gaps in the causation link" between the student's conduct and the subsequent disruptions at school.[119] Furthermore, the school administration failed to connect the alleged disruption to this particular student's profile and could not establish that the "buzz" about the profile was a result of the profile and not of the administrators' reactions to it.[120] Therefore, the school had failed to establish a sufficient nexus between the student's speech and the disruption. The court went

109. *Id.* at 1181.

110. *Id.* In making this determination, the district court suggested that the principal's strong, negative reaction may have been influenced by Beussink's unrelated improper conduct. *Id.* The district court, however, emphasized that the other improper conduct was not the focus of its inquiry. *Id.*

111. *Id.* at 1182.

112. *Compare* Layshock v. Hermitage Sch. Dist. (*Layshock I*), 412 F. Supp. 2d 502 (W.D. Pa. 2006), *with* Layshock v. Hermitage Sch. Dist. (*Layshock II*), 496 F. Supp. 2d 587 (W.D. Pa. 2007).

113. *Layshock I*, 412 F. Supp. 2d at 504.

114. *Id.* at 504. Additionally, the profile contained a picture of the principal obtained from the school's official Web site. *Id.* at 505.

115. *Id.* at 508–09.

116. *Id.* at 508.

117. *Id.*

118. *Layshock II*, 496 F. Supp. 2d 587, 601 (W.D. Pa. 2007).

119. *Id.* at 600.

120. *Id.*

on to explicitly state that any alleged disruption was minimal because "no classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action. . . . [O]ne computer teacher threatened to shut down the system, but that teacher testified that he was able to restore order . . . ."[121] The judge's contrary evidentiary findings are the result of the burdens of proof in civil procedure, but the effect on student speech jurisprudence remains the same. The ambiguity of the material and substantial disruption standard makes application unpredictable, at best.

It may be impossible to succinctly summarize the process of analysis that courts should employ when considering student online speech cases, partly due to the confusion and contradictions that courts themselves exhibit. With the prevalence of Internet connectivity, the clear distinction between activity that occurred on school grounds and off school grounds no longer exists. The lack of a Supreme Court decision addressing the specific issue of online speech makes application of any precedent unclear and perhaps even impossible.[122]

The following Part synthesizes the precedent discussed above with the tension between First Amendment values and public school duties. It then analyzes the present governmental emphasis on providing safe school environments that foster student learning and growth. Additionally, it explores the confusion surrounding current student online speech analysis.

## III. ANALYSIS

"[I]ndependence of thought and frankness of expression occupy a high place on our scale of values, or ought to, but so too do discipline, courtesy, and respect for authority."[123] The protections of the First Amendment, and the values contained therein, are not wholly without exception.[124] Moreover, prohibitions that potentially violate an adult's constitutional rights may not be given the same treatment when applied to children in public schools.[125] This Part briefly addresses the "categories" of speech that can be regulated by school administrators.[126] It then

121. *Id.* The district court's finding that there were no cancelled classes directly conflicts with the earlier finding that computer classes had to be cancelled. *Compare Layshock II*, 496 F. Supp. 2d at 600, *with Layshock I*, 412 F. Supp. 2d at 508.

122. Harpaz, *supra* note 43, at 162 (arguing that the application of the *Tinker* standard to Internet speech cases is doubtful because "the Internet cannot yet be worn to school like an article of clothing").

123. Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989).

124. Roth v. United States, 354 U.S. 476, 484–85 (1957) (discussing the idea that the protection of speech applies unless speech is excludable based on limited areas of more important interests); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 382–84 (1992).

125. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

126. Clay Calvert, *Free Speech and Public Schools in a Post-Columbine World: Check Your Speech Rights at the Schoolhouse Metal Detector*, 77 DENV. U. L. REV. 739, 744 (2000); Frederick, *supra* note 27, at 485–87. Neither of these articles addresses the Supreme Court's decision in *Morse v.*

examines how conflicts are becoming more apparent as government officials begin imposing new responsibilities on school administrators to provide more secure settings, particularly in response to the increase in school violence. This Part also highlights the difficulties school administrators encounter in implementing mandated policies and the consequences these policies cause for both schools and students. Finally, it evaluates the divergent methods of analysis employed by courts and the resulting impacts on schools and children.

### *A. The Categorical Approach to Student First Amendment Rights*

Although not exclusive, many legal commentators and courts have interpreted the Supreme Court's student speech opinions, not including *Morse v. Frederick*, as creating three "categories" of speech that can be constitutionally restricted by public schools.[127] The first category, based on the *Tinker* decision, allows speech to be prohibited when it could substantially and materially disrupt the school environment or interfere with the rights of other students.[128] Courts generally apply this standard to student speech cases, whether or not the speech occurred in the context of the Internet.[129] The second category allows restrictions when the student's offensive, vulgar, or lewd speech occurs during a school-sponsored activity, as was the case in *Fraser*.[130] The final category, with a foundation in the Court's holding in *Hazelwood*, upholds regulation when a reasonable relationship exists between the censorship and the school's legitimate pedagogical concerns.[131]

Due to the fact that the Supreme Court recently decided *Morse v. Frederick*, the lower courts have had limited opportunities to either incorporate its holding into the previously recognized categories, or create a new, distinct category. Shortly after the Supreme Court announced its decision, one critic quickly interpreted it to create a new exception to the First Amendment without "any contained or compelling justification."[132] Looking strictly at the language used in the majority opinion, one could easily determine that a main reason for the Court's decision to uphold the student's discipline was the "'special characteristics of the school environment' and the governmental interest in stopping student drug

*Frederick*. For a critical analysis of the Supreme Court's new exception, see *Leading Cases*, *supra* note 73.

127. Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992); Calvert, *supra* note 126, at 749–50.

128. Calvert, *supra* note 126, at 744.

129. *See, e.g.*, Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa. 2001); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088 (W.D. Wash. 2000); *see also* Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998); Frederick, *supra* note 27, at 487 ("*Tinker* is the standard applied in most student speech cases because it covers the broadest amount of speech and the most common types of student speech.").

130. Calvert, *supra* note 126, at 745–47.

131. *Id.* at 747–48.

132. *Leading Cases*, *supra* note 73, at 296.

abuse."[133] Consequently, it would not be an unreasonable inference for lower courts to find that school administrators may regulate student speech that impacts the school environment and legitimate governmental interests.

Most court cases involving student online speech were decided prior to the Supreme Court's decision in *Morse*. Arguably, this decision significantly increases the tension between First Amendment protection and public school responsibility. Before addressing those issues, the following Section defines the values inherent in the First Amendment and the specific duties of public schools.

### *B. Countervailing Interests and Initiatives*

The government's prerogative to educate its citizenry to be productive members of society oftentimes conflicts with the desire to live in a society that benefits from a diversity of opinions and viewpoints. As noted by one scholar, however, the objectives of free speech and public education are not always divergent.[134] Rather, "[b]oth strive to encourage individual development and advance knowledge."[135] The conflicts arise because free speech presumes citizens are self-sufficient and free-thinking whereas public education incidentally minimizes student autonomy.[136] The following Section discusses the implications of the divergent concepts of free speech and public education.

#### *1. First Amendment Protections and Values*

Freedom of speech is one of the most highly valued fundamental rights conveyed to individuals through the Bill of Rights. It precludes the government from censoring private communication based on the message conveyed, and many consider its presence an essential part of establishing a society that makes decisions based on the consent of the governed.[137] United States citizens can use freedom of speech as "a tool for self-realization [and] a means of discovering the truth."[138] Courts struggle to uphold these fundamental values, especially in public education where the government has the responsibility of teaching students to learn specific concepts while fostering independent thinking.

One commentator contends that school administrators must never forget the importance of free speech and the harm that will occur with its

133. Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007) (citations omitted).

134. Christi Cassel, Note, *Keep Out of MySpace!: Protecting Students From Unconstitutional Suspensions and Expulsions*, 49 WM. & MARY L. REV. 643, 655 (2007).

135. *Id.*

136. *Id.*

137. *See, e.g.*, Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 63 (2002).

138. Calvert, *supra* note 126, at 768.

curtailment.[139] "Individuals must be able to think for themselves in order to exercise . . . political rights in a democratic society."[140] Supporters of First Amendment rights argue that by routinely disciplining student speech, schools demonstrate a disregard for the importance of freedom of expression.[141] These supporters contend that, as a result, students will be less likely to assert their beliefs in a participatory democracy.[142] An alternative to restricting student speech and undermining the importance of the First Amendment would be for school administrators to encourage speech and educate students about the harmful effects of speech and the limitations of the First Amendment.[143]

Notwithstanding the fear that suppressing speech will lead to a decline in democratic participation, the Supreme Court has routinely found that a student's constitutional rights are not "coextensive" with those of adults.[144] Student First Amendment rights are more critically reviewed because of the unique setting of public education in America.[145] While the participatory goals outlined above are important, schools must also inculcate other basic values of democracy, such as civility and respect for others.[146] Public schools should strive to encourage debate between students in civil terms, not terms that are highly offensive or threatening.[147] Moreover, the freedom to "advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[148]

In one case addressing student online speech, a federal district court noted two things: (1) the presence of a public interest in the wide dissemination of ideas, and (2) the necessity of First Amendment protection for "provocative and challenging speech."[149] Contrast this with a scholar's suggestion that after *Morse*, speech "simply needs to be contrary to the educational goals or mission of the school" in order to be constitutionally restricted.[150] Many schools and courts across the country face the confounding cross-section of these two ideals. The discussion above highlights a dichotomy between scholarly opinion about the importance of First Amendment values in public education and the Supreme Court's

139. *Id.*

140. Sandy S. Li, Note, *The Need for a New, Uniform Standard: The Continued Threat to Internet-Related Student Speech*, 26 LOY. L.A. ENT. L. REV. 65, 89 (2005).

141. Calvert, *supra* note 126, at 768.

142. *Id.*

143. *Id.* at 765–66.

144. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

145. Wheeler, *supra* note 55, at 5.

146. Martha McCarthy, *Anti-Harassment Policies in Public Schools: How Vulnerable Are They?*, 31 J.L. & EDUC. 52, 55 (2002).

147. *Id.* at 65 (quoting West v. Derby Unified Sch. Dist., 23 F. Supp. 2d 1223, 1233 (D. Kan. 1998)).

148. *Fraser*, 478 U.S. at 681.

149. Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1181–82 (E.D. Mo. 1998).

150. McCarthy, *supra* note 146, at 65.

willingness to limit First Amendment protections in school settings. The following Section outlines the ever-increasing importance of providing safe, supportive environments in public schools.

### *2. School Safety and Anti-Bullying Measures*

"'[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'"[151] Public schools have the duty not only to educate children, but also to teach them to be contributing members of a society. The prevalence of violence in American schools, however, often overshadows this fundamental duty of public schools. The statistics regarding the extent of school violence are staggering and range from activities such as bullying to assaults with weapons.[152] In fact, a 2002 U.S. Secret Service and Department of Education report concluded that many students committing school violence are themselves bullied, persecuted, or otherwise victimized by others before the attack.[153] The interplay between bullying, school violence, and the Internet drew national attention after tragedies like the school shooting at Columbine High School, where one of the aggressors had a Web site.[154] Government officials, both state and federal, are proposing and adopting measures aimed at deterring school violence and creating a secure environment at all public schools.[155] There are critics of this movement, however, who argue that it severely limits the First Amendment rights of students.[156]

While the old adage that "kids will be kids" is an argument against increasing school administrators' authority to discipline children for engaging in bullying behavior, schools have the duty of preparing youth for adulthood, a duty which may require schools to respond to and remedy harmful behavior.[157] Furthermore, harassing behavior can potentially affect the victim's ability to concentrate, which, in turn, affects his or her performance at school.[158] Justice Alito, in his concurrence to the *Morse* opinion, specifically recognized that schools pose a threat to the physical safety of students.[159] While at school, "[s]tudents may be compelled on a daily basis to spend time at close quarters with other students who may

151. *Fraser*, 478 U.S. at 681 (quoting CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

152. SecurityWorld.com, School Violence Statistics, http://www.securityworld.com/ia-428-school-violence-statistics.aspx (last visited Aug. 27, 2009).

153. Kathy Christie, *Chasing the Bullies Away*, 86 PHI DELTA KAPPAN 725, 725 (2005).

154. Harpaz, *supra* note 43, at 123.

155. *See, e.g.*, Safe and Drug-Free Schools and Communities Act of 1994, 20 U.S.C. §§ 7101–7165 (2006); DEL. CODE ANN. tit. 14, § 4112D (2007).

156. Li, *supra* note 140, at 66–67.

157. Wheeler, *supra* note 55, at 4.

158. Harpaz, *supra* note 43, at 159–60.

159. Morse v. Frederick, 127 S. Ct. 2618, 2638 (2007) (Alito, J., concurring).

do them harm."[160] This "special characteristic" permits school authorities to intervene before violence actually occurs.[161]

State governments have started implementing statutes that require school districts to adopt anti-bullying policies and programs in an effort to curb school violence and the negative impacts of bullying. Many of these mandates are adopted by state legislatures due to the growing amount of research on "(1) the prevalence of bullying in K–12 schools, (2) the likelihood of school bullies to develop more serious socio-emotional problems with the passage of time, and (3) the impact of bullying on its victims and school climate in general."[162] Most state statutes requiring the adoption of an anti-bullying policy define bullying and require the state department of education to provide a model policy for school districts to use as a template.[163] Some states even impose reporting requirements for the number of bullying incidents reported to school administrators and condition the receipt of state funds on the implementation of an appropriate policy.[164]

Government officials at the state level are not the only ones who have recognized the significant interest of providing a safe, secure, and supportive educational environment. The Safe and Drug-Free Schools and Communities Act of 1994[165] was enacted by Congress to "foster a safe and drug-free learning environment that supports student academic achievement."[166] Under the Act, schools are required to adopt programs based on "objective data regarding the incidence of violence" in schools and scientific research evidencing that the program will reduce violence.[167] Moreover, the implemented programs must convey "a clear and consistent message that . . . acts of violence are wrong and harmful."[168]

Although policymakers are willing to take steps and implement legislation that gives school administrators the responsibility of preventing school violence, this movement may cause a restriction of First Amendment protections in school settings. Some critics argue that the restrictions imposed would be unfounded because courts justify giving school administrators more authority simply because courts are afraid.[169] While the concerns exhibited by school administrators and courts are noteworthy, these critics argue that speech cannot be sacrificed on account of

160. *Id.*

161. *Id.*

162. JENNIFER DOUNAY, EDUC. COMM'N OF THE STATES, STATE ANTI-BULLYING STATUTES 1 (2005), http://www.ecs.org/clearinghouse/60/41/6041.pdf.

163. *See, e.g.*, ALASKA STAT. § 14.33.200 (2008); TEX. EDUC. CODE ANN. § 25.0342 (Vernon Supp. 2008).

164. *See, e.g.*, DEL. CODE ANN. tit. 14, § 4112D (2007).

165. 20 U.S.C. §§ 7101–7165 (2006).

166. *Id.* § 7102.

167. *Id.* § 7115(a)(1).

168. *Id.* § 7162(a).

169. *See, e.g.*, Li, *supra* note 140, at 66 (noting that "many cases" dealing with student online speech cite the Columbine tragedy in support of their decisions to increase school authority).

fear.[170] This viewpoint asserts that tragedies like Columbine, cited in many opinions as support for upholding school discipline, although tragic, are rare.[171] One scholar stated that the "generation gap between judges and students" leads to a misconception about the impact of violence on youth.[172] For example, since children are inundated with violent imagery and they are impressionable, one commentator argues that any inappropriate speech may just be an attempt to mimic the culture they are surrounded by daily.[173] The attack continues by stating that the inability of discipline to rectify the harms foreseen by school administrators does not justify the increased restriction of student First Amendment rights.[174] In essence, schools should strive to protect students, but they must not "trample on [students'] constitutional rights in the process."[175]

Although some argue that courts only perpetuate the concerns about violence among children by upholding school administrators' decisions to discipline,[176] a Third Circuit appellate panel placed more emphasis on a student's right to freedom of expression.[177] In *Saxe v. State College Area School District*, a parent challenged the constitutionality of the district's anti-harassment policy.[178] The parent feared that enforcement of the policy would preclude his children from expressing their religious views about homosexuality and other moral issues.[179] The district court dismissed the facial challenge because it concluded the policy only punished speech that does not receive First Amendment protection.[180] The appellate court, however, found that the harassing speech targeted by the school's policy could not entirely be categorized as speech outside of First Amendment protection, making the policy unconstitutional.[181] The court then explicitly recognized the "very real tension" by stating that not all anti-harassment policies would fail First Amendment scrutiny,

170. Calvert, *supra* note 126, at 764.
171. Li, *supra* note 140, at 66.
172. *Id.* at 90.
173. *Id.*
174. Calvert, *supra* note 126, at 765.
175. Cassel, *supra* note 134, at 680.
176. Li, *supra* note 140, at 66.
177. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001). For an in-depth analysis of this case and its possible impact on anti-harassment policies, see McCarthy, *supra* note 146, at 57–70.
178. *Saxe*, 240 F.3d at 202.
179. *Id.* at 203.
180. *Id.* at 204. The appellate court recognized that "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Id.* The court reviewed the scope of the anti-harassment statutes in an effort to clarify the current status of the law and illustrate why the lower court's determination that "'[h]arassment has never been considered to be protected . . . under the First Amendment'" was incorrect. *Id.* at 204–06 (quoting Saxe v. State Coll. Area Sch. Dist., 77 F. Supp. 2d 621 (M.D. Pa. 1999)).
181. *Id.* at 209.

perhaps because the government has a compelling interest in preventing discrimination.[182]

The policy's emphasis on the purpose of the student's speech, rather than its effect on the educational environment, targeted not only disruptive speech, but also "simple acts of teasing and name-calling" that had previously been held insufficient to establish liability.[183] Furthermore, the policy imposed no "geographical or contextual limitations," but encompassed any student harassment by a member of the school community.[184] The court recognized the Tenth Circuit's recent decision to uphold a similar policy, but distinguished that case based on the school administrators' reasonable beliefs that disruption would occur due to past incidents.[185] The school district failed to provide any evidence that would support administrative anticipation of substantial disruption, rendering the policy overbroad despite the school district's compelling interests in promoting student learning in a safe environment.[186]

Public schools are required to teach, protect, guide, and prepare students for the future.[187] These responsibilities are not taken lightly and often are not congruent. The tension between instilling the value of freedom of expression and protecting students from intimidating situations is a powerful example. As evidenced by the numerous cases discussed above, both schools and courts have struggled to rectify these compelling interests. The following Section outlines the impacts of divergent court analyses on both students and administrators.

### *C. Diverse Standards and Their Impact on Schools and Children*

Given the factual differences between the Supreme Court's student speech jurisprudence and online student speech, the lower courts struggle to apply student speech precedent in a consistent fashion. There are different standards for determining where the speech occurred, whether the location of the speech is legally relevant, and whether it caused a disruption, all of which significantly impact a school administrator's authority to discipline.[188] This Section first addresses the determination of where the speech occurred and the consequences of the different tests applied by the lower courts. It then analyzes the methods utilized to determine whether the *Tinker* test has been satisfied, as well as the resulting ambiguity regarding what exactly constitutes a material and substantial disruption.

182. *Id.*

183. *Id.* at 210–11 (quoting Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 652 (1999)).

184. *Id.* at 216.

185. *Id.* at 212 (citing West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000)); McCarthy, *supra* note 146, at 61–62 (discussing how the *Saxe* court distinguished the facts before it from the similar case before the Tenth Circuit).

186. *Saxe*, 240 F.3d at 217.

187. Cassel, *supra* note 134, at 680.

188. *See supra* Part II.B.

### *1. Determining Where the Speech Occurred*

The technological development of the Internet makes the determination of where speech occurred less than precise. Anyone can access information posted on the Internet virtually anywhere at any time without further action by the creator. This becomes particularly relevant in student free speech cases because, traditionally, a school administrator's authority to discipline partially depends upon the student's or the speech's presence on school grounds.[189] This Section identifies the implications of the methods adopted by the lower courts.

Some courts rely on the intent of the student creator when deciding whether a school administrator has the requisite authority to discipline.[190] If the court focuses on the student's intent, the student could be given more freedom to engage in online speech, as was the case in *Killion*.[191] There, because the student did not intend to bring the speech onto campus, the court found that the school administrators' decision to discipline was unconstitutional.[192] Similarly, the *Saxe* court struck down an antiharassment policy because of the policy's attention to the "purpose" of the student's speech.[193] The Third Circuit found this qualification completely ignored the *Tinker* requirement of either a substantial disruption or reasonable belief that such a disruption would occur.[194]

Using such an "intent" test could conceivably permit a student to take refuge in the anonymity of the Internet,[195] even though the repercussions of his or her speech impact the school environment. That is, this standard certainly fosters independent thinking and would limit the ability of school administrators to punish speech solely to "avoid discomfort or unpleasantness."[196] But it would not, however, allow school administrators to discipline students whose speech causes negative effects so long as the speech was created off-campus and the student did not intend for it to be brought on-campus. In addition, it is arguable that a student who posts speech on the Internet necessarily has the requisite intent because the student presumably realizes his or her speech can be accessed anywhere, including on-campus, by anyone.

Another mode of analysis adopted by courts requires school administrators to establish a nexus between the student's speech and the school before discipline can be imposed.[197] This test may look at whether the

189. *See* Harpaz, *supra* note 43, at 142 (inferring from the Supreme Court's student speech cases that a school's authority over student speech "ends as the student leaves the schoolhouse").

190. *See supra* notes 93–98 and accompanying text.

191. Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 454–55 (W.D. Pa. 2001).

192. *See id.* at 458.

193. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 216–17 (3d Cir. 2001).

194. *Id.* at 217.

195. *See* Wheeler, *supra* note 55, at 6 (comparing teenage use of the Internet to William Golding's book *The Lord of the Flies* because the Internet provides anonymity and removes traditional safeguards and protections).

196. *Layshock II*, 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007).

197. *See supra* notes 89–92 and accompanying text.

student's speech was "aimed at a specific school and/or its personnel . . . or [was] accessed at school by its originator."[198] If a school can establish a sufficient nexus between it and the student's speech, the school has overcome the inference that school authority to discipline does not extend past school grounds.[199]

The mere requirement of a connection with school activities or the school environment, however, may create too much liability for students because of their limited control over who accesses the speech once it has been posted.[200] That is, the bright-line test that bases the determination of where speech occurred on its point of receipt poses serious risks for any students who engage in online speech because the students do not have any say in whether it is accessed in a location other than where it was created.[201] Consequently, finding a nexus solely because the speech was accessed by someone while at school severely restricts the First Amendment value of encouraging students to think for themselves. It may enable school administrators to punish "simple acts of teasing and name-calling among school children," speech that was given First Amendment protection by the Supreme Court in *Davis v. Monroe County Board of Education*.[202]

While lower courts struggle to adopt a uniform, consistent standard, legal scholars suggest that the on-campus and off-campus distinction should not even apply to student online speech cases.[203] Because the Internet, as a "borderless medium," differs from traditional mediums of expression, scholars opine that courts' efforts at establishing a dichotomy between online speech that occurs on-campus and online speech that occurs off-campus is an exercise in futility.[204] Independent of what standard provides better protection for both students and schools, one conclusion prevails: authoritative guidance is needed.

### *2. Defining a Material and Substantial Disruption*

After articulating that a student cannot be disciplined for speech absent a material and substantial disruption or an invasion of others' rights,[205] the Supreme Court has failed to further clarify those guidelines. The Court did not explicitly state whether the same protection would be extended if some of the factual circumstances of *Tinker* were not

198. J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002).
199. Harpaz, *supra* note 43, at 142–43.
200. Wheeler, *supra* note 55, at 7.
201. Harpaz, *supra* note 43, at 161.
202. 526 U.S. 629, 652 (1999).
203. Li, *supra* note 140, at 92–93; *see also* Harpaz, *supra* note 43, at 162 (questioning whether a "true *Tinker* case" is possible when speech involves the Internet because the Internet is not a tangible thing that can be brought onto school grounds).
204. Li, *supra* note 140, at 93.
205. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

present.[206] In fact, when the Supreme Court subsequently addressed student speech issues, it created more confusion by distinguishing each case from the previous ones.[207] These ambiguities place both students and school administrators in precarious positions when dealing with online speech.[208] For example, the *Layshock* cases discussed above had diametrically opposed results despite the fact that the issues arose from the same incident.[209] This Section highlights the consequences of the uncertainty that accompanies the application of the *Tinker* standard.

The Supreme Court did not hesitate to find that the students' speech in *Tinker* was "akin to 'pure speech.'"[210] The students in that case did not engage in "aggressive, disruptive action," nor did they interfere with the objectives of the school or the rights of other students.[211] It is not clear, however, how vital these factual circumstances are to the implementation of a material and substantial disruption standard.[212] The lack of clarity surrounding the significance of the factual circumstances supports the argument that purely passive and political speech does not require a substantial disruption before discipline can be constitutionally imposed.[213] In fact, the factual settings of the student speech cases that followed *Tinker* allowed the Court to make distinctions and justify prohibiting student speech that did not cause a disruption.[214] In light of the recent studies that show a significant link between bullying and violence,[215] and the subsequent impacts on the school environment,[216] it is not unconscionable for the Supreme Court to find a new, distinct category of student speech that can be constitutionally proscribed.

Alternatively, perhaps the compelling governmental interest in providing safe schools that are conducive to learning does not compel the creation of a new category, but supports applying a low burden on school administrators trying to establish an actual disruption or a reasonable apprehension of such. This lower standard emphasizes the "rights of other students" aspect of *Tinker*,[217] which has not been applied by many lower courts.[218] Under this analysis, a school administrator may punish

206. Harpaz, *supra* note 43, at 129.

207. For an overview of the "categorical approach" to student free speech cases, see *supra* Part III.A. For a brief discussion of some of the lingering questions regarding the extent of student speech, see Harpaz, *supra* note 43, at 135–36.

208. *See supra* notes 112–21 and accompanying text.

209. *See supra* text accompanying notes 113–21.

210. *Tinker*, 393 U.S. at 508.

211. *Id.*

212. Harpaz, *supra* note 43, at 129; *see also Tinker*, 393 U.S. at 514 (specifying the factual circumstances of the case and stating that the Constitution does not allow regulation of expression "in the circumstances").

213. Harpaz, *supra* note 43, at 135–36 (discussing the continuum created by the Supreme Court's student speech cases).

214. *See* discussion *supra* Part II.A.

215. Christie, *supra* note 153, at 725.

216. Harpaz, *supra* note 43, at 159–60.

217. *Tinker*, 393 U.S. at 508.

218. Frederick, *supra* note 27, at 480.

harmful speech, even if the speech only interferes with a few students' education, because it intrudes on another student's rights.[219] It also allows school administrators to conform to the statutory obligations imposed by states, while simultaneously providing limited protection to student freedom of expression that in no way affects the school atmosphere for a peer.[220] This standard resembles the "true threat" analysis adopted by a few lower courts, which views the threatening material from the viewpoint of a reasonable recipient.[221] If a student reasonably feels intimidated by, or apprehensive of, material posted by another student, and these feelings lead to a disruption of the targeted student's education, school administrators would be acting within their authority in disciplining the student-creator.[222]

Yet another viewpoint argues that the fear of disruption from violence leads to unconstitutional infringements on the rights of students, which are upheld by courts as a result of judicial misconceptions about modern culture.[223] Under this reasoning, what some courts construe to be material disruptions are more like "[p]etty [p]roblems" that are based on the irrational fears of school administrators.[224] The Third Circuit's *Saxe* opinion strongly supports the position that punishment should not be imposed solely because the student engaged in offensive speech directed to some listener without requiring a showing of severity or pervasiveness.[225] Pursuant to this standard, courts would apply the substantial disruption standard, but would first have to determine whether the speech only mimics popular culture and, if so, the student's speech would be given greater protection.[226] Similarly, broad generalizations about the effects of the student's speech and "thin-skinned" reactions to it would not constitute material disruptions, and deference should not automatically be given to school administrators.[227] Application of this standard prevents courts from enlarging the reach of school authority past school grounds by requiring significant impacts on students or school activities in order to justify discipline.

Knowledge of the legal standards typically imposed by state and federal courts may lead one to believe that a material and substantial disruption standard would not be difficult to apply. Experience has shown otherwise. Courts are inconsistent in establishing the presence of a disruption and the scholarly debate about what should constitute a disrup-

219. Wheeler, *supra* note 55, at 7–8 (discussing the Supreme Court's recognition of a compelling interest to provide a supportive school environment and questioning the extent of this interest).

220. *See id.* at 7 (noting the conflict between the material and substantial disruption standard and the legal obligations imposed on school administrators by the states).

221. *See, e.g.*, Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir. 1996).

222. *See* Wheeler, *supra* note 55, at 4.

223. *See* Li, *supra* note 140, at 90–91; *see also* Calvert, *supra* note 126, at 740.

224. Calvert, *supra* note 126, at 760–61.

225. *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001).

226. Li, *supra* note 140, at 99–100.

227. *Id.*

tion continues.[228] While the debate rages, the amount of time and money spent litigating and settling the numerous lawsuits brought to address this issue substantially disrupts both students and schools.[229] A pressing need exists to develop a uniform, consistent standard that gives courts, school administrators, and students succinct information about the consequences of creating and disciplining online speech. The following Part proposes a standard that accounts for the values of the First Amendment while recognizing the compelling interests and duties of public schools.

## IV. RESOLUTION

The current contradictions and inconsistencies that surround litigation over disciplining student online speech evidence the growing need for authoritative judicial guidance. While some speech is punishable independent of where it occurred,[230] lower courts struggle to strike the right balance between vital First Amendment values and the duties of American public schools in cases where the clearly established rules do not apply. These compelling interests need to be reconciled into a widely adopted, easily applied standard that school administrators can rely on when determining whether to impose discipline for a student's speech. The standard needs to clarify how to determine where the speech took place, if necessary, and how to decide what exactly constitutes a material and substantial disruption, if that standard should even apply. It also needs to consider the validity and importance of both state and federal mandates that require schools to take a proactive, no tolerance approach to bullying. This Part proposes such a standard.

### *A. Deleting the On-Campus/Off-Campus Dichotomy*

When analyzing a case of student online speech that was created without the use of school resources, courts should not address whether the speech occurred on-campus. Although the Supreme Court addressed this question in all four of its student speech cases, student online speech requires a different analysis because the concept of the Internet is unlike

228. See *Layshock* I, 412 F. Supp. 2d 502 (W.D. Pa. 2006), and *Layshock II*, 496 F. Supp. 2d 587 (W.D. Pa. 2007), as examples of the divergent application of the *Tinker* standard. Li, *supra* note 140 *passim*, and McCarthy, *supra* note 146 *passim*, highlight the arguments regarding the consequential level of material and substantial disruption necessary to allow school administrators to discipline.

229. It is well-known that cases can take years to be resolved, especially if the issue is appealed all the way to the Supreme Court. Many of the cases involve serious consequences for students if the discipline is upheld. *See, e.g.*, Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1179–80 (E.D. Mo. 1998) (discussing how the suspension imposed by school administrators would result in the student failing all of the classes he was enrolled in for the semester). Many schools decide to settle lawsuits regarding student online speech, perhaps as a means of avoiding any disruption. Harpaz, *supra* note 43, at 150.

230. True threats are an example of speech that is always subject to discipline based on the Supreme Court's analysis in *Watts v. United States*, 394 U.S. 705 (1969). The true threat analysis has been applied in student speech cases. *See, e.g.*, Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616 (8th Cir. 2002); Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. 1996).

the armbands in *Tinker*, the school assembly in *Fraser*, the school newspaper in *Hazelwood*, or the school activity in *Morse*. The Internet is not a tangible thing that can be purposefully brought onto campus, yet student speech on the Internet can cause a disruption on school grounds. The inability to compare the Internet to any other mode of communication makes previous reliance on the on-campus/off-campus dichotomy unnecessary and undesirable.[231] This step in the analytical process is one of the main reasons for the inconsistencies of the lower courts because they are adopting malleable standards.[232] Notwithstanding where one student may have created the online speech, the effects of that speech are most likely to be felt at school, where the creator and the victim are forced to be around one another.[233] Therefore, requiring school administrators to show that the speech occurred on-campus would severely limit their authority, at the expense of the security of targeted students.

Additionally, the Safe and Drug-Free Schools and Communities Act emphasizes a safe school environment, independent of what the threatening activity is or where it occurs.[234] A school must provide an atmosphere both supportive of and conducive to learning. Consequently, schools should be responsible for safeguarding students from activities occurring outside schoolhouse gates that ultimately have an impact inside schoolhouse gates. Bullying or intimidating speech that occurs online, for example, may not have an impact until the victimized student faces the student engaging in the speech. Consequently, the on-campus/off-campus dichotomy ignores the issue of where its effects are most harmful or prominent. As Justice Alito recognized, schools can be "places of special danger," a finding that justifies allowing school authorities to "intervene before speech leads to violence."[235] The appropriate standard for analyzing student online speech should not require a determination of where the speech occurred in order to know the extent of school administrators' authority. This determination is unnecessary because even if the speech was not created at school, the speaker and the victim have no choice but to face each other there. This unavoidable confrontation harmfully affects victims, which should be the focal point of any judicial analysis.

### *B. Analyzing the Presence of a Disruption*

Rather than create inconsistent, unpredictable standards by analyzing where a student's online speech occurred, courts should focus solely

231. Li, *supra* note 140, at 93.

232. *See supra* notes 189–204 and accompanying text.

233. *See* Susan Hanley Kosse & Robert H. Wright, *How Best to Confront the Bully: Should Title IX or Anti-Bullying Statutes Be the Answer?*, 12 DUKE J. GENDER L. & POL'Y 53, 55 (2005) (stating that students often stay home from school, change schools, or avoid school bathrooms in order to avoid being harassed or assaulted).

234. Safe and Drug-Free Schools and Communities Act of 1994, 20 U.S.C. §§ 7101–7165 (2006).

235. Morse v. Frederick, 127 S. Ct. 2618, 2638 (2007) (Alito, J., concurring).

on the establishment of a material disruption of the school environment or the invasion of another's rights.[236] In online student speech cases, school administrators should not face a heavy burden when establishing a disruption or the invasion of a student's rights. Of course, given the individualized nature of student online speech or cyberbullying, school administrators may not be able to establish a material or substantial disruption to the school environment.[237] But that does not mean that an individual student's learning environment was not materially or substantially disrupted. Courts should only require a disruption of the *target's* learning environment to justify disciplinary action.

Federal statutes,[238] state statutes,[239] and advocacy groups all recognize the importance of providing a school environment in which individual students feel safe. Limiting the extent of student constitutional rights in response to a compelling interest is not a revolutionary solution to conflicting governmental interests.[240] Furthermore, speech that criticizes other students and results in an interruption of their education is arguably not the "provocative and challenging speech" that needs to be given extensive First Amendment protection.[241] Rather, this type of speech usually results from one student's characterization of, or feelings toward, another student. Intimidating speech is often no more than a personal attack on the student and rarely expresses noteworthy or valuable ideas like the political speech that was so highly valued in *Tinker*. Such distinctions justify increasing school administrator authority and curbing harmful student online speech.

In *Morse*, the Supreme Court placed heavy significance on the presence of the Safe and Drug-Free Schools and Communities Act when justifying the discipline of what could be considered a promotion of illegal drug use.[242] Drug use is detrimental to students' health and thus makes it imperative for schools to educate about the dangers of such use, even if it results in the suppression of student ideas.[243] An analogous argument can be made regarding the dangers of bullying on students' mental and physical health. Schools are obligated to prepare students for life in a democratic society, one that values civility and respect for others with diver-

236. This standard was the one originally adopted by the Supreme Court in *Tinker*, but it has been inconsistently applied by the lower courts. Accordingly, the Supreme Court needs to provide guidance on the burden of proving either a disruption or invasion of rights.

237. Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 274 (2008).

238. *See, e.g.*, 20 U.S.C. §§ 7101–7165.

239. *See, e.g.*, ALASKA STAT. § 14.33.200 (2008); DEL. CODE ANN. tit. 14, § 4112D (2007); TEX. EDUC. CODE ANN. § 25.0342 (Vernon Supp. 2008).

240. *See, e.g.*, *Morse*, 127 S. Ct. at 2629; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986). Both of these Supreme Court cases, while recognizing the validity of *Tinker*, found that the school's discipline of a student did not violate the student's First Amendment rights because of a significant government interest.

241. Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1182 (E.D. Mo. 1998).

242. *Morse*, 127 S. Ct. at 2628–29.

243. *See generally id.*

gent beliefs.[244] This duty, in conjunction with the federally mandated duty to provide a safe environment, provides evidence of the need to limit student speech in order to foster the overall safety and security of public schools.

Student speech that harasses or intimidates other students is not speech worthy of full First Amendment protection, and it directly contradicts the obligation of public schools to provide nonthreatening environments that are conducive to learning. Given this, the burden of establishing a material or substantial disruption or an invasion of another's rights should not be a significant one. School administrators have a much more realistic perception of the ambiance of their schools and the impact certain behavior has on that setting than judges who review the factual setting months or even years after the incident. School violence, even though it may be rare,[245] is a tragedy, and aggressive action needs to be taken to prevent it. Moreover, the headline-grabbing events are not necessarily the events with the most significant impact. The more subtle effects of bullying may be the ones with the greatest cumulative impact on student learning and school environment. For example, if even one student misses school due to fear of another student, his or her access to a free and appropriate public education is restricted.

If courts continue to apply the current, unpredictable substantial and material disruption standard, any discipline imposed by school administrators may potentially be unconstitutional. If a school administrator does not take action, however, the school fails to comply with federal, and possibly state, law that requires schools to maintain a safe environment. Schools should not be put in this "damned if you do, damned if you don't" type of situation. The victimized student's right to feel secure somewhere he or she is compelled to be, and the school's obligation to provide that environment, clearly outweigh the student speaker's right to free expression.

The proposal of a less stringent material and substantial disruption standard automatically raises concerns about school administrators inappropriately exercising authority over trivial matters or invading students' private lives. This fear is unfounded, however, because school administrators are required to establish how the student's online speech impacts the school environment. If no logical or reasonable nexus exists, the administrator's actions should not be upheld. If the student's online speech does impact the school environment, the student infringes on the rights of another and impedes the execution of the school's duties, so appropriate punishment is justified. Furthermore, if a student decides to post information online, that student cannot contend that he or she had a reasonable expectation of privacy. Placing information in a widely accessible, essentially unregulated medium presents a higher risk of ex-

244. McCarthy, *supra* note 146, at 55.
245. Li, *supra* note 140, at 90.

tensive dissemination and unrestricted access. Students who accept that risk also accept any attendant consequences.

A widely accepted, easily applied standard must be developed in order to notify schools of their constitutional authority and to notify students of their constitutional rights. It would provide school boards with guidance in implementing constitutional anti-bullying policies. The appropriate standard should not attempt to determine where the speech occurred, but rather should focus on the presence of a material and substantial disruption. The burden of proof, although not great, should be placed upon school administrators to show that a student's online speech disrupted either the school environment or another student's educational opportunity. Put simply, if school administrators can show a material and substantial disruption or an invasion of another's rights, school disciplinary action is justified.

## V. CONCLUSION

Although students retain some of their constitutional rights while on school grounds, school administrators can proscribe these fundamental rights in various situations. After all, public schools must provide an environment conducive to student learning while inculcating important democratic values in students. The unique situation presented when one student chooses to engage in online speech that subsequently disrupts the school environment places this duty to provide an environment conducive to learning in conflict with the First Amendment right to freedom of speech. Because a choice between the two must be made for the benefit of both school administrators and judicial officers, more importance should be placed on the duty of schools to provide safe environments conducive to learning. Students are obligated to attend school and should not have to sacrifice their own well-being and educational opportunities in order to protect another student's degrading speech.