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BRIDGING THE LIABILITY GAP: HOW *KOWALSKI'S* INTERPRETATION OF REASONABLE FORESEEABILITY LIMITS SCHOOL LIABILITY FOR INACTION IN CASES OF CYBERBULLYING

Christopher A. Sickles*

INTRODUCTION

Does the administration of a public school system have the power to punish a student for engaging in “Internet bullying” outside the walls of a school? The Fourth Circuit answered this question in the affirmative with its recent opinion in *Kowalski v. Berkeley County Schools*.¹ With the emergence of social media, the free speech rights of students and school systems’ ability to punish students for engaging in speech over the Internet have become increasingly prevalent issues.² As the instances of what has been coined “cyberbullying” are increasing, so are the detrimental effects that this behavior has on the student population.³

Despite the increasing number of “Internet bullying,” or “cyberbullying” cases, federal courts have differed in their views on the issue, and to date, the United States Supreme Court has yet to weigh in.⁴ These differences have been brought to light

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¹ 652 F.3d 565 (4th Cir. 2011).

² See Kathleen Fitzgerald, *Bills to Curb Cyber-Bullying Raise Free-Speech Concerns*, STUDENT PRESS LAW CENTER (Feb. 4, 2008), <http://www.splc.org/news/newsflash.asp?id=1679> (explaining a variety of legislative proposals to combat cyberbullying).

³ See Kathleen Conn, *Allegations of School District Liability for Bullying, Cyberbullying, and Teen Suicides After Sexting: Are New Legal Standards Emerging in the Courts?*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 227, 229 (2011) (explaining that given the statistics that show face-to-face bullying is increasing in the public school system, “the statistics and consequences for cyberbullying are even more profound” (citing John Shryock, *Cyber Bullying Pushes Many Teens Over the Edge*, WSFA 12 NEWS (Nov. 16, 2010), <http://www.wsfa.com/Global/story.asp?S=13515176>)). In fact, “[a]nywhere from 15–33% of students ages thirteen to eighteen years of age report being cyberbullied on a consistent basis.” *Id.* at 231 (citing *Cyberbullying*, U.S. DEP’T OF HEALTH & HUMAN SERV., <http://www.stopbullying.gov/topics/cyberbullying/> (last visited Oct. 14, 2012)).

⁴ See Jill J. Myers & Gayle T. Carper, *Cyber Bullying: The Legal Challenge for Educators*, 238 EDUC. L. REP. 1, 15 (2008) (“The bottom line is that legal guidance is scarce. The Supreme Court has not yet considered a case of students’ use of electronic text . . .”).

after several other high profile opinions in the federal circuits were issued over the summer of 2011.⁵ In *Kowalski*, the Fourth Circuit decided to use the “substantial disruption” test established by *Tinker v. Des Moines Independent Community School District*.⁶ The Third Circuit previously relied on the “vulgar and offensive” exception to student speech, which was established as another exception to students’ rights to free speech in *Bethel School District v. Fraser*.⁷ This test, however, has its limitations, as it has been interpreted to apply only when students engage in speech on school premises.⁸ Only very recently did the Third Circuit reconsider the issue of whether schools can regulate targeted and offensive off-campus speech when it reheard *J.S. ex rel. Snyder v. Blue Mountain School District*⁹ during the summer of 2011. In its final *Snyder* decision, the Third Circuit brought itself in line with the Second and Fourth Circuits by holding that *Tinker* does in fact apply in situations involving the off-campus cyberspeech of a student.¹⁰ Despite its agreement with the applicable test in these circumstances, the Third Circuit’s most recent *Snyder* opinion created a circuit split with the Second and Fourth Circuits, because the Third Circuit has interpreted *Tinker*’s “substantial disruption” test to mean something else in its application.¹¹ In *Tinker*, the Supreme Court held that school administrators may regulate speech “which might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities.”¹² The Third

⁵ See, e.g., *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249 (3d Cir. 2010); *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767 (N.D. Ind. 2011); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

⁶ 393 U.S. 503 (1969). The test in *Tinker* allows a school system to discipline a student for speech or expression that substantially disrupts the operation of the school or invades the rights of other students. *Id.* at 513 (“[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts class-work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”).

⁷ 478 U.S. 675, 683 (1986) (“[I]t is a highly appropriate function of public school education to prohibit . . . vulgar and offensive terms in public discourse.”).

⁸ See *Snyder*, 650 F.3d at 932 (explaining that the school system had no authority to punish a student for internet speech that originated from his home because “*Fraser* does not apply to off-campus speech”); *Layshock*, 593 F.3d at 260.

⁹ 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

¹⁰ *Id.* at 926. See also *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 567 (4th Cir. 2011); *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008); *Wisniewski v. Board of Educ.*, 494 F.3d 34, 38–39 (2d Cir. 2007).

¹¹ See *Snyder*, 650 F.3d at 950 (Fisher, J., dissenting) (“Our decision today causes a split with the Second Circuit. In applying *Tinker*, the Second Circuit has held that off-campus hostile and offensive student internet speech that is directed at school officials results in a substantial disruption of the classroom environment.”).

¹² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969). The Author will refer to this as the “reasonably foreseeable” component of *Tinker*.

Circuit's view of the "substantial disruption" test severely limits the scope of the "reasonably foreseeable" component of the test, which in turn limits a school district's power to regulate off-campus speech.¹³ Other federal district courts have also followed the Third Circuit's approach,¹⁴ limiting school administrators' power to regulate off-campus speech as a result.

Other courts, much like the Fourth Circuit in *Kowalski*, have "concluded that school administrators' authority to regulate student speech extends, in the appropriate circumstances, to speech that does not originate at the school itself, as long as the speech eventually makes its way to the school in a meaningful way."¹⁵ What we are left with are two interpretations of a legal standard that governs off-campus Internet speech that are in conflict with each other. Furthermore, courts that deal with this issue as a matter of first impression are left with little guidance. Because cyber-bullying is a relatively new phenomenon, cases that implicate off-campus speech "present a real conundrum for courts trying to balance students' First Amendment rights against the need to maintain order in schools."¹⁶ Should the Supreme Court weigh in on this issue, it should favor *Kowalski*'s interpretation of the "substantial disruption" test for the reasons articulated below.

A number of commentators argue that decisions analogous to *Kowalski* essentially destroy students' right to engage in protected speech.¹⁷ This Note argues that despite the alternative standards that federal courts have applied to determine the constitutionality of regulating the off-campus speech of students, the "substantial disruption" test, as applied in *Kowalski* (and similar cases), makes the most sense. The test achieves the policy goal of preventing bullying by allowing administrators to regulate speech outside of the school that will eventually cause harm inside of the school.¹⁸ More importantly, *Kowalski*'s application of the substantial disruption test

¹³ See *infra* Part III.B.

¹⁴ See, e.g., *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

¹⁵ *School Disciplines Student for Cruel Webpage*, 29 No. 9 MCQUILLIN MUN. L. REP. 4, Sept. 2011; see also *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008) ("[O]ff-campus conduct of this sort 'can create a foreseeable risk of substantial disruption within a school' and that, in such circumstances, its off-campus character does not necessarily insulate the student from school discipline." (quoting *Wisniewski*, 494 F.3d at 39)).

¹⁶ Associated Press, *4th Circuit Backs W.Va. School in Dispute Over Student's Web Page*, FIRST AMENDMENT CENTER (July 28, 2011), <http://www.firstamendmentcenter.org/4th-circuit-backs-w-va-school-in-dispute-over-student's-web-page> (internal quotation marks omitted).

¹⁷ See, e.g., Ari Cohn, *Fourth Circuit Expands Schools' Abilities to Punish Off-Campus Speech*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (July 29, 2011), <http://thefire.org/article/13429.html> ("[T]his opinion strikes a serious blow against the rights of high school students, and drives the wedge between the Circuit Courts of Appeal on student speech even further, raising the stakes for an eventual Supreme Court showdown.").

¹⁸ See *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007) ("[S]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place.").

limits liability that schools may face in the wake of cyberbullying incidents because it allows administrators to regulate speech up to the point where courts have previously allowed liability in these types of bullying or harassment cases.¹⁹ Currently, schools have little legal guidance on what constitutes a “substantial disruption.”²⁰ When the jurisprudence is unclear, schools face a catch-22: either regulate off-campus speech and risk a First Amendment suit by a cyberbully, or do nothing and risk a suit by the target of the off-campus speech.²¹ This Note argues that in the important realm of financial liability for public schools, *Kowalski*’s version of the substantial disruption test saves money by confronting hurtful, online speech directed at school officials or students head on. The *Kowalski* court, in its analysis of the facts, adopted a more forgiving definition of what constitutes “reasonable foreseeability,” allowing school administrators greater latitude in punishing students for off-campus online bullying.²² In contrast, the Third Circuit’s take on the “reasonable foreseeability” prong of the “substantial disruption” test is limited by its analysis of the facts in *Snyder*.²³ The consequence is that in the Third Circuit, and other jurisdictions that follow its interpretation of the “substantial disruption” test, administrators are more limited in what types of speech they can regulate as being a foreseeable disruption to the school environment. The Third Circuit’s interpretation might even preclude action when administrators have knowledge of off-campus, online bullying, and in turn, can open up school systems to liability for failing to act to protect their student victims.

In order to understand why the Fourth Circuit’s interpretation in *Kowalski* of the “substantial disruption” test is preferable to any other, we must also explore the history of students’ First Amendment rights, school liability, and the cyberbullying phenomenon. Part I of this Note will define cyberbullying, and explain why it is a problem due to the diffuse nature of the cyberbully’s expression. Part II of this Note will present the necessary background jurisprudence involving students’ First Amendment rights. Next, Part III of this Note will detail the Fourth Circuit’s holding in *Kowalski*, the key difference between *Kowalski*’s interpretation of the substantial disruption test and the interpretations of other courts, including the Third Circuit, and explain critics’ fears regarding the broadening of educators’ authority to regulate off-campus speech as a result of *Kowalski*. Part IV of this Note will outline the increasing instances of school liability arising from failures to address the harms of off-campus speech, and argue that there is a gap between what kind of speech administrators can regulate and that for which they can be held liable in the courts. Finally, Part V of this Note

¹⁹ See, e.g., Abby Mollen, *In Defense of the “Hazardous Freedom” of Controversial Student Speech*, 102 NW. U. L. REV. 1501, 1527 (2008).

²⁰ Compare *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565 (4th Cir. 2011), with *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011), cert. denied, 132 S. Ct. 1097 (2012).

²¹ See *infra* Part IV.B.

²² See *Kowalski*, 652 F.3d at 574.

²³ See *Snyder*, 650 F.3d at 920.

will argue that despite any fears of over-regulation, the substantial disruption test as interpreted in *Kowalski* best enables administrators to promote the goals of public education, and, more importantly, closes the gap between administrators' liability and authority to control speech, thereby limiting the financial liability of public schools.

I. CYBERBULLYING AND ITS EFFECTS

Cyberbullying is defined as the "willful and repeated harm inflicted through the medium of electronic text."²⁴ Commonly, students use "Internet web sites, chat rooms, instant messaging, text and picture messaging on phones, and blogs, to bully peers."²⁵ While most incidents of cyberbullying occur off campus, "many of these incidents follow a natural progression into the hallways of the local schools."²⁶ In the case of cyberbullying, technology actually aids a bully, because it limits the chance of discovery and punishment, and the bully might not realize the full extent of the harm caused to the victim.²⁷

Cyberbullying is particularly dangerous due to its broad consequences. A cyberbully's threat or communication can be "widely distributed at the click of a mouse," resulting in access to a potentially endless audience that can exacerbate the negative consequences of the bullying.²⁸ In addition to exposure to a wider audience that may cause a victim to experience further harassment and ridicule, cyberbullying's electronic medium ensures that the effects linger longer than traditional, spoken words.²⁹ For example, "hurtful comments may remain online indefinitely, forcing victims to relive the pain every time they turn on the computer or visit a particular website."³⁰

Instances of cyberbullying are also becoming more widespread,³¹ resulting in increasingly serious consequences for victims, such as absence from school, worsening academic grades, dropping out, or switching schools to avoid further harm.³² In the most extreme cases of cyberbullying, repeat occurrences and the school's

²⁴ Myers & Carper, *supra* note 4, at 3 (quoting J.W. Patchin & S. Hinduja, *Bullies Move Beyond the Schoolyard: A Preliminary Look at Cyberbullying*, 4 YOUTH VIOLENCE & JUV. JUST. 148 (2006)).

²⁵ Todd D. Erb, Note, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 257 (2008).

²⁶ *Id.* at 258.

²⁷ Myers & Carper, *supra* note 4, at 3 ("Anonymity not only shields the bully from discovery, it conceals the impact of the conduct from the offender's view. Offenders are not directly and immediately aware of how their conduct impacts others.").

²⁸ Alison V. King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 850 (2010).

²⁹ *See id.* at 850–51.

³⁰ *Id.*

³¹ *See id.* at 849 (explaining that between the years 2000 and 2005, online harassment of youth increased a reported fifty percent).

³² *See* Myers & Carper, *supra* note 4, at 4–5.

failure to adequately address the situation have lead to depression, and, ultimately, student suicide.³³

II. FREE SPEECH PROTECTION UNDER THE FIRST AMENDMENT

Citizens generally have the right to freedom of expression, guaranteed by the Constitution.³⁴ The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.”³⁵ It is a “bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”³⁶ There are, however, exceptions to this broad right to freedom of speech and expression, one of which applies to students. As the Fourth Circuit held in *Kowalski*, “[w]hile students retain significant First Amendment rights in the school context, their rights are not coextensive with those of adults.”³⁷ “Because of the ‘special characteristics of the school environment,’ school administrators have some latitude in regulating student speech to further educational objectives.”³⁸

This latitude that school administrators enjoy manifests itself in four oft-cited instances.³⁹ First, as established in *Tinker*, “a school may censor student speech that causes a material and substantial disruption in the school environment or infringes on the rights of others.”⁴⁰ It is important to note that the speech in *Tinker* occurred on campus and during school hours.⁴¹ In recent years, however, courts have been open to expand the *Tinker* standard to include off-campus Internet speech, which is essentially what the Fourth Circuit did in *Kowalski*.⁴²

³³ See King, *supra* note 28, at 851 (detailing the stories of several high profile instances of cyberbullying, including the cases of Megan Meier and Ryan Halligan, in which cyberbullying acted as a “catalyst to suicide”).

³⁴ See U.S. CONST. amend I.

³⁵ *Id.*

³⁶ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

³⁷ *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 571 (4th Cir. 2011) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

³⁸ *Id.* (citation omitted) (quoting *Tinker*, 393 U.S. at 505).

³⁹ Harriet A. Hoder, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction Over Students’ Online Activity*, 50 B.C. L. REV. 1563, 1570 (2009) (“Four seminal decisions by the U.S. Supreme Court determine when school officials may discipline a public school student for his or her expression. These cases provide less First Amendment protection for students in public schools and establish that certain kinds of student speech are never permissible in school.” (citations omitted)).

⁴⁰ *Id.* at 1571 (citing *Tinker*, 393 U.S. at 512–13).

⁴¹ *Tinker*, 393 U.S. at 512–13 (“When [a student] is . . . on the campus during the authorized hours, he may express his opinions, even on controversial subjects . . . if he does so without ‘materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.” (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966))).

⁴² See *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565 (4th Cir. 2011); *Wisniewski v. Board of Educ.*, 494 F.3d 34 (2d Cir. 2007) (holding that internet speech made by students

The Supreme Court has also held that school administrators may prohibit students from engaging in “lewd, indecent, or offensive speech and conduct.”⁴³ In *Bethel School District v. Fraser*,⁴⁴ the school administration punished a student for using a sexually explicit statement to promote his friend’s candidacy for a student government position at a school-wide assembly.⁴⁵ The Court held that the student’s speech was lewd, indecent, or otherwise offensive, especially given that he was speaking directly to a captive audience.⁴⁶ Accordingly, the school did not violate the student’s First Amendment rights by punishing him pursuant to established school rules.⁴⁷ The Court relied heavily on the notion that schools stand *in loco parentis* to the students to justify its decision to limit First Amendment rights within the walls of the public school system, emphasizing an already established goal of protecting minors from obscenity and vulgarity.⁴⁸

A third exception to First Amendment protection for students was established in *Hazelwood School District v. Kuhlmeier*.⁴⁹ The Supreme Court held that if the speech in question occurs in a source such as a school newspaper, or at an event that is sponsored by a school, it can be regulated as long as the regulation is “reasonably related to legitimate pedagogical concerns.”⁵⁰ The rule expressed in *Kuhlmeier* requires that the speech be in a school-sponsored forum, thus, this standard has not yet

is governed by the “substantial disruption” test established by *Tinker* and that students can be punished for out-of-school speech that violates school rules).

⁴³ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986).

⁴⁴ 478 U.S. 675 (1986).

⁴⁵ *Id.* at 677–78.

⁴⁶ *Id.* at 679–80, 685.

⁴⁷ *Id.* at 685 (“The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission.”).

⁴⁸ *Id.* at 684 (recognizing “the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech”). The Supreme Court as expressed similar concerns for protecting minors in other areas of society as well. *See Board of Educ. v. Pico*, 457 U.S. 853 (1982) (holding that school administrations have power to remove books from the school curriculum if they are deemed vulgar); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (recognizing an interest in protecting minors from vulgar or lewd radio content); *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding a state law banning the sale of sexually explicit material to minors, even though the material was subject to First Amendment protections when sold to adults).

⁴⁹ 484 U.S. 260 (1988).

⁵⁰ *Id.* at 273 (“[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”). The Court also echoed the same paternalistic concerns as it did in *Fraser*. *Id.* (“This standard is consistent with our oft-expressed view that the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”).

been used to regulate Internet speech by students that occurs off campus.⁵¹ There is a possibility, however, that *Kuhlmeier* can play a larger role in subsequent cases involving off-campus Internet speech, given the increase in school-sponsored laptop programs in recent years.⁵²

A fourth and recent exception to students' First Amendment rights was established in 2007 by the Supreme Court's decision in *Morse v. Frederick*.⁵³ The expression in question in *Morse* was a banner that a student at Juneau-Douglas High School (JDHS) unveiled at an off-campus, school-sanctioned event that stated, "BONG HiTS 4 JESUS."⁵⁴ The Supreme Court reasoned that "[t]he 'special characteristics of the school environment' and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."⁵⁵ Again, the Court also emphasized the notion that schools stand *in loco parentis* to students to further justify the holding:

School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.⁵⁶

The speech in question in *Morse* occurred outside the walls of the school.⁵⁷ The facts of the case, however, led the Court to believe that this was not important, since

⁵¹ See Jacob Tabor, Note, *Students' First Amendment Rights in the Age of the Internet: Off-Campus Cyberspeech and School Regulation*, 50 B.C. L. REV. 561, 579–80 (2009) ("The essence of the Supreme Court's 1988 decision in *Hazelwood School District v. Kuhlmeier* is that a school must have great leeway to reasonably regulate speech that might be attributed to it. . . . *Kuhlmeier* thus cannot apply to off-campus speech unless it might be interpreted as being part of the school's speech. A website claiming to be the school's website might fall in this category, but very little else would." (citations omitted)).

⁵² Stephanie Steinberg, *More Students Need a Laptop Computer for the Classroom*, USA TODAY (Aug. 23, 2010), http://www.usatoday.com/news/education/2010-08-24-classroomlaptops24_ST_N.htm (explaining that since 1996, Microsoft's non-profit laptop program with public schools has grown from 29 to over 10,000 participant schools).

⁵³ 551 U.S. 393 (2007).

⁵⁴ *Id.* at 397.

⁵⁵ *Id.* at 408 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

⁵⁶ *Id.* at 409–10.

⁵⁷ *Id.* at 397.

there was a sufficient connection between the speech, the event, and the relationship to the school.⁵⁸ In fact, the Court believed the situation was analogous to actually being in school.⁵⁹ The Court noted that “[t]he event occurred during normal school hours . . . as an approved social event or class trip,” and that the school district had an express policy that students present on an “approved social event[] [or] class trip[] are subject to district rules for student conduct.”⁶⁰ Furthermore, teachers and administrators accompanied the students on the trip in a supervisory capacity.⁶¹ In these circumstances, the Court believed that Frederick’s planned and targeted speech was engaged in such a manner as to constitute in-school speech. The Court stated:

Frederick, standing among other JDHS students across the street from the school, directed his banner toward the school, making it plainly visible to most students. Under these circumstances, we agree with the superintendent that Frederick cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.⁶²

Despite this analysis, the Court did express worry at the fact that it is uncertain as to where the boundaries lie when courts are applying free speech exceptions to public school students.⁶³

III. *KOWALSKI* AND THE “SUBSTANTIAL DISRUPTION” TEST

A. Overview of Kowalski

Kowalski is the most recent in a line of cases that deals with a school administration’s authority to punish a student for or otherwise prohibit a student from engaging in off-campus speech that would violate school policy.⁶⁴ In 2005, Kara Kowalski, then a senior in high school, created a discussion group web page on MySpace.com from her home computer.⁶⁵ The web page was targeted at a fellow classmate, Shay N., and contained mean-spirited content regarding Shay’s personal life, suggesting that Shay was a “slut” and had “herpes.”⁶⁶ After Kowalski invited approximately 100 fellow

⁵⁸ *Id.* at 400–01.

⁵⁹ *Id.*

⁶⁰ *Id.* (internal quotation marks omitted).

⁶¹ *Id.* at 401.

⁶² *Id.* (internal quotation marks omitted).

⁶³ *See id.* (“There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents . . .”).

⁶⁴ *See, e.g.,* *Wisniewski v. Board of Educ.*, 494 F.3d 34 (2d Cir. 2007); *Mardis v. Hannibal Pub. Sch. Dist.*, 684 F. Supp. 2d 1114 (E.D. Mo. 2010); *O.Z. v. Board of Trs. of Long Beach Unified Sch. Dist.*, No. CV 08-5671, 2008 WL 4396895 (C.D. Cal. Sept. 9, 2008).

⁶⁵ *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 567 (4th Cir. 2011).

⁶⁶ *Id.* (“Under the webpage’s title, she posted the statement, ‘No No Herpes, We don’t want no herpes.’ Kowalski claimed in her deposition that ‘S.A.S.H.’ was an acronym for

classmates to join the web page, Shay N. became aware of its existence and notified her parents, who accompanied her to school the next day in order to file a harassment complaint with the administration.⁶⁷ The purpose of the web page was obviously to ridicule Shay, and it succeeded in that purpose.⁶⁸ “[S]he did not want to attend classes that day, feeling uncomfortable about sitting in class with students who had posted comments about her on the MySpace webpage.”⁶⁹

In response to the complaint filed by Shay’s parents, school administrators met to discuss possible punishment.⁷⁰ The administrators determined that “Kowalski had created a ‘hate website,’ in violation of the school policy against ‘harassment, bullying, and intimidation.’”⁷¹ Punishment, therefore, was both necessary and warranted. The administration:

suspended Kowalski from school for 10 days and issued her a 90-day “social suspension,” which prevented her from attending school events in which she was not a direct participant. Kowalski was also prevented from crowning the next “Queen of Charm” in that year’s Charm Review, having been elected “Queen” herself the previous year. In addition, she was not allowed to participate on the cheerleading squad for the remainder of the year.⁷²

As a result of this punishment, Kowalski claimed that “she became socially isolated from her peers,” “received cold treatment from teachers,” and “became depressed” to the point that she required medication.⁷³ She eventually filed a lawsuit against the school system, alleging that the administration’s decision to punish her for the MySpace web page constituted a violation of the First Amendment.⁷⁴

In terms of the First Amendment claim, the issue before the court was whether the school system violated Kowalski’s First Amendment rights when it punished her

‘Students Against Sluts Herpes,’ but a classmate, Ray Parsons, stated that it was an acronym for ‘Students Against Shay’s Herpes,’ referring to another Musselman High School Student, Shay N., who was the main subject of discussion on the webpage.”).

⁶⁷ *Id.* at 568.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 568–69.

⁷² *Id.* at 569.

⁷³ *Id.*

⁷⁴ *Id.* at 570. Kowalski also alleged several other federal and state law claims, which are not relevant to this discussion. *Id.* (explaining that Kowalski also alleged due process violations under the Fifth Amendment, cruel and unusual punishment in violation of the Eighth Amendment, equal protection violations under the Fourteenth Amendment, violations of corresponding provisions of the West Virginia Constitution, and a state law claim for intentional or negligent infliction of emotional distress).

for speech that occurred off campus. Kowalski attempted to make the geographical distinction between on- and off-campus speech, arguing “that since this case involves off campus speech (she created the My Space page off-campus) and it was not school related, the *First Amendment* shielded her from school discipline.”⁷⁵ “The School District argued that they can, consistent with the *First Amendment*[,] regulate off-campus behavior as long as the behavior creates a foreseeable risk of reaching the school and causing a substantial disruption to the work and discipline of the school.”⁷⁶ The Fourth Circuit agreed with the school system, holding that under precedent established in *Tinker*, “a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct would foreseeably create a risk of substantial disruption within the school environment, at least when it was similarly foreseeable that the off-campus expression might also reach campus.”⁷⁷

The Fourth Circuit had no serious reservation in using the “substantial disruption” test established in *Tinker* to justify its holding that the administration’s punishment of Kowalski did not violate the First Amendment.⁷⁸ Some commentators are wary of this justification, however, because it is hard to determine the foreseeability of off-campus speech reaching campus.⁷⁹ In fact, the Fourth Circuit acknowledged that a line must be drawn somewhere regarding the foreseeability component of the *Tinker* standard, but declined to undertake the task of determining where that line is.⁸⁰

⁷⁵ Brian S. Batterton, *Social Network Bullying & Constitutional Issues Regarding School Discipline*, LEGAL & LIABILITY RISK MANAGEMENT INSTITUTE (Aug. 2011), http://www.llrmi.com/articles/legal_update/2011_social_bully1.shtml.

⁷⁶ *Id.*

⁷⁷ *Kowalski*, 652 F.3d at 574 (quoting *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008)) (internal quotation marks omitted). The court reasoned that the facts surrounding Kowalski’s conduct satisfied this standard. *Id.* (“[E]ven though Kowalski was not physically at the school when she operated her computer to create the webpage . . . other circuits have applied *Tinker* to such circumstances. To be sure, it was foreseeable in this case that Kowalski’s conduct would reach the school via computers, smartphones, and other electronic devices, given that most of the ‘S.A.S.H.’ group’s members and the target of the group’s harassment were Musselman High School students. Indeed, the ‘S.A.S.H.’ webpage did make its way into the school and was accessed first by Musselman student Ray Parsons at 3:40 p.m., from a school computer during an after hours class. Furthermore, as we have noted, it created a reasonably foreseeable substantial disruption there.”).

⁷⁸ *Id.* at 574.

⁷⁹ See Hoder, *supra* note 39, at 1582.

⁸⁰ *Kowalski*, 652 F.3d at 573 (“There is surely a limit to the scope of a high school’s interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate. But we need not fully define that limit here, as we are satisfied that the nexus of Kowalski’s speech . . . was sufficiently strong to justify the action taken by school officials . . .”). See also *Wisniewski v. Board of Educ.*, 494 F.3d 34, 39 n.4 (2d Cir. 2007) (explaining that the panel was split on what the proper test for foreseeability should be in the context of the “substantial disruption” test).

B. Kowalski and “Substantial Disruption” Compared to Other Attempts to Regulate Off-Campus Expression

One of the more recent cases that has added to the confusion regarding schools and cyberspeech jurisprudence is *J.S. ex rel. Snyder v. Blue Mountain School District*.⁸¹ After many appeals, reversals and rehearings, the Third Circuit applied the *Tinker* standard to a fact pattern that was similar to that in *Kowalski*, but ended up with an entirely different result.⁸² The case involved an eighth grade student, J.S., who had been disciplined by her middle school principal, McGonigle, for dress-code violations.⁸³ In response, J.S. and a friend created a fake MySpace profile of McGonigle on March 18, 2007.⁸⁴ The evidence showed that the profile “was created at J.S.’s home, on a computer belonging to J.S.’s parents.”⁸⁵ The profile contained severely vulgar language and was filled with “personal attacks” on the principal.⁸⁶ For example, the “About me” section of the profile read as follows:

HELLO CHILDREN[.] yes. it’s your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL[.] I have come to myspace so I can pervert the minds of other principal’s [sic] to be just like me. I know, I know, you’re all thrilled[.] Another reason I came to myspace is because—I am keeping an eye on you students (who[m] I care for so much)[.] For those who want to be my friend, and aren’t in my school[.] I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs)
MY FRAINTRAIN⁸⁷

Clearly, this type of speech was malicious. Because the profile was also posted on the Internet by J.S. and her friend, this suggested that she wanted others to see it.

In the days that followed, discovery of the profile by McGonigle and the punishment of J.S. were swift:

⁸¹ 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

⁸² See Joseph A. Tomain, *Cyberspace Is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 *DRAKE L. REV.* 97, 151 (2010) (explaining that although the Third Circuit applied the *Tinker* standard and disagreed with the trial court’s analysis under *Fraser*, it agreed with the trial court that no substantial disruption had occurred or was reasonably foreseeable to occur because of the student’s speech).

⁸³ *Snyder*, 650 F.3d at 920.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 921.

McGonigle learned about the profile on March 19, 2007. On March 20, 2007, a teacher told McGonigle that students were discussing the profile during class. Upon McGonigle's request, a student brought him a printed copy of the profile. McGonigle learned J.S. and K.L. created the profile and questioned them on March 22, 2007. J.S. initially denied creating the profile, but she eventually admitted that she created it with K.L. McGonigle contacted MySpace to remove the profile.⁸⁸

In the end, J.S. was given a ten-day suspension from school for making false accusations about her principal, but McGonigle decided not to press any charges.⁸⁹

J.S., through her parents, subsequently sued the school district for violating her free speech rights.⁹⁰ The school district argued, in its defense, that although J.S. engaged in off-campus speech, it could nonetheless punish her pursuant to the *Tinker* standard.⁹¹ The Third Circuit agreed that in cases involving off-campus speech, *Tinker* controls, when it stated: "The Court in *Tinker* held that 'to justify prohibition of a particular expression of opinion,' school officials must demonstrate that 'the forbidden conduct would *materially and substantially interfere* with the requirements of appropriate discipline in the operation of the school.'" ⁹² The school district claimed that J.S.'s speech disrupted school operations in two ways. First, there were "rumblings," or a general buzz among students who were discussing the profile.⁹³ Second, because a school guidance counselor was directed to be present during Principal McGonigle's meeting with J.S. and her parents, several prescheduled counseling appointments were canceled on the morning of the meeting.⁹⁴

⁸⁸ Carolyn Joyce Mattus, *Is It Really My Space?: Public Schools and Student Speech on the Internet After Layshock v. Hermitage School District and Snyder v. Blue Mountain School District*, 16 B.U. J. SCI. & TECH. L. 318, 327 (2010).

⁸⁹ *Snyder*, 650 F.3d at 922; Mattus, *supra* note 88, at 327.

⁹⁰ *Snyder*, 650 F.3d at 920 (summarizing the claims as: 1) that the school district violated J.S.'s First Amendment rights; 2) "that the School District's policies were unconstitutionally overbroad and vague"; 3) "that the School District violated the Snyders' Fourteenth Amendment substantive due process rights to raise their child"; and 4) "that the School District acted outside of its authority in punishing J.S. for out-of-school speech").

⁹¹ *Id.* at 922-23.

⁹² *Id.* at 926 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

⁹³ *Id.* at 922. Specifically, "a Middle School math teacher [] experienced a disruption in his class when six or seven students were talking and discussing the profile; [the teacher] had to tell the students to stop talking three times, and raised his voice on the third occasion." *Id.*

⁹⁴ *Id.* at 923 ("[Guidance Counselor] Frain canceled a small number of student counseling appointments to supervise student testing on the morning that McGonigle met with J.S., K.L., and their parents. Counselor Guers was originally scheduled to supervise the student testing, but was asked by McGonigle to sit in on the meetings, so Frain filled in for Guers.").

Despite agreeing with the school district that *Tinker* was the applicable standard, the Third Circuit held that J.S.'s actions caused neither a substantial disruption nor a foreseeable disruption to school activities.⁹⁵ In support of this holding, the Third Circuit relied on 1) the fact that "J.S. created the profile as a joke"; 2) "she took steps to make it 'private' so that access was limited to her and her friends"; and 3) the profile "was so juvenile and nonsensical that no reasonable person could take its content seriously," among other things.⁹⁶

So, after rehearing the case, the Third Circuit held that off-campus student speech is governed by *Tinker*, and not *Fraser*, as the trial court previously held.⁹⁷ But even though the facts of *Snyder* were analogous to those of *Kowalski*, the Third Circuit held that a substantial disruption to school activities was not reasonably foreseeable.⁹⁸ Both cases involved a student creating a social media page containing vulgar language, sharing that content with other students to some degree, and disrupting school activities. So what was the difference between this scenario and that in *Kowalski* that could warrant a completely different holding? It could be that several students discussing the defamation of their principal during school hours was not a substantial enough disruption for the Third Circuit, or it might be that, because McGonigle was an administrator, some of the concerns about regulating speech do not necessarily apply, because it was not a case of pupil-on-pupil bullying. While the Third Circuit finally did adopt *Tinker* as the standard for analyzing off-campus student speech,⁹⁹ it took several tries. Further, the Third Circuit's result was not in line with the Fourth Circuit's *Kowalski* approach, which held that vulgar speech posted online and shared with classmates creates a reasonably foreseeable risk of a substantial disruption (and in fact did create a disruption) to school activities.¹⁰⁰

Another recent case that, once again, involved a scenario similar to *Kowalski* but reached the opposite holding is *J.C. ex rel. R.C. v. Beverly Hills Unified School*

⁹⁵ *Id.* at 929–30.

⁹⁶ *Id.*

⁹⁷ In fact, the Third Circuit went so far as to say that the *Fraser* standard that the trial court attempted to apply was actually one of the few exceptions carved out of the *Tinker* standard, which only applies to on-campus speech. The panel stated:

[T]he Supreme Court has carved out a number of narrow categories of speech that a school may restrict even without the threat of substantial disruption. The first exception is set out in *Fraser*, which we interpreted to permit school officials to regulate "'lewd', 'vulgar', 'indecent', and 'plainly offensive' speech *in school*." The second exception to *Tinker* is articulated in *Hazelwood School District v. Kuhlmeier*, which allows school officials to "regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern."

Id. at 927 (citations omitted).

⁹⁸ *Id.* at 931.

⁹⁹ *Id.* at 927, 931–32.

¹⁰⁰ *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 574 (4th Cir. 2011).

District.¹⁰¹ This case involved a student posting a video on YouTube that depicted a group of students making fun of a fellow classmate, C.C.¹⁰² Once again, the language was cruel:

One of Plaintiff's friends, R.S., calls C.C. a "slut," says that C.C. is "spoiled," talks about "boners," and uses profanity during the recording. R.S. also says that C.C. is "the ugliest piece of shit I've ever seen in my whole life." During the video, J.C. is heard encouraging R.S. to continue to talk about C.C., telling her to "continue with the Carina rant."¹⁰³

Once again, the effects of the off-campus speech reached the school campus.¹⁰⁴ Specifically, C.C. overheard other students talking about the video at school, and she became "very upset" as a result.¹⁰⁵ Her mother accompanied her to school the next day and met with a school guidance counselor to discuss the YouTube video.¹⁰⁶ During this meeting, C.C. was visibly upset about the incident, and stated that she did not feel comfortable going to class that day.¹⁰⁷ After spending some time counseling C.C., the guidance counselor convinced her to return to class, but she had missed some class time that morning as a result of her feelings being hurt by the video.¹⁰⁸

At first glance, these facts seem strikingly similar to that of *Kowalski*, when the Fourth Circuit stated:

Given the targeted, defamatory nature of Kowalski's speech, aimed at a fellow classmate, it created "actual or nascent" substantial disorder and disruption in the school. First, the creation of the "S.A.S.H." group forced Shay N. to miss school in order to avoid further abuse. Moreover, had the school not intervened, the potential for continuing and more serious harassment of Shay N. as well as other students was real.¹⁰⁹

Both of these cases involved a student posting disparaging remarks about a classmate online and contacting other students about those remarks,¹¹⁰ subsequently causing

¹⁰¹ 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

¹⁰² *Beverly Hills*, 711 F. Supp. 2d at 1098.

¹⁰³ *Id.* (citations omitted).

¹⁰⁴ *Id.* at 1098–99.

¹⁰⁵ *Id.* at 1098.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* ("[C.C.] was crying and told [the guidance counselor] that she did not want to go to class. C.C. said she faced 'humiliation' and had 'hurt feelings.'" (citation omitted)).

¹⁰⁸ *Id.*

¹⁰⁹ *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 574 (4th Cir. 2011) (citation omitted).

¹¹⁰ The Plaintiff in *Beverly Hills* "contacted 5 to 10 students from the School and told them to look at the video on YouTube." *Beverly Hills*, 711 F. Supp. 2d at 1098.

harm on campus (in the form of absence and further discussion of the bullying). But once again, like *Snyder*, the *Beverly Hills* court held that under the *Tinker* standard, no substantial disruption occurred or could be reasonably foreseen.¹¹¹ Specifically, the court “found that the lack of evidence of a prior relationship between the students involved in the video did not support a prediction that a verbal or physical confrontation was likely to occur, and therefore rejected the school district’s argument that there was a reasonable fear of disruption.”¹¹² Once again, this outcome, which is the opposite of that in *Kowalski*, might be due to the court’s view of what the threshold for “substantial disruption” really is, i.e., along with the Third Circuit, the Central District of California has deemed things like absence from school, intervention from school counselors and school administration, and the awareness of the bullying by the student body as insubstantial.¹¹³

Another, more realistic, possibility is that both *Snyder* and *Beverly Hills* largely ignore the prong of *Tinker* that allows administrators to act in light of circumstances that are reasonably foreseeable to create a substantial disruption.¹¹⁴ In fact, Judge Fisher addressed this issue at length during his dissent in *Snyder*.¹¹⁵ He disagreed with the majority’s view that the Plaintiff’s actions did not have the potential to create a substantial disruption on campus.¹¹⁶ Specifically, Judge Fisher noted that “accusing school officials of sexual misconduct poses a foreseeable threat of diverting school resources required to correct the misinformation and remedy confusion.”¹¹⁷ In other words, he believed that given the serious nature of an accusation that a principal engaged in inappropriate sexual behavior, it was reasonably foreseeable that a concerned parent or student might mention something to the police, and an investigation would ensue. Judge Fisher also noted the potential for disruption from the viewpoint of the educators at the school,¹¹⁸ in addition to the effect it could have on the student body. He stated:

¹¹¹ *Id.* at 1117.

¹¹² Samantha M. Levin, Note, *School Districts as Weathermen: The School’s Ability to Reasonably Forecast Substantial Disruption to the School Environment from Students’ Online Speech*, 38 *FORDHAM URB. L.J.* 859, 889 (2011).

¹¹³ See *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1117–19 (C.D. Cal. 2010).

¹¹⁴ See, e.g., *id.* at 1119–22.

¹¹⁵ *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 941 (3d Cir. 2011) (Fisher, J., dissenting), *cert. denied*, 132 S. Ct. 1097 (2012).

¹¹⁶ *Id.* at 945 (“But the profile’s *potential* to cause disruption was reasonably foreseeable, and that is sufficient.”).

¹¹⁷ *Id.*

¹¹⁸ Judge Fisher did this by analogizing the factual scenario in *Snyder* to a recent Second Circuit case, *Wisniewski v. Board of Education*, in which the Second Circuit noted “that a teacher who was subjected to hostile student speech became distressed and had to stop teaching the student’s class.” *Id.* at 947 (citing *Wisniewski v. Board of Educ.*, 494 F.3d 34, 35–36 (2d Cir. 2007)).

The majority also overlooks the substantial disruptions to the classroom environment that follow from personal and harmful attacks on educators and school officials. J.S.'s speech attacked McGonigle and Frain in personal and vulgar terms and broadcasted it to the school community. This kind of harassment has tangible effects on educators. It may cause teachers to leave the school and stop teaching altogether, and those who decide to stay are oftentimes less effective.¹¹⁹

More importantly, Judge Fisher realized that even after finally adopting the *Tinker* standard as applied to off-campus speech, the Third Circuit's reading of the case created a circuit split with the Second Circuit.¹²⁰ This is of particular importance, given the *Kowalski* court's heavy reliance on Second Circuit jurisprudence in formulating its interpretation and application of *Tinker*.¹²¹ Specifically, Judge Fisher calls attention to the Second Circuit's *Doninger v. Niehoff*¹²² opinion, which dealt with an almost identical set of facts as both *Snyder* and *Kowalski*, and held that the school administration could punish online speech directed towards school officials because this type of speech creates a risk of a substantial disruption to the school environment.¹²³

The facts in *Doninger* are summarized as follows: The plaintiff was a member of her high school's student council, and mistakenly believed that the administration had canceled a student event that the council had planned.¹²⁴ In response, the plaintiff made a blog post directed toward the administration from her home computer, in which she stated that the event was "cancelled due to douchebags in the central office."¹²⁵ Like *Snyder* and *Kowalski*, the plaintiff in *Doninger* shared her offensive speech with other students, encouraging others to call or write the school administrator responsible for the decision "to piss [the administrator] off more."¹²⁶ As a result of the

¹¹⁹ *Id.* at 946 (citing Jina S. Yoon, *Teacher Characteristics as Predictors of Teacher-Student Relationships: Stress, Negative Affect, and Self-Efficacy*, 30 SOC. BEHAV. & PERSONALITY 485, 491 (2002); Suzanne Tochterman & Fred Barnes, *Sexual Harassment in the Classroom: Teachers as Targets*, 7 RECLAIMING CHILD. & YOUTH 21, 22 (1998)).

¹²⁰ *Id.* at 950 ("Our decision today causes a split with the Second Circuit. In applying *Tinker*, the Second Circuit has held that off-campus hostile and offensive student internet speech that is directed at school officials results in a substantial disruption of the classroom environment.").

¹²¹ See *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 574 (4th Cir. 2011) (explaining that it adopts the Second Circuit's holding in *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008), which allows schools to regulate off-campus speech so long as there is a reasonable foreseeability that the speech will make its way on campus, thereby causing a disturbance).

¹²² 527 F.3d 41 (2d Cir. 2008).

¹²³ *Snyder*, 650 F.3d at 951 (Fisher, J., dissenting) (explaining that the *Doninger* Plaintiff's blog post "foreseeably create[d] a risk of substantial disruption within the school environment").

¹²⁴ In reality, the school administration had only proposed an alternate venue for the event due to some scheduling conflicts. See *Doninger*, 527 F.3d at 44.

¹²⁵ *Id.* at 45.

¹²⁶ *Id.*

blog post, the school refused to allow the student to run for Junior Class Secretary.¹²⁷ The plaintiff attempted to challenge the administration's punishment as an infringement of her free speech rights, but the Second Circuit, using the *Tinker* standard for off-campus speech, held that the administration was justified in its punishment.¹²⁸ Specifically, the Second Circuit ruled that even if there had been no disruption of school activities as a result of the blog post, the administration could still punish the plaintiff under *Tinker* because it was reasonably foreseeable that "administrators and teachers would be further diverted from their core educational responsibilities by the need to dissipate misguided anger or confusion over [the event's] purported cancellation."¹²⁹

Judge Fisher realized that although adopting the Second and Fourth Circuit's use of the *Tinker* standard for off-campus speech (instead of using the *Fraser* "vulgar and offensive" standard) on rehearing, the Third Circuit had nonetheless created a circuit split through its *application* of the standard, particularly in the area of "reasonable foreseeability."¹³⁰ He bluntly stated that the difference in outcome between *Snyder* and cases like *Doninger* (and necessarily *Kowalski* and *Wisniewski*, among others) was a result of how the circuits differed in analyzing the potential for this type of speech to cause a disruption of school activities: "The Second Circuit held that hostile and offensive off-campus student speech posed a reasonably foreseeable threat of substantial disruption within the school."¹³¹ Instead, Judge Fisher believed that the Third Circuit should have joined others, such as the Second and Fourth Circuits, in holding that offensive online speech directed towards the school (students or officials) should be deemed to per se have the potential to create a reasonably foreseeable disruption to school activities.¹³²

Despite adopting the *Tinker* standard, decisions like *Snyder* and *Beverly Hills* leave much to be desired. Not only do they analyze the basic *Tinker* definition of

¹²⁷ *Id.* at 46 ("Avery was not allowed to have her name on the ballot or to give a campaign speech at a May 25 school assembly regarding the elections. Apart from this disqualification from running for Senior Class Secretary, she was not otherwise disciplined.").

¹²⁸ *Id.* at 50 (explaining that the speech in the blog post, "although created off-campus, 'was purposely designed . . . to come onto the campus'").

¹²⁹ *Id.* at 51–52.

¹³⁰ *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 941, 950 (3d Cir. 2011) (Fisher, J., dissenting), *cert. denied*, 132 S. Ct. 1097 (2012).

¹³¹ *Id.* at 950.

¹³² Judge Fisher stated:

The majority embraces a notion that student hostile and offensive online speech directed at school officials will not reach the school. But with near-constant student access to social networking sites on and off campus, when offensive and malicious speech is directed at school officials and disseminated online to the student body, it is reasonable to anticipate an impact on the classroom environment. I fear that our Court has adopted a rule that will prove untenable.

Id. at 951–52.

“reasonable foreseeability” differently than Second and Fourth Circuit jurisprudence,¹³³ but they also provide little guidance for other courts in determining the extent of school authority to punish students for off-campus cyberspeech. In addition, rulings such as *Snyder* limit a school system’s ability to be proactive, because the Third Circuit read the “reasonably foreseeable” component of *Tinker* in a limited fashion. If the Third Circuit’s view of what *Tinker* really stands for is adopted nationwide, then we are left with a situation in which school administrators are aware of vulgar or offensive speech that is directed toward school officials or students, but are unable to act because the speech occurred off campus.¹³⁴ Courts have been increasingly willing to hold school districts liable in circumstances involving knowledge of such targeted speech and school inaction,¹³⁵ meaning that unless courts adopt the reading of *Tinker* that was promulgated in *Kowalski*, there will be a gap between speech schools can regulate, and speech for which they can be held liable.

C. Fears that *Kowalski* Will Limit Freedom of Expression

Some scholars fear that “affording teachers wide latitude in censoring cyberbullies would have a chilling effect on speech because it gives rise to self-censorships.”¹³⁶ In the alternative, since the substantial disruption test allows educators to be proactive,¹³⁷ some may fear that educators will overstep their authority and regulate speech to the detriment of students’ First Amendment rights. This fear, however, “is the type of ‘undifferentiated fear’ that the Supreme Court has held should not govern the outcome of cases involving student speech.”¹³⁸

Why is this fear undifferentiated? School administrators can be held liable for constitutional violations in the event that they try to regulate too broadly.¹³⁹ So, the

¹³³ *See id.* at 951. The court explained that, despite the Plaintiff’s intentions of the speech never reaching the middle school, because her speech was directed toward school officials and disseminated to the student body, it was “reasonably foreseeable that her speech would cause a substantial disruption of the educational process and the classroom environment. And it is on this point that the majority parts ways with the Second Circuit.” *Id.*

¹³⁴ *See id.* at 952 (“I believe the majority has unwisely tipped the balance struck by *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse*, thereby jeopardizing schools’ ability to maintain an orderly learning environment.”).

¹³⁵ *See infra* Part IV.B.

¹³⁶ Shannon L. Doering, *Tinkering with School Discipline in the Name of the First Amendment: Expelling a Teacher’s Ability to Proactively Quell Disruptions Caused by Cyberbullies at the Schoolhouse*, 87 NEB. L. REV. 630, 658 (2009).

¹³⁷ *Id.* at 657.

¹³⁸ *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

¹³⁹ *See, e.g., Byars v. City of Waterbury*, 795 A.2d 630, 639 (Conn. Super. Ct. 2001) (holding that a defendant *can* be held liable if a plaintiff can prove that the “defendant subjected him or her to a policy or conduct that violate[s] a right protected by federal law”).

potential for liability will dissuade administrators from exercising their power too broadly,¹⁴⁰ and they will act only in the most appropriate situations.

IV. THE RATIONALE FOR REGULATING STUDENT SPEECH

A. Promoting the Goals of Public Education

Regulating off-campus student speech is important to school administrators for several reasons. One reason is that stopping students from bullying or harassing each other helps to promote the goals of public education.¹⁴¹ For example, the Sixth Circuit has held that as a baseline, a goal of school administration is to “not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place.”¹⁴² In fact, the federal government has dedicated resources to the prevention of bullying, as it causes significant on-campus disruption.¹⁴³ The Fourth Circuit even weighed in on this in *Kowalski*, stating that “school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning.”¹⁴⁴

As the youngest demographic of our society, students not only learn academically in the public school system, but also begin to develop their social skills.¹⁴⁵ “As they learn how to express themselves, however, students predictably push the boundaries of acceptable speech to its outer limits, which can have a profound effect on the school environment.”¹⁴⁶ All forms of bullying, including cyberbullying, limit the effectiveness of public educators.¹⁴⁷

As noted above, the Supreme Court has acknowledged the school system’s importance in the social and academic development of our youngest citizens. In fact,

¹⁴⁰ See, e.g., Doering, *supra* note 136, at 657 (arguing that “educators should be trusted to refrain from imposing discipline upon the cyberbully unless the circumstances within the school require it”).

¹⁴¹ Renee L. Servance, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1228.

¹⁴² *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007).

¹⁴³ See, e.g., STOPBULLYING.GOV, <http://www.stopbullying.gov> (last visited Oct. 14, 2012) (explaining that bullying causes disruptions within the student population such as depression and self-harm).

¹⁴⁴ *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 572 (4th Cir. 2011).

¹⁴⁵ Servance, *supra* note 149, at 1238 (citing Philip T.K. Daniel & Patrick Pauken, *The Electronic Media and School Violence: Lessons Learned and Issues Presented*, 164 EDUC. L. REP. 1, 5 (2002)).

¹⁴⁶ *Id.*

¹⁴⁷ Myers & Carper, *supra* note 4, at 4–5 (“The victims [of bullying] may become truants, experience a loss of interest in learning which in turn causes a drop in academic grades, or become at risk of dropping out, transferring, or switching schools.” (citations omitted)).

in *Brown v. Board of Education*,¹⁴⁸ the Court stated that the public school system “is a principal instrument in awakening the child to cultural values . . . and in helping him to adjust normally to his environment.”¹⁴⁹ The Court obviously holds public education in high regard, and entrusts the institution with the development of our children. It follows, then, that “school officials are also the appropriate actors to both punish and prevent cyberbullying.”¹⁵⁰

B. Avoiding Potential Liability

Another reason for school administrators to have an interest in regulating off-campus speech is the desire to avoid potential liability for the consequences of it, which are becoming more extreme with the emergence of social media and cyberbullying.¹⁵¹ On the liability front, schools seem to exist somewhere between a rock and a hard place. Many jurisdictions have limited school authority to regulate only on-campus speech, despite the precedent set by *Tinker*. The other jurisdictions that follow *Tinker* interpret its “substantial disruption” test inconsistently, as noted above.¹⁵² This means that schools that attempt to overreach by regulating off-campus speech (despite legitimate concerns) have been held financially liable for violating the First Amendment rights of students.¹⁵³ On the other hand, school systems also face liability for “inaction in the case of peer-to-peer harassment.”¹⁵⁴ Without a uniform rule authorizing schools to act to regulate off-campus speech in certain situations, schools will continue to struggle with the question of when to regulate speech, and when to refrain from acting due to First Amendment constraints.¹⁵⁵

¹⁴⁸ 347 U.S. 483 (1954).

¹⁴⁹ *Id.* at 493.

¹⁵⁰ Darcy K. Lane, Note, *Taking the Lead on Cyberbullying: Why Schools Can and Should Protect Students Online*, 96 IOWA L. REV. 1791, 1804 (2011).

¹⁵¹ See Marie Hartwell-Walker, *Cyberbullying and Teen Suicide*, PSYCHCENTRAL, <http://psychcentral.com/lib/2010/cyberbullying-and-teen-suicide/all/1/> (last visited Oct. 14, 2012) (“Tragically, [cyberbullying] is leading to increasing numbers of suicides among our teens.”).

¹⁵² See notes 10–11 and accompanying text.

¹⁵³ See Servance, *supra* note 141, at 1214 (citing Mark Rollenhagen, *Westlake Schools to Pay \$30,000 to Settle Net Suit*, PLAIN DEALER, Apr. 14, 1998, at 1A) (explaining that school systems have had to settle cases alleging infringement of First Amendment rights resulting from punishment of students for off-campus speech, with settlement values reaching as much as \$30,000).

¹⁵⁴ *Id.* at 1215 (citing Susan H. Kosse, *Student Designed Home Web Pages: Does Title IX or the First Amendment Apply?*, 43 ARIZ. L. REV. 905, 919–20 (2001)).

¹⁵⁵ See Melissa L. Gilbert, Note, *“Time-Out” for Student Threats?: Imposing a Duty to Protect on School Officials*, 49 UCLA L. REV. 917, 939 (2002) (“Sometimes school officials overreact, thereby alienating students, or exposing themselves to liability because of their affirmative actions. Other times, school officials turn a blind eye to a potential risk to students.” (citations omitted)).

Parents of students who have been harmed, or, in the most extreme cases, driven to suicide, by off-campus speech in violation of school policies have been increasingly willing to file actions against school administrations.¹⁵⁶ The most common claims include state law tort claims, Section 1983 claims,¹⁵⁷ and Title IX claims.¹⁵⁸

1. Tort Claims

A victim's main impediment to recovery under state tort theories (mainly negligence-based theories) is the qualified immunity of school officials and the school system, as they are viewed as government instruments or entities.¹⁵⁹ Qualified immunity, however, might not continue to stifle victims' efforts to obtain recovery as it has in the past. In a recent Ohio case, for example, the court dismissed the charges against a school police officer under qualified immunity but allowed the charges against the school district to proceed.¹⁶⁰ The case arose from a tragic incident in which a middle school student took her own life after facing ridicule for sending a nude photo of herself over her cellular phone.¹⁶¹ Her parents filed suit against the school board, seeking damages based on "[several] negligence-based theories."¹⁶²

In addition, schools may be held liable for failure to protect students from tortious acts committed by other students, based on a theory in the Second Restatement of Torts.¹⁶³ For example, in *Furek v. University of Delaware*,¹⁶⁴ the Supreme Court

¹⁵⁶ See Conn, *supra* note 3, at 227 (citing Christian Nolan, *Fighting Bullying with Lawsuits*, CONN. L. TRIB. (Oct. 29, 2010), http://www.law.com/jsp/article.jsp?id=1202474106893&Fighting_Bullying_With_Lawsuits).

¹⁵⁷ See 42 U.S.C. § 1983. The statute provides that:

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law

Id.

¹⁵⁸ See generally Conn, *supra* note 3, at 232–33 (explaining that parents of bullied children have sued school districts under Title IX).

¹⁵⁹ *Id.* (citing Killen v. Independent Sch. Dist., No. 706, 547 N.W. 2d 113, 116 (Minn. App. 1996)) (explaining that qualified immunity extends to governmental officials for discretionary acts).

¹⁶⁰ Logan v. Sycamore Cmty. Sch. Bd. of Educ., 780 F. Supp. 2d 594, 599 (S.D. Ohio 2011).

¹⁶¹ *Id.* at 595.

¹⁶² Gregory Keating, *Navigating Legal Issues Related to Cyberbullying: An Immediate Look at the Legal and Social Impact of Digital Harassment*, 2011 ASPATORE SPECIAL REP. 6 (2011).

¹⁶³ See, e.g., *Furek v. Univ. of Del.*, 594 A.2d 506, 520 (Del. 1991) (predicating an educational institution's liability on the Second Restatement of Torts).

¹⁶⁴ 594 A.2d 506 (Del. 1991).

of Delaware held that an educational institution could be held liable for injury caused to a student as a result of fraternity hazing.¹⁶⁵ The court found liability based on the Second Restatement of Torts, “which addresses the duty of one who assumes direct responsibility for the safety of another by performing services in the area of protection.”¹⁶⁶ The court believed that the University had assumed responsibility because of its acknowledgment of fraternity hazing problems and its policies directed to prevent hazing.¹⁶⁷ In addition to the legal theory relied upon in *Furek*, Section 320 of the First Restatement of Torts provides another similar theory of recovery. It states that “[o]ne who is required . . . to take . . . the custody of another . . . subject[ing] him to association with persons likely to harm him, is under a duty to exercise reasonable care . . . to control the conduct of third persons as to prevent them from intentionally harming the other”¹⁶⁸ Along these lines, since many public school systems have enacted anti-bullying legislation (including cyberbullying),¹⁶⁹ some scholars have posited that similar liability may be imposed on public schools, following the theory of the *Furek* decision.¹⁷⁰

Indeed, this hypothesis seems to be coming to fruition, in light of the holding in *Scruggs v. Meriden Board of Education*,¹⁷¹ a Connecticut decision involving a student who committed suicide after years of being bullied at school. The court held that the school administration had knowledge of the bullying incidents, since the child’s mother complained numerous times to the administration in an effort to help curb other students’ actions against her son.¹⁷² The court relied on a similar theory that can be seen as an extension of the *Furek* decision, by holding that several “exceptions”

¹⁶⁵ *Id.* at 520.

¹⁶⁶ Duffy B. Trager, *New Tricks for Old Dogs: The Tinker Standard Applied to Cyber-Bullying*, 38 J.L. & EDUC. 553, 560 (2009).

¹⁶⁷ *Furek*, 594 A.2d at 520 (“The evidence in this record, however, strongly suggests that the University not only was knowledgeable of the dangers of hazing but, in repeated communications to students in general and fraternities in particular, emphasized the University policy of discipline for hazing infractions. The University’s policy against hazing, like its overall commitment to provide security on its campus, thus constituted an assumed duty which became ‘an indispensable part of the bundle of services which colleges . . . afford their students.’” (quoting *Mullins v. Pine Manor Coll.*, 449 N.E. 2d 331, 336 (Mass. 1983))).

¹⁶⁸ Trager, *supra* note 166, at 560 (quoting RESTATEMENT (FIRST) OF TORTS § 320 (1934)).

¹⁶⁹ See Myers & Carper, *supra* note 4, at 5–6 (explaining that cyberbullying is on the legislative agendas of many states, and that many states, such as Delaware, South Carolina, and Minnesota have established “legislation that requires school districts to establish a policy on bullying prevention and reporting”).

¹⁷⁰ See Trager, *supra* note 166, at 560 (“Many states have implemented legislation requiring schools to have policies against bullying. Similar liability to that imposed against the University of Delaware could be found when administrators are aware of cyber-bullying and there is an anti-bullying policy in place.”).

¹⁷¹ No. 3:03-CV-2224(PCD), 2007 WL 2318851 (D. Conn. Aug. 10, 2007).

¹⁷² *Id.* at *3.

exist to the rule that qualified immunity generally bars lawsuits for monetary damages against school employees.¹⁷³ The court stated these exceptions explicitly:

[F]irst, where the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . [,] second, where a statute specifically provides for a cause of action against a municipality or municipal official for failure to enforce certain laws . . . [,] and third, where the alleged acts involve malice, wantonness, or intent to injure, rather than negligence.¹⁷⁴

While previously a bar to recovery, trends in case law seem to point to an increasing willingness by courts to hold schools liable when certain conditions like those above are met. The result, therefore, is an increasing chance that schools will be held liable should a uniform rule regarding a school's authority to regulate off-campus speech not emerge, especially when instances of cyberbullying are brought to the administration's attention.

2. Section 1983 Claims

Section 1983 is another common method of recovery for victims of bullying.¹⁷⁵ There are several advantages to bringing a federal suit under Section 1983; for example, "[s]ome states statutorily cap damage awards, while others have laws immunizing the government from certain tort actions altogether."¹⁷⁶ According to Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.¹⁷⁷

To establish a *prima facie* case, a plaintiff suing under Section 1983 "must demonstrate both that she was deprived of an existing federal right and that the deprivation occurred under color of state law."¹⁷⁸

¹⁷³ *Id.* at *21.

¹⁷⁴ *Id.* (quoting *Burns v. Board of Educ.*, 228 Conn. 640, 645 (1994)).

¹⁷⁵ See Deborah Austern Colson, Note, *Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools Under 42 U.S.C. Section 1983*, 30 HARV. C.R.-C.L. L. REV. 169, 170 (1995).

¹⁷⁶ *Id.* at 171 (citing Michael Gilbert, *Keeping the Door Open: A Middle Ground on the Question of Affirmative Duty in the Public Schools*, 142 U. PA. L. REV. 471, 471 n.3 (1993)).

¹⁷⁷ 42 U.S.C. § 1983 (2006).

¹⁷⁸ See Colson, *supra* note 175, at 172.

There are many theories of recovery under Section 1983,¹⁷⁹ but this Note focuses on the “special relationship” test, since student victims have found increased success (albeit limited) under this theory of recovery in the Fifth Circuit.¹⁸⁰ In *Doe v. Taylor Independent School District*,¹⁸¹ the court held that school officials could be liable for failing to prevent a female student from being molested by her teacher on several occasions.¹⁸² Although a different test was applied by the Fifth Circuit in *Doe*, “the court implied that it also would have held the school liable if the case had been litigated under a ‘special relationship’ theory.”¹⁸³ The court noted in dicta that since a child generally depends on his parents to guard him against surrounding dangers, when the State removes the child from his home it assumes the responsibility of protecting the child.¹⁸⁴ The court stated:

Parents, guardians, and the children themselves have little choice but to rely on the school officials for some measure of protection and security while in school To hold otherwise would call into question the constitutionality of compulsory attendance statutes, for we would be permitting a state to compel parents to surrender their offspring to the tender mercies of school officials without exacting some assurance from the state that school officials will undertake the role of guardian¹⁸⁵

The Fifth Circuit has, however, expressed limitations on the breadth of the special relationship between the school and student for purposes of liability.¹⁸⁶ In *Leffall v. Dallas Independent School District*,¹⁸⁷ the Fifth Circuit reinforced its view that a public school owes a duty of protection to students, but also commented that “no such . . . relationship exists during [school-sponsored events] held outside of the time during which students are required to attend school [A]ny special relationship that may have existed lapse[s] when compulsory attendance end[s].”¹⁸⁸

Students have had success with this theory in other localities as well. For example, in *Pagano v. Massapequa Public Schools*,¹⁸⁹ the Federal District Court for the Eastern

¹⁷⁹ *Id.* at 175–83 (describing the most common methods of recovery under Section 1983 as: the “custom, policy, or practice” theory, the “state-created danger” theory, and the “special relationship” test).

¹⁸⁰ *Id.* at 181 (citing *Walton v. Alexander*, 20 F.3d 1350 (5th Cir. 1994)).

¹⁸¹ 975 F.2d 137 (5th Cir. 1992), *vacated*, 15 F.3d 443 (5th Cir. 1994).

¹⁸² *Id.* at 147–48.

¹⁸³ *See Colson, supra* note 175, at 182.

¹⁸⁴ *Id.*

¹⁸⁵ *Doe*, 975 F.2d at 147.

¹⁸⁶ *See Colson, supra* note 175, at 182–83.

¹⁸⁷ 28 F.3d 521 (5th Cir. 1994).

¹⁸⁸ *Colson, supra* note 175, at 183 (quoting *Leffall*, 28 F.3d at 522).

¹⁸⁹ 714 F. Supp. 641 (E.D.N.Y. 1989).

District of New York held that a student's "seventeen reported incidents [of bullying] and the school's failure to take preventative action were more than a single act of negligence and may 'rise to the level of deliberate indifference to an affirmative duty.'"¹⁹⁰

According to the Eastern District of New York, Section 1983 requires a school not to sit idly by and tolerate occurrences of bullying that occur during school hours.¹⁹¹ Per *Leffall*, a school does not have any special relationship to a student outside of regular school hours.¹⁹² This presents an interesting problem in the case of cyberbullying, where the initial actions often occur off campus and after school hours have ended. The effects of cyberbullying, however, are often felt inside the school, and include ridicule, embarrassment, truancy, and further responses by the victim's antagonists.¹⁹³ Does the fact that the effects are felt inside the school require the administration to take "preventative action" and regulate instances of cyberbullying that occur off campus? Under the current Section 1983 framework, the answer is unclear. And when the answer is unclear, schools face a catch-22: either regulate off-campus speech and risk a First Amendment suit, or do nothing and risk a suit by the target of the off-campus speech.

3. Title IX Liability

Title IX actions for damages against federally funded institutions that act with "deliberate indifference" apply to acts of harassment when the harassment "is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."¹⁹⁴ Courts typically find liability under Title IX when a school's response "is clearly unreasonable in light of the known circumstances."¹⁹⁵ Specifically, courts have held that schools display deliberate indifference "when a school has knowledge of multiple incidents of harassment and fails to take preventative measures."¹⁹⁶ For example, in *Davis v. Monroe County Board of Education*,¹⁹⁷ the Supreme Court held that a plaintiff could establish liability on remand by showing the defendant school's actions rose to the level of deliberate

¹⁹⁰ Elizabeth M. Jaffe & Robert J. D'Agostino, *Bullying in Public Schools: The Intersection Between the Student's Free Speech Rights and the School's Duty to Protect*, 62 MERCER L. REV. 407, 435 (2011) (quoting *Pagano*, 714 F. Supp. at 643).

¹⁹¹ *See id.* at 434–35.

¹⁹² *See supra* notes 187–96 and accompanying text.

¹⁹³ *See* Melanie Black Dubis, *Navigating Legal Issues Related to Cyberbullying: An Immediate Look at the Legal and Social Impact of Digital Harassment*, 2011 ASPATORE SPECIAL REP. 6 (describing these effects and noting that the effects are felt inside of school even when the cyberbullying occurs outside of school).

¹⁹⁴ Jaffe & D'Agostino, *supra* note 190, at 437 (quoting *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999)).

¹⁹⁵ *Id.* (quoting *Davis*, 526 U.S. at 648).

¹⁹⁶ *Id.*

¹⁹⁷ 526 U.S. 629 (1999).

indifference after it failed to act in the wake of multiple reports of sexual harassment against the victim.¹⁹⁸

4. Cost of Potential Liability

As noted above, instances of cyberbullying in the United States have risen in recent years due to increasingly accessible technology.¹⁹⁹ One would also assume that lawsuits awarding damages to the victims of cyberbullying would also increase during this time, especially given some of the high-profile, media-friendly cases that have netted victims and their families substantial sums of money.²⁰⁰ This, however, is not the case. “High-profile news accounts notwithstanding, it is extremely difficult to document whether and how much bullying-related litigation may have actually increased in recent years.”²⁰¹ This does not mean, however, that these types of cases are not being brought. Scholars have posited that specifics on school liability in these type of cases are hard to come by, because most lawsuits that involve bullying are likely to be settled out of court, and many of those that do go to trial are not likely appealed, meaning that instances of school liability do not show up in the primary legal databases.²⁰²

Specific statistics regarding the amount of school liability aside, it is apparent that parents of victims of cyberbullying have several avenues of recovery, and have increasingly used these avenues by filing lawsuits.²⁰³ Even though many of these cases settle, and do not further add to American jurisprudence related to cyberbullying, the cost, even of settlement, can be quite high. For example, one account of the settlement landscape describes amounts of as much as \$30,000.²⁰⁴ Given the fact that public school systems across the nation have had to slash budgets as a result of the recent economic crisis,²⁰⁵ any amount that schools might have to pay is detrimental to the smooth workings of the educational system. Even if courts will not continue to find increasing liability, the widespread adoption of technology and the number of

¹⁹⁸ *Id.* at 653–54.

¹⁹⁹ *See* King, *supra* note 28, at 849 (reporting a fifty percent increase in online harassment reported by youth in the United States from years 2000 and 2005).

²⁰⁰ *See* ROBIN M. KOWALSKI, SUSAN P. LIMBER & PATRICIA W. AGATSTON, CYBER BULLYING 164 (2008) (explaining that several recent, high-profile cases involving school bullying have held schools liable for amounts ranging from \$50,000 to \$4.5 million).

²⁰¹ *Id.*

²⁰² *Id.* at 164–65.

²⁰³ *See supra* notes 164–66 and accompanying text.

²⁰⁴ *See, e.g., supra* note 161 and accompanying text.

²⁰⁵ *See* Kimberly Hefling, *School Budget Cuts: Educators Fear Deepest Cuts Are Ahead*, HUFFINGTON POST (Oct. 24, 2011), http://www.huffingtonpost.com/2011/10/24/schools-fear-worst-budget-cuts_n_1028054.html (explaining that school districts across the nation have slashed budgets for public education, and it likely will not be until 2013 or later when districts see budget levels return to prerecession levels).

parents willing to at least file complaints against school systems are, therefore, direct threats to the system, given that even cases that settle cost the parties money.

V. THE “SUBSTANTIAL DISRUPTION” TEST PROMULGATED IN *KOWALSKI*
BEST ALLOWS A SCHOOL TO PROMOTE THE GOALS OF PUBLIC
EDUCATION AND AVOID LIABILITY IN CASES OF CYBERBULLYING

A. Promoting the Goals of Public Education

As noted above, public schools are entrusted to protect students while encouraging their social and academic development.²⁰⁶ The obligations of the public schools “include protecting the rights of the other students, preserving the educational environment at the schoolhouse, and in some instances, protecting the school and even the educators themselves from facing individual liability as a result of not addressing the harassment . . . by the cyberbully in a timely fashion.”²⁰⁷ As noted above, teachers and administrators who have failed to protect the rights of students can face liability for their inaction.²⁰⁸ Decisions such as *Scruggs*, which hold schools liable for inaction even in the event that bullying or cyberbullying has occurred off campus, create a need for administrators to have the authority to act quickly and effectively to alleviate the harms of cyberbullying once they are aware of it.

School officials have a duty to prevent the occurrence of disturbances even though “[f]orecasting disruption[s] is unmistakably difficult to do.”²⁰⁹ Given the increasing instances of cyberbullying and the increasing severity of the harm caused by cyberbullying, such as “bullycide,”²¹⁰ it follows that school officials should be given the latitude to respond to threats or disturbances before they fully manifest on campus. Due to the public school system’s unique position in society, it is best equipped to regulate and punish students for cyberbullying. “Schools can . . . act relatively quickly, punishing or deterring bullies while the parties involved are still in school together,”²¹¹ rather than waiting on legal action that might provide relief only after a student has graduated, dropped out, or in the most extreme cases, committed suicide.

Kowalski’s interpretation of the substantial disruption test solves the problem that educators currently face in preventing the harms of cyberbullying so as to minimize the disruption it has on school activities and the educational goals of the school system as a whole. It allows school officials to be proactive, as they can punish a

²⁰⁶ See *supra* Part IV.A.

²⁰⁷ Doering, *supra* note 136, at 656.

²⁰⁸ See, e.g., *supra* note 153 and accompanying text.

²⁰⁹ Doering, *supra* note 136, at 656 (quoting *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001), *cert. denied*, 536 U.S. 959 (2002)).

²¹⁰ The term “bullycide” refers to when victims take their own life as a result of “a pervasive stream of cyberbullying.” See Keating, *supra* note 162.

²¹¹ Lane, *supra* note 150, at 1804.

cyberbully when officials could “reasonably have [been] led . . . to forecast substantial disruption of or material interference with school activities.”²¹² Under this test, school officials that have knowledge of cyberbullying do not have to sit idly by and wait until some kind of tangible harm occurs within the walls of the school. On the contrary, school officials can, and should, act to quell the disruption caused by cyberbullying before it affects the student body in full force.²¹³ The substantial disruption test, therefore, “foresaw the possibility that educators may need to be proactive in imposing discipline, recognizing, at least implicitly, that there may be cases where it would be improvident to await actual harm before disciplining a student.”²¹⁴ For the approximately 160,000 students in this country that miss school each day for the fear of being bullied,²¹⁵ cyberbullying presents exactly the case in which school officials need to act, whether the bully’s words are spoken on campus or not.

B. Limiting Liability by Eliminating the Gap Between Authority to Regulate Speech and the Speech that Can Ultimately Result in School Liability

Traditionally, schools and school administrators were held liable for inaction or failure to prevent harm only when the specific acts that caused the harm occurred on campus.²¹⁶ The rise of technology, including the Internet, however, allows cyberbullies to engage in off-campus actions that create both a substantial disruption of school activities and tangible harm suffered by the targeted victim on campus.²¹⁷ Increasingly, courts are willing to hold school administrators and school systems liable for failing to address patterns of off-campus cyberbullying that result in harm to another student or in a substantial disruption of school operations.²¹⁸ Using the traditional methods of distinguishing between on-campus and off-campus speech and determining a school’s authority based off of that, therefore, creates a gap between a school’s authority to act and when it can be held liable for failure to act.

With this liability gap in mind, *Tinker*’s substantial disruption test, as adopted by the Fourth Circuit in *Kowalski*, clearly provides schools with a better method of not only preventing harm on campus, but also controlling financial liability. The Third Circuit’s heavy adoption of the “vulgar and offensive” exception to student speech limits an administration’s authority to act because it only addresses on-campus

²¹² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

²¹³ See Doering, *supra* note 136, at 654 (“Much to the contrary, educators are expected to protect and to foster the educational environment, as [e]vents calling for discipline are frequent occurrences and sometimes require immediate, effective action.” (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985))).

²¹⁴ *Id.* at 655.

²¹⁵ Myers & Carper, *supra* note 4, at 2.

²¹⁶ See *supra* notes 7–8 and accompanying text.

²¹⁷ Myers & Carper, *supra* note 4, at 1.

²¹⁸ See, e.g., *Logan v. Sycamore Cmty. Sch. Bd. of Educ.*, 780 F. Supp. 2d 594 (S.D. Ohio 2011) (refusing to grant a defendant school board qualified immunity).

speech, or speech at official school functions.²¹⁹ This test assumes that there can be no substantial disruption to school activities and the student body if speech originates anywhere but within the school walls.²²⁰ With the emergence of social media, however, this approach is insufficient; words that are born off campus are preserved on the Internet for others to see, which can later cause a disruption in school and harm to the targeted victim of the speech. Courts that follow the “vulgar and offensive” exception, then, “have taken away the schools’ ability to respond when there is a foreseeable disruption posed by student speech, frustrating the school’s goal[s]”²²¹ of maintaining a positive learning environment and protecting the school and its educators from liability. Even if courts follow the Third Circuit’s recent application of the “substantial disruption” test that it adopted on rehearing in *Snyder*, its limited definition of what “reasonably foreseeable” means still hampers educators’ ability to be proactive and regulate off-campus speech to the point that ensures they will not incur any liability. By setting a high threshold for what can be a foreseeable disruption to the school, the Third Circuit severely limits the scenarios in which school administrators can intervene, even if they are aware of certain instances of targeted and malicious online speech.²²²

Kowalski’s reading of the “substantial disruption” test, on the other hand, recognizes that a disruption may occur as a result of off-campus speech, taking into account “the impact of speech on the targeted individual” and the “geographic borderlessness of the Internet.”²²³ Internet speech is not like normal speech, in that its effects can be felt and its targets can be harmed at a much later time.²²⁴ As a result, a “geographical distinction is no longer a logical border to school jurisdiction over

²¹⁹ See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (explaining that the school system had no authority to punish a student for internet speech that originated from his home because “*Fraser* does not apply to off-campus speech” and there was no substantial disruption under the *Tinker* standard, although the case dealt with facts analogous to *Kowalski*), *cert. denied*, 132 S. Ct. 1097 (2012).

²²⁰ *Id.* at 932 (noting that the First Amendment protects speech uttered outside of school).

²²¹ Servance, *supra* note 141, at 1232. The author also proposes that courts that follow this standard “cause[] schools to hesitate to act when there is a possibility of violence out of fear of liability under the First Amendment,” which is hardly a positive outcome. *Id.*

²²² See *Snyder*, 650 F.3d at 951–52 (Fisher, J., dissenting) (“The majority embraces a notion that student hostile and offensive online speech directed at school officials will not reach the school. But with near-constant student access to social networking sites on and off campus, when offensive and malicious speech is directed at school officials and disseminated online to the student body, it is reasonable to anticipate an impact on the classroom environment.”).

²²³ Servance, *supra* note 141, at 1222.

²²⁴ *Id.* at 1235 (“Unlike traditional forms of speech, Internet content is not limited by geography. . . . Not only is Internet speech ever-present but one can also quickly and easily disseminate its content to an infinite number of people. This situation stands in stark contrast to . . . traditional forms of expression that reach a far more limited audience and exist in a particular time and place.”).

student speech.”²²⁵ Courts have recognized this regarding school liability, but there is an apparent lag in this realization in terms of granting school administrators the authority to regulate the off-campus speech for which they are increasingly being held liable.

CONCLUSION

As argued above, the “substantial disruption” test, as applied in *Kowalski* (and related cases) makes the most sense for courts and schools alike to apply in instances regarding the regulation of off-campus cyberspeech by students. The test achieves the policy goal of preventing bullying by allowing schools to regulate speech outside of the school that will eventually cause harm inside the school. *Kowalski*’s test is more flexible than the other standards, and it is a stronger interpretation of *Tinker* than the Third Circuit’s interpretation. This yields two distinct advantages: first, it allows school systems to more sufficiently regulate off-campus speech without fear of liability, because *Kowalski*’s view of the “substantial disruption” test holds that hostile and offensive off-campus student speech per se poses a reasonably foreseeable threat of substantial disruption within the school.²²⁶ More importantly, the substantial disruption test in *Kowalski* limits liability that schools may face in the wake of cyberbullying incidents, because it allows administrators to be proactive instead of reactive, and regulate speech up to the point where courts have allowed liability in these types of cases.

Given the current judicial climate, which is split in terms of what standard to apply and, in the event of agreement on the standard, how to interpret the standard, Supreme Court intervention might be possible in the near future. Given the need for schools to be proactive *and* limit financial liability, should the Court have the opportunity, it should adopt *Kowalski*’s interpretation “substantial disruption.”

²²⁵ *Id.* at 1236.

²²⁶ *See Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 574 (4th Cir. 2011).