BULLYING BEYOND THE SCHOOLHOUSE GATE: HOW SCHOOL DISTRICTS CAN CONSTITUTIONALLY REGULATE OFF-CAMPUS CYBERSPEECH

I. INTRODUCTION

"Cyberbullying" is bullying through the use of electronic technology such as mobile phones, computers, social media, and online messaging platforms.[1] The term has distinct twenty-first century origins, initially appearing online in the early 2000s.[2] This new phenomenon is significantly more problematic compared to schoolyard bullying for a number of reasons. For instance, unlike its offline form, cyberbullying is not confined to the schoolyard.[3] Cyberbullies follow their victims to their homes, harming them each time the harassing page garners a new audience.[4] Additionally, cyberbullies tend to be more hurtful compared to their offline counterparts because the Internet's anonymity and remoteness buffer the bully from the victim's reaction.[5] Because of this, cyberbullying has been linked to teen suicides,[6] and is viewed as "one of the top challenges" for schools districts.[7]

1. *What is Cyberbullying*, STOP BULLYING, http://www.stopbullying.gov/cyberbullying/what-is-it/index.html (last visited Sept. 29, 2016).

2. *See What is the Origin of Cyberbullying?*, QUORA, https://www.quora.com/what-is-the-origin-of-cyberbullying (last visited Sept. 29, 2016).

3. *See* Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process, and Fourth Amendment Challenges,* 46 WAKE FOREST L. REV. 641, 641 (2011).

4. *Id.*

5. Sameer Hinduja & Justin W. Patchin, *Cyberbullying: Identification, Prevention, & Response,* CYBERBULLYING RESEARCH CENTER 3 (Oct. 2014), http://cyberbullying.org/Cyberbullying-Identification-Prevention-Response.pdf.

6. Lyrissa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693, 694 (2012).

7. Goodno, *supra* note 3.

While it is clear that school authorities can punish certain types of student speech and conduct occurring on school grounds,[8] it is uncertain whether school officials can regulate speech with off-campus origins.[9] The Supreme Court handed down four seminal cases addressing school regulation of student speech.[10] However, these cases involve student speech that occurred on campus[11] or during a school-sponsored event.[12] In a landmark case, *Tinker v. Des Moines Independent Community School District*,[13] the Supreme Court held that school officials may regulate student speech that either substantially disrupts the school environment, or interferes with the rights of other students.[14] When addressing school regulation of student off-campus online speech, lower courts have applied the *Tinker* holding.[15]

A majority of lower courts limit their attention to the first prong of the *Tinker* holding, examining whether the online speech has caused a substantial disruption to the school environment.[16] However, lower court applications of *Tinker*'s "substantial disruption" standard have been inconsistent.[17] The Supreme Court has persistently refused to review cases involving student online speech.[18] The inconsistency of the lower court decisions, along with the Supreme Court's refusal to provide a legal standard, is troublesome for school officials who learn about the cyberbullying and who must mitigate the harm.[19] Thus, in order to allow schools to help victims of cyberbullying, school officials need to know the extent of their authority over off-campus cyberspeech.

This Note argues that, in order to respond to severe instances of cyberbullying, courts should apply the second prong of the *Tinker* holding:

8. Douglas E. Abrams, *Recognizing the Public Schools' Authority to Discipline Students' Off-Campus Cyberbullying of Classmates*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 181, 186 (2011).

9. David L. Hudson, Jr., *Time for the Supreme Court to Address Off-Campus, Online Student Speech,* 91 OR. L. REV. 621, 621 (2012); Carolyn Stone, *Cyber Bullying: Disruptive Conduct or Free Speech?*, ASCA SCHOOLCOUNSELOR (May 1, 2013), https://www.schoolcounselor.org/magazine/blogs/may-june-2013/cyber-bullying-disruptive-conduct-or-free-speech.

10. *See generally* Morse v. Frederick, 551 U.S. 393 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). Other Supreme Court decisions concerning free speech rights of public school students are beyond the scope of this Note.

11. *See Kuhlmeier,* 484 U.S. at 263; *Fraser*, 478 U.S. at 677; *Tinker,* 393 U.S. at 504.

12. *See Morse,* 551 U.S. at 396.

13. 393 U.S. 503 (1969).

14. *Tinker,* 393 U.S. at 513.

15. Hudson, *supra* note 9, at 623.

16. *Id.*

17. Barry P. McDonald, *Regulating Student Cyberspeech,* 77 MO. L. REV. 727, 737 (2012).

18. Hudson, *supra* note 9.

19. Stone, *supra* note 9.

allowing school officials to regulate speech that invades with the rights of other students to be secure and let alone. Further, *Tinker*'s second prong should be interpreted to include off-campus conduct. Additionally, adopting decisions from the Ninth Circuit, a student's right "to be secure and let alone"[20] should be interpreted to include not just the right to be free from physical contact, but from psychological harm as well. Part II provides an overview of the cyberbullying problem and argues that state cyberbullying laws are an inadequate solution. Part III discusses the four Supreme Court student speech cases and the inconsistent application of Tinker's "substantial disruption" prong by the lower courts. Part IV argues why the "invasion of rights" standard should be applied to address cyberbullying, subject to a showing that (1) the cyberbullying has harmed the victim's learning environment, and (2) the cyberbullying is severe, pervasive, and objectively offensive. Lastly, Part V concludes. It is important to consider that the focus of this Note is limited to speech by high school students and younger, as the four Supreme Court student speech decisions involved speech in the secondary education setting.

II. THE CYBERBULLYING PROBLEM AND THE INADEQUACY OF THE STATE LEGISLATIVE SOLUTION

Cyberbullying is defined as the "willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices."[21] This modern form of bullying is more problematic compared to its schoolyard counterpart because the harassment no longer ends with the school day.[22] Technology enables the bully to hurt the victim twenty-four hours a day.[23] Technology also provides the bully with anonymity, making it impossible for the victim to identify the source and the cause of the mistreatment.[24] Additionally, cyberbullying tends to be more malicious because the harassment is usually conducted from a distant location, where the bully is shielded from the victim's reaction.[25] The Internet also provides the bully with a global platform,[26] where the victim is harmed each time someone views the harassing post.[27]

20. *Tinker*, 393 U.S. 503 at 737.
21. Hinduja & Patchin, *supra* note 5, at 2.
22. *See* Lidsky & Garcia, *supra* note 6, at 693; Goodno, *supra* note 3.
23. Goodno, *supra* note 3.
24. Hinduja & Patchin, *supra* note 5.
25. *Id*.
26. *Id* at 3-4.
27. Goodno, *supra* note 3.

In 2010, about 16% of students in grade levels nine to twelve were cyberbullied.[28] Documented effects of cyberbullying include low self-esteem, depression, academic difficulties, absenteeism, and school violence.[29] Cyberbullying has also been linked to teen suicides.[30] In early 2010, the country learned about the tragic story of Phoebe Prince.[31] The fifteen-year old had just moved from Ireland to a middle-class suburb in western Massachusetts.[32] She started dating a popular football player, causing the ire of the "alpha girls."[33] They followed her around and called her a slut, or more specifically an "Irish slut."[34] They sent her threatening text messages on a daily basis.[35] They posted nasty comments about her on every online and social media forum available, from Facebook to Twitter to Craigslist.[36] The threats and taunting continued persistently for nearly three months.[37] One day in January, a student threw a canned drink at Prince as she was walking home.[38] A few hours later, her sister found her hanging from a stairwell.[39]

The viciousness did not end with her death as her bullies went on to post spiteful comments on her Facebook memorial page.[40] Following the community outrage over Prince's death,[41] district attorney Elizabeth Scheibel had to get "creative" when she charged nine students in connection with the suicide.[42] The charges ranged from criminal harassment, to civil rights violations, to assault with a dangerous weapon—for throwing the canned

28. *The Real Effects of Cyberbullying,* NO BULLYING, http://nobullying.com/the-effects-of-cyber-bullying (last updated Aug. 30, 2016).

29. Hinduja & Patchin, *supra* note 5, at 2.

30. *See* Lidsky & Garcia, *supra* note 6.

31. *See* Kevin Cullen, *The Untouchable Mean Girls*, BOSTON GLOBE (Jan. 24, 2010), http://www.boston.com/news/local/massachusetts/articles/2010/01/24/the_untouchable_mean_girls.

32. *Id.*

33. Nancy Gibbs, *When Bullying Goes Criminal*, TIME (Apr. 19, 2010), http://content.time.com/time/magazine/article/0,9171,1978773,00.html.

34. *Id.*

35. Erik Eckholm & Katie Zezima, *6 Teenagers Are Charged After Classmate's Suicide*, N.Y. TIMES (Mar. 29, 2010), http://www.nytimes.com/2010/03/30/us/30bully.html.

36. Helen Kennedy, *Phoebe Prince, South Hadley High School's "New Girl," Driven to Suicide by Teenage Cyber Bullies*, N.Y. DAILY NEWS (Mar. 29, 2010), http://www.nydailynews.com/news/national/phoebe-prince-south-hadley-high-school-new-girl-driven-suicide-teenage-cyber-bullies-article-1.165911.

37. Eckholm & Zezima, *supra* note 35.

38. *Id.*

39. *Id.*

40. Kennedy, *supra* note 36.

41. *Id.*

42. Gibbs, *supra* note 33.

drink.[43] According to Scheibel, what was particularly "troublesome" was the fact that some teachers and school administrators were aware of the harassment but did not attempt to intervene.[44]

The uproar around Prince's suicide forced Massachusetts' legislature to expedite the enactment of anti-bullying legislation.[45] In April 2010, Massachusetts lawmakers unanimously passed a bullying prevention law that has been deemed "the most comprehensive one in the country."[46] The law created new obligations for school districts, such as the requirement that schools provide "age-appropriate instruction" on bullying prevention in each grade.[47] Additionally, school districts must create and adhere to a bullying prevention and intervention plan.[48] The Massachusetts law also directs teachers and other school staff members to report incidents of bullying to the principal or a designated school official.[49] Additionally, the law provided a legal definition of bullying. According to the Massachusetts legislature, bullying is:

> [T]he repeated use by one or more students or by a member of a school staff including, but not limited to, an educator, administrator, school nurse, cafeteria worker, custodian, bus driver, athletic coach, advisor to an extracurricular activity or paraprofessional of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim's property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school. For the purposes of this section, bullying shall include cyber-bullying.[50]

As one journalist pointed out, the "sheer number of words" used to define bullying reveals the challenge faced by lawmakers in defining the problem.[51] The federal government has also recognized that cyberbullying

43. *Id.*

44. Eckholm & Zezima, *supra* note 35.

45. *See* James Vaznis, *Bullying Legislation Gains New Urgency*, BOSTON GLOBE (Jan. 26. 2010), http://www.boston.com/news/local/massachusetts/articles/2010/01/26/beacon_hill_lawmakers_see_urgent_need_for_antibullying_bill.

46. Emily Bazelon, *Bullies Beware*, SLATE (Apr 30, 2010) http://www.slate.com/articles/life/bulle/2010/04/bullies_beware.html.

47. MASS. GEN. LAWS ANN. ch. 71, § 37O(c) (2009 & Supp. 2016).

48. *Id.* § 37O(d)(1).

49. *Id.* § 37O(g) (2014).

50. *Id.* § 37O(a) (2014).

51. Bazelon, *supra* note 46.

is a problem plaguing our schools.[52] The White House and the Department of Education have hosted conferences aimed at cyberbullying prevention.[53] Additionally, the U.S. Department of Health and Human Services maintains a website that provides strategies for parents and educators on how to prevent, recognize, and respond to cyberbullying.[54] In 2011, a federal cyberbullying prevention bill was proposed.[55] However, the bill was never enacted.[56]

Currently, all fifty states have anti-bullying laws,[57] forty-eight of which cover electronic harassment.[58] Fourteen states cover off-campus behavior in their anti-bullying laws.[59] Anti-bullying laws implicate several constitutional concerns; some laws are impermissibly vague, while others arguably violate Due Process.[60] However, the biggest concern surrounding cyberbullying statutes is their potential to chill student speech.[61] Common occurrences of cyberbullying, such as social media posts and text messages, are considered speech, and even offensive speech is protected under the First Amendment.[62] In 2014, the New York Court of Appeals struck down a county ordinance that criminalized cyberbullying on free speech grounds, finding that it was too broad, "far beyond the cyberbullying of children."[63] With other states' courts hearing challenges to similar laws,[64] the fate of state anti-bullying laws, along with their ability to curtail cyberbullying, remain unclear.

Forty-nine states impose a duty upon school officials to develop anti-bullying policies.[65] There is no question that schools should take an affirmative role in reducing cyberbullying. Schools are not only tasked with

52. Martha McCarthy, *Cyberbullying Laws and First Amendment Rulings: Can They Be Reconciled?*, 83 MISS. L.J. 805, 809 (2014).

53. *Id.* at 810.

54. *Id.*

55. *See* Lidsky & Garcia, *supra* note 6, at 703 n.52 (citing the Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009)).

56. *Id.*

57. *See Policies & Laws,* STOPBULLYING.GOV, http://www.stopbullying.gov/laws/index.html (last updated May 27, 2015).

58. Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws,* CYBERBULLYING RESEARCH CENTER 1, http://cyberbullying.org/Bullying-and-Cyberbullying-Laws.pdf (last updated Jan. 2016).

59. *Id.*

60. *See generally* Goodno, *supra* note 3.

61. John O. Hayward, *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 CLEV. ST. L. REV. 85, 87 (2011).

62. *See* Lidsky & Garcia, *supra* note 6, at 720.

63. Joe Palazzolo, *New York Court Strikes Down Cyberbullying Law,* WALL ST. J. (July 1, 2014), http://www.wsj.com/articles/new-york-court-strikes-down-cyberbullying-law-1404239912.

64. *Id.*

65. Hinduja & Patchin, *supra* note 58.

teaching students, but also with supervising student conduct.[66] However, the main question is whether school authorities can discipline a student for online speech that occurred off-campus. While it is clear that school officials can regulate certain types of on-campus student speech, the Supreme Court has not provided any guidance regarding online student speech with off-campus origins.[67] School districts have faced lawsuits from both sides of the argument: from parents who claimed that school officials did nothing to protect their children from bullying and from parents of the alleged bullies who claimed that school officials violated their children's First Amendment rights.[68] School authorities are often hesitant to discipline bullies out of fear that parents may respond with legal action.[69] School administrators across the country know that cyberbullying is a problem; however, they do not know when they can legally provide a solution.[70] In 2011, three off-campus cyberspeech cases requested certiorari from the Supreme Court.[71] Several education associations filed an *amici curiae* brief seeking guidance for regulating off-campus online speech.[72] Unfortunately, the Supreme Court denied certiorari.[73]

School officials need to know the parameters of their authority over student online speech.[74] Unless school officials are certain of their legal authority to discipline off-campus cyberspeech, anti-cyberbullying statutes will fail to realize their purpose of protecting our nation's youths.[75]

66. Douglas E. Abrams, *Recognizing the Public Schools' Authority to Discipline Students' Off-Campus Cyberbullying of Classmates*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 181, 184 (2011).

67. *See* Hudson, *supra* note 9, at 621.

68. *See* Stone, *supra* note 9.

69. Abrams, *supra* note 66, at 187.

70. Goodno, *supra* note 3, at 648-50.

71. *See* J.S. ex rel. Snyder v. Blue Mountain, 593 F.3d 286, 301 (3d Cir.2010), *cert. denied*, 132 S. Ct. 1097 (2012); Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011), *cert denied*, 132 S. Ct. 499 (2011).

72. Stone, *supra* note 9.

73. *Snyder*, 593 F.3d 286, *cert. denied*, 132 S. Ct. 1097 (2012); *Kowalski*, 652 F.3d 565, *cert. denied*, 132 S. Ct. 1095 (2012); *Doninger*, 642 F.3d, *cert denied*, 132 S. Ct. 499 (2011). *See also* Hudson, *supra* note 9.

74. Hudson, *supra* note 9.

75. Abrams, *supra* note 66, at 187-88.

III. TAKING THE CYBERBULLYING PROBLEM TO COURT

The Supreme Court held in a landmark case, *Tinker v. Des Moines*,[76] that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[77] However, the First Amendment rights of students on campus must be exercised in light of the "special characteristics of the school environment."[78] School authorities therefore have the discretion to regulate on-campus student speech even though the government cannot exercise such discretion when regulating speech in other situations.[79]

In *Tinker*, the Court held that school officials may punish student speech that results in either a substantial disruption to the school environment or an invasion of the rights of other students.[80] This language became known as the *Tinker* standard.[81] Lower courts have used the *Tinker* standard, particularly the "substantial disruption" prong, to justify school regulation of student off-campus online speech.[82] However, lower courts have reached very different results with relatively similar underlying facts.[83]

A. The Schoolhouse Gate: Supreme Court Jurisprudence on Student Speech

Since the Supreme Court decided *Tinker* in 1969, the "schoolhouse gate" has served as a geographical border, wherein school officials were constitutionally permitted to regulate student speech within the gate while student speech outside of it was immune from school district control.[84] In the decades following the *Tinker* decision, the Supreme Court heard three more cases involving school regulation of student speech. The two cases that followed *Tinker* involved student speech that occurred on campus,[85] while

76. 393 U.S. 503 (1969).

77. *Id.* at 506.

78. *Id.*

79. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682-83 (1986); Raul R. Calvoz, Bradley W. Davis, & Mark A. Gooden, *Cyber Bullying and Free Speech: Striking an Age-Appropriate Balance*, 61 CLEV. ST. L. REV. 357, 375 (2013).

80. *Tinker*, 393 U.S at 513.

81. Hudson, *supra* note 9, at 623.

82. *Id.*

83. *See* Stone, *supra* note 9 (*comparing* Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir. 2011) *with* J.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1120 (C.D. Cal. 2010)).

84. John T. Ceglia, Comment, *The Disappearing Schoolhouse Gate: Applying Tinker in the Internet Age,* 39 PEPP. L. REV. 939, 940 (2012).

85. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

the underlying events of the most recent case occurred during a school-sponsored event outside campus.[86] The three succeeding cases specify some types of student speech that may be regulated by school authorities, namely "lewd and indecent speech,"[87] school-sponsored speech,[88] and speech promoting illegal drug use.[89] Collectively, the Court's existing jurisprudence on student speech lead to the conclusion that the free speech rights of students in the school setting are not coextensive with the First Amendment rights of adults in other situations.[90] A student's exercise of First Amendment rights must therefore be balanced against the school's countervailing interest in protecting its educational mission, as well as the rights of other students.[91]

i. Building the Gate: *Tinker v. Des Moines*

In *Tinker*, the Supreme Court developed a two-part standard to determine whether school regulation of student speech was prohibited by the First Amendment.[92] Under this rule, school authorities can inhibit student speech if the speech either (1) substantially disrupts the work of the school, or (2) invades the rights of other students.[93] *Tinker* involved three students wearing black armbands to school in protest of the Vietnam War.[94] The school district had adopted a policy prohibiting students from wearing armbands.[95] After the school principal suspended the students for refusing to take off their armbands, the students filed suit in order to restrain the school from further disciplining them.[96] The district court found that the school's action was constitutional and dismissed the complaint.[97] On appeal, the Eight Circuit, sitting en banc, affirmed the lower court's decision without opinion.[98]

The Supreme Court reversed and remanded.[99] The Court found that there was no proof that wearing black armbands intruded with the school's work or the rights of other students.[100] The Court further observed that the

86. Morse v. Frederick, 551 U.S. 393, 397 (2007).
87. *Fraser*, 478 U.S. at 685.
88. *Kuhlmeier*, 484 U.S. at 273.
89. *Morse*, 551 U.S. at 410.
90. See *Fraser*, 478 U.S. at 682-83; Calvoz, Davis, & Gooden, *supra* note 79, at 375.
91. *See* Calvoz, Davis, & Gooden, *supra* note 79, at 375.
92. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).
93. *Id.*
94. *Id.* at 504.
95. *Id.*
96. *Id.*
97. *Id.* at 504-05.
98. *Id.* at 505.
99. *Id.* at 514.
100. *Id.* at 508.

students' "silent, passive expression of opinion" did not disrupt classes, nor did it cause or threaten to cause violence on school grounds.[101] Accordingly, the school could not, consistent with the First Amendment, prohibit the speech.[102]

ii. Censoring Indecent Speech: *Bethel School District No. 403 v. Fraser*

The Supreme Court then reexamined student free speech rights in *Bethel School District No. 403 v. Fraser*.[103] In *Fraser,* the Court upheld the school district's punishment of a student who made use of sexual innuendos when he gave a speech at a school assembly.[104] Chief Justice Burger explained that the free speech rights of students in public school are not equal to those of adults engaged in public dialogue.[105] The Chief Justice quoted Judge Newman, reasoning that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."[106] The school district was therefore acting "within its permissible authority" when it disciplined the student for giving an "offensively lewd and indecent speech."[107] Additionally, the Court emphasized that free speech rights in schools "must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[108] Thus, the First Amendment does not prohibit schools from regulating speech that may run afoul with its educational mission.[109]

iii. Exercising Editorial Control Over School-Sponsored Speech: *Hazelwood School District v. Kuhlmeier*

A few years later in *Hazelwood School District v. Kuhlmeier*, the Supreme Court upheld a principal's decision to remove two pages from a

101. *Id.*
102. *Id.* at 514.
103. 478 U.S. 675 (1986).
104. *Id.* at 683.
105. *Id.* at 682 (citing New Jersey v. T.L.O., 469 U.S. 325, 340-42 (1985)).
106. *Id*. at 682-83 (citing Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring in result). In *Cohen v. California*, appellant was seen in a courthouse wearing a jacket with the words "Fuck the Draft." 403 U.S. 15, 16 (1971). He was convicted pursuant to a state penal code for disturbing the peace. *Id.* The Supreme Court reversed the conviction, holding the state cannot, consistent with the First Amendment, make the public display of an expletive word a criminal offense without a compelling reason. *Id.* at 26.
107. *Fraser*, 478 U.S. at 685.
108. *Id.* at 681.
109. *Id.* at 685.

school newspaper.[110] The *Kuhlmeier* Court distinguished *Tinker*, finding that the issue addressed in *Tinker* involved the school's authority over student speech on school grounds, which is different from the issue of whether schools have authority over school publications, theatre productions, and other forms of student expression that may be considered part of the curriculum.[111] The Court held that school officials are constitutionally permitted to exercise "editorial control" over student speech in school-sponsored expressive activities "so long as their actions are reasonably related to legitimate pedagogical concerns."[112]

iv. Prohibiting Speech that Promotes Illegal Drugs: *Morse v. Frederick*

Most recently in *Morse v. Frederick*, the Court ruled that the school principal did not violate a student's First Amendment rights when she suspended the student for displaying a banner, which was viewed as advocating illegal drug use.[113] The student in *Morse* did not exhibit the banner on school grounds.[114] Instead, the student revealed the banner at a public street during a school-sponsored class trip.[115] The Court found that "[t]he First Amendment does not require schools to tolerate at school events student expression that contributes to [the dangers of illegal drug use]."[116] Writing for the majority, Chief Justice Roberts reiterated the significance of the speech's setting, repeating the language in *Fraser* and *Kuhlmeier* that school officials may control student speech "even though the government could not censor similar speech outside the school."[117]

110. *See Kuhlmeier*, 484 U.S. 260, 264-66 (1988).
111. *Id.* at 270-71.
112. *Id.* at 273.
113. Morse v. Frederick, 551 U.S. 393, 396-97 (2007).
114. *Id*. at 397.
115. *Id*.
116. *Id*. at 410.
117. *Id.* at 405-06.

B. *Lower Courts Inconsistently Apply* Tinker *Beyond the Schoolhouse Gate*

The Supreme Court has not yet reviewed a case involving school district regulation of student online speech with off-campus origins.[118] Lack of guidance from the Supreme Court has led lower courts to develop their own standards, resulting "in a muddled legal landscape."[119] When dealing with a cyberbullying case, courts either apply the true threats doctrine or the *Tinker* standard.[120] When applying *Tinker*, a majority of lower courts limit their analysis to the first prong of the holding, allowing school administrators to regulate speech that substantially disrupts the school environment.[121] However, lower court decisions on when and how *Tinker*'s "substantial disruption" standard should be applied "are currently in disarray."[122]

i. Circuit Split Involving the Threshold Requirement

Lower courts applying *Tinker*'s first prong can be categorized into two main groups.[123] The first group of courts applies *Tinker*'s "substantial disruption" standard without considering the speech's geographic location.[124] Under these cases, *Tinker* applies provided that "the foreseeable risk of a substantial disruption is established."[125] Thus, a school district may discipline off-campus speech if it "causes or reasonably threatens to cause a substantial disruption[.]"[126]

Other courts consider the speech's location as a threshold issue that must be determined before applying *Tinker* or any of the Supreme Court student

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118. David R. Hostetler, *Off-Campus Cyberbullying: First Amendment Problems, Parameters, and Proposal*, 2014 BYU EDUC. & L.J. 1, 4 (2014).

119. Hudson, *supra* note 9.

120. Calvoz, Davis, & Gooden, *supra* note 79, at 380-81. *See also* Jessica K. Boyd, *Moving the Bully from the Schoolyard to Cyberspace: How Much Protection is Off-Campus Student Speech Awarded Under the First Amendment?*, 64 ALA. L. REV. 1215, 1227 (2013) (discussing how other courts have applied the true threats doctrine in finding that threatening student speech is not protected under the First Amendment).

121. Hudson, *supra* note 9, at 623-24.

122. McDonald, *supra* note 17.

123. *See* J.C. *ex rel.* R.C. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1107 (C.D. Cal. 2010); Calvoz, Davis, & Gooden, *supra* note 79, at 382; McDonald, *supra* note 17, at 736.

124. *Beverly Hills Unified Sch. Dist.,* 711 F. Supp. 2d at 1103. *See also* McDonald, *supra* note 17, at 736 (observing that lower federal courts found that the speech's geographic location was immaterial); Calvoz, Davis, & Gooden, *supra* note 79, at 382 (finding that the majority of cases apply *Tinker* regardless of the speech's off-campus origin).

125. *Beverly Hills Unified Sch. Dist.,* 711 F. Supp. 2d at 1104.

126. *Id.* (citing J.S. *ex rel.* Snyder v. Blue Mountain, 593 F.3d 286, 301 (3d Cir. 2010), *cert. denied*, 132 S. Ct. 1097 (2012)).

speech cases.[127] The Second Circuit, for example, requires that there must be "a sufficient nexus between the off-campus speech and the school."[128] However, lower court decisions do not provide a clear guidance as to what constitutes a "sufficient nexus."[129] The fact that the off-campus speech was brought to campus "may or may not be sufficient."[130] According to the Second Circuit, a sufficient nexus is established if it is "reasonably foreseeable" that the off-campus speech would reach the school.[131] For example, in *Wisniewski v. Board of Education of the Weedsport Central School District*, the Second Circuit found that it was foreseeable that the online speech would reach campus because of the "violent nature" of the speech, and because the student communicated it to fifteen of his classmates over a three week period.[132] Another situation wherein the Second Circuit found that it was reasonably foreseeable that the speech would reach the campus occurred when the student purposefully created the speech "to come to campus" by inciting other students to engage in on-campus behavior.[133] In *Doninger*, for example, the court found a nexus between the student's blog post and the school because the student encouraged readers to contact school administrators.[134] Thus, under the Second Circuit's line of cases, if it is foreseeable that the off-campus speech will reach the school, then the threshold requirement is met, and the *Tinker* standard can be applied.[135]

ii. The Inconsistency in Finding a "Substantial Disruption" to the School Environment

There are no clear guidelines as to what constitutes a "substantial disruption."[136] As one court summarized, a substantial disruption is in-between "some mild distraction or curiosity created by the speech" and "complete chaos."[137] Because most cyberbullying cases fall between these

127. *See Beverly Hills Unified Sch. Dist.,* 711 F. Supp. 2d at 1104; McDonald, *supra* note 17, at 736; Calvoz, Davis, & Gooden, *supra* note 79, at 382.

128. *Beverly Hills Unified Sch. Dist.,* 711 F. Supp. 2d at 1107. *See also* Calvoz, Davis, & Gooden, *supra* note 79, at 382.

129. *Beverly Hills Unified Sch. Dist.,* 711 F. Supp. 2d at 1107 ("It is unclear, however, when such a nexus exists.").

130. *Id.*

131. *Id.*

132. *Id.* at 1104-05 (citing Wisniewski v. Board of Educ. of the Weedsport Central Sch. Dist., 494 F.3d 34 (2d Cir. 2007)).

133. *Id.* at 1105 (citing Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).

134. *Doninger*, 527 F.3d at 50-51.

135. Calvoz, Davis, & Gooden, *supra* note 79, at 382.

136. *See Beverly Hills Unified Sch. Dist.,* 711 F. Supp. 2d at 1111.

137. J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 868 (2002).

two extremes,[138] existing case law has been inconsistent in determining whether a substantial disruption has occurred. Two cases illustrate this inconsistency.[139] In *Kowalski v. Berkeley County Schools,*[140] a twelfth grade student created a MySpace group, which called a classmate a slut with herpes, and invited other students to join the group.[141] The targeted student, along with her parents, filed a harassment complaint with the school principal.[142] The principal and the school board concluded that the online conduct was in violation of a school policy prohibiting harassment and bullying.[143] As punishment, the principal disciplined the student with a ten-day suspension.[144] In response, the student filed suit, alleging that the school district violated her First Amendment rights.[145] The Fourth Circuit ruled for the school district, finding that the online speech created a substantial disruption within the school because: (1) the defamatory nature of the speech was aimed at a classmate, and (2) unpunished conduct has a "snowballing effect" that could lead to future disruption.[146]

In contrast, a district court reached the opposite result in *J.C. ex. Rel. R.C. v. Beverly Hills Unified School District*.[147] The case involved similar facts to *Kowalski*: a student calls a classmate a "slut" on a YouTube video and asks other students to look at the video.[148] However, unlike *Kowalski*, the court in *Beverly Hills Unified School District* held that the actual disruption to the school was "too *de minimis*" because: (1) the school only had to address the concerns of the targeted student who did not wish to go to class, and (2) only five other students missed a portion of their classes.[149] As the two cases demonstrate, *Tinker*'s "substantial disruption" standard fails to provide adequate guidelines for school officials who need to respond to cyberbullying incidents.[150] The standard ultimately burdens faculty and

138. *See Beverly Hills Unified Sch. Dist.,* 711 F. Supp. 2d at 1111.

139. *See* Stone, *supra* note 9 (comparing Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 573 (4th Cir. 2011) with J.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1120 (C.D. Cal. 2010)).

140. 652 F.3d 565 (4th Cir. 2011).

141. *Id*. at 567.

142. *Id*. at 568.

143. *Id.* at 568-69.

144. *Id.* at 569.

145. *Id.* at 570.

146. *Id.* at 573-74.

147. 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

148. *Id.* at 1098.

149. *Id.* at 1117.

150. *See* Stone, *supra* note 9.

school administrators, who need to determine whether a substantial disruption has taken place on campus before they can regulate the off-campus speech.[151]

IV. THE PROPOSED APPLICATION OF THE "INVASION OF RIGHTS" STANDARD

Episodes of cyberbullying only result in minimal discussion among students, and because of this, it would be impossible to find a substantial disruption to the school environment and therefore satisfy *Tinker*'s first prong.[152] Thus, in order to allow school officials to respond to cyberbullying, courts should apply *Tinker*'s "invasion of rights" standard and interpret it to include off-campus conduct that intrudes upon a student's right to be secure and free from psychological harm. Additionally, in order to prevent a broad application of *Tinker*'s second prong to off-campus speech, this Note proposes two threshold requirements for school authorities to meet. First, school officials must show that the cyberbullying has implicated the school's interest in preserving the learning environment. Second, school officials must show that the cyberbullying is severe, pervasive, and objectively offensive.

A. Tinker*'s "Invasion of Rights" Standard Appropriately Addresses Cyberbullying*

Tinker's second prong permits school officials to regulate student speech that invades with "the rights of other students to be secure and to be let alone."[153] Several scholarly articles have explained why the second prong is the more appropriate standard in cyberbullying cases,[154] primarily because it directly addresses one of the main concerns in cyberbullying—protecting the targeted student's learning environment.[155] "The primary function of a public school is to educate its students."[156] Thus, if the bullying has impaired the targeted student's ability to learn what the school is trying to teach, then the bullying has implicated the school's "main functional interest."[157] The Ninth

151. *Id.*

152. *See infra* Part IV.A.

153. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

154. *See, e.g.*, McDonald, *supra* note 17, at 755-56; Ceglia, *supra* note 84, at 943; McCarthy, *supra* note 52, at 828.

155. McDonald, *supra* note 17, at 755-56.

156. Saxe v. State College Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2006).

157. McDonald, *supra* note 17, at 755-56. *See also* Steven M. Puiszis, *"Tinkering" with the First Amendment's Protection of Student Speech on the Internet*, 29 J. MARSHALL J. COMPUTER &

Circuit explicitly acknowledged that school authorities "need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teenagers and interfere with their educational development."[158] Moreover, the school's interest in protecting the learning environment extends beyond the schoolhouse gate because the off-campus speech inflicts detrimental effects in the classroom.[159]

Further, most cyberbullying cases involve student-on-student bullying, that is a student or a group of students target a particular classmate. In such cases, while it is apparent that the bullying has harmed the targeted student, it is difficult to argue that the harassing off-campus cyberspeech created a substantial disruption to the work of the school, and therefore merit the application of *Tinker*'s first prong.[160] Off-campus cyberspeech that satisfy the "substantial disruption" standard involve speech that produces a physical confrontation, or a threat of violence, on school grounds.[161] Another situation where online speech produced the requisite disruption occurs when school personnel are removed from their daily tasks in order to respond to the effects of the speech. In *Doninger*, for example, a student's online speech encouraged other students to contact the school principal and superintendent in order to complain about a cancelled school event.[162] The Second Circuit found that *Tinker*'s first prong was met because both school officials missed scheduled activities in order to respond to "a deluge of calls and emails" generated by the online speech.[163] Similarly, in *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School District*,[164] the Eight Circuit held that the speech caused a substantial disruption to the school environment because school officials

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INFO. L. 167, 219 (2011) (arguing that if student online speech has impaired another student's educational performance, then school officials should be allowed to intercede in order to protect the learning environment).

158. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1179 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007).

159. McDonald, *supra* note 17, at 745. *See also* R. George Wright, *Post-Tinker*, STAN. J. C.R. & C.L. 1, 13 (2014) ("teachers and administrators often recognize school-based impairments of the educational process and of the school's fundamental mission, outside the physicalist interpretation of *Tinker's* first prong").

160. *See* McDonald, *supra* note 17, at 756; Christine Metteer Lorillard, *When Children's Rights "Collide": Free Speech vs. the Right to Be Let Alone in the Context of Off-Campus "Cyber-Bullying,"* 81 MISS. L.J. 189, 253 (2011) (finding that when student speech directly targets another student "there stands to be little or no such broad disruption").

161. *See* McDonald, *supra* note 17, at 755-56; Wright, *supra* note 159, at 12 ("the 'disruption' prong does tend to conjure up mental images of something like an angry hallway confrontation, if not a physical altercation, or threat thereof").

162. Doninger v. Niehoff, 527 F.3d 41, 44-45 (2d Cir.2008).

163. *Id.* at 51.

164. 696 F.3d 771 (8th Cir. 2012).

had to respond to questions from parents and the local media.[165] Additionally in *Wilson*, two teachers found it difficult to manage their classes because the off-campus speech distracted some of her students.[166] Lastly, in *Wynar v. Douglas County School District*,[167] the Ninth Circuit found that the school district did not violate the First Amendment when it expelled a student who informed several classmates online that he would carry out a school shooting.[168] The *Wynar* court found that *Tinker*'s first prong was met because it was reasonable for school administrators to predict that they would need to devote "considerable time" establishing safety protocols and addressing the concerns of the student body and their parents.[169]

On the other hand, gossiping between students would not amount to a substantial disruption to the school environment.[170] In *Tinker* there was evidence that the armbands caused comments and warnings by other students;[171] however, the Supreme Court found that this was insufficient to find that the student speech disrupted the work of the school. Student-on-student cyberbullying would only result in chatter within the school halls. Typical instances of cyberbullying would not produce a flood of phone calls and emails[172] nor would it require school administrators to deal with local media contacting the school.[173] Yet, as law professor Barry McDonald pointed out, courts strained to find a substantial disruption in cases where the apparent concern was to protect the targeted student.[174]

Courts are hesitant to apply *Tinker*'s "invasion of rights" standard.[175] The hesitation is arguably because, as then-Circuit Judge Alito observed, the "scope of *Tinker*'s 'interference with the rights of others' language is

165. *Id.* at 774.

166. *Id.*

167. 728 F.3d 1062 (9th Cir. 2013).

168. *Id.* at 1067.

169. *Id.* at 1071.

170. *See, e.g.*, J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1120 (C.D. Cal. 2010). *But see* Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir. 2011) (holding that the school can regulate the student's off-campus online speech because conversations took place among other students as a result of the speech).

171. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 517-518 (1969) (Black, J., dissenting).

172. *But see* Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008).

173. *But see* S.J.W. *ex rel.* Wilson, 696 F.3d 771, 774 (8th Cir. 2012).

174. McDonald, *supra* note 17, at 756. *See also* Hostetler, *supra* note 118, at 16 (finding that several courts "uphold disciplinary actions under *Tinker*'s 'substantial disruption' standard based largely on the impact the Internet speech has on the targeted individual").

175. Hudson, *supra* note 9, at 624. *See also* McDonald, *supra* note 17, at 756.

unclear."[176] Out of all the federal appellate courts, only the Ninth Circuit has relied on *Tinker*'s "invasion of rights" standard and applied it independently from the "substantial disruption" prong.[177] The Fourth Circuit constantly referred to *Tinker*'s second prong in *Kowalski*.[178] However, the *Kowalski* court combined the two prongs finding that if the speech invades the rights of at least one student, then this is sufficient to find the requisite disruption to the school environment.[179]

On the other hand, most courts simply ignored *Tinker*'s "invasion of rights" standard.[180] But as Professor McDonald pointed out, lack of guidance from the Supreme Court is "a poor excuse for failing to apply the more appropriate function-sensitive standard to cyberbullying cases," given that it is more suitable in situations where student speech caused emotional harm to the victim, but failed to create a substantial disruption to the school environment.[181] Therefore, the Supreme Court should provide the parameters of *Tinker*'s "invasion of the rights of others" prong. Further, in order to allow school officials to remedy cyberbullying, the Court should interpret it to include off-campus speech and the right to be free from psychological harm.

B. Tinker*'s "Invasion of Rights" Standard Should be Interpreted to Include Off-Campus Speech and Psychological Harm*

In *Tinker*, the Supreme Court held that a student's free speech rights within the schoolhouse gate must be balanced with the "special characteristics of the school environment."[182] Since *Tinker* was decided in 1969, the "schoolhouse gate" functioned as a physical boundary between on-campus speech, which is subject to school authority, and off-campus speech, which is beyond school regulation.[183] However, the Internet and mobile technology has blurred physical boundaries,[184] prompting lower courts to extend *Tinker*'s "substantial disruption" standard to student cyberspeech with off-campus origins.[185] The application of *Tinker*'s first prong to off-campus speech is justified by the school's interest in preventing a substantial

176. Saxe v. State College Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2006); *see also* Hudson, *supra* note 9, at 624.
177. McCarthy, *supra* note 52, at 828.
178. *Id.* at 829 (citing Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 571-75 (4th Cir. 2011)).
179. *Kowalski*, 652 F.3d at 573-75.
180. Hudson, *supra* note 9, at 624.
181. McDonald, *supra* note 17, at 756.
182. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
183. Ceglia, *supra* note 84.
184. Puiszis, *supra* note 157, at 221-22.
185. *See supra* Part III.B.

disruption to the school environment.[186] In the same vein, schools also have an equally important interest in protecting the teaching and learning environment for every student; off-campus cyberspeech that impairs a student's ability to learn would implicate this interest.[187] Accordingly, *Tinker*'s "invasion of rights" standard should also apply to student online speech that originated outside the schoolhouse gate.

Tinker's "invasion of the rights of others" standard, along with the substantial disruption standard, was based on two Fifth Circuit cases involving students who were suspended for wearing political buttons on campus.[188] In the latter of those cases, the Fifth Circuit upheld the suspension finding that, in addition to causing a disturbance within the campus, the students disregarded the rights of others because they were trying to pin the buttons on students walking down the hall.[189] While unwanted physical contact undoubtedly collides with the rights of other students,[190] two Ninth Circuit decisions have held that *Tinker*'s "invasion of the rights of others" standard is not limited to physical confrontation.[191]

One such decision is *Harper v. Poway United School District*, which involved a student wearing an anti-homosexuality t-shirt in violation of the school dress code.[192] The student was made to spend the rest of the school day in a school conference room after refusing to remove the t-shirt.[193] The Ninth Circuit upheld the school regulation, finding that the t-shirt collided with the rights of other students "in the most fundamental way."[194] The court rejected an "overly narrow reading" of *Tinker*'s second prong, refusing to find that the standard is limited to instances where student expression has physical accosted another student.[195] The court concluded that "speech capable of causing psychological injury" can interfere with the rights of other

186. *See* McDonald, *supra* note 17, at 756.

187. *Id.* at 755-56.

188. *Id.* at 757 (citing Blackwell v. Issaquena Cty. Bd. of Educ., 363 F.2d 749 (5th Cir. 1966); Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

189. *Blackwell*, 363 F.2d at 752-53.

190. McDonald, *supra* note 17, at 757.

191. *See* Harper v. Poway United Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007); Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1072 (9th Cir. 2013); Stacie A. Stewart, Comment, *A Trade-off That Becomes a Rip-Off: When Schools Can't Regulate Cyberbullying*, 2013 BYU L. REV. 1645, 1673 (2013) (arguing that *Tinker*'s "rights of others" standard comprises "the right to be free from intimidation, humiliation, or harassment that is severe or pervasive").

192. *Harper*, 445 F.3d at 1171-72.

193. *Id.* at 1172.

194. *Id.* at 1178.

195. *Id.* at 1177-78.

students to be secure and let alone.[196] The court further explained that *Tinker*'s second prong involves "not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society."[197] The Supreme Court later vacated the *Harper* decision as moot after the district court dismissed the student's claim for injunctive relief.[198]

The Ninth Circuit again relied on the "invasion of rights" standard in *Wynar v. Douglas County School District*, where it upheld the school district's ninety-day expulsion of a student who sent instant messages suggesting a school shooting.[199] Unlike *Harper*, which involved on-campus speech,[200] the speech at issue in *Wynar* involved a student's off-campus online messages to classmates.[201] The *Wynar* court declined to define when speech crosses the line from being merely offensive to some listeners, to when it invades the rights of others to be secure and let alone.[202] However, the court concluded that the student's threatening messages represented a "quintessential harm to the rights of other students to be secure."[203]

Courts are hesitant to expand the scope of *Tinker*'s second prong for a number of reasons. There is no constitutional right to be free from offensive or hurtful words.[204] Courts may fear that a broad interpretation of *Tinker*'s second prong would suppress speech simply because another student finds it unpleasant.[205] Thus, in order to strike the appropriate balance between a school's ability to address cyberbullying and a student's exercise of free speech rights, this Note proposes two threshold requirements. First, school authorities must show that the cyberbullying has triggered the school's pedagogical interests, and second, the cyberbullying must be severe, pervasive, and objectively offensive.

196. *Id.* at 1178.

197. *Id.*

198. Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2007).

199. *See* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d at 1062, 1072 (9th Cir. 2013).

200. *See Harper*, 445 F.3d at 1171.

201. *See Wynar*, 728 F.3d at 1065-66.

202. *Id*. at 1072.

203. *Id.*

204. *See* Boos v. Barry, 485 U.S. 312, 322 (1988) ("[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.").

205. *Harper*, 445 F.3d 1166, 1198 (9th Cir. 2006) (Kozinski, J., dissenting) (finding that the "invasion of rights" prong "is not meant to give state legislatures the power to define the First Amendment rights of students out of existence by giving others the right not to hear that speech"), *vacated as moot*, 549 U.S. 1262 (2007); McCarthy, *supra* note 52, at 832.

C. Proposed Threshold Requirements to Prevent an Overbroad Application of the "Invasion of Rights" Standard

An unrestrained application of *Tinker*'s "invasion of rights" standard may grant school authorities the license to regulate a student's off-campus speech simply because another student finds it offensive.[206] Thus, in order to ensure that the school's authority is narrowly tailored to meet its goal of protecting a student from cyberbullying, this Note recommends that the school must be required to show that (1) the cyberbullying has triggered the school's interest in protecting the targeted student's learning environment, and (2) the cyberbullying is severe, pervasive, and objectively offensive.

i. School Officials Should Be Required to Prove That the Cyberbullying Has Implicated its Pedagogical Interest in Protecting a Student's Learning Environment

Prior to taking any disciplinary action against the off-campus speech, school authorities must show that the cyberspeech has affected the targeted student's learning environment.[207] This requisite showing ensures that the school is justified in regulating the off-campus speech because the speech has triggered the school's interest in protecting the teaching and learning environment.[208] School officials can meet this threshold requirement through evidence of the student's resistance in attending school, a drop in grades, self-esteem problems, or alcohol or drug use.[209] In *Harper*, the Ninth Circuit recognized the consequences of abusive speech, including "academic underachievement, truancy, and dropout."[210] Limiting school regulation to circumstances where the off-campus speech led to detrimental effects on-campus guarantees that schools do not have an excessively broad authority over student speech.

Moreover, it is undeniable that a school's primary function is to teach.[211] Accordingly, if the cyberbullying has impaired the targeted student's learning ability, then the cyberbullying has implicated the school's primary function.[212] The Supreme Court has held that school authorities may regulate

206. McCarthy, *supra* note 52, at 832.

207. *See id.* Professor McCarthy proposed that "[a]t a minimum," speech "should adversely impact another student's education or the ability of educators to perform their jobs" in order to trigger *Tinker*'s second prong.

208. *See* McDonald, supra note 17, at 755-56.

209. *The Real Effects of Cyberbullying,* NO BULLYING, http://nobullying.com/the-effects-of-cyber-bullying (last updated Aug. 30, 2016).

210. *Harper*, 445 F.3d at 1179.

211. Saxe v. State College Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2006).

212. McDonald, *supra* note 17, at 755-56; *see also* Puiszis, *supra* note 157, at 219.

student speech, albeit on-campus speech, that would interfere with the school's primary function.[213] The Court ruled that schools "need not tolerate student speech that is inconsistent with its 'basic educational mission.'"[214] Therefore, if the school district can show that the cyberbullying has impeded upon a student's learning ability, then the school has a legitimate pedagogical interest to intervene and protect the student.

ii. School Officials Should be Required to Prove that the Cyberbullying is Severe, Pervasive, and Objectively Offensive

Additionally, school officials must show that the cyberbullying is so severe, pervasive, and objectively offensive that it detracts the targeted student's learning ability.[215] This requirement ensures that the regulated speech is not just merely offensive[216] but has invaded with the right to be free from verbal assaults that cause psychological harm.[217]

This proposed threshold showing is based the Supreme Court's decision in *Davis v. Monroe Country Board of Education*.[218] In *Davis*, the Court held that a school district can be liable for damages under Title IX for student-on-student sexual harassment if the harassment is so severe, pervasive, and objectively offensive, thereby diminishing the student's learning experience and effectively denying the student of equal access to the school's resources.[219] Title IX prohibits schools receiving federal financial assistance from discriminating on the basis of gender.[220] In *Davis*, the Court acknowledged that students, while still learning how to mingle with their peers, may occasionally insult, tease, or upset other students.[221] Thus, the threshold showing guarantees that only conduct that is serious enough to impact the targeted student's educational opportunities is actionable.[222]

213. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685-86 (1986); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (finding that school officials may exercise editorial authority over school-sponsored speech so long as the regulation is "reasonably related to the school's legitimate pedagogical concerns").

214. *Kuhlmeier*, 484 U.S. at 266 (quoting *Fraser*, 478 U.S. at 685).

215. Language based on the Supreme Court's decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999).

216. *See* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1071-72 (9th Cir. 2013) (explaining that subjectively offensive speech is not enough to trigger the "invasion of rights" standard).

217. *See* Harper v. Poway United Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006) (finding that "speech capable of causing psychological injury" collides with the rights of other students to be secure and let alone), *vacated as moot*, 549 U.S. 1262 (2007).

218. *See Davis*, 526 U.S. at 633.

219. *Id.* at 651.

220. *See* 20 U.S.C. § 1681(a) (2016).

221. *Davis,* 526 U.S. at 651-52.

222. *Id.* at 652.

The evaluation of severity and pervasiveness involves an objective inquiry, based on the totality of the circumstances.[223] According to the Supreme Court in *Davis*, factors that are relevant in the evaluation include the ages of the students and the number of individuals involved.[224] The Third Circuit in *Saxe* mentioned additional factors to consider, such as the frequency of the conduct, whether the conduct is physically threatening, and whether a reasonable person would find the conduct hostile or abusive.[225]

A required showing of severity or pervasiveness may rehabilitate an otherwise constitutionally infirm school policy. In *Saxe,* the school district enacted an anti-harassment policy, which prohibited speech that either (1) "substantially interfer[es] with a student's educational performance" or (2) creates "an intimidating, hostile or offensive environment."[226] In addressing an overbreadth challenge to the school policy, then-Circuit Judge Alito held that the first prong, which prohibited speech that interferes with a student's educational performance, "may satisfy the *Tinker* standard."[227] However, the *Saxe* court continued to strike down the policy on overbreadth grounds because the second prong, which regulated speech that creates a hostile environment, did not "require any threshold showing of severity or pervasiveness."[228] The court further reasoned that without this showing, the school policy could cover any speech that simply offends someone, including protected political and religious speech.[229] As commentators have pointed out, *Saxe* appears to authorize school officials to regulate harassing speech that is severe or pervasive enough to interfere with a student's educational performance.[230] Similarly, in his dissent in *Harper*, Judge Kozinski explained that harassment law may be "reconcilable with the First Amendment, if it is limited to situations where the speech is so severe and pervasive" that it is equivalent to conduct.[231]

223. *Id.* at 651-52; Saxe v. State College Area Sch. Dist., 240 F.3d 200, 205 (3d Cir. 2001). *See also* Hostetler, *supra* note 118, at 22 (finding that Title IX includes both a subjective and an objective prong).

224. *Davis*, 526 U.S. at 651.

225. *Saxe*, 240 F.3d at 205. The Third Circuit, however, turned to Title VII cases involving workplace sexual harassment when it discussed the relevant factors. *Id.*

226. *Saxe*, 240 F.3d at 202.

227. *Id.* at 217.

228. *Id.*

229. *Id.*

230. Ceglia, *supra* note 84, at 974. *See also* Stewart, *supra* note 191, at 1674 (proposing that, in order to limit the scope of *Tinker*'s "rights of others" standard, the severity or pervasiveness of the harassing speech should be determined as promoted in *Saxe*).

231. Harper v. Poway United Sch. Dist., 445 F.3d 1166, 1198 (9th Cir. 2006) (Kozinski, J., dissenting), *vacated as moot*, 549 U.S. 1262 (2007).

Other commentators have proposed the application of the standard in *Davis* to allow school officials to regulate off-campus speech,[232] providing legitimate reasons for adopting the Title IX threshold standard.[233] First, the standard enables school authorities to protect the targeted student's educational environment,[234] which as explained above, is associated with the school's pedagogical mission. Moreover, the standard is well-established given the amount of precedent for applying Title IX to off-campus behavior.[235] Thus, school officials have adequate guidelines in applying the *Davis* threshold standard, ensuring that the school's authority over off-campus speech is limited to speech that is severe, pervasive, and patently offensive.

V. CONCLUSION

Cyberbullying is one of the top challenges for our public schools,[236] and as social media use increases each year,[237] it will continue to be a challenge. School officials need a clear standard that would enable them to properly address the issue. *Tinker*'s "substantial disruption" test does not properly address cyberbullying mainly because instances of cyberbullying rarely cause a substantial disruption to the school environment. An analysis based on *Tinker*'s "invasion of rights" standard is appropriate because the standard focuses on the school's underlying concern in cyberbullying cases—protecting the targeted student's learning environment from the harmful effects of cyberbullying.[238]

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232. *See, e.g.*, Hostetler, *supra* note 118, at 3 (suggesting a merger of *Tinker*'s "substantial disruption" prong and the standard for Title IX cases articulated by the Supreme Court in *Davis*); Thomas Wheeler, *Facebook Fatalities: Students, Social Networking, and the First Amendment*, 31 PACE L. REV. 182, 226 (2011) (proposing that if harassing speech is "sufficiently severe and pervasive to impair the students' right to a public education under *Davis*," then the speech should be regulated under *Tinker*'s second prong).

233. Hostetler, *supra* note 118, at 23.

234. *Id.*

235. *Id.*

236. Goodno, *supra* note 3.

237. *See* Andre Perrin, *Social Media Usage: 2005-2015*, PEW RESEARCH CTR. (Oct. 8, 2015), http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015.

238. McDonald, *supra* note 17, at 758.

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