Civil Rights Liability in the Public Schools – A 19th Century Law Wrestles with 21st Century Problems

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Section 1983 School Litigation – Bullying, Harassment and Beyond

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*Tinker v. Des Moines* Meets the Internet and Social Media – Does *Tinker’s* Restraint on Regulating Student Speech Reach Outside the School Campus and Sponsored Activities?

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Section 1983 School Litigation – Bullying, Harassment and Beyond

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I. Introduction

This article focuses on recent federal cases brought by parents and students against schools and school officials, alleging civil rights violations under 42 U.S.C. § 1983. The discussion below addresses the liability of schools and their officials based on harassment, bullying, a school’s duty to protect, Monell liability and other Section 1983 claims.

Section 1983 is one of the primary means by which a plaintiff may assert a federal civil rights claim for damages against schools and school officials. However, Section 1983 is not a source of federal rights. Rather Section 1983 provides a conduit for asserting the rights found in the Constitution and other federal statutes.1 Section 1983 was enacted as Section 1 of the Civil Rights Act of 1871 and can be invoked whenever state or local government officials violate federally guaranteed rights.2

The language of Section 1983 reads:

Every 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, suit in equity, or other proper proceeding for redress…


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1 Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617-18 (1979) (“As Senator Edmunds recognized in the 1871 debate: ‘All civil suits, as every lawyer understands, which this act authorizes, are not based upon it; they are based upon the right of the citizen. The act only gives a remedy.””).
Like most statutes, the language of Section 1983 has been interpreted to exclude or include particular meanings. First, the phrase “every person” excludes states, but includes state officers acting in their official capacities and local government units.\(^3\) For schools, this can include boards of education, administrators, teachers, coaches, counselors, nurses, and other employees. Second, “under color of any statute, ordinance, regulation, custom or usage” requires that a school or school officials exercise power “possessed by virtue of state law” or that the defendant is “clothed in the authority of state law.”\(^4\) Parents or students must show that the school’s acts occurred because of a school policy, custom, or usage.\(^5\) Third, “subjects, or causes to be subjected” requires that there be a causal connection between the school’s actions and the harm that results.\(^6\) Finally, “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” illustrates that Section 1983 is not a source of federal rights, but provides the vehicle for asserting rights granted in the Constitution and other federal statutes.\(^7\)

Many types of Section 1983 claims may be invoked for an alleged deprivation of a right, privilege, or immunity secured by the Constitution and laws. Some common claims that students and parents (and employees) may make against schools include violations of the First Amendment free speech clause, the Fourth Amendment right to be free of unreasonable searches, the Fourteenth Amendment right to equal protection, and the Fourteenth Amendment right to due

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process. Regardless of the type of violation the student or parent is asserting, the complaint must allege facts that present a plausible claim of unlawful conduct to survive a motion to dismiss.8

II. Duty to Protect

School districts, as local governmental entities, generally do not have an affirmative duty to protect students from private state actors. This rule was expounded in DeShaney v. Winnebago County Dep’t of Soc. Servs.9 However, several exceptions have developed to this general rule.

A. Special Relationship Exception

First, the special relationship exception was created by the Supreme Court in DeShaney. The special relationship exception states that a special relationship is created when “the state takes a person into custody and holds him there against his will.”10 As a result, an affirmative duty to protect the individual arises. Incarcerated and institutionalized individuals are in special relationships with the state, but generally students do not have this special relationship with their school.11 As a result, school districts can often successfully defend against special relationship claims.

For example, in Doe v. Covington Cnty. Sch. Dist.,12 the Fifth Circuit, sitting en banc, ruled that a school district did not have a duty to protect an elementary student from sexual abuse by a private actor based on a special relationship with the student. The claims in Covington arose when an unauthorized individual signed out a nine year old student on six occasions and sexually

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10 Id. at 199-200.
11 See Shrum ex rel. Kelly v. Kluck, 249 F.3d 773, 781 (8th Cir. 2001) (“school districts are not susceptible to this state-created danger theory of § 1983 liability, because there is no constitutional duty of care for school districts, as ‘state-mandated school attendance does not entail so restrictive a custodial relationship as to impose a duty upon the state.’”).
12 675 F.3d 849 (5th Cir. 2012).
assaulted her. The student’s guardian sued school officials, alleging that their actions, which allowed the individual to remove the student from campus, violated the student’s Fourteenth Amendment due process right to personal safety. The district court granted the school officials’ motion to dismiss, reasoning that they owed no duty to protect the student because there was no special relationship between the school and the student. The Fifth Circuit panel reversed the district court, but the court, sitting en banc, ultimately vacated the panel’s decision. The court explained that there was no special relationship such that the school had a duty to protect the student from a harm inflicted by a private actor where compulsory attendance, the student’s young age, and the affirmative act of placing the student into another’s custody were not analogous to the special relationship described in DeShaney. Therefore, the guardian failed to state a claim that the student’s constitutional rights had been violated.

In Estate of Lance v. Lewisville Indep. Sch. Dist., the Fifth Circuit again briefly addressed a special relationship claim. In this case the estate of a fourth grade student sued the school district after the student committed suicide in a school bathroom. The estate argued that the school failed to protect the student from bullying and from the harm the student inflicted on himself. Citing Covington, the Fifth Circuit found that there was no special relationship between the school and the student such that the school would be subjected to liability because “a public school does not have a DeShaney special relationship with its students…”

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13 Id. at 853.
14 Id. at 854.
15 Id. at 858.
16 Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 987 (5th Cir. 2014).
17 Id.
18 Id. at 1001.
The Third Circuit in *Morrow v. Balaski*\(^{19}\) has also addressed a duty to protect claim based on a special relationship. In this case the court affirmed the district court’s dismissal of a Section 1983 claim against a school district where the parents of two students alleged that their daughters were subjected to a series of threats and physical assaults by several other high school students.\(^{20}\) The parents argued that, while the Fourteenth Amendment’s Due Process Clause does not impose an affirmative duty on the state to protect individuals from harm caused by private citizens, the school district had a duty to protect their daughters because they had a special relationship.\(^{21}\) The district court found that there is no special relationship between public school authorities and students. The court explained that compulsory attendance, *in loco parentis*, and sophisticated security measures do not support a conclusion that public schools have a constitutional duty to protect students from private actors.\(^{22}\) Therefore, there was no special relationship such that the school district would be liable.

**B. State-Created Danger Exception**

The second exception to the general *DeShaney* rule is the state-created danger exception. Courts articulate the requirements of a state-created danger claim differently. But, generally, for this exception to apply a plaintiff must show three things. First, the plaintiff must show that the state, by its affirmative acts, created or increased the danger for the plaintiff.\(^{23}\) Second, the state’s failure to protect the plaintiff from the danger must be the proximate cause of the injury.\(^{24}\) Third,

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\(^{19}\) 719 F.3d 160 (3d Cir. 2013)

\(^{20}\) *Id.* at 163-64.

\(^{21}\) *Id.* at 168-69.

\(^{22}\) *Id.*

\(^{23}\) *D.S. v. E. Porter Cty. Sch. Corp.*, 799 F.3d 793, 798 (7th Cir. 2015).

\(^{24}\) *Id.*
the failure to protect the plaintiff must shock the conscience.\textsuperscript{25} As illustrated by the cases below, state-created danger claims are also difficult for students to prove.

For example, in \textit{D.S. v. East Porter County Sch.Corp.}, the Seventh Circuit focused on the first and third elements of a state-created danger claim. In this case, a student and her parents sued two school districts for equal protection and due process violations after the student was bullied by her peers.\textsuperscript{26} The student asserted that several girls threw basketballs at her head, tripped her, ignored her during basketball practice, kicked her desk, and called her names.\textsuperscript{27} The student’s parents confronted the bullies and school officials and were ultimately barred from school property until they met with the school superintendent because of these confrontations.\textsuperscript{28} The Seventh Circuit affirmed the district court’s grant of summary judgment in favor of the school district. The court determined that the student had not shown that the teachers or coaches instigated, created, or increased the bullying that she experienced.\textsuperscript{29} Further, even if the school’s actions created or increased the danger, its actions did not rise to the level of egregiousness that the third element of a state-created danger claim requires.\textsuperscript{30}

\textit{Covington} and \textit{Estate of Lance} also involved state-created danger claims. In \textit{Covington},\textsuperscript{31} the Fifth Circuit refused to adopt the state-created danger theory “because the allegations would not support such a theory.”\textsuperscript{32} In \textit{Estate of Lance}, the Fifth Circuit, citing \textit{Covington}, explained that, even if the Fifth Circuit recognized the state-created danger theory, the estate’s claim failed

\textsuperscript{25} Id.
\textsuperscript{26} Id. at 796.
\textsuperscript{27} Id.
\textsuperscript{28} Id. at 797.
\textsuperscript{29} Id. at 798.
\textsuperscript{30} Id. at 799.
\textsuperscript{31} 675 F.3d 849 (5th Cir. 2012).
\textsuperscript{32} Id. at 865.
because the school did not “create an opportunity that would not otherwise have existed” or take any action that made it more likely the student would be injured.33

Morrow also involved a state-created danger argument. The parents of two students argued that the school officials created the dangerous situation that lead to their daughters being harassed.34 The district court found that the parents failed to show that the school district made the daughters more vulnerable than they would have been otherwise. The court explained that the passive inaction of the school, where they suspended the students but then let them return rather than expelling them, did not satisfy the affirmative act requirement for the state-created danger exception to apply.35

Finally, two Sixth Circuit cases provide some discussion of a state-created danger claim. In Chigano v. City of Knoxville,36 the Sixth Circuit affirmed the district court’s decision dismissing an autistic student’s Section 1983 substantive due process claim where the student and her parents alleged that school officials violated her rights by failing to inform the police officer, called to arrest the disruptive student, of her disability.37 The court explained that the Due Process Clause does not “require the state to protect the life and liberty of its citizens against actions by private actors.”38 Therefore, since the police officer was private actor, the school employees did not have a duty to protect the student from the officer’s actions. The court also found that the school employees did not create the danger or increase the danger because the

33 Estate of Lance, 743 F.3d at 1002.
34 Id. at 177.
35 Id. at 178.
36 529 F. App’x 753 (6th Cir. 2013).
37 Id. at 754.
38 Id. at 756.
school employees did not call the police officer to the school. Because there was no affirmative act on the part of the school employees, no liability was imposed.39

In *Walker v. Detroit Pub. Sch. Dist.*, 40 the victims of a shooting that occurred near a public high school in Detroit sued the school district and school officials under a state-created danger theory, because the shooting allegedly resulted when rival gang members were required to attend the same school after two high schools merged.41 The victims failed to state a violation of their due process rights because they failed to satisfy the affirmative act element of state-created danger theory against school district and school officials. The failure to act is not an affirmative action under the state-created danger theory.42 The court explained that the relationship between the merger and the violence was “too attenuated,” and the school’s actions did not create or greatly increase the risk.43

### III. Monell Claims Against School Districts

In *Monell v. Department of Soc. Servs.*, 44 the U.S. Supreme Court held that local governmental units, such as school districts, are considered persons to which Section 1983 applies. But *Monell* also limited the scope of a local government’s liability to only those instances where the deprivation of rights results from custom, policy, or practice.45 This established the direct liability principle—that a local government should be liable only for actions for which it is directly responsible. As a result, plaintiffs may sue employees in their

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39 *Id.* at 757.
40 535 F. App'x 461, 462 (6th Cir. 2013).
41 *Id.* at 464.
42 *Id.*
43 *Id.* at 466.
45 *Id.* at 659.
personal and/or official capacity, and the plaintiff can name the local government itself or its official head in Section 1983 suits.\textsuperscript{46}

To establish a claim on a municipal liability theory, a plaintiff must show “the existence of an official policy or custom fairly attributable to the municipality that proximately caused the deprivation of their rights.”\textsuperscript{47} Further, municipal liability based on policy or custom can arise through an express policy, through the decisions of a person with final policymaking authority, through an omission that manifests deliberate indifference to the rights of citizens or through a practice that is so persistent and widespread as to constitute a custom or usage with the force of law. However, as illustrated by the case discussed below, the elements of a student’s claim differ based on the theory used to prove a municipal policy.

While Monell claims are more common outside the school context, these claims do arise against schools. For example, students and their parents may allege that they have been deprived of their constitutional rights by the decisions of a final policymaker or by a school district’s failure to train their staff on their policies.\textsuperscript{48}

The District of Columbia Circuit in Blue v. District of Columbia\textsuperscript{49} addressed the sufficiency of a claim alleging that a school district policy caused the violation of a student’s due process rights.\textsuperscript{50} The student claimed that she and a teacher had a consensual sexual relationship that lead to the birth of a child. Her Section 1983 claims specifically related to the school district’s decision to hire the teacher without conducting a proper background investigation and the

\textsuperscript{46} Will v. Michigan Dep’t of State Police, 491 U.S. 58, 71 (1989).
\textsuperscript{47} Semple v. City of Moundsville, 195 F.3d 708, 712 (4th Cir. 1999).
\textsuperscript{48} See Hill v. Cundiff, 797 F.3d 948, 976 (11th Cir. 2015).
\textsuperscript{50} Id.
district’s decision not to terminate the teacher after an investigation of their sexual relationship.\textsuperscript{51} The court stated that “in order for a municipality to be held liable for the single decision of a final policymaker, that official must have demonstrated deliberate indifference to the risk that a violation of a particular constitutional or statutory right would follow the decision.”\textsuperscript{52} After briefly discussing and dismissing the claim related to the investigation of the teacher for failing to cause the harm, the court focused on the student’s claim that the school district failed to investigate the background of the teacher.\textsuperscript{53} The court found that the student failed to show that the failure to screen one teacher properly constituted a municipal policy actionable under Section 1983.\textsuperscript{54} Further, the court explained that because there are multiple ways to allege a municipal policy, the plaintiff must identify the type of municipal policy at issue.\textsuperscript{55} As a result, the court could not address whether the decision was made by a final policymaker and demonstrated deliberated indifference to the risk of a violation of the student’s rights.\textsuperscript{56}

In \textit{B.A.B., Jr. v. Board of Educ. of City of St. Louis}\textsuperscript{57} a student’s Section 1983 claim regarding the board of education’s failure to train a school nurse who administered a vaccine to the student in the absence of parental consent was not properly pled because the allegations were inadequate and conclusory.\textsuperscript{58} This case arose when an elementary school administered H1-N1 vaccines to their students and B.A.B. was given a shot despite a form signed by his mother indicating that he was not to receive the vaccination.\textsuperscript{59} The court explained that Section 1983

\begin{footnotesize}
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.} at 4.
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.} at 5.
\textsuperscript{57} 698 F.3d 1037 (8th Cir. 2012).
\textsuperscript{58} \textit{Id.} at 1040.
\textsuperscript{59} \textit{Id.} at 1039.
\end{footnotesize}
claims based on the board’s failure to train its employees requires proof that “the board’s training practices were inadequate, the board was deliberately indifferent to the rights of others in adopting them such that the failure to train reflects a conscious choice by the board and the alleged deficiency in the training procedures actually caused the plaintiff’s injury.”60 The student’s allegations failed to meet this rigorous standard and were appropriately dismissed.

IV. Bullying, Harassment, and Abuse

In recent years an increasing number of school districts have faced litigation based on peer-on-peer bullying and harassment. As an emerging area of the law, school districts and their legal counsel may have to address many questions during Section 1983 litigation. One such issue is the definition of bullying. State laws define bullying in a variety of ways. Federally, the U.S. Department of Health and Human Services and the U.S. Department of Education generally define bullying as “unwanted, aggressive behavior among school-aged children that involves a real or perceived power imbalance, and is repeated, or has the potential to be repeated, over time.”61 Bullying may include physical, emotional or verbal abuse and actions such as making threats, spreading rumors, attacking someone physically or verbally, and excluding someone from a group on purpose.

No federal statute specifically prohibits bullying in schools. But when bullying is based on race, color, national origin, sex, disability, or religion, students may invoke the protection of federal antidiscrimination laws such as Title IX, Title VI, and the Fourteenth Amendment’s Equal Protection Clause or the Due Process Clause. As a result, bullying, harassment, and abuse may form the factual foundation of a significant number of Section 1983 claims.

60 Id. at 1040.
Importantly, Fourteenth Amendment claims brought under Section 1983 differ in several ways from federal statutory claims related to harassment or bullying. First, constitutional claims under Section 1983 can be brought against the school district (directly or by suing administrators in their official capacities) and against school officials and employees in their individual capacities for money damages.\footnote{Monell, 436 U.S. at 701.} Federal statutory claims can only be brought against the recipient of federal funds – the district or board.\footnote{Hill v. Cundiff, 797 F.3d 948, 976 (11th Cir. 2015).} Second, the student or parent bringing the suit under Section 1983 can seek punitive damages against individuals.\footnote{Smith v. Wade, 461 U.S. 30, 35 (1983).} Third, in response to claims brought under Section 1983, school districts may be able to assert qualified or municipal immunity defenses—defenses which are unavailable under federal civil rights statutes and which provide a significant tool for shielding school districts.

A. Sexual Harassment – Title IX and Section 1983

The difference between Title IX claims and Section 1983 claims was discussed by the Eleventh Circuit in \textit{Hill v. Cundiff}\footnote{Hill, 797 F.3d at 956.} where a middle school student who was raped by a male student as a result of a “sting operation” asserted claims under both Title IX and Section 1983.\footnote{Id. at 977.} Specifically, the court explained that the standards for establishing liability under Title IX and Section 1983 “may not be wholly congruent.”\footnote{Id.} For school district liability under Title IX, the student must show deliberate indifference, but under Section 1983 the student must show a municipal custom, policy, or practice.\footnote{Id.} In this case, the district’s sexual harassment policy (a “catch in the act” policy) and alleged inadequate training policies were not enough to subject the

\footnotesize{\begin{itemize}
\item \textit{Monell}, 436 U.S. at 701.
\item \textit{Hill v. Cundiff}, 797 F.3d 948, 976 (11th Cir. 2015).
\item \textit{Hill}, 797 F.3d at 956.
\item \textit{Id.} at 977.
\item \textit{Id.}
\item \textit{Id.}
\end{itemize}}
school board to liability. The court reasoned that the student failed to show a direct causal link between the school’s action and the deprivation of rights. Specifically, “the board could not have foreseen that a rape-bait scheme that required an eighth-grade student to voluntarily subject herself to sexual harassment as a ‘known or obvious consequence’ of the ‘catch in the act policy.’”69 This case also analyzes the individual defendant’s liability and ability to assert a qualified immunity defense.

**B. Racial Discrimination – Title VI and Section 1983**

In *Fennel v. Marion ISD*,70 the Fifth Circuit examined a student’s claims brought under Title VI and Section 1983. In this case three African-American sisters claimed that the school district and two employees discriminated against them on the basis of race and created a hostile educational environment.71 The court stated that “to state a claim of racial discrimination under the Equal Protection Clause and Section 1983, the plaintiff must allege and prove that he or she received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from a discriminatory intent.”72 The court concluded that the school officials were entitled to summary judgment because the plaintiffs failed to show that they were treated differently than similarly situated peers.73

In *Doe v. Galster*,74 the Seventh Circuit found that a school district was not liable for peer-on-peer bullying that allegedly violated the plaintiff’s rights under Title VI, Title IX, and the Equal Protection Clause. In this case a middle school student was physically and verbally

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69 Id.
70 804 F.3d 398 (5th Cir. 2015).
71 Id. at 402.
72 Id. at 412.
73 Id. at 414-15.
74 768 F.3d 611 (7th Cir. 2014).
harassed by other students based on her gender and ethnicity. The court affirmed the district court’s grant of summary judgment for the school on the equal protection claim. The court explained that for the equal protection claim to survive summary judgment, the plaintiff needed to offer evidence that the school “acted with a nefarious discriminatory purpose … and discriminated against her based on her membership in a definable class.” Further, she needed to show that the school “acted either intentionally or with deliberate indifference.” The plaintiff was unable to meet this high standard because the facts showed that the school administrators responded to the known acts of bullying and harassment with prompt and escalating discipline and preventative actions.

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75 Id. at 613.
76 Id. at 622.
77 Id.
78 Id.
When the Supreme Court decided *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, the Internet and social media lay far in the future. Notwithstanding that the first lunar landing took place in the same year, no one realistically envisioned smart phones, iPads, blogsites, Facebook, YouTube, or Twitter. New technology creates new problems, and the courts are now wrestling with *Tinker*’s apparent, or perceived, “schoolhouse gate” limitation on the authority of school officials to regulate student speech. Meanwhile, today’s students have discovered and are fully exploiting instant, remote electronic communication to mass audiences, for better or for worse.

A recent en banc decision by a sharply-divided U.S. Court of Appeals for the Fifth Circuit and the ensuing petition for writ of *certiorari* offers the High Court an opportunity to weigh in on these developments and to give school officials much-needed guidance in this area. The case vividly illustrates the several directly conflicting concerns that school districts/boards and their counsel must have in mind when confronted with student speech on the Internet that may transgress discipline codes and become controversial in the school community.3

1. *Tinker* and Subsequent Supreme Court Decisions Regarding Student Speech

The holding in *Tinker* is familiar. The Court ruled that students who merely wore armbands protesting the Vietnam War in class could not be disciplined consistent with the First

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1 The assistance of law clerk Caroline Thibeault in preparing this paper is gratefully acknowledged.
3 These First Amendment claims generally are brought under 42 U.S.C. § 1983.
Amendment. Noting that the protest did not involve actual “disturbances or disorders” and did not “intrude[] upon the work of the schools or the rights of other students,” the Court held that school officials may limit student speech only when the facts “reasonably le[a]d” them to “forecast substantial disruption of or a material interference with school activities.”

In several instances, the Court suggested that this restricted authority is confined to school premises.

In three subsequent decisions, the Court has cautiously expanded the power of school officials to limit student speech. In *Bethel Sch. Dist. No. 403 v. Fraser*, the Court upheld the suspension of a student who delivered a “vulgar and lewd speech” at a mandatory school-sponsored assembly because it “would undermine the school’s basic educational mission.” In *Hazelwood Sch. Dist. v. Kuhlmeier*, the Court sustained a school’s censorship of articles in a school-sponsored newspaper that was part of the educational curriculum because others “might reasonably perceive [the newspaper] to bear the imprimatur of the school” (The Court suggested that *Tinker* involved the authority of school officials to regulate speech “on the school premises.”)

Finally, in *Morse v. Frederick*, the Court upheld the suspension of a student who, during an Olympic torch relay that passed in front of the school, displayed a banner which the school “reasonab[ly]” interpreted as advocating drug use. Although the act technically occurred off school premises, the Court stated that the event was similar to a school-sponsored “social

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4 *Id.* at 508, 514.
5 See, e.g., *id.* at 514 (“The[] [petitioners] caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.”).
8 *Id.* at 270-71.
9 *Id.* at 271.
event or class trip” and ruled that a school can impose discipline for speech which “reasonably can be regarded as encouraging illegal drug use.”\footnote{Id. at 397, 400.}

\section*{2. Bell v. Itawamba Cnty. Sch. Bd. – The Factual Setting}

\textit{Bell v. Itawamba Cnty. Sch. Bd.}\footnote{799 F.3d 379 (5th Cir. 2015)(en banc).} involves a 42 U.S.C. § 1983 lawsuit alleging that a high school student’s suspension and alternative placement violated his First Amendment right of free speech. The discipline was based on a rap song composed by the student and placed on his Facebook page. The relevant facts are based on two proceedings in the district court – an evidentiary hearing on a preliminary injunction application and a subsequent summary judgment cross-motions procedure. The following is a compilation of those facts derived from the majority and the dissenting opinions in both the panel decision,\footnote{Bell v. Itawamba Cnty. Sch. Bd., 774 F.3d 280 (5th Cir. 2014).} and the en banc decision.\footnote{Bell, 799 F.3d 379 (5th Cir. 2015).}

Taylor Bell, a senior at Itawamba Agricultural High School, posted a recording of a rap song to his Facebook page. An aspiring artist, Bell had composed the rap himself and recorded it at a professional recording studio. He posted the recording to his Facebook page, using his personal computer during non-school hours over the Christmas holiday. The recording was “viewable” by Bell’s Facebook “friends,” of which he had approximately 1,380. Bell later posted a second, slightly altered version of the recording on YouTube.

According to Bell, he composed the song after a number of his female friends at school informed him that two athletics coaches had frequently sexually harassed them during school. Allegedly, Coach Wildmon had told students that they were “sexy” and Coach Rainey had “rubbed on girls’ ears” in the gym. Bell’s rap identified the coaches by name and alleged sexual
misconduct against female students by the coaches at school. It also drew parallels to the alleged sexual misconduct of a former Itawamba coach arrested the previous year for sending sexually explicit text messages to a female student. The complete lyrics of the rap song are included Attachment A, and contain vulgar and violent language.

Bell stated that his song was an effort to speak out on the issue of teacher-on-student sexual harassment. He asserted that he did not immediately report the coaches’ misconduct to school authorities because he believed that school officials generally ignored complaints by students about the conduct of school staff. He stated that he did not intend the song as a threat; rather, that he made it because he knew people were going to listen to it. Bell had been pursuing a music career throughout his teens and said that he hoped that posting the song on YouTube would attract the attention of record labels.

On January 6, 2011, Wildmon received a text from his wife informing him about the recording, which she had learned about from a friend. Wildmon asked a student if he could listen to the recording on the student’s smartphone. Afterwards, Wildmon reported to the principal that “several kids” were talking about a rap recording that Bell had posted on Facebook. Wildmon reported that the rap was derogatory towards himself and another coach, and that the rap accused both of inappropriate conduct. The principal then informed the district superintendent. On January 7, the principal, superintendent, and school board’s attorney questioned Bell and sent him home for the rest of the day. The principal drove him home from school.

On January 14, Bell was removed from class and told that he was suspended pending a disciplinary-committee hearing. The school officials did not, however, contact law enforcement at any point in this process and allowed Bell to remain unattended in the school commons for the remainder of the day. He was placed in an alternative-education program for the remainder of the
nine-week grading term. In a letter to Bell’s mother, the school stated that this action was consistent with the district’s administrative disciplinary policy, which lists “harassment, intimidation, or threatening other students and/or teachers” as a “severe disruption.”

The disciplinary-committee hearing was held on January 26. Neither Wildmon nor Rainey were in attendance. No evidence was presented at the hearing that the coaches perceived the song as an actual threat or disruption. Bell also later testified that the officials never told him that school had been disrupted as a result of the song. Community members, outside the school setting, had stated to Bell’s mother that they believed that the language “put a pistol down your mouth” was a direct threat. Bell explained that “he did not mean he was going to shoot anyone, but that he was only ‘foreshadowing something that might happen.’” He said the lyrics reflected the possibility that a parent or relative of one of the female students might eventually react violently upon learning that the coaches were harassing their children – not that Bell would react violently.

Bell also stated that he did not tell anyone at school to listen to the song. At the school, Facebook was routinely blocked on all computers and cell phones were prohibited. According to Bell, he could discern no disruption among students due to the song. Most of the students’ talk at school focused on Bell’s suspension, as opposed to the rap song. However, on Bell’s Facebook page some “friends” commented on the song as the product of Bell’s musical talent as a rap musician. Bell also stated that at least 2,000 people had contacted him about the rap recording in response to the postings.

Bell’s only disciplinary history involved a single in-school suspension for tardiness. There was no evidence that Bell had ever engaged in violent or unlawful conduct. There was also
no evidence to reflect that Bell ever owned, possessed, or had any actual experience with firearms.

The school board’s attorney informed Bell’s mother that the publication of the recording constituted harassment and intimidation of two teachers. The district did not reach the issue of whether the content of the recordings constituted threats. Bell appealed to the school board and the school board unanimously found that Bell had “threatened, harassed and intimidated school employees.”

Rainey later testified that after the recording was posted students began spending more time in the gym, despite teachers’ telling them to remain in classrooms. He testified that the recording affected the way he conducted himself around students, leading him to avoid interactions with students that might be interpreted as being inappropriate. He indicated that he felt the song had affected his ability to act like a “parent figure” to students. However, he stated that he viewed the song as “just a rap,” and that “if [he] let it go, it [would] probably just die down.” Wildmon testified that he interpreted the recording literally, that he was scared, and that he would not allow the members of the basketball team to leave after games until he was in his car. He, too, testified that the song caused him to be more cautious around students and to avoid the appearance that he was behaving inappropriately toward them. Bell introduced affidavits of his classmates detailing the coaches’ sexual harassment of minor female students, including inappropriate touching and sexually-charged comments.

3. Proceedings in the District Court

When Bell sought a preliminary injunction, the district court denied his motion as moot because he had only one day remaining at his alternative school. Summary judgment motion practice followed and the district court entered judgment for the school district. Applying Tinker,
the court found (1) actual “school disruption” based on the coaches’ testimony that they had altered their teaching styles as a result and (2) that it was “reasonably foreseeable” that a song that charges two school employees with serious sexual misconduct and is targeted to an “unlimited internet audience” would cause a material and substantial disruption in the school.15

4. The Panel Decision in Bell v. Itawamba County Sch. Bd.16

After Bell appealed, the Fifth Circuit issued a 2-1 panel decision reversing the entry of summary judgment for the district and ordering judgment for Bell. The majority first held that even if Tinker applies to this off-campus speech, the Tinker standard was not satisfied because there was no “commotion, boisterous conduct, interruption of classes or any lack of order, discipline and decorum at the school” other than the coaches’ assertion that they had altered their “teaching styles” to avoid any perception of improper conduct.17 The majority further held that there were no facts from which the school could reasonably forecast such disruption. The majority also rejected an alternative argument that Bell’s song “’gravely and uniquely threaten[ed] violence” to the school population, contrasting its “violent imagery typical of the hyperbolic rap genre” with language amounting to a “genuine” threat of a Columbine-style attack.18 Finally, the majority observed that Bell’s song did not satisfy a “true threat” theory, because it was not a “plainspoken threat delivered directly, privately or seriously to the coaches but, rather, was a form of music or art broadcast in a public media to critique the coaches’ misconduct and also in furtherance of Bell’s musical ambitions.”19

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16 774 F.3d 280 (5th Cir. 2014).
17 Id. at 295-96.
18 Id. at 299-300.
19 Id. at 300.
The dissent concluded that Bell’s song fell outside First Amendment protection because it reasonably could be interpreted as a “true threat”, since it “intentionally and publicly states that an educator will be ‘capped’ (shot), have a pistol put down his mouth, and hit with a pistol”.20 In the alternative the dissent stated that even if Tinker limits the authority of school officials to the schoolhouse, Bell’s speech was the “functional equivalent of on-campus speech” because he intended that his song “reach members of the community” by posting on Facebook and YouTube.21 The dissent added, however, that Tinker is not limited to the school premises, noting that the “pervasive and omnipresent nature of the Internet, in many respects, has obfuscated the ‘on-campus/off-campus’ distinction” and that it was reasonable for school officials to forecast “possible fact-based” substantial disruptions, including “the coaches’ inability to properly teach, resulting from students’ loss of respect for the coach, to acts of violence carried out against the coaches.”22

5. The En Banc Decision in Bell v. Itawamba Cnty. Sch. Bd.23

The Fifth Circuit re-heard the case sitting en banc and the result was another sharp division, with the authors of the majority and dissenting opinions in the panel decision switching roles – this time with the addition of multiple concurring and dissenting opinions.

The majority opinion by Judge Barksdale observed that the advent of new electronic technologies and their “sweeping adoption by students” have “confound[ed] previously delineated boundaries of permissible regulations,” the clarification of which has been made more important by “now-tragically common violence”.24 The majority opinion rejected Bell’s

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20 Id. at 315 (Barksdale, J., dissenting).
22 Id. at 319, 322.
23 799 F.3d 379 (5th Cir. 2015)
24 Id. at 392-93.
argument that *Tinker* does not apply to speech which originates and is disseminated off-campus without using school resources. It noted that the “pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction” and that *Tinker* governs speech which is “intentionally direct[ed] at the school community” and is “reasonably understood by school officials to threaten, harass, and intimidate a teacher” regardless of where it originates or how it is disseminated. The majority ruled that Bell’s speech reasonably could have been forecast to cause a substantial disruption, pointing out that the manner of the speech—employing “threatening, intimidating, and harassing language”—“must be taken seriously and that threatening, harassing, or intimidating a teacher “impedes, if not destroys, the ability to teach,” “the ability to educate,” “the discipline necessary for an environment in which education can take place,” “encourages and incites other students to engage in similar disruptive conduct,” and “can even cause a teacher to leave [the] profession.”

One concurring opinion urged a narrow holding—that speech may be disciplined wherever made if it contains “an actual threat to kill or physically harm,” “is connected to the school environment,” and “is communicated to the school, or its students, or its personnel.”

Another concurring opinion cautioned that the majority ruling does not make *Tinker* applicable to off-campus speech that is “non-threatening political or religious speech” even if it might be considered “offensive, harassing, or disruptive.”

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25 *Id.* at 393-94.
26 *Id.* at 395-96.
27 *Id.* at 399-400.
29 *Id.* at 402 (Elrod, J., concurring).
Finally, yet another concurring opinion stated that *Tinker* applies to off-campus speech that “is directed at the school community,” “at least when the speech is threatening, harassing, and intimidating.”

Judge Dennis, who wrote the majority opinion in the panel decision, now authored the lead dissent. Eschewing *Tinker* analysis in the first instance, the dissent stated instead that Bell’s speech was “specially protected” because it was “on a matter of public concern” as measured by the “content, form and context” standard. It observed that the song’s “overall ‘content’ is indisputably a darkly sardonic but impassioned protest of two teachers’ alleged sexual misconduct”; that the “form” of the speech, a rap song, was music, an art form which “has historically functioned as a mechanism to raise awareness of contemporary issues”; and that the “context” of Bell’s speech also fits “matter of public concern analysis” because the song was released on the Internet in order to focus attention on the alleged misconduct. The dissent added criticism that the majority’s “content-based, vague, and ‘layperson’-based restriction directly conflicts with the core principles underlying the First Amendment’s guarantees.”

Second, the dissent asserted that *Tinker* does not apply to students’ off-campus online speech. The dissent pointed out that *Tinker* is “expressly grounded in ‘the special characteristics of the school environment’” and that extending *Tinker* to Bell’s speech infringes both on the established right of students to express disrespect or disdain for their teachers when off-campus and on the fundamental interest of parents in rearing their children. Finally, the dissent

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30 *Id.* at 403 (Costa, J., concurring).
31 *Id.* at 404, 408-10 (Dennis, J., dissenting), citing *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011).
32 *Id.* at 409-10.
33 *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 413 (5th Cir. 2015) (Dennis, J., dissenting).
34 *Id.* at 422.
concluded that even if *Tinker* were applicable, the evidence failed to establish either that Bell’s Internet posting “substantially disrupted the school’s work and discipline or that the school officials reasonably could have forecasted that it would do so.” The dissent noted that “there was no commotion, boisterous conduct, interruption of classes, or any lack of order, discipline and decorum at the school[] as a result” and that “there was no evidence that any student played the song at school.”

Another dissenting opinion agreed that *Tinker* does not apply to off-campus speech but recognized that currently technology “serves to significantly blur the lines between on-campus and off-campus speech”. This dissent therefore posited a “modified *Tinker* standard [for] off-campus speech” with the following elements: (1) “evidence of facts which might reasonably have led school authorities to forecast a substantial disruption or evidence of an actual, substantial disruption; AND (2) demonstration of a sufficient nexus between the speech and the school’s pedagogical interests.” The latter, “nexus” element would involve review of at least three factors, including whether the speech could reasonably be expected to reach the school environment; whether the school’s interest as trustee of student well-being outweighs the traditional parental role, giving particular weight to evidence which indicates that off-campus speech has a unique and proven adverse impact on students and the campus environment; and whether the “predominant message is entitled to heightened protection.”

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35 *Id.* at 427.
36 *Id.* at 429-30.
37 *Id.* at 435 (Graves, Jr., J., dissenting).
39 *Id.*
6. Petition for Writ of Certiorari

On November 17, 2015 Bell filed a petition for writ of *certiorari* in *Bell v. Itawamba Cnty. Sch. Bd.* 40 Regarding the merits of the case, the petition argues, first, that *Tinker* does not apply to off-campus speech and, second, that at a minimum *Tinker* should not apply to off-campus speech on “matters of public concern”. Last, the petition asserts that Bell’s speech cannot be considered a true “threat” and therefore is immune from regulation on that basis. 41 42

7. Other Related Court of Appeals Decisions 43

The en banc majority opinion states that six circuits have already addressed the issue of whether *Tinker* applies to off-campus speech, and that five out of the six have concluded that it does (see below). 44 The remaining six circuits have not addressed the issue. Below are brief summaries of the cases to which *Bell* cites.

A. Second Circuit: *Doninger v. Niehoff* 45

A student posted on an independently-operated, web accessible blog off school grounds. The blog post used vulgar language to convey false information about a school band contest. It urged readers to contact the school. The principal concluded that the student’s conduct failed to display the civility and good citizenship expected of class officer, and prohibited her from running for class office. The Second Circuit ruled that 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

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41 Id. at 25-6, 28-9.
42 At the time of this paper’s submission, the opposition to the petition was not yet due.
43 This paper does not cite decisions by the district courts, which are non-binding within their respective circuits and which are less persuasive in other circuits.
44 *Bell*, 799 F.3d at 393.
45 527 F.3d 41 (2d Cir. 2008).
it was similarly foreseeable that the off-campus expression might also reach campus. The court concluded that it was reasonably foreseeable that the posting would reach school property because it pertained to school events, and it created a risk of disruption by encouraging others to contact the school.46

**B. Third Circuit:** (intra-circuit split)

*Layshock v. Hermitage Sch. Dist.*47

Using his grandmother’s computer, a student created a fake internet “profile” that made fun of the principal. To make the profile, the student copied and pasted a picture of the principal from the school’s web site. The student was suspended, placed in an alternative education program, and banned from certain school activities. The school district did not argue that the student’s speech caused a material and substantial disruption of the school environment and conceded that it could not establish a “sufficient nexus” between the speech and a substantial disruption. Instead, the district argued a sufficient nexus existed between the school district and the student’s creation of the profile, via copy and paste from the school district’s website to the fake profile. The Third Circuit rejected this argument. The school district also argued the speech should be treated as “on-campus” speech because the speech was aimed at the school district community. The court concluded, “We need not now define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate because, as we noted earlier, the district court found that [the student’s] conduct did not disrupt the school, and the District does not appeal that finding. Thus, we need only hold that [his] use of the District's web site does not

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46 *Id.* at 50-51.
constitute entering the school, and that the District is not empowered to punish his out of school expressive conduct under the circumstances here.”

J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.

Using her home computer on the weekend, a student created a fake MySpace “profile” that made fun of her principal. It used adult language and sexually explicit content but access was limited to the student’s friends and did not identify the principal by name, school, or location. The student was suspended. On appeal, the Third Circuit “assume[d], without deciding, that Tinker applie[d].” The court concluded that the discipline could not be sustained because it was not reasonably foreseeable that the speech would create a substantial disruption.

In a separate concurrence, five judges wrote that Tinker does not apply to off-campus speech.


A student used her own computer at home to create a Myspace page called “S.A.S.H.,” which stood for “Students Against Sluts Herpes.” The page was dedicated to ridiculing a fellow student. The student invited approximately 100 “friends” to join the group. She was suspended for 5 days. The Fourth Circuit applied Tinker. It concluded that the “nexus” of her speech to the school’s pedagogical interests was sufficiently strong to justify the action taken by administrators in carrying out their role as the trustees of the student body's well-being; that the speech was materially and substantially disruptive in that it interfered with the school's work and collided

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48 Id. at 219.
50 Id. at 920.
51 Id. at 936.
with the rights of other students to be secure and to be let alone; and that it was foreseeable that the student’s conduct would reach the school.\(^{53}\)

**D. Fifth Circuit: Shanley v. Ne. Indep. Sch. Dist., Bexar County, Tex.\(^{54}\)**

Students distributed newspapers containing articles that they authored during out-of-school hours and without using any materials or facilities owned or operated by the school system. The newspapers were distributed near but outside the school premises on the sidewalk of an adjoining street separated from the school by a parking lot. The Fifth Circuit applied *Tinker* and concluded that the speech was protected. “The activity punished here does not even approach the ‘material and substantial’ disruption . . . either in fact or in reasonable forecast [and] [a]s a factual matter . . . there were no disturbances of any sort, on or off campus, related to the distribution of the [newspaper].”\(^{55}\)


A student sent instant messages from his home computer to a classmate in which he talked about getting a gun and shooting other students at the school. The school notified the police, who placed the student in juvenile detention. The student was suspended from school for 10 days, and then the remainder of the school year. The Eighth Circuit upheld the discipline on two alternative grounds. First, it applied the true threats analysis and held that the messages constituted true threats.\(^{57}\) The court next applied *Tinker* and held that it was reasonably foreseeable that the student’s messages about shooting specific students in the school would be

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\(^{53}\) *Id.* at 572-74.

\(^{54}\) 462 F.2d 960 (5th Cir. 1972).

\(^{55}\) *Id.* at 970.

\(^{56}\) 647 F.3d 754 (8th Cir. 2011).

\(^{57}\) *Id.* at 764-65.
brought to the attention of school authorities and would create a substantial disruption within the school environment.\textsuperscript{58}

\textit{S.J.W. v. Lee’s Summit R-7 Sch. Dist.}\textsuperscript{59} (not cited in \textit{Bell})

Two high school juniors created a website and a blog purportedly intended to discuss, satirize, and “vent” about events at the school. They used a Dutch domain site that prevented U.S. users from finding the site through a Google search, although the site could be accessed if the user knew the address. It was not password-protected. The students put up posts using offensive and racist comments, as well as sexually explicit and degrading comments about identified female students. On one occasion one of the students used a school computer to upload files needed to create the site. Whether by accident or intention, word spread quickly and the student body at large learned of the site. There was conflicting testimony as to whether there were significant disruptions in the school as a result, with teachers testifying that many students in their classes were distracted and in some cases upset about the content. The students were issued 180-day suspensions. The Eighth Circuit applied \textit{Tinker} and upheld the discipline because the speech (1) was “targeted at” the school, despite the location of its origin, and could “reasonably be expected to reach the school” and (2) “actually caused a substantial disruption.”\textsuperscript{60}

\textbf{F. Ninth Circuit: \textit{Wynar v. Douglas Cnty. Sch. Dist.}}\textsuperscript{61}

A student sent instant messages from his home computer to his friends, bragging about his weapons, threatening to shoot specific classmates, intimating that he would “take out” people

\textsuperscript{58} \textit{Id.} at 766.
\textsuperscript{59} 696 F.3d 771 (8th Cir. 2012).
\textsuperscript{60} \textit{Id.} at 778.
\textsuperscript{61} 728 F.3d 1062 (9th Cir. 2013).
at a school shooting on a specific date, and invoking the image of the Virginia Tech shootings. His friends notified school authorities and the student was temporarily expelled. The Ninth Circuit applied *Tinker* and upheld the discipline, concluding that it was reasonable for the school district to interpret the messages as a real risk and to forecast a substantial disruption.62

8. Practical Concerns and Considerations for School Boards/Districts and School Counsel As Illustrated by *Bell*

Unless and until the Supreme Court decides the question of whether the *Tinker* standard applies to speech on the Internet and social media, school districts/boards and their counsel must operate in a climate of significant uncertainty. Several circuits have not even addressed the question. The others have adopted varying analyses and in one circuit there appears to be an internal conflict. The *Bell* decision itself reveals a sharp conflict within that court. The following points are offered in this climate of uncertainty and ambiguity.

A. School officials and attorneys confronted with a student’s Internet/social media speech may operate safely only within a limited realm. It seems certain that speech which fits the definition of “unlawful” or “illegal” can reliably be the basis for discipline. This includes speech that advocates specific illegal activity in a school, such as incitement of a Columbine-style attack. It also includes speech that satisfies the requirements for cyberbullying, hazing, and racial or other forms of proscribed discrimination directed at specific persons. In these instances, it makes little sense to require actual disruption under *Tinker* because the character of the speech probably renders it unprotected in the first instance, and in any event, disruption to the learning environment of at least the targeted individuals should be readily “forecasted.” Of course, if speech falls into this category, school officials and their attorneys should promptly contact law enforcement authorities. While arguments were made in the *Bell* case that the student’s speech

62 *Id.* at 1065.
bore this character, the actions of the school officials belied the argument, since law enforcement apparently never was involved and Bell was allowed to remain on school premises on the day in question.

B. Speech that does not fit the category of “unlawful”/“illegal” poses far greater uncertainty for school officials. *Bell* illustrates two significant elements which should color school officials’ decision-making. First, it must be asked whether the speech is on a “matter of public concern.” Notwithstanding the manner of its presentation, Bell’s speech clearly did involve that sort of subject matter – alleged sexual harassment of students by school faculty. Obvious topics that meet this definition include a wide range of possible subjects – for example only, hazing, bullying and other illegal acts by fellow students; criticism of teachers’ competency; criticism of school boards’ expenditures on technology; criticism of a school’s college matriculation rates; assertions that a coach or athletic director is active on sports wagering sites; attacks on a school’s response to building safety issues, such as asbestos or other hazards. If these issues are present in the speech, caution must be used in responding.

Likewise, school authorities and counsel must be sensitive to the form of the speech and whether artistic expression might be involved. From this perspective, *Bell* offers the easy case – the student had a demonstrated record of pursuing a musical interest and his manner of publicizing his song was at least in part consistent with that. Speech that takes the form of posters, images, photo collages, a novella, or a cinematic-style piece posted on YouTube, for example, must invite a careful assessment, especially where the student has a demonstrated artistic interest. Of course, any form of expression can be subjectively characterized as “artistic” and the level of creative effort should be considered in addition to the afore-mentioned “resume” of the student.
C. “Actual disruption” which can be directly tied to the speech is a safer basis for taking disciplinary action. If, for example, the speech directly results in interference with teaching in the classroom, such as students ignoring classroom instruction or students failing to maintain discipline and order in the classroom, that standard would seem to be met. Even here, however, caution is called for. The disrupters ought to be the first targets of discipline and the speaker a secondary target, unless he/she is directly involved in the disruption.

D. Far less reliable ground is present where no actual disruption has occurred and school officials are left with making a “forecast.” It is here where the courts seem to be most confused and where discipline ought to be imposed carefully and sparingly. Other non-disciplinary measures may be advisable, such as requiring the student speaker to restrict access to his/her site by using available settings; restricting/prohibiting the use of cell phones and iPads on school premises; and enforcing acceptable use policies regarding the use of school technology.
Attachment A

Let me tell you a little story about these Itawamba coaches / dirty ass niggas like some fucking coacha roaches / started fucking with the white and know they fucking with the blacks / that pussy ass nigga W[.] got me turned up the fucking max /

Fucking with the students and he just had a baby / ever since I met that cracker I knew that he was crazy / always talking shit cause he know I'm from daw-city / the reason he fucking around cause his wife ain't got no tidies /

This niggha telling students that they sexy, betta watch your back / I'm a serve this nigga, like I serve the junkies with some crack / Quit the damn basketball team / the coach a pervert / can't stand the truth so to you these lyrics going to hurt63

What the hell was they thinking when they hired Mr. R[.] / dreadlock Bobby Hill the second / He the same see / Talking about you could have went pro to the NFL / Now you just another pervert coach, fat as hell / Talking about you gangsta / drive your mama's PT Cruiser / Run up on T-Bizzle / I'm going to hit you with my rueger

Think you got some game / cuz you fucking with some juveniles / you know this shit the truth so don't you try to hide it now / Rubbing on the black girls ears in the gym / white hoes, change your voice when you talk to them / I'm a dope runner, spot a junkie a mile away / came to football practice high / remember that day / I do / to me you a fool / 30 years old fucking with students at the school

Hahahah / You's a lame / and it's a dam shame / instead you was lame / eat shit, the whole school got a ring mutherfucker

Heard you textin number 25 / you want to get it on / white dude, guess you got a thing for them yellow bones / looking down girls shirts / drool running down your mouth / you fucking with the wrong one / going to get a pistol down your mouth / Boww

OMG / Took some girls in the locker room in PE / Cut off the lights / you motherfucking freak / Fucking with the youngins / because your pimpin game weak / How he get the head coach / I don't really fucking know / But I still got a lot of love for my nigga Joe / And my nigga Makaveli / and my nigga codie / W[.] talk shit bitch don't even know me

Middle fingers up if you hate that nigga / Middle fingers up if you can't stand that nigga / middle fingers up if you want to cap that nigga / middle fingers up / he get no mercy nigga

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63 The italicized phrases are those which are given added emphasis in the majority opinion in Bell v. Itawamba Cty. Sch. Board, 799 F.3d 379, 384 (5th Cir. 2015)(en banc).
Section 1983 Hot Spots: Emerging Fourth Amendment and Due Process Claims

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I. Searches and Seizures

The current climate of national violence has resulted in both a heightened level of concern about monitoring for weapons on school grounds as well as the greater presence of law enforcement on school grounds. This is likely to result in an increase in Section 1983 claims arising from searches and seizures conducted by school staff acting alone and school staff working in conjunction with law enforcement or private security firms. 1

New Jersey v. T.L.O., 2 remains the seminal case defining the Fourth Amendment rights of students. In this case, the Supreme Court found that a public school official is subject to the Fourth Amendment but is not required to adhere to the same principles as law enforcement officials. Rather, a search must be reasonable at its inception, the scope of the search must be reasonably related to the purpose of the search, and the search must not be excessively intrusive in light of the age and gender of the students involved. 3

In 2009, the Supreme Court specifically addressed the intrusiveness prong of the T. L.O. standard in the context of strip searches of students and clarified that such searches are subject to a heightened scrutiny. Although a search may be reasonable at its inception because there is a “moderate chance of finding evidence of wrongdoing,” as the scope of the

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1 See, e.g., Herrera v. Santa Fe Pub. Sch., 41 F. Supp. 3d 1188 (D.N.M. 2014) (court denied summary judgment in 1983 action against board for actions of private security firm who searched students before school prom); Armijo v. Peterson, 601 F.3d 1065 (10th Cir. 2010) (police officers had qualified immunity with regard to reliance on exigent circumstances exception to search student’s home and detain student based on information about potential attack on school).


3 Id. at 342.
search becomes more intrusive, both the justification for the intrusiveness of the search and the likelihood that it will result in the discovery of evidence of wrongdoing need to be compelling. For example, a strip search of a student suspected of concealing the triggering device for a bomb may be justified based on the exigent need to conduct a thorough search to prevent an immediate risk of injury to life and property where a strip search of students in an attempt to locate a small amount of stolen money is not. These cases understandably are fact specific and written opinions describing what appear to be similar fact patterns have resulted in inconsistent rulings regarding liability. This supports the argument that the law is unsettled, and therefore, school officials should be given the benefit of the doubt when raising a qualified immunity defense. Courts have reacted to such claims with increased skepticism in light of the fact that the T.L.O. decision is over 30 years old, and the Safford decision has clarified the standard.

A. Searches involving Technology

Advances in technology also have resulted in novel situations relating to school searches, including searches of personal cell phones and other electronic devices carried by students, uses of metal detectors and subsequent searches of persons or property, and video monitoring. In each situation, schools must consider and apply the T.L.O. and Safford standards. For example, courts have differed on the permissible scope of a search of the contents of a student’s cell phone

5 Compare K.P. v Florida, No. 3D 12-1925 (Fla. App. Ct. Dec. 26, 2013) (court found that police search of student backpack for a handgun based on an anonymous tip was reasonable in light of need to protect students in schools) with Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y.1977) (strip search of elementary school class to locate missing $3.00 was unreasonable).
simply because the student possessed a cell phone in violation of school rules.\textsuperscript{7} A recent case from the Sixth Circuit, \textit{G. C. v. Owensboro Pub. Sch.},\textsuperscript{8} showed that courts will take seriously the claim that a student has a reasonable expectation of privacy in the content contained on a cell phone and will require school administrators to articulate a specific factual basis for examining phone content. In that case, the court found that a search of the phone content was reasonable on one occasion where the school had specific information that the phone might contain information that the student intended to harm himself, but found that on a second occasion the school was not justified in searching the content of the phone just because the same student was texting during class time in violation of school rules. The court explained that the mere use of a cell phone during class time in violation of school rules is insufficient to support a conclusion that the search of the phone’s content would “reveal evidence of criminal activity, impending contravention of school rules, or potential harm to anyone in the school.” In other words, the search of the cell phone was not needed to establish the violation of the school rule prohibiting cell phone use during class and the fact that the student was using a cell phone during class in violation of the school rules was insufficient by itself to establish any need to search the phone. This decision establishes that courts are more willing to limit a school administrator’s discretion to conduct searches in situations where there is no imminent threat to school safety.

Some districts have justified the use of metal detectors in schools that have a significant problem with weapons. However, search and seizure issues may arise after a metal detector

\textsuperscript{7} \textit{Compare J. W. v. DeSoto Cnty. Sch. Dist.}, No. 09-00155 (N.D. Miss. Nov. 11, 2010) (school officials did not violate Fourth Amendment by searching cell phone confiscated at school) with \textit{Mendoza v. Klein Indep. Sch. Dist.}, No. 09-3895 (S.D. Tex. Mar. 16, 2011) (administrator’s search of cell phone violated Fourth Amendment as there was no reasonable basis to search phone).

\textsuperscript{8} 711 F.3d 623 (6th Cir. 2013).
alarm is sounded because the scope of the subsequent search may be challenged as excessive in scope or unduly invasive of personal privacy. Some technology, such as airport x-ray body scanners that reveal naked images of the person being scanned would likely be challenged as an excessive invasion of a student’s personal privacy. Video monitoring of public spaces in schools is common, but covert video monitoring by a district of the school locker rooms was found to violate clearly established constitutional principles.⁹

B. Searches Involving Law Enforcement Officials

Many schools have added or increased the presence of school resource officers or other public law enforcement personnel or retained private security firms. It is imperative that school personnel document through written agreements the role of such individuals and the scope of their authority to prevent miscommunication or disagreement about who is the decision-maker in emergency situations as well as claims to define the legal standards that will be applied when the conduct of a law enforcement officer or a school resource officer is reviewed.¹⁰ In addition, schools must be careful to avoid the appearance, or reality, that they are taking actions under the direction of public law enforcement officials to avoid the higher legal standards applicable to law enforcement.

C. Holding Students For Interrogation

The Fourth Amendment also prohibits unreasonable seizures. Section 1983 challenges to a school official’s right to remove a student from class and question the student without parent permission or presence have been rejected in recognition of the fact that such requirements

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¹⁰ Donegan v. Livingston, 877 F. Supp. 2d 212 (M.D. Pa. 2012), aff’d, 2013 U.S. App. LEXIS 12865(3d Cir. 2013) (constitutional claim of unlawful search by teacher’s aide who was subjected to a breathalyzer test by police at request of school was dismissed, finding that reasonableness test applied because officers were not acting in a law enforcement capacity).
would place an undue burden on school officials with regard to the day to day administration of
the school. However, such detentions and questioning of students is subject to the
reasonableness standard set forth in *T.L.O.* The application of this standard to the conduct of a
school resource officer resulted in a finding that the officer had acted unreasonably and was not
entitled to qualified immunity when he questioned and scared an eight year old student who was
not suspected of misconduct for the purpose of inducing another student to confess to a theft of
money on the school bus.12

II. Exclusions From School

A. Student Discipline

Section 1983 challenges to student discipline decisions have been largely ineffective
whether based on procedural or substantive due process grounds. In 1975, the United States
Supreme Court determined in *Goss v. Lopez*13 that students are entitled to due process before
being excluded from educational opportunities as a result of a student discipline decision. The
amount of due process protection for a short suspension is limited to notice and an opportunity to
address the discipline claim, and for a longer exclusion a more extensive hearing is required. As
a result of this decision, states revised school discipline statutes to conform to the constitutional
requirements. Therefore, few challenges to student discipline decisions or the services provided
to suspended or expelled students have been successful on procedural due process grounds. The

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11 See, e.g., *Shuman v. Penn Manor Sch. Dist.*, 422 F.3d 141 (3d Cir. 2005) (school did not
violate the Fourth Amendment by questioning student); *Wofford v. Evans*, 390 F.3d 318 (4th Cir.
2004) (school officials not required to notify parent before questioning student).
decision by a fair and unbiased decision maker. In addition, courts have ruled that an expulsion decision should not be based solely on hearsay but also have found that there is no right for a student facing expulsion to cross-examine all of the witnesses and that student statements may be admitted in lieu of testimony. However, a school’s failure to follow its own policies may give rise to a procedural due process claim.

In addition, if procedural due process is provided, courts have declined to review the discipline imposed on substantive due process grounds unless the plaintiff can establish conduct that is so egregious as to shock the conscience. Finding of such conduct is infrequent and may depend upon special factors such as the known vulnerability of the student. For example, a court declined to dismiss a Section 1983 due process claim that alleged that a special needs student was subjected to excessive force in a way that shocked the conscience by being dragged and restrained in a chair.

B. Non-disciplinary exclusions

From time-to-time, a school will seek to exclude a student from school for non-disciplinary reasons. The student discipline cases suggest that the student is entitled to due process in such cases, just like disciplinary exclusions. In other words, a school official seeking to exclude a student for health and safety reasons must provide the student with notice of the reason for the exclusion and an opportunity to be heard. Generally, non-disciplinary exclusions arise in two situations. The large number of school shootings has understandably resulted in heightened concerns about student mental health issues. School personnel may want to exclude students who appear to be disaffected with the school environment or who show an undue

14 See Jennings v. Wentzville R-IV Sch. Dist., 397 F.3d 1118 (8th Cir. 2005); Johnson v. Newburgh Enlarged Sch. Dist., 289 F. 3d 246 (2d Cir. 2001).
interest in violent activities pending a mental health evaluation even though the student has not violated any school rule. Such exclusions without parent consent or specific statutory authority are likely to result in Section 1983 claims. Similarly, schools have excluded students due to concerns about public health risks from individuals who may have been exposed to a serious infectious disease such as Ebola or students who lack immunizations. School officials may make such decisions abruptly without full development of the facts or consultation with legal counsel. The handling of such claims has the potential to result in a Section 1983 claim.

III. Preventive Measures

The expense and disruption caused by any litigation, even if ultimately the District prevails, compels schools to anticipate situations that may result in the filing of a Section 1983 claims and develop procedures to enable school staff to avoid potential liability.

- A district should review and update its written policies to address common situations that lead to Section 1983 claims, such as searches and seizures and student discipline policies.
- School policies should define clearly who has authority to take action on behalf of the district. For example, a district might enact a policy that only the superintendent may authorize a strip search or that two administrators are required to authorize a strip search. In addition, the policy might provide that no strip searches should be conducted unless there is a reasonable basis to conclude that the search is necessary to prevent imminent harm to persons or substantial property damage.
- School policies relating to searches and seizures or other potential Section 1983 claims should be disseminated to staff in a manner that allows the district to verify that the staff members are aware of the policy. For example, a brief e-mail on a particular topic with a read receipt or requirement of a confirming e-mail verification would establish a record
that the employees are aware of the policy. Staff also might be required to take a brief quiz on the material.

- Schools should consider what situations might arise where a non-certified and inexperienced employee or agent of the school might be confronted with a potential Section 1983 situation and provide appropriate training to these individuals. For example, schools often ignore coaches and bus drivers when conducting training even though it is foreseeable that these individuals will confront situations that may give rise to Section 1983 claims.

- Schools must ensure that there is a written agreement between the school and local law enforcement regarding the roles to be played by each. It is advisable that this agreement also cover issues such as sharing of confidential student information.

- The district should conduct annual training with the administrative staff who will be making decisions regarding investigations of claims, the handling of student discipline matters, searches and seizures, and interactions with law enforcement.