



Off-Campus, On-Line Student Speech Cases

August 2011

Note: The U.S. Supreme Court has yet to issue a decision regarding whether and when school districts can discipline students for off-campus speech. When deciding cases involving off-campus, on-line speech lower courts frequently discuss and/or apply *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). In this case the Court held school officials can regulate student speech if they can “forecast substantial disruption of or material interference with school activities.” *Tinker*, 393 U.S. at 514. Lower courts also often discuss—but less often apply—*Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). In this case the Court held that schools can regulate student speech to protect students “from exposure to sexually explicit, indecent, or lewd speech.” *Fraser*, 478 U.S. at 684. Both *Tinker* and *Fraser* involved on-campus student speech.

Summary of Cases by Circuit

*Name in bold indicates prevailing party

Circuit	District Court	Court of Appeals
1		
2		<i>Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.</i> , 494 F.3d 34 (2d Cir. 2007), <i>cert. denied</i> , 552 U.S. 1296 (2008). <i>Doninger v. Niehoff</i> , 527 F.3d 31 (2d Cir. 2008). <i>Doninger v. Niehoff</i> , No. 09-1452, 2011 WL 1532289 (2d Cir. Apr. 25, 2011).
3	<i>Killion v. Franklin Regional Sch. Dist.</i> , 136 F. Supp. 2d 446 (W.D. Pa. 2001). <i>J.S. v. Bethlehem Area Sch. Dist.</i> , 807 A.2d 847 (Pa. 2002). <i>Flaherty v. Keystone Oaks Sch. Dist.</i> , 247 F. Supp. 2d 698 (W.D. Pa. 2003). <i>Latour v. Riverside Beaver Sch. Dist.</i> , No. 05-1076, 2005 WL 2106562 (W.D. Pa. Aug. 24, 2005).	<i>Layshock v. Hermitage Sch. Dist.</i> , No. 07-4465, 2011 WL 2305970 (3d Cir. June 13, 2011). <i>J.S. v. Blue Mountain Sch. Dist.</i> , No. 08-4138, 2011 WL 2305973 (3d Cir. June 13, 2011).



4		<i>Kowalski v. Berkeley County Schs.</i> , No. 10-1098, 2011 WL 3132523 (4th Cir. July 27, 2011).
5		
6	<i>Mahaffey v. Aldrich</i> , 236 F. Supp. 2d 779 (E.D. Mich. 2002). <i>Coy v. Bd. of Educ. of the North Canton City Schs.</i> , 205 F. Supp. 2d 791 (N.D. Ohio 2002). <i>Barnett v. Tipton County Bd. of Educ.</i> , 601 F. Supp. 2d 980 (W.D. Tenn. 2009).	
7	<i>T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.</i> , No. 1:09-CV-290-PPS, 2011 WL 3501698 (N.D. Ind. Aug. 10, 2011).	
8	<i>Beussink v. Woodland R-IV Sch. Dist.</i> , 30 F. Supp. 2d 1175 (E.D. Mo. 1998). <i>Neal v. Efurd</i> , No. 04-2195 (W.D. Ark. Feb. 18, 2005).	<i>Mardis v. Hannibal Public Sch. Dist.</i> , No. 10-1428, 2011 WL 3241876 (8th Cir. Aug. 1, 2011).
9	<i>Emmett v. Kent Sch. Dist.</i> , 92 F. Supp. 2d 1088 (W.D. Wash. 2000). <i>J.C. v. Beverly Hills Unified Sch. Dist.</i> , 711 F. Supp. 2d 1094 (C.D. Cal. 2010). <i>Requa v. Kent Sch. Dist.</i> , 492 F. Supp. 2d 1272 (W.D. Wash. 2007).	
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11	<i>Evans v. Bayer</i> , 684 F. Supp. 2d 1365 (S.D. Fla. 2010).	
DC		



<i>Beussink v. Woodland R-IV Sch. Dist.</i> , 30 F. Supp. 2d 1175 (E.D. Mo. 1998).					
FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDING	IN ADDITION
Brandon Beussink made a homepage criticizing the school and the administrators . He invited students to contact the principal about their opinions of the high school. An angry friend showed the page to the principal who suspended Beussink for 10 days, which caused him to fail all his classes.	Did not discuss relevance of off-campus speech.	Applies the substantial disruption test: “[D]isliking or being upset by the content of student speech is not an acceptable justification for limiting student speech under <i>Tinker</i> .” (1180) “No significant disruption to school discipline occurred.” (1181)	Not applied	Granted plaintiff’s request for preliminary injunctive relief . (1182)	“Individual student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection.” (1182)

<i>Emmett v. Kent Sch. Dist.</i> , 92 F. Supp. 2d 1088 (W.D. Wash. 2000).					
FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDING	IN ADDITION
Nick Emmett created an unofficial webpage for his high school which included mock “obituaries” of his friends inspired by a creative writing assignment; visitors could vote on who would “die” next. After a TV station characterized his website as a hit list, the principal suspended Emmett for five days.	Website is off-campus speech so school does not have authority to control it: “Although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school’s supervision or control.” (1090)	Discusses <i>Tinker</i> but does not apply it to off-campus speech	Discusses <i>Fraser</i> but does not apply it to off-campus speech	Granted preliminary injunctive relief for the plaintiff because the plaintiff had a substantial likelihood of success on the merits of his claim and would suffer irreparable injury. (1090)	Discusses that the website was not actually threatening but does not discuss or apply “true threats” case law.



FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDINGS	IN ADDITION
<p>Zachariah Paul made a derogatory top ten list about the athletic director and emailed it to friends. An unidentified student distributed it at school. Paul was suspended for 10 days during which he was banned from school activities.</p>	<p>List was brought onto school grounds, though not by Paul, so <i>Tinker</i> applies: “The overwhelming weight of authority has analyzed speech cases (whether on or off-campus) in accordance with <i>Tinker</i>. Further, because the . . . list was brought on campus, albeit by an unknown person, <i>Tinker</i> applies.” (455)</p>	<p>Applies the substantial disruption test first: “[T]he absence of threats or actual disruption lead us to conclude that Paul’s suspension was improper.” (455)</p> <p>“If a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster.” (455)</p>	<p>Concludes <i>Fraser</i> does not apply since speech occurred off-campus: “Although we agree that several passages from the list are lewd, abusive, and derogatory, we cannot ignore the fact that the relevant speech . . . occurred within the confines of Paul’s home, far removed from any school premises or facilities. Further, Paul was not engaged in any school activity or associated in any way with his role as a student when he compiled the Bozzuto Top Ten List.” (457)</p>	<p>Granted summary judgment on plaintiff’s Due Process motion. (452)</p> <p>School violated plaintiff’s First Amendment rights because it failed to satisfy <i>Tinker</i>’s substantial disruption test. (455)</p> <p>School policy was overbroad and vague because it could be interpreted to prohibit protected speech. (459)</p>	<p>School policy is overbroad if it could be interpreted to prohibit protected speech because it does not limit its geographical reach or refer to a substantial disruption. (459)</p> <p>School policy is vague because it does not define abuse and could be applied arbitrarily. (459)</p>



FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDINGS	IN ADDITION
<p>Jon Coy made a website that he accessed on a school computer that labeled pictures of three of his fellow students as “losers” and made other derogatory comments about them. Coy was suspended for four days and then put on probation for 80 days and not allowed to participate in extracurricular activities.</p>	<p>Court implies it considers the speech on-campus: “While Jon Coy accessed the website on a school computer in the school's computer lab, the Court finds the circumstances of this case nearer to those of <i>Tinker</i> than <i>Fraser</i>.” (799-800)</p>	<p>Applies the substantial disruption test: “No evidence suggests that Coy’s acts in accessing the website had any effect upon the school district’s ability to maintain discipline in the school.” (801)</p>	<p>Not applied: “<i>Fraser</i> involves graphic and explicit sexual speech to a group of 600 students, not a student accessing a website he had created.” (799)</p>	<p>District claimed the discipline was for accessing the website not the content of the postings. (800)</p> <p>On the First Amendment claim, “material issues of fact prevent either party from prevailing on a motion for summary judgment.” (800)</p> <p>“The jury should decide whether the defendants were motivated by the website’s content or, as defendant claims, motivated solely by accessing of an unapproved site.” (800-01)</p> <p>“If the school disciplined Coy purely because they did not like what was contained in his personal website, the plaintiff will prevail.” (801)</p> <p>Granted the plaintiff’s motion for summary judgment with respect to the facial challenge to the section of the school district’s student code of conduct that stated school officials could punish students for any behavior deemed to be inappropriate, even if it was not listed in the code. (806)</p>	<p>A school policy is constitutionally invalid on its face if it allows administrators to punish students for any action judged to be “inappropriate” because it is too vague. (801-02)</p>



Mahaffey v. Aldrich, 236 F. Supp. 2d 779 (E.D. Mich. 2002).

FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDINGS	IN ADDITION
<p>Joshua Mahaffey contributed to a webpage that talked about hating school and killing fellow students in a joking manner. He was suspended for almost an entire semester but was not expelled.</p>	<p>Declares speech to be off-campus speech and is hesitant about applying <i>Tinker</i>: “Defendants . . . contend that they are allowed to discipline students for off campus conduct if the disciplinary rule is reasonable and the off campus conduct has ‘an effect on the discipline or general welfare of the school.’ In support, Defendants cite [a number of cases]. None of these cases support Defendants punishing Plaintiff for his off-campus “speech” in the case at bar.” (784)</p>	<p>Applies the substantial disruption test: Found that there was no disruption on campus. (786)</p>	<p>Not applied</p>	<p>Granted summary judgment for plaintiff on the First Amendment claims (786) and the Due Process claims. (790)</p>	<p>The website was not a true threat because a reasonable person would not think that the plaintiff wanted to kill the students listed under “people I wish would die.” (785)</p>



FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDINGS	IN ADDITION
<p>J.S. created a website that denigrated his principal and teacher, Mrs. Fulmer, as well as threatened his teacher with death. The teacher had physical manifestations of stress and had to take a leave of absence. The district suspended J.S. for 10 days and then decided to expel him.</p>	<p>Website is on-campus speech because it was aimed at the school: “We find there is a sufficient nexus between the website and the school campus to consider the speech as occurring on –campus. (865) “Where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.” (865)</p>	<p>Applies the substantial disruption test second: “Keeping in mind the unique nature of the school setting and the student’s diminished rights therein, while there must be more than some mild distraction or curiosity created by the speech [citation omitted] complete chaos is not required for a school district to punish student speech.” (868) “The web site posted by J.S. in this case disrupted the entire school community. . . . The most significant disruption . . . was [the] direct and indirect impact of the emotional and physical injuries to Mrs. Fulmer” who was unable to complete the school year and took medical leave for the next school year. (869) The website was “specifically aimed at this particular school district and seemed designed to create precisely this sort of upheaval.” (869)</p>	<p>Discusses <i>Fraser</i> first but is not sure if it applies to off-campus speech: “The punishment for use of lewd, vulgar and plainly offensive language . . . fits easily within <i>Fraser’s</i> upholding of discipline for speech that undermines the basic function of a public school.” (868) “However . . . questions exist as to the applicability of <i>Fraser</i> to the instant factual scenario” (868) because the speech in this was not “expressed at any official school event or even during a class” (866)</p>	<p>The website was not a true threat judged in light of the totality of circumstances present. (859) The district’s disciplinary action did not violate J.S.’s First Amendment rights because his speech caused a substantial disruption. (869)</p>	<p>A statement is a true threat if the speaker could reasonably foresee that a reasonable person would take it as a threat, keeping in mind the totality of circumstances. (857)</p>



Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 2d 698 (W.D. Pa. 2003).

FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDINGS	IN ADDITION
<p>Jack Flaherty, Jr. posted internet messages on a website message board from home and school that negatively critiqued the boy's volleyball team by making fun of their performances and likelihood of success for the season. He was punished pursuant to the policies in the student handbook.</p>	<p>Did not discuss relevance of off-campus speech.</p>	<p>Applies <i>Tinker</i> to decide if policies are overbroad and vague: The principal "believes that he can discipline a student for bringing 'disrespect, negative publicity, negative attention to our school and to our volleyball team,' this is simply not sufficient to rise to the level of substantial disruption under <i>Tinker</i>." (704)</p>	<p>Not applied</p>	<p>The school's policies were unconstitutionally overbroad and vague because they can be interpreted to violate "speech that is protected under the First Amendment." (703-04)</p> <p>The policies were also unconstitutionally overbroad because they don't contain geographical limitations. (706)</p>	<p>Policies are overbroad if "they are not linked within the text to speech that substantially disrupts school operations." (704)</p> <p>A policy is vague if it does "not provide the students with adequate warnings of the conduct that is prohibited" (704) allowing the school to apply it arbitrarily. (705)</p>



Neal v. Efurd, No. 04-2195 (W.D. Ark. Feb. 18, 2005), <http://www.splc.org/pdf/nealvefur.pdf>.

FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDINGS	IN ADDITION
Justin Neal and Ryan Kuhl both created websites that were critical of their school . Kuhl’s was more violent and angry, but neither of the websites threatened anyone and they were not accessed at school. Both students were suspended for three days and received zeros for all assignments during that time.	Off-campus speech can be regulated under Tinker: Since the speech occurred off-campus, “it may be regulated, but only under the <i>Tinker</i> rule . . . only if it would substantially disrupt school operations or interfere with the rights of others.” (*19)	Applies the substantial disruption test: “The expression of complaints by a small percentage of students and the largely unfounded apprehensions of a few teachers do not constitute a substantial disruption of the educational environment at a high school.” (*23) There was no reason to “forecast a substantial disruption as well because the critical content of the websites is something that capable teachers deal with on a regular basis, and there was nothing that was a true threat.” (*24-25)	Fraser does not apply to off-campus speech. (*19)	Principal and school district violated the First Amendment rights of the students because the speech was not a true threat (*16) and there was no substantial disruption . (*26) “It is well to reflect upon the notion that the overall worth and value of unfettered speech—recognized by the Founding Fathers—vastly outweighs that part of its price which involves putting up with the discomfort and unpleasantness by unpopular expression.” (*27) The court declines to address the issue of whether the student handbook is overbroad or vague because the dispute was resolved on other grounds, but commented: “The real issue of how far a school can go in regulating off-campus speech is determined by the Constitution and existing case law, and a school district cannot by the creation or implementation of its own rules, override that precedent.” (*27)	First asked whether the websites were true threats: Neither website contained a true threat because there was no way that “a reasonable recipient would have interpreted [it] as a serious expression of an intent to harm or cause injury or harm to another.” (*16)

Latour v. Riverside Beaver Sch. Dist., No. 05-1076, 2005 WL 2106562 (W.D. Pa. Aug. 24, 2005).

FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDINGS	IN ADDITION
Anthony Latour wrote four rap songs that were published on the internet. One of the songs was about a fellow student and the others were battle rap songs with violent themes. The school suspended Latour and banned him from school events.	Did not discuss relevance of off-campus speech.	Applies the substantial disruption test: Found there was no substantial disruption before his expulsion even though the girl who was in one of the songs left the school district because she was humiliated. (*2)	Not applied	Granted a preliminary injunction for plaintiff because the speech was protected under the First Amendment . (*3)	The songs were not a true threat because the students mentioned did not feel threatened, Latour had no history of violence, and the school did not investigate Latour or send him to counseling. (*2)



Requa v. Kent Sch. Dist., 492 F. Supp. 2d 1272 (W.D. Wash. 2007).

FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDING	IN ADDITION
<p>Gregory Requa videotaped his teacher with a student posing behind her giving her bunny ears and making pelvic thrusts and posted the video on YouTube. The administration became aware of the video when a news station asked for comment on a story they were doing about YouTube postings critical of teachers. Requa and other students involved were given a 40 day suspension which was reduced to 20 days if they agreed to write a research paper on the incident.</p>	<p>The school district successfully claimed it was not punishing the off-campus posting of the video, only the on-campus filming. (1278)</p> <p>“The editing and posting of the video off-campus was, at best, incidental to the punishable conduct that occurred in the classroom. The punishment in this case is not for the purpose of regulating off-campus speech.” (1278)</p>	<p>Discusses the substantial disruption test as it applies to the in-class conduct:</p> <p>While the filming was not speech per se, “The Court has no difficulty in concluding that one student standing behind a teacher making ‘rabbit ears’ and pelvic thrusts in her direction . . . constitutes a material and substantial disruption to the work and discipline of the school.” (1280)</p> <p>“The First Amendment does not extend its coverage to disruptive, in class activity of this nature.” (1281)</p>	<p>Fraser applies first:</p> <p>The school district “localized the sanctionable behavior,” to the on-campus filming, determining that it was both lewd and vulgar. (1280)</p> <p>“By singling out that discreet portion of ‘speech’ for punishment,” the school district did not infringe on the student’s First Amendment rights.” (1280)</p>	<p>Denied Requa’s preliminary injunction because in balancing the student’s “right to criticize his . . . teachers [and] . . . a school district’s interest in maintaining an environment that is helpful and not harmful,” the school district prevails. (1283)</p>	<p>Determined that Requa was not likely to prevail on the claim that his punishment was for his speech rather than his conduct. (1283)</p>



FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDING	IN ADDITION
<p>Aaron Wisniewski made an instant message (IM) icon that showed a gun shooting his teacher, and another student told the teacher who refused to teach his class. The school suspended Wisniewski for five days. At a hearing the school district found that the icon was a true threat and suspended him for a semester.</p>	<p>Off-campus speech can be regulated if it is reasonably foreseeable that it would reach school property: “The fact that Aaron’s creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline.” (39)</p> <p>“It was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot.” (39)</p>	<p>Applies the substantial disruption test: “Even if Aaron's transmission of an icon depicting and calling for the killing of his teacher could be viewed as an expression of opinion within the meaning of <i>Tinker</i>, we conclude that it crosses the boundary of protected speech and constitutes student conduct reasonably foreseeable risk that poses a that the icon would come to the attention of school authorities and that it would ‘materially and substantially disrupt the work and discipline of the school.’”(38-39)</p>	<p>Not applied</p>	<p>Affirmed dismissal of plaintiff’s First Amendment claims finding that there was a reasonably foreseeable risk of a substantial disruption. (40)</p>	<p>Declined to apply the true threat standard: “Although some courts have assessed a student’s statements concerning the killing of a school official or a fellow student against the ‘true threat’ standard of <i>Watts</i>, [citations omitted] we think that school officials have significantly broader authority to sanction student speech than the <i>Watts</i> standard allows.” (38)</p> <p>Even though the plaintiff did not raise the issue, the court commented about the length of the punishment being excessive. (40)</p>



Barnett v. Tipton County Bd. of Educ., 601 F. Supp. 2d 980 (W.D. Tenn. 2009).

FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDINGS	IN ADDITION
<p>Christopher Barnett made a fake MySpace page for assistant principal LeFlore containing his picture, bio, and suggestive comments about female students. Kevin Black made a similar page for a school coach, and Gary Moses admitted to contributing to both websites. All three boys received in-school suspensions after which Barnett made a “Wanted” poster for a student he believed had given the school officials his identify. At a hearing, the board decided that Barnett would be sent to an alternative school and Black would serve an in-school suspension and any further infractions would cause immediate expulsion.</p>	<p>Did not discuss relevance of off-campus speech.</p>	<p>School board hearing applied substantial disruption test (985) but the court did not discuss it.</p>	<p>Not applied</p>	<p>Summary judgment granted dismissing plaintiffs’ First Amendment claim because they could not show any genuine issue of material fact contending the websites were parodies and therefore protected. (984) Due Process claims dismissed because the school district’s disciplinary proceedings satisfied due process requirements. (985) State tort claims dismissed due to lack of evidence. (985)</p>	<p>Plaintiffs argued the websites were parodies but according to the court, “visitors to the fraudulent website believed it was authentic and that LeFlore had engaged in the inappropriate behavior” so they were not parodies. (984)</p>



Evans v. Bayer, 684 F. Supp. 2d 1365 (S.D. Fla. 2010).

FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDINGS	IN ADDITION
<p>Katherine Evans created a group on Facebook from her home computer about her dislike of a teacher. After she removed it, the posting came to the attention of principal Bayer who suspended her for three days and moved her from an AP class to an honors class.</p>	<p>Off-campus speech becomes on-campus speech if it is aimed at the school and if it is not, it can still be regulated: “The question is whether the fact that Plaintiff’s speech was arguably aimed at a particular audience at the school is enough by itself to label the speech on-campus speech.” (1371) The Facebook page was not aimed at campus, because it “was made off-campus, never accessed on-campus, and was no longer accessible when the Defendant learned of it.” (1372)</p>	<p>Applies the substantial disruption test: “Under any form of the <i>Tinker</i> test, Evan’s actions cannot be construed as disruptive.” (1376)</p>	<p>Rejects <i>Fraser</i>: The speech in question was neither lewd nor vulgar under the <i>Fraser</i> standard. In addition, <i>Fraser</i> does not apply in the off-campus context. “For the Court to equate a school assembly to the entire internet would set a precedent too far reaching.” (1374)</p>	<p>Plaintiff’s speech was protected by the First Amendment because “it was an opinion of a student about a teacher, that was published off-campus, did not cause any disruption on-campus, and was not lewd, vulgar, threatening, or advocating illegal or dangerous behavior.” (1374)</p> <p>Principal did not have qualified immunity because speech was protected and “while the controlling precedent may be unclear, this confusion cannot save [the principal] when his actions do not even comport with the requirements for the regulation of on-campus speech.” (1376)</p>	<p>Discusses <i>Morse</i>: The Facebook group “does not undermine the ‘fundamental values’ of a school education.” (1374)</p>



FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDINGS	IN ADDITION
<p>J.C. posted a Youtube video of students saying mean things about another student. The school suspended J.C. for two days.</p>	<p>Off-campus speech can be regulated under <i>Tinker</i>: “The geographic origin of the speech is not material; <i>Tinker</i> applies to both on-campus and off-campus speech.” (1108)</p>	<p>Applies the substantial disruption test: “The fact that students are discussing the speech at issue is not sufficient to create a substantial disruption, at least where there is no evidence that classroom activities were substantially disrupted.” (1111) “Another factor relevant to the substantial disruption inquiry is whether school administrators are pulled away from their ordinary task to respond to or mitigate the effects of a student’s speech.” (1113) Here, the school did not present evidence that “[the administrators] missed or were late to any other school activities . . . [or that] the actions they took to resolve the situation created by the video were outside the realm of ordinary school activities.” (1118) “The Court must consider whether the school’s decision to discipline is based on evidence or facts indicating a foreseeable risk of disruption, rather than undifferentiated fears or mere disapproval of the speech.” (1115) “The Court cannot uphold school discipline of student speech, simply because young persons are unpredictable or immature, or because, in general, teenagers are emotionally fragile and may often fight over hurtful comments.” (1122)</p>	<p><i>Fraser</i> does not apply to off-campus speech: “Although J.C.’s video certainly contains language that is lewd, vulgar, and plainly offensive, the rule in <i>Fraser</i> is limited to speech that occurs in school.” (1109) “Moreover, the reasoning of <i>Fraser</i>, which is anchored in the school’s duty to teach norms of civility to its students, does not support extending <i>Fraser</i> to lewd or offensive speech occurring off-campus.” (1110)</p>	<p>Granted plaintiff’s motion for summary judgment on the First Amendment claim because no reasonable jury could find that the video caused a substantial disruption to school activities or that there was a reasonably foreseeable risk of substantial disruption. (1117)</p> <p>Granted individual defendants’ motions for summary judgment based on qualified immunity (1123) because the Supreme Court in <i>Morse</i> gave the principal qualified immunity. (1126)</p>	<p>Discussed <i>Tinker</i>’s second prong: <i>Tinker</i> also allows regulation when speech interferes with “the school’s work or with the rights of other students to be secure and be let alone,” (508) but the court found that this was not applicable to the present case. (1122)</p>



<i>Doninger v. Niehoff</i> , 527 F.3d 31 (2d Cir. 2008) (Second Circuit ruling on an appeal of a motion for preliminary injunction).					
FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDINGS	IN ADDITION
Avery Doninger criticized the school administration by calling them “douche bags” on a blog for allegedly canceling a student council event and encouraged others to contact the school officials in protest. Doninger was banned from running for student council her senior year.	Off-campus speech can be regulated if it is reasonably foreseeable that it would reach school property: Citing <i>Wisniewski</i> : (48) “The record amply supports the district court’s conclusion that it was reasonably foreseeable that Avery’s posting would reach school property.” (50)	Applies substantial disruption test: The court found that the blog entry “foreseeably create[d] a risk of substantial disruption, because the language used was disruptive of the efforts to resolve the controversy, the post was misleading and false, and it undermined the Student Government operations and values.” (50-52)	Unsure if <i>Fraser</i> applies to off-campus speech: Doninger’s posting would have fallen under <i>Fraser</i> if it had occurred in the classroom. (49) Since <i>Tinker</i> applies, there is no need to decide if <i>Fraser</i> applies too. (50)	Affirmed the district court’s denial of Doninger’s motion for a preliminary injunction because there was not a sufficient likelihood of success on the merits. (43) Affirmed the district court’s denial of her equal protection claim and state law claims . (53)	The court acknowledged Doninger’s belief that the punishment did not fit the crime , but refused to undermine the judgment of school administrators without specific constitutional violations. (54)



Doninger v. Niehoff, No. 09-1452, 2011 WL 1532289 (2d Cir. Apr. 25, 2011), <http://www.splc.org/pdf/doningerII.pdf> (Second circuit ruling on appeal from a district court ruling on **qualified immunity**).

FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDING	IN ADDITION
See facts above.	Off-campus speech can be regulated under <i>Tinker</i>: “It is . . . incorrect to urge . . . that Supreme Court precedent necessarily insulates students from discipline for speech-related activity occurring away from school property” (*9)	Applies the substantial disruption test: “The undisputed facts . . . demonstrate that it was reasonably foreseeable that Doninger's post would reach school property and have disruptive consequences there.” (*10)	Applying <i>Fraser</i> may be possible: “the applicability of <i>Fraser</i> to plainly offensive off-campus speech is uncertain ” (*10)	School officials are entitled to qualified immunity because Doninger’s First Amendment right to run for class secretary was not clearly established where “it was objectively reasonable for school administrators to conclude that Doninger’s posting was potentially disruptive to the degree required by <i>Tinker</i> .” (*11)	Even if Doninger was prevented from running for class secretary because her speech was offensive versus disruptive “it was also not clearly established . . . that Doninger had any First Amendment right not to be prohibited from running for Senior Class Secretary because of <i>offensive</i> off-campus speech, at least where such speech pertained to a school event, invited student to read and respond to it by contacting school administrators, and it was reasonably foreseeable ‘that the speech would come on to campus and thus come to the attention of school authorities.’” (*12)



FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDINGS	IN ADDITION
<p>J.S. created at home a fake MySpace page about her principal, McGonigle, which included “shameful personal attacks,” which she allowed some students at school to have access to. J.S. was suspended for 10 days.</p>	<p>Court assumes without deciding that Tinker applies to off-campus speech. (*7)</p>	<p>Applies the substantial disruption test: School district conceded J.S.’s speech did not cause a substantial disruption. (*9) Court concludes that the “facts of this case do not support the conclusion that a forecast of substantial disruption was reasonable.” (*9) “If <i>Tinker’s</i> black armbands—an ostentatious reminder of the highly emotional and controversial subject of the Vietnam war—could not ‘reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,’ [citation omitted] neither can J.S.’s profile, despite the unfortunate humiliation it caused for McGonigle.” (*10)</p>	<p>Fraser does not apply: “<i>Fraser’s</i> lewdness standard cannot be extended to justify a school’s punishment of J.S. for use of profane language outside the school, during non-school hours.” (*12) <i>Fraser</i> does not apply to off-campus speech because in <i>Morse</i>, the Court stated that “[h]ad <i>Fraser</i> delivered the same speech in a public forum outside the school context, it would have been protected.” (*11)</p>	<p>“Because J.S. was suspended from school for speech that indisputably caused no substantial disruption in school and could not reasonably have led school officials to forecast substantial disruption in school, the School District’s actions violated J.S.’s First Amendment free speech rights.” (*1) School district’s policies are not overbroad or void-for-vagueness and the school district did not violate the parents’ substantive Due Process rights. (*1)</p>	<p>Concurrence: <i>Tinker</i> does not apply to off-campus speech at all. (*16) Dissent: the school district should have been able to discipline J.S. because a substantial disruption was foreseeable in this case. (*21)</p>



FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDINGS	IN ADDITION
<p>Justin Layshock created a fake MySpace profile for his principal that was insulting but not threatening. The school district suspended him for 10 days, moved him from honors classes to an alternative education program, and forbade him from attending graduation or participating in extracurricular activities.</p>	<p>Court does not decide whether off-campus speech can be regulated by <i>Tinker</i>: The school district did not argue “that it could properly punish [Layshock] under the <i>Tinker</i> exception for student speech that causes a material and substantial disruption of the school environment.” (*7) “[W]e do not think that the First Amendment can tolerate the School District stretching its authority into [Layshock]’s grandmother’s home and reaching [Layshock] while he is sitting at her computer after school in order to punish him for the expressive conduct that he engaged in there.” (*8)</p>	<p>Substantial disruption test not applied: The lower court previously determined there was no substantial disruption and the school district did not challenge that finding on appeal. (*7)</p>	<p>Fraser does not apply to off-campus student speech: “<i>Fraser</i> does not allow the School District to punish [Layshock] for expressive conduct which occurred outside the school context.” (*11)</p>	<p>Affirmed the grant of summary judgment to Layshock for his First Amendment claims. (*12)</p> <p>Where no substantial disruption occurred at school, Layshock cannot be punished for “expressive conduct” engaged in at home even though he also “entered” the district’s website “took” the district’s photo of the principal. (*7)</p> <p>“[W]e need only hold that [Layshock]’s use of the District’s web site does not constitute entering the school, and that the District is not empowered to punish his out of school expressive conduct under the circumstances described here.” (*12)</p>	<p>Concurrence: while <i>Layshock</i> and <i>J.S.</i> (above) fail to resolve this issue, <i>Tinker</i> “can be applicable to off-campus speech.” (*12)</p>



FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDINGS	IN ADDITION
<p>Kara Kowalski created a MySpace webpage using her home computer called S.A.S.H. (Students Against Sluts Herpes). Of the 100 “friends” she invited, about 12 fellow high school students joined the group which mostly ridiculed classmate, Shay N., and suggested she had herpes. Kowalski did not post any comments or photos aimed directly at Shay N., but she commented approvingly of two derogatory postings. She was ultimately suspended for five days and given a 90-day “social suspension,” during which she was barred from participating in cheerleading and “Charm Review.”</p>	<p>Off-campus speech can be regulated under <i>Tinker</i>: “There is surely a limit to the scope of a high school’s interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gates. But we need not fully define that limit here, as we are satisfied that the nexus of Kowalski’s speech to Musselman High School’s pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body’s well-being.” (*14)</p>	<p>Applies the substantial disruption test: “We are confident that Kowalski’s speech caused the interference and disruption described in <i>Tinker</i> as being immune from First Amendment protection.” (*13) “This is not the conduct and speech that our education system is required to tolerate, as schools attempt to educate students about ‘habits and manners of civility’ or the ‘fundamental values necessary to the maintenance of a democratic political system.’” (*13) “To be sure, it was foreseeable in this case that Kowalski’s conduct would reach the school via computers, smartphones, and other electronic devices, given that most of the ‘S.A.S.H.’ group’s members and the target of the group’s harassment were Musselman High School Students.” (*16)</p>	<p>Fraser would apply if the court determined the speech was in-school speech: “We need not resolve, however, whether this was in-school speech and therefore whether <i>Fraser</i> could apply because the School District was authorized by <i>Tinker</i> to discipline Kowalski, regardless of where her speech originated” (*14)</p>	<p>Affirmed summary judgment in favor of the defendants on the First Amendment claim finding Kowalski’s speech was sufficiently connected to the school environment to implicate the district’s discipline authority under <i>Tinker</i>. (*3)</p> <p>Rejected plaintiff’s Due Process claim that she had no notice she could be punished for off-campus speech concluding that the relevant policies “are designed to regulate student behavior that would <i>affect</i> the school’s learning environment.” (*18)</p> <p>Rejected plaintiff’s intentional or negligent infliction of emotional distress claims noting that the defendant’s conduct “did not endanger Kowalski’s safety or cause her to fear for her safety” and could not be characterized as “extreme or outrageous.” (*19)</p>	<p>“Rather than respond constructively to the school’s efforts to bring order and provide a lesson following this incident, Kowalski has rejected those efforts and sued school authorities Regretfully, she yet fails to see that such harassment and bullying is inappropriate and hurtful and that it must be taken seriously by school administrators in order to preserve an appropriate pedagogical environment. Indeed school administrators <i>are</i> becoming increasingly alarmed by the phenomenon, and the events in this case are but one example of such bullying and school administrators’ efforts to contain it.” (*20)</p>



FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDINGS	IN ADDITION
<p>D.J.M. told a classmate over instant message while at home that he was going to get a gun and kill certain classmates. According to the classmate he also discussed shooting himself and wanting to make sure his high school was known for something. D.J.M. was placed in juvenile detention, admitted to a psychiatric hospital after he admitted he contemplated suicide, and suspended until the end of the school year.</p>	<p>Off-campus speech can be regulated under <i>Tinker</i>: “The Court in <u><i>Tinker</i></u> explained that ‘in class <i>or out of it</i>,’ [citation omitted] conduct by a student which ‘might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities’ is not ‘immunized by the First Amendment.’” (*17)</p>	<p>Applies the substantial disruption test: “Here, it was reasonably foreseeable that D.J.M.’s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment.” (*18)</p> <p>“Parents and students had notified school authorities expressing concerns about student safety and asking what measures the school was taking to protect them. They asked about a rumored “hit list” and who had been targeted. School officials had to spend considerable time dealing with these concerns and ensuring that appropriate safety measures were in place.” (*18)</p>	<p>Did not discuss applying <i>Fraser</i></p>	<p>Granting of summary judgment for the school district is affirmed.</p> <p>The district did not violate the First Amendment by disciplining D.J.M. as his speech constituted a true threat. (*16).</p> <p>The district also could discipline D.J.M. under <i>Tinker</i> because school had by substantially disrupted by his threats. (*18)</p>	<p>First applied the “true threat” standard: The Eighth Circuit defines a true threat as a “statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another.” The speaker must have intended to communicate his or her statement to another person. (*11)</p> <p>D.J.M. communicated his threat to a classmate. (*11)</p> <p>“Combined with his admitted depression, his expressed access to weapons, and his statement that he wanted Hannibal ‘to be known for something,’ we find no genuine dispute of material fact regarding whether his speech could be reasonably understood as a true threat.” (*13)</p> <p>D.J.M.’s statements were sufficiently serious to be perceived as a true threat: “The record does not reveal that any person who became aware of D.J.M.’s speech thought he was joking.” (*15)</p>



FACTS	OFF-CAMPUS?	TINKER	FRASER	HOLDINGS	IN ADDITION
<p>One of the pictures T.V. and M.K. posed for at a summer sleepover depicted M.K. sucking a phallic-shaped lollipop while T.V. pretended to suck another such lollipop positioned between M.K.'s legs. T.V. posted a number of similar pictures on her MySpace and Facebook accounts, which were accessible to her "friends." A parent reported to the superintendent that the photos were on Facebook and Photo Bucket. To reduce their discipline to being excluded from 25% of their fall extracurricular activities, they visited a counselor three times and apologized for their actions.</p>	<p>Court assumes without deciding that <i>Tinker</i> applies to off-campus speech (*20)</p>	<p>Applies the substantial disruption test: The actual disruption cited by the district was the parent who brought the photos to the superintendent's attention claimed they were causing "divisiveness" among girls on the volleyball team—some girls were in favor of the activities in the photos and others were not. The court responded: "at most, this case involved two complaints from parents and some petty sniping among a group of 15 and 16 year olds. This cannot be what the Supreme Court had in mind when it enunciated the "substantial disruption" standard in <i>Tinker</i>. (*24)</p> <p>Regarding a forecasted disruption, defendants "offer little, either in evidence or argument, as to the nature of the feared disruption." (*24)</p>	<p>Fraser does not apply to off-campus student speech (*16)</p>	<p>"Plaintiffs' claim of violation of their First Amendment rights by the punishment imposed on them . . . is granted as a matter of law." (*37)</p> <p>Principal Couch is entitled to qualified immunity because "though mistaken, his judgment could reasonably have been thought to be consistent with the students' rights, which were not clearly established at the time of his decision." (*36)</p> <p>"[A] Student Handbook provision that authorizes discipline for out of school conduct that brings "dishonor" or "discredit" upon the school or the student is so vague and overbroad as to violate the Constitution." (*36)</p> <p>This question of whether the school district is immune from damages under the Eleventh Amendment is reserved until the Seventh Circuit decides a case that has been appealed to it on this issue. (*37)</p>	<p><i>Tinker</i> applies regardless of the fact students were only barred from participating in extracurricular activities: "That there is not a constitutional right to participate in athletics or other extracurricular activities may be pertinent to an analysis of other sorts of constitutional claims . . . but as <i>Tinker</i> itself notes, not to a freedom of expression claim." (*18).</p> <p>"[W]hether the punishment of T.V. and M.K. was based on the acts depicted in the photographs, the taking or existence of the images themselves, or the posting of the photographs on the internet, each of those possibilities qualifies as 'speech' within the meaning of the First Amendment." (*13)</p> <p>Photos were not obscene because they did not involve "sexual conduct" as defined by Indiana law; they were not child pornography for the same reason and because they were not "sexually explicit conduct" under federal law. (*13-15)</p>

