



12th Grade First Amendment Inquiry

Are Students Protected by the First Amendment?



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Supporting Questions

1. What is the difference between the Tinker Standard and Fraser Standard as they relate to students' free speech?
2. Does the "no prior restraint" rule apply to students?
3. How does the Supreme Court determine the limits of students' rights?
4. Can school officials exert control over students' use of social media?



12th Grade First Amendment Inquiry

Are Students Protected by the First Amendment?

New York State Social Studies Framework
Key Idea & Practices

12.G2 CIVIL RIGHTS and CIVIL LIBERTIES: The United States Constitution aims to protect individual freedoms and rights that have been extended to more groups of people over time. These rights and freedoms continue to be debated, extended to additional people, and defined through judicial interpretation. In engaging in issues of civic debate, citizens act with an appreciation of differences and are able to participate in constructive dialogue with those who hold different perspectives.

✓ **Gathering, Using, and Interpreting Evidence** ✓ **Civic Participation**

Staging the Question

Read a story from the *Washington Post* about students in Ohio who were expelled for posting rap videos to their social media pages; then assess the actions of the school and the students.

Supporting Question 1

What is the difference between the Tinker Standard and Fraser Standard as they relate to students' free speech?

Formative
Performance Task

Complete a T-chart on the differences between the Tinker Standard and Fraser Standard.

Featured Sources

Source A: First Amendment, Bill of Rights
Source B: Excerpt from a summary of *Tinker v. Des Moines School District*
Source C: Excerpt from a summary of *Bethel School District v. Fraser*

Supporting Question 2

Does the "no prior restraint" rule apply to students?

Formative
Performance Task

Explain in a paragraph the extent to which the Constitution's no prior restraint rule applies to the Hazelwood and Layshock cases.

Featured Sources

Source A: Definition of the term "prior restraint"
Source B: A summary of *Hazelwood School District v. Kuhlmeier*
Source C: Excerpt from a summary of *Layshock v. Hermitage School District*

Supporting Question 3

How does the Supreme Court determine the limits of students' rights?

Formative
Performance Task

Write a concurring or a dissenting opinion on *Morse v. Frederick*.

Featured Sources

Source A: A summary of *Morse v. Frederick*
Source B: Excerpt from Justice Thomas's concurring opinion in *Morse v. Frederick*

Supporting Question 4

Can school officials exert control over students' use of social media?

Formative
Performance Task

Develop a claim supported by evidence about school control over social media that answers the supporting question.

Featured Sources

Source A: Excerpt from Judge Kravitz's Memorandum of Decision in *Doninger v. Niehoff*
Source B: Excerpt from Judge Garber's decision in *Evans v. Bayer*
Source C: Excerpt from Judge Simon's decision in *T. V. v. Smith-Green Community School Corporation*
Source D: Excerpt from Judge Wilson's decision in *J. C. v. Beverly Hills United School District*

Summative
Performance
Task

ARGUMENT Are students protected by the First Amendment? Construct an argument (e.g., detailed outline, poster, essay) that addresses the compelling question using specific claims and relevant evidence from historical and contemporary sources while acknowledging competing views.

EXTENSION Have an informed debate in class about whether students are protected by the First Amendment.

Taking
Informed
Action

UNDERSTAND Investigate the challenges to New York students' First Amendment rights in the digital age by researching cases of cyberbullying and legislation aimed at protecting students.

ASSESS Evaluate the school's current cyberbullying and social media policies and the extent to which they align with recent First Amendment legislation.

ACT Update the school's current cyber-bullying policy or create a new one to be vetted by school administrators and students.



Overview

Inquiry Description

This inquiry leads students through an investigation of students' rights and the First Amendment to the United States Constitution. By investigating the compelling question, students consider the ways in which their rights provide a unique perspective on learning about the First Amendment and the extent to which schools are "special areas," in which various courts have made rulings that may be seen as limiting students' First Amendment rights.

In addition to the Key Idea listed earlier, this inquiry highlights the following Conceptual Understanding:

- (12.G2b) The Constitution aims to protect, among other freedoms, individual and group rights to freedom of speech, freedom of the press, freedom of assembly, freedom of petition, and freedom of religion. The extent to which these ideals exist in practice and how these protections should be applied in a changing world continues to be an issue of ongoing civic debate.

NOTE: This inquiry is expected to take three to five 40-minute class periods. The inquiry time frame could expand if teachers think their students need additional instructional experiences (i.e., supporting questions, formative performance tasks, and featured sources). Teachers are encouraged to adapt the inquiries in order to meet the needs and interests of their particular students. Resources can also be modified as necessary to meet individualized education programs (IEPs) or Section 504 Plans for students with disabilities.

Structure of the Inquiry

In addressing the compelling question "Are students protected by the First Amendment?" students work through a series of supporting questions, formative performance tasks, and featured sources in order to construct an argument supported by evidence while acknowledging competing perspectives.

Staging the Compelling Question

The inquiry opens by having students read a story from the *Washington Post* about students in Ohio who were expelled after posting their homemade rap videos to their social media pages. The school claimed that the videos represented gang activity, while the students declared they were just for fun. Students should read the article and then assess the actions of the students and the school district officials. Teachers may want to ask students such questions as "Did the rap videos cause a distraction for other students?" and "Does the school have the right to expel students for their activities on social media?" Students should begin to think about what rights they have and should, at this point, be able to connect this circumstance to the First Amendment.



Supporting Question 1

The first supporting question—“What is the difference between the Tinker Standard and Fraser Standard as they relate to students’ free speech?”—helps students establish a foundational understanding of how freedom of speech is interpreted in public schools. The formative performance task directs students to compare two Supreme Court cases in which students’ right to free speech was judged differently. The *Tinker v. Des Moines School District* case upheld the symbolic speech of students and argued that, in order to justify censorship, school administrators had to “be able to show that [their] actions were caused by something more than a mere desire to avoid [the] discomfort or unpleasantness that always accompany an unpopular viewpoint.” In *Bethel School District v. Fraser*, the Supreme Court ruled that free speech, as defined by Tinker, did not justify Fraser’s speech because of the obscene and vulgar language used in the latter case. Students should explain why the Supreme Court acted differently in the two cases, and discuss the impact the decisions have had on students’ right to free speech. The featured sources are the First Amendment and the case briefs for *Tinker v. Des Moines School District* and *Bethel School District v. Fraser*.

Supporting Question 2

For the second supporting question—“Does the ‘no prior restraint’ rule apply to students?”—students build on their understandings of the First Amendment and students’ rights by analyzing two court cases dealing with freedom of the press and the precedent of no prior restraint. The formative performance task requires students to apply the no prior restraint precedent to the Hazelwood and Layshock cases. The featured sources include a definition of the term “prior restraint” as well as case briefs for *Hazelwood v. Kuhlmeier* and *Layshock v. Hermitage School District*.

Supporting Question 3

In answering the third supporting question—“How does the Supreme Court determine the limits of students’ rights?”—students examine the limitations of their freedom of expression and how these boundaries extend beyond school grounds. The formative performance task calls on students to write a concurring or dissenting opinion for *Morse v. Frederick*, citing cases examined in Supporting Questions 1 and 2. The featured sources are the case brief for *Morse v. Frederick* and Justice Clarence Thomas’s concurring opinion, in which he challenges the *Tinker v. Des Moines School District* ruling. As teachers structure this exercise for students, they may want additional models of Supreme Court concurring and dissenting opinions. These can be found on the following websites: the Supreme Court’s official website (<http://www.supremecourt.gov>) and [the Landmark Cases of the Supreme Court website developed by Street Law, Inc., and the Supreme Court Historical Society](http://www.streetlaw.org/en/landmark/home) (<http://www.streetlaw.org/en/landmark/home>).



Supporting Question 4

Supporting Question 4—“Can school officials exert control over students’ use of social media?”—further contributes to students’ understanding of freedom of speech and freedom of the press regarding students’ rights. The formative performance task calls on students to address the supporting question by using featured sources to develop an evidence-based claim. The featured sources are four lower-court cases dealing with the issue of school control over students’ use of social media: *Evans v. Bayer* examines a case in which a student in Florida made a fake Facebook page about a specific teacher’s “insane antics”, *Doninger v. Niehoff* presents the case in which a student was penalized for using swear words to describe school officials’ decision to cancel a school concert. *T. V. v. Smith-Green Community School Corporation* examines a case in which four students were suspended from school after posting provocative photos of themselves on Facebook, and *J. C. v. Beverly Hills United School District* recounts a case in which a student posted a video to YouTube making fun of another student. Given the density of many of the Supreme Court cases within this inquiry, teachers may want to replace or supplement these sources with news-related stories about the cases using such outlets as the *New York Times*, *EdWeek*, or National Public Radio.

Summative Performance Task

At this point in the inquiry, students have examined various court precedents and decisions covering the First Amendment rights of students. Students should now be able to demonstrate the breadth of their understanding and the ability to use evidence from multiple sources to support their claims. In this task, students construct an evidence-based argument responding to the compelling question “Are students protected by the First Amendment?” It is important to note that arguments could take a variety of forms, including a detailed outline, poster, or essay.

Students’ arguments will likely vary, but could include any of the following:

- The First Amendment protects students because they are allowed freedom of speech, press, and assembly as long as it is not disruptive to school instruction and is not seen as promoting bullying or drug use.
- The First Amendment does not protect students because the Supreme Court set a precedent after the *Fraser* and *Morse* cases that significantly limited students’ freedom of speech and expression.
- The degree to which the First Amendment protects the rights of students has been complicated by social media.

Students could extend these arguments by having a class debate about whether the First Amendment protects their rights. Students could use the Summative Performance Task as the foundation of their argument and then spend a day researching additional court cases that address the First Amendment in public schools. After completing their research, students could once again debate whether or not their rights are protected by the First Amendment. Teachers may want to use a Socratic circle to ensure all students have the chance to discuss their opinion.

Students have the opportunity to Take Informed Action by further investigating the First Amendment in the digital age. They demonstrate their capacity to *understand* by researching cases of cyberbullying and legislation aimed at



protecting students. They show their ability to *assess* by analyzing their school's current cyberbullying and social media policies as well as the extent to which those policies align with recent First Amendment legislation. And they *act* by updating the current school policy on cyber-bullying or creating a new one to be vetted and passed by school administrators and students. For more information on creating social media policies, see the following article: Steven Anderson, "How to Create Social Media Guidelines for Your School," May 7, 2012, Edutopia.org, <http://www.edutopia.org/pdfs/edutopia-anderson-social-media-guidelines.pdf>.



Staging the Compelling Question

Featured Source

Source A: Elahe Izadi, news story describing a group of students suspended for rap videos they created, “Lawsuit: Black Teens Unfairly Expelled from Ohio High School after Making Rap Music Videos,” *Washington Post*, September 3, 2014.

Parents of four black teenagers say the students were expelled for making rap videos, and in a \$25,000 federal lawsuit filed Tuesday, allege that an Ohio high school unfairly targeted the students because of their race, the Cincinnati Enquirer reported.

The lawsuit against the Northwest Local School District and the Colerain Township Board of Trustees in Ohio stems from an April 2014 incident when the school was abuzz with rumors of gang activity. The lawsuit alleges that on April 10, school and police officials “interrogated” the black students about their social media activity and affiliations with other black youth, the Associated Press reported. According to the lawsuit, the students were shown images of them in rap videos, and images from their social media accounts of them making hand signs. “Based on these images, school administrators accused more than a dozen African-American students of making ‘street signs’ and belonging to a ‘gang,’” the lawsuit states. Additionally, the lawsuit claims that white students who did similar things were left unquestioned and unpunished.

The district’s attorney, John Concannon, told the Enquirer that the lawsuit includes major inaccuracies; students of other races, not just black students, were suspended and expelled, he said. Concannon also told the Associated Press that 14 students in all faced disciplinary action on April 10, mainly for threats made against students or staff via social media or at school, and that it wasn’t related to gang activity or rap videos.

Extra police were at the school on April 11, a day after hundreds of parents came to pick up their kids when rumors of gang activity abounded. The school even sent a letter home to parents explaining why more police would be at the school; the letter referred to an investigation and made vague mention of “gang activity.”

The parents suing the school district also want the expulsions wiped off the students’ records. The students referred to themselves as the “money gang”; their parents said that’s what a group of student athletes call themselves, and that it’s not a real gang, the Enquirer reported. “It is not a crime to be an African-American teenager,” the lawsuit states. “Yet, on April 10, 2014, Colerain High School administrators in coordination with Colerain Township police officer acted as if it were.” Rap music and videos have become a battleground for school disciplinary actions. In 2010, Mississippi teen Taylor Bell was suspended for a rap song he posted online. The same year, Trevor Moore of Maine was expelled after he posted a satirical rap video about his school online.

Teachers, too, have gotten into trouble over their use of rap. An eighth-grade Florida teacher was suspended in January after she assigned explicit Lil’ Wayne lyrics to her students as homework. And a Washington state teacher was put on leave in 2010 after handing out copies of lyrics from a song by a Seattle-based hip-hop group on the first day of class.

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Supporting Question 1

Featured Source

Source A: United States Congress, First Amendment to the Constitution in the Bill of Rights, December 15, 1791

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Public domain. Available at the National Archives: <http://www.archives.gov>.



Supporting Question 1

Featured Source

Source B: Oyez Project, summary of the 1969 court ruling that the First Amendment applies to public schools “*Tinker v. Des Moines Independent Community School District*” (excerpt), August 10, 2015

Petitioner John F. Tinker and Mary Beth Tinker, Minors et al.

Respondent Des Moines Independent Community School District et al....

First Amendment

Facts of the Case

In December 1965, a group of students in Des Moines held a meeting in the home of 16-year-old Christopher Eckhardt to plan a public showing of their support for a truce in the Vietnam war. They decided to wear black armbands throughout the holiday season and to fast on December 16 and New Year’s Eve. The principals of the Des Moines school learned of the plan and met on December 14 to create a policy that stated that any student wearing an armband would be asked to remove it, with refusal to do so resulting in suspension. On December 16, Mary Beth Tinker and Christopher Eckhardt wore their armbands to school and were sent home. The following day, John Tinker did the same with the same result. The students did not return to school until after New Year’s Day, the planned end of the protest.

Through their parents, the students sued the school district for violating the students’ right of expression and sought an injunction to prevent the school district from disciplining the students. The district court dismissed the case and held that the school district’s actions were reasonable to uphold school discipline. The U.S. Court of Appeals for the Eighth Circuit affirmed the decision without opinion.

Question

Does a prohibition against the wearing of armbands in public school, as a form of symbolic protest, violate the students’ freedom of speech protections guaranteed by the First Amendment?

Argument

[Tinker v. Des Moines Ind. Comm. School Dist. - Oral Argument](#)

Conclusion

Decision: 7 votes for Tinker, 2 vote(s) against

Legal provision: Amendment 1: Speech, Press, and Assembly

Yes. Justice Abe Fortas delivered the opinion of the 7-2 majority. The Supreme Court held that the armbands represented pure speech that is entirely separate from the actions or conduct of those participating in it. The Court also held that the students did not lose their First Amendment rights to freedom of speech when they stepped onto school property. In order to justify the suppression of speech, the school officials must be able to prove that the conduct in question would “materially and substantially interfere” with the operation of the school. In this case, the school district’s actions evidently stemmed from a fear of possible disruption rather than any actual interference.



In his concurring opinion, Justice Potter Stewart wrote that children are not necessarily guaranteed the full extent of First Amendment rights. Justice Byron R. White wrote a separate concurring opinion in which he noted that the majority's opinion relies on a distinction between communication through words and communication through action.

Justice Hugo L. Black wrote a dissenting opinion in which he argued that the First Amendment does not provide the right to express any opinion at any time. Because the appearance of the armbands distracted students from their work, they detracted from the ability of the school officials to perform their duties, so the school district was well within its rights to discipline the students. In his separate dissent, Justice John M. Harlan argued that school officials should be afforded wide authority to maintain order unless their actions can be proven to stem from a motivation other than a legitimate school interest.

Courtesy of Oyez®, a free law project at IIT Chicago-Kent College of Law, http://www.oyez.org/cases/1960-1969/1968/1968_21.



Supporting Question 1

Featured Source

Source C: American Bar Association, summary of the 1986 court case that held that not all speech was protected in the public school setting, "*Bethel School District v. Fraser* (478 U.S. 675, 1986) Free Expression for Students" (excerpts), 2005

The Issue

Does the First Amendment prevent a school district from disciplining a high school student for giving a lewd speech at a high school assembly?

Facts and Background

Mathew Fraser, a senior at Bethel High School in Bethel, Washington, spoke to a school assembly to nominate a classmate for an office in student government. His speech was filled with sexual references and innuendos, but it contained no obscenities. The good news is that Fraser's candidate was overwhelmingly elected. The bad news was that Fraser was suspended from the school for three days and removed from the list of students who were eligible to make graduation remarks. (Fraser was second in his class at that time.) His parents appealed the school's disciplinary action. The Washington Supreme Court agreed that his free speech rights had been violated. The school board then appealed the case to the U.S. Supreme Court.

The Decision

The Court had earlier held, in *Tinker v. Des Moines Independent School Board*, that students do not shed their constitutional rights at the school gate. In that case, the Court said that the First Amendment gave students the right to wear black armbands to school to protest the Vietnam War.

In the Bethel case, however, the Court upheld the school district. The Court held, by a 7-2 margin, that school officials acted within the Constitution by disciplining Fraser. Chief Justice Burger wrote for the majority. He pointed out that there was a huge difference between the protest in *Tinker*, which dealt with a major issue of public policy, and the lewdness of Fraser's speech. "The purpose of public education in America is to teach fundamental values," he wrote. "These fundamental values...must...include consideration of the political sensibilities of other students."

Burger conceded that the First Amendment might permit the use of an offensive form of expression by an adult making a political point, but "the same latitude of expression is not permitted to children in a public school."

Justices Stevens and Marshall dissented. Stevens wrote, "I believe a strong presumption in favor of free expression should apply whenever an issue of this kind is arguable."

The Impact of the Decision

Along with *Hazelwood School District et al. v. Kuhlmeier et al* (1988), a case involving a school district that censored a student newspaper, the Bethel case shows the Court re-examining the issue of student expression in the schools and finding that certain limits on expression are permitted by the First Amendment.

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http://www.americanbar.org/groups/public_education/initiatives_awards/students_in_action/bethel.html.



Supporting Question 2

Featured Source

Source A: Legal Information Institute, definition of the legal term “prior restraint,” Cornell University Law School, no date

Prior Restraint

In First Amendment law, a prior restraint is government action that prohibits speech or other expression before it can take place. There are two common forms of prior restraints. The first is a statute or regulation that requires a speaker to acquire a permit or license before speaking, and the second is a judicial injunction that prohibits certain speech. Both types of prior restraint are strongly disfavored, and, with some exceptions, generally unconstitutional.

Legal Information Institute, Cornell University Law School. Used with Permission. http://www.law.cornell.edu/wex/prior_restraint.



Supporting Question 2

Featured Source

Source B: United States Courts, summary of the 1988 Supreme Court decision that a school principal had the right to pull stories thought to be inappropriate from the school newspaper, “Facts and Case Summary — *Hazelwood v. Kuhlmeier*,” no date

Facts and Case Summary — *Hazelwood v. Kuhlmeier*

Facts and case summary for *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988). *The First Amendment rights of student journalists are not violated when school officials prevent the publication of certain articles in the school newspaper.*

Facts

Students enrolled in the Journalism II class at Hazelwood East High School were responsible for writing and editing the school’s paper *The Spectrum*. Two of the articles submitted for publication in the final edition of the paper contained stories on divorce and teenage pregnancy. The divorce article featured a story about a girl who blamed her father’s actions for her parents’ divorce. The teenage pregnancy article featured stories in which pregnant students at Hazelwood East shared their experiences.

To ensure their privacy, the girls’ names were changed in the article. The school principal felt that the subjects of these two articles were inappropriate. He concluded that journalistic fairness required that the father in the divorce article be informed of the story and be given an opportunity to comment. He also stated his concerns that simply changing the names of the girls in the teenage pregnancy article may not be sufficient to protect their anonymity and that this topic may not be suitable for the younger students. As a result, he prohibited these articles from being published in the paper.

Because there was no time to edit the paper if it were to go to press before the end of the school year, entire pages were eliminated. The student journalists then brought suit to the U.S. District Court for the Eastern District of Missouri, alleging that their First Amendment rights to freedom of speech had been violated.

The U.S. District Court concluded that they were not. The students appealed to the U.S. Court of Appeals for the Eighth Circuit, which reversed the ruling, stating that the students’ rights had been violated. The school appealed to the U.S. Supreme Court, which granted certiorari. ...

Issues

Does the decision of a principal to prohibit the publishing of certain articles, which he deems inappropriate, in the school newspaper violate the student journalists’ First Amendment right of freedom of speech?

Reasoning

The U.S. Supreme Court held that the principal’s actions did not violate the students’ free speech rights. The Court noted that the paper was sponsored by the school and, as such, the school had a legitimate interest in preventing the publication of articles that it deemed inappropriate and that might appear to have the imprimatur of the school. Specifically, the Court noted that the paper was not intended as a public forum in which everyone could share views; rather, it was a limited forum for journalism students to write articles pursuant to the requirements of their Journalism II class, and subject to appropriate editing by the school.



Key Points to Remember

- The First Amendment protects the right to freedom of speech.
- The Spectrum was written by students in the Journalism II course as part of the requirements of that course.
- The articles in question were about divorce and teenage pregnancy. The subjects of both of these stories were students at Hazelwood East High School.
- The divorce article featured a story in which a girl blamed her father's actions for her parents' divorce, but the author did not adhere to journalistic standards by informing the father of the story and giving him an opportunity to respond.
- Although their names were changed, the principal was concerned that students may be able to recognize the identity of the girls who were interviewed for the pregnancy article.

RESOURCES

[First Amendment Center](#)

Haynes, Charles C., et al. The First Amendment in Schools: A Guide from the First Amendment Center. Virginia. ASCD (Association for Supervision and Curriculum Development) publications, 2003.

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) ([Majority and dissenting opinions](#)).

Raskin, Jamin B. We the Students: Supreme Court Cases for and About Students, 2nd ed. Washington, D.C. Congressional Quarterly Press, 2003.

Public domain. United States Courts website: <http://www.uscourts.gov/educational-resources/get-involved/constitution-activities/first-amendment/freedom-press-school-newspapers/facts-case-summary.aspx>.



Supporting Question 2

Featured Source

Source C: David C. Soutter, summary of the 2011 Appeals Court decision that held that a school could not punish a student for a social media profile he created outside of school, “Case Comment: Constitutional Law—Third Circuit Holds First Amendment Protects Off-Campus Internet Speech from School Discipline—*Layshock ex rel. Layshock v. Hermitage School District*, 650 Fed 205 (3d Cir. 2011)” (excerpt), *Suffolk Law Review*, 2012

Constitutional Law—Third Circuit Holds First Amendment Protects Off-Campus Internet Speech from School Discipline—*Layshock ex rel. Layshock v. Hermitage School District*, 650 F.3d 205 (3d Cir. 2011)

by **David C. Soutter** November-13-2012

Although the First Amendment protects the right of free speech, the Supreme Court of the United States has held that certain types of speech made by students on campus may be restricted in public schools. The Court has not addressed, however, student speech originating off campus on the internet, requiring the circuit courts to develop and apply methods of dealing with this type of speech, including the Second Circuit’s approach, commonly referred to as the Tinker test. In *Layshock ex rel. Layshock v. Hermitage School District*, the Court of Appeals for the Third Circuit considered whether the Hermitage School District could discipline a student, Justin Layshock, for creating an offensive profile on the social-networking website, MySpace, while off campus. The court held that the school district could not regulate Layshock’s speech because not one of the limited circumstances permitting regulation—as prescribed by the Supreme Court—was present.

In December 2005, Layshock, a Hickory High School student, created a profile that mocked his Principal, Eric Trosch, on MySpace. Layshock created this profile using his grandmother’s computer, at her house, during nonschool hours. Layshock granted access to fellow students, and, not surprisingly, news of the profile “spread like wildfire” spawning at least three copycat profiles. Layshock did access the profile he created twice at school, but school officials took action based on the belief that Layshock’s speech was entirely off campus.

On December 21, school officials learned that Layshock may have created one of the false profiles and decided to call Layshock and his mother to a meeting with the Superintendent. At that meeting, Layshock admitted to creating the profile and, without any prompting, walked to Principal Trosch’s office to apologize. School officials took no disciplinary action at the meeting; however, in January 2006, school officials held a disciplinary hearing concluding Layshock had violated the school’s discipline code and instituted various punishments, including a ten-day suspension and placement in an alternative education program.

On January 27, 2006, the Layshocks filed a three-count complaint alleging that the school district had violated Layshock’s First Amendment right to free speech. The district court granted summary judgment in favor of Layshock because the school district failed to demonstrate a sufficient nexus between the profile Layshock made and a substantial disruption at the school. A three judge panel from the Third Circuit affirmed on appeal; however, the Third Circuit vacated this decision and that of a factually similar, yet differently decided, case, *J.S. ex rel Snyder v Blue Mountain School District*, opting to rehear both en banc to resolve the apparent intracircuit split. After the rehearings, the court reversed *J.S.* and reaffirmed the earlier holding in *Layshock*, that the regulation of Layshock’s speech violated the First Amendment.

Courtesy of Suffolk University Law Review, www.suffolklawreview.org. Used with permission. <https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=45+Suffolk+U.+L.+Rev.+1341&srcty pe=smi&srcid=3B15&key=88404be248fb135bb998daf83b3547a7>.



Supporting Question 3

Featured Source

Source A: United States Courts, summary of the 2007 court ruling stating that a school had a right to remove an inappropriate sign, "Facts and Case Summary— *Morse v. Frederick*," no date

Facts and Case Summary—*Morse v. Frederick*

Morse v. Frederick, 551 U.S. ___, 127 S. Ct. 2618 (2007)

School authorities do not violate the First Amendment when they stop students from expressing views that may be interpreted as promoting illegal drug use.

Facts

Joseph Frederick, a senior at Juneau-Douglas High School, unfurled a banner saying "Bong Hits 4 Jesus" during the Olympic Torch Relay through Juneau, Alaska on January 24, 2002. Frederick's attendance at the event was part of a school-supervised activity. The school's principal, Deborah Morse, told Frederick to put away the banner, as she was concerned it could be interpreted as advocating illegal drug activity. After Frederick refused to comply, she took the banner from him. Frederick originally was suspended from school for 10 days for violating school policy, which forbids advocating the use of illegal drugs.

Procedure

The U.S. District Court for the District of Alaska ruled for Morse, saying that Frederick's action was not protected by the First Amendment. The U.S. Court of Appeals for the Ninth Circuit reversed and held that Frederick's banner was constitutionally protected. The U.S. Supreme Court granted certiorari.

Issues

Whether a principal violates the Free Speech Clause of the First Amendment by restricting speech at a school-supervised event when the speech is reasonably viewed as promoting illegal drug use.

Ruling

No.

Reasoning

In *Tinker v. Des Moines* (1969), the Court stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* held that the wearing of armbands by students to protest the Vietnam War was constitutionally protected speech because it was political speech. Political speech is at the heart of the First Amendment and, thus, can only be prohibited if it "substantially disrupts" the educational process.

On the other hand, the Court noted in *Bethel v. Fraser*, 478 U.S. 675, 682 (1986) that "the constitutional rights of students at public school are not automatically, coextensive with the rights of adults." The rights of students are applied "in light of the special characteristics of the school environment," according to the U.S. Supreme Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

In the present case, the majority acknowledged that the Constitution affords lesser protections to certain types of student speech at school or school-supervised events. Finding that the message Frederick displayed was by his own admission not political in nature, as was the case in *Tinker*, the Court said the phrase "Bong Hits 4 Jesus"

reasonably could be viewed as promoting illegal drug use. As such, the state had an "important" if not "compelling" interest in prohibiting/punishing student speech that reasonably could be viewed as promoting illegal drug use. The Court, therefore, held that schools may "take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use" without fear of violating a student's First Amendment rights.

Concurrences

Justice Thomas

Justice Clarence Thomas concurred with the majority, but argued that, instead of making exceptions to the holding in *Tinker*, *Tinker* should be overturned. Citing various scholarly sources on the history of public education, Justice Thomas argued that the First Amendment was never meant to protect student speech in public schools.

Justices Alito and Kennedy

Justices Alito and Kennedy concurred with the majority, but were careful to note that the majority's decision was at the outer parameters of constitutionally protected behavior. These justices were concerned that the majority's decision permitting the suppression of speech promoting illegal drug use could be used to punish those advocating constitutionally permissible, but unpopular, political ideas, e.g., legalizing medicinal marijuana use.

Concurrences and Dissent

Justice Breyer

Justice Stephen Breyer argued that the majority did not need to decide this case on its merits, but could have decided it on the basis of the doctrine of "qualified immunity." Qualified immunity prevents government officials, such as a school principal, from being sued for actions taken in their official capacities. This protection is in place as long as the legality of the conduct is open to debate. Since Justice Breyer argued that it was not clear whether Frederick's speech was constitutionally protected, Morse was entitled to qualified immunity. This decision would demonstrate judicial restraint, i.e., not having a court decide a larger issue if deciding a smaller issue could dispose of the case.

Under current Supreme Court precedent, issues of qualified immunity cannot be decided unless a Court first determines that a constitutional violation occurred. Justice Breyer took the position that this precedent should be overturned. Since the majority decided that no constitutional violation occurred, it did not address the issue of qualified immunity.

Dissent

Justice Stevens

Justice John Paul Stevens took the position that the school's interest in protecting students from speech that can be reasonably regarded as promoting drug use does not justify Frederick's punishment for his attempt to make an ambiguous statement simply because it refers to drugs. Justice Stevens made several points in his dissent. First, he argued that prohibiting speech because it advocates illegal drug use, unless it is likely to provoke the harm sought to be avoided by the government, violates the First Amendment because it impermissibly discriminates based upon content. Second, even if the school had a compelling interest to prohibit such speech, Frederick's banner was so vague that a reasonable person could not assume that it advocated illegal drug use. Finally, the dissent took issue with the majority's justification that the speech could "reasonably be perceived as promoting drug use" because the constitutionality of speech should not depend on the perceptions of third parties.

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Supporting Question 3

Featured Source

Source B: Justice Clarence Thomas, concurring opinion in *Morse v. Frederick* (excerpt), 2007

Thomas, J., concurring
SUPREME COURT OF THE UNITED STATES
DEBORAH MORSE, et al., PETITIONERS v. JOSEPH FREDERICK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 25, 2007]

The Court today decides that a public school may prohibit speech advocating illegal drug use. I agree and therefore join its opinion in full. I write separately to state my view that the standard set forth in *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969), is without basis in the Constitution.

The First Amendment states that “Congress shall make no law...abridging the freedom of speech.” As this Court has previously observed, the First Amendment was not originally understood to permit all sorts of speech; instead, “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571–572 (1942); see also *Cox v. Louisiana*, 379 U. S. 536, 554 (1965). In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools. Although colonial schools were exclusively private, public education proliferated in the early 1800’s. By the time the States ratified the Fourteenth Amendment, public schools had become relatively common. W. Reese, *America’s Public Schools: From the Common School to “No Child Left Behind”* 11–12 (2005) (hereinafter Reese). If students in public schools were originally understood as having free-speech rights, one would have expected 19th-century public schools to have respected those rights and courts to have enforced them.¹ They did not.

During the colonial era, private schools and tutors offered the only educational opportunities for children, and teachers managed classrooms with an iron hand. R. Butts & L. Cremin, *A History of Education in American Culture* 121, 123 (1953) (hereinafter Butts). Public schooling arose, in part, as a way to educate those too poor to afford private schools. See Kaestle & Vinovskis, *From Apron Strings to ABCs: Parents, Children, and Schooling in Nineteenth-Century Massachusetts*, 84 Am. J. Sociology S39, S49 (Supp. 1978). Because public schools were initially created as substitutes for private schools, when States developed public education systems in the early 1800’s, no one doubted the government’s ability to educate and discipline children as private schools did. Like their private counterparts, early public schools were not places for freewheeling debates or exploration of competing ideas. Rather, teachers instilled “a core of common values” in students and taught them self-control. Reese 23; A. Potter & G. Emerson, *The School and the Schoolmaster: A Manual* 125 (1843) (“By its discipline it contributes, insensibly, to generate a spirit of subordination to lawful authority, a power of self-control, and a habit of postponing present indulgence to a greater future good...”); D. Parkerson & J. Parkerson, *The Emergence of the Common School in the U. S. Countryside* 6 (1998) (hereinafter Parkerson) (noting that early education activists, such as Benjamin Rush, believed public schools “help[ed] control the innate selfishness of the individual”).

Teachers instilled these values not only by presenting ideas but also through strict discipline. Butts 274–275. Schools punished students for behavior the school considered disrespectful or wrong. Parkerson 65 (noting that children were punished for idleness, talking, profanity, and slovenliness). Rules of etiquette were enforced, and courteous behavior was demanded. Reese 40. To meet their educational objectives, schools required absolute obedience. C. Northend, *The Teacher’s Assistant or Hints and Methods in School Discipline and Instruction* 44, 52



(1865) (“I consider a school judiciously governed, where order prevails; where the strictest sense of propriety is manifested by the pupils towards the teacher, and towards each other....” (internal quotation marks omitted)).²

In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.

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Supporting Question 4

Featured Source

Source A: Judge Mark R. Kravitz, district court decision that limits speech meant to disrupt, "Memorandum of Decision" (excerpt), *Doninger v. Niehoff*, 2009

MEMORANDUM OF DECISION

MARK R. KRAVITZ, District Judge.

In *Doninger v. Niehoff*, 514 F.Supp.2d 199, 203 (D.Conn.2007), this Court denied Plaintiff's Motion for a Preliminary Injunction on the ground that she had not shown a substantial likelihood of succeeding on her claim that Defendants' actions while she was a student at the Lewis S. Mills High School violated her constitutional rights. Plaintiff appealed the Court's injunction ruling, and shortly before Avery Doninger's graduation, the Second Circuit affirmed in *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir.2008). Though her request for an injunction is now mooted by her graduation, Ms. Doninger continues to press her lawsuit for damages against school officials.^[1] After the close of discovery, all parties filed cross-motions for summary judgment. For the reasons that follow, Defendants' Motion for Summary Judgment [doc. # 73] is GRANTED in part and DENIED in part, and Plaintiff's Motion for Partial Summary Judgment [doc. # 74] is DENIED.

I.

The facts of this case are familiar to all involved, and were set forth at length in the Court's preliminary injunction ruling. *See Doninger*, 514 F.Supp.2d at 203. The Court assumes familiarity with the facts recited in that opinion. In brief, Avery Doninger, a former student at the Lewis S. Mills High School in Burlington, Connecticut ("LMHS"), challenges several actions by Karissa Niehoff, principal of LMHS, and Paula Schwartz, the superintendent of Region 10 School District. First, Ms. Doninger claims that Ms. Niehoff and Ms. Schwartz violated her First Amendment rights by disqualifying her from running for senior class secretary as punishment for a blog entry that Ms. Doninger posted on livejournal.com. Second, she asserts that Defendants violated her First Amendment rights by prohibiting students from wearing "Team Avery" t-shirts into the school auditorium while students were delivering speeches in connection with the election of class officers. Third, she contends that Defendants violated her Fourteenth Amendment rights by treating her differently from other similarly-situated students when they punished her for the blog entry and allegedly placed a disciplinary log in Ms. Doninger's permanent file. In addition to claiming that these actions violated her federal constitutional rights, Ms. Doninger also alleges that the same conduct by Defendants violated the Connecticut Constitution. Finally, she brings a claim for intentional infliction of emotional distress....

A.

On Ms. Doninger's claim that disqualifying her from running for class secretary violated her First Amendment rights, after reviewing the Supreme Court's decisions concerning student speech in public schools, the Court initially observed that it was not clear whether the *Tinker* or *Fraser* line of cases applied to the particular facts at issue. In brief, in *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), the Supreme Court held that "conduct by the student, in class or out of it, which for any reason—whether it stems



from time, place, or type of behavior— materially disrupts classwork or involves substantial disorder or invasion of the rights of others is ... not immunized by the constitutional guarantees of freedom of speech." *Id.* at 513, 89 S.Ct. 733. In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), the Supreme Court held that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech ... would undermine the school's basic educational mission." *Id.* at 685, 106 S.Ct. 3159.

The Court believed that this case differed from both *Tinker* and *Fraser* because it did not arise from a suspension or other similar student discipline but rather involved participation in voluntary, extracurricular activities—namely, serving as class secretary. In other contexts, the Court explained, "the Supreme Court and other courts have been willing to accord great discretion to school officials in deciding whether students are eligible to participate in extracurricular activities." *Doninger*, 514 F.Supp.2d at 213. The Court cited one treatise as noting that "an overwhelming majority of both federal and state courts have held that participation in extracurricular activities ... is a privilege, not a right." *Id.* For example, in *Lowery v. Euverard*, 497 F.3d 584 (6th Cir.2007), the Sixth Circuit held that it did not violate the First Amendment to bar students from participation on the football team because they had signed a petition seeking removal of the coach. The *Lowery* court reasoned that "Plaintiffs' regular education has not been impeded, and significantly, they are free to continue their campaign to have Euverard fired. What they are not free to do is continue to play football for him while actively working to undermine his authority." *Id.* at 600.

Similarly, this Court explained that Ms. Doninger's education was not impeded by Defendants' actions and she remained "free to express her opinions about the school administration and their decisions in any manner she wishes.... However, Avery does not have a First Amendment right to run for a voluntary extracurricular position as a student leader while engaging in uncivil and offensive communications regarding school administrators." ...

The Court next turns to Ms. Doninger's "Team Avery" t-shirt First Amendment claim, on which both Ms. Doninger and Defendants move for summary judgment. The Court denied Ms. Doninger a preliminary injunction on this issue because it found that there was no imminent election assembly and, hence, no risk of irreparable harm. Ms. Doninger has now graduated, and the Court presumes that she will not be attending any election assemblies at LMHS. Furthermore, the school has apparently implemented new guidelines for election assemblies that would make Ms. Doninger's claim for injunctive relief moot even if she were still a student at LMHS. Of course, none of that affects Ms. Doninger's claim for damages....

Defendants also claim qualified immunity on the t-shirt claim, but the Court concludes that this case is sufficiently similar to *Tinker* that the right was clearly established and, thus, Defendants' are not entitled to qualified immunity. Defendants point out some distinctions, such as the fact that this case involves t-shirts rather than armbands, that *Tinker* did not involve speech in a school auditorium, and that *Tinker* did not involve electioneering materials. None of these distinctions convinces the Court that the right of students to engage in non-offensive, non-disruptive speech on school property was not clearly established. To accept Defendants' qualified immunity defense would be to ignore the Second Circuit's instruction to courts not to define the right so narrowly that "qualified immunity would be a defense unless the very action in question has previously been held unlawful." *Zahrey*, 221 F.3d at 349 (quotation marks omitted).

Therefore, the Court DENIES Ms. Doninger's Motion for Partial Summary Judgment and DENIES Defendants' Motion for Summary Judgment on this claim. At trial, Ms. Doninger will have to prove that her speech was chilled and also will have to prove the amount of damages, if any, that she suffered as a result of any First Amendment violation that is found....

In sum, with respect to Defendants' Motion for Summary Judgment [doc. # 73], the Court GRANTS summary judgment to Defendants on Ms. Doninger's blog entry First Amendment claim, her Equal Protection claim, and her claim for intentional infliction of emotional distress. The Court DENIES summary judgment to Defendants on Ms.



Doninger's First Amendment "Team Avery" t-shirt claim. The Court declines to exercise supplemental jurisdiction over Ms. Doninger's state constitutional claims and therefore dismisses those claims without prejudice to renewal in state court. Finally, the Court DENIES Plaintiff's Motion for Partial Summary Judgment [doc. # 74]. The Court will issue a separate trial scheduling order.

IT IS SO ORDERED.

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Supporting Question 4

Featured Source

Source B: Judge Barry L. Garber, district court decision that limits free speech when speech is deemed as libel, *Evans v. Bayer* (excerpts), 2009

Background

Katherine Evans (“Evans”) was a senior at Pembroke Pines Charter High School in November 2007. Peter Bayer (“Bayer”) was principal at that time. During the evening of November 9, 2007, Evans created a group on Facebook, a social networking website, entitled, ‘Ms. Sarah Phelps is the worst teacher I’ve ever met.’ The group’s purpose was for students to voice their dislike of the Ms. Phelps. Evans posted the following:

Ms. Sarah Phelps is the worst teacher I've ever met! To those select students who have had the displeasure of having Ms. Sarah Phelps, or simply knowing her and her insane antics: Here is the place to express your feelings of hatred.

Three postings appeared on the page from other students supporting Ms. Phelps and debasing Evans for creating the group. The page included Ms. Phelps’s photograph. The posting did not contain threats of violence. This posting was made after school hours and from Evans’s home computer. Ms. Phelps never saw the posting and it did not disrupt school activities. Evans removed the posting after two days. After its removal, the posting came to the attention of Bayer. Bayer, as principal, suspended Evans from school for three days and forced her to move from her advanced placement (“AP”) classes into lesser weighted honors courses. Evans’s “Notice of Suspension” states that she was suspended for, “Bullying/Cyber Bullying/Harassment towards a staff member” and “Disruptive behavior.” See DE 1 at Exh. B. Evans alleges that she engaged in an off-campus activity in a non-violent and non-threatening public forum and that her punishment resulted in an unjustified stain on her academic reputation and good standing.

Evans argues that Bayer’s actions violated her First and Fourteenth Amendment rights and that her rights may be redressed pursuant to 42 U.S.C. § 1983. She seeks an injunction enjoining Bayer from maintaining records relating to the suspension on her permanent school record and revoking, *nunc pro tunc*, the three-day suspension. Evans is also seeking nominal damages for the deprivation of her First and Fourteenth Amendment rights, as well as attorneys’ fees and costs....

i. Constitutional Right

...Bayer, seemingly, also argues that Evans's speech is not protected because it is libel and could trigger a defamation action. Libel or defamation is indeed an exception from that speech that is protected by the First Amendment. Florida courts follow the Restatement Second of Torts as to defamation actions. *Barnes v. Horan*, 841 So.2d 472, 476 (Fla. Dist. Ct. App. 2002). A statement of pure opinion does not give rise to a defamation action. *Scott v. Busch*, 907 So.2d 662, 667-68 (Fla. Dist. Ct. App. 2005). But, if an opinion infers a factual basis for it, that is a mixed-opinion, which may give rise to a defamation action. RST Torts 566. A student calling a “teacher her worst teacher ever” is clearly opinion. Bayer argues that to discipline Evans, the teacher does not have to have a viable defamation complaint merely a putative one. Bayer cites no case to justify this distinction, and the Court cannot find one. Moreover, the Court finds the concept incredible that First Amendment protection would ebb and flow with the willingness of plaintiffs to pay a court filing fee.



Regardless of the standard used, Evans's speech falls under the wide umbrella of protected speech. 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. Therefore, the Court finds that Evans had a constitutional right. The next inquiry is whether it was a clearly established right.

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Supporting Question 4

Featured Source

Source C: Judge Philip P. Simon, district court ruling stating that free speech off school grounds cannot be punished by the school without intent to disrupt, *T. V. v. Smith-Green Community School Corporation* (excerpts), 2011

OPINION AND ORDER

T.V. and M.K. are sophomores at Churubusco High School in Whitley County, Indiana, and Austin Couch is the principal of the school. T.V. and M.K., by their parents as next friends, bring this case pursuant to 42 U.S.C. 1983, challenging the constitutionality of a policy of Churubusco High School, administered by Mr. Couch as the principal, which they contend violates their First Amendment rights. In the motion presently before the court, T.V. and M.K. seek the certification of a class composed of students subject to the allegedly unconstitutional policy. But because the typicality and commonality requirements of Rule 23(a) have not been met, the motion for class certification will be denied.

The amended complaint sets out the following version of the facts underlying T.V. and M.K.'s challenge to the policy. During the summer of 2009, T.V. and M.K. attended a sleepover with friends who were also students at Churubusco High. Amended Complaint [DE 43], p. 4. During the sleepover, the girls took pictures of themselves, including pictures in which they "pretend[ed] to kiss or lick a phallus shaped multi-colored lollipop that they had purchased." *Id.* Both T.V. and M.K. posted the pictures on their MySpace pages. *Id.* at 5. Someone saw the photos, printed them out and gave them to Principal Couch. After reviewing the photos and consulting the school's Student Handbook, Principal Couch suspended T.V. and M.K. from extra-curricular activities for the entire 2009-2010 school year. *Id.* His decision was made prior to the commencement of the school year....

T.V. and M.K. contend that their First Amendment rights of free speech are violated by the policy, because it allows the principal "to bar students from athletics and other extra-curricular activities for expressive activity which takes place off of school grounds and has no effect or impact on the school itself."...

Plaintiffs cite to a number of cases that stand for the proposition that a school district violates the First Amendment when it punishes out of school expressive activity that does not substantially disrupt the operations of the school....

T.V. and M.K. essentially contend that their punishment under the policy violated their constitutional rights of freedom of expression. Resolution of this challenge on the merits will ultimately require determinations such as the nature of the allegedly expressive conduct, whether and to what extent that conduct is protected under the First Amendment, whether the punishment was meted out because the conduct or expression "reflected discredit" upon the school or because it created a "disruptive influence" within the meaning of the policy, and whether the conduct or expression actually did reflect discredit or create a disruptive influence....

Here, for the reasons noted above, I conclude that class certification is not appropriate for failure of the requirements of Rule 23(a). I note, in addition, however, that were the Seventh Circuit to resolve its apparent internal historical difference of opinion on the "need" criterion in favor of what is by now the majority view, that consideration would also weigh against class certification here. A determination in favor of T.V. and M.K., that school authorities could not constitutionally punish out-of-school expressive conduct on grounds of disrepute to the school, would have school-wide impact going forward, without the need for a class-action dimension to this litigation.



For all the foregoing reasons, plaintiffs' original and amended motions for class certification [DE 4 & 45] are denied.

SO ORDERED.

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Supporting Question 4

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Source D: Judge Steven V. Wilson, district court ruling that protects student speech on social media, *J. C. v. Beverly Hills United School District* (excerpts), 2010

I. INTRODUCTION

Plaintiff J.C. brought this action against the Beverly Hills Unified School District, and school administrators Erik Warren, Cherryne Lue-Sang, and Janice Hart (“the individual Defendants”), for the alleged violation of her constitutional rights. Plaintiff seeks injunctive relief, as well as damages against the individual defendants, and nominal damages in the amount of \$1.00 against the School District....

FACTS

The following material facts are undisputed. Plaintiff J.C. was a student at Beverly Vista High School (“the School”) in May 2008. Individual Defendant Erik Warren (“Warren”) is, and at all relevant times was, the principal of the School. Individual Defendants Cherryne Lue-Sang (“Lue Sang”) and Janice Hart (“Hart”) are, and at all relevant times, were the administrative principal and counselor at the School, respectively.

On the afternoon of Tuesday, May 27, 2008 the Plaintiff and several other students gathered at a local restaurant. While at the restaurant, Plaintiff recorded a four-minute and thirty-six second video of her friends talking. The video was recorded on Plaintiff’s personal video-recording device. (*Id.*) The video shows Plaintiff’s friends talking about a classmate of theirs, C.C. (PSUF 8.) One of Plaintiff’s friends, R.S., calls C.C. a “slut,” says that C.C. is “spoiled,” talks about “boners,” and uses profanity during the recording. (Defendants’ Statement of Uncontroverted Facts in Support of Defendants’ Motion for Summary Adjudication 7; Declaration of J.C. in Support of Pl.’s Mot. For Summ. Adjudication [“J.C. Supporting Decl.”], Exh. 1 [YouTube video].) R.S. also says that C.C. is ‘the ugliest piece of shit I’ve ever seen in my whole life.’ (J.C. Supporting Decl., Exh. 1 [YouTube video].) During the video, J.C. is heard encouraging R.S. to continue to talk about C.C., telling her to “continue with the Carina rant.”...

In the evening on the same day, Plaintiff posted the video on the website “YouTube” from her home computer. ... While at home that evening, Plaintiff contacted 5 to 10 students from the School and told them to look at the video on YouTube. She also contacted C.C. and informed her of the video....C.C. told Plaintiff that she thought the video was mean....Plaintiff asked C.C. whether she would like Plaintiff to take the video off the website, but C.C. asked her to keep the video up....

Plaintiff estimates that about 15 people saw the video the night it was posted....

On May 28, 2008, at the start of the school day, Plaintiff overheard 10 students discussing the video on campus.... C.C. was very upset about the video and came to the School with her mother on the morning of May 28, 2008 so they could make the School aware of the video. C.C. spoke with school counselor Hart about the video. She was crying and told Hart that she did not want to go to class....C.C. said she faced “humiliation” and had “hurt feelings.”Hart spent roughly 20–25 minutes counseling C.C. and convincing her to go to class....C.C. did return to class, and the record indicates that she likely missed only part of a single class that morning....

School administrators then investigated the making of the video. Lue-Sang viewed the video while on the school campus....She called Plaintiff to the administrative office to write a statement about the video.... Lue-Sang and Hart also demanded that Plaintiff delete the video from YouTube, and from her home computer.... School administrators questioned the other students in the video, including R.S., V.G., and A.B., and asked each of them to make a written



statement about the video....R.S.'s father came to the School and watched the video with R.S. on campus....He then took R.S. home for the rest of the day....

Lue-Sang and Hart also contacted principal Warren regarding the video....Warren then contacted Amy Lambert, the Director of Pupil Personnel for the District, regarding whether the School could take disciplinary action against Plaintiff for posting the video on the Internet....Lambert discussed the situation with attorneys and advised Warren that Plaintiff could be suspended....Plaintiff was suspended from school for two days. No disciplinary action was taken against the other students in the video....

B. Violation of First Amendment Rights

Plaintiff contends that the School District and the school administrators, Hart, Lue-Sang, and Warren, violated her First Amendment rights by punishing her for making the YouTube video and posting it on the Internet. Plaintiff argues that the School had no authority to discipline her because her conduct took place entirely outside of school. To resolve this issue, the Court must first determine the scope of a school's authority to regulate speech by its students that occurs off campus but has an effect on campus.

2. Application of the Student Speech Precedents by Lower Courts

...the Court concludes that the Supreme Court precedents apply to Plaintiff's YouTube video, and that *Tinker* governs the present dispute. Clearly, *Hazelwood* and *Morse* do not apply. No one could argue that the YouTube video bore the "imprimatur" of the School, like the school newspaper in *Hazelwood*. Further, the YouTube video was not made or transmitted in connection with a school-sponsored event and does not condone illegal drug use; thus, *Morse* does not apply....

In sum, the Court finds that the You-Tube video clearly falls into the "all other speech" category, governed by *Tinker*. See *LaVine*, 257 F.3d at 989. The final issue for the Court to resolve, therefore, is whether J.C.'s speech created, or was reasonably likely to have created, a substantial disruption of school activities.

3. Substantial Disruption

The Supreme Court in *Tinker* established that a school can regulate student speech if such speech "materially and substantially disrupt[s] the work and discipline of the school." 393 U.S. at 513, 89 S.Ct. 733. This standard does not require that the school authorities wait until an actual disruption occurs; where school authorities can "reasonably portend disruption" in light of the facts presented to them in the particular situation, regulation of student expression is permissible. *Id.* at 514, 89 S.Ct. 733; *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir.2001) ("*Tinker* does not require school officials to wait until disruption actually occurs before they may act."). As the Sixth Circuit recently explained, "[s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place." *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir.2007).

Although an actual disruption is not required, school officials must have more than an "undifferentiated fear or apprehension of disturbance" to overcome the student's right to freedom of expression. *Tinker*, 393 U.S. at 508, 89 S.Ct. 733. In other words, the decision to discipline speech must be supported by the existence of *specific facts* that could reasonably lead school officials to forecast disruption. *LaVine*, 257 F.3d at 989. Finally, school officials must show that the regulation or prohibition of student speech was caused by something more than "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509, 89 S.Ct. 733. As the Supreme Court explained: "Any word spoken in a class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk." *Id.* (citing *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949))....

b. Application to the Current Record on Summary Judgment

Based on the undisputed facts, and viewing all reasonable inferences in favor of the Defendants, the Court finds that no reasonable jury could conclude that J.C.'s YouTube video caused a substantial disruption to school activities, or that there was a reasonably foreseeable risk of substantial disruption as a result of the YouTube video.

I. Actual Disruption

...In sum, Defendants have not presented any evidence demonstrating that they were pulled away from their ordinary activities as a result of the YouTube video.

For the *Tinker* test to have any reasonable limits, the word “substantial” must equate to something more than the ordinary personality conflicts among middle school students that may leave one student feeling hurt or insecure. Likewise, the Court finds that the mere fact that a handful of students are pulled out of class for a few hours at most, without more, cannot be sufficient. *Tinker* establishes that a material and substantial disruption is one that affects “the work of the school” or “school activities” in general. *See Tinker*, 393 U.S. at 509, 514, 89 S.Ct. 733. Thus, while the precise scope of the substantial disruption test is still being sketched by lower courts, where discipline is based on actual disruption (as opposed to a fear of pending disruption), the School’s decision must be anchored in something greater than one individual student’s difficult day (or hour) on campus...

IV. CONCLUSION

For the reasons stated above, Plaintiffs Motion for Summary Adjudication as to her First and Second causes of action for violation of section 1983 is GRANTED.

The individual Defendants, Hart, Lue-Sang, and Warren's Motion for Summary Adjudication on the issue of qualified immunity as to the First Cause of Action is GRANTED.

An order regarding Plaintiff’s Motion for Summary Adjudication as to the due process claim will follow shortly.

IT IS SO ORDERED.

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