Bullying in Public Schools: The Intersection Between the Student's Free Speech Rights and the School's Duty to Protect

**by Elizabeth M. Jaffe*
and Robert J. D'Agostino****

I. INTRODUCTION

The 2009 case of eleven-year-old Jaheem Herrera's suicide in Georgia, which resulted after alleged repeated verbal bullying by his classmates,[1] presents an interesting question regarding whether public schools must take action to prevent this type of behavior even if it does not disrupt the classroom. The issue to be addressed is not what speech schools can censor but whether schools must censor or prevent certain speech that has a harmful effect on the educational environment for a specific student or a specifically identifiable group of students.

If a public school student has a civil or liberty right to his education,[2] then it may be concluded that there is a duty imposed on the provider of that education to force students not to interfere with that right.

---

* Associate Professor of Law, Atlanta's John Marshall Law School. Emory University (B.A., magna cum laude, 1992); Washington University School of Law (J.D., 1995). Member, State Bar of Georgia.

** Professor of Law, Atlanta's John Marshall Law School. Columbia University (A.B., 1964; M.A., 1966); Emory University School of Law (J.D., 1971). Member, State Bar of Georgia.

The Authors would like to thank Ken Lewis, Richard Bentley, George Dean, and Malloree Collins for their assistance with this Article.

1. Celeste Lawrence, *Jaheem Hererra, 11, Laid to Rest*, ATLANTA J. CONST., Apr. 28, 2009, http://www.ajc.com/metro/content/metro/dekalb/stories/2009/04/28/jahem_laid_to_rest.html.

2. *See infra* note 315.

Arguably, that duty would require the prevention of certain speech, regardless of whether the speech is true or otherwise traditionally protected as part of a "democratic" exchange of ideas if its purpose or effect is harassment or verbal bullying or if it constitutes an attack on an individual student's core characteristics.[3]

Courts often aver in the abstract that student speech cannot be restrained unless the speech is reasonably likely to "interfere with the work of the school or impinge on the rights of other[s]."[4] Is there then a right to be let alone that includes a right to be free from verbal assaults based upon characteristics such as race, religion, or sexual orientation? This protection presumably does not or should not include critiques of behavior, clothing choice, values, and a right not to be offended unless the purpose of such speech is to inflame, disrupt, or directly attack a particular student for the purpose of inflicting psychological harm.[5] Whether the speech is intended to harm may be determined by analyzing the language actually used in the context in which it is used rather than by looking solely at the idea conveyed. Hence, both content and context are relevant for any speech analysis.

The Supreme Court of the United States classifies school speech as follows: (1) speech that is to be tolerated; (2) speech that is disruptive of the educational mission; (3) speech that is vulgar or offensive and hence inappropriate; or (4) speech that interferes with the rights of another student or students, such as language that disparages a person on the basis of core characteristics.[6] These classifications come from three now well-known cases: "(1) vulgar, lewd, obscene, and plainly offensive speech . . . is governed by *Fraser*, (2) school-sponsored speech . . . is governed by *Hazelwood*, and (3) all other speech . . . is governed by *Tinker*."[7] In recognizing these areas of student speech, courts have attempted to reach "a balance between the free speech rights of students and the special need to maintain a safe, secure and effective learning environment."[8]

---

3. *See infra* text accompanying notes 194-202.
4. *See, e.g.*, Gold v. Wilson Cnty. Sch. Bd. of Educ., 632 F. Supp. 2d 771, 789 (M.D. Tenn. 2009).
5. *See infra* text accompanying notes 189-93.
6. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986). *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
7. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1176-77 (9th Cir. 2006) (footnotes omitted), *vacated as moot*, 549 U.S. 1262 (2007).
8. *Id.* at 1176.

A. Bethel School District No. 403 v. Fraser

In *Bethel School District No. 403 v. Fraser*,[9] high school student Matthew Fraser gave "a speech nominating a fellow student for [a] student elective office" position at a voluntary school assembly held during school hours.[10] Throughout the speech, "Fraser referred to his [fellow student] in terms of an elaborate, graphic, and explicit sexual metaphor."[11] After Fraser delivered the speech, the assistant principal met with him and notified him that the speech violated the school's "disruptive-conduct rule," which prohibited conduct that interfered with the educational process, "including the use of obscene, profane language or gestures."[12] Fraser was given a chance to explain his conduct and admitted using sexual innuendo. Fraser was suspended, and after he participated in the school's grievance process, Fraser's father filed a suit as guardian ad litem in the United States District Court for the Western District of Washington, alleging a violation of Fraser's right to freedom of speech.[13]

The district court concluded that the school's sanctions violated the First Amendment, and the "disruptive-conduct rule [was] unconstitutionally vague and overbroad."[14] The United States Court of Appeals for the Ninth Circuit affirmed, holding that Fraser's speech did not have a disruptive effect on the educational process.[15] The court of appeals rejected the school's argument that the school needed to protect the captive audience of students at the assembly from lewd and indecent language.[16] Moreover, the court noted that "the School District's 'unbridled discretion' to determine what discourse is 'decent' would 'increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools.'"[17]

---

9. 478 U.S. 675 (1986).
10. *Id.* at 677.
11. *Id*. at 677-78.
12. *Id.* at 678-79 (internal quotation marks omitted).
13. *Id.*
14. *Id.* at 679.
15. *Id. at* 679-80. The Supreme Court notably remarked in *Fraser* that "[t]he marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals." *Id*. at 680.
16. *Id*. at 680.
17. *Id.* (quoting Fraser v. Bethel Sch. Dist., 755 F.2d 1356, 1363 (9th Cir. 1985)).

In fact, the district court judge in *Fraser* may have taken the holding from *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*[18] a bit too literally. In *Cornelius* the Supreme Court recognized that regulation of a speaker's access to a nonpublic forum can be based on subject matter "so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."[19] A distinction is viewpoint-based "when it denies access to a speaker solely to suppress the point of view he espouses."[20] The district court judge in *Fraser* may have concluded that the Bethel School District's suppression of vulgar speech was an attempt to impose a set of values regarding "decent" speech on students and ignore the purpose served by the high school assembly forum. Or perhaps the district court judge thought he should decide the purpose served by the forum.

The Supreme Court granted certiorari in *Fraser* and reversed the holding of the court of appeals.[21] The Court recognized that while the First Amendment guarantees wide freedom in matters of public discourse, just because the use of an offensive form of expression may not be prohibited to adults, the same latitude does not necessarily apply to children enrolled in a public school.[22] The Court specifically noted, "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[23] The Court recognized that "[t]he pervasive sexual innuendo in Fraser's speech was . . . offensive to both teachers and students" and considered Fraser's speech to be "acutely insulting to teenage girl students."[24] This decision affirmed the discretionary authority of school officials in the closed forum of a public school to prohibit speech that is not necessarily disruptive.[25] In light of subsequent court decisions, *Fraser* may also be read to allow the censorship of language that the audience may perceive to be offensive, harassing, or demeaning to a group of students–here minor females–based on that group's core characteristics.[26]

Additionally, in *FCC v. Pacifica Foundation*,[27] the Supreme Court specifically "recognized an interest in protecting minors from exposure

18. 473 U.S. 788 (1985).
19. *Id.* at 806.
20. *Id.*
21. *Fraser*, 478 U.S. at 680.
22. *Id.* at 682.
23. *Id.* at 683.
24. *Id*.
25. *See id.* at 684.
26. *See id.* at 685-86.
27. 438 U.S. 726 (1978).

to vulgar and offensive spoken language."[28] As such, the Court in *Fraser* concluded the school district was permitted to "impos[e] sanctions upon Fraser in response to his offensively lewd and indecent speech."[29] The Court noted,

> The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as [Fraser's] would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was [certainly] appropriate for the school to disassociate itself to make the point to the [students] that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.[30]

B. Hazelwood School District v. Kuhlmeier

In *Hazelwood School District v. Kuhlmeier*,[31] a high school principal chose to eliminate two pages from the student-written school newspaper because it contained articles dealing with teenage pregnancy and the impact of divorce on students at school. Specifically, the principal was concerned that, even though the story used false names to shield the identity of the pregnant students, other students might still be able to identify them. In addition, the article made reference to sexual activity and birth control, which the principal felt might be inappropriate for the younger students at the school. Because the principal was concerned that there would not be enough time to make the necessary changes to the articles to protect the students before the paper was printed, the principal eliminated the two pages that contained the offending stories.[32]

Suit was filed in the United States District Court for the Eastern District of Missouri on the grounds that the students' First Amendment rights were violated.[33] The district court denied the students' claims, noting that it is permissible for school officials to restrain "student[] speech in activities that are an integral part of the school's educational function . . . so long as their decision has a substantial and reasonable

---

28. *Fraser*, 478 U.S. at 684 (citing *Pacifica Found.*, 438 U.S. at 749-50).
29. *Id.* at 685.
30. *Id.* at 685-86.
31. 484 U.S. 260 (1988).
32. *Id.* at 262-64.
33. *Id.* at 264.

basis."[34] The district court held that "given the small number of pregnant students" at the school and the identifying characteristics of the students noted in the article, the principal's concern was "legitimate and reasonable."[35] The district court was in fact concerned with the effect of the language on the pregnant and younger students and not with its truth or falsity.[36]

The students appealed, and the United States Court of Appeals for the Eighth Circuit reversed the decision of the district court.[37] Despite the newspaper's being "a part of the school adopted curriculum," the court of appeals noted that the newspaper was also part of the public forum.[38] As such, school officials were precluded "from censoring its contents except when necessary to avoid material and substantial interference with school work or discipline."[39] Moreover, the court of appeals recognized that school officials could censor the articles "only if publication of the articles could [result] in tort liability [against] the school," including liability for the torts of libel or invasion of privacy.[40] Concluding that no tort liability could result, the court of appeals held that school officials had violated the students' First Amendment rights.[41]

The school subsequently filed an appeal with the Supreme Court, which reversed the court of appeals.[42] Quoting *Tinker v. Des Moines Independent Community School District*,[43] the Court recognized that while students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," they can be punished if school authorities believe the expression "substantially interfere[s] with the work of the school or impinge[s] upon the rights of

---

34. *Id.* (quoting Kuhlmeier v. Hazelwood Sch. Dist., 607 F. Supp. 1450, 1463 (1985)) (internal quotation marks omitted).
35. *Id*. (quoting *Kuhlmeier*, 607 F. Supp. at 1466) (internal quotation marks omitted).
36. *See id.* at 264-65.
37. *Id.* at 265.
38. *Id.* (quoting Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1373 (8th Cir. 1986)) (internal quotation marks omitted).
39. *Id.* (quoting *Kuhlmeier*, 795 F.2d at 1374-75) (internal quotation marks omitted) ("The Court of Appeals found 'no evidence in the record that the principal could have reasonably forecast that the censored articles or any materials in the censored articles would have materially disrupted classwork or given rise to substantial disorder in the school.'").
40. *Id.* at 265-66.
41. *Id.* at 266.
42. *Id*.
43. 393 U.S. 503 (1969).

other students."[44] This language is important because it clarifies the kinds of potentially disruptive language that may be censored–language that may disrupt the educational experience of students generally, a specific student, or a specifically identifiable group of students.

The Supreme Court specifically noted that student speech inconsistent with the school's "basic educational mission" need not be tolerated even though that same speech could not be censored outside the school setting.[45] The Court recognized that school officials are entitled to exercise control over modes of student expression–such as school newspapers–to make sure students learn the lessons the school activity is designed to teach and that readers are not exposed to inappropriate material.[46] Therefore, in its capacity as publisher of a school newspaper or producer of a school play, a school may "disassociate itself"[47] from both the type of "speech that would substantially interfere with [its] work . . . or impinge upon the rights of other students"[48] and "from speech that is . . . ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[49]

Recognizing that schools must have the ability to implement high standards for student speech that takes place in school, the Supreme Court in *Hazelwood* noted that schools should consider an intended audience's "emotional maturity" when allowing students to speak on sensitive topics.[50] The Court specifically held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[51] Thus, the Court concluded that parents, teachers, and state and local school officials–not the federal courts–are responsible for the education of youths.[52] The First Amendment "require[s] judicial intervention to protect students' constitutional rights" only when a school's decision to censor school-sponsored activities "has no valid

---

44. *Hazelwood*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 506, 509) (internal quotation marks omitted).

45. *Id*. (quoting *Fraser*, 478 U.S. at 685) (internal quotation marks omitted).

46. *Id.* at 271.

47. *Id*. (quoting *Fraser*, 478 U.S. at 685) (internal quotation marks omitted).

48. *Id*. (alteration in original) (quoting *Tinker*, 393 U.S. at 509) (internal quotation marks omitted).

49. *Id*.

50. *Id.* at 272.

51. *Id.* at 273.

52. *Id.*

educational purpose."[53] Thus, the Court's decision in *Hazelwood* provides authority for school officials to ban language that would potentially affect students to the detriment of their education.

C. Tinker v. Des Moines Independent Community School District

The seminal case that heralded the supervisory authority of courts over school administrators was *Tinker v. Des Moines Independent Community School District*.[54] In *Tinker* the Supreme Court held that students were unconstitutionally denied their right to freedom of expression because they were prohibited from wearing black arm bands to school in protest of the Vietnam War.[55] While this case has been fully analyzed in other publications, the subsequent decisions in *Fraser* and *Hazelwood* discussed above can only be read as a retreat from *Tinker's* requirement of imminent disruption.[56]

The Court in *Tinker* recognized "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[57] The Court explained that the "problem lies in the area where students in the exercise of [their] First Amendment rights collide with the rules of the school authorities."[58] Putting aside the disruption issue, exactly what rights was the Court referencing? In *Tinker* the students protesting the Vietnam War "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others."[59] The Court again used language relating to the "rights of others" and "lives of others,"[60] which suggests that schools have a duty to consider the effect of language directed at a specific student or identifiable group of students; thus, school officials must consider the context of the language, not just the content. In short, the very breadth of *Tinker* necessitated the subsequent *Fraser* and *Hazelwood* opinions, which imposed limitations on the rights of students while giving more discretion to school officials, thus somewhat reinvigorating the doctrine of in loco parentis.[61]

---

53. *Id.*
54. 393 U.S. 503 (1969).
55. *Id.* at 514.
56. *See Hazelwood*, 484 U.S. at 272-73; *Fraser,* 478 U.S. at 685-86.
57. 393 U.S. at 507.
58. *Id*.
59. *Id.* at 514.
60. *See id.* at 513-14.
61. For a discussion of the doctrine of in loco parentis, see *Lander v. Seaver*, 32 Vt. 114, 118-19 (1859). In *Lander* the trial court instructed the jury that a schoolmaster's authority

II. Recent Cases Addressing Student Speech

Federal courts, tasked with determining when a student's First Amendment right to free speech may conflict with a school official's discretionary authority to maintain discipline, limit offensive speech, and provide a nonhostile environment, continue to address new issues. As school officials become more fearful of being sued, the issue of what language is permitted in public schools becomes critical, which includes the questions of whether bullying or harassing language can be–and more importantly, must be–restricted. In determining the answer to those questions, the presumption that free speech is a constant, independent of the forum, does not comport with the incoherence of constitutional law standards. What may be protected by the First Amendment in a public square or public college campus is broader than what is protected by the First Amendment in a grade or high school setting, both of which contain captive audiences and serve a particular function.[62] As previously discussed, the free speech rights of students recognized by the Supreme Court in *Tinker v. Des Moines Independent School District*[63] were effectively restricted in *Hazelwood School District v. Kuhlmeier*[64] and *Bethel School District No. 403 v. Fraser*.[65] Moreover, because "speech-related injuries may be grievous and deeply wounding,"[66] school officials may limit the First Amendment free speech rights of a student in a closed forum–such as a public school–when "instances of derogatory and injurious remarks [are] directed at students' minority status such as race, religion, and sexual orientation,"[67] making both the content and context of speech important.

---

is closely related to that of a parent over a child, and as long as the schoolmaster exercised good judgment in correcting a student's misconduct, the schoolmaster should not be held liable for that exercise unless his motives were in bad faith. The trial court further instructed that even if the jury thought the schoolmaster had administered an excessive punishment–one beyond what the jury would have done in a similar situation–he could not be held liable for his error when he acted with good intentions because without the authority to correct students' misconduct, the business of the school could not be carried out. *Id*.

62. *See* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 513-14 (1969).

63. 393 U.S. 503 (1969).

64. 484 U.S. 260, 272-73 (1988).

65. 478 U.S. 675, 685-86 (1986).

66. Stanley Fish, There's No Such Thing as Free Speech . . . and It's a Good Thing Too 109 (1994) (emphasis omitted).

67. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1183 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007).

It is not necessarily of much solace that qualified immunity exists for school officials providing "complete protection for government officials sued in their individual capacities if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[68] "The purpose of [qualified] immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit 'all but the plainly incompetent or one who is knowingly violating the federal law.'"[69]

A. Harper v. Poway Unified School District

Harper v. Poway Unified School District[70] illustrates the current views about expression and student speech permitted in the public school setting. A high school student named Tyler Chase Harper responded to a school sponsored "Day of Silence," which he believed "endorse[d], promote[d] and encourage[d] homosexual activity," by wearing "a T-shirt to school on which 'I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED,' was handwritten on the front and 'HOMOSEXUALITY IS SHAMEFUL Romans 1:27' was handwritten on the back."[71] The day after the "Day of Silence," Harper wore a T-shirt to school that stated, "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" on the front, "while the back [read] the same . . . as before, 'HOMOSEXUALITY IS SHAMEFUL Romans 1:27.'"[72] On that day, Harper was informed by school officials that the T-shirt he was wearing violated the school's dress code, and he was asked to remove the shirt.[73] After Harper refused, he was counseled by the school staff on "ways that he and students of his faith could bring a positive light onto this issue without the condemnation that he displayed on his shirt."[74] The assistant principal explained to Harper that "the school [was not] promoting homosexuality but rather [the 'Day of Silence'] was a student activity trying to raise other students' awareness

---

68. Vinyard v. Wilson, 311 F.3d 1340, 1346 (11th Cir. 2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

69. Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002) (citation omitted) (quoting Willingham v. Loughnan, 261 F.3d 1178, 1187 (11th Cir. 2001)).

70. 445 F.3d 1166 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007).

71. *Id*. at 1171 & n.2. The record does not reflect that any school staff saw the T-shirt on the "Day of Silence." *Id*. at 1171.

72. *Id*. at 1171 (internal quotation marks omitted).

73. *Id.* at 1171-72.

74. *Id*. at 1172 (internal quotation marks omitted).

regarding tolerance in their judgement [sic] of others."[75] The principal explained that he thought the shirt was "inflammatory," that the school wanted to avoid physical altercations like those that occurred in the past, and "that it was not healthy for students to be addressed in such a derogatory manner."[76] One of Harper's teachers also stated to him that the words on the shirt "created a negative and hostile working environment for others."[77] Harper continued to refuse to remove the shirt, and consequently, he was excluded from classes and was required to remain in a school conference room doing homework for the rest of the day.[78] Harper was visited by a deputy sheriff who was already at the school, and although Harper's complaint alleged the reason was to "interrogate" him, the record reflects that the deputy conducted the conversation "simpl[y out of] curiosity . . . to understand the situation."[79]

Later in the day, Ed Giles, an assistant principal who had attended church with Harper's father, spoke with Harper to make sure he was all right.[80] Giles told Harper "he understood 'where he was coming from' but wished that he could 'express himself in a more positive way.'"[81] Giles went on to say that he–Giles himself–"had to 'leave his faith in [the] car,'" and he encouraged Harper to consider other, more positive and nonconfrontational alternatives.[82]

The plaintiff in *Harper* argued that the defendants' actions violated his rights (1) to freedom of speech under the First Amendment to the United States Constitution;[83] (2) to free exercise of religion under the First Amendment;[84] (3) to equal protection under the Fourteenth Amendment;[85] (4) to due process under the Fourteenth Amendment;[86] and (5) under the Establishment Clause of the First Amendment.[87] In analyzing Harper's claims, the Ninth Circuit primarily considered three Supreme Court cases, stating that "[t]his court has identified 'three distinct areas of student speech,' each of which is governed by different

75. *Id.* (third alteration in original).
76. *Id*. (internal quotation marks omitted).
77. *Id.* (internal quotation marks omitted).
78. *Id*.
79. *Id.* at 1172-73 (alteration in original) (internal quotation marks omitted).
80. *Id*. at 1173.
81. *Id*.
82. *Id*. (alteration in original).
83. U.S. CONST. amend. I, cl. 2.
84. U.S. CONST. amend. I, cl. 1.
85. U.S. CONST. amend. XIV, § 1, cl. 4.
86. U.S. CONST. amend. XIV, § 1, cl. 3.
87. U.S. CONST. amend I, cl. 1.

Supreme Court precedent: (1) vulgar, lewd, obscene, and plainly offensive speech which is governed by *Fraser*; (2) school-sponsored speech which is governed by *Hazelwood*; and (3) all other speech which is governed by *Tinker*."[88]

As to the plaintiff's First Amendment free speech claim, the court of appeals relied on *Tinker*, holding that a student's First Amendment right is limited by the public school's "special need to maintain a safe, secure and effective learning environment."[89] In *Tinker* the Supreme Court held that forbidding the wearing of black armbands by students protesting the Vietnam War was an unconstitutional denial of the student's free speech rights since the fear of a disturbance was "undifferentiated," and "apprehension of disturbance is not enough to overcome the right to freedom of expression."[90]

In *Harper* the fear of disturbance was real–not undifferentiated–because some hostile confrontations had occurred on the previous year's "Day of Silence" as well as on the current year's.[91] Further, the school principal stated that Harper told him "he had already been confronted by a group of students on campus and was involved in a tense verbal conversation earlier that morning."[92] Civility was not the issue because the court in *Harper* saw no problem with T-shirts proclaiming "Young Republicans Suck" or "Young Democrats Suck."[93] The actual reason the school was permitted to limit Harper's free speech rights was neither fear of disruption nor deference to the discretion of school authority; rather, it was the court's concurrence with the principal's statement that "any shirt which is worn on campus which speaks in a derogatory manner toward an individual or group of individuals is not healthy for young people."[94] However, the court stipulated that not all such speech could be prohibited.[95] Concluding that condemning homosexual activity–a behavior–was the same as condemning homosexuals–a core characteristic–the court stated, "[W]e limit our holding to instances of derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation" in a closed forum such as a public school.[96] In short, the court disapproved of the self-righteous judgment by a majority directed towards culturally or

88. *Harper*, 445 F.3d at 1176-77 (footnotes omitted).
89. *Id.* at 1176.
90. *Tinker*, 393 U.S. at 508.
91. *See Harper*, 445 F.3d at 1171-72 (internal quotation marks omitted).
92. *Id*. at 1172 (internal quotation marks omitted).
93. *Id.* at 1182 (internal quotation marks omitted).
94. *See id.* at 1182 (internal quotation marks omitted).
95. *See id.* at 1182-83.
96. *Id.* at 1181, 1183.

genetically determined characteristics, stating that "[p]ublic school students who may be injured by verbal assaults on the basis of a core identifying characteristic . . . have a right to . . . 'be secure and to be let alone.'"[97] After stating that "[t]he government is generally prohibited from regulating speech 'when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction,'"[98] the court went on to explain that public schools are "not always governed by the same rules that apply in other circumstances . . . if the speech violates the rights of other students or is materially disruptive."[99]

The Ninth Circuit also cited *Hazelwood* for the proposition that "school[s] need not tolerate student speech that is inconsistent with its basic educational mission."[100] Is that mission to teach students "tolerance in their judgement [sic] of others"[101] or to eliminate religious speech? Harper, after all, was advised to find alternative ways to address the issue.[102] The court of appeals in *Harper* posited that perhaps the mission comes from the focus of the Supreme Court in *Fraser*, which would "permit, and even encourage" public schools to have "discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred."[103] The dissent posited that political disagreement regarding tolerance of homosexuality and the fact that the "Day of Silence" begged a response supplied sufficient reason to allow Harper's T-shirt because it essentially invited political discourse and debate.[104] The court of appeals held, however, that just because there is indeed political disagreement that would be acceptable in an open forum, that disagreement "do[es] not justify students in high schools or elementary schools assaulting their fellow students with demeaning statements: by calling gay students shameful, by labeling black students inferior or by wearing T-shirts saying that Jews are doomed to Hell."[105] The court reasoned, "As long ago as in *Brown v. Board of Education*, the Supreme

---

97. *Id.* at 1178 (quoting *Tinker*, 393 U.S. at 508).

98. *Id*. at 1184 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

99. *Id*. (citing *Tinker*, 393 U.S at 511 (holding that a school may not prohibit one specific opinion unless it shows constitutionally valid reasons for the prohibition)).

100. *Id.* at 1185 (quoting *Hazelwood*, 484 U.S. at 266) (internal quotation marks omitted).

101. *Id*. at 1172 (alteration in original).

102. *Id.* at 1189.

103. *Id*. at 1185 (citing *Fraser*, 478 U.S. at 681).

104. *See id.* at 1196-97 (Kozinski, J., dissenting).

105. *Id*. at 1181 (majority opinion).

Court recognized that '[a] sense of inferiority affects the motivation of a child to learn.'"[106] Moreover, "[i]f a school permitted its students to wear shirts reading, 'Negros: Go Back to Africa,' no one would doubt that the message would be harmful to young black students."[107]

The Ninth Circuit in *Harper* relied explicitly on *Tinker* and did not consider whether the statements on the T-shirt were "'plainly offensive' under *Fraser*."[108] Thus, the court of appeals was evidently concerned with the school's authority to "not tolerate student speech that is inconsistent with its basic educational mission, [] even though the government could not censor similar speech outside the school."[109] The court of appeals further recognized that because

> [p]art of a school's "basic educational mission" is the inculcation of "fundamental values of habits and manners of civility essential to a democratic society[,]" . . . public schools may permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred.[110]

Moreover, just "because a school sponsors a 'Day of Religious Tolerance,' it need not permit its students to wear T-shirts reading, 'Jews Are Christ-Killers' or 'All Muslims Are Evil Doers.'"[111] In other words, the potential effect on fellow students must be considered if the language involves core identifying characteristics.[112]

Furthermore, the Ninth Circuit stated that schools may prohibit speech not involving physical confrontation when such speech "may well impinge[] upon the rights of other students."[113] Because Harper's T-shirt was "a silent, passive expression of opinion" and would ordinarily be protected under *Tinker*'s disruption standard,[114] the court of appeals's focus on the interference with the rights of others intersects

---

106. *Id*. at 1180 (alteration in original) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)).

107. *Id.*

108. *Id*. at 1176 n.14.

109. *Id.* at 1185 (alteration in original) (quoting *Hazelwood*, 484 U.S. at 266) (internal quotation marks omitted); *see also* Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 264 (3d Cir. 2002) (stating that "[s]tudents cannot hide behind the First Amendment to protect their 'right' to abuse and intimidate other students at school").

110. *Harper*, 445 F.3d at 1185 (quoting *Fraser*, 478 U.S. at 681).

111. *Id*.

112. *See id*. at 1186.

113. *Id.* at 1177-78 (quoting Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 539 (1992)) (internal quotation marks omitted).

114. *See Tinker*, 393 U.S. at 508.

sharply with this particular exercise of religious speech.[115] School authorities are apparently given great leeway in deciding if speech based on a student's core characteristics must be restricted if it offends or criticizes other students or their behavior. Arguably, the court of appeals determined that Harper's passive expression of disapproval turned into an active one when it "colli[ded] with the rights of other students."[116]

Harper's T-shirt interfered with the rights of other students because its offensive message was implicitly unavoidable.[117] This speech is an exception to the rule that speech "may not be curtailed simply because the speaker's message may be offensive to his audience."[118] The Ninth Circuit emphasized that its holding did "not suggest that all debate as to issues relating to tolerance or equality may be prohibited."[119] Rather, the only question answered was whether "T-shirts, banners, and other similar items bearing slogans that injure students with respect to their core characteristics" can be prohibited.[120]

Based on the decision in *Harper*, can speech be prohibited if it is offensive to others generally or generally offensive to a particular student? What right is being protected? Self-esteem? The right to be free of a negative emotional reaction to someone else's words? The right never to have a core characteristic–for example, race, ethnicity, gender, and sexual preference–questioned or talked about? The right never to have a behavior associated with a core characteristic commented on? Perhaps the Supreme Court's holding in *Morse v. Frederick*[121] provides some guidance for these questions.

B. Morse v. Frederick

The most recent direction from the Supreme Court on student free speech can be found in *Morse v. Frederick*.[122] In *Morse* a high school student filed suit, alleging his First Amendment rights had been violated

---

115. *Harper*, 445 F.3d at 1178.

116. *Id*. (quoting *Tinker*, 393 U.S. at 508) (internal quotation marks omitted).

117. *See id.*; *see also* Frisby v. Schultz, 487 U.S. 474, 487 (1988) (holding that "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech"); Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 n.6 (1975) (noting that courts have suggested offensive language may be prohibited when directed at a captive audience).

118. Hill v. Colorado, 530 U.S. 703, 716 (2000).

119. *Harper*, 445 F.3d at 1186.

120. *Id.*

121. 551 U.S. 393 (2007).

122. 551 U.S. 393 (2007).

because he was suspended from school for waving a banner that stated "BONG HiTS 4 JESUS" at an outdoor, off-campus, school-sponsored, and school-supervised event.[123] The United States District Court for the District of Alaska granted the principal's motion for summary judgment, ruling that the principal had not infringed on Frederick's free speech rights.[124] The Ninth Circuit, despite concluding that "the banner expressed a positive sentiment about marijuana use," reversed the finding of the district court.[125] The court concluded that the principal punished Frederick without demonstrating that Frederick's speech threatened substantial disruption, and his First Amendment rights had therefore been violated.[126]

The Supreme Court granted certiorari and reversed the Ninth Circuit.[127] The question before the Court was "whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[128] Quoting *Tinker,* the Court recognized that students and teachers have First Amendment rights in the school setting.[129] The school's interest in avoiding the unpleasantness associated with an unpopular viewpoint "was not enough to justify banning 'a silent, passive expression of opinion, unaccompanied by any disorder or disturbance.'"[130]

The Supreme Court then referenced its holding in *Fraser*, in which the Court concluded school officials did not violate a student's First Amendment rights by suspending him when he used an elaborate, explicit sexual metaphor at a school assembly.[131] Recognizing "[t]he mode of analysis employed in *Fraser* [was] not entirely clear," the Court reiterated two basic principles: (1) the holding in *Fraser* recognizes that the rights of students in school are not coextensive with those of adults in other settings, and (2) "the mode of analysis set forth in *Tinker* is not absolute."[132] The Court also noted that if Fraser's speech had occurred

---

123. *Id.* at 396-97, 399 (internal quotation marks omitted).

124. *Id.* at 399.

125. *Id.*

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

127. *Id*. at 400, 410.

128. *Id.* at 403.

129. *Id.* (quoting *Tinker*, 393 U.S. at 506)

130. *Id*. at 404 (quoting *Tinker*, 393 U.S. at 508). *But cf.*, *Harper*, 445 F.3d at 1171, 1177-78 (holding that a student's wearing of a T-shirt bearing the slogan "HOMOSEXUALITY IS SHAMEFUL" impinged upon rights of other students and could be restricted) (internal quotation marks omitted).

131. *Morse*, 551 U.S. at 404 (quoting *Fraser*, 478 U.S. at 678).

132. *Id.* at 404-05.

outside of the school arena, the speech would have been protected.[133] Additionally, the Court recognized that it did not use the "substantial disruption" analysis set forth in *Tinker* in analyzing *Fraser*.[134] The Court also referenced its holding in *Hazelwood*, in which the Eighth Circuit analyzed the case under *Tinker* and ruled in favor of the students because there was no evidence of material disruption.[135] In *Morse* the Court reversed the Ninth Circuit and reiterated its holding from *Hazelwood*–a student's First Amendment rights are not violated when school officials exercise "control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[136]

However, the Supreme Court in *Morse* noted that *Hazelwood* did not apply because the banner was not school-sponsored, but the Court acknowledged that its decision in *Hazelwood* shows that the holding from "*Tinker* is not the only basis for restricting student speech."[137] The Court drew on the principles applied in student speech cases recognizing that while students "do not shed their constitutional rights . . . at the school-house gate," deterring drug use by students in school is an important–and perhaps even compelling–interest.[138] Moreover, the special setting of the school environment, coupled with "the governmental interest in stopping student drug abuse," permits "schools to restrict student expression that they reasonably regard as promoting illegal drug use."[139] While *Tinker* requires more than an apprehension of disturbance or a desire to avoid discomfort associated with an unfavorable viewpoint, the Court distinguished the banner in *Morse* because the prevention of drug abuse "extends well beyond an abstract desire to avoid controversy."[140] Recognizing school officials have a difficult and important job, the Court held that once the principal saw Frederick's banner promoting illegal drug use, she was permitted to restrict the student's speech as it was in violation of school policy which prohibited the advocation of illegal drug use.[141] The Court concluded that schools are not required under the First Amendment to tolerate student speech at school events that contributes to the dangers of illegal

---

133. *Id.* at 405.

134. *Id.* (quoting *Tinker*, 393 U.S. at 514) (internal quotation marks omitted).

135. *Id.* (citing *Hazelwood*, 484 U.S. at 265).

136. *Id.* (quoting *Hazelwood*, 484 U.S. at 273).

137. *Id.* at 405-06.

138. *Id.* at 406-07 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995)) (internal quotation marks omitted).

139. *Id.* at 408.

140. *Id.* at 408-09 (citing *Tinker*, 393 U.S. at 508-09).

141. *Id.* at 409-10.

drug use.[142] More generally, the Court seemed to recognize that it had previously gone far enough, perhaps too far, in limiting the discretionary authority of school officials to regulate student speech.[143]

III. STUDENT SPEECH

A. Smith v. Greene County School District

In *Smith v. Greene County School District*,[144] a student, after being reprimanded for an incident on the playground, wore a shirt to school that stated "KIDS HAVE CIVIL RIGHTS TOO" on the front and "EVEN ADULTS LIE" on the back.[145] The student's mother affixed the lettering to the T-shirt in response to the student's belief that he had been treated unfairly.[146] The student was suspended after the principal found the student to be "disruptive, unresponsive, surly, and instigating feelings of discord."[147] The student, through his mother, brought an action in the United States District Court for the Middle District of Georgia, alleging the suspension violated his free speech rights.[148]

The district court held that the suspension did not violate the student's First Amendment right to free speech.[149] The court recognized that the disruption the student "caused by wearing the shirt was the final act of defiance in a series of acts" that led to Smith's suspension.[150] Applying the holding in *Tinker v. Des Moines Independent Community School District*,[151] the court recognized that without facts that could lead a school official to reasonably "forecast substantial disruption" or interference with school activities, "[i]t is only where school officials reasonably believe that a student's uncontrolled exercise of expression might 'substantially interfere with the work of the school or impinge upon the rights of other students' that they may restrict such expression."[152]

---

142. *Id*. at 410.
143. *See id.* at 409.
144. 100 F. Supp. 2d 1354 (M.D. Ga. 2000).
145. *Id.* at 1357.
146. *Id.*
147. *Id.* at 1356, 1360 (internal quotation marks omitted).
148. *See id.* at 1356, 1361-62.
149. *Id*. at 1363.
150. *Id.*
151. 393 U.S. 503 (1969).
152. *Smith*, 100 F. Supp. 2d at 1363-64 (quoting *Tinker*, 393 U.S. at 509).

The court then distinguished the facts in *Tinker* from those in *Smith* because in *Tinker* the students were suspended for nothing more than wearing black arm bands in protest of the Vietnam War.[153] In contrast, the suspension in *Smith* resulted after a number of acts of defiance, the final one being the wearing of the shirt.[154] Thus, the district court in *Smith* concluded that the school officials properly exercised their authority in controlling conduct at school.[155] Specifically, noting this was not "one of those rare [situations] when federal courts should 'intervene in the resolution of conflicts that arise in the daily operation of school systems,'" the court did not find a violation of Smith's First Amendment right to free speech.[156]

B. Bullying or First Amendment Protected Student Speech

On April 16, 2009, eleven-year-old Jaheem Herrera hung himself with a belt in the closet of his apartment after allegedly being verbally bullied by his classmates at Dunaire Elementary School in DeKalb County, Georgia.[157] According to Jaheem's mother, she repeatedly complained to school officials that Jaheem was being threatened and teased by his classmates.[158] Specifically, according to Jaheem's step-father, Jaheem was repeatedly called "gay" and "a snitch."[159] Jaheem's mother claims she went to the school six or seven times to discuss this with school officials. Unfortunately, the alleged bullying continued, and Jaheem's family now contends he committed suicide because he was bullied in school.[160]

The DeKalb County School System arguably uses one of the finest student codes of conduct in the country, and it is often cited as an example for other schools to follow.[161] Whether the acts experienced by Jaheem in 2009 constitute bullying as defined by the 2010-2011 DeKalb County School System's Code of Student Conduct (Code of

---

153. *Id*. at 1364.

154. *Id.*

155. *Id.*

156. *Id*. (quoting Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 864 (1982)).

157. Lawrence, *supra* note 1.

158. Kristina Torres, *Dekalb School's Final Report: Bullying Not Key Factor in Boy's Death*, ATLANTA J. CONST., Aug. 26, 2009, http://www.ajc.com/news/dekalb/dekalb-schools final-report-124646.html?printArticle=y.

159. Gracie Bonds Staples, *Bullies at School Took Boy's Life, Family Says*, ATLANTA J. CONST., Apr. 22, 2009, http://www.ajc.com/metro/content/news/stories/2009/04/22/bully0422 .html.

160. *Id*.

161. *Id.*

Student Conduct)[162] raises another question.[163] The Code of Student Conduct now defines bullying, pursuant to the 2010 amendments to section 20-2-751.4 of the Official Code of Georgia Annotated (O.C.G.A.)[164] as follows:

> [A]n act which occurs on school property, on school vehicles, at designated school bus stops, or at school related functions or activities, or by use of data or software that is accessed through a computer, computer system, computer network, or other electronic technology of a local school system, that is:
> (1) Any willful attempt or threat to inflict injury on another person, when accompanied by an apparent present ability to do so;
> (2) Any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm; or
> (3) Any intentional written, verbal, or physical act, which a reasonable person would perceive as being intended to threaten, harass, or intimidate, that:
> (A) Causes another person substantial physical harm within the meaning of Code Section 16-5-23.1 or visible bodily harm as such term is defined in Code Section 16-5-23.1;
> (B) Has the effect of substantially interfering with a student's education;
> (C) Is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or
> (D) Has the effect of substantially disrupting the orderly operation of the school.[165]

While O.C.G.A. § 20-2-751.4 provides a broad definition of bullying, O.C.G.A. § 20-2-145[166] focuses on the school's responsibility to develop a program to encourage character development among its students and defines positive character traits to include "respect for the creator," "respect for others," "kindness," "compassion," and "tolerance."[167]

---

162. DEKALB COUNTY SCHOOL SYSTEM, CODE OF STUDENT CONDUCT (2010-2011).

163. Bullying is defined in O.C.G.A. § 20-2-751.4 (2009), which was in effect at the time of Jaheem's suicide, as follows: "(1) Any willful attempt or threat to inflict injury on another person, when accompanied by an apparent present ability to do so; or (2) Any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm."

164. O.C.G.A. § 20-2-751.4 (Supp. 2010). This section was amended in 2010 to add an introductory paragraph regarding the scope of the definition of bullying and parts (3)(A)-(D) were also added. Ga. S. Bill 250, Reg. Sess., 2010 Ga. Laws 516 (codified as amended at O.C.G.A. § 20-2-751.4 (Supp. 2010)).

165. O.C.G.A. § 20-2-751.4 (Supp. 2010); *see also* DEKALB COUNTY SCHOOL SYSTEM, CODE OF STUDENT CONDUCT 17, 31.

166. O.C.G.A. § 20-2-145 (2009).

167. *Id.*

These traits dovetail rather well with the Code of Student Conduct's prohibition of "harassment."[168] Additionally, the Code of Student Conduct says, "A student shall not verbally threaten and/or intimidate teachers, administrators, bus drivers, other school personnel, other students, or persons attending school-related functions, with or without the use of physical contact" if doing so causes a "reasonable [person] fear of immediate bodily harm (including bullying . . .)."[169] Even "discourteous or . . . inappropriate language, behavior or gestures, including vulgar/profane language" is prohibited by the Code of Student Conduct.[170] The Code of Student Conduct even goes as far as listing "insulting comments about sexual orientation" as sexual orientation harassment and further states that "[t]he DeKalb School System will not tolerate bullying and other forms of harassment and, therefore, reserves the right to punish students after the first incident and upon a finding of guilt."[171] Thus, the Code of Student Conduct does not merely forbid bullying in the commonly used sense but also forbids "other forms of harassment."[172] Could the DeKalb County School officials be suggesting that character development is a school responsibility despite the assertion from *Tinker* that "state-operated schools may not be enclaves of totalitarianism"?[173] Even with *Tinker*, what might "substantially interfere with the work of the school or impinge upon the rights of other students"[174] may well be judged by the effect it has on others rather than by its actual content unless that content is inconsistent with preventing harassment and intimidation.

In *West v. Derby Unified School District*,[175] the context of student speech was an issue when the student "drew a picture of the Confederate flag during class in violation of the school district's harassment and intimidation policy."[176] Based upon past events of racial tension in the school district, the United States Court of Appeals for the Tenth Circuit recognized the school "had reason to believe that a student's display of the Confederate flag might cause disruption and interfere with the

---

168. *Compare id., with* DEKALB COUNTY SCHOOL SYSTEM, CODE OF STUDENT CONDUCT at 23, 31.

169. DEKALB COUNTY SCHOOL SYSTEM, CODE OF STUDENT CONDUCT at 17.

170. *Id*. at 18.

171. *Id*. at 20, 23, 31.

172. *Id*. at 20.

173. 393 U.S. at 511.

174. *Id*. at 509.

175. 206 F.3d 1358 (10th Cir. 2000).

176. *Id.* at 1365.

rights of other students."[177] As in *Harper v. Poway Unified School District*,[178] there was not an imminent threat of violence in *West*.[179]

Returning to the Code of Student Conduct, the issue remains whether harassing speech without the threat–express or implied–of physical harm is preventable by school officials either as a practical or legal matter. Moreover, do students have a cognizable, enforceable right to be left alone and, in essence, not be harassed? While the Anti-Defamation League's Public School Initiative "No Place for Hate"[180] seeks to train faculty and students about diversity and accepting differences, this training might be seen as an anti-harassment policy that goes beyond what schools can otherwise censor. As such, what constitutes "hate speech" seems an ever changing and expanding area as increasing emphasis is placed on the effect of speech on the listener rather than on the content of the speech itself.

For example, in addressing the implications of a city including a nativity scene in its Christmas display, Justice O'Connor noted in her concurrence in *Lynch v. Donnelly*,[181] "The central issue in this case is whether [the City] has endorsed Christianity by its [actions]. To answer that question, we must examine both what [the City] intended to communicate . . . and what message the City's display actually conveyed."[182] Must the government representative be charged with knowing the psychological effect of language used by students when referring to other students? For what purpose should such language be forbidden? And is there a different standard if the language is directed at a specific student rather than a group of students? After all, the Supreme Court found no problem with T-shirts proclaiming "Young Republicans Suck" or "Young Democrats Suck."[183] The Court, however, did find a problem with derogatory remarks made toward gay students because the remarks were injurious and directed at a particular student's minority status.[184]

In *Saxe v. State College School District*,[185] a case decided after *Tinker, Bethel School District No. 403 v. Fraser,*[186] and *Hazelwood*

---

177. *Id.* at 1366.
178. 445 F.3d 1166 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007).
179. *See* 206 F.3d at 1366.
180. *See* ANTI-DEFAMATION LEAGUE, NO PLACE FOR HATE: CLASSROOM RESOURCE GUIDE (2009).
181. 465 U.S. 668 (1984).
182. *Id.* at 690.
183. *Harper*, 445 F.3d at 1182.
184. *See id.* at 1182-83; *see also supra* text accompanying notes 71-91.
185. 240 F.3d 200 (3d Cir. 2001).
186. 478 U.S. 675 (1986).

School District v. Kuhlmeier,[187] the United States Court of Appeals for the Third Circuit held that the anti-harassment policy adopted by the school district was overly broad and therefore violated the First Amendment rights of the students.[188] The policy asserted that its goal was to "provid[e] all students with a safe, secure, and nurturing school environment" and admonished "that [d]isrespect among members of the school community is unacceptable behavior which threatens to disrupt the school environment and well being of the individual."[189] The policy specifically defined harassment as

> verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment. . . .
> . . . Harassment can include any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the characteristics described above. Such conduct includes, but is not limited to, unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation of written material or pictures.[190]

The examples of harassment set forth by the school district in *Saxe* went well beyond verbal or physical conduct based on core or immutable characteristics–such as gender, sexual orientation, race, color, religion, ethnicity, disability, and intellect–by including "clothing, appearance, hobbies and values, and social skills."[191] The court noted,

> Insofar as the policy attempts to prevent students from making negative comments about each others' "appearance," "clothing," and "social skills," it may be brave, futile, or merely silly. But attempting to proscribe negative comments about "values," as that term is commonly used today, is something else altogether. By prohibiting disparaging speech directed at a person's "values," the Policy strikes at the heart of moral and political discourse–the lifeblood of constitutional

---

187. 484 U.S. 260 (1988).
188. *Saxe*, 240 F.3d at 217.
189. *Id*. at 202 (second alteration in original) (internal quotation marks omitted).
190. *Id.* at 202-03.
191. *Id.* at 210 (internal quotation marks omitted); *see also* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 964 (N.D. Cal. 2010) (finding that sexual orientation is an immutable characteristic).

> self government (and democratic education) and the core concern of the First Amendment.[192]

Perhaps this case is analogous to the ever memorable incident at Columbine wherein much of what the murderers–Eric Harris and Dylan Klebold–claimed as harassment and motivation for their rampage was the persistent teasing about their clothing, hairstyles, and other behaviors not generally under the school's control but certainly under the perpetrators control.[193]

In an opinion that more closely adhered to the substantial disruption standard in *Tinker*, the Third Circuit in *Saxe* recognized that restricting speech based solely on its secondary or emotive effect rather than as a prelude to forbidden behavior is impermissible under the First Amendment.[194] It is not the expression that is prohibited but the "*non-expressive* qualities" that promote an unlawful end such as discrimination.[195] Citing *Boos v. Barry,*[196] the court of appeals reasoned that

> [t]he Supreme Court has made it clear, however, that the government may not prohibit speech under a "secondary effects" rationale based solely on the emotive impact that its offensive content may have on a listener: "Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton* . . . . The emotive impact of speech on its audience is not a 'secondary effect.'"[197]

The court of appeals in *Saxe* further recognized that a restriction of expressive speech based on the audience's reaction is not content-neutral and cannot be defined "as a mere 'time, place, and manner' regulation."[198] Thus, the court of appeals arguably backed off the captive audience argument, an interesting result in light the *Harper* and *West* opinions.

In *Saxe* the students objecting to the anti-harassment statute wanted to be free "to speak out about the sinful nature and harmful effects of homosexuality," to discuss their religious objections, and to distribute religious literature.[199] The Third Circuit stated that

---

192. *Saxe*, 240 F.3d at 210.

193. *See* Nancy Gibbs & Timothy Roche, *The Columbine Tapes*, TIME, Dec. 20, 1999, http://www.time.com/time/printout/0,8816,992873,00.html.

194. *Saxe,* 240 F.3d at 209.

195. *Id.* at 208.

196. 485 U.S. 312 (1988).

197. *Saxe,* 240 F.3d at 209 (quoting *Boos*, 485 U.S. at 321).

198. *Id.*

199. *Id.* at 203.

> prohibiting disparaging speech directed at a person's "values" . . . strikes at the heart of moral and political discourse–the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about "values" may offend is not cause for its prohibition, but rather the reason for its protection: "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'"[200]

The speech addressed by the court of appeals in *Saxe* is distinguishable from that in *Harper* because Harper was only prohibited from demeaning and disparaging his fellow students.[201] In essence, the school had an interest in restricting any student speech when the result harassed or provoked rather than invited discourse, and this type of school censure follows the reasoning of *West*.[202]

In the Georgia case involving Jaheem Herrera, students calling Jaheem a "snitch" and using the term "gay" to denigrate and condemn him is hardly an invitation to discourse. The context–that is, the manner, time, and place–was crucial. After Jaheem's suicide, DeKalb County school officials commenced an internal review surrounding the events, and the attorney representing Jaheem's family filed an intent to sue the DeKalb County School System on May 12, 2009.[203] Some former teachers stated they did not witness the alleged bullying.[204] After conducting an investigation, former Superior Court Judge Thelma Wyatt Cummings Moore concluded that Jaheem's suicide was not the result of wrongdoing by the staff at Dunaire Elementary School.[205] Specifically, the investigation concluded that Jaheem was not bullied more than any other students[206] and that by calling Jaheem "gay," students meant that he was "happy."[207]

With little guidance from the courts, school administrators are left with the conflict between a student's right to free speech and the school's

200. *Id.* at 210 (quoting Texas v. Johnson, 491 U.S. 397, 408-09 (1989)).

201. *Harper*, 445 F.3d at 1186.

202. *See* 206 F.3d 1358.

203. Kristina Torres, *DeKalb Schools Report Aims to Detail Bullying Case Wednesday*, ATLANTA J. CONST., May 19, 2009, http://www.ajc.com/news/dekalb-schools-report-aims 7882.html.

204. *Id*.

205. Torres, *supra* note 203.

206. *Id.*

207. Dyana Bagby, *Governor to Sign Anti-Bullying Bill Today*, GA. VOICE, May 27, 2010, http://thegavoice.com/index.php/blog/politics-menu/441 (internal quotation marks omitted).

interest in maintaining a safe learning environment. In Jaheem Herrera's case, he was allegedly called "gay" and a "snitch" routinely. If the officials at Jaheem's school had suspended the bullying students, would the alleged bullies have claimed that their First Amendment right to free speech had been violated? Also, would a Georgia court apply *Tinker* and require a finding of evidence of a material and substantial interference with school work or discipline? Or would the court, as in *Harper*, consider the use of the word "gay" to be harmful to other students seeking to obtain a fair and equal education?

Perhaps *Zamecnik v. Indian Prairie School District No. 204 Board of Education*[208] can provide some guidance. In *Zamecnik* a group of students professed sincere Christian religious beliefs in protest of a "Day of Silence" sponsored by the school's Gay/Straight Alliance by wearing a T-shirt the day after the "Day of Silence" that read "Be Happy, Not Gay."[209] School officials required the students to cross out the "Not Gay" part on the T-shirt and refused to "permit negative statements that are derogatory of homosexuals" to be used.[210] The United States District Court for the Northern District of Illinois concluded that one of the school officials did not violate the student's free speech rights when the official prohibited the student from wearing the T-shirt with the complete slogan.[211] Perhaps the slogan incited rather than invited discourse, thereby making it censorable.[212]

Recognizing the holding in *Morse v. Frederick*,[213] the district court in *Zamecnik* noted that *Morse* "did not change the scope of *Tinker v. Des Moines Independent Community School District* and its progeny."[214] Quoting *Doninger v. Niehoff*,[215] the district court recognized that

> there is "no question that teaching students the values of civility and respect for the dignity of others is a legitimate school objective" and that this objective can be a basis for restricting student speech even when the speech is not vulgar or offensive in the *Fraser* sense, at least (as in the present case) when the student is not otherwise being punished.[216]

But what about speech questioning values?

---

208. 619 F. Supp. 2d 517 (N.D. Ill. 2007).
209. *Id.* at 520 (internal quotation marks omitted).
210. *Id.* (internal quotation marks omitted).
211. *Id.* at 521.
212. *See supra* text accompanying notes 102-07.
213. 551 U.S. 393 (2007).
214. 619 F. Supp. 2d at 524 (citation omitted).
215. 514 F. Supp. 2d 199 (D. Conn. 2007).
216. *Zamecnik*, 619 F. Supp. 2d at 524 (quoting *Doninger*, 514 F. Supp. 2d at 215).

The district court also noted that the decision in *Hazelwood* does not control the outcome in *Morse*; the district court in *Zamecnik* reasoned that to the contrary, *Hazelwood* is "instructive" because Justice Alito's concurrence "expressly states that *Morse* leaves open the question of whether there are any other grounds for restricting speech beyond those recognized in *Tinker, Fraser,* [*Hazelwood*], and now *Morse.*"[217] Thus, the court concluded that the student's First Amendment rights to free speech were not violated.[218] The school official was entitled to restrict the harmful student speech in light of one of the school's educational functions–that is, teaching civility and respect.[219] Restricting the content was permissible, and it left the final decision up to the school officials.[220]

A timeline from *Tinker* (1969) to *Morse* (2007) indicates a retreat by the Supreme Court from a highly restrictive view of public school officials' discretion to a redirection that perhaps school officials–not courts–are better able to judge what restrictions need to be imposed on a rather immature, captive audience seeking–or at least needing–some education, training, and adult guidance. In sum, school officials may censor speech that is (1) reasonably thought to be disruptive or to lead to disruption even if only meant as an invitation to discourse (hence, ordinarily non-censorable); (2) inappropriate in the closed forum of a public school; (3) uncivil, demeaning, or disrespectful; (4) meant to harass, intimidate, or bully regardless of its truth content; or (5) violative of the rights of others. The last is a rather amorphous standard, and the use of the word "rights" implies that schools *must* deal with such speech. It also suggests that speech otherwise not censorable can be censored depending on the context as well as the content of the speech.

Consequently, is there a right to be left alone, to be free from emotional attack, and to be protected from attacks on one's core characteristics? If these rights exist, do school officials have an enforceable duty to protect these rights? Is a failure to do so actionable? Given that the Supreme Court has used the language of "rights" in discussing a school's ability to prohibit certain kinds of student speech, and that states such as Georgia have passed laws suggesting a reinvigoration of the doctrine of parens patriae,[221] has it become

217. *Id*. at 525 (internal quotation marks omitted).
218. *Id*. at 524-25.
219. *Id*.
220. *Id*. at 525.
221. *See* O.C.G.A. § 20-2-751.4 (Supp. 2010).

mandatory, with possible tort liability imposed against noncompliance, for public schools to become in loco parentis?

IV. PUBLIC SCHOOL LIABILITY THEORIES

Assuming that a state's sovereign immunity does not provide a defense or is waived, theories of public school liability for injuries resulting from bullying or harassment may be based on the custodial relationship between school officials and students, which includes a violation of 42 U.S.C. § 1983,[222] the doctrine of in loco parentis, a violation of Title IX,[223] a violation of a student's equal protection rights, or a combination of these theories. Whether a special relationship between a school and its students exists in any specific instance may be found within these theories of liability.

A. 42 U.S.C. § 1983

Under 42 U.S.C. § 1983,

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

In *Fitzgerald v. Barnstable School Committee*,[224] the Supreme Court reversed the court of appeals judgment that affirmed the district court's dismissal of a 42 U.S.C. § 1983 claim that alleged a kindergarten student was repeatedly subjected to bullying of a sexual nature by a third grade student on the school bus.[225] Recognizing "that Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights," the Court held "that § 1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools."[226]

In *Pagano v. Massapequa Public Schools*,[227] a student brought an action under 42 U.S.C. § 1983, alleging seventeen separate incidents of student-on-student harassment during his fifth and sixth grade years of

---

222. 42 U.S.C. § 1983 (2006).
223. 20 U.S.C. §§ 1681-1688 (2006).
224. 129 S. Ct. 788 (2009).
225. *Id.* at 792-93.
226. *Id.* at 797.
227. 714 F. Supp. 641 (E.D. N.Y. 1989).

school.[228] In ruling on the defendant's motion to dismiss, the United States District Court for the Eastern District of New York held that the student's seventeen reported incidents and the school's failure to take preventative action were more than a single act of negligence and may "rise to the level of deliberate indifference to an affirmative duty."[229] The district court analogized *Pagano* to *Doe v. New York City Department of Social Services*,[230] a Second Circuit case, and distinguished *Pagano* from *DeShaney v. Winnebago County Department of Social Services*,[231] a Supreme Court case.[232] Like the victim in *Doe*, the minor in *Pagano* was in foster care, and "the victim and the [harassers] were under the care of the school in its *parentis patriae* capacity at the time [the] alleged incidents occurred."[233]

In reviewing the substantive due process claim, the Supreme Court in *DeShaney* relied on the theory behind the Due Process Clause of the Fourteenth Amendment, which "was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression'" and not to protect people from each other.[234] The district court in *Pagano* distinguished *DeShaney*, in which the Department of Social Services returned a young child to his biological father after having the child in temporary custody.[235] In *Pagano* the district court recognized that there may be a special relationship between the state, which had control, and the complaining student; thus, the court seemed to be relying on the doctrine of parens patriae.[236]

B. In Loco Parentis

The doctrine of in loco parentis provides immunity for school officials and teachers acting in that capacity for acts of negligence unless willful or malicious conduct can be shown.[237] In Justice Thomas's concurring opinion in *Morse*, he explained that "the history of public education suggests that the First Amendment . . . does not protect student speech

---

228. *Id*. at 642.
229. *Id.* at 643.
230. 649 F.2d 134 (2d Cir. 1981).
231. 489 U.S. 189 (1989).
232. *Pagano*, 714 F. Supp. at 643.
233. *Id.*
234. *DeShaney*, 489 U.S. at 196 (alteration in original) (quoting Davidson v. Cannon, 474 U.S. 344, 348 (1986)).
235. *Pagano*, 714 F. Supp. at 643 (citing *DeShaney*, 489 U.S. 189).
236. *Id.*
237. *See* Fustin v. Bd. of Educ. of Cmty. Unit Dist. No. 2, 242 N.E.2d 308, 312 (Ill. App. Ct. 1968).

in public schools."[238] Through in loco parentis, courts historically "upheld the right of schools to discipline students, to enforce rules, and to maintain order."[239] Justice Thomas further reasoned that "[i]n light of the history of American public education, it cannot seriously be suggested that the First Amendment 'freedom of speech' encompasses a student's right to speak in public schools."[240] Because courts have routinely deferred to the school's authority to make rules and to discipline students for violating those rules, merely relying on the in loco parentis status does not in itself establish a custodial relationship.

In *L.R. ex rel. D.R. v. Middle Bucks Area Vocational Technical School*,[241] female plaintiffs alleged they were physically, sexually, and verbally molested by male students in a school bathroom and darkroom several times per week.[242] Arguing that because the government legally compelled their attendance at schools, and that the state legislature granted school officials in loco parentis status, the plaintiffs claimed the State assumed a custodial relationship that imposed an affirmative duty to protect the plaintiffs from harassment.[243] The Third Circuit concluded that the statute granting principals and teachers in loco parentis status merely granted authority to school officials to exercise "only such control as is reasonably necessary to prevent infractions of discipline and interference with the educational process."[244] The court of appeals specifically recognized that in loco parentis grants authority to the school officials rather than imposing a duty upon them.[245]

Other circuits have also rejected the argument that a school's in loco parentis status gives rise to a custodial relationship and, implicit therein, some form of liability.[246] In fact, the Supreme Court in *Vernonia School District 47J v. Acton*[247] specifically stated, "While we do not, of course, suggest that public schools as a general matter have

---

238. Morse v. Frederick, 551 U.S. 393, 410-11 (2007) (Thomas, J., concurring).

239. *Id.* at 413.

240. *Id.* at 419.

241. 972 F.2d 1364 (3d Cir. 1992).

242. *Id.* at 1366.

243. *Id.* at 1371 (quoting *DeShaney*, 489 U.S. at 199-200).

244. *Id.* (quoting Axtell v. LaPenna, 323 F. Supp. 1077, 1080 (W.D. Pa. 1971)) (internal quotation marks omitted).

245. *Id*. (quoting Pa. State Educ. Ass'n v. Dep't of Pub. Welfare, 449 A.2d 89, 92 (Pa. Commw. Ct. 1982)).

246. *See, e.g.*, Hasenfus v. LaJeunesse, 175 F.3d 68, 71-72 (1st Cir. 1999) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995)); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993).

247. 515 U.S. 646 (1995).

such a degree of control over children as to give rise to a constitutional 'duty to protect,' we have acknowledged that for many purposes 'school authorities ac[t] *in loco parentis*,' with the power and indeed the duty to 'inculcate the habits and manners of civility.'"[248]

C. Title IX

Title IX affords plaintiffs an action for private damages against recipients receiving federal funds who "act[] with deliberate indifference to known acts of harassment in its programs or activities" and when the harassment "is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[249] Title IX imposes liability on school boards because a board maintains disciplinary authority over its students and can therefore "exercise[] significant control over" a harassing student.[250]

To meet the deliberate indifference standard, plaintiffs must show more than mere negligence.[251] Deliberate indifference is not a hind-sight inquiry.[252] However, funding recipients with actual knowledge of student-on-student harassment have a duty to act.[253] Courts find liability when the funding recipient's response or failed response "is clearly unreasonable in light of the known circumstances."[254] Negligence rises to deliberate indifference when a school has knowledge of multiple incidents of harassment and fails to take preventative measures.[255]

---

248. *Id.* at 655 (alteration in original) (citations omitted) (quoting *DeShaney*, 489 U.S. at 199-200 (1989); *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681, 684 (1986)).

249. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999).

250. *Id.* at 630, 646 (holding a school board liable under Title IX because the alleged misconduct occurred on the school's premises during school hours).

251. Porto v. Town of Tewksbury, 488 F.3d 67, 74 (1st Cir. 2007). In *Porto* the court held that allowing one special education student to use the restroom and excusing the other to his locker when they had a known off-and-on sexual relationship with one another was merely negligent. *Id*. at 70-71, 74. To prove the deliberate indifference standard, the plaintiff needed to prove the teacher knew that by failing to accompany the complaining student, the plaintiff would follow the other boy to the restroom and that there was a high risk of a sexual encounter. *Id*. at 74.

252. *Id.* at 74.

253. *See Davis,* 526 U.S. at 648; Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1119 (10th Cir. 2008). In *Rost* the Tenth Circuit held that merely alleging that male classmates bothered a complaining student was insufficient to provide actual knowledge of sexual harassment. 511 F.3d at 1119. According to the court of appeals, failing to investigate generalized complaints does not give rise to Title IX liability. *Id*.

254. *Davis,* 526 U.S. at 648.

255. Doe ex. rel. A.N. v. E. Haven Bd. of Educ., 200 F. App'x 46, 49 (2d Cir. 2006); *Pagano*, 714 F. Supp. at 643 (holding that a complaint alleging seventeen separate incidents of harassment and also alleging that school authorities failed to take preventative

In *Doe ex. rel. A.N. v. East Haven Board of Education*,[256] the plaintiff's classmates called her names and harassed her during school after discovering she was a rape victim.[257] Applying the "clearly unreasonable" standard, the United States Court of Appeals for the Second Circuit held that responding to plaintiff's sexual harassment five weeks after receiving knowledge was "clearly unreasonable," thereby rising to the level of deliberate indifference.[258]

To avoid meeting the deliberate indifference standard, a school need only take reasonable preventative action.[259] The "clearly unreasonable" standard does not "require funding recipients to 'remedy' peer harassment" or to make sure students obey certain rules.[260] Under Title IX, funding recipients need only "respond to known peer harassment in a manner that is not clearly unreasonable."[261] In *Doe v. Bellefonte Area School District*,[262] a high school student's peers sexually harassed him as a result of his purported effeminate characteristics. The school had knowledge of the harassment and took preventative action by giving warnings, counseling and suspending students, allowing the complaining student to report incidents to the school's psychologist, and providing the faculty written notice to report harassment against the complaining student.[263] The plaintiffs claimed that the school's "method of dealing with specific, identified perpetrators was not 100% effective in stemming the harassment."[264]

The Third Circuit in *Bellefonte* held that although the harassment continued, the school was not deliberately indifferent because each subsequent incident of harassment on the complaining student involved a student that was not involved in previously reported incidents.[265] Severe, pervasive, and objectively offensive student-on-student sexual harassment can range from "overt, physical deprivation of access to

---

action, survived a motion to dismiss); *see Davis*, 526 U.S. at 648.

256. 200 F. App'x 46 (2d Cir. 2006).

257. *Id.* at 47-48. The plaintiff testified, "A lot of people were calling me a slut, saying I slept with two boys. Just nasty names. . . . A slut, a liar, a bitch, a whore." *Id*. at 48 (omission in original).

258. *Id.* at 49.

259. *See* Doe v. Bellefonte Area Sch. Dist., 106 F. App'x 798, 799 (3d Cir. 2004).

260. *Davis,* 526 U.S. at 648, 667 (citing UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991)).

261. *Id.* at 648-49.

262. 106 F. App'x 798 (3d Cir. 2004).

263. *Id*. at 799-800.

264. *Id.* at 799.

265. *Id.* at 799-800; *see also Davis,* 526 U.S. at 648 (internal quotation marks omitted) (disapproving of a standard that would force funding recipients to suspend or expel "every student accused of misconduct").

school resources" to conduct that "detracts from [a student's] educational experience."[266] Whether conduct amounts to "harassment" under Title IX "depends on a constellation of surrounding circumstances, expectations, and relationships," such as "the ages of the harasser and the victim and the number of individuals involved."[267] Title IX damages are not available "for simple acts of teasing and name-calling among school children" because "students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students [who are] subjected to it."[268]

In *Davis* the Supreme Court held that the United States Court of Appeals for the Eleventh Circuit erred in dismissing the petitioner's complaint, given that the female victim alleged repeated acts of sexual harassment by her fifth grade classmate that not only involved verbal harassment but also included several incidents of offensive touching occurring over a five-month period.[269] The complaint stated that the harassing classmate "rubbed his body against" the complaining student and "attempted to touch [her] breasts and genital area and made vulgar statements such as 'I want to get in bed with you' and 'I want to feel your boobs.'"[270] The complaint also stated that the classmate "placed a door stop in his pants and proceeded to act in a sexually suggestive manner toward [the complaining student]."[271] Because the harassment continued for at least five months before the school board responded, the Court held that the conduct alleged in the complaint satisfied the "severe, pervasive, and objectively offensive" standard.[272] Thus, if the bullying is severe, pervasive, and objectively offensive, the school seemingly has a duty to protect the student being bullied under Title IX.

Finally, the Constitution imposes an affirmative duty to provide adequate protection when a "special relationship" exists between the

---

266. *Davis*, 526 U.S. at 650-51 (holding that to recover under Title IX, the "plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities").

267. *Id.* at 651 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)) (internal quotation marks omitted).

268. *Id.* at 651-52.

269. *Id.* at 653.

270. *Id*. at 633-34.

271. *Id.* at 634.

272. *Id.* at 633, 649. *Compare id.*, *with* Gabrielle M. v. Park Forest-Chicago Heights, 315 F.3d 817, 822 (7th Cir. 2003) (concluding that the complaining child's allegations that her classmate "'bothered' her by doing 'nasty stuff'" was "so vague and unspecific that it cannot provide a basis to determine whether that conduct was severe, pervasive, and objectively offensive harassment").

state and a specific individual.[273] The Supreme Court recognized custody as a special relationship states may create or assume by affirmatively restraining an individual's liberty in a manner that "renders him unable to care for himself, and [by failing] to provide for his basic human needs [namely], food, clothing, shelter, medical care, and reasonable safety."[274]

In *Youngberg v. Romeo*,[275] the mother of a mentally disabled adult filed a civil rights action against a Pennsylvania institution for the mentally retarded. Romeo was a thirty-three year old man who was unable to care for himself and whose mother was also unable to care for him and control his violence. After Romeo was involuntarily committed to the state institution, he suffered self-inflicted injuries and injuries by acts of others at least sixty-three times. The complaint alleged that the state institution knew or should have known about Romeo's injuries and thereby violated his constitutional rights by failing to take preventive measures.[276]

This was a case of first impression for the Supreme Court regarding the substantive rights of involuntarily committed mentally disabled persons under the Fourteenth Amendment.[277] The Court identified three liberty interests protected by the Due Process Clause: (1) safety or personal security when one is lawfully confined, (2) freedom of movement or freedom from bodily restraint, and (3) receiving the "'habilitation' or training necessary to *preserve* those basic self-care skills."[278] None of these liberty interests are absolute.[279]

To determine whether a state violated a substantive right protected by the Due Process Clause, a court must "balance 'the liberty of the individual' and 'the demands of an organized society.'"[280] A trial court or jury should not arbitrarily apply this balancing test.[281] To properly balance "the legitimate interests of the State and the rights of the involuntarily committed to reasonable conditions of safety and freedom from unreasonable restraints," a court need only find "that professional judgment . . . was exercised" rather than adjudicate what methods are

273. *DeShaney*, 489 U.S. at 197-98.
274. *Id.* at 200.
275. 457 U.S. 307 (1982).
276. *Id.* at 309-10.
277. *Id.* at 314.
278. *Id*. at 315-16, 327.
279. *Id.* at 319-20.
280. *Id.* at 320 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).
281. *Id.* at 321.

proper.[282] In *Youngberg* the State had a duty to provide the patient the training that a reasonable professional would provide to ensure the patient's safety and freedom of movement.[283] According to the Supreme Court, "Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[284] As such, schools may have a duty to protect students from bullying based on the custodial relationship between the school and the students and may be liable for failing to meet that duty.

V. CYBERBULLYING AND THE SCHOOLS

Cyberbullying involves the use of modern communications technology to harass, psychologically attack, or threaten another.[285] Harassment might involve the spreading of lies or attacking someone on the basis of one's core characteristics with the intent to cause psychological harm and to disrupt one's life activities. Because cyberbullying is most commonly associated with preteens and teenagers, the life activity most often disrupted by cyberbullying is education.[286] Cyberbullying accompanied by threats of physical harm may effectively be dealt with as an assault and may also constitute a tort.[287] These out-of-school remedies, however, offer little help to a targeted student. School authorities may feel compelled to act; however, if the cyberbullying is unaccompanied by physical threats–particularly if it is initiated off-campus–the school authorities might implicate the First Amendment in seeking to have the cyberbullying restricted.[288] Social networking websites allow students to interact with their peer groups and with the public at large without much limit. In fact, the internet has been called "the digital communication backbone of teens' daily lives."[289]

---

282. *Id*. (citing Romeo v. Youngberg, 644 F.2d 147, 178 (3d Cir. 1980)).

283. *Id.* at 324.

284. *Id.* at 321-22.

285. *See Cyberbulling*, NATIONAL CRIME PREVENTION COUNCIL (Oct. 25, 2010, 3:30 PM), http://www.ncpc.org/cyberbullying.

286. *See School Bullying Affects Majority of Elementary Students,* SCI. DAILY (Apr. 12, 2007), http://www.sciencedaily.com/releases/2007/04/070412072345.htm.

287. *See* Allison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 854-55 (2010) (discussing the ineffectiveness of tort law in addressing cyberbullying).

288. *See* Karly Zande, *When the School Bully Attacks in the Living Room*: *Using Tinker to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103, 120-21 (2009).

289. ROBIN M. KOWALSKI ET AL., CYBER BULLYING: BULLYING IN THE DIGITAL AGE 3 (2008) (internal quotation marks omitted).

As a result of the prevalent use of the internet, a number of states have enacted anti-cyberbullying statutes.[290] Whether such statutes will be effective and can withstand First Amendment challenges is yet to be decided. Whether school officials may intervene and punish cyberbullies who affect the education of others, based upon schools' broadening discretionary authority as set forth in the Supreme Court cases previously discussed, remains at issue. Taking into consideration the holding in *Morse v. Frederick*,[291] although disciplinary action was permitted in that case by a school principal for speech by a student standing off-campus, the Court's rationale was based on the fact that the students exposed to the drug-encouraging banner were engaged in a school-sponsored activity and were subject to school supervision.[292]

The consequences of cyberbullying are often exhibited at school even if the offending student or students choose not to exhibit the particular communication at school. These consequences are foreseeable and interfere with the targeted student's right to be left alone or to have his or her liberty interest protected.[293] The courts have recognized the "secondary responsibility" of school officials to control the school's environment.[294] Various court decisions, however, have limited the right to punish students no matter how disruptive or educationally harmful their speech is if it originated off-campus or was brought on campus by a third party.[295]

In *Porter v. Ascension Parish School Board,*[296] the issue facing the United States Court of Appeals for the Fifth Circuit was whether off-campus speech that was not intended to be communicated on school grounds, but was inadvertently taken to school nevertheless, subjects the student speaker to disciplinary action.[297] The speech in *Porter* consisted of a sketch "depicting the school under a state of siege" and various written threats and racial epithets.[298] The court recognized it was not

---

290. *See* Zande, *supra* note 288, at 104 n.3.

291. 551 U.S. 393 (2007).

292. *See supra* text accompanying notes 123-43.

293. *See supra* text accompanying notes 277-79; *see also* Kara D. Williams, Note, *Public Schools vs. MySpace & Facebook: The Newest Challenge to Student Speech Rights,* 76 U. CIN. L. REV. 707, 730-31 (2008) (stating that "[s]chool officials have admitted to not knowing what students' speech rights are," especially as applied to social networking sites and other cyberspeech).

294. *See, e.g.*, C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 183 (3d Cir. 2005).

295. *See, e.g.,* Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1050 (2d Cir. 1979) (offensive student newspaper distributed off-campus).

296. 393 F.3d 608 (5th Cir. 2005).

297. *Id.* at 611.

298. *Id.*

foreseeable that the student's younger brother would bring the sketchpad containing the sketch to school.[299] Both brothers were disciplined.[300] In deciding the action brought pursuant to 42 U.S.C. § 1983,[301] the court opined that the speech was neither a campus speech nor directed at the campus.[302] The court concluded that the school administrators overreacted.[303] The court held that there was no intended communication, and that it was–as previously pointed out–not foreseeable that this speech would be communicated.[304]

In typical school-age cyberbullying, the perpetrator intends to communicate the message to both the target and to third persons. The message is intended to be harmful and to interfere with the targeted student's functioning. In *Porter* the Fifth Circuit reviewed the case law dealing with off-campus speech brought on campus, in which school authorities disciplined students under the *Tinker v. Des Moines Independent School District*[305] disruption standard.[306]

The *Tinker* standard is not the only standard applicable by school officials in meting out discipline for speech that is vulgar or offensive and speech that interferes with the rights of another–for example, language that disparages a person on the basis of core characteristics.[307] If, as the Ninth Circuit in *Harper v. Poway Unified School*

---

299. *Id.*

300. *Id.* at 612.

301. 42 U.S.C. § 1983 (2006).

302. *Porter*, 393 F.3d at 615.

303. *See id.* at 615-18.

304. *Id.* at 618.

305. 393 U.S. 503 (1969).

306. *Id.* at 615 n.22 (citing LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001) ("analyzing student poem composed off-campus and brought onto campus by the composing student under *Tinker*"); Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield, 134 F.3d 821, 829 (7th Cir. 1998) ("student disciplined for an article printed in an underground newspaper that was distributed on school campus"); Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1071, 1075-76 (5th Cir. 1973) ("student punished for authoring article printed in underground newspaper distributed off-campus, but near school grounds"); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) ("student disciplined for composing degrading top-ten list distributed via e-mail to school friends, who then brought it onto campus; author had been disciplined before for bringing top-ten lists onto campus"); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) ("applying *Tinker* to mock obituary website constructed off-campus"); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1179 (E.D. Mo. 1998) ("student disciplined for article posted on personal internet site"); Bystrom v. Fridley High Sch., 686 F. Supp. 1387, 1389 (D. Minn. 1987) ("student disciplined for writing article that appeared in an underground newspaper distributed on school campus")).

307. *See supra* notes 8-11, 21-25, 52.

District[308] held, a student's First Amendment right is limited by a public school's "special need to maintain a safe, secure and effective learning environment,"[309] would cyberbullying not, per *Virginia v. Black*,[310] be a "true threat"?[311] Moreover, would it not be an attempt to intimidate? In *Chaplinsky v. New Hampshire,*[312] the Supreme Court provided that a state may punish words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[313]

While the decisions in *Black* and *Chaplinksy* dealt with a threat or apprehension of physical harm, the federal courts have used the language of rights to describe a right to be left alone[314] and a right to educational access when provided for under a state's constitution.[315] If there is such a right, then school officials have a duty to enforce that right.[316] In *Black* a cross-burning was meant to intimidate, and it was foreseeable that it would, in fact, intimidate.[317] Similarly, cyberbullying often has the same effect, and when engaged in by school-age children, it is intended to be effective on-campus. The "carried on campus" requirement, rather than necessarily involving a physical carrying on, may be satisfied by the intent to have the electronic communication accessible and the intent to affect the targeted student in school.[318]

---

308. 445 F.3d 1166 (2006).

309. *Id.* at 1176.

310. 538 U.S. 343 (2003).

311. *See id.* at 359.

312. 315 U.S. 568 (1942).

313. *Id.* at 572.

314. *See, e.g.*, Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 741 (1996) ("[G]overnment may directly regulate speech to address extraordinary problems."); Hill v. Colorado, 530 U.S. 703, 716-17 (1983) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Branders, J., dissenting), *overruled by* Berger v. New York, 388 U.S. 41 (1967)).

315. There is no federal constitutional right to an education. *See* Plyler v. Doe, 457 U.S. 202, 221 (1982) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973)). Some state statutes, however, provide education up to a certain age as a fundamental right. *See, e.g.,* 16A C.J.S. *Constitutional* § 736 (2010) (discussing cases reviewing state decisions). Note the Developmental Disabilities Assistance and Bill of Rights Act of 1975, 42 U.S.C. ch. 75 (2006), as amended by Education for All Handicapped Children Act of 1975, 20 U.S.C § ch. 30 (2006), which establishes a statutory right to a free appropriate public education for disabled children if a state accepts federal government funds.

316. 16A C.J.S. *Constitutional* § 736.

317. 538 U.S. at 344.

318. *See* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616 (8th Cir. 2002) (citing United States v. Crews, 781 F.2d 826, 831-32 (10th Cir. 1986)); Hawaii v. Chung, 862 P.2d 1063, 1071-73 (1993)) (off-campus written letters containing violent rants carried on-campus and displayed to the targeted students).

Consider *Doninger v. Neihoff*,[319] in which the Second Circuit, citing *Bethel School District No. 403 v. Fraser*,[320] pointed out once again that "the constitutional rights of students in public schools 'are not automatically coextensive with the rights of adults in other settings.'"[321] Citing *Tinker*, the court of appeals further recognized that a student's rights are to "be applied in a manner consistent with the 'special characteristics of the school environment.'"[322] The court noted,

> The Supreme Court has yet to speak on the scope of a school's authority to regulate expression that, like Avery's, does not occur on school grounds or at a school-sponsored event. We have determined, however, that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct "would foreseeably create a risk of substantial disruption within the school environment," at least when it was similarly foreseeable that the off-campus expression might also reach campus. We are acutely attentive in this context to the need to draw a clear line between student activity that "affects matter of legitimate concern to the school community," and activity that does not. But as Judge Newman accurately observed some years ago, "territoriality is not necessarily a useful concept in determining the limit of [school administrators'] authority." True enough in 1979, this observation is even more apt today, when students both on and off campus routinely participate in school affairs, as well as in other expressive activity unrelated to the school community, via blog postings, instant messaging, and other forms of electronic communication. It is against this background that we consider whether the district court abused its discretion in concluding that Doninger failed to demonstrate a clear likelihood of success on the merits of her First Amendment claim.[323]

It seems that the standard set forth in *Fraser* is as applicable as the *Tinker* standard. The Supreme Court in *Fraser* cited Justice Black's dissent in *Tinker*, wherein Justice Black said, "I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels

---

319. 527 F.3d 41 (2d Cir. 2008).

320. 478 U.S. 675 (1986).

321. *Doninger*, 527 F.3d at 48 (quoting *Fraser*, 478 U.S. at 682).

322. *Id.* (quoting *Tinker*, 393 U.S. at 506).

323. *Id*. at 48-49 (alteration in original) (quoting Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist., 494 F.3d 34, 40 (2d Cir. 2007); *Thomas*, 607 F.2d at 1058 n.13 (Newman, J., concurring in the result)); *see also* Lowery v. Euverand, 497 F.3d 584, 596 (6th Cir. 2007); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001) (concluding that school officials may act if they reasonably expect disruption).

the teachers, parents, and elected school officials to surrender control of the American public school system to public school students."[324]

Cyberbullying undermines the fundamental values of a school education, a result that is both intended and foreseeable. It is also foreseeable that off-campus communications via the internet will affect in-school behavior and are intended to do so. The mere fact that a student's conduct in posting a video clip occurred entirely off-campus does not preclude a school from disciplining that student for cyberbullying.[325] As such, cyberbullying must now be considered in evaluating bullying and students' right to free speech.

VI. CONCLUSION

As the individuals responsible for maintaining an environment conducive to education and learning, "[s]chool principals have a difficult job, and a vitally important one."[326] But those principals, ever fearful of being sued, are now routinely tasked with protecting and providing a safe learning environment while also being forced to take into account a student's First Amendment right to free speech. Although the Supreme Court has retreated from the *Tinker v. Des Moines Independent Community School District*[327] standard of imminent disruption before school authorities can act, it is past time for courts to explicitly recognize that school-age children are biologically less able to control or recognize the consequences of their words and actions than adults.[328]

Many states have laws that expressly ban bullying, including Georgia, yet Georgia's law did not apply to Jaheem Herrera because it only applied to students in grades six through twelve, and Herrera was in the fifth grade.[329] Perhaps the school officials had a responsibility to prevent the students from calling him "gay" under the holdings of *Hazelwood School District v. Kuhlmeier*[330] and *Tinker*. Yet the Judge

---

324. 478 U.S. at 686 (quoting *Tinker*, 393 U.S. at 526) (internal quotation marks omitted).

325. J.C. v. Beverly Hills Unified Sch. Dist., No. CV 08-03824 SVW (CWX), 2010 U.S. Dist. WL 1914215, at *12 (C.D. Cal. May 6, 2010) (recognizing it was foreseeable that a "video [clip] would make its way to campus").

326. Morse v. Frederick, 551 U.S. 393, 409 (2007).

327. 393 U.S. 503 (1969).

328. *See, e.g.,* B.J. Casey et al., *Imagine the Developing Brain: What Have We Learned About Cognitive Development?,* 9 TRENDS IN COGNITIVE SCI. 104 (2005); L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REV. 417 (2008).

329. Dionne Walker, *Bullying Laws Give Scant Protection*, ATLANTA J. CONST., Sept. 14, 2009, http://www.ajc.com/news/nation-world/bullying-laws-give-scant-137805.html.

330. 484 U.S. 260 (1988).

who conducted the investigation on behalf of DeKalb County concluded that Jaheem's suicide was not the result of wrongdoing by the staff at Dunaire Elementary School, that Jaheem was not bullied, and that "gay" meant "happy."[331]

In October 2009, another Georgia student allegedly hung himself as a result of being bullied.[332] The student's parents claimed that he was depressed after years of bullying, which included being called "gay" and alleged physical abuse.[333] The parents filed suit in the United States District Court for the Northern District of Georgia against the Murray County School District, alleging that the student's right to equal protection was violated, and that the administration indirectly played a role in the teen's death.[334]

Recently, the Georgia House of Representatives passed legislation that "set[] a January 2011 deadline for the state Department of Education to develop an anti-bullying policy . . . [which would] include age-appropriate consequences for bullying from kindergarten through [twelfth] grade."[335] The bill was sponsored by Representative Mike Jacobs, who "said the bill was sparked by the death . . . of Jaheem Herrera."[336] On April 29, 2010, in the last hours of the Georgia Legislative Session, the Georgia Senate voted to approve the amended version of the house bill.[337] "While the bill d[id] not specifically address bullying based on sexual orientation or gender identity, lobbyists believe it will help [lesbian, gay, bi-sexual, and transgender] students" who are bullied on those grounds.[338]

Unfortunately, cyberbullying may be a more complex issue. To address this problem, courts may be forced to retreat from their overly legalistic approach in applying the First Amendment to school-age children. Courts should allow for broad discretion, and if appropriate under one or more of the theories set forth in this Article finding

---

331. Bagby, *supra* note 207; Torres, *supra* note 203.

332. D. Aileen Dodd, *Parents Sue District, Principal Over Bullied Son's Death*, ATLANTA J. CONST., Mar. 19, 2010, http://www.ajc.com/news/parents-sue-district-principal 385837.html.

333. *Id*.

334. *Id.*

335. Nancy Badertscher, *Anti-bullying Bill Passes House*, ATLANTA J. CONST., Mar. 30, 2010, http://www.ajc.com/news/georgia-politics-elections/anti-bullying-bill-passes 420066.html.

336. *Id*.

337. Laura Douglas-Brown, *Anti-Bullying Bill Passes in Final Hours of Ga. Legislative Session*, GA. VOICE, Apr. 29, 2010, http://www.thegavoice.com/index.php/news/georgia-news menu/285-anti-bullying-bill-passes-in-final-hours-of-ga-legislative-session.

338. *Id.*

liability, they should require school officials to act to control cyberbullying if it continues in any form or has an intended and foreseeable effect.

In light of the pervasiveness of bullying throughout schools and the public's ever increasing awareness of bullying, school officials will need the necessary tools to restrict the free, yet harmful, speech rights of bullying students. While the theories of public school liability–including violations of 42 U.S.C. § 1983,[339] the doctrine of in loco parentis, and violations of Title IX[340]–may provide possible remedies, school districts need to consider other methods of protection. Perhaps the time has come to specifically address bullying based on sexual orientation and gender identity. Moreover, who is better able to provide that protection to students, the school officials or the courts? If states and school officials do not move forward to protect the right to an education, then the courts, after the expense of litigation, will end up imposing that liability.

339. 42 U.S.C. § 1983 (2006).
340. 20 U.S.C. §§ 1681-1688 (2006).