

AN EXAMINATION OF COURT CASES INVOLVING  
*BETHEL SCHOOL DISTRICT vs. FRASER*

by

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A DISSERTATION

Submitted in partial fulfillment of the requirements  
for the degree of Doctor of Education  
in the Department of Educational Leadership,  
Policy, and Technology Studies  
in the Graduate School of  
The University of Alabama

TUSCALOOSA, ALABAMA

2011

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## ABSTRACT

The modern day school administrator understands that the First Amendment right to free speech is becoming more and more complex in the public school environment. Where students do have constitutional rights in the school atmosphere, the school administration does have protection when facing potential legal ramifications. A school official, be it a principal, superintendent, or school board, must take a proactive approach to address and possibly avoid situations that could possibly violate the constitutional rights of the students in the area of free expression. It is the responsibility of school officials to provide a safe and secure learning environment for students, free from substantial or material disruptions; lewd, offensive, or profane language; and messages containing references to drug use and drug paraphernalia. This research project is a qualitative study reviewing law cases citing *Bethel School District v. Fraser* (1986) and then analyzing the decisions made in each. The study included court cases that cited *Bethel v. Fraser* (1986) from 2000-2010 in order to allow for an adequate number of cases for analysis. The intent was to use the Shepard's United States Citations, which provided a useful tool for investigating the cases with the *Bethel* citation, while at the same time providing the researcher with a resource of relevant cases. The lineage of cases in this study has revealed 34 principles that could possibly decrease litigation for school officials in the area of the First Amendment right to free expression.

## ACKNOWLEDGMENTS

I truly believe that God puts people in your lives at a particular point for a definite reason. In the past three years, I have been blessed with the support and encouragement needed to complete this research. First of all, I would like to thank my four inspirations: Michaela, Brayson, Jaxson, and Britton. You are the reason that I even did this. Whenever Mommy came in from a class or from hours writing this paper, your smiling faces gave me a new energy to be the example of perseverance for you all. I want you to learn that whatever you strive to accomplish can be done through God's will and your family's support. Dream big and know that my love for you kept me going during the triumphs and trials of this entire process. You are my heart and soul. I am extremely proud of each of you, and I look forward to watching each of you learn and grow. Please know that I am always there for you. You four are truly my muses!

I would like to thank Dr. Dagley, my chair, for being such an intriguing source of wisdom for me throughout this process. I appreciate you putting up with my frustrations, my continuous questions, and my constant emails. I also am grateful for your patience and advice. It is an honor to be a protégé of yours and now a colleague. Also, a special thank you goes out to the remaining committee members for their roles in the dissertation process: Dr. Jim McLean, Dr. Phillip Westbrook, Dr. Daisy Arredondo-Rucinski, and Dr. Rose Newton. I would also like to thank Sherri Edwards, my editor, who also put in countless numbers of hours preparing this work for publication. Thank you for answering all my questions, even when the questions did not pertain to you at all. Finally, to all my professors at The University of Alabama, I have enjoyed the intriguing classes. You all have truly taught me to think outside of my comfort zone. I felt an

honest transformation in my academic thought process throughout this journey, and I want to thank you for that challenge.

To my friend, Dr. Cathy Clifton, you were one my strongest supporters. I so enjoyed our talks about this process and your constant encouragement. When I needed the prayers, I knew that you were sending them up for me. Thank you for all your help with perspective. You taught me what mattered and what didn't and you kept me focused on what was important through this entire process. You are my special friend.

To all my colleagues and friends, you are so many! God has blessed me completely with the right people in my life at the right time. The help that I have received is so overwhelming. Thank you all for the kind words, encouragement, and support.

I would like to thank Ed and Linda Edwards along with Phillip and Brandi Johnson. I appreciate you so much. You have accepted me into the family and showed me support throughout this long and tedious journey. The little things like watching the kids for me or running them here or there were never "little" to me. I could not have buckled down and finished that long Sunday without your help. Thank you for being wonderful. I love you all!

I could never have even started this dream without the dedication and support of my dad, mom, brother, and stepmother. My dad, Robert Dudley, and mom, Karen Dudley, instilled in me and my brother long ago that education is one of the most important things that you could ever invest in. They taught us that the pride and effort that you put forth in your education will pay off. Daddy, I want to thank you for always believing in me and always pushing me even when I didn't feel like being pushed. You taught me that I had it in me to overtake the hard times. You taught me the true meaning of family. That unconditional love continued to hold me up and make me strong. You were the one that I wanted to make proud, and in turn it made me a better

person for my kids. I love you! Momma, even though you are looking from above during this, I know that you would be incredibly proud of this work and accomplishment. I appreciate your constant monitoring when I was little, which taught me to take pride in what I write and how I write it. I wish that you were here to see the end product of all your effort in me, but I have peace to know that you love me and are proud of what I have accomplished with the completion of this work. Momma, I love you and miss you so very much, especially during times like these. Robby, I love you so much. I appreciate your belief that I could complete this even when I was emotionally unsure. Thank you for all that you have done for me. I am so proud of what you have accomplished in your academic area. Nancy, I want to thank you for being strong for my daddy. You will never know just how much I appreciate you (and your talks). You have been a fantastic mother for me and my brother. You have been the perfect addition to the Dudley family. I have always felt your unconditional love and support. I love you dearly.

Finally, my husband, Jeff: where do I begin? Without you this would not have happened. You have been my rock and support. When I needed the motivation to finish, you were the one there telling me to get going. You listened to me whine, get frustrated, and brag. You helped entertain the kids a countless number of times so that I could finish a section of this work. You were my extra set of eyes, and you probably learned more about educational law than you ever wanted to know. Your support has been a great example for our kids. Thank you for your patience, your love, and your guidance. You are truly my support beam in life. You have been my drive in the last eleven years. You are a blessing to me. A blessing sent because God knew that you were my perfect fit. I cannot imagine a world without you. I look forward to many more years together. You have seen me about as “raw” as it gets, and you constantly encourage and build me up. When I think that I am not worthy, you are the first to remind me that I am and that

I am ready. You are the reason for my success. I will never truly be able to express to you just how much I appreciate you during this monumental task, just know that your strength in God and in my abilities got me through the toughest times of all. Thank you for your support. You are a great Christian example, and I love you. You are truly incredible.

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## CHAPTER I

### INTRODUCTION TO THE PROBLEM

#### Introduction

The modern day administrator faces many challenges in order to protect the learning environment of the school, while at the same time implementing ethically-sound constitutional decisions. One of the most controversial challenges for administrators and educational policy makers is in the area of student expression, both verbal and nonverbal. According to Dewey (1916), historically the speech and actions of students could be controlled with little to no resistance because of the influence of the evolution of education from the Colonial Period to the Common School Movement and then to the Progressive Movement. With the emergence of the Current Era came one of the most influential cases in student expression, *Tinker et al. v. Des Moines Independent Community School District et al.* It was one of the landmark cases that successfully challenged the administrative authority to suspend a student for a controversial expression, more specifically in this case the wearing of armbands protesting the Vietnam War (Peterson, 2005). For over a decade, accusations of violating students' First Amendment rights and parental threats of lawsuits swayed the disciplinary decisions that were made by administration (Petronicolos, 1996) until *Bethel School District vs. Fraser* in 1986. When the administrator suspended Matthew Fraser after a "lewd and vulgar" speech displayed in a school-sponsored assembly, Matthew's father sued and was successful in overturning the administrative decision. The Supreme Court overturned this decision in 1986 in favor of the administrator, due to the nature of the inappropriate speech and its exposure to compulsory student audience, thus

changing the rules for control of student expression in schools (Chiang, 2007). Students' rights and administrators' rights began to intertwine causing confusion and debates with supporters of student expression and supporters of the school's ethical duty to provide an environment conducive to learning for all (Peterson, 2005). Administrators became concerned about the potential for a vague framework to be followed in order to have legal protection in case of false accusations of violating student expression (Krosse, 2001). The impact of historical legal cases involving student expression such as *Tinker*, *Hazelwood*, and *Fraser* influenced students' rights, administrators' rights, and, ultimately, the implication of current educational policy and analytical frameworks suggested to aid administrators with student expression decisions in the school environment (Warnick, 2009). The Supreme Court's decision of *Bethel v. Fraser* is used as a current precedent for student expression cases involving the struggle between the constitutional rights of a student and the constitutional rights of the school administrator (Chiang, 2007).

The importation of ideas from England during the Colonial Period of American education provided an ideal of "guarding the truth" from the students in school (Dewey, 1916, p. 17). This later evolved into the more liberal Mann-influenced Common School movement. Trager and Russomanno (1993) state that due to the civil rights movement, the Vietnam War, and the launching of Sputnik, the current era of education became a tug of war between students wanting to express themselves with no censorship and school administrators wanting to maintain a conducive learning environment for students. In 1969, the view of legal rights of people under the age of 18 was changed by the *Tinker et al. v. Des Moines Independent Community School District et al.* decision (Trager & Russomanno, 1993), after three students were suspended because of the wearing of black armbands to protest the government's involvement with the

Vietnam War. According to Geylikman (2003), the court found that the wearing of the armbands did not cause a disruption of learning and was protected as symbolic speech. Denning and Taylor (2008) stated that after the decision of *Tinker*, students would often claim a violation of their First Amendment right to freedom of expression when they were disciplined for questionable behaviors.

The test to the *Tinker* case came in 1983 on April 26th (478 U.S. 675 92). According to the case brief of *Bethel v. Fraser*, Matthew Fraser, a senior at Bethel High School in Bethel, Washington, gave an enthusiastic but profane speech in support of a fellow classmate running for the office of student government (478 U.S. 675). Matthew searched for approval from three teachers, two of which clearly discouraged the use of any part of the speech. Despite the lack of teacher approval, Matthew read the speech to the assembly anyway, resulting in the support and widely-margined election of the candidate.

The next day, Fraser was disciplined and told that he violated the school's disruptive conduct rule, which prohibited conduct that materially and substantially interferes with the educational process, including the use of obscene, profane language or gestures (478 U.S. 675). He was suspended from school for 3 days and was removed from the list of students who were eligible to make graduation remarks because school authorities no longer had confidence in his judgment. He later admitted that he did in fact make inappropriate comments during the speech and agreed that he violated the rule. His parents appealed the school district's disciplinary action, claiming a violation of Fraser's right to freedom of speech. The Washington Supreme Court upheld Fraser's right to free speech. The school district then appealed to the United States Supreme Court, which overturned the Washington Supreme Court decision. The basis of this decision was decided on the fact that Fraser was at a school-sponsored event and initiated a

disruption in the school setting and educational process. It was decided that schools must be provided with the means to discipline children who use offensive language in any way. Fraser was not punished for the political nature of his speech, but rather for its sexual innuendo and obscenity.

Ironically enough, this case affected the future of First Amendment student rights cases more than it affected Matthew Fraser himself (Hudson, 2001). Being an honor student with an academic scholarship to Pepperdine University, it seemed that Matthew and Matthew's family were concerned not only with his constitutional rights, but also his academic future. When his parents won at the circuit level, he was granted his scholarship back. He was able to complete law school by the time the Supreme Court overruled the verdict of the circuit court in this case. The monetary relief that Fraser was awarded during the initial Circuit Court hearing was paid back once the Supreme Court overturned this ruling (478 U.S.675). In 1993, he went on to found Education Unlimited, an academic and artistic summer camp that envisioned the teaching of students in the area of critical thinking while at the same time providing a fun learning environment (Education Unlimited). Matthew Fraser also has been the Program Director of the intercollegiate debate team at Stanford University for the last 20 years. He also has toured as a speaker at several conferences and universities. When lecturing, he is known for focusing on many topics such as free speech rights for students, a direct result of his personal experience in *Bethel vs. Fraser*. Fifteen years after his landmark case, Fraser expressed his opinion on the overturned ruling that the Supreme Court handed down (Hudson, 2001). He claimed that there should be protection for speech related to political elections, especially in schools. He continued to argue that his overturned case has set a controlling and authoritative trend in schools. Hudson posted on his website his interview with Fraser, in which Fraser stated, "It is a façade that the

courts protect student rights. . . . As a practical matter, school administrators do what they want to do” (www.freedomforum.org).

This case set a precedent of giving principals the right to protect all students from hurtful or offensive language, while maintaining the overall order of the school (Chaing, 2007). Since 1983, many cases have cited *Bethel vs. Fraser* in order to address the more modern issues of students’ rights and administrators’ rights (Geylikman, 2003). By looking at cases that cite *Bethel vs. Fraser*, a framework has been developed to aid administrators in deciding when the limitations of student speech are constitutionally sound, which shows the direct implications that *Bethel v. Fraser* has on educational policy (Warnick, 2009).

#### Statement of the Problem

*Bethel School District v. Fraser* started its historical journey in a school assembly in 1983, and since then researchers claim that it has brought about a confusing twist to the implementation of policies in the school settings (Peterson, 2005). Since this case, school districts and administrators have struggled with the authoritative duty to confidently make decisions to protect the school environment while at the same time upholding the ethical duty of allowing students the constitutional right of freedom of expression. Administrators have the ethical responsibility to clarify the confusion that has been emerging and influencing the derivation of a framework for administrators to produce decisions that are based on constitutionally-sound limitations of student speech (Warnick, 2009). By analyzing *Fraser* and all the cases that cite *Fraser* since 2000, the researcher can provide the qualitative trends shown in the case law and derive an educational framework based on the data collected from each annotated case (Statsky & Wernet, 1989).

## Significance of the Problem

Modern day administrators need to be educated on the historical legal precedents that have influenced the path of First Amendment rights for students in the school environment in order to make the ethically-sound choices that will uphold the constitutional rights of students. Litigation in such cases that involve administrators and students can be costly to all involved: the administrator, the student, and the school system. The reasoning for a student to take legal actions may be legitimate if the administrator is suppressing constitutionally protected speech, but it may also be a retaliation tactic to selfishly protect the student from disciplinary actions. No matter what the reasoning, the monetary cost may impact the system. School systems understand the importance of protecting all students from offensiveness in the schools, while at the same time upholding the First Amendment right to free speech. By preventing these constitutional violations, the school district can save money, improve public relations, and deter future frivolous lawsuits.

## Purpose of the Study

The purpose of this research was to examine all the cases that cite *Bethel vs. Fraser* in order to develop legal principles to guide administrators and schools districts in the decision-making process in relation to First Amendment litigation issues. The information derived from this research will be beneficial to researchers, both legal and educational, along with being beneficial to any individual with concerns about the ethical and moral obligations that schools provide for students. Warnick (2009) stated that administrators need to be able to evaluate a specific student expression incident within a school setting and handle it in a way that will be

constitutionally and ethically sound without allowing it to cause a disruption to the educational goal of the school.

### Research Questions

1. What are the identifiable issues within cases citing *Bethel School District vs. Fraser*?
2. What are the outcomes in cases citing *Bethel vs. Fraser*?
3. What are the legal trends that have developed through federal and state litigation in cases citing *Bethel vs. Fraser*?
4. What are the applicable legal principles for school administrators and school districts that can be discerned from *Bethel vs. Fraser*?

### Assumptions

This study was based upon the following assumptions:

1. The relevant court cases were located using Shepard's United States Citations.
2. All court cases for this study were adjudicated in compliance with existing federal, state, and local laws.
3. There were a sufficient number of cases from the period of 1986-2010 in order to analyze court rulings for issues, outcomes, and trends of the Supreme Court ruling of *Bethel v. Fraser*.
4. The cases involved in this study were narrowed to contain only cases from the year 2000-2010, cases from a public school environment, cases with litigation between parent(s)/student(s) and school system.

5. The case brief methodology provided the data, which allowed guiding principles to be discerned for practicing school administrators and school districts.

### Limitations

This study was limited by the following:

1. The relevant court cases chosen for this study represented litigation involving citations of *Bethel School District vs. Fraser* from 1986 to 2008.

2. The court cases were limited to those heard by the state appellate courts, Federal District Courts, Federal Appellate Courts, and the United States Supreme Court.

3. The relevant court cases for this study were chosen from Shepard's United States Citations utilizing the volume and page noted in the citation along with the preceded abbreviation.

4. The guiding principles for school administrators and school districts were limited to the court cases reviewed in the study.

5. An educator completed this study and not an attorney.

### Definitions of Terms

The following definitions were relevant to the purposes of this study, and are not necessarily the most common definitions of the terms. The most commonly used sources are *Black's Law Dictionary* (Black, 1990) and *Case Analysis and Fundamentals of Legal Writing* (Statsky & Wernet, 1995).

*Appeal*: "Resort to a superior (i.e., appellate) court to review the decision of an inferior (i.e., trial) court or administrative agency" (Black, 1990, p. 96).

*Appellant*: “The party who takes an appeal from one court or jurisdiction to another” (Black, 1990, p. 97).

*Appellate court*: “A court having jurisdiction of appeal and review; a court to which causes are removable by appeal, certiorari, error or report” (Black, 1990, p. 97).

*Case brief*: “A summary of essential components of an opinion” (Statsky & Wernet, 1995, p. 450).

*Case law*:

The aggregate of reported cases as forming a body of jurisprudence, or the law of a particular subject as evidenced or formed by the adjudicated cases, in distinction to statutes and other sources of law. It includes an aggregate of reported cases that interprets statutes, regulations, and constitutional provisions. (Black, 1990, p. 216)

*Circuit court*: “Courts whose jurisdiction extends over several counties or districts, and of which terms are held in the various counties or districts to which their jurisdiction preside” (Black, 1990, p. 242).

*Citation*: “Identifying information that will enable you to find a law, or material about the law, in a law library” (Statsky & Wernet, 1995, p. 24).

*Defendant*: “The person defending or denying; the party against whom relief or recovery is sought in an action or suit or the accused in a criminal case” (Black, 1990, p. 419).

*Disposition*: “Whatever must happen in the litigation as a result of the holding which the court made in the opinion” (Statsky & Wernet, 1995, p. 128).

*Due process of law*: “Law in its regular course of administration through courts of justice” (Black, 1990, p. 500).

*Fact*: “Any information concerning a person, thing or occurrence that is obtained through the senses” (Statsky & Wernet, 1995, p. 452).

*Federal court:* “The court of the United States (as distinguished from state, county, or city courts) as created by Article III of the United States Constitution, or by Congress” (Black, 1990, p. 610).

*Holding:* “The answer to a legal issue in an opinion; the result of the court’s application of one or more rules of law to the facts of a dispute” (Statsky & Wernet, 1995, p. 452).

*Issue:* “A question” (Statsky & Wernet, 1995, p. 452).

*In loco parentis:* “In place of parent” (Black, 1990, p. 787).

*Law:*

That which is laid down, ordained, or established; a rule or method according to which phenomena or actions co-exist or follow each other. Law, in its generic sense, is a body or rules of action or conduct prescribed by a controlling authority, having binding legal force. (Black, 1990, p. 884)

*Litigation:* “A lawsuit; legal action, including all proceedings therein. Contest in a court of law for the purpose of enforcing a right or seeking a remedy. A judicial contest; a judicial controversy; a suit at law” (Black, 1990, p. 934).

*Opinion:* “A court’s written explanation of how and why it applied rules of law (and perhaps secondary authority) to the specific facts before it to reach its decision or holding” (Statsky & Wernet, 1995, p. 3).

*Plaintiff:* “A person who brings an action; the party who complains or sues in a civil action and is so named on the record. A person who seeks remedial relief for an injury to rights; it designates a complainant” (Black, 1990, p. 1150).

*Precedent:*

An adjudged case or decision of a court, considering as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law. Courts attempt to decide cases based on principles established in prior cases. Prior cases, which are close in facts or legal principles to the case under consideration, are called

precedents. A rule of law is established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases. (Black, 1990, p. 1176)

*Reasoning:* “The court’s explanation for reaching a particular holding for a particular issue on the opinion” (Statsky & Wernet, 1995, p. 112).

*Rule/Regulation:*

An established standard, guide or regulation. Prescribed guide for conduct or action, regulation, or principle. A rule or order prescribed for management or government; a regulatory principle; a precept. Rule of order prescribed by superior or competent authority relating to the action of those under its control.” (Black, 1990, pp. 1286, 1310)

*Statues:*

A formal written enactment of a legislative body, whether federal, state, city, or county; an act of the legislature declaring, commanding, or prohibiting something; a particular law enacted and established by the will of the legislative department of government; the written will of the legislature, solemnly expressed according to the forms necessary to constitute its law of the state. (Black, 1990, p. 1410)

## Organization of the Study

An introduction of the study is the content of Chapter I. It contains a statement of the problem, the significance of the problem, the purpose of the study, the research questions, the assumptions of the study, the limitations of the study, the definitions of operational terms, and the organization of the study.

The review of literature is in Chapter II. It contains a review of the literature in the research area, which includes a brief description of the historical path of educational reform, the impact of freedom of speech before *Tinker*, the impact after *Tinker*, the impact of *Hazelwood*, and the impact of *Fraser* along with the implications that Fraser has had on educational policy. Chapter II concludes with a summary of the literature as it relates to research.

A description of the methods utilized in this study is contained in Chapter III. Printed and electronic resources are utilized in order to demonstrate a complete understanding of the case research method.

The case briefs and data analyses are contained within Chapter IV. Finally, Chapter V contains the summary, conclusions, recommendations for further study, tables and graphs, and guidelines for school administrators.

## CHAPTER II

### REVIEW OF LITERATURE

The First Amendment of the Constitution of the United States declares, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Initially, the historical path of the students’ rights in the classroom took a see but not hear attitude (Liff, 1999). School administrators have the incredible task of fostering students toward responsibly assuming this right as members of the American society. Unfortunately, this is not a clear and definable task. Court decisions have influenced the path that administrators have taken in decision making in relation to disciplining students for disruptive or disrespectful speech within the school setting. The battle between student rights and institutional authority has made landmark cases such as *Tinker*, *Fraser*, and *Hazelwood* the precedent for administrative action within schools. Five areas of influence have impacted the interpretation of the First Amendment rights of students and the institutional authority of administrators: the historical path of educational reform, the impact of freedom of speech before *Tinker*, the impact after *Tinker*, the impact of *Hazelwood*, and the impact of *Fraser*. Individual liability, the action of violating established law without regard for the rights of a student could be minimized for administrators that are aware of the influential components of the First Amendment in today’s schools.

## The Historical Path of Educational Reform in America

The Colonial Period, the Common School Movement, the Progressive Movement, and the Present Movement have influenced the history of American education. Dewey (1916) argued that in early education the guarded “truth” was only given to the masses under severe restrictions. He claimed that the Colonial Period of education dealt with the importation of ideas from England. Parents were responsible for educating children and did not rely on the school to follow through with the task. Schooling seemed to be a luxury, not a requirement. Toward the end of the Colonial Period, the first free elementary school was set up in Pennsylvania mainly as a reaction to the separation from England and the first ideals that all Americans deserve the right to be educated for the greater good of the country (Tyack, 1974).

According to Tyack (1974), the Common School Movement began behind the philosophies and theories of Horace Mann. Dewey (1916) stated that broader social views were expressed in order to keep changes from looking as if they are just inventions of teachers and fads (p. 5). A tendency toward manual training development in education dealing more with practicality for the community needs was the primary purpose of the school (p. 9). The one-room schoolhouse was prevalent in many places with emphasis on practicality in lessons to benefit the needs of the community. A local community influence governed these small schools, with the assessment of educators and administrators often being done by the prominent farmers or business owners in the area. Discipline grew out of social cooperation and community life. Order was a means to an end (p. 12). According to Tyack (1974), these “evaluators” could often be swayed by gifts of hospitality just to get them “out of the way” so that the educators could go back to their lessons.

Next, the Progressive Movement occurred, which contained the influence of reform introduced by Dewey (1916). He wrote that schools were seen as a training ground to help the economy or to produce a disciplined and educated military, and the idea of educating the whole child emerged with the shift from being subject focused to individual focused, which Dewey coined “social progress” (p. 13). Dewey stated that educational renewal occurs when directed learning is established, not when the place of learning focuses on the abstract and remote references (p. 13). He argued that the aim of education was not economic value of products, but social power and insight (p. 13). Tyack (1974) agreed with Dewey in that education should not be just the practical learning for routine employment, but instead be the active scientific insight into natural processes which leads to development of better man (p. 14). Dewey (1916) stated that school introduced and trained the child as a member of a community with a spirit of service and the tools for self-direction which results in a larger society that is “worthy, lovely and harmonious” (p. 20).

Spring (2007) labeled the most recent movement as the Current Era, which contained such influential events as Sputnik, the fall of the USSR, Title IX, Individuals with Disabilities Act (IDEA), National Defense Education Act (NDEA) and No Child Left Behind (NCLB). Spring believed that before the Cold War, the accountability of educators did not center as the sole focus of education. He felt that throughout this time period, education had been influenced by such acts as Title IX, IDEA, NDEA, NCLB and the globalization of society as a whole. Haffen (1987) supported this claim by mentioning that demonstrations began to erupt in support of and against wars resulting in controversial public speech. Naturally, this was reflected in the schools and became an area of concern for administrators who wanted to uphold the First Amendment of the Constitution, but also maintain an orderly learning environment for all

students (Haffen, 1987). Some students and parents supported the more anti-authoritarian attitude brought about in the 1960s which ultimately led to the landmark case of *Tinker vs. Des Moines* (1969). Students at Des Moines High School wore black armbands to school in protest of the Vietnam War despite the warning that students participating in this protest would warrant suspension via principal authority (393 U.S. 503). Once the suspension was delivered, two minors, John and Mary Tinker, sued the school system for violation of the First Amendment rights of freedom of speech. The trial court dismissed the case and the circuit court affirmed. The Supreme Court, on the other hand, reversed the decision. The findings in this case determined that the Tinkers' conduct was protected by the First Amendment and did not contain behavior that provided a premonition of substantial disruption or material interference with school activities (393 U.S. 503).

The historical swings of educational reform have produced a power struggle between the interpretation of the First Amendment in relation to student speech and the authority of the administrator to maintain controlled school operations (Haffen, 1987). These antagonisms have distinguished between teaching students to socially learn and exercise constitutional rights with providing all students an environment conducive to learning, free from inappropriate speech and distractions. Haffen (1987) believed that the contradictory relationship between discipline and free expression in the classroom has caused inconsistent theories to emerge for the educational administrator. He alleged that desirable educational law theories have lucid constitution-based boundaries for students and administrators that not only protect the rights of each, but also the rights of other students within the educational environment.

## Before *Tinker*

The founding fathers of the United States built the First Amendment on the influence of the English school system, which focused on the preservation of the educational environment as a stable and strict area in order to foster learning guided by parental control, private education, and religious theory (Haffen, 1987). Contradictory to that influence, the ideal of democratic preservation of beliefs and learning was also an area of focus for the First Amendment during the initial development of the American public school. The late 1800s were influenced by Horace Mann's English-influenced traditional approaches to education (Dewey, 1916). The students were expected to attend a public school in order to provide national unity based on compulsory attendance in order to maximize their learning within the particular curriculum established. Student expression was not fostered as a learning strategy and censorship was not unusual if verbal expressions contradicted the patriotic theories of America. John Dewey (1916) changed this philosophy with a more progressive approach using the school as a socialization tool in the learning process. Liff (2000) alluded that a conversion to the more strict traditional approaches to learning became popular in American society. The mind-set of much of society reverted back to students should be seen and not heard philosophy within the public school system (Liff, 2000). He reasoned that education administrators sometimes overstepped their institutional authority, which resulted in frequent violation claims in regard to student expression. Liff (2000) researched four pre-*Tinker* cases that dealt with student rights to the First Amendment protection even as minors. After the societal response to Supreme Court decisions on each of these cases, he found that in determining whether the First Amendment was being constitutionally upheld an establishment of public and nonpublic locale would need to be determined. By understanding the importance of the impact of these four pre-*Tinker* cases and the public and nonpublic domain

establishment, Liff (2007) professed that educators began to change the overall views of authoritarian leadership in schools.

### Pre-*Tinker* Years

#### *Accusations of Censorship in the School Setting*

Four Supreme Court cases were dominant during the pre-*Tinker* years when dealing with student expression in schools (Peltz, 2001): *Minersville School District vs. Gobitis* (310 U.S. 586), *West Virginia State Board of Education vs. Barnette* (319 U.S. 624), *Blackwell vs. Issaquena* (363 F.2d 749), and *Burnside vs. Byars* (363 F.2d 744). In 1940, war-time led to many patriotic requirements in America in order to show support of the United States. One such requirement that dated back to the Spanish-American War was reciting pledges to the flag. World War I continued the support by having many states mandating the Pledge of Allegiance to the American flag with few arguments, according to the ACLU. In 1939, some Jehovah's Witnesses proclaimed a doctrine that stated that pledging to the flag was a form of idolatry, which is in direct conflict with their Biblical beliefs. Shortly after this declaration, a third grader in Massachusetts was expelled from school because of his refusal to follow school policy and salute the flag. A recent Jehovah's Witness convert, Walter Gobitis, challenged the required pledging after his children were harassed at school, physically, emotionally, and mentally for their religious beliefs. In 1940, *Minersville School District vs. Gobitis* was decided in favor of the school that had required students to recite the pledge of allegiance (310 U.S. 586). The pledge was historically not an uncommon requirement in schools, but some researchers believe the decision of students to activate the right not to pledge allegiance to the flag may have been influenced by the feelings of World War II (Peltz, 2001). Peltz (2001) went on to report that a

violent reaction occurred which led to mob-led burnings of the Kingdom Hall in Kennebunkport, Maine, and other harassment episodes which prompted the reversal of this decision just 3 years later.

In 1943, the Supreme Court reversed its ruling in *West Virginia State Board of Education vs. Barnette* (319 U.S. 624). By reversing this decision, the Supreme Court set an example of expressing the First Amendment right to free expression even for minors (Peltz, 2001). This case was seen at first as a free speech case, but in today's courts some argue that it could be either a free speech case or a free exercise claim (Bowman, 2007). Bowman (2007) felt that the overall consensus was that this showed that the democratic principles set by the United States Constitution were determined to be more valuable than the administrative discipline of the school. He also declared that the assumption was made by the courts to believe that the example set by allowing constitutional freedom to students within the educational environment would enrich the lesson of a democracy.

During the civil rights movement, 3 years before the *Tinker* case came to light, the *Blackwell vs. Issaquena County Board of Education* (1966) lawsuit became another important student expression precedent (Shepherd, 2004). Students at an all-Black high school wore school buttons that showed a Black and White hand joined with an acronym of SNCC, which stood for Student Nonviolent Coordinating Committee. Thirty members of the student body wore antiviolence buttons, and administrators received reports that some of the participants were talking loudly in the hallways instead of going to class. According to Shepherd, three students were disciplined when they refused to remove the buttons, which brought about a reaction from over 150 students the next school day. The administration decided to ban the buttons and

suspend the students who did not follow the censorship. More than 200 students wore the buttons as retaliation to the ban the next day (Shepherd, 2004).

According to Shepherd (2004), a shift occurred again in the 1960s. He stated that the court decided that the right to free speech was not the right to speak. According to Shepherd (2004), this decision established that there has to be a clear boundary of protective regulations in order to restrict the speech even within a school.

A similar censorship case occurred on the same day of the *Blackwell* case (Shepherd, 2004). *Burnside vs. Byars* (363 F.2d 744) also dealt with the wearing of SNCC buttons encouraging the civil rights movement and the right to vote, but the difference came with the result of the suit. The courts in this case found that the censorship of these buttons was not necessary because wearing these buttons did not disturb the school day or any classroom instructional time. According to the courts, a history of students wearing buttons previously had already been established within the school with no disciplinary action as a result. The administrator was found to have no justification for the censorship of the SNCC buttons in this instance, and the disciplinary action that the principal assigned was found to be a violation of the First Amendment (363 F.2d 744).

#### *Development of Public vs. Nonpublic Forum*

With the political trends of the 1960s influencing the litigation going through the Supreme Courts, the development of public vs. nonpublic forum in reference to the First Amendment's guarantee to free speech emerged (Green, 2004). Green claimed that American society began to exercise its First Amendment's rights much more vocally and sometimes erroneously. In order to prevent discrimination or harassment of not only plaintiffs, but also

defendants, three types of fora were defined in order to prevent confusion or misinterpretation of the U.S. Constitution. Traditional public fora were defined as locales such as parks and streets that were open for all of the public to use for any purpose to express activity. Limited public fora adapted the traditional forum and specified that the government had the power to open a forum for an expressive activity which can only have reasonable restrictions on the speech in the areas of time, place, and manner. Once a school has allowed one group to participate in a permissible limited public forum, there has to be substantial evidence in order to deny another group. Finally, nonpublic fora are located on private property and allow restrictions to be made in the expressive manner of the forum, even if the government owns the property.

The reasoning for clarifying these fora during this period of time was to provide a clear standard for society and administrators to follow with no confusion about violating constitutional rights of individuals (Bender, 1991). Despite the attempt to provide definite boundaries in the schools, administrators had a daunting task to provide legally-sound reasons for preventing or disciplining student speech even in the limited forum category. Schools usually disassociate themselves from private speech situations in order to prevent disruption from the school's educational mission (Caplan, 2003). Instances, such as student speeches, student newspapers, and student rallies, began to occur nationally and blurred the lines between the forum categories causing even more distress for the administrative authorities in the schools (Peltz, 2001). The First Amendment did not prevent administrators from disciplining students for expression if the forum qualification was upheld for the limited or private forum and the educational mission was undermined by the speech (Caplan, 2003). Of course, the forum classification evolved into a more complex entity once *Tinker*, *Fraser*, and *Hazelwood* emerged (Bender, 1991). The evolution of the forum began to expand into tests, such as *Tinker*'s "material and substantial

disruption test,” that were used to detect whether a school was justified in providing protection of the rights of all in the school over the individual (Peltz, 2001).

### Impact of *Tinker*

#### *Tinker Test*

From the case of *Tinker vs. Des Moines*, the *Tinker* test was derived in order to provide a clear explanation of constitutionally-protected student expression in the schools (Pike, 2008). This test, the “*Tinker* Trilogy,” was a three-point explanation of the restrictions that student speech must abide by in order to elude disciplinary action from the school and the board: location, type of speech protection, and the amount of disruption caused by the speech. In the *Tinker* situation, the school did not have a right to discipline those involved with the armband protest even though the student was on a governmentally run school campus. The expression occurred as a private speech in a public forum, was protected political expression, and did not cause a substantial disruption (Johnston, 2000).

Before the case of *Tinker vs. Des Moines*, *Burnside vs. Byars* (1966) set the precedent of material and substantial disruption in the operation of a school (Pike, 2008). The determining facet of this pre-*Tinker* case concluded that the mere fear of the possibility of a disturbance did not legitimate the demonstration of violating the right to free expression. By establishing this triad test, the courts specified that the schools may only limit speech that “substantially disrupts appropriate levels of order and discipline” (1966).

## *Students' Rights*

*Tinker vs. Des Moines* legitimized the extension of First Amendment rights to students, not just adults (Johnston, 2000). According to Johnston, the federal court is not as consistent on holding to the decisive ruling of *Tinker*. The impact of *Tinker* protects the student's right to free speech and oftentimes is generalized as the case that showed that student rights were not dropped at the schoolhouse gate. Johnston claimed that the reason that the federal courts are inconsistent with student expression cases is because of the appointment of federal judges by conservative presidents. He believed that since *Tinker* there have been cases of disciplining students for the content of speeches, class presentations, and dress, that did not rule in favor of the student. The difference in such cases and *Tinker* is the forum in which the expression occurred. *Tinker* occurred on school property, but was private speech, thus a nonpublic forum. A school sponsored forum would include an assembly, a school newspaper, or a classroom presentation. Robbins (2008) believed that the influence of *Tinker* secured the vision that school authorities cannot suppress the student's right to expression without a reason for suppressing that expression based on the *Tinker* test (2008). Students have constitutional rights on school grounds and also have the right to gain a wide range of knowledge through constitutionally protected speech within a nonpublic forum, as long as there is no materially substantial disturbance caused from this expression. Kaufman (2007) seconded this belief because she stated that in a democracy, free speech is necessary in order to produce "active and constructive participation" (p. 10) in order to develop adults that reflect those standards in American society. Johnston (2000) similarly reflected that *Tinker* has impacted the rights of students on campuses all over this nation and provided empowerment and encouragement of protection of constitutional freedom in the classroom in order to expose the nation's future leaders to an exchange of thoughts instead of

through any one kind of authoritative voice (2000). According to Johnston, years after the *Tinker* decision there have been instances of positivity among war supporters, politicians, and anti-war demonstrators which involved respect and educated debate on the issues instead of uneducated and offensive actions. He stated that most schools have students and teachers who have embraced the concept of principles that encourage and foster student free speech.

### *Administrators' Rights*

Despite the *Tinker*-influenced cadre of schools, administrators, and students, courts have been overly extended on determining precedents based on the principle of a student's right to freedom of expression (DeMitchell, Fossey & Cobb, 2000). After the *Tinker* decision some litigation was avoided due to the fundamental constitutional principles of the First Amendment, but an influx of students' rights cases came through the court system and began to influence decision-making strategies for schools. Some students began to demand constitutional protection when they violated school board policy in areas such as dress code. The courts did not show unanimous decisions in such cases after *Tinker* that threatened the rights of the administrator to maintain an orderly conduct while at the same time providing constitutional freedom to his or her students. DeMitchell et al. stated that some courts considered issues such as dress code and appearance as too minute of an issue for litigation, while others gave priority emphasis to such cases. The fluctuating boundaries of free expression for students became a heightened interest for administrators to consider when disciplining a student in the school setting after the *Tinker* case (Robbins, 2008).

The specific instances of students challenging the administrative power to punish behavior that causes substantial disruption lead to a chaotic decision making process in reference

to freedom of expression (Pike, 2008). One example that challenged the administrator of a school was the case of *J.S. vs. Bethlehem Area School District* (2000). The student involved was described as being discontented because of “oppressive adults” (p. 8), so to retaliate he created a website that used profanity and direct references to the Hitler regime. He also singled out a particular teacher with whom he had grievances and publicized violent acts using superimposed pictures on the website. The teacher involved was absent many days of school due to the “distress” (p. 8) of the situation and pressed charges on the individual. The court did not focus on the actual defamation of the teacher’s character but instead ruled on the problem that Swindler caused due to the unprotected speech, which eventually caused the teacher’s absence from school thus rendering a disruption of the school environment. In this case the *Tinker*-test was applied to achieve this ruling, but amended to say that if the off-campus activity is “brought onto the school campus or accessed by its originator on campus, then it is considered on-campus speech” (p. 8), in order to rule in favor of the school. Pike (2008) claimed that the administrator suffered from the lack of legal knowledge to determine the approach needed to discipline students in expression situations. He also stated that the *Tinker* test may have compounded the issue because of inconsistencies with the location of the infraction versus the disruption it causes.

Robbins (2008) seconded this viewpoint by concluding that although the *Tinker* test protects student speech at school and it does not interfere in the educational setting of a school day, *Tinker* has yet to give administrators the clear distinction of when to discipline or when not to discipline student speech. Robbins claimed that when an administrator disciplines for an on-campus situation, the legal precedents are clearer for the school to determine the liability of the disciplinary procedures. Off-campus situations should be handled by school officials by suspension or expulsion, but the less liable procedure is to report the incident to the state police.

While the *Tinker* test did define the rationale behind students' rights to free expression, DeMitchell et al. (2000) questioned where this leaves the administrator when deciding disciplinary action for students who abuse this right. The struggle between the authority of the administrator and the free expression claims of the students has been a direct result of *Tinker*, especially in the area of dress code. In the article "Dress Codes in Public Schools: Principals, Policies, and Precepts" (2000), DeMitchell et al. produced a study of randomly selected principals in the United States and questioned each on the area of dress code. The study consisted of the legal issue of dress codes, data from the principal sample, active dress codes analysis comparison, and proposed constitutionally supportive dress codes. These researchers studied the administrator's rights when tested by students in the area of student expression, specifically in the area of dress codes. They argued that the *Tinker* test does not rule in the dress code situations due to the infraction of violating the rights of other students. In their opinion *Tinker* supports the rights of the administrators "to protect the school environment from unwelcome, unwanted, and uncivil expression" (p. 3). The constitutional rights of one student must not infringe on the need to provide a public education to many students. By using the *Tinker* test, the authors claimed that courts could support the free expression of students while at school as long as the dress is not disruptive or offensive to other students. As a result, it is recommended that administrators have the capability to discipline students on dress code violations with confidence, as long as the administrators follow the *Tinker* test.

## Impact of *Hazelwood*

### *Students' Rights*

After Tinker's influence on student expression, other landmark cases began to emerge, such as *Hazelwood School District vs. Kuhlmeier* (1987). *Hazelwood* upheld the school authority to limit information that was published in a school newspaper based on the principal's decision to remove a section of the publication that focused on teen pregnancy and divorce. The justification of the removal was due to the disclosure of particular students' names along with the young audience that potentially read the publication (Lyons, 2006). The court chose not to use the Tinker test when determining forum due to the fact that the school's name was associated with the publication. A new legal precedent was set with *Hazelwood* with the "two-prong forum analysis test" (p. 4). Tinker distinguished between the public, nonpublic, and limited public fora. The Courts used the established forum but determined that a school newspaper was not a public forum due to the newspaper being used as part of the school's curriculum. The *Hazelwood* test was born due to that determination, but with an additional second prong: the school's authority to regulate speech in the school's nonpublic forum. It was decided that school administrators may take in consideration circumstances such as the age of the affected students and the responsibility of the school to provide an opportunity for students to be exposed to enrichment that supports the underlying theme of creating productive American citizens.

Salmone (1992) determined that *Hazelwood* also affected student rights by defining two new arenas of discrimination: content-based and viewpoint. Content discrimination is the decision to censor the content of information due to the appropriateness of the audience, such as age. The content is the basis for withholding the expression, not the actual disagreement of viewpoints. This type of discrimination is permitted in the nonpublic forum, according to the

courts in *Hazelwood*. Viewpoint discrimination, on the other hand, is prohibited in all fora including the nonpublic forum and involves the authoritative decision to silence student expression based solely on the disagreement of the viewpoint or the avoidance of controversy that the viewpoint will cause.

Students' freedom of expression in print, influenced by *Hazelwood*'s verdict, was considered in book removal cases (Salmone, 1992), specific controversial curriculum-based educational assignments (Upton, 2006), and even collegiate journalism (Pittman, 2006). Interestingly enough, *Hazelwood* influenced not only the Supreme Court cases, but the state and local arena as well. In *Wexner v. Anderson Union High School District Board of Trustees* (258 Cal. Rpt. 26), the California appeals court determined that the school board did not have the authority to determine appropriate reading material for its schools libraries (Salmone, 1992). Despite the administrator's concern for the influence of the students by being exposed to the vulgarity of certain books in the school library, the local courts were concerned with the politicization of the public schools. The justification of this decision was put forth by the influence of *Hazelwood* in developing and distinguishing the content and viewpoint discrimination concerns when it comes to banning books or other print material due to the possibility of future controversy.

Besides controversial book removal from public school libraries, *Hazelwood* also influenced the regulation of educational curriculum-based assignments in the classroom. Upton (2006) argued that there is a growing movement away from using the *Hazelwood* standard and toward a more broad view of students' rights. One case that helped to set this trend was *Romano vs. Harrington* (1994) which was based on the termination of a teacher for allowing a controversial article on the opposition of the Martin Luther King Jr. Holiday to be published in a

school newspaper. The article was not a curriculum assignment but more of an extracurricular expression because the student received feedback instead of a grade or other type of academic assessment. In this situation the courts used *Hazelwood* as a precedent to minimize the termination of the employee and to broaden the definition of “academic curriculum” in student expression cases.

The *Hazelwood* precedent has also influenced the collegiate press. Pittman (2007) argued against the *Hazelwood* decision and its influence on collegiate student expression cases such as *Hosty v. Carter* (2005). He claimed that *Hazelwood* was solely used in elementary, middle, and high school court cases, but with *Hosty* changed this assumption to extend into the collegiate setting. In *Hosty v. Carter* (2005), the editors of *The Innovator*, a collegiate newspaper at Governors State University, refused to subject their writing to “prior review and approval” (p. 3) by Dean Carter. Dean Carter required this after the newspaper printed articles that raised controversial questions about some faculty and employees of the university. *Hazelwood* was used in this case by Carter to validate the controlling decision to review the paper before publication and distribution. The district court then decided that *Hazelwood* was not a proper precedent due to the extracurricular activity of *The Innovator*, compared to the curriculum-based assignment in *Hazelwood*. An appeal went to the Seventh Circuit court, which reversed the findings in favor of the students. The collegiate journalists filed a *writ of certiorari* to the Supreme Court, which was denied in 2006. According to Pittman, *Hosty* was wrongly decided because it conflicts with Supreme Court precedents, it imposes a standard that is set for nonpublic, curriculum-based student work, which is not the qualifications of *The Innovator*, and it does not recognize the difference in primary or secondary schools in comparison to universities. Pittman argued that student rights at the collegiate level should not be viewed with

the same scrutiny as a secondary school student or a primary school student. He stated that if the same precedent is set for all three levels of academic student then the decision of *Hosty* will “likely inhibit the education and development of tomorrow’s professional journalist” (p. 2).

### *Administrators’ Rights*

Besides student rights, the debate of teacher’s rights vs. administrator’s rights in the area of freedom of expression has been influenced greatly by *Hazelwood*. Some scholars believe that *Hazelwood* has caused a hostile situation for teacher expression in the classroom (Daly, 2001). Daly is an advocate of increased teacher expression in order to provide students the right to hear different viewpoints. She claimed that the *Hazelwood* decision has caused an imbalance between the power of the school board over the power of a teacher’s professional right to express ideas and views in the classroom. She argued that a new balance needs to be applied to the effects of *Hazelwood* because teachers have a First Amendment right to expose students to views other than the school board’s views.

While the argument for the protection of teacher in-class speech may bring a balance of power between the teacher and the public, other scholars debate the problems with Daly’s views, which may stem from the lack of exploration of the functions of a teacher in the classroom. DeMitchell (2002) stated that “teachers as employees are essentially hired to speak. Their speech forms the basis of the employment relationship . . . essentially, teachers are hired to speak for the school board’s message, which is the curriculum” (p. 2). He argued five points that claim that Daly provided a flawed claim based on *Hazelwood’s* decision. First, he argued that a competing voice must be given in the classroom even when the teacher agrees with the board’s decision, according to Daly’s claim. Another structural flaw with Daly’s claim is the protection it would

provide for state supported private speech in the classroom, which would not directly coincide with the curriculum. Thirdly, an unfair influence of student ideas would be the daily teacher delivered speech due to the lack of connection that the school board has with the individual learner. This would provide a biased learning situation for the student. Next, DeMitchell stated that Daly's opinion is flawed due to the absurdity that a school board must hire a teacher who would ultimately refute all of its learning missions in order to give the student a right to receive information that may not be supported by the curriculum. Finally, Daly claimed that the school board must not only provide the public forum for counter speech in the classroom and a captive audience of students, but also provide compensation for the teacher that counterweighs the positions of the school board. According to DeMitchell, *Hazelwood* provides a protection for the students due to the concern not of the material that may be contested in the classroom, but of the influence of the authoritative voice of the teacher on his or her impressionable students. His biggest argument in favor of *Hazelwood's* influence on balancing the control of the teacher speech and school board pedagogical stances is the claim that "courts do not let parental displeasure alone determine the curriculum or instructional practices of a school" (p. 4).

#### Impact of *Fraser*

Seventeen years after the *Tinker* decision came the *Bethel vs. Fraser* (1986) case where a high school student used lewd and profane language in a school sponsored assembly to endorse a friend during the student government elections. The administration suspended Matthew Fraser. Fraser's father sued the school system and was successful in the lower courts, but the Supreme Court reversed this decision in favor of the administration thus influencing the entity of school authority vs. student rights in public schools (Peterson, 2005). The *Fraser* case is different from

*Hazelwood* and *Tinker* due to the sexually lewd, vulgar, and indecent speech used by Fraser whereas in *Hazelwood* and *Tinker* the speech was more political. Also, *Bethel vs. Fraser* brought out the idea that student rights are not automatically parallel with the rights of adults. Haffen (1987) brought up the point that throughout history there have been age limitations on a child's constitutional rights, such as voting and the right to bear arms. The legal expectation to teach principles in the school is complicated due to the paradox of repressing a student in order to reach genuine freedom and then later releasing the same student to be creative and reach genuine freedom. Students often do not understand both sides of this legal expectation, which leads to cases that tend to target the institution that allows them to express their views more freely than constitutionally required. Finally, the difference in Fraser and other student expression doctrine was that it was given at a school assembly which does not allow vulgar speech and lewd conduct because of its contradictory nature in relation to the values of public school education (Peterson, 2005). The Court did not apply the *Tinker* test of material and substantial disruption test but developed a new *Fraser* test that would provide the school board the right to determine what manner of student speech should be acceptable in a school forum such as a school assembly or classroom setting. "In other words, students do not have a right to have the school sponsor their controversial speech" (p. 3).

### *Fraser Test*

The *Fraser* test has been developed in response to *Bethel vs. Fraser* along with the *Tinker* and *Hazelwood* tests (Peterson, 2005). This approach took all three cases and combined them into one three-category rule. The first part of this triad considers the fact that if speech is lewd, vulgar, or plainly offensive, then the board may use discretion in shielding the student body from

it. Second, if the speech is school-sponsored, then regulations may be used to avoid legitimate educational concerns in relation to the audience and forum of the speech. Third, any other speech is protected unless it has easily shown that it does or will cause a material and substantial disruption. Love (2008) stated that the court made this three-fold test by allowing the precedents for offensive speech to be governed by the *Fraser* rules, the school-sponsored speech situations be governed by *Hazelwood*, and all of the other speech be governed by *Tinker*. The triad began a precedent that impacted students' rights along with administrators' rights in the school settings, especially in high schools.

### *Students' Rights*

Slaff (1987) stated that a student's right to free speech is an exchange of ideas, participation in a democratic government, and the development of future citizens. A student has the rights, but these rights are not absolute, especially at school where discipline is needed in order to constitutionally protect all students. *Fraser* impacted students' rights by providing a clearer constitutionally protected expression. The assumption that freedom of expression is the right to say whatever whenever is not practical. This freedom must take into consideration public order, justice, and moral progress of not only one individual, but all individuals. Slaff stated that student rights are not necessarily coterminous with adult rights, but instead student rights are the guarding of civil liberties of these students as future adults.

Many argued that *Fraser* actually diminished the First Amendment protection of students (Peterson, 2005) due to the fact that viewpoints can be construed to show disruption, or be skewed to one side if it does not reflect the justification of the teaching community. Peterson stated that this implies that speech that encouraged someone's values is allowed, but speech that

denounces another's values is not allowed regardless whether disruption occurs or not. This may lead to confusion between the precedent set forth by *Tinker*, and then elaborated on later in *Fraser*. Immunity can occur if the legal precedent causes confusion between the precedent set forth by *Tinker* and then elaborated on later in *Fraser*. Immunity can occur if the legal precedent causes confusion, such as in *Denno* (2000) where the principal did not understand the law and was granted immunity when he suspended a student when the student displayed a Confederate flag to some friends during lunch period. Peterson later argued that students' rights have become so insignificant that school officials have the authority to find any unpopular expression as censorable. He stated that *Fraser* has "turned students' rights to free speech into a privilege" (p. 17).

#### *Administrators' Rights*

Dupree (1996) claimed that the challenge of principals today is the job of using judgment in decision making in order to act in the best interest of children within a society that accepts and condones acts of "defiance, disrespect, and disorder" (p. 1) in public schools. Peterson (2005) and Dupree (1996) have similar views that legal precedents have caused confusion, but Dupree argued that this confusion has not just diminished students' rights, but also the rights of the administrator to maintain an orderly environment for all students to learn. She stated that the Courts in *Bethel vs. Fraser* (1986) established a standard of school power in relation to student expression more like that of a parent looking out for the best interests of all students being exposed to the incident. Dupree claimed that Mary Beth Tinker's expression is at one end of the continuum and for years was the only example until *Fraser* and *Hazelwood*, which gave

administrators a right to discipline students for speech that violated forum and content policies, as found in these two cases.

Despite Peterson's (2005) opinion of how *Fraser* diminished student rights, he did state that there were two main duties of the school that had to be at work for the educational environment to be successful. First, schools have the responsibility to provide academic and societal values to all of its students. Secondly, schools have the ability to teach students acceptable behaviors at an early age while maintaining a neutral political stance. He claimed that this can prevent silencing expression due to controversial nature.

On the other hand Dupree (1996) stated that these reasons can also provide protection for the administrator acting in the best interest of students that are being forced to view the expression. She argued that the main distinction between *Tinker* and *Fraser* is that Mary Beth Tinker's argument did not reflect that the school was involved with the expression of the armbands. Fraser's actions were in a school-sponsored forum, thus they were conceived as promoted by the school. She stated that Fraser's verdict hugely impacted *Vernonia School District vs. Acton* (1995), a case built around mandatory drug testing for student athletes. She argued that the judge in *Acton* inadvertently endorsed the supposedly dead *in loco parentis* or "in place of the parent" (Black, 1990) doctrine of school power by stating that the relationship of the school to its students is "custodial" (1995). According to Dupree, *Fraser* had impacted the future of school power by reawakening possible *in loco parentis* relationships and causing even more refinement to the analysis of school power.

### *Implications on Educational Policy*

Peterson (2005) proposed that the courts should “put Fraser back on its leash” (p. 12) by using five clearer rules for high school settings. He claimed that his proposal is a combination of the *Tinker*, *Hazelwood*, and *Fraser* tests:

1. Students are not allowed to engage in any expression that is lewd.
2. Students are not allowed to engage in any expression that is vulgar.
3. Students are not allowed to display advertisements for illegal drugs or for alcohol or tobacco products.
4. Students are allowed to engage in all other types of expression as long as the expression does not and would not cause a material and substantial disruption with the work of the school or the rights of others to be secure and left alone.
5. The school shall have greater discretion to regulate the content of student expression when the school is sponsoring the forum in which the expression is given as long as the school can reasonably demonstrate that the suppression of the expression is related to legitimate educational concerns. (p. 12)

Through this clearer rule, Peterson argued that in cases such as *Denno* (2000) the school’s suspension of the student was unconstitutional due in part to the fact that the Confederate flag did not qualify as lewd because it was not sexual, vulgar because it was not being construed in an offensive matter, inappropriate because it did not display an advertisement for anything illegal, or materially or substantially disruptive because the evidence showed that there was no threat or violence involved with the incident. Peterson (2005) also stated that administrators can use these clearer rules to answer First Amendment questions of disciplinary issues in high schools and believes that in *West Virginia Board of Education v. Barnette* (1943) the student was properly suspended based on his “Viewpoint-Neutral Rule.” Due to the history of racial problems in those particular schools in relation to the Confederate flag, the school system may believe that drawing a Confederate flag is against the policy of banning racial slurs and symbols. The board may suppress such expression thus legitimately suspending the student due to material and substantial disruption to the mission of the school.

A different approach to handling student speech rights in schools comes from Warnick (2009) who argued that the special environment of the school setting actually sets forth a particular analytical framework that educators should follow in order to maintain an ethical balance between student rights and administrator rights. He proposed that seven characteristics of schools should be considered when determining whether or not the speech of a student should be disciplined. He claimed that schools have complex characteristics compared to other environments that far surpass the two main characteristics that courts have used to determine student speech expressions: conservative values and safety inculcation and liberal democratic accountability. Whereas these three characteristics are important, Warnick takes it a step further by implying that schools are much more complex and proposes that an educational criterion for student rights should be established due to the special school environment. Through his research of court decisions he claimed that this type of information is beneficial to the legal community, the educational research community, and anyone concerned with ethics in schools.

A school environment is different from normal societal environments due to the fact that the age of the student must be taken into account (Warnick, 2009). He stated that age usually changes the way that society thinks when it comes to constitutional rights and obligations. The limited experiences of children and adolescents often determine the level of knowledge or competence on an issue. When making policy within a school environment, Warnick suggested that considerations of limiting student speech rights come from the fact that if students are children, then they have less experience and are not as mentally developed as adults, thus they do not portray the advanced cognitive abilities to justify complete immunity to censorship. On the other hand, Warnick argued that schools can be in support of student speech rights when it is realized that children can speak competently, that the age of children can determine the

developmental level of the mind, and that children are allowed to speak outside of schools. The role of the child versus the role of the student clarifies the idea of how special the school environment is because no matter if the student is a child or an adult there are particular instances where complete freedom of expression would be acceptable. Age is an important factor to the implementation of policy in student speech cases which leads into the next characteristic of the special school environment: attendance requirements.

Warnick (2009) continued to build his argument from the age of students into the next characteristic of the attendance requirement of compulsory schooling. The environment is important in speech rights because no one is required to be at a park, shopping center, or political rally. School on the other hand is not a choice. Warnick takes into account the special situations of private schools that do not accept federal funding or home schools, but his primary focus is the public school domain. Due to the requirement of attendance, administrators may be justified in limiting speech in situations such as sexually explicit language or hate speech. Students do not have the option to maintain an “exit” from such speech if it is occurring in a compulsory educational setting. The right to escape this exposure is not an option for students, so the right to complete freedom of expression should not be an option. Warnick stressed the balance between justification of censorship in this situation and the justification of protecting student speech rights. The administrator must realize that people have a tendency to be offended by others. Due to this characteristic of a school setting, an administrator should be able to legally implement policy that not only provides protection against lewd and vulgar language, but also provides protection for student expression when it is not lewd and vulgar.

Warnick’s (2009) next characteristic of the special environment of the school is the school’s multiple constituencies. The schools have to serve three main sets of stakeholders in

order to maintain a successful educational environment: the government, to provide future productive citizens; the parents, to provide at least some parental preferences; the children, to aid them in living successful lives. Warnick believed that focusing on the parental constituency gives justification for schools to stop controversial student speech.

The fourth characteristic in Warnick's (2009) description of the school environment is the considerations of safety concerns. With the compulsory nature of schools, the environment cannot be avoided, unlike more public areas such as a mall. Administrators and policy makers have the responsibility to maintain a school environment that is safe. This may supersede any protection of student expression, especially in the area of threats, bigotry, or sexual harassment. He stated that when there are clear situations that involve a captive audience or infringement on the rights of other students, then administrators have a rational reason to suppress certain forms of speech.

The fifth characteristic of Warnick's (2009) framework is the need for public accountability. Because of the acceptance of public funds, schools are accountable to larger society for their policies. These policies must be revisable if necessary in accordance with all the constituencies that the school serves. Public accountability and student expression is intertwined in the popular speech rights argument. Free speech is necessary to make accountability possible, as long as it does not violate any of the previously explained characteristics.

Next, Warnick (2009) explained that schools have a special characteristic of the association of the school with the student's speech. Due to the cooperative nature of student speech and school resources, the right to free expression needs to be in accordance with schools because of the relational association of the school with the student. Warnick does not justify complete censorship powers when it comes to speech within the school association

characteristic, but he does make a point that if the school is providing resources such as materials, audience, money, or spatial settings for the speech of a student, then the school has a right to enforce policies that prohibit offensive speech. This is different from speech outside the school setting which is then labeled parent associated speech in which the parents are responsible for the exposure of material and speech to the child. Warnick stressed the importance of differentiating between the rights of a student in a school setting and the rights of a child outside of a school.

Finally, the seventh principal characteristic as defined by Warnick (2009) is that the school is a place that needs to promote educational goals. Student learning needs to occur without interruption, which may justify censorship of particular situations. Warnick defined two types of censorship to the educational goals in relation to freedom of expression legal cases: activity-oriented censorship and message-oriented censorship. He stated that activity-oriented censorship is when a particular speech prevents the normal function of school activities. Message-oriented censorship is when speech counteracts the overall educational message or mission of the school.

The specific implementations of Peterson's (2005) Viewpoint-Neutral Rule at the high school level combines rulings from *Tinker*, *Fraser*, and *Hazelwood*. Warnick (2009) took a different approach by suggesting that a criterion be set for educational administrators when limiting speech rights of students. The criterion proposed by Warnick takes into account the practical and legal implications when student speech rights are limited by the school administrator. He stated that the special characteristics of the school environment must be addressed separately from other societal environments. "If and when speech rights are limited,

they should be limited in an educational way; one that affirms the value of free speech while acknowledging its limitations in schools” p. (211).

### Summary

The review of literature shows that legal precedent has been influenced by the historical path of American education along with three landmark cases in the area of the First Amendment rights of a student within the school setting.

The intertwined rulings in *Tinker*, *Hazelwood*, and *Fraser* can cause confusion for administrators needing guidance with a disciplinary decision that entails possible limitations of student expression. However, as shown in the literature, administrators do have legal protections when enforcing student expression limitations within the school setting, as long as a framework is developed to not just suppress speech that is lewd and vulgar, but to also celebrate the value of free speech. Chapter III will explore the methodology and procedures utilized to investigate the court cases that have referenced *Bethel v. Fraser* (1986) since the year 2000.

## CHAPTER III

### METHODS AND PROCEDURES

#### Introduction

This research project is a qualitative study reviewing law cases citing *Bethel School District v. Fraser* (1986) and then analyzing the decisions made in each. The primary source material originated from the actual cases and decisions from federal, state, and circuit courts using *Bethel vs. Fraser* at some point during arguments. The secondary sources were writings about legal cases utilized as offering guidance in understanding case law and by offering practicality of the founded trends in such cases. The study included court cases that cited *Bethel v. Fraser* (1986) from 2000-2010 in order to allow for an adequate number of cases for analysis. The intent was to use the Shepard's United States Citations, which provided a useful tool for investigating the cases with the *Bethel* citation, while at the same time providing the researcher with a resource of relevant cases. The researcher analyzed trends and patterns in the cases in order to develop a set of guiding principles for the administrators and school systems of the future.

#### Participants

There were no direct human subjects involved with the research study. The sample size was determined once all the cases citing *Bethel vs. Fraser* were reviewed and analyzed, which left the number of participants inconclusive, but in essence approximately 100 judges presiding over the cases expressed their opinions through the rulings of each case. The researcher used

Shepard's United States Citations to narrow the sample in the following manner: (1) cases that cited *Bethel*; (2) cases from the year 2000 and later; (3) cases that occurred during a public school environment; (4) cases that did not contain litigation involving teachers v. school system; and (5) cases that did not contain litigation involving a university or college environment.

### Materials

The research employed primary sources made up from the actual law cases found in the Shepard's United States Citations citing *Bethel vs. Fraser*. The secondary sources consisted of law reviews and relevant journal articles focusing on the areas that arise from the analysis of the cited cases. To prevent bias, the secondary sources were not used to provide the analysis for the legal briefs, only to inform and supplement the trends found in the briefs.

### Data Collection

In order to collect relevant court cases, the researcher compiled a collection of court cases from the Educational Law section of the Mervyn H. Sterne Library on the campus of the University of Alabama at Birmingham and the Calhoun County Courthouse in Anniston, Alabama. By using the Shepard's United States Citations research method, the researcher identified the case number (478 U.S. 675, 92 L.Ed2d 549) for *Bethel School District vs. Fraser*. By referring to the appropriate label of 675 in the United States Report, the researcher then found an exhaustive list of case numbers that at some point within the case contained one or more citations of the *Bethel School District vs. Fraser*. Shepard's United States Citations was the most beneficial method of research due to the listing of the relevant cases utilizing *Bethel vs. Fraser*, not just the topic of student expression in schools. This provided the researcher with the absolute

list of cases to develop a qualitative trend analysis. The researcher compiled the relevant cases and the briefs according to the case brief methodology as set forth in *Case Analysis and Fundamentals of Legal Writing* (Statsky & Wernet, 1995).

After the researcher compiled the exhaustive court cases with *Bethel vs. Fraser* citations found by Shepard's United States Citations, then a legal brief was developed for each case. Each brief contained the following: the case citation, key facts, issue, holdings, reasoning, and disposition (Statsky & Wernet, 1995). This is essentially a qualitative way to interview the judge of each case by analyzing the court's opinion and breaking it down into the previously mentioned format. The outline for the brief case analysis method that was used in this study is as follows:

1. Citation-the identifying information that enables the researcher to find a law, or material about the law, in a library.
2. Key facts-the facts that are essential to a court's holding which includes a fact that would have changed the holding if that fact had been different or had not been in the opinion.
3. Issue-a specific legal question that is ready for resolution.
4. Holding(s)-the answer to a legal issue in an opinion; the result of the court's application of one or more rules of law to the facts of the dispute.
5. Reasoning-the explanation for why a court reached a particular holding for a particular issue.
6. Disposition-the order of the court as a result of its holding. (p. 41)

A legal-historical research approach that embraced the case study method of research was used for this qualitative study. Raw data were exposed in the briefs by the researcher. At that time, the information in the briefs was analyzed to answer the research questions, which in turn showed legal trends that were gathered to develop guiding principles for administrators and school systems in the future.

## Research Questions

1. What are the identifiable issues within cases citing *Bethel School District vs. Fraser*?
2. What are the outcomes in cases citing *Bethel vs. Fraser*?
3. What are the legal trends that have developed through federal and state litigation in cases citing *Bethel vs. Fraser*?
4. What are the applicable legal principles for school administrators and school districts that can be discerned from *Bethel vs. Fraser*?

## Data Analysis

Qualitative research is designed to embrace the holistic relationships involved in personal and social settings (Creswell, 1998). Creswell classified qualitative research into five categories: phenomenology, grounded theory, ethnography, case study, and biography. Phenomenology is research that is based on a particular phenomenon and the meaning of that phenomenon. Grounded theory is qualitative research that is centered on a structured framework with the purpose of developing a theory. Ethnography is research that includes time in field with the researcher becoming part of society or culture. The case study method of research focuses on one particular case or several people involved in one case and then it uses the data to develop a theory. The biography method of research develops a theory from the life history of an individual. This research qualified as qualitative research due in part to the ongoing analysis of data that accumulated over the course of the research along with the ethical reflectiveness of the researcher. This study specifically qualified for the case study method due to its focus on a particular legal case and how that case has been cited in 21st century cases. The data collected

were used by the researcher to determine legal principles relative to administrators in today's schools.

When analyzing the data, the procedures followed the qualitative research methods of Stake (1995) and the suggested legal research methods of Statsky and Wernet (1995). Stake (1995) endorsed the content analysis research method, which involves the use of categorical aggregation, direct interpretation, correspondence and pattern, and naturalistic generalization. The categorical aggregation included extracting information from the case and distributing it into like categories (Stake, 1995). First, the demographics involved with the case were determined in order to allow categorization of state location and year (Statsky & Wernet, 1995). The next step was direct interpretation in which the researcher drew key details from the data and distributed them into categories (Stake, 1995). The researcher extracted key elements from the data and those elements were categorized by the nature of the complaint of litigation (Statsky & Wernet, 1995). The third step was the determination of correspondence and pattern within the data (Stake, 1995). In order to implement this step the researcher developed a list of cases and aligned these cases with the corresponding trends (Stake, 1995). Finally, naturalistic generalization is used to interpret the information that has been collected. In order to satisfy the naturalistic generalization component of this research method, the court decisions were analyzed for favorable or unfavorable rulings for the administrators or school systems (Statsky & Wernet, 1995). At that time, a conclusive viewing of all case analyses was used to determine the legal trends in the data (Creswell, 1998). If any trends existed, then the researcher identified, explained, and analyzed the trend, and then developed the appropriate guiding principles in relation to the trends.

To prevent questionable validity, triangulation is suggested by Stake (1995). This involved using different data sources in order to prevent researcher bias or other validity discrepancies. In order to increase validity, the researcher used three sources to triangulate the data: (1) the data produced from the study, (2) the comparison of the produced data to the legal literature, and (3) the comparison of the produced data to the educational administration literature. The researcher took the information from the case briefs and reduced it to data. These data were analyzed by using qualitative methods which resulted in analysis answers to research questions 1-3. Validity was checked by taking the produced data and outcomes and comparing it to the legal literature and then to the educational administration literature. This will be discussed in Chapter V.

### Summary

The information attained from this research will benefit administrators by identifying trends that shape guiding principles to legally protect school administrators when limiting student expression in schools. In order to create such principles, the researcher used the legal history research method of case analysis to break down the data in each legal brief. After this information was collected, then the researcher used qualitative methods that corresponded with case studies, such as content analysis. After the patterns and trends were established, a collection of all the categorical information was summarized. Finally, the researcher validated her work using triangulation by providing data from not just articles, but also law reviews, and case law. The researcher presumed that the data defined practical benefit in aiding the development of a theoretical framework for school administrators to use in the field. Chapter IV will explore court

cases that have utilized the Supreme Court findings in *Bethel vs. Fraser* (1986) and will investigate the rulings in those consequential cases.

## CHAPTER IV

### DATA PRODUCTION AND ANALYSIS

#### Data

This chapter provides a description of 101 court cases that used *Bethel v. Fraser* as a precedent within litigation. The data included cases from the years 2000-2010, in order to produce trends that the modern day administrator may face in elementary and secondary schools in regard to claims of First Amendment infringements of student rights by educational authorities. Data were derived from a case-by-case analysis according to the key facts, holdings, and dispositions from each case. The cases were analyzed according to Statsky and Wernet's (1995) *Case Analysis and Fundamentals of Legal Writing*. The cases are in chronological and alphabetical order. Each case brief includes the case citation, key facts, issue, holding, reasons, and disposition.

#### Case Briefs

2000

Citation: *A. Smith v. Greene County School District*, 100 F. Supp. 2d 1354 (M.D. Ga. 2000).

Key Facts: On Friday, March 27, 1998, Adam Smith was a fifth grade student at Union Point Elementary School when he was involved with a playground incident in his physical education class. The plaintiff, a Hispanic student, got in a physical altercation with another student who was Black. He felt that he was treated unfairly by the Black teacher, Ms. Robbins, when he was asked to sit out of the class after the altercation. He went on to ask the teacher if she

was a racist, to which she responded that she did not know the meaning of the word. He continued speaking to her in a disrespectful manner after she denied him access to reenter the playground again. As Ms. Robbins escorted Smith to Principal Goodwin, Smith apologized to Robbins for his comments. The principal gave Smith the punishment of reporting to her office during physical education class and writing a mediation essay. Smith's mother met with the principal and took issue with her son writing the essay. The next day during physical education class, the principal required Smith to report to her office. He wore a t-shirt to school that said "Kids have civil rights too" on the front with "Even adults lie" on the back.

When he wore the shirt, he was asked what the shirt meant. He only wore the shirt for about 15 minutes because of the questioning that he received. He did put it back on when he reported to the principal's office that day during physical education class. He did not write the essay. There was dispute on what happened next. The principal ultimately suspended the student because the t-shirt that he was wearing caused a disturbance and because he was disruptive, unresponsive, surly, and instigating feelings of discord.

Issue: At issue is whether the school administration violated the student's First Amendment rights when he was suspended for wearing a t-shirt and behaving inappropriately.

Holding: The United States District Court for the Middle District of Georgia, Athens Division held that defendants' motion for summary judgment was granted, and the plaintiff's claims were dismissed.

Reasoning: The court found that the defendants did not just suspend the student for the shirt. Instead, the defendants' testimony showed that he was suspended for the shirt and for his conduct before the shirt incident. The court found that the facts in this case were very different from that in *Tinker* mainly because the plaintiff was not suspended just for wearing the t-shirt.

The court held that unlike in *Tinker* where the administration prohibited the wearing of the armbands, in this case the wearing of the shirt was the final act in a list of defiance incidents. The evidence showed that the plaintiff tried to materially and substantially interfere with the discipline in the school environment. Because there was no evidence that wearing the shirt was the reason for the suspension, then the plaintiff's claim to substantial due process and procedural due process had no basis. There is also no evidence that the plaintiff or his mother asked the defendants for an explanation of the suspension. The court also found that the state claims to 28 U.S.C. § 1367 would be best resolved by the Georgia courts, not the federal courts.

Disposition: The court granted summary judgment in favor of the defendants on all federal claims and dismissed without prejudice the plaintiff's state law claims.

Citation: *Boroff v. Van Wert City Board of Education; Basinger; Clifton; Froelich*, 220 F.3d 465 (6th Cir. Ohio 2000).

Key Facts: Nicholas Boroff wanted to wear "Marilyn Manson" t-shirts to school, but the school would not allow it, due to offensive symbols and words that promoted values that were contrary to the school's mission. On August 29, 1997, Boroff, a high school senior, wore a "Marilyn Manson" t-shirt with a design on the front that was a three-faced Jesus with the inscription of the words "See No Truth. Hear No Truth. Speak No Truth." The word "BELIEVE" was printed on the back with the word "LIE" highlighted. On Sept. 4, 1997, he came to school with another Manson t-shirt. After a meeting with his mother and the principal and superintendent, they told Boroff that Marilyn Manson shirts were not allowed on school property. For the next 3 school days, Boroff wore more of the Manson shirts. He was told at the end of each day that he would not be permitted to attend school while wearing the t-shirts. He did not attend school for the next 4 days. His mother brought suit against the school system

claiming that Boroff's First Amendment right to free expression and his Fourteenth Amendment right to due process were violated. She requested a temporary restraining order and preliminary injunction, both of which the court denied. Following this decision, both Boroff and the School moved for summary judgment, which the court entered in favor of the school. This appeal case followed.

**Issue:** At issue is whether or not school authorities can prohibit a student from wearing t-shirts that contain offensive illustrations, drug, alcohol, or tobacco slogans or some other message contradictory to the educational mission of the school.

**Holding:** The United States Court of Appeals for the Sixth Circuit held that the district court was correct in finding that the defendants did not act in an unreasonable manner in prohibiting Marilyn Manson t-shirts, pursuant to the district's dress code.

**Reasoning:** The appeals court affirmed the district court's decision to allow the school to prohibit the wearing of the Marilyn Manson shirts per their dress code policy. The court found that the First Amendment claim to suppression of free expression was false, along with the Fourteenth Amendment claim to lack of due process.

By using *Bethel v. Fraser* (1986), the court of appeals found it appropriate for school administrators to be able to prohibit the use of vulgar or offensive terms due to the public nature that the school setting contains. The court found that the administrators in this case did not act in an unreasonable manner in finding the shirt offensive and enforcing the dress code. The plaintiff argued that other t-shirts, which portrayed other bands, were not prohibited, and that one student who had a backpack with Marilyn Manson patches on it was not prohibited to bring it to school. This argument was not supported by the court because the defendants brought evidence of the concern that they had as administrators of children and the message that Boroff's Manson shirts

portrayed. The school was able to prove the concern centered on the disruptive and demoralizing values, which were counter-productive to education, and is not related to offensive religious message that the first shirt Boroff wore made.

The Fourteenth Amendment claim suggests that the school violated Boroff's due process rights. The appeals court found problems with this claim because Boroff did not discuss this claim in his brief on appeal. Due to the lack of argument, the appeals court did not believe that they needed to consider a procedural due process claim.

Disposition: The United States Court of Appeals affirmed the findings of the United States District Court for the Northern District of Ohio at Toledo to grant summary judgment in favor of the defendants. It is noted that one of the three judges did deliver a separate dissenting opinion.

Citation: *Castorina and Dargavell v. Madison County School Board; Johnson; Fultz*, 246 F. 3d 536 (6th Cir. 2001).

Key Facts: In 1997, Timothy Castorina, a junior, and Tiffany Dargavell, a freshman, were students at Madison County High. On the morning of September 17th, both plaintiffs wore Hank Williams Jr. concert t-shirts. These shirts had a picture of Williams on the front and two Confederate flags were displayed on the back with the phrase "Southern Thunder." The students claimed that they were wearing the shirts to commemorate the birthday of Hank Williams Jr. and to display their Southern heritage. When they entered the office to change a schedule, the principal, Fultz, saw the two and told them that the Confederate flag is a symbol that offends other students and the shirts had to be turned inside out or changed. The students refused to do either, and their parents were called to the school. The principal told the parents that if the students would follow through with changing the shirts or turning them inside out, then no

disciplinary action would occur. The parents of both plaintiffs supported their children, which led to a 3-day suspension.

When the students returned to school, the plaintiffs wore the same shirts again. Fultz again explained the reasoning for the prohibition, but the plaintiffs opted for another 3-day suspension. The two never returned to Madison and were given home-schooling by their parents. The district court granted summary judgment in favor of the defendants. The plaintiffs appealed.

Issue: At issue is whether or not wearing a Confederate flag is qualified as First Amendment protected speech, and if it is can a school administrator regulate that type of speech in the public school atmosphere.

Holding: The United States Court of Appeals for the Sixth Circuit held that the judgment of the district court be reversed and remanded.

Reasoning: The appeals court changed the ruling of the district court because of two reasons. One was the claim that the plaintiffs' conduct was speech governed by the First Amendment. The other reason was the claim the school board has the authority to regulate speech governed by the First Amendment.

The appeals court, after reviewing the district court's notes on the case, saw where the district court did not consider the wearing of the shirts to qualify as speech. The appeals court found this claim as incorrect and that the viewpoint that the shirt portrayed as easily understandable to an observer. The district court made the mistake of stating that the wearing of the shirt was just a mere display of the Confederate flag and it did not result in protected speech. The plaintiffs stated that wearing the shirt not only commemorated Williams's birthday, but also displayed their southern pride. The school board did not dispute this claim. The appeals court found that the expression was more than just mere appreciation for the music performer. When

the students returned after the first suspension wearing the shirts again, it showed that the students knew exactly what the message of the shirt portrayed. The appeals court, found that the wearing of the Hank Williams Jr. shirts constitutes speech falling within the First Amendment.

By viewing the facts in *Tinker* (1968) *Fraser* (1986), and *Hazelwood* (1987), the appeals court found that the Madison County case was more relevant to *Tinker* than any of the other two. First, the plaintiffs testified that there were other students who wore clothing such as Malcolm X and were not disciplined. Special attention was given to the accusation that a targeted school-wide ban for only certain racial viewpoints seemed to be enforced. The next argument from the plaintiffs was that they did not disrupt school activity by wearing the shirts. The plaintiffs' speech implied by wearing the shirts clearly expressed their personal views and could not be considered "school-sponsored" speech. Finally, no school resources were used to express their views. The appeals court took all these instances in consideration when overturning the decision of the district court.

Disposition: The United States Court of Appeals for the Sixth Circuit reversed and remanded the decision because the appellate court did not resolve the constitutionality of the defendant's actions.

Citation: *C.H. as guardian ad litem of Z.H. and C.H. individually v. Grace Olivia; Gail Pratt; Patrick Johnson; Medford Township Board of Education; Leo Klagholtz; The State of New Jersey Department of Education*, 226 F.3d 198 (3d Cir. N.J. 2000).

Key Facts: Z.H. was a kindergarten student who was asked to draw a poster in the spirit of the Thanksgiving holiday. The theme of the poster was for the students to draw what they were thankful for. Z.H. drew a picture showing that he was thankful for Jesus. The posters were

then displayed by the teacher in the hallway. School officials subsequently removed the poster because of its religious themes.

The removal of the poster occurred on a day in which the kindergarten teacher was absent and upon her return, the teacher returned the poster to the hallway. This time the poster was placed in a less prominent place at the end of the hallway. Both Z.H. and C.H. were made aware of the removal of the poster because of its religious theme.

Issue: At issue is whether a principal may censor student's work due to it having a religious theme.

Holding: The United States Court of Appeals for the Third Circuit held that the District Court erred in granting judgment for the defendants. The court reversed and remanded for a determination whether the Medford defendants did in fact treat Z.H.'s poster in a discriminatory fashion because of religious content.

Reasoning: The District Court cited one main reason for the initial decision to grant judgment in favor of the defendants. The court held that the relocation of the poster was not a violation of freedom of expression, but instead was a legitimate pedagogical concern for the school. The United States Court of Appeals for the Third Circuit overturned this ruling due to the discriminatory nature of the decision to remove the poster based on religious views.

The appeal was based on the issue that public schools are government property, which means that the forum must be addressed between a public and nonpublic forum. Within this entity, viewpoint discrimination has to be addressed. It was determined that even in nonpublic forum viewpoint discrimination is not allowed. The Supreme Court found that discrimination based on religious character of speech is viewpoint discrimination. The appeals court found that constitutionally permissible ways to regulate speech in a school if the student expression

interferes in the effective operation of the school or creates a threat to the safety of the school community. Due to the possibility of the removal of the poster occurring because of religious viewpoint discrimination, the defendants would need to prove that the decision to remove the poster was to prevent a substantial disruption and not due to religion.

Disposition: The Court of Appeals vacated the judgment that originally was in favor of the Department of Education. It affirmed the decisions in relation to claims that occurred by the other defendants in the case during the plaintiff's kindergarten year. It also remanded the decision by the District Court in order to give the plaintiff the opportunity to amend the allegations of the original complaint.

Citation: *Denno v. School Board of Volusia County, Florida*, 218 F. 3d 1267 (11th Cir. Fla. 2000).

Key Facts: This case is an appeals case from a dismissal of the plaintiffs' claims that the school district deprived the plaintiffs of their First Amendment rights. The events of the case focused on Wayne Denno, a minor at Pine Ridge High School, who was extremely interested in Civil War history. At a lunch break at school, Denno quietly conversed with a small group about his hobby as a Civil War reenactor. He displayed a 4" x 4" Confederate battle flag while he discussed historical issues. He was escorted to the office and advised that he was suspended. The district court dismissed the complaint on the basis of qualified immunity and granted summary judgment in favor of the board. The plaintiff appealed.

Issue: At issue is whether or not the school administration violated the First Amendment rights of a student who displayed a Confederate flag when participating in a historical discussion during non-instructional school time.

Holding: The United States Court of Appeals for the Eleventh Circuit affirmed the disposition of dismissal from the United States District Court for the Middle District of Florida.

Reasoning: The appellate court addressed two issues on appeal: the entitlement to qualified immunity for the individual defendants and the granting of summary judgment in favor of the board. The first area of analysis is the qualified immunity. The appellate court looked at the issue that every school official in similar circumstances would have known the law of *Tinker* and *Fraser*. The court found that not every public official would be aware of all of the precedents that *Tinker* and *Fraser* would offer, plus the court rejected the argument that the school was a public forum. It also agreed with the district court that the possibility of a substantial disruption was a true concern for the school administration that day. Because no new evidence came to light in this portion of the appeals, the court did not find a reason to overturn the district's ruling.

When the district granted summary judgment in favor of the defendants, then the plaintiffs appealed the final policymaking authority of the school administration along with the practice of banning the Confederate flags on school grounds existed. The appellate court found that the code of student conduct that the school district had in place gave school officials discretion to review disciplinary decisions. The defendants claimed that three other students were disciplined for displaying the Confederate flag, while the plaintiff claimed that no other students received the same punishment as he did. The appellate court found that the plaintiff did not produce any evidence to back up this claim, so the court agreed with the decision of the district court to maintain that the school board cannot be held liable and the summary judgment should be granted in favor of the board.

Disposition: The court of appeals affirmed the district courts' ruling to dismiss the plaintiffs' claims against the individual defendants and the summary judgment in favor of the board.

Citation: *D.G. and C.G. v. Independent School District Number 11 of Tulsa County Oklahoma*, 2000 U.S. Dist. LEXIS 12197 (N.D. Okla. Aug. 21, 2000).

Key Facts: On May 3, 2000, a student and her friend were in said teacher's classroom. The teacher was showing a movie and allowing the students to work on class assignments when a few students in a particular area of the classroom starting talking. The teacher thought that student was one of the ones talking and required for her to move to another area of the room. The student felt wrongly accused by the teacher and wrote a poem that contained threatening and profane language. The student showed this poem to her friend who in turn drew a picture of a hangman to represent the teacher. The friend put both the poem and picture in her backpack. The drawing and the poem were found on the floor of another classroom by a student. The student turned it in to the assistant principal, Mrs. O'Shea. Mrs. O'Shea confronted the student about writing the poem, which resulted in a confession. The student was informed on May 9 that she was suspended from school because of the poem. On May 10, 2000, the student's father went to the school to discuss the suspension with the school principal. He was told he could file an appeal with the superintendent. The suspension was to last from the remainder of the second semester of the 1999-2000 academic year and the first semester of the 2000-2001 academic year. The student claimed that she did not intend for the teacher, or anyone else, to see the poem. The policy violated was concerning a death threat to a faculty member. The administration did not take the poem to be a true threat against the teacher's life and the teacher did not fear for her life. The student was allowed to attend alternative placement rather than out-of-school suspension;

that way she could meet with individual teachers during the teacher's planning period to discuss lessons covered in class, so no academic work was compromised during the suspension assignment.

Issue: At issue is whether or not the school violated the student's constitutional right to free speech under the First Amendment for a possible threatening and profane poem written about a school employee.

Holding: The plaintiff's motion for preliminary injunction was granted because her speech was protected by the First Amendment.

Reasoning: The court recognized that the First Amendment protects the right to free speech even for students unless that speech falls under one of the exceptions that the Supreme Court has used as precedent. If the speech does not fall into one of the limited exceptions, then it is considered protected speech and cannot be censored or punished even by the school. *Fraser* (1986) determined that a school does not need to tolerate speech that is inconsistent with its basic educational mission. Also, by *Hazelwood* (1987), the court determined that schools can suspend students for conduct that substantially interferes with the discipline of the school or violated the rights of other students. Threats are not protected by the First Amendment. The district court in this case answered two questions. The first question was a matter of the student's intent and the state of mind she was in when she was writing the poem. The second question that was answered by the court was whether the conduct substantially disrupted the operation of the school or invaded the rights of others.

The first question was answered when the defendants admitted that the student did not write the poem as a genuine threat. The defendants also agreed that the student did not intend to put the teacher in fear. The plaintiff claimed that the poem was written to let out the frustrations

and anger with the teacher for falsely accusing the student of being a disruption. The timing of the discipline also proved to the court that the defendants did not take this poem as a threat. The suspension was not issued until 6 days after it was found.

The second question was answered when the defendants argued that the student's suspension did not violate the First Amendment because it did cause a substantial disruption. The defendants claimed that if the act of disrespect goes unpunished, then it will cause a substantial disruption to the school system because it would undermine the authority to discipline students. The problem for the defendants came from the lack of citations from case law to support this possibility.

The preliminary injunction would be awarded if the plaintiff could show if the student will suffer irreparable injury. The court found that the punishment of the defendants constituted irreparable harm. The second and third element of a preliminary injunction showed that the injury to the plaintiff outweighed the damage the injunction may cause the defendants. The court found that the evidence showed the school admitted that reinstating the plaintiff to the school population would not endanger the environment. Finally, the fourth requirement that the court found in favor of the plaintiff was the likelihood of prevailing on merits. It was shown that the speech in this case is protected by the First Amendment of the Constitution, so the school district could not censor or punish the student due to the poem.

Disposition: The court found that the plaintiffs' motion for preliminary injunction was granted, and the court demanded the instant reinstatement of the student back into the Owasso High School after the outcome of the scheduling conference by the court.

Citation: *Doe v. Frank Depalma*, 163 F. Supp. 2d 870 (S.D. Ohio 2000).

Key Facts: A sixth-grade student in the Centerville, Ohio, school system in May of 1999 was disciplined for allegedly harassing a female student by writing an obscene, sexual comment in her yearbook. The plaintiff admitted that he wrote, "I just sniffed your crack" on the crease on a page in the female's yearbook. The plaintiff student was issued a written discipline and double detention as a punishment. The plaintiff's parents filed a declaratory judgment action claiming that the punishment violated the Doe's First Amendment rights as well as his right under the Equal Protection Clause of the Fifth and Fourteenth Amendments. The defendants filed a motion to dismiss.

Issue: At issue is whether or not the school administration violated First Amendment rights when implementing discipline for obscene, sexual handwritten comments in a yearbook.

Holding: The district court held that the defendants' motion to dismiss was sustained, the defendants' motion for summary judgment was moot, and the complaint was dismissed without prejudice.

Reasoning: When testing the legal sufficiency of the plaintiffs' complaint, the court must accept all the allegations in the complaint as true and any ambiguities must be resolved in the plaintiff's favor. The court can grant a motion to dismiss if no set facts could be proven that are consistent with the allegations.

The court concluded that the plaintiff's complaint failed to state a claim that relief may be granted. The court recognized that even if Doe was singled out unfairly for disciplinary actions, the plaintiff did not prove that his Equal Protection Rights under the Constitution have been violated. They did not identify a specific class of people that are protected or to which Doe even belongs. No discrimination occurred because he was part of a protected class.

Also, the plaintiff does not present a claim in which relief can be granted. Because of this, the defendants' motion to dismiss is sustained based on the allegation that the plaintiff's words were legally obscene. Relying on *Bethel v. Fraser* (1986), the defendants' claim that the principal did not violate First Amendment rights for the punishment of inappropriate speech. The school need not put up with vulgar or obscene language on the school campus. The plaintiffs are challenging the characterization of the comment and not the punishment. They are concerned that the labeling of the speech as obscene and vulgar will stigmatize the student's future. The court found that this does not violate any First Amendment rights.

The court found that it need not decide whether the remarks on Doe's disciplinary form deprived him of liberty interest or whether Doe received due process protection. The plaintiffs did not bring the due process protection before the court, so no decision had to be made. The court did grant the plaintiffs leave to file an amended complaint within 14 days from the concluding complaint.

Disposition: The United States District Court for the Southern District of Ohio, Western Division sustained the defendants' motion to dismiss, denied the defendants' motion for summary judgment, and dismissed the complaint without prejudice to the filing of an amended complaint.

Citation: *J.S. and his parents H.S. and I.S. v. Bethlehem Area School District*, 757 A.2d 412 (Pa. Commw. Ct. 2000).

Key Facts: In May of 1998, the student, J.S., was in eighth grade at Nitschmann Middle School. The student created a website on his home computer and on his own time sometime prior to May. The website was titled "Teacher Sux," which consisted of several web pages that made derogatory comments about the student's algebra teacher, Mrs. Fulmer, and the principal, Mr.

Kartsotis. Before entering the website, a visitor must agree to a disclaimer that indicated that the visitor was not a member of the district's faculty or administration and that the visitor must not intend to expose the creator of the website or cause trouble for the individual.

The principal was contacted by an instructor who received an anonymous email exposing the website. Mr. Kartsotis contacted the local authorities who, in turn, contacted the Federal Bureau of Investigation. The FBI identified the student, J.S., as the creator of the website. The student continued to attend class and participate in extracurricular activities while the investigation was occurring. A week after the principal found out about the website, J.S. removed it.

In July 1998, the school district notified the plaintiffs in writing that the student violated school district policy through three offenses: threat to a teacher, harassment to a teacher and principal, and disrespect to the teacher and the principal. After a hearing, the 3-day suspension expanded to a 10-day suspension at the beginning of the school year. The district then went through the proceedings to get the student expelled from the school district. Expulsion hearings began in August, but the parents enrolled the student in an out-of-state school.

Issue: At issue is whether or not a school system can expel a student for constructing a website out of school that contains derogative statements about faculty members and staff.

Holding: The Commonwealth Court of Pennsylvania held the affirmation ordered by the Court of Common Pleas of Northampton County to permanently expel the appellant student from its schools.

Reasoning: The reasoning behind the affirmation was determined by whether the school district violated the student's constitutional rights, whether the school district committed errors of law, and whether the school board's decision to expel the student is supported by substantial

evidence. The court had to determine that there was ample evidence that the student's web-site disrupted the educational process in the school. The school district did not act unreasonably to think that a person could be physically and emotionally disturbed after viewing the graphic images.

The court found that the school was justifiable in its decision to take the threats seriously. By looking at *Fraser* (1986), the court rejected the appellants' attempt to dismiss the reactions of the targeted faculty members. *Fraser* noted that promoting citizenship in schools is not confined to books or the curriculum. Schools must teach by example by sharing values of a civilized social order. Given the content on the website and the reactions of all of those involved, the court concluded that the school district did not violate the student's rights under the First Amendment.

The appellants claimed that the school district committed errors of law when it found that the student's comments and statements on the website were classified as harassment and threats. The court found that because the disclaimer at the beginning of the website was ineffective and the student had no privacy right, the appellants' claim is rejected. The school district provided a description of infractions in the code of conduct that were clearly defined and were violated by the student in this case. The appellants believed that the statements should have not been punished because it was an off-campus activity. The court looked to compare the expectation of privacy of information over the internet. According to this case, a writer of the letter can assume that the contents stay private until it is opened. At that time, the expectation of privacy cannot be guaranteed. In the same manner, the creator of a website can guarantee privacy until the information is posted. At that point there is no guarantee of privacy.

Finally, the appellants claim that the contents of the website did not cause actual physical harm to the schools community. The court took into account the testimonies of Kartsotis and

Fulmer who spoke of their mental and physical reactions to the web-site. The school district believed that their testimonies were creditable, but the court cannot review credibility on appeal. The court was convinced that the record supports the decision made by the school district to be based on factual evidence.

Disposition: The Commonwealth Court of Pennsylvania affirmed the decision made by the Common Pleas Court of the County of Northampton. A dissent was offered by one judge, but the majority agreed with the affirmation declared.

Citation: *Littlefield, et. al. v. Forney Independent School District, et. al.*, 108 F. Supp. 2d 681 (N.D. Tex. 2000).

Key Facts: In April 1999, the Forney Independent School District implemented a mandatory school uniform policy applicable to four schools. The plaintiff students and their parents filed an action under the provision of 42 U.S.C § 1983 against the school district, its trustees, and its superintendent due to the claim that the mandatory policy violated their individual constitutional rights. The policy did include an opt-out provision that allowed students to apply for an exemption to the policy based on philosophical, religious, or medical objections. A grievance procedure was implemented for the parents if the opt-out policy was rejected. The three-step procedure included that first, the request be considered by the principal of the school; next, if it is denied, then the parent can request an appeal by the superintendent; finally, if that appeal is denied, then it is reviewed at the local school board meeting by the board members. Some of the plaintiffs refused to fill out the questionnaire or failed to go through the grievance procedure. They then filed this suit to seeking to enjoin the school board from applying the uniform policy to them and declaring that the uniform policy is unconstitutional.

The defendants responded by filing two motions to dismiss due to the lack of a stated claim upon which relief could be granted. The defense also moved for summary judgment and the individual defendants asserted the qualified immunity motion.

Issue: At issue is whether or not a school district violated First Amendment rights when implementing a mandatory school uniform policy.

Holding: The United States District Court for the Northern District of Texas, Dallas Division, held that the defendants' motion for summary judgment was granted and their motions to dismiss were deemed moot due to the fact that the school uniform policy did not violate any of the plaintiffs' constitutional rights.

Reasoning: The plaintiffs alleged that the uniform policy by a public school, where attendance is mandatory, violated their asserted rights under the Constitution. The court found that determining summary judgment was proper because there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. The first issue that was addressed under the Constitutional claims of the plaintiffs was the question of whether or not the implementation of dress code can be characterized as speech for First Amendment analysis. The court analyzed whether the intent to convey a particular message was present and whether the likelihood was apparent that all who viewed the message would understand it.

The courts have used *Tinker*, *Hazelwood*, and *Fraser* to determine that students have rights in school, but the appropriateness of speech in the classroom or in a school assembly is to be determined by the school board. (*Fraser*, 1986). The court looked to use the Spence test to determine whether or not the students intended to convey a particular message by wearing their chosen dress. The students claimed that they were going to express their individuality with their dress. The court found that this expression satisfied the first part of the Spence test.

On the other hand, the court reached a different conclusion with respect to the likelihood that others would understand the individuality message that the plaintiffs were trying to convey. The court believed that by wearing the clothes of their choice did not guarantee that the students were communicating a particular message that was understood by others. The plaintiffs claimed that if they were to comply to the dress code, then they would communicate a message of forced conformity. The court noticed that the plaintiffs did not attack any parts of the opt-out process. The court found it “ludicrous” to suggest that the questionnaire or the grievance procedure was somehow restricting free speech. The court concluded that the school uniform policy did not violate the plaintiffs’ free speech rights under the First Amendment, and the defendants are entitled to judgment as a matter of law due to no genuine issue of material fact of any of the plaintiffs’ claims.

Disposition: The court found that the defendants’ motion for summary judgment was granted and their motion to dismiss was deemed moot due to no First Amendment violations.

Citation: *Long v. Board of Education of Jefferson County, Kentucky*, 121 F. Supp. 2d 621(W.D. Ky. 2000).

Key Facts: The Atherton High School Based Decision-Making Council was a school council that was responsible for setting school policy that provides an environment that enhances student achievement and helps the school meet its goals. The assistant principal and task force member, Kirk Lattimore, was concerned with the problems associated with student dress, which included gang dress. After meeting with the task force, which included members of the faculty, a dress code was identified in order to address the problem with gang affiliation in order to promote student safety, prevent student-on-student violence, and make students identifiable by officials of the school in order to prevent intruders.

The dress code limits the clothing students may wear as well as the manner in which they wear it. It prohibits logos other than the school's logo to be on clothing. It prohibits medallions and necklaces and requires closed heel and toe shoes. The plaintiffs want to wear clothing of their own choice and believe that the dress code is unnecessary. The plaintiffs feel that the dress code will not produce its goal.

Issue: At issue is whether or not school administration violated the First Amendment rights of students when proposing and implementing a dress code in schools.

Holding: The United States District Court for the Western District of Kentucky, Louisville, held that the plaintiffs' complaint was dismissed without prejudice and the defendants' motion for summary judgment was sustained.

Reasoning: The court decided to rule against the plaintiffs' claim that the dress code of the school infringed on their First Amendment right to freedom of speech by preventing expressive conduct through the choice of the school attire. The court had to decide if the dress code violated an activity that the First Amendment protects. The plaintiffs' expression does have constitutional protection, but the court found that the dress code did not reach the expressive conduct under the First Amendment. The court found that no evidence suggests that the dress code was intended to suppress the conduct or message of the students. This resulted in the court using the *O'Brien* test, which is a less stringent standard for evaluating restrictions of symbolic speech.

Looking first at *Tinker* and *Fraser*, the court found that the school forum determines a different look than expression outside of a school, because of the need to control the atmosphere in which students learn. By applying the *O'Brien* test, the court found that the school

administration had a substantiated interest in creating a positive learning setting for its students, free of gang presence. The court felt that the officials did not intend on suppression of speech.

The court found that the extended deliberation of the adoption process of the dress code was reasonable and therefore did not violate the plaintiffs' rights under the First Amendment. It was found that the dress code did not have to stop an actual disruption to receive protection. The court did note that there were still some unanswered questions, but school officials have a right and obligation to anticipate problems before they arise.

No allegations were made that the plaintiff students were ever suspended or disciplined, so the due process clause is not required. The dress code is also determined to be gender neutral, so the equal protection claim cannot be based on gender discrimination.

Disposition: The court found that the defendants' motion for summary judgment is sustained and the plaintiffs' complaint is dismissed without prejudice.

Citation: *Emmett v. Kent School District*, 92 F. Supp. 2d (W.D. Wash. 2000).

Key Facts: Nick Emmett was an 18-year-old senior at Kentlake High School. He was a well-rounded student with a 3.95 GPA. On Feb. 13, 2000, he posted a webpage on the internet that he created from his home computer that was entitled the school's unofficial homepage. It contained commentary on the school administrators and faculty. The page also posted some mock obituaries about two of Nick's friends. The writing was inspired by a creative writing assignment from a class from the year before. The plaintiff allowed visitors to the website to vote on who would "die" next.

On February 16, an evening news show featured the website and described it as having a hit list of people to be killed. The words "hit list" were never on the website. That night the plaintiff removed the site from the internet. The next day he was summoned to the school office

and was told that he was on emergency expulsion for intimidation, harassment, and disruption of the educational process, not to mention a violation of the Kent School District copyright. The emergency expulsion was modified to a 5-day suspension. Because of the school's vacation, he actually was suspended from February 28 to March 1, 2000, which affected his participation in school sports including basketball practice and playoff games.

Issue: At issue is whether or not the school administration violated the student's First Amendment rights when he was suspended and denied sports participation due to the construction of a mock "unofficial" school website that was made on a home computer.

Holding: The United States District Court for the Western District of Washington, Seattle Division held that the defendants were enjoined from enforcing the short-term suspension imposed on the plaintiff.

Reasoning: In order for the court to decide a conclusion to this case, it must take in account the likelihood of success on merits and the irreparable injury that granting a preliminary injunction would cause. The plaintiff used *Tinker* to argue that the First Amendment rights do not stop at the schoolhouse gates. The defendants used *Fraser* as justifiable grounds for punishment. The court takes into consideration that school administrators have a difficult job providing a safe environment for all students. Web sites can be an early sign of potential violence, but the defendants did not provide any evidence that showed that the mock obituaries and voting on the website actually threatened anyone. The lack of evidence proved that the plaintiff has a substantial likelihood of success on merits. If the court does not grant relief to the plaintiff, then the student will miss 4 additional days of school and a playoff basketball game. The court finds that there is a sufficient amount of evidence to prove irreparable injury.

Disposition: The court found that the defendants are enjoined from enforcing the short-term suspension on Nick Emmett.

Citation: *Pangle v. Bend-Lapine School District, et. al.*, 169 Ore. App. 376 (2000 Ore. App. LEXIS 1414).

Key Facts: This appeals case began when a high school student was expelled for writing articles in an unauthorized publication that he distributed on the school campus. The publication was distributed on school grounds without the authorization of school administration. Chris Pangle wrote an article that included a list of things that he would like to see happen at school to the people who run it. He wrote another article that included a list of names, addresses, and telephone numbers of the teachers of the high school. Pangle was suspended after a disciplinary hearing. It was recommended that Chris be expelled from the high school during the first semester unless a plan of administrative probation could be developed that was acceptable to the plaintiffs and the school administration.

The plaintiff filed a declaratory judgment action and writ of review petition. The initial plan of administrative probation was developed in August, which allowed Chris to reenter the school. The trial court granted the defendants' motion to dismiss the amended petition for a writ of review because the petition was untimely.

Issue: At issue is whether or not the school administration violated the First Amendment rights of a student who was suspended due to writing potentially threatening articles in an unauthorized publication that was distributed on school grounds.

Holding: The Court of Appeals in Oregon vacated the judgment dismissing the state law declaratory judgment due to the lack of jurisdiction and remanded for entry of judgment in accordance with the opinion. All other judgment was otherwise affirmed.

Reasoning: The plaintiff argued that the district's discipline violated his First Amendment rights because the discipline of a high school student could not be based on the use of vulgar language, the use of threatening language that was not directed toward a lawless action, or be based on the failure to obtain prior approval under a school rule for the distribution of a publication on campus. The court used all three cases of *Tinker*, *Fraser*, and *Hazelwood* to determine the Supreme Court's case law that concerned the First Amendment rights of high school students.

The appellate court had to decide if the distribution of the publication caused a disruption, actual or potential, to the school's educational mission. The court disagreed with the plaintiff that the discipline suppresses Pangle's viewpoint. The appellate court believed that if the activities written in the publication had been acted on, then the safety and rights of other students along with school personnel would be infringed upon. The court found that the disciplining of Pangle was not unlawful by using *Fraser* due to the undermining of the public school mission.

*Fraser* also was used by the appeals court to hold that the vulgar language used in the written publication would not be protected expression. The court also found that the defendants have the constitutional right to regulate the time, place, and manner of distribution of outside publications within the school environment including the school campus. The evidence showed that the district disciplined Pangle because his purpose of distributing the work was to disrupt the operation of the school by combining threatening language and vulgar speech as forms of expression.

Disposition: The appeals court vacated the judgment to dismiss the state law declaratory claim because of lack of judgment. It then remanded for entry the judgment of the district court and otherwise affirmed all other actions in favor of the defendants.

Citation: *Riggan v. Midland Independent School District, N. Richmond, The Midland Independent School Board, M. Manulik, G. Lara, G. Bufler, S. Boring, P. Hodges, J. Fuller, B. Oekerman, J. Cummins, J. Kelly, and J. Baressi*, 86 F. Supp. 2d 647 (W.D. Tex. 2000).

Key Facts: Casey Riggan was a high school senior at Midland Senior High School in 1999. At the time, the principal, Richmond, was being investigated for alleged sexual improprieties as a result of various photographs and videotapes. A local newspaper claimed to have an intimate videotape of Richmond, but this tape was never produced. Administrators learned that Riggan might have some information relating to the rumors. Riggan admitted that he and two other friends had seen Principal Richmond out at a local restaurant and they decided to follow him while he drove to a teacher's house. Riggan claimed to have handed the camera to one of his friends who took two pictures of Richmond's car on the street, but no one ever brought the pictures to school, and Riggan denied starting any rumors of Richmond's sexual misconduct.

Richmond interrogated the two friends about the picture taking incident, and each one repented. Neither one of these students was punished. Richmond called Riggan's father, Tim Riggan, into the office in April 1999. A dispute occurred over the content of the meeting. Principal Richmond claimed that the meeting was to simply inform Riggan and his father of what Richmond had found out and to get their side of the story. The Riggans disputed this and claimed that the meeting turned heated resulting in Tim Riggan being removed from Richmond's office.

After the meeting, Richmond charged Riggan with retaliation defined in Texas Penal Code § 36.06, which is a Level III offense in the code of conduct and suspended Riggan for 3 days. Level III offenses were referred to the Midland law enforcement. The retaliation claim

came from the accusation that Riggan had several previous disciplinary incidents dealing with being asked to leave several high school basketball games due to wearing an inappropriate shirt and sneaking sodas into the game. A second meeting was held with Tim Riggan about the remainder of Riggan's punishment, 5 days at the Alternative Educational Program as a compromise. Riggan was also required to write two letters of apology or he would be banned from participating in the graduation ceremony. The principal must issue a written decision within 3 days summarizing the grievance, stating the decision, and the reasons for the decision. A written decision was never issued in this case.

Joe Cummins presided over the hearing and found that no evidence of retaliation, but instead charged Riggan with disrespect to an adult. Riggan's discipline was taken away from Richmond and assigned to an assistant principal. This was done because Richmond threatened civil action against Riggan and his parents. Riggan appealed to the Board of Trustees, which called a Level III hearing. No new evidence was presented, but a Board member allegedly was planning on giving more retaliation information outside the record. Also, the Board quite possibly could have violated the Opening Meetings Act when refusing to open the meeting to the public because several students had come to speak on behalf of Riggan. After Riggan and his family initiated the legal action, the Board of Trustees met again and changed the motion to a "settlement offer" of allowing him to participate in graduation ceremonies if he wrote the letters of apology or dropped the lawsuit.

Issue: At issue is whether or not school administration violated a student's First Amendment rights when disciplining a student without procedural due process.

Holding: The United States District Court for the Western District of Texas, Midland-Odessa Division, held that summary judgment be granted in part and denied in part for the defendants.

Reasoning: The court analyzed whether or not the due process protections apply and which process is due in this case. The Supreme Court found that students had a protected property interest in education that required minimum due process protections before disciplinary suspensions could be imposed. In Texas, schoolchildren have a legal right to a public education and it cannot be taken away through suspension or expulsion without due process of law. The court must decide whether or not property interest was implicated by the punishment that Riggan received.

The court found that it need not decide between the individual disciplinary actions that Riggan was given, but instead it will look at the entire disciplinary package that the principal implemented which included: three days of suspension, five days assignment to AEP, and two letters of apology. The package was sufficient enough to implicate that Riggan had protected property rights in education and should be allowed at least the minimum Due Process protections. With this decision, the courts examined the evidence to see if Riggan's due process rights were actually met by the grievance procedure.

When a student is suspended or expelled from public school, he or she is entitled to oral or written notice of the charges, an explanation of the evidence against him or her, and the opportunity to present his or her side of the story. Bias played a part in Riggan's due process because the principal disciplining the student was personally involved with the rumor. When the principal's level of involvement is so great that he or she allows a jury to determine that decision, then the possibility of due process being violated is high. The court found that under these

circumstances, there is an issue as to whether or not Richmond's bias affected the initial hearing and the second level hearing.

The plaintiff in this case claimed that Richmond did not give effective notice of charges against him or of the evidence against him. The failure of not providing a written decision after the Level 1 hearing is not necessarily a due process violation. The court found that despite the fact that the due process may have not been violated, it is relevant to whether the plaintiff was given adequate notice of conduct violations or what evidence was against him. Even with a list of prior offenses to justify the disciplinary action, if Riggan was not given notice of these transgressions before his disciplinary hearings in order to allow him to respond, then due process was not satisfied. This resulted in the defendant's motion for summary judgment of procedural due process claims being denied by the court.

The defendant also moved for summary judgment on substantive due process. While the court seemed to see Principal Richmond as using his position to prosecute an individual who allegedly damaged his reputation, the court did find that this case is more properly analyzed under procedural due process instead of substantive due process. The plaintiff abandoned this claim by not responding to the motion for summary judgment as to substantive due process claims, which means the court granted the motion for summary judgment for the defendants.

Other claims brought up in this case are Fifth Amendment claims, First Amendment claims, conspiracy claims, state constitutional claims, and qualified immunity claims. The plaintiff abandoned the Fifth Amendment claim so, in turn, the court granted summary judgment in favor of the defendant. The court found that because full discovery cannot be made without more evidence, then the defendants' motion for summary judgment is denied. The plaintiff's conspiracy claim is denied on the fact that the imbalance of power and the conduct of defendants

when a settlement offer was given as an option. The defendants' request for summary judgment on the plaintiff's state constitutional claims is denied in order to allow the plaintiff the opportunity to explore what forms of equitable relief may be available. The court decided that the conduct of the defendants throughout the time that all of this occurred does not clearly show that the defendants acted reasonably or in good faith. Credibility determinations should be explored further in discovery and submitted to a jury. The court found that the defendants' motion for summary judgment on qualified immunity grounds is denied.

Disposition: The court found that the defendants' motion for summary judgment is granted in the areas of substantive due process and self-incrimination claims. The defendants' motion for summary judgment is denied in the areas of plaintiff's procedural due process, state constitutional, freedom of speech, and conspiracy claims, and the defendants' qualified immunity claim.

Citation: *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000 U.S. LEXIS 4154).

Key Facts: A suit was brought by current and former students of a school in Santa Fe Independent School District in April of 1995. This suit was based on the claim that some policies and practices of the school system that violated the religion clause of the First Amendment. The school system allowed students to initiate Christian prayer at graduation ceremonies and home football games. In August of that year, the school system responded by adopting a policy entitled "Prayer at Football Games." This policy gave authorization of two student elections, one of which was to determine whether or not the invocations were to be delivered at home games; the other was to select the student spokesperson to deliver the invocations. The student body voted to allow the invocations and also chose a spokesperson. In October of 1995, the school system

adopted a revised version of the August policy which basically omitted the word “prayer” and specifically described the policy’s missions and goals. When the system rewrote the policy it did not conduct new elections to replace the results of the August policy. The District court denied injunctive relief to the petitioning students, but it did require that the invocations be nonsectarian and nonproselytizing. The United States Court of Appeals reversed this decision and found that the October policy was still a violation of the establishment of religion clause. The United States Supreme Court affirmed.

Issue: At issue is whether a school district policy that allows a student-led prayer publicly to be delivered over the public address system before home football games violated the Establishment Clause of the First Amendment of the Constitution.

Holding: The United States Court of Appeals held that the school district’s policy permitting student-led, student-initiated prayer at football games violated the Establishment Clause.

Reasoning: The United States Court of Appeals on writ of certiorari supported its holdings due to three reasons. First, the Court used *Lee v. Weisman* (505 U.S. 577) to find that government may not force or persuade participants to follow a religion or a religious exercise. Due to this invocation policy being presented on school property, at a school-sponsored event, over the school’s public address system, then the speech is not private, but instead labeled as public speech in a public forum. By using *Bethel v. Fraser* (1986) and *Hazelwood v. Kuhlmeier* (1987), the establishment of the type of speech and the type of forum, public or private, was determined. Next, the Court found that the school district’s argument that the policy is different from the rabbi-led graduation prayer because there was no government coercion to force anyone to participate in the prayer. The opinion of the Court was that the Constitution requires that

schools not forcibly impose on students the choice of whether to attend games or not in order to avoid a personally offensive religious ritual. Finally, the Court rejected the school district's argument that the suit was premature because no invocation had yet been delivered at the time of legal action. The Court focused on the electoral process used to put the issue of prayer to a majority vote thus creating a governmental entity that controls the forum of a particular religion. The student minority did not have their views constitutionally recognized, according to the Court.

Disposition: The Court affirmed the trial court's decision of the school district's violation of the Establishment Clause of the U.S. Constitution.

Citation: *Seamons & J. Seamons v. D. Snow, M. Benson, Sky View High School, The Cache County School District*, 206 F. 3d 1021 (10th Cir. Utah 2000).

Key Facts: This appeals case comes from a locker-room assault of a high school football player by several of his teammates. The plaintiff student filed an action under 42 U.S.C. § 1983 against his coach and principal along with the school district. Four teammates had grabbed him, restrained him, and then bound him to a towel rack with adhesive tape. A girl who had formerly dated Brian, the plaintiff student, was brought in the locker room in order to humiliate him further. The incident was reported to the police and to school authorities, the principal and the football coach. Two days after the assault, Brian and his parents met with Benson, the principal, and Snow, the football coach, to discuss the possibility of pressing criminal charges against the team members who participated in the assault. Snow mentioned that none of the assailants would be removed from the team. Brian wanted some time to decide if he would return to the team.

That Friday, Brian met with Coach Snow and mentioned that he would like to remain on the team. The coach agreed and asked Brian to meet with the four team captains before the game.

Two of the four captains were involved in the assault. The coach was present at the meeting and the purpose of the meeting was to settle the dispute before the game. A confrontation occurred between Brian and Dan Ward, one of the assailants. Dan believed that Brian should have to apologize to the team for reporting the assault to the police and the school administration. Dan said that Brian had betrayed the team by telling and should not get to play until he apologized. Coach Snow told Brian to forgive, forget, and apologize to the team captains. Brian refused then Coach Snow told him to take the weekend and think about it because he would not be allowed to play on the team until he apologized. The next Tuesday, Brian told Coach Snow that he would not apologize to the team and he still wanted to play football. Coach Snow kicked him off the team. The next day the remainder of Sky View's football season was canceled.

The plaintiffs filed suit with many allegations, all of which were dismissed by the district court. The plaintiffs appealed, and the appellate court affirmed all the dismissals with the exception of the First Amendment claim. The district court also unusually held an evidentiary hearing with five witnesses that testified. Despite this testimony, the district court granted summary judgment for the defendants and held that all school officials were entitled to qualified immunity.

Issue: At issue is whether or not a district court can conduct an evidentiary hearing on a summary judgment motion. Also, at issue is whether or not a school official can discipline a student for not apologizing for reporting an assault.

Holding: The United States Court of Appeals for the Tenth Circuit reversed the judgment of the district court in regard to the defendants Snow and Cache County, affirmed the judgment in regard to the defendant Benson, and remanded the case for further proceedings.

Reasoning: The appellate court found conflicting testimony presented at the evidentiary hearing and in depositions, and determined that the district court could not reach the conclusions on the First Amendment claim without resolving the factual disputes. The resolution is not something that the district court can do at this point in the summary judgment proceedings by *MacLean* (274 F. Supp. 190). The First Amendment claim was reanalyzed by the appeals court in three ways. After the First Amendment claim was addressed, then the appeals court used the qualified immunity claim to finalize its holding.

The first issue that the appeals court focused on was whether or not Coach Snow asked Brian to apologize to the team captains. A dispute was apparent in this testimony. The district court found that Brian was not asked to apologize for reporting the assault. Brian testified that Dan Ward demanded an apology and when he refused then Coach Snow said that Brian would need to forgive, forget, and apologize in order to remain on the team. Coach Snow admits to making statements of this caliber despite denying ever directly telling Brian to apologize.

The next issue that the appeals court focused on was the intended scope of this apology. The district court found that the word “apologize” was not a true request for an apology from Brian, but instead was a request for reconciliation in order to allow the boys to work together as a team in the game. The appeals court did not agree with the district court in this regard and instead saw the instance as Snow requiring an apology or the result would be Brian’s dismissal from the team. The scope of the request for an apology is dependent on what Snow’s intent was when asking for it.

The third issue is whether Brian’s failure to apologize was a significant factor in his dismissal from the team. The district court found that Brian had not produced legal causation for a connection between his speech and the dismissal from the football team. The court of appeals

disagreed. The appellate court found the suspension and dismissal from the team and the lack of an apology to be directly related. Because of the delegated authority that the school district gave to Coach Snow, then the school district could be liable for Snow's action about the team membership. With respect to the liability of Principal Benson, the issue was more complex. He was involved with the controversy, but he never had a direct relationship with Brian's suspension or dismissal. The appeals court agreed with the district court that Benson should be dismissed as a defendant in this lawsuit.

The district court found that even if the evidence did show a support for a First Amendment claim, then the defendants would be entitled to qualified immunity. The appeals court held that the complaint stated that the defendants clearly violated established law and therefore were not entitled to qualified immunity. School authorities cannot punish students for speech that is non-disruptive, non-obscene, and not school-sponsored (*Fraser*, 1986; *Hazelwood*, 1987; *Tinker*, 1961968). Coach Snow was not given qualified immunity by the appeals court. That precedent set that a competent public official should know the law governing his or her own conduct before acting on a decision.

Disposition: The court affirmed in part, reversed in part, and remanded for further proceedings the district court's holding.

Citation: *Anderson, individually and as a guardian of A.A. v. Milbank School District 25-4*, 197 F.R.D. 682 (2000 U.S. Dist. LEXIS 19418).

Key Facts: While in the principal's office, A.A. said a word that violated the school district's written policy against the use of profanity or other inappropriate language on school property. A.A. was clear on the rule and did not dispute that she violated the rule. Being that the rule was a "zero tolerance" rule, A.A. was given a 2.5 day in-school suspension, as well as a 2%

grade reduction from classes missed, per the policy. The grade reduction ultimately did not affect her semester grade.

The plaintiff then challenged the constitutionality of the school policy under the First Amendment. The court considered the merit of the plaintiff, but decided that the school could ban profanity and inappropriate language on school property because it was a legitimate pedagogical concern. Civility, maintaining decorum, and obscene speech are not entitled to constitutional protection.

Issue: At issue is whether a school system can implement a “zero tolerance” policy against profanity and inappropriate language.

Holding: The United States District Court for the District of South Dakota, Northern Division, held that civility, maintaining decorum, and obscene speech are legitimate concerns and are not constitutionally protected by the First Amendment.

Reasoning: Looking at the case, three major reasons appear in the decision of this case. The first topic for discussion was whether the expression was “school-sponsored speech” or “independent student” speech. A school has greater control over “school-sponsored” speech, although this case was found to be “independent.” Keeping this in mind, in the absence of a public forum, school officials may limit student speech in a school-sponsored activity if they believe it is a legitimate concern, according to *Hazelwood* (1987). At Milbank, coming to the principal’s office to receive messages is a school activity.

Secondly, *Fraser* (1986) shows us that schools must teach by example the shared values of a civilized social order. These values include discipline, courtesy, and respect for authority. Civility is a legitimate pedagogical concern, as is compliance with school rules. In this case, the student signed an agreement that she would obey school rules.

The final reason for the outcome of the case is maintaining the decorum of the school. Because the principal is the disciplinarian of the school, this would certainly apply to conduct within the principal's office. It is understood that most vulgar language is spoken to one's self out of frustration or anger, but the court has recognized that certain kinds of speech are less central to the First Amendment.

Disposition: The District Court ordered that the motion of the defendant for a summary judgment is granted and the case was dismissed on the merits.

2001

Citation: *D. Canady; B. Jones, P. Jones; T. Attaway; E. Hodgkin's; E. Fisher; C. Ayers; D. Jones; T. Neese; D. McCrory; V. Walsh; M. Walsh; P. Vidal; D. Turner; L. Wright; T. Broderick; K. Henderson; J. Christen; D. Allen; C. Wilhelm; B. Emerson; T. Davis; K. Higginbotham; B. Shoebridge; E. Walker; N. Kirkpatrick; W. Leritte; K. Vance; K. Foster; B. Dominique; T. Monroe; T. Harmon; C. McCarl; D. McCarl; V. Allen; B. Monroe v. Bossier Parish School Board*, 240 F. 3d. 437 (5th Cir. La. 2001).

Key Facts: The Louisiana Legislature amended section 17:416 of the Louisiana Revised Civil Statutes to allow parish school boards the option to implement mandatory uniforms if written explanation of the dress requirements is given to the parents. In the academic year of 1998-1999, the Bossier Parish School Board required 16 of its 17 schools to adopt the mandatory uniform requirement in order to see if it was more effective on learning environment to have uniforms. The 1999-2000 academic year required all 17 schools to adopt the uniform mandate as a result of the positive results from the findings of a year ago. The average uniform consisted of two colors of polo or oxford shirts and navy or khaki pants. The schools sent written notification

to the parents explaining the dress requirements along with a list of local vendors supplying the clothing. The parent plaintiff filed suit against the Bossier Parish School System claiming a violation of their children's right to freedom of expression, a failure of religious consideration in dress code mandate, and violation of Fourteenth Amendment liberty interest for their children to wear clothing of their choice.

Both the parents and school board filed for summary judgments. The evidence convinced the district court to enter summary judgment in favor of the school board. The parents appealed on the basis that the district court mistakenly found that the school uniform policy did not violate their children's constitutional rights. They also claimed that the district court denied the plaintiffs additional time to conduct discovery.

Issue: At issue is whether or not a school board can implement a mandatory student dress code.

Holding: The United States Court of Appeals for the Fifth Circuit affirmed the United States District Court for the Western District of Louisiana's decision to grant summary judgment to the defendant school system.

Reasoning: The court of appeals had to first decide if the choice of attire qualifies as speech protected by the First Amendment. Next, the court had to enforce the precedent found in *Bethel v. Fraser* (1986) where constitutional protection is not absolute for students in the public school setting. The third reason behind the appeal court's affirmation is that the mandatory uniform policy is viewpoint-neutral. Finally, the argument that the Fourteenth Amendment was denied to the students is not proven by the plaintiffs in the case because the due process should not be used as a fallback argument when the First Amendment directly applies.

First, the district court concluded that the choice of clothing that a student has is a personal taste and therefore cannot be given the same First Amendment protection as other speech. The argument that clothing may symbolize ethnic background, religion, or political views is the reasoning behind the idea that the comparison cannot be made between hair and clothing.

Secondly, the appeals court noted that while certain forms of speech are constitutionally protected, this protection is not absolute in the public school setting. The school does not have to tolerate speech that is inconsistent with the basic educational mission even if the speech would be tolerated outside of the school setting. Using *Fraser* (1986) and *Hazelwood* (1987), the authority to decide what is appropriate within the schools in the areas of behavior and dress is the school administration, as long as the three categories of speech regulation are addressed: viewpoint; whether it is lewd, vulgar, obscene, or plainly offensive speech; was it a school-sponsored activity.

Thirdly, the appeals courts felt that the facts of this case do not conform to any of the three categories previously mentioned. The uniform policy is a viewpoint-neutral policy. The school has not punished the students for wearing lewd, obscene, or offensive clothing. Finally, the students' choice to wear the uniform to school is not an activity that the school sponsors or that is related to the curriculum. So the plaintiff's argument does not correspond to any of the precedents of *Tinker* (1968), *Fraser* (1986), or *Hazelwood* (1987).

Finally, the appeals court argued that because there is no reason to address a due process claim in this case, and then the claim that the student's "liberty" interest in choosing to wear whatever clothing they wish was violated is not relative to the violation of the Fourteenth

Amendment. With this in mind, the appeals court affirmed the decision of the district court to deny claims of violating the Fourteenth Amendment.

Disposition: The decision for the United States District Court or Western District of Louisiana was affirmed by the United States Court of Appeals for the Fifth Circuit.

Citation: *Killion v. Franklin Regional School District*, 136 F. Supp. 2d 446 (W.D. Pa. 2001).

Key Facts: Zachariah Paul, a student at Franklin Regional High School during the 1998-1999 academic school year, created a “Top Ten” list about a faculty member in retaliation of denial of a student parking permit and discipline for a rule infraction in relation to the track team. The faculty member was the athletic director, Robert Bozzuto. The list contained inappropriate statements about the appearance of Buzzuto with some statements containing vulgar language. Paul composed the list at home, but emailed it to a list of friends. Paul claims that he never printed the list, but a few weeks later several copies were found in teacher lounge and at the middle school. Upon finding copies of the list at school, Paul was disciplined with a 10-day suspension because the list contained offensive marks about a school official, was found on school grounds, and Paul admitted to creating it. Paul also was not allowed to participate as a representative of the school on the track team while the suspension was in place. On May 10, 1999, the plaintiffs sought immediate reinstatement due to the lack of due process proceedings by the school district. A settlement agreement was reached in which the plaintiff would withdraw the complaint if the school would provide Paul with the due process outlined in the board policy of the school district. At 10:15 p.m. the plaintiffs received a fax stating that there was a suspension hearing at 9:00 a.m. the next morning. On May 12, 1999, the plaintiff sued for violation of the First and Fourteenth Amendment.

Issue: At issue is whether or not school administration may punish a student for inappropriate language written about a faculty member.

Holding: The United States Court for the Western District of Pennsylvania held in the favor of the plaintiffs on the grounds that the defendants did not show that a substantial disruption occurred.

Reasoning: The court ruled in favor of the plaintiff because of the due process violation, the freedom of speech violation, and the vagueness of the school policy about such offenses as this. The plaintiff argued that the school district violated Paul's right to procedural due process. The plaintiff also argued that the speech of Paul was restricted because the speech was not threatening. Finally, the plaintiff stated that the Franklin Regional School District's Retaliatory Policy was unconstitutionally vague and overbroad.

According to the court, the school district violated the due process code of 22 Pa. Code §§ 12.6, 12.8. Not providing written notice to the parents of Paul or to Paul himself prior to the suspension violated 12.6 and 12.8. These two sections state that there must be written notification given of the reasons for the suspension before the informal hearing occurs. The school district did not provide Killion with reasons for the suspension until the middle of the first informal hearing. On the other hand, the second due process violation claim was not supported by the courts because the district did provide written notification of possible suspension the night before the second informal hearing. Also, the plaintiff's prior agreement to the date and the time of the hearing failed to show lack of due process with the second hearing. Despite this, the court did grant summary judgment in regard to the May 4 suspension which was issued without prior written notification.

The courts found that there was limited case law to review in regard to freedom of speech violations that contain speech that occurs off school grounds. It is found that school authority over off-campus expression is much more limited than expression that is on school grounds. The courts applied the *Tinker* analysis and found that Paul's suspension violates the First Amendment because the defendants fail to satisfy the *Tinker* substantial disruption test. Even though the writing was upsetting to Bozzuto, it did not cause any faculty member to take a leave of absence such as in *J.S., a minor v. Bethlehem Area School District* (2000). The court found that there was an absence of threat or actual disruption. *Fraser* cannot be applied by the courts because the list was generated outside of the school grounds, so Paul was not engaged in any school activity or association when he compiled the Buzzuto Top Ten list.

Finally, the courts easily granted the plaintiff's challenge that the retaliatory policy of the school district was overbroad and vague because the defendants failed to address the matter. An overbroad statute punishes activities that are not constitutionally protected, but prohibits protected activities as well. The court found that the policy is overbroad because it could not be interpreted to prohibit protected speech, and it is not limited to speech that causes substantial disruption. The court found that the policy was vague because the unlimited discipline that school officials can use when "abuse" is directed toward a teacher or administrator was subjective and not defined. This leads to dangerous interpretations by school officials. The unrestricted delegation of power is the reason for the vagueness in this policy.

Disposition: The United States District Court for the Western District of Pennsylvania ordered that the motion of the plaintiffs be granted and the motion for the defendants be denied. Monetary damages and counsel fees incurred by the plaintiffs were argued at a later date.

Citation: *Sypniewski, M. Sypniewski, and B. Sypniewski v. Warren Hills Regional Board of Education*, 2001 U.S. Dist. LEXIS 25388 (D.N.J. Sept. 4, 2001).

Key Facts: Warren Hills School District educates about 2,000 student from Grades 7 through 12. About 5% are minorities, with a total of 50 African American students. Racial tension has been an issue in the school system for several years. Some instances included when a White student dressed up as a Black slave with a noose around his neck on “Costume Day” at school. That student was suspended because of his attire. Another student complained that a shirt that contained the words “redneck” and the symbol of the Confederate flag was offensive. This complaint brought a human relations commission together to make a number of suggestions on how to handle the situation. Out of the commission came a program for the high school that promoted diversity and involved peer mediation.

The plaintiff in this case, Thomas Sypniewski, admitted to wearing the Confederate flag to school, but did not feel it was a racist sign or symbol. Some students in the school formed a group called the “hicks” or “rednecks.” This group organized several activities that occurred on September 20, 2000. At 7:30 a.m. that day, a student walked down the hall waving a Confederate flag. Other racially offensive incidents occurred that day, which resulted in the assistant principal interviewing the students allegedly involved in the flag waving incident. At this point the administration learned about the group known as the “hicks” and their “White Power Wednesday.”

Tension rose at the school to a high point within the next month. A group of parents in support of wearing the Confederate flag, including Sypniewski, were present at the meeting to show the support of the discipline action against the racist group on campus, but not to banning the Confederate flag on clothing. The meeting received media coverage, but did not result in the

Board of Education adopting any new policy because of the belief that students should have a right to reform their behavior.

After a few months and a few more incidents, the board of education researched racial harassment policies from other school districts and chose a policy that withstood legal challenges. Brian Sypniewski purchased three Jeff Foxworthy t-shirts at Wal-Mart. These shirts were based on the comedy routine that Jeff Foxworthy is known for: “You might be a redneck if. . . .” These shirts were worn by the Sypniewski boys several times during the 1999-2000 and 2000-2001 school years. On March 22, 2001, during the last period of the day, Thomas Sypniewski was asked to report to the principal’s office because he was wearing the Foxworthy shirt. Griffith, the assistant principal, disciplined him as a violation of the dress code. The assistant principal gave Sypniewski the choice to turn the shirt inside out or change or take a suspension. The plaintiff claimed that he did not believe the Foxworthy shirt was offensive or violated the dress code. The plaintiff then stated that he would appeal any suspension which resulted in the assistant principal reprimanding Sypniewski.

Before he could appeal the suspension, an incident regarding his brother Brian Sypniewski and the Foxworthy t-shirt occurred the next day. Brian was at the middle school, which had the same dress code, and was referred to the vice-principal for his Jeff Foxworthy t-shirt. The vice principal of the middle school, Robert Griffin, informed Brian that the shirt was not a violation of the dress code and therefore no disciplinary action would occur.

The appeal of the suspension of Thomas Sypniewski was denied by the school board because of the specific dress code violation and insubordination. A letter was sent to Thomas’s parents stating the appeal was denied and the suspension was put into place.

Issue: At issue is whether or not a school district violated the First Amendment rights of students when banning the wearing of t-shirts that contain the word “redneck.”

Holding: The court enjoined the enforcement of the challenged provisions of the dress code and policy as currently written. The court also enjoined that any discipline against students for wearing the t-shirt were based on these challenged and unamended provisions.

Reasoning: To decide if injunctive relief should be granted, the court has to consider reasonable probability of success on merits, regulation of public school student expression, irreparable injury, the balance of hardships, public interest, bond requirement, and relief provisions. The court reviewed only two policies: racial harassment and intimidation policy. The court possesses subject matter jurisdiction over this claim which decided that the plaintiffs’ challenges were appropriate for consideration.

The standard for preliminary injunctive relief is that a party that is seeking injunction must demonstrate a reasonable probability of success on merits. The court found that no reasonable probability of success exists, so the defendants are constitutionally prohibited from banning the Foxworthy t-shirt.

The court examined the restrictions on student speech in the public school setting using three cases: *Tinker* (1968), *Fraser* (1986), and *Hazelwood* (1987). The court had to decide if the Foxworthy t-shirt qualified for special treatment under the *Hazelwood* (1987) or *Fraser* (1986) test or if it related more to the *Tinker* (1968) substantial disruption rule. The court chose to use the *Tinker* standard because the Foxworthy t-shirt does not invoke any lewd, vulgar, or obscene language such as in *Fraser* or speech that is considered the school’s own speech as in *Hazelwood*. The court agreed with the defendants that they have sufficient grounds to ban the Foxworthy shirt, but not because of the motivations of the student or intent to disrupt. The

argument should have been more focused on the racial tension. Despite this mistake, the court concluded that the moving plaintiffs have not demonstrated a sufficient probability as to the success of prohibiting the Foxworthy t-shirt under the *Tinker* substantial disruption standard.

On the other hand, the moving plaintiffs have established the existence of irreparable injury supporting the entry of injunctive relief. Due to the probability that the challenged portions of the dress code and the racial harassment or intimidation policy are unconstitutionally overbroad and vague, the court found that irreparable injury almost certainly exists. A preliminary injunction is required if the plaintiff would suffer irreparable harm, the defendants would suffer little harm, and the third parties suffer no harm. The court found that the defendants did not present evidence to support this outline, and the court found a reasonable probability of success on merit.

Due to the over-breadth and vagueness of the policy and dress code, the court found that the defendants did not use the appropriate tools to prevent substantially disruptive behavior. The court concluded that given the harm that enforcing the policies are most likely overbroad and vague. The defendants have created a hardship for themselves to maintain a stable and safe educational environment within constitutional limitations. The court concluded that the balance of hardships favors injunctive relief.

The public interest prong of the injunction decision favors constitutional protection. The court rejected the argument that controlling the environment to ensure that a breakdown does not occur and that racial tensions are avoided is more important than constitutionality. Due to this belief the court favored the public interest prong in favor of the preliminary injunctive relief.

The court waived the requirement for moving plaintiffs to post a security bond due to the lack of monetary harm to the defendants and the absence of any argument by the defendants

against the waiver. The court will grant some but not all of the injunctive relief to the moving plaintiffs. The courts will preliminary enjoin the defendants from enforcing the dress code and racial harassment or intimidation policy as it is written, and it will provide assistance in adopting an appropriate policy in order to maintain constitutionality.

Disposition: The United States District Court for the District of New Jersey granted in part and denied in part the moving plaintiffs' motion for preliminary injunctive relief.

Citation: *Wildman v. Marshalltown, C. Rowles, J. Stephens, G. Funk*, 249 F. 3d 768 (8th Cir. Iowa 2001).

Key Facts: Rebecca Wildman was a high school sophomore at Marshalltown High School where she was a member of the school's basketball team. She hoped to play on the Varsity team, and she claimed that the coach promised to promote her through conversations he had with Wildman before the season. She was not promoted, which frustrated her, so she wrote a letter to her teammates asking their opinion of the situation and the coach. In the letter she used the term "bullshit" to describe the treatment that the coach had given the team.

About a week later, the coach received a call from a parent concerned with the contents of the letter. Another player's parent gave him a copy of the letter. After receiving a copy of this letter, Rowles met with Funk, athletic director, and Stephens, principal, to ask advice on how to handle the situation. The coaching staff met with Wildman and explained that her letter was disrespectful and demanded that she apologize to her teammates. She was told that if she did not apologize within 24 hours she would be removed from the team. Wildman refused to apologize and did not practice or play with the team for the last six games of the season. She was also not invited to the post-season award banquet. At the end of the school year, Wildman and her family moved to another school district where she enrolled.

Issue: At issue is whether or not school administration violated a student's First Amendment rights when conditioning her continual participation on a sports team with a required apology to her teammates after a critical letter was written.

Holding: The United States District Court for the Southern District of Iowa dismissed the summary judgment of the plaintiff. The United States Court of Appeals for the Eighth Circuit affirmed the dismissal.

Reasoning: In order to reverse the ruling of the district court, the appellate court reviews the plaintiff's argument that the First Amendment prevents the school from disciplining her for a written letter that was a personal communication to other students accounting her personal expression. The court is reminded in *Tinker v. DesMoines* (1968) that students do not shed their constitutional rights at the schoolhouse gate, but the right to express opinions on school premises is not absolute, as in *Bethel v. Fraser* (1986).

The court found that the student conduct handbook of Marshalltown High School and the more specific Marshalltown Bobcat Basketball Handbook both showed that disrespect and insubordination would result in disciplinary action at the coach's discretion. The defendants claim that her letter caused a substantial disruption in the school and contained vulgar language. The court agreed that the letter that Wildman wrote was insubordinate because of the call for her other teammates to unite against the coach, and was not protected by the First Amendment. In the opinion of the court of appeals, the plaintiffs erroneously cited *Seamon v. Snow* (2000), a speech case involving a hazing incident. The court found that it was not unreasonable for the defendants to ask the plaintiff to issue an apology before allowing continued participation with the team.

Disposition: The United States Court of Appeals for the Eighth Circuit affirmed the summary judgment dismissal of the plaintiff's claim of alleged violation of her rights under the Free Speech Clause of the First Amendment.

2002

Citation: *Lavine & J. Lavine v. Blaine School District, T. Haney, D. Newell, & K. Mulholland*, 279 F.3d 719 (9th Cir. 2002).

Key Facts: This appeals case was based on the expulsion of a student for his writing in an English classroom. James LaVine, an 11th grader at Blaine High School, wrote a poem about school shootings involving the feelings of a person who shot and killed 28 people about two years prior. He turned his poem in to the English teacher who read it and found it disturbing enough to show the guidance counselor, principal, and the vice-principal. The school administration involved the Community Mental Health Crisis Line who suggested that the county sheriff do a welfare check on James to determine if he needed a psychological evaluation. A sheriff's deputy did an interview of James and his mother, got a copy of the poem, and provided evidence that James had no access to weapons or was a danger to anyone. Once this occurred, the deputy called the counselor with his observations.

The principal met with his personnel and "emergency expelled" James. After meeting with a child psychiatrist, it was determined that he could return to school. He was allowed to attend Blaine High after the approval, which resulted in James and his father suing for partial judgment on the grounds that James's First Amendment rights were violated and for an injunction to remove the emergency expulsion from his file. The district court ruled in the favor of the parents and held that the LaVines were entitled to an injunction preventing placing any

negative documentation of this instance in James's school file. Damages were to be determined later. The defendants appealed.

Issue: At issue is whether the school administration violated the student plaintiff's First Amendment rights when punishment was given for what was said within a poem that was a classroom assignment.

Holding: The appeals court reversed the partial summary judgment and rejected a petition for rehearing.

Reasoning: The reasoning behind the reversal of the district court's decision is based on analyzing the expulsion as trying to protect students from violence and not as trying to discipline James for his speech. Constitutionality was not taken into account by the district court based on the precedents of *Tinker* (1968), *Fraser* (1968) and *Hazelwood* (1987). What is not at issue is the removal of the pending psychiatric evaluation. The appeals court found that the district court erroneously reasoned with its holding.

The appeals court found that school administrators may punish student speech if they can show facts that might reasonably give administrators a reason to forecast a substantial disruption as seen in *Tinker* (1968). The error occurred when the district court found that *Tinker* allowed that a mere prediction of disturbance justifies suppression. Also, an error occurred when *Tinker* was used to justify punishment that did not contain any intentional wrongdoing by the student. Finally, the appeals court found that *Tinker* requires a showing of a disturbance, not just a prediction. *Fraser* (1986) reaffirmed the appeals court *Tinker* analysis of this case by stating that schools could constitutionally punish a student for giving a lewd speech in school. Finally, *Hazelwood* (1987) drew that the students in public schools do not shed their constitutional rights at the schoolhouse door.

The appeals court clarified the difference in this case as the words being threatening not the writer. The fact that James wrote the poem might justify the temporary suspension for a mental examination, but after the examination he could return to school, which was the course that occurred. There is no constitutional violation of including this information in his school file, so the parents' request for that was justifiably reversed by the court of appeals.

Disposition: The United States Court of Appeals for the Ninth Circuit reversed the decision of the district court and denied the rehearing of the case.

Citation: *Coy v. Board of Education of the North Canton City Schools*, 205 F. Supp. 2d 791 (N.D. Ohio 2002).

Key Facts: Before March 2001, John Coy created a website on his own computer during his own time. On the website, he had a section entitled "losers" where he published pictures of three boys with a few insulting sentences under each picture. The website also contained pictures of two boys giving visual signs of profanity along with written profanity that contained many spelling and grammatical errors.

A student told one of the math teachers at the school about the website, which she visited and then told the principal about. The principal, Stanley, did not immediately take action against Coy. The next day, Coy was in the computer lab going from screen to screen. The technology specialist was asked to come in and check the computer Coy was using to see which websites Coy accessed. The specialist verified that Coy visited his own unauthorized website from the computer lab.

The principal decided to suspend him for 4 days. The plaintiff's mother was given written notice of the suspension for violation of sections 8, 14, and 21 of the student conduct code. The letter stated that Coy was being referred to the superintendent for possible expulsion. In April

2001, the school district held a hearing and expelled Jon Coy for 80 days. A few days later, the school district modified the decision to allow Coy to remain in school but be on probation during the 80-day expulsion. The plaintiff filed a complaint claiming the violation of Coy's First Amendment rights due to the discipline implemented against him for creating, publishing, and maintaining the website.

**Issue:** At issue is whether or not a school administration violated a student's First Amendment rights when discipline was administered for a website created off campus that contained profanity and possible harassment of other students.

**Holding:** The court held that the defendants' motion for summary judgment granted in part and denied in part, but the court denied the defendants Stanley and Stoup's qualified immunity. The court held that the plaintiffs' motion opposing motion for summary judgment granted in part and denied in part.

**Reasoning:** The court based its decision on three main claims of the discipline in violation of the First Amendment, the Constitutionality of the school district's code of conduct, and the entitlement of qualified immunity of the school administrators. The plaintiff's claim is that the defendants violated Coy's right to freedom of expression by disciplining him for the content on the website he created off campus. The defendants, on the other hand, claim that he was disciplined because he violated the internet policy of the school and displayed vulgar speech on school grounds. This contradicts an earlier statement that had the defendants describing their discipline as resulting from the creation of the website, not the access of the website from the school computers.

The plaintiffs claim that neither *Tinker* (1968) nor *Fraser* (1986) should apply to this particular case because no speech took place within the school forum. The basis of this claim

relied on a school incorrectly disciplined a student for an activity that happened outside of the campus. The court determined that *Tinker*'s holding applied to the current case because the speech did not substantially interfere with the requirements of day-to-day school operations. Despite this determination, the court found that material issues of fact prevented either the plaintiffs or defendants from prevailing on a motion for summary judgment. The court felt that no evidence was presented to verify that when Coy accessed the website at school that it created a disturbed environment. This lack of evidence convinced the court to deny summary judgment to both parties in respect to the plaintiffs' first claim.

The second claim challenged the constitutionality of the student code of conduct sections 8, 14, and 21 on the grounds of over-breadth and vagueness. When making this determination, the court determined whether or not the school conduct code reached a substantial amount of constitutionally protected speech. The court found that section 21 was vague and did not give students any indication of what actions warranted disciplinary actions. On the other hand, the court held that sections 8 and 14 were not vague because the policy clearly prohibited the use of offensive speech. Due to the material issues of fact as to the motivation for disciplining Coy, the summary judgment with respect to the claim that the sections are unconstitutional is inappropriate at this point.

The court did hold that Coy's constitutional rights were established despite the fact that the alleged facts were supported by evidence from the plaintiff. Summary judgment cannot be awarded if there is not an established constitutional violation that has occurred. The motivation behind the principal's and superintendent's motion for disciplinary action against Coy did not qualify them from immunity in the decision.

Disposition: The United States District Court for the Northern District of Ohio granted in part and denied in part the defendants' motion for summary judgment, denied Stanley and Stoup qualified immunity, and granted in part and denied in part the summary judgment of the plaintiffs.

Citation: *Doe v. Pulaski County Special School District*, 306 F. 3d 616 (8th Cir. Ark. 2002).

Key Facts: J.M., male, and K.G., female were dating during their seventh-grade year at Northwood Junior High School. Their relationship was plagued with breakups throughout the year. With the last breakup, J.M. wrote two violent and obscene rap songs that contained lyrics that expressed a desire to molest, rape, and murder K.G. He could not get his songs into a particular beat or rhythm, so he wrote them as letters and signed them at the conclusion. His best friend, D.M. found the letter and asked to read it. Reluctantly, J.M. did allow D.M. to read it. K.G found out about the existence and contents of the letter. D.M., unknowing to J.M., delivered the letter to K.G. She read it at school in front of some other students, one of whom went immediately to the school resource officer. The principal investigated the situation and recommended that J.M. be expelled for the remainder of the school year. The discipline decision was based on Rule 36 in the school district, which prohibits threats against others. J.M.'s parents appealed the recommendation. This appeal was denied. His parents then filed suit that the school board violated his free speech rights. The district court issued a temporary restraining order, in which J.M. could be reinstated to the school as long as no contact was made with K.G. A bench trial then found in favor of J.M. because the district court found that the letter was not a true threat of violence. The court required the district to permanently reinstate J.M., to restore all

rights and privileges that he lost, and to remove all reference of the incident of expulsion from his records.

Issue: At issue is whether or not the school administration violated a student's First Amendment rights when implementing discipline due to a threatening and vulgar letter that was written about another student.

Holding: The United States Court of Appeals for the Eighth Circuit reversed the judgment of the district court and remanded with instructions to dissolve the injunctive relief afforded the student and to dismiss the First Amendment claim against the school district.

Reasoning: A panel decision of the appeals court changed the district court's judgment in the original case of *Doe V. Pulaski County* (2002). The concern came about due to the true threat inquiry from the recipient's viewpoint. The court determined that a true threat is when a reasonable person would foresee that a statement expresses the intent to harm or assault. In order to determine if it was a threat, the intent to communicate and the perception of a threat had to be analyzed.

The court found that the speaker does not have to truly intend to carry out the threat in order for expression to be threatening. The only requirement was that the speaker must have communicated the statement to someone before he or she was punished for it. This requirement was satisfied if the speaker communicated the statement to a third party. The court found that J.M intended to communicate the letter, so he must take accountability for the threatening nature of his expression. The school had the right to delegate punishment on the writing based on the threatening nature that was expressed toward one of its students. Also, the writing was found on school grounds with or without the intent of J.M. to bring it to school. The letter caused a substantial and material disruption when several of the students saw the letter and the reaction

that it caused in K.G. The *Tinker* (1968) analysis showed that the expression was not protected and the school had jurisdiction to discipline due to this result.

The appeals court disagreed with the district court's interpretation that the words contained in the letter were arguably threatening. The court found that the letter exhibited hate and used vulgar and obscene language over 80 times in reference to K.G. Per *Fraser* (1986), the obscene and vulgar language involved in this unprotected expression allowed the school district to implement the expulsion policy used by the schools in the code of conduct. The court also found the warning that K.G. should not go to sleep because he would kill her would easily be perceived as a true threat. No remorse was shown by J.M. at any time for K.G.'s emotional response of reading the letter, which again concerned the court. Due to these facts, the appeals court found that the school did not violate J.M.'s First Amendment rights by initiating disciplinary action based on the letter's threatening content. The appellate court found that the district court was erroneous. The level of severity of the punishment was not up to the federal courts to decide as long as school administrators used wisdom and compassion in regard to the suspension or expulsion of a student.

Disposition: The appeals court reversed the district court's decision and remanded the instructions to dissolve the injunctive relief and dismiss the First Amendment claim against the school district.

Citation: *Fleming, et al. v. Jefferson County School District, et al.*, 298 F. 3d 918 (10th Cir. Colo. 2002).

Key Facts: On April 20, 1999, two Columbine High School students entered the school and shot numerous students and teachers before taking their own lives. The school district decided to reopen the school with the expectations of significant mental health challenges with

the students and faculty. A project was proposed in which students would create abstract artwork on tiles that would be glazed, fired, and installed about the molding throughout the halls of the school. The administrator, Barbara Monseu, directed that there would be no reference to the attack, the date of the attack, names or initials of students, no Columbine ribbons, no religious symbols, and nothing obscene or offensive. The funds for the materials were paid for by private donations to be used at the discretion of the CHS administrators.

As participation began with the project, the community was also allowed to contribute by painting tiles. This was allowed to promote healing within the community. Some of the parents of the victims wanted to include religious messages or symbols along with students' initials. They were informed that they could decorate their tiles anyway they would like, but the actual tiles that were allowed to be hung would be left to scrutiny of the administrator based on the said guidelines. In September, Ms. Monseu relaxed the restrictions allowing remembrance of the students by allowing the initials of students, dates other than 4-20, and the Columbine ribbon. They were not allowed to paint religious symbols, the date of the shooting, or anything obscene or offensive. None of the plaintiffs went to the school to repaint any tiles. Because they were denied the opportunity to paint the tiles they wanted to paint, they brought suit under 42 U.S.C. §§ 1983 and 1988 for a violation of their free speech rights and the Establishment Clause. The district court granted judgment for the plaintiffs on the free speech claim, and then the school district brought this appeal.

Issue: At issue is whether or not a school district has violated the First Amendment rights of parents, students, and community members when the district denied the painting of religious symbols, date of school shooting, or anything obscene or offensive on the tiles of a school remembrance project.

Holding: The United States Court of Appeals for the Tenth Circuit reversed the district court's judgment on the plaintiffs' free speech claim, vacated the injunction, and remanded the case.

Reasoning: The district court held that the tiles at issue for the project did not constitute government speech nor school-sponsored speech. It instead held that the speech was private and in a limited public forum. The district found that it was not reasonable to prohibit the date of the shooting or religious symbols. The appeals court disagreed with the district court's belief that this expression was not school sponsored by using *Hazelwood* (1987). The appellate court analyzed the issue of speech in a school setting and the application of *Hazelwood*.

By analyzing the three main categories of speech within the school setting, the appeals court found that using *Hazelwood* to determine school-sponsored speech was the most applicable. If the expression seems to bear the imprimatur of the school, then the school may exercise editorial control over the expression as long as the control is reasonable and has legitimate pedagogical concerns.

When using *Hazelwood* (1987), the appeals court has to determine whether the forum was traditional public, designated public, or nonpublic. Due to the reservations that the district imposed for the tile project, the level of control that was retained by the school district revealed a nonpublic forum and allowed the appeals court to determine whether the tile project constituted school-sponsored speech. The appellate court found that because the school permanently integrated the tiles into the school environment, then the tiles bear the imprimatur of the school. The court also found that the goal of the project involved a type of pedagogical interest. The fact that the school allowed other stakeholders to participate in the project did not lessen the

pedagogical interest of the project. Instead the project continued the message that is being conveyed to the students.

Disposition: The court reversed the district court on the plaintiffs' claim under the Free Speech Clause of the First Amendment. The court vacated the district court's injunction and remanded the case for further proceedings consistent with this opinion.

Citation: *Mehaffey, et. al. v. P. Aldrich, et. al.*, 236 F. Supp. 2d 779 (E.D. Mich. 2002).

Key Facts: The plaintiff was suspended by school authorities for his contribution to a website that was created by another student in the school. The website listed "people I wish would die," "people that are cool," and "music that is cool." At the bottom of the webpage was a statement of "Satan's mission for you this week." The mission instructed viewers to stab someone for no reason, throw them off a cliff, and spit on their face. There was a disclaimer at the end of the message that stated to please not start killing people and blaming it on the creator of the webpage.

The student and the creator admitted to producing the webpage and then possibly using the computers at the school. The student was recommended for expulsion based on the threat that the website exhibited. The student withdrew from the system before the expulsion hearing was set. The administrator cancelled the meeting due to the withdrawal. Mehaffey's parents claimed that they did not withdraw their son, but instead enrolled him in a neighboring school district to give him the education that the Waterford School District refused to provide.

A hearing was then recalled and conducted with a ruling of allowing the student to return to the school after the second semester. The administrator informed the parents that she was not recommending expulsion. The plaintiff did not enroll back into the Waterford School District, but instead graduated from the neighboring school district.

Issue: At issue it whether the administration of the school violated the First Amendment rights of a student when suspension was administered for a threatening, but joking website that was produced off-campus.

Holding: The United States District Court for the Eastern District of Michigan held that the plaintiff's motion for summary judgment was granted in part and denied in part.

Reasoning: The court believed that *Tinker* (1968) sets precedent that students do have rights inside the school. In this case, the only information that verifies any on campus situations is that some of the website creation "may have" taken place on the computers at the school. The court found that the defendants did not investigate this statement any further. The school could discipline the plaintiff if it could be proven that the website caused a substantial disruption of school activities. The court found that there was no evidence that any work of the school was disrupted or any rights of other students impinged.

Due to the lack of evidence that there was no record that the plaintiff communicated the statements on the website to anyone, the court found the statements on the website to be interpreted as a serious expression. The listing of the names under "people I wish would die" did not constitute a true threat in the eyes of the court. The lack of evidence of a true threat and a substantial disruption occurring due to the production of this website actually protects the speech encompassed within the site. With this found, the court found that the plaintiff's motion for summary judgment shall be granted on the free speech and free expression claims.

The partial judgment comes into effect under the due process claim and the disability claim. The school did not follow the Code of Conduct policies when administering the disciplinary action of suspension, so the plaintiff was entitled to summary judgment on due process claim. The court, on the other hand, does not grant a disability claim against the school

board. The plaintiff claimed violations of Section 504 of the American with Disabilities Act. Due to the lack of evidence, the defendant was granted summary judgment on disability claims.

Disposition: The court found that on the claim of the First Amendment and Fourteenth Amendment, free speech and due process, that the plaintiffs are granted summary judgment. On the disability claim, the court grants summary judgment in favor of the defendant.

Citation: *Sonkowsky v. Board of Education for Independent School District No. 721, R. Wilson, K. Madigan, and J. Anderson*, 327 F3d. 675 (D. Minn. 2002).

Key Facts: A 9-year-old, fourth grade student, participated in the GridIron Geography curriculum at New Prague Intermediate School. Each student was assigned cities in which NFL teams were located to research and complete assignments. Rocky Sonkowsky, the plaintiff, was an avid Green Bay fan and had moved to Minnesota recently. He often would show his support of the team by wearing a Green Bay jersey to class. During the project, there were several assignments dealing with showing support to the local team, the Minnesota Vikings. As part of the curriculum, the local teams would sponsor a contest for the winning class to visit the practice facility and speak to a player. Rocky oftentimes would decorate his assignments with Green Bay colors which he complained were not displayed by his teacher like the other students. He felt that he was deprived the right to wear his Packer's jersey and be in the photo that was going to be sent to the Vikings. He claimed that he was denied the opportunity to participate in the parade because he wanted to wear a Packer's jacket. Finally, he told his teachers that he was going to say "Vikings Suck" along with other derogatory statements to Cris Carter on the class field trip to the training facility because he was such a huge Packers fan. He was not allowed to go on the trip. Rocky alleged that the reason why he was denied to go on the trip was because the teachers would be afraid that Rocky would embarrass the school or the contest sponsors. He also claimed

that he was discriminated against in this situation because of his disability of ADHD and his disability with conduct. The plaintiffs filed a complaint for action in pursuant of 42 U.S.C.S § 1983 and the defendant filed a motion for summary judgment.

Issue: At issue is whether or not school administration violated the First Amendment rights of a student who claimed discrimination due to his behavior and due to his ADHD.

Holding: The United States District Court for the District of Minnesota granted the defendants' motion for summary judgment and denied the plaintiff's filed action suit.

Reasoning: The district court reached its decision after analyzing the plaintiff's § 1983 claims and the disability discrimination claim. The plaintiff alleged that his rights were violated on three grounds: free speech violation, due process and equal protection violation, and violation of professionalism on the part of the teachers. In order to decide if the action is favorable for the plaintiff, the court must claim whether or not Rocky suffered a deprivation of a constitutionally protected right.

According to *Hazelwood* (1987), a school does not need to tolerate student speech that is inconsistent to the educational mission of the school. The court recognized that students have a constitutionally protected right to their education and cannot be denied that opportunity, but the court did not find that there was a constitutional right for a fourth grade student to wear a Green Bay Packers jersey to school. The court was convinced that Rocky was denied any rights because the school allows him to wear the jersey whenever he wanted to with the exception of the days when pictures were made for the Vikings contest. His education did not suffer because he was not allowed to wear the Green Bay jersey. He never was suspended or his grade penalized because of wearing it. The defendants chose to not allow him to be in the contest picture, which had no effect on his educational opportunity. The court went so far as finding that even if every

allegation from the plaintiff was true, none of the activities that Rocky was allowed to participate in due to his determination to wear the Green Bay jersey or coat affected Rocky's education, so he did not suffer a deprivation of any constitutionally protected rights. The summary judgment was granted in favor of the defendants.

Count II of this suit was an allegation that the school discriminated against Rocky because he has ADHD, which involves a disability in conduct. The plaintiff claimed that Rocky was deprived full utilization and benefit from the educational institution because he was not permitted to go on the trip. The American Disability Act by stated that first, the individual must be a qualified individual with a disability; and second, the individual was excluded from participation in services, programs, or activities because of his or her disability. The district court did not dispute the fact that Rocky had ADHD, but did find that the defendant gave legitimate, nondiscriminatory reasons for not letting him attend the field trip. Rocky's inappropriate behavior history and his alleged plans of being disrespectful to Minnesota Viking Cris Carter while on the trip was the basis for the decision by the defendants to not allow Rocky to attend the trip. The courts were reminded that the school officials do not have to be certain that a disruption will occur to prevent it. The district court granted the defendants summary judgment on Count II of discrimination due to the disability claim.

Disposition: The district court ordered the defendants' motion for summary judgment to be granted.

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Citation: *Newsom v. Albermarle County School Board, etc.*, 354 F. 3d. 249 (4th Cir. Va. 2003).

Key Facts: Alan Newsom, a student at Jack Jouett Middle School, was a 12-year-old student who came to school with a purple t-shirt that had three black silhouettes of men holding firearms with the words “NRA” above the phrase “Shooting Sports Camp.” The shirt portrayed the men as aiming their firearms with no indication of whom or what their targets may be. The assistant principal testified that her first impression was that the men were sharp shooters and she was concerned with the appropriateness of the t-shirt because of school-related violence, such as Columbine High School.

The assistant principal walked over to Newsom in the lunchroom and whispered in his ear that he needed to do something about the shirt. Newsom questioned why because he had just got it a summer camp. He was advised that it was inappropriate for school because of the images of the men shooting guns. The assistant principal advised Newsom that the school did not allow weapons in school or the images of weapons on student clothing. When asked to change, Newsom made the comment, “What if I refuse?” Pitt, the assistant principal, stated that the issue then becomes a disciplinary action in relation to defiance in which in-school suspension could be a possibility. He appeared to oblige with the request.

The next year, Pitt observed Newsom wearing a t-shirt that bore the initials “NRA,” an NRA logo, and other written messages referencing the NRA. None of these depicted any images of people with guns, so there was no prohibition in regard to Newsom wearing these shirts. On September 17, 2002, Newsom filed suit against the school board and other school officials for alleging that his First Amendment rights were violated.

Issue: At issue is whether or not the school administrators violated the First Amendment rights of a student when requiring the removal of t-shirts that show objectionable images of violence.

Holding: The Court of Appeals held that the district court abused its discretion when it concluded that Newsom did not satisfy the requirements of preliminary injunctions in regard to the overbroad dress code policy.

Reasoning: Newsom's original complaint alleged that his First Amendment rights were violated when he was instructed to change his shirt; his due process was violated when he was not given notice that wearing his shirt would cause disciplinary actions, and the dress code policy of the school district was overbroad and vague. He filed for a preliminary injunction asking that he have permission not only to wear the t-shirt in the case, but also to be allowed to wear other t-shirts containing messages related to the legal possession of firearms. An order denying Newsom's motion for a preliminary injunction was found by the district court. Newsom's appeal claimed that the court erred when it denied the preliminary injunction.

The appeals court found that there was no evidence in the record demonstrating that any clothing worn by students with messages related to weapons, nonviolent, nonthreatening, ever substantially disrupted school operations or interfered with the rights of others. No evidence was found that showed that Newsom's shirt ever caused a commotion. The lack of evidence suggests that the ban on messages related to weapons was not necessary to maintain order and discipline. By looking at *Castorina ex rel Rewt. v. Madison County School Board* (2000), the appeals court found that the unlimited examples of the unnecessarily broad nature of the dress code showed over-breadth and vagueness to the policy. Also, the reasoning for the appeals court's decision came about because of the lack of harm that the school will encounter with the issuance of a preliminary injunction. Since the court found that the policy was likely to be found unconstitutional, then the changing of the policy not only does not harm the school system, but it also serves the public interest by upholding constitutional rights.

Disposition: The United States Court of Appeals for the Fourth Circuit vacated the United States District Court for the Western District of Virginia at Charlottesville's order denying the student's motion for a preliminary injunction and remanded with instructions to enter a preliminary injunction.

Citation: *Smith v. Mount Pleasant Public Schools*, 285 F. Supp. 2d 987 (E.D. Mich. 2003).

Key Facts: In October 2000, Alexander Smith, a junior at Mount Pleasant High School, and five other friends were eating lunch in the lunchroom. While eating lunch, one of the plaintiff's friends requested that Smith read aloud a 3-page typed commentary criticizing the school's tardy policy. He read it aloud to his table, but at least two other female students heard the speech.

The speech stated that the policy was made by a Nazi and gave names of teachers who the plaintiff believed supported the policy that he referred to as "teacher gestapos." He called the policy "turd lic" which he designated as "turd licking." The commentary not only addressed the policy, but went into the allegations that high school principal, Betty Kirby, had divorced her husband after having an affair with another school principal to whom she was now married. She was called "skank" and "tramp" in the commentary. Comments were also made about assistant principal, Michael Travis, and his sexuality.

One of the female students that overheard the commentary was offended by the comments in the writing and told the assistant principal about the incident. Later in the day, the school liaison officer asked Smith to leave his physics class and escorted him to the conference room. He was asked by the principal and assistant principal to produce the commentary, which he did. The principal read it and the plaintiff then apologized. The next day, the principal called

the plaintiff's parents to notify him that he was being charged with verbal assault under the school's code of conduct. A letter was mailed the same day that informed the parents that he would be suspended for 10 school days.

A few days later, Smith delivered five apology letters to the school personnel mentioned in the writing. Smith, his parents, and their attorney met with several school officials appealing the suspension, but the principal upheld the suspension. The plaintiff appealed the suspension to the superintendent of the schools who offered to reduce the suspension to 8 days if the plaintiff voluntarily submitted to psychological screening at Mt. Pleasant Counseling Services. Smith attended the screening with the result that the commentary was not meant for delivery, publication, or harm. It was also determined that Smith did not suffer from any psychological disorder. His parents appealed again to the superintendent's decision to suspend the plaintiff for 8 days, but the appeal was denied. He completed the suspension and returned to school in January of 2001. He later went on to graduate Mt. Pleasant High School in June 2002.

Issue: At issue is whether or not school administration violated the First Amendment rights of a student who violated a verbal abuse policy when reading a degrading commentary aloud on the school campus.

Holding: The district court granted the student's motion for summary judgment in part and denied it in part. The court held that the discipline for the student's disrespect did not offend the First Amendment.

Reasoning: The court found three reasons for its decision to order the plaintiff's motion for summary to be granted in part and denied in part. The state statute requiring that school boards suspend or even expel students who verbally assault others while relying on the school board to define the term "verbal assault" was unconstitutionally vague and overbroad. Secondly,

the school board's definition that "verbal assault" included offensive language is also vague and overbroad. On the other hand, the discipline that was applied in this case was not found to be unconstitutional because despite the vague and over-breadth statutes, the First Amendment was not violated.

The concern for the court in finding if a state statute is vague and overbroad is whether there is a realistic danger of the statute compromising First Amendment protections. Several cases were cited to verify this concern, but *Saxe v. State College Area School District* (2001) was used because the anti-harassment policy in this case prohibited both protected and unprotected speech. The plaintiffs' question whether the verbal assault statute from the state prohibits speech by students that is neither vulgar nor school sponsored, nor disruptive to the school learning environment. When adding the term verbal to assault, the state broadened the concept to include not just physical assault, but also speech. By using *Saxe*, the court found that just because someone might take offense to speech then that is not justification for prohibiting it.

The same concern arises for the power of the school policy with verbal assault in relation to the state statute that requires school districts to suspend or expel students that commit this assault. The court found that the statute and the school policy could both be read to prohibit viewpoint-based speech, but when the views of an individual are taken by speakers and not the actual subject matter then the First Amendment violation is more evident. *W. Va. State Bd. of Education v. Barnette* (1943) was used as an example of not having the government decide on what shall be acceptable in political speech, nationalism, religious speech or other opinionated speech. The court finds that the state and the school board prohibits speech that is protected by the First Amendment, thus finding that the plaintiff's summary judgment was partially granted due to the vagueness and over-breadth of the statute and policy.

The court found that even though the statute and the school policy on verbal assault was unconstitutionally vague and overbroad does not resolve the questions of whether the school could suspend Smith for his actions. The code of conduct of the school gives the school administrators a broad blanket control in regulating student behavior. When vulgar and offensive speech is involved, then the limitations are given to the power of the administrator. The court used *Boroff v. Van Wert City Board of Education* (2000) to balance this claim. The statement written by Smith contained an expression against student government, but the remarks that turned into rumors were not politically enticed, but instead personal and vulgar. Since the speech impinged on the rights of other students and was disruptive to the overall school's operation, then it could be suppressed by *Tinker* (1968). The court found that the act of disciplining Smith did not offend the First Amendment.

Disposition: The United States District Court for the Eastern District of Michigan granted the plaintiffs' motion for summary judgment in part and denied in part. The defendants' motion for summary judgment was granted in part and denied in part. An injunction was issued.

Citation: *Barber v. Dearborn Public Schools and J. Coebly*, 286 F. Supp. 2d 847 (E.D. Mich. 2003).

Key Facts: Bretton Barber, a junior at Dearborn High School, wore a t-shirt to school with a photograph of George W. Bush with the caption of "International Terrorist" under the photograph. He wore it to the first class and his first three morning classes. During the lunch period, one of the two assistant principals, Micheal Shelton, was approached by a student who was upset at Barber's shirt. The student felt that it was inappropriate and disrespectful. Shelton had no impression that the student was going to harm Barber. The assistant principal approached Barber about how inappropriate his shirt was and that Barber had to turn it inside out or remove

it. Barber refused, and Shelton told him to call his father. Barber called his father and went home. The two parties argue if Barber leaving was on his own free will or if he was told he had to leave school. The only reason for Barber having to turn the shirt inside out was because the shirt was causing a disruption. Shelton admitted that it did not violate the student code of conduct, and he did not believe that the t-shirt advocated drugs or alcohol or promote terrorism. Barber was told that if he wore the shirt again then he would be asked to turn it inside out or call home. Barber filed a motion for a preliminary injunction.

Issue: At issue is whether or not the school administration violated the First Amendment rights of a student when the student was asked to remove a shirt that did not violate dress code policy.

Holding: The student's motion for a preliminary injunction was granted.

Reasoning: The district court recognized that students do not shed their rights at the schoolhouse gate, according to *Tinker v. Des Moines* (1968). Sometimes the conflict comes when school officials have to make a disciplinary decision if conduct causes a substantial and material disruption to the school setting. The problem with this case is the unsubstantiated fear that a viewpoint will obtain opposition, so school officials made a decision to suppress the wearing of a t-shirt.

The assistant principal found Barber's shirt inappropriate based on one student's and one teacher's comments. The comments do not constitute a material disturbance, thus no evidence was given that Barber should not wear the shirt to school. The court took into account the principal's reason for prohibition, which was based on previous experience at another school during Desert Storm. The defendants did not provide evidence or case law to support their stance. The court found that the plaintiff has a substantial likelihood for succeeding on the

merits, and he has suffered irreparable harm from absolute prohibition of ever wearing the t-shirt. The court found that by suppressing the speech of a shirt that does not violate dress code or create a substantial material disruption, the defendants created substantial harm to others and the public interest.

Disposition: The United States District Court for the Eastern District of Michigan found that the plaintiff's motion for a preliminary injunction was granted.

Citation: *Cleveland v. Blount County School District*, 2008 U.S. Dist. LEXIS 6011 (E.D. Tenn. Jan. 28, 2008).

Key Facts: In the 2004-2005 academic school year, the plaintiff students asked Dr. Christy Martin, principal of William Blount High School, for permission to form a "Step Team" to perform at a basketball game. After the team was formed and performed at its first basketball game, Dr. Martin claimed that she received several complaints about suggestive moves during the performance. The team revised its routine for the next performance, but the team was eventually disbanded due to another controversial performance later in the season, along with other disciplinary problems. Mr. Cleveland, the parent of plaintiff students, claimed that there were no suggestive moves in the performances. Dr. Martin claimed an attempt to meet with the members of the team regarding the disbandment, but no meeting occurred or was rescheduled.

Racial tension began to increase at the school as the year continued. Incidents began to occur such as rumors about guns being brought to school, racial graffiti, and a hit list of names of African American students. In April 2005, the sheriff's office informed school officials that a WBHS student was being held at the detention center due to knowing about a plan for a student to pull the fire alarm and kill African American students during evacuation. After meeting with several parents including the plaintiffs' parents, a list of recommendations were given to school

officials. The director of schools for the Blount County School System determined that a dress code should be enforced banning the wearing of racially diverse symbols including the Confederate flag. A suit was filed by the plaintiffs.

Issue: At issue is whether or not a school district violated the First Amendment rights of students when an extracurricular activity was dissolved.

Holding: The plaintiffs' First Amendment and Equal Protection claims were dismissed with prejudice while the defendants' motion for summary judgment was granted in part and denied in part.

Reasoning: The courts analyzed the First Amendment, the Fourteenth Amendment, and Title VI when deciding on a ruling on this case. The plaintiffs' claim of a violation of First Amendment rights came from the dissolution of the Step Team. The school district replied that the plaintiffs have no authority to support the allegation that participation in extracurricular activities is a protected form of expression. By looking at *Tinker* (1968), *Fraser* (1986), *Hazelwood* (1987), and *Morse* (2007), the four frameworks of student speech were defined. After reviewing each of these cases, *Hazelwood* was established as the appropriate framework for the facts of this case because the expression of the Step Team was school-sponsored speech. Dr. Martin required that the group have a faculty sponsor, along with limitations on the type of dancing and music allowed to be utilized by the school group. The complaints that came to Dr. Martin were evidentiary toward the idea that the community and student body would have perceived the Step Team's performances to bear the imprimatur of the school. The court found that students do not have a constitutional right to participate in extracurricular activities as found in *Lowery* (2007). Also, the issue that the speech was part of an extracurricular activity weakens the plaintiffs' claims of a First Amendment violation. The claim of treating the Step Team

different than the cheerleaders and dance teams on the basis of race is not a First Amendment claim, but an equal protection claim.

The court found that there was a genuine issue of material fact as to the issue of deliberate indifference to racial discrimination in the school district. The plaintiffs argued three equal protection arguments: exposing plaintiff students to racially divisive slang terms, not uniformly enforcing the dress code, and disbanding the Step Team, which consisted of more African American students than Caucasian students. The defendants claimed that there was no different treatment of any of the alleged claims because of race. Evidence was shown that the slang terms were not all inclusive to just African American students. Also, the enforcement of the dress code policy was addressed over the entire school year, not just in response to a heightened racial tension period in the school. Finally, the dissolution of the Step Team was not because of race but because of disciplinary problems which included several attempts to keep the performances from being vulgar, obscene, and offensive. The defendants show that the dissolution of the team not only affected African American students, but also Caucasian students. Due to the evidence in the equal protection claims, the court found that the plaintiffs did not show enough evidence that the school district treated Caucasian students more favorably than the plaintiff students.

Finally, the plaintiffs claimed that under Title VI, they were exposed to a hostile school environment, along with the dissolution of the step team and the lack of participation that African American students were allowed in the classroom. The court found that the plaintiffs did not show sufficient evidence in any of these claims and that these were just allegations. The court found that the plaintiffs did not show enough evidence for its claim, but because of the

genuine issue of material fact that was discussed in the First Amendment claim, then the Title VI claim can move to trial.

Disposition: The court found that the school district's motion for summary judgment was granted in part and denied in part, whereby the plaintiffs' First Amendment and Equal Protection claims were dismissed with prejudice.

Citation: *Scott v. School Board of Alachua County*, 324 F. 3d. 1246 (11th Cir. Fla. 2003).

Key Facts: The plaintiff students filed a lawsuit against the School Board of Alachua County. The plaintiffs claimed that the discipline implemented by the principal for the action of displaying a Confederate flag on school premises violated the First Amendment right to free speech. The defendants claimed that the unwritten ban of Confederate flags was to prevent a racial disruption. The United States District Court for the Northern District of Florida granted the summary judgment to the defendants. The plaintiffs appealed.

Issue: At issue is whether a school system can enforce an unwritten ban on Confederate flags on school premises.

Holding: The United States Court of Appeals for the Eleventh Circuit affirmed the district court's grant of summary judgment.

Reasoning: The plaintiffs used three arguments to appeal the district court's ruling in favor of the defendants. The first argument was that the plaintiffs believed that their school suspension was based on a lack of proof that a material and substantial disruption occurred due to bringing the Confederate flags on campus. The next argument was that the unwritten ban was pre-textual and should expose the school board to monetary liability. The final argument was that the plaintiffs claimed that genuine issues of material fact exist because the school board was either unaware or indifferent to the unwritten ban and to the principal's reason for the ban.

The appeals court affirmed the decision of the district court because the unwritten ban on Confederate flags on school grounds was not an unconstitutional restriction of First Amendment rights. Due to that affirmation, the court does not need to consider whether or not the board was indifferent to the ban or not. The appeals court declared that it would interfere with the administration of the school. The district court used *Tinker* (1968) and *Fraser* (1986) to determine that the school can appropriately censure speech when the speech causes a substantial and material disruption or it does not promote habits and manners of civility.

Disposition: The district court's grant of summary judgment was affirmed.

Citation: *Demers v. Leominster School Department, Dr. Joseph Rappa, Judith P. Mulhern & Susan Hitchcock*, 263 F. Supp. 2d 195 (D. Mass. 2003).

Key Facts: The complaint was filed by the father of Michael Demers, a minor, against the school and its officials for violation of free speech. The student was known for classroom disruptions, substance abuse problems, and other extreme behavior such as psychiatric hospitalizations. After drawing a two-sided picture of the school surrounded by explosives with students hanging out the windows and the superintendent of the schools with a gun pointed at his head with explosives at his feet, the plaintiff was ordered to attend a psychiatric evaluation. When he refused, he was disciplined through a suspension. The court felt that the safety concern of students, faculty, and school officials outweighed the plaintiff's freedom of expression.

Issue: At issue is whether school officials denied the constitutional rights of a student when the student was suspended because he refused to attend a psychiatric evaluation after drawing violent and threatening pictures depicting students and school officials.

Holding: The United States District Court for the District of Massachusetts held that the defendants' motion for summary judgment was allowed on Counts I, III, V, and VII and the remaining Counts were dismissed without prejudice.

Reasoning: By citing *Bethel v. Fraser* (1986), the court reasoned that the school officials had the authority to limit, restrict, or punish speech that causes substantial and material disruption, such as Demer's drawings. It was found that Demer's drawings were not constitutionally protected through a "true threat" doctrine. In *Lavine v. Blaine School District* (2001), a student was expelled due to a violent poem that he showed a teacher. After the District Court overturned the expulsion, the Appeals Court applied the *Tinker* standard and held that the school district did not violate and considered the totality of the historical facts based on the previous issues that the school had with this particular student. In Demer's situation, the court determined that he should have concluded that his drawings and notes would be considered a threat to the school and to himself.

Another reasoning for the Court's decision in the Demer case was the issue that was reviewed in other student free speech cases such as *Westfield High School L.I.F.E Club v. City of Westfield* (2003). The difference in the Demer case and the *Westfield L.I.F.E Club* case is that the matter was not a silent, passive, expression, but more of a verbal or written expression that caused the school to be concerned for the safety of the other students along with Demer himself. The suspension was only initiated as a consequence if Demer did not attend a psychiatric evaluation and was conditioned that he could return to school after the evaluation. By using the *Tinker* Standard and the *Westfield L.I.F.E Club* case, the court determined that school officials were preventing potential disorder to school order and safety.

The Court also determined that Demer's right to privacy was not violated when school officials required he submit personal information in the form of a psychiatric evaluation. The court held that it was not an invasion of Demer's privacy to submit psychological testing before returning to class. Due process was followed because the school had given ample notice of the questionable conduct and ample opportunity for Demer to explain his side of the events, which he failed to do when he refused to attend the psychiatric meeting.

The defendants were given qualified immunity because the courts found that it was not an established violation of a student's constitutional rights to suspend a student for violent and threatening drawings. Due to the limited case law on school violence, the defendants were entitled to qualified immunity.

Disposition: The United States District Court for the District of Massachusetts granted the defendants' motion for summary judgment.

Citation: *Schroeder v. Maumee Board of Education*, 296 F. Supp. 2d 869 (N.D. Ohio 2003).

Key Facts: The plaintiff was 15 at the time of the case, but claimed that during his fifth, sixth, and seventh grades at Fort Miami Elementary School and Gateway Middle School in Ohio he was a victim of repeated physical and verbal harassment. He alleged that the defendants took no action to stop the occurrences. Schroeder claimed that he began to receive harassment after he found out that his older brother was gay. He spoke out as a proponent of gay rights at school which led others to believe that he was gay. He alleged that his classmates targeted him with physical threats and violence. He got in several physical altercations. He claimed to report incidents to his mother, to his teachers, and to the administration. He contended that the defendants did not enforce the policies prohibiting abuse and harassment within the school. He

waited 3 years before he filed the lawsuit, and he attended several other schools after transferring where he finally was home schooled.

Issue: At issue is whether or not the school administration violated a student's First and Fourteenth Amendment rights for failure to protect the student from retaliation for his expression on gay rights.

Holding: The motion for summary judgment was denied, but the motion as to the equal protection claim against the school board and board member was granted.

Reasoning: The defendant's motion was granted in part and denied in part. The defendants, Conroy and Wilson, cannot be liable under § 1983, but the court found that the plaintiff presented evidence that showed the defendants' deliberate indifference of animus against homosexuals. The remarks made by Conroy, principal, and Wilson's, assistant principal, alleged failure to intervene while students harassed and physically abused the plaintiff. This prevented the defendants' summary judgment from being granted.

The court found that the plaintiff did not offer any evidence that the Board of Education knew about or was deliberately indifferent to Conroy's and Wilson's discriminatory treatment of plaintiff. A local government may not be sued under § 1983 for an injury inflicted by its employees or agents. The plaintiff does not implicate any teachers or administrators in the harassment or abuse, nor had he or his mother ever made any member of the board aware of any abuse or harassment. Thus, the defendants' motion to plaintiff's equal protection claim against the Maumee Board of Education and Gregory Smith, the superintendent, is granted.

Disposition: The United States District Court for the Northern District of Ohio, Western Division, found that the defendants' motion for summary judgment was granted in part and denied in part.

Citation: *S.G as guardian of A.G. v. Sayreville Board of Education, Baumann, & Bauer*, 333 F. 3d 417 (3d Cir. N.J. 2003).

Key Facts: A 5-year-old kindergarten student uttered “I’m going to shoot you” at recess to a friend while playing cops and robbers. School officials suspended the student for 3 days after the statement was made. The justification of the extremity of the punishment was because of three threats from students to shoot someone or claiming to have a gun at the school along with a nationally publicized incident of a 6-year-old shooting another child. The principal visited each class and discussed the issue, but the plaintiff was absent on that day thus he did not hear the discussion. The parents argued that the 5-year-old was deprived his First Amendment right to freedom of speech when he was suspended. The parents also contend that the boys were playing a game of cops and robbers and that did not substantially disrupt school operations or interfere with the rights of other students. The District Court ruled in the favor of the defendants, which resulted in an appeal from the father.

Issue: At issue is whether a school system has the right to suspend a student for a claim of possessing a gun even at as young an age as 5 years.

Holding: The Court held that the school district acted within authority that was permissible by imposing the said sanctions on the student. It was found that the student’s First Amendment rights were not violated.

Reasoning: The court used *Tinker* (1968), *Hazelwood* (1987), and *Fraser* (1986) to justify its reasoning for its decision. First, *Tinker* set the precedent that the school board has the right to determine what manner of speech is appropriate or inappropriate. Because *Tinker* showed that the rights of students in public school are not necessarily coextensive with the rights

of adults in other settings, the court found that the sanctions to discipline the student through suspension were not unconstitutional.

Next, the court used *Hazelwood* (1987) as a reason for its holding because the plaintiff's statement about guns was not focused on a political point. The defendants did not censor the plaintiff's speech based on a controversially political outlook, but more for the protection and safety of the school environment.

Finally, the court held that the school does not have to tolerate speech that is not consistent with the basic educational mission, by citing *Fraser* (1986). The plaintiffs attempted to mention that the statement could be classified as political speech, which contradicts the claim that the boys meant no harm. The school officials determined that the speech was unacceptable and the school had to make a decision to benefit the decision-making process of the school board. The allegations are insufficient to establish a violation of the kindergartener's constitutional rights.

Disposition: The United States Court of Appeals for the Third Circuit affirmed the decision made by the United States District Court of New Jersey.

Citation: *Walker-Serrano; Walker; Serrano v. Leonard; Ellsworth; Simon; Carpenter*, 325 F. 3d 412 (3d Cir. Pa. 2003).

Key Facts: A 9-year-old third grader started a handwritten petition against a field trip that involved going to the circus. Amanda Walker-Serrano believed that the circus was harmful to animals. She prepared a petition that stated, "We 3<sup>rd</sup> grade kids don't want to go to the circus because they hurt animals. We want a better field trip." She had 30 classmates sign it at recess. She brought the petition the next day to class, but her teacher told her to put it away. Walker-Serrano then tried to get more students to sign the petition at recess. Again, she was told to put

the petition away due to an injured student that had to be taken to bandage a cut. Walker-Serrano was never punished for soliciting signatures or for having possession of the petition. She was given the opportunity to voice her opinion through passing out coloring books and stickers that dealt with cruelty to animals at the circus to her fellow students during school the day before the trip was scheduled. On April 7, 1999, the class went on the trip to find that Walker-Serrano and her mother protested the circus by standing outside. Local media coverage was provided throughout the protest.

The parents sued because of the possible violation of Walker-Serrano's First Amendment rights when school officials told her to put the petition away because of the brief disruption during classroom instruction that it caused. Walker-Serrano's parents were upset that no action was taken by the board and the principal. The District Court for the Middle District of Pennsylvania held that summary judgment be granted for the defendants and that qualified immunity was granted also to the defendants because Walker-Serrano's First Amendment rights were not violated. The plaintiffs appealed.

Issue: At issue is whether a school system has the right to deny the terms expressed in a student petition.

Holding: The United State Court of Appeals for the Third Circuit held that the decision made by the district court was affirmed.

Reasoning: As a general rule, petitions are protected under the First Amendment. The court found that an elementary school setting may require a different application. The concerns about the parental influence on these views of an elementary student were legitimate and resulted in a great leeway that was given to the school authorities to maintain a regulated environment.

The *Tinker* (1968) analysis was proven by the defendants as justification for restricting the student's petition because of the disruption it would cause in the daily lessons. Despite the fact that *Tinker* set a precedent that students do not lose their First Amendment rights at the schoolhouse gate, it does regulate student speech that interferes with the rights of other students. The courts found no violation of the rights of Walker-Serrano because she actually was allowed to circulate the petition at school on the playground, and was allowed not to attend the field trip without interference from the defendants. The appeals court used *Sypniewski v. Warren Hills Reg'l Board of Education* (2002) to justify the expectation of disruption caused by the signing of the petition in class.

Disposition: The United States Court of Appeals for the Third Circuit affirmed the judgment of the district court to grant summary judgment to the defendants in the case.

Citation: *Westfield L.I.F.E Club v. City of Westfield*, 249 F. Supp. 2d 98 (D. Mass. 2003).

Key Facts: Members of a religion-based student club were suspended from school after distributing candy canes with religious messages during the Christmas season. Despite the school's denial of permission to distribute the candy canes, the students proceeded with handing them out anyway. The school authorities responded by suspending the students, which resulted in a claim that the students were denied their right to free speech. The claims stated that the school officials violated the student speech rights due to no reasonable disruption or disorder occurring. The school had no basis for this disciplinary action due to the fact that the information was distributed during non-instructional time and did not violate the Establishment Clause. The policies were found to be putting unconstitutional restraints on the students' freedom of expression.

Issue: At issue is whether school officials violated the First Amendment rights of free speech when permission was denied to distribute candy canes with a religious message during the Christmas season.

Holding: The United States Court for the District of Massachusetts granted the plaintiffs' motion for preliminary injunction and motion for waiver of security bond.

Reasoning: The decision made by the court was based on two areas of reasoning: legal standing and ripeness. The court found the LIFE club to be a properly named plaintiff in the case. This arose out of the claim by the defendants that the Club needed to be dismissed from the lawsuit because it is not a legal entity thus resulting in the lack of capacity to bring suit in its name. This allowed the suit to continue against the defendants.

Next, the defendants argued that there was no violation of free speech since the decision to not hand out the candy canes was ignored and the club continued with its activity. No speech was suppressed. At the time of the case, the superintendent had stayed the suspensions of the students involved and had not decided to impose the suspensions. The plaintiffs argue that the fact that the school has yet to impose the proper consequences for the defiance is non-consequential because the actual harm came from suppressing the voice of the club not the punishment of suspension.

Finally, the defense argued that exhausting administrative procedures was provided by the school administration in accordance with the Westfield Public Schools Student Handbook. When the defendants used this argument to justify the actions of the school, it was dismissed which took the lawsuit from being just about discretionary school discipline to being questionable about the violation of constitutional law.

Disposition: The court granted the plaintiffs' motion for preliminary injunction and motion for waiver of security bond.

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Citation: *Doe v. Winchendon School Committee et al.*, 18 Mass. L. Rep 53 (Mass. Super. Ct. 2004).

Key Facts: The plaintiff was a student in the 11th grade at Murdock Middle-Senior High School where bomb threats had been made several times during the academic year of 2003-2004. On March 29, 2004, a bomb threat was made against the school which resulted in evacuation of the school building. Students and faculty were given a written explanation of the threat and the reasoning for the evacuation from the administration. Adam took his memorandum and wrote a note on the back that said, "A Bomb will not go off between the hours of 7:28 am and 2:00 pm, do not evacuate the school. Nothing will happen, do you understand." This note was given to a fellow student, who left the note in the classroom. Another student found it the next morning and gave it to the teacher, who gave it to the administration, which resulted in tracing the note back to Adam. Adam admitted to writing the note, but apparently meant it as a joke. He received a 5-day suspension until a hearing was pending. The school resource officer also notified the local police department which, in turn, initiated the juvenile delinquency court system. The principal sent a note to Adam's father informing him that Adam was suspended for the duration of the proceedings. A hearing occurred at which the superintendent upheld the principal's suspension ruling.

Issue: At issue is whether or not the school administration violated a student's First Amendment rights when a suspension was issued to him after he wrote a note concerning a bomb threat.

Holding: The Superior Court of Massachusetts at Worcester denied the plaintiffs' motion for preliminary injunction.

Reasoning: The court based its ruling on the burden that the plaintiff must show the following to grant a preliminary injunction: likelihood of success on merits and irreparable harm. The plaintiff had to be able to demonstrate that the school acted arbitrarily in determining that without the suspension the presence of the plaintiff would have a detrimental effect on the general welfare of the school. The superintendent would have determined that Adam's presence would have a detrimental effect. The court would not substitute an opinion for that of the superintendent because the school administration is more of an authority of the day-to-day operations of the school.

The plaintiff claimed that the school system had deprived him the right to free speech. The court recognized *Tinker* (1968) as precedent to show that students do have rights within the school, but by *Fraser* (1986), those rights are not unlimitedly protected. The court found that the administrators in the school determined the character of the speech to not be protected by *Tinker* because it was not politically expressive, and it had a threatening nature. Due to this finding, it was determined that Adam's First Amendment rights were not violated. The court held that there was not a substantial likelihood that the plaintiff would be successful based on the merits in this case.

In order to receive a preliminary injunction, the plaintiff must also show irreparable harm. In this particular case, the timing of the suspension and the hearing left only five days in

the academic year at Murdock Middle-Senior High School. It was already determined that the suspension was not unreasonable or un-rational. The court found the argument, that missing the last 5 days of the year would cause irreparable harm to Adam, lacking in merit since he already had missed 6 weeks prior to the court hearing. Records showed that the principal sent alternate schooling provisions for Adam in his May 7th letter explaining his suspension, but neither the student nor his father contacted the school about the home-school plan to keep Adam academically up to date with his classmates. The court found that it would be unfair to expect Adam to take final exams with his classmates during those last 5 days. It was found that there would be no irreparable harm to Adam if a preliminary injunction was not granted.

Disposition: The plaintiffs' motion for preliminary injunction is denied.

Citation: *Porter, et. al. v. Ascension Parish School Board*, 393 F. 3d 608 (5th Cir. La. 2004).

Key Facts: Adam Porter, 14 at the time, sketched a drawing of his school in the privacy of his own home that depicted violence on the school and people associated with the school. He showed the picture to his mother, his younger brother, and a friend who was living with them at the time. His mother stored the sketch pad in the top of a closet in his home.

Two years later, Adam's younger brother, Andrew Breen, came across the sketch pad. He drew a llama on a blank page in the sketch pad and took it to school to show his teacher. He showed a fellow classmate his drawing on the bus ride home. The student told the bus driver that "They're going to blow up EAHS," which resulted in the bus driver confiscating the sketchpad and reporting the incident to the school administration.

Andrew admitted to bringing the pictures to school, so he was suspended for possessing the violent picture on school grounds. Adam then was interrogated and admitted that he was the

originator of the piece 2 years earlier. The resource officer searched Adam's book bag and person to find paraphernalia that could be easily be used for violence in the school. Adam's mother was contacted and told that Adam was being recommended for expulsion. Adam was allowed to enroll in the Ascension Parish Alternative School with plans to re-enroll at the high schools, but in March he dropped out.

The original case had the plaintiffs claiming violations of the First, Fourth, and Eight constitutional amendments. The district court dismissed without objection plaintiff's equal protection, Eighth Amendment, and § 1415 claims, and the plaintiffs agreed to dismiss all claims against Linda Wilson, the principal of the middle school. The court held that Adam had produced no evidence of any policy by the Ascension Parish School Board violating his constitutional rights.

Issue: At issue is whether a school board violated the First Amendment rights of a student who violated a policy related to drawing pictures depicting school violence.

Holding: The appellate court affirmed the district court's grant of summary judgment.

Reasoning: Three standards were analyzed by the United States Court of Appeals to determine if the district court erred in the decision to grant summary judgment to the defendants. The first two standards were developed to balance the First Amendment rights of students while at the same time maintaining a safe and effective learning environment. The last standard dealt with the idea that Adam's drawings constituted a "true threat."

The first standard was set by *Tinker v. Des Moines* (1968) and stated that school officials may regulate student speech when they can show that speech would interfere with the work of the school or the rights of other students. The court found that Adam's drawing does not constitute student speech on the school premises because it was stored away for 2 years, and it

was never meant to be brought to campus. The district court used the *Tinker* test to determine between on-campus and off-campus speech. It was found that the school's authority over off-campus expression was much more limited than student expression that occurred on-campus. The appeals court felt that the *Tinker* test was not appropriate in this situation.

The second standard relies on the regulation of student speech by school administration if the speech furthers a governmental interest. The appeals court found that this standard applies to student expression, but in the case of Adam's drawing there was no relation to any particular viewpoint occurring.

The final standard, determining a "true threat" was looked at by the district court and analyzed by the appeals court. The district court found that the government can address a true threat without offending the First Amendment. Looking at *Doe v. Pulaski* (2002), a similar situation occurred and the decision was made by the court of whether a reasonable recipient would consider the expression as a threat not whether the threat would actually be carried out. The appeals court found that Adam's drawing would not constitute a true threat because it was not intentionally known to be something that Adam wanted to communicate to others. Because Adam's drawing was not a true threat, the district court did not have the authority to sanction him for the message.

Disposition: Adam did not brief on the district court error in granting summary judgment. The appeals court waived and found that without that burden of proof, and then the district court granted summary judgment in favor of the defendants. While the United States Court of Appeals does not agree with the finding, it does find that the principal is entitled to qualified immunity. Thus the judgment of the district court is affirmed.

Citation: *Caudillo, et.al. v. Lubbock Independent School District*, 311 F. Supp. 2d 550 (N.D. Tex. 2004).

Key Facts: On September 12, 2002, two members of GAP Youth, also known as the Lubbock Gay Straight Alliance, contacted a Board trustee, Roy Grimes, for permission to advertise the group with the posting of signs in the buildings of Lubbock High School. They, Waite and Caudillo, wanted to make an announcement over the PA system. Around September 20, 2002, they again made a request to Hardin, the assistant superintendent. On November 6, Waite and Caudillo made a formal written request to the defendants and members of the school board to be placed on the board agenda for the next meeting so that they could request permission again to post their fliers. They were granted the request to be put on the board agenda.

Waite addressed the board, but no action was taken to grant permission. On December 19, 2002, Waite made a request to the principal, Vogler, to allow the GAP Youth to meet on campus. Defendant Hardin telephoned Waite that the request was denied. Volger and Hardin reviewed GAP Youth's website. The fliers that the group wanted to hang up advertised the group's website along with direct links to other resources such as [www.gay.com](http://www.gay.com) and [www.youthresource.com](http://www.youthresource.com). The defendants claimed that the permission to post the fliers was because of the abstinence-only policy of the school district. The [www.gay.com](http://www.gay.com) content was determined as inappropriate for a school campus, so Caudillo took that link off of the website. However, the [www.youthresource.com](http://www.youthresource.com) content was still on the website before the final decision was made to deny the group permission to meet on campus.

Issue: At issue is whether or not school administration violated First Amendment rights when denying a Gay and Straight Alliance youth group from posting fliers in the school, using the PA system, and being recognized as a student group with rights to meet on campus.

Holding: The court held that the plaintiffs' motion for summary judgment was denied and the defendants' motion was granted.

Reasoning: When making the decision to grant the defendants' motion for summary judgment, the court had a hard time finding case law that would specifically set precedent in the case. The only problem that the court found with using these as precedent was that none of these cases was dealing with a school campus that maintained an abstinence-only policy on campus and banned any discussion of sexual activity on its campuses. Also, another fact to take into consideration was that the laws of Texas banned sexual acts between homosexuals at the time of the claim. Texas law also made it a crime for minors to engage in sexual acts if they were of the same sex or if they were of opposite sex and more than 3 years apart according to Tex. Penal Code Ann § 21.11.

First, the court analyzed the plaintiffs' claim that their First Amendment rights were violated. The plaintiffs alleged that their First Amendment rights must be analyzed under the limited public forum of *Tinker* (1968). Limited public forums allow a school to limit the subject matter of discussion, but not the individual viewpoints. The forum of the schools in the school district is reserved for student groups. The court found that restrictions to the subject matter are allowed if suppression of expression does not occur merely because the officials oppose the speaker's view. The court determined that the defendants would have clearly denied any group access to the school facilities if a group had chosen to violate the school's policy of sexual activity. The matter of whether the material was homosexual or heterosexual is not relevant. The

court also found that it was inappropriate to direct students toward material by the promotion of the website posted on school campus. The court also found that the plaintiffs did not show evidence that would conclude that one viewpoint was being allowed on campus and another was being denied.

Secondly, the defendants argued that the exposure of this material to minors qualifies the *Fraser* (186) test of lewd, vulgar, and obscene speech. The court found that a school district has the authority to declare the indecent speech has no claim to First Amendment protection through the precedent set by *Bethel v. Fraser* (1986). The court determined that the goal of discussing sexual conduct in an organized club meeting was in direct contradiction of the subject-matter limitations within the school forum thus it does not violate the First Amendment.

The district court believed that the defendants would have acted in the same manner if the group asking for permission to hang up fliers came from a heterosexually-oriented club. The school policy and Texas state law support the motives and the decision of the defendants. The court felt that the public school is entrusted with the education of children of all ages thus it must not provide a setting that advances one view over another because of the conflict that it may have with private beliefs.

Disposition: The United States District Court for the Northern District of Texas granted the defendants' motion for summary judgment and denied the plaintiffs' motion for summary judgment.

Citation: *Demmon, et. al. v. Loudoun County Public Schools, et. al.*, 342 F. Supp. 2d (E.D. Va. 2004).

Key Facts: A parent association with Loudoun County Public Schools started a fundraising project for Potomac Falls High School by creating a walkway of fame. The principal

oversaw the construction and approval of the brick designs that would be used for the project. The red brick pavers were used to line a walkway into the school, which could be used by students or be easily avoided. Twenty-four symbols were available to inscribe on the bricks via laser etching. The only religious symbol was the Latin cross. The principal received a letter complaining about the bricks bearing the Latin cross. The parent association, principal, and legal counsel decided to remove the bricks inscribed with the Latin cross. The purchasers would be given replacement bricks that contained only the student's name and year of graduation, and they would be refunded the money they had paid to have the symbol appear on the bricks. The plaintiffs were parents of former PFHS students who had purchased bricks with the Latin cross through the fundraiser, or they were parents of students who would like to purchase the brick for the upcoming year. The plaintiffs filed suit to seek declaratory relief and immediate return of the bricks with the inscribed cross. The defendants filed a motion to dismiss.

Issue: At issue is whether or not the school administration can censor an inscription on a parent association fundraiser.

Holding: The plaintiffs' motion for summary judgment was granted and defendants were ordered to immediately return plaintiffs' bricks to their former places in the walkway.

Reasoning: The court found that in order to come to its conclusion it had to address whether the case was moot due to a closed forum, did the removal of the bricks violate the plaintiffs' freedom of speech rights, and whether the removal of the bricks constituted a violation of the Establishment clause. The defendants claimed that the case is moot due to the fact that they have closed the walk of fame as a forum for expression. The court found problems with this though because the school did not remove all the expressive bricks, only the ones that bore the Latin cross.

The court showed that closing a forum was a permissible solution to reconciling First Amendment issues, but the court believed that the forum was not sufficiently closed due to the fact that the only censored content was the religious content. The school did not remove the secular symbols. The court felt that closing the forum would require removing all expressive activity and censoring all new speech. The court found that the defendants had not closed the forum sufficiently because of the exclusion of the religious viewpoint and not the secular viewpoint that rendered the case moot.

The court also found that the plaintiffs' argument that the school board was guilty of viewpoint discrimination was unlawful in any forum. When the defendants removed only the bricks that contained the viewpoint of religion, then they discriminated against the plaintiffs. This discrimination was unlawful and unconstitutional. The court found that the plaintiff engaged in protected speech even though it was religious speech. The protected speech could still be regulated if the forum was treated correctly, but the court found that the school board did not control the forum. The court held that the forum was a limited public forum because the school intended to reserve the forum for certain groups and for certain types of expressive activity. The plaintiffs claimed that the forum was to express something that was of importance to the honoree. The court agreed. The court also found that the removal of the Latin crosses on the bricks was unnecessary because the bricks do not bear the imprimatur of the school or relate to a legitimate pedagogical concern such as found in *Hazelwood* (1987).

Disposition: The court ordered that the plaintiffs' motion for summary judgment is granted, the defendants' motion for summary judgment is denied, and the defendants shall return the plaintiffs' bricks to their former places in the "walk of fame" at the high school.

Citation: *Holloman v. Harland, Allred; Holloman v. Walker County Board of Education*, 370 F. 3d 1252 (4th Cir. Va. 2004).

Key Facts: Michael Holloman, a student at Parrish High School in Walker County, Alabama, filed a § 1983 suit against his teacher, Allred, his principal, Harland, and the school board. He was punished because during the pledge of allegiance he silently raised his fist instead of reciting the pledge with the rest of his class. He claimed that his Establishment Clause rights were violated by Allred's daily silent moment of prayer. He claimed that he silently protested the daily ritual because of a disciplinary action that had occurred to a fellow student, Hutto, the day before. The principal decided that Holloman would serve 3 days detention and would not receive his diploma until he completed his punishment. Due to the timing of the punishment, the principal gave Holloman a paddling instead because there was not enough days to serve out the punishment before graduation day. The district court granted summary judgment on qualified immunity grounds in relation to the teacher and the principal. Separately, the court granted summary judgment to the school board on the grounds that Holloman did not provide a violation of a constitutional right. Holloman appealed the rulings.

Issue: At issue is whether or not the school administration violated the First Amendment rights of a student by punishing a student for raising his fist during the daily flag salute.

Holding: The United States Court of Appeals for the Eleventh Circuit reversed the summary judgment in favor of the defendants and remanded the case to the district court.

Reasoning: In order to determine why the court of appeals reversed the summary judgment in this case, the evidence showed that Allred and Harland were engaged in a discretionary function at the time of the disciplinary action against Holloman. The court found

that Holloman's right to be free from compelled speech was violated. The issue that the court analyzed was the judgment of qualified immunity in regard to the defendants.

The court focused on if the defendants' acts that were being questioned by the plaintiff involved the exercise of actual discretion and if it fell within the employee's job responsibilities. In order to decide this, the court had to decide if the teacher and principal were engaged in a legitimate job-related function. After this was concluded, then the court had to decide if he or she was executing that job-related function in an authorized manner. It was determined that Allred was attempting to maintain order in her classroom even though she did not have the right to violate the constitutional rights of her students. The appeals court found that her actions in relation to the incident were discretionary acts for which she could seek qualified immunity. Harland was also entitled to potentially be granted qualified immunity. Once this was decided, then the plaintiff had the burden of showing that evidence proved a violation of a constitutional right that was clearly established at the time of the incident.

The first issue was whether Holloman successfully found a violation of a constitutional right. He provided four pieces of evidence that were in support of his argument. First, the day before the Holloman incident occurred, Hutto, another student, was degraded in front of the class, then sent to the principal's office, was threatened to have his recommendation to the Air Force Academy revoked, and finally forced to apologize to his teacher and classmates for remaining silent during the pledge. Second, the teacher's deposition was filled with reference to her desire to witness the flag saluted in a proper way. She claimed that she was deeply offended by the thought that any American would not want to salute the flag. Third, Harland, the principal, made an effort to interrupt Holloman's physics class in order to threaten any students with punishment if they did not say the pledge of allegiance. Finally, the plaintiff's mother was told

by the principal that he, Harland, had to wait to punish Holloman because Harland was afraid that he would hurt Holloman. The court found that with these four pieces of evidence a jury should have the right to decide on this interpretation of events.

The court reversed the district court's holdings in the area of established constitutional right and affirmative expression. The appeals court found that a reasonable administrator and educator should know that it was unconstitutional to discipline Holloman for refusing to recite the pledge. This protest of the pledge requirement is constitutionally protected speech because Holloman has the right to engage in non-disruptive expression in the classroom environment. The court found that Holloman succeeded in proving his claims against the school board under the First Amendment right to free or compelled speech, affirmative expression, and viewpoint discrimination along with his Establishment Clause rights. Due to this evidence, the qualified immunity entitlement was dropped for both Allred and Harland.

Disposition: The United States Court of Appeals for the Eleventh Circuit reversed and remanded the district courts grant of summary judgment in favor of the defendants.

Citation: *Doe v. Perry Community School District, R. McCaulley, D. Marburger, B. Gittens, J. Jans, & City of Perry, Iowa*, 316 F. Supp2d 809 (S.D. Iowa 2004).

Key Facts: The plaintiff filed a complaint against the local school authorities and school board after he alleged that his First Amendment rights were violated when he was disciplined for his outspokenness against hate-based discrimination, harassment, and discrimination. For 3 years, Doe alleged that he had been a victim of harassment including assaults and threats because he was perceived as homosexual. He claimed to have gone to the school administration about the problem, but the school failed to provide him with a safe learning environment. He alleged that

no less than 40 individual students at the school, including some teachers and administrators, treated him with a demeaning manner.

One specific incident on May 8, 2003, was the basis of the plaintiff's testimony. Doe had a confrontation with another student as he was leaving the parking lot of the school the day before. Doe found out that the student was telling other students that he would physically harm Doe. The student used lewd and vulgar language to describe his physical threats. Doe approached Officer Jans, the School Resource Officer, and told Jans about the threats. Doe asked for advice on how to handle the situation. The police officer told him two options: one, to ignore the offending student, or two, confront the student in a large crowd in order to have witnesses. At no time did the officer tell Doe to engage in a physical confrontation with the alleged harasser.

Later that day, Doe approached the harassing student and chose to confront him. A verbal altercation occurred which led to a physical altercation. Both boys were arrested by Officer Jans and charged with disorderly conduct for participating in the fight. They were given a 3-day suspension on top of the arrest.

Doe alleged that the harassment of the students, along with the lack of discipline by the school board and its employees is what led to an atmosphere filled with this type of behavior. He claimed that he no longer felt safe at school. He quit the wrestling team due to harassment and began to home school to avoid further confrontations in the school environment. Doe filed for a preliminary injunction and asked for relief in three respects: one, the district and the school administrators be enjoined from taking any adverse action against the plaintiff if he spoke out against hate discrimination; two, the Perry Police Department and its officers be enjoined from arresting or charging Doe in reaction to his speaking out in the school about hate discrimination;

and three, the court order that the school district enforce the harassment policy against homosexuals.

Issue: At issue is whether or not a school violated a student's First Amendment rights when the student was suspended and arrested for a physical altercation at school in response to homosexual harassment.

Holding: The United States District Court for the Southern District of Iowa held that the student's motion for preliminary injunction to be denied.

Reasoning: Four reasons are the basis for the denial of the preliminary injunction set by the court. The court considered: the probability of success on merits, the threats of irreparable harm to the movant, the balance between the harm and the injury that granting the injunction would cause, the public interest of granting the injunction.

The court must analyze the First Amendment claim in order to decide if a preliminary injunction should be ordered. In this case, the defendants argued that they had had no objection to the plaintiff expressing himself in regard to his perceived sexuality. They also stated that they have no intention of interfering with the plaintiff's First Amendment rights. The court found that the plaintiff has failed to provide any evidence that showed the defendants had in the past interfered or restrained the plaintiff from his right to speak or express himself in response to harassment he has received. The only direct interference the school may have given was when the speech led to a physical altercation. The court felt that the plaintiff was correct in citing *Tinker* (1968) in order to state that protected speech may cite others to anger, but the court felt that Doe did more than condemn the crowd when he became involved in physical violence. Finally, the court was unable to find that a likelihood of success on his First Amendment claims was established which, in turn, does not allow relief to be granted to protect those rights.

To issue a preliminary injunction, the plaintiff must also demonstrate that there is a threat of irreparable harm that would occur without the injunction. In this case, the court found that the cases that were used by the plaintiff failed in this regard due to fact that they were not related to the actions that warranted the punishment enforced by the school system. The plaintiff in this case claimed that without the preliminary injunction he would not be able to effectively speak out against hate-based harassment. The court did not connect the reasoning to enforce a preliminary injunction with overcoming any harm. It was found that the defendants had not prevented the plaintiff from any speech.

The balance of harms must be considered also to implement a preliminary injunction. Doe, the plaintiff, claimed that enjoining the district would take little or no effort to the defendants. Doe claimed that the defendants would only be asked to not take adverse action against him for speaking in the halls of the schools against hate-based threats. The defendants argued that if the injunction was granted, then the ability for the school authority to maintain an ideal learning environment would be compromised. By citing *Fraser* (1986), the defendants claimed that the schools were expected to impress the shared values of civilized social order. The court found that Doe was being harmed by not attending school because he felt safe. The court also found that there would be little harm to the defendants to grant the motion for preliminary injunction, but this factor alone would not be sufficient enough to warrant the preliminary injunction.

The final area of analysis is the consideration of public interest. The plaintiff argued that the injunction would protect the constitutional rights of free speech while at the same time assisting the school district in providing a safe environment for its students. The court agreed that there is a public interest in creating tolerance and a safe environment for educational

opportunities. Despite this acknowledgement, the court gave little credit to this thought when granting a motion for a preliminary injunction.

Disposition: The court found insufficient evidence to support the motion for preliminary injunction resulting in the motion being denied.

Citation: *Saxe v. State College Area School District and C. Martin*, 240 F. 3d 200 (3d Cir. 2001).

Key Facts: In August 1999, the State College Area School District adopted an Anti-Harassment Policy that dealt with harassment in all areas from sexual harassment to religious harassment. The policy established procedures for reporting, mediation, and complaints along with setting a list of punishments for harassment. David Saxe is a member of the Pennsylvania State Board of Education and he is the legal guardian of the student plaintiffs. David Saxe filed suit in District Court claiming that the policy was facially unconstitutional under the First Amendment. The plaintiffs were concerned that the policy would cause them to be punished because of their religious speech.

The district court found that even though Saxe had standing to challenge the constitutionality of the policy, the court granted the defendant's motion to dismiss holding that the policy was constitutional. The district court dismissed the plaintiffs' free speech claims because the conclusion that harassment is not entitled to First Amendment protection. The plaintiffs claimed that the policy was a hate speech code, but the court found that the policy merely prohibits harassment that is already unlawful under state and federal law.

Issue: At issue is whether or not a school district violated the First Amendment rights by adopting an anti-harassment policy.

Holding: The United States Court of Appeals for the Third Circuit reversed the judgment because the policy was unconstitutionally overbroad since it appeared to cover substantially more speech than could be prohibited under the *Tinker* (1968) substantial disruption test.

Reasoning: The court of appeals disagreed with the district court's reasoning because there is no harassment exception to the First Amendment. The court also felt that the policy prohibits a substantial amount of speech that would be considered harassment under either federal or state law. The court of appeals found no categorical rule that prevents "harassing" speech to have First Amendment protection.

The reasoning behind the overturning of the district court's ruling is primarily focused on the over-breadth of the policy that the school board implemented. The policy prohibits harassment based on personal characteristics that are not protected under federal law, so it seemed to prohibit more broad, catch-all categories that are not constitutionally protected such as clothing, appearance, hobbies, etc. The court or legislature has not suggested that unwelcomed speech that is directed at another's values should be prohibited under the rubric of anti-discrimination.

The appeals court examined the policy to find if it is justified as a permissible regulation of speech within the schools. Using *Tinker* (1968), the court found that the regulation of student speech is permissible only when the speech substantially disrupts or interferes with the school setting or the rights of other students. A specific situation has to occur, not a blanket policy. By using *Fraser*, the court of appeals found that a school can use a policy to prohibit any speech that is lewd, vulgar, or profane. Looking at *Hazelwood*, the court found that a school may regulate school-sponsored speech. If the speech falls outside of these two categories, then the *Tinker* test is applied. The policy set forth by the school district addressed so many different very specific

guidelines. Despite the specificity of the type of prohibited speech, the policy is still too broad for any of the precedents to apply. The appeals court held that the policy was too unconstitutionally overbroad.

Disposition: The judgment of the United States Court of Appeals for the Third Circuit was to reverse the opinion of the United States District Court for the Middle District of Pennsylvania.

Citation: *Bannon v. School District of Palm Beach, E. Harris, J. Sabia*, 387 F. 3d 1208 (11th Cir. Fla. 2004).

Key Facts: This appeals case is based on litigation of a school beautification project that occurred at a religiously diverse public school. The school underwent remodeling and in the halls were large wooden panels to separate the students from the construction. The students were invited to paint murals on the panels. The school did not prohibit students from expressing their views, especially religious ones. The school did clarify that the murals could not be profane or offensive to anyone. The plaintiff student was a member of the Fellowship of Christian Athletes. The group decided to participate in the project, so one Saturday afternoon several murals were painted without prior administrative approval of the ideas.

On Monday morning, a commotion on campus near one of the murals occurred. The murals received media attention that day from three television stations, not to mention TV reports and phone calls. The murals became a distraction of school-day operations. The plaintiff was asked to cover the murals. The plaintiffs filed suit. The district court found that the defendants did not create a public forum.

Issue: At issue is whether or not a school can require a student to remove religious messages from murals painted for a school beautification project.

Holding: The United States Court of Appeals for the Eleventh Circuit affirmed the district court's decision.

Reasoning: The appellant court found that the district court erred in not subjecting the school's action to the First Amendment standards in determining public or limited public forum. Also, the appellant court found an error in the application of *Hazelwood* (1987). The appeals court felt that the district court should have used *Tinker* (1968) in this case due to the disruption that the mural caused within the school day. The appeals court first analyzed the public forum. After the court determined that the plaintiff student determined that the expression occurred in a nonpublic forum, then the regulation was analyzed to see if the imprimatur test was applicable and then if the censorship was a viewpoint or content restriction.

The courts have founded three kinds of government property for the purpose of determining First Amendment protection: traditional public fora, designated public fora, and nonpublic fora. The court found that the mural project was not a traditional public forum because public schools do not possess the same assembly as other settings. *Hazelwood* (1987) determined that the school retained editorial control over a forum that deals with the school. The district court found that the expression occurred in this case in a nonpublic forum. The intention was not to require expression during the beautification project, but to offer a way to express views. The court found that the principal had editorial control over the murals in three ways. The first way was that the principal declared that none of the murals could be profane or offensive. The second way was that the mural project was supervised by a faculty member. The third way was that the principal told students to express themselves, but he never said that the students could express themselves religiously or politically.

The appeals court found that the nonpublic forum of a school can regulate expression if there is a reasonable purpose to regulate the expression. By using *Fraser* (1986) and its definition of vulgar expression, the school had permission to restrict expression in order to prevent a disruption or to offend a group of individuals who do not have a choice to be exposed to the expression. The district court concluded that the murals were school-sponsored expression and applied *Hazelwood*. The appeals court felt that was an error. *Hazelwood* (1987) is used to control school-sponsored speech, but within the context of a curricular activity. The appeals court clarified that the expression in this case was a curricular activity despite the fact that the plaintiff did not paint them in the classroom setting. Because the expression bore the imprimatur of the school, it was determined that *Hazelwood* can be used to censor the expression.

The suppression of the plaintiff's speech was reasonable and survived under *Hazelwood* (1987) if it is reasonably related to pedagogical concerns. The appeals court agreed with the previous ruling by the district court because of the legitimate pedagogical concern in avoiding the disruption that the murals caused. By using *Fleming* (2002), the school made the right decision to remove the student's expression in order to end the disruption.

Disposition: The district court's decision was affirmed.

Citation: *The Circle School; Rietmulder; Mishkin; Hochberg; Project Learn; Upattinas School and Resource Center; The School in Rose Valley; and The Crefeld School v. Pappert; Phillips; Allis; Biondo; Hatch; Jones; Pasanek; Schomburg, Dr.; Smith; and Wachtel*, 381 F.3d 172 (3d Cir. Pa. 2004).

Key Facts: The Pennsylvania State Constitution mandated that all public, private, and parochial schools within the Commonwealth display the national flag in every classroom and provide a time to recite either the Pledge of Allegiance or the national anthem every school day.

Private schools could opt out because of religious reasons and individual students could opt out due to religious or personal reasons. If a student did opt out, school officials were required to notify the parents in writing that their child did not participate.

The district court held that notifying parents was a clear discrimination that was based on the expression of the student and that it was clearly triggered only when a student exercised the right of the First Amendment. Also, the court found that by applying the statute to all schools, it caused a burden to the schools' mission of freedom of choice. Since the court found that the First Amendment right was violated it did not reach the Fourteenth Amendment.

Issue: At issue is whether a governmental statute can force school systems to inform parents when their child is not reciting the Pledge of Allegiance or national anthem.

Holding: The United States Court of Appeals for the Third Circuit held that the District Court was correct in their judgment for the plaintiff dealing with exercising First Amendment rights.

Reasoning: The statute requiring every student to recite the Pledge or anthem was one that forced the students to submit to the Commonwealth's views. This was found to be unconstitutional because it interfered with the students' expressions of values. The court found that the students were engaged in expressive association. Educational entities are highly expressive organizations and definitely fall within this standard.

The plaintiffs also claimed that their Fourteenth Amendment rights had been violated. They felt that the statute infringed on the rights of parents to choose how to educate their children. The district court using reasoning similar to what they used for the First Amendment ruling, upheld the parent's claim.

Disposition: The Court of Appeals affirmed the judgment of the district court.

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Citation: *D.F. by parent and natural guardian, Andrew Finkle v. Board of Education of Sysosset Central School District, Kassebarum, and Hankin*, 386, F. Supp.2d 119 (E.D.N.Y. 2005).

Key Facts: A 12-year-old student was given an assignment by his sixth grade English teacher to keep a journal to express his thoughts, feelings, or concerns. As part of one of the assignments, he wrote a short story entitled “Costume Party,” which depicted a fellow student going on a murder spree and several female students involved in sexual acts. The characters were all named after students in the school. The composer went on to read the story to other students during class while the teacher was occupied with calling attendance. Later during a voluntary program the same day, he requested to read it aloud to the students involved with the program. The instructor in charge of the “Latin at Lunch” voluntary program requested to read it to herself first, where she found the story disturbing enough to take the story to the principal. A 5-day suspension entailed with written notification given to the parents of the dates of suspension. The day before the suspension was to begin, the plaintiff was not allowed to attend his classes and a school psychiatrist performed psychological tests on the plaintiff without the notification or consent of the parents. The plaintiff also claimed that the principal communicated with parents of the children named in the story and that the plaintiff had engaged in threatening behavior and sexual harassment toward their children. The plaintiff had no prior disciplinary action at the time of writing the story. A superintendent hearing was held and a school suspension of 30 days was enforced due to three violations of the school districts code of conduct: (i) threatening the use of a weapon, (ii) harassment, and (iii) intent to intimidate or threaten other students.

Issue: At issue is whether school officials violated the constitutional rights of a student when the student was suspended as a result of writing a story portraying violence and sexual harassment against other students.

Holding: The United States District Court for the Eastern District of New York held summary judgment for the plaintiff was denied.

Reasoning: The court found that the student's story was speech that was not protected in the school setting due to the graphic nature of the story. *Tinker* (1968) set precedent that students do not lose their rights at the school gate, but that does not mean that school administration does not have authority over inappropriate speech in the school setting. *Fraser* (1986) set precedent that the language used in a school setting cannot materially or substantially disrupt the educational setting, and that it cannot infringe on the rights of other students. The court found that the defendants showed evidence that the student did infringe upon the rights of students and that this type of written expression was not protected by the First Amendment.

Also, the court found that due process was adequately received in relation to the suspension hearing, that the 30-day suspension was not excessive, that there was no selective treatment shown to this particular student, and that the defendants were entitled to qualified immunity for the violation of the student's rights.

Disposition: The court denied summary judgment to the plaintiffs.

Citation: *Jacobs v. Clark County School District*, 373 F. Supp. 2d 1162 (D. Nev. 2005).

Key Facts: Kim Jacobs was an 11th grade student at Liberty High School in Las Vegas in 2004. The school implemented a dress code policy that the state of Nevada also endorsed. Jacobs was warned, reprimanded, and suspended in a 6-week period for dress code violations. The court denied the plaintiffs' request for a TRO (temporary restraining order) but granted the request for

preliminary injunction in favor of the plaintiff barring the enforcement of the dress code for the duration of the litigation. The plaintiffs provided evidence that Liberty High did not conduct the parent survey and the school district did not offer zone variances to students who did not want to participate in the uniform dress code. The precedent had been set by *Canady v. Bossier Parish Sch. Bd.* (2001), which allowed a school district to impose a school uniform policy if the policy was content-neutral. The court in this case was concerned due to the phrasing of the policy and its recognition of exempting nationally recognized youth organizations such as boy or girl scouts.

The school district removed the exemptions and eliminated the parent survey component. Kim Jacobs withdrew from Liberty High School because of the fame that the case had caused her. The defendants filed a motion to dismiss on the grounds that Jacobs was not a student of the school anymore. The plaintiff then filed an amended complaint that contained more plaintiffs, all of who had suffered punishment for dress code violations.

Issue: At issue is whether or not the school system violated the First Amendment rights of students when the students were disciplined for the violation of a state-wide dress code policy.

Holding: The United States District Court for the District of Nevada struck two sections of the dress code policy, granted the district's motion to dismiss, and denied the plaintiffs' motion for partial summary judgment.

Reasoning: The court analyzed three issues when determining the plaintiffs' freedom of expression. The first issue was whether a student's choice of attire constituted expressive conduct within First Amendment protection. The next issue was whether the student plaintiffs' choice of attire constituted expression. The last issue was what First Amendment standard needed to be analyzed in order to justify the constitutionality of the defendants' actions.

Using *Texas v. Johnson* (491 U.S. 397), the court found that the context and environment are considerations when determining if the conduct amounted to speech. The court in this case had no problem in deciding that student attire could constitute speech. Kim Jacobs wore shirts that bore religious messages and Liberty High's enforcement of its dress code kept her from wearing the shirts. It was determined that Kim was clearly attempting to display a particular message with a high likelihood that the message would be understood by those who viewed the clothing.

The court next had to determine whether or not a dress code could be constitutional. The courts concluded three prongs to its dress code constitutionality test: (1) it must improve the educational process and concerns for the health, safety, and order of public schools; (2) it must not suppress student expressions and stay viewpoint neutral, and (3) it must not be more than necessary. The court found that the dress code was not unconstitutionally implemented by the state of Nevada, but the specific Liberty High implementation was at risk. The court found that the specific high school dress code was absent of definite and delineated considerations and procedures which could regulate and prevent viewpoint discrimination. The court required an amendment to portions of the dress code or it will be looked as unconstitutional. The revised version was reevaluated and found that it did not infringe on the plaintiffs' freedom of expression, which resulted in the defendants being entitled to summary judgment against those claims.

Disposition: The court granted the district's motion to dismiss in the form of a motion for summary judgment and denied the plaintiffs' motion for partial summary judgment.

Citation: *K.D. by parent, Laura Dibble v. Fillmore Central School District and Kyle Faulkner*, 2005 US Dist. LEXIS 33871 (D. Nev. 2005).

Key Facts: A sophomore student came to school wearing a pro-life t-shirt. A teacher at the school told him that the shirt violated the school dress code and asked him to remove or cover it up. If he did not comply he would be sent home for the day. The student then professed that his First Amendment rights were being violated. The student's shirt was clearly political speech, but there was no evidence of engaging in debate. Three female students complained about the shirt, but the complaints did not escalate into substantial interference with the administration of the school. Based on these facts, the district court issued a preliminary injunction that prohibited the school from not allowing the student to wear the shirt until the school could show that the shirt would cause a substantial disruption.

Issue: At issue is whether a principal may censor student wardrobe that is not plainly offensive, vulgar, obscene, or profane and does not disrupt the working of a school environment.

Holding: The United States District Court for the Western District of New York held the plaintiff's motion for a preliminary injunction without prejudice.

Reasoning: Five major reasons shaped this case. The first reason dealt with the fact that Faulkner contended that the shirt is inaccurate. Homicide is defined as an "unlawful" act, so Faulkner claimed that because abortion is legal the shirt was not factual. The problem was that Faulkner objected to the factual inaccuracy that related to the message of the shirt, not the manner in which it was relayed.

The second reason for this case occurred because Faulkner felt that the shirt was a direct attack on students who had been through or contemplated an abortion and that those acts were inappropriate in the school environment. It was decided that just because a student has a different view from another it did not constitute a personal attack. *Barber v. Dearborn Pub. Schools* (2003), an "International Terrorist" t-shirt case, was used to back up this point.

The third and fourth reasons dealt with the words “homicide” and “abortion.” Faulkner felt that “homicide” is a word that is objectionable because it promotes violence and “abortion” is a subject that does the same. If these arguments were to be accepted, it would require a prohibition of the words. In this case, words such as “war” and “terrorism” would have to be prohibited because they promoted violence.

The final reason in this case was that Faulkner contended that elementary students should not be exposed to such topics as abortion. It was never proven that K.D. would ever encounter younger students and there is no indication that it would pose a distraction to the educational goals of the younger students.

Disposition: The Court granted the motion for a preliminary injunction, without prejudice to defendants’ filing a motion for summary judgment after the conclusion of discovery, and without prejudice to any other appropriate motion.

Citation: *Nixon v. Northern Local School District Board of Education*, 383 F. Supp. 2d 965 (S.D. Ohio 2005).

Key Facts: In August of 2004, James Nixon and his mother attended a church camp and purchased a t-shirt that portrayed the Bible verse John 14:6 on one side and the other three unsupportive statements of homosexuality, Islam, and abortion. He wore it on the first day of school. The guidance counselor told him that he would need to remove the shirt because its message was offensive and inappropriate. He refused to remove the shirt. His father was called to pick him up. When Mr. Nixon, the plaintiff’s father, refused to leave campus without an explanation, which he never was given, the defendants felt the need to call the local police department. A meeting with the superintendent and parents occurred to discuss the situation, but the description of why the shirt was offensive was never truly answered. There was no evidence

that James' t-shirt caused any disruption at school. He had worn other Christian shirts to school, but never violated the school's policy before.

Issue: At issue is whether a school administration violated a student's right to wear a t-shirt that did not violate dress code or cause a substantial disruption in the educational mission of the school.

Holding: The court held that the plaintiff's motion for preliminary and permanent injunction was granted and the request for nominal damages of \$1.00 was granted.

Reasoning: The court used the preliminary injunction analysis to determine its judgment in favor of the plaintiff. First, James' conduct in wearing the shirt clearly is expression protected under the First Amendment. The court analyzed the case using the *Tinker-Fraser-Kuhlmeier* tests of school-sponsored speech, vulgar and obscene language, and material disruption.

The defendants argued that the decision to prohibit James from wearing the t-shirt was justified due to *Fraser's* (1986) plainly offensive precedent. The district court disagree with this. The only argument made from the defendants was that the shirt had the potential to cause disruptive incidents and that the shirt possibly infringed on the rights of others at school. The court found that there was no evidence that the wearing of the shirt caused any interference with the work of the school or the rights of others. With this decision, the First and Fourteenth Amendment rights were violated because the school system prohibited the plaintiff from wearing his shirt.

Irreparable injury and harm to others and public interest were addressed. The court found that because the plaintiff demonstrated a strong likelihood of success on merits of the First Amendment claim, it was decided that irreparable injury would occur if a preliminary injunction was not issued. In regard to the harm to others and public interest, the court found in this case

that the message on the t-shirt was not enough to outweigh the constitutional right to free expression.

Disposition: The court grants the plaintiff's motion for a preliminary and permanent injunction along with being entitled to \$1.00 in nominal damages.

Citation: *Posthumus v. Board of Education of the Mona Public Schools, Vanderstelt, Bustard, Trujillo, and Babbitt*, 2005 U.S. Dist. LEXIS 44261 (W.D. Mich. Apr. 18, 2005).

Key Facts: This case comes from an original case *Posthumus v. Board of Education* (2005) that was dismissed by the district court on January 27, 2005. The plaintiff brought before the court four issues. One issue is the plaintiff's motion objecting to defendants' taxed bill of costs entered by the clerk asking that it be vacated. The second issue is the plaintiff's motion for enlargement of time for filing responses and objections. The final issue brought to the district court is the defendants' motion for prevailing party attorney fees and costs.

Issue: At issue is whether or not the district court needed to revisit a First Amendment and Fourteenth Amendment claim that was dismissed.

Holding: The court held that the plaintiff's motion objecting to the defendants' taxed bill of costs entered by the clerk is dismissed as moot. The plaintiff's motion for enlargement of time for filing responses is granted. The defendants' motion for prevailing party attorney fees is granted in part.

Reasoning: The district court's decisions were based on three rulings. The first ruling that is being revisited is the plaintiff's motion objecting to the defendants' taxed bill of costs. The transcripts of the deposition were not obtained and therefore are not reimbursable costs. The court awarded the defendants \$1,025.32, which was accurate, and no further reduction was needed. The court dismissed the first issue as moot.

The second issue was the plaintiff's motion to enlarge time to file a response. The court found that because of certain family circumstances and the lack of the defendants' opposition for this motion, motion was granted.

The final issue held by the court is the defendants' motion for attorney fees. Courts have awarded attorney fees to the prevailing plaintiffs and defendants under the 42 U.S.C. § 1988. Prevailing defendants usually recover fees in the most extreme case of misconduct. The defendants' claim that the case is frivolous because the plaintiff failed to present any facts to the due process claims failed to cite any support for the over-breadth charge to school policies, failed to show legal basis to the First Amendment claims, and finally, failed to show that he suffered any adverse consequences from the ruling. The court agreed with the defendant and awarded \$2,100 fee against the plaintiff's counsel for the frivolous claims under § 1927.

Disposition: The United States District Court for Western Michigan ordered that the plaintiff's motion of objection is dismissed as moot; the plaintiff's motion for enlargement of time is granted; the defendants' motion for attorney fees is granted in part.

2006

Citation: *Brandt, Darugar, and Van Enck v. Board of Education of the City of Chicago, Kotis, Rosales, Laughlin, and Chancy*, 420 F. Supp. 2d 921 (N.D. Ill. 2006).

Key Facts: Beaubien School held an annual contest with the eighth grade students to design a class t-shirt. Twenty designs were submitted for the students to choose for the class shirt. Brandt's shirt design was not chosen. After losing the election, Brandt added the word "gifties" to the back of the shirt in honor of his gifted class. The principal prohibited the design as an alternate shirt because a fair vote was conducted and the alternate shirt did not win the

election. The gifted students started a petition that stated that the regular education students had no problem with the gifted students wearing the alternate shirt. Brandt went to the local school board to voice his concerns about the voting of the class shirt and the opportunity to have their own shirt. The school council supported the principal's decision to prohibit the t-shirts.

The gifted students produced their shirts anyway and wore them on April 1, 2003. The principal told them that they were in violation of the disciplinary code. Tension began to come between the gifted and regular students after the t-shirt incident. Several gifted students wore the "gifties" shirts again on May 12, 2003. The administration tried to solve the t-shirt problems by giving the options if they wore the shirts then they would stay in the gifted or they could cover the word "gifties" on the shirts and have access to anywhere in the school. At least one gifted student wore the banned shirt every day until May 23. Because the principal did not foresee a problem with student safety, he allowed the students to wear the "gifties."

Issue: At issue is whether or not the school administration denied the gifted students their First Amendment rights to free speech when the "gifties" shirt was prohibited.

Holding: The United States District Court for the Northern District of Illinois, Eastern Division, denied the parents' summary judgment and granted the defendants' summary judgment.

Reasoning: The court analyzed whether wearing the "gifties" t-shirt was protected speech and whether the individual defendants were entitled to qualified immunity. In order to determine if the speech was protected, the court had to evaluate the particular message and the likelihood of the message being understood. Also, it had to be determined if the speech was inconsistent with the school's basic educational mission. Finally, the court had to determine if the individual defendants were entitled to qualified immunity.

The defendants claimed that the wearing of the t-shirt to school was not for political affiliation or protest of social issues. The defendants also claimed that the message did not have the likelihood of being understood by those who viewed it. The courts found that the First Amendment does protect speech, conduct, or symbols as long as the action or message would likely be understood by the viewer. The plaintiffs claimed that regardless of the content, the shirt was made and worn out of protest because they felt they were cheated at the election. The court found that despite the defendants' argument that the students wore the shirts out of defiance, the plaintiffs have established a genuine issue of whether the students wore the t-shirt in protest of the t-shirt election. There is also an established genuine of fact of whether the other students understood the particularized message about the t-shirt election. Despite the genuine issue of material fact, the court found that the gifted students' speech was inconsistent with the school's education mission set by the precedent in *Fraser* (1986). The evidence showed that the tension between the gifted students and regular students had occurred, so the disturbance that the shirts caused substantially interfered with the school work and infringed on the rights of the other students.

The court found that the defendants had safety concerns due to the tension between the students and the gifted students. The principal prohibited the wearing of the shirts and restricted the gifted students to their homerooms if they wore them. Once the intervention team concluded that this would cause no safety concerns, then the principal allowed the students to wear the t-shirts to school. The court found that under these circumstances, a reasonable school official would not be aware of a clear violation of First Amendment rights. Because of the constitutional uncertainties such as in *Hosty* (2005), the court found that the defendants could easily be

confused over the rights of the plaintiffs in this case. The school administration's prohibition of the gifted students' t-shirts was not an obvious violation of the students' First Amendment rights.

Disposition: The court denied the plaintiffs' partial motion for summary judgment and granted the defendants' motion for summary judgment. The court also denied the defendants' motion to strike as moot.

Citation: *Curry v. School District of the city of Saginaw and Hesinger*, 452 F. Supp. 2d 723 ( E.D. Mich. 2006).

Key Facts: Joel Curry, a fifth grade student at Handley School in Saginaw, Michigan, was participating in a class project called "Classroom City," which was a multi-disciplinary assignment that incorporated learning from all spectrums of the academic core. It was a 3-day event held in the school's gymnasium. Each student had to create, market, and sell a product for the simulation Classroom City. Joel, unable to come up with a product, took the suggestion of his mother to make ornaments made of pipe cleaners and beads in the likeness of candy canes. His father suggested that a card be attached to the ornament with the religious symbolism of the origin of the candy cane. When Joel submitted the prototype, he did not include the attached card that his father offered to make. When the product was brought to the school neither Joel nor his parents mentioned to administrators the addition of the card. He passed the inspections that the elected student "sheriffs" conducted.

Joel's partner was of Asian Indian decent and proceeded to tell Joel that "no one wanted to hear about Jesus." Siddarth Reddy, Joel's partner, was in charge of preparing the storefront while Joel was in charge of preparing the products to sell. After Siddarth saw the attached cards, he decided to make his own product which doubled his burden of preparing the storefront and his

new product. Joel manned the storefront in the morning, and Siddarth manned it during the afternoon.

On the first day of the event, the gym teacher noticed that Joel was selling religious items. The director, Lisa Sweebe, verified that the card had not been attached during the market survey approval. She told Joel that he could continue to sell the candy canes without the card until she talked with Irene Hensinger, the principal. She had to leave a message. Joel's mother arrived at school and discovered that Joel was not allowed to sell the card with the candy canes and told Sweebe that the use of the cards fell within Joel's constitutional rights. She mentioned that she would bring in some literature regarding his rights in this arena. Sweebe agreed to review and pass it along to the principal.

Joel's mother believed that he had a constitutional right to sell the ornaments with the card. She attached an article with a note to Sweebe and sent it to school the next day. The article was written by Mathew Staver and was entitled "Students' Rights on Public School Campuses." Hensinger, the principal, and Norwood, the superintendent, decided that the cards were not appropriate for the instructional time of Classroom City, but he was welcomed to sell the candy canes with the cards in the parking lot after school. Joel decided to sell the ornaments without the cards during the exercise.

Joel received an "A" for the assignment and was not disciplined for attempting to sell the candy canes with the religious cards. During the event, it was noted that students had the "free choice" to purchase products for sale at the mock storefronts. In June of 2004, the plaintiffs filed a five-count complaint seeking monetary damages, injunctive relief, and attorney fees. In January of 2005, the parties filed cross motions for summary judgment. The argument was heard in October 2005.

Issue: At issue is whether or not a school administration has the right to regulate student speech in the form of religious messages during a required pedagogical project.

Holding: The court held that the plaintiffs' motion for summary judgment is denied and the defendants' motion for summary judgment is granted.

Reasoning: The reasoning behind the court's holding are the school district's liability, the liability of the individual defendant, and the possible injunctive relief. The plaintiffs in this case attempted to establish a claim under 42 U.S.C §1983. In order to be successful, the plaintiffs had to satisfy the claim that there was a deprived right secured constitutionally and this deprivation was caused by a person acting under state law.

The school district's liability was challenged by the plaintiff because of the claim that the school board violated constitutional rights under § 1983. The court does not believe that the plaintiffs brought any evidence to show that the school district was deliberately being indifferent to the issue. The Supreme Court recognized two patterns of which indifference could be determined. The two patterns are (1) a known series of violations and (2) the lack of training that should be done with employees dealing with a particular issue. In this case, there was no evidence to show that there had been a series of violations of religious rights at the school. Also, there was no evidence to show that the school board knew that it should train teachers in that area.

The liability of the individual defendant, the principal, was the next challenge that the plaintiffs brought to the court's attention. The defendant, Irene Hensinger, contended that she was entitled to qualified immunity in this case because of the definition of qualified immunity. Qualified immunity is the defense that protects government workers who perform discretionary functions from liability of civil damages if their conduct does not clearly violate established

constitutional rights of which a reasonable person would have known. Because the defendant raised the qualified immunity defense, then the burden is on the plaintiffs to prove that she is not entitled to qualified immunity. The court found that the principal did not act unreasonably when she prohibited Joel from selling the items with the cards attached. She balanced the obligations of the Establishment Clause and the free speech provisions of the First Amendment when she offered Joel the possibility to sell the cards after school.

Finally, injunctive relief was requested by the plaintiff because of the claim that the defendants violated Joel's constitutional rights by banning religious expression that fulfilled a classroom assignment. When the court found that the principal was able to obtain qualified immunity, this shielded her from damages only, not from injunctive relief. The court found however that the claim for declaratory and injunctive relief is moot because the student plaintiff left the middle school in 2004. The court decided that requiring injunctive relief to Joel after he had already left the middle school campus was useless. The courts denied the plaintiffs' request for declaratory and injunctive relief.

Disposition: The United States District Court for the Eastern District of Michigan, Southern Division, ordered that the plaintiffs' motion for summary judgment be denied and the defendants' motion for summary judgment be granted. The complaint was dismissed with prejudice.

Citation: *Once v. Socorro Independent School District*, 432 F. Supp. 2d 682 (W.D. Tex. 2006).

Key Facts: E.P. was a sophomore at Montwood High School, where he wrote in a journal from the first person point of view detailing the creation of a pseudo-Nazi group on the

Montwood High School campus. The notebook contained descriptions of violence and threats including a plan to commit an attack on Montwood High School during E.P.'s senior year.

In August 2005, E.P. told another student about the notebook and showed him its writings. The student then told a teacher about the book who as a result informed the assistant principal, Jesus Aguirre, about it. Aguirre questioned the student to whom E.P. had shown the notebook. The defendant did not present any evidence of the substance of the questioning. A meeting was set up with E.P. and Aguirre. E.P. explained to the assistant principal that he was writing a work of fiction. Aguirre asked permission to search E.P.'s backpack to which E.P. did consent. Aguirre questioned E.P. about certain journal entries, but the only response that E.P. gave was that it was all fiction. The assistant principal called the mother to the school where she verified that she had encouraged E.P. to write a fictional work in the first person because she herself was taking creative writing classes at the University of Texas at El Paso. The assistant principal told E.P. and Ms. Ponce that he would read it over thoroughly and give an administrative decision based on the safety and security of the student body. E.P. was released back into the general population.

The assistant principal read the work several times and admitted that there were some passages in which he was concerned. The court noted that the defendant was unable to identify the certain lines that disturbed him. The assistant principal viewed the work as a terroristic threat. This disciplinary procedure warranted a 3-day suspension and a recommendation to the school's alternative educational program. E.P.'s parents appealed the decision to the principal, then to the assistant superintendent of instructional services, and finally to the school board's designated committee. No written decisions or transcripts were available for the court to review documenting an appeal each time. Rather than having E.P. attend the alternative academy, he

transferred to a private high school. The plaintiffs filed a complaint claiming violation of the First, Fourth, and Fourteenth amendments by the school and school board.

Issue: At issue is whether or not a school administrator violated a student's first amendment rights when the student was disciplined for creatively writing what was perceived as a terrorist threat.

Holding: The school district's motion to dismiss was denied as to the issues of standing and the First Amendment, but was granted as to the issue of the Fourth and Fourteenth Amendments. The parents' motion for a preliminary injunction was granted.

Reasoning: The court analyzed the First Amendment, the Fourth Amendment, and the Fourteenth Amendment to decide whether a preliminary injunction should be granted. By looking at each amendment and the court cases that were precedent in each case, the court justified its decision to grant the parents' motion for a preliminary injunction.

The First Amendment categorizes student speech into vulgar, lewd, and plainly offensive speech; school-sponsored speech; and all other speech that does not fall into one of the first two types of speech. The court found that the defendants failed to classify which category of speech that E.P.'s notebook fell into which resulted in an incorrect analysis of either *Fraser*, *Tinker*, or *Hazelwood*. The defendants did not argue that the speech was vulgar, lewd, or plainly offensive, so the court found that *Fraser* (1986) would not apply. Likewise, the defense did not argue that the notebook was school-sponsored speech, eliminating *Hazelwood* (1987) as a First Amendment precedent in this case. The defendant's case relied on the *Tinker* (1968) test. If the administrator felt that E.P.'s notebook was going to cause an immediate threat to the safety of other students, then the administrator should not have sent the student back to class after questioning him and confiscating the booklet. The court disagreed with the school in the area of classifying the

notebook as a terroristic threat and the defendants did not provide evidence that justified the disciplinary decision. The court felt that the defendants did not act reasonably because there was no evidence to support the school belief of possible threat.

The Fourth Amendment claim was found to be granted in the favor of the defendant because the student admitted to allowing the assistant principal to search his backpack. This showed that the search was acceptable to the plaintiff and it was done on school grounds. Because the plaintiff did not show burden of proof that his Fourth Amendment right was violated, the defendant's motion to dismiss the claim is granted.

Finally, the Fourteenth Amendment of the Constitution deals with due process. The court in this case recognized that neither party set the appropriate standard for analyzing a due process claim under the Fourteenth Amendment. The plaintiffs failed to produce any law that was utilized in Jefferson. The court found that based on the lack of evidence or lack of argument, the defendant's motion to dismiss the plaintiff's Fourteenth Amendment claim was granted.

The court found that the threatened injury to the plaintiff outweighed any damage that the defendant might have suffered due to the injunction. Because the test of the motion of a preliminary injunction is four fold, the court found that the injunction would not disserve the public interest.

Disposition: The plaintiff's motion for a preliminary injunction is granted.

Citation: *Frazier v. Alexandre*, 434 F. Supp. 2d 1350 (S.D. Fla. 2006).

Key Facts: Frazier was an 11th grade student at Boynton Beach Community High School in Florida and was disciplined as "disrespectful" because he refused to recite or stand during the pledge of allegiance due to his political beliefs. The district board and the Florida statute § 1003.44 claimed that a student must recite the pledge of allegiance unless excused by the written

request of a parent. On December 8, 2005, Frazier was in Ms. Alexandre's math class when he was asked to stand and recite the pledge. This was the second time that particular day that the pledge was recited. When Alexandre ordered Frazier to at least stand in respect, Frazier responded that he had not stood since sixth grade and he was not going to change his practice now. An argument transpired between the student and teacher which led to Frazier being escorted to the office by the assistant principal. Once in the office Frazier was told to take a copy of the board policy and Florida statute to his mother to sign in order to properly allow him to express his right not to say the pledge of allegiance. Frazier and his mother were both informed that he would still have to stand via the Florida state statute. His punishment was that he was removed from the class during that period and not allowed to return to that classroom that day. He was not punished after this incident. The plaintiff filed suit due to his humiliation by the actions of the individual defendants due to the deprivation of Frazier's rights to refuse to remain seated during the pledge of allegiance.

Issue: At issue is whether or not a school district violated the First Amendment rights of a student who was deprived of the opportunity to remain seated during the pledge of allegiance without punishment.

Holding: The court denied the state defendants' and the teachers' motion to dismiss. The court granted the student's motion for summary judgment. The court awarded the student damages, attorney fees, and costs against the school defendants who were permanently enjoined from enforcing the school district's policy relating to non-recitation of the Pledge of Allegiance by students.

Reasoning: The court analyzed the constitutionality of the parental consent in this case, the requirement of non-participating students to stand, and the school district's responsibility to

enforce the pledge statute. The court found through *Bethel v. Fraser* (1986) that it was a longstanding rule of constitutional law that a student may remain quietly seated during the pledge on grounds of belief as long as he or she was not causing a distraction. The court also agreed that Frazier was not challenging the daily recital of the pledge or the content of the pledge, but instead his challenge was based on the authority of the state to override his belief in non-participation of the pledge. In 2004, the Third Circuit struck a state statute that required parental notification when a student refused to recite the pledge of allegiance or to salute the flag, by way of *Circle School v. Phillips* (2004). This was a statute made after the fact. Students were still allowed to choose whether or not they wanted to say the pledge. The court held in this case that the statute was much more restrictive and possibly violated the First Amendment right of the students to choose to participate in the practice.

Frazier argued that he should not have to receive parental consent for First Amendment rights. The court found that the Florida statute actually referred to students standing if they were reciting the pledge. They argued that the school had the right to implement the statute to students because of the disorder it would have caused to not have that authority. The court found that the statute was not meant to be applied to non-participating students and did not require those students to stand for the recitations. His failure to secure the parental consent did not nullify his personal rights. The state defendants alleged that they should not be subject to the plaintiff's challenge because they are not responsible for enforcing the pledge statute. The court found that the state board of education was charged with the authority and duty to enforce compliance with the law with the state of Florida through statute § 1001.03 (8).

The free speech analysis of the court began with the argument that a child may not block the right of a parent or guardian to direct the education of his or her child. Once the court found

that the statute was unconstitutional, then Frazier was entitled to relief. The school board could punish a student who was disruptive, but if the student was not reciting the pledge or sitting quietly during the pledge, then he or she could not be disciplined.

Disposition: The court ordered to deny the defendant's motion to dismiss and to grant the plaintiff's motion for summary judgment.

Citation: *Grzywna v. Schenectady Central School District, Ely, DiLeva, DeLorenzo, G. Comley*, 489 F. Supp. 2d 139 (N.D.N.Y 2006).

Key Facts: Jane Doe, daughter of the plaintiff, wore a red, white, and blue beaded necklace that she made to school to show her support for the soldiers in Iraq, which included certain members of her family, and to demonstrate her love of the United States. Defendants informed her that she could not wear her necklace because it might be construed to be gang related. The school district has a policy that prohibits the wearing of gang-related items. The plaintiff was told that if she did not follow school policy, then she would be subjected to disciplinary actions.

The plaintiff claimed that policy and its enforcement unto her violated her rights under the First Amendment. The claim that was before the court was the defendants' motion to dismiss the plaintiff's claim due on the grounds that the district is entitled to Eleventh Amendment immunity, the individual defendants are entitled to qualified immunity, and the dress code policy is not overbroad or vague.

Issue: At issue is whether or not the school district violated the First Amendment rights of a student who wanted to wear a necklace to show her support for the troops in Iraq in a non-disruptive manner.

Holding: The United States District Court for the Northern District of New York found that the defendants' motion to dismiss was denied.

Reasoning: The court granted judgment to the defendants in order to dismiss the case on the grounds that the school district is entitled to Eleventh Amendment immunity. The court considered and rejected similar claims. The court in this case provided no evidence to warrant a different result, so this argument was rejected. This led to the decision by the court to allow the plaintiff's First Amendment rights to be addressed. The defendants used *Bethel v. Fraser* (1986) to argue that because the plaintiff was of middle school age, then she does not enjoy the same First Amendment rights of adults. The court found that middle school aged students did have a constitutional right to protected speech to engage in non-disruptive, non-violent, and silent speech to express views disapproving of war by *Tinker* (1968).

Once the court found that the plaintiff had a First Amendment right to wear the necklace, then it had to analyze the particular message that it portrayed, the comprehensibility of the message, and the possible qualified immunity of the defendants making the decision to ban the necklace. The plaintiff had the burden to demonstrate that her message deserved First Amendment protection by showing that her conduct was expressive. Because she had shown that she had a plausible contention that her conduct was expressive and that she had notified the defendants of the message that she intended, then the court found that she had shown a particularized message despite the findings that there were no facts to show that she was entitled to any relief.

The plaintiff then had to show that by wearing the necklace that most would understand the message that she was trying to convey. The court used the example of the arm bands in *Tinker v. Des Moines* (1968) to prove a definite comprehensibility of message. The court in this

case cannot find any reason to question that the wearing of the red, white, and blue necklace was clearly coinciding with the war in Iraq. The problem is that even though the colors are patriotic, the public might not automatically know that the necklace supported the troops. Again, she may be able to have the First Amendment right to wear the necklace, but the court found no reason to entitle the plaintiff to any relief.

Finally, the defendants then sought dismissal against the ground of qualified immunity. The court found that due to *Tinker* (1968), a reasonable person would have known that the plaintiff had a right to engage in non-disruptive, non-violent conduct to express their disapproval over the war. The court found that as of this case, it cannot make that determination. Defendants are welcomed to raise this issue at a motion for summary judgment, not a dismissal hearing.

Disposition: The court denied the defendants' motion to dismiss.

Citation: *Harper v. Poway Unified School District; Mangum, et al.*, 445 F.3d 1166 (9th Cir. Cal. 2006).

Key Facts: Poway High School was known for having a history of conflict over sexual orientation. In 2003, the school allowed a group of students to participate in the Day of Silence at the school in order to attempt to teach tolerance of those with a different sexual orientation. Several incidents had occurred on the school campus in regard to the school's participation in this event. A "Straight-Pride Day" was formed by a group of heterosexual students whom were wearing t-shirts with derogatory remarks about homosexuals. The next year, the Gay Straight Alliance attempted to work with the principal to resolve the tension between the two groups during the next Day of Silence. On the 2004 Day of Silence, Tyler Chase Harper wore a t-shirt that said, "I will not accept what God has condemned," and "Homosexuality is shameful." No evidence was presented that the school staff saw Harper's t-shirt on that day.

The next day he wore a shirt that said, “Be ashamed. Our school embraced what God has condemned.” He was sent to the office where he refused to remove the shirt. He was written a dress code violation claiming that the shirt was “inflammatory.” His principal did not send him home or write up anything in his disciplinary record because the principal felt that Harper should not have a negative reflection on something that he felt so strongly about. Harper was to stay in the office all day, but he did receive credit for attendance for the day.

Harper filed a lawsuit against the school district for five different federal causes of actions including violation of his right to free speech. The school filed a motion to dismiss, then Harper filed a motion for preliminary injunction seeking to enjoin the school from continuing to violate the constitutional rights of Harper. The district court granted the school’s motion to dismiss as to Harper’s equal protection, due process, and state law claims, but denied the motion to the First Amendment claims. The district court also denied Harper’s motion for preliminary injunction. Harper filed an interlocutory appeal denying the preliminary injunction.

Issue: At issue is whether or not the school administration violated First Amendment rights for not allowing a student to wear an inflammatory message on his t-shirt in the class.

Holding: The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the district court and remanded the case for further proceedings.

Reasoning: The appeals court reviewed the denial of the preliminary injunction on behalf of the plaintiff. In order to overturn the ruling, the appellate court must determine if the district court abused its decision by using an erroneous legal standard. The district court concluded that the plaintiff failed to demonstrate the likelihood of success on merits of his claims that the school violated his First Amendment right to free speech under *Tinker* (1968).

The appellate court made its decision using the *Tinker* (1968) prongs that a student may regulate speech that would impinge upon the rights of other students and may prohibit student speech that results in a substantial disruption with school activities. By analyzing *Tinker*, it was found that the school did not violate any constitutional rights when it prohibited the wearing the demeaning t-shirt. The appeals court found that Harper's wearing of the t-shirt violated the rights of other students by verbal assault, also proven in *Tinker*.

The court held that the district court did not abuse its discretion in denying the preliminary injunction due to the likelihood that the plaintiff did not show a way to prevail on the merits of his free speech. The Free Speech clause of the constitution permits the school to prohibit speech that intrudes upon the rights of other students. The appeals court found that the shirt that Harper was wearing was injurious to homosexual students.

A dissent was filed by one of the circuit judges in this appeal. He disagreed with the ruling in the appeals case mainly because the only disputed issue was that likelihood of success on merits. Even though he understood the reasoning for the decision that the school made to try to diffuse the controversial situation, he believed that Harper would succeed on his t-shirt claim due to the school participation in the Day of Silence, which was forced upon students. The dissenting judge believed that the courts did not consider that even though the ones that participated in the Day of Silence believed that they were promoting tolerance and equality, the opposing viewpoint that Harper and other students had was one that felt the school was exalting homosexuality and oppressing their own sexual orientation and religious beliefs. Despite the dissention, the court affirmed the district courts findings.

Disposition: The appeals court affirmed the district court's judgment and remanded the case for further proceedings.

Citation: *Behymer-Smith v. Coral Academy of Science, S. West, B. Karaduman, and C. Garlock*, 427 F. Supp. 2d 969 (D. Nev. 2006).

Key Facts: The plaintiff student was a finalist in a state poetry competition. He was scheduled to compete in the *Poetry Out Loud* competition on April 22, 2006, when the Dean of Students at Coral Academy of Science objected to the poem because it contained the inappropriate language of “hell” and “damn.” The Chair of the English department claimed that she presented the collection of competition poems to the administration in January to seek their approval, which was granted. Inside the collection was the plaintiff’s poem to recite at the competition, *The More Loving One*, by W.H. Auden. The plaintiff practiced the poem twice a day for over two months in order to perfect the pronunciation. He even recited it on March 17th in the cafeteria at the school-wide competition with little to no disruption from the student audience.

On April 5, 2006, the plaintiff student recited the two poems at the district-wide competition where he won first place. The next day, the Dean of Students sent a letter of reprimand to the English chair and the other English teachers for allowing the plaintiff to recite the poem in the competition. As a result, the plaintiff was told he could not recite the poem in the state competition and would have to choose another poem. The defendants sent a weekly memo out to the faculty and staff that condemned the use of inappropriate language by the teachers and students. The plaintiff filed a complaint and emergency motion on April 11, 2006, alleging that the school and the administration violated his First Amendment right to free speech.

Issue: At issue is whether or not a school administration violated the First Amendment when prohibiting a student to recite an approved poem at a poetry competition, because of inappropriate language.

Holding: The United States District Court for the District of Nevada held that the defendants were restrained and enjoined from prohibiting the student from reciting the poem at the poetry recitation competition.

Reasoning: The court looked to the criteria for granting a preliminary injunctive relief by analyzing the likelihood of success on merits, the possibility of irreparable injury if the preliminary relief, a balance of hardships, and the advancement of public interest. The plaintiff had to establish a likelihood of success on its claims by looking at the three types of student speech, lewd, vulgar, and offensive speech; then school-sponsored speech; and, finally, the speech that falls into neither of these categories.

The likelihood of success on merits was analyzed by first looking at lewd, vulgar, and obscene language through the precedent of not only *Bethel v. Fraser* (1986), but also *Frederick v. Morse* (2007). These cases gave way to the school to be able to control and prevent lewd, vulgar, and obscene language that promotes a disruption or diversion to the educational day. The court found that the recitation of the poem that contained the words “damn” and “hell” may have been lewd, vulgar, or obscene to some, but it was not disruptive in any way. The defendants also did not argue this point. Later, the recitation of the poem at the state competition was not considered to be school-sponsored speech because the speech was not a part of a regular classroom activity in which all students were made to participate, such as shown in *Hazelwood v. Kuhlmeier* (1987). The poem actually would be recited off school grounds of course, but it is even being recited on a nonschool day. The third point was whether the recitation of the poem falls into the category of causing a substantial disruption to the educational mission of the school. The court felt that there was no likelihood that the plaintiff’s recitation of Auden’s poem was a threat to this standard. With a total absence of evidence against the plaintiff, the court found that

the plaintiff had shown a high probability of success on merits of this claim that his First Amendment rights were violated.

The court found that a likelihood of success on merits was shown, so the plaintiff only needed to show the possibility of irreparable injury if the preliminary relief was not granted along with showing that the balance of hardships sway toward the plaintiff. The court realized that the loss of First Amendment rights at any time causes irreparable injury thus resulting in granting injunctive relief. The court found that the plaintiff's restraining order would be granted because the hardship that the defendants would show was not as serious as the harm that the plaintiff would endure if denied the opportunity to recite the poem in the state competition.

Finally, the public interest was quickly addressed by the court to show that if the constitutional rights of an individual has shown a likelihood of success on merit, then the public interest must be considered for future violations. The court found that it is of interest of the public to uphold First Amendment principles.

Disposition: The United States District Court for the District of Nevada concluded that the plaintiff had a right to injunctive relief, and it granted an emergency motion for a temporary restraining order.

Citation: *Pinard, M. Lipke, G. Linn, H. Mills, T. Jarvi, T. Jeffers, N. White, D. Crawford, C. Somes v. Clatskanie School District, J. Baughman, M. Corley, L. Wallace, E. Fisher*, 467 F. 3d 755 (9th Cir. Or. 2006).

Key Facts: This appeals case was brought about by eight former members of the 2000-2001 Clatskanie High School varsity boys basketball team. The plaintiffs had testified that their coach, Jeff Baughman, was verbally abusive and intimidating. He would tell his players that what happens in the locker room stayed in the locker room, which intimidated many of his

players into not reporting the incidents, according to the plaintiffs. He would use profanity and vulgar language, not to mention physical antics such as throwing dry erase boards and kicking garbage cans. After one home game, Baughman gave his team an ultimatum and told them that if they wanted him to quit, then they should say so. The co-captains on the team called a team meeting at a local restaurant to discuss the coach's behavior and to begin a petition. All the members except Baughman's son and a foreign exchange student signed the petition. The next day the team delivered the coach the petition. The coach immediately took the letter to the principal who was in a meeting with the superintendent. Describing himself as upset and hurt, Baughman asked permission to take off the rest of the day. That night an important game was scheduled, but the principal and superintendent was unsure if the coach would show for the game. Baughman called his junior varsity coach, Gary Points, to inform him about the situation with the team. Baughman was trying to find out who the "back-stabbers" were, and he claimed that the principal and superintendent advised him to either resign or not resign and tell the players to choose to either get on the bus or not get on the bus and turn in their uniforms.

After Baughman left school, the principal, Corley, met with the Athletic Director, Wallace, and the team to find out what happened. Corley and Wallace presented two options to the players: the players could participate in a mediator appointment or they could stand firm and forfeit their opportunity to play in the game. The players left the meeting without expressing their intentions. Baughman then decided not to coach the game that evening. A substitute coach was found to replace Baughman, but the players were not notified of the decision. Only three of the players boarded the bus and played the game with members of the junior varsity team. The missing players came to the game as spectators and claimed that they did not play in the game in order to express their sincerity in the petition.

The next day, the principal and athletic director met with the players and several players' parents. Corley decided to suspend all the players permanently from the team. The defendants went on to argue that the decision was based on the authority that the Code of Conduct and Appearance for Athletes, but Corley concluded in his testimony that he was unfamiliar with the contents of the Code.

The plaintiffs filed a lawsuit under 42 U.S.C. § 1983 alleging that the defendants punished them for a complaint about a school board employee, Baughman, which violated their First Amendment right to free speech. The defendants moved to dismiss the case claiming that the speech was not a constitutionally protected speech and was not a matter of public concern. The district court implemented the public concern test, but denied the dismissal because the test does not apply in the public school arena. The defendants then moved to a summary judgment, which was granted. The court found that the plaintiffs were not engaged in constitutionally protected speech, but more a private grievance against a school employee. The court found that constitutionally protected or not, the plaintiffs caused a substantial disruption with a school activity when they did not board the bus and go to the game. In the opinion of the district court, this justified the school's authority to punish the plaintiffs. The plaintiffs appealed the ruling.

Issue: At issue is whether or not the school administration violated the students' First Amendment rights when suspension from the team was given as punishment due to a petition to remove a coach from his duties being circulated throughout the team.

Holding: The appeals court reversed in part, affirmed in part, and remanded the decision of the United States District Court for the District of Oregon.

Reasoning: The United States Court of Appeals reevaluated the decision of the district court to grant summary judgment to the defendants, when the plaintiffs alleged a First

Amendment violation had occurred. The plaintiffs were suspended from the team because, in their opinion, they were being retaliated against due to speaking out against their coach. The court of appeals reversed, affirmed, and remanded the decision back to the district court.

First, the appellate court reversed in part the decision of the district court because the petition is a constitutionally protected speech due to it being a form of pure speech. The definition of pure speech is described in *Tinker* (1968) as minimal conduct used to express a view. The appellate court disagreed with the district court in the ruling that the defendants had a constitutional right to punish the petition due to a concerted action taking place when filing the petition or complaining about the coach. The only justification for the punishment of the petition was if the defendants forecasted the substantial disruption with the school activities as a result of the petition only. The defendants applied the public concern test erroneously due to confusing the proper usage of the test in the school environment. A public employee's speech may be constitutionally suppressed in order to protect the public's best interest, such as personnel matters and terms and conditions of employment. The court of appeals does not agree that this is synonymous in this case due to the school environment. *Tinker* (1968) addressed the public forum issue, but it did not contain a public concern requirement. The appellate court affirms the usage of *Tinker's* holding that the First Amendment protects student speech that is neither school sponsored, a true threat, vulgar, lewd, plainly offensive, or will cause a substantial disruption with school activities. Due to these reasons, the appellate court reversed the district court's opinion and held that summary judgment not be granted for the defendants in regard to the protected speech of the petition and the complaints of the coach.

On the other hand, the court of appeals agreed with the summary judgment holding in favor of the defendants for the punishment of the students for the boycotting of the basketball

game. The principal and athletic director did not tell the students that the coach was not coaching the game in question. The court felt that if they were told then the students would have boarded the bus, attended the game, and played as usual. The plaintiffs argued that they had constituted expressive conduct, which is protected by the First Amendment. The defendants claimed that the students were substantially disrupting a school activity by boycotting the school-sponsored ball game. This is in direct alignment with the findings in *Tinker* (1968), so the appellate court found that the district court was correct with its decision to grant summary judgment to the defendant. The appeals court claimed that the last minute boycott forced the team to play the game with replacement players or cancel the event. If the event was cancelled, then the plaintiffs have not only substantially disrupted their school's event, but also another school's event. By using *Tinker* (1968), the decision that the defendants did not violate the First Amendment rights of the plaintiffs was affirmed by the United States Court of Appeals.

Finally, the appellate court remanded the decision of whether or not the punishment was a retaliation attempt in response to the refusal to board the bus or the petition against the coach. To establish a First Amendment retaliation claim with student speech cases, the plaintiff must show that he or she was involved in a constitutionally protected activity, the defendants would intimidate the person involved to not continue in the protected activity, and the activity was a factor in the defendants' conduct. The appeals court found that the district court must determine whether the plaintiffs showed the evidence that would have a jury conclude that petition and the complaints against the coach were the motivating factor in the principal's decision to suspend them permanently from the team.

Disposition: The United States Court of Appeals for the Ninth Circuit reversed the district court's decision to grant summary judgment to the defendants in regard to the

punishment of students based on a constitutionally protected pure speech petition. The court of appeals affirmed the decision of the district court's holding to grant summary judgment to the defendants in reference to the boycotting of a school-sponsored event and, finally, the appellate court remanded for a decision from the district court in regard to the students' retaliation claim.

Citation: *L.W., S. and T. Whitson v. Knox County Board of Education*, 2006 U.S. Dist. LEXIS 76354 (E.D. Tenn. Sept. 6, 2006).

Key Facts: L.W. is an 11-year-old Christian who considers Bible study an important component of the Christian faith. He and a friend would read the Bible and talk about it during recess. Over time, a few more students joined in the discussion. The students began to meet in a corner of the playground each day. After about four or five days, the school stopped the Bible study. One of the children in the bible study group told his father that the principal shut down the group. When a parent called to ask why the study stopped, he was told that a parent complained about the group occurring on school grounds. When one of the children's parents involved with the Bible study called to speak to Principal Summa, she did not have the time and declined to discuss it with the parent.

The plaintiffs' attorney sent a letter to the superintendent and the board, advising that the action of not allowing the Bible study violated the students' constitutional rights. The board declined to respond to the letter. Three days later the principal issued a letter to all the parents of the elementary school explaining her actions, and she submitted a series of statements to the media about her position on the matter. The plaintiff filed a motion for preliminary injunction. The story made media coverage on a large scale, including FoxNews. The principal later admitted that she thought the students wanted to have a Bible study in class. She did not realize that the Bible study was during recess.

Issue: At issue is whether or not a school administration violated students' First Amendment rights when it denied a student-led Bible study group to meet during recess.

Holding: The court held that the claim of municipal liability against the school board could proceed and the principal was not entitled to qualified immunity. The court denied the defendants' and the students' motion for summary judgment and denied the principal's motion for summary judgment. The court denied the principal's motion to dismiss for failure to exhaust administrative remedies.

Reasoning: The court found that religious expression is protected by the First Amendment. When investigating student speech, the courts looked to *Hazelwood* (1987), *Fraser* (1986), and *Tinker* (1968). The speech in this case is not school sponsored, so *Hazelwood* does not apply. It also does not contain any lewd or indecent speech, so *Fraser* does not apply. *Tinker* is applicable when restricting student speech in this case.

Schools have less control over student speech during non-instructional time than during class as in *Westfield High School L.I.F.E Club v. City of Westfield* (2003). Despite the facts in this case that the students wanted the Bible study during non-instructional time, the principal did not realize she denied an activity that was occurring at recess, or the activity was denied because a parent complained that the Bible study was going on at school, the court found that too many questions were left unanswered in order to issue a summary judgment. Summary judgment is to be used only when there is no question as to such issues of fact.

The court found that L.W. was not required to exhaust administrative remedies much like the defendants claim prior to pursuing relief for Constitutional violations. The court also felt that the plaintiff has presented enough evidence to support a claim of liability against the Knox County School Board. The court then denied qualified immunity for the principal because it felt

that a reasonable official in her position should be familiar with the educational standards of religious practices in school. The court found that it was plain that the students' constitutional rights to read and study his Bible with friends were clearly established.

Disposition: The United States District Court for the Eastern District of Tennessee denied the defendant's motion for judgment, plaintiff's motion for summary judgment, Cathy Summa's motion for summary judgment, and Cathy Summa's motion to dismiss for failure of plaintiff to exhaust administrative remedies. The parties prepared the case for trial.

Citation: *Wentworth School District v. Hendrickson and Counterclaim Plaintiffs v. Donnelly, MacMillan, Robertson and Wentworth School District*, 421 F. Supp. 2d 410 (D.N.H. 2006).

Key Facts: The plaintiff school district and defendant's parent filed cross-motions for summary judgment in reference to the action that the school took in suspending a high school student for refusing to remove or cover a patch that he wore on his outer clothing. The school had two rival groups, the "gay students" and the "rednecks." These two groups had a history of harassing each other, which often resulted in discipline, including suspensions in some cases. Two instances of physical threats had also been recorded. The "redneck" group was known to approach the "gay students" and salute them using the Nazi "Seig Heil." The student in question came to school wearing a patch that is described as a "No Nazis" patch, which contained a crossed out swastika. The administration foresaw this as a potential disruption and possible physical threat to the student, so the student was asked to remove the patch. After refusing, the student was suspended.

Issue: At issue is whether school officials violated the student's First Amendment rights by administering a disciplinary action of suspension after the student refused to remove a "No Nazis" patch.

Holding: The United States District Court for the District of New Hampshire held that the school administration did not violate a student's First Amendment right to free speech when suspension was implemented as a disciplinary action due to refusal to remove a potentially disruptive item of clothing.

Reasoning: The courts decided in the favor of the school because of five main reasons. First, the student could not prove that his First Amendment rights had been violated, but even if he had, the administration would qualify for immunity with regard to Hendrickson's claim. By continuing to use the *Tinker* (1968) precedent, the court found that by offering Hendrickson the option of removing the patch or the option of suspension, then the administration was just preventing a "substantial disruption." Secondly, no monetary award was granted to Hendrickson because he failed to prove a specific policy that the School District uses to suppress his federally protected rights. *Tinker* was used again as the main precedent for this reasoning, along with the case of *Saxe v. State College Area Sch. District* (2001).

The third reason for ruling in favor of the school administration was that it was established that the school administrator does not have to wait until after the substantial disruption before he or she steps in. As a matter of fact, administrators are expected to prevent incidents and diffuse tension in the school setting. The precedent in *Castorina* (2000) supports this reasoning as long as the administrator acts reasonably in his or her decision.

The fourth reason for the ruling was that the authorities in the school prohibited the "No Nazis" patch because they felt that there was reasonable belief that if it was worn it would have

caused a substantial disruption or interference with school activities. The administration also reasoned that the wearing of this patch by Hendrickson sent a direct confrontational message to the “redneck” group thus creating a challenging environment, which might have ended in physical violence.

Finally, the court ruled in favor of the administration because the First Amendment does not restrict school leadership from using experience, expertise, and judgment if diffusing potentially violent disruptions. The relationship between the school and the student is based on the lack of protection that students can provide themselves and the lack of protection that parents can provide their children in the school environment. It was not unreasonable for the school administration to believe that if Hendrickson was allowed to wear the patch that there was a possibility of “discord, tension, harassment, and disruptive, even potentially violent behavior at school” (p. 12).

Disposition: The United States District Court for the District of New Hampshire granted the Governor Wentworth Regional School District’s motion for summary judgment denying the parent’s motion for summary judgment.

Citation: *Guiles v. Seth Marineau, Kathleen Morris-Kortz, Douglas Shoik, and Rodney Graham*, 461 F.3d 320 (2d Cir. Vt. 2006).

Key Facts: A t-shirt was worn by the plaintiff criticizing the President of the United States. The shirt referred to the President as a “chicken-hawk” president and also had accusations of the president being a former alcohol and cocaine abuser. The shirt included images of the President, a chicken, drugs, and alcohol. The shirt was worn by the student every week for 2 months with only one student complaining. After complaints were received from the student’s parents, school officials decided the t-shirt violated the school’s dress code. The student,

however, was allowed to continue wearing the shirt as long as duct tape was used to cover the drug, alcohol, and word cocaine. The District Court overturned the ruling. The disagreement of the court's ruling occurred because *Fraser* (1986) steered the case. *Fraser* is limited to cases involving only vulgarity, obscenity, and profanity. *Tinker* (1968) was used by the court because censorship of the shirt violated the student's free speech rights due to the fact that it did not disrupt the work and discipline of the school.

Issue: At issue is whether a principal may censor a student's wardrobe that is not plainly offensive, vulgar, obscene, or profane and does not disrupt the working of a school environment.

Holding: The United States Court of Appeals for the Second Circuit held that it affirmed the district court's holding that the disciplinary action should be expunged from Guile's record, remanded this matter to the district court for further proceedings, and vacated the district court's order as it denied Guile's judgment action against the defendants in regard to enforcing the dress code.

Reasoning: The United States Court of Appeals for the Second District held its decision for four reasons. The first reason deals with the fact that nothing was being disputed about the issue of the school not sponsoring Guile's shirt or the shirt being something approved by the school. It is understood that an anti-drug and alcohol policy is a legitimate concern, but the defendants could not look to *Hazelwood* (1987) for support.

The second reason given by the court was that *Fraser* (1986) did not apply. It was determined that the district court misjudged the scope of *Fraser* and inappropriately applied it due to the fact that the image of drugs and alcohol are not considered offensive.

Reason three looks to *Tinker* (1968) for guidance. It was agreed that Guile's shirt did not, in any way, disrupt or confront any students in the school, nor would it. The shirt had been worn for a period of 2 months with no incidents occurring.

Finally, reason four addresses the expunging of Guile's suspension from his school records. Guile was found to be entitled to the injunction that permitted him to wear the shirt.

Disposition: The court affirmed in part, vacated in part, and remanded.

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Citation: *Bar-Navon v. School Board of Brevard County, Florida*, 2007 U.S. Dist. LEXIS 82044 (M.D. Fla. Nov. 5, 2007).

Key Facts: The plaintiff, Danielle Bar-Navon, was a 10th grade student who wore a number of piercings on her body, but the dress code only allowed piercings to be in the ear due to safety concerns. She wore a nose ring, a lip ring, and two studs beneath her lip on the first day of school. The principal and the disciplinary dean met her when she got off the bus and informed Bar-Navon that she should either remove her jewelry or call her father and have him take her from school. She refused to take out her piercings, so she was asked to leave school for the day.

Her father questioned the dress code to the principal who referred him to the area superintendent, Dr. Piccolo. Piccolo gave the plaintiff permission to wear clear or flesh-colored studs in her piercings while she was at school. This worked until the plaintiff's lip became infected. She removed the plastic studs and replaced them with the metal ones. She then developed a practice of taking out the studs when she walked past school administrators in the morning and would then put them back in after. She was caught once wearing the metal jewelry

and then was given lunch detention for 5 days. She had not been disciplined since. She claimed that she wore the jewelry to convey a message of individuality and non-conformity.

Issue: At issue is whether or not the school administration violated a student's First Amendment rights when punishing her for violating the piercing section of the district's dress code.

Holding: The United States District Court for the Middle District of Florida, Orlando division granted the board's motion for summary judgment and denied the students' cross-motion for summary judgment.

Reasoning: The court analyzed four challenges to the school board's dress code policy. First, the plaintiff claimed that the policy was factually invalid. Second, the policy was overbroad. Third, the policy was void and vague. Finally, the policy was invalid as applied to the plaintiff.

The court considered whether the regulated conduct was protected speech. It found that if the wearing of the piercings was protected speech, the court would decide what level of scrutiny was applicable. To determine if the plaintiff's first claim was valid, the court had to determine the content-neutral regulation of conduct. The court found that the plaintiff did not provide any evidence that the dress code, in relation to this case, suppressed student speech. It was found that limiting pierced jewelry to the ear does not make any reference to a viewpoint or message, which resulted in the court determining that there was not any evidence of viewpoint discrimination. The court then applied the balancing test used in *Canady* (2001). The test applied the time, place, or manner test to the policy to determine if the strength of the government's interest in the regulation interferes with the speech. Because the policy prohibited wearing jewelry through piercings in places other than the ear and did not prohibit the actual piercings, then the court

found that the dress code policy gave ample alternative methods of communication. This determination finds that the defendants' policy was factually constitutional.

The second claim by the plaintiff was that the policy was unconstitutionally overbroad. The court found that the over-breadth challenge did not apply in this case because the plaintiff had already pierced her body, inserted the jewelry, and arrived at school in full view of the other students. The third claim of vagueness went hand in hand with the over-breadth claim by the plaintiff. The court found that a policy or regulation that was vague must not give an ordinary citizen adequate notice of what is forbidden or permitted. The court found that the policy was not vague because the policy used ordinary terms that have common use and common understanding.

The fourth claim was the policy was unconstitutional as it applied to her. She alleged that the school enforced the policy regardless of her or any other student's viewpoint. The evidence was contradictory because the policy was applied with complete indifference to the plaintiff's viewpoint. The court found that the defendant's dress code policy was not unconstitutional as applied to the plaintiff.

Disposition: The court denied the plaintiff's motion for summary judgment and granted the defendant's motion for summary judgment.

Citation: *Boim v. Fulton County School District*, 494 F. 3d 978 (11th Cir. Ga. 2007).

Key Facts: Rachel Boim, a student at Roswell High School in Fulton County School District, was writing in her notebook during art class. The teacher, Travis Carr, noticed that she gave the notebook to a male student seated next to her. Carr instructed the student to put away the notebook. A few minutes later the notebook was back in the male student's lap. The teacher asked for the notebook, which the student gave back to the plaintiff instead. Carr asked Boim for

the notebook and she said “no” and then tried to switch the notebook. The teacher noticed and confiscated the correct notebook to later read a passage out of it labeled “Dream.”

The writing was about her math teacher and how she dreams that she shoots him during school. Carr, the art teacher, spoke with Mr. John Coen, the school administrator in charge of discipline. Coen read the notebook the next day and had concerns that it was planning in disguise of a dream. He consulted with the school resource officer who also was concerned after reading the entry. When Boim was taken out of her second period class and confronted about the writing, she did mention that the writing was hers, but it was a piece of creative fiction. She was sent home that day. The principal, Edwards Spurka, met with a team of school administrators and Rachel’s sixth period male math teacher who was shocked and felt threatened about the event. He even felt uncomfortable to have Boim in his class after reading the notebook. The team decided that she had violated three school rules: threat of bodily harm; disregard of school rules, directions, or commands; and disrespectful conduct. She was suspended for 10 days beginning October 8. Spurka recommended her for expulsion through an independent arbiter. The superintendent stayed Rachel’s expulsion hearing appeal to the Fulton County Board of Education, which affirmed the suspension, but overturned the expulsion. Boim was not expelled from RHS, and she did not appeal the BOE’s decision. Two years later, Nancy Boim, the mother of the plaintiff, filed suit. The district court granted the defendant’s motion for summary judgment and denied the Boims’ motion for partial summary judgment.

Issue: At issue is whether a school administration violated the First Amendment rights of a student when she was suspended for a physically threatening alleged creative fictional writing of her teacher.

Holding: The United States Court of Appeals for the Eleventh Circuit affirmed the District Court for the Northern District of Georgia's decision to grant summary judgment to the defendants.

Reasoning: The appeals court took issue of analyzing whether or not the district court erred in granting summary judgment to the defendants based on the violation of Boim's First Amendment rights, along with the possible error of concluding that the plaintiff was not entitled to any injunctive relief requiring that the incident be expunged from her records. The appellate court recognized that through *Tinker* (1968), students do not shed their rights at the schoolhouse gate, but *Fraser* (1986) showed that the rights of students must be applied according to the special characteristics of the school environment. The court concluded that there was no question that Boim's writing was an expression, but that expression caused a material and substantial disruption to RHS when she gave the notebook to another student to read. She was not just punished for the writing itself, but also for insubordinate behavior when asked to hand over the notebook by her art teacher. She violated three school policies. The appeals court recognized the school's concern over the violence in the writing and its attempt to prevent violence on school property, which resulted in no violation of Boim's First Amendment rights.

Thus, the appellate court decided that the plaintiff was not entitled to any relief to remove the incident from her record. The ruling was based on the lack of evidence to prove that by not removing the disciplinary action from her record would violate her First Amendment rights. It was found that the district court's denial of injunctive relief was not an abuse of discretion.

Disposition: The United States Court of Appeals for the Eleventh Circuit affirmed the court's grant of summary judgment in favor of the defendants.

Citation: *Bowler v. Hudson*, 514 F. Supp. 2d 168 (D. Mass. 2007).

Key Facts: In the fall of 2004, Christopher Bowler and his friend, James Milello, researched and formed the HHS Conservative Club as a forum to express their conservative political views. Bowler affiliated the club with a national organization called the High School Conservative Clubs of America or HSCCA in order to get resources and assistance with the club. He was able to find a teacher sponsor and the principal recognized the club as an official student club in November of 2004. Bowler prepared posters advertising the first meeting. On the posters was a website for the HSCCA. On Monday, December 6, 2004, the technology director received an email from a faculty member warning her to block the website that was advertised on the posters due to the links on the website to violent and brutal beheadings that were done by terrorists. The links were accompanied with a warning. The HSCCA website was blocked from the HHS network. The administration was told about the website and the posters were taken down on December 7, 2004. The club was told that they could post the signs, but without the web address. On January 7, 2005, the club posted new posters and some of them contained the HSCAA website address. The club was allowed by the administration to black out the website address if they wanted to keep the posters up in the school. The club members claimed to be harassed by members of the HHS faculty, staff, and administration that had different political views. Bowler said that he was called “ignorant” and an “idiot” as a result of his conservative views. The club held seven meetings during the 2004-2005 academic year. It held its last meeting on April 13, 2005, due to alleged harassment and intolerance to the Club views.

Issue: At issue is whether the school administration violated the First Amendment rights of a conservative club when the club’s posters were removed from school property due to the fact that the posters listed a website address that contained a link to graphic footage of hostage beheadings.

**Holding:** The United States District Court for the District of Massachusetts held that defendants' motion for summary was denied in part and allowed in part.

**Reasoning:** The Court had several difficult issues in this decision, which led to the denial and allowance of the defendant's motion for summary judgment. The complaint was that the school violated the students' First Amendment right of free expression, the Equal Access Act, EAA, the right to equal protection under the Equal Protection Clause of the Fourteenth Amendment. The defendants attempted to use *Tinker v. Des Moines* (1968) and *Bethel v. Fraser* (1986) in order to support the school's censorship. The court ruled that the school did not have a right to censor the posters due to the material and substantial disruption of school operations, so *Tinker* did not apply. The defendants also argued that the censorship was in the bounds of the Supreme Court student speech jurisprudence. The court ruled that the offensive speech was not actually displayed at school, so *Bethel v. Fraser* does not apply. The plaintiffs did not argue against qualified immunity for the individual school administrators. Due to this action, the court allowed summary judgment as to the qualified immunity of the individual defendants.

**Disposition:** The court decided that the only summary judgment that was allowed was to the qualified immunity. The court denied summary judgment with respect to the municipality and all other claims.

**Citation:** *B.W.A., a minor v. Farmington School District*, 508 F. Supp. 2d 740 (E.D. Mo. 2007).

**Key Facts:** The students wore clothing with the Confederate flag displayed on them. The students were told they could not wear this type of clothing because the district dress code prohibited clothing that materially disrupted the educational environment. The school system felt that this type of material would cause a substantial and material disruption, due to the fact that

incidents had occurred in the past. Evidence was brought forth by the defendant showing that students had been in racially motivated fights and other incidents, including one that led to a federal investigation. Racial slurs and hate speech had been used on school grounds in the past, leading to the thought that even a passive wearing of such material could cause or promote disruption.

Issue: At issue is whether the school system violated a student's First Amendment rights when it prohibited students from wearing the Confederate flag on clothing.

Holding: The United States District Court for the Eastern District of Mississippi, Eastern Division held that prohibition of wearing the Confederate flag to maintain a peaceful environment was not constitutionally protected by the First Amendment, thus the defendants' summary judgment was granted.

Reasoning: The *Tinker* (1968) case entitled students to freedom of expression, unless the school system deemed a prohibition necessary to avoid a substantial interference with the school atmosphere or discipline. The court found that with the background of the school tension between races, the prohibition of wearing the Confederate flag was justified. The court held that the school district's policy on dress code was valid because the school administration felt the expressions would interfere with the work or impinge on the rights of other students.

Next a claim was submitted that the dress code was unconstitutional based on four major reasons: overbroad, subjective, applied on an ad hoc basis, and viewpoint discriminatory. The court felt that this claim was not successful based on any of the four reasons due to the ban already being fulfilled by the *Tinker* (1968) substantial disruption theory. The court found that the dress code of the district had clearly adopted *Tinker's* theory.

Finally, the Court found that the defendant did not violate Missouri law. The fact that simply wearing the Confederate flag on school premises would cause a disruption gave the school administration the right to prohibit it. Using *Morse* (2007) and *Fraser* (1986) the court found that the school administration has the authority to maintain the school environment. The court decided that the administrators took into account the special environment of the school. Plain language allowed the school officials to prevent such materials due to the promotion of its disruption.

Disposition: The District Court granted the motion of summary judgment in favor of the defendant.

Citation: *Lueneburg & S. Eccleston v. Everett School District*, 2007 U.S. Dist. LEXIS 51189 (W.D. Wash. July 13, 2007).

Key Facts: The plaintiffs were former students of Everett High School in Everett, Washington and served as co-editors in chief of the *Kodak*, the student newspaper. The faculty advisor and journalism teacher was Ms. Deborah Kalina. The paper had at least 15 years of publication behind it. The entire staff was composed of EHS students, and it was self-sufficient financially because of advertisements and the support of the Associated Student Body account at school. The students had complete control over the layout, production, and content of the paper. The faculty advisors never regulated what stories were run or anything about the paper except for editing grammatical errors in order to provide grades for the journalism class.

The paper published an article about the new principal, Ms. Catherine Matthews. In the article, the focus was on the student committee's involvement in the selection process of the principal which had Ms. Matthews as its third choice out of five. The article headlined "EHS New Principal: Third Choice for Student Committee." Ms. Matthews was upset about the article

and informed the assistant principal, Dr. Johnson, that she would sue the faculty advisor personally along with the school if the article was not removed.

During the new school year, the new principal came to Kalina's classroom to tell her that someone in the community was willing to publish the paper for free. The plaintiffs shared a proposed masthead that they wanted for the paper, which proclaimed the student forum status of the paper along with the First Amendment rights that the student staff had to run the paper. Ms. Matthews objected to the language due to a concern over school board policy. She gave the plaintiffs three options of deleting the masthead, revising the masthead, or accepting the district's version of a masthead, all of which the plaintiffs refused.

The plaintiffs claim that the denial of the student proposed masthead was a retaliation act by the principal along with the note that Matthews now wanted to review the paper prior to publication. In response, the principal published the newspaper without the masthead and without permission from the plaintiffs. The plaintiffs retaliated by reading an announcement over the PA system that the paper had been printed and distributed without the staff's knowledge or consent. This announcement resulted in a new requirement that all announcements have to be approved by an administrator before reading over the PA system. A lawsuit and motion for summary judgment followed.

Issue: At issue is whether or not a school administrator violated the First Amendment right to free speech when he or she required review or approval of a student-led school newspaper by the principal prior to publication.

Holding: The United States District Court for the Western District of Washington granted in part and denied in part the defendant's motion for summary judgment.

Reasoning: The district court must address three issues with this case. The first issue is whether the paper, *Kodak*, is a forum of public expression and whether or not the principal and school district were justified in not accepting the masthead proposed by the plaintiffs. The next issue is the new rule of the principal requiring prior review before publication. The final issue for the court to reason is the dismissal of the cause of action under the Washington State Constitution.

The ideal case to use as precedent in addressing control of high school publications is *Hazelwood v. Kuhlmeier* (1987). The Supreme Court found that the inappropriateness of material that is a manner of speech in the classroom or school assembly is not a decision for the federal courts, but more of the local school board. In this case, the court found that the paper was being used as part of the journalism curriculum at the school with students receiving grades for participation and grammatical abilities. The Ninth Circuit Court of Appeals followed *Hazelwood* by stating that the school-sponsored speech is nonpublic and unless the school intends to open a forum for indiscriminate use, then restrictions can be made by the school authority. The court also found that there was no dispute in the board policy and procedures that allow review of the publication by the principal before publication. The conflict came to light when the plaintiffs produced evidence that the *Kodak* was not maintained exclusively as part of the school curriculum. It was listed as a school club in the handbook. The members of the staff would work on materials after school and sold advertisements on the weekends. The court agreed with the plaintiff that whether the school officials intended to create a nonpublic forum or whether the publication intended to operate as a limited public forum is a genuine issue of material fact. The court found that the questions pertaining to the type of forum remain to be resolved, but stated that it was not necessary to address the defendants' argument.

The court agreed with the defendant in the claim that the prior review of the newspaper by the principal is not a restraint under federal or state law. The reason the review is not a restraint is because it does not prohibit the publication of the material altogether. If the principal decides the material is inappropriate and forbids the staff from publishing it, then the review process could lead to a prior restraint. The court agreed with the defendant and found that the summary judgment is in favor of the defendant and the plaintiffs' prior restraint claims were dismissed.

The court is not persuaded that the defendant's claim that the plaintiffs' action to the Washington State Constitution must be dismissed because the state constitution does not give any greater protection for the nonpublic forum expression. The defendants believed that the court must deny this claim by the plaintiffs because the *Kodak* is a public forum, subject to restrictions, and is given no greater protection by the Washington State Constitution as the federal law. The court found this argument premature, so it did not address it, but left it open for future argument. The court also found that the retaliation argument was brought up in the reply brief and declined to consider it. The court decided that the summary judgment is not appropriate on the retaliation claims.

Disposition: The court ordered the defendant's summary judgment granted in part and declined in part.

Citation: *DePinto, M. LaRocco, R. LaRocco v. Bayonne Board of Education, Quinn, Lore, and McGeehan*, 514 F. Supp. 2d 633 (D.N.J. 2007).

Key Facts: Two fifth grade students attending two separate schools in Bayonne School District each wore a button to school protesting the mandatory school uniform policy. The button depicted a group of Hitler Youth with the phrase "No School Uniforms" and a slashed red circle

through the picture. The button did not contain swastikas or other symbols that verified that the youth in the picture are members of Hitler Youth, but the plaintiffs never denied this fact.

The school district sent identical letters home to the parents and/or guardians of these fifth graders explaining that if they wore the buttons again to school then suspension would be administered as discipline. The letters stated that the images of Hitler Youth were offensive to many citizens of Bayonne, and the wearing of these offensive buttons did not portray free speech. The parents and/or guardians of both students filed a suit claiming a violation of the students' First Amendment right to free speech.

Issue: At issue is whether or not school authorities can discipline students for wearing buttons that protest a rule at the school they attend.

Holding: The United States District Court for the District of New Jersey held that the plaintiffs' motion for a preliminary injunction be granted.

Reasoning: The court first analyzed the holdings of *Tinker* (1968), *Fraser* (1986), and *Kuhlmeier* (1987) and found that a three-part framework is involved in this case. First, student speech can be suppressed if it is school-sponsored speech. Next, it can be suppressed if it is vulgar, lewd, obscene, and plainly offensive. Finally, it can be suppressed if it does not fall into one of the first two categories, but it causes a substantial disruption to the school setting. *Morse* (2007) was also used as precedent in the findings in this case. The plaintiffs argued that the case falls under *Tinker*, but the defendants claimed that it falls under *Fraser*. The Court found that *Fraser* did not apply to this case, nor did *Morse* because of the lack of vulgar, lewd, obscene, or plainly offensive speech involved with the message on the buttons. The court also found that *Kuhlmeier* does not apply due to the button wearing being of the students' own free accord, not a school assignment. The school plainly did not sponsor the button wearing.

The court was aware of why the school believed that faculty, parents, and some students would be offended by the button wearing, but it is not an image that was profane or containing sexual innuendo. The court believed that the plaintiffs were exercising their First Amendment rights through expressive speech by wearing the buttons. The defendants in this case did not provide evidence to show that the substantial disruption occurred during the academic school day when the buttons were worn. If the buttons were handed out to other students, then the findings would change.

Disposition: The Court granted the plaintiffs' motion for preliminary injunction as long as the buttons were not distributed in school. The Court also allowed the school the ability to take action if the buttons begin to cause disruptions parallel to the *Tinker* (1968) analysis.

Citation: *Requa v. Kent School District, B. Grohe, & M. Albrecht*, 492 F. Supp.2d 1272 (W.D. Wash. 2007).

Key Facts: Greg Requa, a high school senior at Kentridge High School, filed a motion for a temporary restraining order to enjoin defendants from enforcing a long-term suspension during the course of the Requa's lawsuit. He felt that his First Amendment rights were violated when he was suspended for allegedly posting a video on YouTube of one of his teachers in a critical manner.

During his junior year, Requa took raw video footage of his teacher (Ms. M) and edited it together with graphics and a soundtrack then posted it on the website YouTube.com. The video contained scenes and commentary on the teacher's hygiene, organizational habits, and lack of classroom discipline. In one scene, a student was standing behind her making faces, putting two fingers up at the back of her head, and making pelvic thrusts at her.

The plaintiff admits to posting a link on YouTube on his personal MySpace page in June 2006 at his home residence. School began in September with no one being aware of the link until a local news reporter found the link and contacted the Kentridge administration for comment. On February 14, the footage was aired on the news and the plaintiff deleted the link from his MySpace page when he learned that it would possibly be viewed as harassment.

The school administration conducted an investigation to find out the people responsible, starting with the student in the video. That student identified S.W. as one of the alleged who did the filming. S.W. identified Requa as the editor and webmaster behind the instances. This testimony, along with four other students, identified Requa as the student behind the video. The four other students testifying did so by unsigned written statements. Requa then submitted his own statement to the principal, which denied involvement with any aspect of filming, editing, or posting the video. He only admitted to putting it on his MySpace page.

Requa and his parents were notified by letter that a disciplinary action would be taking place in the form of a 40-day suspension with a 20 day "held in abeyance" if he completed a research paper while on suspension. The plaintiff requested a hearing, but at the hearing was denied an appeal to the discipline order. The plaintiff then appealed to the defendant's board of directors. The appellate proceeding with the board of directors upheld the suspension. He began his suspension and was allowed to return to the regular school setting in time for his graduation ceremony.

Issue: At issue is whether or not a student's First Amendment rights were violated when he was punished for unknowingly filming a teacher in her classroom, editing the material, and then posting it on YouTube.

Holding: The United States District Court for the Western District of Washington denied the plaintiff's motion for a temporary restraining order.

Reasoning: In this case, the court realized that the plaintiffs were asking for a mandatory injunction that would lift the suspension previously imposed. The court was very cautious about issuing mandatory preliminary injunctions unless the facts and the law clearly favor the moving party. The two areas that are to be analyzed by the courts in order to justify this injunction are the likelihood of success on the merits and the balance of harms.

In order to grant the Temporary Restraining Order, the likelihood of success on merits must be determined by the courts. The defendants took the position that the punishment or suspension implemented in this case was because of the behavior on school grounds, the filming of the teacher in class. The on-campus behavior is found by the courts to be evidence in providing the plaintiff with little to no likelihood of prevail. The three students involved in the videoing were all given the same punishment. The plaintiff could not prove that the punishment given to him was only to suppress his free speech away from campus. The defendants have established that their punishment was not for the purpose of regulating speech off-campus, but instead for the on-campus filming of a teacher unknowingly. The court found that the sole basis for the TRO was based on the plaintiff's claim that his First Amendment rights were violated. His total denial to the involvement of the creation of the video, along with the isolated reasoning of the First Amendment violation, is why the TRO was denied. The off-campus activity of the video posting was determined to be protected speech, but the school board used its authority to discipline behavior in a way that will be upheld by the Supreme Court by using *Fraser* (1986) and *Tinker* (1968) *Fraser* (1986) was used to show to the court the lewd and vulgar movement of the pelvic thrusts that were being done by a student behind the filmed teacher. The *Tinker* test is

verified when the material and substantial disruption to work occurred during all the filming during the class. The plaintiff's claim to likelihood to success on merits of *Fraser* or *Tinker* protection failed.

Due to the unlikelihood of success of the plaintiff's claims, the court concluded that the injuries to the plaintiff were insufficient also. Instead the focus turned to the balance of harm and the defendants. The court viewed the hardships and found that if the plaintiff was relieved of his punishment and granted the TRO, then inequity plays a part because the other participants would be held fully accountable thus the disciplinary authority of the defendants would be diminished. This matter does not implicate the public interest, and the court found that the defendants understood that students are allowed to engage in free expression. The public also understood that the maintenance of an educational system can influence the practice of teachers who deserve an environment free of harassment, lewdness, and inappropriate behavior. Disposition: The court found the plaintiff had failed to meet the criteria for the granting of a TRO.

Citation: *Griggs v. Fort Wayne School*, 359 F.Supp. 2d 731 (N. D. Ind. 2005).

Key Facts: The plaintiff was a student at Elmhurst High School and was a proud supporter of the United States Marines. He came to school wearing a t-shirt that contained the creed of the United States Marines. A large picture of an M16 rifle appeared between two stanzas of the creed and beneath the last line of the text. The administrators felt that the t-shirt was inappropriate for the educational setting and told him not to wear the shirt to school again. The plaintiff felt that the dress code policy placed a broad restriction on student speech, so he filed suit for an injunction allowing him to wear the shirt and prohibiting the school from enforcing the ban on symbols of violence.

Issue: At issue is whether a school system violated a student's First Amendment rights when it prohibited him from wearing a shirt that contained the Marine Creed.

Holding: The United States District Court for the Northern District of Indiana, Fort Wayne Division, held the plaintiff's motion for summary judgment on the ban on symbols of violence was denied, while the motion for summary judgment on the plaintiff's particular shirt is granted.

Reasoning: The court analyzed two issues in this case: the ban on clothing that depicts symbols of violence and the ban on Griggs' particular Marine Creed shirt. The trilogy of *Tinker* (1968), *Fraser* (1986), and *Hazelwood* (1987) was determined by the court as the first method that needed to be addressed. Through the information in this case, the court found that *Tinker* was the most prevalent in this case due to the lack of vulgar and offensive language and the confusion of the forum that the shirt was worn.

The court found that the ban on apparel depicting symbols of violence was reasonable and constitutional. On the other hand, the court found that the power to censor student speech cannot be limitless. The court believed that the school board and administrators interpret the dress code policy in the boundaries of the First Amendment. Despite this belief, the court found that the regulation went too far with the non-disruptive Marine shirt that Griggs wore to school. The defendants did not show the evidence in regard to the disruption that Griggs' shirt would provide a substantial disruption to the educational process.

Disposition: The District Court ordered that the plaintiff's motion for summary judgment was granted in part and denied in part.

Citation: *Zamecnik and A. Nuxoll* , 2007 U.S. Dist. LEXIS 28172 (N.D. Ill. 2007).

Key Facts: The Gay/Straight Alliance at Neuqua Valley High School had activities planned for a “Day of Silence” on April 18, 2007. This was the day to protest the discrimination for homosexuals. At NVHS, this event had gone on for at least four years and Zamecnik was in school and noticed that several students that participated in the Day of Silence would wear labels or buttons or even t-shirts that stated “Be Who You Are.” The plaintiffs were Christians who believed that the homosexual lifestyle was immoral. The Christian students would have a “Day of Truth” the day after the Day of Silence to promote Christianity. A t-shirt was worn by the Day of Truth participants that stated “The Truth cannot be silenced.”

Zamecnik remained silent on the Day of Truth and wore a shirt that stated “Be Happy, Not Gay.” She was required to cross “Not Gay” off her shirt. The plaintiffs complained that they had a desire to engage in a silent protest on the Day of Truth. They filed for a motion for preliminary injunction in regard to speech activity during school. The defendants agreed to permit the plaintiffs to remain silent in the same manner as the Day of Silence participants. The defendants agreed to allow the wearing of t-shirts as long as the shirts portrayed a positive message: “Be Happy, Be Straight,” or “Straight Alliance.”

Issue: At issue is whether or not school administration violated students’ First Amendment rights when prohibiting negative speech about homosexuality.

Holding: The district court denied the plaintiff students’ motion for a preliminary injunction.

Reasoning: The court used the precedent from *Harper v. Poway Unified School District* (2006) to uphold the denial of the preliminary relief. The court recognized that the t-shirt in the Harper case was more derogatory than in the Zamecnik case because it said, “Be Ashamed, Our School Embraced What God Has Condemned” and “Homosexuality is Shameful.” The court

used the Harper case, along with the *Tinker* (1968), *Hazelwood* (1986), *Fraser* (1987) trilogy to determine the free speech rights of students in this case.

When granting a preliminary injunction, the likelihood of success is found and in this case is low. The district court agreed that the high school administration had an obligation to protect its students from harm. The plaintiffs had a choice to express the views in a manner that they chose, but in a positive manner. Harm is not in the favor of the plaintiff due to the fact that the plaintiff was given an alternate option in portraying the message in a more positive manner.

The plaintiff then claimed that the defendants' restrictions suppressed her rights, violated the viewpoint discrimination or equal protection claims. These claims have no likelihood of success because the plaintiffs' actions could be taken as a favorable statement sponsored by the school to promote the school's basic education mission. The court found that the school did not discriminate among viewpoints because they allowed expressions supporting tolerance, not expressions supporting intolerance. The court continued to use the *Harper* (2006) case as precedent. The court found that the over-breadth and vagueness claim over the constitutionality of the school's suppression of the "Be Happy, Not Gay" t-shirt was moot because a school is a nonpublic forum where restraint is allowed as long as it was reasonable. The court found that through *Harper*, the board could prevent the plaintiffs from engaging in the expression of an issue, such as homosexuality.

Disposition: The United States District Court for the Northern Division of Illinois, Eastern Division denied the plaintiffs' motion for preliminary injunction.

Citation: *Layshock v. Hermitage School District; Ionta; Trosch; and Gill*, 496 F. Supp. 2d 587 (W.D. Pa. 2007).

Key Facts: The plaintiff, Justin Layshock, was a senior at Hickory High School. On December 10, 2005, he created a website parody profile of the principal of the school, Eric Trosch, the defendant. This parody profile was created on MySpace, which allowed Layshock to portray himself as Trosch and use the provided template to answer profile questions as if he were Trosch. Layshock created this website at his grandmother's home. No school resources were used to create the profile, but Layshock did access the school's website in order to cut and paste a picture of Trosch to use on the MySpace page. Layshock's answers to questions were crude and offensive, but often characterized as juvenile. The profile was sent to other students in the school district, which resulted in, ultimately, the entire student body receiving access to it.

During mid-December, three other profiles about Trosch emerged which contained more vulgar and offensive statements. The technology director attempted to disable the page, but was only successful in blocking the MySpace page. Students were able to access other URLs to MySpace while at school. At least five teachers reported students wanting to discuss the profiles in class or attempting to access the profile during school hours. Computer use was limited during the next few weeks, and the technology director spent a large majority of time working on disabling all MySpace access. On December 21, 2005, Layshock and his mother were summoned to a meeting with Superintendent Ionta and Co-Principal Gill. Layshock admitted to creating one profile of the three. No disciplinary action was taken at the time. Written notice of suspension and an informal hearing for January 6 was sent to the plaintiff. At the hearing, a 10-day suspension was administered. Additional discipline placed him in the Alternative Curriculum Education, banned him from attendance or participation of any events sponsored by or participated in by the school, and prohibited him from participating in the June 2, 2006, graduation ceremony. The plaintiff filed a three-count complaint pursuant to 42 U.S.C. § 1983 as

well as a motion for a temporary restraining order. The Court denied the motion for a TRO, but a conference was called between both parties, which allowed the easing of some of the disciplinary actions such as the fact that he was phased out of the Alternative Curriculum Education program, was permitted to participate in Academic Games, and he attended the graduation ceremony.

Issue: At issue is whether or not school authorities can discipline a student for parodying a school board employee by originating an internet profile impersonating the employee, even though the profile was created off-campus.

Holding: The United States District Court for the Western District of Pennsylvania held that the plaintiffs' summary judgment motion was granted in part and denied in part, along with the defendants' summary judgment motion denied.

Reasoning: The case began as an out-of-school conduct case that carried over into the public school setting and forced the administration to make a disciplinary decision balanced between allowing freedom of expression and maintaining an environment suitable for learning. The court was concerned with the balance between the typical public school disciplinary authority and the appropriate constitutional boundaries within a school environment.

By referencing *Syniewski v. Warren Hills Regional Board of Education* (2001), the courts were able to provide an outline of First Amendment rights to students in a public school setting. The most pressing issue that faced the courts was the decision of supporting the authorization of punishing Justin for creating the profile of his principal. The courts determined that the test for school authority was based solely on the location of the infraction. The test can be based on "timing, function, context or interference with its (the school's) operations" in order to maintain a controlled learning environment for all students. In this case, however, the school failed to establish that it had the authority to punish the student. Layshock was granted summary

judgment on Count I against the School District only because the court found that the disciplinary action of suspending him after posting the false profile on the internet violated Layshock's First Amendment rights. Compensatory damages were decided at a later date, but Ionta and Gill were granted qualified immunity.

The decision of the court on Count II, on the other hand, granted summary judgment to the defendants. This decision was made based on the analysis of *Saxe* (2001) and *Killion* (2001). In these cases, the courts found the policies of the school board as broad because the language of the policy did not allow limitations to the school authority and gave unrestricted power to school administration. In Layshock's case the court concluded that the policy itself was not vague or overbroad even though they were misapplied.

The final allegations from the plaintiffs in this case were the violation of their parental rights to discipline their child. The school has been known to act in loco parentis, as seen in *J.S. v. Bethlehem* (2000), by using its authority to discipline students. The court explained that the only violation of the constitutional rights of parents is when the school's decision keeps the parents from making a decision concerning their child. The plaintiffs did not prove the violation of this claim, so the defendants were awarded summary judgment on Count III of this case.

Disposition: The court found that the plaintiffs' motion for summary judgment was granted in part (Count I) and denied in part (Count II and III). The court also found that the defendants' motion for summary judgment was granted in part (Count II and III) and denied in part (Count I).

Citation: *Lowery, et.al. v. Euverard, et.al & Jefferson County Board of Education*, 497 F.3d 584 (6th Cir. Tenn. 2007).

Key Facts: The plaintiff students were football players at Jefferson County High School in Tennessee during the 2005-2006 school year. They were dissatisfied with the head football coach, Euverard, due to the allegations against the coach that he struck a player with a helmet, threw away college recruiting letters, humiliated and degraded players, used inappropriate language, and required a year-round physical conditioning program in violation of high school rules.

A petition stating, "I hate Coach Euvard and I don't want to play for him," began to circulate in order to collect signatures. The disgruntled players intended to give the petition to the defendant principal at the end of the season. The head coach found out about the petition. The players who allegedly signed the petition were questioned. Several boys quit with one asked to leave because of his personal feelings against the coach.

Issue: At issue is whether a school violated the First Amendment rights of players who started a petition and were punished by being dismissed from the team.

Holding: The United States Court of Appeals for the Sixth District held that the coach had a right to maintain control and discipline of his team and was allowed to dismiss any athlete who caused disruption, thus reversing the district court's decision to deny the defendants' summary judgment.

Reasoning: The appeals court recognized that the First Amendment protection depended on the consideration of the context and the limitations of student speech. The court also recognized that schools were not run like democracies due to the forum that must be maintained or upon the consent of the students. Despite this determination, students do have First Amendment rights within the three frameworks of *Tinker* (1968), *Hazelwood* (1987) and *Fraser* (1986). In this case, the issue before the court was not the approval of the coach's methods or the

fairness of the dismissal of the plaintiffs. The issue is whether the officials of the school engaged in viewpoint discrimination against student athletes.

The plaintiffs argued that their case was different from *Wildman v. Marshalltown* (2001) because the current petition did not contain obscene language, while the *Wildman* petition contained inappropriate obscenities. The appeals court did not agree with this argument because the content of the petitions in both cases was more of insubordination. The plaintiffs argued that the defendants were not entitled to the summary judgment because they claimed that the petition did not disrupt the team. The appellate court disagreed. The plaintiffs argued that the court need not rely on the defendants' self-serving claims. Again, the appellate court disagreed and stated that *Tinker* (1968) did not require the disruption to have actually occurred, but possibly occurred. The court found that the defendants did not have to wait until the petition substantially disrupted the team before acting. Through *Lavine* (2001), it was determined that school officials have a duty to prevent disturbances.

Disposition: The Court ruled that the denial of summary judgment was reversed and the case was remanded for entry of summary judgment in favor of the defendants.

Citation: *Madrid v. Anthony*, 510 F. Sup. 2d (S.D. Tex. 2007).

Key Facts: On Monday, March 27, 2006, 300 students at Cypress-Ridge High School performed a walk-out protest pending immigration reform legislation in Congress. Many of the students were Hispanic and wore shirts that read "We Are Not Criminals." The principal asked the students who participated in the walk-out to come inside and congregate in the school auditorium. Principal Garcia allowed the students to voice their opinion, in English and Spanish, concerning immigration. The principal then explained to the students who participated in the walk-out that day would not be disciplined, but students who participated in any future walk-out

would be disciplined. He told them that walking out of school violated state truancy laws and could be dangerous to them.

Rumors began to circulate that there was another walk-out for the next day along with the possibility of Caucasian and African American students planning to wear t-shirts that read “Boarder Patrol.” Several Hispanic students claimed that their teachers retaliated against them because of the political protest. One student claimed that her teacher would not let her go to the restroom during class because she was wearing the “We Are Not Criminals” t-shirt, but allowed an African American to use the restroom during class. Later, despite the previous warning from the principal, a second walk-out occurred with about 130 students, most of who did not return to school. The students were suspended on Wednesday, Thursday, and Friday. The students were unaware of their suspension until they returned to school on Wednesday. The parents of the students were called to pick up their children. Some of the parents demanded to meet with the principal and demanded an explanation for the suspension. Principal Garcia asked them to schedule an appointment. Some of the parents caused a disturbance and were asked to move outside of the building. After some parents ignored this request, then the school security asked them to leave campus.

The plaintiffs filed a suit that their daughter’s First Amendment rights were denied when she was not allowed restroom access during class in retaliation for expressing her political viewpoint. Also, the claim was made that Lourdes’ First Amendment rights to a peaceful assembly were violated. The defendants filed for summary judgment.

Issue: At issue is whether or not the school administration violated a student’s First Amendment rights when suspending her after a second walk-out protest on school grounds.

Holding: The United States District Court for the Southern District of Texas, Houston Division, granted the defendants' motion for summary judgment, entered judgment for the district on each claim, and dismissed all of the plaintiffs' claims.

Reasoning: The court analyzed several factors to conclude its holding. The plaintiff claimed that she was denied her First Amendment rights when she was denied the wearing of her shirt that expressed her personal viewpoints. The defendants claimed that the plaintiff lacked standing in this case because she was not asked to change her shirt the day she wore it. The court found that using *Canady v. Bossier Parish Sch. Bd.* (2001) would allow the plaintiff to wear her shirt any day.

Taking into consideration the special environment of the school atmosphere, the court looked to *Tinker* (1968) to determine if there was a material and substantial disruption in the school process in wearing the t-shirt. The courts found that school officials held a reasonable belief that wearing the t-shirts would cause a severe disruption and possibly put student safety at risk. The defendant did not interfere with the plaintiffs' First Amendment right to free speech by prohibiting the wearing of the t-shirts by *Tinker* (1968).

In order to claim First Amendment violations, the plaintiff must show that the student was engaged in a constitutionally protected activity, the actions of the school district would chill a person of ordinary firmness from continuing to engage in the protected activity, and the protected activity was a substantial or motivating factor in the school district's conduct. The court found that the plaintiff failed to meet the second and third elements of a First Amendment retaliation claim. The court did not feel that the plaintiff showed the evidence needed to prove that the district's actions would chill a person from engaging in a protected activity. Also, the

court did not feel that there was no evidence to suggest that the plaintiff was denied the right to use the restroom during class based on her political views.

The parents claimed that the defendant violated the First Amendment right to peaceful assembly at school. The court disagreed because the school did not discipline the students for the first walk-out, but was warned that if it was done again, then they would be suspended. The students were given an opportunity to express their views appropriately. The court found that the school administration had a right to insist that students, school personnel, parents, and other third parties conduct themselves appropriately while on school property.

Disposition: Due to the reasoning of the court, the defendant, David G. Anthony, was granted motion for summary judgment while the final judgment was entered in favor of the defendants for all the plaintiffs' claims.

Citation: *M.A.L; M.L. and S.A v. Kinsland, Fitzpatrick, Werner, Boudrie, Jefferson School District*, 2007 U.S. Dist. LEXIS 6365 (E.D. Mich. Jan. 30, 2007).

Key Facts: On October 24, 2006, the plaintiff came to school wearing a pro-life sweatshirt that displayed the message "Pray to End Abortion," red tape over his mouth, and red tape on his wrists with the word "Jesus" on one and "John 10:27" on the other. The intentions of the plaintiff were to report to school and participate in a silent observance while passing out literature containing abortion facts. He passed out the information before school. During his first period class he was sent to the principal's office by his teacher because the teacher described the manner of dress as disruptive and not suitable to express a pro-life message. The guidance counselor ordered the plaintiff to remove the tape from his mouth and wrists while also turning his sweatshirt inside out or put another shirt over it so the message was covered. He followed these instructions.

Later in the day, the plaintiff attended band class. He claimed to need to turn his sweatshirt back in order to use the front pocket to carry his notebook while he carried his instrument. He was in the process of covering the message with a piece of paper when he was sent to the principal's office again. The principal then met with the plaintiff and stated that he could protest at home; his message was age appropriate; the principal did not have the opportunity to smoke, drink, or look up things on the internet, so the plaintiff could not do everything that he wanted to either; and the plaintiff could not protest this way due to separation of church and state. The only disruption was that some students saw the plaintiff turn his shirt right-side out in the cafeteria.

Issue: At issue is whether or not an administrator can restrict the distribution of non-school sponsored literature in the hallways if the distribution does not cause a substantial disruption.

Holding: The court held that the plaintiff's motion for a preliminary injunction is granted.

Reasoning: The reasoning for this decision was because the plaintiff provided the four prong requirements of granting a preliminary injunction while at the same time proving the distribution of literature did not provide a substantial material disruption of the school day. By using *Tinker* (1968), the plaintiff argued that the distribution of the leaflets did not cause a disruption while the defendants argued that *Tinker* was inapplicable in this case because the school is a nonpublic forum where speech could be regulated as to time, place, and manner.

The court found that the restrictions that the defendant placed on the plaintiff were unconstitutional and there was no particular past or potential disruption that occurred. To grant an injunction, the court had to conclude that the plaintiff demonstrated a strong likelihood of success on merits, which in this case was shown. The court recognized that school administration

needs to have a right to defer potential disruptions, but not when there is an absence of proof of a substantial disruption.

The court found that the loss of First Amendment freedom would cause one to have irreparable injury. Because the plaintiff proved that there was a strong likelihood of success on merits, then the court found that irreparable injury would occur if the preliminary injunction was not issued.

The third prong to justify the granting of the preliminary injunction was to prove that there would be substantial harm to others if it was granted. The plaintiff proved that the distribution of leaflets, along with the silent protest, would not be harmful to others. The defendants would not be harmed either if they were enjoined from enforcing an unconstitutional policy such as set by *Newsom v. Albermarle County School Board* (2003).

Finally, since the protection of constitutional rights is always in the public interest, then the fourth prong of serving the public interest was met. The court found that the preliminary injunction should be granted because the First Amendment rights of the plaintiff were infringed upon due to an unconstitutional policy. Despite the validity of certain reasons to regulate the speech of students constitutionally, such as in *Bethel v. Fraser* (1986), students are entitled to freedom of expression of their own views by *Tinker* (1968).

Disposition: The United States District Court for the Eastern District of Michigan, Southern Division, found that the preliminary injunction was granted in favor of the plaintiff.

Citation: *Morse v. Frederick*, 553 U.S. 393 (2007 U.S. LEXIS 8514).

Key Facts: As the Olympic Torch was traveling through Juneau, Alaska, Deborah Morse, the principal at Juneau-Douglas High School, allowed her students to participate in viewing the event as an approved school event. One student, Joseph Frederick, arrived tardy to school and

then joined the student body that was lining both sides of the street to view the event. As the torch bearers and media came closer, Frederick and his friends displayed a banner that stated, “BONG Hits 4 JESUS.” Morse confronted the students to put the banner away. All the students complied, except for Mr. Frederick. Morse confiscated the banner and disciplined Frederick because the banner supported illegal drug use, which is a violation of school policy. He was suspended for 10 days. Frederick then appealed the suspension and brought suit against Morse and the school board for violating his First Amendment rights of free speech. The District Court granted the school board and Morse qualified immunity, finding that they had not infringed on Frederick’s speech rights. The Ninth Circuit reversed this decision. The Ninth Circuit found that the school officials punished the student without demonstrating that his speech gave rise to a risk of substantial disruption. The Supreme Court reversed the Ninth Circuit decision and remanded the action. The Supreme Court held that schools were entitled to take steps to safeguard those entrusted to their care from speech that could reasonably be regarded as encouraging illegal drug use.

Issue: At issue is whether a principal may restrict student speech at a school event when that speech is reasonably viewed as promoting illegal drug use.

Holding: The Supreme Court held that school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending Frederick.

Reasoning: The Supreme Court supported its holding due to three reasons. First, Frederick argued that this case was not a school speech case which was rejected by the Court. The Court held that the event in question occurred during normal school hours and was sanctioned by Morse as an approved social event at which school policy governed. Next, the Court agreed with Morse that those who viewed the banner would interpret it as advocating or

promoting illegal drug use, which is a direct violation of school policy. The Court found that teachers and administrators were charged with the duty of protecting students from the promotion of illegal drug use during school sponsored activities. Finally, the Court agreed that a principal may restrict student speech at a school even when that speech is reasonably viewed as promoting illegal drug use. The Court applied two basic principles from *Bethel v. Fraser* (1968). The first principle was “the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings” (1986). The same display outside of a school event would have been protected. The second principle *Bethel* established was that the *Tinker v. Des Moines* (1968) substantial disruption test was not unconditional. The petitioners argued that student speech celebrating illegal drug use at a school event in the presence of a student body requires the protection of the students in the care of the school.

Disposition: The Court reversed the judgment of the Ninth Circuit and it remanded the action for further proceedings.

Citation: *Pounds v. Katy Independent School District*, 517 F. Supp. 2d 901 (S.D. Tex. 2007).

Key Facts: In 2005 the plaintiffs filed for a temporary restraining order on behalf of their children who attended Pattison Elementary School. The children were not allowed to discuss their Christian beliefs or to distribute religious literature to other students in the class. Several students complained that their teachers would not allow them to talk about God in school, pass out Faith bracelets, or use the phrase “Merry Christmas.” The plaintiffs alleged that the school district was favoring non-religion over religion.

The problem stemmed from the school policy that was extremely narrow. Despite the many problems with the policy, the plaintiff only pressed two aspects of limitation of the FNAA

(Local) policy. The plaintiff challenged the requirement that involved the prior-review requirement of more than 10 copies of nonschool merit. The second challenge was the absence of specific criteria for setting time, place, and means of limitations.

Issue: At issue is whether or not the Limitations on Conduct policy violated several students' First Amendment rights.

Holding: The court granted the district's partial summary judgment motion and denied the parents' partial summary judgment, plus denied the parents' partial summary judgment motion.

Reasoning: The court analyzed the summary judgment standard and the legal standard to determine its ruling in this case. First, in deciding the standard for summary judgment, the court determined that the burden of proof lies with the nonmoving party. If the moving party failed to meet this burden, then the motion for summary judgment must be denied.

After deciding if the moving party was eligible for summary judgment then a legal standard was applied. Most First Amendment cases used *Tinker* (1968), *Hazelwood* (1987), and *Fraser* (1986) as precedent to set a legal standard. The court felt that *Canady v. Bossier* (2001) took a comprehensive look at the three previously mentioned cases along with its own First Amendment school jurisprudence. The plaintiffs' challenges were both content and viewpoint-neutral. The prior-review provision was the policy that was being challenged by the plaintiff, not the time, place, and means limitations provision that applied to the distribution.

The local policy at issue had many features that the courts have found necessary for constitutionality. It did limit the principal's discretionary decision-making in the area of rejecting materials submitted for review. The policy also provided an opportunity to appeal. The plaintiffs' challenge to the "more than 10" provision, which allowed students to hand out 10 pieces of

literature with no prior approval from the principal, was over and under-inclusive, according to the courts. The court found that the school district agreed that picking a particular number to cutoff nonschool materials for distribution was arbitrary. The court found that the “more than 10” policy does not make the local policy unconstitutional.

The time, place, and manner limitations of the local policy limited student distribution on nonschool material. The court found that if it was content or viewpoint regulated, then *Tinker* (1968) would apply. The *O’Brien* test is not applicable either due to the specific limitations of the policy. The court found that the principal does not have discretion to prohibit or limit the distribution of nonschool material on school grounds. He or she can determine when the materials can be distributed, where they can be distributed on campus, and finally how they can be distributed.

Disposition: The United States District Court of the Southern District of Texas, Houston Division found that the defendants’ motion for partial summary judgment was granted and the plaintiffs’ cross motion for partial summary judgment was denied.

Citation: *Raker v. Frederick County Public Schools; Plaughter; Swack*, 470 F. Supp. 2d (W.D. Va. 2007).

Key Facts: A senior at Millbrook High School in Winchester, Virginia, sought a preliminary injunction granting him permission to distribute anti-abortion literature to his fellow students during the non-instructional times of the school day. In the past years he had participated in activities such as a Pro-Life Day, the wearing of symbolic clothing, and the distribution of small flyers. No disruption occurred on any of these occasions, according to both the plaintiff and the defendant. On October 24, 2006, Raker gave the principal, Joseph Swack, a copy of his anti-abortion material and asked for permission to start a pro-life club at school. The

next day Raker was called to the office and was informed that he could not distribute the flyers during school hours, but he could do so before and after school. A regulation was written and approved by the Superintendent in January of 2007, which, in turn, banned all circulation of written material during lunchtime and between classes. On January 12, 2007, the court held a hearing for Raker's motion of preliminary injunction to challenge the alleged overly broad regulation.

Issue: At issue is whether or not the school authority can limit the distribution of controversial material during non-instructional time if that material does not cause a substantial disruption of the school environment.

Holding: The United States District Court for the Western District of Virginia, Harrisonburg Division, held that the preliminary injunction be granted in favor of the plaintiff.

Reasoning: Substantial disruption and forum analysis are the primary reasons to support the holding of the courts in this case. The plaintiffs used *Newsom v. Albemarle County Sch. Bd* (2003) and *Tinker* (1968) to support the claim that the distribution of the anti-abortion literature did not cause a substantial disruption in the academic environment of the school. The defendants, on the other hand, argued that the forum analysis of *Tinker* (1968) should be used to determine the constitutionality of the restriction enforced.

The court found that when the school system developed a policy that limited the distribution of non-school material to before and after school, then the school was anticipating a "remote apprehension of disturbance." Despite this anticipation, the court could not find justification for the argument that the distribution was going to cause a "substantial disruption" because similar instances have been done by the student with no disruption at all in the school setting. Defendants claimed that the concern surpassed just disruption, but also carried over to

congestion and littering, all of which the court found irrelevant to the constitutionality of the issue.

The defendants also failed to provide evidence that the *Tinker* (1968) analysis would make a difference in the constitutionality of restricting Raker's freedom of expression in this case. The court found that the restrictions for denying the distribution of the anti-abortion material were pervasive since students were allowed to distribute Thomas Paine's "Common Sense" and invitations to pray at the flagpole. With the likelihood that the viewpoint neutral discrimination was not applied to Raker's restriction, the court decided that Raker would succeed on the merits of his First Amendment claim. The court recognized that the school administrators and faculty must enforce order, but if Raker had gone through the proper channels to get the distribution approved along with making sure that the distribution did not interfere with day-to-day operations of the school, then he should not be denied his right to distribute his work.

Disposition: The Court entered the preliminary injunction enforcing the regulation of the school board, thereby allowing Raker to distribute his literature.

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Citation: *Doninger by parent Lauren Doninger v. Karissa Niehoff, Paula Schwartz*, 527 F.3d 41 (2d Cir. Conn. 2008).

Key Facts: The plaintiff, along with other student government officers, sent emails to various members of the community explaining the rescheduling of a band contest. Numerous people responded and the principal requested that a corrective email be sent. Instead of sending the email, the plaintiff posted a blog that included vulgar language, misinformation saying that the contest had been cancelled, and encouraged everyone to contact the school. Due to this act,

the principal prohibited the student from running for class office, saying that the student failed to display good citizenship.

Upon appeal, the court found that the parents failed to prove their First Amendment claim because the blog that was written contained vulgar language that could be prohibited in the school. The fact that it did not happen on school grounds was mute because the student's expression was one that could substantially and materially disrupt the work and discipline of the school. This blog was one that could reach school property because of its nature, and could certainly risk a disruption because it encouraged others to contact the school.

Issue: At issue is whether a principal may censor student's blogs that occur off school grounds.

Holding: The United States Court of Appeals for the Second Circuit held that it denied the motion, concluding that Doninger had failed to show sufficient likelihood of success on its merits. Avery's blog post created a foreseeable risk of substantial disruption at LMHS and the court concluded that the district court did not abuse its discretion.

Reasoning: This case was decided based on two reasons. The first reason dealt with the language of the blog. If this language had occurred within the classroom it would have fallen within *Fraser* (1986). The noting in the First Amendment would prohibit school authorities from discouraging vulgar and inappropriate language in the school environment. This blog did contain the type of language that certainly could be prohibited in the school system.

Reason number two in the case deals with the regulation of an off-campus act. Schools may regulate off-campus speeches with offensive language if it is likely to bring attention to school authorities. This blog posting proved to be one that would create a substantial disruption

within the school environment. Due to the facts in this case, it is determined that the *Tinker* (1968) standard has been adequately established.

Disposition: The Court affirmed the district court's decision.

Citation: *Barr, R. White, and C. White v. Lafon, Hord, and Blount County School Board*, 538 F. 3d 554 (6th Cir. Tenn. 2008).

Key Facts: The plaintiff students challenged the findings of the United States District Court for the Eastern District of Tennessee in which summary judgment was granted in favor of the defendants. The Blount County School Board of Education issued a dress code that affected student dress and grooming. The dress code banned clothing that exhibited illegal substances, drugs or alcohol, negative slogans, vulgarities, or any disruption to the educational process including racial/ethnic slurs, gang affiliation, or sexually suggestive lettering or printing. It was announced at an assembly for the freshmen class that no one would be allowed to have Rebel flags or symbols of Rebel flags on their clothing.

This announcement was in reaction to some racially motivated disruptions that had occurred in the past year. Some of the incidents included racial graffiti, hit lists, physical altercations between African American and White students, along with police lockdown. The director of the Blount County Schools, Alvin Hord, testified that through conversations with parents and students it was determined that some students felt threatened by the Confederate flag and were fearful for their safety because of the racial tensions that wearing the flag could entice. The principal of the high school felt that if the ban were lifted that it would cause confrontation.

The plaintiff students wanted to express their southern heritage by wearing clothing depicting the Confederate flag at school. The students claimed that the dress code violated their First Amendment rights to freedom of expression. They also alleged that by specifically banning

the Confederate flag, the school board discriminated on the basis of viewpoint thus unconstitutionally suppressing the students' freedom to express pride in their southern background. The court of appeals affirmed the grant of summary judgment that the district court held.

Issue: At issue is whether a school district is violating the First Amendment rights of students by denying the wearing of Confederate flags on clothing.

Holding: The United States Court of Appeals for the Sixth Circuit held the district court's decision.

Reasoning: The court of appeals considered *Tinker* (1968), viewpoint discrimination, and due process. The appellate plaintiff claimed that the evidence present was merely hearsay. The problem that the court of appeals had with this claim is that the appellate plaintiff did not specify which pieces of evidence were hearsay and which pieces were factual evidence. The plaintiffs argued that there was no evidence that the wearing of the Confederate flag ever caused a disruption at the school even when it was worn during the ban. Also the plaintiffs argued that the high level of racial tension was alleged. The appeals court inquired if it was reasonably forecast that the Confederate flag would cause material and substantial disruption in the school mission.

The appellate court concluded that racist graffiti, hit lists, or the wearing of the Confederate flag do not have to be violent in order to cause a disruption by the *Tinker* (1968) test. The court's concern is that the regulated speech will falsely cause a precedent to be established to justify a school's ban on student speech only because other students find that speech offensive. The holding is that in order to stay constitutionally sound with the Confederate flag ban, the defendants must prove a high rate of racial tension within the school. The appeals court felt that the defendants were successful in this task.

The plaintiff appellants claimed that the ban on clothing with racial symbols, including the Confederate flag, violates the First Amendment due to viewpoint discrimination. The argument is that the school system engaged to ban racially divisive symbols and not racially inclusive symbols. The defendants suggested that the restriction on racially divisive clothing is a content-based restriction and not enforced in a viewpoint-discriminatory manner. The appellate court agreed with the school, thus agreeing with the district court. The blanket ban on using racial epithets constitutes content-based regulation while a ban on the use of racial slurs constitutes viewpoint-discrimination. It was found that there was no evidence that the ban on disruptive symbols would have been equal to a student displaying a flag with hate groups or displaying a flag with a line drawn through it.

Finally, the last reasoning behind the holding of the appeals court was the examination of the due process claim. The district court did not analyze the due process claim, but granted summary judgment to the board. The plaintiffs did not argue the due process in their summary judgment motion. They only mentioned it once in the opening brief for the appeals court. Due to this lack of attention, it was found that the plaintiffs failed to develop the issue, so the appeals court did not consider.

Disposition: The United States Court of Appeals for the Sixth Circuit affirmed the grant of summary judgment to the School Board in regard to the plaintiffs' First Amendment claim, Equal Protection claim, and the due process claim.

Citation: *Lowery; C. Dougan; M. Joesph; W. Crow; F. Dougan; L. Dougan; H. Joseph v. Watson Chapel School District; C. Knight; C. Daniels; S. Boone; D. Hartsfield; D. Holcomb; J. Johnson; M. Nelson; J. Treglown; H. Webb*, 540 F. 3d 752 (8th Cir. Ark. 2008).

Key Facts: To protest a school uniform policy, a group of parents and students handed out black armbands to be worn to school. The policy stated that the students could wear jewelry as long as it did not overlap any part of the uniform. Each student that protested was very careful to wear the armband in a way that did not overlap the school uniform either on the wrist, forearm or bicep. Due to the nature of the reason for wearing the armband, each student was disciplined. A flyer was also passed out critical of the school uniform policy, but the student, Lowery, did so without gaining approval from the principal before doing so. On October 10, 2006, the plaintiffs filed a complaint requesting declaratory relief, preliminary and permanent injunctive relief, damages, attorneys' fees, and other costs. The district court granted the motion and ordered that defendants be preliminarily enjoined from disciplining any student who wore a band around his or her wrist similar to the way the plaintiffs wore theirs.

On February 22, 2007, the plaintiffs filed an amended complaint with three new claims for relief in addition to the initial complaint. At the same time, the defendants filed a motion for partial summary judgment arguing that the school board members and the administrators should be granted qualified immunity on all claims that were against their individual capacity. The motion was granted in part and denied in part. The district court found that the typical school board member would not be aware that the student uniform policy was unconstitutional. The same is in play with the student literature review policy. The school board members were granted qualified immunity. Knight and Webb, the superintendent and the principal, were denied summary judgment and qualified immunity because the evidence showed that the decision to discipline was because of viewpoint discrimination. On September 13, 2007, the jury found that the plaintiffs each had proven zero dollars in damages. This judgment had to be amended

because the district court instructed the jury that if there are no monetary damages, then a reflection of one dollar would show as the nominal damages.

On October 31, 2007, the district court held that the preliminary injunction would be made permanent in part and dissolved in part. The court permanently enjoined the defendants from disciplining students from wearing a band that is similar to the plaintiffs' armbands in accordance to the geographical requirements in reference to the uniform policy. The district court did decline to enjoin the 2006-2007 student literature policy because it was no longer in effect at the time. A filing by the plaintiffs to apply for fees and expenses was entered. The school district was required to pay the plaintiffs for attorney fees and out-of-pocket expenses.

Issue: At issue is whether or not the school administration can discipline students for wearing bands that protest the wearing of a school uniform.

Holding: The appeals court affirmed the decision of the district court after the defendants argued that the district erred by finding that the First Amendment rights were violated, amending the verdict to reflect nominal damages, making the preliminary injunction permanent in part, and finally awarding the plaintiffs' attorneys' fees and costs.

Reasoning: First, the defendants claimed that *Tinker* (1968) was not precedent because the *Tinker* students protested a political policy set forth by the federal government, not merely a student dress code policy. The court of appeals found the distinction immaterial between the two. By using *W. Va. State Bd. of Education v. Barnette* (1943), the courts found that even though local school boards may seem small and territorial, they must continue to be Constitutionally sound in their judgments. The appeals court found that the district court has correctly found that the plaintiffs have established a violation of First Amendment rights in this case.

Secondly, the defendants claimed that the verdict in the initial case failed to raise issue of inconsistent verdicts before the jury. The appeals court agreed with the district court's findings that there were no inconsistencies. In order to qualify for inconsistency, a jury's verdict must contradict the factual findings in the case. In this case, the jury's failure to follow the proper instructions of the court does not qualify as an inconsistency. The instructions of the court were for the jury to award a monetary award of \$1.00 if there were no damages awarded to the plaintiffs. This was not followed by the jury, so the court had to amend the judgment.

Next, the defendants argued that the district permanently enjoined them from disciplining students who wore bands around their wrists if it was similar to the situation shown in this case. The argument spawns from the idea that there was no evidence to show that irreparable harm to students other than the plaintiffs occurred, so the injunction should have been denied.

Finally, the defendants appealed the decision of the district court because of the belief in error in judgment in awarding attorneys' fees and costs. The appeals court analyzed the actual award that was given to the plaintiff and found that the application of such an award was not abused in this case. It was found that the decision was made in a timely manner, contained all the necessary information, and contained no claims by the defendant that they were prejudiced. The district court may apply a monetary value to attorney's fees based on no specific determinations. Due to the ruling that the defendants violated the plaintiffs' right to free speech, the appeals court held that the district court was acting with discretion when deciding the fee award.

Disposition: After review of the decision, the United States Court of Appeals for the Eighth Circuit affirmed the decision made by the U.S. District Court for the Eastern District of Arkansas.

Citation: *Defoe v. Spiva, et al.*, 566 F. Supp. 2d (E.D. Tenn. Jan. 7, 2008).

Key Facts: Tom Defoe, a former student of Anderson County High School and Anderson County Technical Center, wore a t-shirt to school that had a picture of a Confederate flag. Due to dress code policy, school administration informed him that he needed to remove the shirt or turn it inside out. He refused to comply. Defoe claimed that he was suspended because he refused to comply, while the defendants asserted that he was just sent home. In November, Defoe wore a belt buckle with a Confederate flag on it. Again, he was informed that he would have to remove it. Again, he refused to remove it. When he refused to comply with the dress code, he was suspended for insubordination.

The plaintiff claimed that there was no disruption in the learning environment for wearing the Confederate flag. He also asserted that other students were allowed to wear Malcolm X, foreign national flags, and candidate for political viewpoints on their clothing. The defendants claimed that there have been racial disruptions at the school as a result of displaying the Confederate flag. The defendants denied the allegations that other students were allowed to wear controversial messages. They stated that at most a student “got away” with wearing a Malcolm X shirt, but that does not show that the school or any of its board approved of the shirt.

Issue: At issue is whether or not the school administration violated a student’s First Amendment right to free expression when suspension was given as punishment for a violation of the dress code policy by wearing a Confederate flag.

Holding: The United States District Court for the Eastern District of Tennessee granted the defendants partial summary judgment as to the qualified immunity, but denied partial summary judgment as to all other grounds.

Reasoning: The court determined its findings on the analysis of mootness, qualified immunity, punitive damages, and timeliness. At this point in the proceedings, the judge

determined whether sufficient evidence had been presented to make issue of the fact, judge the credibility of the witnesses, and determine the truth of the matter. This was to determine the need for trial.

Mootness was claimed by the defendants because the plaintiff had since withdrawn from school. The test for mootness was determined if the relief that was sought would make a difference in the legal interests of the parties involved. The court found that none of those cases was applicable in this instance because the plaintiff did not graduate, but instead would still have reason to visit the school and adhere to the dress code despite no longer being a student. The defendants even told him that the dress code policy still applied to him on May 6, 2008. The court found that since the disciplinary records still contained and would contain any future violations of dress codes upon visits to the campus, and the plaintiff must continue to adhere to the dress code when on campus, then the plaintiffs' claims were not moot.

The defendants claimed that the individual defendants were entitled to qualified immunity. If the right is clearly established then qualified immunity does not protect the public officials from all liability. The school can regulate speech if it is obscene, is sanctioned by the school, and has the possibility of causing a material and substantial disruption to the learning environment such as in *Morse v. Frederick* (2007). A dispute between whether or not Krull, Deal, and Spiva could forecast a substantial disruption when Defoe wore the Confederate flag caused the court to not grant qualified immunity to these three. On the other hand, Stonecipher, the current director of schools for the district, and Burell, the current chairman of the school board, were granted qualified immunity due to their lack of direct contact with Defoe and the situation.

Punitive damages were the next consideration for the court. Punitive damages could not be awarded against a local government entity. On the other hand, a plaintiff could collect damages from an individual defendant if the behavior was motivated by evil intentions or reckless indifference. The court would not determine if the defendants violated the plaintiff's rights with reckless indifference, thus it would not grant a motion for summary judgment on the issue of punitive damages.

The second motion for summary judgment by the defendants was argued after the deadline for scheduling an order had passed. This alternate motion was addressing issues that the plaintiff had raised in the originally filed case and the court had already addressed those issues. The court will not address the issues again and denied it as untimely.

Disposition: The defendants' motion for partial summary judgment was granted in regard to qualified immunity of Stonecipher and Burrell and denied in part to all other asserted grounds. The defendants' motion for summary judgment was denied as untimely.

Citation: *Krestan v. Deer Valley Unified School District*, 561 F. Supp. 2d 1078 (D. Ariz. 2008).

Key Facts: Krestan is a Christian high school student and belongs to a student club called Common Cause at Mountain Ridge High School. The group meets together on campus on Friday mornings before school. The students share their Christian faith and participate in other activities centered on Christianity, such as student led prayer. The board policy states that students have the right to pray individually and in groups, audibly or silently, and to discuss religious views with peers as long as they are not disruptive of other students or staff.

Morning announcements are made each day to the entire student body at Krestan's high school. The PA system is used and oftentimes includes a video feed to all the classrooms. All

students are required to be in attendance during the announcements. Any club may submit a request for an announcement. The request has to be made on a printed form and returned to the office by noon on the day before the announcement is to be made.

Printed materials may also be distributed by clubs, but only after approval from the administration. Leaflets may be distributed by all clubs during the Fall in the week of “club rush” to solicit new members. The defendants limit the distribution of the leaflets to the 17 days of club rush and student elections in order to control litter on the campus and to control disruptions on the campus.

In January 2008, Krestan submitted a video to the administration to play during morning announcements encouraging students to participate in the weekly prayer at the flagpole. The approval was denied by the defendants due to the Establishment Clause to the First Amendment. The plaintiff also sought permission to distribute a leaflet to students to participate in the weekly prayer. It was determined that the contents of the leaflets were not objectionable, but the defendants denied the distribution because of the religious symbol of a cross that was printed on them. The defendants also stated that no students were allowed to distribute leaflets during the school day. The plaintiff moved that the court require the defendants by injunction to read the announcement, play the video, and grant permission to hand out the leaflets.

Issue: At issue is whether or not the school administration violated the First Amendment rights of members of a Christian organization when they requested permission to read an announcement, play a video soliciting membership, and hand out leaflets on school grounds.

Holding: The United States District Court for the District of Arizona held that the plaintiff’s motion for preliminary injunction be granted in part and denied in part.

Reasoning: In order for the plaintiff to prevail on the motion for a preliminary injunction, then she must show likelihood of success on merits and that the balance of hardships was in her favor. The court found that the plaintiff established a probability of success on the merits of her Equal Access Act claim, which allowed the courts to avoid having to address her First Amendment Claim.

Three elements proved to the court that the motion for preliminary injunction in regard to the First Amendment rights of Krestan via the Equal Access Act should be granted. In order for the Equal Access Act to apply the school must be a public secondary school, must receive federal funding, and must establish a limited open forum to allow non-curriculum groups to meet and advertise their activities in school announcements or publications. The high school met all the required criteria. The defendants permitted student clubs to present videos that encourage students to participate in their clubs. The Common Cause video is similar to all clubs in the way that it presents a promotional endorsement for membership. The court found that the school has clearly established a limited open forum in which student clubs can promote themselves through video. The same right must be afforded to the Common Cause club.

Besides the Equal Access Act, the court also analyzed the Establishment Clause that applied in this case. The first factor of neutrality must be addressed when determining Establishment Clause violations. If the injunction occurred and the school district granted permission for the religious group to access the school and its announcement opportunities then the forum would ensure neutrality. With religious clubs in schools, the court must also determine if coercion is occurring. The court found that prayer or activities can have a coercive effect on high school students. After viewing the proposed announcement tape, the court did not foresee a risk in coerced participation. The final element in determining a violation in the Establishment

Clause is endorsement. The court found that since the video did not coerce religious opinions then the video also did not endorse the defendants' favoritism of a particular religious view. Due to these claims, the court found that the plaintiff is likely to prevail on the merits of her claim that the display of Common Cause video is required by the Equal Access Act. The court grants the motion for a preliminary injunction to present the video.

The distribution of the leaflet on school grounds is a completely different element in the preliminary injunction. The court found that the plaintiff maintained that the procedures for leaflet approval violated her First Amendment rights. The defendants claimed that the procedures were put into place to prevent substantial disruption in the educational environment. By having a club rush once a year, pollution on school grounds and classroom disruption is minimized. The court did not have to decide how far a school can go in suppressing speech to maintain order, per *Bethel v. Fraser* (1986). The court concluded that all clubs are treated the same when it comes to the leaflet distribution policy. This allowed the court to find that the policy was content-neutral and reasonable. The court found that the plaintiff is not likely to show a likelihood of success on merit and in result is denied the preliminary injunction on the leaflet issue.

Finally, the court concluded that the plaintiff has not shown enough evidence to prove a risk of injury because of the pre-approval policy. The court found that the plaintiff is not entitled to the preliminary injunctive relief on the issue of the preapproval issue as a whole.

Disposition: The court granted the preliminary injunction in part in the areas of playing the video and reading the announcements of the Common Clause group. The court denied the preliminary injunction in part in the areas of leaflet distribution and relief due to the defendants' preapproval policy.

Citation: *Gillman v. School Board for Holmes County, Florida*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008).

Key Facts: The plaintiff, Heather Gillman, is an 11th grade student at Pounce de Leon High School where she is a heterosexual student who supported homosexual rights. She claimed that David Davis, the principal of the school, prohibited her and other students from wearing clothing or symbols that showed that they advocated the acceptance of and fair treatment for homosexuals. A 12th grade student, Jane Doe, claimed that she was being harassed by five middle school students due to her sexual orientation. She approached a teacher aide about it who referred her to the principal. Davis questioned her about her sexual orientation and counseled Jane about it not being right to be homosexual, and then he called her parents to inform them of this information.

The next day Doe was absent due to her sister having surgery, but a rumor had gone around the school that Davis had suspended her because she was homosexual. The student body showed their support for Doe's false suspension by writing GP or Gay Pride on their bodies or on their t-shirts along with other avenues of protest. This explosion of support against the school administration on her behalf caused several incidents. A few weeks later, Heather Gillman wore a rainbow belt and a handmade shirt to school in support of a homosexual cousin and other classmates that had been suspended for their actions during this time. Her conduct did not cause a disruption at school, and she was not reprimanded or punished. Gillman sent a letter of guidance to the school board to ask permission to display some phrases, symbols, or images that support gay rights. The school board supported Principal Davis's censorship on the ground that the expressions indicated an illegal membership of a secret society with the symbols disrupting the educational process. Gillman did not display the symbols and messages that she mentioned in

her permission letter due to the fear of being disciplined for violating the verbal and written instructions of the school board and principal.

Issue: At issue is whether the school administration deprived a student her right to free speech and constituted viewpoint-based discrimination based on the support of homosexuality.

Holding: The court permanently enjoined the board and school employees from prohibiting students from expressing their support for homosexuals along with being enjoined from taking retaliatory action against the plaintiff or any other students in regard for their support of homosexuals.

Reasoning: The court took into consideration the free speech claim and the viewpoint-based discrimination claim when coming to its conclusion. Under the free speech claim, the court found the use of *Tinker* (1968) to be the most used precedent because the Supreme Court in *Tinker* held that the First Amendment protects the free speech rights of students and teachers. With the topic of homosexuality and its expression, several cases have been used to support students' First Amendment rights.

The court found that the school board had imposed a ban on speech that was not lewd, not offensive, and not obscene, but was purely political. Despite the false information of the suspension due to homosexuality issues, the principal seemed to be the instigator of conflict with the Gay Pride movement at the school. Some students went so far as to display their political views only to express their views of homosexuality over his authoritarian attitude. More questions arose after the morality assembly that was strategically scheduled in the midst of the conflict even though it did not contain a message on homosexuality. The court found no evidence with the gay pride expression of speech and any disruptions in the school day at Ponce de Leon in September of 2007. The court found that the speech and symbols that were banned at the high

school were not connected to the any misbehavior justified to be banned. The court also found that the speech was similar to *Tinker* (1968) in that it did not substantially or materially disrupt the academic school day, unlike the principal claimed. Finally, the court found that Gillman's speech should not be silenced because of alleged disruptions from other students.

In reference to viewpoint discrimination, the court found that the evidence established that the principal banned speech because of his own personal disagreement with its message. The First Amendment protects his right to disagree with homosexuality as does Gillman agree with it, but he does not have a right to silence the opinions of others who do not agree with him by *Harper v. Poway Unified Sch. Dist.* (2006). Through testimony, Davis claimed that he stood by his view of banning homosexuality because of its offensiveness, but he was not consistent with this trend with other symbols such as swastikas. The school board became negligent when it was aware of alleged constitutional violations and disregarded those violations. The school board knew of a constitutional violation but did not investigate or question the reasons for the unlawful decision that the superintendent made. The court found that the school board in this situation was guilty of that offense also.

Disposition: The court found that board and school employees are permanently enjoined from prohibiting the student and fellow pupils from expressing their support for homosexual persons. The board was enjoined from taking retaliatory action against the students in regard to their support of homosexual persons.

Citation: *Johnson v. New Brighton; Osheka; Kasperek; Passarelli*, 2008 U.S. Dist. LEXIS 72023 (S.D. Cal. Sept. 4, 2008).

Key Facts: Cory Johnson was a high school senior at New Brighton High School in April 2006. On that day the school had a guest speaker, Harlem Globetrotter Melvin Adams, to present

an assembly on diversity and racial tolerance. Adams asked for volunteers from the student body to participate in an activity. Johnson volunteered and was selected to participate. Adams nicknamed the students famous names such as Osama bin Laden, Brittany Spears, Sandra Bullock, and Chris Brown and then continued on with the activity. The names were used in a lighthearted way, and most present at the assembly, including Johnson, laughed when the nicknames were used.

At school the next day, several students and at least one teacher jokingly referred to Johnson as “Osama” or “Osama bin Laden.” While in the library, he approached a friend who was alone at a table, and she asked Johnson, “What’s up Osama?” He replied, “If I were Osama I would already pulled a Columbine.” The librarian overheard the conversation and notified the assistant principal and principal. The principal called the superintendent who suspended the student for 10 days along with taking prom attendance away from Johnson. The principal and superintendent both admitted that they were aware of the prior arrest that Johnson had for possession of a firearm and assault of another individual in town. Despite this knowledge, the school administration believed that the decision to suspend was not influenced by the arrest, but instead was solely formed due to the terroristic threat that accompanied the Columbine statement.

Issue: At issue is whether the school administration is violating First Amendment rights when a suspension is based on a terroristic statement, jokingly or not.

Holding: The United States District Court for the Western District of Pennsylvania held to grant summary judgment in favor of the defendant.

Reasoning: The reasoning behind granting summary judgment in favor of the defendants focuses around on main reason, perception of a possible threatening situation for the student

body. The plaintiff does not suggest that Mercer, the librarian who overheard the comment, made accusations that were false or somehow was looking for alternative motive to damage his reputation. The court considered *Tinker* (1968) and *Morse* (2007) and decided that Mercer's perception did not discriminate against Johnson. The reasoning by the courts was that all the evidence that was presented supported the facts that the speech of Johnson violated the mission of the school along with causing concern for the safety of all the student body. According to *Tinker*, the reference to Columbine falls outside of the bounds of political speech and thus is not supported by the *Tinker* test or the *Tinker* holding.

Disposition: The United States District Court for the Western District of Pennsylvania granted the Defendant's motion for summary judgment and denied the plaintiff's cross-motion.

Citation: *J.S. v. Blue Mountain School District, J. Romberger, and J. McGonigle*, 2008 U.S. Dist. LEXIS 72685 (M.D. Pa. Sept. 11, 2008).

Key Facts: On March 18, 2007, a personal profile containing a picture of principal James McGonigle appeared on MySpace.com. The profile described him as a pedophile and a sex addict. The profile was made by J.S., a 14-year-old eighth grade student at Blue Mountain Middle School and her friend K.L. who was also a student. The profile did not mention him by name, but it contained his picture and it contained the information that he was a principal. The students created the profile on a home computer owned by J.S.'s parents during non-school hours. The plaintiff set the profile to private about a day after it was created. J.S. and K.L. granted access to 22 individuals to view the profile. McGonigle was able to access the site 3 days later. On March 22, McGonigle called J.S. into the office and met with her in the presence of the guidance counselor. At first, J.S. denied any involvement with the creation of the site, but eventually admitted that she created it with K.L.

The principal made contact with the parents of each child. He also determined that J.S. had violated the school discipline code which prohibits the making of false accusations against school staff members. Also, it was a violation of the district's computer use policy, which states that students cannot use copyrighted material without permission from the agency or website from where the material was obtained. The use of the photo from the board website was the violation. The plaintiff received a 10-day suspension because she had created the website. Her school assignments were sent home to her. She had the opportunity to appeal the suspension via a hearing with the school board, but J.S. did not take advantage of that opportunity. Instead she instantly instituted this case.

Issue: At issue is whether or not a school district violated the First Amendment rights of a student that was disciplined for creating an imposter MySpace page of her middle school principal off-campus.

Holding: The United States District Court for the Middle District of Pennsylvania held that the plaintiff's motion for summary judgment was denied and the defendants' motion for summary judgment was granted.

Reasoning: In order for the court to make its decision, it had to take three elements into consideration. One element was did the school violate the plaintiff's First Amendment rights. The next element was the analysis of the unconstitutionally vague and overbroad district policies. Finally, the court had to determine if the school district violated the Snyders' parental rights.

The First Amendment issue centered on *Tinker v. Des Moines* (1968). The plaintiffs argued that the school must establish that her speech caused or was likely to cause a substantial and material disruption at the school. The court found a student may express his or her opinions during school hours if he or she would not materially or substantially interfere with the operation

of the school. *Fraser* (1986) also allowed the schools to have authority to prohibit the use of vulgar and offensive terms in public discourse. The plaintiff discusses whether she can be punished for the website at school although she created it off campus. The court found that she can. The plaintiff tried to cite cases such as *Layshock v. Hermitage Sch. Dist* (2007) and *Killion v. Franklin Regional School Dist.* (2001), but the court found that these were unsuccessful in the plaintiff's argument. The court stated that the facts in this case were much more vulgar and offensive so the plaintiff cannot establish a First Amendment violation and summary judgment will be granted to the defendant.

The plaintiffs also argued that the policies that J.S. was charged with were vague and overbroad because they can be read to allow punishment for out-of-school conduct. The court found that J.S.'s discipline was appropriate, so the court cannot find the policies were vague and overbroad. The judgment was granted for the defendant on this issue.

Finally, the court had to address the allegations that the school violated the parental rights when discipline was administered for off-campus violations. The court disagreed with the plaintiffs' claim to parental rights in this matter because discipline was appropriately applied by the school.

Disposition: The court found that the plaintiffs' motion for summary judgment was denied, and the defendants' motion for summary judgment was granted.

Citation: *Logan v. Gary Community School Corporation*, 2008 U.S. Dist. LEXIS 79390 (N.D. Ind. Sept. 25, 2008).

Key Facts: Kevin Logan, a transgendered male, wore girls' clothing and also wore a girls' dress to prom. The principal did not allow him to enter the dance, so the plaintiff sued. The suit was based on four allegations. The first reason was the claim that the defendants violated

Logan's First Amendment rights. The plaintiff next looked to challenge the school board policy that denied the wearing of clothing or accessories that advertise sexual orientation. The third complaint was the claim that the school corporation violated Title IX. Finally, the plaintiff claimed that the defendants violated the equal protection law of the Fourteenth Amendment. The defendants filed a motion to dismiss the case.

Issue: At issue is whether or not the school administration violated a student's First Amendment rights when denying transgender dressing at a prom.

Holding: The United States District Court for the Northern District of Indiana, Hammond Division, denied the defendants' motion to dismiss the case.

Reasoning: The defendants' claim that the court does not have jurisdiction over this case because of the separation of powers doctrine and because the case is moot. The court disagrees with the defendants. The separation of powers claim did not keep the court from viewing this case because there is a large body of law that showed the federal courts would hear suits in which the students sued the school board, such as *W. Va. St. Bd. of Education v. Barnette* (1943), and *Brandt v. Bd. of Education of City of Chicago* (2006)

Using the *Brandt* (2006) case, the court found that the attempt to enjoin the school rule would be moot because the student is no longer a student at West Side High School. Counts one, three, and four are not moot because the plaintiff sought damages.

The defendants claimed that the federal courts should never interfere with school administration. Based on that reasoning, the motion to dismiss was denied. The plaintiff claimed that he was excluded from the prom because of his sex while the defendants disagreed and claimed the reason to be because of his dress. Title IX prohibits discrimination on the basis of

sex in federally funded education programs. The court claimed that it was too early in the case to dismiss at this stage.

The final area of discussion of the court was whether Logan's First Amendment rights were violated. The court had to decide if the wearing of the prom dress was a preferred form of self-expression or if it was actually a statement in favor of a particular viewpoint. An analysis to see if *Fraser* (1986), *Tinker* (1968), or *Hazelwood* (1987) applied was looked at and the determination by the court was that it was too premature to dismiss the case for the defendants. The court noted that the plaintiffs' and defendants' First Amendment claims would need additional development in order to discover the violations that may occur.

Disposition: The court denied the defendants' motion to dismiss the case.

Citation: *Miller v. Penn Manor School District and Penn Manor School District Board of Directors*, 588 F. Supp. 2d 606 (E.D. Pa. 2008).

Key Facts: Donald Miller, a ninth grader at Penn Manor High School, wore a t-shirt to school that displayed images of an automatic handgun with the statement "Volunteer Homeland Security." This was a shirt that was bought by his mother at her brother's graduation from the United States Army Infantry School at Ft. Benning, Georgia. The first time he wore the t-shirt to school, a female student in Donald's math class wrote a note to the teacher mentioning that the message on the shirt made her uncomfortable. A civil confrontation was made with Donald and the math teacher about the possible problems that wearing the t-shirt would cause. Ms. Baireuther, the math teacher, told the concerned student that she talked with Donald and she would talk to the school administration to verify if it violated school district policy.

The school administrator decided that the shirt was inappropriate and violated the school district policy. Donald wore the shirt again a few days later when he was warned not to wear that

particular t-shirt to school or Ms. Baireuther would have to send him to the office. Despite this warning, Donald wore the t-shirt again in November 2007. He reported to the assistant principal's office where he was directed to go to the restroom and turn the t-shirt inside out. Donald stood up and cursed, which resulted in him being issued a 2-hour detention for the use of foul language.

The next day Donald's parents came to the office and after speaking to the assistant principal became visibly upset. Donald's father accused the assistant principal of not supporting the troops and asked who else he could speak to before he called his lawyer. In January 2008, the board of directors met and determined that no disciplinary action would be taken against Donald until the matter was solved. The board decided that the t-shirt did not constitute protected school district policy, so it could not be worn to school. The 2-hour detention discipline imposed was not enforced until completion of the litigation. The situation attracted some media coverage based on an article on the FoxNews website. The court noted that the media coverage could more than likely cause some level of disruption at the school if Donald were allowed to wear the shirt.

Issue: At issue is whether or not school administration has the right to censor a t-shirt that is seen as promoting violence.

Holding: The court held that the plaintiffs' motion to earn preliminary injunction with respect to the school's violence policy was denied. The court did decide that certain policies in regard to student expression of religion and dress code were overbroad and vague.

Reasoning: The court looked at First Amendment school speech issues, likelihood of success, over breadth and vagueness of policy, along with irreparable harm as the reasoning for its decision. The plaintiffs claim that the defendants must prove that the t-shirt was likely to cause a substantial disruption at school before they had the legal right to censor it. By using

*Tinker* (1968), the plaintiffs argued that there was no substantial disruption nor was there likely to be one. The defendants brought up that in *Morse* (2007), speech that promotes any illegal behavior may be restricted in the school setting. In this case, the defendants felt that Donald was promoting a clear threat of violence in the school. The court found that characterizing the message on the shirt was going to determine the reasoning.

The court decided that the defendants did not have to prove that a substantial and material disruption occurred or would occur in order to restrict the plaintiff from wearing his t-shirt. The message cannot be dismissed because the motive is not clear. The shirt does not endorse a particular branch of the military or any other protected political message. The court found that the likelihood that success by merits would be shown by the plaintiff was unsuccessful because the only message seen is one of force, violence, and vigilante behavior.

A constitutional concern of the over-breadth and vagueness of the school district's policy was challenged by the plaintiffs. Using *Sypniewski v. Warren Hills* (2001), a court will not strike down a policy that is overbroad unless it is substantially unconstitutional. The challenged policies were addressed by the court, where they were found not to be overbroad or vague, but instead constitutional. The policies were then revised, but the court did not address these policies since the plaintiffs avoided attacking the revised policies.

Finally, the court found no likelihood of success on merits for the plaintiffs. This conclusion resulted that there is no irreparable injury suffered by the plaintiffs. Due to the fact that no First Amendment freedoms were lost. The defendants are not harmed either by enjoining overbroad and vague district policies.

Disposition: The United States District Court for the Eastern District of Pennsylvania denied the plaintiffs' motion for preliminary injunction in part. The court denied the student's

motion for a preliminary injunction with respect to the school's policy prohibiting violence, finding that the policy was not unconstitutionally overbroad or vague. However, the court did conclude that certain policies regarding the expression of religion and student dress were overbroad and vague.

Citation: *Nuxoll v. Indian Prairie School District*, 523 F. 3d 668 (7th Cir. Ill. 2008).

Key Facts: This law case is an appeal case of *Zamecnik and Nuxoll v. Indian Prairie School District* (2007), which involved a school system not allowing any anti-defamatory statements of another group in reference to race, ethnicity, religion, gender, sexual orientation, or disability. In the *Zamecnik* case, the plaintiffs were allowed to participate in the day of truth, a silent protest against homosexual sin, but the plaintiff argued that the stipulations for participating were unconstitutional.

The plaintiffs were Christians who believed that the homosexual lifestyle was immoral. The Christian students would have a "Day of Truth" the day after the Day of Silence to promote Christianity. A t-shirt was worn by the Day of Truth participants that stated "The Truth cannot be silenced."

Zamecnik remained silent on the Day of Truth and wore a shirt that stated "Be Happy, Not Gay." She was required to cross off the "Not Gay" on her shirt. The plaintiffs complained that they had a desire to engage in a silent protest on the Day of Truth. They filed for a motion for preliminary injunction in regard to speech activity during school. The defendants agreed to permit the plaintiffs to remain silent in the same manner as the Day of Silence participants. The defendants agreed to allow the wearing of t-shirts as long as the shirts portrayed a positive message: "Be Happy. Be Straight." or "Straight Alliance." The district court denied the students' motion for a preliminary injunction.

The difference in this case is that one of the plaintiffs branched off the main case and appealed the district court's decision. Nuxoll challenged the rule that the defendants implemented because he believed that the First Amendment entitles him to make, whether in school or out, any comments he wants to make about any members of a group as long as the words are not "inflammatory," or fighting words.

Issue: At issue is whether or not a school system violated a student's First Amendment rights when a rule forbids derogatory comments that refer to religion, gender, sexual orientation, or disability.

Holding: The United States Court of Appeals for the Seventh Circuit reversed the district court's order denying the student's motion for a preliminary injunction, and it remanded the case back and directed the district court to enter a preliminary injunction enjoining defendants only apply the rule to ban the t-shirts that recited: "Be Happy, Not Gay."

Reasoning: The appeals court took into consideration the argument from the plaintiff that the school's "No derogatory statements" rule violates his First Amendment rights because it only protects the rights of the students against whom the derogatory comments are directed. The court cannot find a legal right to prevent criticism of people's beliefs or way of life. The court does not find that there is an indication that the negative comments that the plaintiff wants to make about homosexuals targets an individual or is defamatory.

The plaintiff argued that the Supreme Court has balanced the school's authority over student speech cases with *Tinker's* (1968) substantial disruption ruling and *Fraser's* (1986) lewd or vulgar speech tests. The plaintiff used Justice Alito's concurring opinion in *Morse v. Frederick* (2007) to that to claim the school's "educational mission" as grounds to uphold restrictions on high school students' freedom of speech is a dangerous line to cross with First

Amendment rights. In the opinion of the appeals court, the school has failed to justify the ban of the derogatory speech.

Even though the appeals court has reversed the decision, it has only granted the plaintiff with limited relief. The appeals court foresaw the plaintiff's discontent with limited relief, which will lead to litigation. With the case remanded back to the district court, the appeals court suggested that the district judge carefully balance between the right of a student to campaign against the sexual orientation of other groups and the school's right to maintain an atmosphere with little distractions over personal identity.

Disposition: The United States Court of Appeals for the Seventh Circuit reversed the United States District Court for the Northern District of Illinois's decision to deny the student's motion for a preliminary injunction and it enters a limited preliminary injunction enjoining the defendants.

2009

Citation: *Doninger v. Karissa Niehoff and Paula Schwartz*, 594 F. Supp. 2d 211 (D. Conn. 2009).

Key Facts: Avery Doninger claimed that Karissa Niehoff and Paula Schwartz, Doninger's former high school principal and school district superintendent, violated her First Amendment rights to freedom of expression by not allowing her to run for senior class secretary or allowing students to wear t-shirts promoting Doninger due to opinions that were posted on a blog entry. The court ruled that the defendants were entitled to qualified immunity on the area of punishing the student for the blog entry because the particular right that student was trying to voice was not clear at the time of all the questionable events. It was unreasonable to expect the school

leadership to be able to draw a line with student speech because of the exposure that most students have with technological resources on and off campus. On the other hand, the court did not grant qualified immunity to school administration with respect to the t-shirt censorship because of the right that students have to engage in non-offensive, non-disruptive speech on school property.

**Issue:** At issue is whether school officials violated a student's First Amendment's rights by using disqualification from a student election and prohibition of students wearing t-shirts promoting the student as punishment for opinions written on a student blog.

**Holding:** The United States District Court for the District of Connecticut held that the summary judgment was granted in part and denied in part along with denying the plaintiff's motion for partial summary judgment.

**Reasoning:** The United States District Court for the District of Connecticut supported its partially granted and denied summary judgment due to four different reasons. Three of these reasons were the basis to support the denial of the plaintiff's summary judgment. First, the court believed that this case differed from both *Tinker* (1968) and *Fraser* (1986) because it did not come about because of a suspension or similar student discipline, but instead involved extracurricular activities that were voluntary in nature. Secondly, the Second Circuit used three factors to show that the plaintiff's blog entry satisfied the *Tinker* standard, no matter if it was on-campus or off-campus speech. The language used in the blog was deemed plainly offensive and had the potential to cause a disruption during the school's election. The blog was found to contain misleading information, which caused more of a disruption during the school environment. The discipline that was related to the blog was found to be undermining to the

values that a student government promotes, so by using *Lowery* (2007), the court found that there was no First Amendment violation for disqualifying the plaintiff from the election.

This reasoning was mainly focused around the “Team Avery” t-shirt First Amendment claims. The Court denied the plaintiff a preliminary injunction on this issue in part because there was no election assembly, so an actual speech was not denied. Also, the plaintiff has now graduated and it was presumed that she would not be attending any future election assemblies for the sake of her own political office within the school. After her graduation, the school implemented new guidelines for election assemblies that would not validate her claims even if she was still a student at the school. The Court decided that the “Team Avery” shirts were governed by *Tinker* (1968). Because the plaintiff was not running for office, the shirts were not electioneering material and could not be excluded. Even though the defendants did allow the students to wear the t-shirts before and after the assembly, the principal and superintendent were not subject to qualified immunity, which resulted in a denial of the defendants’ motion for summary judgment on this claim.

Disposition: The Court granted summary judgment to the defendants on the plaintiff’s blog entry First Amendment claim, the plaintiff’s Equal Protection claim, and the plaintiff’s claim for intentional infliction of emotional distress. The Court denied summary judgment to the defendants on the plaintiff’s First Amendment “team Avery” t-shirt claim. The Court also denied the plaintiff’s motion for partial summary judgment.

Citation: *Brown v. Cabell County Board of Education, W. Smith, and G. Webb*, 605 F. Supp. 2d (S.D. W. Va. 2009).

Key Facts: Brown, a freshman at Huntington High School, wrote the words “Free A-Train” on both of his hand in marker on March 17, 2009. The message was a reaction to a

punishment of detention of a student Anthony Jennings, aka “A-Train,” had received. Jennings currently faced criminal charges, including the shooting of a Huntington police officer. The assistant principal, Archer, noticed that this message was written on Brown’s hands and gave him the option to go to the restroom and wash it off or serve a 10-day suspension. Brown initially washed it off, but later rewrote it. He was warned of the consequences, but declined to remove it again which resulted in a 10-day suspension. His father was given a notice of suspension, which stated that the grounds for the suspension were a disruption of the educational process.

The school administration had concerns due to the increased gang activity at the school. A gang, BET or Black East Thugs, had arisen from students in the school where Jennings had been associated. After the arrest of Jennings for the two counts of armed robbery and the one count of attempted murder of a police officer, several signs of support for “A-Train” began to crop up in the school. This frightened several students, caused alarm with parents, and concerned teachers. School administrators verbally agreed to enforce a policy to ban the “Free A-Train” slogan due to the disruption that it caused the educational process.

Issue: At issue is whether or not school administrators violated a student’s First Amendment rights when suspension was administered due to a message that was written on his hand.

Holding: The United States District Court for the Southern District of West Virginia, Huntington Division denied the plaintiffs’ motion for a temporary restraining order and a preliminary injunction.

Reasoning: The court held to deny the plaintiffs’ motion for preliminary injunction because the plaintiff was unlikely to succeed on merits and the balance of harms or public

interest does not weigh in the plaintiffs' favor. The plaintiff claimed that the slogan on his hand had protection from the First Amendment right to free speech. He used *Tinker* (1968) and *Hazelwood* (1987) to validate that students do not shed their constitutional right at school. He claimed that there was no evidence that Brown was associated with BET or any other gang and that his display of support by writing the slogan was for personal reasons that were independent from the gang connotation that the school administration had assumed it may be linked to.

The court recognized the claims that the plaintiff had, but found that the plaintiff failed to see how *Tinker* (1968) also does not protect speech that materially disrupts classwork or involves any disorder to the educational process. The school board provided evidence of incidents that gave specific reasons that expression similar to Brown's had caused a material and substantial disruption at school including a fear for students to attend class or at least to remain attentive in class. The slogan had a perception of gang association, which brought fear of physical threats to the school environment. The verbal policy to ban the slogan was more than just an avoidance of discomfort of an unpopular viewpoint, such as in *Newsom v. Albermarle* (2003). Despite the fact that Brown had no evidence to show that he was connected to the gang activity, the school administration had significant fear that the slogan would create a disruption. Because of this finding, the court determined that the plaintiff would not have likelihood to succeed on success on merits in this case.

The court found that the plaintiff faced a restriction on his right to express an opinion of public importance while the school faced a responsibility to create a feeling of safety and security among students. The court determined that the balance against the hardships for the plaintiff and the harm that the school would incur if the injunction was granted would increase a disruption in educational process at the school. The injunction would undermine the students'

and the parents' confidence that the school administration has the power to deal with gang activity associated with violence and criminal conduct despite the lack of evidence that Brown was a part of that gang activity. The public interest in this case was in favor of the defendants.

Disposition: The court denied the plaintiff's motion for a temporary restraining order and preliminary injunction.

Citation: *Corder v. Lewis Palmer School District*, 566 F.3d 1219 (10th Cir. Colo. 2009).

Key Facts: Corder was a student at Lewis Palmer High School where she was one of fifteen valedictorians of her graduating class. Traditionally, the valedictorians were permitted to give a speech during graduation as long as the speech was approved and met the time limit. The principal was to approve the 30-second speech. The principal did not give any additional instructions concerning the conduct or content of the speech. The only written policy was the school district's policy that prohibited speech that slanders, contains profanity, or creates hostility or disruption during the educational process. The plaintiff challenged the school district's unwritten policy of requiring the speeches for content review before presentation.

Corder presented her speech prior to graduation to the principal, but then changed her speech after the review. The speech she gave at graduation mentioned religion. When the graduation ceremony was over, Corder was escorted to see the assistant principal and told that she would not receive her diploma. She also had to make an appointment to see the principal. Five days later, she and her parents met with the principal who said that she would not receive her diploma unless she apologized publicly for her speech. She did not apologize, but prepared a written statement that supported the idea that the speech was her own personal beliefs and were not those of the principal or the school system. She also made the statement that she revised the speech after the principal's approval, so the principal had no knowledge of the changes. The

principal then told her to add a sentence that contained the statement, “I realize that, had I asked ahead of time, I would not have been allowed to say what I did.” He then told her that if she did not include this sentence then she would not receive her diploma. She included it and then her statement was sent out via email. Corder received her diploma.

Corder filed suit claiming that her First Amendments rights were violated along with her Fourteenth Amendment rights, Colorado Rev. Stat. § 22-1-120, and the Establishment Clause of the First Amendment. She sought nominal damages and injunctive relief. The school district filed a motion for judgment on the pleadings and then filed cross motions for summary judgment. The district court granted the school district’s motion for judgment.

Issue: At issue is whether or not the school district violated a student’s First Amendment rights and Equal Protection rights when denying the presentation of a diploma after a controversial religious graduation speech.

Holding: The United States Court of Appeals for the Tenth Circuit affirmed the district court’s grant of the school district’s motion for summary judgment.

Reasoning: The appeals courts analyzed several factors when looking at the district court’s ruling. One issue was the argument by the school district that the plaintiff’s claims for declaratory and injunctive relief are moot. The next issue that was analyzed by the appeals court was the First Amendment claim. Finally, the last two issues looked at were the Fourteenth Amendment and Colorado State Law claims.

The plaintiff complained that the school district’s unwritten policy impinged on her First Amendment rights and the Equal Protection Clause. The problem was that once Corder graduated high school she was no longer a student under the school district’s control. She would not suffer again from the policies of the school district in regard to content review of valedictory

speeches. The district court found that the declaratory and injunctive relief was moot. This only occurred if the action was too short of duration and if the complaining party would be subject to the same action again. In this case, the first requirement of the mootness exception test was met, but the second was not because of the graduation of the plaintiff. The appeals court agreed with the district court and declared that declaratory and injunctive relief do not fall to exception and that only the claim for nominal damages was up for appellate review.

The appellate court then addressed the First Amendment issues that Corder claimed were violated in this case. The first violation was the claim that her freedom of speech was violated when her speech was reviewed for content. The next violation that Corder argued was that her requirement of a written apology as a condition of receiving her diploma refrained her from speaking thus violating her right to free speech. Finally, Corder claimed that the school district burdened her religious beliefs in violation of the Free Exercise Clause of the First Amendment when she was disciplined for her speech. The appellate court analyzed the first violation by looking at the three precedents for all student speech cases, *Tinker* (1968), *Hazelwood* (1987), and *Fraser* (1986). Using *Morse v. Frederick* (2007), the court found that the plaintiff's speech was so closely related to a school function that the school had a right to review the content before the speech was made. Using *Hazelwood's* precedent for school-sponsored speech, along with *Fleming* (2002), the valedictory speech was considered to be part of a school-sponsored activity that the students, parents, and members of the public might deem as to bear the support of the school. Because of this determination, the appeals court held the decision that the school did not violate Corder's First Amendment rights by requiring a review of the content of her speech.

The second violation of the First Amendment was the requirement by the principal to submit a written apology to be circulated as a condition of receiving her diploma. The Supreme

Court has held precedent that the government cannot tell people what they must say. The appellate court found that the presentation of the speech and the forced apology both fall under the imprimatur concept of school-sponsored speech. The apology was determined to reasonably relate to the School District's pedagogical concerns and related to learning, according to the court by *Fleming* (2002). By this standard, the appeals court concluded that the school district did not violate the plaintiff's First Amendment rights by forcing her to email an apology in exchange for the receipt of her high school diploma.

The third claim of First Amendment freedom violation by the plaintiff is the freedom of religion. Corder believed that the school district burdened her religious beliefs when it disciplined her for her speech. The court found that the school district did not force another belief on her or prevent her from voicing her beliefs, but if she used the school-sponsored forum to do that then she would be disciplined due to the previous precedents. The convincing factor for the holding was the fact that she was disciplined because she gave a speech that was different from the one that the principal reviewed.

Corder also claimed that the district court erred in the ruling that the school district did not violate the equal protection clause of the Fourteenth Amendment along with the failed claim under Colo. Rev. Stat § 22-1-120. The idea that all valedictorians gave inspirational speeches, even if they gave them differently does not settle the dispute in favor of Corder. She was not on equal protection claim grounds because she gave a speech that was different than the speech she sent in for review by the principal. The appeals court held the district court's opinion on this claim because Corder was not similarly situated to other valedictory speakers. The same goes for the final argument of the failed claim under Colo. Rev. Stat § 22-1-120, which states that no expression contained in a student publication shall be subject to prior restraint. The district court

found that Corder's verbal speech was not written publication. Also, the appeals court found that when the plaintiff changed course and argued that the statute was ambiguous, then the claim was not considered. The appeals court also found no Colorado case law at the time that would alter the plain-meaning analysis of the district court.

Disposition: The appeals court affirmed the district court's grant of the School District's Fed. R. Civ. P. 12 (c) motion for judgment on the pleadings.

Citation: *Busch as the parent of W. Busch v. Marple Newtown School District; Marple Newtown School District Board of Directors; R. Mesaros; T. Cook*, 567 F. 3d 89 (3d Cir. Pa. 2009).

Key Facts: In October 2004, Wesley Busch, a kindergarten student, participated in a curricular unit called "All About Me." The students participated in three ways: by sharing information about themselves by bringing a visual aid, by bringing a snack or toy to share, and by inviting parents to class to share the student's special talents. Busch made a poster that contained pictures of his family and a church building. He was allowed to display the poster and present the poster to the class through a verbal explanation of each picture. Wesley invited his mother to visit his class and read his favorite book. His mother, D. Busch, testified that Wesley asked her to read the Bible to the class. She chose five verses to read out of Psalm 118 from the King James Bible.

On the morning of the visit, Busch informed the teacher, Jaime Reilly, of her decision to read from the Bible. The teacher referred the question to Thomas Cook, the school's principal, who asked if Ms. Busch would read from another book since the violation of separation of church and state was an issue. After a civil disagreement, Ms. Busch compromised and read a book about counting.

It was found that the teacher has one parent who led two presentations on Hanukkah and Passover that were planned in advance from Reilly. A menorah, dreidel, and matzoh balls were used as visual aids during the presentation. Reilly permitted these presentations and visuals because the holidays were part of the official social studies curriculum. She also discussed Christmas and Kwanzaa as part of the winter holiday unit. On May 3, 2005, Ms. Busch filed lawsuit on behalf of herself and her son against the school district, the superintendent, and the principal based on six claims. These claims were violation of the Free Speech Clause of the U.S. Constitution, violation of the Free Communication Clause of the Pennsylvania Constitution, violation of the Establishment Clause of the United States Constitution, violation of the Equal Protection Clause of the United States Constitution, and the violation of the guarantee of equal rights and the prohibition on discrimination in the Pennsylvania Constitution.

Issue: At issue is whether a principal has the right to deny the voluntary reading of the Bible by a parent to an elementary class in a public school.

Holding: The United States Court of Appeals for the Third Circuit held that the summary judgment in favor of the defendants was affirmed.

Reasoning: The courts found in the favor of the defendants due to two reasons. One reason was the appropriateness of student expression in the elementary school classroom. Another reason was the challenge to the school's actions on establishment grounds.

Schools should not have to choose between soliciting information about students as a part of an educational lesson and opening the classroom to any content that a speaker chooses to present to a student body. The principal at the school believed that by allowing Ms. Busch to speak to the class then he was showing a specific religious point of view to a group of underage, easily influenced kindergarten students. The school wanted to prevent the promotion of speech

that would be adverse to educational goals and could come across as being approved by the school. The argument that the school was showing viewpoint discrimination specifically to Busch and her son was disapproved because the school had permitted the expression of Wesley's religious beliefs in the classroom throughout the "All About Me" academic project.

The court found that the conduct of the school complies with the Establishment Clause if it meets the three requirements of having a secular purpose, of showing no endorsement for or against a particular religion, and of generating no excessive conflict with religion. By using these three criteria, the court determined that the Establishment Clause was not violated in this case.

The principal's decision to not allow the plaintiff to read the Bible to her son's kindergarten class was based on a secular reasoning. The principal claimed that the separation of church and state had to be maintained. Through cases such as *Santa Fe Independent School District v. Doe* (2000), the religious messages at school activities had to maintain secular or a violation of the Establishment Clause would be addressed.

Next, the defendant maintained that the efforts of the school were not to be hostile toward the particular faith of Wesley and Busch's family, but instead an effort to comply with the Constitution on the issue of church and state. The principal believed that the opportunity for the plaintiff to present his views to his class was given and embraced due to the participation in the "All About Me" curriculum project.

Finally, due to the lack of coherence of school policy when it comes to parental participation in classroom activities or religious expression, the defendant had to make an ad hoc judgment about allowing the plaintiff to continue with the reading of the Bible. The court found that the monitoring of the school district's policy of permitting holiday-oriented material and

cultural themes while at the same time disallowing speech that promotes a particular religion does not violate the Establishment Clause. By this reason, the Establishment Clause does not validate the entanglement of governmental actions with religion. Educational materials must be reviewed to ensure compliance with Constitutional requirements. The reviewing of the materials does not entangle with religion.

Disposition: The United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court.

Citation: *Defabio, P. Defabio, & M. Rusinsky v. East Hampton Union Free School District*, 2009 U.S. Dist. LEXIS 91319 (E.D.N.Y. 2009).

Key Facts: In April 2004, a Hispanic student at East Hampton High School was killed in a motorcycle accident. A day of mourning was observed at the school. On the day of the mourning, allegedly Daniel Defabio overheard a student in the halls make the following comment: “one down, 40,000 to go.” According to Defabio, he repeated the statement to another student, which resulted in the rumor that he was the originator of the statement. As the day progressed, more Hispanic students found out about the upsetting remark and threats began to be aimed toward the plaintiff. Defabio repeatedly denied himself as the originator of the statement. For his own safety, Defabio was housed in the nurse’s office during questioning by the assistant principal and principal, who later sent Defabio home to avoid a violent school environment. A period of suspension occurred, whether it was for Daniel’s safety or was a disciplinary action for the statement was up for debate.

On April 27, 2004, Daniel had prepared a statement that he wanted to read aloud to the school over the loudspeaker to claim his innocence about the matter. The principal denied Defabio’s request to read the statement stating that it would make the students angrier and

possibly cause more violence over this matter within the school. Defabio later wanted the opportunity to read it in front of the assembly. This was also denied. A superintendent's hearing was held where two students testified against Daniel. The superintendent found Daniel guilty of saying the comment and suspended him for the remainder of the school year. An appeal was filed by the parent of Defabio in order to overturn this decision and expunge the incident from the record. The appeal was denied by the East Hampton Board of Education. The student transferred to another school, but the incident was never expunged from his record. His family filed a motion for summary judgment in November of 2008.

Issue: At issue is whether a principal may restrict student speech by denying the reading of a statement letter to the student body by loudspeaker or at an assembly.

Holding: The United States District Court for the Eastern District of New York held that school officials in this case did not violate the First Amendment by preventing the plaintiff the opportunity to proclaim his innocence regarding a comment during a school forum, nor did school officials violate due process or equal protections rights in regard to the school suspension.

Reasoning: The reasoning behind the decision actually is based on the response to four claims that the plaintiffs presented in this case. First, the plaintiff asserted that Daniel read his statement at a school assembly that was called in the auditorium. If the school administration had forcibly called the students into the auditorium, then it would be brought as a speech that was sponsored and supported by the school. *Hazelwood* (1987), set precedent that claimed that the statement of innocence would fall under school sponsored speech.

The same reasoning is placed on the second claim that Daniel was denied the opportunity to have the statement read to all the students over the school's public announcement system. If it was read over the school's PA system, then the statement would have turned into school-

sponsored speech. Similar to the religious message represented in *Santa Fe Indep. Sch. District v. Doe* (2000), Defabio's speech was not characterized as private once it became school-sponsored speech.

Thirdly, Defabio also was denied the opportunity to circulate a copy of the statement to all the students during school hours and on the school campus. Any communication that uses the distribution system of the school may also be seen as school-sponsored, as determined by *Busch v. Marple Newtown School District* (2009). The school has a right to deny anything that would bear the "school's seal of approval."

Finally, the plaintiffs claimed that the school denied Daniel the right to return to school and address the students about the rumor comment even during non-instructional time. The defendants argued that the reason for denial was not for censorship, but rather for the safety of Defabio and the school since foreseeable hostility could easily cause an unsafe environment. The court used not only *Tinker* (1968) to justify this decision, but also *Hazelwood* (1987) and *Fraser* (1986). Through these cases, the court found that school officials have the freedom to act before the disruption occurs if a substantial disruption will interfere with the normal proceedings of the school day.

Disposition: The United States District Court for the Eastern District of New York granted the defendant's motion for summary judgment on the First Amendment and Fourteenth Amendment claims. The court declined to exercise supplemental jurisdiction over the plaintiff's state claims, so these claims were dismissed without prejudice.

Citation: *Gold v. Wilson County School Board of Education*, 623 F. Supp. 2d. 771 (M.D. Tenn. 2009).

Key Facts: This case is a subsequent case following a religious activity case that involved five couples who sued for themselves and on behalf of their minor children. In that case, the court held that Lakeview administrators and some teachers were religiously entangled with activities of the Praying Parents group, which ended with a violation of the First Amendment Establishment Clause. Some of the activities were including a nativity scene at the end of a Christmas program, and a Thanksgiving prayer related to the historical background of the holiday. The Court granted the Does limited injunctive relief. The controversy comes from the named plaintiff students and parents that are not presented in Doe. The school board policy restricted the posting of religious events such as See You at the Pole and the National Day of Prayer done by the Praying Parents organization. These events are privately run by individuals who receive permission from the school to use the facility in the hours after the school day is complete. The plaintiffs alleged that the school was unconstitutionally applying viewpoint discrimination to disallow the religious postings of these events while allowing secular postings to continue throughout the school grounds.

Issue: At issue is whether or not a school can restrict religious postings of non-curricular events while allowing other postings of non-curricular events that are not of religious nature.

Holding: The court held that the plaintiff parents' motion for preliminary injunction be granted under 42 U.S.C.S. § 1983.

Reasoning: The appeals court based its decision to grant a preliminary injunction on four factors. One factor was the plaintiffs' likelihood of success on merit. The next was whether or not the plaintiffs would suffer harm if they were not to receive the injunction. The third factor is whether or not the injunction will cause harm to others. The final factor was based on the impact the injunction will have on the public interest.

The court is not deciding if the plaintiffs receive merits for the decision, but instead the focus is on the success that may be received due to the merits. The court found that there was no evidence at this time that can show that the Lakeview lobby and hallway leading to the cafeteria constitute a public forum open by law. These locations cannot be compared to a public sidewalk or a public park. The court does believe that the school has opened a limited public forum by allowing certain speakers on certain topics to take part in posting information. The policy seems to allow the limited public forum of the school open to speakers of community, educational, charitable, recreational, and other similar groups who wish to advertise events that are of student interest. The court finds that the Praying Parents organization qualifies as “other similar groups.”

The court also found that the plaintiffs have shown that irreparable harm would occur if the injunction is not granted. Through affidavits, the plaintiffs have proven that students and parents will be hesitant to draw up posters or announce religious events for fear of school administration deciding that some religious words, phrases, or images are inappropriate. The argument is that the judgment of the administration infringes on the right of free speech due to viewpoint discrimination. The court noted that this factor weighed heavily in the decision of the court to grant the preliminary injunction.

Next, the court found that granting the preliminary injunction will not result in substantial harm to anyone thus resulting in cause to favor on the side of the plaintiffs. The defendants argued that this would cause disruption and confusion because the administration was trying to avoid Establishment Clause concerns.

Finally, the impact concerns on the public as a result of this injunction are the distraction of the administration’s attention from school concerns and the fundamental rights of the students and parents. The court understands that the decision-making process of administration to run an

efficient learning environment may be affected. Despite this fact, the court weighs the protection of the individual constitutional rights as being more important, thus granting the preliminary injunction.

Disposition: The United States District Court for the Middle District of Tennessee, Nashville Division, granted the parent plaintiffs' motion for preliminary injunction.

Citation: *Palmer; P. Palmer; S. Baker v. Waxahachie Independent School District*, 579 F.3d 502 (5th Cir. Tex. 2009).

Key Facts: Paul Palmer was a high school sophomore at Waxahachie High School, and submitted three shirts for approval under the dress code of Waxahachie Independent School District. In September 2007, he went to school wearing a shirt that said, "San Diego" on it. The assistant principal Johnson told Palmer that his shirt violated the district's dress code, which does not allow printed messages on shirts. His parents brought him another shirt that said "John Edwards for President '08," which again was not allowed due to the same policy. Palmer went to the principal to appeal, which was denied and the superintendent sustained the principal's denial.

In April 2008, Palmer sued the school district under 42 U.S.C. § 1983 alleging that the dress code violated his freedom of speech under the First Amendment. He asked for declaratory relief, a preliminary injunction, a permanent injunction, nominal damages, and attorney's fees. A new dress code was adopted 4 days before the hearing, so the court dismissed the plaintiff's motion as long as a new copy of the dress code was submitted. After receiving the new dress code, Palmer submitted three shirts to the district for approval. One was the original John Edwards shirt and the other two mirrored similar messages of John Edwards for President and Freedom of Speech with a copy of the first Amendment on the back. The school district rejected

all three. Palmer again sued. The district court found that Palmer had not shown how he would suffer irreparable harm because of the dress code and was denied a preliminary injunction.

Issue: At issue is whether or not a school district can adopt and implement a policy denying a student from wearing a printed shirt even if it does not cause a substantial disruption, promote violence, or contain lewd or vulgar language.

Holding: The United States Court of Appeals for the Fifth Circuit affirmed the order of denying a preliminary injunction in favor of the plaintiff.

Reasoning: The reasoning behind the affirmation begins with the review of the denial of a preliminary injunction for abuse of discretion. It was found that the district court examined only the second prong of why a preliminary injunction is granted because the district court concluded that Palmer did not satisfy his burden of proving irreparable injury. The district court's assumption that the school district's enforcement of the dress code could not irreparably harm Palmer was abused.

The court of appeals held that because the regulation was content-neutral. The court concluded that the viewpoint and content neutral school dress codes should be reviewed under immediate scrutiny. The appeals court found that there was no proof that the district was attempting to suppress any student expression through its dress code, so this makes it a content neutral policy. Palmer has not shown likelihood of success, which ultimately verifies that the school district did not abuse its discretion, which results in denying a preliminary injunction.

Disposition: The United States Court of Appeals for the Fifth Circuit affirmed the order from the United States District Court for the Northern District of Texas.

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Citation: *In re Nickolas S.*, 226 P.3d 1038 (Ariz. Ct. App. 2010).

Key Facts: In January 2009, B.B., the on-campus reassignment teacher, was monitoring a classroom at Deer Valley High School. Nickolas, the plaintiff, was texting on his cell phone. B.B. told him to bring the phone to her desk, but he refused. She called security and told the plaintiff to bring it to her again. Again he refused and called the teacher an obscene name. Security arrived and removed him from the classroom.

Two days later another incident occurred between the juvenile and the teacher. Nickolas asked to be sent to room 205, which was a room for special needs kids or behavioral kids. B.B. told him to sit down and wait for administrative approval. He got upset and began playing on his cell phone again. When he was told to put it away, he used obscene and vulgar language toward the teacher, calling her names while shouting. He left the room, and B.B. called security to retrieve him. He was put through an adjudication hearing where he argued that his speech was protected by the First Amendment. He was placed on summary probation.

Issue: At issue is whether or not a school administration violated a student's First Amendment rights when discipline was implemented after he used obscene and vulgar language to verbally abuse a teacher.

Holding: The court of appeals of Arizona affirmed in part and reversed in part the decision of the Superior Court in Maricopa County.

Reasoning: By looking at whether the speech must be analyzed under the First Amendment, whether the constitutional rights that apply to pure speech constitutes the same rights for fighting words, and how many counts actually contained fighting words, the court of appeals decided to affirm in part and reverse in part the original decision in this case. The courts

have held that pure speech was entitled to First Amendment protection under *Tinker* (1968). The court disagreed with the juvenile court's conclusion that the entire speech of Nickolas fell outside of the First Amendment parameters.

The first issue that the court analyzed was whether the speech in this case would be protected by First Amendment rights. For criminal liability, the appeals court came to the conclusion that the juvenile court erroneously found that the plaintiff's speech was unprotected by the First Amendment.

After finding that the determination that the speech could be protected by the constitution, the court had to determine if the speech constituted fighting words. Courts have a duty to help reword statutes if they are overbroad or vague. They found that the statute that was written to protect the school board employee from verbal abuse can withstand a First Amendment challenge by limiting its reach to fighting words.

Once the limitation of First Amendment protection had been determined in this case, the court had to decide if the speech by the plaintiff raised the level of speech to that of fighting words. The definition of fighting words was that of words that were used to provoke a violent reaction and must be directed to the person. When he used the word "bitch" once under his breath, the appeals court determined that was not considered fighting words. This count would be dismissed. On the other hand, the incident that occurred later that contained vulgar language in a loud manner directly to the teacher was considered to be fighting words especially when these words were spoken with a challenge. By *Fraser* (1968), the court found that the teacher's calm reaction did not disregard the action that she had to endure. The second count against the plaintiff was considered to be delinquent.

Disposition: The court vacated the delinquency adjudication as to count one, but affirmed the finding of delinquency as to count two.

Citation: *Evans v. P. Bayer*, 2010 U.S. Dist. LEXIS 12560 (S.D. Fla. 2010).

Key Facts: Katherine Evans was a senior at Pembroke Pines Charter High School. She created a group on Facebook entitled, “Ms. Sarah Phelps is the worst teacher I’ve ever met.” The purpose of this group was for students to voice their dislike of the teacher. Three postings appeared on the page from students supporting Ms. Phelps. This page included a photograph of the teacher. The posting did not contain violence, and it did not contain threats of violence. She removed the posting after 2 days. After she removed it, Peter Bayer, the principal, became aware of it.

Bayer suspended Evans from school for 3 days and forced her to move from her advanced placement classes into lesser weighted honor courses. The suspension notice described the reason for Evan’s suspension as bullying/cyberbullying/harassment toward a staff member and disruptive behavior. Evans filed a motion seeking an injunction enjoining Bayer from maintaining records related to the suspension in her permanent school record and revoking the 3-day suspension. She was also seeking nominal charges for the violation of her First and Fourteenth Amendment rights as well as attorney fees.

Issue: At issue is whether a principal violated the First Amendment rights of a student when suspending her for a Facebook page that was created to negatively express feelings about a particular teacher.

Holding: The United States District Court for the Southern District of Florida held that the plaintiff’s request for an injunction was dismissed without prejudice and the defendant’s motion to dismiss was granted in part and denied in part.

Reasoning: The court took into account three elements in this case when making its decision. The first element was the analysis of whether the preliminary injunction would be enjoined or not. The second element was the nominal damages claim, and the third element is the attorney fee claim.

The defendants argued that he should be granted qualified immunity in order to shield him from litigation. He claimed that he was acting as an officer of the school, and he has the right to discipline students for potentially disruptive behavior. Qualified immunity does not protect Bayer automatically from action of injunctive relief. The issue for the court was if injunctive relief can be sought against a defendant in his individual capacity when the act occurred during his official capacity. The court found the answer to be no. If the suit were amended to be against the school district and the principal in his official capacity, then the demand for injunction would be reconsidered. The motion for injunction is dismissed without prejudice, but the court has given leave for the plaintiff to file an amended complaint naming the proper parties.

The next element in the finding of the court is the nominal damages. The court determined that Bayer was acting in his official capacity, so the burden switched to the plaintiff to prove that the defendant is not entitled to qualified immunity. The plaintiff had to show that the defendant violated a constitutional right and that the right was established clearly at the time of the violation. Off-campus student speech could be subject to analysis under *Tinker* (1968), *Morse* (2007), or *Fraser* (1986) if the speech raised on-campus concerns such as in *J.S. v. Blue Mountain* (2008) and *Doninger v. Niehoff* (2008). The court believed that the question is if the plaintiff's speech was aimed at one particular audience, the students who want to voice their opinion about the teacher, then is it labeled as on-campus speech. The court decided that it is not

on-campus speech. Evan's speech did not occur at a school-sponsored activity, and there is no evidence shown that a substantial disruption occurred from the speech. The court found that the speech in Evan's Facebook page did not undermine the educational philosophies of the school or use lewd, vulgar, or obscene language. With so many precedents, it is unclear which precedent is the clearest in this case. The court finds that none of the precedents can save Bayer from his actions because he did not follow the requirements for regulating on-campus speech that these precedents set. This resulted in the defendant's motion to dismiss the case denied as to Evan's demand for nominal damages.

The final element is whether or not the defendant is immune from paying attorneys' fees if Evans prevails. The court quickly addresses this using 42 U.S.C. § 1988 to state that the court may allow the prevailing party a reasonable attorney's fee as part of the cost in the nominal damages. Because the court denied the dismissal of the plaintiff's demand for nominal damages, then the defendant's motion to dismiss is also denied as to Evan's demand for attorney's fees.

Disposition: The court found that the defendant's motion to dismiss is granted in part and denied in part, and the plaintiff's request for an injunction is hereby dismissed without prejudice with leave to file an amended complaint.

Citation: *J.C. v. Beverly Hills Unified School District, et. al., 2010*, U.S. District LEXIS 54481 (C.D. Cal. 2010).

Key Facts: The plaintiff was a high school student at Beverly Vista High School in May of 2008. After school one day, she videotaped, without them knowing, a conversation of her friends talking about a classmate at school. The group of friends was using lewd and obscene comments to describe the classmate known as C.C. Profanity was also used. The plaintiff took the recording and posted it on YouTube on her home computer without the consent of anyone

involved. She then contacted 5 to 10 students at home and suggested that they view the video. She also contacted C.C. and told her about the video. The plaintiff asked C.C. whether she would like the video removed from the website. C.C. asked for her to keep the video up so that it could be presented to school administration the next day.

After meeting with parents of the students who were videoed and talking to the board attorney, the defendants suspended the plaintiff for 2 days. The plaintiff had a prior history of videotaping a teacher at school. While investigating the alleged YouTube incident, the administration found another taping done by the plaintiff on school grounds which clearly violated the videotaping and cell phone policy of the board code of conduct. The videos may have been produced on campus, but none of the material was viewed on campus except by the administrator.

Issue: At issue is whether or not the First Amendment was violated when a student was suspended because she posted a threatening conversation about another student on YouTube unknowingly to the ones involved in the conversation.

Holding: The United States District Court for the Central District of California granted summary judgment in regard to the First Amendment violation to the defendant due to the lack of evidence to deny qualified immunity.

Reasoning: The plaintiff claimed that the school district and the school administration denied her the First Amendment right by punishing her for making a YouTube video and posting it on the net. She claimed that she made the video and posted the video out of school. The court determined that the scope of the school's authority was justified with its disciplinary action by using *Bethel vs. Fraser* (1986).

The court felt that the school has the responsibility to instill fundamental values such as habits and manners of civility as described in *Fraser* (1986). The court held that when lewd, vulgar, profane, or threatening speech is occurring inside or outside by a student, the school may regulate the speech. The court found that the fact that the student was geographically off campus does not prevent the school from taking action against the student. The court also found that it was foreseeable that the video would make its way to campus because the plaintiff posted it and make it readily accessible to the general public. The court found that just the fact that the administrator found out about the video and accessed it from school was reason to believe that it would and could make its way onto school grounds. The problem that the school faced in the ruling was the lack of evidence that the posting of the YouTube videos caused a substantial disruption. The fear of substantial disruption does not prove the argument against the plaintiff. Despite the court's belief of what *Fraser* sets as precedent, the court found that the defendants did not present enough evidence to be presented to justify the suspension of the student. The court found that the victim, C.C., did not suffer psychological harm, and the prevention of such did not hold enough evidence to prove otherwise. The court recognized that the speech did impinge on the rights of C.C. along with emotional damage and threaten her, but the defense failed to produce applicable evidence for this case.

Despite the courts holding in the area of summary adjudication for the plaintiff, the defendants were granted qualified immunity. Due to no binding Supreme Court precedent to govern J.C.'s conduct of posting off-campus speech on the internet about fellow students, the court found that the school official is immune to litigation in regard to his or her actions to discipline in this case. It found that the boundary lines of protecting a student's First Amendment right to make defamatory, degrading, or threatening videos about a classmate are not defined or

established at this time, but the qualified immunity of the school administration is clearly entitled when implementing disciplinary actions. Due to this finding, the courts found that Hart, Lue-Sang, and Warren were granted qualified immunity.

Disposition: The court found that the plaintiff's motion for summary judgment for violation of section 1983 was granted and the defendant's motion for qualified immunity was granted.

### Analysis of Cases

The purpose of this research was to examine recent court cases that used *Bethel School District v. Fraser* (1986) as a citation within public school cases that involved students, parents, teachers, educational administrators, and school districts. The data were retrieved by analyzing cases from the year 2000 with the court case of *Smith v. Greene County School District* (2000) to the year 2010 with the court case of *Evans v. Bayer* (2010). In order to determine the facts, trends, and patterns, the cases were organized using the key facts and court reasoning. The information was then analyzed to develop guidelines and principles for school administrators to use when First Amendment freedom of expression issues arrive within the school environment. A number of litigation categories evolved during this analysis and were then discussed.

### *Elements of First Amendment Freedom of Expression Claims*

To begin an analysis of First Amendment Freedom of Expression claim cases, one needs to understand the definition of student expression and to be aware of the elements within successful student expression action. The Supreme Court has evolved student expression within the school environment as the constitutionally guaranteed right to freedom of speech with

limitations reflecting from disruption, forum, obscenity, and safeguarding other students. *Tinker* (1968) guarantees that a student's right to freedom of expression is not left at the schoolhouse gate as long as the expression does not create a substantial disruption to the education environment. Despite this precedent, successful litigation in student expression cases has evolved to a three-prong analysis of not only *Tinker's* substantial disruption test, but also *Hazelwood's* (1987) forum analysis and *Fraser's* (1986) obscene analysis. *Morse* (2007) adds a fourth test of safeguarding students from exposure to illegal drug use during school activities. This study contains 101 cases from 2000-2010 that reference *Bethel v. Fraser* (1986) at some point in the litigation. Out of the 101 cases, one case, *The Circle School v. Pappert* (2004), included both the elementary and secondary settings and for the purpose of this research was tallied in both sets of results. Another case, *Posthumous v. Bd. of Ed. Of Mona Public Schools* (2005), took place with the central office being the setting. In this case, most of the categories were not applicable, with the exception of the issue, prevailing party, and precedent case. Due to these abnormalities, the actual case total is 101, but numbers tally for 102 in the categories of issues, subcategory, student punishment, and prevailing party would occur. Out of the 101 cases, 28 ruled in favor of the student or parent, 58 ruled in favor of the educator, and 14 were awarded partial judgment in the favor of both the plaintiff and defendant. One case went against the juvenile court educational system in favor of the courts. These decisions cultivated a multitude of modern day First Amendment expression issues within public schools such as cyber, verbal, written, physical, and visual speech along with dress code issues. These issues are intertwined with subcategories of symbolic expression, uniforms, internet violations, athletic controversy, profanity, true threats, and petitions. The court decisions during this time period addressed one or more of these main issues.

The data were collected and analyzed, and a trend in the facts began to evolve. After consideration of all the comprehensive information, then the research was separated into fact patterns. These case analysis fact patterns consisted of the grade level of the students involved, the issue that was targeted, the subcategories that the issues addressed, the punishment that was administered, the prevailing party in the case, and the precedent case during litigation. The table below distributed the case analysis by the fact pattern.

Table 1

*Final Court Decisions*

Year & Primary/ Secondary	Case	Issue	Subcategory	Student Punishment	Prevailing Party	Precedent Case
2000/P	Smith v. Greene County	Dress	Symbolism	Suspension	Defendant	F/T
2000/S	Boroff v. Van Wert City, et.al.	Dress	Symbolism	Prohibition	Defendant	Fraser
2000/S	Castorina, et.al. v. Madison Cnty., et al.	Dress	Symbolism	Suspension	Plaintiff	F/T
2000/P	C.H. v. Olivia, et.al.	Written	Symbolism	Prohibition	Plaintiff	F/T
2000/S	Denno v. Volusia County	Visual	Symbolism	Suspension	Defendant	F/T
2000/S	D.G & C.G. v. Ind. Sch. District of Tulsa	Written	True Threat	Suspension	Plaintiff	F/T
2000/P	Doe v. Depalma	Written	Profanity	Detention	Defendants	Fraser
2000/S	J.S. & I.S. v. Bethlehem Area Sch. District	Cyber	Website	Expulsion	Defendants	Fraser
2000/S	Littlefield, et.al. v. Forney Ind. Sch. Dist., et.al	Dress	Uniforms	Prohibition	Defendants	Fraser
2000/S	Long v. Bd. of Ed of Jefferson County, KY	Dress	Symbolism	Prohibition	Defendants	F/H
2000/S	N. Emmett v. Kent School District	Cyber	Athletics	Prohibition	Plaintiff	F/T
2000/S	Pangle v. Bend-Lapine School District	Written	True Threat	Suspension	Defendants	T/F/H
2000/S	Riggan v. Midland Ind. School District, et. al.	Visual	True Threat	Suspension	Plaintiff	F/T
2000/S	Santa Fe Ind. School District v. Doe	Verbal	Symbolism	Prohibition	Plaintiff	F/H
2000/S	Seamons v. Snow, et. al.	Physical	True Threat	Prohibition	Defendants	Fraser
2000/S	Anderson v. Milbank School District	Verbal	Profanity	Suspension	Defendants	Fraser
2001/S	Canady, et. al. v. Bossier Parish Sch. Board	Dress	Uniforms	Prohibition	Defendants	Fraser
2001/S	Killion v. Franklin Regional Sch. District	Verbal	Profanity	Suspension	Plaintiffs	F/T
2001/S	Sypniewski, et. al. v. Warren Hills Reg. Bd.	Dress	Symbolism	Suspension	P/D (in part)	T/F/H
2001/S	Wildman v. Marshalltown, et. al.	Written	Profanity	Prohibition	Defendant	Fraser
2002/S	Lavine, et. al. v. Blaine School District	Written	True Threat	Expulsion	Defendant	T/F/H
2002/S	Coy v. Bd. of Ed. Of North Canton City	Cyber	Website	Suspension	P/D (in part)	F/T
2002/S	Doe v. Pulaski Co. Special School Dist.	Written	True Threat	Expulsion	Defendant	F/T
2002/S	Fleming, et. al. v. Jefferson Cnty. Sch. Dist.	Written	Symbolism	Prohibition	Defendant	F/H
2002/S	Mehaffey v. Aldrich, et. al.	Cyber	True Threat	Suspension	Plaintiff	F/T
2002/P	Sonkowsky v. Bd. of Ed. For Ind. Sch. Dist.	Written	Profanity	Prohibition	Defendant	F/H
2003/S	Draudt v. Wooster City Schools	Written	Symbolism	Prohibition	Defendant	F/T/H
2003/P	Newsom, et. al. v. Albermarle Cnty Sch, Brd.	Dress	Symbolism	Prohibition	Plaintiff	Fraser
2003/S	Smith, et. al. v. Mt. Pleasant Public Sch.	Verbal	Profanity	Suspension	P/D (in part)	F/T
2003/S	Barber v. Dearborn Public Sch.	Dress	Symbolism	Prohibition	Plaintiff	F/T
2003/S	Cleveland v. Blount Co. Sch. Dis.	Dress	Symbolism	Prohibition	P/D (in part)	Fraser
2003/S	Scott v. Sch. Bd. of Alachua County	Visual	Symbolism	Prohibition	Defendants	Fraser
2003/S	Demers v. Leominister Sch. Dept., et. al.	Written	True Threat	Suspension	Defendants	Fraser
2003/S	Schroeder v. Maumee Bd. of Ed.	Verbal	Profanity	Prohibition	P/D (in part)	Fraser
2003/P	S.G.v. Sayreville Bd. of Ed., et. al.	Verbal	True Threat	Suspension	Defendant	F/H
2003/P	Walker-Serrano, et. al v. Leonard, et. al.	Written	Petition	Prohibition	Defendant	F/T
2003/S	Westfield L.I.F.E. v. City of Westfield	Written	Symbolism	Prohibition	Plaintiff	F/T
2004/S	Doe v. Winchendon Sch. Com., et. al.	Written	True Threat	Suspension	Defendant	F/T
2004/S	Porter, et. al. v. Ascension Parish Sch. Brd.	Written	True Threat	Expulsion	Defendant	F/T
2004/S	Caudillo, et. al. v. Lubbock Ind. Sch. Dist.	Ver/W	Symbolism	Prohibition	Defendant	Fraser
2004/S	Demmon, et. al. v. Loudoun Ctny Sch., et. al.	Ver/W	Symbolism	Prohibition	Plaintiff	F/H
2004/S	Holloman v. Harland, et.al.	Visual	Symbolism	Suspension	Defendant	Fraser
2004/S	Doe v. Perry Com. Sch. Dist., et. al.	Physical	True Threat	Suspension	Defendant	F/T
2004/S	M.D. v. Evans, et. al.	Ver/Vis	True Threat	Suspension	Defendant	Fraser
2004/S	Saxe v. State College Area Sch. Dist., et. al.	Verbal	Symbolism	Prohibition	Plaintiff	F/T/H
2004/S	Bannon v. Sch. Dist. Of Palm Beach, et. al.	Visual	Symbolism	Prohibition	Defendant	F/T/H
2004/P,S	The Circle Sch., et. al. v. Pappert, et. al.	Verbal	Symbolism	Prohibition	Plaintiff	F/H
2004/P	Wofford, et. al. v. Evans, et. al.	Verbal	True Threat	Other	Defendant	F/T/H
2005/S	D.F. v. Bd. of Ed. Of Sysosset Central, et. a.	Written	True Threat	Suspension	Defendant	F/T
2005/S	Jacobs v. Clark Cnty. Sch. Dist.	Dress	Uniforms	Suspension	Defendant	Fraser
2005/S	K.D. v. Fillmore Cent. Sch. Dist. & Faulkner	Dress	Symbolism	Prohibition	Plaintiff	F/T

*(table continues)*

Year & Primary/Secondary	Case	Issue	Subcategory	Student Punishment	Prevailing Party	Precedent Case
2005/S	Nixon v. Northern Local Sch. Dist. Bd of Ed.	Dress	Symbolism	Prohibition	Plaintiff	F/T
2005/Bd.	Posthumus v. Bd. of Ed. Of Mona Public Sch.	Written	Other	None	Partial	Fraser
2006/S	Brandt, et. al. v. Bd. Of Ed. Of Chicago, et. al.	Dress	Symbolism	Prohibition	Defendant	Fraser
2006/P	Curry v. Sch. Dist. Of Saginaw & Hesinger	Written	Symbolism	Prohibition	Defendant	Fraser
2006/S	Pounce, et. al. v. Socorro Ind. Sch. Dist.	Written	True Threat	Suspension	Plaintiff	F/T
2006/S	Frazier v. Alexandre	Ver/Vis	Symbolism	Prohibition	Plaintiff	Fraser
2006/S	Grzywna v. Schenectady-Cent. Sch. Dist. et.al.	Dress	Symbolism	Prohibition	Plaintiff	F/T
2006/S	Harper v. Poway Unified Sch. District	Verbal	Symbolism	Prohibition	Defendant	F/T
2006/S	J. Behymer-Smith v. Coral Acad. Of Sci.	Verbal	Profanity	Prohibition	Plaintiff	F/H
2006/S	Pinard, et. al. v. Clatskanie Sch. Dist., et. al	Verbal	Profanity	Suspension	Plaintiff	F/T
2006/P	L.W., et. al. v. Knox County Bd. of Ed.	Verbal	Symbolism	Prohibition	Plaintiff	F/H/T
2006/S	Wentworth Sch. Dist v.. Hendrickson	Visual	Symbolism	Suspension	Plaintiff	F/T
2006/S	Guiles v. Marineau, et. al.	Dress	Symbolism	Prohibition	Plaintiff	F/T/H
2007/S	Bar-Navon v. Sch. Bd. of Brevard Cnty.	Dress	Symbolism	Suspension	Defendant	F/H
2007/S	Boim v. Fulton Cnty. Sch. Bd.	Written	True Threat	Suspension	Defendant	F/T
2007/S	Bowler v. Hudson	Written	Symbolism	Prohibition	P/D (in part)	F/T
2007/S	B.W.A. v. Farmington Sch. Dist.	Dress	Symbolism	Prohibition	Defendant	F/T
2007/S	Lueneburg & Eccleston v. Everett Sch. Dist.	Written	Symbolism	Prohibition	P/D (in part)	F/H
2007/P	DePinto, et. al. v. Bayonne Bd. of Ed.	Dress	Symbolism	Suspension	Plaintiff	F/T/H
2007/S	Requa v. Kent Sch. Dist., et. al	Cyber	Website	Suspension	Defendant	F/T
2007/S	Griggs v. Ft. Wayne Sch.	Dress	Symbolism	Prohibition	P/D (in part)	F/T/H
2007/S	Zamecnik & Nuxoll	Dress	Symbolism	Prohibition	Defendant	F/T/H
2007/S	Layshock v. Hermitage Sch. Dist, et. al.	Cyber	Website	Suspension	P/D in part)	Fraser
2007/S	Lowery, et. al. v. Euverard, et. al.	Written	Petition	Suspension	Defendant	F/T/H
2007/S	Madrid v. Anthony	Visual	Symbolism	Suspension	Defendant	F/T
2007/S	M.A.L., et. al. v. Kinsland, et. al.	Dress	Symbolism	Prohibition	Plaintiff	F/T
2007/S	Morse v. Frederick	Written	Symbolism	Suspension	Plaintiff	F/T
2007/P	Pounds v. Katy Indep. Sch. Dist.	Verbal	Symbolism	Prohibition	Defendant	F/T/H
2007/S	Raker v. Frederick Cnty. Sch., et. al.	Written	Symbolism	Prohibition	Plaintiff	F/T
2008/P	Cuff v, Valley Sch. Dist & Knecht	Written	True Threat	Suspension	Defendant	F/T
2008/S	Doninger v. Niehoff, Schwartz	Cyber	Blog	Prohibition	Plaintiff	F/T
2008/S	Barr, et. al. v. Lafon, et. al.	Dress	Symbolism	Prohibition	Defendant	F/T
2008/S	Lowery, et. al. v. Watson Sch. Dist., et. al.	Dress	Symbolism	Suspension	Plaintiff	F/H
2008/S	Defoe v. Spiva, et. al.	Dress	Symbolism	Suspension	P/D (in part)	F/T/H/M
2008/S	Kresten v. Deer Park Unif. Sch. Dist	Ver/Vis	Symbolism	Prohibition	P/D (in part)	Fraser
2008/S	Gillman v. Sch. Bd. for Holmes Cnty.	Dress	Symbolism	Prohibition	Defendant	F/T
2008/S	Johnson v. New Brighton, et. al.	Verbal	True Threat	Suspension	Defendant	F/T/M
2008/S	J.S. v. Blue Mtn. Sch. Dist., et. al.	Cyber	Webpage	Suspension	Defendant	F/T/M
2008/S	Logan v. Gary Comm. Sch. Corp.	Dress	Symbolism	Prohibition	Plaintiff	F/T/H
2008/S	Miller v. Penn Manor Sch. Dist., et. al.	Dress	Symbolism	Prohibition	Defendant	F/T
2008/S	Nuxoll v. Indian Prairie Sch. Dist.	Dress	Symbolism	Prohibition	Defendant	F/T/H/M
2009/S	Doninger v. Niehoff & Schwartz	Dress	Symbolism	Prohibition	P/D (in part)	F/T/M
2009/S	Brown v. Cabell Cnty Bd. of Ed., et. al.	Dress	True Threat	Suspension	Defendant	F/T/H
2009/S	Corder v. Lewis Palmer Sch. Dist	Verbal	Symbolism	Prohibition	Defendant	F/T/H/M
2009/S	Busch v. Maple Newton Sch. Dist., et. al.	Verbal	Symbolism	Prohibition	Defendant	Fraser
2009/S	Defabio, et. al. v. East Hampton Un. Free Dis.	Verbal	True Threat	Suspension	Defendant	F/T/H
2009/P	Gold v. Wilson Cnty. Bd. of Ed.	Written	Symbolism	Prohibition	Plaintiff	F/T
2009/S	Palmer, et. al. v. Waxahachie Ind. Sch. Dist.	Dress	Symbolism	Prohibition	Defendant	F/T/M
2010/S	In re Nickolas S.	Verbal	Profanity	Expulsion	Defendant (court)	Fraser
2010/S	Evans v. Bayer	Cyber	Webpage	Suspension	P/D (in part)	F/T/M

The purpose of this study was to attempt to determine the issues and trends that find their way to the courtroom against the public school administrator or system. The cases in this study

identified written, verbal, physical, visual, and cyber expression along with student expression through dress. By becoming aware of the importance of each issue identified, then the school administrator has the ability to avoid litigation and save the school system financially (see Figure 1--Cases based on issue). The primary purpose is to identify the issues and trends, but in doing that the researcher was able to address and develop guidelines to protect the school officials involved in legal proceedings of First Amendment violation claims. The lineage of cases in this research found that with *Tinker* (1968), *Fraser* (1986), *Hazelwood* (1987), and, later, *Morse* (2007) as precedent, then the administration of a school is afforded protection within certain boundaries. Of the 101 cases, 58 were found in favor of the administration, with 28 in favor of the student or parent(s). Fourteen cases had partial judgment in favor of both the administration and the student (see Figure 2--Cases based on prevailing party).

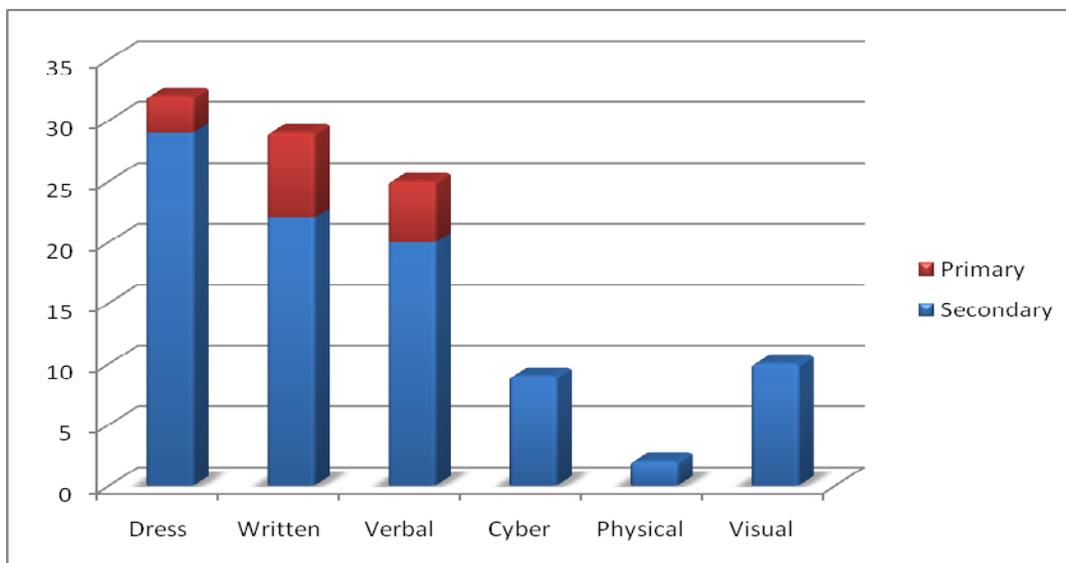
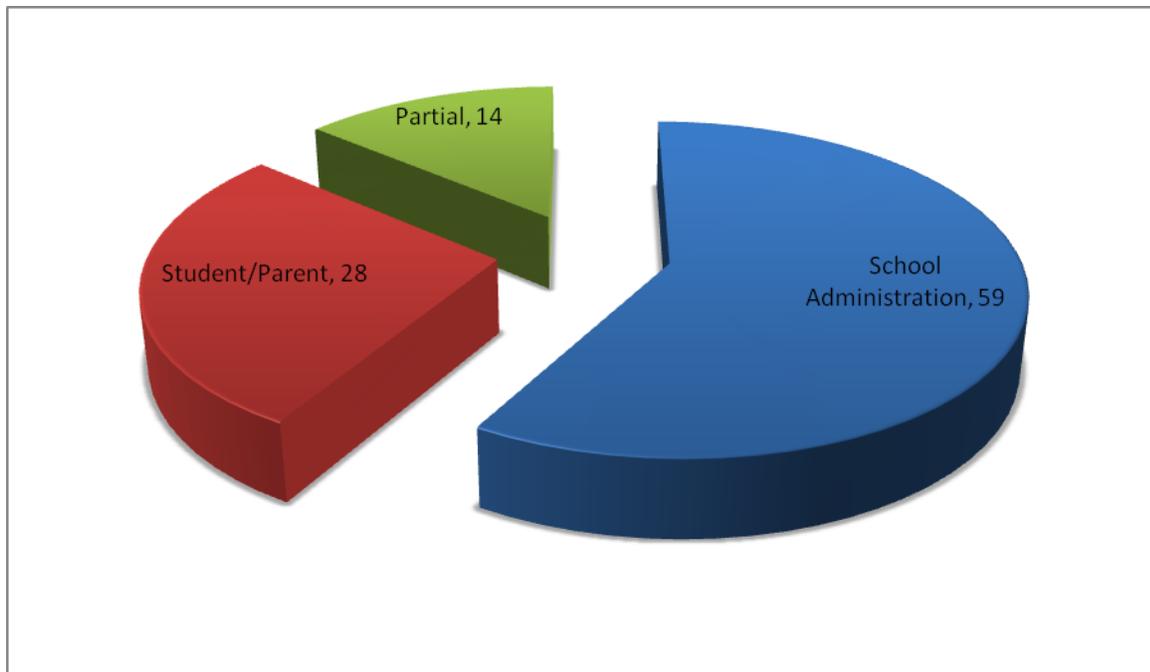


Figure 1. Cases based on issue.



*Figure 2. Cases based on prevailing party.*

The direct responsibility of the rights of students within the school environment falls first on the principal, the superintendent, and then the school board. The issues of First Amendment violations have evolved during the decade of 2000-2010 and subcategories emerged of symbolism, uniform mandates, internet violations, profanity, true threats, and petitions. Within these subcategories, extracurricular controversy arises in athletics and student clubs (see Figure 3--Cases based on subcategory). In looking at the 101 cases, it was found that students who expressed themselves through symbolism were the highest group to seek litigation, if disciplined for this expression. Within the 101 cases, 56 were symbolism cases, with true threat at 22 cases being the next largest area. Internet violations have become more of an issue in the past 10 years and it is worthy to note the possibility of more litigation issues, especially in off-campus incidents, with 9 cases documented in this study.

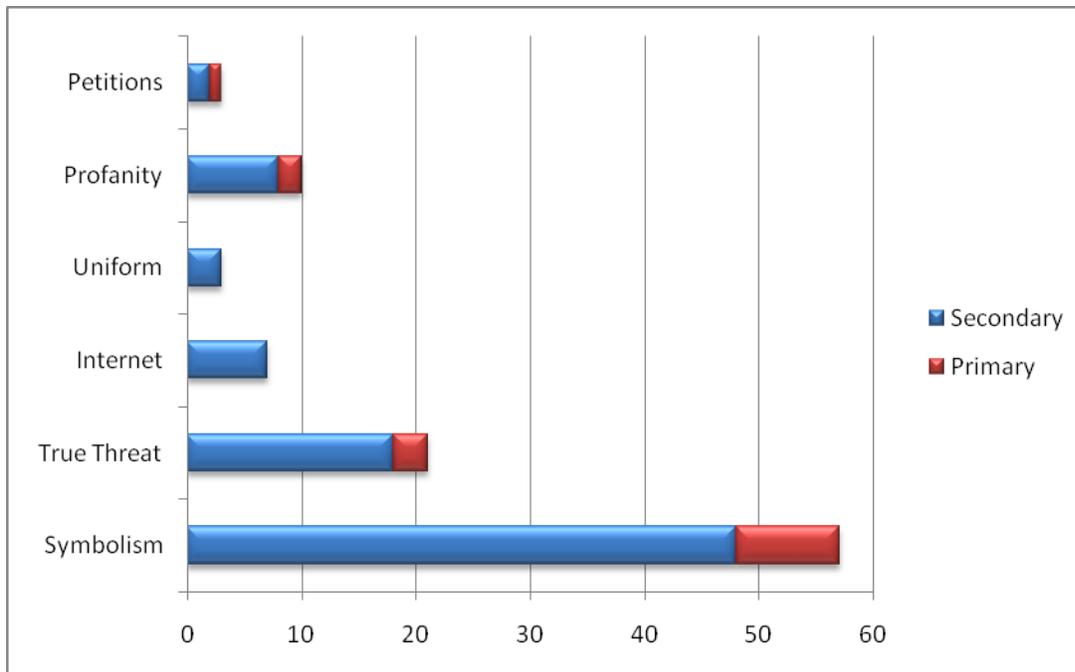
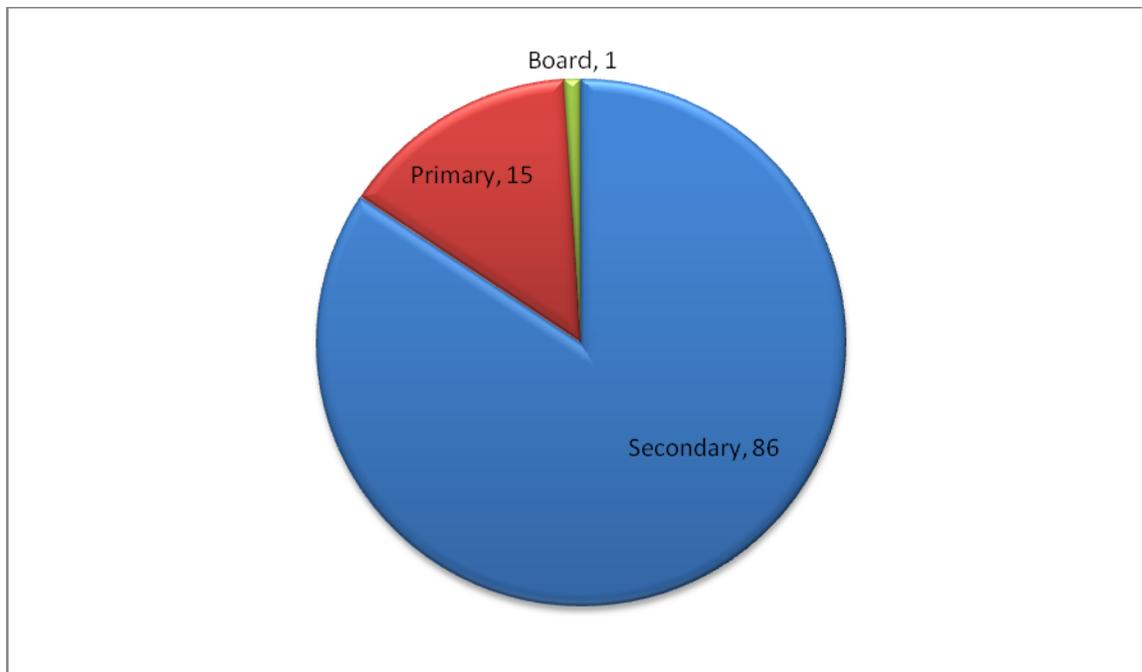


Figure 3. Cases based on subcategory.

It is not surprising that the secondary school environment warrants more litigation in the area of freedom of expression. Out of the 101 law cases that cited *Bethel v. Fraser* (1986), 15 were elementary cases and 86 were secondary cases. Outside of those results, another category emerged with two cases: *The Circle School v. Pappert* (2004), involved in both the elementary and secondary environment, and *Posthumus v. Bd. of Ed. Of Mona Public Schools* (2005) dealt with the central office environment (see Figure 4--Cases by environment).



*Figure 4. Cases by environment.*

School officials involved with cases that cited *Bethel v. Fraser* (1986) often used particular student discipline. The discipline ranged from detention, suspension, expulsion, and prohibition (see Figure 5--Cases by punishment). Elementary cases had 1 detention, 4 suspension, 0 expulsion, and 9 prohibition disciplinary actions (see Figure 6--Elementary cases by punishment). Secondary held the majority of cases, but also saw an increase in the areas of suspension and expulsion cases compared to elementary cases. With 27% of cases in elementary resulting in a punishment of suspension or expulsion, a substantial difference in the 47% of secondary cases with a punishment of suspension or expulsion becomes evident. Secondary cases had 0 detention, 35 suspensions, 5 expulsions, and 46 prohibitions (see Figure 7--Secondary cases by punishment).

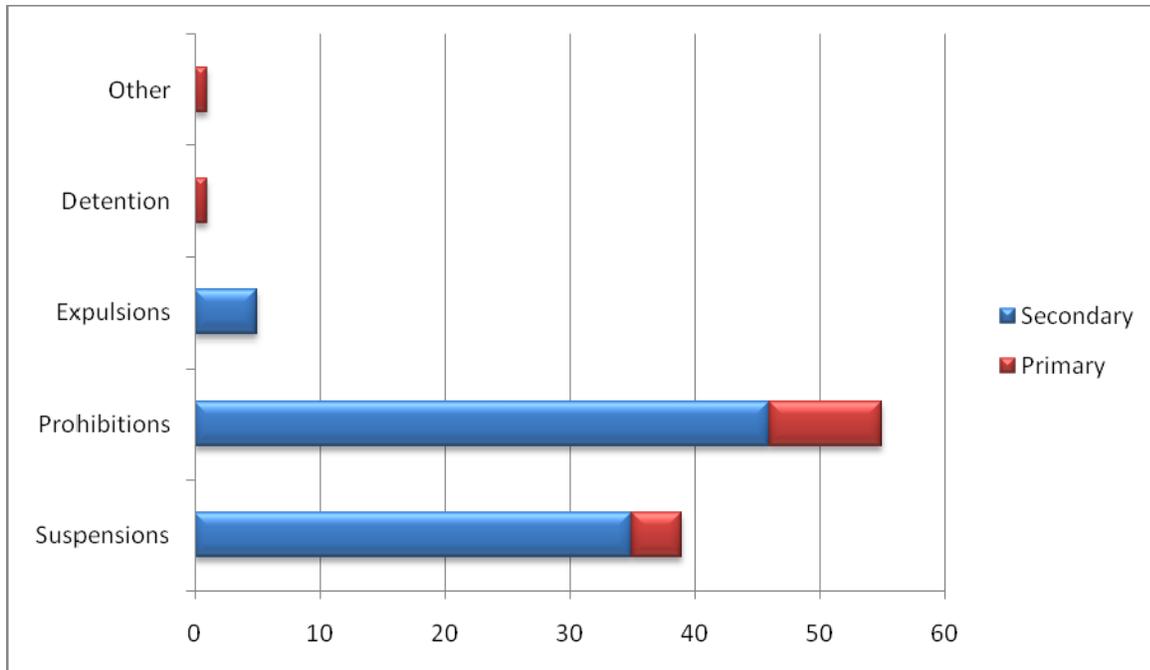


Figure 5. Cases by punishment.

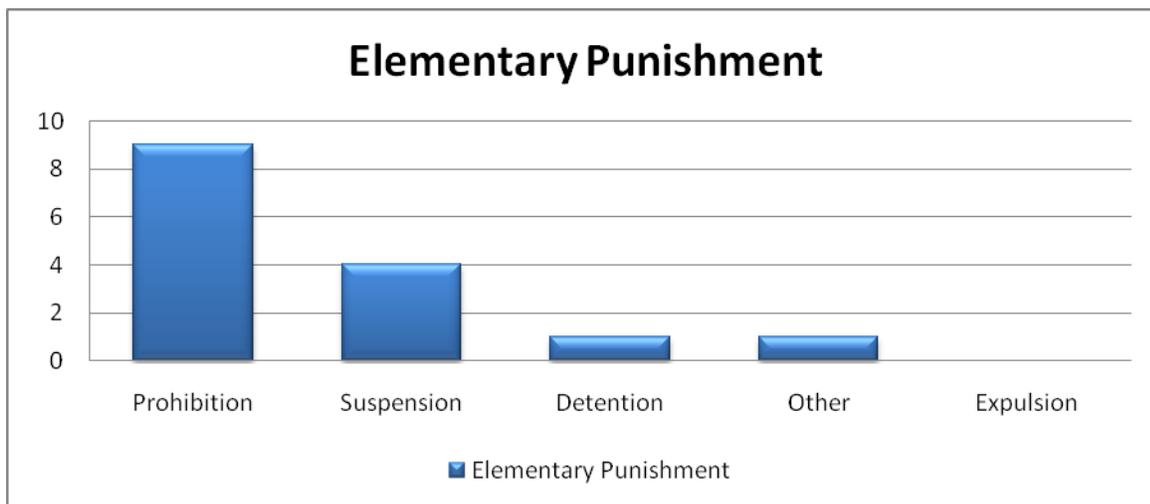


Figure 6. Elementary cases by punishment.

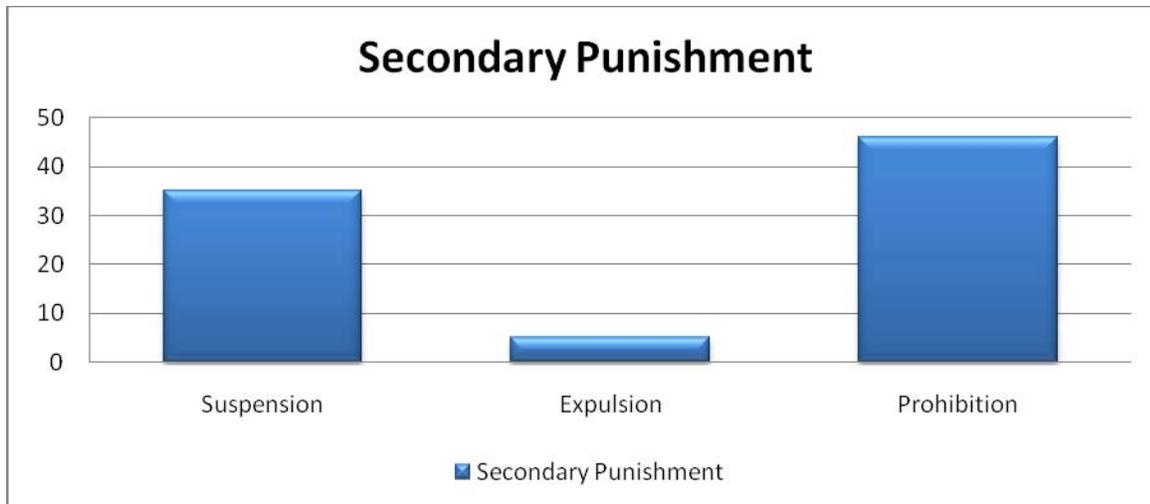


Figure 7. Secondary cases by punishment.

Interesting is the comparison of the precedent case used in this litigation. The combination of cases range from *Fraser* (1986) alone with 26 cases; *Fraser* and *Tinker* (1968) with 39 cases; *Fraser* and *Hazelwood* (1987) with 12 cases; *Fraser*, *Tinker*, and *Hazelwood* with 17; *Fraser*, *Tinker*, and *Morse* (2007) with 5 cases; to *Fraser*, *Tinker*, *Hazelwood*, and *Morse* with 3 cases (see Figure 8--Cases by precedent case). Each of these cases set precedent for the school official to follow in order to prevent litigation. The *Fraser* citation referenced the school's right to discipline speech that was lewd, profane, and obscene. The *Tinker* citations protected the discipline implementation by the school administration if the speech provided a material and substantial disruption to the school environment. The *Hazelwood* citations added the ability to prohibit and discipline speech that becomes part of a school-sponsored event or school curriculum. Finally, *Morse*, the most recent addition to free speech citations, gave specific protection for school administrators who are disciplining students that use their freedom of expression to promote drug use or drug paraphernalia.

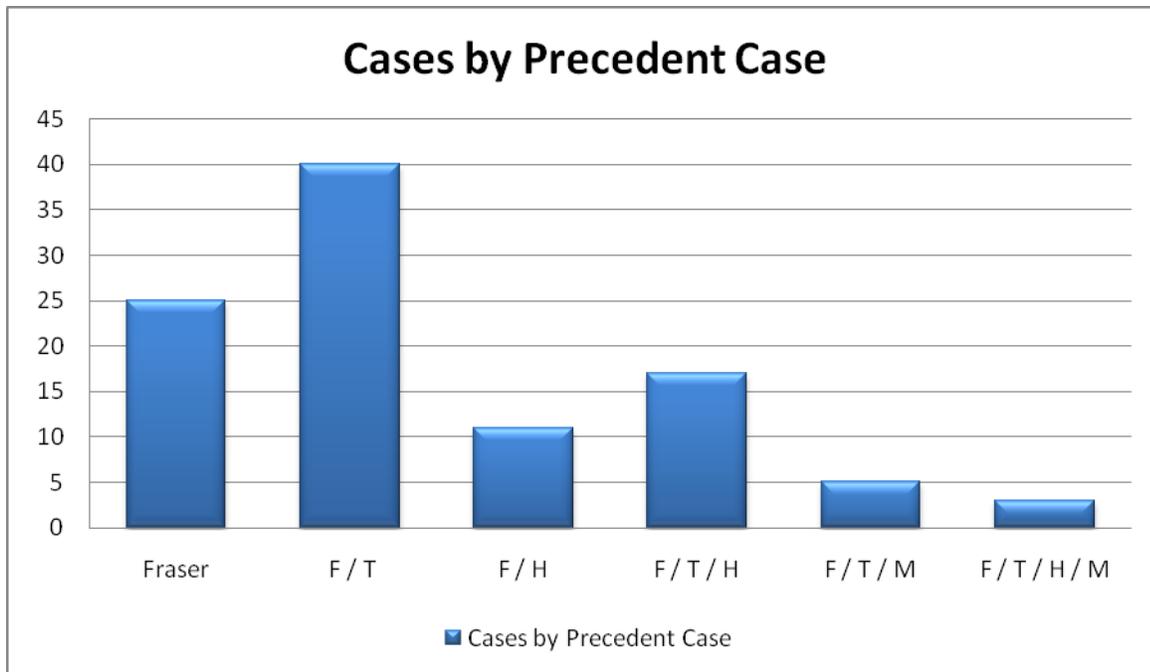


Figure 8. Cases by precedent case.

By using the specific results of this study, school officials can be aware of the protected First Amendment rights of students during their normal day operations of the school. If working within their authority and certain established boundaries, school administration can preserve the balance between the constitutional rights of all and the special environment of the school. By becoming educated on the past litigation examples, the administration of an elementary or secondary school can prevent freedom of expression violations of all students while at the same time protecting themselves from legal actions.

*Bethel vs. Fraser* (1986) has had a major influence on public school education in the past 10 years. The research has found several modern day First Amendment expression issues within the public school setting. In looking at the 101 cases, 15 took place at the elementary level and 86 took place at the secondary level. One of these cases was set in both the secondary and primary settings and will be used in the tally for both areas. Subcategories began to evolve from

the study. At the elementary level, the issues that were included were situations involving dress, written, and verbal expression. There were three involving dress expressions, seven involving written expressions, and five involving verbal expressions at the elementary level. Symbolism, profanity, true threats, and petitions were the subcategories that surfaced to affect elementary administration. Symbolism varied from Confederate flag expression to religious expression. There were nine elementary cases that dealt with the symbolism subcategory. There were two profanity, three true threats, and one petition issues within the elementary cases that cited *Bethel v. Fraser* (1986).

Of the 101 cases in which *Bethel v. Fraser* (1986) was cited during legal proceedings, 86 took place at the high school level. Of the 86 cases, two new categories of issues arose: cyber expression and physical expression. While secondary administration still had incidents of expression issues in dress, written, and verbal expression, much like the elementary administrators, all levels of subcategories increased for the secondary administrator. Twenty-nine cases of dress expression arose from the secondary area, while 9 of cyber expression, 20 cases of verbal expression, 2 of physical expression, 10 cases of visual expression, and 18 of written expression also became common areas of issues in litigation.

Of the 101 cases, the punishment given to the student or student body by the administrative authority was broken into four areas: suspension, expulsion, prohibition, and detention. Suspension sentences were defined as a punishment of removing the student from the school environment on a short-term basis. This can range from 1 to 20 days according to the specific school board policy. Expulsion, on the other hand, is the permanent removal of the student from the school system. Prohibition was usually the denial of participation or action in which the student was attempting to show expression. Finally, detention was classified as the

least severe punishment, usually not requiring the student to physically leave the school campus. At the elementary level, 4 cases involved suspension, 0 cases involved expulsion, 9 cases involved prohibition, 1 case involved detention, and 1 case ended in questioning by authorities only. At the secondary level, 35 cases involved suspension, 5 cases involved expulsion, 46 cases involved prohibition, and 0 cases involved detention.

In the research, it was found that the cases the majority of the time favored the defendant school system or administrator. *Santa Fe Independent School District v. Doe* (2000), *The Circle School v. Pappert* (2004), and *Morse v. Frederick* (2007) were the exceptions where the plaintiff was the administrator, but the case still was held in favor of the educator. In 15 cases dealing with elementary schools, 4 found in favor of the student and 11 were found in favor of the educator. Secondary school cases had 24 in favor of the student and 47 in favor of the educator. One juvenile delinquency case was found in favor of the defendant court. The cases were not always clearly determined with a judgment in favor of the plaintiff or the defendant. Of the 101 cases, 14 cases had partial judgment in favor of both the plaintiff and the defendant. These cases all dealt with punishment of either suspension or prohibition and were all at the secondary level. The issues and subcategories were random and showed no clear trend.

Finally, the research showed that out of 101 cases, the precedent case used at some point during the litigation was either *Fraser* (1986) alone; *Fraser and Tinker* (1968); *Fraser and Hazelwood* (1987); *Fraser, Tinker, and Hazelwood*; *Fraser, Hazelwood, and Morse* (2007); *Fraser, Tinker, and Morse*; or *Fraser, Tinker, Hazelwood, and Morse*. The cases that took place in the elementary setting had three that used *Fraser* alone; five that used *Fraser and Tinker*; three that used *Fraser and Hazelwood*; four that used *Fraser, Tinker, and Hazelwood*, and zero that used *Fraser, Tinker, Hazelwood, and Morse*. The cases that were set in secondary schools had 23

that used *Fraser* alone; 34 that used *Fraser* and *Tinker*; 9 that used *Fraser* and *Hazelwood*; 13 that used *Fraser*, *Tinker*, and *Hazelwood*; 0 that used *Fraser*, *Hazelwood*, and *Morse*; 5 that used *Fraser*, *Tinker*, and *Morse*; and 3 that used *Fraser*, *Tinker*, *Hazelwood*, and *Morse*. The case of *The Circle School v. Pappert* (2004) used *Fraser* and *Hazelwood* as precedent cases, but was addressed under the elementary and secondary categories, due to the litigants in the case. Of course, there were no cases before 2007 that used *Morse v. Frederick*, but the research showed that cases after 2007 with dress as an issue and symbolism as a subcategory would tend to use *Morse* along with the others as precedent.

The research showed importance in the areas of the subcategories. After analyzing the area of expression of dress, written, cyber, visual, verbal, and physical, the areas of symbolism, uniforms, internet violations, athletic controversy, profanity, true threats, and petitions became trends. Selected cases were chosen to emphasize the developed theme of each subcategory.

### *Symbolism*

The subcategory of symbolism contained cases focusing on content involving displaying the Confederate flag to wearing Marilyn Manson t-shirts. It was such a broad category, that it is important for the research to show that each of these cases supported the freedom of expression in reference to a particular abstract or concrete symbol. Religious expression was also considered in this particular subcategory. Out of the 101 cases, there were 56 cases that dealt with symbolism. Symbolism was shown in 28 cases of dress expression, 12 cases of written expression, 8 cases of visual expression, 12 cases of verbal expression, and 2 cases of combination expression of verbal and written,

Most symbolism cases were secondary cases, but one influential elementary case was *C.H v. Grace Olivia, et. al* (2000). This symbolism case of written expression involved a kindergarten student who was asked to draw a poster in the spirit of Thanksgiving with the theme of what he or she was most thankful for. The kindergarten student drew a picture showing that he was thankful for Jesus. All of the students' posters were displayed by the teacher in the hallway. The school administration took down this particular poster. The parents brought litigation against the school, and the district court ruled in favor of the school. On the other hand, the court of appeals determined through *Fraser* (1986) and *Tinker* (1968) that it was determined that the poster was discriminated against because of religious content and reversed the original ruling.

One well-known secondary case involving symbolism and dress was *Boroff v. Van Wert City, et. al.* (2000), otherwise known as the Marilyn Manson t-shirt case. In this case, the student wanted to wear Marilyn Manson shirts, a popular singer known for his demonic type music, to school. When he was denied the opportunity due to the offensive illustrations on the shirts, then he and his mother brought legal action against the school system. The district court used *Fraser* (1986) as precedent and ruled in favor of the defendant school system, and the appeals court affirmed this ruling. The courts found that through *Fraser*, the school had the right to determine if the shirt contained offensive material and violated the dress code. The student was prohibited from wearing the shirts to school.

Despite the popular *Boroff* (2000) case, the Confederate flag was an area of symbolism in many cases, especially at the secondary level. *Castorina* (2000), *Denno* (2000), *Sypniewski* (2001), and *Scott* (2003) were a few of the Confederate flag cases that emerged in the research. *Castorina* used *Fraser* (1986) and *Tinker* (1968) to determine that the plaintiff student's First Amendment right to freedom of expression was violated. Two students showed up at school with

Hank Williams Jr. shirts on to display their Southern heritage. They were asked to remove the shirts due to the Confederate flag that was displayed on the shirt. They refused, which resulted in a 3-day suspension. The students sought legal action against the school system, and at the district level the school prevailed. An appeal was filed, which resulted in reversing the findings because it was found that other students were not disciplined for the wearing of Malcolm X shirts, and that the shirts did not cause a school distraction. The shirts clearly expressed the student's views and were not school-sponsored speech.

### *Uniforms*

The subcategory of uniforms affected secondary school settings in this research. *Littlefield* (2000), *Canady* (2001), and *Jacobs* (2005) were three cases that were known for the battle over uniforms between parents and school systems. The plaintiffs in these cases claimed that a mandatory uniform dress code violated the students' right to freedom of expression. In all three cases, the courts ruled in favor of the defendants. The courts found that the school was not violating any First Amendment rights when requiring the wearing of a uniform, mainly because the plaintiffs could not prove that the wearing of specific clothes qualified as protected speech.

In *Canady* (2001), the Louisiana legislature amended a civil statute to allow parish school boards to mandate the wearing of uniforms due to research that showed a positive result in the increase of student achievement in schools that had mandated uniform policies. The Bossier Parish School Board required 17 schools in 2 years to implement the uniform policy. Parents filed legal action against the school system claiming that their children's First Amendment rights to wear the clothing of their choice were violated. The district court and court of appeals both

agreed through *Fraser* (1986) that the school system has the right to implement a dress code policy for its district and that the dress code was not an area of protected “speech.”

### *Internet Violations*

Again, an area mainly dealing with secondary schools, the subcategory of cyber expression through internet violations was important in the research. Of the 101 cases, 9 cases contained an internet violation, which ranged from websites to bogus MySpace accounts to blogs. Cyber expression is an issue that can occur on campus and off campus. Despite the off-campus possibilities, schools do not violate freedom of expression when disciplining students involved with these violations. The courts have set precedent through *Fraser* (1986) and *Tinker* (1968) that schools do not violate the First Amendment rights of students when an internet violation occurs against anyone associated with the school. Internet violations mainly result in suspension as student punishment, but *J.S. v. Bethlehem Area Sch. Dist.* (2008) ended with a student’s expulsion.

In this case, the student created a website on his home computer that was derogatory to the school and several teachers. An anonymous email exposed the site and the FBI identified J.S. as the creator of the website. The site contained threats to a teacher, harassment of a teacher and principal, and disrespect to the teacher and principal. The issue that this webpage was not created on a school computer was irrelevant to the court’s decision. The website was viewed at school and disrupted the school environment. Graphic images were also included that portrayed threatening messages against school leaders. Due to the perceived school threats, the court found that the site should be shut down and the creator punished. He was given a 10-day suspension in which further proceedings expelled him and he enrolled in an out-of-state school.

The courts tend to be less clear with internet or electronic law in regards to schools. The cases did not have a definite trend to guide administrators in disciplining students for cyber infractions. Administrators are facing controversial rulings for 1<sup>st</sup> Amendment rights of students in modern school law due to the specificity of each case. The courts have allowed for consideration of the locale of the infraction, the availability of exposure to the information on school grounds, the climate of the school once information is exposed, and the reaction of the student body once the information to be exposed to all dictate the holdings during litigation. This provides a sporadic outcome that is difficult for administrators to use as a precedent.

### *Athletic Controversy*

This research found that very few cases referencing *Fraser* (1986) were used within the area of athletics as a subcategory on its own. Oftentimes, athletics are part of the profanity subcategory, true threat category, and, even, the petition category. Due to this deduction, the research will not use athletic controversy as a subcategory.

### *Profanity*

With *Bethel v. Fraser* (1986) being a case focused on the administrator's right to discipline a student for the use of profane or obscene language during school sponsored speech, the subcategory of profanity was found in many issues within the research. Profanity was shown in 0 cases of dress expression, 3 cases of written expression, 0 cases of visual expression, 7 cases of verbal expression, and 0 cases of combination expression of verbal and written. The cases dealing with profanity usually are found in the favor of the defendant school system or in partial

favor of both the plaintiff student and defendant school, but there was one exception that favored the plaintiff, *Behymer-Smith v. Coral Academy of Science* (2006).

In *Behymer-Smith* (2006), the student was a finalist in a state poetry competition that required the recitation of a poem that contained inappropriate language. The poem was preapproved for competition and won first place in the district-wide competition. He was told by the Dean of Students the next day that he could not recite the poem in state competition. The student successfully proved that the possibility of irreparable injury would occur if preliminary relief was not granted. The court found that a likelihood of success on merits was shown and that the defendants would suffer less harm if denied the opportunity to recite the poem.

*Fraser* (1986) set a precedent that was very clear in profanity cases. If a school has a policy addressing profane and obscene language, then the school's right to discipline is protected and there are no violations of the student's freedom of speech. When an administration adds *Tinker's* (1968) substantial disruption precedent to the already established precedents of *Fraser*, then the Supreme Court seems to rule in favor of the school even more consistently.

### *True Threat*

True threat cases are mostly involved in verbal, visual, and written issues, but dress code could also cause a true threat in schools. True threat was shown in 1 cases of dress expression, 11 cases of written expression, 2 cases of physical expression, 2 cases of visual expression, 5 cases of verbal expression, and 1 case of cyber expression. The research showed that 4 true threat cases were in favor of the plaintiff student and 17 were in favor of the defendant school system. After 2002, there is only 1 case that favors the plaintiff, *Pounce v. Socorro Ind. School District* (2006).

In *Pounce* (2006), a student was asked to write a journal entry from the point of view of a pseudo-Nazi group. The journal was descriptive and had violent inscriptions including a plan to commit an attack on the school during the student's senior year. The student showed the notebook entry to another student. It was seen as a terrorist threat by the student, teacher, and administration despite the confession that it was a fictional work for a class assignment. The student was suspended until recommendation to the alternative school program was approved. His parents decided to transfer him to a private high school to avoid the alternative school setting and filed suit that his First Amendment rights were violated. The court found that the threatened injury to the plaintiff outweighed any damage that the defendant might have suffered due to the injunction, so the plaintiff's motion for a preliminary injunction was granted.

*Pounce* (2006) was a rare instance, especially in the cases of the last 5 years of the decade. In *Brown v. Cabell County Board of Education* (2009), a student came to school with the message "Free A-train" on both his hands. This was in relation to punishment given to another student. Due to the concerns of increased gang activity surrounding the student "A-train," the plaintiff was asked by administration to wash the message off his hands or be punished. He refused and was suspended. The court recognized that the school board adequately used *Fraser* (1986) as precedent and then used *Tinker* (1968) provided evidence of incidents that gave specific reasons that the expression would cause a material and substantial disruption at the school. Despite the lack of proof that the plaintiff was involved in gang activity personally, the slogan's association with gang affiliation alone gave the school the authority to suspend the student for refusal of removing the slogan from his hands.

The question is when do schools act on the true threat claim? The court seemed to rule in favor of the school when a true threat was brought to the attention of the school officials and then

handled according to board policy. The grey area for administrators is when the true threat is not reported and occurs anyway. Many administrators struggle with the authoritarian style of controlling all facets of their students' lives, so what goes on outside of school premises is yet to set a true precedent in the courts. The challenge is for the courts to decide specific guidelines for a true threat.

### *Petition*

The research found three cases that were involved with written expression in the form of petitions that used *Fraser* (1986) as a citation in litigation. *Walker-Serrano v. Leonard* (2003) and *Lowery v. Euverard* (2007) both resulted in judgments in favor of the defendants. *Pinard v. Clatskanie* (2006) held a partial judgment. In all of these cases, the written petition is speech protected by the First Amendment, but the school's reaction to the petition does not have to favor the plaintiff. The only guarantee when it comes to punishment for the petition is that the defendant school must not punish the students in retaliation for the written petition. What the plaintiffs in *Walker-Serrano* and *Lowery* failed to realize was that their right to petition is protected, but that does not ensure the result for which they are searching.

In *Pinard* (2006), eight members of the Clatskanie High School Varsity Boys basketball team signed a petition to get their coach removed, due to his extensive use of profanity and obscenity. The school system did not remove or reprimand the coach despite proven testimony of the allegations. Instead the plaintiffs were suspended from the team. The district court found in favor of the defendants, justifying the school's ruling because the petition caused a substantial disruption to a school activity. The appeals court reversed the decision that the petition was not constitutionally protected speech. The court found that the school had the right to discipline the

students with the suspension from the team for boycotting a game, but could not punish the students.

### Conclusion

The results of the assigned fact patterns seem to show an inconsistency in the judgment precedents. *Fraser* is clearly used in cases that involve defined profane, obscene, and vulgar expression. The fact patterns begin to develop differently when the courts inconsistently use *Fraser* coupled with *Tinker*, *Hazelwood*, and *Morse*. The cases that use *Fraser* and *Tinker* not only include profane expression, but also material and substantial expression. Whenever *Hazelwood* is used with *Fraser*, the profane language is coupled with public and nonpublic fora. Finally, *Fraser* with *Morse* specifically focused on profane cases and drug related references. The inconsistencies were found in the cases that took *Fraser* and declared it as a precedent, but then used the findings from the case of *Tinker* erroneously. The fact patterns show that *Fraser* was used in cases that focused on material and substantial disruption along with obscene expression. The courts have not provided administrators the confidence in these cases to make decisions, due to the lack of confidence in precedent found in some of the standalone *Fraser* cases. This research developed a set of principles based on these fact patterns in order to give administrators something that the courts have not clearly defined as of yet: the legally researched ability to make the proper First Amendment decisions within the schools.

## CHAPTER V

### SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

#### Introduction

The purpose of the research was to examine how the courts have addressed the use of *Bethel v. Fraser* (1986) in litigation involving public school administrators in reference to First Amendment freedom of speech issues. The period of time between 2000 and 2010 was chosen to provide an adequate number of cases for the determination of comparisons and trends. This chapter includes a summary of the research as it relates to the research question, conclusions based on the analysis of court cases, and recommendations for future studies.

#### Summary

The following research questions guided the data collection and analysis:

1. What are the identifiable issues within cases citing *Bethel School District vs. Fraser* (1986)? According to the research in this study, the issues of First Amendment expression in the areas of cyber, verbal, written, physical, visual, and dress code were addressed by the courts. The issues resulted in subcategories becoming evident in litigation in the areas of symbolism, uniforms, internet violations, athletic controversy, profanity, true threats, and petitions. With these matters in consideration, 34 guidelines have been developed to guide school administrators with the issues and subcategories brought to light during the study. Of the 101 case from the year 2000-2010, 58 cases resulted in summary judgment in favor of the school,

28 resulted in favor of the student, and 14 results in partial judgment awarded to each. According to the study, cyber expression is the issue of speech that is becoming a trend for the courts to rule upon. With 9 cases of cyber expression citing *Bethel v. Fraser* (1986) coming to litigation since 2000, the administrator has to be aware of the growing need to become educated about the issues in the schools.

2. What are the outcomes in cases citing *Bethel vs. Fraser* (1986)?

In the court decisions since 2000 that cite *Bethel v. Fraser* that deal with public school education, the courts' opinions have remained consistent in the area of freedom of expression within the school. With school authorities granted favorable judgment in 58 of 101 cases, the protection of the school official when disciplining a student claiming that his or her right to free speech was violated was established through the use of *Tinker* (1967), *Hazelwood* (1988), and *Morse* (2007) coupled with *Fraser* (1986) in litigation. Through these cases, the matters of forum, material and substantial disruption, and lewd or profane language were formed as guidelines that school administration used to successfully retain favorable judgment in legal cases against student and parents.

Qualified immunity has become a defense argument for school officials who are involved in litigation of First Amendment claims. The qualified immunity of school administration is only granted when certain requirements are met. The courts have to decide if a constitutional right has been violated by the principal's disciplinary actions of detention, suspension, or prohibition, or a superintendent's recommendation for expulsion. If a constitutional right has been violated, then the court will decide if the principal will be granted qualified immunity. In order to be granted qualified immunity, the constitutional right violation must not be established at the time of the

principal's action. In the case of a clear establishment of a constitutional right violation, the principal will be denied qualified immunity.

The court's decision in *Tinker* (1969) allowed school officials to only prohibit student speech when there was a substantial disruption to the school environments. The matter of *Bethel v. Fraser* (1986) provided school officials with legal protection in regard to First Amendment violation claims if the student was disciplined because of the use of offensive, lewd, and profane language in a school-sponsored assembly or forum. *Hazelwood* (1988) added to the first two prongs of *Tinker* and *Fraser* by allowing proper prohibition of student speech if the speech took place in a particular fora. Finally, *Morse* (2007) provided a fourth aspect to the legal protection of school officials if the disciplined student expression has any reference to drug use or drug paraphernalia. With the support of *Tinker*, *Fraser*, *Hazelwood*, and *Morse*, school authorities can begin to protect the rights of all students when making disciplinary decisions in the area of student expression in schools.

3. What are the legal trends that have developed through federal and state litigation in cases citing *Bethel vs. Fraser* (1986)?

According to this research, one of the trends is that school officials have been granted favorable judgment in 58 of 101 cases citing *Bethel v. Fraser* (1986) as legal precedent in the public school environment. The courts have granted immunity to school officials who act in good faith within the scope of their authority. The school officials must determine whether the discipline action of detention, suspension, expulsion, or prohibition does not violate student expression protected by the First Amendment. School authorities are successful in student expression litigation when the speech is not protected, the speech occurs in a school-sponsored forum, the speech substantially and materially disrupts the school environment, the speech

contains lewd or profane language, or, finally, the speech contains references to drug use or drug paraphernalia. With these guidelines set by the courts, principals can begin to evaluate their discipline decisions in regard to student expression in public schools.

The 10 years studied in the research had 21 cases of true threat. School officials were granted favorable judgment in 17 out of 21 true threat cases. With this study reflecting cases after the Columbine tragedy, school safety of all students on and off campus was shown to be a priority for school authorities. The data showed true threat cases in written, visual, verbal, physical, and cyber expression. Written expression contained 11 true threat cases, of which 9 were in favor of the school authorities. Visual expression contained two true threat cases, of which one was in favor of the school authorities. Verbal expression contained 5 true threat cases, of which all 5 were in favor of the school authorities. Physical expression contained 2 true threat cases, of which both were in favor of school authorities. Cyber expression contained 1 true threat case, which was not in favor of school authorities. The courts struggled with the definition of a true threat. The cases found in this research basically showed the court defining a true threat as one that is found threatening by one or all of the individuals in which the threat was aimed.

Within the years of 2000-2010, symbolism has become another trend that has emerged. Symbolism encompasses topics such as the recitation of the pledge of allegiance, the display of the Confederate flag, the expression of gay/lesbian rights, and the expression of religious beliefs. Students have a right to the freedom of expression through symbolism, but school authorities have the right to override this right in the public school atmosphere when violations of constitutionally-sound school policy occur during the students' expression. Student expression through dress contained 56 symbolism cases, of which 29 were in favor of the school authorities. Written expression contained 12 symbolism cases, of which 4 were in favor of the school

authorities. Visual expression contained 8 symbolism cases, of which 3 were in favor of the school authorities. Verbal expression contained 12 symbolism cases, of which 6 were in favor of the school authorities. Student expression through dress contained 28 symbolism cases, of which 12 were in favor of school authorities. In this research the fact pattern of symbolism was broad, encompassing Marilyn Manson t-shirts to Confederate flags to Jesus Christ. For the sake of this study the definition of symbolism is the representation of an item to show personal expression.

A possible trend of internet violations emerged in the research also. This trend encompassed personal websites, blogs, and popular profile sites such as MySpace and Facebook. The judgment in these cases varied, with 9 cases in favor of the student and 4 in favor of the school authorities. The issues in the cyber expression category are becoming more established as students have on-campus and off-campus instances that intertwine. The research found that it is difficult for principals to deal with cyber expression when administering discipline.

4. What are the applicable legal principles for school administrators and school districts that can be discerned from *Bethel vs. Fraser*?

The school administration understands that the First Amendment right to free speech is becoming more and more complex in the public school environment. Where students do have constitutional rights in the school atmosphere, the school administration does have protection when facing potential legal ramifications. A school official, be it a principal, superintendent, or school board, must take a proactive approach to address and possibly avoid situations that could possibly violate the constitutional rights of the students in the area of free expression. It is the responsibility for school officials to provide a safe and secure learning environment for students, free from substantial or material disruptions; lewd, offensive, or profane language; and messages containing references to drug use and drug paraphernalia. The lineage of cases in this study has

revealed thirty-four principles that could possibly decrease litigation for school officials in the area of the First Amendment right to free expression.

### Guiding Principles

1. The in loco parentis doctrine does not provide an automatic parental relationship between school authority and student (*Demers v. Leominster Sch. Department*, 2003).

2. A school official involves the use of decision making and is entitled to qualified immunity when handling a discipline situation if a student's rights are not clearly established at the time of an infraction (*Demers v. Leominster Sch. Department*, 2003).

### Symbolism

3. A school official may prohibit the reading of the Bible by a parent to an elementary class in a public school setting (*Busch v. Marple Newtown School District, et. al.*, 2009).

4. A school official may discipline a student for the violation of the piercing policy approved by the school board (*Bar-Navon v. School Board of Brevard County*, 2007).

5. School officials may prohibit the publication and distribution of a student-led school newspaper with or without approval from the administrator if the forum is limited and the paper is part of the educational curriculum (*Lueneburg & Eccleston v. Everett School District*, 2007).

6. School officials may discipline students that participate in protest behavior (*Madrid v. Anthony*, 2007).

7. A school board policy requiring student participation in an invocation or pledge of allegiance is a violation of the First Amendment freedom of expression (*Frazier v. Alexandre*, 2006).

8. School officials may not deny the distribution of religious information during non-instructional time on school campus as long as the distribution does not cause a substantial or material disruption if the distribution of other information is allowed on campus at all (*Westfield L.I.F.E Club v. City of Westfield*, 2003).

9. School officials may deny the posting of fliers, the use of school materials, or the recognition of being a student group if the forum of the school is determined to be limited public forum (*Caudillio, et. al. v. Lubbock Independent School District*, 2004; *Doe v. Perry Community School District*, 2004; *Bowler v. Hudson*, 2007).

10. Prohibiting the expression of symbolism without the determination that the speech was school-sponsored is a violation of the First Amendment right to freedom of expression (*Fleming, et. al. v. Jefferson County School District*, 2002; *Bannon v. School District of Palm Beach, et. al.*, 2004).

11. School officials must require that all invocations at school-sponsored events be nonsectarian and non-proselytizing (*Santa Fe Independent School District v. Doe*, 2000).

12. A school official may not prohibit a student from participation in an extracurricular activity if a refusal to apologize for an action is the reason for prohibition (*Seamons v. Snow, et. al.*, 2000; *Wildman v. Marshalltown, et. al.*, 2001).

13. A school official may discipline a student for displaying a Confederate flag during non-instructional time if substantial and material disruption occurs (*Denno v. Sch. Board of Volusia County*, 2000; *Scott v. School Board of Alachua County*, 2003).

14. A school official may not censor a student's work due to it having a religious theme if discriminatory treatment is involved (*C.H. v. Olivia, et. al.*, 2000).

15. A school official can discipline students for displaying drug use or drug related messages during school-sponsored activities (*Morse v. Frederick*, 2007).

16. The prohibition of transgender dressing at a prom is a violation of the First Amendment freedom of expression if the action does not cause a material or substantial disruption at the event (*Logan v. Gary Community School Corporation*, 2008).

### *Uniforms*

17. School officials may implement a dress code policy that can include but not be limited to the mandatory use of uniforms (*Littlefield, et. al. v. Forney Ind. School District, et. al.*, 2000; *Long v. Bd. of Ed. Of Jefferson County*, 2000; *Canady, et. al. v. Bossier Parish School Board*, 2001).

18. The censorship of student wardrobe that is not plainly offensive, vulgar, obscene, or profane, and does not cause a substantial or material disruption of the school environment is a First Amendment free speech violation (*K.D. v. Fillmore Central School District*, 2005; *Nixon v. Northern Local School District Board of Education*, 2005).

19. A school official can discipline a student for wearing clothing that depicts offensive illustrations; drug, alcohol, or tobacco slogans; or any other message that contradicts the educational mission of the school (*Boroff v. Van Wert City Board of Education*, 2000; *Castorina & Dargavell v. Madison County School Bd.*, 2000; *Newsom & Newsom v. Albermarle County School Board*, 2002; *Barber v. Dearborn Public Schools*, 2002).

### *Internet*

20. A school official can discipline a student for any bogus or derogatory profile of school personnel published on the internet that was created on or off-campus if it can be shown that there is a substantial disruption to the school environment (*J.S. & I.S. v. Bethlehem Area School District*, 2000; *Emmett v. Kent School District*, 2000; *Layshock ex. rel Layshock v. Hermitage*, 2007; *J.S. v. Blue Mountain School District*, 2007; *Requa v. Kent School District No. 415*, 2007, *Mahaffey v. Aldrich, et. al.*, 2002; *Evans v. Bayer*, 2010)

21. A school official can discipline a student for cyber expression created on or off campus that contains profanity or harassment of other students (*Coy v. Board of Education of North Canton City Schools*, 2002).

22. School officials may discipline students for cyber harassment that occurs on or off campus (*Doninger v. Niehoff & Schwartz*, 2008).

### *Profanity*

23. A school official may discipline a student for possible threatening and profane expression aimed at school board personnel (*D.G. & C.G. v. Independent School District*, 2000).

24. A school official may discipline a student for obscene and sexual language produced in school writings of the student (*Doe v. Depalma*, 2000; *Lavine v. Blaine School District, et. al.*, 2002; *Porter et al. v. Ascension Parish School Board*, 2004).

25. A school official can implement a “zero tolerance” policy against profanity and inappropriate language and discipline accordingly (*Anderson v. Milbank School District*, 2000).

26. A school official may discipline a student for inappropriate language expressed about a school board employee (*Killion v. Franklin Regional School District*, 2001; *Boim v. Fulton County School District*, 2007).

27. The adoption of an anti-harassment policy is not a violation of the First Amendment freedom of speech (*Saxe v. State College Area School District*, 2004).

28. A school official may discipline a student or deny the reading of a speech that violates the school district policy of speech that slanders, contains profanity, or creates hostility or disruption during the education process (*Corder v. Lewis Palmer School District*, 2009; *Defabio v. East Hampton Union Free School District*, 2009).

29. A school official may dissolve an extracurricular activity for offensive, obscene, or lewd conduct or language (*Cleveland v. Blount County School District*, 2003).

#### *True Threat*

30. Disciplining a student for a true threat written expression drawing is not a violation of the First Amendment right to free speech if the school official shows a concern that a potential disruption to the school environment may occur (*Doe v. Pulaski County Special School District*, 2002; *Demers v. Leominster Sch. Department*, 2003).

31. A school official may discipline a student for writing potentially threatening articles in an unauthorized publication and distributing them on school grounds (*Pangle v. Bend-Lapine School District*, 2000).

32. A school official may discipline a student for any claims to the possession of a gun or any violent material on campus no matter what the age of the student (*S.G. v. Sayreville Board of Education, et. al*, 2003; *Doe v. Winchendon School Committee, et. al.*, 2004).

33. School officials may detain and interrogate a student without a parent's knowledge on the suspicion of possession of a firearm (*M.D. v. Evans, et. al.*, 2004).

#### *Petition*

34. Denial of the terms within a petition is not a First Amendment violation, but the gathering of signatures on a petition is protected under the First Amendment (*Walker-Serrano, et. al. v. Leonard, et. al.*, 2003; *Pinard, et. al. v. Clatskanie School District*, 2006; *Lowery, et. al. v. Euverard & Jefferson County Board of Education*, 2007).

#### Conclusions

School officials are faced with many controversial situations in regard to First Amendment violation claims by students and parents. When disciplining students by detention, suspension, expulsion, or even prohibition, the school administration has to take precautions in order to avoid litigation. *Bethel v. Fraser* (1986) was the precedent case that gave administrators the right to protect the school environment in particular circumstances. By looking at the cases that cite *Bethel v. Fraser* at some point during the proceedings, educators can begin to see trends that can help them avoid situations that may infringe on their students' First Amendment rights.

#### Recommendations for Further Study

Based upon the findings and conclusions of this study, the following recommendations are made:

1. Research should be conducted to examine *Bethel v. Fraser* (1986) citations in noneducational areas in comparison to education settings from 2000-present.

2. Research should be continued after the 2010 case of *Evans v. Bayer* (2010) in order to determine the impact on current litigation

3. A study should be conducted to determine the First Amendment issues found in the research as it pertains to school officials in Alabama

4. Research should be conducted in cases citing *Bethel v. Fraser* (1986) in relation to determining guidelines of qualified immunity for school personnel.

5. Research should be conducted to determine the implications for the outcomes of this research based upon the decisions of the U.S. Supreme Court during its 2010-2011 term.

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