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The Quarterly Report provides information on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at kmcadowel@doe.state.in.us.

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**PRO SE PARENTS AND THE FEDERAL COURTS:
REPRESENTING A CHILD’S INTERESTS UNDER THE IDEA**

On October 27, 2006, the U.S. Supreme Court granted a petition for writ of certiorari to resolve a split among the Circuit Courts as to whether non-lawyer parents may proceed *pro se* in federal court under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* Winkelman v. Parma City School District, 127 S. Ct. 467 (2006).¹ This dispute arose out of Ohio. In an unpublished decision, a panel of the U.S. Sixth Circuit Court of Appeals informed the parents of a child with autism spectrum disorder that their appeal would be dismissed within 30 days unless they retained counsel. Winkelman v. Parma City School District, No. 05-3886 (6th Cir. Nov. 4, 2005), relying upon Cavanaugh v. Cardinal Local School District, 409 F.3d 753, 756 (6th Cir. 2005) (non-lawyer parents may not represent a minor child in an IDEA action in federal court).² The Winkelmans sought and obtained a stay of that order from the U.S. Supreme Court. See Winkelman v. Parma City Sch. Dist., 126 S. Ct. 2057 (2006).³

The U.S. Supreme Court, on May 21, 2007, determined that the language of IDEA, when read in its totality, affords parents certain limited rights, allowing them to bring an action on their own behalf and represent themselves *pro se* even when the dispute spills over into a federal district court. Winkelman v. Parma City School District, 550 U.S. ___, 127 S. Ct. 1994 (2007).

Justice Anthony M. Kennedy, writing for the court, noted that, without reference to IDEA, parties are allowed to prosecute their own claims in federal court under 28 U.S.C. § 1654.⁴ 127 S. Ct. at 1999. Although the IDEA does not specifically address a parent’s right in this regard, a review of the entire scheme of the IDEA indicates such a right exists. The stated purposes of IDEA are, *inter alia*, “to ensure that the rights of children with disabilities and parents of such children are protected,” 20 U.S.C. § 1400(d)(1)(B), as well as “to ensure that educators and

¹The exact issue for consideration read as follows: “The question presented, over which there is a three-way split among six circuits, is: Whether, and if so, under what circumstances, non-lawyer parents of a disabled child may prosecute an Individuals with Disabilities in [sic] Education Act, 20 U.S.C. § 1400 *et seq.*, case *pro se* in federal court.”

²The 7th Circuit Court of Appeals earlier had determined that *pro se* parents who are not attorneys could not represent the interests of their children in the federal courts. See Navin v. Park Ridge Sch. District 64, 270 F.3d 1147, 1149 (7th Cir. 2001).

³Despite the stay, a different panel—with the parties’ agreement—reviewed and affirmed the district court’s denial of the parents’ request for injunctive relief to have a private school established as the student’s current educational (“stay put”) placement while IDEA procedures were employed. 20 U.S.C. § 1415(j). See Winkelman v. Parma City School Dist., 166 Fed. Appx. 807 (6th Cir. 2006). This decision is not implicated in the Supreme Court matter.

⁴“In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by rules of such courts, respectively, are permitted to manage and conduct causes therein.

parents have the necessary tools to improve educational results for children with disabilities[.]” § 1400(d)(3). *Id.* at 2000.

Various IDEA provisions mandate or describe parental involvement. Although the court did not exhaustively detail all of them, the court did address four specific areas: (1) IEP development procedures; (2) provision of a free appropriate public education (FAPE); (3) dispute resolution processes; and (4) cost recovery issues.

IEP Development Process

Parents play a significant role in the development of a child’s Individualized Education Program (IEP). Not only do they serve as members of the IEP Team⁵ charged with the development of the IEP, § 1414(d)(1)(B), but their concerns must be considered by the IEP Team. § 1414(d)(3)(A)(ii). Parents also have a role in the determination of the educational placement where the IEP will be implemented. §1414(e). There are general procedural safeguards established to “ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education[.]” § 1415(a). Parents have the right to examine all relevant records. § 1415(b)(1). “A central purpose of the parental protections is to facilitate the provision” of a FAPE to the child. *Id.* “The IEP proceedings entitle parents to participate not only in the implementation of IDEA’s procedures but also in the substantive formulation of their child’s educational program.” *Id.* at 2004.

FAPE

The court noted that a FAPE is provided pursuant to an IEP that is specially designed to meet the unique needs of a child. The IEP will include special education and related services that are “at no cost to the parents.” § 1401(29). *Id.* at 2000-01.

Dispute Resolution

A parent has the right to challenge any proposed or refused action by the public agency regarding identification, educational placement, evaluation, or any aspect of a FAPE. § 1415(b)(6). This not only includes a due process hearing under § 1415(f), or administrative appeal under § 1415(g), where applicable,⁶ but the right to participate in a resolution session, § 1415(f)(1)(B), or to mediate disagreements, § 1415(e). An aggrieved party—which could be the parent—has the right to bring a civil action in federal court to challenge an adverse administrative decision. § 1415(i)(2)(A). *Id.* at 2001. The IDEA is clear “that parents will be participating as parties” in these various procedures. *Id.* at 2002.

⁵In Indiana, the IEP Team is known as the “Case Conference Committee.” See 511 IAC 7-17-10.

⁶Indiana provides for both a due process hearing at the local level, 511 IAC 7-30-3, and an administrative appeal to the Board of Special Education Appeals. 511 IAC 7-30-4.

Nothing in these interlocking provisions excludes a parent who has exercised his or her own rights from statutory protection the moment the administrative proceedings end. Put another way, the Act does not *sub silentio* or by implication bar parents from seeking to vindicate the rights accorded to them once the time comes to file a civil action. Through its provisions for expansive review and extensive parental involvement, the statute leads to just the opposite result.

Id.

Cost Recovery

Parents can recover the costs of a private school enrollment where it has been determined that the public agency failed to provide a FAPE. § 1412(a)(10)(C)(ii). Additionally, parents may recover attorney fees where the parent is the “prevailing party.” § 1415(i)(3)(B)(i)(I). Id. at 2001-02.

“The parents enjoy enforceable rights at the administrative stage, and it would be inconsistent with the statutory scheme to bar them from continuing to assert these rights in federal court.” Id. at 2002. The court rejected the school district’s argument that parent rights are derivative of the child’s rights and do not stand alone (except with regard to cost recovery and certain procedural compliance issues).

This interpretation, though, is foreclosed by provisions of the statute. IDEA defines one of its purposes as seeking “to ensure that the rights of children with disabilities and parents of such children are protected.” § 1400(d)(1)(B). The word “rights” in the quoted language refers to the rights of parents as well as the rights of the child; otherwise the grammatical structure would make no sense.

Id. IDEA presumes “parents have rights of their own.” How else could the “rights accorded to parents” be transferred to their children? § 1415(m)(1)(B). Additionally, IDEA refers to individual rights of parents or students under the IDEA. See §§ 1401(10)(E), 1412(a)(14)(E) (addressing limitations on challenging the “highly qualified” status of teachers). Id. at 2002-03. “It is not a novel proposition to say that parents have a recognized legal interest in the education and upbringing of their child.” Id. at 2003, citing Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 45 S. Ct. 571 (1925) and Meyer v. Nebraska, 262 U.S. 390, 399-401, 43 S. Ct. 625 (1923).

There is no necessary bar or obstacle in the law, then, to finding an intention by Congress to grant parents a stake in the entitlements created by IDEA. Without question a parent of a child with a disability has a particular and personal interest in fulfilling “our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” § 1400(c)(1).

Id. “We...interpret the statute’s references to parents’ rights to mean what they say: that IDEA includes provisions conveying rights to parents as well as to children.” Id.

These provisions confirm that IDEA, through its text and structure, creates in parents an independent stake not only in the procedures and costs implicated by this process but also in the substantive decisions to be made. We therefore conclude that IDEA does not differentiate through isolated references to various procedures and remedies, between the rights accorded to children and the rights accorded to parents. As a consequence, a parent may be a “party aggrieved” for purposes of § 1415(i)(2) with regard to “any matter” implicating these rights. See § 1415(b)(6)(A). The status of parents as parties is not limited to matters that relate to procedure and cost recovery. To find otherwise would be inconsistent with the collaborative framework and expansive system of review established by the Act.

Id. at 2004. The court declined “to conclude that some rights adhere to both parent and child while others do not.” To recognize such “would impose upon parties a confusing and onerous legal regime, one worsened by the absence of any express guidance in IDEA concerning how a court might in practice differentiate between these matters.” Id. at 2004-05.

We conclude IDEA grants parents independent, enforceable rights. These rights, which are not limited to certain procedural and reimbursement-related matters, encompass the entitlement to a free appropriate public education for the parents’ child.

Id. at 2005.

Balancing Act

Pro se litigants pose particular problems for the parties they name as defendants and the courts where such claims are brought. The school district argued that permitting *pro se* parents to represent their interests in federal district courts will result in significant burdens to public agencies attempting to defend against such claims raised by individuals without training and who are not bound by ethical requirements or canons of professional responsibility.

...IDEA does afford relief for States in certain cases. The Act empowers courts to award attorney’s fees to a prevailing educational agency whenever a parent has presented a “complaint or subsequent cause of action...for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.” § 1415(i)(3)(B)(i)(III). This provision allows some relief when a party has proceeded in violation of these standards.

Id. at 2006.

The Interests of the Child

The Supreme Court in Winkelman did not address whether parents acting *pro se* may represent the interests of their children in the federal courts. Justice Antonin Scalia emphasized this in his dissenting opinion. Winkelman, 127 S. Ct. at 2007-2011. He noted that “the common law generally prohibited lay parents from representing their children in court, a manifestation of the more general common-law rule that non-attorneys cannot litigate the interests of another. [citations omitted.] Nothing in the IDEA suggests a departure from that rule.” Id. at 2007, n.1.⁷

The distinction between the child’s interests and the parent’s in the Winkelman decision has not been generally understood. L.J. by N.N.J. and N.N.J., individually, v. Broward Co. School Board, 2007 U.S. Dist. LEXIS 41925 (S. D. Fla. 2007), a post-Winkelman decision, demonstrates this misunderstanding.

In L.J., the mother, a non-attorney, sued the school district in federal district court, alleging the school district failed to implement her son’s IEP, failed to adequately train school staff, and retaliated against her. The school district moved to have the complaint dismissed. The federal district court noted that in the 11th circuit “parents who are not attorneys may not bring a *pro se* action on their child’s behalf because it helps to ensure that children rightfully entitled to legal relief are not deprived of their day in court by unskilled, if caring, parents.” 2007 U.S. Dist. LEXIS 41925 at *5, citing Devine v. Indian River Co. Sch. Bd., 121 F.3d 576 (11th Cir. 1997). The Supreme Court’s recent Winkelman decision found that the IDEA does provide parents with their own enforceable rights. “However, the Supreme Court declined to decide whether a parent could litigate *pro se* her child’s rights under the IDEA.” Id. As a consequence, the mother was not permitted to represent her son’s interests. His interests would need to be represented by an attorney. The mother, however, “has personal rights under the IDEA, as a parent of a disabled child, and may continue to litigate claims for violation of her parental rights, including the right that her child receive a meaningful education.” Id. at *6.

The next question the Supreme Court will have to answer (in the context of the IDEA) will be whether a parent who is also an attorney can recover attorney fees as the prevailing party in an IDEA proceeding. To date, only the 2nd, 3rd, 4th and 9th Circuit Courts of Appeal have addressed this issue and have found that such representation is *pro se* and does not entitle the parent-attorney to attorney fees.

Parent-Attorney and Fees

While the U.S. Supreme Court has determined that under the IDEA non-attorney parents can represent their own interests in the federal courts, the Court has not yet specifically addressed whether attorney-parents representing the interests of their children can recover attorney fees.

⁷Justice Scalia agreed with the majority that a parent has enforceable rights of the parent’s own under the IDEA. He believed the majority erred when it included challenges to the substantive adequacy of the FAPE provided. This issue is the child’s interest, not the parent’s. Id. at 2011.

The issue has been addressed by four U.S. Circuit Courts of Appeal as well as the Indiana Supreme Court,⁸ but the specific issue has not been placed before the highest court.

The courts are being asked to decide whether a parent-attorney who is a prevailing party under IDEA can recover attorney fees. Prior to 2006, only the 3rd and 4th Circuit Courts had addressed the issue at the federal level. The 2nd and 9th Circuits have now weighed in, agreeing with the 3rd and 4th Circuits that a parent-attorney cannot recover IDEA attorney fees for representing the interests of the parent-attorney's child.

S.N. v. Pittsford Central School District, 448 F.3d 601 (2nd Cir. 2006) began when S.N. was in the fourth grade. In addition to other needs, S.N. also has health concerns that interfered with her school attendance. At one time, her IEP incorporated an Individualized Health Plan (IHP) that required one-to-one home tutoring for her after three consecutive days of absence from class, although standard district policy required such home tutoring only after 10 days' absence. In March of 2002, her IEP was amended, removing all references to her IHP. The parents requested a hearing. S.N. was represented by her father, a licensed attorney. An Impartial Hearing Officer (IHO) ordered the home-tutoring provision reinstated, but a State Review Officer (SRO) reversed, albeit a year after the IHO's decision was rendered. 448 F.3d at 601-02.

S.N.'s father then filed a complaint in the federal district court, alleging violations of the IDEA and seeking attorney fees. In August of 2004, the parties settled the dispute. The school district reinstated the home-tutoring program and S.N. agreed to dismiss her complaint with prejudice. The district court retained jurisdiction to resolve the attorney fee request. The district court later denied the motion for attorney fees and dismissed the complaint with prejudice. The federal district court reasoned that the attorney-fee provision of IDEA contemplates independent counsel and a paying relationship between an attorney and the attorney's client. S.N. appealed to the 2nd Circuit. Id. at 602.

The 2nd Circuit noted that this was an issue of first impression for them, although at that time only two other Circuit Courts of Appeal had considered the matter and found that parent-attorneys could not recover fees under the IDEA. Id. at 603, citing Woodside v. School District of Philadelphia Board of Education, 248 F.3d 129, 131 (3rd Cir. 2001) and Doe v. Bd. of Education, 165 F.3d 260, 265 (4th Cir. 1998), *cert. den.* 526 U.S. 1159, 119 S. Ct. 2049 (1999).

Both the 3rd and 4th Circuits relied upon the U.S. Supreme Court's decision in Kay v. Ehrler, 499 U.S. 432, 111 S. Ct. 1435 (1991), which actually involved the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988(b). This attorney fee provision is similar to IDEA's: The district court has the discretion to award "a reasonable attorney's fee" to the prevailing party. The Supreme Court found that Congress enacted § 1988 primarily "to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." Kay, 499 U.S. at 436. The Supreme Court added that awarding counsel fees to *pro se* litigants, even if limited to licensed attorneys, "would create a disincentive to employ counsel whenever such a plaintiff

⁸See "Attorney Fees: Parent-Attorneys," **Quarterly Report** April-June: 1996.

considered himself competent to litigate on his own behalf.” Kay, 499 U.S. at 438. Even a skilled lawyer, the court added, “is at a disadvantage in contested litigation” where the lawyer is personally involved. Kay, 499 at 437-38. 448 F.3d at 603.

The Kay decision, and its pointed concerns regarding what is essentially *pro se* representation, is applicable to IDEA cases as well.

A rule that allows parent-attorneys to receive attorneys’ fees would discourage the employment of independent counsel. Yet, just like an attorney representing himself, a parent-attorney representing his child is deprived of the judgment of an independent third party in framing the theory of the case, formulating legal arguments, and in making sure that reason, rather than emotion, informs his tactical decisions. The danger that a parent-attorney would lack sufficient emotional detachment to provide effective representation is undeniably present in disputes arising under the IDEA. The statute itself recognizes that parents do and should have an intense personal interest in securing an appropriate education for their child. [Statutory and case citations omitted.] In order to best promote the effective litigation of a child’s meritorious claims under the IDEA, we hold that attorney-parents are not entitled to attorneys’ fees under § 1415(i)(3)(B).

Id. at 603-04 (internal punctuation and citation omitted). The 2nd Circuit rejected S.N.’s contentions, some based on the reasoning in Matthew V. v. DeKalb County School System, et al., 244 F.Supp.2d 1331 (N.D. Ga. 2003), where the federal district court would have awarded attorney fees to the parent-attorney had she actually prevailed in the hearing (which she did not). The court also rejected the assertion that the prohibition on IDEA attorney fees for parent-attorneys would affect representation by “more distant relatives.” The 2nd Circuit noted that “parent” is defined by the IDEA, and that S.N.’s father fits within that definition.⁹ Id. at 604-05.

Shortly after the 2nd Circuit’s decision in S.N., the 9th Circuit reached the same conclusion in Ford v. Long Beach Unified School District, 461 F.3d 1087 (9th Cir. 2006).

Ford involved a series of disputes between the parents of a child with a disability and the local school district. The child’s mother is a licensed attorney. In 2000, the parents and school disagreed as to the child’s continued need for a residential placement, although the school district had earlier agreed she should be returned home. A due process hearing was requested. Eventually, the parties entered into a settlement agreement, which required the school district to abide by its earlier agreement to return the student to her home. 461 F.3d at 1088-89.

In 2003, to resolve another dispute, the parties entered into a second settlement agreement. The following year, the child and her father filed a complaint in the federal district court, seeking to recover attorney fees related to the two settlement agreements with the school district. The school district moved to dismiss the action. Id. at 1089.

⁹See 20 U.S.C. § 1401(23) and 34 C.F.R. § 300.30 for the current definition of “parent.”

The 9th Circuit joined the 2nd, 3rd, and 4th Circuits in finding the IDEA does not authorize attorney fees for attorney-parents representing their own children. *Id.* at 1090. The amendments to IDEA in 2004 (Individuals with Disabilities Education Improvement Act of 2004) did not alter the attorney fee language or the court’s analysis. *Id.* The 9th Circuit followed the 2nd Circuit’s analysis of 42 U.S.C. § 1988 and its application of Kay v. Ehrler. *Id.* at 1090-91.

Like an attorney appearing *pro se*, a disabled child represented by his or her parent does not benefit from the judgment of an independent third party. Indeed, the danger of inadequate representation is as great when an emotionally charged parent represents his minor child as when the parent represents himself [internal punctuation and citations omitted]. Therefore, we agree with our sister circuits that the better rule is one which encourages parents to seek independent, emotionally detached counsel for their children’s IDEA actions. [Internal punctuation and citations omitted.] Accordingly, the Fords are not entitled to attorneys’ fees because Whiteleather, Whitney’s legal counsel, is also Whitney’s mother.

Id. at 1091. The 9th Circuit clarified that it did not mean the child’s mother did not act in a professional manner. “[W]e are convinced that our rule—which presumes irrefutably that parents and guardians are *always* unable to provide independent, dispassionate legal advice—will better serve Congress’ intentions.” *Id.* (emphasis original). Awarding attorney fees under these circumstances “would create a disincentive to employ counsel whenever a parent or guardian considered herself competent to litigate on behalf of her child.” *Id.*

Back Home Again In Indiana

Although the 2nd and 9th Circuit Courts did not mention the case, both the 3rd and 4th Circuits, in their earlier decisions, did refer to a decision by the Indiana Supreme Court directly on this issue.

In Miller v. West Lafayette School Corporation, 665 N.E.2d 905, (Ind. 1996), the Supreme Court agreed with the school district that the father was acting as a “*pro se* parent and a party” rather than as an attorney, and as “a *pro se* litigant [he]...is not entitled to [attorney] fees” which are available to parents who prevail through IDEA procedures. See 20 U.S.C. §1415(i)(3)(B). The decision relied upon Rappaport v. Vance, 812 F.Supp. 609 (D. Md. 1993), appeal dismissed, 14 F.3d 596 (4th Cir. 1994), which found that a lawyer-parent representing his child in IDEA proceedings is a *pro se* litigant and thus not entitled to attorney fees under the IDEA. The Rappaport court itself relied upon the Supreme Court decision in Kay v. Ehrler, 499 U.S. 432, 111 S.Ct. 1435 (1991), which held that attorneys who are *pro se* litigants are not entitled to attorney fees in civil rights actions because “the word ‘attorney’ assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under [42 U.S.C.] §1988.” 111 S.Ct. at 1437-38.

The Indiana Supreme Court quoted extensively from Kay, 499 U.S. at 436-38, 111 S.Ct. at 1437-38:

Although [the fee-shifting section] was no doubt intended to encourage litigation protecting civil rights, it is also true that its more specific purpose was to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights.

In the end...the overriding statutory concern is the interest in obtaining independent counsel for victims of civil rights violations. We do not, however, rely primarily on the desirability of filtering out meritless claims. Rather, we think Congress was interested in ensuring the effective prosecution of meritorious claims.

Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness. He is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. The adage that “a lawyer who represents himself has a fool for a client” is the product of years of experience by seasoned litigators.

A rule that authorizes awards of counsel fees to *pro se* litigants—even if limited to those who are members of the bar—would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

Miller, 665 N.E.2d at 906-7.

The U.S. 7th Circuit Court of Appeals has not yet been presented with this issue; however, it is noteworthy that 7th Circuit Court Judge Richard D. Cudahy was part of the three-member 2nd Circuit panel that decided S.N. See 448 F.3d at 601.

COMPUTERS AND ONLINE ACTIVITY: STUDENT FREE SPEECH AND “SUBSTANTIAL DISRUPTION”

**By Hillary Knipstein, Legal Intern,¹⁰ and
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On July 5, 2007, the U.S. Court of Appeals for the Second Circuit provided the latest decision in an evolving area of school law analyzing the extent to which public school districts can discipline students for their Internet activity, both on school grounds and off school grounds. Wisniewski v. Board of Education of the Weedsport Central School District, 2007 U.S. App. LEXIS 15924 (2nd Cir. 2007) involved an eighth grade student who used Instant Messaging (“IM”) software on his parents’ home computer to communicate in real time with his friends on his “buddy list.” The student’s icon, which identified him as the sender of a message, was a small drawing of a pistol firing a bullet at a person’s head, with dots above the head representing splattered blood. Below the drawing were the words “Kill Mr. VanderMolen.” VanderMolen was the student’s English teacher at the time. The student created the icon shortly after his class had been instructed that no threats would be tolerated. He sent the icon to 15 of his friends. He did not send it to VanderMolen or any other school official. However, someone did inform VanderMolen of the icon, which resulted in an immediate five-day suspension of the student. He was later suspended for a semester, based upon the perceived disruption of the school by threatening a teacher. The school district did provide him with an alternative education. Law enforcement declined to prosecute.

The parents sued, asserting the school district violated the student’s First Amendment rights of free speech¹¹ for punishing him for his off-campus speech. The federal district court judge granted the school district’s Motion for Summary Judgment. A panel of the U.S. Court of Appeals for the Second Circuit affirmed, applying Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733 (1969), as well as the U.S. Supreme Court’s June 25, 2007, decision in Morse v. Frederick, 127 S. Ct. 2618, (2007). Tinker, the first Supreme Court decision addressing student free speech, involved students who were suspended from school for wearing black armbands in protest of the Vietnam War. The Supreme Court determined that public school districts could not sanction students for their speech merely “to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” 393 U.S. at 509. The student conduct would have to (1) “substantially interfere with the work of the school,” Id.; (2) cause “material and substantial interference with schoolwork or discipline,” Id. at 511; (3) “materially and substantially disrupt the work and discipline of the school,” Id. at

¹⁰ Hillary Knipstein served as a Legal Intern with the Legal Section, Indiana Department of Education, during the Fall Semester of 2006. Ms. Knipstein, a second-year law student at the time, served through the Program on Law and State Government, Indiana University School of Law–Indianapolis.

¹¹“Congress shall make no law...abridging the freedom of speech....” The First Amendment is applicable to the States through the Fourteenth Amendment (“...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life liberty, or property, without due process of law; nor deny to any person equal protection of the laws.”)

513; or (4) “might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.” Id. at 514.

In Morse, the Supreme Court applied the third element above to find that a student’s display of a banner apparently promoting illicit drug usage during a school-sponsored event was not “speech” that merited protection because the speech at issue would materially and substantially disrupt the work and discipline of the school.¹²

In Wisniewski, the 2nd Circuit found that the middle school student’s transmission of an icon depicting the killing of his English teacher was not the sort of expression of opinion that would be protected by Tinker; rather, the “speech” crossed the boundary of protected speech. The transmission of the icon, even though not sent to the teacher or any school official, constituted misconduct that posed a reasonably foreseeable risk that would materially and substantially disrupt the work and discipline of the school. The panel did not believe that the fact the icon was transmitted off-campus using non-school equipment and not on school time should insulate the student from discipline because it was reasonably foreseeable the icon would reach school officials. The potential for disruption was clear. The student’s speech was not merely offensive. It was threatening.

Wisniewski involved a middle-school student. Not surprising, many of the computer-related incidents resulting in school discipline involve middle-school students. As the Internet becomes more pervasive, children at a younger age are becoming more computer- and Internet-savvy. They are provided numerous chances throughout each day to access the Internet both at home and at school. As a result of this increased student computer access and proficiency, schools have found it difficult in some circumstances to discipline students for their computer usage and online activity, especially when new student behaviors evolve from conduct that is not explicitly covered in the school’s disciplinary code.

A first generation of First Amendment cases involving student discipline arising out of Internet/computer usage has evolved, implicating the constitutionality of school sanctions for computer/Internet behavior. The threat of pending constitutional litigation and the complexity of that litigation sometimes act as a deterrent to schools in disciplining students for *any* of their computer conduct. First Amendment issues aside, there are several statutory authorities that may provide wide latitude for student discipline (and, in some cases, potential prosecution) for online/computer behavior.

¹² As will be seen later in this article, the Supreme Court’s four decisions addressing student free speech issues all involve speech at school or at a school-sponsored activity. In Morse, the student held up the banner across the street from the school but directed it towards school personnel and other students. The activity was a school-sponsored one (celebrating the passing of the Olympic Torch on its way to the Winter Olympics). The Supreme Court has not yet addressed off-campus student speech.

Hacking

Before wading into the murky waters of the First Amendment, there are some computer usages by students that merit sanctions primarily because the activity is criminal or criminal in nature. Most of these computer crimes are analogous to property damage, but legislatures find it difficult to stay abreast of the rapid changes that are occurring. The Indiana General Assembly is no stranger to these relatively new intrusions. The legislature has created criminal liability for certain computer crimes, including computer trespass.

Indiana Code § 35-43-1-4(b), **Computer Tampering**, provides:

A person who knowingly or intentionally alters or damages a computer program or data, which comprises part of a computer system or computer network[,]
without the consent of the owner of the computer system or computer network
commits computer tampering, a class D felony.

Indiana Code § 35-43-2-3(b), **Computer Trespass**, provides:

A person who knowingly or intentionally accesses: (1) a computer system; (2) a computer network; or (3) any part of a computer system or computer network;
without the consent of the owner of the computer system or computer network, or
without the consent of the owner's licensee, commits computer trespass, a Class
A misdemeanor.

According to this latter statute, a student who decides to use the Internet or other means to hack¹³ into the school's computer system could be committing a criminal offense. Even though a school's Internet/computer usage policy may not explicitly provide sanctions for this type of activity, Indiana's criminal law does. Indiana law allows a school to suspend or expel a student for the student's "unlawful conduct" on or off school property, whether or not school is in session, if the unlawful activity may reasonably be considered to be an interference with school purposes or an educational function; or it is necessary to restore order or protect people on school property. I.C. § 20-33-8-15.¹⁴

One of the earlier computer hacker cases is Pittsburgh Board of Public Education v. M.J.N., 524 A.2d 1385 (Pa. Cmwlth. 1987). M.J.N., a high school freshman, was suspended for thirty (30) days from school for allegedly gaining unauthorized access after school hours into the school district's main computer. He accomplished this feat from his home computer. The suspension was based, *inter alia*, on violations of the school's rules involving damage, destruction, or theft

¹³ Indiana law does not define "hack" or "hacking." In United States of America v. Riggs, a/k/a Johnson, a/k/a Prophet and Neidorf, a/k/a Knight Lightning, 739 F.Supp. 414, 423-424 (N.D. Ill. 1990), a court had to define the term. Relying upon various dictionary definitions, the court defined "hacker" as "[o]ne who gains unauthorized, usually non-fraudulent access to another's computer system." Hackers, the court noted, "exhibit a spectrum of behavior from benign to malicious." Whatever the motive of the hacker, the term means anyone "involved with the unauthorized access of computer systems by various means."

¹⁴ As noted in Sherrell v. Northern Community School Corporation, 801 N.E.2d 693 (Ind. App. 2004), "unlawful activity" in I.C. § 20-33-8-15 does not require a judicial determination of unlawful conduct before a school may discipline a student under this statute.

of school property. The student sought injunctive relief, which the trial court granted, finding the school board failed to provide M.J.N. a fair hearing. Another hearing was held and he was again suspended for thirty (30) days. The trial court eventually reversed the school board and ordered M.J.N. reinstated in school. The school board appealed.

The Pennsylvania Commonwealth Court affirmed the determinations of the trial court, finding that the school board had impermissibly commingled prosecutorial and adjudicative functions, thus denying the student basic due process rights. The dispute was remanded to the school board to conduct an appropriate hearing. What was not in dispute in this matter was whether the school board could discipline the student for “property damage” resulting from his alleged hacking activities, even though the school rule being applied referred to “school property” globally and was not written with computer hacking in mind.

Boucher v. School Board of Greenfield, 134 F.3d 821 (7th Cir. 1998), a case emanating from Wisconsin, did not involve direct computer hacking. Rather, it involved a publication that instructed others how to engage in such an untoward activity. *The Last* was an underground newspaper distributed at the high school. In one issue there appeared an article entitled “So You Want To Be A Hacker,” which purported to instruct would-be hackers how to enter the school district’s computers. The article was written by self-professed “hackers with anarchistic views.” The article did provide genuine information that could be used to hack into the school district’s computers. It also warned about trying to do this while using the school’s computers. The author was eventually determined to be Justin Boucher, who had just completed his junior year. He was suspended shortly before the school year ended. The school district moved to expel him because his article had “endangered school property.” Id. at 822-23. Boucher sought injunctive relief, claiming the expulsion violated his First Amendment rights. A preliminary injunction was eventually granted by a federal district court judge. However, a panel of the 7th Circuit Court of Appeals vacated the preliminary injunction. Id. at 823.

The school board was justified in expelling Boucher. Boucher’s article instructed others on how to gain unauthorized access to the school district’s computer programs by disclosing restricted access information. This violated Wisconsin law (which is similar to Indiana’s law) as well as the school board’s policy on the acceptable use of school computers and the Internet. Although the article was not written at school, it was distributed at the school. The 7th Circuit was not persuaded by Boucher’s characterization of the article as “mere advocacy” that should be protected by the First Amendment. Id. at 824. There was testimony that someone following Boucher’s instructions could gain access and alter student grades and disciplinary information entered by individual teachers. Even if Boucher’s article did not violate Wisconsin’s criminal statute, it did violate the school board’s computer policies. Id. at 825.

The potential for substantial disruption is evident. The school board was justified in taking disciplinary action against Boucher for what it believed to be a serious threat to school property. “The utter defeat of the Board’s disciplinary efforts [by issuing the preliminary injunction] when confronted by a self-proclaimed ‘hacker’ is clearly a substantial harm.” Id. at 827. In addition to the immediate threat of unauthorized access, the school’s technology expert had to conduct hours of diagnostic tests on the computer system and change all the passwords referenced in the

article. In this case, school officials had a reasonable basis for believing Boucher's expression would be disruptive. *Id.* at 828. The article was not, as Boucher described it, "a mere hostile critique" of the high school, a parody of "anarchist high school hackers," or an altruistic attempt to "increase computer literacy among students." "Instead, it purports to be a blueprint for the invasion of Greenfield's computer system along with encouragement to do just that." *Id.* It also does not matter that the article was written off-campus. The article was distributed on campus and advocated certain on-campus activity (the attack on the school district's computer system). *Id.* at 829.

Cyber-Bullying

Cyber-bullying refers to the practice of using Internet communication, either direct (e-mail, Instant Messaging) or indirect (websites, blogs¹⁵) to degrade or humiliate another person or group of people.

Indiana Code § 20-33-8-0.2 defines bullying as follows:

[O]vert, repeated acts or gestures including: (1) verbal or written communications transmitted; (2) physical acts committed; or (3) any other behaviors committed; by a student or a group of students against another student with the intent to harass, ridicule, humiliate, intimidate, or harm the other student.

Indiana does not appear to differentiate "cyber-bullying" from the traditional concept of bullying. Indiana's definition of bullying focuses on the intended effects of the bully's behavior, not on the means the bully employs to achieve this end.

Indiana law requires public schools to adopt discipline rules that meet specific requirements that further public policies within the educational system. I.C. § 20-33-8-13.5 provides as follows:

- (a) Discipline rules adopted by the governing body of a school corporation under Section 12 [I.C. § 20-33-8-12] of this chapter must:
 - (1) prohibit bullying; and
 - (2) include provisions concerning education, parental involvement, reporting, investigation, and intervention.
- (b) The discipline rules described in subsection (a) must apply when a student is:

¹⁵"Blog" is short for "web log." *New Hampshire v. Goupil*, 908 A.2d 1256, 1262 (N.H. 2006). A "blog" is "an online personal journal with reflections, comments, and often hyperlinks provided by the writer." *McCabe v. Basham*, 450 F.Supp.2d 916, 925, *n.* 4 (N.D. Iowa 2006). Others have described a "blog" as "a type of online diary posted to a website." *In re Injunction: Zyprexa Litigation*, 474 F.Supp.2d 385, 393 (E.D. N.Y. 2007). A "blogger" is one who writes a "blog" while "blogging" is the act of posting information on the "blog" or reading information posted by others on a "blog." The "blogosphere" is the universe where all "blogs" and "bloggers" (and their readers) are engaged in "blogging." See, *e.g.*, *U.S. v. Conrad Black*, 483 F.Supp.2d 618, 621 (N.D. Ill. 2007) ("The case has generated similarly intense commentary in the blogosphere").

- (1) on school grounds immediately before or during school hours, immediately after school hours, or at any other time when the school is being used by a school group;
- (2) off school grounds at a school activity, function, or event;
- (3) traveling to or from school or a school activity, function, or event; or
- (4) using property or equipment provided by the school.

Indiana's current campaign to stop bullying combined with the aforementioned statutory authorities seem to not only allow for the disciplining of "cyber-bullying" but also to require Indiana schools to create disciplinary measures specific to "cyber-bullying," particularly in situations where the bully would be using school computers, school-provided Internet access, or even e-mail accounts provided by the school to target his or her victim.

A school that is extremely wary of violating First Amendment rights by disciplining cyber-bullying can rely on the criminal law, which criminalizes certain acts of harassment and intimidation without differentiating between the actual means used to harass or intimidate a victim. As previously noted, Indiana law allows for schools to discipline students for unlawful activity that may reasonably be considered to be an interference with school purposes or an educational function, or where it is necessary to restore order or protect people on school property. This would be so regardless where or when the "unlawful activity" occurred. I.C. § 20-33-8-15.

Indiana's harassment statute, I.C. § 35-45-2-2, provides as follows:

- (a) A person who, with intent to harass, annoy, or alarm another person but with no intent of legitimate communication:
 - (1) makes a telephone call, whether or not a conversation ensues;
 - (2) communicates with a person by telegraph, mail, or other form of written communication;
 - (3) transmits an obscene message, or indecent or profane words, on a Citizens Radio Service channel; or
 - (4) uses a computer network (as defined in IC 35-43-2-3(a))¹⁶ or other form of electronic communication to:
 - (A) communicate with a person; or
 - (B) transmit an obscene message or indecent or profane words to a person; commits harassment, a Class B misdemeanor.
- (b) A message is obscene if:
 - (1) the average person, applying contemporary community standards, finds that the dominant theme of the message, taken as a whole, appeals to the prurient interest in sex;

¹⁶ "Computer network" means the interconnection of communication lines or wireless telecommunications with a computer or wireless telecommunication device through remote terminals; a complex consisting of two (2) or more interconnected computers; or a worldwide collection of interconnected networks operating as the Internet.

- (2) the message refers to sexual conduct in a patently offensive way; and
- (3) the message, taken as a whole, lacks serious artistic, literary, political, or scientific value.

Because the Indiana law specifically addresses computer communications in defining harassment, cyber-bullying can be considered to be within the definition of harassment. Thus, even if a school policy fails to address the issue directly, the school may still discipline a harassing student for his or her “unlawful activity.”

Indiana’s statute addressing “intimidation” is comprehensive. I.C. § 35-45-2-1 reads in relevant part:

- (a) A person who communicates a threat to another person, with the intent:
 - (1) that the other person engage in conduct against the other person’s will;
 - (2) that the other person be placed in fear of retaliation for a prior lawful act; or
 - (3) of causing:
 - (A) a dwelling, a building, or another structure; or
 - (B) a vehicle;to be evacuated;commits intimidation, a Class A misdemeanor.

- (b) However, the offense is a:
 - (1) Class D felony if:
 - (A) the threat is to commit a forcible felony;
 - (B) the person to whom the threat is communicated: ...
 - (iv) is an employee of a school corporation; ...

 - (D) the threat is communicated using property, including electronic equipment or systems, of a school corporation or other governmental entity; ...

- (c) “Threat” means an expression, by words or action, of an intention to:
 - (1) Unlawfully injure the person threatened or another person, or damage property;
 - (2) Unlawfully subject a person to physical confinement or restraint;
 - (3) Commit a crime;
 - (4) Unlawfully withhold official action, or cause such withholding;
 - (5) Unlawfully withhold testimony or information with respect to another person’s legal claim or defense, except for a reasonable claim for witness fees or expenses;
 - (6) Expose the person threatened to hatred, contempt, disgrace, or ridicule;
 - (7) Falsely harm the credit or business reputation of the person threatened;or

- (8) Cause the evacuation of a dwelling, a building, another structure, or a vehicle.

Indiana has case law in a school context on what constitutes “transmission” or “communication” of statements that could constitute harassment or intimidation. In *J.T. v. Indiana*, 718 N.E.2d 1119 (Ind. App. 1999), a high school student, using school equipment, typed a description of violent acts to be inflicted upon another student and sent the document to the printer. The student and another student found a book in the school library on witchcraft. J.T., using a computer in the library, typed up a witches’ calendar from the book and sent the document to the only printer in the library, which was located in a restricted area. The librarian gave the document to J.T. without comment. J.T. and the other student then created another document based on occult themes from the book, mentioning another student as a potential sacrifice. *Id.* at 1121-22. School administrators intercepted the document and eventually delivered it to the student identified in the document. The author was suspended from school and charged with intimidation and harassment. The juvenile court found J.T. to be a delinquent child. *Id.* at 1122. The Indiana Court of Appeals reversed. The appellate court held that the “communication” element of harassment and intimidation were not met because, although the student drafted a document that contained a possible threat, the document was not transmitted or communicated by the student-author to the object of the threat. The court noted that communication of a threat need not be direct but can also be indirect, so long as the means for communication made it likely the intended target would be aware of the threat. *Id.* at 1123. In addition, the court held that all of the evidence indicated the student-author thought that her document would just be printed and returned to her; she had no reason to believe that it would reach the purported object of the threat. *Id.* “The printing of a single document, without more, does not constitute a communication to the person named in the document.” *Id.* While J.T.’s delinquency adjudication was reversed, her school-based discipline was not. “However, the same facts that would support school discipline may be insufficient as a matter of law to support a true finding based on a criminal statute.” *Id.* at 1124. “[A]s citizens, we are entitled to think what we want and write what we want, and it is only when we communicate those thoughts or attempt to communicate those thoughts that we can be held accountable.” *Id.* at 1125¹⁷.

While this case has certain implications for written documents, it leaves unanswered the question of what “communication” would entail when dealing with Internet conduct like blogging or similar website postings where the threat isn’t actually addressed or communicated to the object of the threat, but is visible and accessible to the public at large.

The Children’s Internet Protection Act

Indiana public schools that receive federal grants or other educational funds may not use those funds to provide Internet access to their students without first creating and enforcing an Internet

¹⁷ The Indiana Department of Education, Office of Student Services, through its Indiana School Safety Specialist Academy, provides considerable information on cyber-bullying and how to address it. Please see http://www.doe.state.in.us/issas/cyber_bullying.html (last visited July 18, 2007).

safety policy. Schools receiving grants or educational funds would be obligated to provide appropriate discipline for students' online misbehavior. The Child Internet Protection Act (CIPA) reads in relevant part:

(a) In General.—No funds made available under this part to a local educational agency for an elementary school or secondary school that does not receive services at discount rates under section 254(h)(5) of the Communications Act of 1934 (47 U.S.C. 254 (h)(5)) may be used to purchase computers used to access the Internet, or to pay for direct costs associated with accessing the Internet, for such school unless the school, school board, local educational agency, or other authority with responsibility for administration of such school both—

(1)(A) has in place a policy of Internet safety for minors that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

- (i) obscene;
- (ii) child pornography; or
- (iii) harmful to minors; and

(B) is enforcing the operation of such technology protection measure during any use of such computers by minors; and

(2)(A) has in place a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

- (i) obscene; or
- (ii) child pornography; and

(B) is enforcing the operation of such technology protection measure during any use of such computers

20 U.S.C. § 6777; 20 U.S.C. § 9134(f)(1). Thus, the school has both the right and, in many cases, the responsibility to monitor students' computer behavior and also to create and enforce a discipline policy that holds students accountable for their online behavior while using school computers. While the CIPA only requires technology to prevent children from seeing or accessing material that could be offensive or harmful to them, it is notable that CIPA has survived a First Amendment challenge.¹⁸ CIPA's existence despite this challenge indicates that students' right to free speech inside the classroom is limited by a school district's responsibility to create a safe environment for its students.

¹⁸ See, for example, U.S. v. American Library Assoc., 539 U.S. 194, 123 S. Ct. 2297 (2003) (plurality opinion), finding CIPA was a valid exercise of congressional authority and did not violate the Free Speech Clause of the First Amendment.

Pending Legislation–Deleting Online Predators Act of 2006

Besides the CIPA, Congress has attempted to pass legislation designed to protect children from the potential harms presented by Internet access. Some congressional attempts have been subjected to judicial scrutiny with mixed results.¹⁹ A current Congressional effort targets online predators.

The Deleting Online Predators Act (DOPA) focuses on limiting the use of “social networking” websites like MySpace.com, Thefacebook.com, and other online chat-rooms on computers at schools and libraries because of privacy and safety concerns for children who may frequently encounter sexual predators while using these websites. Basically, the DOPA requires schools and libraries receiving federal funding to prohibit access to commercial social networking websites or chat rooms where children may be presented with obscene or indecent material, subjected to unlawful sexual advances, or gain access to other material that is otherwise harmful to minors. However, the act does allow for an administrator to permit supervised access to the networking sites for educational purposes. Schools and libraries that do not comply with these acts could lose federal funding. H.R. 5319: Deleting Online Predators Act of 2006. Despite First Amendment concerns, the DOPA passed the House of Representatives in May of 2006 but did not pass the Senate before the 109th Session of Congress adjourned. The bill has been revived in the 110th Congress. On June 18, 2007, Rep. Mark Kirk (R-Ill.) introduced H.R. 1120, which has been referred to the House Energy and Commerce Committee.

The Supreme Court’s Student Free Speech Cases

As of June 25, 2007, the U.S. Supreme Court has had occasion to decide four (4) disputes involving the extent to which students may exercise their First Amendment free-speech rights within the context of the public school. The seminal case is Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733 (1969). In Tinker, school district officials had suspended students who wore black armbands to school in protest of the Vietnam War. The Court held that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” 393 U.S. at 506. The Court found the school’s actions violated the students’ freedom of speech, Id. at 513-14, noting that “[t]he problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment.... Our problem involves direct, primary First Amendment rights akin to ‘pure speech.’” Id. at 507-08. In order for a public school to justify a prohibition of a particular expression of opinion, the school must “show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” Id. at 509. The school district could not prohibit the students from wearing the

¹⁹ See, for example, The Communications Decency Act of the Telecommunications Act of 1996, 47 U.S.C. § 223, which was found unconstitutional in Reno v. ACLU, 521 U.S. 844, 117 S. Ct. 2329 (1997); the Child Pornography Prevention Act, P.L. 104-128 (1996), also determined unconstitutional, Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389 (2002); and the Child Online Protection Act, 47 U.S.C. § 231 (1998), which was enjoined because of likely First Amendment infringement of rights, Ashcroft v. ACLU, 542 U.S. 656, 124 S. Ct. 2783 (2004).

armbands without a showing that this conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” *Id.* The school district could not rely upon an “undifferentiated fear or apprehension of disturbance.” *Id.* at 508. Rather, the school district needed evidence that such disruption had occurred or was likely to occur. In *Tinker*, the school was unable to produce evidence upon which there could have been a reasonable forecast of disruption. There was no evidence the students’ conduct had actually caused a disruption. Accordingly, the school district’s actions violated the students’ free speech rights.

Seventeen years later, the Supreme Court revisited student speech in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159 (1986). In this case, a high school student was disciplined for a speech at a school assembly nominating a classmate for student government. The speech was laced with sexual innuendo that provoked a series of responses from the 600 students in attendance. These responses ranged from yelling and mimicry to bewilderment and embarrassment. The school disciplined him for violating a school rule that prohibited the use of obscene or profane language or gestures that materially and substantially interfered with the educational process. The Court distinguished *Tinker* from this matter, noting that there is a “marked distinction between the political ‘message’ of the armbands in *Tinker* and the sexual content of respondent’s speech in this case.” 478 U.S. at 680. The Court recognized “that the constitutional rights of students in the public schools are not automatically coextensive with the rights of adults in other settings.” *Id.* at 682. Lewd and vulgar speech differs from speech that expresses a certain viewpoint. The school district’s discipline of this student was not related to any political viewpoint. “The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission,” which includes teaching students appropriate social behavior. *Id.* at 681, 685. “A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.” *Id.* at 685. “[S]chools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct.” *Id.* at 683.

A mere two years later, the Supreme Court decided *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562 (1988), where the Court upheld, against a First Amendment challenge, a principal’s deletion of student articles on teen pregnancy and divorce from the school newspaper. Noting that the school had not opened the school newspaper as a public forum, the Court found that a school can exercise editorial control over the content of student speech in a school-sponsored newspaper “so long as [the school’s] actions are reasonably related to legitimate pedagogical concerns.” 484 U.S. at 273. The Court distinguished its holdings in *Tinker* and *Fraser*, noting that *Fraser* involved vulgar and offensive speech while *Tinker* rested upon the propensity of the speech to materially disrupt the school or create a substantial disruption. The Court also distinguished personal expression that happens to occur on school premises from expressive activities that are sponsored by the school in the sense that such speech may fairly be characterized as part of the school curriculum or attributable to the school. *Id.* at 270-271.

Lastly, the Supreme Court decided Morse v. Frederick, 551 U.S. ___, 127 S. Ct. 2618 (2007) on June 25, 2007. This case involved a high school student who displayed a banner that read “Bong HiTS 4 Jesus” while the Olympic torch was passing by the school on its way to the Winter Olympics in Utah. The student was standing on the street across from the school but the event was school sponsored. Although it was not clear what message the student meant to convey, the consensus was that the message advocated or promoted the illegal use of drugs. A “substantial disruption” test need not be employed. A principal may, consistent with the First Amendment, restrict student speech at a school event where that speech is reasonably viewed as promoting illegal drug use. 127 S. Ct. at 2628-29. The Morse court acknowledged that “[t]here is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents.” Id. at 2624. Justice Samuel A. Alito, Jr., in his concurring opinion, sought to ensure that Morse could not be applied any “further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use” or be used to “support...any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as ‘the wisdom of the war on drugs or of legalizing marijuana for medicinal use.’” Id. at 2636.

Any analysis of student free speech vis-à-vis a public school district’s responsibility to maintain discipline and promote the values of citizenship will implicate one or more of the Supreme Court’s decisions. The following are representative areas of dispute where courts have wrestled with balancing these relative rights and responsibilities.

Overbreadth and Vagueness: Validity of Policies

School policies attempting to regulate student Internet/computer use can sometimes result in violations of constitutional rights. In Flaherty v. Keystone Oaks School District, 247 F.Supp.2d 698 (W.D. Pa. 2003), a school attempted to discipline a student according to the policies set forth in the school’s Student Handbook for posting messages on an Internet message board about an upcoming volleyball game. He posted three messages from both his parents’ home and one from school. Although the messages concerned the upcoming volleyball game, several of the messages contained insults directed towards the mother of one of the opposing players. The mother was also a teacher at Flaherty’s school. The handbook defined various concepts in rather broad terms (*e.g.*, “attack,” “harassment”) and forbade “inappropriate language” or “verbal abuse...toward an employee” which “may be considered [an] ‘attack.’” In addition, each student was required to “express ideas and opinions in a respectful manner so as not to offend or slander others.” The handbook also included a provision listing “technology abuse” as a punishable infraction.” The term proscribed the “use of computers to receive, create or send abusive, obscene, or inappropriate material and/or messages[.]” Id. at 701, *n.* 3. The court held that the school’s policy was overbroad because it did not limit the authorization of a school official to discipline a student where the student’s speech was either causing a substantial disruption to operation of the school or was likely to cause such a disruption, nor did the policy include any geographic limitations on sanctionable student conduct. Id. at 703-04, 706. The court added that even if the policy were not overbroad, the terms used in the handbook to define “technology abuse”—such as “abuse,” “offend,” “harassment” and “inappropriate”—were not sufficiently defined in such a manner that students would have adequate warning what conduct was

prohibited. *Id.* at 704. As such, the provisions were unconstitutionally vague. In addition, the lack of functional definitions in the handbook could lead to arbitrary enforcement.²⁰ *Id.* “Thus, without any further definition or limitation, the policy could be (and is) read by school officials to cover speech that occurs off school premises and that is not related to any school activity in an arbitrary manner.” *Id.* at 706.

The court’s decision in *Flaherty* does not negate the authority of schools to draft school policies that regulate student computer and Internet usage. However, for such policies to be considered constitutionally valid, these policies cannot allow for student discipline for conduct that does not cause, or is not likely to cause, a substantial disruption to school operations. The policies must be fashioned in such a way that students are put on notice of exactly what type of computer/Internet conduct will subject them to discipline at school. A constitutionally valid school policy on student computer/Internet usage should include precise definitions for operative terms like “abusive,” “harassing,” or “inappropriate,” along with illustrations of what types of conduct could result in school discipline. There should also be an inclusionary statement that allows for discipline for similar types of behavior.²¹ In addition, a school policy on computer/Internet usage should make clear that the school can discipline a student for conduct that occurs off campus, due to the characteristics of the Internet that allow for consequences to occur far away from the actual computer conduct. Finally, school policy on school discipline should be broadly distributed to students, parents, and teachers to give them notice of the changing school policy.²²

Other courts have analyzed constitutional challenges to school policies as applied to computer speech. See *Layshock v. Hermitage School District* and *Coy v. Bd. of Education of the North Canton City Schools*, *infra*.

First Amendment Issues

More tension is created when schools discipline students for their computer/Internet conduct where no potential criminal activity has occurred, such as damage to school property through hacking, cyber-bullying, or the communication of a threat, as discussed *supra*. The tension arises between maintaining school order and discipline while respecting students’ First Amendment right to free speech. Computer/Internet conduct is also problematic because a

²⁰ The principal testified that the situation would depend not upon where the speech occurred, even if off school grounds and unrelated to any school activity. He believed he could punish any speech that was disrespectful or negative toward the school or the volleyball team. “While [the principal] believes he can discipline a student for bringing ‘disrespect, negative publicity, negative attention to our school and our volleyball team,’ this is simply not sufficient to rise to the level of ‘substantial disruption’ under *Tinker*.” *Id.* The volleyball coach provided similar testimony. *Id.* at 706.

²¹ *Where Does Tradition End and Hazing Begin? Implications for School District Policy*, 196 West Ed. Law Rept. 19, 26 (2005).

²² *Id.*

student's conduct may not always occur at school but can oftentimes be viewed at school. In addition, Internet/computer conduct involves typed, somewhat passive language that is unlike the vocal communication that can disrupt a class. Notwithstanding, computer speech can be more pervasive, as the speech can be easily viewed and disseminated to anyone with computer access. The off-campus speech issue is difficult to dissect because the Supreme Court's four cases addressing student speech involved speech that occurred either on-campus (Tinker, Fraser, and Hazelwood) or at a school-sponsored event (Morse). Under the Tinker-Fraser-Kuhlmeier trilogy (Morse to a lesser degree), schools can regulate student speech that presents a substantial classroom disruption, impinges upon the rights of others, is lewd or vulgar, or is presented in a manner that the student speech could be construed as school-sponsored speech.

What constitutes a substantial disruption?

The first generation of case law regarding a school's ability to sanction students for their Internet conduct without impinging on their First Amendment right to free speech has not provided definitive direction so as to determine what type of Internet conduct constitutes (or can reasonably be projected to cause) a substantial disruption or material interference with school functions. While the definition of "substantial disruption" in regards to computer conduct continues to evolve, the current case law has established some basic guidelines on the subject.

Student conduct that involves insults so cruel and severe that a teacher was forced from her classroom has been considered a substantial disruption. In J.S. v. Bethlehem Area School District, 807 A.2d 847 (Pa. 2002), a middle-school student created a website on his home computer called "Teacher Sux" and posted it on the Internet. The site was dedicated to insulting school administrators, particularly his algebra teacher. His website featured profane language directed towards the teacher, a graphic that showed her picture with her head morphing into Hitler's, a picture showing the teacher with her head cut off, a list of reasons why she should die, and a special section where he solicited donations to fund a hitman to kill her. The teacher was so upset by the content of the website that she had to take a medical leave and begin taking medication for anxiety and depression. The school attempted to permanently expel the student from school for making a threat to a teacher. Using a Tinker analysis, the court held the school could constitutionally discipline the student because his website constituted a substantial disruption in that it caused the teacher's absence and thus deprived the other students of their regular classroom teacher. Id. at 869. It is also noteworthy that although the student's "speech" occurred off campus, he facilitated the on-campus speech by accessing the website on a school computer, showing the website to another student and informing other students of its existence. Id. at 865.

Computer conduct that creates a substantial "buzz" in the student body or causes damage to school computers or networks may constitute a substantial disruption. In Layshock v. Hermitage School District, 412 F.Supp.2d 502 (W.D. Pa. 2006), a high school student posted a "parody profile" of his principal on a MySpace.com website, featuring the principal's purported answers to an online survey, along with the principal's photograph, which the student copied from the school district's website. The student used his grandmother's computer and developed the parody during non-school hours. The parody, which contains vulgarity and many sexual

connotations, seemed to be a tremendous hit with the students—teachers described the school as “abuzz” when news of the parody spread. As a result, the website was accessed so many times from the school that the computer system reportedly crashed. The website “blitz” and ensuing computer crash deprived students of academic use of school computers and forced the technology assistant to spend a great deal of his time fixing the problem instead of developing the school computer system. Several classes were reportedly cancelled. The court used a Tinker analysis and held that the website created a substantial disruption because it caused the school computers to crash, depriving students of academic use of the computers. Id. at 508.

Under these circumstances Plaintiff’s actions appear to have substantially disrupted school operations and interfered with the rights of others, which, along with his apparent violations of school rules, would provide a sufficient legal basis for Defendants’ actions. Therefore, the Court finds and rules that Plaintiffs have not demonstrated a reasonable probability of success on the merits of the case.

Id. Accordingly, the student’s motion for a temporary injunction was denied. Id. at 509. But this was just the injunction stage. When the record was more fully developed, the court viewed the matter differently.

On July 10, 2007, the court issued Layshock v. Hermitage School District, et al., 2007 U.S. Dist. LEXIS 49709 granting in part Layshock’s Motion for Summary Judgment, finding the school district violated his First Amendment free-speech rights. As noted *supra*, this dispute arose after Layshock, then a 17-year-old senior who had no disciplinary history to speak of and who was academically successful, decided just before Christmas recess to create a “parody profile” of one of the high school principals, which he then posted on “MySpace.com,” a popular Internet site where users can share photos and similar personal information with “friends” the user designates. The profile was juvenile, vulgar in parts, and crude. Needless to say, it did not provide a flattering profile of the principal. Layshock used his grandmother’s computer to create the parody. He did not use school equipment and did not develop the profile on school time. 2007 U.S. Dist. LEXIS 49709 at *2-3. The principal was also targeted at the same time by three other parody profiles on MySpace. Some of the content of the other profiles was considerably more vulgar than Layshock’s creation. Layshock apparently had nothing to do with the other three profiles. Id. at *4.

As early as October of that school year, school officials had attempted to block student access through the school computers to MySpace but had little success. Students were still able to find other ways to access profiles through other web addresses. The four profiles that appeared in December became something of a discussion item in high school classes. Some students—including Layshock—accessed the profiles through school computers while at school. Teachers expressed concern about the students’ interest in the profiles. School officials considered shutting down the computer system but decided not to. Eventually, school officials contacted MySpace directly to have the profiles disabled. Id. at *4-7. Shortly thereafter, the school was successful in blocking all access to MySpace through the school computer system. Id. at *9. During the four days before Christmas recess, the use of computers was limited. Teacher supervision was required for students to use the computers. Computer programming

classes were suspended. *Id.* at *8-9. However, no substantial disruption was observed during this time. *Id.* at *6. Some disruption did occur, but school officials cannot directly attribute which of the four profiles may have caused the disruption. *Id.* at *9.

The school conducted an investigation. Although the authors of the other three profiles were never determined, Layshock admitted to creating one of the profiles. He was suspended from school and notified that a hearing would be held to consider any additional disciplinary action. The school charged Layshock with violations of certain disciplinary codes: “Disruption of the normal school process; Disrespect; Harassment of a school administrator via computer/Internet with remarks that have demeaning implications; Gross misbehavior; Obscene, vulgar and profane language; Computer Policy violation (use of school pictures without authorization).”²³ *Id.* at *10-11. Following his hearing, Layshock received a ten-day out-of-school suspension, was removed to an alternative education program for the remainder of the year, was banned from attendance at or participation in any school events, and prohibited from participating in the graduation ceremony.²⁴ Layshock sued the school district and certain administrators, claiming in part a violation of his First Amendment free speech rights.²⁵ *Id.* at *11-12.

The court denied Layshock the injunctive relief he sought. See *supra*. However, after the subsequent receipt of additional evidence, the court determined that the school had violated Layshock’s First Amendment rights: His off-campus speech did not result in a substantial disruption of school operations. *Id.* at *12-13.

This is an important and difficult case, in which the Court must balance the freedom of expression of a student with the right and responsibility of a public school to maintain an environment conducive to learning. This case began with purely out-of-school conduct which subsequently carried over into the school setting.

Id. at *14-15. The court determined that the “substantial disruption” test from *Tinker* would provide the analytical framework for this dispute. *Fraser* involved student speech in school and would not apply. *Morse* does not provide anything new, other than it clarified that *Fraser* does not permit school officials to proscribe speech—including off-campus speech—merely because school officials believe such speech to be “offensive.” *Id.* at *17-20, citing *Morse*, 2007 WL 1804317 at *10.

²³ The “use of school pictures without authorization” stems from Layshock’s “cut and paste” of the principal’s picture from the school’s website to his parody profile.

²⁴ The school eventually readmitted Layshock to his standard classes, allowed him to participate in school activities, and allowed him to participate in the graduation ceremony. See 2007 U.S. Dist. LEXIS 49709 at *13.

²⁵ He also claimed the school’s policies were unconstitutionally overbroad and vague. In addition, he raised a Fourteenth Amendment claim of interference with the rights of his parents to determine how best to raise him. The court found the policies were not overbroad or vague, and found no merit in the Fourteenth Amendment claim. 2007 U.S. Dist. LEXIS 49709 at *43-50.

The court acknowledged the school officials, under Tinker, did not have to wait until there was a “substantial disruption” before they could act. They could take pre-emptive action where there is a “specific and significant fear of disruption.” Id. at *20-21. However, “a mere desire to avoid discomfort or unpleasantness will not suffice.” The “emotive impact” of the offensive content of the speech on a listener does not authorize school officials to prohibit such speech. Rather, there must be a “well founded expectation of disruption, such as past incidents arising out of similar speech.” Id. at *21 (internal punctuation and citation omitted).

The threshold, and most difficult, inquiry is whether the school administration was authorized to punish [Layshock] for creating the profile. The mere fact that the Internet may be accessed at school does not authorize school officials to become censors of the world-wide web. Public schools are vital institutions, but their reach is not unlimited. Schools have an undoubted right to control conduct within the scope of their activities, but they must share the supervision of children with other, equally vital, institutions such as families, churches, community organizations and the judicial system.

Id. at *22. The court recognized that the “reach of school administrators is not strictly limited to the school’s physical property.” Id. at *24. Schools have the “undoubted ability to govern student conduct at school-sponsored” events that occur off the school property, such as field trips, athletic contests, and other similar competitions, as well as during the transportation to and from such events. “On the other hand, the mere presence of a student on school property does not trigger the school’s authority.” Id. at *24-25. Whether the school has the authority to discipline a student depends upon timing, function, context, or interference with school operations. This is usually a straight-forward matter. “However, in cases involving off-campus speech, such as this one, the school must demonstrate an appropriate nexus.” Id. at *27-28.

The court noted that Layshock’s parody was “lewd, profane and sexually inappropriate.” “Nevertheless, *Fraser* does not give the school district authority to punish him for creating it. In effect, the rule in *Fraser* may be viewed as a subset of the more generalized principle in *Tinker*, i.e., that lewd, sexually provocative student speech may be banned without the need to prove that it would cause a substantial disruption to the school learning environment. However, because *Fraser* involved speech expressed during an in-school assembly, it does not expand the authority of schools to punish lewd and profane off-campus speech. There is no evidence that [Layshock] engaged in any lewd or profane speech while in school. In sum, the *Fraser* test does not justify the Defendants’ disciplinary action.” Id. at *28-29.

Utilizing the Tinker analysis, the court concluded the school officials “have not established a sufficient nexus between [Layshock’s] speech and a substantial disruption of the school environment. There are several gaps in the causation link between Layshock’s off-campus conduct and any material and substantial disruption of operations in the school.” Id. at *29-30. There was little evidence that it was Layshock’s profile (as differentiated from the other three profiles) that caused a “buzz” in the school. In some instances, it was the school’s investigation that caused more disruption than any of the profiles. In any event, any disruption that occurred “was rather minimal—no classes were cancelled, no widespread disorder occurred, there was no

violence or student disciplinary action.... The profiles were accessible for less than one week before being disabled immediately prior to the Christmas vacation. There were some student comments about the profiles. However, in *Tinker* the Supreme Court held that the far more boisterous and hostile environment sparked by the children wearing anti-Vietnam war armbands...did not give school officials a reasonable fear of disturbance sufficient to overcome their right to freedom of expression.” *Id.* at *30-31.

The court also noted that the charges the school leveled against Layshock were for his off-campus conduct. “On this record, there is no evidence that the school administrators even knew that [Layshock] had accessed the profile while in school prior to the disciplinary proceedings.” *Id.* at *33. There was also no fear of any future disturbances. The school was dismissed for Christmas vacation, MySpace removed the profiles, the school blocked access to MySpace, and Layshock was suspended immediately upon resumption of classes. “In sum, the School District has failed to demonstrate a sufficient causal nexus between [Layshock’s] conduct and any substantial disruption of school operations. Accordingly, the School’s right to maintain an environment conducive to learning does not trump [Layshock’s] *First Amendment* right to freedom of expression based on the evidentiary record in this case.” *Id.* at *33-34. Layshock was entitled to summary judgment on his *First Amendment* claim.²⁶

While the aforementioned case law seems to establish a very broad standard for what constitutes a substantial disruption, online conduct that is merely offensive to school administrators but does not threaten or actually result in physical harm to school administrators or property, is not considered a substantial disruption. In *Latour v. Riverside Beaver School Dist.* 2005 U.S. Dist. LEXIS 35919 (W.D. Penn. 2005), a middle school student wrote and recorded four rap songs at his home, one of which was entitled “Murder, He Wrote,” and mentioned another student by name. The student’s other rap songs were considered to be “battle raps.” In all, three students were referenced in the rap songs. After the student uploaded these songs onto his webpage, the school sought to expel him from school for two years. The court held that because none of the students named in the songs felt any imminent threat of harm, the student did not have a violent history, and the raps caused no other academic disruption, the school violated the student’s *First Amendment* right to free speech by disciplining him for posting his songs on the Internet. The school district was enjoined from expelling or otherwise sanctioning the student.

The federal district court disagreed with the school district that the rap songs constituted a “true threat.”²⁷ The student’s songs were written in the rap genre where violent language and imagery

²⁶ The court’s discussion of qualified immunity for specific school officials is of special note. The court characterizes this dispute as a “close call,” and even though the court determined the school officials violated Layshock’s *First Amendment* rights, these rights were not clearly established. The Supreme Court has not addressed off-campus student speech, and even in its recent decision in *Morse*, it is evident from the five separate opinions issued that the highest court struggles with student speech within a public school context. See *Id.* at *40-42.

²⁷ “True threats” are “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals....” In analyzing whether a communication is a “true threat,” a court will consider the speaker’s intent, the intended victim’s reaction, how the threat was communicated (directly or indirectly), whether the threat was conditional, and whether the

are common but no actual violence is intended. The student did not communicate these songs directly to any of the named students, nor did any of the students feel threatened by the songs. The student did not bring the songs to school, and he did not have a history of violence. Additionally, the court noted, the school district conducted no investigation of its own, did not search the student's locker to determine whether he possessed any type of weapon, did not refer him to counseling, did not talk to him or his parents, and did not remove him from school until the expulsion, all of which tends to militate against the school district's present argument that school personnel considered the rap songs to constitute "true threats" against the other students.

The court also rejected the school district's argument that the student's rap songs caused a substantial disruption to the school's functions. There was no evidence the student sold the songs at school or otherwise sought to distribute them there. There were no fights or other disturbances. The only disruption that occurred—and these were slight—were in the reactions of other students to the school's expulsion of the student and not in reaction to his rap songs.

In Coy ex rel. Coy v. Board of Education of the North Canton City Schools, 205 F.Supp. 2d 791 (N.D. Ohio 2002), a middle-school student created a website on his home computer and during non-school time. The website chronicled the actions of a group of skateboarders, and included pictures, quotes, and information about the student and his friends. The website also contained a "losers" section, which contained pictures and insulting comments about other boys at the student's school. The website also contained numerous grammatical and spelling errors as well as other pictures of students making obscene gestures. "While somewhat crude and juvenile," the court wrote, "the website contains no material that would remotely be considered obscene." Id. at 795.

The student and his mother had signed the school's acceptable use policy (AUP) at the beginning of the school year, which prohibited, *inter alia*, hacking and the display of "offensive messages and pictures." Id.

The student was caught accessing his website at school in the school's computer lab. The student was suspended for four days and then ultimately expelled for 80 days for what the school described as obscenity, disobedience, and inappropriate action or behavior.²⁸ The student had never been previously suspended or expelled. Using a Tinker analysis, the court denied both parties' motions for summary judgment because issues of material fact existed, notably whether the school disciplined the student for accessing the unauthorized website or for the content of the website itself. Id. at 800-01. The court hinted that the school had a heavy burden to bear, stating that the school could not have constitutionally punished the student for the content of his website. Its discipline must have been due to the student's accessing the unauthorized or

speaker had a propensity for violence. Virginia v. Black, 538 U.S. 343, 359, 123 S. Ct. 1536 (2003).

²⁸ At issue were Sections 8 (obscenity), 14 (disobedience), and 21 (inappropriate action or behavior) of the Student Conduct Code. As will be seen, Sec. 21 was considered unconstitutional. This section read as follows: "Any action or behavior judged by school officials to be inappropriate and not specifically mentioned in other sections shall be in violation of the Student Conduct Code." Id. at 796.

unapproved website, but even at that, to constitutionally discipline him for accessing the site, the school must prove that the student's access created a substantial disruption. Id.

The court expressed skepticism regarding the school's proffered reasons for disciplining the student, describing them as "implausible." Id. at 800. Even assuming a jury would find the school disciplined the student for violating its AUP rather than for the content of his website, the burden will not shift. "[N]o evidence suggest [the student's] acts in accessing the website had any effect upon the school district's ability to maintain discipline." Id. at 801.

Although Sections 8 and 14 of the Student Conduct Code did contain some ambiguous terminology, the court did not find these unconstitutional because of overbreadth or vagueness. These sections established an "identifiable standard of conduct," are "sufficiently clear," and are limited to school-related applications. Id. at 803. Sec. 21, however, is different. This section is "impermissibly vague because it does not give students any indication of what actions or behavior would lead to discipline." Id. at 802. The court described Sec. 21 as a "catch-all" provision that "invites arbitrary, discriminatory and overzealous enforcement." Id. (citation omitted). Sec. 21 "is constitutionally invalid on its face." Id.

In Emmet v. Kent School District No. 415, 92 F.Supp.2d 1088 (W.D. Wash. 2000), a high school student posted mock "obituaries" of fellow students and faculty members on his website, "The Unofficial Kentlake High Home Page," which he created with his father's help. The website was developed at home, on non-school resources, and on the student's own time. The student had no disciplinary history. He maintained a high grade-point average and was involved in athletics. The website was inspired by a creative writing assignment where students were required to write their own "obituaries." The website became very popular with the students: They started submitting their own "obituaries" and voted for who would "die" next and be the subject of a fake obituary.

Unfortunately, a television news program learned of the website and referred to the mock "obituaries" as a "hit list," although these words appeared nowhere on the website. Following the television news broadcast, the student removed the site from the Internet. Nevertheless, the school district expelled him for "intimidation, harassment, disruption to the educational process, and violation of Kent School District copyright." Id. at 1089. The expulsion was later modified to a five-day suspension. Id.

The school district was unable to present to the court any evidence that any student felt threatened or intimidated by the content of the website. Id. The court, in granting the student's request for a temporary restraining order, noted that the student's speech was not at a school assembly (Fraser) and was not in a school-sponsored newspaper (Hazelwood), nor was it produced in connection with any class or school project. "[T]he speech was entirely outside of the school's supervision and control." Id. at 1090.

The court enjoined the school from suspending the student, finding there was no evidence that the mock obituaries and voting on his website were intended to threaten or intimidate, or did

actually threaten or intimidate anyone, nor did the website manifest any violent tendencies of the student.

In Killion v. Franklin Regional School District, 136 F.Supp.2d 446 (W.D. Pa. 2001), a high school student compiled a “Top Ten” list on his home computer that was uncomplimentary towards the athletic director at his school. The list contained statements that made fun of the athletic director’s weight and several remarks about his sex life. He e-mailed the list to the home computers of several friends from his home computer, but he did not bring the list to school. An undisclosed student printed the list and brought it to school. The student was suspended from school for ten days after he admitted to creating the list. The school characterized the student’s list as “verbal, written abuse of a staff member.” Id. at 448-49. The suspension was warranted, the school stated, because the student admitted he created the list, it contained offensive remarks about a school official, and the list was found on school grounds. The court noted that school officials’ authority over off-campus expression is much more limited than expression that occurs on the school grounds. Id. at 454. The court, applying Tinker, held that the suspension violated the student’s First Amendment rights because the school failed to show any evidence of actual disruption that occurred as a result of the list. Although upsetting to the athletic director, the list contained nothing threatening to students or staff, nor was there any language that would lead school officials to reasonably anticipate a substantial disruption. Id. at 455-56. In addition, the court held that the speech was not threatening. Id. at 455.

The school district argued that there was a reasonable expectation of disruption based on past incidents where this student had created lists. Although the student had created lists in the past and had been warned that bringing these lists on campus in the future would result in disciplinary action, there was no evidence the prior lists had caused any disruptions, nor was the student disciplined for these previous lists. Id. at 455-56.

The court rejected the school’s argument that the student’s list would impair the school’s ability to discipline students. The “childish and boorish antics of a minor,” without more, could not impair the school’s authority, the court found. Id. at 456. The school district cannot discipline the student for “lewd, vulgar, or profane speech” because the speech occurred off school grounds such that Fraser would not apply. Id. at 456-58.

In Beussink v. Woodland R-IV School District, 30 F.Supp.2d 1175 (E.D. Mo. 1998), a high school student created a homepage from his home computer, criticizing (in sometimes crude and vulgar language) his high school and its administration. While a female friend was using his computer, she saw the homepage. Later, in retaliation for an argument between the friend and the student, she showed the website to a computer teacher at her school. The teacher became upset and reported the homepage to the principal. When the principal saw the homepage, he immediately decided to suspend the student for five days. Later in the day, he extended the suspension to ten days. The court held that these suspensions were unconstitutional because the school failed to show that any substantial disruption occurred because of the student’s website. The student had created the website from his home computer and had not given the address to anyone at school, nor had he accessed the webpage at school. In addition, the court held that the

speech on the website was not threatening, and the fact that others might find the website crude or vulgar was not an acceptable justification for limiting student speech under Tinker.

Any disruptions that occurred in the school were the result of the principal serving the two notices of suspension on the student while he was in class. The principal's immediate decision to suspend the student for his off-campus speech, absent any substantial disruption, runs afoul of Tinker. "Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*." Id. at 1180. "Speech within the school that substantially interferes with school discipline may be limited. Individual student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection." Id. at 1182.

These First Amendment cases suggest that online/computer speech that advocates, threatens, or causes physical harm to be done to school property is considered a substantial disruption and can constitutionally be restricted. Beyond those websites posing actual or threatened physical harm to school property, what online/computer speech might constitute a "substantial disruption" under Tinker is still somewhat malleable. While some website content, particularly content developed off campus through private means, may be offensive to school officials, generally this is insufficient basis to restrict the speech as a "substantial disruption." However, where the content crosses a certain line so as to constitute a "true threat" to staff or other students, this could be considered an actual or potential "substantial disruption" justifying the need for sanctions.

CANINE "SNIFFS" AND THE FOURTH AMENDMENT: IMPLICATIONS FOR SCHOOL-BASED SEARCHES

By Shanida Sharp, Legal Intern²⁹

The Fourth Amendment protects individuals from unreasonable searches and seizures by the government.³⁰ This prohibition against unreasonable governmental intrusions extends to state public school officials as well. New Jersey v. T.L.O., 469 U.S. 325, 336-37, 105 S. Ct. 733 (1985). In T.L.O., the U.S. Supreme Court found that a school official's search of a high school student's purse after she had been discovered smoking cigarettes in the school lavatory was justified at its inception and reasonable in its scope, even though the search for cigarettes revealed the student possessed drugs and drug paraphernalia.

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³⁰ The Fourth Amendment to the U.S. Constitution reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

School officials need not have probable cause, the court wrote. Rather, there must be “reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” 469 U.S. at 342. The search will be “permissible in its scope” where “the measures adopted are reasonably related to the objectives of the search and [are] not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” Id.

The “special needs” context of the public school excuses strict adherence to the probable cause required in a criminal context. Id. at 341 (requiring individualized suspicion). What is reasonable in a public school context is determined by balancing the school district’s interest against the student’s expectation of privacy. In a public school context, students have a reduced expectation of privacy when compared with the public at large. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656-57, 115 S. Ct. 2386 (1995) (holding that randomly testing student athletes for drug use satisfied the Fourth Amendment). See also Bd. of Education of Ind. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 122 S. Ct. 2559 (2002) (upholding a school board’s random, suspicionless drug-testing program for students in extracurricular activities).³¹

Courts have found that what a school official perceives through the olfactory sense may give rise to the type of “reasonable grounds” that would justify a search. See, e.g., Rhodes v. Guarricino, 54 F.Supp.2d 186 (S.D. N.Y. 1999) (court found principal’s search of students’ hotel rooms while on class trip was constitutionally reasonable as the search followed the principal smelling marijuana around a cluster of students outside one of their rooms).

But what if the nose doesn’t belong to a person, the search is a general one, and there is no individualized suspicion?

Dogs have often been used in schools to sniff out contraband and associated paraphernalia. For over thirty years, state and federal courts have wrestled with the constitutional limits of dog-sniff endeavors.

On May 22, 2006, the United States Supreme Court declined to review Myers v. Indiana, 839 N.E.2d 1154 (Ind. 2005), *cert. den.* 126 S. Ct. 2295 (2006), letting stand the decision of a divided (3-2) Indiana Supreme Court. In Myers, a high school student was charged with possession of a firearm on school property after police discovered the weapon during a canine drug sweep of student lockers as well as vehicles in the school's parking lot.³²

³¹ Also see Linke v. Northwestern School Corporation, 763 N.E.2d 972 (Ind. 2002), where the Indiana Supreme Court found that the school district’s random, suspicionless drug-testing of students involved in athletics, extracurricular activities, or driving to school did not violate the Indiana Constitution, Art. 1, § 11 (unreasonable search or seizure) and Art. 1, § 23 (equal privileges or immunities).

³² The dogs were specifically sniffing for narcotics. One of the dogs “alerted” on Myers’ car. A school administrator had Myers unlock his car. During the subsequent search of the car, the school administrator found the firearm. The court did not find relevant the fact that the search unveiled an item that the dog was not at the school to detect.

The school officials at Scott County School District had authorized the police to conduct a drug search with trained dogs in mid-December of 2002.³³ Students were held in their classrooms while the dogs sniffed the lockers and the cars in the school parking lot. Two dogs were used during the inspection. If one dog alerted to the scent of drugs, a second dog was brought in. If the second dog detected drugs, a school official would search the locker or vehicle. Myers, 806 N.E. 2d at 350 (Ind. App. 2004). Both dogs alerted twice to the scent of drugs after sniffing Myers' vehicle. The assistant principal searched the car and found a loaded gun. Id. Subsequently, the student was charged with possession of a firearm. Myers moved to suppress the evidence for lack of a warrant or individualized suspicion. The trial court denied the motion. The defendant appealed to the Indiana Court of Appeals, which affirmed the trial court's decision. The Indiana Supreme Court granted transfer and affirmed (3-2) the denial of Myers' motion to suppress.

The defendant argued that the search was unconstitutional. He asserted that the search was not a school search but a police search; that the search was conducted without individualized reasonable suspicion; and that the warrantless search was not justified by either his consent or the "automobile exception."³⁴ The majority rejected all these arguments.

In reaching its decision, the majority relied on Illinois v. Caballes, 543 U.S. 405, 125 S. Ct. 834 (2005), which held that "a dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Constitution." 534 U.S. at 410. Specifically, the Caballes court decided the matter on a narrow issue: "Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop." Id. at 407. On this narrow issue, the answer was "no." The court even assumed that the "officer conducting the dog sniff had no information about the respondent except that he had been stopped for speeding." Id. In Caballes, a drug-sniffing dog alerted to the presence of drugs in Caballes' trunk while one police officer was writing him a ticket. When the second police officer opened the trunk, he found marijuana. Id. at 406.

Myers held where searches are "initiated and conducted by school officials alone or where school officials initiate a search and police involvement is minimal, the reasonableness standard is applicable." 839 N.E. 2d at 1160. "[T]he ordinary warrant requirement will apply where 'outside' police officers initiate, or are predominantly involved in, a school search of a student or student property for police investigative purposes." Id. The court relied upon New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733 (1985), which articulated boundaries for searches conducted by school officials, finding such searches are not subject to the "probable cause" test but rather the "reasonableness" standard. The Indiana Supreme Court concluded that reasonable

³³ Additional facts are taken from the Indiana Court of Appeals' opinion. Myers v. Indiana, 806 N.E.2d 350 (Ind. App. 2004).

³⁴ The automobile exception is an exception to the warrant requirement. The exception applies when a vehicle's "ready mobility" excuses an officer from obtaining a warrant once there is probable cause to conduct a search. See Myers, 806 N.E.2d at 353-54 (Ind. App. 2004) (citations omitted).

suspicion is not required for a narcotics dog to sniff the exterior of a vehicle “that does not involve an unreasonable detention of a person.” 839 N.E.2d. at 1161.³⁵ Moreover, it found that the search was “reasonable because it was conducted after an alert by a police narcotics dog.” Id. The court noted that the school officials limited their searches only to those areas where the dogs alerted. Id.³⁶

The dissent, on the other hand, thought the drug sweeps were orchestrated under the aegis of law enforcement and less at the behest of school officials. Justices Frank Sullivan, Jr., and Robert D. Rucker both believed that the “probable cause” requirement should have been applied and that the search, as conducted, violated the Fourth Amendment. Justice Sullivan asserted the search was conducted by police officers and not by school officials on their own initiative pursuant to “educationally related goals.” Id. at 1162.

Justice Rucker argued that reasonable suspicion is required before using a narcotics dog to perform a sniff test. Id. at 1163. He stressed that in Caballes (the case the majority relied on in its decision), the Supreme Court repeatedly emphasized the use of dog sniffs following a legitimate traffic stop. Id. The Supreme Court in Caballes identified a narrow issue, as noted above, “Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle *during a legitimate traffic stop.*” 543 U.S. at 407 (emphasis added). At several times, the high court used the words “traffic stop” or “lawful traffic stop” when qualifying the context of dog sniff. See Myers, 839 N.E. 2d at 1163. Ultimately, the Supreme Court concluded that “a dog sniff conducted during a *concededly lawful traffic stop* that reveals no information other than the location of the substance no individual has any right to possess does not violate the Fourth Amendment.” Caballes, 543 U.S. at 410 (emphasis added). Justice Rucker argued the majority in this case “expands the use of drug-sniffing dogs to a variety of contexts not specifically sanctioned by the Caballes court, notably to cars that are ‘parked and unoccupied.’” Myers, 839 N.E. 2d at 1164. He cited several cases in contexts other than traffic stops where the courts required reasonable suspicion of criminal

³⁵ Other courts have indicated that a dog alert itself provides reasonable suspicion for school officials (or probable cause for police officers) to search the item that the dog alerted to. See, e.g., State v. Barrett, 683 So.2d 331, 339 (La. App. 1996) (“Once the drug detection dog alerted on the wallet, the principal had *probable cause* to suspect the wallet contained drugs and was justified in searching the wallet without a warrant.”) (emphasis added); Huff v. Ohio Dep’t of Admin. Servs., 658 N.E.2d 356, 363 (“Once a trained dog alerts to the odor of drugs from a lawfully detained vehicle, an officer has *probable cause* to search the vehicle for contraband.”) (citations omitted) (emphasis added).

³⁶ The Indiana Supreme Court did not address whether the dog sniff itself was a “search.” This issue has already been decided by the U.S. Supreme Court. Dog sniffs are in their own category. A dog sniff is considered “*sui generis*” (unique) because it “discloses only the presence or absence of narcotics, a contraband item.” United States v. Place, 462 U.S. 696, 707, 103 S. Ct. 2637 (1983) (“[N]o other investigative procedure [] is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.”). The court held that a sniff test by a trained narcotics canine is not a search within the meaning of the Fourth Amendment. See also City of Indianapolis v. Edmond, 531 U.S. 32, 40, 121 S. Ct. 447, 453 (2000) (“The fact that officers walk a narcotics-detection dog around the exterior of each car ... does not transform [a] seizure into a search.”); State v. Watkins, 515 N.E.2d 1152, 1155 (Ind. App. 1987) (“That the smell testing by the trained dog is not a search within the meaning of the Fourth Amendment is clear”), citing, Place, 462 U.S. at 707. These cases all involved searches of objects and not persons.

activity. *Id.* Furthermore, he asserted the reasonableness standard applies in situations where “the evidence is not used or intended to be used for criminal law enforcement purposes.” *Id.* at 1165. In this case, because the school’s drug prevention policy was intended to discover evidence for law enforcement purposes, Justice Rucker asserted the probable cause requirement was necessary. *Id.* The lower constitutional standard applies to the school officials, not the police conducting the search. Lastly, he contended “where a law enforcement officer directs, participates, or acquiesces in a search conducted by school officials, the officer must have probable cause for that search, even though the school officials acting alone are treated as state officials subject to a lesser constitutional standard.” *Id.* at 1166, quoting A.J.M. v. State of Florida, 617 So.2d 1137, 1138 (Fla. App. 1993).

Three years prior to Myers, the Indiana Supreme Court decided a case with similar facts. School officials, in conjunction with the local police, used drug-sniffing dogs to locate contraband on the school’s campus. In South Gibson Sch. Bd. v. Sollman, 768 N.E.2d 437 (Ind. 2002), neither the parties nor the court raised any issue with the use of the drug-sniffing dogs. This may be due to the fact that, unlike in Myers, the student in South Gibson was appealing his expulsion and the denial of credits rather than appealing a denial to suppress evidence in a criminal or delinquency proceeding based on the evidence obtained during the school search.³⁷

The first dog-sniff case reported in Indiana found its way to the 7th Circuit. The U.S Supreme Court declined to review the 7th Circuit decision. Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), *reh. den.*, *cert. den.*, 451 U.S. 1022, 101 S. Ct. 3015 (1981)³⁸. In this case, a 13-year old child was subjected to a nude search after a narcotics-sniffing dog alerted to the possible presence of drugs.

Highland, Indiana is a medium-sized city in northwest Indiana³⁹. At the time of this dispute, the city had a Junior and Senior High School that were adjacent to each other and shared common facilities. 475 F. Supp. at 1015. School officials became concerned about the growing drug problem at the Junior and Senior High Schools during the 1978 academic year. *Id.* During that year, there were twenty-one (21) recorded instances of drug- or alcohol-related infractions. There was a four-week period of daily reports by parents, students, faculty, and school administrators of drug use on the two school campuses. Due to the pervasiveness and severity of the drug problem, members of the school board decided to use drug-sniffing canines to search for drugs within the school buildings. *Id.* at 1016. The school officials requested the assistance of the local police and volunteer canine units to detect and remove any drugs or drug paraphernalia. *Id.* “The school officials insisted, and the police agreed, that no criminal

³⁷ The results of the canine sniff in Sollman were not for law enforcement purposes but for school-based decision- making, a result that courts have looked favorably upon in approving other school policies that are somewhat invasive. See, e.g., Linke v. Northwestern Sch. Corp., 763 N.E.2d 972 (Ind. 2002) (approving random drug testing).

³⁸ Renfrow was decided prior to T.L.O. For more information about T.L.O., see “Strip Searches of Students: Expectations of Privacy, Reliable Informants, and Special Relationships,” **Quarterly Report** April-June 2005.

³⁹ The facts are taken from the district court opinion. Doe v. Renfrow, 475 F. Supp 1012 (N.D. Ind. 1979).

investigations would occur as a result of any evidence recovered during the school investigation.” Id.

In March of 1979, the school administrators, with the assistance of the Highland police and volunteer canine units, conducted the drug sweep. A canine team was sent to each classroom to sniff the students for drugs. Once a dog alerted to a student, the student was asked to empty his or her pockets or purse. Eleven students were asked to undergo a body search once the dog continued to alert after the pockets or purse were emptied. Diane Doe was one of those students escorted to the nurse’s office, where she disrobed and was searched by two women. No drugs were found on the plaintiff. It was discovered that Doe had been playing with one of her dogs before school. The dog was in heat. Id.1016-1017. Ultimately, only 17 of the 50 students alerted to were found to be in possession of drugs or drug paraphernalia. Id. at 1017.

Doe filed a complaint against the superintendent, the principal, five members of the Highland Town School District Board, the local police chief, and the trainer of drug-detecting canines. Renfrow, 631 F.2d. at 91. Doe sought actual and punitive damages, as well as declaratory and injunctive relief. Id. at 92.

The federal district court found that the detention and inspection of over 2,000 students was constitutionally valid, except for the strip search. The court then dismissed the complaint against the police chief and the dog trainer because they did not personally participate in the strip search. The court also granted summary judgment to the defendant school officials and denied petitioner’s claim for damages against the school officials on the ground that they were immune from liability under the “good faith” defense⁴⁰ established in Wood v. Strickland, 420 U.S. 308, 95 S. Ct. 992 (1975). The judge concluded Doe was entitled to declaratory relief because the nude search was made without reasonable suspicion and this violated her Fourth Amendment rights. Id. at 92.

The 7th Circuit Court of Appeals affirmed the district court’s decision, “except with respect to the portion of the decision that the defendant school officials are immune from liability arising out of the nude search.” The court cited both common sense and human decency for the reason for reversing the district court on that issue.

It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under "settled indisputable principles of law."

⁴⁰ Wood “found that school officials who act ‘in good-faith fulfillment of their responsibilities and within the bounds of reason under all circumstances’ and ‘not in ignorance or disregard of settled indisputable principles of law’ are immune from liability.” Myers, 631 F.2d at 92, citing Wood, 420 U.S. at 321. Additionally, the court will not require school officials to “predict [] the future course of constitutional law” (citations omitted).

Id. at 93 (citations omitted). The 7th Circuit then remanded the case to the trial court to determine the issue of damages. Four judges dissented from the court's declination to rehear the case *en banc*. *Id.* at 93-95. Judge Luther Swygert contended that the "dragnet inspection" of the junior and senior high school students did, in fact, constitute a search under the Fourth Amendment. *Id.* at 93. Additionally, he argued that neither the school officials nor the police had individualized reasonable suspicion of any particular students or group of students. Essentially, "all 2,780 students were under suspicion, and there was no crime." *Id.* at 94. Judge Swygert addressed the fact that the police did not plan on arresting any students found in possession of narcotics. "The Fourth Amendment protects against unreasonable searches because of 'the rights of the people to be secure in their persons' whether or not an arrest would necessarily follow." *Id.* Judge Thomas Fairchild questioned the reliability of using dog alerts to establish probable cause and justify the student searches. *Id.* at 95. Judges Harlington Wood and Richard Cudahy also dissented, but did not express an opinion on the merits of the case. *Id.*

Doe petitioned the U.S. Supreme Court to review the case; however, the court denied the petition. *Doe v. Renfrow*, 451 U.S. 1022, 101 S. Ct. 3015 (1981). Justice William J. Brennan, Jr., wrote an opinion dissenting to the court's denial of certiorari. He stated that he would have granted the petition and reversed the portions of the Court of Appeals' opinion that affirmed the district court's judgment. *Id.* at 1022. He argued that the school officials' use of the trained drug-sniffing dogs constituted a search under the Fourth Amendment. Additionally, he contended that when school administrators used the police in their efforts to address the drug problem, "they step outside the quasi-parental relationship, and their conduct must be judged according to the traditional probable-cause standard." *Id.* at 1026. It was irrelevant that the police agreed not to arrest any students found in possession of drugs. *Id.* at 1026, *n.* 6. Lastly, Justice Brennan stated that the school officials lacked probable cause or even reasonable suspicion of any particular students who may be using drugs at school. All the school administrators had was a "generalized hope" that their investigation would lead to discovering illegal drug materials. *Id.* at 1027. For these reasons, he would have found the search was unconstitutional.⁴¹

Circuit Courts of Appeal are split on whether canine sniffs of a person constitute a search for Fourth Amendment purposes. While the 7th Circuit held that the dog-sniffing of students is not a search, other Circuit Courts have rejected this and criticized the case. These courts found that dog sniffs of a person, absent individualized reasonable suspicion, is unconstitutional. *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982) was decided one year after *Renfrow* (but still before *T.L.O.*). Similar to the facts in *Renfrow*, school officials responded to the growing drug problem by bringing in dogs to detect drugs and other contraband. Here, school officials contracted with a private security firm that trained dogs to alert to the scent of drugs and alcohol. *Id.* at 474. School officials also conducted school-wide assemblies to acquaint the

⁴¹ Justice Brennan revisited this theme four years later in the *T.L.O.* decision, where he concurred in part and dissented in part. He agreed that school officials could conduct a search of a student's belongings without first obtaining a warrant but "not [when] acting as agents of law enforcement authorities." 469 U.S. at 355-56 (Brennan, J., dissenting).

students with the dogs and inform them of the program. At random times, the dogs came to inspect lockers, vehicles, and students. Students who triggered alerts were discreetly asked to leave so that their pockets, purse, and person could be searched. No nude searches were conducted.

Two of the three plaintiffs triggered alerts by the dogs, but school officials found no drugs on either of them. *Id.* The plaintiffs alleged that the school district violated the Fourth Amendment. The plaintiffs moved for class certification. Both parties moved for summary judgment. The district court denied the class certification. Further, the district court held that the dog sniffing was a search, but it was not unreasonable. Additionally, it concluded that the reasonableness standard applied to school officials acting *in loco parentis*, and that the alert of the dogs provided reasonable suspicion to search students (pockets, purses, and outer garments), lockers, and vehicles. The court also held that the dog-sniff program does not violate the Due Process clause of the Fourteenth Amendment⁴². The plaintiffs appealed the district court's decision. *Id.*

Relying on United States v. Goldstein,⁴³ 635 F.2d 356 (5th Cir. 1981), *cert. denied*, 452 U.S. 962, 101 S. Ct. 3111 (1981), the 5th Circuit Court of Appeals held that dog sniffs of lockers and vehicles are not searches and consequently did not address the issue of reasonableness. 690 F.2d at 477. "*Goldstein* stands for the proposition that the use of the dogs' nose to ferret out the scent from inanimate objects in public places" is an extension of the officer. *Id.* The "use of a canine's more enhanced (through training) olfactory sense cannot convert a sniff of the exterior of those suitcases into a search." Goldstein, 635 F.2d at 361 (citations omitted).⁴⁴ "The use of the dogs to sniff the students, however, presents an entirely different problem." Horton, 690 F.2d at 477. The court first addressed whether a dog sniff was a search and then whether it was reasonable.

The court concluded that the intrusive nature of a dog-sniffing inspection renders it a search. *Id.* at 479. Second, the court held the dog sniff was unreasonable and, therefore, unconstitutional due to the lack of individualized suspicion. *Id.* at 482. "The intrusion on dignity and personal security that goes with the type of canine inspection of the student's person involved in this case cannot be justified by the need to prevent abuse of drugs and alcohol when there is no individualized suspicion." *Id.* at 481-82.

The 9th Circuit also addressed the question of whether a dog sniff of a person is a search under the Fourth Amendment. See B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260 (9th Cir. 1999). In this case, a former student, not specifically singled out for a dog-sniff search, filed a

⁴² "...nor shall any state deprive any person of life, liberty, or property, without due process of law[.]"

⁴³ Goldstein is another case decided before *T.L.O.*

⁴⁴ A Texas decision decided two years prior to *Horton* found that drug-sniffing dogs replaced, not enhanced the human sense of smell. Jones v. Latexo Indep. Sch. Dist., 499 F. Supp 223, 233 (E.D. Tex. 1980) (The dogs can "detect odors completely outside the range of the human sense of smell. The dog thus replaced, rather than enhanced, the perceptive abilities of school officials."). Additionally, the court noted that the dogs' capabilities "resembled those of an x-ray machine or bugging device," because their sense of smell can penetrate through things, such as closed car doors. *Id.* at 235.

complaint challenging the search as an unreasonable search and unconstitutional seizure. In May 1996, drug-sniffing dogs were brought in. *Id.* at 1263. The students were asked to exit their classrooms and pass by a dog. The dog alerted to a student other than the plaintiff. Then the dog entered the classroom to sniff the students' belongings. When the students walked by the dog again before re-entering the classroom, the dog alerted to the same student. That student was searched by school officials, but no drugs were found on that student or on any other student on that day. *Id.*

The 9th Circuit Court of Appeals argued that while the U.S. Supreme Court has yet to specifically address whether a dog sniff of a person is a search, it has spoken on whether using a dog to sniff objects is a search. "The Supreme Court has held that the use of a trained canine to sniff unattended luggage is not a search within the meaning of the Fourth Amendment. But neither the Supreme Court nor the 9th Circuit has addressed the issue whether a dog sniff of a person is a search." 192 F. 3d at 1265-66 (citations omitted)⁴⁵.

The 9th Circuit agreed with the court in *Horton*. "Because we believe that the dog sniff at issue in this case infringed upon B.C.'s reasonable expectation of privacy, we hold that it constitutes a search." *Id.* at 1266. In determining whether a suspicionless search may be reasonable, the court relied on a two-part test established in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624; 109 S. Ct. 1402, 1417 (1989). *Id.* at 1267. A search may be reasonable "where (1) the privacy interests implicated by the search are minimal, and (2) where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." *Skinner*, 489 U.S. at 624. Under the first prong, the court determined that privacy interests implicated were not minimal because the search was "highly intrusive" and "completely involuntary." *Id.* at 1267-1268 (quoting the district court). Under the second prong, the court concluded that the "random and suspicionless dog sniff search of [the plaintiff] was unreasonable in all circumstances." *Id.* at 1268. The court agreed that deterring drug use is an important and compelling governmental interest, but the high school did not have a drug problem it was attempting to address. *Id.*⁴⁶ However, the defendants were granted qualified immunity because "when the dog sniff search...occurred, it was not clearly established that the use of dogs to sniff students in a school setting constituted a search." *Id.*

As previously noted, while the courts are split as to whether a dog-sniff of a person is a search, there is a consensus that searches of objects, such as lockers and vehicles, are not searches under the Fourth Amendment. See, e.g., *Barrett*, 683 So. 2d at 337 ("The action of a drug dog in sniffing an *object* is not the equivalent to a search") (emphasis added). In the following two cases, police officials were authorized to use trained canines to detect odors of narcotic substances in automobiles parked in the school parking lot. Police officials are held to a higher standard than school officials, but in both of these cases the courts held the dog alert provided the necessary probable cause to search the car.

⁴⁵ The Court did acknowledge that the 5th and 7th Circuits have previously analyzed this issue. *Id.* at 1266.

⁴⁶ Several of the other cases involve school officials who instituted drug-sniff programs in response to a growing drug problem at the school.

In *Jennings v. Joshua*, 877 F.2d 313 (5th Cir. 1989), *cert. den.* 496 U.S. 935, 110 S. Ct. 3212 (1990), *appeal after remand*, 948 F.2d 194 (5th Cir. 1991), *rehearing, en banc, denied*, 952 F.2d 402 (5th Cir. 1992), *cert. denied*, 504 U.S. 956, 112 S. Ct. 2303 (1992), school officials ran a drug education and deterrence program. School officials contracted with a private security firm⁴⁷ to provide drug-sniffing dogs to detect drugs, narcotics, weapons, and other prohibited contraband on campus. The dogs would visit the school periodically to sniff the parking lot. The goal for the random inspections was to discourage students from bringing banned items to school. *Id.* at 315.

In March of 1989, a dog alerted to a student's car. When she was asked to consent to a search, she refused. Her father, a federal law enforcement official, had advised her to refuse consent if a dog ever alerted to her car. *Id.* The student's father was called to school to give his consent. When he refused, the school officials contacted the police. The situation was then turned over to the police. After the county attorney concluded there was sufficient probable cause to seek a search warrant, the police obtained a search warrant and searched the car. No drugs, weapons, or other prohibited items were found. Claiming a violation of the Fourth Amendment, the father brought suit pursuant to 42 U.S.C. § 1983 suit on behalf of himself and his daughter.

Citing *Horton*, the court found that use of dogs to sniff vehicles in a school parking lot is not a search under the Fourth Amendment. *Id.* at 316. Additionally, the school officials were not implicated because they turned the matter over to the police once the student and her father refused to consent to the search of the vehicle. *Id.* at 317. The court determined that the police officer had probable cause before applying for the search warrant and searching the car. *Id.* at 318.

The Ohio Court of Appeals in *In the Matter of Dengg*, 724 N.E.2d 1255 (Ohio App. 1999) reversed the trial court's judgment, which granted a student's motion to suppress. Streetsboro City Schools gave the local police department permission to inspect the school grounds for drugs with the assistance of trained dogs. The police searched inside the school before moving to the parking lot. *Id.* at 1256. Drug paraphernalia were found in the student's car after a drug-sniffing canine detected the odor. *Id.* The student was charged with possession of drug paraphernalia and he moved to suppress the evidence discovered during the drug search. *Id.* at 1256-57.

The magistrate concluded that the warrantless search was not reasonable and ruled the evidence suppressed. The State of Ohio appealed. The trial court upheld the magistrate's decision. The state appealed to the Ohio Court of Appeals, which found that using a dog to sniff the exterior of an object is not a Fourth Amendment search. *Id.* at 1258-59. Additionally, because of the dog's alert, the court determined the police had probable cause to search the student's car. *Id.* Lastly, once the police had probable cause, they were permitted to conduct a warrantless search under

⁴⁷ This is the same security firm the school in *Horton* utilized. See also *Latexo Indep. Sch. Dist.*, 499 F. Supp 223. There the private security firm was employed to conduct drug inspections with trained drug-sniffing dogs. Here, the Texas district court determined that the dog sniff was a search and that both the search of the students and the vehicles were unreasonable because there was no individualized suspicion prior to the search. The court enjoined the school officials from using "sniffer dogs" to search persons or property without a reasonable belief that particular persons are in possession of contraband.

the automobile exception. The fact that the car was immobilized or unattended did not preclude the police from searching a car parked on public property. *Id.* at 1259. For these reasons, the Court of Appeals reversed the trial court’s judgment and remanded the case.

In Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981), marijuana was found in the plaintiff’s locker after drug-sniffing dogs alerted to his locker.⁴⁸ While the court did not address the Fourth Amendment in regards to the dog sniff that revealed the drugs in the locker, the court decided the search of the lockers did not violate the Fourth Amendment. *Id.* at 670. The court stated that the “search was legal once the probability existed that there was contraband inside the locker.” *Id.* The dog alert indicated that there was some probability that there were narcotics present in the locker.

COURT JESTERS: PROOF IS IN THE PUDD’NHEAD

Mark Twain,⁴⁹ Missouri’s Favorite Son, created through his novels a host of colorful characters who have passed into American lore and language. One who is not so well known is David Wilson, a New York lawyer who traveled west to the village of Dawson’s Landing some time before the Civil War.⁵⁰ Dawson’s Landing was south of St. Louis, on the banks of the Mississippi River.

Unfortunately, upon disembarking Wilson made a peculiar remark about a yelping dog that caused the denizens of Dawson’s Landing to believe him somewhat tetch. Thereafter, they referred to him, not fondly, as “Pudd’nhead” Wilson. Wilson isn’t even the main character in the novel until the end when, through the use of the theretofore unknown forensic science of fingerprinting, he unravels a 23-year-old hoax and solves a sensational murder case.

It is comforting to know that Mark Twain still influences the folksy ways of Missouri residents, even those who may be considered the professional heirs of “Pudd’nhead” Wilson—the lawyers and judges of the Missouri bar.

State of Missouri v. Leslie Paul Knowles, 739 S.W.2d 753 (Mo. App. 1987) started when Knowles was charged with receiving stolen property (a chain saw), which he “kept” with the purpose of depriving the owner of his property. The statute under which Knowles was charged, however, does not use the word “kept.” Rather, it requires the defendant “retain” the property. The trial court judge dismissed the case without prejudice, expecting the prosecutor to amend the charge by changing “kept” to “retained.” He didn’t, though. He appealed.

⁴⁸ This case was also decided prior to *T.L.O.*

⁴⁹Samuel Langhorne Clemens (1835-1910).

⁵⁰*Pudd’nhead Wilson and Those Extraordinary Twins* (1894), also known as *The Tragedy of Pudd’nhead Wilson*.

The Court of Appeals seemed somewhat amused by the semantic dispute from faraway Nodaway County. The opinion begins, appropriately, with a reference to the Favorite Son: “As Mark Twain might have put it, this is a tale about what gets into folks when they don’t have enough to do.”

Appellate Court Judge Anthony Nugent, Jr., writing for the court, did his best to imitate Twain’s knack for both the use of vernacular and the employment of sarcasm.

Old Dave Baird, the prosecuting attorney up in Nodaway County, thought he had a case against Les Knowles for receiving stolen property, to-wit, a chain saw, so he ups and files on Les.

Now Les was a bit impecunious,⁵¹ so the judge appointed him a lawyer, old Dan Radke, the public defender from down around St. Joe. Now, Dan, he looks at that old information and decides to pick a nit or two, so he tells the judge that the information old Dave filed against Les is no good, that under the law it doesn’t even charge Les with a crime. Dan says Dave charged that Les “kept” the stolen chain saw and that’s not against the law. You don’t commit that crime by “keeping” the chain saw, says Dan; the law says you commit the crime of “receiving” if you “retain” the saw, and that’s not what Dave charged Les with, and the judge should throw Dave out of court. And that’s exactly what the judge did.

But old Dave was not having any of that. No, sir! That information is right out of the book. [Citation omitted.] Word for word! Yes, sir!

Bystanders could plainly see the fire in Old Dave’s eyes. He was not backing down. Sure. Dave could simply refile and start over with a new information by changing only one word. Strike “kept”; insert “retained.” But that is not the point. Dave knows he is right.

And so he is.

So we’ll just send the case back to Judge Kennish⁵² and tell the boys to get on with the prosecution.

739 S.W.2d at 754. And so they did...and ever the Twain shall speak. At least in Missouri.

⁵¹This is a 50-cent word, to be sure. “Pudd’thead” Wilson would use such a big word, being from New York and all, or have it applied to him, as it means “penniless” or “poor,” which is what he would have been had he tried to make a living as a lawyer in Dawson’s Landing with such an unfortunate appellation. He had other skills that kept a roof over his head and food in his stomach until the aforementioned murder trial.

⁵²Judge Thomas W. Kennish, Circuit Court, Nodaway County.

QUOTABLE . . .

The purpose of education is not to endow students with diplomas, but to equip them with the substantive knowledge and skills they need to succeed in life. A high school diploma is not an education, any more than a birth certificate is a baby.

Presiding Justice Ignazio J. Ruvolo, O'Connell, et al. v. Superior Court of Alameda County, 47 Cal. Rptr.3d 147, 167 (Cal. App. 2006). (Appellate court required trial court to vacate its preliminary injunction against the California State Board of Education, preventing the State Board from denying diplomas to members of the 2006 graduating class who had not passed both portions of the California High School Exit Exam but were otherwise eligible to graduate.)

UPDATES

Boy Scouts of America

Despite Congressional sanction,⁵³ the Boy Scouts of America (BSA) remain a target for litigation.⁵⁴

1. In “Boy Scouts of America,” **Quarterly Report** January-March: 2005 (update), the case of Powell v. Bunn, 108 P.3d 37 (Ore. App. 2005) was reported. Powell involved an allegation of discrimination under Oregon law. Oregon law prohibits discrimination, *inter alia*, in any public elementary or secondary school or interschool activity where the program, service, school or activity is financed, in whole or in part, by state funds appropriated by the legislature. The State Board of Education established rules to implement this law. The rules provide for a local process with an appeal to the State Superintendent of Public Instruction.

The BSA excludes atheists from membership. The organization recruited members at a public elementary school. The parent of a first-grade student filed a discrimination

⁵³See 36 U.S.C. § 30902 (“The purposes of the corporation are to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods that were in common use by boy scouts on June 15, 1916.”) Also see 20 U.S.C. § 7905, the “Boy Scouts of America Equal Access Act.”

⁵⁴See “Being Prepared: The Boy Scouts and Litigation,” **Quarterly Report** October-December: 2002. Consult the Cumulative Index for additional articles on this topic.

complaint with the local school district, claiming that the BSA's theistic requirement discriminated against her and her son, both of whom are atheists. Although the school district altered some of its internal procedures for distribution of literature and the conduct of presentations by community groups, the school district essentially denied the complaint. The parent appealed to the State Superintendent.

The State Superintendent reviewed the record, determined there was no substantial evidence of discrimination, and declined to take any further action. The trial court reversed, finding the State Superintendent abused his discretion and remanded the dispute to the State Superintendent. The Oregon Court of Appeals affirmed the trial court in significant part, finding the school district did subject persons to differential treatment in a school activity based on religious grounds.

In Powell v. Bunn, 142 P.3d 1054 (Ore. 2006), the Oregon Supreme Court reversed the appellate and trial courts.

The Supreme Court noted the school district did not specially invite the BSA to make presentations at the elementary school. The BSA is one of a number of community organizations that periodically use the school as a venue to provide information to students about the organization activities. Religion was not mentioned during the presentations, nor was religion referenced in any of the material distributed.

The dispute, the Supreme Court noted, is concerned only with the state's anti-discrimination law and not with any constitutional issues, such as the Establishment Clause of the First Amendment.⁵⁵ Id. at 1058.

The anti-discrimination state law prohibits school personnel from discriminating against persons, or from permitting others, including community organizations, from doing so on school property. Id. at 1058-59. The law doesn't prohibit such organizations from discrimination in their own off-campus activities that are not public school programs, services, or activities. Id. at 1059. In this case, classroom time and the school's lunch period were used for BSA presentations and recruitment activities. This would constitute a public elementary school activity and would be covered by the state's anti-discrimination law.

“By the same token, however, the fact that the school district permits a community group to provide flyers to be handed out in the classroom or to make a presentation during lunch period or to include information in a school newsletter does not transform all the activities of that community group, including those that take place off-site or outside school activities, into a ‘public elementary, secondary...school...activity.’” Id.

⁵⁵“Congress shall make no law respecting an establishment of religion[.]...”

In this case, neither school personnel nor BSA officials mentioned religion in any school-based presentation or distribution of literature or other information. The information presented and distributed was neutral in content. Id. at 1059-60.

“The actual (but undisclosed) existence of a religious aspect to the Boy Scouts organization does not change the foregoing facts. In short, all the evidence points to the same conclusion: neither school district personnel nor the Boy Scouts’ representative ‘differentiated treatment’ among school children by disseminating the flyers or the school newsletters, by making presentations during the lunch period encouraging boys to join the Boy Scouts, or by using wristbands to identify those who expressed an interest. Rather, all children were treated precisely the same way.” Id. at 1060.

It is in the later enrollment process where the Boy Scouts differentiate among those who profess a belief in God and those who do not. This is not done by school personnel or on public school property. Id.

“Here, the school district neither directly discriminated against [the student] in its treatment of him nor permitted the Boy Scouts to discriminate against him in any such public school program, service, or activity.” Id.

All the school district did was “permit a community group to provide nondiscriminatory information to parents and students, who may then voluntarily decide the extent of their involvement, or noninvolvement, in such activities.” Id. at 1061.

2. Evans v. City of Berkeley, 129 P.3d 394 (Cal. 2006). The Berkeley Sea Scouts are affiliated with the BSA. It is a nonprofit association. It has no formal administrative structure, no budget, and no employees. The Sea Scouts are ethnically diverse and teach maritime skills to its members, who are both boys and girls. The Sea Scouts have never discriminated against anyone on the basis of sexual orientation or religion, although the BSA does have policies that militate against participation by homosexuals and atheists. See Boy Scouts of America v. Dale, 530 U.S. 640, 120 S. Ct. 2446 (2000) and Curran v. Mt. Diablo Council of the Boy Scouts, 952 P.2d 218 (Cal. 1998). 129 P.3d at 396-97.

In the late 1930s, the local BSA council permitted the city to quarry rock from BSA property in order to build a marina and breakwater. In exchange, the city gave the BSA free berths at the marina for use by the Sea Scouts. This arrangement was formalized through city resolutions in 1945 and 1969. The agreement could be revoked on 30 days’ notice. Id. at 397.

In 1997, faced with requests for free berths from other nonprofit groups, the city council adopted a resolution to create a uniform policy for awarding free berths. Included in the criteria, a nonprofit organization cannot deny access based in relevant part on “a person’s...religion...[or] sexual orientation...” The Waterfront Commission was delegated the responsibility to review applications and provide recommendations to the city council. Id. at 397-98.

The Sea Scouts' application was reviewed in 1998. The commission expressed reservations about the BSA's policies. The Sea Scouts provided a written assurance that attempted to address the commission's concerns. However, the assurance was somewhat equivocal on sexual orientation: "We believe that sexual orientation is a private matter, and we do not ask either adults or youths to divulge this information at any time." Id. at 398.

The commission recommended continuation of the free berth for the Sea Scouts. The city council, however, voted to end the subsidy based on its belief the Sea Scouts would discriminate against an avowed homosexual member or adult leader. The Sea Scouts' association with the BSA was a primary factor in this decision. Id. at 398-99.

The Sea Scouts sued, asserting the city council's "guilt by association" determination violated their free speech and association rights under the First Amendment,⁵⁶ as well as their due process and equal protection rights under the Fourteenth Amendment.⁵⁷ Id. at 399. The trial court dismissed the suit. The California Court of Appeals affirmed, finding the Sea Scouts were denied the free berth subsidy "because they declined to adhere to Berkeley's nondiscrimination policy." No one "attempted to muzzle anyone's speech" or force the Sea Scouts to cease their association with the BSA. The Sea Scouts appealed to the California Supreme Court. Id.

The Supreme Court affirmed the decision of the Court of Appeals "that a government entity may constitutionally require a recipient of funding or subsidy to provide written, unambiguous assurances of compliance with a generally applicable nondiscrimination policy." Id. at 400.

The city's mandate on nondiscrimination in order to secure a subsidy does not require an organization to espouse or to denounce any viewpoint or sever any association. The nondiscrimination policy applied only to a city subsidy-free berths at the marina. The U.S. Supreme Court has a broad rule that government's refusal to subsidize the exercise of a First Amendment right does not infringe upon that right. There are two exceptions to this broad rule.

First, a funding restriction that has as its purpose the suppression of a disfavored viewpoint is subject to strict scrutiny. This is not implicated in this dispute. The city's policy does not require the Sea Scouts to adhere to or renounce any idea or viewpoint. Id. at 402.

Second, a restriction will be considered suspect where it extends beyond limiting the government-funded expressive activity of the recipient to attempt to limit further expressive activities that are not government funded. This one is likewise inapplicable to this situation.

⁵⁶"Congress shall make no law...abridging the freedom of speech[...]...or the right of the people peaceably to assemble...."

⁵⁷"...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The city is not attempting to control the exercise of speech or associational rights of the Sea Scouts outside the marina. The nondiscrimination policy is limited to the marina program subsidized by the city. *Id.* at 403.

The California Supreme Court also rejected the “guilt by association” claim. The Sea Scouts have never discriminated on the basis of religion or sexual orientation (or by any other category). They assert that they are being treated differently solely because of their BSA association. Even though the Sea Scouts have not discriminated in the past, this “does not mean none would occur in the future. To require of a group operating as part of an organization with an official policy of discrimination that it agree in advance not to discriminate in the use of the city’s free marina berths is a reasonable and narrowly tailored step to implement the diversity and nondiscrimination provisions” of the city’s policy. Although other nonprofit organizations not associated with the BSA were not required to provide an assurance statement, this “does not show unequal treatment.” *Id.* at 405.

The Supreme Court observed that although the Sea Scouts attempted to distance themselves from the BSA’s positions on the exclusion of potential members or leaders based on sexual orientation or religion, the organization acknowledged that should the BSA demand compliance with these positions with respect to a potential member or leader, the Sea Scouts would be obliged to comply. *Id.*

The city council has an unambiguous policy of nondiscrimination; the Sea Scouts’ assurance statement is ambiguous, tending to indicate that it reserves the right to discriminate in the future. *Id.* at 406.

“Denial of free berths to a program operating under a national organization with an enforced policy of discrimination, a program that was asked to and would not give an unqualified assurance of future nondiscrimination, was not overbroad or unjustified as a means of enforcing Berkeley’s policy limiting free berths to nonprofit community-service organizations that serve the public diversely and without invidious discrimination.” *Id.*

Visitor Access To Public Schools

The safety needs of public schools, especially following several school shooting incidents, have resulted in increased security measures, including the implementation of visitor polices and procedures to control access to the school buildings or property by non-school personnel. As noted in previous articles,⁵⁸ disputes arise, often with parents of students who perceive their situation to be different from other visitors.

1. Thomas v. Helms Mulliss Wicker PLLC, et al., 2007 U.S. Dist. LEXIS 24986 (W.D. N.C. 2007) began when the father of an elementary school child, acting *pro se*, sued the school

⁵⁸See “Visitor Access to Public Schools: Constitutional Rights and Retaliation,” **Quarterly Report** January-March: 2005 and “Visitor Policies: Access to Schools,” **Quarterly Report** January-March: 2000.

district, claiming it denied his son the chance to qualify for the Talent Development program. The federal district court dismissed the complaint, finding that it was based on claims of “educational malpractice,” which is not recognized in North Carolina (or in most states).⁵⁹ See *Thomas v. Charlotte-Mecklenburg Board of Education, et al.*, 2006 U.S. Dist. LEXIS 82280 (W.D. N.C. 2006). While the “educational malpractice” case was pending, the father attempted to obtain information directly from the school superintendent rather than through the school’s attorneys. The school’s attorneys wrote to Thomas and provided him the requested information. However, Thomas was instructed to contact the attorneys rather than their clients should he require anything additional. After the court dismissed Thomas’ educational malpractice complaint, Thomas went to his son’s elementary school where he became confrontational with a school police officer. Another confrontation occurred later that day when Thomas again returned to the school.

The school’s attorneys sent a letter to Thomas, ordering him to stay off the school’s campus except where the school has prior notice or there should be an emergency involving his son. Thomas ignored the letter and appeared on campus four days later. He was reminded of the letter, but he denied receiving it. When he would not leave the school campus, he was arrested. Thomas then sued the law firm, alleging constitutional and civil rights violations and defamation. The law firm moved to dismiss the complaint.

The court dismissed the action, noting that the law firm’s actions in sending him a letter advising him not to enter school property did not violate his constitutional rights. “The Fourth Circuit has held that a parent’s constitutional rights are not violated if a school bans that parent from school property. *Lovern v. Edwards*, 190 F.3d 648 (4th Cir. 1999).” (*Lovern* involved a parent who had established a pattern of being verbally abusive and threatening to school staff. He was banned from school property by the school superintendent. The school had the authority and the responsibility to ensure the safety of the school.)

2. The Office for Civil Rights (OCR) of the U.S. Department of Education continues to receive complaints that public school districts have discriminated against parents by restricting access to the school campus, including the classrooms. In *West Islip (NY) Public Schools*, 46 IDELR 107 (OCR 2006), the parent and the elementary school principal had had some sharp exchanges. She had also argued with other school personnel. The school’s attorney wrote to the parent, advising her that she was prohibited from entering the school grounds until further notice. She was warned that should she ignore this prohibition, she would be arrested for trespass. The principal wrote a similar letter to the parent. The parent did not heed either letter. She appeared at school on three separate occasions shortly thereafter, but was not arrested. She was warned not to do so again. The next day, she reappeared on campus and was arrested. OCR found the school’s actions did not constitute discrimination. The parent had violated the school district’s Code of Conduct, which provides in relevant part that “no person shall disrupt the peaceful and orderly conduct of classes, enter school premises without authorization, and refuse to comply with any reasonable order of school

⁵⁹Please consult the cumulative index for past articles on “educational malpractice.”

district officials.” Potential penalties—including being arrested for trespass—were also detailed. Prior to the letters being sent, the parent had arrived at the school on several occasions, very angry and verbally abusive to staff. On one occasion, the parent was screaming in the hallway while kindergarten registration was occurring. The school district, OCR found, “had a legitimate, non-retaliatory reason for barring the Complainant from the School and having her arrested.”

3. Vernon-Verona-Sherrill (NY) Central School District, 47 IDELR 50 (OCR 2006) involved the parents of a child with a disability who asserted the school district discriminated against them when it prohibited them from observing their child’s classroom and made them sign-in at the front desk. The school district denied it had prohibited the parents access to the child’s classroom. The school does require all visitors (including parents) to sign in at the front desk and obtain a pass before proceeding to a classroom. The policy is uniformly applied. The incident that gave rise to this complaint occurred when one of the parents, without signing in, went to the child’s classroom and interrupted the teacher. The principal informed the parents of the visitor policy. The superintendent likewise advised the parents of the visitor policy. OCR found the policy was uniformly applied. OCR also noted the school district provided documentation that indicated the parents had been allowed on numerous occasions to observe the child’s classroom. The parents had also been invited by the teacher to parties, field trips, and other class functions. OCR also found no merit to the parents’ complaint that other parents were not required to comply with the visitor policy. The parents, on one of the occasions when they observed the child’s classroom, saw two other adults in the classroom. The two adults were not parents; they were teacher aides employed by the school district.
4. In Pine Forest (AZ) Charter School, 47 IDELR 139 (OCR 2006), the father of a child with a disability had a sharp exchange with the child’s teacher during an IEP Team meeting. At one point, the father banged his hand on a table. Witnesses said he leaned towards the teacher, raised his voice and acted in an aggressive manner. After the meeting, the teacher informed administration that she was disturbed and upset as a result of the exchange and felt threatened and harassed. The school sent a letter to the parents, asking the father not to approach the teacher in any capacity while on school property and not to enter the school building at any times when the teacher may be present. The letter also requested that neither parent chaperone field trips without first making arrangements with the teacher. OCR found that the school’s letter was not in retaliation for the father exercising rights under disability anti-discrimination laws; rather, the letter was in response to the father’s “inappropriate behavior and to prevent future confrontational situations[.]” OCR also noted the school’s anti-bullying policy provides that the school “can remove anyone who exhibits behavior that is deemed threatening by another student, staff member, or parent.” Other school board policies also stressed the need for requiring acceptable conduct in order “to provide a physical environment for teaching and learning that is safe and productive for students, staff members, and the public.” OCR also found the school had placed similar restrictions on other parents for the same or similar behavior. OCR determined the school had not retaliated against the father for engaging in an activity protected by disability anti-discrimination laws.

Date: August 23, 2007

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