

WHEN PIXELS HURT: A CATEGORICAL EXCLUSION TO *TINKER* FOR CYBER-ABUSE

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INTRODUCTION

“If there’s one goal . . . it’s to dispel the myth that bullying is just a harmless rite of passage or an inevitable part of growing up . . . Today, bullying doesn’t even end at the school bell—it can follow our children from the hallways to their cell phones to their computer screens.”¹ In the past, a

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1. Barack Obama, Remarks by the President and First Lady at the White House Conference on Bullying Prevention (Mar. 10, 2011, 10:25 AM), <https://obamawhitehouse>

disgruntled student's complaints were often voiced in private conversations with friends around the lunch table or during a sleepover.² Today, however, students tend to let off steam online, whether they are at school or at home, with the potential for their message to be read by anyone with access to the internet.³ In a world with social media, the line separating school settings from the outside world has become much more permeable, and this has serious implications for how courts should approach public schools' power to punish students for discrimination, harassment, and bullying.⁴

Public schools must comply with federal civil rights statutes, including Title IX, which require schools to address speech that is harassing on the basis of sex, race, or disability, because that speech may interfere with equal access to education.⁵ If public schools may discipline students for disruptive speech only when it occurs on campus or in a school-sanctioned setting, this will weaken their ability to address discrimination, harassment, and bullying.⁶

In *Mahanoy Area School District v. B.L.*, the United States Supreme Court recognized that off-campus speech could be regulated by public schools, but that different rules should apply to assessing the First Amendment limitations of a public school's authority to regulate off-campus speech.⁷ The Court, however, did "not set forth a broad . . . First Amendment rule" to define when off campus student speech could be limited by schools.⁸ Instead, the Court provided three features of off-campus speech that "diminish the strength of the unique educational characteristics that might call for special First Amendment leeway."⁹ These features recognize that (1)

.archives.gov/the-press-office/2011/03/10/remarks-president-and-first-lady-white-house-conference-bullying-prevent [https://perma.cc/D2J4-CB7V].

2. Ian Millhiser, *The Supreme Court's "cursing cheerleader" case could reshape students' First Amendment rights*, VOX (Apr. 22, 2021), <https://www.vox.com/2021/4/22/22394121/supreme-court-cursing-cheerleader-first-amendment-bl-mahanoy-brandi-levy-student-free-speech-campus> [https://perma.cc/SBB9-5R5E].

3. *See id.*

4. *See id.*

5. For example, Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin, while Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex. Both Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 2004 prohibit discrimination on the basis of disability. *See Discrimination in Education-Federal Laws*, FINDLAW.COM (Mar. 18, 2021), <https://www.findlaw.com/civilrights/discrimination/discrimination-in-education-federal-laws.html> [https://perma.cc/S9DM-27CX]. Lastly, the goal of the No Child Left Behind Act (2001) was to provide "all children" with the ability to obtain a high-quality education. *See generally* Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999).

6. Jeannie Suk Gersen, *The Complicated Case of the Pennsylvania Cheerleader*, *The New Yorker* (May 6, 2021), <https://www.newyorker.com/news/our-columnists/the-complicated-case-of-the-pennsylvania-cheerleader> [https://perma.cc/D9ZE-9HYT].

7. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2045 (2021).

8. *Id.*

9. *Id.* at 2046.

schools will rarely stand *in loco parentis*¹⁰ in relation to off-campus speech, (2) a court will be more skeptical of a school's efforts to regulate off-campus speech, and (3) public schools, as the "nurseries of democracy," have an interest in protecting a student's unpopular expression.¹¹

The Court left open when, where, and how those features dictate a school's authority to punish off-campus speech and how such speech should be addressed.¹² Entering this void and endeavoring to bring clarity to part of this uncertainty, this Note constructs a rule to address a particular type of off-campus speech that should not enjoy full First Amendment protection. When off-campus speech, especially in the context of cyberspace, can be classified as bullying, harassment, or discrimination, that speech should be subject to a modern-day categorical exclusion from *Tinker*. In structuring this exclusion, this Note argues for a more straightforward and inclusive path to protect all students from peer aggression that threatens their right to education and preserve the ability of public schools to perform their educational function in a digital age.

In support of this argument, this Note begins in Section II by providing a broad overview of the public school's power to restrict student speech under the First Amendment. Specifically, this Section discusses how the Supreme Court has historically analyzed the power of public schools to discipline students for speech and exactly what criteria has been used to permit or deny that authority. Next, Section III discusses how the lower courts have struggled to determine when the *Tinker* test applies to off-campus speech. Further, this Section documents how the United States Supreme Court's recent decision in *Mahanoy Area School District v. B.L.* partially resolved the conflict by extending *Tinker* to certain off-campus incidents.¹³ However, the Court's failure to define these concepts with the precision required for regulation of speech effectively opened the door for the next generation of school litigation. Accordingly, Section IV emphasizes the inadequacy of the current understanding of what constitutes bullying and harassment, especially when viewed through today's digital lens. Additionally, with the prevalence of social media and digital forums, this Section highlights the obvious and constitutionally appropriate concern on the part of parents, school administrators, and lawmakers to protect children from cyber-abuse. Thus, Section V proposes a solution for how the courts should distinguish when speech outside of the school-supervised setting should fall outside the ambit of First Amendment protection through a modern-day definition of cyber-abuse, which encompasses forms of

10. Of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent. The Supreme Court has recognized that during the school day, a teacher or administrator may act *in loco parentis*. See *in loco parentis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

11. *Mahanoy*, 141 S. Ct. at 2046.

12. See *id.*

13. See *id.* at 2045.

bullying, harassment, and discrimination that take place through a digital medium. Specifically, schools should be given leeway to protect its community and comply with federal civil rights statutes when speech: (1) threatens the school community, (2) intentionally targets specific individuals or groups in the school community, (3) creates a hostile school environment, or (4) affects a marginalized student's access to education. Further, this proposed rule presents a more straightforward and inclusive path to protect all students from peer aggression that threatens their right to education and complies with the parameters of the First Amendment.

I. THE HISTORY OF THE STUDENT SPEECH DOCTRINE

The First Amendment protects the rights of citizens to express themselves through verbal, written, and non-written forms of communication.¹⁴ Public school students, as young citizens, do not lose their constitutional rights to freedom of speech or expression at the schoolhouse steps.¹⁵ While students maintain their First Amendment rights to express themselves, those rights are limited by two legal principles.¹⁶ First, children in public schools are not afforded the same latitude of constitutional rights as adults.¹⁷ Second, public schools, as instruments of the state, possess the power to determine what conduct and speech undermines a school's basic educational mission.¹⁸ Balancing students' First Amendment rights with the educational concerns of school officials is no easy task, with problems seen especially "in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities."¹⁹ This Section highlights the United States Supreme Court's pivotal cases addressing these collisions and provides a broad overview of the student speech doctrine framework.

The limitations of student speech were first defined in 1969 by the Supreme Court's formative decision, *Tinker v. Des Moines Independent School District*.²⁰ A group of students were suspended after they wore black armbands in silent protest of the Vietnam War.²¹ Even though the students did not technically speak out in protest, the Court held that disciplining the students violated the First Amendment because their silent conduct was a

14. See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

15. See *id.* at 505–06.

16. See David L. Hudson Jr., *K-12 Public School Student Expression Overview*, FREEDOM FORUM INST. (updated March 2018), <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/k-12-public-school-student-expression/> [https://perma.cc/Y4RV-RGZU].

17. See *id.*; *Tinker*, 393 U.S. at 505–06.; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682–83 (1986).

18. See Hudson, *supra* note 16; *Tinker*, 393 U.S. at 507–08; *Bethel*, 478 U.S. at 684; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 265–66 (1988).

19. Hudson, *supra* note 16; *Tinker*, 393 U.S. at 507–08.

20. 393 U.S. 503 (1969).

21. See *id.* at 504.

form of symbolic speech “akin to pure speech.”²² The Court established a protective standard for student expression, making clear that public school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” and are permitted to express a “[nondisruptive], passive expression of a political viewpoint.”²³ However, a student’s conduct is not “immunized by the constitutional guarantee of freedom of speech” when it “materially disrupts classwork or involves substantial disorder or invasion of the rights of others,” irrespective of the time, place, or type of behavior.²⁴ Accordingly, public school officials may punish its students only for speech that would materially and “substantially interfere with the work of the school or impinge upon the rights of other students.”²⁵

Although public school students possess constitutional rights, those rights are not absolute nor equivalent to the rights of adults in other settings.²⁶ In addition to a school’s special interest in regulating speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others,” the Supreme Court has also recognized three specific limitations of student speech in certain circumstances.²⁷ These limitations are (1) “indecent,” “lewd,” or “vulgar” speech uttered to a school body on school property, (2) speech that may reasonably be perceived as “bear[ing] the imprimatur of the school,” and (3) speech promoting “illegal drug use” during a class trip.²⁸ When student speech falls within any of the above-mentioned circumstances, *Tinker* does not apply and the student’s speech is not afforded First Amendment protection.

The vulgar speech limitation was identified in 1983, after a Washington State high school student was disciplined for delivering a lewd and indecent speech at a school assembly.²⁹ The Supreme Court held that the student’s speech was not protected by the First Amendment,³⁰ noting that “the [] freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”³¹ Further, the Court observed that there is nothing in the Constitution prohibiting the states from concluding that particular modes of expression are inappropriate and subject to sanctions, and it is the school’s duty to inculcate the boundaries of permissible and socially acceptable expression.³² The Court also

22. *Id.* at 505.

23. *Id.* at 506, 508.

24. *Id.* at 513.

25. *Id.* at 509.

26. *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986).

27. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2045 (2021).

28. *Id.*

29. *See Bethel*, 478 U.S. at 677–79.

30. *See id.* at 685.

31. *Id.* at 681.

32. *See id.* at 683.

recognized that public schools sometimes stand *in loco parentis*, and therefore have a duty to protect children from exposure to vulgar and lewd speech, especially when those children are a captive audience.³³ Because the “[p]rocess of educating our youth for citizenship in public schools is not confined to books[,] . . . schools must [also] teach by example the shared values of a civilized order,” and therefore, public school students’ First Amendment rights are circumscribed when their on-campus student speech is inconsistent with schools’ basic educational mission.³⁴ Accordingly, *Tinker*’s mode of analysis is not absolute; schools are authorized to determine what manner of speech is inappropriate³⁵ and to impose disciplinary sanctions for conduct disruptive of the educational process.³⁶

Students have the freedom to express themselves in a manner that does not cause substantial disruption to the school; however, the school may impose certain free speech boundaries. While students can write articles for school newspapers or work on school yearbooks, because students’ rights are not “automatically coextensive with the rights of adults in other settings,” schools may prohibit student staff members of a school newspaper from writing on certain controversial subjects.³⁷ For example, in St. Louis, Missouri, student staff members of the school-sponsored newspaper filed suit against the school district and school officials, alleging their First Amendment rights were violated when their principal withheld two student-authored articles from publication that he deemed to be inappropriate.³⁸

Before determining that the principal’s removal of the articles from publication did not violate the students’ First Amendment rights, the Court addressed and answered two threshold questions. First, the Court held that a school-sponsored newspaper is not a “public forum” for public expression when it is reserved for its intended purpose as a supervised learning experience for journalism students.³⁹ Consequently, school officials may impose reasonable restrictions on student speech in any reasonable manner.⁴⁰ Second, the Court ruled that public school officials are permitted to “disassociate” from more than just speech that substantially interferes with a school’s work or intrudes upon the rights of other students when it occurs during activities that “might reasonably [be] perceive[d] to bear the imprimatur of the school.”⁴¹ The Court held that public school officials can censor school-sponsored student expression provided that they have a valid

33. *See id.* at 684.

34. *Id.* at 683.

35. *See id.* at 683.

36. *See id.* at 686.

37. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Bethel*, 478 U.S. at 682).

38. *See id.* at 262–63.

39. *Id.* at 267–70.

40. *See id.*

41. *Id.* at 267–68 (quoting *Bethel*, 478 U.S. at 685–86).

educational justification.⁴² Thus, *Hazelwood School District v. Kuhlmeier*'s holding acknowledges that schools may regulate some speech "even though the government could not censor similar speech outside the school."⁴³

While *Tinker* hinted at schools' authority to regulate speech beyond the schoolhouse gate, the Court's subsequent decisions only clarified circumstances that would authorize school regulation of speech occurring on-campus. However, in 2007, the Court clearly established that schools had the authority to restrict student speech beyond the literal geographical boundary of school grounds.⁴⁴ A school district in Juneau, Alaska, suspended a student for holding up a banner that read "BONG HiTS 4 JESUS" during an off-campus but school-sponsored event.⁴⁵ Despite construing the student's banner as expressing a "positive sentiment about marijuana use," the Ninth Circuit decided that the school violated the student's First Amendment rights when it punished him because there was no showing of a "risk of substantial disruption."⁴⁶ The United States Supreme Court granted certiorari, and began its analysis by highlighting principles distilled from each of its student speech cases.⁴⁷

Beginning with *Tinker*, the Court noted that a school's "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint . . . or an urgent wish to avoid the controversy which might result from the expression" is not enough to justify restricting a student's "silent, passive expression of opinion" that does not create disorder or disturbance.⁴⁸ Next, relying on two principles distilled from the Court's decision in *Fraser*, which were reaffirmed by *Kuhlmeier*, the Court acknowledged that (1) students' First Amendment rights are circumscribed in view of the "special characteristics" of the school environment⁴⁹; and, importantly (2) that *Tinker* "is not the only basis for restricting student speech."⁵⁰ Last, the Court noted that it drew upon these student speech principles in the context of the Fourth Amendment when it held that although children do not lose their constitutional rights at the schoolhouse gate, "the nature of those rights is what is appropriate for children in school."⁵¹ Reversing the Ninth Circuit's judgment, the Court held that in light of a school environment's special characteristics, coupled with a governmental interest in deterring drug use, "schools may take steps to safeguard those

42. *See id.* at 272–73.

43. *Id.* at 266.

44. *See Morse v. Frederick*, 551 U.S. 393, 399–400 (2007).

45. *Id.* at 397.

46. *Id.* at 399.

47. *See id.* at 400–01, 403–05.

48. *Id.* at 403–04.

49. *Id.* at 405 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

50. *Id.* at 406.

51. *Id.* (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995) (quoting *Tinker*, 393 U.S. at 506)).

entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”⁵²

Although jurisprudence has answered part of the how, when, and where schools may regulate student speech without violating the First Amendment, courts have traditionally premised a school’s disciplinary authority on geography.⁵³ Thus, if student expression occurs beyond school grounds or after hours, courts still struggle to determine exactly when *Tinker* applies to off-campus speech. To further complicate the matter, the prevalence of social media and digital forums in cyberspace, a medium with no particular geographical location, has blurred the boundary between on-campus and off-campus speech.

II. THE CIRCUIT COURTS’ STRUGGLE WITH DETERMINING WHEN *TINKER* GOVERNS OFF-CAMPUS SPEECH

The Internet, a product of the digital revolution, is the world’s most diverse, participatory, and amplified communications medium people have ever had,⁵⁴ and one that is entitled to the First Amendment’s historical protections.⁵⁵ In today’s world, many students turn to the Internet to express themselves and their viewpoints, and schools now, more than ever, have an increasing interest in regulating student speech occurring outside of the school-supervised setting.⁵⁶ While students generally have considerable freedom to express themselves outside of school on their own time and using their own devices, several lower courts have held that *Tinker* applies to some student speech that is both off-campus and outside of the school-supervised setting.⁵⁷ Yet, there is no consensus for when students’ First Amendment rights are diminished for engaging in such activity.⁵⁸ Thus, this Section begins by discussing the various threshold tests utilized by the Second, Third, Fourth, Fifth, and Ninth Circuit Courts to determine whether *Tinker* controls off-campus speech, revealing the chaos surrounding off-campus student speech. This Section concludes by highlighting how the Supreme Court’s *Mahanoy* holding failed to resolve the confusion.

The circuit courts’ utilization of various tests for off-campus student speech led to different outcomes and reasoning, creating a giant doctrinal

52. *Id.* at 397.

53. See generally Daniel Marcus-Toll, Note, *Tinker Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 *FORDHAM L. REV.* 3395 (2014).

54. AM. C.L. UNION (ACLU), *Internet Speech*, (2021), <https://www.aclu.org/issues/free-speech/internet-speech> [<https://perma.cc/BEH8-F2SV>].

55. See generally *Reno v. Am. C.L. Union*, 521 U.S. 844 (1997).

56. See Somini Sengupta, *Warily, Schools Watch Students on the Internet*, *N.Y. TIMES* (Oct. 29, 2013), <https://www.nytimes.com/2013/10/29/technology/some-schools-extend-surveillance-of-students-beyond-campus.html> [<https://perma.cc/2Z5R-V8GC>].

57. See *infra* Section III.

58. See *infra* Section III.

mess.⁵⁹ Many courts hold that *Tinker* offers a student no protection against school discipline if a student's expression poses a "reasonably foreseeable risk that the [speech] would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school.'"⁶⁰ Just because a student's conduct occurred off-campus and away from school property does not shield one from school punishment.⁶¹

For example, the Second Circuit recognizes that a student's "off-campus conduct can create a foreseeable risk of substantial disruption within a school;" however, the Court is split as to whether the school must show that it was reasonably foreseeable that the student's off-campus conduct would reach the school grounds or, if it did reach the school grounds, whether that undisputed fact omits any inquiry of reasonable foreseeability.⁶² Regardless, if it is reasonably foreseeable that both a student's conduct would reach the school and that such conduct poses a risk of substantial disruption to the school, then the school is permitted to discipline without abridging a student's First Amendment rights.⁶³ In evaluating whether it was reasonably foreseeable for off-campus digital student speech to reach school grounds, the Second Circuit considers the following factors: (1) the content of the speech, (2) whether the student knew that the speech would likely reach the school community, and (3) the student's intent for the speech to reach the school.⁶⁴ If these factors are present, then the student's speech satisfies the Court's threshold inquiry, and the Second Circuit proceeds by applying *Tinker's* substantial disruption standard.⁶⁵

While the Second Circuit and Ninth Circuit agree that *Tinker* affords a student no protection against school discipline for conduct which poses a reasonably foreseeable risk that the speech would reach and impact the school, this factor is only one of the relevant considerations that the Ninth Circuit includes to determine when *Tinker* applies to off-campus speech.⁶⁶

As the Ninth Circuit described, *Tinker* applies to off-campus speech if the speech bears a sufficient nexus to the school.⁶⁷ In addition to the reasonable foreseeability factor, the Court provides two other relevant considerations: "the degree and likelihood of harm to the school caused or

59. David L. Hudson Jr., *Online Speech*, FREEDOM FORUM INST. (updated March 2018), <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/k-12-public-school-student-expression/cyberspeech/> [https://perma.cc/ZRK4-R5YS].

60. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38–39 (2d Cir. 2007) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969); see also *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989–92 (9th Cir. 2001); *Boucher v. Sch. Bd.*, 134 F.3d 821, 827–28 (7th Cir. 1998).

61. See *Wisniewski*, 494 F.3d at 39.

62. *Id.*

63. See *id.* at 38–39.

64. See *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008).

65. See *id.* at 50–51.

66. See *Wisniewski*, 494 F.3d at 39; *McNeil v. Sherwood Sch. Dist.* 88J, 918 F.3d 700, 707 (9th Cir. 2019); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989–92 (9th Cir. 2001).

67. See *McNeil*, 918 F.3d at 707.

augured by the speech, . . . and the relation between the content and context of the speech and the school.”⁶⁸ If a school district reasonably determines that it faces an identifiable and credible threat of school violence, then there is always a sufficient nexus between the student’s off-campus speech and the school.⁶⁹ Accordingly, a school may punish a student for such off-campus speech without violating the First Amendment, irrespective of the student’s mode or manner of speech, the student’s intent, or how the school became aware of such speech.⁷⁰ Focusing on the school’s duty to protect its students from violence, if off-campus student speech presents an “identifiable threat of school violence,” the *Tinker* standard applies.⁷¹

Similarly, the Fourth Circuit also follows a “sufficient nexus” rule.⁷² Unlike the Ninth Circuit, however, the Fourth Court holds that *Tinker* applies to off-campus speech if there is a sufficient nexus between the student’s speech and the school’s “pedagogical interests.”⁷³ Additionally, whether a student’s off-campus speech creates a reasonable risk of reaching school property and causing a substantial disruption in the school is relevant to the Fourth Circuit’s threshold inquiry.⁷⁴

In contrast to the Second Circuit’s use of foreseeability as the anchor in its analysis,⁷⁵ the Fourth Circuit focuses on how a student’s behavior would affect the school’s learning environment.⁷⁶ Public schools have a compelling interest to regulate speech that “creates substantial disorder, or collides with or invades the rights of others.”⁷⁷ By focusing on the school’s role as “the trustee[] of the student body’s well-being,” the Fourth Circuit holds that speech which interferes with the work and discipline of the school, is immune from First Amendment protection and subject to school discipline.⁷⁸

While the Second, Ninth, and Fourth Circuits’ approaches to a school’s power to discipline students for speech outside of the school-supervised setting are similar in some respects, each of their threshold inquiries are guided by different principles and, under the same set of facts, would likely lead to different outcomes.⁷⁹ To further complicate the issue,

68. *Id.* (omitted second consideration).

69. *See id.* at 707–08.

70. *See id.* (reaffirming the Court’s holding in *Wynar v. Douglas County School District* - a school district may take disciplinary action in response to off-campus speech when it reasonably determines that it faces an identifiable and credible threat of school violence. *See* 728 F.3d, 1062, 1069 (9th Cir. 2013)).

71. *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013).

72. *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 577 (4th Cir. 2011).

73. *Id.* at 573.

74. *See id.* at 571.

75. *See Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2d Cir. 2007); *see also Morse v. Frederick*, 551 U.S. 393 (2007).

76. *See Kowalski*, 652 F.3d at 575.

77. *Id.* at 572.

78. *Id.* at 571–73.

79. *See Marcus-Toll*, *supra* note 54.

there are other circuits that either refuse to adopt a threshold test or conclude that *Tinker* never applies to off-campus speech.⁸⁰

For its part, the Fifth Circuit has declined to adopt a specific rule to off-campus speech because “each situation involving expression and discipline will create its own problems of reasonableness;”⁸¹ however, under certain circumstances, *Tinker* would apply.⁸² In light of the advent of the Internet, coupled with the rise in incidents of violence against school communities, the Fifth Circuit recognizes that it is necessary for “school officials to be able to react quickly and efficiently to protect students and faculty from threats, intimidation, and harassment intentionally directed at the school community.”⁸³ The Court’s precedent highlights that a “speaker’s intent matters when determining whether the off-campus speech being addressed is subject to *Tinker*. A speaker’s intention that his speech reach the school community, buttressed by his actions in bringing about that consequence, supports applying *Tinker*’s school-speech standard to that speech.”⁸⁴ Accordingly, *Tinker* governs the Fifth Circuit’s analysis whenever a student intentionally directs speech at the school community that may be “reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when such speech originated, and was disseminated, off-campus without the use of school resources.”⁸⁵

The Third Circuit, which heard the *B.L. by and through Levy v. Mahanoy Area School District* case, went even further, holding that *Tinker* does not apply to off-campus speech.⁸⁶ The Third Circuit identified off-campus speech as that which is “outside school-owned, -operated, or -supervised channels and [] not reasonably interpreted as bearing the school’s imprimatur.”⁸⁷ Although it makes sense that schools have “comprehensive authority” to discipline or regulate disruptive student conduct that occurs on school grounds or during school hours, the Third Circuit held that “it makes little sense where the student stands outside that context, given that any effect on the school environment will depend on others’ choices and reactions.”⁸⁸

80. See *infra* Section III.

81. *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 394–95 (5th Cir. 2015) (The Court addressed its holding in *Porter v. Ascension Par. Sch. Bd.*, to identify parameters for when to apply *Tinker* to off-campus student speech. 393 F.3d 608 (5th Cir. 2004)).

82. See *id.* at 396.

83. *Id.* at 394.

84. *Id.* at 394–95 (The Court addressed its holding in *Porter v. Ascension Par. Sch. Bd.*, to identify parameters for when to apply *Tinker* to off-campus student speech. 393 F.3d 608 (5th Cir. 2004)).

85. *Id.* at 396.

86. 964 F.3d 170 (3d Cir. 2020).

87. *Id.* at 189 (using *Hazelwood Sch. Dist. v. Kuhlmeier* to identify an area in which schools have leeway to regulate student speech that does not meet the *Tinker* standard and subsequently holding that *Kuhlmeier* does not apply to off-campus speech that does not bear the school’s imprimatur).

88. *Id.* at 189–90.

While the Court recognized that recent technological changes present challenges for the school administrators, including managing the school environment, these advancements also create new areas where the schools might try to suppress off-campus student speech that they see as being “inappropriate, uncouth, or provocative.”⁸⁹ Permitting that sort of effort would mean “sacrificing precious freedoms that the First Amendment protects,” something the Third Circuit could not allow.⁹⁰ After the Third Circuit affirmed the District Court’s conclusion—B.L.’s snapchat had not caused substantial disruption—the school district filed a petition for certiorari with the United States Supreme Court.⁹¹

The Supreme Court agreed with the Third Circuit’s conclusion that the school violated B.L.’s First Amendment rights when it punished her for two images that she posted to Snapchat, but overruled the Third Circuit’s holding that *Tinker* never applies to off-campus speech.⁹² After B.L. was passed over for the varsity cheerleading team, she expressed her frustration online via Snapchat.⁹³ The first was a photo of herself giving the middle finger with the caption “Fuck school fuck softball fuck cheer fuck everything.”⁹⁴ The second was a blank image with the caption, “Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn’t matter to anyone else? 😊”⁹⁵

The Court began its analysis by reiterating that students do not lose their First Amendment rights at the school house gate; however, those rights are to be applied “in light of the special characteristics of the school environment.”⁹⁶ The Court then went on to identify the characteristics that call for special leeway when schools regulate student speech that occurs under its supervision.⁹⁷ One such characteristic is the fact that schools sometimes stand *in loco parentis*.⁹⁸ Next, the Court identified three specific types of student speech that schools may regulate: (1) speech that is “indecent,” “lewd,” or “vulgar” during a school-sponsored assembly on school grounds; (2) speech promoting “illegal drug use” while on a class trip; and (3) “speech that others may reasonably perceive as bear[ing] the imprimatur of the school.”⁹⁹ Finally, the Court reaffirmed *Tinker*’s “substantial disorder” and “invasion of rights of others” prongs—that is,

89. *Id.* at 189.

90. *Id.*

91. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2044 (2021).

92. *Id.* at 2043, 2045.

93. *Id.* at 2043.

94. *Id.*

95. *Id.*

96. *Id.* at 2044.

97. *Id.* at 2045.

98. *Id.* at 2044–45 (“in the place of the parents”).

99. *Id.* at 2045.

schools have a special interest in regulating student speech that satisfies these prongs.¹⁰⁰

Shifting its focus from speech that occurs under a school's supervision to speech that takes place off-campus, the Court concluded that there are some off-campus circumstances wherein a school's regulatory interests remain significant.¹⁰¹ Although the Court highlighted several types of off-campus behavior that may call for school regulation listed in the parties' and amici's briefs—"serious or severe bullying or harassment targeting particular individuals; [and] threats aimed at teachers or other students"—the Court refused to "set forth a broad, highly general First Amendment rule" to determine what constitutes off-campus speech, and whether or how such speech's First Amendment standards must give way to a school's regulatory interests.¹⁰²

Instead, the Court identified three features of a student's off-campus speech that diminish the strength of the unique educational characteristics that might call for special First Amendment leeway.¹⁰³ First, responsibility for student speech occurring off-campus is normally delegated to the parents; thus, schools will rarely stand *in loco parentis* when it comes to off-campus student speech.¹⁰⁴ Second, whenever schools attempt to regulate off-campus speech, courts apply heightened or even strict scrutiny, meaning that schools will have a heavy burden to justify intervention.¹⁰⁵ Third, "America's public schools are the nurseries of democracy," and they have an interest in protecting unpopular ideas, especially when it occurs off campus.¹⁰⁶ Taken in sum, these three features reduce the First Amendment leeway afforded to public schools in light of their special characteristics when it comes to off-campus student speech.

Applying these guidelines to the case at hand, the Court concluded that the school had violated B.L.'s First Amendment rights.¹⁰⁷ Of note, the Court focused on the when, where, and how she spoke: after hours and off campus, without identifying nor targeting any particular member of the school community with vulgar or abusive language, and through her own cellphone to a private audience of her friends.¹⁰⁸ Although her speech risked being transmitted to the school itself, the school did not stand *in loco parentis*, there was no "substantial disruption" of a school activity or a threatened harm to the rights of others, nor was there any substantial interference in or disruption of the school's efforts to maintain team

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 2046.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 2048.

108. *Id.* at 2047.

cohesion.¹⁰⁹ Accordingly, these features diminished the school's interest in disciplining her speech to a point where no justification of the school's actions could be made.¹¹⁰

While this case answered part of the when, where, and how a school may regulate off-campus student speech, this was not the appropriate case to identify when or how a school's regulatory interests remain significant in some off-campus circumstances. This case dealt with a school's interest in prohibiting students from using vulgar language aimed at part of the school community. B.L.'s post did not disparage anyone on the basis of race, sex, or disability. Thus, the Court's holding only makes clear that schools are not categorically barred from disciplining students for speech occurring off campus. Accordingly, the Court has left for a future case the harder problem of what disciplinary definitions of discrimination, harassment, and bullying sufficiently respect free speech.¹¹¹

III. THE SUPREME COURT'S LACK OF GUIDANCE COUPLED WITH VARYING DEFINITIONS OF CYBER-ABUSE WILL PRODUCE DANGEROUS CONSEQUENCES.

Because the *Mahanoy* Court declined to define under what circumstances speech might be understood to harm students' right to free speech, the lower courts were tasked with not only conceptualizing what constitutes harassment, bullying, or discrimination, but also coming up with a rule that applies to cases involving such speech. What makes this even more difficult is the increasingly expanded scope of what constitutes harassment.¹¹² Moreover, most of the conduct that teenagers engage in occurs digitally, and unlike traditional modes of expression, digital speech is uniquely pervasive and easily accessible.¹¹³

This Section first considers the current definitions of bullying, harassment, and discrimination employed by circuit courts, state legislatures, and the federal government. This Section then addresses the inadequacy of the current understanding of what constitutes bullying and harassment, especially when viewed through today's digital lens. Finally, with the prevalence of social media and digital forums, this Section examines the concern on the part of parents, school administrators, and lawmakers to protect children from cyberbullying, as research indicates that cyberbullying raises unique concerns and is linked to many negative outcomes.¹¹⁴

109. *Id.* at 2047–48.

110. *Id.* at 2048.

111. Gersen, *supra* note 6.

112. *Id.*; *see also infra* Section IV.

113. *See infra* Section IV.C.

114. *See infra* Section IV.C.

A. The Current Concept of Bullying

There is no universal definition of bullying, but it is often seen as synonymous with harassment.¹¹⁵ The United States Department of Health and Human Services defines bullying as “unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance, which is either repeated, or has the potential to be repeated, over time.”¹¹⁶ There are three types of bullying: verbal, social, and physical.¹¹⁷ Behaviors encompassed by this definition include making threats or inappropriate sexual comments, hurting someone’s reputation or relationship by spreading rumors or embarrassing someone in public, or hurting a person’s body or possessions.¹¹⁸ While bullying can occur during or after school hours on or off school property, it can also happen on the internet, in the form of cyberbullying.¹¹⁹

Cyberbullying is defined as the “willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices.”¹²⁰ It is a special form of bullying because other people can view, participate, and share negative, harmful, false, or mean content about someone, damaging a person’s online reputation with a simple click of the keyboard.¹²¹ As social media and digital platforms continue to gain traction, so does the prevalence of cyberbullying.¹²²

B. The Hodgepodge of Laws, Policies, and Regulations

One of the biggest challenges facing educators, legislatures, and courts is how to conceptualize and define bullying and harassment, and the

115. See Anne M. Payne, *Establishing Liability of a Public School District for Injuries or Damage to a Student Resulting from Bullying or other Nonsexual Harassment by Another Student*, in 105 AM. JUR. PROOF OF FACTS 93, 114–15 (3d ed. 2009) (Sept. 2021 Update).

116. U.S. DEP’T OF HEALTH AND HUM. SERVS. (DHHS), *What is Bullying*, STOPBULLYING.GOV (last reviewed Nov. 5, 2021), <https://www.stopbullying.gov/bullying/what-is-bullying> [<https://perma.cc/P9GB-WQRY>].

117. *Id.*

118. *Id.*

119. *Id.*; see DHHS, *What is Cyberbullying*, STOPBULLYING.GOV (last reviewed Nov. 5, 2021), <https://www.stopbullying.gov/cyberbullying/what-is-it> [<https://perma.cc/ZZ8V-MYMZ>].

120. CYBERBULLYING RES. CTR., *What is Cyberbullying* (Dec. 23, 2014), <https://cyberbullying.org/what-is-cyberbullying> [<https://perma.cc/MKH9-AEE2>].

121. See DHHS, *supra* note 119.

122. See *id.*; see also CTRS. FOR DISEASE CONTROL AND PREVENTION (CDC), *High School Youth Risk Behavior Survey*, (last reviewed June 9, 2021) (The 2017 Youth Risk Behavior Surveillance System indicates that 14.9% of high school students were electronically bullied in the 12 months prior to the survey. In 2019, 15.7% reported being electronically bullied), https://www.cdc.gov/healthyyouth/data/yrbs/reports_factsheet_publications [<https://perma.cc/WL5E-P8PP>].

extent to which these terms can be applied to online behavior.¹²³ Without a standardized federal definition of bullying or harassment in schools, state legislatures have attempted to define what constitutes such behavior and have taken action to prevent bullying and protect children.¹²⁴

While all fifty states have laws requiring schools to respond to bullying, each jurisdiction addresses bullying differently.¹²⁵ Some states have established laws, policies, and regulations, while others have developed model policies that local educational agencies may, but are not required to, adopt.¹²⁶ Most states require schools to implement a bullying policy as well as investigation and response procedures, but they generally do not prescribe specific consequences for students who engage in bullying behavior.¹²⁷ Forty-eight states' bullying laws cover cyberbullying or electronic harassment; however, only twenty-five states extend school authority to regulate speech that originates off campus.¹²⁸ Furthermore, when bullying behavior overlaps with discriminatory harassment, it is covered under federal civil rights laws.¹²⁹ Lastly, courts have differed in their analysis of First Amendment principles in cases of bullying, harassment, and discrimination.¹³⁰ The end result is a hodge-podge of laws, policies, and regulations covering a myriad of behaviors, none of which adequately address or protect those affected by this discrimination.

C. The Concerns and Effects of Cyberbullying

While cyberbullying is a form of bullying, it looks and feels different than traditional bullying, and there are several unique challenges parents, educators, and the courts face when trying to deal with it. First, while students who experience traditional forms of bullying used to be able to find solace at their home or over the weekend, now it is virtually impossible to find relief from the continuous and immediate ability to communicate in the digital world.¹³¹ Second, "anyone can practice [cyberbullying] without having to confront the victim. You don't have to be strong or fast, simply equipped

123. Ellen M. Selkie, et al., *Cyberbullying Prevalence Among US Middle and High School-Aged Adolescents: A Systematic Review and Quality Assessment*, 58 J. OF ADOLESCENT HEALTH 125, 126 (2016), <https://www.sciencedirect-com.bunchproxy.idm.oclc.org/science/article/pii/S1054139X15003821?via%3Dihub>.

124. See DHHS, *Laws, Policies & Regulations*, STOPBULLYING.GOV (last reviewed Jan. 7, 2022), <https://www.stopbullying.gov/resources/laws> [<https://perma.cc/A3HU-3GLW>].

125. See *id.*

126. See *id.*

127. See *id.*

128. See Sameer Hinduja, & Justin W. Patchin, *State Bullying Laws*, CYBERBULLYING RES. CTR. (updated Jan. 2021), <https://cyberbullying.org/Bullying-and-Cyberbullying-Laws.pdf> [<https://perma.cc/NE8L-QJA9>].

129. DHHS, *Federal Laws*, STOPBULLYING.GOV (last reviewed Oct. 6, 2021), <https://www.stopbullying.gov/resources/laws/federal> [<https://perma.cc/6ZLV-7J57>].

130. See *supra* Section III.

131. See Selkie et al., *supra* note 123, at 125.

with a cell phone or computer and a willingness to terrorize.”¹³² Third, there is a potentially limitless audience and a greater ability for anonymity by the offenders.¹³³ Fourth, because cyberbullying can be done from anywhere, parents, educators, and other adults who have a duty to protect students may not recognize that cyberbullying is taking place.¹³⁴ Finally, because an online reputation tends to be public and permanent, a negative digital footprint can affect current and future areas of life.¹³⁵

Social media is a powerful tool for student expression, and it is one that appears to be “everywhere all at once.”¹³⁶ In fact, 95% of teens have access to a smartphone, 88% have access to a computer, and 84% have access to a gaming console.¹³⁷ Forty-five percent of those teens report using the internet almost constantly,¹³⁸ with YouTube, Instagram, and Snapchat being the most popular online platforms.¹³⁹ As social media continues to rise in use and popularity, research shows that it may be one of the main factors negatively impacting children’s mental health.¹⁴⁰ In 2020, social media’s negative impact became front-page news after a Facebook employee leaked research conducted by its own researchers, finding that social media can be, and is, harmful.¹⁴¹ Instagram reported that its platform (1) makes body issues worse for one in three teen girls, (2) increases in the rate of anxiety and depression, and (3) traces back to an 6% increase in suicidal ideation among U.S. teens.¹⁴² With the prevalence of social media and modern technology, not only are these apps negatively affecting mental health, but they also

132. Robin M. Kowalski, et al., *CYBERBULLYING IN THE DIGITAL AGE*, 1 (John Wiley & Sons eds., 2d ed., 2012) (quoting L. King’s *No Hiding from Online Bullies* (2006)), <https://ebookcentral-proquest-com.bunchproxy.idm.oclc.org/lib/belmont-ebooks/reader.action?docID=822111&ppg=1>.

133. Selkie et al., *supra* note 123, at 125.

134. *See id.* at 125-26.

135. DHHS, *supra* note 119.

136. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (3d Cir. 2011) (Smith, J., concurring).

137. Monica Anderson & Jingjing Jiang, *Teens, Social Media, and Technology 2018*, PEW RSCH CTR. (May 31, 2018), <https://www.pewresearch.org/internet/2018/05/31/teens-social-media-technology-2018/> [<https://perma.cc/57XY-P8G2>].

138. *Id.*

139. *See* Katherine Schaeffer, *7 Facts About Americans and Instagram*, PEW RSCH CTR. (Oct. 7, 2021), <https://www.pewresearch.org/fact-tank/2021/10/07/7-facts-about-americans-and-instagram/> [<https://perma.cc/GAM2-MN8L>].

140. GENOMIND, *The Social Media Dilemma: How Children’s Mental Health May Be Affected* (May 5, 2021), <https://www.genomind.com/blog/social-media-may-be-affecting-your-childs-mental-health> [<https://perma.cc/GF9H-NJLB>].

141. *See* Schaeffer, *supra* note 139.

142. *See* Georgia Wells et al., *Facebook Knows Instagram is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sept. 14, 2021), <https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739> [<https://perma.cc/6RYC-5MBD>].

provide cyberbullies multiple ways to be mean or cruel simply by logging on.¹⁴³

There are many negative outcomes linked to cyberbullying, including mental, physical, and psychological issues.¹⁴⁴ Bullying not only affects the well-being of those being bullied, but it also affects the lives of those who bully and those who witness bullying.¹⁴⁵ For those children who are bullied, victims can develop or are more likely to experience anxiety, depression, social isolation, decreased academic achievement and school participation, and some might even try to retaliate through extremely violent measures.¹⁴⁶ Twenty-seven percent of teenagers feel that social media has a mostly negative effect on people their own age, with the most negative effect being bullying and/or rumor spreading.¹⁴⁷ Children who bully other children are more likely to engage in delinquent behavior, participate in early sexual activity, abuse alcohol and other drugs, and drop out of school.¹⁴⁸ Children who witness bullying are more likely to use alcohol and drugs, experience depression or anxiety, and/or skip school.¹⁴⁹ While there are conflicting reports linking bullying to suicide, both the victim and the bully are at risk of suicidal thoughts and actions.¹⁵⁰ Moreover, even though most Americans might agree that discrimination on the basis of ability, race, ethnicity, religion, immigration status, gender, and/or sex is wrong, these marginalized groups continue to be the focus of bullying.¹⁵¹ Which marginalized group, or groups, a student identifies with dictates what, if any, specialized interventions have been developed or identified to protect this vulnerable population.¹⁵² However, these interventions do not provide uniform

143. See Amanda Lenhart et al., *Teens, kindness, and cruelty on social network sites*, PEW RSCH. CTR. (Nov. 9, 2011), <https://www.pewresearch.org/internet/2011/11/09/teens-kindness-and-cruelty-on-social-network-sites/> [<https://perma.cc/YYM5-FZEP>].

144. DHHS, *Effects of Bullying*, STOPBULLYING.GOV (last reviewed May. 21, 2021), <https://www.stopbullying.gov/bullying/effects> [<https://perma.cc/Y3Q5-RL5N>].

145. See *id.*

146. See *id.*; Christa Boske & Azadeh Osanloo, *Uncomfortable Truths: An Introduction to Bullying in U.S. Schools*, in STUDENTS, TEACHERS, AND LEADERS ADDRESSING BULLYING IN SCHOOLS, at XIII, XV (Christa Boske & Azadeh Osanloo eds., 2015), <https://ebookcentral-proquest-com.bunchproxy.idm.oclc.org/lib/belmont-ebooks/reader.action?docID=4737003&pg=3>.

147. Anderson & Jiang, *supra* note 137.

148. See DHHS, *supra* note 144.

149. See *id.*

150. Compare DHHS, *supra* note 144, and Sameer Hinduja & Justin W. Patchin, *Connecting Adolescent Suicide to the Severity of Bullying and Cyberbullying*, in 18 J. OF SCH. VIOLENCE 333, 340 (2019) <https://www-tandfonline-com.bunchproxy.idm.oclc.org/doi/full/10.1080/15388220.2018.1492417>, with Boske *supra* note 147, at XV-XVI.

151. Christa Boske, *Bullied*, in STUDENTS, TEACHERS, AND LEADERS ADDRESSING BULLYING IN SCHOOLS, *supra* note 146, at 1, 3.

152. See *Black's Law Dictionary*, *supra* note 10; see also *Protecting Students Overview*, U.S. DEP'T OF EDUC. (last modified Jan. 16, 2022), <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/protectingstudents.html> [<https://perma.cc/8ZF4-V2QL>]; U.S. DOJ C.R. DIV., *Application of Bostock v. Clayton Cnty. to Title IX of the Education Amendments of 1972* (2021), https://usa.kpssinfo.org/wp-content/uploads/2021/09/2021.03.26_karlan_me

protection against bullying and harassment because students are diverse and have multiple social identities.¹⁵³

Finally, extensive research regarding the harmful impact of bullying on child development and well-being shows that such conduct detracts so heavily from the victims' educational experience that victims are effectively denied equal access to an institution's resources and opportunities.¹⁵⁴ While no one can say for certain how many children stay home on any particular day, studies show that 18.5% of students have skipped school at some point during the school year because of bullying at school, and 10% of students stayed home because of cyberbullying.¹⁵⁵ Recognizing that "many students who are bullied online are also bullied at school, . . . approximately 5.4 million students skip school at some point in the year due to bullying (over 530,000 skip many times)."¹⁵⁶ Besides missing school, only 57% of students who reported being cyberbullied said that they felt safe while at school, while 95% of students who had not been bullied reported feeling safe at school.¹⁵⁷ Missing school has a direct impact on school performance. Besides failing grades, standardized test scores are lower for kids who attend a school with a severe climate of bullying.¹⁵⁸ "One possible reason for the lower scores . . . is that students are often less engaged in the learning process because they are too distracted or worried about the bullying."¹⁵⁹ Beyond poor academic performance, these students may drop out of extracurricular activities, not speak up or ask questions in class due to fear, and they may even isolate themselves at school, which can cause the issue to worsen.¹⁶⁰ These negative consequences are not confined to adolescence.¹⁶¹ Many of these issues may persist into adulthood, including low self-esteem, trouble developing and

mo_eo13988_final.pdf [https://perma.cc/76AJ-XY3U]. *But see* U.S. DEP'T OF EDUC., *Resources for LGBTQI+ Students* (last modified May 10, 2022), https://www2.ed.gov/about/offices/list/ocr/lgbt.html [https://perma.cc/AK38-SQAY]. *Compare* DHHS, *Race, Ethnicity, National Origin & Religion*, STOPBULLYING.GOV (last visited Dec. 10, 2021), https://www.stopbullying.gov/bullying/groups [https://perma.cc/FR6S-6R2G], *with* DHHS, *Bullying and Youth with Disabilities and Special Health Needs*, STOPBULLYING.GOV (last visited July 21, 2021), https://www.stopbullying.gov/bullying/special-needs [https://perma.cc/GHK3-SNCW].

153. *See supra* note 152.

154. *See infra* pp. 24–25.

155. Justin W. Patchin, *Millions of Students Skip School Each Year Because of Bullying*, CYBERBULLYING RSCH. CTR. (Jan. 3, 2017), https://cyberbullying.org/millions-students-skip-school-year-bullying [https://perma.cc/524Q-4E68].

156. *Id.*

157. *Id.*

158. Sherri Gordon, *The Long-Lasting Effects of Bullying*, VERYWELLFAMILY (Oct. 17, 2021), https://www.verywellfamily.com/bullying-impact-4157338 [https://perma.cc/KAY3-Q938].

159. *Id.*

160. Steven Woda, *The Educational Impact of Bullying and Cyberbullying*, UKNOW KIDS.COM (Nov. 2, 2018), https://resources.uknowkids.com/blog/bid/302867/the-educational-impact-of-bullying-and-cyberbullying [https://perma.cc/3948-AAPE].

161. *See* DHHS, *supra* note 144.

maintaining relationships, and social isolation.¹⁶² Thus, it is clear that not only does bullying have long-lasting and widespread implications over the course of an individual's life, but also that "[t]hese problems are associated with great emotional and financial costs to society."¹⁶³

Although technology has the potential to be used for good, when students exploit social media to bully, harass, or discriminate fellow students, it is especially problematic. A majority of teens have experienced some form of cyberbullying, with roughly 59% of teens reporting that they have been bullied or harassed online.¹⁶⁴ Nearly all teens believe that online harassment is a problem that affects their peers and a majority think that teachers, social media companies, and politicians are failing to tackle this issue.¹⁶⁵ All children deserve equal access to a safe education and an equal opportunity to live their best lives. Protecting all children, especially those that live in the margins, is a collective effort. Thus, in order to protect *all* students, there is an urgency to reach a consensus on the definitions of bullying in all its forms and to improve the effectiveness of cyberbullying intervention and prevention programs.¹⁶⁶

IV. BETTER TOGETHER: A COLLABORATIVE APPROACH TO CYBER-ABUSE

Protecting all children from bullying behavior requires action from lawmakers, school officials, parents, and judges. When a child is a victim of peer cyber-abuse, who is in the best position to resolve the issue: the legal sector, or the educational and familial systems?¹⁶⁷ In other words, is cyber-abuse better viewed as a legal matter or as an educational issue?¹⁶⁸ Further,

162. Gordon, *supra* note 158.

163. William E. Copeland, et al., *Adult Psychiatric Outcomes of Bullying and Being Bullied by Peers in Childhood and Adolescence*, 70 JAMA PSYCHIATRY 419, 425 (April 2013), <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/1654916> [<https://perma.cc/9HG> P-49LC]; *see also* Gordon, *supra* note 158.

164. PEW RSCH. CTR., *Percentage of teenagers in the United States who have experienced cyber bullying as of April 2018, by gender*, STATISTA (2022) (59% of teen boys reported being a victim of cyberbullying or cyberharrasment, while 60% of teen girls reported the same), <https://www-statista-com.bunchproxy.idm.oclc.org/statistics/189325/us-teens-who-have-experienced-cyberbullying-sorted-by-gender/>.

165. Monica Anderson, *A Majority of Teens Have Experienced Some Form of Cyberbullying*, PEW RSCH. CTR. (Sept. 27, 2018), <https://www.pewresearch.org/internet/2018/09/27/a-majority-of-teens-have-experienced-some-form-of-cyberbullying/> [<https://perma.cc/S9Z3-RTXR>].

166. *See* Christa Boske, *Bullied, in Students, Teachers, and Leaders Addressing Bullying in Schools*, *supra* note 146, at 1, 3; DHHS, *Prevent Cyberbullying*, STOPBULLYING.GOV (last reviewed Nov. 10, 2021), <https://www.stopbullying.gov/cyberbullying/prevention> [<https://perma.cc/AW93-UU56>]; *see* DHHS, *supra* note 129.

167. Thomas Eveslage & Scott T. Eveslage, *Cyberbullying and Student Expression*, in 2 THE SAGE GUIDE TO KEY ISSUES IN MASS MEDIA ETHICS AND LAW 827, 828 (William A. Babcock & William H. Freivogel eds., 2015).

168. *See id.*

can these two views collaborate in a way that sufficiently protects everyone involved, including the victims, the students' First Amendment rights, and the schools who have a duty to protect and educate their student body?¹⁶⁹

When states legislatures create anti-bullying laws, they need to do so in a way that effectively balances the safety of their children with their students' First Amendment rights.¹⁷⁰ If not, the tension will inevitably result in a legal collision.¹⁷¹ Moreover, there are constitutional issues that arise when states and school officials seek to regulate bullying, especially cyberbullying.¹⁷² Specifically, there are overbreadth and vagueness concerns that these parties must pay attention to when regulating cyberbullying, particularly when (1) defining the term cyberbullying, (2) determining the scope of schools' authority to discipline student speech, and (3) applying the proposed categorical exclusion to cyberbullying.¹⁷³ Historically, the focus has been on the harm that did or was likely to occur because of the speech. However, this Note proposes to shift the focus toward the harassing conduct. While everyone has an interest in mitigating the harm that results from the abusive speech, there is an equal, if not greater interest in preventing the abusive conduct from occurring in the first place. Reframing the issue in this light reduces overbreadth and vagueness concerns inherent in viewpoint regulations.¹⁷⁴

Thus, this Section first proposes a definition for an umbrella concept called "cyber-abuse," which would encompass the online forms of bullying, harassment, and discrimination. Specifically, the states should combine these concepts under the umbrella category of cyber-abuse statutes, and school systems need to create clearly defined cyber-abuse school policies. Second, this Section argues that schools should be given broad authority to regulate cyber-abuse speech because schools are "uniquely situated" to regulate cyber-abuse.¹⁷⁵ Last, given the lack of consensus among the lower courts for how to approach the issue of cyber-abuse, this Section recommends a test that distinguishes between merely offensive speech and speech that creates an actual, objective interference with a student's education, the latter being speech that schools should be given wide latitude to regulate.

169. *See id.*

170. Philip Lee, *Expanding the Schoolhouse Gate: Public Schools (K-12) and the Regulation of Cyberbullying*, 5 UTAH L. REV. 831, 868 (2016).

171. *See Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 507 (1969) ("Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.").

172. *See infra* Section V.A.

173. Lee, *supra* note 170, at 869.

174. *See generally* Lee, *supra* note 170 (Section V of Lee's Note provides suggestions for schools to mitigate overbreadth and vagueness concerns).

175. DHHS, *Tips for Teachers*, STOPBULLYING.GOV (last reviewed May 21, 2021) (Teachers and school administrators are in "unique positions" where they may notice signs that cyberbullying may be occurring and can use their skills and roles to address or prevent cyberbullying.), <https://www.stopbullying.gov/cyberbullying/tips-for-teachers> [<https://perma.cc/5VY9-TJ7K>].

A. Defining Cyber-Abuse

“Administrators, teachers, students, school-board members, parents, lawmakers—everyone wants answers;”¹⁷⁶ however, no clear template has emerged for combatting online abuse. Logically, the first step is developing a shared language to identify and describe online abuse.¹⁷⁷ Instead of treating the concepts of cyberbullying, cyber-harassment, and cyber-discrimination as distinct terms, this Note advocates for consolidating these terms under the umbrella of “cyber-abuse.” While each of these aggressive behaviors may have their own nuances, they all produce a hostile school environment.

To begin, lawmakers need to create cyber-abuse statutes that can address the many abusive tactics that students may experience over the Internet.¹⁷⁸ Although historically, each of the above-mentioned terms have been defined separately, they all require “online abusive interpersonal behaviors that are overly aggressive in nature.”¹⁷⁹ By shifting the focus to the abusive conduct and injury, the broader term cyber-abuse can safely envelop the phenomenon that just so happens to have many names.¹⁸⁰ By shifting the policymaking focus to the abusive conduct and its resulting injuries, the term cyber-abuse effectively addresses the full scope of harmful phenomena. Therefore, in order for the *conduct* to rise to such an intolerable level, cyber-abuse laws need to have three major components: (1) intentionality, (2) seriousness or repetition; and (3) an observed or perceived power imbalance.¹⁸¹

First, states should include an element of intentionality, as defined in criminal law. As the Fifth Circuit recognizes, the “speaker's intent matters when determining whether the off-campus speech” is subject to school discipline.¹⁸² Intent is generally understood to refer to the mental aspect behind a person's action.¹⁸³ To be held in violation of a cyber-abuse statute, it would make sense that, at minimum, the perpetrator intended to engage in cyber-abuse. Accordingly, cyber-abuse necessarily requires that the speaker to intend the speech to reach the victim, either purposefully, knowingly, or recklessly. Akin to sexual harassment cases under Title VII, where the act

176. Eveslage, *supra* note 167, at 832.

177. Pen America, *Defining “Online Abuse”: A Glossary of Terms*, ONLINE HARASSMENT FIELD MANUAL (2022), <https://onlineharassmentfieldmanual.pen.org/defining-online-harassment-a-glossary-of-terms/> [<https://perma.cc/8M9N-9ST5>].

178. *See id.*

179. Chris Piotrowski, *Bullying: A Research-based Content Analysis of the Psychological Literature*, ALA. COUNSELING ASS'N J. 13, 13 (2012).

180. *Cf. Pen America, supra* note 177.

181. This proposed test loosely follows a Title VII framework by focusing on the intentional conduct of the abuser, instead of the courts' traditional approach of looking at the harm realized by the victim. *See generally* Davis *ex rel.* LaShonda v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999) (holding that school authorities can be held liable under Title IX for damages in a case involving student-on-student harassment).

182. Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 395 (5th Cir. 2015).

183. *See Intent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

itself presupposes intentional conduct,¹⁸⁴ inherent in the very nature of cyber-abuse, an actor's misconduct will always involve some sort of intentional or reckless misconduct. While speech may be the means used to target the particular victim, it is the actor's deliberate, purposeful conduct that is being punished.

From the school system perspective, schools should define cyber-abuse to include the element of intent in their handbooks, school policy manuals, and online materials. Not only does an intent requirement place a restraint upon the breadth of speech schools may discipline or regulate, but it also permits schools to act against any student behavior that intentionally, knowingly, or recklessly harms, intimidates, or humiliates the victim. Requiring a *mens rea* component strikes a balance between a student's right to freedom of expression with a victim's right to participate in school and a school's ability to protect that right.¹⁸⁵

Second, states ought to require the conduct¹⁸⁶ to be serious or pervasive. Of particular importance, states need to define "serious" in a way that recognizes that even a one-time occurrence can impair or infringe upon a student's right to education.¹⁸⁷ Because a single aggressive act can lead to numerous incidents of repetitive victimization, and not necessarily at the hands of the perpetrator, the traditional criterion of requiring repetition seems to be less pertinent in the virtual context.¹⁸⁸ Moreover, a single incident posted publicly, may subject the victim to greater harm overall, as the potential audience is virtually innumerable.¹⁸⁹ Thus, even a single incident of cyber-abuse has the potential to be "serious."

184. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998).

185. As attorney Lisa S. Blatt, acknowledged, "when it comes to the Internet, things like time and geography are meaningless." Thus, in order for a school to regulate speech, the focus must be on the speaker's intent, not the speaker's location. Oral Argument at 00:06:29, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021) (No. 20–255), <https://www.oyez.org/cases/2020/20-255> [<https://perma.cc/VM7L-RW3W>].

186. The conduct encompassed in cyberspace includes behavior that is manifested through written, verbal, or visual expression. CAL. ED. CODE § 48900(r)(2)(A) properly defines "electronic act" as "the creation or transmission by means of an electronic device, including, but not limited to, a telephone, wireless telephone, or other wireless communication device, computer, or pager, of a communication, including, but not limited to, any of the following: (i) a message, text, sound, video, or image, (ii) a post on a social network internet website." DHHS, *California Anti-Bullying Laws & Policies*, STOPBULLYING.GOV (last reviewed Aug. 1, 2021), <https://www.stopbullying.gov/resources/laws/california>.

187. See Gersen, *supra* note 6.

188. Lucie Corcoran, et al., *Cyberbullying or Cyber Aggression?: A Review of Existing Definitions of Cyber-Based Peer-to-Peer Aggression*, in *CYBERBULLYING: WHERE ARE WE NOW? A CROSS-NATIONAL UNDERSTANDING*, SOCIETIES J., 1, 1 (Conor Mc Guckin & Lucie Corcoran eds., Jan. 2017), http://www.mdpi.com/journal/societies/special_issues/cyberbulling [<https://perma.cc/SV8D-XN2L>].

189. *Id.* at 2.

While there may be many proponents of the “severe” conduct standard,¹⁹⁰ Justice Sotomayor recognized that “most of the conduct that teen-agers engage in would [not] fit any of our traditional categories.”¹⁹¹ Instead, shifting the level of conduct from “severe” to “serious” permits schools to act quicker, which ultimately provides greater protection for the school community at large. Moreover, if a student’s conduct is serious enough to cause a disruption, that is, serious enough to interfere with another student’s ability to function in or attend the school community, then it is bad enough for the school to know about it. Akin to employer liability in agency law, when a student’s purposeful, abusive conduct infringes upon another’s right to education, the school’s failure to act contributes to the continuation of the conduct, and the school is liable for its own negligence.¹⁹² In the context of the school system, it would be prudent for schools to provide examples of speech that could potentially be seen as “serious” (distinguishing between one-off comments, teasing, etc.).

Whether it is a one-time incident or a repetitive attack, once a student’s speech reaches the level of serious, what is being punished is speech that any reasonable school system, parent, or judge will realize is intolerable to the victim. When such speech persists in light of such a state of mind, whatever First Amendment protection the speech might otherwise have enjoyed may appropriately be deemed forfeited. Serious conduct coupled with the element of intent creates a common-sense line that distinguishes between speech that merely hurts feelings and speech that abridges a student’s legally vested interest: the “legitimate entitlement to a public education as a property right.”¹⁹³ Accordingly, “[a] speaker’s intention that his speech reach the school community, buttressed by his actions in bringing about that consequence,” should be sufficient for a school to discipline such conduct.¹⁹⁴

Finally, it is important to recognize that although the power imbalance relationship exists whether the bullying occurs in person or through an electronic medium, cyber-abuse’s inherent “elements add intensity, influence, audience, and permanence to the hurtful message” not found in traditional bullying.¹⁹⁵ This criterion, whether real or perceived,

190. Oral Argument at 1:03:42, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021) (No. 20-255), (“If it is bullying that is severe or pervasive enough to interfere with access to education, they can take action, consistent with the First Amendment.”), <https://www.oyez.org/cases/2020/20-255> [<https://perma.cc/VM7L-RW3W>].

191. Oral Argument at 1:19:44, *Mahanoy*, 141 S. Ct. 2038 (No. 20-255), <https://www.oyez.org/cases/2020/20-255>, [<https://perma.cc/VM7L-RW3W>].

192. Applying the idea that an employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate or successively higher authority over employee to the public-school context. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 724, 755–61 (1998).

193. *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

194. *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 395 (5th Cir. 2015).

195. Eveslage, *supra* note 167, at 829; See *supra* Section IV.C.

describes the perpetrator as more powerful, “either physically, socially, or emotionally, such as a higher social status, or is physically larger or emotionally intimidating, than the victim.”¹⁹⁶ Because of the particular medium used, “[p]ower imbalances can change over time and in different situations, even if they involve the same people.”¹⁹⁷ Additionally, children who use their power to control or harm others over electronic devices have the additional advantage of the option to remain anonymous. Worse, anonymity breeds courage; “the anonymity provided by cyberspace allows people to do and say things they would never do otherwise.”¹⁹⁸ Moreover, because there is no physical interaction, abusers lack remorse.¹⁹⁹ Whether posting under a pseudonym, impersonating another student, or creating a false identity profile, the possible anonymity of the perpetrator may intensify a victim’s feeling of powerlessness, and can take an exhausting, emotional toll on a child.²⁰⁰ Whether or not the identity of the abuser is known, when cyber-abuse strikes, a child is likely to feel overwhelmed and at a loss for where or who to go to make it stop.²⁰¹ Accordingly, whether real or perceived, the power imbalance is an important feature for the abuse and a critical element of cyber-abuse.

While bullying, harassment, and discrimination have traditionally been defined separately, in the cyber context, many of the abuse tactics used by students fit within one or more of these categories.²⁰² Accordingly, grouping these terms under the term “cyber-abuse” focuses on the abusive conduct and provides better guidance to schools on how they can comply with applicable federal and state laws, allowing them to act without triggering *Tinker*. Moreover, allowing cyber-abuse to encompass these areas of abusive speech allows schools to act more quickly because it does not require the school to wait for a substantial disruption. Thus, due to the special harm associated with cyber-abuse, if cyber-abuse is defined as a form of speech worthy of First Amendment leeway, then schools would be enabled to protect their most vulnerable students from intentional, serious, and/or repetitive cyber-abuse, while also balancing the free speech rights of their students.

196. See PACER.ORG, *How is Bullying Defined?* (Nov. 2016), <https://www.pacer.org/bullying/info/questions-answered/how-is-bullying-defined.asp> [<https://perma.cc/F2FA-HD36>].

197. DHHS, *supra* note 116.

198. TRULIOO, *Invisible Online: How Anonymity Affects Cyberbullying* (Oct. 25, 2013), <https://www.trulioo.com/blog/invisible-online-how-anonymity-affects-cyberbullying> [<https://perma.cc/F6B2-Y3UD>].

199. See John R. Suler, *The Online Disinhibition Effect*, THE PSYCHOLOGY OF CYBERSPACE (2001, revised 2004), <http://truecenterpublishing.com/psyber/disinhibit.html> [<https://perma.cc/EP6Y-XQRP>].

200. See Erin Peebles, *Cyberbullying: Hiding Behind the Screen*, 19 PEDIATRIC CHILD HEALTH 527, 527–28 (2014), <https://academic.oup.com/pch/article/19/10/527/2638997> [<https://perma.cc/3X4K-3WD6>].

201. See *id.*

202. See PEN AMERICA, *supra* note 177.

B. Deference Should be Given to Schools When Handling Cyber-Abuse

Due to cyber-abuse's unique concerns, it is inherently more pervasive.²⁰³ Unlike traditional abusive behavior, cyber-abuse can (1) reach a victim anytime, anywhere, (2) be repeated with or without the contribution of the abuser, (3) extend to a limitless audience, and (4) be done under the guise of anonymity.²⁰⁴ Furthermore, "[t]he digital world is constantly evolving with new social media platforms, apps, and devices, and children and teens are often the first to use them."²⁰⁵ These concerns, coupled with the fact that cyber-abuse is harder to recognize, it is no wonder that parents have a difficult time understanding when, or to what extent, cyber-abuse is occurring.²⁰⁶ While schools have been the enforcer over traditional student abusive conduct, there is no clear authority over cyber-abuse.²⁰⁷ This lack of authority makes it difficult to not only to regulate cyber-abuse, but also to protect against it.

It may be argued that regulation of conduct that occurs off campus and after hours is still a job for parents;²⁰⁸ however, this is a view seen through privileged, rose-colored glasses. Although beyond the scope of this Note, it is important to mention that one in seven American children are living in poverty.²⁰⁹ Economic and structural inequities are inextricably linked to America's long history of racism and discrimination, and "are compounded by a lack of affordable child care, which is one of the biggest expenses for families today."²¹⁰ The inability to provide child care should not be mistaken as neglect, but it does mean that an estimated 15 million students—including roughly 3.7 million middle schoolers—are home alone without parental supervision.²¹¹ Furthermore, 55% percent of children living

203. See *supra* Sections III-IV.

204. See Lee, *supra* note 170, at 858–60.

205. DHHS, *Digital Awareness for Parents*, STOPBULLYING.GOV (last reviewed Aug. 17, 2021), <https://www.stopbullying.gov/cyberbullying/digital-awareness-for-parents> [<https://perma.cc/P59N-647U>].

206. DHHS, *supra* note 116.

207. See *supra* Section V.

208. Oral Argument at 1:25:29–1:37:18, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021) (No. 20-255), <https://www.oyez.org/cases/2020/20-255> [<https://perma.cc/8BS8-7VE8>] (In front of Justice Kagan, Cole argues that *Tinker* is a supervision test, not a geographic test. He then tells Justice Kavanaugh that *Tinker*'s disruption standard applies within the school-supervised settings, not outside. Finally, he posits that speech occurring off campus, must be addressed consistent with the First Amendment rules that govern a particular problem).

209. Areeba Haider, *The Basic Facts About Children in Poverty*, CTR. FOR AM. PROGRESS (Jan. 12, 2021) (last visited Oct. 18, 2021), <https://www.americanprogress.org/issues/poverty/reports/2021/01/12/494506/basic-facts-children-poverty/> [<https://perma.cc/LB9V-J6UY>].

210. *Id.*

211. AFTERSCHOOL ALLIANCE METLIFE FOUND., *Keeping Kids Safe and Supported in the Hours After School*, Issue Brief No. 65 at 1 (May 2014) <http://www.afterschoolalliance.org/researchSafety.cfm>. [<https://perma.cc/58YD-9MWE>].

in poverty come from a single parent household.²¹² Who monitors what these children do online while the parent is away? And who protects children from abusive electronic behavior if mom and dad cannot or simply are not present? As Justice Breyer noted,

[T]oday [schools] don't just teach classical subjects. We're there to help the child have adequate health, in many cases, to see that he's adequately fed. In quite a few cases, we become a caretaker, and we don't want to send them home immediately because there's nobody home, and we have to plan after-school activities. There are dozens of areas that didn't used to be thought of as within the purview of the public school.²¹³

Although plenty of parents take an active role and interest in their children's online activity, their interest against cyber-abuse is understandably narrow in scope. Limited to a particular familial situation, a parent's main concern does not extend much further than one's own child. To make matters worse, children are reluctant to tell their parents about cyber-abuse for fear of losing their "lifeline to the social world."²¹⁴

Conversely, in the context of public schools' custodial responsibilities, schools have a compelling interest in preventing cyber-abuse to adequately protect the safety and well-being of its *whole* student body. Additionally, because teachers, officials, and other school staff watch students interact on a daily basis, they are more likely to notice when something is amiss.²¹⁵ Furthermore, school employees have the ability to use their skills and roles to create safe environments with positive social norms.²¹⁶ "In light of the special relationship between First Amendment protections and children, schools should be given broad authority to regulate cyber-abuse when perpetuated by their students against other students, even when it occurs off campus."²¹⁷ If abusive conduct occurs on the Internet, a school's power to discipline should not turn on where the statement was

212. U.S. DEP'T OF EDUC., *Characteristics of Children's Families*, NAT'L CTR. FOR EDUC. STATS. (May 21, 2021) (In 2019, of those children living in poverty, 37% lived in a mother-only household, while 18% lived in a father-only household.), <https://nces.ed.gov/programs/coe/indicator/cce>.

213. Oral Argument at 1:10:23, *Mahanoy*, 141 S. Ct. 2038 (No. 20-255), <https://www.oyez.org/cases/2020/20-255> [<https://perma.cc/8BS8-7VE8>] (Justice Breyer, quoting a conversation with a San Franciscan superintendent about how much public schools have changed).

214. YOUTHTECH HEALTH, *Why Teens Don't Report Cyberbullying*, <https://yth.org/teens-dont-report-cyberbullying/> (last visited Oct. 24, 2021) [<https://perma.cc/58KT-3G4C>].

215. See DHHS, *supra* note 175.

216. See *id.*

217. Lee, *supra* note 170, at 878.

made.²¹⁸ Mindful of cyber-abuse's detrimental effects,²¹⁹ in assessing whether a student's speech interferes with a student's access to equal education, the inquiry should be based upon what the school reasonably believes the speech to be at the time it is occurring. This standard of reasonableness may, in some circumstances, require the school to undertake additional investigatory effort before disciplining the student; however, whatever burden that places on a school also protects the school from otherwise violating a student's First Amendment rights.²²⁰

C. Judicial Application of the Cyber-Abuse Test

The *Mahanoy* Court's three features of off-campus speech that "diminish the strength of the unique educational characteristics that might call for special First Amendment leeway" mean, geographically speaking, that off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.²²¹ This general rule makes sense; if schools were able to regulate any student speech that occurred off-campus or after-hours, then effectively schools could regulate *all* student speech.²²² However, as previously mentioned, parents are generally woefully unequipped to recognize, prevent, and address cyber-abuse in their own home, much less in the school community at large.²²³

Thus, this Note argues that whenever Internet behavior is deemed bullying, harassment, or discrimination, the speech creates a sufficient disruption to the school environment, permitting schools to stand *in loco parentis* and discipline students for such cyber-abuse speech. Under these circumstances, the first feature of *Mahanoy's* off-campus speech does not "diminish the strength of the unique educational characteristics that might call for special First Amendment leeway."²²⁴ Courts need to determine when off-campus digital speech can be understood to harm students' rights by redefining *Tinker's* "substantial disruption" standard. During oral arguments, Justice Kagan noted,

[I]t's also possible to understand *Tinker* as a decision about what's necessary for a school's learning environment. And it might be that student speech that occurs outside of school is sometimes going to cause fundamental problems, disruption of the school's learning environment, and I guess then the

218. See Ian Millhiser, *supra* note 2.

219. See *supra* Section IV.

220. See Marcus-Toll, *supra* note 53.

221. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021).

222. See *id.*

223. See *supra* Section V.B.

224. *Mahanoy*, 141 S. Ct. at 2046.

question is why we shouldn't acknowledge that and allow a school to deal with it.²²⁵

Echoing Justice Kagan's perspective, to be sufficient to justify school discipline, off-campus digital student speech must first reasonably fall into one of cyber-abuse's three buckets: (1) bullying, (2) harassment, or (3) discrimination. If such speech falls into one of the aforementioned categories, and the speech objectively (1) interferes or (2) deprives another student of access to an education, then the speech has caused substantial disruption, and a school has the authority to regulate and take disciplinary measures. When off-campus speech is deemed bullying, harassment, or discrimination, a school may stand *in loco parentis* to protect its community and thus discipline students for such speech. Redefining the substantial disruption standard in this manner eliminates vague, context-specific tests.

Under this Note's proposed test, courts should perform a fact-specific inquiry, viewed through the lens that public schools should be afforded deference when they discipline students for behavior off campus irrespective of whether the discipline occurs before it becomes a severe disruption, when that speech threatens to harm, harass, or invade the rights of its community. Under this Note's proposed test, courts should afford deference to schools when they discipline students for off-campus behavior that threatens to harm, harass or invade the rights of the student community, irrespective of whether the discipline occurs before or after the behavior causes a severe disruption. In assessing whether schools should be entitled to a presumption of good faith when engaged in removing student-created barriers to other students' education, their actions in response to bullying, harassment, or discrimination should be reviewed under a less searching analysis than strict scrutiny. Disciplining students who participate in cyber-abuse is a reasonably effective means of addressing schools' legitimate concerns in preventing, deterring, and detecting cyber-abuse. Evaluating school action in this context, as long as the discipline of students who take part in cyber-abuse effectively serves the school's interest in protecting the safety and well-being of its students, no violation of a student's First Amendment rights has occurred.

Therefore, off-campus Internet student speech that intentionally, knowingly, or recklessly (1) threatens the school community, (2) intentionally targets specific individuals or groups in the school community, (3) creates a hostile school environment, or (4) affects a marginalized student's access to education creates a substantial disruption. Under any of these circumstances, the substantial disruption is reasonably related to

225. Oral Argument at 1:25:01, *Mahanoy*, 141 S. Ct. 2038 (No 20-255), <https://www.oyez.org/cases/2020/20-255> (discussing how *Tinker* could be understood "as a decision about what's necessary for a school's learning environment" instead of as a geographical test, which would permit schools to handle off-campus student speech that disrupt the school's learning environment). [<https://perma.cc/8BS8-7VE8>].

legitimate pedagogical concerns, and a school would be entitled to take disciplinary action it deems reasonable and necessary to abolish the actual or threat of infringement.

Critics of this approach are likely to contend that the courts should require the speech to be “severe” before affording a school First Amendment leeway.²²⁶ At first glance, this appears to be reasonable and sound. However, in an effort to balance between students’ First Amendment rights against anti-bullying and anti-harassment principles, it effectively advocates extreme strictures on the range of conduct that public schools could consider as bullying or harassment for punishment reasons. While schools may not discipline student speech off campus and online merely because it may cause “disruption,” schools need the power to discipline students for behavior before it becomes severe or pervasive to protect a marginalized student’s access to education. Educational institutions should be available to everyone, especially the most vulnerable, for “education is important in itself and is often called a ‘multiplier’ human right, as the degree to education impacts the level of enjoyment of other human rights.”²²⁷

CONCLUSION

“The old adage, ‘sticks and stones may break my bones, but words will never harm me’ does not apply in the worlds of Internet technology, where false, hurtful, or humiliating comments can go viral and global in just seconds.”²²⁸ A lot has changed in the fifty-two years since *Tinker* was decided. Social media platforms infiltrate every facet of our lives. Along with the benefits of easy connectivity and increased information, social media has also become a vehicle for bullying, harassment, and discrimination. While students are entitled to a significant measure of First Amendment protection, even at the schoolhouse gate, schools must be able to safeguard those entrusted to their care from speech reasonably regarded as to interfere with their access to education. While *Tinker* may guide the courts’ analysis for many student speech cases, it is impractical, if not impossible, to articulate a bright-line rule that fairly applies *Tinker* to all categories of speech said away from the schoolhouse. Within the narrow confines of abusive online conduct, when courts are confronted with circumstances of cyber-abuse, *Tinker* should

226. Oral Argument at 1:03:42, *Mahanoy*, 141 S. Ct. 2038 (No. 20-255) (“If it is bullying that is severe or pervasive enough to interfere with access to education, they can take action, consistent with the First Amendment.”), <https://www.oyez.org/cases/2020/20-255> [<https://perma.cc/8B88-7VE8>].

227. INT’L NETWORK FOR ECON., SOC., & CULTURAL RTS., *The Right to Education*, <https://www.escri-net.org/rights/education> (last visited Jan. 15, 2022) [<https://perma.cc/3S8Z-UPHQ>].

228. Emma Cooper, *What Should you do if a Cyberbully Starts to Bully at School?*, CARDINAL CHATTER (Jan. 15, 2017), <https://www.cardinalchatter.com/7941/uncategorized/what-should-you-do-if-a-cyberbully-starts-to-bully-at-school/>.

be inapplicable. Thus, it is critical that the courts create a standard unique to this issue.

Under this Notes' proposed rule, cyber-abuse, regardless of when or where it is created or transmitted, is *not* subject to *Tinker*. First, online speech that (1) threatens the school community, (2) intentionally targets specific individuals or groups in the school community, (3) creates a hostile school environment, or (4) affects a marginalized student's access to education is cyber-abuse. Second, because cyber-abuse interferes with access to education, causing a substantial disruption, schools have the authority to discipline students for engaging in this conduct. Last, mindful that schools are best positioned to address cyber-abuse occurring between their students, the courts' assessment of substantial disruption is based upon what the school reasonably believed the speech to be at the time it occurred.

Protecting all children from cyber-abuse is a group effort. When a child is a victim of cyber-abuse at the hands of their peers, "[s]chool administrators can't say it's up to the parents. Parents can't say it's up to the teachers. Teachers can't say it's not their job. And kids can't say, 'I was too afraid to tell.' Every single one of us has to play our role if we're serious about putting an end to the madness. We are all responsible. We must be."²²⁹

229. DEAR BULLY: SEVENTY AUTHORS TELL THEIR STORIES 267 (Megan Kelley Hall & Carrie Jones eds., Sept. 6, 2011).