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# Pennsylvania School Solicitors' Guidance on How School Officials Should Respond when Regulating Off-Campus Student Expression

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EXAMINATION OF STUDENTS RIGHTS OF OFF-CAMPUS EXPRESSION

PENNSYLVANIA SCHOOL SOLICITORS' GUIDANCE ON HOW  
SCHOOL OFFICIALS SHOULD RESPOND WHEN REGULATING  
OFF-CAMPUS STUDENT EXPRESSION

BY

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Submitted in partial fulfillment of the requirements  
for the degree of Doctor of Education

Seton Hall University

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OFFICE OF GRADUATE STUDIES

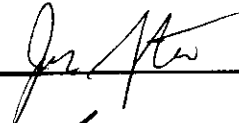
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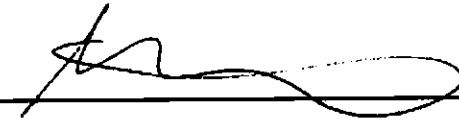
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The mentor and any other committee members who wish to review revisions will sign and date this document only when revisions have been completed. Please return this form to the Office of Graduate Studies, where it will be placed in the candidate's file and submit a copy with your final dissertation to be bound as page number two.

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**Abstract**

PENNSYLVANIA SCHOOL SOLICITORS' GUIDANCE ON HOW SCHOOL  
OFFICIALS SHOULD RESPOND WHEN REGULATING OFF-CAMPUS STUDENT  
EXPRESSION

The purpose of this study was to gather and analyze the perspectives of Pennsylvania school solicitors in Montgomery and Bucks Counties about how school officials should assess their regulatory authority of off-campus student online expression. With the rise in students online communication, the increasing and changing role of the school administrator, and the lack of a Supreme Court ruling on the matter, guidance and clarity for how school officials should proceed is blurry. Case law used as precedent to guide decision making has been inconsistent, with variations based on geographic region and the trends in that particular Circuit Court of Appeals.

I explore relevant case law, discuss social factors influencing the authority of school officials, analyze relevant scholarly research, and most importantly assess the perspectives of solicitors. Through qualitative interviews, school solicitors offered perspectives on their interpretations of legal trends, which precedents to apply, and what guiding questions to ask when determining the legal and professional responsibility of school officials to regulate off-campus expression.

I found that while there are many complicating factors that raise the level of responsibility for school officials' involvement, the primary factors determining regulatory authority are the establishment of a nexus at the school and whether the expression results in substantial disruption to the on-campus educational environment.

### **Acknowledgments**

This dissertation would not have been possible without the incredible support and encouragement of others. I am especially thankful to my dissertation committee chair and mentor, Dr. Joseph Stetar, for his guidance and direction through this process. Dr. Stetar, your swift and meaningful feedback was incredibly helpful and you always made time to support me, even through your teaching and international travel. To my other committee members, Dr. Martin Finkelstein and Dr. Anthony Stevenson, you each provided me with your unique perspective, guidance, and inspiration that allowed the study to take its form. I appreciate your willingness to serve in this role.

I would like to thank my Seton Hall cohort XV colleagues for making this process simultaneously enjoyable and enlightening. Our laughs together eased the challenges of the program. While it took me a bit longer than most of you to finish, I will forever appreciate your encouragement to complete the process. Through this process, I gained not only knowledge, but also life-long friends and professional colleagues.

To my grandparents, I am eternally grateful for the foundation of education that you established that was so clear as I grew up. My grandparents, Donald and Mickey Eveslage, were empathetic, compassionate, and dedicated educators to the core. I cherish the memories of your stories about school, family, teaching kindergarten, and being a high school principal. You shaped me more than you ever could know. I miss you both tremendously.

Thank you to my parents, Thomas and Sonja Eveslage. I recall the days when you were each working on your own dissertations, with papers sprawled and hours spent on the manual typewriter, working diligently to finish. Little did I know at the time that I

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would someday be sprawling papers myself in pursuit of the same goal. You have always been such amazing models for me, and your ethics and work habits have been something to which I have always aspired. I am so appreciative of your consistent and enduring love and support in every way.

Finally, and most of all, to my amazing wife, Lena, and our wonderful children, Donovan and Mikayla, you have no idea how thankful I am to have you all in my life. I have always felt your love, support, and understanding. Being away from you for the many hours at school and working on this dissertation was not easy, but knowing that I had your support was so comforting. I will proudly relish supporting each of your own pursuits and witnessing the success I know that you each will achieve. I love you all more than I can describe here.

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## CHAPTER I: INTRODUCTION

### Introduction to the Study

Since 1969, when the historic Supreme Court decision in *Tinker vs. Des Moines Independent School District* ruled that students' first amendment rights of expression were conditionally protected in a school setting, both courts and school districts have used the *Tinker* case as the primary standard to determine if student expression was protected. When school districts have faced the question of whether the school has the authority to regulate student expression, they have used the "Tinker test" to determine if (a) the speech or expression is reasonably likely to cause a substantial disruption to the school environment, or (b) the speech or expression will interfere with the rights of others.

First amendment advocates have long lauded *Tinker* as the benchmark case protecting student rights. McCarthy (2009) referred to *Tinker* as the "Magna Carta of students' expression rights." Dryden (2010) takes this further, stating not only is it *the* standard, but *Tinker* has been the best defense for students seeking protection for their expression. Calvert (2009) called *Tinker* a "bulwark against the censorial proclivities of school officials."

However, since *Tinker*, Supreme Court rulings on student expression, coupled with recent lower court appellate rulings, indicate the *Tinker* standard been applied less frequently when ruling on school related issues. What is more, when it has been applied, it has been interpreted in a manner that students are losing their rights of expression in school settings (Kozlowski, 2011).

Several pivotal societal trends have altered public perception of the responsibility

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of schools to maintain a level of regulation beyond the boundaries of the school. This change has extended into student expression cases. Most notably, several occurrences of school shootings, such as the tragedies at Columbine High School (Littleton, CO), Sandy Hook Elementary (Newtown, CT), and many other locations, have heightened the public expectation that educators and schools should have an increased awareness of students' interests and tendencies beyond their in-school lives. Similarly, the school's expanding role in regulating bullying and cyberbullying cases have led to increased burden on schools to be aware of, and make judgments on, communication and conduct originating off campus.

While I will not closely examine these social phenomena, their implications have to be considered while examining the rights of students and responsibilities of school administrators. As social trends change, legal cases continue to be heard and ruled upon with the application of the legal precedents of Supreme Court rulings. There have been four key Supreme Court rulings, starting with *Tinker v. Des Moines Independent School District* in 1969, that have established the foundation for student expression cases. Since 1969, the Supreme Court rulings, and the related lower circuit court decisions, have blurred the boundaries for school administrators pertaining to regulatory control over student speech and expression. Adding to this confusion, in an age where social media and cyberbullying are extremely relevant topics in schools, the Supreme Court has not yet ruled on any case involving student off-campus online expression.

The *Tinker* case immediately established a landmark standard of granting students rights of expression while placing the responsibility on the schools to determine a justification for regulating or suppressing student expression. In the 17 years following

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*Tinker*, the burden of proof in free-speech cases remained on school officials, not students. However, in the mid-80s, the U.S. Supreme Court began retreating from the rigid requirements facing school officials, gradually granting them more leeway. Never totally abandoning the students-have-speech-rights message of *Tinker*, the Supreme Court in several rulings during the next two decades made it easier for administrators to justify regulating or restricting student expression.

After the 1969 *Tinker* ruling, the courts repeatedly cautioned school officials not to overreact when students express themselves in school. The Supreme Court first lightened the burden on administrators by again ruling on a student expression case in 1986. In *Bethel School District v. Fraser*, the Supreme Court ruled the school was justified in disciplining a student who, while speaking at a school assembly, used several less-than-subtle sexual metaphors in a two-minute campaign speech for a student council candidate. The speech led to no “substantial disruption,” but the court said that, beyond the constraints of *Tinker*, school officials have the authority to punish speech that is lewd, vulgar, or indecent. *Tinker* standards remain, the court said, but Chief Justice Warren Burger added, “The undoubted 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.”

Two years later, in 1988, the Supreme Court upheld censorship of a student newspaper, ruling in *Hazelwood School District v. Kuhlmeier* that school officials deserve some additional leeway in student expression cases. The 8th Circuit Court of Appeals ruled in favor of the students, saying that the newspaper did not substantially disrupt the school or interfere with the rights of other students. The Supreme Court did

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not refute this, but chose to neither apply nor overturn *Tinker*. Instead, the Supreme Court expanded on its message in *Bethel* and said administrators also have a valid interest in regulating expression inconsistent with the school's "basic educational mission" that send messages the public could incorrectly perceive as reflecting the beliefs of the school. Although *Hazelwood* dealt with the school newspaper, a school-sponsored venue, the court's reasoning has been applied since then in some off-campus cyberbullying cases where someone considered a school's failure to act to be educational malpractice.

The courts considered an important point before deciding whether administrators can regulate what is said: Are ideas expressed in a school venue within the school's purview (thus seen by the public to have the approval of the administration) or do they come independently from a student beyond the school's reach? This question was asked again in 2007 when an Alaska high school student unfurled a banner that said "Bong Hits 4 Jesus." In *Morse v. Frederick*, the Supreme Court once again ruled in favor of the school. Joseph Frederick claimed his first amendment rights were violated by being punished despite being off school property when he displayed his banner as the Olympic Torch Relay came by on the street across from his school in 2002. Despite Frederick arguing there was no public disturbance as a result of his personal message expressed on a public street, the principal suspended him from school.

In a close decision, the Supreme Court ruled in favor of the school and upheld the suspension. *Tinker* again was acknowledged, but not applied, as the majority in *Morse* ruled this was a school-related event, since students were excused to attend and teachers were present, supervising students. Applying a theme from both *Bethel* and *Hazelwood*, it was determined Frederick clearly was making a reference to some sort of drug use, so

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school officials understandably would not want the public to believe the school tolerated such drug use.

Since *Hazelwood*, the U.S. Supreme Court has not ruled on a student expression case, in or out of school. Meanwhile, the technology world has vastly changed, significantly altering how students can communicate with one another and school officials. As technology began expanding, the expectations were simultaneously increasing for school officials to monitor, contain, and resolve bullying issues. Online bullying cases emerged and school administrators were faced with student expression issues much more complicated than a student carrying an objectionable banner near the school. Judges in the lower courts soon realized the apprehension of school officials fearful that the mobile devices readily available to students could make it more difficult for the schools to protect students from the harmful words of others.

With the *Bethel* ruling, the legal burden began shifting from the school administrator back to the student, as it was in the pre-*Tinker* years. For 30 years after *Tinker*, when students' non-disruptive speech was stifled in school, they could create and distribute a written "underground" protest outside of school, beyond an administrator's legal reach. School officials seldom interfered with off-campus speech or conduct. However, as technology emerged and computers, mobile devices, smartphones, and social-networking sites became common carriers for student speech, school boundaries became more and more blurred.

Administrators, empowered with greater legal latitude to ensure safety and smooth school operations, began using the "substantial disruption" standard beyond the boundaries and criterion established in the *Tinker* ruling. Courts have divided on whether

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the standards of *Tinker* can be applied off campus in this way, but they seem receptive to an educator's argument that where the speech originated is less important than the likelihood that students within the school will feel its negative impact.

For decades, student free-speech litigation has focused on the "substantial disruption" standard. With the recent growth of cyberbullying, the second tenet of *Tinker* has emerged. The Court has maintained that student expression infringing on the rights of others is unprotected. It is not surprising that school officials, obligated to protect their students and offer them a safe school environment conducive to learning, argue in court that a cyberbullying attack, using social media and crossing school boundaries, infringes on the rights of a student victimized by bullying. Balancing student expression rights with protecting the rights of individuals is an on-going challenge and it is not a static issue. The American Jewish Committee (2012) cautioned "it changes depending on the specific circumstances in each case, and is affected especially by the age of the students involved."

The U.S. Supreme Court has not yet ruled on a cyberbullying case, or any case concerning student online communication, but is likely to hear such a case at some point. Bullying and cyberbullying laws exist in virtually every state (Hinduja & Patchin, 2014), and district and appellate courts are at odds on how to reconcile and apply the Supreme Court's rulings in *Tinker*, *Bethel*, *Hazelwood* and *Morse*. Consequently, school officials are searching for guidance from the courts and school solicitors in the face of demanding parents who want assurances their schools are safe and their children protected (Calvoz, Davis, & Gooden, 2013).

School officials clearly need guidelines to protect students who are victims of



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bullying, and not just for those bullied in school, but those targeted anonymously via posted threats or personal, hurtful half-truths. Many school officials reason that cyberbullying, akin to harassment, is worthy of off-campus monitoring when victims can feel the effects of such attacks while in school. In the process, if administrators intervene based on how a student expresses him or herself online, even if this expression is interpreted as cyberbullying, school officials must consider prior court rulings on student expression issues. Whether intervention or regulation by school officials is merited depends on school district policies and student codes of conduct. In turn, case law and court rulings indirectly shape such policies and codes.

Because the U.S. Supreme Court has not yet heard an off-campus student expression case, schools and lower courts have typically applied the standards established in *Tinker v. Des Moines*. Though it determined the rights of student speakers and obligations of administrators inside the school, *Tinker* gave school officials two justifications for restricting student speech: threat of substantial disruption and intrusion on the rights of others. Believing that preserving the educational process and ensuring the safety of students trumped an individual's right to speak, school officials argued that *Tinker* permitted punishment for off-campus speech when they could demonstrate one of the court's free-speech exceptions.

In almost every instance when the school has been challenged in court for punishing off-campus speech, administrators have argued that the expression was substantially disruptive. Judges have demanded school officials demonstrate they could "reasonably foresee" substantial disruption inside the school and prove a nexus between the disruption and the specific off-campus expression. Before the dramatic increase in

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instances of cyberbullying, and the violent school shootings in Columbine and Newtown, the courts pressed school officials hard for evidence of the link between off-campus speech and school disruption.

For the past decade, however, judges have given administrators more latitude, easing the burden-of-proof requirements. Calvoz et al. (2013) explained: “school administrators have relatively broad discretion to regulate student speech, provided those regulations either serve legitimate pedagogical ends or protect the rights of other students and the school environment” (p. 363). If an online message connected the sender in any way to school gun violence, courts were likely to justify intervention on the basis of either reasonably foreseeing substantial disruption or intrusion on the rights of students in that school.

Frank LoMonte, student free speech advocate and executive director of the Student Press Law Center, acknowledges it is harder these days to defend the free-speech rights of young citizens. LoMonte believes that *Tinker* should be applied only to student expression within the school, where speech can be narrowly defined and its effects measured. Off-campus speech takes too many forms and comes from too many different sources and circumstances. *Tinker* offers too little protection to such an array of speech outside of school, LoMonte argues, adding that most well-intentioned anti-bullying legislation uses vague and overbroad language either difficult to fairly enforce or doomed to defeat as unconstitutional if challenged in court (LoMonte, 2012a).

In this study, I will analyze legal interpretations of Pennsylvania school solicitors to determine how school officials may be guided, by both policy and solicitor advice, in finding a balance between the rights of students to freely express themselves and the

school's authority to regulate student expression.

The tenure of school solicitors is typically much longer than the tenure of superintendents or principals whom they advise. Consequently, solicitor interpretations provide a longitudinal perspective and more closely and accurately measure the legal trends, policy changes, or revisions surrounding this delicate issue. School solicitors are suited to provide guidance regarding the application of legal standards when school administrators assess off-campus expression issues and measure their own regulatory authority.

### **Problem Statement**

School officials confront the challenge of fostering an environment that supports and encourages the free exchange of student ideas while simultaneously providing an orderly, safe, and disruption-free school environment in which the institutional needs of the building and district are respected. Turning to the courts for guidance in finding that balance between these two goals has resulted in conflicting messages as courts, when applying *Tinker*, have inconsistently determined what constitutes substantial disruption (Reeves, 2008). This issue has become increasingly more complex with the introduction of cases surrounding off-campus cyber expression, particularly in cases where schools have attempted to discipline students when school officials are targeted by off-campus Internet postings on blogs or social-networking sites (Dryden, 2010).

Given the research indicating that practicing Pennsylvania principals have a relatively low knowledge-base of student constitutional rights and school law (Provinzano, 2010) regardless of type or recency of principal training, building-level assignment, or years of experience, the problem school leaders and solicitors face is a

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daunting one. Furthermore, principal preparation programs and the law books used as tools to prepare them are presenting law in a manner that could contribute to misunderstanding with school issues pertaining to regulation of student expression, especially if these issues relate specifically to the *Tinker* or *Hazelwood* Supreme Court cases (Bowen & Ivan, 2011).

Successfully empowering school leaders to navigate the legal landscape involved with managing student expression in schools seems an impossible task without the integral involvement of school solicitors. This study addresses the need to examine the perspectives of Pennsylvania solicitors to interpret the conflicting precedents and guide school officials in legally sound practice.

### **Research Questions**

In this study, I explore the following research questions:

1. Based upon the perspectives of solicitors in Pennsylvania Region 11, what should be the questions asked, criteria used, or guidelines followed to determine the legal parameters of school authorities to regulate off-campus speech, electronically or not?
2. Based upon the perspectives of solicitors in Pennsylvania Region 11, to what extent has the school administrator's latitude changed since the 2007 *Morse v. Frederick* Unites States Supreme Court ruling and the rise in the number of off-campus social networking cases involving student rights of expression?
3. Based upon the perspectives of solicitors in Pennsylvania Region 11, how have district policies regarding school's authority to regulate off-campus student expression changed since 2007 and what factors contributed to that change?

### **Significance of the Study**

School officials and building administrators have the ethical and moral responsibility to foster a school environment that protects and encourages student rights of free expression. The legal climate of schools has resulted in school officials treading lightly when making decisions in an effort to avoid litigation. According to the Civil Rights Act of 1871 (Section 1983), school officials can be sued for damages for knowingly violating students' rights to free expression. With Pennsylvania principals having a relatively rudimentary knowledge of school law and student constitutional rights (Provinzano, 2010), Pennsylvania school principals and school leaders could use this study for guidance when making school-based decisions pertaining to student expression issues, particularly off-campus expression. This consultation can legally protect school districts and officials and inform school leaders in their quest to create a school environment that supports and fosters student free expression.

Additionally, interviewing school solicitors in Pennsylvania may provide an opportunity for solicitors to reflect on the need to intensify communication with school officials in Pennsylvania. Professional development at the building or district level could increase. It is the best interest of both solicitors and school officials for educators to be well versed in understanding the pertinent issues surrounding school law and their collective legal and ethical obligation to protect student rights. Solicitors may also be subtly encouraged to re-evaluate current district policies pertaining to school authority over student expression this research finds that current policies do not align with recent legal trends.

### **Definitions of the Terms**

*Freedom of expression* - the freedom of speech, press, assembly, or religion as protected by the First Amendment (Black, 2004)

*First Amendment* – the government shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances (U.S. Constitution)

*School Solicitor* – the school board-appointed lawyer who provides legal counsel and advice to the school district and its school officials

*Tinker’s First Prong or Tenet* – A legal precedent of the *Tinker* case that determined school officials cannot censor student expression unless the expression causes or is reasonably likely to cause a “substantial disruption” to the school environment or interferes with the rights of other students. This “substantial disruption test” pertains to *Tinker’s* first prong or tenet.

*Tinker’s Second Prong or Tenet* – Regarding the same explanation as above, this refers to student expression that interferes with the rights of others. Expression may be censored or regulated if it is determined to meet either of *Tinker’s* “tenets” or “prongs.”

*Case* – a civil or criminal proceeding, action, suit, or controversy at law or in equity (Black, 2004)

*Case Law* – the law found in the collection of reported cases that form all or part of the body of law within a given jurisdiction (Black, 2004)

*Circuit* – a judicial division in which hearings occur at several locations (Black, 2004)

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*Third Circuit* – the judicial division that includes Pennsylvania, New Jersey, Delaware, and the Virgin Islands. This is the circuit in which the interviewed solicitors practice law and includes the districts they represent.

*Prior restraint* – a governmental restriction on speech or publication before its actual expression (Black, 2004)

*School officials* – includes public school administrators, school board members, or faculty members.

*Cyber expression* – includes communication from on the Internet, blogs, social media sites, social networking sites, cell phones (including text message, video or pictures), or instant messaging.

### **Summary**

This chapter presented background information pertaining to the challenges school administrators face when navigating a complex landscape surrounding the regulation of student expression off-campus. This chapter included the historical legal context of the formulation of the problem statement. The chapter also stated the research questions, noted the significance of the study, and defined terms used in the study. In Chapter II, I will review the current literature and recent relevant legal decisions relevant to the research topic.

## **CHAPTER II: LITERATURE REVIEW**

### **Introduction of Literature in this Study**

The relationships between case law and school practice have evolved over time. Societal trends and political climate have certainly served a role in the types of school-related issues appearing before the courts. When examining the legal landscape of cases involving school officials regulating off-campus student-expression, I will first examine the literature surrounding cases and case law and the historical trends of these rulings. There will be a particular focus on cases ruled by the U.S. Supreme Court, relevant lower court rulings (specifically regarding student expression originating off-campus), and the particulars of specific Third Circuit rulings on this issue. The U.S. Court of Appeals for the Third Circuit has appellate jurisdiction over the district courts in the states of Delaware, New Jersey, Pennsylvania, and the Virgin Islands. Because interview subjects will be school solicitors in the Third circuit, I will review more closely cases in this circuit.

Second, I will examine literature addressing some of the social factors contributing to this increasingly complicated issue. I will focus on issues surrounding school violence, bullying, and cyber-bullying. Legislation around these issues has changed, as have school district policies. These legal and policy changes have made it increasingly challenging for school officials to balance protecting students' first amendment rights, as determined by the courts, and the obligation to enforce school policy; some cases include language obligating some extent of regulation of off-campus expression. I will consider scholarly analysis of these trends and social factors influencing this issue. Third, I will review relevant literature about the role of the school



solicitor.

Little scholarly research exists on the connection between school law and practice from the perspective of the school solicitor. To serve as a requisite knowledge base prior to interviewing Pennsylvania Region 11 solicitors, this literature review will provide a foundational understanding of how courts have responded to administrative action taken in student expression cases. The review will also offer a perspective of how scholars have interpreted these cases.

### **Relevant U.S. Supreme Court Cases**

The U.S. Supreme Court has ruled on four primary student expression cases since 1969, each contributing to the aggregate case law in its own unique manner. To date there have been no Supreme Court rulings on a school's authority to regulate the cyber expression of students while off campus. While lower courts have ruled on such cases, school solicitors are offering advice to school districts based on their interpretation of inconsistent lower court rulings. Precedents involving cyber expression cases and off-campus expression have applied a range of standards, each providing direction to others. As society has embraced technology in new ways, and students are using multiple means to communicate electronically, it is reasonable to assume that school officials are seeking clarity and guidance on their limits to authority when regulating student expression in an attempt to maintain a safe and orderly school environment.

#### ***1969 Tinker v. Des Moines Independent Community School District***

First amendment advocates laud the *Tinker* case as the “landmark student speech decision that broadly accommodated, and celebrated, students’ First Amendment rights” (Kozlowski, 2010). This case was the first time the Supreme Court ruled on the rights of

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students to express themselves in a school setting. In the midst of the Vietnam War, three students, two high school-aged and one in junior high school, chose to wear black armbands to school to express their protest of the war and support of a proposed truce.

After the principal adopted policy banning such expression, the three students knowingly violated the rule and were suspended from school for not complying with the policy. The American Civil Liberties Union filed a lawsuit on behalf of the Tinker family; two of the three children who were suspended were from this family.

While district courts initially upheld the decision, the U.S. Supreme Court ruled the school's regulation of such expression was unconstitutional. The Supreme Court stated students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." School officials were only permitted to censor student speech if they reasonably conclude it would "materially and substantially disrupt the work and discipline of the school." The two-prong test used as a guiding principle states school officials cannot censor student expression unless:

- (First prong) the expression causes or is reasonably likely to cause a "substantial disruption" to the school environment or;
- (Second prong) the expression causes or is reasonably likely to interfere with the rights of other students.

The Tinker case became the primary precedent for lower court rulings for many years and the U.S. Supreme Court did not rule on a decision on another student expression case for 17 years after *Tinker*. This literature review will explore how the *Tinker* test has been applied when dealing with in-school speech. The *Tinker* test has been applied inconsistently (Reeves, 2008) and often avoided (Kozlowski, 2010) when

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used in off-campus speech cases.

### ***1986 Bethel School District v. Fraser***

Student Matthew Fraser was giving a speech to the student body nominating a friend and classmate for student government office. The speech contained sexual innuendoes and double entendre. School officials deemed it vulgar, lewd, and inappropriate for school. The Bethel School District suspended Matthew Fraser from school and prohibited him from speaking at graduation or participating in the student council election.

Fraser's family sued the school district on grounds it was violating his first amendment rights. The Court of Appeals had ruled the suspension unconstitutional but the U.S. Supreme Court reversed that ruling and upheld the suspension. This case established a new standard for authorizing schools to regulate student expression – whether it is vulgar, sexually explicit, or lewd. When applying the *Tinker* test, district level courts and the Court of Appeal ruled this speech was not substantially disruptive; therefore it violated Matthew Fraser's rights of expression. In contrast, the U.S. Supreme Court differentiated this case from *Tinker*, saying Fraser was speaking in an assembly format and was therefore participating in a school event. His speech was determined to be vulgar and lewd, thus in violation of school policy, and therefore not protected by the First Amendment.

### ***1988 Hazelwood School District v. Kuhlmeier***

The U.S. Supreme Court ruled student expression via a school newspaper or publication completely funded and staffed by the school district could be censored. In the *Hazelwood* case, the high school principal forced student editors for the school

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newspaper to remove the articles students had prepared on the topics of divorce and teenage pregnancy. The students claimed that their first amendment rights of expression had been violated. The Eighth Circuit Court of Appeals initially supported the students, saying the school could not suppress the expression because it did not pass the *Tinker* test of substantial disruption. However, the U.S. Supreme Court reversed the decision, stating the school could censor the expression.

Consequently, principals and school officials have the authority to review a newspaper or publication before the information is published. The court ruled this type of censorship or prior review does not violate the students' first amendment rights to freedom of speech or freedom of the press. *Hazelwood* empowered school officials to regulate school-sponsored student expression if that expression is "reasonably related to legitimate pedagogical concerns." School officials may censor expression in such venues as school publications or newspapers, deemed to be limited public forums, as well as school-related theatrical productions, curriculum topics, or class celebrations.

Under *Hazelwood*, the authority to censor did not extend to personal communications, speech that is non-school-related, publications off-site, or non-school-sponsored communication. While *Tinker's* substantial disruption standard had been previously considered the only standard for censorship of school-related expression, school officials were now granted greater latitude for intervening or censoring such expression.

### ***2007 Morse v. Frederick***

This case relates to the suspension of 18-year-old student Joseph Frederick after he displayed a banner reading "BONG HITS 4 JESUS" while off-campus, across the

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street from the school, during a school-supervised event. The U.S. Supreme Court ruled Principal Deborah Morse was within her rights to suspend Frederick and it was not a violation of his first amendment rights of free expression. She suppressed his speech because she viewed it as promoting illegal drug use. The court ruled schools have a compelling interest in deterring drug use. This case was the first Supreme Court student expression ruling that involved a student off-campus, but the courts did not determine the student to be out of the jurisdiction of the school because the event took place during the school day and was a school-supervised event.

Scholars have disagreed on the interpretations of the Morse case, arguing on how to apply its standard. Some have interpreted it narrowly and strictly, maintaining schools have the authority to regulate speech advocating illegal drug use. Others have applied a broader interpretation, claiming school officials can limit expression that either undermines the school's basic educational mission or poses a threat to students' health or safety.

### **Relevant Lower Court On-Campus Rulings - What is the Standard?**

While the four Supreme Court rulings most directly related to this issue have served as the primary precedents when dealing with the issue of student expression rights, pertinent legal rulings have emerged both in and out of the Third Circuit about students' off-campus expression. This study includes some cases that have provided legal guidance or direction. While the focus of this study is on the regulation of off-campus student expression, some court rulings have circumvented *Tinker* and applied other Supreme Court decisions as precedents.

The cases below involve on-campus expression, but are examples of the

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complexity of interpretation required by school administrators, with lower court rulings seemingly unpredictable. Not only is *Tinker* rarely used as a controlling precedent in these cases, but all cite examples of school regulation that could be interpreted as stretching beyond the scope of the original details of the events in the standard cited as their precedent. This makes it difficult for school administrators to determine the circumstances to which different constitutional standards should be applied. It also raises the issue of what guiding questions should be asked when deciding if regulation is appropriate. While *Tinker* was not applied in the first three cases listed below, it could be argued that neither of *Tinker*'s prongs could be applied as justification to regulate student expression. These examples speak to the challenges of monitoring and regulating student expression even when it occurs on campus, leading one to imagine the complexity of off-campus regulation.

### ***1999 Boroff v. Van Wert City Board of Education***

The Sixth Circuit Court of Appeals, in 1999, upheld a school official's decision to forbid a student from wearing Marilyn Manson t-shirts to school because the shirts were deemed offensive and "the band promotes destructive conduct and demoralizing values that are contrary to the educational mission of the school." The court cited *Fraser* as the applicable precedent because it governed all "vulgar or plainly offensive speech," even though the shirts themselves did not display lewd or sexually suggestive language nor innuendos similar to Matthew Fraser's speech in the *Fraser* case. No "substantial disruption" element existed in this case, nor was the school advocating intervention and regulation based on foreseeable disruption. The justification for suppression of expression in this case was that the t-shirt was deemed offensive. The courts supported

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this interpretation, despite no explicit profanity, vulgarity, or anything sexually suggestive.

*Key takeaway:* Citing *Fraser*, school officials have the authority to regulate offensive expression, including on clothing; this authority extends beyond vulgarity or profane expression.

*Question:* Does this authority extend to off-campus expression?

### ***2008 Curry v. Hensiner***

In 2008, the Sixth Circuit ruled *Hazelwood* provides the controlling precedent when the court determined the school could restrict speech and student expression of personal views in class assignments. In *Curry*, fifth-grade student Joel Curry produced a card as part of a class assignment involving a simulated marketplace at school. The card explained how candy canes could be viewed as a symbol of Christianity, admittedly attempting to promote Jesus to the other students. Citing *Hazelwood*, the courts supported censorship by Principal Irene Hensiner of this unsolicited religious message during an organized curricular activity. Despite no substantial disruption, the censorship stood because the school had legitimate pedagogical concerns. Thus, the suppression of the expression was not deemed to be in violation of the student's first amendment rights. It is important to note that the elementary age of the students involved in this case was a factor in the court's ruling.

*Key takeaway:* Citing *Hazelwood*, schools can censor school-related expression if a legitimate pedagogical concern exists. In addition, the age of the students involved in expression cases is a contributing factor.

*Question:* Can expression originating electronically and off-site ever be

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considered school-related expression and therefore censored or regulated?

### *2014 Dariano vs. Morgan Hill Unified School District*

In 2014, the Ninth Circuit ruled in support of the Morgan Hill Unified School District (CA) when they took a controversial stance against a typically-supported patriotic symbol. At the racially mixed Live Oak High School, on May 5, 2010, the school held its annual Cinco de Mayo celebration, honoring the Mexican community and celebrating its heritage. School officials spoke to a group of white students about wearing t-shirts and other clothing displaying the American flag. They asked them to change their clothing or turn their shirts inside-out so the flag was not so prominently displayed. The school officials, citing a recent history of gang and race-related violent incidents at the school, claimed the request for students to change their clothing was an attempt to prevent disturbances. The students were not actively inciting any confrontation or violence, and no disruption had occurred.

The students refused to change their clothing or turn their clothing inside-out, so the school administrators, expressing concern for the students' safety, sent the students home for the remainder of the day with an excused absence. School officials administered no disciplinary action to the students.

The families of the students pursued legal action against the school district, claiming the school had violated their constitutional rights to freedom of expression. The courts ruled in favor of the school, stating that the perceived threat level, given the pattern of violence at the school, rose to the level of threat of substantial disruption. The court noted these were circumstances unique to the context of this event. The school neither imposed discipline on the students nor instituted or enforced a blanket ban on



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apparel representing the American flag.

In a dissenting opinion, Judge Diarmuid O’Scannlain asserted this decision was a misrepresentation of *Tinker*. He stated that when the courts permitted such suppression, they were enabling a fundamental principle of first amendment law – the heckler’s veto doctrine. This states that “an audience’s hostile response to a speaker they disagree with cannot serve to cause for silencing the speaker” (*Harvard Law Review*, 2015).

*Key takeaway:* While foreseeable substantial disruption is a much less frequently applied acceptable standard to regulate expression in recent cases than actual substantial disruption, school officials have greater leeway in cases where the threat of violence in schools exists.

*Question:* If students express unpopular opinions via off-campus expression that could be interpreted as foreseeably causing a disruption on campus due to the potential violent response of those who disagree, is this grounds for regulation as an attempt to maintain order?

### ***2013 B.H. and J.M v. Easton Area School District***

In 2013, the Third Circuit ruled against the Easton (PA) school district when school officials disciplined students for wearing “I (heart shape) Boobies” bracelets to school. The middle school students, B. H. and J. M., claimed to be wearing the bracelets in support of breast cancer awareness. In restricting the expression, the school cited both *Bethel*, claiming that the expression was lewd and vulgar, and *Tinker*, based on the threat of foreseeable disruption. The district court supported the students, saying that neither precedent can be applied to uphold a bracelet ban. The Third Circuit supported this decision, furthering that speech should not be censored in school if it does not rise to the

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level of plainly lewd and a reasonable observer could plausibly interpret this as commentary on a relevant political or social issue.

The district did not prove any substantial disruption occurred as a result of wearing the bracelets. Some students were disciplined, suspended from school, and banned from a school dance after refusing to remove the bracelets when asked by a security guard. This case is relevant to this study for many reasons - its recency, its proximity (within the Third Circuit and regionally close to the Region 11 solicitors interviewed), and that participating solicitors in the interviews referenced it in the interviews.

This ruling seems to be inconsistent with aforementioned *Boroff* case. In dissenting the ruling, one judge said,

As this case demonstrates, running a school is more complicated now than ever before. Administrators and teachers are not only obliged to teach core subjects, but also find themselves mired in a variety of socio-political causes during school time. And they do so in an era when they no longer possess plenary control of their charges as they did when they acted *in loco parentis*.

Circuit judge Joseph Greenaway Jr. also dissented, questioning how school administrators could apply the test of plausibility of whether the speech was connected to a social issue or cause. He says this “leaves school districts essentially powerless to exercise any discretion and extends the First Amendment’s protection to a breadth that knows no bounds.” Greenaway also added “school districts seeking guidance from our First Amendment jurisprudence in this context will find only confusion.” The summary states that in situations when the speech is not plainly lewd , as in this case, it may not be

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suppressed or restricted. Lewd speech is not open to discretion from the school official.

*Key takeaway:* Plainly lewd expression is not open to broader interpretation.

Expression must be considered within the context of a social issue prior to regulation.

*Question:* With expression needing to be considered within the context of its relevancy to a social issue, what are the limits of this additional protection? Does this additional protection extend to other standards?

These cases are examples of the challenges of school administrators to determine which guiding questions should be asked when regulating student expression. These cases were unable to demonstrate actual substantial disruption, per *Tinker's* first-prong test, nor were they instances where the expression infringed upon the rights of others, per *Tinker's* second-prong test. Even the use of *Fraser* and *Hazelwood* in these examples applies standards differently than the original Supreme Court cases did. Additionally, these examples were all on-campus expression cases. The added level of complexity of off-campus expression only further complicates the decision-making process for school administrators. The range of precedents and interpretations of the Supreme Court cases used in the lower court rulings challenges solicitors and school officials to craft legally-defensible policies and properly regulate student expression.

### **Off-Campus Student Expression Cases Ruled by Lower Courts**

The cases described in this section all deal with off-campus student expression. I review relevant details of the cases, including circumstances in which students used some type of electronic media as the source of the communication. The targets of the

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communication vary, as do the rulings from the courts on the schools' regulatory authority.

### ***2002 J.S. v. Bethlehem Area School District***

A Third Circuit case, the *J.S. v. Bethlehem* case preceded the *J.S. v. Blue Mountain* and *Layshock v. Hermitage* (also Third Circuit cases and described below). All three are Pennsylvania cases and share similarities in their details of the cases, but the rulings differed. In 1998, 14-year-old student Justin Swidler, using an off-site computer and website, targeted a principal and teacher in a site called "Teacher Sux." The site depicted images of a bullet hitting the head of the principal and an animated image of the teacher transforming into Adolph Hitler. The site continued to list reasons why the teacher should die and asked viewers to consider contributing \$20 for a hitman.

The school chose to move to a disciplinary hearing and expelled the student. Meanwhile, the school contacted authorities but neither the local police nor the FBI ultimately moved forward with criminal charges. The student's family and lawyer claimed that the expression was protected because it was off-site, included exaggeration and hyperbole, and was not a true threat. The courts ruled in favor of the school, supporting the expulsion, but did not ultimately validate the expulsion because it did not find the student's conduct threatening. The judge called the act "a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody" but not a true threat. Rather, the courts ruled that there was sufficient nexus between off-campus and on-campus due to the substantial disruption caused by the posting. The teacher was personally and professionally affected by the posting, showing signs of anxiety, stress, and depression, ultimately leading to a sabbatical and an inability to return to work.

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*Key Takeaway:* Off-campus expression can be regulated under *Tinker's* substantial disruption standard if it measurably negatively affects staff members, even if the expression is not determined to be a true threat.

*Question:* If the targeted staff member is “resilient,” and shows no measurable negative effects, does the school lose the authority to regulate the expression?

### ***2007 Wisniewski v. Weedsport Central School District***

The Second Circuit upheld the semester-long suspension of an eighth-grade New York student for his instant messaging icon created off-campus. The icon displayed a pistol firing a bullet at a person’s head with the words “Kill Mr. VanderMolen” under it. Mr. VanderMolen was the student’s English teacher at the time. While the icon was not sent to the teacher or any school official, the student used the icon for three weeks with a relatively small audience while off campus. Approximately 15 other people saw it, which the court determined amounted to “extensive distribution.”

Another student, who had seen the posting outside of school, informed the school and the punishment soon followed. The Second Circuit applied *Tinker* and held that, even if the other student had not informed the school, it was “at least foreseeable to a reasonable person, if not inevitable” that the icon would have come to the attention of school officials. Because of the icon’s “potentially threatening content,” the court said “there [could] be no doubt” that once it got to school, the speech would “foreseeably create a risk of substantial disruption.”

Despite the Eighth Circuit upholding the discipline in this case, reasonable foreseeability is the weakest connection courts have found sufficient to establish a nexus between off-campus expression and the school campus itself (Ellison, 2010). In this case,

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the icon was on display electronically to several other students for three weeks with no disruption to the campus or no attempt by the student to bring it to campus. But because the icon did reach school property, the court applied *Tinker's* standard of substantial disruption, albeit foreseeable, and determined the school did not have to prove the expression itself constituted a true threat. In this case, the police did not pursue criminal prosecution; instead, they determined it to be a joke and no actual threat. Also, because the court applied *Tinker*, the issue of whether the student intended for it to reach campus was not addressed by the court (Ellison, 2010).

*Key takeaway:* School officials have greater leeway with regulating expression connected to potential school violence. A threat of school violence can be a reason to act even if that threat was never criminally determined to be an actual threat.

*Question:* If the definition of a threat does not need to align with the legal definition, how much latitude will school officials have to interpret what may be threatening expression when regulating by citing *Tinker's* foreseeable substantial disruption?

### ***2008 Doninger v. Niehoff***

In this ruling, the Second Circuit applied *Tinker* in deferring to schools' forecasts of disruption. High school student Avery Doninger used her personal computer at home to post a vulgar message about school officials on her publicly accessible blog. Her post expressed anger over school officials cancelling a school concert. She posted "jamfest is cancelled due to douchebags in the central office." She urged other students to complain

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by contacting the superintendent about the cancellation of a school event to “piss her off more.”

When the school principal discovered the message nearly two weeks later, she prohibited Doninger from running for a senior class office. Furthermore, when students supporting their friend wore t-shirts that read “Team Avery” at the election speeches (in which Avery was not permitted to participate), school officials demanded the students change their shirts. Doninger challenged the punishment in the courts but the Second Circuit upheld the punishment because it viewed the blog post, its content, and the wearing of the shirts as potentially disruptive and they “foreseeably created a risk of substantial disruption.” Applying *Tinker’s* first prong, the court cited substantial disruption, supporting the school’s disciplinary action. It did not address the issue of whether Doninger’s right to run for senior class office and make a public speech was a first amendment right. This case was sent to the U.S. Supreme Court, but the court chose not to hear the case.

*Key takeaway:* Off-campus expression can be regulated if the school official, citing *Tinker*, determines that there is foreseeable substantial disruption.

*Question:* Given that there was no health and safety risk involved as a basis for foreseeable disruption, what guiding questions should be asked to determine the latitude a school official has when determining foreseeable substantial disruption?

### ***2010 J.S. v. Blue Mountain School District***

### ***2010 Layshock v. Hermitage School District***

These two important cases are fundamentally linked 2010 rulings. Both are Pennsylvania High School cases, both cases were ruled on by the Third Circuit judges,

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and both involved off-campus expression targeting school officials with similar details, but the rulings seemed to contradict one another. These two cases, *J. S. v. Blue Mountain School District* and *Layshock v. Hermitage* are particularly pivotal to this research study as the Pennsylvania solicitors who will offer opinions on this matter provide guidance to school districts in the Third Circuit.

In *J. S. v. Blue Mountain School District*, although the full Third Circuit has since vacated the opinion and ordered en banc review, the decision initially deferred to the schools. In the case, a middle school student, while off campus, created a fake MySpace profile of her principal, insinuating he was a sex addict and pedophile. The profile included lewd language and profanity. The student was suspended for ten days and the school's decision was initially supported by the courts. It was determined that, even though the speech was created off campus, "a school need not satisfy any geographical technicality" to regulate speech under *Tinker*. The courts said that if off-campus speech causes or reasonably threatens to cause a material and substantial disruption, the student can be punished for the speech. Although the Third Circuit en banc review later reversed this decision, it initially supported the school's right to discipline the student.

Ironically, in February of 2010, on the same day the Third Circuit ruled in favor of the school district in *J. S. v. Blue Mountain*, a different panel on the Third Circuit ruled in *Layshock v. Hermitage School District* that Hickory High School officials had violated student Justin Layshock's first amendment rights of free expression when he was disciplined for creating an online parody of his principal. Layshock had created a fake MySpace profile of his principal, mocking the principal's size and weight, penis size, and sexual orientation, as well as referencing past episodes of drinking. Layshock was



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suspended for 10 days out of school, initially sent to an Alternative Education Program, and banned from graduation. The school eventually allowed him to return to his regular classes and graduate, but administering the school discipline was ruled a violation of his rights of expression nonetheless.

What is currently a challenging time to look to the courts for guidance was even more so following these contradictory rulings on the same day within the same circuit in two very similar cases. Although, through an en banc review, in which the entire Third Circuit panel of judges would hear the case, the courts reconciled this discrepancy and ruled in favor of the students in both cases. They concluded the schools over-stepped their constitutional bounds in disciplining the students for their off-campus creation of the fake online profiles of school officials. Nevertheless, there was a period when these conflicting rulings simultaneously served as precedents. Despite the reconciliation, there may not be a more powerful example of the reason this is so difficult for school officials and a necessity for the U.S. Supreme Court to rule on an off-campus or on-line expression case.

*Key takeaway:* In off-campus expression cases targeting staff or administrators, school officials should be very hesitant to issue discipline.

*Question:* What level of disruption to school or how harsh of a character attack would warrant a school official regulating expression targeting a staff member?

### ***2010 J.C. v. Beverly Hills Unified School District (CA)***

In this controversial Ninth Circuit cyberbullying case in California involving two 13-year-old students, one student (J. C.) recorded a four-and-a-half-minute video of her and her friends speaking disparagingly about a classmate (C. C.). The video was recorded

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at a community restaurant on a school night and uploaded to YouTube. The recording included profanity and lewd language, referring to C. C. as “a slut,” calling her “spoiled,” and saying that she is the “ugliest piece of shit I’ve ever seen in my whole life.” Also in the video, J. C. encourages her friends to continue to talk about C. C. Between five and ten more students were informed that evening of the video and encouraged to watch it prior to school the next day.

Having learned of the video, C. C. and her parents were upset and informed the school. C. C. was initially hesitant to go to class and began the next school day with the school counselor where, after missing a portion of her first class, she eventually went to her scheduled class despite being clearly unnerved by the fear of gossip. The school administration suspended student J. C. two days for her role in the cyberbullying incident.

The family of J. C. proceeded to sue the school for violating her first amendment rights, claiming the school was over-reaching in regulating her off-site expression. While the courts clarified that the school could have regulated the off-campus expression if the expression had resulted in on-campus substantial disruption, the ruling supported the family, saying the district did not adequately demonstrate that substantial disruption had occurred. It was determined that C. C.’s missing a nominal amount of class to process with the counselor and fear of gossip did not rise to the level of substantial disruption. The suspension was overturned and the school was ordered to pay the family of J. C. over \$100,000 to cover the family’s legal fees.

Perhaps more than any other lower court ruling, this case tells a cautionary tale to school officials to be wary of disciplining students for their off-campus expression. The courts made no mention of *Tinker’s* second prong of violating the rights of others, did not

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consider the lewd nature of the expression, and granted the school virtually no leeway with substantial or foreseeable disruption, minimally taking into account the emotional toll on the targeted student.

*Key takeaway:* Substantial disruption to the school environment is the most prominently considered factor when determining whether off-campus expression can be regulated; this disruption needs to be documented and proven to be substantial, beyond typical intervention by administrators or counselors.

*Question:* With laws mandating schools to get intervene in bullying and cyberbullying issues, both on- or off-campus, how should school officials proceed when the courts indicate off-campus regulation may result in the school being sued for violating a cyberbully's first amendment rights?

### ***2011 Kowalski v. Berkeley County Schools***

A pivotal cyberbullying case in the Fourth Circuit, a high school principal disciplined student Kara Kowalski, suspending her for five days and removing her from the cheerleading team for creating a MySpace group called *S.A.S.H.* Kowalski claims the name stood for "Students Against Slut Herpes" but another student, Shay N., claims she was bullied as the group targeted her; she maintained that *S.A.S.H.* stood for "Students Against Shay's Herpes."

When Shay N.'s family brought the content to the principal by, it was determined to be cyberbullying. The school contended that the MySpace group invited others to indulge in hateful conduct, which could cause an in-school disruption. Consequently, the school administered discipline to Kara Kowalski. She and her family sued the school, contending it was a violation of her first amendment rights because the expression was

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private and unrelated to school. The Fourth Circuit courts ruled that, despite the expression originating off-campus and off-hours, *Tinker's* first and second prongs both apply as the posting was disruptive enough in school and violated the rights of the student target. The court also used broad language indicating *Fraser* could extend off campus under the right circumstances.

It is pivotal to note this was a Fourth Circuit ruling and may have been ruled on differently had the case been in the Third or Ninth Circuits. The court's response differed greatly than the aforementioned Ninth Circuit (*J.C. v. Beverly Hills*) Third Circuit rulings (*J.S. v. Blue Mountain* and *Layshock v. Hermitage*). While the circumstances were different than the Third Circuit cases, with students targeting other students in the *Kowalski* case as opposed to students targeting staff members in *J.S.* and *Layshock*, the response from the court was also vastly different.

In *Layshock*, because the target was an adult, the courts determined the school could neither demonstrate nor predict substantial disruption to the educational environment. Additionally, the courts stated that, although the content was lewd and vulgar, *Fraser* was not applicable because the speech occurred outside the school context. The Third Circuit took a stronger stance on the originating students' first amendment rights, stating "it would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities" (Hofheimer, 2013).

In *Kowalski*, however, sufficient nexus between school and home was established, with the school then responsible for enforcing its code of conduct and policies in

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protecting students from assaultive expression. It was determined that Kowalski should have known the expression would be accessed and brought to school and could predict its likely harmful effect, citing *Tinker* and specifically stating *Tinker* can be applied beyond the school walls (Hofheimer, 2013). It is difficult, however, to reconcile the negligible differences between the *Kowalski* and the *J. C. v. Beverly Hills* case. The court rulings contradicted one another despite the relative similarities. Nevertheless, the online audience in the *Kowalski* case was broader than the *J. C.* case and Kowalski was determined to have, as Judge Niemeyer stated, “used the Internet to orchestrate a targeted attack on a classmate.”

*Key takeaway: Tinker’s* first and second prongs can both be applied as grounds to regulate, even if the expression originated off-campus. The application of *Fraser* as a justification to regulate to off-campus expression, however, may be over-reaching, even if the expression is vulgar and lewd.

*Question: Can Tinker’s* second prong stand by itself as a justification to regulate off-campus expression?

### **Social Factors Impacting Court Rulings**

One cannot ignore societal trends and their influence on legal rulings. The Vietnam War and the protests for social justice were very relevant issues in society at the time of the *Tinker* case. Hudson (2005) maintained that tragedies such as the mass school shootings at Columbine High School in Colorado and the Oklahoma City bombing have created an increased societal burden on schools to maintain a safe and orderly environment. Once viewed as sacred grounds, schools had now become regarded as potential targets. As such, schools have received a greater level of leniency in regulating

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speech, especially if the school has reason to believe there may be some type of safety threat.

Even prior to *Tinker* and any rulings on rights of expression for students, the U.S. Supreme Court had established limits to expression. In *Dennis v. United States (1951)*, the court ruled that members of the communist party had limits on their free expression if it involved the threat of overthrowing the U.S. government. This abandoned an earlier test of “clear and present danger” for free speech cases (Calvoz et al., 2013). Instead the court ruled that a “balancing test” must be administered: “In each case [courts] must ask whether the gravity of the ‘evil’, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger” (*Dennis v. United States, 1951*).

Years later, after high-profile school shootings such as the incident at Columbine High School in Littleton, CO, these same questions were asked in schools. However, schools experienced an unprecedented sense of vulnerability and a culture of fear had arisen around schools, leaving the public expecting schools not to discount the threat of violence. In reaction, many school districts across the country established zero tolerance policies around controversial speech issues.

While this reaction brought a heightened sense of responsibility and awareness to the issue for teachers and administrators, the fear of threats to safety also led to limiting the constitutional speech rights of students (Hudson, 2005). School officials faced the balancing act of maintaining school safety with protecting students’ constitutional rights. Courts recognized this challenge and granted a greater level of leeway in such cases, reasoning that a rise in public school violence had given school officials little choice other than to exclude students when attempting to prevent potentially disastrous

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situations. The courts, however, have never clearly defined true threats, especially as it relates to protected speech. First amendment scholar David Hudson (2008) stated, “the line between protected expression and an unprotected true threat is often hazy and uncertain” (*para 3*) and has been loosely interpreted, but not clearly defined, through cases both involving schools and outside of schools.

In the 2011 Missouri case of *D. J. M. v. Hannibal Public School District*, the Eighth Circuit cited *Tinker’s* first prong of threat of substantial disruption when ruling in favor the school district when it disciplined a high school student for online instant messages indicating that the student was considering shooting students at the school and then committing suicide. When the messages were forwarded to the school, school officials treated them like a threat and contacted the police. There was an arrest, a psychiatric evaluation, and then a suspension.

While the family sued the district because the student’s off-campus speech did not disrupt the school in any manner, the court ruled in favor of the school, citing that such speech can be considered a “true threat” and is therefore not protected. While the intent of the *Dennis* case was to determine if expression could be considered a true threat to the government, the *D. J. M.* case is certainly an example of the courts reflecting changing societal norms and contributing to the redefinition of what should be considered a “true threat” within the context of schools.

In June of 2015, the U.S. Supreme Court, in the case of *Elonis v. United States*, for the first time ruled on the limits of speech on social media in a case involving true threats. Because *Elonis* was an adult, the standard for the regulation of his expression is inherently different from that of students. While this case was not a student expression

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case, it involves clarifying the nature of a true threat and could impact how courts determine the boundaries of school authority when regulating off-campus expression involving threatening expression.

Anthony Elonis had been convicted in 2010 under a federal threat-speech statute for violent and threatening language he used on Facebook to target his wife, local elementary schools, and an FBI agent. The Supreme Court, however, overturned the decision, ruling that a person can be convicted for online threats only with proof of awareness that the speech will be received as threatening. This rule provided clarification on what constitutes a “true threat” on social media.

In his defense, Elonis claimed the Facebook posts were rap lyrics with no intention to threaten anybody. He claimed the posts were fictitious and therapeutic for him as he dealt with the pain he felt after his wife left him, taking their children. The Supreme Court overturned Elonis’ conviction, ruling a person cannot be convicted for online speech simply under the assumption that a reasonable person could perceive the expression as a threat.

The words Elonis used were harsh, including posting this about his wife:

*If I only knew then what I know now... I would have smothered your ass with a pillow. Dumped your body in the back seat. Dropped you off in Toad Creek and made it look like a rape and murder.*

Elonis also posted this, which was originally deemed a threat to the schools:

*That’s it. I’ve had about enough. I’m checking out and making a name for myself. Enough elementary schools in a ten mile radius to initiate the most heinous*



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*shooting ever imagined. And Hell hath no fury like a crazy man in a Kindergarten class. The only question is . . . which one?*

By the newly established standard of the Supreme Court, this expression could only be determined as a threat if it could be proven that the originator of the expression was aware that the recipient perceived it as a true threat. It has yet to be determined how this would impact school officials if this standard were applied to student-school communication. It would be tremendously challenging for a school official to prove that a student was aware that another member of the school community, particularly another student, perceived such communication as threatening. Courts have been deferential to schools in cases involving threats to safety or school violence, so it has yet to be seen if the *Elonis* ruling affects this in any way.

As school officials began to address these issues more vigilantly and weigh safety considerations, contradictions arise. In cases where school officials must decide if, or when, a student expressing unpopular opinions rises to the level of harassment or bullying, applying *Tinker's* standards presents an interesting conundrum. Applying *Tinker's* second prong to assess emotional harm as “infringing on the rights of other students” is unquestionably blurry at best. If this is determined to be the case, such speech could be suppressed. Many argue that emotional effects should be considered when assessing the infringement on the rights of others and disruption. The disruption is real, even if the impact may be less outwardly visible, as reinforced by Warnick who stated, “emotional violence may lead to physical violence, but even if it never does, the damage is real” (Warnick, 2009, p. 206).

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The conundrum with this scenario is that the courts have more strongly considered outward disruption than emotional effects, which many would interpret as subtle or immeasurable. Clearly measurable disruption is more readily accepted as evidence of disruption. The potential disruptive effect is determined more by the response to the purported harassment than the original expression itself. Therefore, by this logic, when applying the foreseeability standard, the nexus is stronger if the target is more likely to fight back or respond aggressively. Could one then argue that those who quietly endure such expression should not be protected? (Warnick, 2009). Should the potential reaction of the target be a deciding factor in determining regulation? Should adult or school involvement not protect a student who is targeted by cyberbullying but either displays extreme resilience or privately internalizes the message?

This dilemma is similar to the legal phenomenon known as the “eggshell plaintiff” in which individuals in a tort case may be more susceptible to damage due to a pre-existing medical or emotional condition. In these cases, the person responsible for an accident is held just as responsible for the damages that result, even if the damages would not have been as significant with a different victim. When school officials assess or predict the reaction, response, or damage to a target of cyber expression when determining their involvement, they face an ethical conundrum.

Regardless of the response from the school to potential bullying issues, the U.S. Department of Education and Office of Civil Rights partly clarified the question of whether a school should be involved in some capacity. In 2011, they published the *Dear Colleague* letter as a guidance document. Sent to all public school entities nationwide, the letter heightened the urgency for schools to be involved in protecting the rights of

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students, citing the threat of rescinded funding in cases where this was not the case.

While this particularly focused on Title IX, sexual harassment, discrimination, and sexual violence, it generally was an ethical calling to schools to protect those who have been bullied by either institutions or individuals. The expectation was clear that schools must implement procedures and take measures to address these issues.

With bullying and cyberbullying laws in virtually every state (Hinduja & Patchin, 2014), Hayward (2011) stated “anti-cyberbullying laws are the greatest threat to student speech because they seek to censor it anytime it occurs, using ‘substantial disruption’ of school activities as justification and often based only on mere suspicion of potential disruption” (p. 363). Six states have language in their anti-bullying legislation allowing schools to discipline students for off-campus expression (Ceglia, 2012). Only one of those six states, New Jersey, is in the Third Circuit. New Jersey’s laws have been called the “nation’s toughest” and require schools to regulate off-campus expression and respond to off-campus bullying, harassment, or intimidation.

In reviewing case law in these cyberbullying cases, some argue school administrators can apply the *Fraser* “fundamental values” standard to protect victims of cyberbullying (Calvoz et al., 2013). When applying this argument, Calvoz, Davis, and Gooden contend the school has the responsibility to teach what is appropriate and inappropriate by regulating expression and conduct that, although constitutionally protected outside of school, may be “counter to the fundamental values schools seek to inculcate” (p. 384). Citing *Boroff v. Van Wert*, they referenced the application of *Fraser* to regulate a student wearing to school a t-shirt with Marilyn Manson or a confederate flag on it. This clearly could not be prohibited outside of school but, citing fundamental

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values, it could be regulated on campus. Calvoz, Davis, and Gooden provide examples of *Fraser's* application beyond school-sponsored events.

However, other scholarly interpretations disagree. Tabor (2009) argued that *Fraser* dealt with issues “unique to on-campus speech” and offers two reasons for schools only to regulate on campus expression. First, school authorities serve as *in locus parentis* and have a responsibility to protect children from lewd and vulgar speech and teach appropriate forms of speech. Tabor concludes that, when students are not in school and *in locus parentis* is not in effect, parents have this authority and responsibility. Tabor's second contention is that, while schools have the responsibility to teach students appropriate societal discourse, and may express its disapproval of certain language, schools should limit this to on-campus expression. “Off-campus, unlike in the classroom or a student assembly, there is no reason for students to believe the school approves of their classmates' speech” (Tabor, 2009, p. 579). In his concurring opinion in *Fraser*, Justice Brennan stated that if the speech referenced in the case had been given outside of school, it would have been protected by the First Amendment.

Yet it was *Tinker*, not *Fraser*, that was cited in the *Kowalski* cyberbullying case. Both prongs of *Tinker* were applied, citing disruption and a violation of the rights of the online target. The cyberbullying phenomenon is paramount to this study as it involves electronic communication and frequently originates off-campus. The *Tinker* standard can clearly be applied if there is actual disruption, but there is certainly ambiguity surrounding the notion of foreseeable or potential substantial disruption on campus, or predicting whether there is a nexus making it reasonably foreseeable it could make its way on campus. With scholarly interpretations and lower-court rulings differing on which

controlling precedent should, or could, be used, school officials continue to struggle to ask the right guiding questions with such cases.

With the Supreme Court rulings granting school officials greater leniency when regulating student speech, should school officials be seeking ways to censor speech in a legally protected manner? Scholars have made suggestions for refining these questions to minimize ambiguity.

### **Scholarly Analysis of Relevant Cases**

Other researchers have analyzed cases and provided perspectives for schools to consider when balancing the limits of their rights to regulate student expression off-campus. Oten (2004) postulated that the higher courts need to create a new standard for off-campus student expression, particularly cyber expression. Moreover, Oten contended the lower court rulings and their inconsistency is in large part due to the Supreme Court not evaluating cyber expression in the context of schools. A look at cases since 2005 supports Oten's claim, with lower federal appellate court decisions demonstrating that Third Circuit interpretation of *Tinker* is becoming increasingly inconsistent (Kozlowski, 2010). Between 2006 and 2010, students have lost their first amendment claims nearly 65% of the time in cases in which *Tinker* provides the controlling precedent. The 65% includes one case in which the courts ruled in favor of the student and the case was subsequently overturned (Kozlowski, 2010).

Questions remain over which test should be used to determine regulation of student expression. Scholars and the courts seem to disagree. The Second, Third, and Fourth Circuits rely on *Tinker* and the substantial disruption test as the question most frequently asked, but the Third Circuit departs slightly from the other circuits by focusing

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more on the “student’s intent to communicate the speech towards the school, rather than the foreseeability that the speech would reach the school or school administrators” (Boyd, 2013, p. 1231).

Ellison (2010) suggested the courts reduce ambiguity by using pure intent and location tests. If the expression originated on-campus, was brought to campus by the originator, or was created with the intent to reach campus, schools would then be able to regulate such expression. The *Wisniewski* case is an example of such a case that, if this proposed standard had been applied, would never have been regulated. The expression originated off-campus, had no seeming intent to reach campus, but was brought to the school by a third party. With Ellison’s proposal, the reasonable foreseeability clause, the most ambiguous element of the regulation, would be clarified. Furthermore, he contended that students need “to be put on sufficient notice that their speech could fall within the realm of school discipline. The intent requirement accomplishes this” (Ellison, 2010, p. 843).

Boyd (2013) suggested the courts should be addressing off-campus speech cases by combining the two *Tinker* prongs into a balancing test that would assess whether the speech could be regulated while not impinging on the student’s rights of expression. She states that the following should be examined:

1. Whether the student intended for the speech to reach inside the schoolhouse gate;
2. The content of the expression;
3. How many people actually accessed the speech online;
4. How many people accessed the speech inside the school;

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### 5. If the speech collided with the rights of others.

There are concerns with both Ellison's and Boyd's suggestions. Both focus on intent of the student, which is not only difficult to assess, but also frequently absent from written district policy. Policies tend to focus on conduct and impact, intentionally avoiding language assessing intent. All four of the student expression U.S. Supreme Court Cases deal with circumstances in the secondary schools, but the age, knowledge, and intellectual capacity of the student are significant factors when attempting to determine intent. With younger students, assessing intent is more complicated. Furthermore, in Boyd's argument, assessing how many people accessed online speech and where they did so is currently beyond the capability of school officials.

Tabor (2009) offered a more simple suggestion, stating that off-campus student cyber expression that targets school, faculty, and administration is uniformly beyond the reach of school authority. However, he suggested the student off-campus cyber expression that targets other students and infringes upon their rights should be open for school punishment. Students have the right, Tabor posited, to feel secure at school. And cyberbullying, even if originated off-campus, can infringe upon that right and disrupt the learning environment. Tabor contended that making this one distinction, and emphasizing *Tinker's* second prong, will be a positive step in clarifying this issue.

The rise of technology has made the "schoolhouse gate" statement, which was so powerful when first spoken in the original *Tinker* ruling, less of a defining statement in this day and age. *Tinker's* first prong, the notion of substantial disruption or foreseeable disruption, has created the most confusion in these cases (Ceglia, 2012). Ceglia suggested only *Tinker's* second prong, infringing upon the rights of others, should be applied to

online cases. He stated that doing so will balance school safety and constitutional rights, as well as reinforce the hope and need for greater legal clarity from a future U.S.

Supreme Court case.

Yet another suggested methodological framework to apply when regulating online off-campus cyber expression cases is what Benjamin Heidlage referred to as a relational approach (2009). Using this approach, the first questions a school official would ask when assessing a situation would be very different. Instead of initially focusing on the location, impact, or intent, Heidlage urged that the initial question should be whether the originator of the expression was acting as a student or as a citizen. If it was determined that the originator was acting as a student, then the student speech standards outlined in *Tinker* would be applied. However, if it was determined that the originator of the expression was speaking as a general citizen, full first amendment protections would be applied. Heidlage argued that, should the role of student be determined, the relationship between school and student is already defined, negating the geographical dimension, which “accounts for the Internet’s lack of spatial determinacy” (Heidlage, 2009, p. 595). This approach would limit the authority of school officials by restricting the school’s ability to apply the substantial disruption test or foreseeable disruption for expression as a “general citizen.”

### **The Role of the School Solicitor**

The school attorney, or the position referred to as the *school solicitor* in Pennsylvania and throughout this study, is retained by the school district to serve the role of protecting the legal interests of the school district. The goal of the solicitor is to assist the school board in meeting the objectives of the district within legal parameters (Julka &



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Curry, 2011). The client of the solicitor is the school board (collective) and the district as an organization itself, not the individual administrators, school officials, or school board members. While the solicitor serves as a counsel to drive action and policy, Julka and Curry noted the role is broader. They classify the solicitors as “advocates, mediators, counselors, and problem solvers” (p. 14). More than simply having knowledge about the law, they must offer advice with an understanding of how the law works and how it can be applied and interpreted within the current political climate.

A unique dynamic exists between the solicitor and the district in that the solicitor communicates primarily through the superintendent and not the individual school board members, but the solicitor primarily represents the board. The solicitor advises the school board and the superintendent on policy, procedures, regulations, and statutes (Kowalski, 2013). Policy, Kowalski noted, can potentially be the greatest area of conflict between the superintendent and school solicitor, as indicated by the steady rise of influence the courts have in shaping school district policy. School boards and superintendents are responsible for ensuring that policies are legally defensible and adjusted accordingly as the courts dictate. This can naturally disrupt district policy revision cycles or political and administrative agendas.

These factors are particularly important in this study. The interpretation of student expression case law in the Third Circuit may be very different from comparable analysis elsewhere. The case law examined in this study indicates the Third Circuit courts have ruled more consistently in favor of students, granting greater leniency with their expression than in many other circuits. In the study, I will ask school solicitors to provide

their interpretations based on the legal rulings of the Third Circuit as well as the influence on policy that perhaps has resulted from this climate.

### **Summary**

This literature review has examined several components of the issue of the rights of students to express themselves in and out of school, on and offline. I have reviewed relevant court cases from the four major U.S. Supreme court cases as they relate to some lower court rulings that have provided precedents for school officials and solicitors. I have explored scholarly reviews of these cases, many with conflicting interpretations of which precedents should be controlling when navigating on and off-campus student expression issues.

Additionally, in this chapter I touched on some significant social factors, particularly school violence and cyberbullying, influencing the courts' interpretations of the latitude that should be granted to schools in student expression cases. Each social factor has uniquely affected the societal expectation for the school's awareness of students' personal lives and communication. This changing expectation has directly impacted the level of latitude schools receive for their regulation of student expression. Finally, I examined the role of the school solicitor.

Chapter III will present a discussion of the methodology used in this study.

## **CHAPTER III: METHODOLOGY**

### **Introduction**

The purpose of this study is to help school officials answer the question, “What guiding questions should I be asking and how should I thoughtfully and logically approach complicated online or off-campus student expression issues in an educationally, ethically, and legally sound manner?” To answer this question, and more comprehensively understand this issue, I examined legal trends and associated scholarly commentary on cases involving student rights of expression. I also analyzed the perspectives and interpretations of these legal trends by Region 11 Pennsylvania school solicitors.

In this chapter, I will explain the background of the study and my interest in this topic. I will also describe the methods used to gather the data to answer the research questions. I will then explain the process used to collect, analyze, and validate the data. This chapter will also explain the limitations and delimitations of the study.

This study was a basic qualitative study with two components:

- (1) I used case law as a foundation to identify the legal trends of court rulings surrounding student expression issues in schools. This was important in that I was first able to establish a foundation of case-law knowledge; this knowledge, and the understanding of these trends, served as an integral point of reference for properly contextualizing part two of the research study. Because this study is legal in nature, participants frequently cited case law regarding legal precedents and standards applied to advise administrative action.

(2) I used a qualitative semi-structured interview approach. I interviewed Pennsylvania school solicitors from the Pennsylvania School Board Association (PSBA) Region 11 to determine a more in-depth understanding of how legal counsel in these school districts are interpreting recent legal trends and guiding school officials in their practices regarding student expression issues. The solicitor interviews allowed me to gather valuable complementary data inaccessible simply from the study of case law. Fundamentally, this method allowed me to “gather in-depth data about [participant’s] experiences and feelings...and examine attitudes, interests, feelings, concerns, and values” (Gay, Mills, & Airasian, 2009). The interdependence of the two components of this study was vital. Obtaining a base knowledge of the recent legal trends (the first component) allowed me to ask relevant follow-up questions in the semi-structured interviews and discuss case law in the midst of the interview at the appropriate times to determine guiding precedents. This qualitative design allowed me to gain an in-depth insight into a research topic and address the research questions. Data collection and analysis focused on understanding the participants’ perspectives of their experiences, and specifically how these perspectives shaped their actions in supporting and advising districts. The research allowed me to gather the point of view of individual participants, to get closer to their perspective through detailed interviewing, and to understand how their interpretations influenced their actions (Denzin & Lincoln, 2012).

### **Background**

Coming from a family of educators, I did not grow up specifically yearning to join the profession. Despite this, I was immersed in ongoing discussions about schools, the roles schools play in shaping students, and the ethical responsibilities of the educator. My grandfather was a long-time principal, my grandmother a career kindergarten teacher, and both my parents were high school English teachers who transitioned to college level teaching and administration. The common thread among them was a relentless dedication to developing students as independent and socially responsible thinkers. Despite initially resisting the field of education, I did possess this mindset as a student and young adult. Like my parents, I questioned school officials who focused more on controlling students and ensuring their compliance than they did on learning and teaching. As I entered the field of education as a professional, I found this mindset of learning and teaching has driven me, even as my roles within the field have changed.

As my roles changed, my understanding of the complexities of educational administration deepened. Competing interests, strong opinions, and questionable interpretation or manipulation of the law came to dominate the administrative world in which I worked. The reality of lawsuits and legal action against a district, intentional or not, helped create a culture of mistrust and often fear between communities and school districts. This challenged my ethical compass on which I had relied so consistently through my early years in the field. I witnessed many of my fellow administrators and informal network of principals making decisions out of fear, driven by protecting the school district and their own livelihood. This was understandable, yet disheartening.

The issue of student expression has been of particular interest to me. As a school

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administrator and principal, I have always valued student voice and taken pride in finding ways to empower students to express themselves, even if those opinions differed from mine or the traditional and fundamental philosophies of the school. I gave priority to the value of respecting and dignifying differing opinions.

Equally important to me has been the need to create a school culture where students feel safe, respect one another, and conduct themselves respectfully in their many interactions. While these two goals would seem to go hand-in-glove, the rise in cyber-bullying cases and social media has frequently conflicted these goals. With increasing social media usage, students, and in turn school officials, are aware of more and more instances where others interpret expressions of opinions as unkind, unwelcome, or unpopular. As a result, students and parents seek the school's involvement in addressing conduct that many interpret as inconsistent with the values of the school.

Having a natural faith in students, I do not operate with the mindset that students are nastier to one another than they once were. Rather, through social media and electronic communication, there are more venues to share information, more permanence to that communication, and more potential to reach a wider audience. Couple this with teenage impulsivity and we have a web of on and off-campus expression that may result in students feeling disrespected or bullied, and a constituency of people who seek our assistance in resolving these issues.

Some school officials who have chosen to take an aggressive stance in addressing on-line communication by punishing students have found themselves in legal trouble. Others who have taken a "hands-off" approach have been criticized as weak administrators who are unwilling to tackle big issues. Sometimes they are even sued for

negligence by “allowing” bullying to continue.

I have sat in yearly in-service meetings regarding legal updates on this and other topics but, despite having an interest in student expression, the guidance has remained unclear. The court rulings have been inconsistent, as have the interpretations of these rulings. As with many dilemmas I face as a school administrator, I try to return to the guiding question “How should this situation be handled in a way that promotes student learning?” Choosing to be either overly punitive or hands-off does not align with that philosophy, so where is the balance? How should we, as school officials, be involved in a way that dignifies student voice, contributes to a culture of respect, focuses on learning, and keeps our constituents satisfied, while always proceeding in a legally defensible manner? I hope that this study provides some clarity for me and other school officials and contributes to the body of research guiding administrators as they seek to maintain this challenging and delicate balance.

### **Case Law Review and Examination**

Since the *Tinker* case in 1969, the courts have ruled on a wide range of cases involving the rights of student expression and the authority of schools to regulate it. For many years, *Tinker* was the primary standard and precedent used to guide legal rulings. For the purpose of this study and narrowing the focus of the broad legal scope of student expression, the examination of case law primarily focused on cases involving student expression off-campus as the courts have differentiated the role of the school in its authority based on the location of the expression in question. However, I examined some relevant on-campus cases as their precedents helped frame some guiding questions for regulation. Also, I studied more closely some recent cases and rulings (since 2007) from

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within the Third Circuit (Pennsylvania, New Jersey, and Delaware). However, because there have been other very recent rulings in other federal circuits contradicting some Third Circuit rulings, and may benefit the clients (school districts) of school solicitors, I also studied some of these cases.

The year 2007 was pivotal in that the key Supreme Court ruling of *Morse vs. Frederick* granted the school authority to regulate conditionally off-campus speech of students. This is particularly important because, with the rise in social networking and cyber-communication, more cases of off-campus speech were reaching the courts, albeit not the Supreme Court. The Supreme Court has not ruled on an issue of students' rights of expression since *Morse vs. Frederick* (2007). While lower courts have heard student cases involving off-campus expression, rulings outside the Third Circuit have tended to rule more favorably for school officials, granting them more authority to regulate off-campus speech. Nevertheless, there have been instances when this was not the case. Conversely, some key cases in the Third Circuit have supported students and tended to grant school districts less authority in the regulation of both on and off campus expression. For this reason, the second part of this research, the interviewing of Pennsylvania solicitors, is significant; it provides insight into how they understand, interpret, and narrate these cases.

As solicitors who advise school districts in the Third Circuit, their opinions and perspectives have a significant impact on guiding the practices of school administrators. Through their responses during the qualitative interviews, solicitors shared many relevant cases, many of which I had previously studied. Other mentioned cases with which I was unfamiliar. I researched them after the interviews and, when applicable, added them to



the literature review. These cases allowed me to study precedents and guiding questions used to frame the thinking of solicitors as they provided advice. My familiarity with and understanding of some of the relevant case law prior to the interviews contributed to more conversational semi-structured interviews.

When participants introduced cases into the interview, I was usually familiar with the case and could compare details of other cases with similar circumstances. This allowed me to contextualize properly the responses of school solicitors when they shared their interpretations of student expression rights. It also made my interview notes more robust. Overall, I intended for this approach to reveal, from a social constructivist perspective, the reality that participating solicitors have created (Denzin and Lincoln, 2012; Merriam, 2009). More specifically, a constructivist stance maintains that learning is a process of constructing meaning; it is “how people interpret their experiences..., what meaning they attribute to their experiences” (Merriam, 2009, p. 23) and “how people make sense of their world” (p. 24). It was evident that how solicitors make sense of the legal landscape surrounding this issue has changed over the years, so understanding their current reality was imperative to understanding the research question.

### **Research Design**

This basic qualitative study incorporated a semi-structured one-to-one interview approach with school solicitors in Pennsylvania’s Region 11. The interviews took place during April and May of 2015 at varying locations and times, depending on the availability and convenience of the participants.

Merriam (2009) reports the basic qualitative study has a specific goal of “understanding how people make sense of their experiences. Data are collected through

interviews, observations, and documents and are analyzed inductively” (p.37). Elements of this study lend themselves to a collective case study methodology, specifically using multiple sources to explore a phenomenon in context (Baxter & Jack, 2008). However, while I used multiple sources when including interviews of solicitors and analysis of relevant cases, the phenomenon is not an intrinsically bounded system, which is a necessary element of a case study (Merriam, 2009).

School officials are struggling to manage challenging student expression scenarios and cases to make meaning of this dimension of their work. This qualitative research uncovered, through interviews, how meaning within this context is constructed, and explored how school solicitors interpret these legal phenomena, which in turn guides and advises school officials. Using a semi-structured interview approach allowed solicitors, when answering more open-ended questions, to define uniquely the situations through their perspective while the approach allowed the researcher to respond to the unique perspective of the respondent with appropriate follow-up questions (Merriam, 2009). Throughout the interviews, I could ask several follow-up questions, which permitted the interviews to bring to the surface the perspectives of each participant. Using probes and follow-up questions allowed me to respond to the feedback gained from the participant and make necessary adjustments. I was able to “sense that the respondent is on to something significant or that there is more to be learned” (Merriam, 2009, p. 101).

### **Population of Interviewees**

Pennsylvania has 501 school districts and 200 different school solicitors (Pennsylvania School Board Solicitors Association Directory, 2010). The Pennsylvania School Board Association divides the state into 15 different regions by county lines.

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Region 11 contains the 35 public school districts in Montgomery and Bucks counties. Both counties are on the north and northeast border of the city of Philadelphia in Southeastern Pennsylvania. All of the school districts in Region 11 are considered suburbs of the city of Philadelphia.

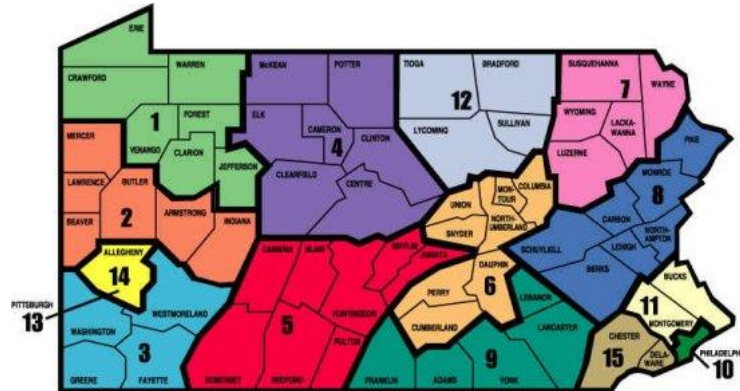


Figure 1. Map of the Pennsylvania School Board Association's Regions via <https://www.psba.org/about/regions/>

Fifteen different solicitors represent these 35 school districts. Many obviously represent more than one district. For the purpose of this study, the scope of the 15 solicitors in this region provided the sample of potential participants. I sent letters of invitation and hard copies of the informed consent form to the law offices of the 15 solicitors to inform them of the nature of the study and to invite their participation in the research. Only one solicitor responded to the initial written invitation to participate. Two weeks after I sent the letters, I sent follow-up emails to solicitors in Region 11 who had not yet responded. This yielded seven additional volunteers to participate. For those who did not respond to either the letter or follow-up email, I made phone calls to their law offices. These calls yielded one additional participant. If there was no response to the

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letter, email, or phone call, I made no additional attempts to seek involvement.

I anticipated fewer than 15 solicitors would accept the offer to be interviewed, but was hopeful the sample size would be large enough to generalize trends of thought patterns and responses from participants. From reviewing the content of the interviews, coding the responses, and analyzing the results, I determined the nine participants provided sufficient interview answers to allow me to generalize the responses of the participants to the Region 11 solicitors as a whole.

While a single person serves as the primary school solicitor for each school district, all solicitors work with a team of other lawyers at their respective firms. These teams frequently have lawyers with a range of areas of expertise. For example, some lawyers specialize in personnel issues while others may primarily work with special education issues. In most cases, specialty-area lawyers work in conjunction with the primary solicitor to provide guidance to the district but, in other cases, they provide the guidance directly to the district. This dynamic allowed for, in some cases with this research, a primary school solicitor to refer me to a member of his or her legal team who would typically be better suited to provide legal counsel to the school district in a student expression case. As such, not every participant was a primary school solicitor for a Region 11 school district.

In addition, some law firms are larger than others and may have multiple lawyers within the firm who serve as school solicitors. Of the nine participants in this study, they and their law firms provide legal counsel to a range of the school districts in Montgomery and Bucks Counties, and sometimes beyond these counties. Of the 22 school districts in Montgomery County, the legal counsel from 21 of those districts (95%) was represented

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in this study. Of the 13 school districts in Bucks County, the legal counsel from three (23%) was represented in the study. Overall, of the 35 school districts in Region 11, 24 districts (69%) were represented in the study.

While this study sought to gather the interpretations and perspectives of Region 11 solicitors, many of the participants also represented school districts in other neighboring counties such as Chester County, Delaware County, and Philadelphia County. Some of the participants also provide legal representation for other school entities (vocational schools, intermediate units, charter schools, private schools) beyond the public schools on which this study focused. Finally, most participants have done some sort of legal work with other school districts in Pennsylvania and other states beyond the districts they may formally represent currently.

Of the nine participants in the study, all have extensive experience practicing school law. All participants have been practicing a minimum of 10 years, with the most experienced participant having over 45 years of experience practicing school law and advising school districts. Participants also have actively litigated some of the cases referenced in this study.

I guaranteed confidentiality for the participating solicitors in this study. While the opinions and perspectives shared were of the participants themselves, and not their clients or their law firms, most solicitors asked probing questions to assure themselves that their responses would not be identifiable. Due to the relatively small number of solicitors in Region 11, they share familiarity and collegiality. To respect their confidentiality, I offer no profiles of the participants in the study, as it could be potentially identifiable. When reporting responses, I will identify participants only with a number from #1 through #9.

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There is no significance to the number designating each participant.

### **Data Collection**

When interviewing the solicitors, I asked each participant the questions below in a semi-structured open-ended format. I sought agreement from the participants to digitally tape record the interviews. If the solicitors were not in agreement to record the interviews, they were offered the chance to continue with the interview and I would simply take notes as the participants responded verbally. While there typically was some initial deliberation over this, all participants consented to digitally recording the interviews. Face-to face interviews were the preferred means of collecting data, but I offered phone interviews as an alternative. All participants opted to conduct the interviews face-to-face and had their location of choice for the interview. Eight of the nine participants chose to conduct the interview in their respective law offices. One participant chose to meet at a neutral location, a school conference room. Of the interviews at the law offices, some took place in the participant's actual office while we had others in a conference room at the law office. In all cases, only two people were present for the interview - the participating solicitor and me.

The interviews included no identifiable information connecting the responses to the participant. Throughout the interviews, the participants and I were on a first name basis, but no names were included in the reporting. I confidentially forwarded the digital recordings to an approved transcription service. Upon receiving the transcribed interviews, approximately three to four weeks after the interview, I mailed a hard copy of the transcribed interview to the participant for the purposes of a member check. Participants had the opportunity to review the transcriptions and inform me if they

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wanted to amend, add to, or strike anything included in the transcribed interview. They received the opportunity to withdraw from the study if they chose. This would result in the removal of their interview from consideration in the study. After each participant received a copy of the transcription, they had a six-week window of time to respond. None of the participants offered any revisions or changes to their original responses. All opted to remain in the study.

The interview questions were designed to cite relevant Supreme Court rulings, but intentionally did not include any specific questions about Third Circuit cases or lower court rulings. The questions were crafted to be divergent and open-ended and “may be more difficult to make sense of, but this type of question allows the researcher to obtain information that may otherwise be considered discrepant” (Gay et al., 2009, p. 371). To assess which cases and precedents have the most influence on the decision-making process of the solicitors, I did not highlight the lower-court rulings in the original questions. I expected the language of the Supreme Court Cases (e.g. substantial disruption, foreseeable disruption) would emerge through the responses of the participants. Leaving the lower-level cases absent from the questioning allowed me to see which cases, and their accompanying language, most heavily influenced the solicitors when advising districts.

I followed the same procedure with follow-up questions. Despite the interviews being semi-structured, and thus allowing for follow-up questions, I was purposeful when interviewing not to lead the participant by introducing lower-court case law to the discussions. Because of our geographical location, the participants frequently mentioned Third Circuit cases and the general tendencies of the Third Circuit. When the participants

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introduced key rulings within the Third circuit (e.g. *Layshock*), I could ask relevant follow-up questions to probe more deeply.

The interview questions I asked to each participant are listed below. Table 1 below the list explains which research question is the root for each interview question.

1. If a school administrator is made aware that a student, while off-campus, made derogatory remarks or insinuations about a school official or student either via social media or in writing, what protocol or process should the school administrator follow and what questions should the school administrator ask to determine how he or she should respond?
2. What criteria should be used by the school administrator to determine if the expression can be regulated (including the content of the expression, where/when /how the message is conveyed, and to whom the expression is addressed or conveyed)?
3. How has the U.S. Supreme court, from their rulings in the cases *Tinker v. Des Moines Independent Community School District* (1969), *Bethel School District v. Fraser* (1986), *Hazelwood School District v. Kuhlmeier* (1988), and *Morse v. Frederick* (2007) shifted the balance of student rights of expression from the student to the school?
4. Since the 2007 *Morse v. Frederick* Supreme Court ruling and the rise in the number of off-campus social networking cases involving student rights of expression, how has school officials' authority changed when regulating off-campus student expression? Why has this change occurred?
5. Can you share anonymous details of a recent off-campus student expression case



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for which you may have provided guidance? Can you share how the school responded? Looking back, would you change any of the advice you gave? If so, why?

6. Have district policies regarding school’s authority to regulate off-campus student expression changed in the districts that you advise? If so, how?
7. What factors contributed to that policy change?
8. Is there anything that I have not asked you that you believe will enable me to more comprehensively understand this complex issue?

Table 1

*Connections between Interview Questions and Research Questions*

Interview Question	Research Q #1: Based on the legal literature and related court decisions, what should be the questions asked, criteria used, or guidelines followed to determine the legal parameters of school authorities to regulate off-campus speech, electronically or not?	Research Q #2: Based upon the perspectives of solicitors in Pennsylvania Region 11, to what extent has the school administrator’s latitude changed since the 2007 <i>Morse v. Frederick</i> U.S. Supreme Court ruling and the rise in the number of off-campus social networking cases involving student rights of expression?	Research Q #3: Based upon the perspectives of solicitors in Pennsylvania Region 11, how have district policies regarding school’s authority to regulate off-campus student expression changed since 2007 and what factors contributed to that change?
1	X		
2	X		
3		X	
4		X	
5	X		
6			X
7			X
8	X	X	X

### **Data Analysis**

Once the semi-structured interviews were completed, the process of analyzing the data began. The interview responses were all transcribed, coded, and then analyzed. During the interview process, while the conversations were being digitally recorded, I took notes. In these notes I identified areas of further research and data collection. The solicitors in the interviews occasionally brought up new legal terminology or unfamiliar cases. I noted these required further research so I could understand fully the phenomena being explained in the interview (Bogdan & Biklen, 2007).

When I received the copies of the transcribed interviews, I listened to the recordings while reading the transcriptions to ensure the accuracy of the transcription. I also read my field notes in conjunction with the transcriptions to enhance the meaning of the interview. After I ensured the accuracy of the transcription, I coded the interview responses, assigning specific designations to a particular aspect of the data (Merriam, 2009). From the interview responses, I began to see emergent findings and patterns of how the participants were thinking (Bogdan and Biklen, 2007). These emergent findings developed into the coded categories based on the research questions. The triangulation of the data - the research questions, the interview questions, and the interview responses - will help achieve the practical goal of the data analysis - to find answers to the research questions (Merriam, 2009).

When analyzing the responses, I designated coded categories in relation to the research questions. Driven by the purpose of this study, I named each category systematically. There were multiple sources for the codes, including the research questions and the literature review (Merriam, 2009). Some of the codes originated from

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the case law, including the prominent language from the U.S. Supreme Court cases and commonly mentioned legal precedents. However, the participants themselves suggested other codes (Bogdan and Biklen, 2007). For example, when discussing the changing latitude of authority of school officials during the interviews, every participating solicitor discussed in some form the changing role of the principal in a broader context. This emerged as its own coded category, which became very important in thoroughly understanding the historical and longitudinal context needed to assess the authority of school officials. Similarly, participating solicitors commonly used the term “nexus to school.” The concept is not only vital for administrators to establish regulatory authority, but was a literal term used by all participants. Thus, it emerged as a coded category.

Each coded category met the standard outlined by Merriam (2009) as: *sensitive* to the data, with a meaning from which an outsider could get a sense of the nature of the category; *exhaustive* so all relevant data could be placed in subcategory; *mutually exclusive* so relevant data can only be placed in one category; and *conceptually congruent* so that all categories have a similar level of abstraction (pp. 185-186).

Identifying coded categories allowed me to determine emerging themes, including most commonly mentioned legal precedents and the courts from which they originate, responses regarding guidance or advice to school officials when facing off-campus expression issues, policy implications, and other specific dimensions of the research questions. These coded categories allowed me to answer the research questions. Through this coding process, I was able to analyze the interview responses and theorize. Because one of my purposes was to predict appropriate responses to future scenarios, the concept of theorizing was particularly relevant. It allowed me to develop a theory or an

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explanation for an aspect of practice and allowed me to draw inferences about future activity (Merriam, 2009). The articulation and clarification of the significance of the study ensued from this analysis. Table 2 lists the coded categories that emerged for analysis.

*Table 2*

*Coded Categories for Data Analysis*

<b>Code</b>	<b>Explanation</b>
SD	<b>Substantial Disruption.</b> The first tenet of the <i>Tinker</i> ruling that provides conditions for regulation of expression.
FSD	<b>Foreseeable Substantial Disruption.</b> The first tenet of the <i>Tinker</i> ruling that provides conditions for regulation of expression.
ROO	<b>Rights of Others.</b> The second tenet of the <i>Tinker</i> ruling that provides conditions for regulation of expression.
THAS	<b>Threat to the Health and Safety</b> of others. A tenet of the <i>Morse</i> and <i>Tinker</i> rulings that provide conditions for regulation of expression.
LPC	<b>Legitimate Pedagogical Concerns.</b> A tenet of the <i>Hazelwood</i> ruling that provides conditions for regulation of expression.
VSL	<b>Vulgar, Sexually Explicit, or Lewd.</b> A tenet of the <i>Bethel</i> ruling that provides conditions for regulation of expression.
UBEM	<b>Undermining the Basic Educational Message.</b> A tenet of the <i>Morse</i> ruling that provides conditions for regulation of expression.
NTS	<b>Nexus to School.</b> Determining if the off-campus expression establishes a relevant nexus to the school.
POL	<b>Policy.</b> References to school policy.
CROP	<b>Changing Role of the Principal.</b> Specific information that speaks to the complexities of the changing role of the principal.
SRE	<b>Student Rights Eroding.</b> Solicitor explaining how students have eroding rights of expression in schools.
SRI	<b>Student Rights Increasing.</b> Solicitor explaining how students have increasing rights of expression in schools.
PRO	<b>Process or Procedure.</b> Specific procedure or protocol suggested by the solicitor.
GQ	<b>Guiding Question.</b> Explicitly stated guiding questions that a solicitor recommends that a school administrator should ask.

### **Limitations of the Study**

When reviewing this study, readers should be aware of the following limitations:

1. I am an educator and public school administrator and not an attorney; as such, I write from this perspective.
2. The review of literature contains an array of court cases and legal rulings seemingly connected to the core issue of student rights of expression, particularly involving off-campus expression. I reference court cases and opinions as appropriate, but I did not examine the complete legal manuscripts of the cases.
3. I used interviews of school solicitors to gather information about legal perspectives. These interview responses may not include data that would directly meet my desire to navigate student expression issues from an educational and ethical lens. I will deduce the ethical and educational elements, in part, from review of the related literature.

### **Delimitations of the Study**

In achieving a concentrated focus in this study, readers should consider the following delimitations:

1. I conducted a review of legal cases solely on student expression cases involving public schools; I did not explore the issue of rights of students in private schools. This delimitation is due to the court direction that *Tinker* and first amendment cases provide regarding the rights of students in a public education setting.
2. I chose cases for analysis with the intent of examining key issues involving student expression in schools over time. I did not intend this study to be a comprehensive analysis of every related court ruling.

3. The collection of data and perspectives from Pennsylvania school solicitors emerged from interviews with school solicitors in Region 11, which contains school districts located in Montgomery and Bucks County in Pennsylvania. The PSBA determined the regions themselves and grouped them geographically by county. This sample of solicitors in this study represents only roughly 7.5% of all school solicitors in Pennsylvania (15 out of 200 according to the 2010 PSBA Membership Directory). Consequently, I cannot definitively conclude that the perspectives gathered can be generalized to other regions of the state; the political and economic climates in other regions in the state may vary significantly. Furthermore, 200 school solicitors represent 501 Pennsylvania school districts. The solicitors in Region 11's Montgomery and Bucks counties represent the 35 school districts in these counties (22 in Montgomery County and 13 in Bucks County). In total, I sought to gather perspectives of solicitors from 35 of the 501 Pennsylvania school districts and cannot assume these perspectives would be consistent if the sample size were broader.

### **Validity and Reliability**

Through this study, I sought to measure Pennsylvania Region 11 school solicitors' perspectives on the regulatory authority of school officials in issues of off-campus student expression. The methodology was designed to most accurately measure its intended purpose. Validity refers to "the degree to which qualitative data accurately gauge what the researcher is trying to measure" (Gay et al., 2009, p. 375). However, qualitative research can never actually capture reality. Maxwell (2005) discusses validity as a goal rather than a product, claiming that validity can never be proven. While Merriam agrees, she also states there are strategies that can be implemented to increase

the credibility of the findings and ensure the trustworthiness of the qualitative research (Merriam, 2009).

To ensure the validity of the qualitative research, I used several of these strategies to increase the credibility of the findings. I implemented triangulation, using multiple sources of data in the data collection: case law review, scholarly discussion, interview data, follow-up interviews, and member checks. The “strength of qualitative research lies in collecting data in many ways” and crosschecking information allows the researcher to obtain a complete picture (Gay et al., 2009, p. 377).

Participants were receptive to follow-up questions during the interviews and they participated in member checks to confirm the accuracy of their responses afterwards. I was able to follow up and ask clarifying questions with the participants as they all made themselves available via phone and email even days after the interviews occurred. In some cases, I confirmed case law they mentioned or asked clarification of a precedent to which they had referred.

Attorneys are typically deliberative and thoughtful in choosing their words and I found this to be the case with participants. I afforded them the opportunity to review their responses by viewing the transcripts and confirm that the message conveyed was as they had intended. Reading a transcript of what they had said is a common occurrence for solicitors in their daily practices, so this occurred naturally. Member checks, also called *respondent validation* (Merriam, 2009), is a method endorsed by Maxwell (2005), who says it is “the single most important way of ruling out the possibility of misinterpreting the meaning of what participants say” (p. 11). These member checks allowed me to confirm the report with the participants before sharing it in its final form (Gay et al.,

2009).

In addition to member checks and triangulation, I also followed other strategies to ensure validity including: (a) *developing a detailed description of the context* around the political, social and legal landscape of the study; (b) *establishing structural coherence* that examined closely any internal conflicts or contradictions within the data collected; and (c) *practicing reflexivity*, which allowed my biases as a school administrator, and not an attorney, to be ever present (Gay et al., 2009).

In practicing reflexivity, I needed to be aware of the relational context between the participants and me. I also need to be aware of my own assumptions and preconceptions. While the interviews and data collection theoretically sought objectivity, both in the questions and the answers, and I made intentional efforts to construct objective questions, the participants spoke to me knowing my role as a school administrator so the conversations were in essence similar to those that occur regularly with school officials. I made efforts when interpreting the findings to be cognizant of how the data was constructed both interactively and culturally. After interviews, I also reviewed the interviews and reflected on my role through interactions and follow-up questions.

With these steps taken to avoid the threat to validity, I feel as if the study was successful at measuring what I intended. The study achieved a high level of descriptive and interpretive validity (Maxwell, 2005). The descriptions of participants' responses were accurate. I also feel, when interpreting the data, I closely considered the context in which the perspectives were shared and shaped. Both of these factors contributed to ensuring validity.



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Reliability refers to the degree to which the qualitative research data “consistently measure whatever they measure” (Gay et al., 2009, p. 378). There are fundamental elements of qualitative research that make reliability problematic. The nature of research around the area of the social sciences is such that human behavior, personal experiences, and perspectives are highly contextual, never static, multi-faceted, and dependent on many changing social and personal factors. For this reason, replication of a qualitative study will not yield the same results; however, this does not discredit the results of the study or even subsequent further studies (Merriam, 2009). When considering and assessing reliability, Guba and Lincoln (1994) conceptualized reliability by stating that, with qualitative research, the more important determination should be whether the results are consistent with the data collected.

Merriam (2009) discussed the pertinent issue posed by Guba and Lincoln:

Rather than demanding that outsiders get the same results, a researcher wishes outsiders to concur that, given the data collected, the results make sense - they are consistent and dependable. The question then is not whether the findings will be found again but whether the results are consistent with the data collected. (p. 221)

So, by definition, the study lacks reliability. However, the study does meet the standard of consistency prioritized by Guba and Lincoln, and later furthered by Merriam.

Triangulation is a strategy for reaching this desired level of dependent and consistent data, congruent with the reality of the participants (Merriam, 2009). To this end, I believe the study has resulted in congruent and consistent data.

**Summary**

In Chapter III, I explained the research methodologies I employed. This included descriptors of the research design, the population sample from which I gathered the data, the study's validity and reliability, its limitations and delimitations, and the process for data collection and analysis used in the study.

## **CHAPTER IV: FINDINGS**

### **Introduction**

In this chapter, I will present the findings of the participant interviews. Chapter III outlined the data collection process and the demographics of the participants. I will group and synthesize the findings of the study based on the research questions that were posed and drove the study. I organize the findings according to major themes emerging from the qualitative coding process. I constructed and specifically targeted each interview question to gather data and appropriately address a particular research question. In the following sections, I will share the themes that emerged through this collection, grouped by research question.

### **Research Question One**

The first research question this study sought to answer was the most complex and resulted in the largest amount of data to be analyzed. This question sought to challenge solicitors to address the issue from the perspective of a building administrator when attempting to navigate off-campus student expression issues.

*Based upon the perspectives of solicitors in Pennsylvania Region 11, what should be the questions asked, criteria used, or guidelines followed to determine the legal parameters of school authorities to regulate off-campus speech, electronically or not?*

### **Assessing Health and Safety Risks**

The primary factor in determining involvement or action is the assessment of whether the expression constitutes any type of threat to the health, safety, or welfare of another person, even if the person was not connected to the school. Seven of the nine

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participants (79%) introduced the aspect of school violence or health and safety into the interview and, of those, all prioritized the safety element as the first step of the decision-making process. Not only is it sensible and inherently connected to the role of the school administrator, but courts have granted a much greater level of latitude with school involvement surrounding issues of school safety. Parents and families of students in issues such as this have also been more inclined to be cooperative with, and understanding of, school officials' desire to be involved in mitigating such incidents.

Unlike some other examples of off-campus expression, which may never lead to any actual level of in-school disruption, expression characterized as a threat warrants a more urgent response and intervention for preventative purposes. Procedurally, this may necessitate school officials contacting the police or the authorities immediately to mitigate any threat.

The initial guiding question a school administrator should ask is "Does this constitute a threat to anyone's safety?" Participant #2 reinforced this urgency by stating "if it's being perceived as threatening, even if it's not a direct threat, I think there's a little more of a feeling that I'm going to err on the side of intervening here." He also added that a school official might risk the threat of a potential lawsuit by intervening, operating under the mindset of "I'm not going to be the guy who just ignored it and then had the unthinkable happen." Participant #4 echoed this, saying, at times when threats of violence are imminent, the concern over protecting a student's first amendment rights becomes secondary. He stated, "I wouldn't give much weight to a student's first amendment rights at that point."

### **The Nexus to School**

If, after investigating an off-campus expression issue, the school official had determined to institute some type of school-related discipline, the responsibility falls on the school official to confirm that a nexus had been established between the off-campus expression and the school itself. All nine participants in the study engaged in discussion about the dynamic of assessing the nexus. Participant #1 stated the school official “needs to make the determination as to whether or not, and to what extent, the issue is related to school.”

Expression occurring on-campus clearly is connected to school. The nexus is also clearly established (Morse, 2007) if the expression occurred off-campus under certain circumstances such as a school-sponsored function (e.g. field trip, extracurricular sporting event). Policies crafted around technology use, such as a school district’s *Acceptable Use Policy*, frequently clarify there are certain expectations for how a school-owned device would be used, even if that device was off-campus. Conduct falling under this policy would also have established a nexus. In these cases, the nexus is relatively clear. The focus of this study is on the expression that originates off-campus and the nexus is less clearly defined.

Establishing a nexus is much more complex than realizing the source of the expression may be a student. A student’s expression, when it is deemed unrelated to school, is as protected as it is for any other citizen, even if the expression may be deemed by a school official as lewd, offensive, racist, or homophobic, for example. Regulating this type of expression would be considered over-reaching and a violation of the student’s first amendment rights. When determining nexus, there are some parallels to assessing

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the nexus in a situation of student off-campus conduct. Establishing a nexus involves assessing intent, impact, context, audience, and scope.

Participant #1 used the following analogy to conduct:

If kids are out on...the night before Halloween and throwing eggs at houses and happen to throw one at the assistant principal's house not knowing it's the assistant principal's house, there's really nothing that the school can do about it, but if they specifically target the assistant principal's house because it's the assistant principal's house, now you may have something there.

Participants uniformly agreed that technology has not made the challenge of determining nexus any more clear. One participant stated that technology has "blurred the distinction over what constitutes in-school versus out-of-school context and over whether, and to what extent, a disturbance rises to the level of a valid basis for considering something to be school based conduct."

Take the above analogy as an example. Assume students were aware a house they were egging was the home of the assistant principal. It is relatively easy to assess the intent of the action, the audience, the impact, and the scope. In a technology-related example, suppose a student were to proverbially egg the assistant principal's house by posting something, in the evening, at home, and on his or her own computer, negative in nature about the assistant principal. In such a case, it is far more complicated to assess the intent, audience, scope, and context of the expression. Consequently, it is more difficult to establish a nexus.

Most of the language derived from the U.S. Supreme Court cases dealing with student expression originated prior to the advent of the Internet and beyond the context of

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assessing the impact of social media. Online communication has changed that dynamic, therefore changing the criteria used for determining a nexus. Participant #4 explained this, discussing how the impact on the school has become the most influential factor when determining nexus. The location of where the expression originated, meanwhile, has become less important. Participant #4 said, “Obviously now social media is such that the [on- or off-campus] distinction is moot at this point because you could be outside the school and write something that's going to have a big effect inside the school.” He went on to clarify that the notion of *impact* is highly scrutinized and typically means that the expression has led to material substantial disruption. *Impact*, as it is used, is not to be interpreted as simply unsettling another person. In everyday language or discussion, people within the school may say they are impacted by another’s expression because it resulted in them feeling uncomfortable with the expression or they simply did not agree with the message. This is frequently the case if a student posts something politically charged or socially controversial. While this may generate negative feelings among others in the school, in and of itself it is not typically sufficient to rise to the level of substantial disruption.

The nexus issue is particularly relevant to student-on-student communication, or issues typically interpreted as bullying. Even if the communication, had it occurred on campus involving the same two students, would align with a district’s bullying or harassment policies, that same communication involving the same two students off-campus may not result in establishing a nexus to school. If the context is determined to be unrelated to school, the nexus is not established.

Participant #3 highlighted this dynamic with a sample scenario:

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You have to look at [whether or not] this statement [was made] in the context of school... hypothetically let's say it's middle school. [Assume] you have two students and they happen to be on the same basketball team outside of school. They're not on the middle school basketball team. And one student makes a [social media] post about the other student in the context of that basketball team...the context is totally outside school.

In this example, the communication would not prove to have established a nexus to school, therefore it should not be regulated. Parents may contact the school and inform the school officials of the incident, anticipating assistance in its resolution. School officials would then decide to allocate resources and time to resolve the issue, but there is no authority in this case to regulate through the administration of school-related discipline. If the tension between the two students resulted in unruly conduct or disruption in school, school officials at that point would have the authority to regulate or discipline the students, but only for what occurred while the students were in school.

Connected to this example, and the responsibility that a school official may feel to get involved in community events, several participants offered cautionary advice about how deeply immersed a school principal should be in the community. While educational research supports a strong community/school connection and communities typically laud principals who are actively involved in the community, solicitors advise school officials to establish clear boundaries.

On the issue of community involvement, Solicitor #1 stated:

School officials vary on the degree to which they want to be the arbiters of neighborhood, out-of-school disputes... [Y]ou certainly don't ever want to be



getting involved when someone's feelings get hurt because they didn't get invited to a birthday party or bar mitzvah and some people perceive that as bullying - and it may be - but it's not school-based and it's [not] something you need or want to get involved in necessarily.

### **Substantial Disruption and Foreseeable Disruption**

Every participating solicitor in the study discussed the dynamic of substantial disruption and foreseeable substantial disruption. School safety was the primary justification for involvement. Aside from school safety, every participant named assessing evidence that material or substantial disruption had occurred in school as the most influential factor to consider when establishing a nexus. Substantial disruption is associated with *Tinker's* first prong, as is the notion of foreseeable substantial disruption. Yet, it was clear solicitors were much less confident in recommending regulation or disciplinary action based on foreseeability, and cautioned against it. The exception to this was if the foreseeability involved a health and safety risk, most specifically physical safety.

While they primarily considered the standard of substantial disruption the guiding factor, they recommended consideration of the other elements of the *Tinker* language -- the second prong, infringing on the rights of others, and the second part of the first prong, foreseeable substantial disruption -- but only under the umbrella of evidence of the effect of substantial disruption. No participant responded that he or she would advise clients, based on the Third Circuit rulings, to regulate solely on the grounds of either foreseeability or the infringement on the rights of others. In the event another student's rights were infringed upon, participants still advised that there be evidence of how the

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infringement of those rights substantially interfered with the student's education.

Participant # 7 discussed the connection between infringing upon the rights of others within the context of substantial disruption:

Disruption is the driving factor in terms of being able to issue discipline against a student for actions that occur off campus when you're talking about speech.

[Regarding the] interference with the rights of others, I view that as really within the ambit of the effect of the communication. [In a] bullying example, you have communications that are ongoing, repeated, [and] that are harsh directed toward another student. They're made off-campus but they're accessible...through a social media site that you can access on a school computer and they're open to other members of the school community. There could be an effect on the student in school, the targeted student, whether it's attendance or students' performance or other areas, too. So I think you're looking at both [the rights of others and substantial disruption], but to me the driving factor is substantial disruption...I view... [infringement on the rights of others] as a subset of substantial disruption.

Similarly, regulating based on foreseeability also is clearly a more risky standard to apply as grounds for regulation than actual disruption, and falls within the context of substantial disruption. Solicitors and courts support it less as grounds for suppressing expression. As Participant #7 explains, "foreseeability is one of those very slippery areas legally. And a district is on safer ground making a decision based on what has happened as opposed to what is foreseeable."

Foreseeability naturally involves a level of discretion and judgment by the school official. Recognizing that maintaining order in schools frequently requires swift decision-

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making, courts have tended to show deference to school officials in most cases involving schools intervening with off-campus expression based on foreseeability of a school safety concern. However, aside from health and safety issues, courts have been less lenient with decisions based on foreseeability made at the expense of suppressing a student's first amendment rights. Consequently, solicitors caution school officials to use foreseeability as a lone standard. Foreseeability is inherently a judgment, both for a school official and a potential judge. If the courts potentially assess that same scenario differently than the school official, a greater level of risk of legal action ensues. Participant #6 strongly encourages his clients to find evidence of actual disruption and tries to steer them away from the risks of foreseeability. He said "if you're just worried that the speech is going to have some disruption, [that is not] not good enough... [I]t has to be real...and where that line between real and not real is anybody's guess."

Participants made suggestions for school officials to consider to strengthen the case for foreseeability. First, school officials should be deliberative and thoughtful when addressing these issues. The courts could perceive less favorably a quick judgment with little documentation, particularly if that judgment involved some level of discipline. Clearly documenting what has occurred, even if there are signs of some level of disruption, would strengthen the argument that the event could foreseeably escalate. A comprehensive school investigation into an issue may reveal additional relevant information such as students sharing other additional information or teachers indicating previously unknown disruptions. This would properly ensure that students' due process rights were honored, and it could provide evidence there was some form of real disruption, even if it does not significantly disrupt the school or educational process.

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Examples of disruption cited by participants include students accessing the school counselor or other support services, parents requesting class or teacher changes, and excessive conversation in class that disrupts learning. By being deliberative and taking the time to observe and document these disruptions, the case for foreseeability strengthens.

A second suggestion for school officials was to remove anyone emotionally attached to the incident from the investigation. If the nature of the expression in question involved disparaging comments about a particular school official or a particular program connected to an official such as an athletic director, the solicitors recommended to remove the targeted individual from the investigation if possible. This would minimize the possible perception of the regulation or discipline being retaliatory or reactionary in nature.

Solicitors view issues through the lens of assuming that a factfinder (hearing officer or judge) could one day look back on this case. They consequently advise their clients accordingly. Knowing that foreseeability is a weaker argument than actual disruption, these suggestions for administrators increase the possibility of court support for their actions. Solicitors also understand the conundrum of foreseeability – while school officials must make predictions on potential disruption quickly, judges and the courts have the luxury of hindsight in seeing how these situations played out. This hindsight reinforces the necessity for school officials to be as deliberative as possible.

Participant #2 discussed the deference to actual disruption versus judgment on foreseeable disruption with the advantage of hindsight:

I don't necessarily agree with it, but [the courts have] made it clear that it's got to

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be way outrageous or very disruptive... [T]hey say it's a substantial likelihood of disruption. But by the time the case is litigated, either there was a disruption or there wasn't disruption. So...whether you prospectively think there's going to be a disruption and you're deciding in that moment of ground zero whether you're trying to make a decision, you're going to be judged with 20-20 hindsight when the case gets to trial.

Conversely, inaction or a school official's failure to properly investigate an off-campus concern brought to his or her attention can be equally or, as Participant #8 describes below, more damaging. This is another, albeit more horrific, example of the challenges of foreseeability. Hindsight again allows for easy judgment.

Participant #8 discussed hindsight:

By the time you get to court, as you know, the judge [and] the jury get to use hindsight... [T]hat's the nature of the system. So we have a child who's being bullied, out of school conduct, [and] the principal says I'm powerless to do anything about it, and that child takes his or her own life ... [I]t's a horrible case. The jury and the judge get to hear a horrible case and there's a sense of something more should have been done. And Principal, what did you do? I did absolutely nothing. Is it possible that a verdict would be entered [against the school for inaction]? Yes, I think it's possible.

When dealing with foreseeability, the response of the target is difficult to predict, particularly with student-on-student issues. This places a great level of burden on the school official. One respondent, Participant #4, described the uncertainty of assessing the effect on the targeted student and predicting the ensuing response by that student. With

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substantial material disruption as the most influential factor in determining nexus, it may be unethical for a school official to wait for such disruption to occur. A school official who is made aware of the emotional effect that some type of expression has had on a student, even if that effect has not yet manifested itself into a physical outburst, is put in the challenging position of predicting student response. Warnick (2009) says, “emotional violence may lead to physical violence, but even if it never does, the damage is real” (p. 206).

Nonetheless, emotional effects have typically not been a strong enough factor in the eyes of the courts to establish nexus unless there is measurable disruption connected to it. For a school official, predicting this is incredibly challenging. On one hand, you may have a resilient student who absorbs the assaultive expression, does not outwardly respond, and therefore little or no substantial disruption results. On the other hand, with the same circumstances and degree of online targeting, a targeted student may lash out, demonstrate extreme outward angst or aggression, and create a substantial level of disruption in school.

Participant #4 discussed the response of the target as a difficult factor to predict in these cases, reinforcing the challenge of foreseeability:

There's a legal term called the *eggshell plaintiff* where you take them as you find them. You could be in a car accident and you just get tapped. That person is fragile and had a lot of injuries. You really can't argue, well, we only tapped you at five miles an hour. Whereas you could be in a 55-mile-an-hour wreck and the person walks away from it...a stronger person. But...there is a bit of subjectivity I guess in terms of the recipient.

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Aside from cases involving the threat of violence, there are few recent court examples where foreseeable substantial disruption, absent any form of material substantial disruption, is a strong enough standard to stand alone as a reason to regulate off-campus expression. The participants did not share any examples of such a Third Circuit ruling, nor did they advise that foreseeability be a standard that, by itself, should warrant nexus or regulation. The case of *Dariano v. Morgan Hill Unified School District* (2014) is a school-related case that used only foreseeability as its means to regulate. However, the courts supported the suppression of expression in this case of on-campus expression because there was an imminent health and safety risk to students on campus. This was summarized well with the advice of Participant #7, who shifted the focus to actual substantial disruption:

Focus...on the disruption that has occurred and is occurring. I believe it gets far too speculative and it may be a waste of everyone's time, including the administrator's time, to say, well, what disruption...do you expect next week to be like? What do you expect it to be a month from now?

### **Cyberbullying and the Infringement on the Rights of Others**

According to participants, the standards for regulation in cyberbullying cases do not differ from other cases and remain consistent with the responses outlined above when determining nexus and substantial disruption. The notion of *Tinker's* second prong, infringement on the rights of others, is not a strong enough standard in and of itself to warrant regulation and discipline. Four participants (44%) specifically mentioned the case of *J. C. v. Beverly Hills Unified School District* (2010) in which the school got involved in disciplining a student for off-campus cyberbullying, only to be sued by the

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family and be ordered to pay the family over \$100,000. While this was a California and Ninth Circuit case, participants believed the Third Circuit would rule consistently with this case, supporting the first amendment rights of the student while off-campus.

However, every participant mentioned the intensified anti-bullying and harassment laws put into effect in Pennsylvania and most states. With bullying and cyberbullying laws in virtually every state (Hinduja & Patchin, 2014), solicitors nationwide are reconciling state bullying legislation, local policy, and case law. Many participants discussed how the current bullying laws hold schools to such a high standard, and are worded so generally, that if they were enforced as written, the actions of the district would not be legally defensible. They observed the language of the bullying legislation does not fully align with how courts have ruled in other cases, such as the *J. C. v. Beverly Hills Unified School District* (2010), which is unquestionably a case of cyberbullying. The bullying laws would dictate schools to regulate this form of bullying, but the courts ruled otherwise, indicating that doing so may result in legal action against the district.

Additionally, the 2011 *Dear Colleague* letter referenced earlier in this study was followed up subsequently again since with a letter to all public school entities nationwide urging schools to be involved in protecting the rights of students from bullying, sexual harassment, discrimination, and sexual violence (Ali, 2011). The letter was worded strongly. Failure to act accordingly and protect students could result in legal action and sanctions for school districts that create a culture where discrimination existed.

Similarities exist between the *Dear Colleague* letter and the bullying legislation, neither limiting the responsibility of the school to involvement with events that occur



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within the walls of the school. With schools expected to deal with community bullying, families of students have sought assistance from schools in supporting their children who are bullied, even if that bullying occurred online or out of school. While solicitors are all aware of the conflicts and inconsistencies among bullying legislation, local policy, and case law, their advice regarding nexus and substantial disruption held true. According to participants, the bullying legislation and *Dear Colleague* letter provided greater justification for administrators to be involved with all cases that come to them, even if they do not result in some type of regulation or discipline. Inaction is not a recommended response.

Some participants shared the frustrations with the inconsistencies between the demands of the *Dear Colleague* letter and the authority school officials have. Participant #8 expressed frustration over this contradiction, claiming that on one hand the *Dear Colleague* letter called school officials to protect all children from bullying, especially those in a protected class, but on the other hand, the courts have not ruled in a manner supporting this. Participant #8 stated “if the bullying is based upon the fact that the child is in any protected class – [and] at least in my experience a lot of bullying is based upon that any protected class - race, gender, sexual orientation - that that can be considered discrimination if the schools fail to do something about it.” So, while the *Dear Colleague* letter demands action by the district, Participant #8 cited the cases of *J. C. v. Beverly Hills Unified School District* (2010), *J. S. v. Blue Mountain* (2010), and *Layshock v. Hermitage* (2010) as examples of “free speech cases that [support] the rights of the bully.”

While the example above provided by Participant #8 expressed frustration,

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Participant #9 shared how out-of-school bullying concerns brought to school officials can increase awareness of what may be occurring in school, unbeknownst to some educators. While still maintaining a focus on the in-school disruption, further investigation can be beneficial to all parties.

Participant # 9 discussed a recommended investigatory procedure when information is brought to the school about a potential harassment or bullying case but for which no evidence of disruption yet exists:

But with respect to a student [concern, school officials should investigate] ... what is happening in the school environment, and...look at whether or not there are any [signs of] ... harassment [or] bullying [in school]. If this is just a small piece of evidence of harassment that has been unnoticed, but because this has brought it to your attention, now you can start recognizing that these things are happening in school or [it] corroborates something else that is happening in school. Then I would [investigate that further]. So you might go and see if there have been any other complaints [or] if the teachers have had any complaints in school. Same with the administrator, or the school official. The questioning to those people would be: are you seeing anything within school? What are you seeing? Have there been any complaints made to you by any students about the person who made the comments about anything happening in school? Are these people feeling harassed?

### **What Does Appropriate Involvement and Regulation Entail?**

Even in cases where a nexus warranting discipline has not been established, all participants discussed the educational and ethical responsibility of school officials

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involved in the resolution of the issue. Participant #3 commented on this: “you have to... analyze those gradations... [I]s this a disciplinary offense or is this an interpersonal moment, a teaching moment, in terms of the conduct?”

When information comes to schools from parents, even if it is outside school, contending that their child is a target of bullying, participants consistently recommended school officials should act and not assume a stance of inaction. Participant #4 commented on the recommended response. Even if the school felt as if the action was strictly off-campus without a nexus, “you try to address it. I think districts are open to... more liability if they just turn the other way when someone comes with bullying allegations. You try to address it short of disciplining the kid.... [Take] some measures to remediate the situation.”

Remediation and involvement could be speaking with parents or families, involving the counselor, engaging in a peer-mediation session, making teachers or other staff members aware of the concern, interviewing other students, or conducting further investigation. When information is brought from off-campus to an administrator, Participant #9 suggests, “what you're getting is outside evidence of something that could happen in school. And so are you obligated to take any action? No. You're obligated to take action on the inside-of-school issues.” But Participant #9 followed this by recommending further investigation, which may reveal similar types of behavior or exchanges occurring in the school. Doing so does not guarantee regulation or discipline, but demonstrates comprehensive investigations and good faith in developing partnerships with families to solve problems.

While the core responsibility of the solicitor is to provide legal counsel,

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participants consistently said they value working closely with school officials to help them effectively meet their goals of creating a safe and effective learning environment. Solicitors see their role as not to tell their clients what to do, but, as two different participants characterized, to offer “options and outcomes” for administrators and school boards. When offering advice on outcomes, one outcome was consistent: the school official is always more legally protected when not administering discipline. Participants suggested that, when a school official is in doubt, it is legally safer to proceed by limiting his or her involvement to taking steps to remediate the issue as opposed to administering discipline.

Solicitors consistently responded by advising school officials to assume the responsibility of investigating, cautioning against the hands-off approach. Capturing the perspective of the respondents, Participant #7 said “I don't subscribe to [the approach of]... it happens off campus and it's through a social media site; we don't control what is said and, therefore, there's nothing we can do about it; parent, you should report it to the police if you think it's that serious.” He added that schools’ efforts to take affirmative steps can be helpful in problem solving student-on-student issues, even in cases that may not have the strength of nexus to result in discipline. Although these steps are not legally a responsibility, and can be time-consuming, the positive involvement can contribute to healthy resolution for all parties. Parents and students will typically view the school as part of the solution and appreciate the involvement.

These participant responses are significant in that they affirm the literary research on the role of the solicitor. Julka and Curry (2011) describe solicitors as “advocates, mediators, counselors, and problem solvers” (p. 14). All participants reinforced their

desire to approach these issues educationally and ethically, assuming a problem-solving and mediating stance. In constructing the knowledge for this study, it was important to not simply improve clarity on the legal boundaries of regulation, but to also give due consideration to the desire of school officials to support the rights of students, encourage citizenship and expression, and yet prioritize a healthy and safe school experience for all. A potential limitation of the study is that the data gathered from solicitor interviews may not directly meet my desire to navigate student expression issues from an educational and ethical lens. However, the findings indicate that participants assume the role of not only legal advisors, but also problem-solvers and counselors, affirming the related literature.

### **Lower Court Rulings Influencing Decision Making**

Throughout the interviewing process, I intentionally included the U.S. Supreme Court cases and their relevant language in the questioning to assess how solicitors perceive the different established high court standards and which standards they thought should be applied when determining regulation of off-campus expression cases. However, it intentionally did not include lower court rulings in the questioning. This allowed the study to focus on cases that have likely influenced the solicitors' thought process and decision making when offering counsel on these issues.

All participants mentioned the Third Circuit rulings, albeit with varying levels of detail. All mentioned the general tendencies of the Third Circuit to favor the protection of students' rights of free expression, both in and out of school. The *J. S. v. Blue Mountain* (2010) and *Layshock v. Hermitage* (2010) cases were mentioned frequently as examples when participants suggested how to respond when school officials are targeted in off-campus expression cases. Specifically, one participant stated that the cases are “about

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adults and they tend to be about the building administrators or occasionally teachers and basically the message that those cases all say to building administrators and teachers is get a thicker skin.” Another participant summarized these two cases by stating, “the courts are basically saying... we expect administrators to have thick skin and to be able to take the slings and arrows of a couple of high school kids with barbed tongues.” In summary, attempting to regulate off-campus student expression when adults are targeted, absent substantial disruption, is fruitless.

Another Third Circuit case, *B. H. and J. M v. Easton Area School District* (2013), was a local case within 60 miles of every Region 11 school. In this case, the court protected the rights of middle school students to wear “I (heart shaped) boobies” bracelets in school. Seventy-eight percent of the participants introduced this case into the interview discussion. The case was clearly influential in how guidance was provided because many solicitors perceived it as a contradictory response to the U.S. Supreme Court rulings. Given Easton’s close proximity to the districts the participating solicitors advise, the details of this case were influential in their guidance, even more so than the Supreme Court rulings. While the case was an on-campus expression case, participants mentioned it as an example of the Third Circuit’s tendency to support student rights of expression. The case further reinforced the weight the substantial disruption standard carries in student expression cases.

Participant # 6 explained his disagreement with the ruling and how it created additional challenges for school officials:

The problem is for Pennsylvania administrators, the Third Circuit doesn't seem to be going as far as the U.S. Supreme Court on allowing educators to regulate

speech. I disagree with the majority's decision in the recent case dealing with *I love boobies* that ruled the court violated the kids' rights by prohibiting the bracelets in school. I was a little bit surprised that the Supreme Court didn't take that case. And the reason I was surprised that it didn't take the case is because it seems to be inconsistent with the *Morse* case. The administrators in the *I love boobies* case clearly believed that it had sexual innuendo involved (*Bethel*) and [schools] should have been able to say we're not going to get involved in sexual innuendo. But the Third Circuit came up with – or at least the majority of the Third Circuit came up with - a cockamamie test which [is] if the sexual innuendo has a socially valuable purpose with [a] message to it then it's a little bit different.

### **Less Influential U.S. Supreme Court Precedents**

When analyzing and discussing the findings of this research, it is relevant to consider the absence of certain data from the research. There have been four key U.S. Supreme Court cases on student expression, each including pivotal language used to provide guidance on the conditions warranting some level of school regulation. When navigating the landscape of off-campus expression and the degree it can be regulated, participants focused on language within the *Tinker* ruling, most prominently *substantial disruption* and, to a lesser degree, *foreseeable substantial disruption* as grounds to regulate expression.

While participants cited the *Hazelwood*, *Morse*, and *Bethel* cases as precedents for many of the lower court rulings mentioned in this study, the fundamental language of each of these three Supreme Court cases was not used as a primary justification for regulation by any of them. Table 3 indicates codes I initially identified through the data

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analysis portion of this study as potentially pivotal considerations, but, based on the solicitors' perceptions and responses, I found minimally impactful in the findings.

Participants did not mention these cases or the tenets of the Supreme Court cases when recommending guidelines for regulation of off-campus expression. Therefore, based on the responses from the participating solicitors, the following standards, absent a substantial disruption element to accompany it, likely would not be applied by school officials when regulating off-campus expression:

1. Expression that legitimately conflicts with the school's pedagogical message
2. Expression that is lewd, vulgar, profane, or sexually explicit.
3. Expression that is deemed to undermine the basic educational message of the school.



Table 3

*Codes Dropped from the Study*

LPC	Legitimate Pedagogical Concerns. A tenet of the <i>Hazelwood</i> ruling that provides conditions for regulation of expression.
VSL	Vulgar, Sexually Explicit, or Lewd. A tenet of the <i>Bethel</i> ruling that provides conditions for regulation of expression.
UBEM	Undermining the Basic Educational Message. A tenet of the <i>Morse</i> ruling that provides conditions for regulation of expression.

**Possible Procedures for Administrators**

Research Question #1 in part seeks to gain the solicitors’ perspectives on providing guidance to school officials when dealing with the regulation of off-campus expression. As such, I used the data collected from the participating solicitors to summarize some procedural recommendations for school officials. While the procedures should not be construed as legal advice, the summary of these recommendations is included in Chapter V.

**Research Question Two**

The second research question sought to explore the solicitors’ perspectives on the changing landscape of both the latitude of the administrator and the first amendment rights of students. Data is grouped below by theme. When addressing this research question through the interviews, participating solicitors’ responses focused on two emerging big-picture themes. Both themes are related, depend upon one another, and contribute to understanding the research question. The first theme was the changing rights of the students. In this theme, participants discussed interpretations on how students have gained or lost rights over the years. The second theme, which emerged through discussions about administrative latitude, was and the changing role of the principal:

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*Based upon the perspectives of solicitors in Pennsylvania Region 11, to what extent has the school administrator's latitude changed since the 2007 Morse v. Frederick United States Supreme Court ruling and the rise in the number of off-campus social networking cases involving student rights of expression?*

### **Are Students Rights of Expression Eroding?**

The Student Press Law Center's Frank LoMonte argues most anti-bullying legislation uses vague and overbroad language either difficult to fairly enforce or doomed to defeat as unconstitutional if challenged in court (LoMonte, 2012a). He also argues the *Tinker* standard should only be applied for expression originating within the school walls and applying it to out-of-school expression is an example of students' rights eroding. Other scholars agree, stating that *Tinker*, when it has been applied, has resulted in students losing their rights of expression in school settings (Kozlowski, 2010). This study's participants agree with LoMonte's assertion that bullying legislation is vague and overbroad, but disagree with LoMonte and Kozlowski that student rights of expression are eroding.

All nine of the interview subjects spoke to the courts clarifying the conditions under which school officials can regulate expression, but participants did not perceive this as an indication of erosion of student rights. The participants acknowledged the U.S. Supreme Court cases presented scenarios where expression could be regulated by schools. However, they referenced many other lower-court cases that clearly established the standard that off-campus expression could not be regulated. These cases include the Third Circuit rulings of *J. S. v. Blue Mountain School District* (2010), *Layshock v. Hermitage* (2010), and *B. H. and J. M v. Easton Area School District* (2013), as well as

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the Ninth Circuit case of *J. C. v. Beverly Hills Unified School District* (2010).

Participants consistently perceived the courts as generally cognizant of protecting students' rights of expression. These cases are examples of the courts protecting students' rights and participants mentioned them as influential cases when determining the guidance that solicitors provide.

The prevailing theme of the participants' perspective was that students' rights of expression have not eroded, but rather increased, as evidenced by an increase of student knowledge and awareness. According to the solicitors, students have greater access to information, have more familiarity with their rights and case law, and are savvy in utilizing their many means of expression. Participant #9 shared that students' knowledge empowered them, and therefore "students then know how far that they can push. And I think that there's more of an understanding of the law in school so that students may go right up to that line." Participant #9 then added that this awareness of their rights, and the multiple avenues for students to express themselves, has allowed students to maximize their rights, encouraging a more healthy exchange of ideas. This solicitor interpreted this as an example of an increase in students' rights of expression.

Participant #1 cited increased technology as evidence:

Kids do and get away with way more stuff than they ever did because there's so much more opportunity to do it. If you wanted to bad mouth your principal in 1967, you had a very limited ability to do that. You can do it now. You could viral in 11 minutes.

When discussing the impact of the court rulings on students' rights of expression over time, Participant #3 stated, "I don't think that they...whittled away at that right [of

expression]. I think that...the decisions are being fine-tuned based on the content of the message.”

Students are more aware of their own rights. The Internet and the availability of information about case law and school-based examples have made this possible.

Participant #7 stated, “At times there are students that want to test the boundaries of their rights when they are, particularly, in high school.” Students may test the boundaries after having the knowledge of the specific details of what may have occurred at another school in another part of the country. Other participants discussed the natural consequences of the information age, citing examples of students mimicking precisely the behavior of another student expression issue in perhaps another state that had reached the courts and in which the student's expression had been upheld. One participant referenced an example of a t-shirt case in which the students bought the same t-shirt worn in an out-of-state case and wore it to school, testing the boundaries. When school officials stepped in, both the students and parents already knew of the details of the case and challenged the school officials’ involvement and decisions.

Participant #8 emphatically disagreed with the notion that student rights may have eroded:

I believe that the courts [since the] *Tinker* decision have failed to follow *Tinker* to a very large extent and have expanded the rights of student expression. Because I believe *Tinker* made it clear that...students do not have a right of free speech where their speech impinges the right of another student to a...free and public education. *Tinker* specifically mentioned that. And I think *Tinker* interestingly gave us the way to deal with these bullying issues even though it was long before

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cyber... the *Tinker* court was very willing to look at the impact of the targeted student. That has not been repeated; it hasn't been emphasized other than in dissents. And I believe it's unfortunate that the courts have [failed to apply] that second prong of *Tinker* and have focused solely on the substantial disruption, which leaves the bullied student, the cyber bullied student if we're talking about out-of-school expression, with very little assistance available from the courts.

That's my opinion.

That said, this same solicitor counsels his clients to guide them in such a way that they will proceed in a legally defensible manner, frequently advising the de-emphasis of school discipline in off-campus and cyber-bullying cases, despite his personal opposition to this philosophically.

It should be noted that, when exploring the idea of students' rights of expression changing over time, I conducted this analysis in the context of off-campus expression. Within the broad realm of student expression, there are other on-campus student expression examples which, had I included them in the questioning, may have elicited a different response from participants. Of the four major U.S. Supreme Court Cases involving student expression, one case in particular, *Hazelwood School District et al. v. Kuhlmeier* (1988) has drawn the ire of free-speech advocates. It provides conditions for the school to censor in-school or out-of-school speech, typically associated with student newspaper censorship, if that expression is deemed to be inconsistent with the school's "basic educational mission." Frank LoMonte and many journalists see this as a glaring infringement on students' rights of expression. This study provides no basis to evaluate the participants' perspectives on the increasing or eroding expression rights of students

within the context of their student press rights.

### **Changing Role of the Principal**

When assessing the changing regulatory authority of the school official regarding off-campus expression cases, the participating solicitors acknowledged the landscape shift due to technology. They referenced the relevant court cases that provide guidance on that authority, but most prominently they broadened the conversation about the how the role of the principal, the responsibility of the school, and society's expectations for schools have all changed dramatically over the years. The laws contributing to these changes go beyond student expression cases and first amendment issues.

Every participating solicitor referred, in some regard, to the ever-changing challenges facing school officials. The role of, and expectations for, the school administrator are established uniquely by each community – in part by the school board, the superintendent, the values of the community, the geographic location of the district, and even the size of the school. This varies from district to district. Couple this with the changes to technology and how students are using technology, both on and off campus, and the dynamic becomes even more challenging. The principal's responsibility to maintain a healthy climate that fosters learning has not changed, but the community expectations and laws that govern school officials have. Participants in the study discussed these changes and their impact on the regulation of off-campus expression.

The influx of technology and its associated mediums for communication has affected the changing role of school officials; they have become much more aware of the extent and various modes of communication among students, parents, and school officials. While it is unclear what impact this has had on the authority of the

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administrator, information is more readily available and accessible to everyone.

Participant #9 highlighted this by stating that administrators know “much [more] ... about what happens [and]...it happens faster.... Communication happens so much more because of technology. I don't know that it's drastically changed school official authority as opposed to that school officials know more when things happen.” A range of sources makes officials more aware of what occurs both on- and off-campus. For example, years ago, school officials were significantly less likely to be aware of off-campus bullying issues and were less likely to be expected to intervene or resolve such issues.

When assessing the authority of school officials, the on- and off-campus line is not as clear as it once was. This blurring warrants a broader conversation. Laws and policies, in areas beyond student expression, have included placing a professional responsibility on school officials to regulate student conduct beyond the school walls. An example of this is the school's legal obligation for students from portal-to-portal.

Participant # 3 discussed the blurring line between in- and out-of-school responsibilities:

I represent some charter schools in [Philadelphia].... When you have portal-to-portal [responsibility] in the city that means [students] walking to the 7-Eleven, the Dunkin Donuts on the corner in the morning with a bunch of students and a fight breaks out or words are exchanged. Does that lead to discipline? It's on the way to school. Code of conduct usually says to and from school. So those are situations when it directly impacts [school] and [the authority] is door-to-door, portal-to-portal.

Not only have the laws broadened the authority beyond the school walls, such as the

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portal-to-portal responsibility explained above, but also societal expectations have increased. In the aftermath of the Sandy Hook Elementary school tragedy, the school system and the county's mental health supports were called into question for the support, or perceived lack of support, provided for the former student who ended up being the perpetrator. Some speculated that mental health supports were insufficient.

Whether the courts ever legally determined that the school was negligent is moot to the argument that the perception of such a broad scope of responsibility by the school exists in society. School supports and authority go beyond the walls of the school and the expectations, both legally and societally, have increased. Schools now must deal with issues of truancy, homebound instruction, and social work. These responsibilities require school officials to visit the home. All of this has contributed to a bigger picture issue - the line distinguishing in and out-of-school responsibility of school officials is much less clear; consequently, issues surrounding student conduct and expression are less clear.

Participant #3 spoke to the bigger picture with school's authority off-campus:

There's a larger analysis...in terms of the school's regulating off-campus conduct.

When you look at the Sandy Hook report and it points fingers at the school - or maybe pointing fingers isn't the right phrase - but in terms of monitoring the homebound instruction and monitoring the need for homebound instruction, monitoring what was happening at the home, at what point... do you cross that line? [Schools] have Home & School Visitors who do more than just truancy.

When we look at students not attending school and the regulations, ...the case law is telling us we need to send people out into the home to see what we can do to get students in [to school]. There is a line that isn't so protective anymore that



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schools don't come into the home. Schools *do* come into the home... So when I look at situations... I'm analyzing them in the context of what does this mean? ... I was just in a truancy hearing where a lot of the discussion was what services can the school provide for the student and the family to get the student into school? And that all means going outside of the realm – outside of the boundaries of the school or the campus of the school and delving into issues like the student getting out of bed in the morning. So now if that student is lying in bed in the morning and posting stuff about school, is that different? I think it is. I mean, I think it is because of...free speech. But that boundary is blurred. And the impact on school ...it's not easier... [to clearly see] the nexus to school. Schools... always have been an important part in communities but they're being looked at for so many different roles that ... do have an impact on what's happening in school.

Every participants mentioned the changes to the bullying laws in the state of Pennsylvania. These changes have increased the expectations for involvement by schools in off-campus bullying incidents, often setting a standard that some participants perceived to be beyond the law. As one participant stated, the laws “broadened the scope” of administrative authority over student-on-student discipline. The bullying legislation has contributed to parents turning to the school to help solve what were at one point issues handled by families. Dealing with out-of-school bullying, searching for answers, and left with few options for how to proceed, families turn to schools for assistance.

Participant # 8 shared:

That poor targeted student, those parents are so distraught they want [their] child to go to school. They may not have alternatives available to say, well, I'm just

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going to pull my child out of the school and send him to [private school]....

[T]hose choices are not available for the vast majority. So who do they turn to?

They turn to the school; it's the first place that they turn to.... [T]hey call [the principal] and say, what am I going to do? My son or daughter doesn't even want to come to school anymore; you've got to help. What are you going to do?

The bullying legislation and other off-campus scenarios shared by Participant #3 above were very specific examples, but all the participants discussed in some capacity the increased expectations communities have for schools.

Participant #1 spoke about society's changing expectations for schools:

I do see a lot more consciousness and involvement on the part of families and parents of kids who are more sensitive and who have a greater expectation that the school district will fix – I don't mean to say this in any way sarcastically - but that [schools are] going to fix the problems of society. They're going to fix the problems of...the community... [B]asically the expectation [is] that the school district is going to combat discrimination in whatever form, based on disability, based on race, based on religion, based on sexual orientation, anything. The expectation is so much higher now than it was 25 years ago that students who commit and say and do things that could be interpreted as discriminatory are being held accountable for that conduct far more now than they would have been 25 years ago. Hazing [is a] good example, though hazing is not really freedom of expression.... [W]hat used to pass for boys will be boys, kids will be kids, that doesn't fly in 2015 the way it did in 1990 and I think to the extent that people feel that students' rights are being eroded, they could just be perceiving the fact that

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students are [engaging] in a lot more conduct that they're being held accountable for than they ever did before. Both because of how much larger the consequences of that conduct can be... [and] because of the heightened awareness of society and school districts...to combat the more invidious forms of discrimination.”

Beyond community expectations, case law has created some guidance for school officials with issues beyond expression issues. The courts have discussed nexus determination within the context of student expression cases, but participants shared some other scenarios where school officials are expected to understand a different set of guidelines that help determine other on/off campus regulation issues. For many of the same reasons, these issues have become more complicated. While not explored in this study, they do speak to the changing role of the schools in regulating off-campus issues and conduct. Examples include disciplining students in extra-curricular activities for their off-campus drug and alcohol involvement, or students being under the influence of drugs or alcohol while on campus even if the intake of the substance occurred off-campus. The guiding questions vary for each circumstance, challenging school officials to know, understand, and apply each set of guiding questions to the appropriate circumstance.

A responsibility that has not changed over the years, but has become more difficult to determine, is recognition of issues and discerning which issues need to be addressed. The influx of technology, the many aforementioned on- and off-campus issues, and the increased volume of information to process have all contributed to complicating this discernment for school officials.

Participant #6 spoke to the discernment and recognition:

The number one thing that a school administrator needs to do is... to recognize

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when there is an issue. And I can tell you even this year, I've dealt with some administrators who literally walk past an issue and don't recognize the fact that they should be doing something and reporting it somewhere.... and it's partially because of the increased complexity of the law and society.

When recognizing an issue and demonstrating a willingness to address it, school officials today deal with increasingly more layers and a greater level of complexity. Participants spoke to this, reinforcing the challenge of school officials to consider special education laws, students' rights of due process, bullying laws and policies, as well as parental and societal expectations when conducting investigations. With additional steps and added complexity comes awareness that, at any point, parents could challenge, either practically or legally, the school official on process. What at one time was a societal acceptance of school officials assuming a "we run the school the way we want to" attitude has evolved to a system that includes many more checks and balances. Processes are more complex and frequently involve parents, a broader scope of school officials and personnel such as psychologists, counselors, special education teachers, and often school solicitors. Administrators who acknowledge, understand, and accept this can lead a more thoughtful, comprehensive, and deliberative approach when dealing with these issues.

Participants complimented the approach of the administrators, saying that most school officials have readily accepted the role of "co-parent," open to all information, even if outside of school, to help students. But solicitors acknowledged this has created an additional burden on school officials. Participant #9 discussed this notion of parents seeking assistance from the schools to help with what some may consider to be parental responsibilities. In the context of negative discussion online, Participant #9 observed

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“Parents who are monitoring social media, social networking sites of their children, are seeing these things and wanting the school to be aware of it and help watch what's happening when the kids are in school.”

While the participating solicitors admired the good intentions of their clients, and acknowledged the willingness of school officials to be involved with their students' lives, these examples provide evidence of the solicitors' perspectives on how the authority of school officials has changed since the *Morse v. Frederick* case in 2007. While not specifically citing the *Morse* case as a turning point, they see three major influencing factors that, since 2007, have impacted the latitude of school officials.

First, every participant mentioned that changes in technology have increased information and accessibility and blurred the distinction between in- and out-of-school communications. The increase in text messaging means parents and students are in communication frequently during the school day. Despite some districts' efforts to control this, the phenomenon is a reality. Issues originating off-campus can enter campus quickly and by multiple electronic means, and vice versa. Parents, due to during-the-school-day text or social media communication, are often aware of issues that originate in school even before school officials may learn of them. This has contributed to school officials, students, and parents struggling to distinguish between in- and out-of-school communication and conduct. The speed of information intake has also made it more difficult for school officials to proceed deliberately when investigating, a recommendation made by many participants. As information increases, so does anxiety by students and parents to resolve the issue. This creates growing pressure on school officials and conflicts with attempts to be deliberate.

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The second influencing factor participants saw as having an effect on the latitude of the school officials is the influx of more detailed anti-bullying and harassment legislation, including the added expectations dictated in the *Dear Colleague* letter (Ali, 2011). The burden has increased on the school official to be responsible for monitoring and regulating bullying even when it is off-site. Solicitors viewed this as an incredible conundrum for school officials, as there are inherent contradictions between this expectation and the third influencing factor on assessing the latitude of school officials.

The third influencing factor on the latitude of authority has been the trending lower-level court rulings, especially those in the Third Circuit in off-campus student expression cases. Without clarity from the U.S. Supreme Court on the issue of cyberbullying, school officials will be forced to balance these seemingly competing edicts from the law. With the increase of technology, the changing role of and expectations for the school and its officials, and comprehensive bullying laws, it could be concluded that the authority and latitude of school officials has increased. However, the solicitors perceive a diminishing of the regulatory authority of school officials and the ability to establish a nexus since 2007.

The courts have provided definition and there has been greater clarity for administrators, according to participants. The general message to school officials is to refrain from disciplinary action. Region 11 solicitors have been able to sift through the many standards and keep the standard of substantial disruption prioritized as the only consistently defensible standard for regulation. Without the presence of documented substantial disruption, the options for school officials, aside from providing resources, are minimal.

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However, the legal responsibility to provide those resources, and the societal expectation for them to be provided in a broader range of areas have increased. So, in summary of Research Question #2, the perspectives of school solicitors observe school officials, since 2007, have an increased level of responsibility for students, as indicated by both legislation and by community expectations, and a more challenging landscape to navigate with increased technology. At the same time, school officials have a diminished authority to impose discipline and formally regulate student off-campus expression. Participating solicitors see this landscape remaining consistent unless court rulings dictate otherwise. While Region 11 solicitors consistently interpret expression cases with deference to the Third Circuit, a Supreme Court ruling could change that.

Participant #5 expressed his hope the U.S. Supreme Court would take on a cyberbullying case to provide clarity:

It's a complex issue. It ... is both complex in that it's very nuanced but it's also complex in that it depends on the interactions of many different cases and many different interpretations. And when you go from circuit to circuit it changes. And because the Supreme Court doesn't want to get involved in every one of these cases to deal with all the nuances, it means that in every circuit you actually have a different body of law that's going to be saying, here's how you do it.

### **Research Question Three**

Through the third research question, I sought to explore the solicitors' perspectives on policy trends connected to the issue of off-campus student expression since the most recent of the four Supreme Court rulings on student expression, *Morse v. Frederick* (2007). Much has changed since 2007: laws have changed, lower-court rulings

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have been handed down, and the social media landscape has evolved. Because both policy and law guide administrative action, this research question sought to assess the solicitors' perspective on how policies have changed and what has influenced those changes. Below, I grouped the data by the responses most commonly shared.

*Based upon the perspectives of solicitors in Pennsylvania Region 11, how have district policies regarding schools' authority to regulate off-campus student expression changed since 2007 and what factors contributed to that change?*

### **Policy Changes and Implications**

A major theme emerging from the study was the level of importance solicitors place on having strong policies to which administrators consistently adhere. Every participant discussed how important it is for school officials to protect themselves and the school district legally by acting in alignment with policy. A strong connection between regulatory administrative action and policy was essential. In essence, policy to a school administrator is as compelling as law and drives decision making. When advising how to respond to the investigation of off-campus expression issues, every participating solicitor reinforced the necessity for school officials to tie their responses to policy. So if, through investigation, it was determined that a nexus to school had been established, school officials would have to align any student discipline directly to the conduct outlined in the policy, whether it be bullying, harassment, threatening remarks.

None of the participants cited sample language from policies that offered clear direction on specifically handling the issue of off-campus expression. Policy-specific language providing such guidance is, according to participants, mostly absent. Because of the very nature of the issue, expression, on- or off-campus, is obviously permissible.



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Policies should clarify the circumstances when expression would be regulated, regardless of the location of its origin. Participants discussed why the off-campus expression issue is not more directly included in policy. Regarding off-campus student speech policies, Participant #2 says “it’s an odd thing to try to regulate [through policy], because it’s sort of regulating the exception.” He added that doing so would be “creating a policy for the exception because it’s more a question...of bringing the conduct under the authority of the school district to discipline, which is that portal-to-portal from the school code.”

While the off-campus expression issue is not specifically addressed in policy, all participants spoke to the many changes to the harassment and bullying policies in the districts they represent. Because state legislation included expectations of some off-campus regulation, districts’ bullying policies have been revised many times; they include some nuanced language based on the lower court rulings and the Third Circuit language, including some direction on nexus.

Participant #5 explained the relationship involving law, the solicitor, and policy, citing the specific complications of the bullying legislation:

Policies [are] revised to be aligned with law and solicitors work with districts to ensure that they are, but in some cases, districts craft over-reaching policies because the administration, Superintendent, or school board are trying to maintain or improve the reputation of the district. In other cases the laws themselves, which drive the policies, are not helpful, [such as the] cyberbullying laws in the *Safe Schools Act*. The problem is, and I think what [actually makes] the law overreaching is that the law itself says that you can reach out-of-school activity with this, and [in] that the policy that you draw, you are permitted to reach to this

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out-of-school off-campus unconnected activity. And I think that a lot of districts look at the law and say, oh, that's great, now I can [issue discipline for this] – and you have to tell them, look, I think that the Pennsylvania legislature overreached on that. And that if there came a case where you actually were going to be taking action against somebody who had done all this stuff off campus, you're going to be at the losing end.

Pennsylvania's bullying legislation, which participants agreed was over-reaching, has unintentionally created an almost alternate set of guiding practices for school officials.

Participant #6 discussed this exception:

Bullying is a little bit different than free speech... [F]ree speech always has all kinds of limitations....[W]ith respect to bullying, the general rule that I articulated [is that] we can't control stuff that's not connected to school. Bullying is an exception because the general assembly passed a law several years ago requiring school districts to take action...[and] have policies with respect to bullying...so if it falls within bullying conduct, school districts actually have certain responsibilities that they have to meet that are over and above.

Participants discussed how policies are crafted in a way that “is intentionally not overly specific.” This grants districts and school officials a degree of leeway and discretion when following policies. According to solicitors, administrators have mixed reactions to the policy ambiguity. Some wish for more clarity, while others appreciate having more discretion.

The PSBA crafts general guidelines and policies that many districts in the state of Pennsylvania choose to adopt directly. These policies, according to the participants, very

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closely align with the law but are generally vague with a great amount of latitude for interpretation. None of the participants shared that the districts they represent rely solely on the PSBA policies; the solicitors all work with the districts to craft policy.

Policies around cyberbullying differ from district-to-district, but are most vague when it comes to clarifying nexus. Participants attributed this to the courts not ruling on a cyberbullying case. While the U.S Supreme Court has not taken on a cyberbullying case, neither has the Third Circuit. The Third Circuit cases that most significantly influenced Region 11 solicitors when offering counsel on such issues were *Layshock* and *J. S.*, which targeted staff members, and the *I love boobies* case in Easton, PA, which dealt with on-campus non-cyber expression.

Participants want to have a U.S. Supreme Court ruling on a cyberbullying case so policies can be crafted in a way to provide greater clarity. One participant was active in the litigation of a key lower-court ruling that many thought the U.S. Supreme Court would hear. Participant #4 reported “the ... National School Board Association joined us in [appealing to the Supreme Court] saying they would like clarity.” Despite the plea, the Supreme Court did not hear the case. Participant #5 echoed the sentiment, saying “I think what the districts would appreciate most is not whether or not they can have authority.... It's having certainty. Not knowing what they're allowed to do and what they should do are driving all of these debates over how to regulate this.” If a case were to be heard, greater clarity would ensue. This would, in turn, impact policy significantly.

Three of the nine participants discussed how changing technology has directly resulted in additional policies and revisions to existing policies since 2007. Most districts have *Acceptable Use* policies stipulating constraints and practices students and staff

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members must abide by when accessing a school district network or using the school-owned technology. Districts that provide students with devices introduce the on-campus/off-campus dilemma regarding regulation and therefore craft policy for protection. Such policies protect the district by clarifying nexus when the school-owned device is used, even off-site.

Other technology-related policies that have changed since 2007 are social media policies and policies connected to online learning, cyber schools, or online submission of, or sharing of, student work. In some cases, these policies also help clarify nexus in off-campus expression cases. Most social media policies provide guidance for how staff members should be accessing social media, particularly when interacting with students. These policies guide staff members in their online conduct in a manner that protects them when doing so. Participants provided no examples of social media policies that attempt to regulate student access of social media outside of school.

### **Factors Influencing Policy Changes**

All participants discussed how law and particularly recent case law influence policy. Included in this discussion were the aforementioned inconsistencies among rulings of the U.S. Supreme Court, the Third Circuit, the Pennsylvania Anti-Bullying and Harassment legislation, and the *Dear Colleague* letter. Participants agreed that law drives policy more than anything and the lack of clarity in the law has led to vague policy.

Four of the nine participants discussed the influence social trends and societal norms, national or local, can play in driving policy. While the law certainly establishes the parameters for the extent a district may regulate, sometimes school districts choose not to craft policies to the threshold the law provides. Solicitors noted the differences in

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policies even among the districts within Region 11. By understanding the population of each community and what it can tolerate, policies are adjusted to reflect the norms of the community. One participant described this as a district setting its own limits by asking “What is going to alarm [our] population?”

Participant #9 discussed the local level of influence on policy:

Policies change a lot based on the culture of the school. The policies are different from school to school based on the culture of the school.... [A]ll of your policies are going to be in-line with the law. But from a solicitor's perspective you're really looking at how does this school handle this [issue]... how do you actually do it within the school.

Two of the nine participants discussed the role that PSBA policy guidance plays in dictating policy revisions and additions. One participant also shared that advocacy groups can influence policy change. Advocacy groups frequently communicate with districts and solicitors, providing recommendations to update policies pertaining to the issue specific to that group.

### **Summary**

In this chapter, I grouped and discussed the findings by research question. The findings of the interviews revealed that participating solicitors deem the evidence of on-campus substantial disruption as the most influential factor when determining if an off-campus student expression issue can be regulated. I was able to synthesize recommendations by the participating solicitors for guiding questions that a school official should ask when determining a nexus to school. I will discuss these recommendations in Chapter V.

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The study also produced findings regarding school solicitors' perceptions on the changing role of the school administrator and the evolution of expression rights of students over time. Participants do not believe student rights of expression are eroding, citing examples of how increased access to information has contributed to the empowerment of students. Additionally, participants discussed the many additional complexities within the role of the school official that make navigating off-campus expression issues more difficult than it once was. Responsibilities and expectations, formally via policy and law changes, and informally via changing societal norms and expectations, have blurred the on- and off-campus line.

In this chapter, I also discussed the findings relating to how district policies have changed and what has contributed to those changes. The participants shared some relevant policy changes, particularly related to bullying and cyberbullying, but laws or policies have not been clarified to the point that school officials have clear direction when dealing with off-campus student expression issues. In Chapter V, I will discuss the conclusions drawn from these findings and the implications of this research.

## **CHAPTER V: DISCUSSION AND CONCLUSION**

### **Study Overview and Key Findings**

Between 1969 and 2007, the U.S. Supreme Court ruled on the four key student expression cases that have dictated both policy and practice for school officials. Students and school officials today are living in a world in which communication is very different from that of students and schools at the time of the U.S. Supreme Court cases. In particular, the realities of social media and cyberbullying have added a completely new dimension to expression. “The anonymity and physical separation that the Internet affords have given birth to a new, insidious occupation, as people take refuge in the distance permitted by the Internet to disparage, embarrass, and debase others” (Ivester, 2011, p. xii). Cyberbullying has added layers of complexity and emotion to how students communicate while simultaneously blurring the once-clear issue of location of origin.

With case law, particularly at the U.S. Supreme Court level, not providing clear guidance, especially relative to the reality of cyberbullying and technology, this study sought to help practitioners more clearly navigate the handling of off-campus expression issues. Chapter IV outlined the findings of the research. In this chapter, I will discuss the practical and research implications of the findings. I will summarize the findings relative to the research questions and synthesize the recommendations for policy, practice, and further research.

The case law relative to student expression issues, while minimal at the U.S. Supreme Court level, is vast and encompassing within the lower courts. However, court rulings involving student expression, on- an off-campus, vary greatly, with significant differences among rulings across different circuits.

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A noted limitation of the study was that I am an educator and not a lawyer. As such, interpreting case law and predicting which precedents should be more strongly considered when faced with a student expression issue were tasks beyond the me. Also, when studying the related literature, legal scholars posited how such issues should be addressed, but their suggestions for idealistic conditions for regulation were rarely supported through case law.

Ellison's (2010) suggestion to rely purely on intent and location, Tabor's (2009) suggestion that off-campus expression is beyond authority, and Ceglia's (2012) recommendation that only *Tinker's* second prong should be applied to online cases are all examples of idealistic generalizations and recommendations not supported by the courts. If the U.S. Supreme Court were to rule on a cyberbullying case, and such a standard were to be established, this would be a significant step toward increased clarity. As the legal landscape stands now, the courts have provided little clear guidance to practitioners. This leaves the interpretation of the solicitor as instrumental in guiding practice and policy around this issue. However, the perspective of the school solicitor is glaringly missing from the research. This study sought to help fill that gap.

Through interviews, Region 11 solicitors were able to provide their perspectives on which legal precedents should be prioritized and considered when faced with off-campus expression issues. Similarly, some precedents have minimal influence in the decision-making process. From gathering the data and feedback from the participants, I was able to determine emerging themes that contributed to answering Research Question #1 by determining what solicitors believed to be the questions that should be asked, criteria used, and guidelines followed to determine the legal parameters of school



officials to regulate off-campus expression.

### **Implications on Practice**

#### **What Legal Precedents Should Guide School Officials?**

Substantial disruption, actual and material, not foreseeable, was found to be the primary factor to determine if expression could be regulated. With substantial disruption as the most influential factor, *Tinker's* first prong serves as the guiding legal precedent for determining nexus and regulation. According to participants, foreseeable substantial disruption, the tenet of *Tinker's* second prong, is less influential and, absent the threat of a school safety concern, not strong enough of a precedent to be a sole determining factor for regulation.

Participating solicitors also interpreted the other three U.S. Supreme Court Cases and their primary themes as having little influence on decision making for school officials when determining if the off-campus expression should be regulated: *Bethel's* lewd, vulgar, or indecent expression; *Morse's* expression that relates to drugs or other moral issues the schools would not endorse; and *Hazelwood's* expression that is inconsistent with the school's basic educational mission. While these Supreme Court precedents provide guidance for on-campus expression, absent actual disruption, they should not be used as means to regulate off-campus expression.

With *Tinker's* substantial disruption driving the decision-making process, the participants used the Third Circuit cases as examples affirming the need for material disruption to determine nexus. These cases tended to be more supportive of students. Third Circuit Cases, the circuit in which the participants practice, included elements of lewd and vulgar expression, and expression that may have been offensive to school

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officials, such as *Layshock v. Hermitage, J. S. v. Bethlehem*, and *B. H. and K. M. v. Easton*. These cases were highly influential in the responses from the participants when cautioning against disciplinary regulation.

With these influential Third Circuit rulings, it seems unlikely the participants, if they had been presented scenarios replicating cases in other circuits, would have recommended a school response similar to that which actually occurred, even if that response was supported by the courts in other circuits. For example, the Second Circuit court supported the school's disciplinary action against student Avery Doninger in *Doninger v. Niehoff* (2008) on the grounds of foreseeable, not actual, disruption, despite no evidence this was a school safety or health risk for students or staff.

While I did not ask participants specifically about the details of this case, given the responses and guiding precedents that were shared, it seems unlikely that participating solicitors in Region 11 would now advise their clients to discipline the student if similar circumstances arose. This distinction is important, despite gathering the data seven years after and in a different circuit than the circumstances of the *Doninger* case. While case law is abundant, the number of cases driving decision making is much more limited. This circuit-by-circuit variance exemplifies the need for greater Supreme Court clarity.

Despite the complexity sifting through the many conflicting lower court rulings, and the range of conditions in which school regulation has been supported by the U.S. Supreme Court, when focusing solely on the regulation of off-campus expression, participants have narrowed the considerations for school officials to focus primarily on the presence of material substantial disruption. This theme helped the researcher develop

some possible procedures for administrators when faced with off-campus student expression issues.

### **Possible Procedures for Administrators**

Because this research study, and Research Question #1 in particular, sought to gain the solicitors' perspectives on providing guidance to school officials when dealing with the regulation of off-campus expression, I collected, grouped, and synthesized data to provide a list of procedural recommendations for school officials. The list below summarizes the emerging themes. A limitation of this study is that I am a researcher and educator, not an attorney. The procedures should not be construed as legal advice; it is written as if directed to a school official.

1. Assess if there is an immediate health or safety risk. If so, act swiftly and inform the proper authorities if appropriate. Concern for a student's first amendment rights should not be a deterrent to reporting health and safety risks.
2. Remove emotion from the decision-making process. If a specific administrator was targeted through the expression, allow that person to distance himself or herself from the investigation. Another school official should conduct the investigation.
3. Start with the mindset that you are attempting to resolve and educate, not discipline. The safe and most legally protected mindset to begin the process is to assume you will not have the authority to discipline.
4. Be involved right away, but approach the process deliberatively. When a concern is brought to your attention, acknowledge receipt of the concern and express a commitment to investigate. However, drawing conclusions or reacting too quickly

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often can sacrifice the integrity of an investigation and possibly the due process rights of the students involved. Take the time to gather comprehensive information deliberatively.

5. Proactively involve parents as early as possible in the process. Families who see you are operating with the mindset to resolve and not discipline will more naturally offer their support to the resolution process. Based on the age of the students involved, consider including the parents in the interview process. Be open with families about the possibility of school-based discipline if that possibility is real, but prioritize resolution.
6. Document the process thoroughly. Gather any documentation from the technology. This is a benefit of online communication. Preserving screen shots and documentation of postings can eliminate the *he said, she said* nature of other schoolyard expression issues. Also, maintain accurate records of the steps taken, including contacts with adults, interviews with students, and any signs of material in-school disruption.
7. If an adult is targeted, absent substantial school disruption, do not pursue disciplinary action. The issue can be discussed with the student and his or her parents, but this is not a nexus warranting discipline.
8. Assess the on-campus impact and effect of the off-campus expression. Although the scope or audience in cases involving online communication may be difficult to capture, make a good faith effort to answer the questions below. In answering these questions, try to determine to what extent the communication relates to the school; this will help determine a nexus.

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- a. Who was the source?
  - b. Where did the expression originate?
  - c. Were school-owned devices used in the communication?
  - d. What was “said” and what was the context of the expression?
  - e. What was the intent of the expression?
  - f. Who was the target of the expression?
  - g. Who was the intended audience?
  - h. How widespread and far-reaching was the communication? Was this a posting viewable by the public or was it in some type of limited forum?
  - i. Who was affected by the communication and how?
  - j. What in-school effects are directly attributable to the communication?
9. Determine if there was enough information gathered to establish a nexus to school. If no nexus has been established, your response cannot involve any discipline.
10. Determine your objective. What do you want to see happen? If a nexus has been established and you are seeking to issue discipline, ensure the expression or conduct and associated disciplinary consequence aligns with your school board policies, code of conduct, and student handbook. Even if a nexus did exist and some type of material disruption occurred at school because of the expression, if it is not in violation of the code of conduct, you have no grounds to issue discipline. Some off-campus speech may lead to on-campus disruption but, despite the disturbance, the nature of the speech may still be protected.
11. Consult with the solicitor to discuss options and outcomes based on your

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objective.

The participants offered consistently strong words of advice about the necessity for school officials to recognize what warranted investigation and then to conduct that investigation properly, thoughtfully, and deliberatively. These guidelines and procedures are a collection of the thoughts and suggestions of the nine participants. To conduct a thorough investigation, administrators must know when to stop and when to explore further. If, when investigating, a school official does not see evidence of substantial disruption, that is not necessarily the determining factor for the investigation to cease. This level of discernment is crucial. Although foreseeability is a much less influential standard than actual disruption, the notion of foreseeability may be a reason to investigate further.

The involvement of the solicitor in the procedures listed above would vary based on the relationship the administrator has with the solicitor. In some districts, principals contact solicitors regularly. In others, only select administrators have permission to do so. Solicitors see themselves as resources for their districts to help school officials problem-solve. While the recommendation to involve the solicitor was the last procedure listed above, solicitor involvement may occur at any point throughout the process. Solicitors are more than just sources of legal information; they are sounding boards who help their clients strategize and they have great respect for the challenges of school officials.

This was explained by Participant#2:

If our clients wanted to know what the law was they could call PDE (Pennsylvania Department of Education) or they could call PSBA (Pennsylvania School Board Association); our clients have objectives. They have things that

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they feel that in order to do their jobs need to get done and we advise them on risks and strategies.

One objective a school official may have is to discipline the student involved. The desire to discipline varies from administrator-to-administrator and district-to-district. A clear range of personal opinions existed among participating solicitors on how much discipline should be handed out in such off-campus expression cases. Some usually assumed an educational and resolution stance, while others would discipline whenever possible. Other participants lamented the lack of authority of school officials to discipline and hoped that the courts would grant greater latitude for schools to discipline. Despite these varying personal opinions, clear procedural themes emerged and solicitors offered consistent advice, referencing case law and the standards to apply in off-campus student expression cases.

### **Implications on Policy**

School officials and solicitors are tasked with constructing policy to address bullying, including cyberbullying and on- and off-site bullying conduct. Regulation of this is challenging. Despite limited authority to regulate off-campus cyberbullying, the expectations outlined in the *Dear Colleague* letter are clear that such conduct is under the purview of the school. While the reconciliation for school districts is not clear, one hope from the study is that participating solicitors reflect on the policies and accompanying guidance in place for the districts they represent.

Participants suggested any programs in place involving technology should have accompanying policy in place that can protect and guide school officials. Examples that should have strong policies in place include bring-your-own-device programs, 1:1

initiatives, acceptable use of the network and devices, online learning or collaboration platforms, blended learning models, and virtual classes.

It was abundantly clear that policy, almost every bit as much as law, dictated defensible administrative action. Therefore, it seems reasonable to expect districts to more directly and publicly address how they plan to balance the competing edicts of the *Dear Colleague* letter and the rights of students to express themselves off-campus. I suggest it would protect districts legally, as well as clarify parental and student expectations, if districts were to formalize how they would be involved with off-campus bullying issues, regardless of whether the issue was related to conduct or expression. By overtly stating the district assumes responsibility for assisting in the resolution of off-campus bullying issues, some formal recognition and reconciliation of what are currently competing laws and policies would occur. Policies and accompanying administrative regulations regarding bullying could include some of these guiding questions.

### **Further Research**

This study sought to gather the perspectives of Region 11 school solicitors on the factors school officials should most strongly consider when faced with challenging off-campus student expression cases. The findings suggest four areas warranting additional research:

1. Researchers could replicate this study in different PSBA regions within the Third Circuit. While similar Circuit court rulings and Pennsylvania state laws would still govern other PSBA regions, the results of this study cannot be generalized to other PSBA regions. Pennsylvania is a mostly rural state with a great degree of political and socio-economic variation. Region 11 includes school districts



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situated in the Philadelphia suburbs, which is one of the wealthier and most litigious areas of the state. Under different political conditions, the responses of solicitors in other regions may differ. For very similar reasons, researchers could replicate this study in other circuits. One cannot generalize the findings of this study to other circuits and it would be interesting to learn what guiding questions and legal precedents prove to be most influential in other circuits.

2. The cyber world of expression has led to many similar issues involving the rights of expression of school employees in both public and private schools. To what extent are protections of expression granted to school employees who communicate what may be perceived as inappropriate electronic postings while off-site and not in their professional capacity? It would be interesting to modify slightly the methodology of this study to assess school solicitor perspectives on the expression rights of school employees.
3. Further study is warranted on how school officials have chosen to regulate off-campus harassment and bullying issues. With more states formalizing bullying legislation, expectations for schools to regulate bullying and harassment off-site have increased. Couple this with the added expectations dictated in the *Dear Colleague* letter (Ali, 2011) and further study is warranted in how school officials are managing this legislation. The burden has increased on the school official to be responsible for monitoring and regulating bullying even when it is off-site. While there are contradictions between the legal expectations in bullying legislation and the limited latitude granted to schools to regulate, it would contribute to this literature to study how school officials are balancing these

competing edicts and choosing to be involved with off-campus expression cases.

Additionally, studying the perceptions of the school's effectiveness of such interventions would contribute to this literature.

4. Researchers could study the perceptions of current practicing school administrators to assess their interpretations of the regulatory authority of the school when faced with student off-campus expression issues.

### **Discussion and Conclusion**

As this study sought to guide school officials in both their framework for thinking and practically responding to off-campus student expression issues, the basis of Research Question #2 may have been a distractor. While I did find it fascinating to assess perspectives on how the roles and rights of both school officials and students, both formally and informally, have evolved, this issue did not seem to influence the practical guidance for school officials.

While LoMonte (2012b) and Kozlowski (2011) express concern over the erosion of student expression rights and the weakening of the standards of *Tinker*, participating solicitors disagreed. They see students as empowered as they ever have been. Despite these differences, I suggest that both LoMonte and Kozlowski would be generally pleased with the results of this study and the emerging recommendations for practice. Participants cautioned against an administrator disciplining off-campus expression even when the expression was harsh enough that it could be interpreted as cyberbullying. LoMonte has taken the stance that off-campus unkind expression is beyond the reach of school officials; findings of this study agree. While one cannot generalize the findings of this study to other circuits, Third Circuit and Region 11 solicitors generally align with

this thinking.

School officials will inevitably be involved with cyberbullying cases. But what *involvement* may entail requires discernment, judgment, and a foundation of guiding questions that help drive the process for school officials. These processes are independent of one's perspective on how the rights of students and school officials have changed or evolved over time. A fundamental element of the *Tinker* case is the emphasis on the burden facing school officials who choose to restrict speech or student expression. As a government entity, the public school official will always carry this responsibility. Being equipped with the capacity to carry out this burden responsibly is an essential skill for school officials.

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## **Appendix A: Interview Protocol**

### **Welcome**

- Introduction of Interviewer

### **Explanation of the Topic**

- I am assessing school solicitors' perspectives on this challenging issue. School administrators are struggling with guidance and direction in navigating the balance of regulating off-campus student expression issues.
- The results will be used to inform a dissertation at Seton Hall University.
- You were selected because you fit the study criteria of being a Region 11 Pennsylvania school solicitor.

### **Interview Guidelines**

- There are no correct or incorrect responses.
- This semi-structured interview allows the interviewer to ask relevant follow-up or probing questions.
- We are tape-recording.

### **Introductory Comments and Overview**

Hello and thank you for agreeing to serve as an interview subject for this study about the school solicitors perspectives on balancing students' rights of expression and the regulatory authority of school officials. My name is Scott Eveslage and I am a doctoral candidate at Seton Hall University and this interview is part of a dissertation study. While there has been scholarly educational research on students' rights of expression, there has been little educational research including the vital role of the school solicitor perspective in understanding this delicate balance. I am inviting the school solicitors for the 35 school districts in Montgomery and Bucks counties (PA) to participate in this study.

There is a microphone in the room. We are tape-recording the session because we don't want to miss any of your comments. People often say very helpful things in these discussions and we can't write fast enough to get them all down. We will be on a first name basis for this interview, and we won't use any names in our reports. You may be assured of complete confidentiality. The results from this study will guide school administrators and officials as they make judgments on regulating student expression.

Unless you have any questions about the process, we can begin.

### **Appendix B: Interview Questions**

1. If a school administrator is made aware that a student, while off-campus, made derogatory remarks or insinuations about a school official or student either via social media or in writing, what protocol or process should the school administrator follow and/or what questions should the school administrator ask to determine how he/she should respond?
2. What criteria should be used by the school administrator to determine if the expression can be regulated (including the content of the expression, where/when /how the message is conveyed, and to whom the expression is addressed or conveyed)?
3. How has the U.S. Supreme court, from their rulings in the cases *Tinker v. Des Moines Independent Community School District* (1967), *Bethel School District v. Fraser* (1986), *Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederick* (2007) shifted the balance of student rights of expression from the student to the school?
4. Since the 2007 *Morse v. Frederick* Supreme Court ruling and the rise in the number of off-campus social networking cases involving student rights of expression, how has school officials' authority changed when regulating off-campus student expression? Why has this change occurred?
5. Can you share anonymous details of a recent off-campus student expression case for which you may have provided guidance? Can you share how the school responded? Looking back, would you change any of the advice you gave? If so, why?
6. Have district policies regarding school's authority to regulate off-campus student expression changed in the districts which you advise? If so, how?
7. What factors contributed to that policy change?

### **Summary**

- Is there anything that I have not asked you that you believe will enable me to more comprehensively understand this complex issue?

**Appendix C: Codes**

<b>Code</b>	<b>Explanation</b>
SD	<b>Substantial Disruption.</b> The first tenet of the <i>Tinker</i> ruling that provides conditions for regulation of expression.
FSD	<b>Foreseeable Substantial Disruption.</b> The first tenet of the <i>Tinker</i> ruling that provides conditions for regulation of expression.
ROO	<b>Rights of Others.</b> The second tenet of the <i>Tinker</i> ruling that provides conditions for regulation of expression.
THAS	<b>Threat to the Health and Safety</b> of others. A tenet of the <i>Morse</i> and <i>Tinker</i> rulings that provide conditions for regulation of expression.
LPC	<b>Legitimate Pedagogical Concerns.</b> A tenet of the <i>Hazelwood</i> ruling that provides conditions for regulation of expression.
VSL	<b>Vulgar, Sexually Explicit, or Lewd.</b> A tenet of the <i>Bethel</i> ruling that provides conditions for regulation of expression.
UBEM	<b>Undermining the Basic Educational Message.</b> A tenet of the <i>Morse</i> ruling that provides conditions for regulation of expression.
NTS	<b>Nexus to School.</b> Determining if the off-campus expression establishes a relevant nexus to the school.
POL	<b>Policy.</b> References to school policy.
CROP	<b>Changing Role of the Principal.</b> Specific information that speaks to the complexities of the changing role of the principal.
SRE	<b>Student Rights Eroding.</b> Solicitor explaining how students have eroding rights of expression in schools.
SRI	<b>Student Rights Increasing.</b> Solicitor explaining how students have increasing rights of expression in schools.
PRO	<b>Process or Procedure.</b> Specific procedure or protocol suggested by the solicitor.
GQ	<b>Guiding Question.</b> Explicitly stated guiding questions that a solicitor recommends that a school administrator should ask.