ABUSE OF SOCIAL MEDIA BY STUDENTS AND LIMITATIONS ON PUBLIC SCHOOL ADMINISTRATORS IMPOSED BY THE FIRST AMENDMENT

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I. BACKGROUND

A. United States Constitution

(1) First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

(2) Fourteenth Amendment: Section 1: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."

B. 42 U.S.C. section 1983 – Civil Action for Deprivation of Rights Guaranteed by the U.S. Constitution or Federal Statutes

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

(2) Remedies typically include an injunction and an award of attorney fees as well as monetary damages from time-to-time.

C. California Constitution

(1) Article I, section 2, subsection (a): "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

(2) Article IX, section 5: Constitutional right to a free public education.

D. Education Code section 48950

(1) Districts operating high schools may not subject pupils to disciplinary actions solely based on expression which when engaged in outside of the campus would be protected by the First Amendment of the Federal Constitution or Article I, section 2, of the California Constitution.

(2) Students may sue to enforce this provision. The remedy is typically injunction and attorney fees.

(3) Student free speech rights are subject to reasonable time, place, and manner regulations.

(4) Students may be disciplined for speech/other forms of communication which amount to harassment, threats, or intimidation provided such speech is not constitutionally protected.

E. Education Code section 48907

(1) In California, students are accorded broad expression rights and school officials are only allowed a very limited power to censor official school publications. Editorial control of student publications is conferred upon the student editors alone, with only limited exceptions.

(2) Section 48907 expressly provides that there shall be no prior restraint by school officials of material prepared for an official school publication except that school officials must prohibit expression which is either: (i) obscene, (ii) libelous, (iii) slanderous, or (iv) an expression which presents a clear and present danger of inciting students to commit unlawful acts on campus, violate lawful school regulations, or substantially disrupt the orderly operation of the school.

II. SEMINAL FIRST AMENDMENT CASES INVOLVING STUDENTS

A. *Bethel Sch. Dist. v. Fraser* (1986) 478 U.S. 675 – Salacious speech at school assembly

FACTS At a school assembly, a student delivered a speech containing an elaborate, graphic, and explicit sexual metaphor. He did so against the counsel of two of his teachers. There were 600 students in the audience and many began hooting and yelling, while others made sexually suggestive gestures. Others appeared to be bewildered and embarrassed. The student was suspended for two days.

HOLDING The federal constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings. As instruments of the state, schools may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct.

School officials may prevent and punish speech that is vulgar, lewd, obscene, or plainly offensive without a showing that such speech occurred during a school-sponsored event or threatened to substantially interfere with the school's work. Speech that is vulgar, lewd, obscene, or plainly offensive may be suppressed and punished without any further requirements.

B. *Tinker v. Des Moines Indep. Cmty. Sch. Dist*. (1969) 393 U.S. 503 – Silent protest and wearing black arm bands

FACTS School officials suspended pupils for wearing black armbands to school in a silent protest of the Vietnam War.

HOLDING Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression, and the mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint cannot justify a school official's decision to punish or prohibit student speech.

School officials cannot restrain a student's expression unless the surrounding circumstances demonstrate that school authorities may reasonably forecast a substantial disruption of or material interference with school activities. Because the expression in *Tinker* was a silent, passive expression of opinion, unaccompanied by any disorder or disturbance, and did not interrupt school activities or intrude in the school affairs or the lives of others, the First Amendment prohibited school officials from denying the expression.

C. *Hazelwood School Dist. v. Kuhlmeier* (1988) 484 U.S. 260

FACTS A principal deleted an article regarding teen pregnancy from the student newspaper in order to protect the identities and privacy of the pregnant students who were the subject of the article.

HOLDING In upholding the censorship, the Supreme Court explained that school officials are entitled to control student expression and activities that students, parents, and members of the public might reasonably perceive to bear the endorsement of the school. School officials have the discretion to disassociate the school from expression that is ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar, or profane, or unsuitable for immature audiences.

The Court further explained that the federal courts should defer to a school's decision to disassociate itself from speech that a reasonable person would view as bearing the endorsement of the school when the decision is reasonably related to legitimate pedagogical concerns, including suppression or punishment of vulgar, lewd, or plainly offensive speech. A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.

NOTE California high schools cannot rely on *Hazelwood* to justify censoring the content of student publications, bulletin boards, distribution of printed materials, the wearing of buttons, badges, or patches. Education Code section 48907 effectively nullifies *Hazelwood* and severely limits the circumstances where school officials may censor a student publication such as the student newspaper or yearbook.

D. *Morse v. Frederick* (2007) 127 S.Ct. 2618 – "Bong Hits for Jesus" banner

FACTS A student was suspended from school after he refused the principal's direction to take down a banner that he unfurled at a school-sponsored and school-supervised event as the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. The banner said "Bong Hits 4 Jesus." The principal directed the student to take the banner down because the banner appeared to advocate illegal drug use in violation of school policy. The student did not comply and was suspended for 10 days.

The Ninth Circuit applied an analysis similar to that in the *Tinker* case and ruled that since there was no likelihood of a substantial disruption of a school activity, the expression could not be suppressed or punished.

HOLDING The U.S. Supreme Court applied a Fraser-like analysis and explained that deterring drug use by school children is a compelling interest. Drug abuse can cause severe and permanent damage to the health and well-being of young people. Schools should not be required to tolerate student expression that contributes to those dangers at school events. Therefore, a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.

NOTE Section 48950 provides that a high school student may not be disciplined for conduct, which if engaged in outside of school, would be protected by the First Amendment or the California Constitution.

E. *Watts v. United States* (1969) 394 U.S. 705

FACTS 18 U.S.C. section 871 criminalized communications threatening violence against the President of the United States. During an anti-draft rally on the Washington Monument grounds, an 18-year-old Watts proclaimed to a broad audience, which included a U.S. Army Counterintelligence Corp investigator, that if they ever made him carry a rifle, he would set his sights on the President. While the audience laughed, the investigator did not.

The Supreme Court held that the United States Constitution protected uninhibited, robust, and wide-open debate on public issues and such debate may include vehement, caustic, and sometimes unpleasantly sharp attacks on public officials. The Court explained that taken in the

context of the anti-draft rally, and considering the expressly conditional nature of the statement, it was not a true threat, but political hyperbole. As such, it was constitutionally protected speech.

III. MOST RECENT NON-SOCIAL MEDIA CASES INVOLVING STUDENT AND THE FIRST AMENDMENT

A. *Dariano v. Morgan Hill Unified Sch. Dist.* (N.D. Cal. 2011) 822 F. Supp.2d 1037 – American flag on Cinco de Mayo/ongoing racial tension and gang violence within the school

FACTS On May 5, three Caucasian Live Oak High School students wore t-shirts to school which included images of the American flag. The assistant principal directed the students to either remove their shirts or turn them inside out. The students refused to comply. After spending 90 minutes in the office, the parents of one student arrived and decided to take her son home for the day. The absence was recorded as excused.

Earlier in the morning, the Caucasian students had been confronted by other students and accused of not liking Mexicans. Other students approached the assistant principal and advised that they believed a fight was going to result. The assistant principal explained that the reasons he would not allow the students to wear the American flag shirts was for their own safety. The students advised that they would rather fight in self-defense than remove their shirts.

The previous year, on Cinco de Mayo, there were altercations between groups of Caucasian students and Mexican/American students. The altercations include profanity, insults and threats. The subject Caucasian student was involved in some of the altercations the previous year as well.

After he left school for the day, the student received texts threatening his physical safety and a threatening telephone call as well. Students were over heard to say that gang members were coming to town to assault the Caucasian student. Indeed, the student stayed home from school for several days out of concern for his safety.

Despite the threats and surrounding acrimony, no classes were delayed or interrupted that day, no incidents of violence occurred on campus that day and prior to asking the students to change their shirts, there were no reports of any resulting disturbances.

HOLDING The Court determined that in this circumstance, school officials were able to reasonably forecast that the Caucasian student's clothing could cause a substantial disruption with school activities and expose him to significant danger. Therefore, school officials did not violate the standard set forth in *Tinker* by requiring that plaintiffs change.

Regarding the student's rights to freedom of speech and expression under Article I, section 2(a) of the California State Constitution, the Court advised that in the context of schools, California courts have generally treated the rights of students and teachers under Article I, section 2(a) of the California State Constitution, as being co-extensive with those provided by the First

Amendment. Here, since the state claim is dependant upon the Court finding a violation of the *Tinker* standard, the conduct of the school officials did not violate Article I, section 2(a) of the California State Constitution.

B. *Taylor v. Roswell Indep. Sch. Dist*. (10th Cir. N.M. 2013) 713 F.3d 25 – Rubber fetus doll distribution at school

FACTS A local religious group called Relentless consists of high school students affiliated with a strong anti-abortion evangelical outreach called Church on the Move. They would speak to other students about their religious beliefs and anti-abortion views either one-on-one or in groups while at school. They regularly prayed both silently and aloud on school grounds, including during class. The Relentless students were never asked to stop these activities.

Relentless activities on school grounds also included giving away various perks to students and teachers such as hundreds of McDonald's sandwiches, a thousand donuts and various knick-knacks and candy with religious and anti-abortion themes. These activities never caused a disruption until January 29, 2010. On that morning, eight or nine Relentless students, along with their church pastor, set up tables at the entrances of the school, approached each student entering the school and offered them two-inch rubber dolls designed to look like a 12-week old fetus along with a card advertising the church's Pregnancy Resource Center. The entrances were not blocked and students who declined to take a doll were politely allowed to continue on their way.

Unfortunately, many students, none of whom were part of Relentless, began to tear the heads off the dolls and used them as rubber balls, including throwing the dolls and doll parts at the "popcorn" ceilings in the classrooms so they became stuck. Dolls were used to plug toilets. Several students covered the dolls in hand sanitizer and lit them on fire. One or more male students removed the dolls' heads, inverted the bodies to make them resemble penises, and hung them on the outside of their pants zippers.

Teachers complained that their students' preoccupation with the dolls disrupted classroom instruction. While in class, students would throw dolls and doll heads across classrooms, at one another and into wastebaskets. Some teachers said the disruptions took 8 to 10 minutes each class period, and others said their teaching plans were derailed entirely. An honor's freshman English class canceled a scheduled test because students had become engaged in name calling and insults over the topic of abortion. School officials stopped the distribution after about 300 of the 2,500 dolls were handed out.

Two weeks later, on Valentine's Day, the Relentless students attempted to distribute the rest of the dolls, believing that doing so was their Christian duty and constitutional right. School officials precluded them from doing so. However, Relentless was permitted to continue evangelizing at the high school and distribute other religious knick-knacks and candy. No further disruptions occurred.

Nevertheless, Relentless sued the district and its officials asserting that the district had violated their students' free speech rights when it stopped the on-campus distribution of the rubber dolls.

RULE The Court advised that restrictions on student speech in public schools are analyzed under one of two standards: the (i) *Tinker* case which governs private student speech, and (ii) *Kuhlmeier* case which governs school-sponsored speech. In *Tinker*, the Supreme Court held that the school could not restrict student speech unless the school could reasonably forecast that it would cause a substantial disruption to the school environment. Student speech is analyzed under *Kuhlmeier* where students, parents and members of the public might reasonably perceive the speech to bear the imprimatur of the school. The *Kuhlmeier* case involved a school's decision to censor the content of a high school newspaper published as part of the school's journalism program. The Supreme Court held that schools may exercise editorial control over the style and content of student speech in school-sponsored expressive activities, consistent with the First Amendment, provided the restrictions are reasonably related to legitimate pedagogical concerns.

DECISION The Court determined that the rubber doll distribution was a private student speech matter and consequently the *Tinker* analysis applied. Per the *Tinker* case, explained the Court, school officials may act to prevent problems as long as the situation might reasonably lead authorities to forecast substantial disruption or interference with the rights of others. This forecast must be reasonable. For a school's forecast to be reasonable, it should be based on a concrete threat of substantial disruption. Silent/passive expression that merely provokes discussion in the hallway does not constitute such a threat, particularly if that expression is political unless it is clearly associated with past school violence or other substantial disruption.

The rubber fetus doll distribution conveyed a political and religious message and would merit First Amendment protection outside of a school context. But, in a school context, the government has a compelling interest in protecting the educational mission of the school and ensuring student safety.

Unlike the *Tinker* case, where the students wearing black arm bands were otherwise silent and passive, as the Court explained, the expression in the present matter involved proactive contact with large numbers of students. Additionally, advised the Court, the sheer number of items put into the hand of students created a strong potential for substantial disruption. The items were small size making them tempting projectiles and effective toilet clogging devices. In fact, there were a significant number of rubber doll- related disruptions, including damage to school property (such as the ceilings and plumbing) and risks to student safety (such as using dolls to start fires and as projectiles).

In a school context, the ability of school officials to limit disruptive expression does not generally turn on the blameworthiness of the speaker. So, it is not relevant that the source of the disruption is the misbehavior of third party students and not the Relentless students. Although that circumstance may be relevant outside a school context, the *Tinker* rule is guided by a school's

need to protect its learning environment and its students. Generally, only the inquiry into the potential for disruption is pertinent.

C. *Hardwick v. Heyward* (4th Cir. S.C. 2013) 711 F.3d 426 – Confederate flag and school with a history of racial disturbances

FACTS Latta is a small southern town in South Carolina. The school population of the town is equally divided between whites and blacks. The town has endured racial tension and segregation for some time. Although the level of racial tension has diminished of late, it still exists.

Emblems and slogans incorporating the Confederate national flag have resulted in numerous disruptions in the community and in the schools. The community recently endured other racial incidents as well that did not involve displaying the Confederate flag.

On multiple occasions at the middle school and subsequently at the high school, a female student was prohibited from wearing the Confederate flag embossed or incorporated into a shirt with various snarky and some incendiary slogans. Such shirts are a violation of the school dress code. The dress code provides that student dress is appropriate so long as it does not distract others, interfere with the instructional program or otherwise cause disruption. Per the dress code, examples of prohibited clothing include clothing that displays profane language, obscene/derogatory sayings, drugs, tobacco or alcohol advertisements, sexual innuendoes of anything else deemed offensive.

Typically, the school would require the student to change her shirt. Once though, she refused and received in-school suspension. So, she sued seeking to enjoin the school from prohibiting her from wearing shirts with the Confederate national flag. The student contended that the Confederate national flag was a symbol of her family heritage and religion. The Circuit Court applied the *Tinker* test.

RULE The court enunciated the *Tinker* Substantial Disruption test as follows: school officials may prohibit or punish student speech that would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school or collide with the rights of others. School officials may regulate such speech even before it occurs, as long as they can point to facts which might reasonably have led them to forecast such a disruption. However, schools may not punish speech based on only an undifferentiated fear or apprehension of disturbance or a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

DECISION Past racially charged incidents in Latta allow school officials to reasonably predict that displaying the Confederate flag at school would disrupt school activities. Prohibiting the display of the Confederate flag is necessary to prevent disruptions. A public school has the power to act to prevent problems before they actually occur. So long as school officials can reasonably

forecast a substantial disruption, they may act to prevent that disruption without violating the student's constitutional rights and the Court should not second guess any reasonable decisions.

D. *T.A. v. McSwain Union Elem. Sch*. (E.D. Cal., July 15, 2010) 2010 U.S. Dist. LEXIS 71976 – Anti-abortion t-shirt worn during STAR testing week

FACTS During STAR testing week, a 6th grade student at McSwain Union Elementary School wore a shirt to school that expressed her opposition to abortion. The shirt featured the word "ABORTION" in white with black-bordered block letters on the front side. Below the word "ABORTION" were three squares approximately three inches in height. The first two squares contained color picture images of what appeared to be human fetuses in two stages of prenatal development. The third square is filled in with black. Below the three squares appears the caption "growing, growing . . . gone." The student obtained the shirt from her church.

The school district's dress code precluded clothing which suggests tobacco, drug or alcohol use, sexual promiscuity, profanity, vulgarity or "other inappropriate subject matter." The dress code also precludes clothing which presents a health or safety hazard or a distraction that would interfere with the educational process.

The school district also has a free speech policy which precludes distributing or posting materials that are obscene, libelous or slanderous. The policy also precludes expression that incites students as to create a clear and present danger of the commission of unlawful acts on school premises, a violation of school rules or substantial disruption of the school's orderly operation.

School officials determined that the pictures depicted on the shirt were too graphic for the younger students at the school site. School officials also feared that the pictures would distract students during the time in which they should have been taking the STAR test.

The student was given three options: (i) maintain possession of the shirt, but wear it inside out; (ii) have her mother come pick the shirt up and provide a replacement; or (iii) turn the shirt over to the school for the remainder of the school day and receive a temporary replacement shirt. Instead, the student opted to sue the school district.

RULE School officials may not impose viewpoint-based restrictions on student speech unless: (i) the expression leads school officials to reasonably forecast a substantial disruption or material interference with school activities (*Tinker* case); (ii) the student's expression might reasonably be perceived by the public as bearing the imprimatur of the school (*Kuhlmeier* case); or (iii) the student's expression can be reasonably viewed as promoting illegal drug use (*Morse* case). Schools may impose viewpoint-neutral, content-based restrictions on student expression that is "vulgar," "lewd," "obscene," or "plainly offensive" (*Fraser* case).

DECISION The student's motion for summary judgement against the school district was denied because there was enough evidence to support an inference that the restriction or "other inappropriate material" was not viewpoint-based, but rather is a viewpoint-neutral rule and that the school's concerns were a reasonable forecast of substantial disruption.

E. *B.H. v. Easton Area Sch. Dist*. 725 F.3d 293 (3d Cir. Pa. 2013) – I ♥ Boobies!/Ambiguously lewd speech

FACTS The Keep A Breast Foundation educates women, 13 to 30 years old, about breast cancer. The Foundation often partners with merchants to co-brand products that raise awareness. The Foundation believes that young women perceive the topic of breast cancer as taboo. So, the thinking goes, if young women see such products as cool and trendy, then they will be more willing to talk about breast cancer and to perform self-examinations.

Silicone bracelets of assorted colors emblazoned with "I ♥ Boobies! (KEEP A BREAST)" are designed to be such a product. The Foundation's website address and motto ("art. education. awareness. action.") appear on the inside of the bracelet.

As intended, the "I ♥ Boobies" initiative quickly became a successful and high profile educational campaign. Two middle-school students purchased bracelets with their mothers. The students purchased them because of the bracelet's popularity and awareness message.

There is no indication that the bracelets caused in-school disruptions or inappropriate comments by young boys except that on one occasion, a boy made a rude comment for which he was suspended for a day. Nevertheless, the Easton Area School District banned the bracelets because of the use of the word "boobies." Their thinking was that the use of the word "boobies" was lewd and, therefore, the school had the authority to ban it pursuant to the *Fraser* case which allows schools to restrict vulgar, lewd, profane or plainly offensive speech. The school believed that the word "boobie" was lewd because its use trivialized breast cancer, conveyed a harmful sexual double entendre, invited inappropriate touching and sexual statements by young boys, would cause the natural sexual curiosity between young boys and girls to spike, and would encourage students to engage in more egregiously sexualize advocacy campaigns.

DECISION In the context of the Keep A Breast Foundation's national campaign against breast cancer, the school may not prohibit students from wearing "I ♥ Boobies!" bracelets. Doing so was a violation of the students' civil right to freedom of expression as guaranteed by the First Amendment.

The Third Circuit court explained that school speech which threatens a specific and substantial disruption to the school environment or that invades the rights of others may be restricted. However, there are only three narrow circumstances in which student speech may be restricted when there is no risk of substantial disruption or invasion of others' rights.

First, schools may categorically restrict vulgar, lewd, profane, or plainly offensive speech, even if it would not be obscene outside of a school context. Second, schools may restrict speech that a reasonable observer would interpret as advocating illegal drug use and that cannot plausibly be interpreted as commenting on any political or social issue. Third, schools may impose restrictions on school-sponsored speech (as opposed to student speech) when such restrictions are reasonably related to legitimate pedagogical concern.

Schools can restrict expression that would be obscene from a minor's perspective, even though it would not be obscene in an adult's view, when minors are either a captive audience or the intended recipients of the speech. Obscenity is not protected because it is not an essential part of any exposition of ideas, and is of such slight social value, as a step to truth, that any benefit that may be derived from it is clearly outweighed by the social interest in order and morality. In other words, obscenity and obscenity directed at minors, like all other historically unprotected categories of speech, have little or no political or social value.

Under *Fraser*, schools may restrict plainly lewd speech regardless of whether it could plausibly be interpreted as social or political commentary.

Under *Fraser*, schools may restrict ambiguously lewd speech only if it cannot plausibly be interpreted as commenting on a social or political matter.

The *Fraser* case does not permit a school to restrict ambiguously lewd speech that can also plausibly be interpreted as commenting on a social or political issue.

IV. MOST RECENT CASES INVOLVING SOCIAL MEDIA ABUSE BY STUDENTS

A. *Rosario v. Clark County Sch. Dist*. (D. Nev. July 3, 2013) 2013 U.S. Dist. LEXIS 93963 – Cyberbullying the school basketball coaches

FACTS Following the final basketball game of the season, while having dinner at a restaurant with his family, Juliano used the social networking site Twitter to post several derogatory tweets about the coach and other school staff. There was nothing redeeming in the Tweets. Juliano liberally used the works "b*tch," "f*ck," and "*ss." The tweets were racist, violent and hateful. School administrators charged Juliano with cyber-bullying and punished him. Juliano's parents sued the school district.

The Court noted that obscene material is not protected by the First Amendment. To be obscene, however, expression must meet each of the following three elements: (i) whether the average person applying contemporary community standards would find that the expression, taken as a whole, appeals to the prurient interest; (ii whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, (iii) whether taken as a whole, the expression lacks serious literary, artistic, political, or scientific value. (*Miller v. California* (1973) 413 U.S. 15, 23, 93 S. Ct. 2607, 37 L. Ed. 2d 419.)

Applying the *Miller* standard, the Court determined that only one of the derogatory tweets was obscene. That tweet expressed the hope that the coach (a male) gets gang raped by 10 black men.

RESULT Regarding a school's ability to punish students for off-campus speech on social media websites, the Nevada court cogently summarized the law. School officials have the authority to discipline students for off-campus speech that will foreseeable reach the campus and cause a substantial disruption. That issue had not yet been decided, so the court scheduled the case for trial.

Juliano also asserted that the school violated his privacy rights guaranteed by the Fourth Amendment when school officials searched his private Twitter account. Juliano apparently tweeted using Twitter's privacy setting. When a user utilizes the Twitter privacy setting, he or she intends the message to be heard only by his or her followers and not by the general public. Nevertheless, the court determined that users have no reasonable expectation of privacy in their Twitter accounts because they know that their followers may advise others of the expression. In this case, one of Juliano's followers brought the tweet to the attention of school administrators and let them use his Twitter account to access the message.

B. *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F.Supp.2d 1094, 2010 (C.D. Cal. 2010) – Cyberbullying of fellow student

FACTS A high school student used her cell phone to record a video of her classmates engaged in a conversation at a restaurant after school. The conversation consisted of making derogatory comments about another classmate. The comments were vile, vulgar and defamatory. The victim was called a "slut," and an "ugly piece of shit." Later in the evening, the student posted the video to YouTube from her home computer. She then contacted 5 to 10 fellow students and told them to view the video. The video received 90 hits. The next day, the video was discussed by several students while at school. The victim was very upset and crying. She told the school counselor that she did not want to go to class because of the resulting humiliation. The counselor spent 20-25 minutes convincing her to return to class. Forty-five minutes were spent with the victim's mother and school administrators expended time investigating the mother's complaint. The student was suspended for two days.

RESULT The school district violated the student's First Amendment free speech rights when it punished her because, in this circumstance, the YouTube video did not cause a substantial disruption of school activities nor could a substantial disruption have been reasonably forecasted by school officials.

C. *J.S. v. Blue Mt. Sch. Dist*., 650 F.3d 915, 2011 (3d Cir. Pa. 2011) – Cyberbullying of fellow student

FACTS An 8th grade honor roll student was suspended from school for creating a faux profile mocking the school principal and posting it on MySpace. The profile was created from the student's home using her parent's computer. The profile was exceptionally demeaning, crude, vulgar and defamatory.

RESULT The school district violated the student's First Amendment free speech rights when it punished her because the expression did not create a substantial disruption in school and the circumstances could not have led school officials to reasonably forecast a substantial disruption at school.

D. *Layshock v. Hermitage Sch. Dist*., 650 F.3d 205, 2011 (3d Cir. Pa. 2011) – Cyberbullying of school principal

FACTS A high school senior was suspended for creating a faux profile parodying the school principal and posting it on MySpace. The school implemented other adverse action as well. He was sent to an alternative education program, banned from extracurricular activities, and not allowed to participate in the graduation ceremony. The profile had been created during non-school hours using his grandmother's computer. It cast the principal as a drunkard, steroid user and homophobic. The profile was exceptionally demeaning, crude, vulgar and defamatory.

RESULT The school district violated the student's First Amendment free speech rights when it punished him because there was an insufficient nexus between the expression and a substantial disruption of the school environment.

E. *Kowalski v. Berkeley County Sch*., 652 F.3d 565, 2011 (4th Cir. W. Va. 2011) – Cyberbullying of fellow student

FACTS From her home, a high school senior created and posted to MySpace a burn page titled "Students Against Sluts Herpes." The page was largely dedicated to harassing/bullying a fellow student. It used the concept of preventing sexually transmitted diseases as a thinly veiled platform for defaming and demeaning the victim. Among other things, the victim was accused of having herpes and called a whore. The discussion group interacting and posting comments or, "friends," included two dozen other fellow high school students. The victim understood the attack to be school related and complained to school officials. The student was punished with suspension from school and was banned form attending school-related social activities.

RESULT The school district did not violate the student's First Amendment free speech rights when it punished her for creating and posting the burn page designed to attack another student. School administrators have the authority to regulate student expression even if it does not

originate at the school, so long as the expression can make its way to the school in a meaningful manner. Because the burn page was defamatory, demeaning and aimed toward a fellow classmate, it created a substantial disorder of the school environment or a substantial disorder could be reasonably forecasted by school officials in this circumstance.

F. *Wynar v. Douglas County Sch. Dist*., 2011 U.S. Dist. LEXIS 89261 (D. Nev. Aug. 10, 2011)

FACTS Off campus and after school, a high school student tweeted a friend and fellow student that on April 20 (anniversary of the Columbine massacre), he wanted to shoot and kill several girls at Douglas County High School, shoot a certain named male student and kill 50 other students at random with his SKS assault rifle and 50 round clip, semi-automatic shot gun and pistol. The message was forwarded to another classmate who gave a copy to the school. The student was suspended and expelled.

RESULT The school district did not violate the student's First Amendment free speech rights when it punished him because in this circumstance, a substantial disruption can be reasonably forecasted. The student indicated he had access to guns and ammunition, he specifically referenced shooting girls and a male student, he referenced the school by name, he picked the anniversary of the Columbine massacre as the date, and also referenced the Virginia Tech massacre.

V. PROACTIVE/NON-DISCIPLINE RESPONSES CYBER-BULLYING

- Ask the system administrator to remove offending material (email MySpace at schoolcare@myspace.com or call 310-969-7398; email Facebook at advertize@facebook.com).

- Request a parent to closely supervise and restrict their child's activities involving computer and cell phone use.

- Issue a public notice that the school is not affiliated with the expression of certain offensive ideas and disapproves of them.

- Seek civil damages against the parents if available under Education Code section 48904(a).

- Seek a criminal complaint pursuant to Government Code section 6201– altering and falsifying a public record; Penal Code section 471 – falsifying records; Penal Code section 530.5(a) – identity theft; federal cyber-crime statutes in Title 18 of the United States Code and a violation of California's hate crime laws.

- Seek civil damages against the perpetrator for defamation, intentional infliction of emotional distress.