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VIRTUAL SCHOOLS, STUDENT RIGHTS, AND THE FIRST AMENDMENT: ADJUSTING THE SCHOOLHOUSE GATE TO THE 21ST CENTURY

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The advent of virtual schools has created uncertainty for school officials seeking to discipline students for speech. This uncertainty is fueled partly by the ostensibly omnipresent nature of virtual speech and partly by the fact that the United States Supreme Court has never ruled on the free speech rights of students in virtual schools. This Article analyzes the current First Amendment student speech jurisprudence in order to determine whether school officials have censorship authority over students' virtual on-campus speech as well as students' virtual off-campus speech. To further this analysis, it is important to understand the nature of virtual schools. Therefore, the Article presents an overview of virtual schools, the instructional methods used in virtual schools as well as virtual schools' regulation of student behavior through acceptable use policies ("AUPs") and student codes of conduct. In addition to analyzing the quartet of United

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States Supreme Court student-speech cases, decided in the context of on-campus speech, for language that could provide censorship authority over virtual speech, the Article examines how lower courts address virtual students' speech rights. It also discusses how courts distinguish on-campus virtual speech from off-campus virtual speech. Additionally, the Article presents guidelines for virtual schools to avoid unconstitutional exercise of censorship authority over student speech. Pursuant to this, the Article examines virtual schools under the public forum doctrine as well as the government speech doctrine. Finally, the Article discusses the First Amendment status of virtual school AUPs that censor offensive student speech on the basis of race, gender, or sexual orientation.

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I. INTRODUCTION

The ubiquity of the Internet in the current digital age as well as the prevalence of technology as a staple in student culture has fueled the quest for innovative ways to harness technology in education.[1] Virtual schools constitute one such innovation designed to change the way schooling is delivered.[2] Virtual schools are schools in which "learning is not bound by time, space and pace, liberating education systems from the confines of rigid blocks of time and uninspired configurations of space to better meet the needs of students."[3] They constitute a paradigm shift from long-

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[1] Justice Oliver Holmes encouraged the competition of ideas as a means of encouraging free speech, rather than censorship, when he noted that "the best test of truth is the power of the thought to get itself accepted in the competition of the market" Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In other words, information sharing and more speech is better than censorship. The Internet makes the sharing of information and speech more pragmatic and accessible. Indeed, "today, the Internet has become the latest realization of the 'marketplace of ideas' so critical to the democracy envisioned by the Founding Fathers." Julie J. Geng, *When Forums Collide: The San Francisco Bart As A Battleground For The First Amendment In The Internet Era*, 10 I/S: J. L. & POL'Y for INFO. SOC'Y 127, 176 (2014).

[2] *See, e.g.*, Jan Hawkins, *Technology-Mediated Communities for Learning: Designs and Consequences*, 514 ANNALS AM. ACAD. POL. & SOC. SCI. 159, 160 (1991).

[3] Gregg Vanourek & Evergreen Education Group, *An (Updated) Primer on Virtual Charter Schools: Mapping the Electronic Frontier*, NACSA CYBER SERIES ISSUE BRIEF 3 (Sept. 2011), http://files.eric.ed.gov/fulltext/ED544289.pdf (last visited June 16, 2015). Internationally, the term "ICT", which stands for Information and Communication Technologies, is also sometimes used to refer to virtual schools. *Id.* These schools are sometimes referred to as online schools, cyber schools, internet-based learning, distance learning schools or Web-based distance learning schools, eCommunity schools, networked classrooms, or electronic or e-schools. *See* Matthew D. Bernstein, *Whose Choice Are We Talking About? The Exclusion of Students With Disabilities From For-Profit Online Charter Schools*, 16 RICH. J.L. & PUB. INT. 487, 489 (2013); Gillian Locke et al., *Virtual Schools: Assessing Progress and Accountability Final Report of Study Findings,* PUB. IMPACT 7 (2014), http://www.charterschoolcenter.org/sites/default/files/files/field_publication_attachment/Virtual%20Schools%20Accountability%20Report_0.pdf (last visited June 16, 2015); Paul Kim et al., *Public Online Charter School Students: Choices, Perceptions, and Traits*, 49 AM. EDUC. RES. J. 521, 522 (2012);

standing tradition which dictates that instruction will be delivered in a physical space consisting of desks or tables directed toward a podium, chalkboard or lecturer.[4]

Public virtual schools must comply with the dictates of the United States Constitution with respect to students.[5] Accordingly, the First Amendment's Free Speech Clause applies to student speech that occurs in virtual schools. However, school administrators might be confused about how to appropriately address First Amendment concerns in a virtual school setting. As the Ninth Circuit noted:

> [T]he challenge for administrators is made all the more difficult because, outside of the official school environment, students are instant messaging, texting, emailing, Twittering, Tumblring, and otherwise communicating electronically, sometimes about subjects that threaten the safety of the school environment. At the same time, school officials must take care not to overreact and to take into account the creative juices and often startling writings of the students.[6]

This Article addresses the intersection of virtual schools and the First Amendment rights of students. Part II of the Article provides background information on virtual schools to foster an understanding of these schools. Part III provides an overview of the instructional methods used by virtual schools. Part IV discusses how virtual schools try to control behavior through acceptable use policies ("AUPs") and student codes of conduct. Part V examines whether the quartet of United States Supreme Court cases decided in the context of on-campus speech apply to virtual speech and off-campus speech.

Margaret Lin, *School Quality in the Cloud: Guidelines for Authorizing Virtual Charter Schools*, NACSA CYBER SERIES ISSUE BRIEF 1 (2011), http://files.eric.ed.gov/fulltext/ED544280.pdf (last visited June 16, 2015); Joe Ableidinger et al., *Policy Guide: Online and Blended Charter Schools*, NACSA CYBER SERIES 1 (2012); Hawkins, *supra* note 2, at 160.

[4] David Jaffee, *Virtual Transformation: Web-Based Technology and Pedagogical Change*, 31 TEACHING SOC. 227, 228 (2003).

[5] Public schools are subdivisions and instrumentalities of the state and are bound by the United States Constitution, as are all subdivisions and instrumentalities of the state. *See* Sailors v. Bd. of Educ., 387 U.S. 105, 106 (1967); Reynolds v. Sims, 377 U.S. 533, 575 (1964).

[6] Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1064 (9th Cir. 2013).

Part VI examines how lower courts address the First Amendment free speech rights of virtual students in light of the Supreme Court's absence on the issue. This discussion includes how lower courts distinguish on-campus speech from off-campus virtual speech. It also examines the status of off-campus virtual speech brought onto a school's campus.

Part VII discusses how virtual schools can ensure that their campuses are recognized by the judiciary as an expansive campus, increasing their authority to censor student speech. Part VIII is an analysis of virtual schools under the public forum doctrine while Part IX presents a government speech analysis of virtual student speech. Part X analyzes whether AUPs that restrict offensive speech on the basis of race, gender, or sexual orientation violate the First Amendment prohibition against content-based discrimination.

II. OVERVIEW OF VIRTUAL SCHOOLS

The first references to virtual schools in the educational literature were to two initiatives in Canada in the mid-1990s.[7] The first two virtual schools appeared in the United States in 1997.[8] Since that time, virtual schools have experienced rapid growth.[9] At the present time, almost 250,000 students are enrolled in these schools.[10] At least 200,000 students attend full-time virtual schools, and enrollment at such schools is increasing annually at a rate of fifteen to twenty percent.[11] Virtual schools have spread so quickly that twenty-seven states as well as the District of Columbia have at least a full-time virtual school, covering several districts or the

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[7] Vanourek & Evergreen Education Group, *supra* note 3.

[8] *Id.*

[9] *Id.* at 7.

[10] Gary Miron & Jessica Urschel, *Understanding and Improving Full-Time Virtual Charter Schools: A Study of the Student Characteristics, School Finance, and School Performance in Schools Operated by K12 Inc*, NATIONAL EDUCATION POLICY CENTER 2 (2012) http://nepc.colorado.edu/publication/understanding-improving-virtual.

[11] *See* Vanourek & Evergreen Education Group, *supra* note 3.

entire state.[12] In fact, it is possible that by 2019 fifty percent of all courses in the United States in elementary through high school will be virtual.[13] Most of the full-time virtual schools in the country are charter schools.[14] In fact, charter schools were "early adopters" of virtual schools.[15]

Virtual schools are typically held wholly on the Internet, giving students the opportunity to attend classes from anywhere with online access.[16] Virtual education could potentially expand a school's geographic range such that it avails students of educational opportunities they might not otherwise have in their local communities.[17] Margaret Lin, first executive director of the National Association of Charter School Authorizers ("NACSA"), aptly described the nature of virtual schools:

> Indeed, the way to think about a virtual charter school is simply to think of a "regular" charter school and remove the building: swap in a

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[12] *Id.*; Luis A. Huerta et al., *Cyber and Home School Charter Schools: Adopting Policy to New Forms of Public Schooling*, 81 PEABODY J. EDUC. 103, 104-05 (2006). Gary Miron et al., *Full-Time Virtual Schools: Enrollment, Student Characteristics, and Performance*, NAT'L EDUC. POL'Y CTR. 25 (2013), http://nepc.colorado.edu/files/nepc-virtual-2013.pdf (stating that virtual schools "now constitute one of the fastest-growing forms of school choice" and that "an increasing number of district and state education agencies are now starting full-time virtual schools"). *See also* Anthony G. Picciano & Jeff Seaman, *K-12 Online Learning: A 2008 Follow-Up Of The Survey of US School District Administrators,* THE SLOAN CONSORTIUM (2009), http://olc.onlinelearningconsortium.org/publications/survey/k-12online2008.

[13] Courtney B. Myers, *Clayton Christensen: Why Online Education Is Ready For Disruption, Now*, THE NEXT WEB, INC. (2011), http://thenextweb.com/insider/2011/11/13/clayton-christensen-why-online-education-is-ready-for-disruption-now/.

[14] Vanourek & Evergreen Education Group, *supra* note 3.

[15] *Id.*

[16] *See* Kara Page, *The Advantages of Virtual School,* EHOW.COM, http://www.ehow.com/list_5965288_advantages-virtual-school.html; *see also* Ableidinger et al., *supra* note 3; *see also* Miron et al., *supra* note 12.

[17] Lin, *supra* note 3, at 1–2.

computer instead and the Internet connection becomes thebus" transporting students to school.[18]

III. INSTRUCTIONAL METHODS USED BY VIRTUAL SCHOOLS

The four dominant methods of instructional delivery in virtual schools are: independent; asynchronous; synchronous; and a combination of asynchronous and synchronous.[19] The independent model is similar to a traditional correspondence course except that the computer mediates the education experience.[20] Students teach themselves or are taught by their parents, with minimal teacher involvement.[21]

Most virtual schools in the United States use the asynchronous delivery model.[22] The asynchronous instructional approach differs from the independent delivery model in that there is more interaction between teachers and students.[23] Teachers also serve a more active role, "guiding the students through the curriculum and serving as the source of both formative and summative evaluation of the student's work."[24] However, students still have a great deal of independence in that they work through the online curriculum at their own pace.[25] Asynchronous classes use direct messaging ("DM"); discussion boards such as whiteboard ("WB") and social

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[18] *Id.* at 2. *See also* Jason Ohler, *Why Distance Education?*, 514 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 24 (1991) ("[I]nformation is transported, not people; students stay put and school comes to them.").

[19] *See generally* Huerta et al., *supra* note 12 (discussing the various methods of instructional delivery). *See also* June Ahn, *Policy, Technology, and Practice in Cyber Charter Schools: Framing the Issues*, 113 TEACHERS COL. REC. 1, 5 (2011).

[20] *See generally* Huerta et al., *supra* note 12.

[21] *Id.*

[22] Michael Barbour, *Today's Student and Virtual Schooling: The Reality, the Challenges, the Promise,* 13 J. OF DISTANCE LEARNING 5, 14 (2009).

[23] Michael K. Barbour & Thomas C. Reeves, *The Reality of Virtual Schools: A Review of the Literature*, 52 COMPUTERS & EDUC. 402, 405 (2009).

[24] *Id.* at 406.

[25] *Id.*

networking, such as blogs, Facebook, YouTube, and Twitter to increase collaboration and learner interaction.[26]

The synchronous approach requires students and teachers to be online simultaneously.[27] Synchronous courses may also use chat rooms that allow people to interact through texting.[28] Additionally, students could be connected to instructor presentations through telecommunication technology (video conferencing) or the Internet (web conferencing or "webinars").[29] In some cases, live video interactions between students and teachers are coupled with computer simulations, virtual personas, and instruction.[30]

Under the fourth method of delivery, virtual schools use a combination of synchronous and asynchronous educational approaches.[31] Michael Barbour provides an example of how virtual schools in remote regions of Canada apply a combination of synchronous and asynchronous approaches:[32]

> [The schools provide] synchronous instruction using the voice over Internet protocol software, *Elluminate Live®*. This software allows for two-way voice over the Internet, a shared, interactive whiteboard, instant messaging, application sharing, breakout rooms, and interactive quiz and surveymanagement. . . . The asynchronous instruction is conducted using a course management system called *WebCT®*. This

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[26] Barbour & Reeves, *supra* note 23 at 405. *Synchronous vs. Asynchronous Classes*, ELEARNERS.COM, *available at* http://www.elearners.com/online-education-resources/online-learning/synchronous-vs-asynchronous-classes/ [hereinafter *Synchronus vs. Asynchronus*].

[27] *Synchronous vs. Asynchronous*, *supra* note 26; Huerta et al., *supra* note 12.

[28] *Synchronous vs. Asynchronous*, *supra* note 26; Huerta et al., *supra* note 12 at 110.

[29] *Synchronous vs. Asynchronous*, *supra* note 26.

[30] Christopher J. Dede, *Emerging Technologies: Impacts on Distance Learning*, 514 ANNALS AM. ACAD. POL. & SOC. SCI. 146, 151 (1991); Kim et al., *supra* note 3 at 530. Complex content can be presented through a variety of media including animations, audio and video recordings, visual images, quiz banks, virtual social lounge, virtual labs, PowerPoint and other text. *Id.* Students can also have live conversations with researchers working on a scientific research vessel or other experts globally. Hawkins, *supra* note 2, at 160 (1991).

[31] *See generally* Huerta et al., *supra* note 12. *See also* Ahn, *supra* note 19, at 5.

[32] Michael Barbour, *Portrait of Rural Virtual Schooling*, 59 CANADIAN J. OF EDUC. ADMIN. & POLICY 1 (2007).

> software provides the teacher and students with a variety of tools, including: a discussion forum, a shared calendar, an internal e-mail system, and aplace to house the course web pages.[33]

Even in a virtual school environment, with or without teacher supervision, student behavior must be regulated so that it does not disrupt learning. As Judge Jordan of the United States Court of Appeals, Third Circuit, observed, "[m]odern communications technology, for all its positive applications, can be a potent tool for distraction and fomenting disruption."[34]

IV. ENFORCEMENT OF STUDENT BEHAVIOR

In order to limit the disruption to the learning environment, public schools, including virtual schools, provide guidance for student behavior with respect to educational technology through student code of conduct policies.[35] These codes of conduct often incorporate acceptable use policies ("AUPs").[36] AUPs inform students about permissible and impermissible uses of educational

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[33] *Id.* at 10–11. (2007).

[34] Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 222 (3d Cir. 2011) (Jordan, J., concurring).

[35] Georgia Dep't of Educ., *Student Codes of Conduct*, http://www.gadoe.org/Curriculum-Instruction-and-Assessment/Curriculum-and-Instruction/Pages/Student-Code-of-Conduct.aspx (last visited June 21, 2015). Student codes of conduct identify acceptable and unacceptable behavior in a school. *Id.* They also outline possible consequences for violations. Owensboro Public Schools, *2015-2016 Code of Acceptable Behavior and Discipline,* http://www.owensboro.kyschools.us/discipline_handbook.pdf (last visited Oct. 19, 2015).

[36] Patrick D. Paukin, *Morse v. Frederick and Cyber-bullying in Schools: The Impact of Freedom of Expression*, *Disciplinary Authority, and School Leadership*, in TRUTHS AND MYTHS OF CYBER-BULLYING: INTERNATIONAL PERSPECTIVES ON STAKEHOLDER RESPONSIBILITY AND STUDENT SAFETY 159, 160 (Shaheen Sharif & Andrew H. Churchill, eds.) (2009).

technology.[37] They emphasize to students that use of the school's server and technology system is a privilege rather than a right.[38]

AUPs are designed to protect the school from educational disruption and to preclude or minimize student exposure to danger and hurtful information online while harnessing opportunities for digital learning.[39] Violations of the AUP can result in disciplinary action such as suspension, expulsion, litigation and termination of the student's access to the school's server and technology system.[40]

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[37] Philip T.K. Daniel & Silas McCormack, *Technological Advances, Student Expression, and the Authority of Student Officials*, 248 WEST'S EDUC. L. REP. 553, 574 (2009).

[38] *See, e.g.*, Clark Cty Sch. Dist., *Acceptable Use Policy*, http://ccsd.net/district/acceptable-use-policy/ (last visited June 21, 2015); Austin ISD, *Austin Independent School District Acceptable Use Guidelines*, https://www.austinisd.org/sites/default/files/dept/technology/docs/AU_Guidelines_20131206.pdf (last visited June 21, 2015); Greenville County Schools, *Greenville County Schools Acceptable Use Policy (AUP)*, http://www.greenville.k12.sc.us/Departments/main.asp?titleid=etsaup (last visited June 21, 2015).

[39] James Bosco, *Rethinking Acceptable Use Policies to Enable Digital Learning: A Guide for School Districts*, COSN 2–3 (March 2013), http://www.cosn.org/sites/default/files/pdf/Revised%20AUP%20March%202013_final.pdf (last visited June 16, 2015).

[40] Owensboro Public Schools, *supra* note 35 at 26; Louisiana Virtual School, *Acceptable Use Policy*, LA VIRTUAL SCH. 2009-2010, 1–2 (2010), *available at* http://publications.sreb.org/2009/LVSAcceptableUse.pdf (last visited June 21, 2015); Greenville County Schools, *Greenville County Schools Acceptable Use Policy (AUP)*, *available at* http://www.greenville.k12.sc.us/Departments/main.asp?titleid=etsaup (last visited June 21, 2015); The School District of Philadelphia, ACCEPTABLE USE OF INTERNET, SCH. DIST. OF PHILA. OPERATIONS 1, 11 (2014), *available at* http://www.philasd.org/offices/administration/policies/815.pdf; Austin ISD, *Austin Independent School District Acceptable Use Guidelines* 1, 2, *available at* https://www.austinisd.org/sites/default/files/dept/technology/docs/AU_Guidelines_20131206.pdf (last visited June 21, 2015); *see* Michigan Virtual School, *Acceptable Use Policy*, MICH. VIRTUAL SCH. (2015), *available at* http://www.mivhs.org/Students/Getting-Started/Acceptable-Use-Policy (last visited June 16, 2015) ("Any user accounts found to be violating these service limitations will be terminated without warning or recourse at the sole discretion of MVU [Michigan Virtual University] . . . In such cases, where an account is terminated for service violations as detailed in this or the following two sections; no refunds or credit will be offered, and the User acknowledges that their account termination may

Use of the school's technology is often conditioned on parent and/or student signed consent to comply with the AUP's terms.[41] Even when the signed consent is not imposed as a condition of use, schools generally require parent and/or student signatures affirming understanding of and consent to the terms of AUP.[42]

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result in course failure as well as other disciplinary action."). Michigan Virtual School's policy also includes the following disciplinary terms:

> Any user's failure to abide by the MVS [Michigan Virtual School] Acceptable Use Policy could result in any or all of the following actions:
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> A.The immediate removal of the user's access to all MVS instructional computing resources.
>
> B. The immediate removal of the user from their course(s) and termination of any teaching assignment(s).
>
> C. The involvement of law enforcement agencies and subsequent legal action.

Michigan Virtual School, *Acceptable Use Policy*, MICH. VIRTUAL SCH. 1, 4-5 (2015), *available at* http://www.mivhs.org/Students/Getting-Started/Acceptable-Use-Policy (last visited June 16, 2015). *See also* Clark County School District, *Acceptable Use Policy*, *available at* http://ccsd.net/district/acceptable-use-policy/ (last visited Oct. 19, 2015) ("The system administrators reserve the right to terminate access to the District's computer network resources if this AUP is violated while using real-time chat features, including video conferencing.").

[41] *See, e.g.*, Louisiana Virtual School, *supra* note 40 at 2 ("No student will be allowed to participate in the Louisiana Virtual School unless a completed (and appropriate)Internet Usage Contract has been submitted to both the Louisiana Virtual School and the student's home district."); *see also* Florida Virtual School, *Student and Parent Handbook*, FLA VIRTUAL SCH 2015-16, 63 (2015), http://www.flvs.net/myFLVS/student-handbook/Documents/Student_Parent_Handbook.pdf (providing that infringing students "may be refused participation in Florida Virtual School [FLVS] courses.").

[42] For a sample AUP contract requiring student and parent acknowledgement of understanding and consent to the AUP's terms, see LA Virtual School, *supra* note 40. *See also* Virginia Department of Education, STUDENT AND PARENT HANDBOOK: VIRTUAL VIRGINIA 13 EDUC. 12 (2014), *available at* http://www.virtualvirginia.org/students/handbook/downloads/student_handbook.pdf (last visited June 21, 2015) ("Each student will acknowledge his/her willingness to abide by Virtual Virginia's Acceptable Use Policy . . . "). S*ee also* *id.* at 17 ("STUDENTS ACCEPT THE TERMS OF THIS ACCEPTABLE USE POLICY BY CLICKING AN AGREEMENT BEFORE THEY ACCESS THEIR COURSE CONTENT FOR THE FIRST TIME."); SCH. DIST. OF PHILA. OPERATIONS, ACCEPTABLE USE OF INTERNET, COMPUTERS AND NETWORK RESOURCES 4–5 (2014), http://www.philasd.org/offices/administration/

The AUP of the Owensboro Kentucky School District is typical for public schools.[43] The Owensboro School District provides "students access to electronic information, including the Internet and email, through a service called OPS Net."[44] Students have access to OPS Net both at home and at school.[45] The AUP provides that "[s]chool district personnel have the right to access information stored in any user directory, on the current user screen, or in electronic mail."[46] Thus, "[s]tudents should not expect files stored on District servers *or through District provided or sponsored technology services* to be private."[47]

The Owensboro AUP also provides that students will use its computing resources lawfully and respectfully.[48] For instance, the AUP prohibits students from using the district's electronic services for creating, distributing, accessing or obtaining information that is prejudicial, sexually explicit, discriminatory, harassing, disruptive to learning or bullies other students.[49] Many public virtual schools have AUPs governing student computing behavior similar to that of Owensboro school district set forth above. The Agora Cyber Charter School's AUP, for instance, warns that the failure to follow the guidelines set therein could result in removal of the student's access to the school's instructional computing services, suspension or expulsion; or "[i]nvolvement with law enforcement

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policies/815.pdf (last visited June 22, 2015) ("By accessing the district's Internet . . . computers and network resources . . . users acknowledge awareness of the provisions of this policy and awareness that the district uses monitoring systems to monitor and detect inappropriate use and may use tracking systems to track and recover lost or stolen equipment.").

[43] All virtual schools covered in this Article are public schools.

[44] Owensboro Public School, *supra* note 35 at 26.

[45] *Id.*

[46] *Id. See also* CLARK COUNTY SCHOOL DISTRICT, *supra* note 40 (stating that "[e]lectronic mail is not private.. . . . As with written communication . . . users should recognize there is no expectation of privacy for electronic mail."). FLORIDA VIRTUAL SCHOOL *supra* note 41 ("Email is not private. Never say anything via email that you wouldn't mind seeing on the school bulletin board or in the local newspaper.").

[47] Owensboro Public School, *supra* note 35 at 26. (emphasis in original).

[48] *Id.* at 27.

[49] *Id.*

agencies and possible legal action."[50] Among other things, Agora's AUP requires parents and students to follow "netiquette" or network etiquette in communicating with others online.[51] The AUP states that students should "[n]ever use derogatory comments, including those regarding race, age, gender, sexual orientation, religion, ability, political persuasion, body type, physical or mental health, or access issues."[52] Students are also warned that swear words are unacceptable.[53]

Louisiana Virtual School's AUP, on the other hand, prohibits "sites that contain obscene, pornographic, pervasively vulgar, excessively violent, or sexually harassing information or material."[54]

Even as virtual schools attempt to regulate student speech, it is important that they comply with the dictates of the First Amendment.

V. VIRTUAL SCHOOLS AND THE FREE SPEECH CLAUSE

A. *Case Law*

As public schools, virtual public schools must comply with the Free Speech Clause when regulating student expression.[55] While the United States Supreme Court has never ruled on online on-campus or off-campus student speech, in a quartet of cases, the Court has held that schools may punish student speech in certain situations. These cases are *Tinker v. Des Moines Independent*

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[50] Agora Cyber Charter School, 2011-2012 SCHOOL HANDBOOK 42 (2011), http://agora.k12start.com/images/schools/2011-12_Agora_Student_Handbook_FINAL_11-14-11_-_4-20-12_COA.pdf. Agora Cyber Charter School is a public virtual school for Pennsylvania students.

[51] *Id.* at 43.

[52] *Id.*

[53] *Id.*

[54] Lousiana Virtual School, *supra* note 40.

[55] Lisa M. Pisciotta, *Beyond Sticks & Stones: A First Amendment Framework For Educators Who Seek To Punish Student Threats*, 30 SETON HALL L. REV. 635, 648 (2000).

Community School District;[56] *Bethel School District No. 403 v. Fraser*;[57] *Hazelwood School District v. Kuhlmeier*;[58] and *Morse v. Frederick*.[59] This section examines whether virtual schools can restrict online student speech (on-campus and off-campus) under the quartet of United States Supreme Court cases governing the student-speech jurisprudence.

1. *Tinker v. Des Moines Independent Community School*

In this case, three students filed a First Amendment claim against their school district after school officials suspended them for refusing to remove black armbands they wore to school in protest of the Vietnam War.[60] Prior to the students wearing their armbands to school, school officials learned of the planned armband protest and preemptively passed a policy authorizing officials to discipline students who failed to comply with school demands to remove their armbands.[61] The United States Court of Appeals for the Eighth Circuit upheld the United States District Court for the Southern District of Iowa ruling that school officials acted constitutionally since they were trying to avoid disruption at the school.[62] The Supreme Court granted certiorari to review whether the First Amendment permits school officials to censor student speech that disrupts a school.

This was the Supreme Court's first ever decision about the First Amendment free speech rights of students. Consequently, the Court started by acknowledging that students have First Amendment rights in public schools. Specifically, the Court declared that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[63] This talismanic statement, which recognized a schoolhouse gate, has appeared in almost every

[56] 393 U.S. 503 (1969).
[57] 478 U.S. 675 (1986).
[58] 484 U.S. 260 (1988).
[59] 551 U.S. 393 (2007).
[60] *Tinker*, 393 U.S. at 504.
[61] *Id.*
[62] *Id.* at 504–05.
[63] *Id.* at 506.

student speech case since then.[64] The metaphoric schoolhouse gate demarcates the boundaries between on-campus speech and off-campus speech. The statement implies that students do not lose their free speech rights simply because they step beyond the schoolhouse gate onto school grounds. Even though the Court did not have occasion to address online speech, it is evident today that "*Tinker's* 'schoolhouse gate' is not constructed solely of the bricks and mortar surrounding the school yard."[65] Therefore, *Tinker* and its mandates arguably apply to virtual public schools. Besides, as public schools, virtual schools are subject to the First Amendment.

The *Tinker* Court ruled, however, that students' rights within the school are not as broad as those outside the school because of the need for order and discipline at school.[66] Accordingly, the Court created the material and substantial disruption test for determining when schools can discipline students for speech.[67] This test provides that school officials can discipline students for their speech if there is actual, or reasonable forecast of, material and substantial disruption.[68] The Supreme Court has never required a "magic number of students or classrooms that must be affected by the speech" in order to satisfy the material and substantial disruption test.[69] Instead the test is based on a case-by-case factual inquiry.[70]

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[64] *See, e.g.*, Burch v. Barker, 861 F.2d 1149, 1153 (9th Cir. 1988); Beussink v. Woodland R-IV Sch. Dist., 30 F.Supp. 2d 1175, 1180 (E.D. Mo. 1998); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 452 (W.D. Pa. 2001); Mardis v. Hannibal Pub. Sch. Dist., 684 F.Supp.2d 1114, 1117 (E.D. Mo. 2010); Layshock *ex rel*. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 212 (3d Cir. 2011); Bell v. Itawamba Cty. Sch. Bd., 859 F. Supp. 2d 834, 837 (N.D. Miss. 2012).

[65] *Layshock* ex rel. *Layshock*, 650 F.3d at 216.

[66] *See Tinker*, 393 U.S. at 505–08.

[67] *Id.* at 509. This test is also simply referred to as the *Tinker* test.

[68] *See id.* at 512–14.

[69] J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1111 (C.D. Cal. 2010).

[70] *Id. See also* Todd D. Erb, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying,* 40 ARIZ. ST. L.J. 257, 266 (2008) ("There is not a precise test for what defines a substantial

The *Tinker* Court warned school officials to avoid disciplining students on the basis of "undifferentiated fear or apprehension of disturbance."[71] Besides, "school officials cannot suppress 'expressions of feelings with which they do not wish to contend.'"[72] The unpleasantness, unpopularity, controversy, or discomfort of speech is not a constitutional basis for disciplining students for speech.[73] Students also cannot be restricted to officially-sanctioned speech.[74]

The Court held that the students in *Tinker* could not be disciplined for their armbands because their speech did not actually materially and substantially disrupt the school, and there was no basis to reasonably forecast material and substantial disruption.[75] The Court reasoned that only a very small proportion of the 18,000 students wore the armbands.[76] Furthermore, the armbands did not instigate any violence or threats at the school.[77] The Court also ruled that the fact that student speech generates discussion outside the confines of a classroom is not alone sufficient ground for discipline.[78] In the context of virtual schools, the classroom could be the learning management system or other mediating technology used to congregate students for a class session.

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disruption . . . but courts have reasoned that there must be more than some mild distraction or curiosity created by the speech . . . but complete chaos is not required . . . . In determining the magnitude of the disruption . . . courts will consider factors such as: the reaction of the students and teachers to the speech, whether any students or teachers had to take time off from school because of the speech, whether teachers were incapable of controlling their classes because of the speech, whether classes were cancelled, and how quickly the administration responded to the speech . . . . If the court does find that the Internet speech actually disrupted or foreseeably could have disrupted the school's learning environment, the administration's disciplinary measures will most likely be upheld." (internal quotation marks omitted)).

[71] *Tinker*, 393 U.S. at 508.

[72] *Id.* at 511 (citing Burnside v. Byars, 363 F.2d 744, 749 (1966)).

[73] *See Id*. at 509–10.

[74] *Id.* at 511.

[75] *Id.* at 508–10.

[76] *Id.* at 508.

[77] *Id.*

[78] *Id.* at 514.

As mentioned earlier, the rules above could certainly apply to off-campus speech as well as online speech. Although there is some language in *Tinker* that may lead to the conclusion that the case controls only speech on school grounds,[79] the authors found language, in various parts of the *Tinker* case, indicating that the rules from *Tinker* could govern any speech; thus encompassing both off-campus speech and online speech. For instance, the Court stated that the rules were "not confined to the supervised and ordained discussion which takes place in the classroom."[80] Additionally, the Court stated that "[a] student's rights, therefore, do not embrace merely the classroom hours."[81]

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[79] This conclusion is buttressed by the fact that each of the four cases that the Supreme Court has been presented involved a different context of student speech; and in each case, the Court created a different test. These cases are Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); and Morse v. Frederick, 551 U.S. 393 (2007). Consequently, it is inferable that the Court will establish a different test when confronted with its first off-campus student speech case or its first online student speech case. Moreover, one of the Court's first statements to begin its analysis in *Tinker* specifically honed in on the on-campus focus: "Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance . . . . But our Constitution says we must take this risk." *Tinker*, 393 U.S. at 508 (emphasis added) (citing Terminiello v. Chicago, 337 U.S. 1 (1949)). The geographic locations identified in this contextual statement portend an on-campus scope for the subsequent analysis in the *Tinker* case.

[80] *Tinker*, 393 U.S. at 512.

[81] *Id.* This statement, which potentially implies that the Court extended *Tinker* rules and reasoning far beyond the classroom and even beyond the schoolhouse gate, was however qualified by the immediate subsequent statement: "When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfere[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id.* at 512–13 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). This statement leaves one with the impression that the Supreme Court limited the *Tinker* rules and reasoning as well as the material and substantial disruption test to on-campus speech.

Still, other statements in the case suggest that *Tinker* encompasses all student speech. For example, the Supreme Court ruled that:

> [C]onduct by the student, *in class or out of it*, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[82]

The key phrase that implies an off-campus reach is "in class or out of it."[83] This phrase could mean outside the classroom but within the schoolhouse gate; or any geographic location beyond the classroom, including off-campus.[84] Further, the Court stated that "we do not confine the permissible exercise of First Amendment rights . . . to supervised and ordained discussion in a school classroom,"[85] implying an off-campus reach similar to the previous statement. Moreover, since online student speech often constitutes speech beyond the "supervised and ordained discussion in a school classroom,"[86] the Court's statement could be interpreted to mean that students have free speech rights in online forums. Nevertheless, what is clearly evident is that the Supreme Court did not expressly settle or even address whether *Tinker* governs off-campus speech or online speech as those were not the facts of the case before the Court. As such, we are only left to interpret the Court's, at times, inconsistent statements above.

2. *Bethel School District No. 403 v. Fraser*

In *Bethel*, a student filed suit against the school district claiming that the district violated his First Amendment rights by disciplining him for using graphic sexual metaphors in a speech

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[82] *Tinker*, 393 U.S. at 513 (emphasis added).

[83] *Id.*

[84] *See, e.g.*, Bell v. Itawamba Cty. Sch. Bd., 859 F. Supp. 2d 834, 837–38 (N.D.Miss. 2012), *aff'd* in part *rev'd* in part by Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280 (5th Cir. 2014) (interpreting the phrase to mean that "the U.S. Supreme Court in *Tinker* specifically ruled that off-campus conduct causing material or substantial disruption at school can be regulated by the school.").

[85] *Tinker*, 393 U.S. at 513.

[86] *Id.*

supporting a schoolmate's candidacy for an elected office.[87] The speech, delivered at a mandatory school assembly attended by about 600 fourteen-year old high school students, garnered reactions from some students who graphically simulated the sexual references in the speech while others loudly expressed derision or yelled.[88] School officials suspended the student based on a school policy barring student use of obscene language.[89] The United States District Court for the Western District of Washington as well as the United States Court of Appeals, Ninth Circuit held that the discipline violated the student's free speech rights under the First Amendment, primarily because the speech did not cause material and substantial disruption at the school.[90] The Supreme Court reversed the lower court decisions.[91]

The Court explained that political speech—the form of speech in *Tinker*—must be treated differently from sexual speech.[92] While political speech must be accorded the highest protection in schools in the absence of material and substantial disruption, sexual speech is readily subject to censorship because of the need for sensitivity to student sensibilities in schools.[93] Further, while our democratic society encourages expression of divergent and controversial views, we place trust in schools to teach and develop students in the socially appropriate norms and decorum in expressing in such views.[94] Consequently, even if vulgar and offensive language is uncensorable for adults, it can be censored for students particularly

[87] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677–79 (1986).

[88] *Id.* at 678. The speech, which left some students startled, was delivered against the admonition of teachers. *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 680.

[92] *Id*. at 680–81.

[93] *Id.* at 680.

[94] *Id.* at 681–83 (citing *Tinker*, 393 U.S. at 508) ("The inculcation of these values is truly the 'work of the schools..'"); *see also Id.* at 684 ("[S]chools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment ina ando out of class.").

when they are in a school.[95] The Court ruled that school officials can censor student speech that is lewd, plainly offensive, vulgar or obscene.[96] This is the *Bethel* test.[97] Applying this test to the student's speech in the case, the Court ruled that school officials could censor the speech because its glorification of male sexuality was plainly offensive to teenage girls and lewd.[98]

The context of this case indicates that the *Bethel* test and Court's reasoning in the case only apply to on-campus speech. Specifically, the speech was delivered at a school assembly, which was an on-campus setting. Moreover, the Supreme Court has acknowledged that if the student "delivered the same speech in a public forum outside the school context, it would have been protected."[99] Therefore, applying the *Bethel* decision to an off-campus context or an online context, neither of which was present in *Bethel*, might be taking the decision out of context.[100] The Court seemed to emphasize an on-campus focus in stating that the "constitutional rights of students *in* public school are not

[95] *Id*. at 682 (citing New Jersey v. T.L.O., 469 U.S. 325, 340–342 (1985)) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.").

[96] *Id.* at 683–84. This is not only because of the school's role as an institution of learning but also because of the youth and immaturity of students exposed to such language. *Id.* at 680.

[97] It can also be referred to as the *Fraser* test – the other short form of the case name.

[98] *Bethel Sch. Dist. No. 403*, 478 U.S. at 683–85.

[99] Morse v. Frederick, 551 U.S. 393, 405 (2007).

[100] Some language from the case indicates that the Court limited school officials' authority to censor lewd, plainly offensive, vulgar or obscene student speech to on-campus settings. Accord J.S. *ex rel*. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 932 (3d Cir. 2011) ("The School District's argument fails at the outset because *Fraser* does not apply to off--campus speech. Specifically in *Morse*, Chief Justice Roberts, writing for the majority, emphasized that [h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected." (internal quotation marks omitted) (citing *Morse*, 551 U.S. at 405; Cohen v. California, 403 U.S. 15 (1971)). For instance, in justifying its decision to create the *Bethel* test, the Court declared that "[t]he determination of what manner of speech *in* the classroom or *in* school assembly is inappropriate properly rests with the school board." *Bethel Sch. Dist. No. 403*, 478 U.S. at 683 (emphasis added).

automatically coextensive with the rights of adults in *other* settings."[101] This language suggests that students have constitutional rights that are coextensive with those of adults in settings beyond the public school.[102] Further language in the case could imply that schools have authority to censor students' off-campus speech. For example, the Court declared that "[c]onsciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment *in and out* of class."[103] The "in and out of class" reference could either mean in and out of class on school grounds; or it could refer to any place outside the class, which would encompass off-campus locales. Additionally, the Court stated "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[104] This authorization of censorship over student public discourse was not explicitly restricted to on-campus discourse; nor was it restricted to offline speech. Thus, the authorization could be interpreted to include off-campus and online discourse.

However, it would be fantastic to imagine that the Court granted unbridled school authority over student public discourse irrespective of location and connection to the school. After all, the Court ruled in *Tinker*, "[s]chool officials do not possess absolute

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[101] *Bethel Sch. Dist. No. 403*, 478 U.S. at 682 (emphasis added) (citing New Jersey v. T.L.O., 469 U.S. at 340–42).

[102] *See J.S.* ex rel. *Snyder*, 650 F.3d at 932 ("Specifically in *Morse*, Chief Justice Roberts, writing for the majority, emphasized that [h]ad Fraser delivered the same speech in a public forum outside the school context, it would have beenp protected. The Court's citation to the *Cohen* decision is noteworthy. The Supreme Court in *Cohen* held, in a non-school setting, that a state may not make a single four-letter expletive a criminal offense . . . Accordingly, Chief Justice Roberts's reliance on the *Cohen* decision reaffirms that a student's free speech rights outside the school context are coextensive with the rights of an adult." (internal quotation marks and citations omitted)). *See also J.S.* ex rel. *Snyder*, 650 F.3d at 932 ("*Fraser's* 'lewdness' standard cannot be extended to justify a school's punishment . . . for use of profane language outside the school, during non--school hours.").

[103] *Bethel. Sch. Dist. No. 403*, 478 U.S. at 683 (emphasis added).

[104] *Id.*

authority over their students."[105] Therefore, even if *Bethel* applies to off-campus speech[106] courts must require a significant nexus to the campus in order to avoid convoluting the distinction between off-campus and on-campus speech. As for online speech, the only reason not to extend *Bethel* to such speech is the context of *Bethel*: *Bethel* involved offline speech. Even though the context of *Bethel* was offline speech, the language of *Bethel* nevertheless suggests that the decision could be interpreted as applicable to online speech. This is, for instance, evident in the Court's declaration that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[107] In this statement, there is no distinction between online speech and offline speech. In all, from our discussions above, one could surmise that *Bethel* applies online and offline but not off-campus. However, of the Supreme Court's quartet of cases, Hazelwood School District v. Kuhlmeier[108], discussed next, provides the clearest limitation of school censorship authority to the confines of the campus and thus on-campus speech.

3. *Hazelwood School District v. Kuhlmeier*

In *Hazelwood*, student staff members of a newspaper, published as part of a journalism class, sued their school district alleging that school officials' censorship of two articles in the paper violated their First Amendment free speech rights.[109] One of the articles addressed the effect of divorce on students while the other detailed three students' experiences with pregnancy.[110] The officials reasoned that the articles compromised the confidentiality and identities of the students and family members covered.[111] The United States District Court for the Eastern District of Missouri

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[105] Tinker v. Des Moines Independent Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

[106] As evident above, on the whole, *Bethel* does not appear to apply to off-campus speech, however.

[107] *Bethel Sch. Dist. No. 403*, 478 U.S. at 683.

[108] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[109] *Id.* at 262, 264.

[110] *Id.* at 263.

[111] *Id.* at 262–63.

refused to enjoin the censorship because the newspaper was part of a class.[112] The United States Court of Appeals, Eighth Circuit reversed, ruling that the articles could not be censored unless school officials satisfied the material and substantial disruption test.[113] The Supreme Court granted certiorari to determine if school officials could censor student speech in school publications without violating the First Amendment.[114]

The Supreme Court ruled that school officials may censor school-sponsored student speech—student speech that the public might reasonably view to bear the school's imprimatur. School officials can censor such speech as long as they can show that the censorship was reasonably related to a legitimate pedagogical concern.[115] This is the *Hazelwood* test. Under this test, school officials can censor school-sponsored speech to ensure that students learn the curriculum, to protect students' emotional maturity, and to address students' grammatical errors, bias, or profanity.[116] The Court ruled that, since the newspaper was part of a class and had not been opened to indiscriminate use, it was a closed public forum and as such school-sponsored speech that the school could censor.[117]

While the medium for the speech in the *Hazelwood* case was a hard copy newspaper (as opposed to the Internet), the medium did not play a dispositive role in the Court's decision. Further, since schools can sponsor speech online or offline (e.g., the newspaper in *Hazelwood*), the *Hazelwood* test, which governs school-sponsored speech, should extend online even though it does not extend off-campus.

While the context of *Hazelwood* clearly suggests it only has on-campus reach, the Court also prominently stated that "[a] school need not tolerate student speech that is inconsistent with its

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[112] *Id.* at 264–65.
[113] *Id*. at 262–63.
[114] *Id.* at 266.
[115] *Id.* at 271, 273.
[116] *Id.* at 272.
[117] *Id.* at 267.

'basic educational mission,' even though the government could not censor similar speech *outside* the school."[118] This statement suggests that school officials do not have unbridled power over students outside the schoolhouse gate. Per contra, since the school-sponsored nature of speech was the dispositive factor in *Hazelwood*, and school-sponsorship of speech is borderless, presumably the *Hazelwood* test could be stretched for an off-campus reach.[119] Indeed, in *Morse v. Frederick*,[120] discussed next, the Court affirmed this limited reach in stating "*Kuhlmeier* acknowledged that schools may regulate some speech even though the government could not censor similar speech outside the school."[121]

4. *Morse v. Frederick*

This was the last student-speech case decided by the Supreme Court.[122] As in the prior cases, the speech occurred offline.[123] However, unlike the prior cases, which literally occurred on school grounds, the speech in *Morse* occurred outside the confines of school grounds.[124]

In *Morse,* a student filed a First Amendment claim against the school district alleging a violation of his right to free speech after he was suspended, pursuant to the school's policy against advocacy of illegal substances, for unfurling a banner which read "BONG HiTS 4 JESUS" as the Olympic Torch Relay proceeded on the street in front of his school.[125] The school also rationalized

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[118] *Id*. at 266 (emphasis added) (citing *Bethel School District No. 403*, 478 U.S. at 685).

[119] Beyond these observations, there is no indication in the case that the Court intended for the test to apply off-campus.

[120] Morse v. Frederick, 551 U.S. 393 (2007).

[121] *Id.* at 405–06 (internal quotation marks omitted).

[122] *See id.*

[123] *See generally Id*.

[124] *Id.* at 396.

[125] *Id.* at 397–99. School officials approved the commercially-sponsored (as opposed to school-sponsored) event as a class trip though students were under no obligation to attend the event. The event was neither funded nor coordinated by the school. *Id.*

the discipline as punishment for unfurling the banner at a school-sanctioned event during school hours.[126] At the time, the student was standing outside school grounds on the public sidewalk across the street from the school.[127] Indeed, the principal had to cross the street onto the public sidewalk to confront the student.[128] Despite the fact that the event was not mandatory, school officials monitored students in attendance.[129] The United States District Court for the District of Alaska granted summary judgment, finding no First Amendment infringement.[130] The United States Court of Appeals for the Ninth Circuit reversed, concluding that school officials failed to satisfy the material and substantial disruption test.[131] The Supreme Court granted certiorari to consider whether the First Amendment protected the student's banner.[132]

The Supreme Court chose to create a new test for determining when school officials can censor student speech.[133] This test, the *Morse* test, provides that school officials can censor student speech

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[126] *Id.* at 398; *see also id.* at 398–99 ("The common sense understanding of the phrase 'bong hits' is that it is a reference to a means of smoking marijuana. Given [Frederick's] inability or unwillingness to express any other credible meaning for the phrase, I, I can only agree with the principal and countless others who saw the banner as advocating the use of illegal drugs. [Frederick's] speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst of a school activity, for the benefit of television cameras covering the Torch Relay. [Frederick's] speech was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use.").

[127] *Id.* at 397-99. In fact, the student with the banner was late that day and did not enter the school's physical premises; instead he went straight across the street from the school. *Id.;* Frederick v. Morse, 439 F.3d 1114, 1115-17 (9th Cir. 2006).

[128] *Morse*, 551 U.S. at 397.

[129] *Id.* at 397–98.

[130] *Id.* at 399.

[131] *Id.* at 399–400.

[132] *Id.* at 400, 403.

[133] *Id.* at 404–06. The Court also found the prior tests—*Tinker*, *Bethel* and *Hazelwood*—insufficient for addressing the gravity of drug threats to students. *Id.* at 408–09.

that advocates illegal drug use.[134] The Court reasoned that drugs present such great danger to students that speech advocating their use cannot be tolerated in schools.[135] Accordingly, school officials can take steps to deter a student culture of drug abuse by censoring advocacy of drugs.[136] Even when the speaker does not intend to advocate illegal drug use through the speech, school officials can censor the speech if they reasonably interpret it to advocate illegal drug use.[137]

The Court rejected the plaintiff's contention that this case was an off-campus speech case because it occurred outside school grounds.[138] The Court explained that the speech was delivered at a school-sanctioned event that took place during school hours.[139] Moreover, the supervisory presence of school officials, as well as the presence of other students, brought the location across the street within the ambit of the schoolhouse gate.[140] The Court declared that a student "cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school."[141] Beyond the supervisory and student presence requirements, however, the Court failed to define what process schools must follow in order to sanction an event for purposes of the First Amendment. Conceivably, schools can sanction events post-hoc in order to justify censorship of off-campus student speech—a dangerous proposition.[142] Despite this

[134] *Id.* at 408.
[135] *Id.* at 407.
[136] *Id.* at 407.
[137] *Id.* at 401, 408.
[138] *Id.* at 400–01.
[139] *Id.* at 401.
[140] *Id.* at 400–01.
[141] *Id.* at 401 (internal quotation marks omitted). The Court effectively empowered schools to sanction events that they do not sponsor if they want to extend their censorship beyond the schoolhouse gate. Thus non-school-sponsored speech can still be censored at school-sanctioned events that occur even off-campus.
[142] This is a dangerous proposition since it is in effect a grant of unwieldy power to schools to censor student speech through manipulation of the sanctioned nature of events.

grant of expansive school power, the Court acknowledged that there is incertitude in the scope of its student-speech precedents.[143] Thus, there is no certainty that the precedents apply to off-campus speech.[144] Further, "the very fact that the Supreme Court created a new basis for restriction of student speech – rather than trying to shoehorn the [*Morse*] case into *Tinker*, *Fraser*, or *Hazelwood* . . . suggests that other . . . [tests] may subsequently be recognized as well."[145]

VI. VIRTUAL SPEECH AMIDST THE AMBIVALENCE IN THE STUDENT-SPEECH JURISPRUDENCE

The earlier discussion of the United States Supreme Court's student-speech precedents reveals that the Court has yet to review a case involving virtual student speech.[146] The Court's silence has fueled the uncertainty of both administrators and school officials regarding how to handle virtual student speech. Lower courts have likewise struggled to determine which of the student-speech tests should govern virtual student speech.[147] Indeed, the law has failed

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[143] *Morse*, 551 U.S. at 401. Recall, the Supreme Court's student-speech precedents factually only involved on-campus speech.

[144] *See, e.g.*, Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist., 494 F.3d 34, 39, n.3 (2d Cir. 2007) ("Since the Supreme Court in *Morse* rejected the claim that the student's location, standing across the street from the school at a school approved event with a banner visible to most students,, was not 'at school,' it had no occasion to consider the circumstances under which school authorities may discipline students for off--campus activities." (internal citations omitted)). *See also* D.J.M. v. Hannibal Pub. Sch. Dist. # 60, 647 F.3d 754, 761 (8th Cir. 2011) ("In none of these cases [*Tinker*, *Bethel*, *Hazelwood* and *Morse*] was the Court faced with a situation where the First Amendment question arose from school discipline . . . for conduct outside of school.").

[145] Emily G. Waldman, *A Post-Morse Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 489 (2008).

[146] *See supra* Part V.

[147] *See* Joseph O. Oluwole & Preston C. Green, III, *Censorship and Student Communication in Online and Offline Settings* (2015) (extensively discussing lower courts' struggles), *available at* http://www.igi-global.com/book/censorship-student-communication-online-offline/134799 (last visited Oct. 31, 2015).

to catch up with technology.[148] Nonetheless, according to the Supreme Court, it is indisputable that the First Amendment applies to virtual speech.[149]

In the cases that have reviewed virtual student speech, *Tinker's* material and substantial disruption test has emerged as the favorite test.[150] Courts use the material and substatial disruption test as the default test when resolving virtual student speech cases because such cases do not precisely fit the factual contexts of the Supreme Court's student-speech precedents.[151] Rather than investigating whether the Supreme Court intended the material and substantial disruption test to apply to off-campus speech, some courts simply assume its applicability.[152] When courts choose to apply the material and substantial disruption test, they are more likely to find school censorship of student speech unconstitutional because of the requirement to prove substantial disruption.[153]

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[148] Christopher E. Roberts, *Is Myspace Their Space?: Protecting Student Cyberspeech In A Post-Morse v. Frederick World,* 76 UMKC L. REV. 1177, 1181 (2008).

[149] Reno v. American Civil Liberties Union, 521 U.S. 844, 870 (1997).

[150] LaVine v. Blaine Sch. Dist., 257 F.3d 981, 988– 89 (9th Cir. 2001); O.Z. v. Bd. of Trs. of Long Beach Unified Sch. Dist., No. CV 08–5671 ODW, 2008 WL 4396895, 4 (C.D. Cal., Sept. 9, 2008); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000); *accord* Douglas D. Frederick, *Restricting Student Speech That Invades Others' Rights: A Novel Interpretation Of Student Speech Jurisprudence In Harper v. Poway Unified School District*, 29 U. HAW. L. REV. 479, 487 (2007).

[151] *Accord* J.S. *ex rel*. Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 301 (3d Cir. 2010); Boucher v. School Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 827–28 (7th Cir. 1998); Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960, 970 (5th Cir.1972); T.V. *ex rel*. B.V. v. Smith-Green Cmty. Sch. Corp., 807 F.Supp.2d 767, 781 (N.D. Ind. 2011).

[152] *See, e.g.*, *J.S.* ex rel. *Snyder*, 650 F.3d at 926.

[153] Frederick, *supra* note 150 at 497. *See also* Leora Harpaz, *Internet Speech And The First Amendment Rights Of Public School Students*, 2000 B.Y.U. EDUC. & L.J. 123, 128 (2000) (characterizing the substantial-disruption requirement as a "significant burden").

The first lower court case to rule on the virtual speech rights of students was *Beussink v. Woodland R-IV School District*.[154] In that case, a student was disciplined for creating a website that used vulgar and boorish language to criticize his principal, teachers, and the school's website.[155] The student challenged the discipline as a violation of his First Amendment rights.[156] The website solicited readers to send their critical comments about the school to the principal.[157] The website was created on the student's home computer, outside school hours, and without using school resources.[158] The student's website included a hyperlink to the school's website; however, the student did not intend for anyone at the school to see his website.[159]

No one accessed the website at the school until the student's friend reported the website to a teacher.[160] The friend discovered the website while using the student's personal computer at the student's home.[161] The student neither authorized nor knew of his friend's access of the website.[162] Furthermore, the website caused no disruption at the school.[163]

The student, unclear about his free speech rights, approached the school's civics teacher to inquire about whether he could be disciplined for his speech.[164] The teacher's response exemplifies the typical confusion of school officials regarding the scope of students' First Amendment rights; she simply stated that "she did not know."[165] The federal district court, however, tried to bring clarity to the jurisprudence. Specifically, the court decided that the material and substantial disruption test should govern online

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[154] 30 F. Supp. 2d 1175 (E.D. Mo. 1998).
[155] *Id.* at 1177.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.* at 1177–78.
[162] *Id.* at 1178.
[163] *Id.* at 1179–80.
[164] *Id.* at 1179.
[165] *Id.*

speech since the other tests in existence at the time, the *Bethel* and *Hazelwood* tests, did not contextually fit this virtual speech case.[166] The court found that upset feelings and disapproval of the website's content, rather than material and substantial disruption, motivated the suspension.[167] Consequently, school officials had no authority to censor the speech.[168]

The court failed to provide a rationale for extending judicial authority into the realm of off-campus speech other than ruling that the material and substantial disruption test is the default test when no other test is applicable to student speech. A review of the decision, however, suggests that the court likely found the following connections between the speech and the school paramount and sufficient to create a nexus justifying application of the material and substantial disruption test to off-campus speech: (1) the website criticized school officials; (2) the website was hyperlinked to the school website; (3) and the website was accessed at school by the student's friend and school officials.[169] The court relied on these weak connections, rather than requiring that the speaker actually bring the off-campus speech to school or affirmatively facilitate its on-campus presence. In essence, while courts may choose to apply the material and substantial disruption test to off-campus speech, they may also rely on weak connections between off-campus speech and the campus in order to bring the off-campus speech within the Supreme Court's student-speech precedents.

A. *Distinguishing On-Campus from Off-Campus Virtual Speech*

With the advancement of technology, we are likely to continue to see students capitalize on technology to find ample opportunities

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[166] *Id.* at 1180, n. 4 (showing the court chose the material and substantial disruption test despite acknowledging that the Supreme Court has varied its First Amendment student-speech jurisprudence based on the form of the student speech).

[167] *Id.* at 1180–81.

[168] *Id.* at 1180–82.

[169] Harpaz, *supra* note 153, at 148.

to misbehave.[170] School officials driven to regulate the student behavior are faced with the challenge of determining whether they can censor off-campus speech. Research shows that school officials are more inclined to punish off-campus speech that criticizes school officials as opposed to speech expressing a political or other viewpoint off-campus.[171] This shows that school officials censoring students tend to be thin-skinned.

On-campus speech clearly falls within the Supreme Court's student-speech precedents; thus, such speech is readily subject to censorship pursuant to the quartet of student-speech tests.[172] As discussed previously, the lack of Supreme Court precedent on off-campus student speech leaves school officials in a gray area as to whether they can regulate off-campus speech.[173] In virtual schools, it is difficult to determine what constitutes off-campus speech versus on-campus speech. The ubiquity of the Internet makes the distinction between on-campus speech and off-campus speech elusive.[174] This elusiveness could make it difficult for courts and school officials to determine when to apply the Supreme Court's

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[170] *See generally* Requa v. Kent Sch. Dist. No.415, 492 F. Supp. 2d 1272 (W.D. Wash. 2007); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009). *See also* Pisciotta, *supra* note 55, at 661–62 ("The Internet, however, has also presented students with an unprecedented opportunity to candidly ridicule their schools and teachers.").

[171] Aaron H. Caplan, *Public School Discipline For Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 161 (2003).

[172] *See generally* Oluwole & Green, *supra* note 147, at 62–121 (2015) (extensively discussing lower courts' struggles), *available at* http://www.igi-global.com/book/censorship-student-communication-online-offline/134799 (last visited Oct. 31, 2015).

[173] *See supra* Section V.

[174] This is particularly so because of the far-reaching scope of the internet that makes it difficult to define geographical boundaries of speech. As the Supreme Court observed, "[t]his dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." *Reno*, 521 U.S. at 870.

student-speech precedents.[175] Judge Jordan of the United States Court of Appeals for the Third Circuit described this challenge adeptly:

> [f]or better or worse, wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.[176]

In virtual schools, the campus could include the school-provided laptop, Internet access, server, and the learning management system, as well as the video and audio system used for class sessions. As such, off-campus will be areas outside these examples. What constitutes virtual off-campus could also change temporally. In other words, during the hours of using a school laptop (or other school technology resource) for educational purposes, the student will be on-campus. Outside those times, the student would be deemed off-campus.

Unfortunately, there is a very sparse jurisprudence on the distinction between virtual off-campus and on-campus speech.[177] One case that has considered this distinction is *Requa v. Kent School District No. 415*.[178] The student in that case, in concert with classmates, allegedly recorded his teacher twice, furtively, and posted the video on YouTube.[179] He also included a link to the YouTube video on his personal MySpace webpage.[180] The

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[175] *See, e.g.*, D.J.M. v. Hannibal Pub. Sch. Dist. # 60, 647 F.3d 754, 765 (8th Cir. 2011) ("The widespread use of instant messaging by students in and out of school presents new First Amendment challenges for school officials. Instant messaging enables student messages to be rapidly communicated widely in school and out. School officials cannot constitutionally reach out to discover, monitor, or punish any type of out of school speech.").

[176] Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (Jordan, J., concurring).

[177] J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 864 (Pa. 2002).

[178] Requa v. Kent Sch. Dist. No.415, 492 F. Supp. 2d 1272, 1272 (W.D. Wash. 2007).

[179] *Id.* at 1274. We use "allegedly" because the court found that there was dispute as to the student's level of involvement in the recording. *Id.* at 1274–75.

[180] *Id.* at 1274.

recording included critical comments about the teacher's hygiene.[181] It also showed a student thrusting his pelvic toward the teacher while holding two fingers above the back of the teacher's head (rabbit ears).[182]

A section of the video, preceded by the warning "Caution Booty Ahead" (and accompanied by a song titled "Ms. New Booty"), showed several shots of the teacher's buttocks while bending over or walking.[183] While the filming occurred on campus during school hours, the editing and YouTube posting occurred off-campus after school hours.[184] The school computers blocked access to YouTube, so no student accessed the video on a school computer.[185] However, a local television station found the video while researching a news story on students' use of YouTube to criticize teachers and informed the school.[186] School officials chose to suspend the student even though the video caused no actual disruption at the school.[187] The student filed a First Amendment claim against the school district challenging the discipline for his speech.[188]

School officials contended, and the court agreed, that the student was disciplined for his on-campus filming rather than the off-campus video editing and YouTube posting.[189] The court reasoned that school officials did not require the student to remove the YouTube link from his MySpace page; nor did they bar the student from re-posting the link after the student voluntarily removed it.[190] Furthermore, school officials did not discipline other students who posted a link to the YouTube video on their MySpace

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[181] *Id.*
[182] *Id.* at 1274, 1279.
[183] *Id.* at 1274.
[184] *Id.* at 1275–76.
[185] *Id.* at 1274.
[186] *Id.*
[187] *Id.* at 1274–75. The student served his suspension in contract school, an interim placement where a student works on school assignments from home with aid of a tutor. *Id.* at 1276.
[188] *Id.* at 1275–76.
[189] *Id.* at 1275.
[190] *Id.* at 1278.

pages.[191] In other words, school officials only disciplined the student for his on-campus speech. By isolating the on-campus filming from the off-campus expressive actions of the student, the court was able to avoid confronting the uncertainty in the scope of the Supreme Court's student-speech precedents.

In essence, if school officials can limit their discipline to the on-campus portion of a student's expression, then any pertinent test among the four student-speech tests will be readily applicable to the speech. In this particular case, the court chose to apply the *Bethel* test as well as the material and substantial disruption test.[192] The court determined that the filming of the pelvic thrust, the teacher's buttocks, and the rabbit ears, as well as the "Caution Booty Ahead" graphic and the song, constituted lewd and plainly offensive speech under the *Bethel* test.[193] Therefore, the speech was censorable.[194] The court reached this conclusion despite acknowledging that "[t]he facts of this case are not on all fours with *Fraser* in the sense that the 'speech' at issue here was ultimately published in an off-campus forum (i.e., the Internet)."[195] To rationalize its decision, the court underscored the fact that school officials successfully isolated the on-campus speech from the off-campus speech:

> [b]ut an inseparable part of the speech which Plaintiff seeks to protect is the filming of the footage in the classroom. That is an inextricable part of the activity which comprises the "speech" of the completed video and, in singling out that discreet portion of the "speech" for punishment, Defendants have localized the sanctionable behavior to the area in which their authority has been upheld by the Supreme Court.[196]

The court concluded that school officials could also discipline the student under the material and substantial disruption test, even though the video caused no actual disruption at the school.[197] The court explained that the filming of a teacher's buttocks, rabbit ears,

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[191] *Id.*
[192] *Id.* at 1279–81.
[193] *Id.* at 1279.
[194] *Id.*
[195] *Id.* at 1280.
[196] *Id.*
[197] *Id.*

and pelvic thrust was a demeaning, sexually suggestive action; accordingly, it constituted a *per se* disruption of the school's culture of respect among teachers and students.[198] The court chose to apply the material and substantial disruption test because it is the "catch-all" test when other student speech cases do not neatly fit the case under consideration.[199] As long as the Supreme Court fails to rule on which test should govern off-campus speech, the inclination toward the material and substantial disruption test will continue.[200]

It appears that if virtual schools can separate the on-campus components of speech from the off-campus components, they will have an easier constitutional route to censorship under one of the student-speech tests. If the off-campus and on-campus speech components are inseparable, courts are less likely to sanction censorship unless the speech has some connection to the campus. When off-campus speech has a cognizable connection to the campus (such as where off-campus virtual speech is brought on campus), courts will be inclined to bring the speech within the ambit of the Supreme Court's student-speech precedents.

B. *Off-Campus Virtual Speech Brought On Campus*

Sometimes courts have to determine whether speech occurring outside the schoolhouse gate, but with an effect on campus, constitutes on-campus speech or off-campus speech. This was the issue in *J.C. ex rel. R.C. v. Beverly Hills Unified School District*.[201] In this case, while off-campus at a local restaurant, a student recorded her friends calling a classmate a "slut," "spoiled," and "the ugliest piece of shit I've ever seen in my whole life."[202] One of the friends also accused the classmate of speaking about

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[198] *Id.*

[199] *Id.* (citing Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3rd Cir. 2001)).

[200] J.C. *ex rel*. R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1102–03 (C.D. Cal. 2010).

[201] *Id.* at 1100.

[202] *Id.* at 1098.

"boners."[203] As the student recorded the scene, she could be heard cheering on the off-color comments.[204] She posted the video on YouTube using her personal computer.[205] She then informed several students and the classmate targeted in the video of the YouTube link.[206] The classmate, who was very upset about the video and had to undergo counseling, reported the video to school officials.[207] The school blocked student access to YouTube and other social networking site so only school officials watched the video on campus.[208] Nonetheless, school officials required the student to delete the video from both YouTube and her personal computer.[209] She was also suspended for two days.[210] Consequently, she filed a First Amendment claim against the school district challenging the discipline.[211] The court had to "determine the scope of a school's authority to regulate speech by its students that occurs off campus but has an effect on campus."[212] In this case, the on-campus effects of the off-campus speech included: (1) the school visit by the upset parent of the targeted student to complain about the speech; (2) the counseling for the targeted student; and (3) the student's temporary refusal to go into his classroom.[213]

The court observed that "many other courts analyzing off-campus speech that subsequently is brought to campus or to the attention of school authorities apply the substantial disruption test from *Tinker* without regard to the location where the speech originated (off campus or on campus)."[214] Indeed, the court noted

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[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.* at 1099.
[209] *Id.* at 1099–1100.
[210] *Id.*
[211] *Id.* at 1100.
[212] *Id.* at 1098.
[213] *Id.* at 1117.
[214] *Id.* at 1103. In other words, a number of courts see the material and substantial disruption test as borderless; and are willing to disregard the on-campus context of *Tinker*. *See id.* at 1104 ("In these cases, the courts have

"the substantial weight of authority indicates that geographic boundaries generally carry little weight in the student-speech analysis."[215] If geographical boundaries are discounted, then the lack of Supreme Court precedent on off-campus speech, or virtual speech, becomes highly insignificant or even immaterial in student-speech cases.[216] Accordingly, the court chose to apply the material and substantial disruption test to the YouTube video.[217] However, the court found no evidence of substantial disruption at the school; instead, the court noted the effects of the speech at the school such as the upset parent of the target student, the counseling, and temporary refusal by the targeted student to enter the classroom were *de minimis*.[218] Moreover, the court ruled that the need to guard students' emotional maturity from criticisms does not satisfy the material and substantial disruption test:

> Indeed, no one could seriously challenge that thirteen-year-olds often say mean-spirited things about one another, or that a teenager likely will weather a verbal attack less ably than an adult. The Court accepts that C.C. was upset, even hysterical, about the YouTube video, and that the School's only goal was to console C.C. and to resolve the situation as quickly as possible. Unfortunately for the School, good intentions do not suffice here. Defendants have failed to present sufficient evidence that the YouTube video caused a substantial disruption to school activity on May 28, 2008. Further, Defendants' fear that a substantial disruption was likely to occur simply is not supported by the facts.[219]

Looking beyond the material and substantial disruption test, the court concluded that the *Bethel* test was inapplicable because that

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directly applied the *Tinker* substantial disruption test to determine if a First Amendment violation occurred, without first considering the geographic origin of the speech.").

[215] *Id.* at 1104.

[216] *Id.* at 1107.

[217] *Id*. at 1109; *see also id.* at 1110 ("[T]he Court finds that the YouTube video clearly falls into the 'all other speech' category, governed by *Tinker*.").

[218] *Id.* at 1117–22; *see id.* at 1119 ("For the *Tinker* test to have any reasonable limits, the word 'substantial' must equate to something more than the ordinary personality conflicts among middle school students that may leave one student feeling hurt or insecure.").

[219] *Id.* at 1122.

test is "limited to speech that occurs in school."[220] Moreover, the court was "not aware of any authority from the circuit courts applying *Fraser* to speech that takes place off campus."[221] The *Morse* test was not applicable because the YouTube video did not advocate illegal drug use; and the *Hazelwood* test was inapplicable because the speech was not school-sponsored.[222]

The court emphasized that school officials must not "become censors of students' speech at all times, in all places, and under all circumstances."[223] If it is established that a student had no intention of bringing off-campus speech to the campus, or the student takes steps to ensure that the speech does not get to the campus, the Supreme Court student-speech precedents would be inapplicable to the off-campus speech.[224]

C. *Location As Context and the Nexus Requirement for Virtual Speech*

Despite the fact that a number of courts insist on ignoring the on-campus context of the Supreme Court's precedents when applying those precedents to off-campus speech, some courts

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[220] *Id.* at 1109; *see* Evans v. Bayer, 684 F. Supp. 2d 1365, 1374 (S.D. Fla. 2010) (finding the context of online speech distinct from a school assembly in *Bethel* and noting that "[f]or the Court to equate a school assembly to the entire internet would set a precedent too far reaching"). *See also* Scott A. Moss, *The Overhyped Path From Tinker To Morse: How The Student Speech Cases Show The Limits Of Supreme Court Decisions—For The Law And For The Litigants*, 63 FLA. L. REV. 1407, 1446 (2011) (describing the distinction between the captive audience of *Bethel* and the internet which generally involves students accessing and then voluntarily navigating in order to be exposed to content).

[221] J.C. *ex rel*. R.C. v. Beverly Hills Unified Sch. Dist., 711 F.Supp.2d 1094, 1110 (C.D. Cal. 2010) ("Moreover, the reasoning of *Fraser*, which is anchored in the school's duty to teach norms of civility to its students, does not support extending *Fraser* to lewd or offensive speech occurring off campus. For these reasons, the Court will not apply *Fraser* to Plaintiff's YouTube video.").

[222] *Id.* at 1109.

[223] *Id.* at 1110, n.8 (citing Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1052 (2d Cir. 1979)).

[224] *Id.* at 1098, 1107–09 (stating the student in this case did not meet this standard, however, since she told other students of the video and asked them to watch it on YouTube).

consider the context critical.[225] These courts require that the location of the speech must be a threshold determination before deciding applicability of the Supreme Court's student-speech precedents.[226] These cases tend to extend the precedents to off-campus speech only if it has a nexus to the school.[227] *Wisniewski v. Board of Education of the Weedsport Central School District*[228] is a prime example. The student in the case used a firing pistol as his AOL Instant Messaging (IM) identifier icon when communicating from his home computer.[229] The pistol was directed at a human head that had dots signifying blood splatter above it.[230] The following phrase, targeting the student's English teacher, appeared below the head: "Kill Mr. VanderMolen."[231] This icon was visible, for at least three weeks, during IM exchanges with about fifteen people on the student's buddy list, which included some classmates.[232] A student who was not on the list reported the icon to the English teacher who in turn informed school administrators.[233] The student-speaker was first suspended for five days and then for one semester.[234] School officials granted the distressed teacher's request to no longer teach the student.[235] The student filed suit against the school district claiming that the discipline for his speech violated his First Amendment right to free

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[225] *See, e.g.*, *J.S. ex rel. Snyder*, 650 F.3d at 931 n.8 (3d Cir. 2011).

[226] J.C. *ex rel*. R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1104 (C.D. Cal. 2010). *See* Evans v. Bayer, 684 F. Supp. 2d 1365, 1370 (S.D. Fla. 2010) ("Where the speech occurs should be determined at the outset in order to decide whether the 'unique concerns' of the school environment are implicated.").

[227] *See, e.g.*, Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir. 2011).

[228] 494 F.3d 34 (2d Cir.2007).

[229] *Id.* at 35.

[230] *Id.* at 36.

[231] *Id.*

[232] *Id.* at 36, 39. The buddy list is a group of people that a message sender on IM chooses to communicate with in real time.

[233] *Id.* at 36.

[234] *Id.* at 36–37. A police investigation and a psychologist evaluation revealed that the student meant the icon as a joke. *Id.* at 36.

[235] *Id.* at 36.

speech.[236] The district court ruled for the school district and the student appealed.[237]

Although the court of appeals acknowledged a distinction between off-campus speech and on-campus speech, it ruled that the material and substantial disruption test can be extended to off-campus speech if the speech has a nexus to the school.[238] That nexus is established when the speech is reasonably foreseeable to come to the attention of school officials.[239] The court reasoned that it would be unwise to wholly foreclose school censorship of off-campus speech because, in some instances, such speech could "create a foreseeable risk of substantial disruption within a school."[240] The court chose the material and substantial disruption test as the governing test for determining the constitutionality of school censorship of off-campus virtual speech because, of the student-speech tests, the material and substantial disruption test is the only one that embodies a nexus.[241]

Another case that recognized a distinction between off-campus and on-campus speech and imposed a nexus requirement is *Doninger v. Niehoff*.[242] In this case, a student council member, in concert with other students, sent out mass emails to community members asking them to intervene in the scheduling of an annual band concert.[243] The students objected to school officials' plans to move the location of the event, a change that could have threatened the scheduled date of the event.[244] As a result of the mass emails, school officials received a flood of emails and calls supporting the students.[245] The student council member posted the following on a

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[236] *Id.* at 37.
[237] *Id.*
[238] *Id.* at 39.
[239] *Id.*; D.J.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 766–67 (8th Cir. 2011).
[240] *Wisniewski*, 494 F.3d at 39.
[241] *Id.*
[242] Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).
[243] *Id.* at 44–45.
[244] *Id.* at 44.
[245] *Id.*

publicly-accessible blog, after school hours, using her personal computer:

> Jamfest is cancelled due to douchebags in central office. here is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. Basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. we have so much support and we really appreciate it. however, she got pissed off and decided to just cancel the whole thing all together. anddd so basically we aren't going to have it at all, but in the slightest chance we do it is going to be after the talent show on may 18th. anddhere is the letter we sent out to parents.[246]

The student also posted a copy of the mass email on the public blog.[247] School officials were displeased at the misleading and vulgar nature of the blog and disciplined the student.[248] The student filed a First Amendment claim against the school district.[249] The district court ruled for the school district and the student appealed.[250]

The court of appeals acknowledged that the emergence of virtual student speech has made geographical location elusive.[251] Nonetheless, geographical location is important; for as the court noted, had the student used language such as "douchebags" on campus, school officials could have readily censored the speech under the *Bethel* test.[252] The court, however, refused to resolve

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[246] *Id.* at 45.

[247] *Id.*

[248] *Id.* at 45–46. It was misleading to claim that the event had been canceled as this is completely false. *Id.* at 51. The principal asked the student to write an apology letter, show her mother the blog and withdraw from the Senior Class Secretary election. *Id.* at 46. The student complied with these disciplinary sanctions with the exception of the candidacy withdrawal. Even though school officials prevented her name from getting on the ballot, she got a plurality of the votes. Despite her election, school officials did not allow her to assume the Senior Class Secretary position. *Id.*

[249] *Id.* at 47.

[250] *Id.* at 43.

[251] *Id.* at 48–49.

[252] *Id.* at 49 (The *Bethel* test (also known as the *Fraser* test) empowers school officials to censor plainly offensive, lewd, vulgar and obscene student speech.).

whether the *Bethel* test could be extended to off-campus speech.[253] Instead, the court viewed the material and substantial disruption test as *the* established test for off-campus speech with a caveat.[254] Specifically, the court ruled that a nexus is created to allow censorship under the test *if* off-campus speech is reasonably foreseeable to reach the campus.[255] Further, a nexus is created if the speech is reasonably foreseeable to cause substantial disruption on campus.[256] The blog posting satisfied the requisite nexus requirements as the posting showed that the student intended to stir up community members to call and email the school.[257] The blog also included misleading and vulgar language designed to rile people to oppose school officials, potentially undermining the good faith efforts of school officials for an amicable solution.[258] Consequently, a nexus was established.[259]

Also in *J.S. v. Bethlehem Area School District*,[260] the court made analysis of speech location a threshold requirement in student-speech cases; and required a nexus between off-campus speech and the campus before extending the Supreme Court's precedents to off-campus speech.[261] In *J.S.*, a student created a

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[253] *Id.* at 50 ("We need not decide whether other standards [besides the material and substantial disruption test] may apply when considering the extent to which a school may discipline off-campus speech."); *see also id.* at 49 ("It is not clear, however, that *Fraser* applies to off-campus speech.").

[254] *Id.* at 50. As discussed earlier herein, the material and substantial disruption test is the *Tinker* test.

[255] *Id.* at 50–51, *see also* S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012) (citing *D.J.M.*, 647 F.3d at 766) ("*Tinker* applies to off-campus student speech where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting.").

[256] *Doninger*, 527 F.3d at 50.

[257] *Id.* at 50–51.

[258] *Id.; see also id.* at 51–52 (stating that the student's "conduct posed a substantial risk that LMHS administrators and teachers would be further diverted from their core educational responsibilities by the need to dissipate misguided anger or confusion over Jamfest's purported cancellation.").

[259] *Id.* at 51–52.

[260] J.S. v. Bethlehem Area School District*,* 807 A.2d 847 (Pa. 2002).

[261] *Id.*

website called "Teacher Sux" that included a disclaimer warning visitors not to disclose the site or the student's identity to school officials.[262] The website, created on his home computer after school hours, included vulgar and threatening words, sound clips, pictures and animation targeting his principal and algebra teacher.[263] One of the webpages accused the principal, in vulgar terms, of having sexual relations with another principal.[264] The webpages targeting the teacher profanely attacked her physique and disposition.[265] The website also showed the teacher in a witch costume with her face morphing into Adolf Hitler's.[266] Additionally, the student called for the teacher's termination.[267]

The most disturbing webpage titled "Why Should She Die?" solicited twenty dollars from visitors to pay for a hitman to kill the teacher.[268] The page identified the following as reasons for the teacher to die: "(1) Is it a rug, or God's Mistake? (2) Puke Green Eyes (3) Zit! and (4) Hideous smile."[269] On that webpage, the student also repeated the following statement 136 times: "F ___ You Mrs. Fulmer. You Are A B ____. You Are A Stupid B ____."[270] A final page depicted the teacher's severed head with trickles of blood.[271] The student informed some of his schoolmates of the website and even showed it to one of them while at school.[272] When the principal learned of the website, he contacted the Federal Bureau of Investigation and the police as he considered the threats serious.[273] No charges were filed, however.[274]

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[262] *Id.* at 850–51. The disclaimer indicated that visitors clicking on the website were committing to these terms. *Id.* at 851.
[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] *Id.* at 851 n.4 (internal quotation marks omitted). *See also id.* at 858.
[270] *Id.* at 851.
[271] *Id.*
[272] *Id.* at 852.
[273] *Id.*
[274] *Id.*

The algebra teacher lost weight, appetite, and sleep as a result of the website and could not complete the school year.[275] She feared that she would indeed be killed.[276] In fact, the school needed three substitute teachers to fill in for the algebra teacher.[277] According to school officials, the website significantly impacted school morale, akin to a student or teacher's death.[278] The student received a three-day suspension, which was subsequently extended to ten days and then expulsion.[279] The student filed suit against the district claiming that the discipline violated his First Amendment right.[280] Both the trial court and the appellate court ruled for the school district and the student appealed to the Supreme Court of Pennsylvania.[281]

The court ruled that the first step in any student-speech analysis must be a determination of whether the virtual speech occurred on-campus or away from campus.[282] According to the court, if speech is on campus, the United States Supreme Court's student-speech precedents will easily apply.[283] If the speech is off-campus, however, school officials must show a nexus between the off-campus speech and the campus in order for the speech to fall within the ambit of the student-speech precedents.[284] If a nexus is found, the speech will be converted to on-campus speech for

[275] *Id.*
[276] *Id.*
[277] *Id.*
[278] *Id.* at 852.
[279] *Id.* at 852–53.
[280] *Id.* at 853.
[281] *Id.*
[282] *See id.* at 864 ("What can be said, based upon these student expression cases, is that any constitutional analysis of a student's freedom of speech must include a number of considerations. *First*, a threshold issue regarding the 'location' of the speech must be resolved to determine if the unique concerns regarding the school environment are even implicated, i.e., is it on campus speech or purely off-campus speech?" (emphasis added)).
[283] *Id.* at 864 ("[I]n attempting to discern the proper standard by which to evaluate the School District's discipline of J.S., we must first determine whether the speech at issue was on-campus speech and thus, subject to United States Supreme Court's student expression case law.").
[284] *Id.* at 865.

purposes of the First Amendment.[285] A nexus will exist if the speech was accessed on campus, or if the speech was aimed at students, teachers or others connected with the school.[286]

The Supreme Court of Pennsylvania ruled that, in the case before it, there was "a sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus."[287] The student created the nexus when he accessed the website at the school.[288] A nexus was also established when the student shared the website with his schoolmates.[289] Alternatively, a nexus was created when school officials accessed the website on the campus.[290] A nexus was also created by the fact that the website was aimed at people (the teacher and the principal) connected with the school.[291] The court declared that "where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech."[292]

Even though the court found the website in the instant case to be sophomoric and misguided, rather than a true threat, it ruled that school officials could censor the speech under both the material and substantial disruption test as well as the *Bethel* test.[293] Rather than simply choose one of the two tests, the court decided to apply

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[285] *Id.*

[286] *Id.; accord.* S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 778 (8th Cir. 2012) ("[W]e expect *Tinker* will apply here because the Wilsons' speech was, in the District Court's words, 'targeted at' Lee's Summit North."); *cf.* Evans v. Bayer, 684 F. Supp. 2d 1365, 1371 (S.D. Fla. 2010) ("Thus, the question is whether the fact that Plaintiff's speech was arguably aimed at a particular audience at the school is enough by itself to label the speech on-campus speech. While further development of the facts may result in a different determination, the Court finds that it is not.").

[287] *J.S.*, 807 A.2d at 865.

[288] *Id.*

[289] *Id.*

[290] *Id.*

[291] *Id.*

[292] *Id.* Some cases have explicitly ruled that school officials cannot censor off-campus speech is not accessed on campus. *See, e.g.*, Evans v. Bayer, 684 F. Supp. 2d 1365, 1371–72 (S.D. Fla. 2010).

[293] *J.S.*, 807 A.2d at 860, 867–68.

each test because the speech was both vulgar and disruptive.[294] The court explained that the facts of the case were not on all fours with those of *Tinker* and *Bethel* so that made it even more prudent to apply both tests (as opposed to just one).[295] The court, however, continued to express doubt about the applicability of the *Bethel* test to the case.[296] The court was more comfortable applying the material and substantial disruption test given that it is the choice test for courts reviewing virtual off-campus speech.[297] This is surprising because the United States Supreme Court has never "considered whether *Tinker* applies to expressive conduct taking place off of school grounds and not during a school activity and has in fact noted that [t]here is some uncertainty at the outer

[294] *Id.* at 867–68.

[295] *Id.* at 867–68 ("The United States Supreme Court has not spoken in any case involving facts that are analogous to this case. Although other lower courts, in the context of Internet communication, have focused on *Tinker*, based upon our prior discussion, we are not convinced that reliance solely on *Tinker* is appropriate. Yet, whether the facts before us are more aligned with the events in *Fraser* and governed by the lewd and plainly offensive speech analysis, or are more akin to the situation in *Tinker* and thus subject to review for substantial disruption of the work of the school, we need not definitively decide, for application of either case results in a determination in favor of the School District. Thus, we will first apply *Fraser*, and then *Tinker* to the facts sub judice.").

[296] *See id.* at 868 (stating that "questions exist as to the applicability of *Fraser* to the instant factual scenario."). Other courts have found the *Bethel* test inapplicable to off-campus speech. *See, e.g.*, J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 930–32 (3rd Cir. 2011); T.V. *ex rel.* B.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767, 779 (N.D. Ind. 2011).

[297] *J.S.*, 807 A.2d at 865–68; *accord J.S. ex rel. Snyder*, 650 F.3d at 933 ("Neither the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school. We follow the logic and letter of these cases . . . An opposite holding would significantly broaden school districts' authority over student speech and would vest school officials with dangerously overbroad censorship discretion.").

boundaries as to when courts should apply school speech precedents."[298]

Sometimes, courts chose to convert off-campus speech into on-campus speech by virtue of the fact that the speech is aimed at persons at the school.[299] In such a case, the United States Supreme Court's student-speech precedents would be applicable to the off-campus speech as with any on-campus speech.[300] The conversion of off-campus speech into on-campus speech is employed when courts want to avoid resolving the difficult question of whether the Supreme Court's student-speech precedents should be applied to off-campus.

When off-campus speech is not converted to on-campus speech, the material and substantial disruption of the school, caused by off-campus speech, can create a nexus with the school, allowing school officials to censor the off-campus speech.[301] This was evident in *O.Z. v. Board of Trustees of Long Beach Unified School District*[302] where a student created, and posted on YouTube, a slideshow dramatizing her teacher's murder. The slides depicted the teacher in a costume with red text describing the graphic scene.[303] On one slide that showed a butcher knife targeting the teacher, the student wrote "Jelly Donut's knife: haha fat bastard. here i come!"[304] The knife was placed on the slain image of the teacher with the words "hehehe. i'm a shank yooooooooo!"[305] The

[298] *T.V.* ex rel. *B.V.*, 807 F. Supp. 2d at 781 (internal quotation marks omitted) (citing Frederick v. Morse, 551 U.S. 393, 401 (2007); Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 n. 22 (5th Cir. 2004)).

[299] Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 573 (4th Cir. 2011).

[300] *Id.*

[301] S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 776–77 (8th Cir. 2012); O.Z. v. Bd. of Trs. of Long Beach Unified Sch. Dist., 2008 WL 4396895 at *4 (C.D. Cal. 2008); Mahaffey *ex rel.* Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 784 (E.D. Mich. 2002); *T.V.* ex rel. *B.V.*, 807 F. Supp. 2d at 788.

[302] *O.Z.*, 2008 WL 4396895 at *1.

[303] *Id.*

[304] *Id.*

[305] *Id.*

slideshow ended with the phrase "your [sic] dead, BITCH!:D".[306] The teacher found the slideshow on YouTube, after googling her name, and reported it to her principal.[307] She found the video so disturbing that she could not sleep for days and became sick.[308] The principal suspended the student and transferred her to another school.[309] The student filed suit against the school district claiming an infringement of her First Amendment right to free speech.[310]

The court ruled that the material and substantial disruption test governed since the case involved threatening speech that could be reasonably forecasted to substantially disrupt the school.[311] This reasonable forecast, as well as the health impact on the teacher, provided nexus to the school.[312] Accordingly, the court concluded that, even though the student "created the slide show off-campus, it created a foreseeable risk of disruption within the school," justifying censorship of the speech.[313]

Legal scholar Leora Harpaz keenly observed the importance of the nexus requirement in relation to virtual off-campus speech:

> This situation has not arisen in any of the Supreme Court cases reviewing public school student discipline in the face of First Amendment challenges. In fact, the clear inference to be drawn from the Court's cases is that it is assuming the school's authority over the speech of its students ends as the student leaves the schoolhouse. To overcome this inference, schools attempt to link the off-campus speech to some on-campus event; either the speech reaches the campus

[306] *Id.*
[307] *Id.*
[308] *Id.*
[309] *Id.* at 1–2.
[310] *Id.* at 2.
[311] *Id.* at 2–3.
[312] *Id.* at 3–4.
[313] *Id.* at 4, 6. *Accord* Evans v. Bayer, 684 F. Supp. 2d 1365, 1370 (S.D. Fla. 2010) ("Student off-campus speech, though generally protected, could be subject to analysis under the *Tinker* standard as well if the speech raises on-campus concerns."); *see also* Kowalski v. Berkeley Cty. Sch., 652 F.3d 565, 574 (4th Cir. 2011). ("At bottom, we conclude that the school was authorized to discipline Kowalski because her speech interfered with the work and discipline of the school.").

through some means or the off-campus speech has some effect on-campus.[314]

In sum, the above discussions show that the nexus of off-campus speech to the school is critical in determining whether school officials can censor off-campus virtual speech.

D. *Virtual Speech Not Using School Resources and Time*

When determining whether school officials can censor off-campus student speech, courts sometimes examine whether the student used school resources or time in creating the speech. This played out, for instance, in *Coy ex rel. Coy v. Board of Education of North Canton City Schools*.[315] In this case, a student used his personal computer to create a website after school hours in his home.[316] The student used no school resource or time in creating the website.[317] The website had a section called "losers" that included the pictures of, and insults targeting, three boys at the student's school.[318] Another section of the website included vulgarity and a student displaying the "finger" gesture.[319]

Earlier in the school year, the student had signed the school district's acceptable use policy that prohibited students from accessing websites with offensive language on school computers.[320] A teacher expressed concern to the principal that the student might be violating the policy after he was observed switching between screens on the school computer.[321] After the district technology specialist searched the computer's history, he determined that the student had violated the policy by accessing the website on school computer.[322] School officials then suspended the student and later

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[314] Harpaz, *supra* note 153, at 142-43.
[315] Coy *ex rel.* Coy v. Bd. of Educ. of N. Canton City Sch., 205 F. Supp. 2d 791 (N.D. Ohio 2002).
[316] *Id.* at 795.
[317] *Id.*
[318] In the case of one boy, the insult claimed that the boy was "sexually aroused by his mother." *Id.*
[319] *Id.*
[320] *Id.*
[321] *Id.* at 795–96.
[322] *Id.* at 796.

expelled him for eighty days for creating the website (as opposed to the on-campus access of the website).[323] The student filed a First Amendment claim against the school district.[324]

The court chose to apply the material and substantial disruption test to the off-campus speech.[325] According to the court, the fact that the student only "occasionally accessed his website in a manner designed to draw as little attention as possible to what he was viewing" made the case akin to *Tinker's* silent and passive speech.[326] Although the student accessed the website on the school computer, the court found it critical that the student did not show the website to any other student.[327] Most important to the court was the fact that the student did not use school resources or time to create the website which he merely surreptitiously accessed at the school.[328]

Even though the student used vulgar language on the website, the court opted not to apply the *Bethel* test because of the contextual difference between the *Bethel* case and the case sub judice: "*Fraser* involved graphic and explicit sexual speech to a group of 600 students, not a student accessing a website he had created."[329] The *Hazelwood* test was inapplicable because the speech was not school-sponsored speech as evident in the fact that the student created the speech entirely on his own time with his

[323] *Id. See id.* at 797 ("Earlier, the defendants explained their discipline as resulting from the creation of the website, not the accessing of the website from school."). We add that the school later claimed that the discipline was for accessing the site, though the court found evidence that the discipline was likely for the content.

[324] *Id.* at 797.

[325] *Id.* at 800.

[326] *Id.* ("*Tinker's* holding that it is only appropriate to regulate 'silent, passive expression of opinion' when the speech would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school' is the proper standard for the Court to analyze the plaintiffs' first claim.").

[327] *Id.* at 799.

[328] *Id.* ("Most important, Coy simply accessed his own website, a website he created on his own time and with his own equipment.").

[329] *Id.*

own resources and words.[330] Thus, when virtual speech is not created using school resources or time, the *Hazelwood* test would be inapplicable. Further, when the virtual speech involves accessing a student's own personal website, created without use of school resources or time, it appears that *Bethel* would be inapplicable.

E. *Parodies*

Students sometimes create virtual parodies that could present First Amendment challenges for school officials. In order for speech to be deemed a parody for purposes of the First Amendment, it must be shown that no one would reasonably believe that the speech is describing actual facts.[331] There must also be clear exaggeration in the speech to effect humor.[332] Speech that satisfies these requirements is protected under the First Amendment.[333]

As in *Barnett ex rel. Barnett v. Tipton County Board of Education*, students at times claim that their speech constitutes a parody in order to avoid school discipline.[334] In *Barnett ex rel. Barnett,* students created fake MySpace profiles of the high school coach and the assistant principal.[335] The profile of the assistant principal included his biography and photograph copied from the district website.[336] It also included sexual comments directed at female students, leading a parent and reporter who discovered the site to think that the assistant principal had been inappropriate with students.[337] The parent and the reporter notified school officials.[338]

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[330] *Id.* at 800.

[331] Barnett *ex rel.* Barnett v. Tipton Cty. Bd. of Educ., 601 F. Supp. 2d 980, 984 (W.D. Tenn. 2009) (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988)).

[332] *Barnett* ex rel. *Barnett*, 601 F. Supp. 2d at 982.

[333] *Id.*

[334] *Id.*

[335] *Id.* at 982.

[336] *Id.*

[337] *Id.* at 983.

[338] *Id*.

The three students involved were given in-school suspensions.[339] One of them also received a two-day suspension from school and was sent to an alternative school for the rest of the school year.[340] The students filed suit claiming that school officials violated their First Amendment rights by disciplining them for their virtual parodies.[341] The court dismissed their claim because the profiles were not clearly exaggerated.[342] Further, visitors to the site, such as the reporter as well as the parent, reasonably believed the profile described actual facts.[343] Besides, the MySpace profile used the actual profile and biography from the district website, further suggesting an authenticity to the profile.[344] Additionally, there was no humor to the profile.[345] Consequently, students seeking parody protection for virtual speech under the First Amendment need to present strong evidence clearly showing that the speech is indisputably humorous and fictitious.[346]

VII. ASSURING A COMMODIOUS VIRTUAL CAMPUS

Given that virtual students can complete their work at any time of the day and on any day, it is difficult to delineate when students are off-campus versus on-campus. This is amplified by the integration of competency-based education ("CBE") into virtual education. CBE is an educational "approach [that] allows students to advance based on their ability to master a skill or competency at their own pace regardless of environment."[347] Virtual students may be offline and yet be working on school assignments at home. Such is the case with Connections Academy where elementary students work on the computer for approximately ten percent of schooling

[339] *Id.*
[340] *Id.*
[341] *Id.* at 983–84.
[342] *Id.* at 984.
[343] *Id.*
[344] *Id.*
[345] *Id.*
[346] *Id.*
[347] Educause Library: Competency-Based Education (CBE), EDUCAUSE, *at* http://www.educause.edu/library/competency-based-education-cbe (last visited Oct. 9, 2015).

time, middle school students for about thirty percent and high schoolers for fifty percent.[348]

It is unclear whether schoolwork completed during the traditional school hours of the weekday should constitute on-campus work just as it would in a brick and mortar school or whether the work should be treated as homework that brick and mortar school students complete at home after their school hours; with the difference being that, for virtual students, those "afterschool" hours could occur at any time of the day, once the student is not actively engaged in instruction and learning on the school's learning management system or other platform. While the United States Supreme Court has stated that "[t]he principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities,"[349] virtual schools do not necessarily have prescribed hours except for synchronous sessions. Therein lies the challenge in deciphering the scope of a school's censorship authority under the First Amendment. This is even more evident under the independent instructional model where students have very little contact with teachers and complete the lion's share of their work in offline settings.[350]

Historical practice dictates that students in brick and mortar schools working offline, at home after school on homework, are generally beyond the purview of the school since they are working exclusively within the privacy of their homes. Unlike those students, however, virtual schools generally reside inside the virtual student's home. All the student needs to do to engage is to log on to the learning management system to connect with curriculum content and, if synchronous, with an instructor.[351] Certainly, when the student is engaged with the learning management system, the student is on the virtual campus.

[348] Vanourek & Evergreen Education Group, *supra* note 3, at 7–8.

[349] Tinker v. Des Moines Independent School District, 393 U.S. 503, 512 (1969).

[350] See *supra* Part III for a description of this model. *See generally* Ahn, *supra* note 19; Huerta et al., *supra* note 12 (discussing instructional models).

[351] *See supra* Part III for a description of synchronous delivery.

Similarly, when the student is on any other online platform or webinar for the virtual school, or using its video or audio system, the student is on the virtual campus. To avoid any confusion about the boundaries of the school, the school's acceptable use policy ("AUP") should explicitly define the scope of the virtual campus. Further, in order to enlarge the school's censorship orbit in such a way that a reviewing court might at least find an implicit virtual campus, the AUP should also distinctly state that communications on the learning management system are subject to monitoring and censorship. Parents and students should be required to affirm acknowledgement and consent to the policy with their signatures. Virtual schools have an interest in the judiciary finding a broad virtual campus and expansive classrooms, especially if courts are reluctant to recognize broad school authority over off-campus speech. After all, the Supreme Court has ruled that school officials have censorship authority on campus; and in the classroom, school officials have leeway to determine the manner of speech that is appropriate.[352]

During the hours of virtual campus instructional and learning sessions, students might engage in electronic utterances on sites or platforms besides the school's platforms or sites. The question arises whether such electronic utterances outside of the school's platform constitute off-campus or on-campus speech. If the school provides the computer and/or Internet access for the student's virtual schooling, then, arguably, the entirety of the student's communication on the computer or Internet access is on-campus speech. This would encompass the electronic utterances outside of the school's platform occurring on the school-provided computer and/or Internet access. To ensure that a court supports this reasoning, the AUP needs to be very clear. The policy should explicitly state that all communications on the computer and Internet access (even those on non-school platforms) are subject to the school's purview and censorship with no right to privacy for students on the school-provided technology.

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[352] Bethel School District No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

Even when the school provides the computer, but not the Internet access, the AUP should clearly state that, irrespective of the source of the Internet access, all content on the school computer is subject to inspection and censorship with no student expectation of privacy. Where the AUP does not have such language, or the student is using his home computer, the scope of students' First Amendment rights becomes less clear. Specifically, when a virtual student makes electronic utterances on his personal computer during synchronous school hours, are those electronic utterances on-campus or off-campus speech?

As mentioned previously in the discussion of *Requa v. Kent School District No. 415*[353] in order to resolve this, the court would try to isolate any on-campus component of the speech from its off-campus component. If the AUP is clear about the scope of the virtual campus, and the computer or the Internet access is provided by the school, the court will likely view the entire speech as on-campus speech. Furthermore, if the student used any element of the school's server, learning management system, platform, or video or audio system for the electronic utterance, then that portion of the utterance would be deemed to be on-campus speech and thus be subject to censorship under one of the Supreme Court's student-speech precedents. If the student used his home computer when the electronic utterance occurred, it might be more challenging to isolate the on-campus component from the off-campus component.

As illustrated above, if the on-campus component cannot be separated from the off-campus component of the utterance, courts will look for a connection between the school and the speech to determine if it is censorable.[354] Such connection would include whether any component of the off-campus speech was brought to

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[353] 492 F. Supp. 2d 1272, 1277–80 (W.D. Wash. 2007); *see also supra* Part VI.A (discussing the judicial distinction of off-campus and on-campus speech).

[354] D.J.M. v. Hannibal Pub. Sch. Dist. # 60, 647 F.3d 754, 766–67 (8th Cir. 2011). *See supra* Part VI.C "Location As Context And The Nexus Requirement for Off-Campus Virtual Speech" (discussing the judicial search for connection between off-campus speech and the school's campus). *See also supra* Part VI.B "Off-Campus Virtual Speech Brought On Campus" (discussing the significance of off-campus speech brought on campus).

the virtual campus or was reasonably foreseeable to get to the attention of school officials.[355] If so, most courts apply the material and substantial disruption test, irrespective of whether the speech originated off-campus or on-campus.[356]

If the speech is reasonably foreseeable to cause a material and substantial disruption within the virtual school, a nexus is created between the speech and the virtual campus which brings the speech within the ambit of the Supreme Court's student-speech precedents.[357] A nexus is also created when the student shares the speech with his virtual schoolmates or when school officials access the speech on campus.[358] Moreover, a nexus would be found if the speech was directed at persons connected to the virtual school.[359] Indeed, in such a case, the court might simply convert the off-campus speech into on-campus speech, making censorship under the Supreme Court's student-speech precedents more accessible and accordant.[360]

These nexus rules similarly apply when the virtual student communicates outside school hours without using any school resources.[361] In that situation, of the four student-speech tests, only the material and substantial disruption test would be applicable.[362]

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[355] Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist., 494 F.3d 34, 39 (2d Cir. 2007)

[356] J.*C. ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1103 (C.D. Cal. 2010).

[357] Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008).

[358] J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002).

[359] *Id.* ("[W]here speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.").

[360] Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573 (4th Cir. 2011).

[361] *See* Coy *ex rel.* Coy v. Bd. of Educ. of N. Canton City Sch., 205 F. Supp. 2d 791, 795–97 (N.D. Ohio 2002); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177–80 (E.D. Mo. 1998).

[362] *Coy* ex rel. *Coy*, 205 F. Supp. 2d at 795-79. *See also supra* Part VI.D "Virtual Speech Not Using School Resources and Time." As noted in that section, the *Hazelwood* test would be inapplicable because without school resources or time, the speech would not constitute school-sponsored speech. The *Bethel* test would be inapplicable because of a lack of contextual fit. *See also*

Another consideration in determining the constitutionality of school censorship of student speech is the forum of the speech.

VIII. PUBLIC FORUM ANALYSIS

The First Amendment accords different levels of protection to speech based on the forum in which the speech occurs.[363] In order to determine the level of protection due, courts balance the government entity's "interest in limiting the use of its property to its intended purpose [against] the interest of those wishing to use the property for other purposes."[364] Nevertheless, "[i]n cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum."[365] Based on this balancing test, the Supreme Court has divided forums into four categories: traditional public forums; designated public forums; limited public forums; and non-public forums (closed forums).[366]

Speech in public parks, streets and sidewalks has the highest level of protection because those are "places which by long tradition or by government fiat [that] have been devoted to assembly and debate."[367] According to the United States Supreme

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Coy ex rel. *Coy*, 205 F. Supp. 2d at 799 ("*Fraser* involved graphic and explicit sexual speech to a group of 600 students, not a student accessing a website . . .").

[363] *See* Perry Educ. Ass'n v. Perry Educators' Ass'n, 460 U.S. 37 (1983).

[364] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

[365] *Id.* at 804.

[366] *See Perry Educ. Ass'n*, 460 U.S. at 37; Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 679 n.11 (2011) (discussing the various public forum categories).

[367] *Perry Educ. Ass'n*, 460 U.S. at 45; *see* Hague v. CIO, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."); *see also* Frisby v. Schultz, 487 U.S. 474 (1988) ("No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.").

Court, public parks, streets and sidewalks are "quintessential public forums."[368] In such places, known as traditional public forums, the government's authority to censor speech is "sharply circumscribed."[369] In traditional public forums, content-based censorship is prohibited unless the government shows that it has a compelling reason for the censorship; and that the censorship is narrowly tailored to the compelling reason.[370] Content-neutral censorship[371]—related to time, place, and manner regulations[372]—is permissible in traditional public forums if the government can establish the following: (1) there is a significant government

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[368] *Perry Educ. Ass'n*, 460 U.S. at 45.

[369] *Id.; see also id.* at 55 ("In a [traditional] public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.").

[370] *Id.* at 45; *see also* Carey v. Brown, 447 U.S. 455, 461 (1980). This is the strict scrutiny standard of review. According to the Supreme Court, "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485 (citing City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 808–10 (1984)). *See also* Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (citing United States v. Albertini, 472 U.S. 675, 689 (1985) ("the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. To be sure, this standard does not mean that . . . regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.").

[371] *See* Boos v. Barry, 485 U.S. 312, 320 (1988) (citing Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)) ("'[C]ontent-neutral' speech restrictions [are] those that 'are justified without reference to the content of the regulated speech'").

[372] *See* Cox v. Louisiana, 379 U.S. 536, 558 (1965) (quoting Cox v. New Hampshire, 312 U.S. 569, 576 (1941)) ("It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is exercised with uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination [and with] a systematic, consistent and just order of treatment . . . ." (internal quotations omitted)).

reason for the censorship; (2) the censorship is narrowly tailored to the significant government reason; and (3) even with the censorship, the government has left the speaker with sufficient alternate avenues for the speech.[373] Virtual schools are certainly not traditional public forums since they have not been held in public trust immemorially as forums for indiscriminate public use for speech or assembly.[374]

Virtual schools could fall under one of three forum categories: designated public forums, limited public forums, or non-public forums (closed forums).[375] Non-public forums are government properties that are neither immemorially, or by government designation, forums for public debate and assembly.[376] In non-public forums, the government can reserve the forum for its intended purpose, exclude speech or assembly, and discriminate based on subject matter or speaker identity if the censorship is: (1) reasonable, and (2) not designed to censor speech simply because of the viewpoint expressed.[377] The government can also censor

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[373] *Perry Educ. Ass'n*, 460 U.S. at 45; Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). *See Ward*, 491 U.S. at 802 (describing the alternate-avenue requirement by stating that the government censorship "continues to permit expressive activity . . . and has no effect on the quantity or content of that expression beyond regulating the extent of amplification that the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence for there has been no showing that the remaining avenues of communication are inadequate.").

[374] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267. (1988).

[375] Widmar v. Vincent, 454 U.S. 263, 267–77 (1981). Virtual schools cannot be traditional public forums because they have not been held by long tradition in trust for the public for debate and assembly. *Perry Educ. Ass'n*, 460 U.S. at 45. In fact, the Supreme Court has been very resistant to expanding traditional public forums beyond public parks, streets and sidewalks, declaring that "[t]he Court has rejected the view that traditional publicforumstatus extends beyond its historic confines." Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998).

[376] *See Perry Educ. Ass'n*, 460 U.S. at 46.

[377] Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985) (internal citations omitted) ("Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the

speech in non-public forums using reasonable time, place and manner regulations.[378] According to the Supreme Court, the government has increased censorship powers in non-public forums because the government is entitled to reserve some of its properties for specific purposes, which is similar to the right of private property owners to reserve their properties for certain purposes.[379] Otherwise, the functions of government will be compromised.[380]

A virtual public school is a non-public forum unless the school has intentionally opened up the property, through practice or policy, to the general public or to a part of the public for indiscriminate use.[381] "Publicly owned or operated property does not become a public forum simply because members of the public are permitted to come and go at will."[382] Accordingly, the mere fact that students are allowed to use a virtual school's learning management system, video or audio system, discussion forums, RSS feeds,[383] blogs, podcasts, and wikis at convenient times when

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purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.")*; see also Perry Educ. Ass'n*, 460 U.S. at 46–49 ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.").

[378] *Perry Educ. Ass'n*, 460 U.S. at 46.

[379] *Id.*; United States Postal Serv. v. Council of Greenburgh Civic Ass'ns., 453 U.S. 114, 129–30 (1981).

[380] Adderley v. Florida, 385 U.S. 39, 48 (1966). *See generally* Greer v. Spock, 424 U.S. 828 (1976).

[381] *Hazelwood,* 484 U.S. at 267; Widmar v. Vincent, 454 U.S. 263, 267–69 (1981). *See also Cornelius*, 473 U.S. at 802 ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.").

[382] United States v. Grace, 461 U.S. 171, 177 (1983) (internal quotation marks omitted).

[383] RSS is also referred to as Really Simple Syndication. *See* WHAT IS RSS? RSS EXPLAINED, http://www.whatisrss.com (last visited Oct. 10, 2015) ("RSS

they can log in at will does not convert these forums into public forums. If the school or any of its platforms is a non-public forum, the school can censor speech within the specific forum in question as long as the censorship is viewpoint neutral and reasonable.[384] The school's "decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation."[385]

When a virtual school is opened up for specific topics or specific groups, it becomes a limited public forum.[386] As a limited public forum, a virtual public school is "not required to and does not allow persons to engage in every type of speech."[387] The school, however, does not wield unbridled censorship power as a limited public forum: the First Amendment prohibits the school from viewpoint discrimination and from imposing censorship that is unreasonable when the purpose of the forum is considered.[388]

When a virtual public school is opened up for indiscriminate public use, it becomes a designated public forum.[389] As long as the

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(Rich Site Summary) is a format for delivering regularly changing web content. Many news-related sites, weblogs and other online publishers syndicate their content as an RSS Feed to whoever wants it.").

[384] *Cornelius*, 473 U.S. at 806 (1985).

[385] United States v. Kokinda, 497 U.S. 720, 730 (1990) (internal quotation marks omitted).

[386] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–93 (1993); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983).

[387] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001); *see Perry Educ. Ass'n*, 460 U.S. at 45–46.

[388] *See Cornelius*, 473 U.S. at 806; *see also Good News Club*, 533 U.S. at 106–07.

[389] *See Lamb's Chapel*, 508 U.S. at 392; *see also Perry Educ. Ass'n*, 460 U.S. at 45–46. In order for a court to find school property to be a designated public forum or a limited public forum, the intent of the school to open up the property must be clear as evidenced from policy or practice. *Cornelius*, 473 U.S. at 802–03. *See also* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998) ("A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers.").

property is open to the public for indiscriminate use for speech or assembly, a virtual school that is a designated public forum is governed by the same First Amendment standards as a traditional public forum.[390] In other words, content-based censorship must be justified by a compelling reason and the censorship must be narrowly tailored to serve that reason.[391] Further, as long as the regulations leave open sufficient alternate speech forums, the school may impose content-neutral speech regulations that are narrowly tailored to satisfy a significant interest for the censorship.[392]

A school that is a designated public forum or limited public forum need not indefinitely remain a designated or limited public forum; it can revert back to being a non-public forum if the school closes the forum and returns it to its intended purposes.[393] Further, discrimination within limited public forums, or in designated public forums against content or subject matter that fits the criteria for which the forum was intentionally opened is subject to the strict scrutiny standard of review.[394] Thus, the school must have a compelling interest and narrowly tailor its restriction on speech to achieve the compelling interest.[395]

Even if a virtual school is a limited public forum or a designated public forum, it does not mean that all forums within the school are limited public forums or designated public forums respectively.[396] Indeed, the Supreme Court has ruled that the First Amendment does not obligate schools to provide equivalent access to all parts of the school for communicative purposes.[397]

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[390] *See Perry Educ. Ass'n*, 460 U.S. at 45–46.

[391] *Id.*

[392] *Id.* at 45–46; *see* Widmar v. Vincent, 454 U.S. 263, 269–70 (1981).

[393] *See Perry Educ. Ass'n*, 460 U.S. at 46.

[394] This is the essence of content-based discrimination.

[395] *See, e.g.*, *Ark. Educ. Television Comm'n*, 523 U.S. at 677; *Perry Educ. Ass'n*, 460 U.S. at 49.

[396] *See generally Perry Educ. Ass'n*, 460 U.S. 37.

[397] *Perry Educ. Ass'n*, 460 U.S. at 44; *see also* Grayned v. City of Rockford, 408 U.S. 104, 117–18 (1972) ("But we nowhere suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a

Nevertheless, similar to a virtual school itself, computers and Internet access at virtual schools could be designated public forums, limited public forums or non-public forums, depending on whether the school allows indiscriminate use of the school-provided computers and Internet access, or only permits use limited to specific topics or groups.[398]

Students post comments on school discussion forums, blogs and wikis that could be part of the school's learning management system.[399] Those comments could disagree with or criticize other students, the school, teachers, or administrators, or express views that school officials find unacceptable.[400] Even though those forums could be designated public forums (if the school opens them up to indiscriminate use) or limited public forums (if the school opens them up for use on specific topics or to its group of students), they are generally non-public forums reserved for

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school building or its immediate environs for his unlimited expressive purposes.").

[398] We add the caveat that while the Supreme Court has not denied use of the public forum doctrine in online contexts, it has expressed hesitancy about carte blanche application of the doctrine to the Internet. *See* United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 207 n.3 (2003) (citing Denver Area Ed.. Telcoms. Consortium v. Fed FCC, 518 U.S. 727, 749 (1996)) ("Even if appellees had proffered more persuasive evidence that public libraries intended to create a forum for speech by connecting to the Internet, we would hesitate to import the public forum doctrine . . . wholesale into the context of the Internet . . . . [W]e are wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area."). Nonetheless, the Court has ruled that the public forum doctrine applies to all government property, including metaphysical spaces. *See* Bd. of Regents v. Southworth, 529 U.S. 217, 230 (2000); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995) ("[A] forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."); *Cornelius*, 473 U.S. at 804; *Perry Educ. Ass'n*, 460 U.S. at 44. For examples of the Court applying the public forum doctrine to discussion of metaphysical forums, including the Internet, see generally Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661 (2011); United States v. Am. Library Ass'n, Inc., 539 U.S. 194 (2003); Reno v. ACLU, 521 U.S. 844 (1997).

[399] Jaffee, *supra* note 4, at 228.

[400] *Id.*

educational purposes. As non-public forums, the school can censor speech on the discussion forums, blogs, and wikis if the censorship is reasonable and not viewpoint discriminatory.[401]

Michigan Virtual School is a good example of a school that has tried to establish a non-public forum theme in its AUP. The policy provides in pertinent part:

> *MVS* [Michigan Virtual School] instructional computing resources are intended solely for course related activities specific to the intent of the course the student is enrolled in.
>
> A. Users shall not upload or post any software on *MVS* instructional computing resources, including web development servers, which is not specifically required and approved for course assignments. Non-approved materials will be removed by the *MVU* [Michigan Virtual University] staff without notice.
>
> B. Users shall not post any MP3 files, compressed video or images unless they are a part of the instructional activities in an *MVS* course, nor load any other non-instructional media files to any *MVS* server.[402]

Virginia Virtual School's policy, on the other hand, provides that:

> Communications via Virtual Virginia software and resources should not be considered private. (This includes, but is not limited to, the e-mail, pager, discussion board, blog, and chat tools in the course management system and other Virtual Virginia resources.) Students . . . who have the privilege to use virtual school online resources are expected to . . . [u]se the online resources only for school-related, educational activities.[403]

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[401] *Perry Educ. Ass'n*, 460 U.S. at 46.

[402] Michigan Virtual School, *supra* note 40 ("MVS or MVU are used interchangeably in this agreement.").

[403] Virginia Virtual School, *Student and Parent Handbook: Virtual Virginia*, VA. DEPT. OF EDUC. 16 (2014), http://www.virtualvirginia.org/students/handbook/downloads/student_handbook.pdf (last visited June 21, 2015). Philadelphia School District's AUP clearly shows its system is intended to be a non-public forum: "The district has the right to place restrictions on the use of equipment, resources and material users access or disclose through the district's Internet, computers and network resources. Users are expected to follow School Reform Commission policies and administrative procedures governing conduct and discipline, and law and regulations, in their use of the district's Internet, computers and network resources. . . . *This access has not been established as a public access service or a public forum. . .* ." The School District of

As with both Michigan and Virginia Virtual Schools, any virtual school looking to control student speech should characterize its learning platforms as non-public forums.[404] For evidentiary purposes, on each platform, the school could explicitly disavow any intent to create a limited public forum or designated public forum. The school must also ensure its practices do not provide any basis for a court to find circumstantial or direct evidence that the platform was opened up intentionally to create a limited public forum or designated public forum.

IX. GOVERNMENT SPEECH ANALYSIS

The United States Supreme Court has recognized the right of government entities to speak on various issues, free from competing voices and the restraints of the Free Speech Clause,

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Philadelphia, *supra* note 40. *See also id.* ("Users shall have no expectation of privacy in anything they create, store, send, delete, receive or display on or over the district's Internet, computers or network resources, including personal files or any use of the district's Internet, computers or network resources. The district reserves the right to monitor, track, and log network access and use . . . .").

[404] Louisiana Virtual School's AUP, for instance, clearly states that "Students will work within the confines of the infrastructure of Blackboard.com for messaging, bulletin/discussion board use, and virtual chat (unless directed elsewhere by the instructor)." Louisiana Virtual School, *supra* note 40, at 2. The policy further provides that "Posting personal messages outside of classroom content shall be forbidden." *Id. See also* Florida Virtual School, *supra* note 41, at 32 (restricting emails to course-related content). Virginia Virtual School seeks to maintain the reins on its forums by including the following in its policy: "As cited in Virtual Virginia's Acceptable Use Policy, students should not consider communication within Virtual Virginia's course management system as private. Communication through the pager, e-mail, discussion board, chat, blog, and other communication tools provided by Virtual Virginia is subject to monitoring by Virtual Virginia staff without other prior notice. Inappropriate use of any Virtual Virginia communication tool, such as using these tools for profanity or cyberbullying, is grounds for discipline including but not necessarily limited to the following: parental contact; local school contact; application of local student code of conduct consequences; administrative removal from Virtual Virginia courses; or contact of law enforcement agencies in instances where violation of local, state, or federal laws is suspected." Virginia Virtual School, *supra* note 403.

pursuant to the government-speech doctrine.[405] This "recently minted" doctrine[406] has particular application to virtual schools because it empowers schools to censor speech without First Amendment consequence.[407] Government speech can best be described as follows:

> Government speech is a broad category that includes any government action that communicates or subsidizes the communication of a particular message. It encompasses activities from appropriating taxpayer money to campaign for or against specific legislative measures to deciding who gets access to public fora such as theatres and broadcasting frequencies to offering a program of subsidies for expression—for example, funding for the arts—that makes content-based decisions among qualified applicants. The government can be said to 'speak' when it pays for speech directly, when it provides access to public property for the communication of a given message, or when an elected official voices her opinion on a given issue.[408]

The Supreme Court articulated the government-speech doctrine in *Rust v. Sullivan*.[409] In *Rust*, petitioners claimed that federal regulations prohibiting Title X fund recipients from conducting abortion-related activities violated the First Amendment because the regulations barred those recipients from discussing abortion as an option for family planning while requiring them to offer information about carrying a pregnancy to term.[410] The Supreme Court rejected the petitioners' argument, reasoning that the

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[405] Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

[406] Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 481 (2009) (Stevens, J., concurring).

[407] The Supreme Court has recognized applicability of the government-speech doctrine in not only physical spaces but also metaphysical spaces. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995). Accordingly, the doctrine is applicable to online platforms.

[408] Charlotte H. Taylor, *Hate Speech and Government Speech*, 12 U. PA. J. CONST. L. 1115, 1142–43 (2010).

[409] *See* Rust v. Sullivan, 500 U.S. 173 (1991). *See also Velazquez*, 531 U.S. at 541 ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.").

[410] *See Rust*, 500 U.S. at 177–78, 192.

government has the right to espouse and even promote certain values.[411] The Court explained that:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. A legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.[412]

Thus, if the government chooses to support democratic values, it is not required to support competing ideologies like communism and fascism.[413] In the same vein, if virtual schools, on their learning management systems, webinars, video or audio conferences, or other platforms choose to espouse values more suitable to education, they can opt to disallow competing values on those platforms. Indeed, in *Rosenberger v. Rector*, the Supreme Court empowered government entities to make content-based decisions when government speech is involved.[414] Specifically, in addressing whether the University of Virginia had made unconstitutional content-based choices, the Court stated:

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[411] *See id.* at 192–93 ("[T]he government may make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds." (internal quotation marks omitted) (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

[412] *Id.* at 193 (internal quotation marks and brackets omitted).

[413] *Id.* at 194; *see also* ACLU v. Bredesen, 441 F.3d 370, 379 (6th Cir. 2006) ("Government can certainly speak out on public issues supported by a broad consensus, even though individuals have a First Amendment right not to express agreement. For instance, government can distribute pins that say 'Register and Vote,' issue postage stamps during World War II that say 'Win the War,' and sell license plates that say 'Spay or Neuter your Pets.' Citizens clearly have the First Amendment right to oppose such widely-accepted views, but that right cannot conceivably require the government to distribute 'Don't Vote' pins, to issue postage stamps in 1942 that say 'Stop the War,' or to sell license plates that say 'Spaying or Neutering your Pet is Cruel.'" (footnotes omitted)).

[414] *See generally* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (discussing government entities' authority to engage in content-based censorship if the speech is government speech).

> [W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.[415]

This same rule would apply to virtual schools, authorizing them to make content-based decisions on their platforms pursuant to the government-speech doctrine.

The United States Supreme Court further defined/elucidated nuances of government-speech in *Johanns v. Livestock Marketing Ass'n*.[416] The Court ruled speech must be "effectively controlled" by the government entity for it to be deemed government speech.[417] Virtual schools would be wise to be intentional in documenting their efforts showing that they satisfy the following five factors that prove that speech is "effectively controlled" by them:[418] (1) the school created the speech "from beginning to end"; (2) the school "set out the overarching message" of the speech; (3) any non-government entity (including students) authorized by the school to contribute some details to the speech remained accountable to the school for the speech; (4) the school had "final approval authority over every word used"; and (5) the school reviewed the speech's wording and substance.[419] If the school "sets the overall message to

[415] *Id.* at 833.

[416] 544 U.S. 550 (2005).

[417] *Id.* at 560.

[418] *See id.* at 560–61 (discussing these five factors identified by the Supreme Court as essential to proving that a government entity is in control of speech). These are referred to as the *Johanns* factors.

[419] *Id.* A sixth pertinent factor considers whether the government entity attended and participated in open meetings for the development of the proposal or program that contained the speech. Prior to *Johanns*, several federal courts of appeals applied a non-exclusive four-factor list to determine if speech was private or government speech: the central purpose of the program in which the speech occurs, the degree of editorial control exercised by government or private entities over speech content, the identity of the literal speaker, and whether the government or private entity bears the ultimate responsibility for the content of the speech. *See, e.g.,* Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610, 618–19 (4th Cir. 2002) (discussing the

be communicated and approves every word that is disseminated, it is not precluded from relying on the government speech doctrine merely because it solicits assistance from nongovernmental sources [including students] in developing specific messages."[420]

More recently, in *Pleasant Grove City, Utah v. Summum*,[421] the Court ruled that private speech, not government speech, is subject to the Free Speech Clause.[422] Therefore, when speech is government speech, the government entity has wide latitude to decide what it says and to "say what it wishes."[423] In this light, a virtual school has the power to "select the views that it wants to express" from competing views.[424] The Court explained that, in order to function effectively, the "government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question."[425]

In consonance with the Supreme Court, "in freedom of speech cases, lower courts have accepted the *Rust*-inspired government speech doctrine and seem to be aware that when the government has a message to send, such a message need not be viewpoint-neutral, and other messages need not receive governmental support."[426] This was evident in *Downs v. Los Angeles Unified*

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four factors); Knights of the Ku Klux Klan v. Curators of Univ. of Mo., 203 F.3d 1085, 1093–94 (8th Cir. 2000). It is unclear if these factors will and should continue to play as key a role as they did prior to *Johanns.*

[420] *Johanns*, 544 U.S. at 562.

[421] 555 U.S. 460 (2009).

[422] *See id.* at 467.

[423] *Id.* (internal quotation marks omitted) (quoting *Rosenberger,* 515 U.S. at 833).

[424] *Summum*, 555 U.S. at 467 (citing *Rust*, 500 U.S. at 194; Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring)). *See also Summum*, 555 U.S. at 468 ("[I]t is the very business of government to favor and disfavor points of view." (internal quotation marks omitted)).

[425] *Summum*, 555 U.S. at 468 (quoting *Johanns*, 544 U.S. at 574 (Souter, J., dissenting)).

[426] Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 379 (2009).

School Dist.[427] In *Downs*, a public school teacher posted counter-speech in response to his/her district's speech on school bulletin boards, celebrating Gay and Lesbian Awareness month.[428] The court of appeals ruled that the bulletin boards represented "an example of the government opening up its own mouth"; therefore, constituting government speech.[429] Hence, the district did not have to share its podium with counter-speech.[430] Furthermore, the court ruled "[s]imply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist."[431] The court highlighted a key distinction between public forum (which involves government regulation of private speech) and government speech (which is government regulation of government speech):

> [W]hen a public high school is the speaker, its control of its own speech is not subject to the constraints of constitutional safeguards and forum analysis, but instead is measured by practical considerations applicable to any individual's choice of how to convey oneself: among other things, content, timing, and purpose.[432]

Discussion forums, blogs, wikis, and other message forums for virtual schools are similar to the bulletin board in the *Downs* case. Although the school solicits the views of students in promoting its broader educational message, in those forums, the school should be able to edit or entirely censor student speech that is counter to the school's message. In order for speech in forums made available to students to constitute government speech, however, the school must show that the speech satisfies the five factors above from the *Johanns* case.[433]

As the Supreme Court has emphasized, when the government platform conveys a message over which the government has editorial control and final authority, even if private citizens

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[427] Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000).
[428] *Id.* at 1005–08.
[429] *Id.* at 1012–13.
[430] *Id.*
[431] *Id.* at 1013.
[432] *Id*. at 1011–13.
[433] *Johanns*, 544 U.S. at 562.

participate in the speech, the message is still government speech.[434] Moreover, in the case of government speech, virtual schools have the right to exclude "unwelcomed speech in the time, place, and space of government speech activity."[435] Given the significant control that the government-speech doctrine affords over student speech, shrewd virtual schools would set up their various platforms in such a way that speech within those platforms qualify as government speech. Virtual schools should include clear language on their platforms stating that all communication thereon constitutes government speech. For evidentiary purposes, the school could explicitly document that, in practice and intent, it meets the requirements of the five *Johanns* factors; and that it has clearly and indubitably communicated to students that the school retains absolute editorial control over all content on the school's platforms. For schools seeking more authority over student communication, it would be foolish not to document compliance with the *Johanns* factors in a calculated effort to capitalize on the government-speech doctrine. After all, the government-speech doctrine makes possible "what had previously been thought forbidden: the burdening, even if not silencing, of private viewpoints *because* the government disagrees with them."[436]

X. CONTENT-BASED DISCRIMINATION AND ACCEPTABLE USE POLICIES: NETIQUETTE RESTRICTIONS AND OFFENSIVE STATEMENTS

Acceptable Use Policies ("AUPs") regulate student access to digital content in order to protect students from online vices and to

[434] *Knights of the Ku Klux Klan*, 203 F.3d at 1094. For more on the government-speech doctrine, see Joseph O. Oluwole, *Revisiting Parents Involved v. Seattle School District: Race Consciousness and the Government-Speech Doctrine*, 43 GOLDEN GATE U. L. REV. 393 (2013); Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695 (2011); Randall P. Bezanson, *The Manner of Government Speech*, 87 DENV. U. L. REV. 809 (2010); Lyrissa B. Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975 (2011).

[435] *Bezanson*, *supra* note 434, at 809.

[436] *Blocher*, *supra* note 434, at 695.

preserve the learning environment.[437] The following explication of the design behind AUPs (netiquette codes)[438] fastidiously reveals troubling concerns about student access to technology, especially in an educational environment:

> A critical concern is: How can we best assure that students will not have access to pornography, hate sites, or other pernicious Internet content or experience sexual or physical harassment. There is also concern about students wasting instructional time in social media sites, engaging in cyberbullying, harassing of other students, or cheating on tests.[439]

In addition, the Federal Communications Commission ("FCC") has identified five elements that must be addressed in AUPs:

> (a) Access by minors to inappropriate matter on the Internet;
>
> (b) The safety and security of minors when using electronic mail, chat rooms and other forms of direct electronic communications;
>
> (c) Unauthorized access, including so-called "hacking," and other unlawful activities by minors online;
>
> (d) Unauthorized disclosure, use, and dissemination of personal information regarding minors; and
>
> (e) Measures restricting minors' access to materials harmful to them.[440]

The above concerns, as well as the FCC mandates, have fueled schools' design and use of AUPs to engage in content-based discrimination in an effort to ensure student safety and academic success.[441]

AUPs span a broad range in their approach to censoring student speech:

> In public schools, this approach often presents itself in policies that prohibit broad categories of behavior or access: banning cell phones, blocking social networking sites, filtering certain topics or words. Taken to an extreme, these policies can lead to results ranging from

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[437] *See* section IV titled "Enforcement of Student Behavior."

[438] Netiquette refers to network etiquette. It is also a reference to the rules of appropriate speech dictated in AUPs. Michigan Virtual School, *supra* note 40.

[439] Bosco*, supra* note 39.

[440] *Id.* at 3 (citing Children's Internet Protection Act, § 1701, 114 Stat. 2763A-335, *available at* https://transition.fcc.gov/cgb/consumerfacts/cipa.pdf (last visited June 16, 2015).

[441] Bosco*, supra* note 39 at 3.

> humorous (one student was unable to do a report on his Congressman, *Dick* Armey, due to a keyword filter) to truly restrictive (a new policy in one Massachusetts district limits teachers and students to using only online services that have been approved by, and signed contracts with, the district).[442]

AUPs that single out a specific kind of speech (e.g. race, gender, or sexual orientation discrimination) for protection might run into content-based discrimination challenges.[443] AUPs also sometimes prohibit racial slurs and racially-discriminatory comments.[444] Michigan Virtual School's AUP, for instance, prohibits "bigotry, racism, [and] hatred."[445] Virginia Virtual School's AUP, on the other hand, states in pertinent part: "Do not use expressions of bigotry, racism, and/or hate."[446] Agora Cyber Charter School's AUP provides that students should not "use derogatory comments, including those regarding race, age, gender, sexual orientation, religion, ability, political persuasion, body type, physical or mental health, or access issues."[447] Such provisions are designed to censor hate speech – speech targeting the victim

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[442] Shelley B. Chamberlain et al., MASS. EDUC. TECH. ADVISORY COUNCIL, RESPONSIBLE TECHNOLOGY USE IN PUBLIC SCHOOLS 1–2 (2009), *available at* http://www.doe.mass.edu/boe/sac/edtech/safety.pdf (last visited June 21, 2015).

[443] *See* Geng, *supra* note 1, at 162 ("[I]f a regulation distinguishes on its face between 'favored speech [and] disfavored speech on the basis of the ideas or views' being expressed, then it is content-based." (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994)).

[444] Austin Independent School District, AUSTIN INDEPENDENT SCHOOL DISTRICT ACCEPTABLE USE GUIDELINES 1 (2013), https://www.austinisd.org/sites/default/files/dept/technology/docs/AU_Guidelines_20131206.pdf (last visited June 21, 2015) (prohibiting "inappropriate language such as swear words, vulgarity, ethnic or racial slurs, and any other inflammatory language.")

[445] Michigan Virtual School, *supra* note 40.

[446] Virginia Department of Education, *supra* note 42 at 16; *see* The School District of Philadelphia, supra note 40, at 7 ("Users shall not use the district's Internet, computers or network resources to access, send, receive, transfer, view, share, or download material that is profane, obscene, pornographic, advocates illegal acts, or that advocates violence or discrimination towards other people (hate literature)."); *see also id.* at 8 ("Users shall not use obscene, profane, lewd, vulgar, rude, inflammatory, hateful, threatening or disrespectful language. 13. Users shall not engage in personal attacks, including prejudicial or discriminatory attacks.").

[447] Agora Cyber Charter School, *supra* note 50 at 43.

simply because he actually belongs to, or is perceived to belong to, a particular class.[448] "Thus, epithets such as 'nigger,' 'wetback,' 'honkey,' 'kike,' 'gook,' 'spic,' 'faggot,' 'wop,' or 'mick,' constitute hate speech when addressed to persons perceived to be members of the disfavored class."[449]

According to the Consortium for School Networking, many school districts are dropping their traditional AUP approaches, replacing them with "responsible use policies" (RUPs).[450] RUPs are different from traditional AUPs in that they view and deal with "the student as a person responsible for ethical and healthy use of the Internet and mobile devices."[451] Additionally, AUPs are "policies geared towards avoidance rather than education" whereas RUPs are geared toward education rather than avoidance.[452] In essence, while AUPs focus on what students should not do, RUPs present what students should do—an educational approach.[453] RUPs rely on students to make responsible choices among competing content and to learn from consequences of their choices

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[448] Michael S. Degan, "*Adding the First Amendment to the Fire": Cross Burning and Hate Crime Laws*, 26 CREIGHTON L. REV. 1109, 1112 (1993).

[449] *Id.* at 1112–13. *See id.* at 1113 ("Whereas hate crimes involve the bias-related selection of a victim in the commission of an otherwise criminal act, hate speech refers only to the biased content of certain speech. Theoretically, hate crimes do not necessarily contain an element of speech because an individual could remain silent during the commission of a hate crime, but the surrounding circumstances nevertheless may reveal a biased motive . . . However, a determination that an assailant has committed a hate crime generally requires the presence of spoken words reflecting the assailant's biased motive.").

[450] *See generally* CONSORTIUM FOR SCHOOL NETWORKING, MAKING PROGRESS: RETHINKING STATE AND SCHOOL DISTRICT POLICIES CONCERNING MOBILE TECHNOLOGIES AND SOCIAL MEDIA 2 (2012), http://www.splc.org/pdf/making_progress_2012.pdf (last visited June 16, 2015) (discussing the move toward responsible use policies). *See also* Chamberlain et al., *supra* note 442, at 1.

[451] CONSORTIUM FOR SCHOOL NETWORKING, *supra* note 450, at 6.

[452] Chamberlain et al., *supra* note 442, at 1.

[453] CONSORTIUM FOR SCHOOL NETWORKING, *supra* note 450, at 6 (2012); *see also* Chamberlain et al., *supra* note 442, at 3 ("Many acceptable use policies for students read like a list of *unacceptable* uses . . .").

through such measures as school discipline and teachable moments.[454]

Even then, whenever a school disciplines a student for speech choices, pursuant to an AUP or an RUP, based on the content of the speech, a question arises as to whether the school is acting within constitutional bounds; particularly because the First Amendment does not favor content-based censorship.[455] In fact, the analysis of such AUPs or RUPs must begin with the fact that content-based restrictions on speech are "presumptively invalid."[456] The censoring government entity can overcome the presumption by showing that the content of the speech has "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[457] Speech that the Supreme Court has found to satisfy this standard, and therefore qualified per se for content-based restrictions, are fighting words,[458] obscenity,[459] defamation,[460] child pornography,[461] and true threats.[462] A school can censor these categories of speech "because of their constitutionally proscribable

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[454] Bosco, *supra* note 39 at 2.

[455] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642–43 (1994) ("[W]hile a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases. Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." (internal citations omitted)).

[456] R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992); Daniel Aisaka & Rachel Clune, *Hate Crime Regulation And Challenges*, 14 GEO. J. GENDER & L. 469, 479 (2013).

[457] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[458] *Id. See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2355 (1989) ("[R]acist speech is so common that it is seen as part of the ordinary jostling and conflict people are expected to tolerate, rather than as fighting words.").

[459] Roth v. United States, 354 U.S. 476 (1957); *See also* Joseph O. Oluwole, Preston C. Green, & Melissa Stackpole, *SextEd: Obscenity Versus Free Speech In Our Schools*, 25-49 (2013); Miller v. California, 413 U.S. 15 (1973).

[460] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[461] New York v. Ferber, 458 U.S. 747 (1982); Oluwole et al., *supra* note 459, at 51–66 (2013).

[462] Watts v. United States, 394 U.S. 705 (1969).

content" but it cannot censor their non-proscribable content because it favors or disfavors the content.[463]

The United States Supreme Court addressed the constitutionality of content-based hate speech restrictions in *R.A.V. v. City of St. Paul, Minnesota*.[464] In that case, the city of St. Paul, Minnesota alleged that petitioner and other teenagers burned a cross in an African American family's yard.[465] The city charged the petitioner with a hate crime under an ordinance that regulated speech on the basis of its content:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[466]

This provision is very similar to those of the AUPs above that single out speech for regulation on such basis as race. The petitioner challenged the ordinance as unconstitutional content-based discrimination under the First Amendment.[467] The Supreme Court agreed, holding that the ordinance unconstitutionally barred "otherwise permitted speech solely on the basis of the subjects the speech addresses."[468] The Court ruled that government entities cannot regulate speech based on hostility or favor toward the speech.[469]

The Court found unacceptable that, under the ordinance, "[d]isplays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics."[470] Therefore, "[t]hose who wish to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union

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[463] R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 383–84, 386–87 (1992).
[464] 505 U.S. 377 (1992).
[465] *Id.* at 379.
[466] *Id.* at 380.
[467] *Id.*
[468] *Id.*
[469] *Id.* at 386.
[470] *R.A.V.*, 505 U.S. at 391.

membership, or homosexuality—are not covered."[471] Unlike the other virtual schools' provisions referenced above, Agora Cyber Charter School's provision bars all uses of derogatory comments.[472] Further, it merely uses classes such as race, gender, sexual orientation, *inter alia*, as examples, as evident in its use of the word "including."[473] As a result, Agora's provision is unlike the St. Paul ordinance. Thus, the Court might not find Agora's provision as objectionable as St. Paul's ordinance, which only barred "abusive invective", based on the specified classes.[474]

As part of its content-based analysis, the Court also found St. Paul's ordinance unconstitutional because it promoted viewpoint discrimination.[475] Specifically, the Court objected to the ordinance only prohibiting fighting words that, for instance, invoked race (or any of the other classes) in a negative sense while allowing use in a positive sense:

> In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But 'fighting words' that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing in favor of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.' St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.[476]

The Court explained that while the city should confront fighting words that include "messages of 'bias-motivated' hatred

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[471] *Id.*

[472] Agora Cyber Charter School, *supra* note 50 at 42.

[473] *Id.*

[474] *R.A.V.*, 505 U.S. at 391.

[475] *Id. See* Geng, *supra* note 1, at 163–64 (2014) ("[E]ven in situations where the government makes content-based regulations, those regulations must still be viewpoint-neutral.").

[476] *R.A.V.*, 505 U.S. at 391–92.

and in particular, as applied to this case, messages 'based on virulent notions of racial supremacy' . . . the manner of that confrontation cannot consist of selective limitations upon speech."[477]

Despite the Supreme Court's evident admission that burning of crosses in others' yards is "reprehensible,"[478] the Court made a notable observation; notable because it revealed the Court's distaste for content-based regulation of hate speech even when the speech is despised:

> St. Paul's brief asserts that a general 'fighting words' law would not meet the city's needs because only a content-specific measure can communicate to minority groups that the 'group hatred' aspect of such speech 'is not condoned by the majority.' The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.[479]

This is disfavorable because the Court is in essence encouraging broader censorship of speech than is necessary to achieve effective regulation of hate speech.[480]

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[477] *Id.* at 392.

[478] *Id. See* Matsuda, *supra* note 458, at 2353 (noting the values that have led to protection of even racist expressions are "part of the American structure of government and the American commitment to political and civil rights. The American position may be extreme, but it responds to American circumstances. It recalls the times when our commitment to freedom was tested — the Sedition Act, the McCarthy era, the movement for racial justice, the riots and protests of the Vietnam age. Our commitment to the position has been neither steadfast nor universal. Judges have sometimes failed to understand it, resulting in loose doctrinal ends. The basic principle, however, has survived, and the thrust of the cases and commentary supports first amendment primacy.").

[479] *R.A.V.*, 505 U.S. at 396.

[480] *Id.* at 393–94 (The Court added that the city's content-based regulation of hate speech did not fit any of the exceptions to unconstitutional content-based regulation; and its selective focus on race, gender and religion was problematic:
The content-based discrimination reflected in the St. Paul ordinance comes within neither any of the specific exceptions [obscenity and defamation] to the First Amendment prohibition we discussed earlier nor a more general exception for content discrimination that does not threaten censorship of ideas. It assuredly does not fall within the exception for content discrimination based on the very reasons why the particular class of speech at issue (here, fighting words) is proscribable. As explained earlier, the reason why fighting words are

The Court ruled that a content-based regulation is only permissible if the government entity has a compelling end for the regulation; and the regulation is narrowly tailored to serve a compelling end.[481] The city of St. Paul argued that its regulation was driven by a compelling interest in affording human rights and protection to groups that have historically faced discrimination; and enabling them to live without harassment.[482] The Supreme Court did not dismiss these interests as non-compelling.[483] Instead, the Court stated that "[w]e do not doubt that these interests are compelling, and that the ordinance can be said to promote them."[484] Similarly, schools have reason to censor hate speech since such speech carries real health consequences for students: "physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."[485] It causes such inner pain for the victims that hate

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categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey. St. Paul has not singled out an especially offensive mode of expression—it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid, but St. Paul's comments and concessions in this case elevate the possibility to a certainty) (internal citation omitted).

[481] *Id.* at 395.

[482] *Id.*

[483] *Id.*

[484] *Id.*

[485] Matsuda, *supra* note 458, at 2336. *See id.* at 2340 ("Psychologists and sociologists have done much to document the effects of racist messages on both victims and dominant-group members. Writers of color have given us graphic portrayals of what life is like for victims of racist propaganda . . . From the victim's perspective racist hate messages cause real damage.").

speech has been characterized as a murder of the spirit.[486] Victims end up isolating themselves from others, self-censoring, and even stopping their education.[487] In fact, research reveals that the psychological damage from hate speech can be crushing and unavoidable:[488]

> Research in psychosocial and psycholinguistic analysis of racism suggests a related effect of racist hate propaganda: at some level, no matter how much both victims and well-meaning dominant-group members resist it, racial inferiority is planted in our minds as an idea that may hold some truth. The idea is improbable and abhorrent, but it is there before us, because it is presented repeatedly. 'Those people' are lazy, dirty, sexualized, money-grubbing, dishonest, inscrutable, we are told. We reject the idea, but the next time we sit next to one of 'those people' the dirt message, the sex message, is triggered. We stifle it, reject it as wrong, but it is there, interfering with our perception and interaction with the person next to us. For the victim, similarly, the angry rejection of the message of inferiority is coupled with absorption of the message. When a dominant-group member responds favorably, there is a moment of relief – the victims of hate messages do not always believe in their insides that they deserve decent treatment. This obsequious moment is degrading and dispiriting when the self-aware victim acknowledges it.[489]

A problem could arise for students if the Supreme Court deems these health damages as mere emotional consequences of speech. After all, the Court has ruled that "[t]he emotive impact of speech on its audience" is not a constitutionally-recognized exception to the rule against content-based regulation.[490]

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[486] *Id.* at 2336–37 (citing Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 MIAMI L. REV. 127, 139 (1987)).

[487] Matsuda, *supra* note 458 at 2336–37.

[488] *Id.* at 2237–41.

[489] *Id.* at 2239–40. *See also id.* at 2237–38. ("One subconscious response is to reject one's own identity as a victim-group member. As writers portraying the African-American experience have noted, the price of disassociating from one's own race is often sanity itself. As much as one may try to resist a piece of hate propaganda, the effect on one's self-esteem and sense of personal security is devastating. To be hated, despised, and alone is the ultimate fear of all human beings. However irrational racist speech may be, it hits right at the emotional place where we feel the most pain.").

[490] *R.A.V.*, 505 U.S. at 394.

Even if the Court finds these interests compelling, the challenge lies in whether the content-based regulation is narrowly tailored to serve the compelling interests.[491] Schools would have to ensure that there are no content-neutral alternatives that can readily address the compelling interests.[492] According to the Court, "the danger of censorship presented by a facially content-based statute, requires that weapon be employed only where it is necessary to serve the asserted [compelling] interest. The existence of adequate content-neutral alternatives thus undercut[s] significantly any defense of such a statute."[493]

The Court's disfavor of content-based discrimination might make it inclined to find AUPs that single out specific content for regulation unconstitutional.[494] After all, the Court signaled just that in *R.A.V.*, when it found that, even if the city had compelling interests, its content-based regulation was not narrowly tailored.[495] The Court artfully reasoned that there was at least one content-neutral alternative available:

> An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility—but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.[496]

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[491] *Id.* at 395.
[492] *Id.*
[493] *Id.* (internal quotation marks and citations omitted).
[494] This would especially be so when the student is regarded as off-campus, and thus in citizen status, under the Constitution, similar to all citizens including adults. For citizens, "[w]hat the American position means in the area of race is that expressions of the ideas of racial inferiority or racial hatred are protected. Anyone who wants to say that African Americans and Jews are inferior and deserving of persecution is entitled to. However loathsome this idea may be, it is still political speech. The law becomes strong at its edges." *Matsuda*, *supra* note 458 at 2351 (1989).
[495] *R.A.V.*, 505 U.S. at 395.
[496] *Id.*

Similarly, the Court might artfully and painstakingly search out content-neutral alternatives to content-based provisions in AUPs.

The Court distinguished St. Paul's ordinance from Title VII, which prohibits employment discrimination on grounds such as race and gender, inter alia.[497] Distinctively, the Court noted that Title VII did not violate the First Amendment's content-neutral requirement because Title VII's prohibition of racial and gender is merely a "content-based subcategory of a proscribable class of speech . . . swept up incidentally within the reach of a statute directed at conduct rather than speech."[498] In other words, Title VII was designed to target conduct, not speech; the regulation of speech is merely incidental to regulation of conduct. Thus, AUPs that similarly regulate conduct, with mere incidental regulation of speech, would survive a content-based discrimination challenge.

The synopsis is that, in assessing AUP content-based censorship of hate speech, the Court would look to whether the school can achieve the same end—prohibition of hate speech—with a broader prohibition that does not single out specific content such as race, gender, or sexual orientation. Before adopting content-based regulation of hate speech, schools must, therefore, make a conscientious effort to justify that the regulation is narrowly tailored. They can accomplish this by documenting that there were no content-neutral alternatives; or that content-neutral alternatives would not achieve "precisely the same" compelling end.[499]

XI. CONCLUSION

The emergence of virtual schools, blended with opportunities for potentially far-reaching virtual student speech, has raised new challenges for school officials seeking to censor student speech; particularly because of the Internet's pervasiveness and borderless nature. It has also fueled further uncertainty regarding the distinction between on-campus speech and off-campus speech.

[497] *Id.* at 389.
[498] *Id.* (applying the reasoning to the other protected classes under Title VII.).
[499] *Id.* at 396.

While the debate over the distinction between on-campus and off-campus speech preceded the advent of the Internet, the fusion of schooling and the Internet has distended the ambivalence in the off-campus versus on-campus jurisprudence. Schools officials and students are unsure of the scope of their censorship authority and their First Amendment rights, respectively.

This Article provided some clarity for school officials. The analysis revealed that school officials can censor virtual student speech based on the forum—traditional public forum, designated public forum, limited public forum, nonpublic forum—of the speech. They can also censor all virtual speech that qualifies as government speech. However, when schools use AUPs and RUPs to censor student speech, the provisions of those policies could be challenged as unconstitutional content-based discrimination; especially when those policies seek to regulate hate speech. Schools that rely on AUPs and RUPs to censor hate speech must ensure that they can clearly articulate compelling reason(s) for those censorship provisions; and that the censorship in the provisions is narrowly tailored to achieve the compelling reason(s). What emerges from the analysis in this Article is that "[e]ven with the vastly increased opportunity to speak and be heard created by the Internet, the exceptions to First Amendment protection for student speech remain narrowly drawn even for immature and foolishly defiant students."[500] Accordingly, the First Amendment remains a safe haven for students.

The analysis in this Article also revealed that virtual schools can censor on-campus speech pursuant to the four Supreme Court tests for student speech: the material and substantial disruption test, the *Bethel* test, the *Hazelwood* test and the *Morse* test. When speech is off-campus courts require that school officials establish a nexus between the speech and the school. School officials should not, however, be allowed to "police students' out-of-school speech

[500] Beidler v. North Thurston School District No. 99-2-00236-6, 3 (Wash. Super. Ct.) (July 18, 2000).

by patrolling the public discourse."[501] Even if school officials are empowered to censor on-campus speech in order to maintain the educational environment, students need an outlet, or safe space, to express pent up emotions through speech. As evident in the cases discussed earlier, student speech that schools seek to censor is imbued with emotions. With the controlled nature of the campus environment, the outlet and safe space for venting students is typically off-campus.

Students must be allowed to express themselves cognitively and emotionally, particularly when they are not engaged in school-related work. Such expression might be a way to avert another tragedy as happened at Columbine High School.[502] If students know they have an outlet for their emotions, they might be less inclined to engage in depravity (as happened at Columbine High School); or even to act irresponsibly upon pent-up emotions.[503] This need to protect emotionally-charged speech is important even if the speech is critical of school officials. As the United States Supreme Court stated in *Cohen v. California*:

> We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, . . . [o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.[504]

Indeed, "[i]f societies are not to explode from festering tensions, there must be valves through which citizens may blow off steam. Openness fosters resiliency; peaceful protest displaces more

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[501] Layshock *ex rel*. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 217 n.16 (3d Cir. 2011) (internal quotation marks omitted).

[502] *See* David L. Hudson, Jr., *Censorship Of Student Internet Speech: The Effect Of Diminishing Student Rights, Fear Of The Internet And Columbine*, 2000 L. REV. MICH. ST. U. DET. C.L. 199 (2000) (discussing the Columbine High School tragedy).

[503] The outlet of expression might also enable schools to quickly identify students who need help so that appropriate intervention can be provided.

[504] Cohen v. California, 403 U.S. 15, 26 (1971).

violence than it triggers; free debate dissipates more hate than it stirs."[505]

[505] Clay Calvert, *Off-campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 282 (2001) (citing Rodney A. Smolla, *Free Speech* I*n* A*n* O*pen* S*ociety*, 13 (1992)).