

# Students, websites, and freedom of expression in the United States and South Africa

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## **Ralph D Mawdsley**

*JD PhD*

*Professor and Roslyn Z Wolf Endowed Chair in Urban Educational Leadership,  
Cleveland State University*

## **Marius H Smit**

*LLM PhD*

*Associate Professor, School of Education, North-West University Potchefstroom  
Campus*

## **Charl C Wolhuter**

*BA (Hons) BEd MEd DEd*

*Associate Professor, School of Education, North-West University Potchefstroom  
Campus*

### OPSOMMING

#### **Leerders, Webblaie en Vryheid van Uitdrukking in die VSA en Suid-Afrika**

Leerders het gereedelik toegang tot die internet en dit skep die geleentheid om deur e-pos en ander vorme van elektroniese kommunikasie met persone by die skool te kommunikeer sonder dat hulle fisies teenwoordig hoef te wees. Terwyl baie van hierdie kommunikasie steurend kan wees wanneer leerders gedurende die skooldag hulle daarmee besig hou, is die mees kommerwekkende aspek van elektroniese boodskappe dié wat kru, beledigend, neerhalend of selfs dreigend is. In die Verenigde State van Amerika (VSA) het skoolbeamptes gevind dat die beheer van sodanige kuberspraak wat hulle oorsprong buite die skool het, wemel van konstitusionele probleme.

Hierdie artikel het drie doelstellings. Die eerste is om die regspraak oor leerder kuberspraak in die VSA te ondersoek waar die volgende vyf feitlike variante die gesag van die skool om leerders te bestraf beïnvloed: die plek van oorsprong van die kuberspraak (binne of buite die skoolterrein), die plek van toegang tot die kuberspraak (binne of buite die skoolterrein), die persone wat die toegang tot die spraak bewerkstellig het (personeel of ander leerders), die inhoud van die elektroniese uitdrukking, en die impak van die uitdrukking op die skool. Die tweede doelstelling is om die gesag wat die skool het om leerders te bestraf vir buite-skoolse kuberkommunikasie te bespreek in verhouding tot die ouers se reg om die rigting en inhoud van hulle kinders se opvoeding te bepaal.

'n Bespreking van die regte van leerders tot uitdrukking in die kuberruimte vereis 'n veelsydige benadering wat oorweging skenk aan beide die regspraak se beoordeling van leerders se regte en die gesag wat skole het om leerders te dissiplineer. Hierdie artikel sal 'n ewewig bewerkstellig deur die hofuitsprake van Amerika sowel as Suid-Afrika te oorweeg. Die finale oogmerk is om beginsels vanuit die Amerikaanse regspraak, waar veelvuldige aspekte deur-dink is, te ekstrapoleer tot riglyne vir Suid-Afrika.

## 1 Introduction

At least since the dawn of a new constitutional dispensation in 1994, discipline has been a problem in South African schools.<sup>1</sup> Research has found that teachers lack a repertoire of effective methods of maintaining discipline.<sup>2</sup> This state of affairs has a negative effect on the professional and personal lives of teachers. In an empirical study of the effect of student discipline problems on South African teachers Wolhuter and Van Staden<sup>3</sup> established that 85 percent of teachers are of the view that discipline problems sometimes or regularly make them unhappy in their work, 90 percent feel that discipline problems at school have sometimes or regularly caused tension in their family lives, and 79 percent have, because of discipline problems at school, at times considered quitting the teaching profession.

Student ready access to the internet affords opportunities through email and other forms of texting to communicate with persons from beyond the school without having to be physically present at school. While much of these communications can be distracting when accessed by students during the school day, the most worrisome electronic messages are those that are crude, insulting, disparaging, and, perhaps, even threatening. School officials in the United States of America (US) have found that controlling student cyber expression that originates off school premises is fraught with constitutional trip wires.

While in the US the problem of school discipline in the context of students' roaming on the electronic communication highway has been subjected to much jurisprudence, and a historical evolution is discernible, this is not the case in South Africa. This article has three purposes. The first is to examine how the following five factual variants in student cyber speech cases affect the authority of schools to punish students: the place or origin of the expression (on or off school premises), the place of access to the expression (on or off school premises), the person(s) who accesses the expression (staff or other students), the content of the electronic expression, and the impact of the expression on the school. The second purpose will be to discuss how the authority of schools to punish students for off-campus cyber interacts with the parents' right to direct the education of their children. The final purpose of the article is to extrapolate guidelines from jurisprudence in the US on the issue for South Africa, where this issue has not been as thoroughly thrashed out in jurisprudence as in the US. The Constitution of South Africa states that when interpreting the Bill of Rights contained in the Constitution, a court, tribunal or forum may consider foreign law.<sup>4</sup>

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1 Wolhuter, Oosthuizen & Van Staden "Skoolfase/Leerderouderdom as Faktor in Leerderdisipline in Suid-Afrikaanse Skole" 2010 *Tydskrif vir Christelike Wetenskap* 169-186.

2 Wolhuter & Van Staden "Bestaan daar 'n dissiplinekrisis binne Suid-Afrikaanse skole? Belewenis van opvoeders" 2008 *Tydskrif vir Geesteswetenskappe* 395-396.

3 *Ibid.*

4 S 39(1)(c) SA Constitution.

A discussion of student cyber expression rights requires a multi-faceted approach that explores both the judiciary's consideration of student expressive rights and the authority of schools to discipline students. This article will develop this balancing act by the courts by dividing the article into five sections that discuss: (1) The key US Supreme Court decisions affecting student expression; (2) the application of these US Supreme Court decisions to two selected cases (one state and the other federal); (3) the complications associated with analysing legal theories regarding cyber speech; (4) the implications of court decisions regarding student cyber speech, particularly as impacting the constitutional right of parents to direct the education of their children, and finally; (5) the South African jurisprudence on freedom of expression and its impact on student rights.

## 2 Tinker and its Progeny: Balancing Student Expression and the Authority of Schools to Discipline Students

The US Supreme Court's declaration in *Tinker v Des Moines Independent Community School District*<sup>5</sup> that "students ... [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"<sup>6</sup> has become the constitutional benchmark for determining the extent to which school officials can restrict student expression.<sup>7</sup> In upholding the right of students to wear black armbands to protest the war in Vietnam as a form of passive speech, the Court set a fairly high standard of limiting school restriction of student expression to that which would "materially and substantially disrupt the work and discipline of the school".<sup>8</sup> Despite the assertions of Justice Thomas that the Court's awarding of constitutional rights to students in *Tinker* "[was] without basis in the Constitution"<sup>9</sup> and that the Court should return to the

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5 393 US 503 (1969).

6 *Idem* 506.

7 *Tinker* produced yet another standard, "intrudes upon ... the rights of other students", (*Idem* 508) which was referenced by the Ninth Circuit in *Harper v Poway Unified School District* 445 F3d 1166 to prohibit a student from wearing a t-shirt with a religious message in opposition to sexual orientation; however, the *Harper* court of appeals also found the religious message inconsistent with the *Fraser* standard regarding "fundamental values of habits and manners of civility essential to a democratic society", (*Harper* 445 F3d 1185, citing *Fraser* 478 US 681) so the second *Tinker* standard does not have a clear record of standing on its own as does the *Tinker* disruption standard. For an article supporting the use of the second *Tinker* standard in assessing the constitutionality of student expression cases, see McCarthy "Student Expression That Collides with The Rights of Others: Should the Second Prong of Tinker Stand Alone?" 2009 *Ed Law Rep* 1 14 ("there may not be many other legal options beyond Tinker's second prong that allow school authorities to curtail non disruptive expression when it collides with others' rights to be secure and to be let alone").

8 *Idem* 513.

9 *Morse v Frederick* 551 US 393 (Thomas J concurring).

common-law doctrine of *in loco parentis* under which “the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order”,<sup>10</sup> the *Tinker* decision has demonstrated remarkable resilience.

In three post-*Tinker* decisions, *Bethel School District v Fraser*,<sup>11</sup> *Hazelwood School District v Kuhlmeier*<sup>12</sup> and *Morse v Frederick*,<sup>13</sup> the Supreme Court sought to broaden the control of school personnel over students. Thus, in *Fraser*, the Supreme Court, in refusing to grant free speech protection to a lewd and vulgar campaign speech delivered to students in an assembly, invoked a school’s responsibility to instil “the habits and manners of civility”.<sup>14</sup> In *Kuhlmeier*, the court, in refusing to award free speech protection to the school newspaper articles of a student editor, emphasised a reasonableness standard for school control over the school curriculum where the school’s actions were “reasonably related to legitimate pedagogical concerns”,<sup>15</sup> and where students, parents, and members of the public might reasonably perceive student expressive activities “to bear the imprimatur of the school”.<sup>16</sup> Finally, in upholding the suspension of a student who had displayed a banner expressing support for marijuana, (“BONG HiTS 4 JESUS”),<sup>17</sup> the *Morse* court underscored the substantial interest that a school has in safeguarding “those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use”<sup>18</sup> in violation of a “established school’s policy”<sup>19</sup> against student use of illegal drugs.

The challenge for courts has been applying the student free expression case law from the *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse* decisions to new sets of facts. In *Morse*, the Supreme Court’s observations regarding *Tinker*, *Fraser*, and *Kuhlmeier* reflected some of the uncertainty as to how the legal principles of each case can be influenced by the facts of each case. The *Morse* court perceived *Tinker* as dealing with “political speech” where the school’s only interests in that case had been the “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”, or “an urgent wish to avoid the controversy which might result from the expression”.<sup>20</sup> *Fraser*, according to the *Morse* court, would have been decided differently if the student had “delivered the same speech in a public forum outside the school context”.<sup>21</sup> Finally, the court in *Morse* found *Kuhlmeier* inapplicable to its set of facts because

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10 *Safford Unified School District No 1 v Redding* 129 SCt 2633, 2646 (Thomas J concurring in the judgment in part and dissenting in part).

11 478 US 675.

12 484 US 260.

13 551 US 393.

14 *Fraser* 478 US 681.

15 *Kuhlmeier* 484 US 273.

16 *Idem* 271.

17 *Morse* 551 US 397.

18 *Ibid.*

19 *Idem* 408.

20 *Idem* 403-04, citing *Virginia v Black* 538 US 343, *Tinker* 393 US 509 510.

21 *Morse* 551 US 405.

“no one would reasonably believe that Frederick's banner bore the school's imprimatur”.<sup>22</sup>

In a pre-*Morse* Second Circuit decision involving a t-shirt, *Guiles v Marineau*,<sup>23</sup> the court of appeals suggested that *Tinker* was the default standard for student free expression cases in the absence of evidence that student t-shirt expression explicitly violated the *Fraser* or *Kuhlmeier* standards. *Morse*, with its new standard of refusing to protect student support of drugs in violation of established school policy, arguably has done nothing to challenge this default theory. In religious expression cases, the Establishment Clause has afforded considerably less protection for student expression. In the Supreme Court's decision, *Santa Fe Independent School District v Doe*,<sup>24</sup> the court invoked *Kuhlmeier* to reject a student religious speech claim and to strike down student prayer prior to football games. More recently, the Supreme Court, in *Christian Legal Society v Martinez*,<sup>25</sup> referenced both *Tinker*<sup>26</sup> and *Kuhlmeier*<sup>27</sup> in rejecting a law school student religious organisation's free speech claim that a law school non-discrimination policy prohibiting discrimination on the basis of sexual orientation violated the organisation's free speech right to determine the religious requirements for its members.<sup>28</sup>

22 *Idem*. Further complicating the picture of student expressive rights has been a wide range of cases concerning free speech protection for the messages on student t-shirts that has not yet reached the Supreme Court, as well as cases arguing protection for student religious expression which has. See Mawdsley “The Uncertain Currents of T Shirt Expression in the US” 2007 *ANZ J of Law and Ed* 69; Mawdsley “The Rise and Fall of Constitutionally Protected Religious Speech in the United States” 2009 *Int J of Law and Ed* 71.

23 461 F3d 320.

24 530 US 290.

25 130 SC. 2971. On remand to the Ninth Circuit regarding CLS's claim that the law school's failure to apply its “all comers” participation policy to other student group violated the First Amendment, the Ninth Circuit found that CLS's statement of the issue in its initial brief, “whether the Constitution permits a public law school to deny a religious student group numerous valuable benefits because the group requires its officers and voting members to agree with its religious viewpoint”, lacked sufficient specificity to raise and, thus, save for review, the CLS organisation's pretext claim. See *CLS v Wu* 626 F3d 483 485. See also *CLS v Martinez, Appellate Brief to the Ninth Circuit* 2006 WL 3420535 2 for statement of the CLS organisation's claim.

26 *Idem* 2988. (“This Court has long recognised ‘the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.’” *Tinker* 393 US 507).

27 *Idem* referencing the Court's “oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges”. *Kuhlmeier* 484 US 273.

28 For a pre-*CLS v Martinez* analysis of protected speech for religious organisations, see Mawdsley & Mawdsley “Balancing a University's Non-discrimination Policy Regarding Sexual Orientation With the Expressive Rights of Student Religious Organisations: A USA Perspective”, 2007 *ANZ J of Law and Ed* 47.

In the past decade, a new genre of student cyber expression case law involving the use of web pages and the internet has captured the attention of school officials and the courts. This case law affords far more subtle expressive issues than the positions of student organisations on social issues<sup>29</sup> or student messages on t-shirts.<sup>30</sup> Courts are called to apply student expression standards designed in the context of physical symbols and signs (*Tinker, Morse*), direct face-to-face student expression (*Fraser*), and school-sponsored curriculum (*Kuhlmeier*) to student-generated electronic cyber expression accessed in schools where the person who originated the message may not be the person who accesses or distributes it within the school setting.

### 3 Punishing Student Cyber Expression: Comparing the Results from Two Similar Cases

Two court decisions, one a state supreme court decision and the other a federal circuit court decision, have been selected because of the similarity in facts to discuss in detail how courts have determined whether students could be punished for their cyber speech. Worth noting is how the two courts choose to emphasise different factors, either in supporting school discipline or protecting student expression.

In *JS v Bethlehem Area School District (Bethlehem)*,<sup>31</sup> the Supreme Court of Pennsylvania upheld expulsion of an eighth grade student resulting from his home-generated website containing threatening and derogatory comments about a teacher. The student in this case, JS, apparently did not care for his algebra teacher and created at home a website entitled “Teacher Sux”, which contained among other items, a picture of the teacher that morphed into a picture of Adolph Hitler and a hand-drawn picture of the teacher in a witch’s costume. More serious, though, was a webpage regarding the teacher with the caption, “Why Should She Die?” with a request from the reader to give him “\$20 to help pay the hitman”.<sup>32</sup> Another page contained a small drawing of the teacher “with her head cut off and blood dripping from her neck”.<sup>33</sup> The website was viewed by student members at the middle school, at least one of whom was directed to the site by JS. One of the school’s instructors brought the webpage to the attention of the middle school principal who notified the local police and the Federal Bureau of Investigation (FBI), both of which declined to file charges against JS. The principal also informed the

29 See *Bannon v School District of Palm Beach County* 387 F3d 1208 (citing *Hazelwood* in permitting the school to delete religious murals that had been painted by the Fellowship of Christian Athletes on hallway panels where the murals were considered by the court of appeals to be school sponsored speech).

30 See *Guiles* 461 F3d 327-328 where a student t-shirt with martini and drugs, worn for two weeks to school, was considered to be acceptable political speech in opposition to the President of the United States.

31 807 A2d 847.

32 *Idem* 851.

33 *Ibid.*

algebra teacher about the webpage. After viewing the webpage the teacher testified she was frightened, fearing someone would try to kill her, [and] suffered stress, anxiety, loss of sleep, loss of weight, a general sense of well-being, short term memory loss, inability to go out of the house and mingle with crowds and headaches requir[ing] her to take anti-anxiety/anti-depressant medication.<sup>34</sup>

In addition, she was unable to finish the 1997-98 school year and “applied for and was granted a medical leave for the 1998-99 school year because of her inability to return to teaching”.<sup>35</sup> As a result, the school was required to utilise three substitute teachers for the 1998-99 school year “which disrupted the educational process of the students”.<sup>36</sup>

The parents of JS enrolled him in an out-of-state school which prevented his attending one of the two dates for the school board expulsion hearing.<sup>37</sup> In expelling JS, the board characterised JS’s webpages as “a threat”, “harassment”, and “disrespect to the teacher ... resulting in actual harm to the ... school community [and] to the teacher”.<sup>38</sup> JS’s parents appealed the expulsion to a Pennsylvania state trial and appeals court, both of which upheld the expulsion. The state appeals court, in language reminiscent of *Tinker*, held that the school was justified in taking student threats seriously “where the conduct materially and substantially interferes with the educational process”.<sup>39</sup>

On appeal to the Supreme Court of Pennsylvania, the court affirmed the expulsion, but only after carefully parsing the nature of the student’s speech and the protection of the Free Speech Clause of the First Amendment. The Supreme Court determined that JS’s speech did not fit within a category known as “true threats” which the US Supreme Court has ruled has no free speech protection.<sup>40</sup> In comparing JS’s threats to other cases in which courts had found “a true threat”,<sup>41</sup> the Supreme Court of Pennsylvania, in assessing the context in which JS’s statements were made, the reaction of listeners, and the nature of the comments,

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34 *Idem* 852.

35 *Ibid.*

36 *Ibid.*

37 *Idem* 853. JS was able to attend the hearing on Aug 19 but not on Aug 26.

38 *Ibid.*

39 *Ibid.*

40 See *Watts v US* 394 US 705 (holding that a Vietnam protestor stating that he would get LBJ in his sights was “political hyperbole”, not a violation of a federal statute prohibiting threats against the President).

41 See *Lovell v Poway Unified School District* 90 F3d 367 (finding that, against a backdrop of violence in schools, a student’s threat to kill her guidance counselor if she did not make changes in the student’s schedule, a reasonable person in the student’s position would interpret the statement as a serious expression of intent to harm or assault); *In the Interest of AS* 626 NW2d 712 (finding a true threat in a 13-year-old student’s detailed descriptions of violence to a police officer, middle school principal, social studies teacher, and a fellow student where an objective, reasonable person would interpret the statement as a serious expression of a purpose to inflict harm).

determined that the statements did not constitute true threats.<sup>42</sup> Thus, the Pennsylvania supreme court had to weigh whether JS's constitutional free expression rights had been abridged by the school board's expulsion.

Citing *Tinker*, *Kuhlmeier*, and *Fraser*, the Supreme Court of Pennsylvania determined that the relevant criteria were the location of the speech (on or off-campus), the form of the speech (political, lewd, vulgar, offensive), the effect of the speech (level of disruption), the setting in which the speech is communicated (school assembly, classroom), and the speech as part of a school sponsored expressive activity (newspaper, play).<sup>43</sup> While finding that the website was created off-campus, the Supreme Court noted that JS had "facilitated the on-campus nature of the speech by accessing the web site on a school computer in a classroom, showing the site to another student, and by informing other students at school of the existence of the web site".<sup>44</sup> Although finding that JS's web site was not the "political message" of *Tinker*, nor was it the "lewd, vulgar and offensive speech" of *Fraser* or the school sponsored speech of *Kuhlmeier*,<sup>45</sup> the Pennsylvania Supreme Court, nonetheless, decided that either *Fraser* and *Tinker* might be able support the school board's expulsion of JS. However, while the court opined that "the 'Teacher Sux' web site [was] no less lewd, vulgar or plainly offensive than the speech expressed at the school assembly"<sup>46</sup> it ruled that, ultimately, "it is the issue of disruption, potential or actual, that dissemination of 'Teacher Sux' caused to the work of the school"<sup>47</sup> that had to be considered. In rejecting the claims of JS's parents that the disruption was minimal, the Supreme Court found substantive disruption in "the direct and indirect impact of the emotional and physical injuries to [the teacher]", the anxiety of certain students "for their safety", and concerns voiced by parents "for school safety and the delivery of instruction by substitute teachers".<sup>48</sup>

The opposite result was reached in *Layshock v Heritage School District*<sup>49</sup> (*Layshock*) where the Third Circuit, in an *en banc* decision upholding a three judge court's decision on behalf of a school district, held that the school district had violated a 17-year-old student's free speech rights by punishing him for creating a parody web profile of his

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42 See *JS* 807 A2d 858-859 (finding that the threatening statements were not made conditionally since no address was given to collect money for a hitman, that the threatening statements had not been made directly to the teacher, that JS had made no prior statements to the teacher, and that the teacher had no reason to believe JS had the propensity for violence).

43 *JS* 807 A2d 864.

44 *Idem* 865.

45 *Idem* 865-66.

46 *Idem* 868.

47 *Ibid.*

48 *Idem* 869.

49 F3d (3d Cir 2011) (*en banc*), *aff'ing* 593 F3d 249.



principal on *My Space*.<sup>50</sup> Using his grandmother's computer at her home, Layshock's profile of his high school principal was formed from bogus answers to phony questions that indicated in part the principal's use of drugs and steroids, as well as theft of items.<sup>51</sup> The word of the profile spread throughout the school and was accessed at school by Layshock and other students, in addition to spawning several other unflattering profiles prepared by other students. The principal, while not being concerned for his life, found the profiles to be "degrading", "demeaning", "demoralising" and "shocking".<sup>52</sup> Although the principal considered the profiles to constitute harassment, defamation or slander, no criminal charges were filed against Layshock or other creators of profiles. Approximately a week after creating the profile, Layshock apologised orally to the principal, followed by a written apology. Notwithstanding these apologies, Layshock was found by the school to have violated the school's discipline code<sup>53</sup> and, in addition to a ten-day suspension, was placed in the Alternative Education Program, was banned from extracurricular activities, and was not allowed to participate in graduation.<sup>54</sup> In upholding the Third Circuit three-judge panel's summary judgment for *Layshock*, the *en banc* Third Circuit, reviewed the limitation of student free expression in *Tinker, Fraser, Kuhlmeier*, and *Morse*, concluding that none of the cases applied in *Layshock*. Noting that "Tinker's 'schoolhouse gate' is not constructed solely of the bricks and mortar surrounding the school yard", the Third Circuit cautioned that "the concept of the 'school yard' is not without boundaries and the reach of school authorities is not without limits".<sup>55</sup> Observing that 'it would be unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities',<sup>56</sup> the Third Circuit found untenable the school district's claim that it could punish the student "because his speech has reached inside the school".<sup>57</sup> In substance, the *en banc* court of appeals found that the school district sought "to forge a nexus between the School and [the student's] profile by relying upon his

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50 *MySpace* is a popular social-networking website that "allows its members to create online 'profiles,' which are individual web pages on which members post photographs, videos, and information about their lives and interests". *Doe v MySpace Inc* 474 FSupp 2d 843 845.

51 *Layshock* F3d 1, 2. (For example, some of the comments based on the three, "big", were: Are you a health freak: big steroid freak"; "In the past month have you smoked: big blunt"; In the past month have you been on pills: big pills")

52 *Layshock* 593 F3d 253.

53 *Idem* 254. The language of the discipline code cited was: "Disruption of the normal school process; Disrespect; Harassment of a school administrator via computer/internet with remarks that have demeaning implications; Gross misbehaviour; Obscene, vulgar and profane language; Computer Policy violations (use of school pictures without authorisation)".

54 *Ibid.*

55 *Layshock* F3d 9.

56 *Ibid.*

57 *Ibid.*

‘entering’ the [School] District’s photo of [Principal] Trosch”.<sup>58</sup> The Third circuit rejected the school district’s claim that, although the student could not be punished under *Tinker* because no disruption had taken place, school officials could punish the student pursuant to the *JS*, *Wisniewski*, and *Doninger* decisions. However, the court of appeals observed that these three cases simply demonstrated that expressive conduct occurring outside of school can be treated as inside the “schoolhouse gate”, but these limited circumstances did not apply in *Layshock*. The Third Circuit opined in its conclusion that:

[w]e need not define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate because ... we hold that [the student’s] use of the [School] District web site does not constitute entering the school and that the [School] District is not empowered to punish his out of school expressive conduct under the circumstances here.<sup>59</sup>

Worth noting is that, while the student in *Layshock* had a protected First Amendment right in his webpage created off-campus, the *en banc* Third Circuit let stand the three-judge panel’s response to the parents’ Fourteenth Amendment Liberty Clause claim regarding their upbringing of their son,<sup>60</sup> namely, that “they [had been] able to take the action they thought necessary to communicate their displeasure with their son’s actions and the inappropriateness of his behaviour”.<sup>61</sup>

#### 4 Sorting out the Legal Theories: The Changing Interpretation of Student Expression

Both *Bethlehem* and *JS* reflect the difficulty in applying the Supreme Court’s student discipline standards to student expression that originates off-campus. Although the Supreme Court of Pennsylvania in *Bethlehem* did not find the student’s message to be a “true threat”, the case does suggest a starting point for analysis in determining whether student expression is either a “true threat” for which no free speech protection exists, or is a threat that violates one or more of the student discipline standards. Thus, in *Wisniewski v Board of Education of the Weedsport Central School District*<sup>62</sup> (*Wisniewski*), the Second Circuit found that an AOL Instant Messaging icon, showing a pistol firing a bullet at a person’s head with dots representing spattered blood and the words, “Kill Mr. Van der Molen” (the student’s English teacher), below the icon, fell within

<sup>58</sup> *Idem* \*7.

<sup>59</sup> *Idem* \*12.

<sup>60</sup> For a discussion of legal changes in the right of parents to direct the education of their children in the face of the development of students’ constitutional rights, see Mawdsley “The Changing Face of Parents’ Rights” 2003 *Brigham Young U Ed and Law J* 165.

<sup>61</sup> *Layshock* 593 F3d 264. The case notes that the parents “were understandably upset over Justin’s behaviour, discussed the matter with him, expressed their extreme disappointment, grounded him, and prohibited him from using their home computer”. *Idem* 254.

<sup>62</sup> 494 F3d 34.

*Tinker*. The court of appeals refused to address whether the icon, which had been sent to other students but not to the teacher, was a “true threat”, finding instead that under *Tinker* “school officials have significantly broader authority to sanction student speech”.<sup>63</sup> In upholding the suspension of the student, the Second Circuit concluded that the student’s icon:

cross[ed] the boundary of protected speech and constitute[d] student conduct that pose[d] a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would ‘materially and substantially disrupt the work and discipline of the school’.<sup>64</sup>

Thus, unlike *Bethlehem* where the student’s message was read by the teacher, the message in *Wisniewski* sent to other students had not come to the attention of the teacher. Nonetheless, the Second Circuit found that because the “risk” that the icon distributed to students “would come to the attention of school authorities and the teacher whom the icon depicted being shot”<sup>65</sup> was “at least foreseeable to a reasonable person, if not inevitable”, the icon represented “a risk of substantial disruption within the school environment”.<sup>66</sup>

The notion that students can be disciplined for communications originating off-campus has been approved by two recent decisions in the Eighth and Fourth Circuit Courts of Appeal. In the Eighth Circuit decision, *DJM v Hannibal School District*<sup>67</sup> (*DJM*), DJM, a student in the Hannibal Public School District, sent instant messages from his home to a classmate (CM) in which he talked about getting a gun and shooting some other students at school. The alarmed recipient and a trusted adult she had consulted contacted the school principal about their concerns. School authorities decided they must notify the police, who took a statement from DJM that evening and then placed him in juvenile detention. DJM was subsequently suspended for ten days and later for the remainder of the school year. In upholding a federal district court’s decision to deny DJM’s free speech claim, the Eighth Circuit agreed that his communication was “a true threat” where DJM had communicated his statement to the object of the purported threat *or to a third party*<sup>68</sup> and where a reasonable recipient would have interpreted DJM’s statements as a serious expression of an intent to harm or cause injury to another.<sup>69</sup> As the court of appeals noted, DJM’s statements that “five specific named individuals ‘would go’ or ‘would be the first to die’ were real cause for alarm, especially since he talked about using a 357 magnum that could be borrowed from a friend”, and were viewed as serious enough by CM and the trusted adult to report the content to the

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63 *Idem* 38.

64 *Idem* 38-39, citing *Tinker* 393 US 513.

65 *Idem* 39.

66 *Idem* 40.

67 *DJM v Hannibal School District* F3d 2011 WL 3241876.

68 *Idem* (Headnote 1) (emphasis in original).

69 *Idem* (Headnote 4).

principal and district superintendent.<sup>70</sup> The Eighth Circuit also supported its result relying on *Tinker* for the proposition that “it was reasonably foreseeable that DJM’s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment”.<sup>71</sup> However, as the Eighth Circuit noted in reflecting on the application of the US Supreme Court’s *Tinker*, *Fraser* and *Morse* decisions to student off-campus electronic communications:

[t]he [Supreme] Court has not yet had occasion to deal with a school case involving student threats or one requiring it to decide what degree of foreseeability or disruption to the school environment must be shown to limit speech by students.<sup>72</sup>

In the Fourth Circuit decision, *Kowalski v Berkeley County Schools*,<sup>73</sup> a school district with punishment for a student who used her home computer to create a My space page (SASH – Students Against Sluts Herpes) with about 100 individuals invited to participate. The web page contained false, derogatory, vulgar and offensive comments against a student, Shay N, which included pictures of Shay N and pictures alleging that she had herpes. Shay N’s parents filed a harassment complaint against the students involved in the website and the school, after meeting with Kowalski who admitted to creating the website, “suspended her from school for 10 days [later reduced to 5] and issued her a 90-day [later reduced to 45-day] ‘social suspension,’ which prevented her from attending school events in which she was not a direct participant”.<sup>74</sup> In addition she was not permitted to participate in crowning the new Queen of Charm or serve on the cheerleading squad. Unlike *DJM* though, the school dealt with the My Space website as a violation of the school’s harassment policy.<sup>75</sup> The Eighth Circuit dispatched with the student’s

70 *Idem* (Facts discussion, I) (the trusted friend Allen encouraged CM to continue e-mailing DJM with the following comments having been preserved and introduced into evidence:

the instant message conversation begins with DJM discussing his frustration having recently been spurned by “L”, a romantic interest. CM asks DJM “what kinda gun did your friend have again?” DJM responds “357 magnum”. CM then replies, “haha would you shoot L or let her live?” DJM answers, “I still like her so I would say let her live”. CM follows up by asking, “well who would you shoot then lol”, to which DJM responds “everyone else”. DJM then named specific students who he would “have to get rid of”, including a particular boy along with his older brother and some individual members of groups he did not like, namely “midgets”, “fags”, and “negro bitches”. Some of them “would go” or “would be going”. CM later forwarded most of these statements to Allen by email).

71 *Idem* (Headnote 6).

72 *Ibid.*

73 *Kowalski v Berkeley County Schools*, F3d (2011 WL 3132523) (4th Cir. 2011).

74 *Idem* (Fact discussion I).

75 *Idem* (Fact Discussion I). The *Harassment, Bullying, and Intimidation Policy* prohibited “any form of ... sexual ... harassment ... or any bullying or intimidation by any student ... during any school-related activity or during any education-sponsored event, whether in a building or other property owned, used or operated by the Berkeley Board of Education”. The Policy

free speech claim and found support for the school's discipline under *Tinker* that "public schools have a 'compelling interest' in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying";<sup>76</sup> under *Morse* where "school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning";<sup>77</sup> and, under *Fraser* where abusive student speech:

[I]s not the conduct and speech that our educational system is required to tolerate, as schools attempt to educate students about 'habits and manners of civility' or the 'fundamental values necessary to the maintenance of a democratic political system'.<sup>78</sup>

However, the notion that off-campus speech that "causes or reasonably threatens to cause a substantial disruption of or material interference with a school" can be regulated was rejected by the Third Circuit, sitting *en banc*, in *JS v Blue Mountain School District (Blue Mountain)*.<sup>79</sup> In *Blue Mountain*, two students created a fictitious profile on My Space of one of their middle school principal that included in the profile's URL the phrase, "kidsrockmybed", identified his interests as "hitting on students and their parents", and "mainly watching the playboy channel on directv", described himself in an "about me" section as a "sex addict", "I have come to my space so I can pervert the principal's [sic] to be just like

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defined "Bullying, Harassment and/or Intimidation" as "any intentional gesture, or any intentional written, verbal or physical act that"

(1) A reasonable person under the circumstances should know will have the effect of:

(a) Harming a student or staff member; ...

(2) Is sufficiently inappropriate, severe, persistent, or pervasive that it creates an intimidating, threatening or abusive educational environment for a student. The policy also provided that violators would be suspended and that disciplinary actions could be appealed.

The *Student Code of Conduct* provided, "All students enrolled in Berkeley County public schools shall behave in a safe manner that promotes a school environment that is nurturing, orderly, safe, and conducive to learning and personal-social development". It also committed students to "help create an atmosphere free from bullying, intimidation and harassment" and to "treat others with respect" and "demonstrate compassion and caring". The *Code* classified "Bullying/Harassment/Intimidation" as a "Level III Violation" with possible consequences including an out-of-school suspension of up to 10 days; signing a behavioural contract; being denied participation in class and/or school activities; and a social suspension of up to one semester. Before punishing a student under the *Student Code of Conduct*, a principal was required to "immediately undertake or authorize an investigation" of the incident and complaint, including "personal interviews with the complainant, the individual(s) against whom the complaint is filed, who may have knowledge of the alleged incident(s) or circumstances giving rise to the complaint".

76 *Idem* (Headnote 6).

77 *Idem* (Headnote 6).

78 *Idem* citing *Fraser* 478 F3d 681.

79 593 F3d 286.

me”, and declared that “I love children [and] sex of (any kind)”.<sup>80</sup> JS and her colleague, KL, when confronted by the teacher, admitted to creating the webpage, apologised in his office, and later wrote letters of apology, but were still punished with a ten-day suspension. The principal considered criminal harassment charges but elected not to pursue them when informed by police that the charges would ultimately be dropped. The disruption to the school was limited: a teacher had to silence 7 or 8 students who wanted to talk about the profile in class, some 8<sup>th</sup> grade girls approached another teacher expressing concern about comments regarding the principal and his family, and several girls were reprimanded for decorating the lockers of JS and KL on the day they returned from their 10-day suspension.<sup>81</sup> In upholding the suspensions, a three judge panel of the Third Circuit applying *Tinker* to this set of facts, refused to limit off-campus speech to “any geographical technicality”<sup>82</sup> in terms of the authority of the school to control such expression and determined that “the potential impact of the profile’s language alone is enough to satisfy the *Tinker* substantial disruption test”.<sup>83</sup>

An *en banc* panel of the Third Circuit, finding that a student’s free speech rights outside the school context were coextensive with the rights of adults, reversed the three judge panel and ruled that the school district could not have reasonably forecast substantial disruption and that the district could not punish student use of profane language outside the school and during non-school hours.<sup>84</sup>

Worth noting is that the *en banc* Third Circuit in *Blue Mountain*, unlike the *en banc* Third Circuit in *Layshock*, reached the merits of the parents’ claim that the school district’s action had deprived them of their liberty clause right to direct the education of their child. The *en banc* Third Circuit in *Blue Mountain* observed that a liberty clause violation would be implicated only if the state’s action “deprived [the parents] of their right to make decisions concerning their child”, and not when the action merely “complicated the making and implementation of these decisions”.<sup>85</sup> In upholding the federal district court’s summary judgment for the school district in *Blue Mountain* concerning the liberty clause claim, the *en banc* Third Circuit noted that “the school district’s actions in no way forced or prevented JS’s parents from reaching their own disciplinary decision, nor did its action force her parents to approve or disapprove of her conduct”.<sup>86</sup>

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80 *Idem* 300.

81 See *Idem* 294 for a full description of disruption and school discipline.

82 *Idem* 301.

83 *Idem* 302.

84 *JS* F3d \*11, citing *CN v Board of Education* 430 F3d 159.

85 *Idem* \*13.

86 *Idem* \*13. The three judge panel in *Blue Mountain* noted as a practical matter that the school’s discipline had not pre-empted that of the parents since “they had also punished her ‘for a very long time’ for creating the profile”. *Blue Mountain* 593 F3d 305.

The rejection of student free speech claims in the *Bethlehem* and *JS*, while upholding student free expression claims in *Layshock* and *Blue Mountain*, needs to be juxtaposed to other federal district court decisions finding on behalf of students. Worth noting is that these cases, similar to *Layshock* and *Blue Mountain*, tend to rely on a narrow interpretation of *Tinker*.

In the earliest of the cases, *Beussink v Woodland R-IV School District*<sup>87</sup> (*Beussink*), a Missouri federal district court granted a preliminary injunction against a ten-day suspension awarded to a student as a result of an off-campus created homepage that “was highly critical of the administration at Woodland High School [and] used vulgar language to convey his opinion regarding the teachers, the principal and the school’s own homepage”.<sup>88</sup> Even though the principal and the computer teacher “were upset by the homepage”,<sup>89</sup> the teacher had nonetheless permitted students to access the homepage in class. Citing *Tinker*, the district court found that “no significant disruption to school discipline [had] occurred”<sup>90</sup> and, indeed, in turning the case into one purely of free speech, the court pointedly declared that the student had not been disciplined “because he was disrespectful or disruptive in the classroom ... [but] because he [had] expressed an opinion on the Internet which upset [the] Principal and [the computer teacher]”.<sup>91</sup> In addition to enjoining the school district from using the ten day suspension served by plaintiff in any manner to adversely affect his grades, the district court also enjoined the school district “from restricting [the student’s] use of his home computer to repost that homepage”.<sup>92</sup>

Three years later, a Pennsylvania federal district court, in *Killion v Franklin Regional School District*<sup>93</sup> (*Killion*), granted injunctive relief to a student suspended for webpage content created at his home that contained a list of uncomplimentary comments about the athletic director.<sup>94</sup> In overturning the ten-day suspension awarded to the student because his list “contained offensive remarks about a school official”,<sup>95</sup> the district court limited *Fraser* and *Hazelwood* to their narrow sets of facts<sup>96</sup> and applied *Tinker*. In addition to noting that the list was not “threatening”, (even though it was “upsetting”) to the athletic director,

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87 30 FSupp 2d 1175.

88 *Idem* 1177.

89 *Idem* 1178.

90 *Idem* 1181.

91 *Ibid.*

92 *Idem* 1182.

93 136 FSupp 2d 446.

94 *Idem* 448. Among the comments about the athletic director were that: “He is constantly tripping over his chins”; “The girls the 900 #’s sic keep hanging up on him”; and, “He has to use a pencil to type and make phone calls because his fingers are unable to hit only one key a time”.

95 *Idem* 449.

96 See *Idem* 454. (The expression in *Killion* “was not in a school assembly” (*Fraser*) and “was not in a school sponsored newspaper” (*Hazelwood*)).

the school district adduced no evidence of “actual disruption;”<sup>97</sup> there was “no evidence that teachers were incapable of teaching or controlling their classes because of the list, [and] indeed, the list [had been] on school grounds for several days before the administration became aware of its existence, and at least one week passed before the defendants took any action”.<sup>98</sup> A copy of the list had been downloaded and appeared at school although the school district was not able to produce any credible evidence that the student who created the webpage had been the one responsible;<sup>99</sup> in any case, even if the student had brought a hard copy of the list to school, the absence of disruption would most likely have produced the same result.

One year later, two federal district courts, one in Michigan, *Mahaffey v Aldrich*<sup>100</sup> (*Mahaffey*), and the other in Ohio, *Coy v Board of Education of the North Canton City Schools*<sup>101</sup> (*Coy*), relied on *Tinker* to address suspensions related to student-created websites. In *Mahaffey*, a high school suspended a student who had contributed the following content to a website he had created:

SATAN'S MISSION FOR YOU THIS WEEK: stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face. Killing people is wrong don't do It [sic]. Unless [sic] Im [sic] there to watch. Or just go to Detroit. Hell is right in the middle. Drop by and say hi.

PS: NOW THAT YOU'VE READ MY WEB PAGE PLEASE DON'T GO KILLING PEOPLE AND STUFF THEN BLAMING IT ON ME. OK?<sup>102</sup>

The *Mahaffey* district court found the comments to not constitute a threat because “there was no evidence that [the student] communicated the statements on the website to anyone”.<sup>103</sup> More importantly, in granting summary judgment to the student, the court observed that the school district had produced “[no] proof of disruption to the school or on campus activity”.<sup>104</sup>

*Coy* differed from *Mahaffey* in that the school district alleged that it had expelled a student, not for the content of his webpage, but for violating a school rule prohibiting use of school computers to visit unauthorised sites. The federal district court in *Coy* found sufficient evidence to warrant a middle school student going to trial following his suspension

97 *Idem* 455.

98 *Ibid.*

99 *Idem* 458 n 2.

100 236 FSupp 2d.

101 205 FSupp 2d 791.

102 *Mahaffey* 236 FSupp 2d 782. The federal district court inserted the “sic” references.

103 *Idem* 785. The court accepted the student’s assertion on the website that it had been created “for laughs” and viewed the last sentence as a disclaimer that no reasonable person would interpret as “an intent to harm or kill anyone listed on the website”. *Idem* 786.

104 *Idem* 786.



for four days after creating a webpage that contained: “a few insulting sentences written under each picture [of three other middle school students]”, “two pictures of boys giving the ‘finger’”, “some profanity”, “and a depressingly high number of spelling and grammatical errors”.<sup>105</sup> Although the district court refused to grant summary judgment to the student (Coy), it did determine that the case should be resolved under a *Tinker* rather than a *Fraser* or *Kuhlmeier* standard. Even though the website was “crude”, it did not contain the “elaborate, graphic, and explicit sexual metaphor” in *Fraser*<sup>106</sup> nor had Coy been “speaking or attempting to speak in front of a captive student audience”.<sup>107</sup> Likewise, *Kuhlmeier* was not applicable because Coy’s “activity was not sanctioned by the school nor did the school knowingly provide any materials to support the expression”.<sup>108</sup> In sending the case back for trial, the district court established two key benchmarks: (1) “If the school disciplined Coy purely because they did not like what was contained in his personal website, the plaintiff will prevail;”<sup>109</sup> and, (2) even if the school established that it punished the student, not because of website content, but because he had violated a school policy prohibiting accessing non-approved websites using school computers, the school would still have to demonstrate under *Tinker* that accessing the website had an “effect upon the school district’s ability to maintain discipline in the school”.<sup>110</sup>

Most recently, an Indiana federal district court, in *TV v Smith-Green Community School Corporation*,<sup>111</sup> reversed a school district’s removal of two female students (MK and TV) from the volleyball and show choir extracurricular teams (later reduced by the school to removal from 25 % of the activities) after they had posted to one of the student’s restricted access *MySpace* and *Facebook* accounts sexually provocative photos taken at an off-campus “sleepover”. After two parents furnished the school principal with copies of the photos, the volleyball coach complained that the photos were causing divisiveness among team members who were taking sides supporting and opposing the photos. The school officials relied on their extracurricular activities policy which provided that “[i]f you act in a manner in school or out of school that brings discredit or dishonour upon yourself or your school, you may be removed from extra-curricular activities for all or part of the year”.<sup>112</sup> In finding that the student photos were protected free speech, the court concluded that:

[a]s a matter of law that the conduct in which MK and TV engaged, and that they recorded in the images which led to their punishment by Smith-Green School Corporation, had a particularised message of crude humour likely to

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105 *Coy* 205 FSupp 2d 795.

106 *Idem* 799 citing *Fraser* 478 US 678.

107 *Idem* 800.

108 *Ibid.*

109 *Idem* 801.

110 *Ibid.*

111 *TV v Smith-Green Community School Corporation* F Supp 2d.

112 *Idem* \*2.

be understood by those they expected to view the conduct, and so was sufficiently expressive as to be considered within the ambit of the First Amendment.<sup>113</sup>

The district court found *Fraser* inapplicable as the photos were taken off-campus and neither girl brought the photos onto the school campus.<sup>114</sup> In finding *Tinker* inapplicable because the photos had not caused disruption, the court declared that a student “cannot be punished with a ban from extracurricular activities for non-disruptive speech”.<sup>115</sup> As to the school’s claim that the photos had caused disruption, the court determined that:

[p]etty disagreements among players on a team – or participants in clubs for that matter is utterly routine. This type of unremarkable dissension does not establish disruption with the work or discipline of the team or the school, much less disruption that is ‘substantial’ or ‘material’ ... In sum, at most, this case involved two complaints from parents and some petty sniping among a group of 15 and 16 year olds. This can’t be what the Supreme Court had in mind when it enunciated the ‘substantial disruption’ standard in *Tinker*.<sup>116</sup>

The district court also found the school’s policy unconstitutional for vagueness and overbreadth because “it is obvious that out-of-school conduct that brings discredit or dishonour upon the student or the school is a standard that reaches a whole host of acts for which no First Amendment protection could be claimed”.<sup>117</sup>

## 5 Analysis and Implications: School Punishment of Students and the Rights of Parents

The dominating force of *Tinker* in addressing students’ creation of and access to webpages created off-campus limits the disciplinary authority of school districts. *Coy* casts doubt as to whether school suspensions would be possible simply because a student has used a school computer to access a student-created website, although disciplinary sanctions restricting or prohibiting student access to school computers would seem to be plausible since students would not be excluded from the school setting. However, much seems to depend on the language of school disciplinary codes. The district court in *Coy* held that a school conduct provision prohibiting the use of “obscenity, profanity, any form of racial slur or ethnic slurs, or other patently offensive language or gesture”,<sup>118</sup> was unconstitutionally overbroad,<sup>119</sup> since “it reached language,

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113 *Idem* \*6.

114 *Idem* \*9.

115 *Idem* \*10.

116 *Idem* \*13.

117 *Idem* \*18.

118 *Idem* 803.

119 A law or regulation is overbroad under the First Amendment if it “reaches a substantial number of impermissible applications” relative to the law’s legitimate sweep; *Coy* 205 F3d 801 citing *Déjà Vu of Nashville Inc v Metro*

distasteful as it might be, that is protected under the First Amendment".<sup>120</sup> Nonetheless, the court upheld the language as not being unconstitutionally vague, and thus could be enforced by the school, because it applied only to "school property, at school-sponsored events off school grounds, or during travel to and from school".<sup>121</sup> In effect, schools have discretion in formulating discipline policies defining inappropriate language as long as students are afforded sufficiently clear notice.

The second *Tinker* standard, "intrudes upon ... the rights of other students" or "collides with the rights of other students to be secure and to be let alone",<sup>122</sup> has supported school district discipline where students have worn t-shirts with messages expressing hostility or lack of tolerance for persons representing protected category viewpoints,<sup>123</sup> but one can question whether it applies with the same force to website messages created off-campus. In many of the cases discussed in this article, the students who created their webpages also accessed the website at school for their friends. Arguably, the student creator accessing his/her own webpage could be compared to a student choosing a t-shirt with a vulgar or offensive message to be worn at school, but the comparison breaks down when the person accessing the webpage at school is not the creator of the website. At some point, regardless how distasteful or vulgar, the school should not be able to reach into a student's home to punish him or her for the message created there. Indeed, at some point one returns to the facts of *Tinker* where the students who wore the black armbands were simply following the example of their parents,<sup>124</sup> although none of the webpage cases suggest that student vulgar comments on the internet merely reflected the parents' views of school personnel. Nonetheless, in the absence of the kind of disruption required under *Tinker*, one can argue that the function of education should not be to engage in a kind of mind control to eradicate the personally or politically unacceptable student views of the moment.<sup>125</sup> As the Second Circuit observed in the post-*Tinker*, but pre-*Fraser*, case, *Thomas v Board of Education*<sup>126</sup> (*Thomas*), student activity in

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*Government* 274 F3d 377, or "imposes restrictions so broad that it chills speech outside its legitimate regulatory purpose" *Coy* 205 F3d 801 citing *Deja Yu* 274 F3d 377.

<sup>120</sup> *Coy* 205 FSupp 2d 802.

<sup>121</sup> *Idem* 803.

<sup>122</sup> *Tinker* 393 US 508.

<sup>123</sup> See *Harper* 445 F3d 1178 (finding that student handwritten message on a t-shirt, "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" violated the second *Tinker* standard because "public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses").

<sup>124</sup> See *Tinker* 393 US 504.

<sup>125</sup> See eg *Beussink* 30 FSupp 2d 1177 where the student "did not intend his homepage to be accessed or viewed at his high school; he just wanted to voice his opinion".

<sup>126</sup> *Thomas v Board of Education* 607 F2d 1043.

creating a satirical publication for distribution in school which “was deliberately designed to take place beyond the schoolhouse gate”<sup>127</sup> could not, in the absence of disruption, be the subject of school discipline. The Second Circuit opined in *Thomas* that “our willingness to defer to the schoolmaster’s expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate”.<sup>128</sup>

Other than the Third Circuit *en banc* decision in *Blue Mountain*, none of the courts deciding cases discussed in this article addressed the substantive question whether the disciplinary reach of school officials into the home violates not only the free speech rights of the student, but the constitutional rights of the parents to direct the education of their children. Clearly, as the US Supreme Court noted in *Troxel v Granville*,<sup>129</sup> “the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children”.<sup>130</sup> Since the *en banc* Third circuit in *Layshock* did not address at all the parents’ constitutional claim, the comments by the three judge panel, while not resolving the parents’ claim on its merits, observed that it could envision situations “where a school’s reaction to student’s conduct could interfere with the parents’ ability to exercise appropriate control and authority over their child and his/her upbringing and education”.<sup>131</sup> However, the court of appeals provided no insights into what those situations might be. As far as the case before the Third Circuit was concerned, the court observed that the parents had communicated their displeasure with their son and “the school’s inappropriate response to [their son’s] actions in anyway interfered with [the parents’] liberty interest in raising their son”.<sup>132</sup> At the very least, *Layshock* is indicative of current legal developments where “a child’s constitutional rights will not always be coterminous with his/her parents’ liberty interests”,<sup>133</sup> and children are recognised as possessing constitutional rights even if parents have no constitutional claims.<sup>134</sup> The Third Circuit’s *Blue Mountain en banc* decision remains the

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<sup>127</sup> *Idem* 1050. The articles in the publication included such topics as masturbation and prostitution, as well as more standard fare such as “school lunches, cheerleaders, classmates, and teachers”. *Idem* 1045.

<sup>128</sup> *Idem* 1045.

<sup>129</sup> 530 US 57 (invalidating state statute granting grandparents visitation rights where those rights would be contrary to the custodial parent’s rights).

<sup>130</sup> *Idem* 67 (relying for support on the seminal Supreme Court decisions recognising parent rights protected under the Liberty Clause, *Meyer v Nebraska* 262 US 390, *Pierce v Society of Sisters* 268 US 510).

<sup>131</sup> *Layshock* 593 F3d 264.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> See eg *The Circle Schools v Pappert* 381 F3d 172 (invalidating state statute requiring that parents be notified if their children failed to participate in the Pledge of Allegiance pursuant to student’s right of privacy, but refusing to reach the merits of parents’ Liberty Clause claim). See generally, Mawdsley “The Changing Face of Parents’ Rights” 2003 *Brigham Young U Ed and Law J* 165 179-183.

only federal court of appeals decision that has addressed the merits of a parental liberty clause claim where they have sought to use that right to restrict the disciplinary authority of school officials. The reasoning of the *Blue Mountain* court of appeals does not bode well for parents who seek to use their liberty clause right to negate a school's discipline of their children. Whether a student can be punished by a school district is an issue between the school and the student and does not implicate the constitutional rights of parents. A parental liberty clause right to punish non-school conduct seems unaffected by the cases discussed in this article; what seems clear is that non-school conduct of students implicates the constitutional rights of students, but not the students' parents.

No one, certainly not the courts, is suggesting that students who create offensive websites should go unpunished, but, in the absence of *Tinker* disruption, school suspensions or expulsions should not be the appropriate means of punishment.<sup>135</sup> In several of the cases, school officials contemplated civil or criminal action, but then, whether dissuaded by the attendant publicity or the school board, decided not to proceed.<sup>136</sup> Should they decide to go forward with a judicial proceeding, school officials would probably have a difficult task in prevailing in civil damages or criminal claims,<sup>137</sup> but such difficulty should not become the determining factor as to whether school officials should bring to bear the full force of the school district against the student.

Unlike the *Harper* t-shirt message or the *Morse* sign that requires some advance planning and materials, the internet is instantaneous. What students could accomplish fifty years ago by writing and passing notes to only one or two students in class can now be readily accessible to a wide number of students almost at the moment of creation by punching a few keys on a keyboard. Contrary to the notes passed in schools in the past, most of the objectionable Internet webpages have originated in the students' own homes. Perhaps, Justice Thomas was correct that in granting constitutional rights for students, we have opened the Pandora's Box of separating the role and responsibility of parents from the schools. Worth noting in the cases discussed in this article are the students who not only apologised for their webpages, but were also punished by their

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<sup>135</sup> For an example of a creative alternative, see *Doninger v Niehoff* 527 F3d 41 where the Second Circuit upheld denial of a preliminary injunction to a student disqualified by her high school from running for Senior Class Secretary after she posted a vulgar and misleading message, referring to school administrators as "douchebags", about the supposed cancellation of an upcoming school event; the court of appeals found that the language was not only "plainly offensive", but "foreseeably created a risk of substantial disruption within the school environment" by being "hardly conducive to cooperative conflict resolution". *Idem* 50-51.

<sup>136</sup> See eg *Coy* 205 FSupp 2d 796.

<sup>137</sup> See *Blue Mountain* 593 F3d 293 (state police officer after reviewing student's webpage told the principal he could press criminal charges "but they would likely be dropped").

parents.<sup>138</sup> By setting up school officials as the final arbiters of what is distasteful or inappropriate in student, home-generated webpages, we not only have made adversaries of parents but have made certain that the webpage content that was probably accessible to only a relatively few students will now be memorialised in West Publishing Company's Reporter series.

## 6 Summary: US Jurisprudence

The Eighth Circuit in *DJM* observed that “[o]ne of the primary missions of schools is to encourage student creativity and to develop student ability to express ideas, but neither can flourish if violence threatens the school environment”.<sup>139</sup> Despite over a decade of litigation, the courts are still no closer to articulating a clear free speech standard for student cyber speech. Other than the *Tinker* disruption standard, school officials are left with very little else to use as a standard for prohibiting offensive webpages and punishing students. What is becoming clear is that courts are loathe to permit schools to intrude into homes and monitor the parents' or students' personal computers. Courts seem willing to superimpose an objective test on student-generated webpages and give little, if any, attention to student intentions. If the effect of a webpage is school disruption, whether the student anticipated the result is apparently of no consequence. In walking through this free speech minefield, school officials would seem better served to avoid constitutional tripwires by focusing on the objective harm to the school setting and forego discussion about the subjective humiliation and embarrassment resulting from student cyber barbs.

## 7 Freedom of Expression in South Africa

Despite the fact that US law differs fundamentally from South African law, the wealth of US case law on freedom of expression in the education context is instructive. However, when comparing case law and legal theories the inherent differences of the two legal systems must always be kept in mind.<sup>140</sup> The Constitution of the Republic of South Africa, 1996 protects the broader concept “freedom of expression” and not only freedom of speech, which is the standard term used in the US. This implies that in addition to speech, any manner of human expression is protected as a fundamental right. Section 16(1) of the South African Constitution provides as follows:

- 16(1) Everyone has the right to freedom of expression, which includes  
(a) freedom of the press and other media;

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<sup>138</sup> See *eg Layshock* 593 F3d 254.

<sup>139</sup> *DJM* F3d (Headnote 6 D).

<sup>140</sup> For instance, the US Constitution does not have a limitation clause such as section 36 of the South African Bill of Rights which regulates the balancing of fundamental rights according to a set of criteria.

- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

Freedom of expression is one strand of a web of rights and is closely related freedom of religion, belief and opinion, the right to human dignity, as well as the right to freedom of association, the right to vote and to stand for public office and the right to assembly. These fundamental rights implicitly recognise the ability to form and express opinions, whether individually or collectively, even where those views are controversial.<sup>141</sup> The corollary of the freedom of expression and its related rights is tolerance by society of different views, opinions and ideas. Tolerance, of course, does not require approbation of a particular view.<sup>142</sup>

In *Le Roux v Dey* the Constitutional Court affirmed the importance of freedom of expression in South Africa by stating that “the free and open exchange of ideas is no less important than it is in the United States of America”.<sup>143</sup> In the authoritarian political climate of Apartheid students were prevented from questioning educators, were not encouraged to think critically and were taught to accept authority without question.<sup>144</sup> As democracy is not yet firmly established in South Africa “the open market of ideas is all the more important”<sup>145</sup> in order to enable the “quest for truth”<sup>146</sup> by means of scientific, artistic or cultural expression of ideas and discoveries; to provide access to news, information and critical viewpoints inform the citizenry and electorate; to allow the free expression of the human personality as a natural part of being human; and to ensure accountability, responsiveness, and transparent decision-making.

However, section 16(2) of the SA Constitution contains internal limitations which demarcate the extent of constitutional free expression as follows:

- (2) The right in subsection (1) does not extend to
  - (a) propaganda for war;
  - (b) enticement of imminent violence; or
  - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

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141 *South African National Defense Force Union v Minister of Defense* 1999 4 SA 469 (CC) par 8.

142 *Ibid.*

143 *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae)* JOL 27031 (CC) (2011) par 47.

144 *Van Vollenhoven Learners understanding of their right to freedom of expression in South Africa* (2006) 70.

145 *S v Mamabolo (eTV intervening)* 2001 3 SA 409 (CC) par 45.

146 *Currie et al* 310.

## 8 Freedom of Expression in the South African Education Context

South African courts have *inter alia* been called on to apply the constitutional standards to determine the limits of freedom of expression in the education or school context concerning physical symbols (Antonie,<sup>147</sup> Pillay<sup>148</sup>) personal expression (Williams<sup>149</sup>), publication of untrue statements in the media (Hamata<sup>150</sup>) student protests (Ngubo<sup>151</sup>) and student-generated electronic cyber expression created outside the school setting but having an effect on school discipline (Le Roux<sup>152</sup>).

Section 10 of the Constitution states that “Everyone has an inherent dignity and the right to have their dignity respected and protected”.<sup>153</sup> At times the fundamental rights to dignity and freedom of expression come into conflict with one another. In the context of a school a further complicating factor is that the unlimited exercise of the right of freedom to expression can easily undermine student discipline, and thus also hamper the school in its function to educate children.

### 8 1 Substantive Disruption of Discipline – the *Tinker* Standard

In *Antonie v Governing Body, the Settlers High School and Head, Western Cape Education Department*<sup>154</sup> the School Governing Body suspended a student from school for wearing dreadlocks in contravention of the school’s uniform dress code. The student, *Antonie*, was a Rastafarian and wore dreadlocks as part of her religious practice. The student’s parents supported her conduct. The matter was taken on review and the High Court held that the infringement of the school’s uniform dress code was not a serious misconduct and did not warrant suspension. The court found that the suspension could not only have a negative effect on her normal development and her future career, but could also submerge her personality, dignity and self-esteem. On the facts the court found that the wearing of dreadlocks by the girl did not cause a substantial disruption of school discipline, to the extent that it impinged upon other students’ right to basic education. The court ruled in favour of *Antonie* and the suspension was set aside.

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147 *Antonie v Governing Body, the Settlers High School and Head, Western Cape Education Department* 2000 4 SA 738 (WC).

148 *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC).

149 *Western Cape Residents’ Association obo Williams v Parow High School* 2006 3 SA 542 (C).

150 *Hamata v Chairperson, Peninsula Technikon* 2000 4 SA 621 (C).

151 *Acting Superintendent-General of KwaZulu-Natal v Ngubo* 1996 3 BCLR 369 (N).

152 *Le Roux*.

153 S10 SA Constitution.

154 *Antonie*.



In *MEC for Education, KwaZulu-Natal v Pillay*, the Constitutional Court also upheld the right to freedom of expression of a student at Durban Girls High School, to wear a gold nose-stud to school, in keeping with her South Indian family traditions and culture.<sup>155</sup> Reading between the lines it is apparent the main driving force behind the insistence on wearing the nose-stud to school was the student's mother. The student's main argument was based on the right to equality and the constitutional prohibition against unfair discrimination based on culture and religion. The Constitutional Court found that the norm embodied by the school's code was not neutral, but that it enforced mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms.<sup>156</sup> The court reiterated that this case was not about the constitutionality of school uniforms. It was about granting religious and cultural exemptions to an existing uniform as symbolic expression. Langa CJ was of the opinion that school uniforms served admirable purposes but that these purposes would not be undermined by allowing for certain exemptions. The school did not present any evidence to show that a student who is granted an exemption from the provisions of the dress code will be any less disciplined or that it will negatively affect the discipline of others. The court thus held that the student's right to freedom of expression had been unjustifiably limited because her wearing of a nose-stud posed no risk of substantial disruption to school activities and would not impose an undue burden on the school. Langa CJ therefore confirmed that the refusal to allow Pillay to wear the nose-stud amounted to unfair discrimination which unconstitutionally limited the student's right to express her religion and culture which is central to the right to freedom of expression.

In both the aforementioned cases the courts applied the standard similar to that first articulated in *Tinker* that a student's right to free expression may only be limited if "substantial disruption of school discipline" could or would result from the student's conduct. Therefore, the authority of the educators and school governing bodies to set rules to establish an orderly and disciplined environment may be limited to allow free expression insofar as the school's discipline is not substantially disrupted. It is interesting to note that although in both *Antonie* and *Pillay* the rights of parents to direct the education and religious or cultural upbringing of their children played an important role in the perpetuating each student's adamant disregard for the school rules, the courts dealt with the merits of the issues by considering the constitutional rights of the students (ie the children) and not the rights of the parents.

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<sup>155</sup> *MEC for Education, KwaZulu-Natal*.

<sup>156</sup> *MEC for Education, KwaZulu-Natal v Pillay* par 44.

## 8.2 Parents Attempt to Circumvent School Discipline and a School's Duty to Educate.

In *Western Cape Residents' Association obo Williams v Parow High School*<sup>157</sup> the parents (with the support of their friends in the Resident's Association) applied for an urgent interdict to compel the school to allow a grade 12 learner, *Williams*, to attend a matric farewell-function.<sup>158</sup> The school had refused permission because of her continued ill-discipline during the course of the year. The court considered arguments that the student's dignity, equality and freedom of expression had been infringed upon by the school's refusal, but found that the attendance of a matric farewell-function was an extra-curricular social activity and, as such, was a privilege and could not be claimed as an enforceable right. Also, the court considered the interests of the school, the other students and the applicant and determined on balance that:

Two of the important lessons that a school must teach its learners are discipline and respect for authority. The granting of privilege as a reward for good behaviour is one tool that may be used to teach such lessons. The withholding of such privilege can therefore not be claimed as an infringement of a right to equality or to dignity. Indeed, the granting of the privilege in the absence of its having been earned may well constitute an infringement on the rights to equality and dignity of those who have merited the privilege. The right to freedom of expression, of course, does not equate to a right to be ill-disciplined or rude. The system of rewards for good behaviour permeates all walks of life and to learn the system at an early age can only benefit the learner later on in his or her life. I see nothing of constitutional concern in the use of such a system in schools.<sup>159</sup>

The court thus held that in view of the school's duty to teach children discipline and respect for authority, the withholding of privilege on the grounds of bad behaviour is not an infringement on the rights to dignity, equality or freedom of expression. By excluding the interests of the parents in the matters of *Antonie, Pillay* and *Williams*, the courts have implicitly affirmed the individual rights of the students by balancing it with the duty of the school authorities to maintain order and discipline. This sensible approach by the courts has undergirded the authority of the school authorities to maintain order and discipline in spite of attempts by the parents of the student to overlook ill-discipline or to attempt to circumvent the resultant punishment.

## 8.3 Untruthful Publication - Suspension of a Student Affirmed

In *Hamata v Chairperson, Peninsula Technikon*<sup>160</sup> a journalism student at the Peninsula Technikon was suspended after the publication of the

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<sup>157</sup> *Western Cape Residents' Association*.

<sup>158</sup> Similar to a Prom-dance in the US context.

<sup>159</sup> *Western Cape Residents' Association* 545B-C.

<sup>160</sup> *Hamata v Chairperson, Peninsula Technikon* 2000 4 SA 621 (C).

article "Sex for Sale on Campus" in the *Mail and Guardian* newspaper during September 1998. The article refers to prostitution and conveyed the message in no uncertain terms, that not only the practice of prostitution on the Technikon's campus was prevalent and the existence thereof a well-known fact, but also that the authorities of the Technikon acquiesced in this practice. On review of the disciplinary proceedings the High Court held that although untrue information could at times be protected under the right to freedom of expression, this false dissemination could be limited when balanced against other constitutional rights. The court held that countervailing interests of the educational institution and of victims harmed by untrue statements would more easily override untrue than true expression. The court upheld the student's suspension and affirmed that the harmful exercise of the freedom of expression was justifiably limited in this instance.

#### **8 4 Harmful Effects of Student Protests and Harassment**

In *Acting Superintendent-General of KwaZulu-Natal v Ngubo*<sup>161</sup> police evicted college students who slept on the property and harassed college staff while protesting. The students contested the legality of this action and applied for a court review of the provincial Head of Education's decision to have protesting students forcibly evicted. The court held that the freedom of expression of the students had not been justifiably limited as "freedom of expression does not extend to justify harassment ...". This affirms that direct, face-to-face expression of protests may be duly limited if it infringes on the rights and safety of other persons or is unduly harmful to the educational institution.

#### **8 5 Cyberbullying, Defamation and Schools**

The case of *Le Roux v Dey*<sup>162</sup> is the only court ruling by South African courts involving students' use of cyberspace. In this case *Le Roux* (1st defendant) had created a computer image at his home in which the faces of the principals and deputy principal of his school were super-imposed on an image of two naked gay bodybuilders sitting in a sexually suggestive posture. The school crests were super-imposed over the genital areas of the two men in the image. Apparently satisfied and amused by his own handiwork, *Le Roux* shared his achievement with a close friend and sent it to his friend's cell phone via his computer. This friend (2<sup>nd</sup> defendant) then reproduced the image and circulated it to many other students at the high school. Eventually one of the students (3<sup>rd</sup> defendant) at the school made photocopies and affixed the image to the school's notice board. Understandably, the principal and deputy principal were embarrassed and felt particularly aggrieved by this. After an internal hearing by the School Governing Body the students were disciplined and their punishments *inter alia* included the performance of

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161 *Acting Superintendent-General of KwaZulu-Natal v Ngubo* 1996 3 BCLR 369 (N).

162 *Le Roux*.

community service at the school and the Pretoria Zoo. However, despite the disciplinary steps against the students, the tag “Dey is gay” was heard in the corridors of the school which perpetuated untrue rumours and continued to infringe the deputy principal’s dignity. The deputy principal instituted action and claimed damages for defamation. Defamation is per definition the wrongful infringement and harm of a person’s good name and reputation. Its focus is the protection of the constitutional rights to dignity and privacy of any person. When a court assesses whether a publication is defamatory through the prism of the Constitution, it is concerned with the interpretation, protection and enforcement of the Constitution.<sup>163</sup> In this case the process involved the balancing of the rights to dignity and privacy on the one hand, with the rights freedom of expression and the rights of children, on the other.

The matter eventually reached the Constitutional Court where the schoolboys defended their conduct by contending that the picture was not defamatory as it was only a schoolboy prank. Also in defense of the actions of the students the Freedom of Expression Institute (1st *amicus curiae*) stressed the rights of children to freedom of satirical expression. The court did not accept the defendants’ defense that they lack *animus iniurandi* or intent. Defamation does not require that the schoolboys were motivated by malice or ill-will. The court also accepted the evidence of the plaintiff and of another school principal that respect for teachers is an essential precondition for discipline, that discipline in turn is an essential requirement for the proper functioning of the school system, and that there is a growing tendency in South African schools to challenge the status and authority of teachers with a concomitant breakdown in discipline.

Brand J, on behalf of the majority of the Constitutional Court, considered whether the humour of the manipulated image was excusable, but held that a jest is not legitimate, if the joke would be insulting, offensive or degrading to another. The test is whether it is a joke in which the subject cannot share because it is hurtful and defamatory to the subject. A statement or idea which raises a laugh is defamatory when there is an element of *contumelia* in the joke, that is, when it is insulting or degrading to the butt of the joke. Brand J found that a schoolchild called as a witness for the schoolboys came to exactly the same conclusion; that even though it could be called a schoolboy prank, it humiliated and demeaned the victims of the prank. The court held that the question is not so much whether the attempt at a joke is objectively funny or not. Nor is it of any real consequence whether we regard the joke as unsavoury or whether we think that those who may laugh at it would be acting improperly. The real question is whether the reasonable observer – perhaps, while laughing – will understand the joke as belittling the victim; as making the victim look foolish and unworthy of respect; or as exposing the victim to ridicule and contempt. If the joke achieves that

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<sup>163</sup> *Idem* 31.

purpose, then it is defamatory, even when it is hilariously funny to everyone, apart from the victim.

The court thus confirmed that the manipulated computer image was defamatory and ordered that the students had to apologise and to pay compensation to the plaintiff. It follows therefore, that defamatory conduct that infringes the dignity of an educator, a student or anyone for that matter, whether it takes the form of direct face-to-face insults or originates from a cyber source outside the school, is not only contrary to South African common law but also to the Constitution because it infringes a person's dignity.

The Constitutional Court thus set a subjective test as the high standard by which the defamatory consequences of insulting or degrading action or content should be measured. In *Le Roux* the court did not apply the objective standard of "substantive disruption of school discipline" (the *Tinker* standard) as the measuring yardstick to determine the constitutionality of the students' conduct. It matters not whether the injurious or harmful expression originated in the school or whether it had a deleterious effect on school discipline. Logically, therefore, the subjective *Le Roux* standard may be applied to any setting in society and simply inquires whether a reasonable observer would understand that the expression (in whatever format) infringes the dignity of the victim.

## 9 Summary: South African Jurisprudence

Broadly speaking, the South African courts have not applied the same reasoning as the US courts by considering the five factual variants of the place or origin of the expression (on or off school premises), the place of access to the expression (on or off school premises), the person(s) who accesses the expression (staff or other students), the content of the electronic expression, and the impact of the expression on the school in determining the constitutionality of the limitation of a student's right to freedom of expression.

However, the South African courts have adjudicated the right to freedom of expression in the school or education context by considering the nature of the idea or message (eg symbolic, cultural, religious, words, innuendo's, images etc), the manner of communication or expression (eg face-to-face or indirect) and the content of the expression. The cases that dealt with freedom of expression and student discipline in the school or educational context (*Antonie, Pillay, Hamata, Ngubo* and *Le Roux*) can be categorised into two factual variants namely, instances where the expressions have not been harmful, and instances where the expressions have been harmful to individuals, other persons or the educational institutions. In essence, therefore, the South African courts have firstly applied the *Tinker*-standard (albeit without naming it as such) that free expression is allowed in the absence of substantive disruption of student discipline or harm to others, and secondly, the *Le Roux* standard and

subjective test where the expression has subjectively infringed a person's dignity or has caused harm to others or the school.

## 10 Conclusion

In the US there has been, since *Tinker*, a movement in jurisprudence to confirm the right of schools to take decisions and to implement measures to exercise its duty to educate children and the right to have measures in place to maintain discipline. South African court rulings have likewise upheld this right of schools. When not threatening discipline, however, South African court rulings have come down in favour of upholding students' right to freedom of expression. When the exercise of free expression has been harmful to persons, educational institutions or individuals, the South African courts have upheld the limitation of the students' right to free expression in order to protect the safety of persons, and the dignity of individuals or educational institutions. However, the law is not settled with regard to a possible conflict between parents' rights to educate their children according to their own judgment, and a schools' right to lay down measures it deems proper. Whereas South African courts have yet to provide guidelines on this issue, the US jurisprudence has been in favour of a schools' right to maintain discipline.