

WHEN STUDENT SPEECH BECOMES STUDENT HARM: THE LIMITS
OF THE FIRST AMENDMENT IN THE WAKE OF *MAHANOV*

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INTRODUCTION

In 2025, while American public schools force students to use technology to learn, they often refuse to extend protections for their use beyond school grounds. Since the emergence of widespread social media in 2003,¹ the Supreme Court and lower federal courts have grappled with determining when public schools can regulate off-campus cyberbullying on students' social media without violating the First Amendment.² The First Amendment provides that public or government officials³ are prohibited from abridging the freedom of speech, religion, press, assembly, and petition of any individual residing in the United States.⁴ In the public school context, enrolled students do not automatically “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁵ On the other hand, freedom of speech rights are not as extensive for minor-aged students as they are for adults in other settings.⁶

Since 1969, the Supreme Court and lower federal courts have permitted public schools to restrict student speech on campus if the

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¹ Michael L. Rustard & Diane D'Angelo, *The Path of Internet Law: An Annotated Guide to Legal Landmarks*, 2011 DUKE L. & TECH REV. 12, 14 (2011).

² See Andrew Boone, Note, *Off-Campus Speech and the Basis of Public-School Authority in Mahanov v. B.L.*, 74 BAYLOR L. REV. 716, 736 (2022).

³ See Hous. Cmty. Coll. Sys. v. Wilson, 595 U.S. 468, 474 (2022) (quoting Nieves v. Bartlett, 587 U.S. 391, 398 (2019)) (“‘[A]s a general matter,’ the First Amendment prohibits government officials from subjecting individuals to ‘retaliatory actions’ after the fact for having engaged in protected speech.”).

⁴ See U.S. CONST. amend. I.

⁵ Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

⁶ See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (“[T]he constitutional rights of students in public school[s] are not automatically coextensive with the rights of adults in other settings.”).

speech substantially disrupts the work and order of the entire institution.⁷ With the popularization of social media over the past 20 years, lower federal courts have begun applying the same “substantial disruption” standard to student speech occurring on social media during school hours.⁸

Recently, in limited circumstances, the lower courts stretched the standard further to encompass speech that occurred on social media off campus and outside school hours.⁹ Depending on the jurisdiction, the majority of courts apply one of two tests to determine whether the “substantial disruption” standard applies to off-campus speech. The first test, employed by the Fourth Circuit,¹⁰ inquires whether the speech bore a “sufficient nexus” to the school’s pedagogical interests and whether the speech impacted the school’s pedagogical interests.¹¹ The second test, employed by the Second,¹² Fifth,¹³ and Eighth¹⁴ Circuits, inquires whether it is “reasonably foreseeable” that the off-campus speech would cause a substantial disruption to the work and order of the school.¹⁵ Other

⁷ See Laura McNeal, *Integrating the Marketplace of Ideas: A New Constitutional Theory for Protecting Students’ Off-Campus Online Speech*, 76 STAN. L. REV. 1575, 1583–84 (2024).

⁸ See *Castro v. Clovis Unified Sch. Dist.*, 604 F. Supp. 3d 944, 951–953 (E.D. Cal. 2022) (holding that a derogatory post made by a student on social media while “on school grounds and during school hours” is appropriately punishable). *But cf. Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 192 (2021) (noting the school’s interest was significantly diminished by the fact the student’s social media post was made “outside the school *on her own time*” (emphasis added)).

⁹ See McNeal, *supra* note 7, at 1588.

¹⁰ See *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 573 (4th Cir. 2011) (holding that *Tinker* applies where there is a sufficient nexus between the speech and pedagogical interests of the school).

¹¹ See McNeal, *supra* note 7, at 1592.

¹² *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38–39 (2d Cir. 2007) (finding the student’s post threatening a teacher to “pose[] a reasonably foreseeable risk that the icon would come to the attention of school authorities and . . . would ‘materially and substantially disrupt the work and discipline of the school’”); see also *Doninger ex rel. Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008) (holding that a student’s offensive blog post was reasonably foreseeable to reach school property because the student “purposely designed . . . [it] to come onto the campus”).

¹³ See *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 388 (5th Cir. 2015) (*en banc*) (holding that it is reasonably foreseeable that a post in which a student intimidated and harassed his teachers via a rap song could cause a substantial disruption).

¹⁴ See *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist.* No. 60, 647 F.3d 754, 766 (8th Cir. 2011) (holding that it is reasonably foreseeable that the school would be made aware of the student’s threatening posts online); see also *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 985 (11th Cir. 2007) (Black, J., concurring) (stating the “reasonably foreseeable” test should ask whether the speech “would cause school officials to reasonably anticipate a substantial disruption of or material interference ‘with the work of the school or impinge upon the rights of other students’”).

¹⁵ See McNeal, *supra* note 7, at 1588–89.

circuits, such as the Ninth,¹⁶ use a combination of tests, on a case-by-case basis, to evaluate the permissibility of disciplining off-campus speech.¹⁷

With the growing need to address the circuit split, the Supreme Court confirmed that a school may have a regulatory interest in developing a standard that disciplines off-campus speech in limited circumstances, including “serious or severe bullying or harassment targeting specific individuals.”¹⁸ Unfortunately, this standard has been inconsistently applied in cases of cyberbullying. Currently, American public schools cannot discipline students for off-campus cyberbullying unless the cyberbullying amounts to serious or severe bullying—generally achieved through repeated, obscene occurrences—that substantially disrupts the school’s operation.¹⁹

This Comment argues that the current standard for regulating off-campus cyberbullying is too narrow, and the requirement that bullying be repeated before courts consider it “severe” will lead to the inadequate protection of minor students both on and off campus. Parts I and II provide the history of the First Amendment in public schools as defined by several Supreme Court cases and the tests later developed by the First, Sixth, and Ninth Circuits. Part III discusses the specifics of cyberbullying in schools today. Part IV highlights the challenges posed by applying the current First Amendment standard to cyberbullying. Finally, Part V proposes a solution to strengthen a public school’s ability to discipline off-campus cyberbullying, thereby better protecting students.

BACKGROUND

The First Amendment, incorporated by the Fourteenth Amendment,²⁰ protects the free exchange of ideas in public forums from regulation by state actors based on their content and the speaker.²¹

¹⁶ See *Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 720 (9th Cir. 2022) (reiterating that one factor of the Ninth Circuit’s “sufficient nexus” test is reasonable foreseeability of impact on the school).

¹⁷ See McNeal, *supra* note 7, at 1594.

¹⁸ See *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 188 (2021).

¹⁹ See *id.* at 188 (stating that “serious or severe bullying or harassment” that occur off-campus “may call for school regulation” when it involves “substantial disorder or invasion of the rights of others”); see, e.g., *Chen*, 56 F.4th at 711-12 (describing disturbing posts made by a student to bully other students for over a year).

²⁰ *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

²¹ Jason Zenor, *Tales Out of School: Delineating Student Speech Protections for the Digital Age*, 22 U.N.H.L. REV. 93, 101 (2023).

The First Amendment does not, however, protect obscenity,²² fraud,²³ speech integral to criminal conduct,²⁴ true threats,²⁵ fighting words,²⁶ and some commercial speech.²⁷ Although the Supreme Court consistently fleshes out the broader contours of the First Amendment, its treatment of student speech is sparser, with only five main cases in the past fifty-five years setting the standard.²⁸ As a result, lower courts have grappled with the ambiguity surrounding student speech, struggling to determine how the old-school cases fit with current technological expectations and the impacts on American public school students.²⁹

I. THE FIRST AMENDMENT IN PUBLIC SCHOOLS IN THE SUPREME COURT FROM 1969 TO 2021

Students enrolled in public schools do not automatically “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”³⁰ A public school student’s First Amendment rights are limited, however, in circumstances where the speech conflicts with the special pedagogical interests and order of the institution.³¹ Although it is insufficient to regulate speech based on a “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,”³² the Supreme Court recognizes several First Amendment limitations in public school settings.

A. *The Tinker Test: Material and Substantial Disruption*

In 1969, the Supreme Court considered, for the first time, when public schools may regulate student speech. In *Tinker v. Des Moines*

²² See *United States v. Williams*, 553 U.S. 285, 288 (2008).

²³ See *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003).

²⁴ See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

²⁵ See *Counterman v. Colorado*, 600 U.S. 66, 72 (2023).

²⁶ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992).

²⁷ See *id.* at 424 (Stevens, J., concurring) (noting that there are justifications for depriving commercial speech of full constitutional protections under the First Amendment).

²⁸ See Mary-Rose Papandrea, Mahanoy v. B.L. & First Amendment “Leeway,” 2021 SUP. CT. REV. 53, 62 (2021).

²⁹ See Isabella Santos, Comment, *Bright Young Minds: Envisioning a Child’s Right to Direct Their Education*, 56 ARIZ. ST. L.J. 1571, 1574 (2024).

³⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

³¹ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 273 (1988).

³² *Tinker*, 393 U.S. at 509.

Independent Community School District, several students wore black armbands to school in protest of the Vietnam War.³³ In response, the school threatened to suspend any student who refused to remove the armband.³⁴ After five students refused, the school followed through on its threat and suspended all five students.³⁵

When *Tinker* arrived at the Supreme Court, Justice Fortas first synopsisized the First Amendment as it applied to public school students. Reiterating over fifty years of precedent, the Supreme Court stated that public school students do not lose their First Amendment rights when they go to school³⁶ because they are still “‘persons’ under our Constitution.”³⁷ First Amendment rights are subject, however, to the “special characteristics of the school environment.”³⁸ Although the Supreme Court did not elaborate on what “special characteristics” are, the characteristics have since developed to include, among others, school-implemented grooming and dress codes,³⁹ student speech that “disrupt[s] the educational process,”⁴⁰ speech that raises legitimate pedagogical concerns,⁴¹ and the limited circumstances in which the school assumes parental obligations to the student.⁴²

In holding that such “special characteristics” did not apply, the *Tinker* Court concluded that the school unconstitutionally impeded upon the expression of the five students for three reasons. First, the armbands did not substantially disrupt school operations.⁴³ Second, the school district did not have a reasonable expectation that the armbands would eventually substantially disrupt school operations.⁴⁴ Third, no

³³ *Id.* at 504.

³⁴ *See id.*

³⁵ *See id.* at 508.

³⁶ *Id.* at 506.

³⁷ *Id.* at 511.

³⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

³⁹ *See id.* at 507-08.

⁴⁰ *See Morse v. Frederick*, 551 U.S. 393, 413 (2007) (Thomas, J., concurring).

⁴¹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

⁴² *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986); *see also Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 187 (citing *Fraser*, 478 U.S. at 684) (stressing that one characteristic of the school environment “is the fact that schools at times stand *in loco parentis*, i.e., in the place of parents”).

⁴³ *Tinker*, 393 U.S. at 509.

⁴⁴ *Id.* at 514.

evidence indicated that the students' silent expression interfered with "the rights of other students to be secure and to be let alone."⁴⁵

The *Tinker* test, thus, bears two prongs: (1) foreseeable* or actual substantial disruption or (2) an invasion of the rights of others.⁴⁶ If the student's speech satisfies either prong, a school is within its right to regulate student speech to protect school order and safe operation. Notably, there is "no authority interpreting what 'invasion on the rights of others' really entails" nor a Supreme Court decision that focuses solely on that language when addressing the constitutionality of student speech regulations.⁴⁷ While the Supreme Court has not expounded upon what an "invasion on the rights of others" may look like, some lower courts have found there is a right to sanctity and a right to a public school environment free from hostility.⁴⁸ Thus, bullying in all its forms results in an invasion of the rights of others.⁴⁹

B. *Tinkering with Tinker: Three Carveouts*

Since *Tinker*, the Supreme Court has added three carveouts that permit public schools to regulate student speech outside *Tinker*'s analytical bounds. The first expansion was set out in *Bethel School District No. 403 v. Fraser* in 1986. In *Fraser*, a student made a speech riddled with sexual innuendos in front of six hundred students during a school assembly.⁵⁰ Bethel High School subsequently suspended the student.⁵¹ The student then filed suit for violation of his First Amendment rights.⁵² The Supreme

⁴⁵ *Id.* at 508, 514.

* Note that the foreseeability of substantial disruption is based on the ability to point to specific facts that substantial disruption is likely; thus, it is an objective standard. *See, e.g.* Melton v. Young, 465 F.2d 1332, 1335 (6th Cir. 1972) (holding that the school could forecast the substantial disruption of Confederate flag clothing by pointing to recent racial incidents, such as citywide disturbances and school closures).

⁴⁶ W. Christopher Schwartz, Note, *Mahanoy v. B.L. ex rel. Levy and the Virtual School Environment: A Framework for Regulating Online, Off-Campus Student Speech*, 51 J.L. & Educ. 262, 269 (2022).

⁴⁷ *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005).

⁴⁸ *See Virginia G. v. ABC Unified Sch. Dist.*, 19 Cal. Rptr. 2d 671, 674 (Cal. Ct. App. 1993); *see also Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 723 (9th Cir. 2022) ("[T]argeted students stated that the severity of the hostile environment they experienced was exacerbated by the knowledge that other students participated in the account and 'liked' the abusive posts.").

⁴⁹ *See Doe v. Hopkinton Pub. Schs.*, 19 F.4th 493, 509 (1st Cir. 2021).

⁵⁰ *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677-78 (1986).

⁵¹ *See id.* at 678-79.

⁵² *Id.* at 679.

Court held that a school may reprimand its students for lewd, vulgar, and indecent speech that disrupts “educational school activities[.]” even if the speech would otherwise be protected in a different forum.⁵³ *Bethel* was the first case to go beyond the *Tinker* analysis because the Supreme Court “certainly did not conduct the ‘substantial disruption’ analysis prescribed by *Tinker*.”⁵⁴

Hazelwood School District v. Kuhlmeier set out the second expansion in 1988. In *Kuhlmeier*, an upcoming edition of a student newspaper contained two articles: one about a student’s experience with pregnancy and another regarding the impact of divorce.⁵⁵ The principal deleted the articles from the edition because he felt the articles contained inappropriate material.⁵⁶ The students who wrote the articles filed suit, claiming their First Amendment rights were violated.⁵⁷ The Supreme Court rejected that claim, holding that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”⁵⁸ In other words, a school can restrict speech that could reasonably be considered to “bear the imprimatur of the school.”⁵⁹

Another narrow expansion of student speech regulation developed in *Morse v. Frederick* in 2007. In *Morse*, a school principal permitted students and staff to leave class early to participate in the Olympic Torch Relay as it passed through the area.⁶⁰ While the cameramen and torchbearers passed, a student and his friends waved a fourteen-foot banner with the phrase “BONG HITS 4 JESUS” largely written on the banner.⁶¹ The principal demanded that the students take down the banner because it encouraged illegal drug use.⁶² After one student refused to take the banner down, the school suspended him.⁶³ The Supreme Court agreed that the sign encouraged drug use and, thus,

⁵³ See *id.* at 685; see also *id.* at 688-89 (Brennan, J., concurring).

⁵⁴ *Morse v. Frederick*, 551 U.S. 393, 405 (2007).

⁵⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263 (1988).

⁵⁶ *Id.* at 263-64.

⁵⁷ *Id.* at 264.

⁵⁸ *Id.* at 273.

⁵⁹ *Id.* at 271.

⁶⁰ *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

⁶¹ *Id.*

⁶² *Id.* at 398.

⁶³ *Id.*

posed a student safety risk.⁶⁴ The Supreme Court reasoned that, because Congress expressly declared school interest in educating students about the dangers of drug use,⁶⁵ the “special characteristics of the school environment” permit regulating student speech that encourages, rather than deters, drug use.⁶⁶

C. *Holding Space for Regulating Off-Campus Speech: Mahanoy Area School District v. B.L. by and through Levy*

In addition to the *Tinker* exceptions, the Supreme Court authorized a significant expansion of the *Tinker* test in *Mahanoy Area School District v. B.L. by and through Levy*⁶⁷ in 2021. The increase in public schools’ use of technology in the wake of COVID-19 forced the Supreme Court to address when schools could regulate off-campus speech made entirely online.⁶⁸ As stated, many lower courts already applied the *Tinker* test to off-campus instances governed by variants of the “reasonably foreseeable” or “sufficient nexus” tests.⁶⁹ Still, the Supreme Court only addressed the issue once public education moved entirely online for an indefinite period.⁷⁰ When the Supreme Court granted certiorari in *Mahanoy* on January 8th, 2021, public schools were still responding to the COVID-19 crisis, and most classroom activities occurred online.⁷¹ The shift to online learning created new opportunities for students to torment one another. The

⁶⁴ *Id.* at 402; *see also id.* at 425 (Alito, J., concurring).

⁶⁵ *Id.* at 408.

⁶⁶ *Morse v. Frederick*, 551 U.S. 393, 408 (2007).

⁶⁷ 594 U.S. 180, 193-94 (2021).

⁶⁸ Blakely Evanthia Simoneau, *Technology, Tinker, and the Digital Schoolhouse*, 63 SANTA CLARA L. REV. 431, 446-47 (2023); *see also Mahanoy*, 594 U.S. at 188 (insinuating that computer-based learning leaves open a hole of when school-related, off-campus instances can be considered for regulation).

⁶⁹ *See Doninger ex rel. Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008) (holding that a student’s blog “although created off-campus, ‘was purposely designed by [the student] to come onto the campus’”); *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013) (holding that the *Tinker* analysis applies to off-campus text messages threatening to shoot specific students); *A.S. ex rel. Schaefer v. Lincoln Cnty. R-III Sch. Dist.*, 429 F. Supp. 3d 659, 670 (E.D. Mo. 2019) (holding a post on Snapchat falsely stating another student died was designed to reach the school because it was “specifically, deliberately, and purposefully shared with other high school students on social media”).

⁷⁰ Simoneau, *supra* note 68, at 446-47.

⁷¹ *See* Brief for Nat’l Sch. Bds. Ass’n et al. as Amici Curiae Supporting Petitioners at 23, *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180 (2021) (No. 20-255).

new opportunities included virtual attacks in classroom chats among students that educators generally cannot access, as well as taking screenshots of other students.⁷² With COVID-19 shifting bullying entirely off-campus, the Supreme Court was forced to respond.

In *Mahanoy*, a Pennsylvania high school student, B.L., tried out for the varsity cheerleading and softball teams.⁷³ B.L. only made the junior varsity cheerleading team.⁷⁴ Upset with the decision, B.L. took to Snapchat to post a “story” lasting twenty-four hours with a photo of herself captioned “F[]ck school f[]ck softball f[]ck cheer f[]ck everything.”⁷⁵ The story was available to 250 “friends” on the account, including other students from Mahanoy Area High School.⁷⁶ One of the viewers took a photo of the post and circulated it to other cheerleading squad members, one of whom showed it to her mother, a cheerleading coach.⁷⁷ Another cheerleading coach, an Algebra teacher, faced student questioning in class about the post for a few minutes.⁷⁸ The coaches then conferred with the school principal.⁷⁹ Along with the principal, the coaches determined that the posts were profane and used in connection with the school’s extracurricular activity, thereby violating the school’s policy.⁸⁰ Together, the school’s principal, athletic director, superintendent, and school board decided to suspend B.L. from the junior varsity team for the upcoming year.⁸¹

B.L. subsequently filed suit in the United States District Court for the Middle District of Pennsylvania, alleging a violation of her First Amendment rights.⁸² Judge Caputo addressed the *Tinker* carveouts first and found that the closest carveout would be for profanity under *Fraser* or the imprimatur of the team under *Kuhlmeier*.⁸³ Both carveouts failed.⁸⁴ *Fraser* only permits punishment of “‘offensively lewd,’ ‘obscene,’

⁷² See *id.* at 23-24.

⁷³ See *Mahanoy*, 594 U.S. at 184.

⁷⁴ *Id.*

⁷⁵ *Id.* at 184-85.

⁷⁶ *Id.* at 185.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 185 (2021).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 185-86.

⁸³ See *B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429, 441, 443 (M.D. Pa. 2019).

⁸⁴ See *id.* at 442-43.

‘indecent,’ and ‘vulgar’” speech that occurs during a school-sanctioned event on campus.⁸⁵ *Fraser* is, thus, inapplicable because B.L. spoke at a convenience store during personal time.⁸⁶ Likewise, there is little coherent argument under the *Kuhlmeier* doctrine that B.L.’s off-campus speech could reasonably be seen as sanctioned by the team or the school.⁸⁷ The court, therefore, granted B.L.’s motion for summary judgment.⁸⁸

The school district appealed to the United States Court of Appeals for the Third Circuit.⁸⁹ In affirming the judgment, the Third Circuit created a bright-line rule that public schools may not punish students for speech, however severe, made without school resources that occurs off-campus and outside school hours.⁹⁰ The school district filed a petition for certiorari in the Supreme Court, which the Supreme Court granted.⁹¹

The Supreme Court affirmed the ruling but ultimately rejected the Third Circuit’s bright-line rule.⁹² The Supreme Court replaced the bright-line rule with an ambiguous standard⁹³ that suggests public schools may have an interest in regulating off-campus speech in some circumstances. Still, public schools have a significantly lesser interest in regulating off-campus speech than they do in regulating on-campus speech.⁹⁴ Justice Breyer, writing for the majority, observed that off-campus speech lacks the same degree of school interest for three reasons. First, schools rarely stand *in loco parentis* when students are off campus,⁹⁵ which, in a traditional school setting, allows school administrators to assume parental obligations to a student “where the children’s actual parents cannot protect, guide, and discipline them.”⁹⁶ The modern application of the doctrine of *in loco parentis* is intensely

⁸⁵ *Id.* at 435 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)).

⁸⁶ *Id.* at 441-42.

⁸⁷ *Id.* at 443.

⁸⁸ *Id.* at 445.

⁸⁹ *B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 176 (3d Cir. 2020).

⁹⁰ *See id.* at 189.

⁹¹ *B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170 (3d Cir. 2020), *cert. granted*, 141 S. Ct. 976 (2021).

⁹² *Simoneau*, *supra* note 68, at 448-49.

⁹³ *See Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 219 (2021) (Thomas, J., dissenting) (“[T]he Court’s foundation is untethered from anything stable, and courts [and schools] will almost certainly be at a loss as to what exactly the Court’s opinion today means.”).

⁹⁴ *See id.* at 190 (majority opinion).

⁹⁵ *Id.* at 189.

⁹⁶ *Id.*

debated, but the majority, concurrence, and dissent in *Mahanoy* insinuate that the doctrine remains relevant when evaluating the effect of *on-campus* student speech on a school's educational mission.⁹⁷ Accordingly, there are few circumstances in which a parent delegates their parental rights to the school to regulate a student's off-campus conduct.⁹⁸ Second, allowing school regulation of off-campus speech invites a breadth of control that would, in effect, surveil the student's speech twenty-four hours a day, which stifles the First Amendment.⁹⁹ Third, a public school is meant to foster an environment that protects unpopular opinions and expressions.¹⁰⁰

Applying the new standard to B.L.'s speech, the Supreme Court held that the school did not have a regulatory interest in B.L.'s off-campus speech for three reasons. First, B.L. spoke at a convenience store, and there is no indication that school officials stood *in loco parentis*.¹⁰¹ Second, general discontent lasting only a few days and a five to ten-minute conversation about the posts in the classroom does not constitute a substantial disruption under *Tinker*.¹⁰² In fact, *Tinker* specifically asserts that disciplinary action cannot be taken to "avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."¹⁰³ Mahanoy Area High School faculty confirmed that B.L.'s speech did not disrupt class or school activities and, therefore, punishing B.L. based on a few conversations of discontent would deteriorate *Tinker*'s limit on disciplinary action.¹⁰⁴ Third, there was no indication that the posts would substantially interfere with team morale going forward.¹⁰⁵ The Supreme Court, thus, rejected a large portion of the "sufficient nexus" test by ruling that the ability of B.L.'s off-campus speech to permeate the school was insufficient on its own to justify punishment.¹⁰⁶

⁹⁷ Compare *id.* at 187, 189 (majority opinion), with *id.* at 198-201 (Alito, J., concurring), and *id.* at 216-17 (Thomas, J., dissenting).

⁹⁸ See *id.* at 189, 192.

⁹⁹ *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 189-90 (2021).

¹⁰⁰ *Id.* at 190.

¹⁰¹ *Id.* at 192.

¹⁰² *Id.* at 192-93.

¹⁰³ *Id.* at 193.

¹⁰⁴ See *id.* at 192-93.

¹⁰⁵ *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 193 (2021).

¹⁰⁶ See *id.* at 191.

Although the Supreme Court found the suspension unconstitutional in *Mahanoy*, it noted that “regulatory interests remain significant in some off-campus circumstances.”¹⁰⁷ Declining to follow the Third Circuit’s holding that the license to regulate student speech disappears off-campus, the Supreme Court opined that several off-campus circumstances, including “serious or severe bullying or harassment targeting particular individuals[.]” allow for school regulation.¹⁰⁸ Accordingly, if bullying is deemed “serious or severe[.]” a public school may follow the *Tinker* analysis to determine whether to discipline the student perpetrator. *Mahanoy* would, thus, look much different had B.L. “identif[ied] the school in her posts or target[ed] any member of the school community with vulgar or abusive language.”¹⁰⁹

II. BATTLE OF THE CIRCUITS: APPLYING *MAHANAY*’S “SERIOUS OR SEVERE BULLYING” CARVEOUT

Since the Supreme Court decided *Mahanoy* in 2021, a public school’s regulatory interest in “serious or severe bullying” that occurs off-campus has been explored three times in the Federal Circuit Courts of Appeals and nine times in various federal district courts. As Justice Thomas warned in his dissent in *Mahanoy*,¹¹⁰ the circuit courts are taking different approaches to addressing “serious or severe bullying” in light of *Mahanoy* as it relates to *Tinker*. On the one hand, the First Circuit applied *Tinker*’s lesser-explored “invasion of the rights of others” prong to determine whether schools may discipline serious or severe bullying that occurs off-campus.¹¹¹ On the other hand, the Sixth Circuit embraced the status quo application of the “substantial disruption” test, standing alone.¹¹² That is, a public school may have an interest in regulating off-campus “serious or severe bullying” insofar as it has, or could have, substantially disrupted the order of the school. The Ninth Circuit followed the “substantial disruption” test relatively closely, adding only a causal element of whether the harm to the school was “caused or augured by the speech.”¹¹³

¹⁰⁷ *Id.* at 188.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 191.

¹¹⁰ *See id.* at 219 (Thomas, J., dissenting).

¹¹¹ *See Doe v. Hopkinton Pub. Schs.*, 19 F.4th 493, 508 (1st Cir. 2021).

¹¹² *See Kutchinski ex rel. H.K. v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350, 359 (6th Cir. 2023).

¹¹³ *See Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 718, 720 (9th Cir. 2022).

A. *The First Circuit: Doe v. Hopkinton Public Schools*

Five months after *Mahanoy* was decided, the First Circuit addressed the first inquiry involving “serious or severe bullying” in *Doe v. Hopkinton Public Schools*. In *Doe*, a high school student on the hockey team filed a complaint to Hopkinton High School alleging bullying by eight other hockey team members.¹¹⁴ Hopkinton High’s investigations uncovered various videos and photos of Roe in a Snapchat group among team members, where they discussed his and his family’s appearance.¹¹⁵ The posts on Snapchat spanned over a month by the time Roe filed a complaint with the school.¹¹⁶ Roe’s teammates exhibited such an egregious pattern of bullying towards Roe that the school moved him to a different class.¹¹⁷ At the conclusion of the investigation, Hopkinton High School held suspension hearings for all eight students, resulting in varying suspension terms based on their degree of involvement.¹¹⁸

Despite noting that the Supreme Court justifiably applied the “substantial disruption” *Tinker* prong to B.L.’s generalized speech in *Mahanoy*,¹¹⁹ the First Circuit reiterated its precedent that *Tinker*’s “invasion of the rights of others” prong is better suited to evaluate bullying.¹²⁰ “Serious or severe bullying[,]” unlike general statements of discontent as in *Mahanoy*, is inherently targeted.¹²¹ The First Circuit reasoned that where targeted speech exists, the *Tinker* analysis should rest not on the impact of the institution—the “substantial disruption” prong—but on the impact on the targeted individual—the “invasion of the rights of others” prong.¹²² Here, the First Circuit found that the defendants’ conduct invaded Roe’s rights because “[s]peech or conduct that actively and pervasively encourages bullying by others or fosters an environment in which bullying is acceptable and actually occurs . . . is not protected under the First Amendment.”¹²³

¹¹⁴ *Doe*, 19 F.4th at 497.

¹¹⁵ *See id.* at 500.

¹¹⁶ *See id.* at 498, 500.

¹¹⁷ *Id.* at 498.

¹¹⁸ *See id.* at 501-02.

¹¹⁹ *See id.* at 506.

¹²⁰ *See Doe v. Hopkinton Pub. Schs.*, 19 F.4th 493, 506 (1st Cir. 2021) (citing *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 29 (1st Cir. 2020)).

¹²¹ *Id.* at 505-06.

¹²² *See id.*

¹²³ *See id.* at 509.

The remaining inquiry was then whether the school was justified in punishing the students for such an invasion. The First Circuit held that the school was justified because there was a causal connection between the speech on Snapchat and the bullying that invaded Roe's rights.¹²⁴ For the students who directly bullied Roe, there was no dispute that a causal connection existed.¹²⁵ A causal connection, however, also existed for the group members who did not directly contribute but encouraged the behavior.¹²⁶ Judge Lynch noted that children are more susceptible to bullying in groups because one instance can embolden others to either join in or encourage the perpetrators to continually bully the individual and, thus, continually invade their right to a non-hostile learning environment.¹²⁷ To prevent others from being emboldened, *Doe* laid the foundation for schools to punish students who indirectly contributed to bullying that violated others' right to an environment free from bullying.

Overall, the First Circuit embraced the district court's conclusion that a school cannot rely on *Tinker's* "substantial disruption" prong to justify punishing bullying because that standard is insufficient for targeting bullying.¹²⁸ Therefore, where there is "serious or severe bullying[.]" schools need only consider whether the bullied individual's rights were invaded, regardless of the institution's overall disruption level.¹²⁹

B. *The Sixth Circuit: Kutchinski as next friend to H.K. v. Freeland County School District*

Two years after *Mahanoy*, the Sixth Circuit took a view opposite to the First Circuit's when it determined that off-campus speech constituting "serious or severe bullying" is subject to *Tinker's* "substantial disruption" prong. In *Kutchinski*, H.K. created a fake Instagram account to impersonate his biology teacher.¹³⁰ After creating the account, H.K. informed two other students that he had made it and encouraged their participation.¹³¹ On the account, H.K., along with

¹²⁴ *Id.* at 506-07.

¹²⁵ *Id.* at 507.

¹²⁶ *Doe v. Hopkinton Pub. Schs.*, 19 F.4th 493, 508 (1st Cir. 2021).

¹²⁷ *See id.* at 507-09.

¹²⁸ *See id.* at 511; *id.* at 511 n.17.

¹²⁹ *See id.* at 508-09.

¹³⁰ *See Kutchinski ex rel. H.K. v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350, 354 (6th Cir. 2023).

¹³¹ *See id.*

the two other students, made posts insulting disabled students at the school, sexualizing other teachers, and threatening students.¹³²

The following Monday, knowledge of the account spread around the school.¹³³ Students spoke about the account during class time, teachers victim to the sexualizing statements on the account reported feeling humiliated, and one teacher cried in class over the incident.¹³⁴ H.K. then deleted the account during his lunch period, fearing that it had accumulated too much attention.¹³⁵ Several students, however, had already identified H.K. as the account's creator, and he was subsequently suspended for five days.¹³⁶

Upon reaching the Sixth Circuit, the Sixth Circuit held that Freeland High School did not violate H.K.'s right to free speech by suspending him for the content of his account.¹³⁷ Instead, the speech against the teachers and students constituted "serious or severe bullying or harassment[.]" and the school could regulate the speech, so long as H.K. bore responsibility for it and it caused a substantial disruption.¹³⁸ Further, any other student who "cause[d], contribute[d] to, or affirmatively participate[d] in harmful speech" after being given access to the account could also face consequences.¹³⁹

H.K.'s behavior satisfied both elements. As the account's creator, he contributed to the harmful speech and, thus, bore responsibility.¹⁴⁰ Further, an account impersonating a teacher and attributing sexual and violent posts to that teacher was reasonably foreseen to "substantially disrupt normal school proceedings."¹⁴¹ Arguably, the potential for substantial disruption materialized into actual disruption.¹⁴²

H.K. was also responsible for the content of the two students to whom he granted access to the account.¹⁴³ Although not a "publisher or speaker[.]" H.K. participated in and contributed to the content the other

¹³² See *id.* at 354-55.

¹³³ *Id.* at 355.

¹³⁴ See *id.*

¹³⁵ *Id.* at 355.

¹³⁶ *Kutchinski ex rel. H.K. v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350, 355 (6th Cir. 2023).

¹³⁷ See *id.* at 358, 360.

¹³⁸ *Id.* at 358.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 359.

¹⁴² *Kutchinski ex rel. H.K. v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350, 359 (6th Cir. 2023).

¹⁴³ See *id.* at 358.

students posted by granting them initial access to the account and joking about the posts.¹⁴⁴ H.K. was also responsible for accepting followers to the account, which allowed more people to consume the account's content.¹⁴⁵ Accordingly, H.K. contributed to the harmful speech and was responsible for the posts of the two students and his own posts.¹⁴⁶

Kutchinski established the Sixth Circuit's stance that off-campus speech constituting "serious or severe bullying" is subject to the "substantial disruption" *Tinker* prong. The opinion did not address the "invasion of rights" *Tinker* prong and, thus, stands apart from the First Circuit's holding in *Doe*.

C. *The Ninth Circuit: Chen by and through Chen v. Albany Unified School District*

Like the Sixth Circuit, the Ninth Circuit ultimately applied the "substantial disruption" *Tinker* prong to "serious or severe bullying" via its own preexisting "sufficient-nexus" test. The Ninth Circuit noted that *Mahanoy* did not disrupt its sufficient-nexus test because the Supreme Court used many of the same factors the Ninth Circuit already considers in its analysis.¹⁴⁷ Further, any additional considerations implemented by the *Mahanoy* Court, such as *in loco parentis* and First Amendment chilling effects, "fit comfortably" within its preexisting framework.¹⁴⁸ Developed in *McNeil v. Sherwood School District* in 2019, the Ninth Circuit's "sufficient-nexus" test determines whether *Tinker* applies to off-campus speech by inquiring into (1) the likelihood of harm to the school, (2) whether the impact on the school was reasonably foreseeable, and (3) a causal connection between the speech and the school.¹⁴⁹

In *Chen by and through Chen v. Albany Unified School District*, Cedric Epple created an Instagram account he intended to be "very private" under the username "yungcavage."¹⁵⁰ A limited number of Epple's friends, including Kevin Chen, followed the account, which

¹⁴⁴ *Id.* at 358-59.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 359.

¹⁴⁷ See *Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 719-20 (9th Cir. 2022).

¹⁴⁸ See *id.* at 720.

¹⁴⁹ *McNeil v. Sherwood Sch. Dist.*, 918 F.3d 700, 707 (9th Cir. 2019).

¹⁵⁰ See 56 F.4th at 711.

contained insulting posts about other students at Albany High School.¹⁵¹ Although followers like Chen did not directly contribute to the account's content, they engaged with it by commenting on and liking posts.¹⁵² In addition to remarking on the physical appearances of students at the school, Epplé's account was riddled with racist and violent themes.¹⁵³ Epplé frequently uploaded photos of black students at his school to compare them to gorillas, referred to them using historically derogatory terms, and alluded to lynching specific black students.¹⁵⁴

Despite Epplé's efforts to keep the account private, one of the few followers shared a post depicting another student with a noose.¹⁵⁵ The account's contents spread, distressing ten students so severely that they refused to attend class.¹⁵⁶ Also, faculty members noticed that "'a majority' of the students knew about the matter and wanted to talk about it . . . which disrupted [the teachers'] plans for the class."¹⁵⁷ Further, over 100 people organized a rally "to bring people together and start the healing process" while awaiting the Albany Unified School District Board's hearing on the matter.¹⁵⁸ The Albany Unified School District Board ultimately voted to expel both Epplé and Chen for their respective contributions to the account.¹⁵⁹

On appeal, the Ninth Circuit held that "the likelihood of 'substantial disruption . . . ' from such malicious abuse aimed at particular students is . . . obvious."¹⁶⁰ Epplé argued that the racist nature of the posts is subject only to general harassment laws and not to punishment on behalf of the school for "serious or severe bullying."¹⁶¹ The Ninth Circuit disagreed and found that where a school is made aware of "serious or severe bullying" that occurs off-campus and creates a hostile environment on campus, and it fails to respond, the school district will be subject to liability.¹⁶²

¹⁵¹ *See id.*

¹⁵² *See id.* at 712.

¹⁵³ *Id.* at 711-12.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 712.

¹⁵⁶ *Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 712-13 (9th Cir. 2022).

¹⁵⁷ *Id.* at 713.

¹⁵⁸ *Id.* at 714 (internal quotation marks omitted).

¹⁵⁹ *Id.* at 714-15.

¹⁶⁰ *Id.* at 718.

¹⁶¹ *Id.* at 722.

¹⁶² *Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 722 (9th Cir. 2022).

Here, the Ninth Circuit found it “clear” that Epplé’s speech “bore a sufficient nexus” to Albany High School.¹⁶³ Epplé’s subjective intention not to cause a substantial disruption is given less weight when viewed alongside the foreseeability that “the speech would reach and impact[*] the school[.]” especially given the characteristics of electronic communications.¹⁶⁴ Although the ability to reach the school is not enough on its own,¹⁶⁵ the causal connection between Epplé’s speech and the school also created an impact, as demonstrated by three circumstances. First, the students targeted in the post reported feeling fearful and refused to go to class.¹⁶⁶ A similar reaction was shared among nontargeted individuals at the school.¹⁶⁷ Second, the school’s mental health staff was overwhelmed with distraught students.¹⁶⁸ Finally, one student withdrew from the high school because of the post.¹⁶⁹

The impact undoubtedly carried a causal connection and a likelihood of harm. Therefore, the inquiry shifted to a *Tinker* analysis to determine whether the impact constituted a substantial disruption. The Ninth Circuit confirmed that the aforementioned backlash to the posts created a substantial disruption, which justified punishing not only Epplé but also students like Chen who contributed to the bullying through comments and likes.¹⁷⁰ Therefore, where “serious or severe [online] bullying” occurs off-campus, the Ninth Circuit first determines whether the hurtful speech bore a sufficient nexus to the school before following *Tinker*’s “substantial disruption” prong. The Ninth Circuit’s holding follows the Sixth Circuit’s reasoning in *Kutchinski*,¹⁷¹ but it contrasts sharply with the First Circuit’s holding in *Doe*, which demands the application of the “invasion of rights” *Tinker* prong instead of the “substantial disruption” prong in the bullying context.¹⁷²

¹⁶³ *Id.* at 720.

* Note that the Ninth Circuit uses the term “impact” to address whether *Tinker* can be applied, and then if it is determined that it can be, the analysis shifts to determine whether that impact substantially disrupted the order and operation of the school. *See id.* at 720-23.

¹⁶⁴ *Id.* at 720.

¹⁶⁵ *See id.* at 721 (citing *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 191 (2021)).

¹⁶⁶ *Id.*

¹⁶⁷ *Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 721 (9th Cir. 2022).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *See id.* at 723.

¹⁷¹ *See Kutchinski ex rel. H.K. v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350, 359 (6th Cir. 2023).

¹⁷² *See Doe v. Hopkinton Pub. Schs.*, 19 F.4th 493, 508 (1st Cir. 2021).

III. PREVALENCE OF CYBERBULLYING AND ITS EFFECTS

Schools may undoubtedly discipline students for bullying another student on campus. Nearly all U.S. states have laws regarding bullying in public schools.¹⁷³ Forty-six of the laws permit school sanctioning for cyberbullying or online harassment.¹⁷⁴ Case law further supports the authority of public schools to take disciplinary action to “protect their students from harassment and in the school environment”¹⁷⁵ and “prevent [disruptions] from happening in the first place.”¹⁷⁶ Some states even impose a duty to report on teachers; thus, failure to act against known instances of bullying can lead to liability.¹⁷⁷

Conversely, whether schools may discipline students for off-campus cyberbullying is less certain. As of 2023, twenty-eight states permitted school sanctions for off-campus bullying.¹⁷⁸ According to the United States Department of Health and Human Services, ninety-five percent of children aged thirteen to seventeen use at least one social media platform.¹⁷⁹ Also, over thirty-three percent of children aged thirteen to seventeen regularly use social media.¹⁸⁰ Although social media use is less common among children younger than thirteen, it is reported that forty percent of children aged eight through twelve also use social media.¹⁸¹

With the increased use of social media, students have moved bullying beyond the classroom to permanent internet forums. According to the Pew Research Center, forty-six percent of children aged thirteen to seventeen are bullied online in some manner.¹⁸² The most common

¹⁷³ See *Laws, Policies & Regulations*, U.S. DEPT. HEALTH & HUM. SERVS. (May 17, 2023), <https://www.stopbullying.gov/resources/laws>.

¹⁷⁴ Sameer Hinduja & Justin W. Patchin, *Bullying Laws Across America*, CYBERBULLYING RSCH. CTR., <https://cyberbullying.org/bullying-laws> (last visited June 4, 2026).

¹⁷⁵ *A.S. ex rel. Schaefer v. Lincoln Cnty. R-III Sch. Dist.*, 429 F. Supp. 3d 659, 671 (E.D. Mo. 2019).

¹⁷⁶ *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007).

¹⁷⁷ See *Estate of Olsen v. Fairfield City Sch. Bd. of Educ.*, 341 F. Supp. 3d 793, 800 (S.D. Ohio 2018).

¹⁷⁸ See Hinduja & Patchin, *supra* note 174.

¹⁷⁹ U.S. DEPT. OF HEALTH & HUM. SERVS., *SOCIAL MEDIA AND YOUTH MENTAL HEALTH: THE U.S. SURGEON GENERAL’S ADVISORY 4* (2023), <https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Emily A. Vogels, *Teens and Cyberbullying 2022*, PEW RSCH. CTR. (Dec. 15, 2022), <https://www.pewresearch.org/internet/2022/12/15/teens-and-cyberbullying-2022/>.

target is physical appearance.¹⁸³ When students are cyberbullied, they report feeling angry, hurt, embarrassed, and scared.¹⁸⁴ Cyberbullying can lead to increased “anxiety, depression, social isolation, decreased academic achievement . . . decreased . . . school participation,”¹⁸⁵ suicide,¹⁸⁶ and even homicide.¹⁸⁷ Further, the consequences of bullying extend into adulthood.¹⁸⁸ With the rise of online classrooms in the wake of COVID-19, students have been subjected to a greater risk of cyberbullying, which may have long-term consequences both inside and outside of the classroom.¹⁸⁹

ANALYSIS

In light of *Mahanoy*, *Doe*, *Chen*, and *Kutchinski*, the need to reevaluate how *Tinker* fits into “serious or severe” cyberbullying is particularly pertinent given the increased online presence of minor students since 2020. The following Analysis section first addresses the inadequacy of the “substantial disruption” test before proposing a four-factor test for determining whether a school may regulate off-campus cyberbullying by its students.

I. “SEVERE” BULLYING WITH A “SUBSTANTIAL DISRUPTION” TO THE OPERATION OF A SCHOOL IS A HARMFUL STANDARD WHEN ADDRESSING OFF-CAMPUS CYBERBULLYING

Under *Mahanoy*, public schools may discipline students only for “serious or severe bullying or harassment targeting particular individuals” that is likely to substantially disrupt a school’s operations.¹⁹⁰ Oddly enough, the *Mahanoy* standard ignores the second prong of

¹⁸³ *Id.*

¹⁸⁴ *D.C. v. R.R.*, 106 Cal. Rptr. 3d 399, 419 (Cal. Ct. App. 2010).

¹⁸⁵ Lindsay Dial, Note, *When Pixels Hurt: A Categorical Exclusion to Tinker for Cyber-Abuse*, 10 BELMONT L. REV. 143, 160 (2022).

¹⁸⁶ *D.C.*, 106 Cal. Rptr. 3d at 420.

¹⁸⁷ *Id.*

¹⁸⁸ Dial, *supra* note 185, at 161.

¹⁸⁹ See Anna Sorentino et al., *Has the COVID-19 Pandemic Affected Cyberbullying and Cybervictimization Prevalence among Children and Adolescents? A Systematic Review*, INT’L J. ENV’T. RSCH. & PUB. HEALTH, May 2023, at 1-2, 15.

¹⁹⁰ See *Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 720-21 (9th Cir. 2022) (holding that the student’s posts were foreseeable to hit their target and impact not only the individual, but the school as a whole).

Tinker, which is that schools have an interest in regulating student speech that invades the rights of others.¹⁹¹ Asserting that bullying invades the rights of others is a far more suitable alternative than attempting to determine if bullying has an impact on an entire school. Traditional bullying, let alone cyberbullying, can hardly ever be stretched far enough to find a substantial disruption to a school's operation.¹⁹² An inherent characteristic of bullying is that it is tailored to specific people, not an entire institution.¹⁹³ Therefore, any "substantial or material disruption" will be to an individual student's learning environment,¹⁹⁴ which will "not meet *Tinker's* demanding standard."¹⁹⁵ If the effect of cyberbullying is pulled from the "substantial disruption" prong and reallocated to the "invasion of rights" prong, schools will be better suited to tackle the issue at its root—especially because "[t]he effects of bullying may be excruciating to bear for that individual, but the rest of the student body may not even know about the bullying, much less feel its effects."¹⁹⁶

The application of "serious or severe bullying" to the "invasion of rights" *Tinker* prong has been explored only once, in 2021, by the First Circuit. To summarize, in *Doe v. Hopkinton Public Schools*, a group of students used Snapchat to torment another player on their hockey team.¹⁹⁷ The students posted derogatory comments and nonconsensual photos and videos for three months.¹⁹⁸ Although the school undoubtedly had a regulatory interest because the hockey team was a school-sponsored activity,¹⁹⁹ the First Circuit also noted that the bullying satisfied the second prong of *Tinker* because a school has an interest in regulating "'serious or severe bullying or harassment' that *invades the rights of others*."²⁰⁰ Thus, the First Circuit interpreted the "serious or severe bullying" standard to apply to the second *Tinker* prong without regard to the potential substantial

¹⁹¹ See *Doe v. Hopkinton Pub. Schs.*, 19 F.4th 493, 505 (1st Cir. 2021) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

¹⁹² See Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257, 274 (2008).

¹⁹³ See *id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 193 (2021).

¹⁹⁶ Erb, *supra* note 192, at 274.

¹⁹⁷ *Doe v. Hopkinton Pub. Schs.*, 19 F.4th 493, 507-08 (1st Cir. 2021).

¹⁹⁸ *Id.*

¹⁹⁹ See *Mahanoy*, 594 U.S. at 194 n.1 (Alito, J., concurring).

²⁰⁰ *Doe*, 19 F.4th at 506 (emphasis added).

disruption.²⁰¹ The First Circuit's "invasion of rights" application stands starkly apart from the Ninth and the Sixth Circuits on this matter, both of which interpreted the standard to be viewed in the light of "substantial disruption."²⁰² Both cases cite the invasion-of-rights prong only in the background of *Tinker*, but then neglect it in their analysis.

Where an individual is targeted explicitly as the subject of harmful language, the only instances in which it would be deemed a "substantial disruption" under *Mahanoy* are when the speech (1) implicates the institution's educators,²⁰³ (2) involves a pattern of obscene behavior that is at the very extreme of the bullying spectrum,²⁰⁴ or (3) involves a threat to the school community.²⁰⁵ In the modern interpretation of extreme patterns of obscene bullying behavior, the bullying is disciplined because it is systematically harmful, thus, having a spillover effect on more than just the individual the speech initially targeted, such as in *Chen*.²⁰⁶ Although cyberbullying is overwhelmingly distressing and not uncommon, it is still not the most common form of bullying among minor students.²⁰⁷ In *Chen*, the opinion revolved around substantial disruption from systematic injury; however, the social media account also targeted other students for comments deemed "immature" by the court.²⁰⁸ The court immediately dismissed the other targeted comments and, as a result, the impact on the other students was wholly abandoned in the subsequent analysis.²⁰⁹ The court's application of "substantial

²⁰¹ See *id.* at 503 (noting that speech "may be regulated only if it would substantially disrupt school operations or interfere with the right of others" (emphasis added)). But see *Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 718 (9th Cir. 2022) ("[T]he likelihood of 'substantial disruption of or material interference with school activities' from such malicious abuse aimed at particular students is equally obvious . . .").

²⁰² See *Chen*, 56 F.4th at 718; *Kutchinski ex rel. H.K. v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350, 359 (6th Cir. 2023) ("Having determined that H.K. bears responsibility for the harmful speech, we next consider whether the subject speech caused, or had the potential to cause, substantial disruption at Freeland.").

²⁰³ See *Kutchinski*, 69 F.4th at 359 (holding that the impersonation of a teacher substantially disrupted the order of the school).

²⁰⁴ See *Chen*, 56 F.4th at 723 (holding that violent and racist remarks substantially disrupted the order of the school).

²⁰⁵ See *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 188 (2021).

²⁰⁶ See, e.g., *Chen*, 56 F.4th at 712-13.

²⁰⁷ Cf. E. THOMSEN ET AL., STUDENT REPORTS OF BULLYING: RESULTS FROM THE 2022 SCHOOL CRIME SUPPLEMENT TO THE NATIONAL CRIME VICTIMIZATION SURVEY 46 (2024) (statistics show that in-person bullying is more common than cyberbullying among minor students).

²⁰⁸ *Chen*, 56 F.4th at 711.

²⁰⁹ See *id.*

disruption” in *Chen*, thus, sets the precedent that students must endure cyberbullying that is so severe that its effects will equally poison others, who are entirely separate from the attacks.

Such a high standard is irreconcilable with the “serious or severe” set out in *Mahanoy*. Under the “substantial disruption” approach, serious instances of cyberbullying will effectively be wiped from the analysis under the pretext that the attacks are “immature”²¹⁰ or sufficiently normal for minor students, because bullying is an “age-old problem.”²¹¹ Unmistakenly, the *Mahanoy* Court did not explicitly state that instances of serious or severe bullying must meet the “substantial disruption” prong. Instead, the *Mahanoy* Court simply noted that regulatory interest remains high in such circumstances and that such speech may be subjected to *Tinker* more readily than other forms of off-campus speech.²¹² Unfortunately, lower courts often forget that the *Tinker* analysis may take one of two routes, and that the latter—the invasion of rights analysis—may be more appropriate, as it evaluates the impact on only the targeted student, not the institution to which that student belongs.

Two arguments against the “invasion of rights” prong to address severe bullying exist. The first is that “invasion of rights” is an overly broad standard that lacks substance.²¹³ As stated above, there is “no authority interpreting what ‘invasion on the rights of others’ really entails” nor a decision that focuses solely on that language when addressing the constitutionality of student speech regulations.²¹⁴ For that reason, some believe that another student’s “rights” are limited to the fundamental rights provided by the Fourteenth Amendment, which do not include freedom from bullying.²¹⁵ The *Tinker* Court, however, states explicitly that “rights” pertain to the “rights of other students to be secure and to be let alone.”²¹⁶ Therefore, the insinuated

²¹⁰ *Id.*

²¹¹ *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 209 (2021) (Alito, J., concurring).

²¹² *See id.* at 188 (majority opinion).

²¹³ *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (stating only that the invasion of rights prong did not apply in the case).

²¹⁴ *Nixon v. N. Loc. Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005).

²¹⁵ Note that no current federal anti-bullying legislation exists. Several proposals, however, have been introduced to (1) amend the Elementary and Secondary Education Act of 1965 to include federal grants to support states’ efforts at addressing bullying, STOP Bullying Act, H.R. 549, 117th Cong. (2021); and (2) to require states to direct their local educational agencies (“LEAs”) to establish policies that prevent and prohibit bullying and harassment of elementary and secondary school students, Safe Schools Improvement Act, H.R. 6031, 118th Cong. (2023).

²¹⁶ *Tinker*, 393 U.S. at 508.

right is a right to sanctity and a right to a public school environment free from hostility.²¹⁷ A public school that permits student-on-student cyberbullying to go without discipline cannot foster an environment that is free from hostility.²¹⁸

Additionally, concern exists that the prong would necessarily rely on a school official's viewpoint on a particular speech matter.²¹⁹ In other words, the prong would effectively censor different views based on a school official's viewpoint, which is an overt violation of the First Amendment.²²⁰

Viewpoint censorship reemerged as a pressing issue in the public school context in 2004, when the Ninth Circuit held in *Harper v. Poway Unified School District* that a school official could censor certain political viewpoints if they were deemed demeaning or derogatory.²²¹ The Ninth Circuit cited *Tinker* to hold that demeaning or derogatory viewpoints would infringe on other students' rights, warranting school censorship.²²² Hesitation and fear are understandable when a precedent allows public school officials to censor unpopular speech that the Supreme Court has previously rendered protected.²²³ Viewpoint censorship does not apply here, however, because cyberbullying is not merely an unpopular opinion but rather is the ultimate intrusion of

²¹⁷ See *Virginia G. v. ABC Unified Sch. Dist.*, 19 Cal. Rptr. 2d 671, 674 (Cal. Ct. App. 1993) (“[T]he right of all students to a school environment fit for learning cannot be questioned. Attendance is mandatory and the aim of all schools is to teach. Teaching and learning cannot take place without the physical and mental well-being of the students. The school premises, in short, must be safe and welcoming” (internal quotation marks omitted)); see also CAL. EDUC. CODE § 48900.4 (West 2003) (permitting expulsion if a student “intentionally engaged in harassment, threats, or intimidation” against other pupils that “invas[es] the rights of . . . pupils by creating an intimidating or hostile educational environment” (emphasis added)).

²¹⁸ See *Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 723 (9th Cir. 2022) (“[T]argeted students stated that the severity of the hostile environment they experienced was exacerbated by the knowledge that other students participated in the account and ‘liked’ the abusive posts.”).

²¹⁹ See Jerico Lavarias, *A Reexamination of the Tinker Standard: Freedom of Speech in Public Schools*, 35 HASTINGS CONST. L.Q. 575, 578 (2008).

²²⁰ *Id.*

²²¹ *Id.* at 577.

²²² *Id.*

²²³ See *Morse v. Frederick*, 551 U.S. 393, 403-04 (2007) (“Political speech . . . is ‘at the core of what the First Amendment is designed to protect’ . . . [and] the ‘mere desire to avoid the discomfort and unpleasantness that always accompan[ies] an unpopular viewpoint’” is insufficient.); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

one's rights²²⁴ that is severe enough to warrant not only school sanctions in almost all states²²⁵ but also criminal sanctions in forty-five of them.²²⁶ Rarity in application does not lessen the prong's reliability but instead displays the lower courts' unwillingness to deviate from the status quo, even if that deviation would expand the protection of public school students around the country.

II. PROPOSED FRAMEWORK

While the "substantial disruption" *Tinker* prong is inappropriate in the context of cyberbullying, the "invasion of rights" *Tinker* prong in relation to *Mahanoy*'s "serious or severe bullying" standard remains unclear. If lower courts were to follow the general rationale in *Doe*, it would provide little guidance because the First Circuit did not detail its reasoning in determining the invasion of rights. Further, the First Circuit in *Doe* improperly aligned with other circuits by equating the severity of bullying solely with repetition. The lack of Supreme Court guidance on what constitutes "serious or severe bullying" and the divergent rationales of lower federal courts will require an adult member of the judiciary to determine what is or is not serious or severe for minor students. In effect, the extent of cyberbullying a minor student must endure will vary significantly from jurisdiction to jurisdiction because the modern standard demands judicial discretion as to the impact on the minor.

To combat confusion and lack of uniformity, the courts should adopt a four-factor test to determine whether cyberbullying falls within an educational institution's purview, while balancing the interests of the First Amendment. First, the court should ask whether the online speech constituted an intentionally harmful verbal, textual, or pictorial comment. Second, the court should assess whether the comment was aimed at the school community. Third, the court should find whether the bullied student was personally aware of the comment, regardless of the speaker's expectation of privacy. Fourth, the court should determine whether the comment objectively interfered with the student's education.

²²⁴ See *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 29 (1st Cir. 2020) ("[B]ullying is the type of conduct that implicates the governmental interest in protecting against the invasion of the rights of others, as described in *Tinker*.").

²²⁵ See Hinduja & Patchin, *supra* note 174.

²²⁶ *Id.*

A. *Factor One: Intentionally Harmful Comments Made Verbally, Textually, or Pictorially Online*

When a public school is made aware of off-campus cyberbullying, it should first review the post to determine whether the student intentionally posted a harmful comment in a video, picture, comment section, and so on, intended to target another student. Since *Mahanoy*, courts apply a “severity” standard when evaluating the effect of such harmful comments,²²⁷ often equating seriousness with repetition or continuity.²²⁸ The “severity” standard, however, positions an adult member of the judiciary to determine what is serious and what is “immature,”²²⁹ holding minors to a standard that undermines their distinct constitutional position from that of an adult. Accordingly, the severity inquiry for cyberbullying must be informed by a minor’s heightened vulnerability in the eyes of the law as well as the internet’s inherent ability to amplify harm through anonymity, permanence, and limitless dissemination.

Post-*Mahanoy*, courts have struggled to articulate a workable definition of “severity.” Without a workable definition, other areas of law are illustrative when evaluating “severity.” For example, Social Security disability claims demand “severity” as the standard is the evaluation of impairment severity.²³⁰ Without drawing specific lines, an impairment is generally considered severe if it has more than a “minimal effect on the individual that it would . . . be expected to interfere with the individual’s ability to work, irrespective of age, education, or work experience.”²³¹ Similarly, the seriousness or severity of bullying should be limited to its *actual* effect on the student, and not left solely to an adult member of the judiciary to weigh and determine what the effect *could* be. Although the latter approach has some positive aspects, such as allowing an objective third party to observe the conduct and determine whether a reasonable person in the circumstances would agree it was severe, this approach completely neglects the comparative seriousness to a vulnerable class of persons: minor students.

²²⁷ See *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 188 (2021).

²²⁸ See, e.g., *Doe v. Hopkinton Pub. Schs.*, 19 F.4th 493, 507-09 (1st Cir. 2021); *Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 711 (9th Cir. 2022).

²²⁹ See, e.g., *Chen*, 56 F.4th at 711.

²³⁰ See *Hampton v. Bowen*, 785 F.2d 1308, 1311 (5th Cir. 1986).

²³¹ *Id.*

As noted by Justice Sotomayor during oral argument in *Mahanoy*, courts look to three categories—true threats, obscenity, and fighting words—when determining whether speech falls out of the First Amendment’s bounds, and the conduct of teenagers hardly ever fits into the categories.²³² Justice Sotomayor, thus, impliedly acknowledged that leveling the playing field between minor students and adults under the First Amendment would hold minor students to a higher standard than they are capable of meeting.²³³ In the realm of cyberbullying, the current “severity” standard would subject minor students and adults alike to the same standard of severity. Such a standard would radically deviate from the widespread view in the Supreme Court and lower federal courts, which consistently hold that it generally cannot hold minors and adults to the same standard.²³⁴

What is considered serious or severe to minor students is wildly different than what is considered serious or severe to adults because minor students are more susceptible to emotional regulation issues.²³⁵ According to a study evaluating emotion regulation in minors, factors such as unsupportive emotion socialization, psychological control, secure attachment, aversiveness, family conflict, parent emotion regulation, and parent psychopathology destabilize a minor’s ability to regulate their emotions adequately.²³⁶ Therefore, a court may deem one or a few comments “immature” without regard to how each comment affected the child specifically.

Changing the analysis first differentiates between the accepted definitions of bullying and cyberbullying. The Department of Health and Human Services provides that bullying is “unwanted, aggressive

²³² Oral Argument at 01:19:27, *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180 (2021) (No. 20-255), <https://www.oyez.org/cases/2020/20-255>.

²³³ *See id.*

²³⁴ *See, e.g., Roper v. Simmons*, 543 U.S. 551, 569-70 (2005) (stating that “juvenile offenders cannot . . . be classified among the worst offenders” because of “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young” and thus, “their irresponsible conduct is not as morally reprehensible as that of an adult”); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico ex rel. Pico*, 457 U.S. 853, 880 (Blackmun, J., concurring) (acknowledging that schools may remove books from school libraries if they are “psychologically or intellectually inappropriate for the age group” (emphasis added)).

²³⁵ *See* Sylvia Chu Lin et al., *Research Review: Child Emotion Regulation Mediates the Association Between Family Factors and Internalizing Symptoms in Children and Adolescents – A Meta-Analysis*, 65 J. CHILD PSYCH. & PSYCHIATRY 260, 260 (2024).

²³⁶ *Id.*

behavior among minor students that involves a real *or perceived* power imbalance, which is either repeated or *has the potential to be repeated* over time.”²³⁷ Cyberbullying, on the other hand, has a much narrower definition: “willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices.”²³⁸ The currently accepted definition of cyberbullying only touches on willfully repeated harm. The willfully repeated harm requirement is most adequately reflected in *Chen*, perhaps the most significant case addressing the severity standard post-*Mahanoy*. In *Chen*, the Ninth Circuit held that cruel Instagram posts that targeted other students over a span of five months warranted discipline by the school.²³⁹

Although repeated behavior adds to severity, courts would be wise to broaden the definition of cyberbullying to include the potential to be repeated over time, just as in the traditional definition of bullying. Just as courts neglect *Tinker*’s second prong, they also neglect what is seemingly the first prong of the “serious *or* severe bullying”—that is, analyzing seriousness. Given the nature of social media, courts should more broadly construe the severity standard to include singular and serious instances. Generally, as stated above,²⁴⁰ the lower courts equate severity and seriousness with continuity. Although a continuity analysis makes sense for face-to-face bullying, it falls below the mark for cyberbullying for three reasons: (1) Internet forums embolden bullies,²⁴¹ (2) there is a “limitless audience,”²⁴² and (3) there is a lasting digital footprint,²⁴³ so single instances of cyberbullying are “repeated” by nature. To address the first reason, courts consistently recognize that bullying on the internet is becoming more popular because the bully does not have to face their victim.²⁴⁴ For example, the trend of social media sites with business models based on anonymity, such as

²³⁷ Dial, *supra* note 185, at 157 (emphasis added).

²³⁸ *Id.*

²³⁹ See *Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 711, 723 (9th Cir. 2022).

²⁴⁰ See, e.g., *Doe v. Hopkinton Pub. Schs.*, 19 F.4th 493, 507-09 (1st Cir. 2021); *Chen*, 56 F.4th at 711.

²⁴¹ See *Doe*, 19 F.4th at 508.

²⁴² Dial, *supra* note 185, at 159.

²⁴³ Brian Mund, Note, *Social Media Searches and the Reasonable Expectation of Privacy*, 19 YALE J.L. & TECH. 238, 239 (2017).

²⁴⁴ Ashleigh Hammer, Comment, *An Age-Old Problem Poses New Constitutional Challenges in the Modern Digital Age: The Desperate Need for Cyberbullying Reform in Texas*, 49 TEX. TECH L. REV. 457, 464 (2017).

Ask.fm and YikYak, allows bullies to post without revealing their identity.²⁴⁵ Such anonymity fosters the ability to “embolden” the bully to be harsher because they are removed from the situation.²⁴⁶ Not only does anonymity embolden bullies, but so does safety in numbers. As opposed to traditional face-to-face bullying, the ability to see others hide behind a wall of anonymity and make mean comments emboldens other potential bullies as well.²⁴⁷

In addition to becoming harsher, the Internet fosters a “limitless audience.”²⁴⁸ Generally, social media provides two privacy options: public or private pages.²⁴⁹ Regardless of whether social media pages are set to public or private, social media users tend to have a false sense of privacy.²⁵⁰ The notion of privacy lies within the Fourth Amendment, which traditionally “safeguard[s] the privacy and security of individuals against arbitrary invasions by government officials.”²⁵¹ With public school officials acting as representatives of the state, the Fourth Amendment applies to the acts of schoolteachers.²⁵²

Katz v. United States is the current standard for determining when a reasonable expectation of privacy against government intrusion exists.²⁵³ *Katz* states that a reasonable expectation of privacy exists when “a person ha[s] exhibited an actual (subjective) expectation of privacy and . . . the expectation [is] one that society is prepared to recognize as ‘reasonable.’”²⁵⁴ The third-party doctrine, however, limits that expectation.²⁵⁵ In short, the third-party doctrine provides that no expectation of privacy exists

²⁴⁵ *See id.*

²⁴⁶ Karly Zande, Comment, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Cyberbullying*, 13 BARRY L. REV. 103, 109 (2009).

²⁴⁷ *See* Arno R. Lodder et al., *Internet Law: A Brief Introduction*, SAGE ENCYC. OF THE INTERNET, June 21, 2018 at 2.

²⁴⁸ Dial, *supra* note 185, at 159.

²⁴⁹ *See Safeguarding Your Online Presence*, DEP’T VETERANS AFFS., <https://department.va.gov/privacy/fact-sheet/safeguarding-your-online-presence-privacy-best-practices-for-social-media/> (last visited June 3, 2026).

²⁵⁰ *See Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 720-21 (9th Cir. 2022) (holding that the student’s subjective intent to keep the Instagram page, used to torment another student, private was irrelevant since its contents were reasonably foreseeable to spread to the school).

²⁵¹ *Carpenter v. United States*, 585 U.S. 296, 303 (2018) (quoting *Camara v. Mun. Ct. of S.F.*, 387 U.S. 523, 528 (1967)) (internal quotation marks omitted).

²⁵² *See New Jersey v. T.L.O.* 469 U.S. 325, 336-37 (1985).

²⁵³ *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

²⁵⁴ *Id.*

²⁵⁵ Mund, *supra* note 243, at 247-48.

where an individual volunteers information to others.²⁵⁶ Therefore, if a student posts to a public page, like a student who posted degrading comments about another student on a public MySpace page, courts may deem this action the equivalent of voluntarily sharing information on a public street, because an innumerable number of people can see it.²⁵⁷ As a result, courts often refuse to afford a reasonable expectation of privacy to publicly available social media content.²⁵⁸ Students who post harmful comments about other people online make that information available to schools, employers, colleges,²⁵⁹ and even strangers, all of whom can view the student's social media.

The more significant issue, however, is that the posts were made in what a student believed was a private forum. Such posts include direct messages, limited group chats, private accounts, and so on. The ability to enable privacy options gives students a sense of confidentiality that feels distinguishable from posting to a public MySpace page.²⁶⁰ For example, the student in *Chen* felt falsely secure behind his private social media page. Epplé subjectively believed that, because he was not posting on his main page, the posts on his private account were private, and others who could see the account would keep it private.²⁶¹ No such expectation lives within the protections of the Fourth Amendment under the current regime.²⁶² With privacy expectations sufficiently eroded on social media, the information is not only accessible to anyone with an internet connection but also *legally* accessible. The false sense of security stands in stark contrast with traditional bullying because traditional bullying is at least in part inhibited by the fear of getting in trouble.²⁶³ When students, however, can hide behind anonymity

²⁵⁶ Grace Manning, *Alexa: Can You Keep a Secret? The Third-Party Doctrine in the Age of the Smart Home*, 56 AM. CRIM. L. REV. ONLINE 25, 25 (2019).

²⁵⁷ See *People v. Harris*, 949 N.Y.S. 2d 590, 595 (N.Y. Crim. Ct. 2012).

²⁵⁸ Mund, *supra* note 243, at 248.

²⁵⁹ Press Release, Kaplan, Kaplan Survey: College Admissions Officers Increasingly Say Applicants' Social Media Content is "Fair Game" (Jan. 28, 2021), <https://kaplan.com/about/press-media/kaplan-survey-college-admissions-officers-applicant-social-media>.

²⁶⁰ See James Grimmelmänn, *Saving Facebook*, 94 IOWA L. REV. 1137, 1140 (2009) ("Over a hundred million people have uploaded personally sensitive information to Facebook, and many of them have been badly burnt as a result. Jobs have been lost, reputations smeared, embarrassing secrets broadcast to the world.").

²⁶¹ *Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 711 (9th Cir. 2022).

²⁶² Mund, *supra* note 243, at 250-51.

²⁶³ See *What Role Does Online Anonymity Play in Bullying?*, SUSTAINABILITY DIRECTORY (Mar. 23, 2025), <https://lifestyle.sustainability-directory.com/question/what-role-does-online-anonymity-play-in-bullying/>.

and exponentially expand the audience for all to see, an instance of bullying that would otherwise go unnoticed becomes a spectacle, thus, significantly increasing its seriousness.²⁶⁴

Lastly, even singular instances of cyberbullying are serious because of the Internet's ability to retain information for long periods. Just as privacy settings do not shelter youth from the third-party doctrine, they also do not shield youth from the effective permanence of anything posted on the internet.²⁶⁵ As a result, some states have enacted "erasure" laws to help minors erase their online presence when requested.²⁶⁶ Notably, minors are already able to delete their posts, which they tend to do often when they get caught bullying.²⁶⁷ Therefore, the "erasure" laws kick the can down the road on the more significant issue: the information is stored within the website operator's servers.²⁶⁸

To illustrate this storage concept through a social media platform, turn to B.L. and Epple's cases. B.L. and Epple used Snapchat,²⁶⁹ which provides in its privacy policy that when an account is deleted, it will retain "some deleted account data" for "legal, security, and business needs."²⁷⁰ Therefore, regardless of the minor's action to delete a post, the possibility remains that the information could be recovered,²⁷¹ thus, affirming that it still exists. In the context of cyberbullying, the ability for information to remain indefinitely on the internet poses a unique threat when a post reveals sensitive information about another minor, even if the cyberbullying occurs in a single instance. Further, even if the poster deletes the post, it may have been screenshotted or otherwise stored by third parties.

²⁶⁴ See *id.*

²⁶⁵ Stephen J. Astringer, Note, *The Endless Bummer: California's Latest Attempt to Protect Children Online is Far Out(side) Effective*, 29 NOTRE DAME J. L. ETHICS & PUB. POL'Y 271, 276 (2015).

²⁶⁶ See *id.* at 273.

²⁶⁷ See, e.g., *Kutchinski ex rel. H.K. v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350, 355 (6th Cir. 2023).

²⁶⁸ Astringer, *supra* note 265, at 276 n.30.

²⁶⁹ See *Chen ex rel. Chen*, 56 F.4th 708, 712 (9th Cir. 2022); *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 183 (2021).

²⁷⁰ *How Do I Deactivate or Delete my Snapchat Account?*, SNAPCHAT, <https://help.snapchat.com/hc/en-us/articles/7012328360596-How-do-I-deactivate-or-delete-my-Snapchat-account?lang=en-US>, (last visited June 3, 2026).

²⁷¹ *How Snap Inc. Works with Law Enforcement*, SNAPCHAT, <https://help.snapchat.com/hc/en-us/articles/7012327251348-How-Snap-Inc-Works-with-Law-Enforcement/>, (last visited June 3, 2026).

Although an increasing body of scholarship suggests that the Internet may not be permanent because there may not be reasonable ways to access older information,²⁷² this notion alone does not preclude the argument that isolated instances of cyberbullying are exacerbated by the Internet's ability to retain information for long periods. Recall Eppe, who left all the hurtful posts on the Instagram page for four months because he subjectively believed the posts to be private.²⁷³ Without a doubt, the actual effect of the first post lasted five months because it remained on the account for that long.²⁷⁴ Within a traditional bullying context where the harmful comments were made verbally rather than online, the words would cease to exist because there would be no physical documentation. On the other hand, with cyberbullying, the harmful comment is effectively published if posted on the Internet. The cyberbullying, thus, "repeats" every time a new viewer sees the post and recognizes it as about another student.

The ability of the Internet to embolden bullies, enlist limitless viewers, and foster longevity is precisely why the definition of cyberbullying should include single instances with the potential to be repeated. Harmful comments on the Internet do not vanish as in-person comments do. Thus, courts would be wise to determine whether the student posted a harmful comment—whether verbal, visual, or pictorial—on the Internet to target another student. The severity of the comment should not be equated with the comment's repetition because the nature of the Internet inherently renders the comment "repeated" every time there is a new viewer, which aligns with the importance of continuity when evaluating the seriousness of harmful comments.²⁷⁵ Broadening the definition to include singular, harmful instances on the Internet aligns with the first prong of the *Mahanoy* standard: seriousness.²⁷⁶ Whether a harmful comment is posted on the Internet to embarrass, hurt, or otherwise humiliate another student is all that needs to be considered in Factor One.

Others may argue that allowing the "severe" standard to be more broadly construed will have a chilling effect on the First Amendment

²⁷² See Pien Huang, *The Internet Is Forever. Or is it?*, NAT'L PUB. RADIO (Jan. 26, 2025), <https://www.npr.org/2025/01/26/nx-s1-5271539/the-internet-is-forever-or-is-it>.

²⁷³ See *Chen*, 56 F.4th at 711.

²⁷⁴ See *id.*

²⁷⁵ Cf. *Doe v. Hopkinton Pub. Schs.*, 19 F.4th 493, 503, 507-08 (1st Cir. 2021).

²⁷⁶ See *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 188 (2021).

because of the incidental suppression of unpopular and even offensive speech on social media.²⁷⁷ The arguments stem from social media being one of the “most important places . . . for the exchange of views.”²⁷⁸ Viewing social media as a platform for the free exchange of views, however, does not hold water in the context of cyberbullying. In most cases, where students pick on other students for their physical appearance, the comments can hardly be said to contribute to the marketplace of ideas.²⁷⁹

B. Factor Two: Whether the Comment was Aimed Toward the School Community

Mahanoy has been hastily construed to mean that off-campus speech’s ability to reach schools alone is *never* sufficient to warrant school discipline.²⁸⁰ Although true in light of the facts directly before the *Mahanoy* Court, the *Mahanoy* Court did not explicitly foreclose the possibility in all circumstances. B.L.’s behavior in *Mahanoy* did not satisfy even the broadest standard of bullying, let alone the more narrowly construed cyberbullying. The post did not target any other students,²⁸¹ nor was it repeated behavior. Given that the targeting and repetition are what courts consider when addressing bullying and cyberbullying, the *Mahanoy* Court found the post fell short of the bullying standard and deemed it a protected criticism.²⁸² Thus, the *Mahanoy* Court turned to whether the speech substantially disrupted the school.²⁸³ The criticism was not particularized like targeted cyberbullying is, so the disruption necessarily had to be applied to the institution as a whole.²⁸⁴ Despite the court’s refusal to create a clear standard for regulating off-campus speech,²⁸⁵ the distinctions the Court made between cyberbullying and criticism permit speculation that, although criticism reaching the school is insufficient, the ability to consider cyberbullying may not be barred.

²⁷⁷ See Erb, *supra* note 192, at 283.

²⁷⁸ Johnson v. Freborg, 995 N.W.2d 374, 389 (Minn. 2023) (quoting Packingham v. North Carolina, 582 U.S. 98, 104 (2017) (internal quotation marks omitted)).

²⁷⁹ See Erb, *supra* note 192, at 283.

²⁸⁰ See, e.g., Chen *ex rel.* Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 721 (9th Cir. 2022).

²⁸¹ *Mahanoy*, 594 U.S. at 191.

²⁸² See *id.* at 190-91.

²⁸³ See *id.* at 192.

²⁸⁴ See *id.* at 192-93.

²⁸⁵ *Id.* at 190.

Therefore, when cyberbullying targets a member of the school community, it is “properly considered on campus speech . . . [r]egardless of its place of origin.”²⁸⁶ In *Mahanoy*, Justice Breyer relies solely on geographical location to determine whether speech is considered off-campus, arguing that *in loco parentis* hardly applies to off-campus speech.²⁸⁷ As stated, the doctrine of *in loco parentis* holds that a parent delegates some parental rights to teachers for disciplinary purposes while the child is at school.²⁸⁸ The argument for applying *in loco parentis* to a child outside of school on the internet is subject to intense debate. David Cole, counsel for B.L. in *Mahanoy*, articulated this concept by stating, “inside the school, the child is captive; outside, [the child] is not,” thereby shifting supervisory authority from the school back to the parent while off campus.²⁸⁹ The *Mahanoy* Court mostly agreed with the sentiment that parents are in the best position to discipline and regulate their child’s off-campus speech,²⁹⁰ including their social media activity.

A parent’s ability to discipline their child’s off-campus social media activity is limited, however, because parents are often oblivious to their child’s online behavior. First, children and teenagers deliberately create secret accounts (“Finstagrams”)²⁹¹ to be out of their parents’ sight. When a minor intentionally avoids parental supervision, a parent’s awareness of the totality of their child’s behavior on the Internet cannot be automatically assumed. Further, even when children and teenagers notice bullying or are subject to bullying, they often do not tell their parents out of fear of losing their social media access.²⁹² Permitting students to bully or harass other students on social media outside of school solely because a child went to great lengths to avoid their parents is egregious and yields dangerous results.

Second, a narrow reading of the *in loco parentis* doctrine that applies only when a student is on campus fails to acknowledge poverty

²⁸⁶ *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (3d Cir. 2011) (Smith, J., concurring).

²⁸⁷ See *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 189 (2021).

²⁸⁸ S. Ernie Walton, *In Loco Parentis, The First Amendment, and Parental Rights—Can They Coexist in Public Schools?*, 55 TEX. TECH. L. REV. 461, 466-67 (2023).

²⁸⁹ Oral Argument at 1:22:29, *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180 (2021) (No. 20-255), <https://www.oyez.org/cases/2020/20-255>.

²⁹⁰ See Hammer, *supra* note 244, at 476.

²⁹¹ See *R.H. ex rel. A.H. v. Borough of Sayreville Bd. of Educ.*, No. 21-19835, 2023 WL 3431214, at *2 n.2 (D.N.J. May 12, 2023).

²⁹² See Dial, *supra* note 185, at 169.

concerns in the United States. Childcare is among the most expensive expenditures for families, and, at times, economic disadvantages force parents to leave their children at home alone for long periods.²⁹³ An estimated fifteen million school-aged youth are left home alone, with fifty-five percent of children in poverty living in a single-parent household.²⁹⁴ Despite Justice Breyer's overall ruling that schools are hardly *in loco parentis*,²⁹⁵ he correctly acknowledged during oral argument in *Mahanoy* that sometimes areas that were not previously reached by public schools are now within reach because of the fear of sending students home alone.²⁹⁶ Whether students are home or not, parents are usually not in a better place to prevent cyberbullying of another student than the school is. Public schools are mandated to foster a healthy learning environment,²⁹⁷ and turning a blind eye to another student's torment severely undermines that mandate.

Although *in loco parentis* should undoubtedly apply on campus,²⁹⁸ and in arguable instances outside of school,²⁹⁹ it should always apply to off-campus cyberbullying. A school is in an objectively better position to handle cases of cyberbullying among its students. Parents are hardly in the same position because their children deliberately hide their online presence from them. On the other hand, schools observe students daily and are more likely to notice potential bullying and its symptoms.³⁰⁰ If schools see such symptoms and ignore the signs purely because of the technical, geographic standard proposed by the *Mahanoy* Court, they abandon their duty as school officials.³⁰¹

²⁹³ See *id.* at 168.

²⁹⁴ *Id.* at 168-69.

²⁹⁵ See *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 189 (2021).

²⁹⁶ Oral Argument at 1:10:23, *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180 (2021) (No. 20-255), <https://www.oyez.org/cases/2020/20-255>.

²⁹⁷ See *Mahanoy*, 594 U.S. at 201 (Alito, J., concurring).

²⁹⁸ See *id.* at 218 (Thomas, J., dissenting).

²⁹⁹ See *id.* at 188 (majority opinion) (stating that schools may have a regulatory interest in off-campus speech in some circumstances, including "serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers").

³⁰⁰ See *Dial*, *supra* note 185, at 169.

³⁰¹ See Oral Argument at 1:24:21, *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180 (2021) (No. 20-255) (stating that B.L.'s attorney was making *Tinker* into a geographical test, and while it can be read that way, "[I]t's also possible to understand *Tinker* as a decision about what's necessary for a school's learning environment. And it might be that student speech that occurs

Judge Collins noted in *Chen*: “Although Epple may be correct that his parents have the primary responsibility for policing his off-campus use of social media, the school’s authority and responsibility to act *in loco parentis* also includes the role of *protecting other students* from being maltreated by their classmates.”³⁰² Therefore, even when cyberbullying takes place off campus, when a student directly targets another student, they are aiming the post at the school community.³⁰³ In fact, the school community—other students—is the audience meant to receive the very torment schools are entitled to prevent and fight against.³⁰⁴

Mahanoy could be read to state that aiming harmful content at the school community is not enough on its own, but that would misconstrue the holding. The *Mahanoy* Court stated only that the school’s interest in discouraging vulgar speech was weak and further weakened by the speech occurring off-campus.³⁰⁵ The speech’s general aim at the school was not relevant because its content lacked a reasonable link to the school’s pedagogical interests.³⁰⁶ Therefore, the *Mahanoy* Court left open the opportunity for language aimed at the school to be punished so long as (1) there was a strong interest in preventing the behavior, and (2) the speech specifically targeted the school. Cyberbullying satisfies both prongs because (1) state antibullying legislation, school policies, and criminal statutes display the compelling interest a school has in combatting bullying,³⁰⁷ and (2) cyberbullying specifically targets another member of the school. Therefore, Factor Two eliminates determining *in loco parentis* based solely on geographical lines by assessing whether the cyberbullying was directly aimed at a school community member. If so, schools can be assumed to be acting *in loco parentis* and are permitted to discipline as if the speech were made on campus.

outside of school is sometimes going to cause fundamental problems, disruption of the school’s learning environment, and I guess then the question is why we shouldn’t acknowledge that and allow a school to deal with it.”), <https://www.oyez.org/cases/2020/20-255>; see also *Mahanoy*, 594 U.S. at 201 (Alito, J., concurring) (“[T]he school has a duty to protect students while in school because their parents are unable to do that during those hours.”).

³⁰² *Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 721-22 (9th Cir. 2022).

³⁰³ See *Mahanoy*, 594 U.S. at 191 (finding that B.L.’s general statements encompassed a message aimed at the school).

³⁰⁴ See *id.* at 218-19 (Thomas, J., dissenting).

³⁰⁵ See *id.* at 191-92 (majority opinion).

³⁰⁶ See *id.*

³⁰⁷ See Hammer, *supra* note 244, at 459-60.

C. *Factor Three: Whether the Bullied Student was Personally Aware of the Comment*

Factor Three asks whether a student was personally aware of the comment made against her. As much as “[i]t might be tempting to dismiss . . . words as unworthy of . . . robust First Amendment protections[.]”³⁰⁸ there is still a fundamental interest in protecting even offensive speech.³⁰⁹ When speech occurs off campus, the *Mahanoy* Court noted that students may be subject to twenty-four-hour surveillance if schools may regulate every instance in which a student says something offensive.³¹⁰ Not only would regulation to that degree stifle the known protection of offensive speech, but it would also stifle the marketplace of ideas.³¹¹ For example, say a school finds out that Person X texted Person Y off campus, slinging a slew of insults about Person Z. Person Y informs the school, and Person Z never knew the insults existed. If the school punishes Person X for what Person Y told them, the school will effectively stifle and censor Person X’s freedom to express his views and opinions, even if his views are offensive. In turn, a situation like this could create a slippery slope that would allow schools to punish speech that school officials personally believe is “bullying,” which can easily slip into viewpoint censorship, as discussed above in *Harper*.³¹²

Factor Three remains loyal to *Mahanoy*’s assertion that certain features of speech cannot be punished because they risk transmission to the school.³¹³ The *Mahanoy* Court noted that the coaches did not come across B.L.’s comment on their own; rather, they were informed by other students in the school.³¹⁴ Therefore, a school administration’s interest in disciplining off-campus speech should receive less weight when the school is made aware of the circumstances by third parties, when the victim herself is unaware. Although Factor Two distinguished this

³⁰⁸ *Mahanoy*, 594 U.S. at 193.

³⁰⁹ See *Cohen v. California*, 403 U.S. 15, 25 (1971) (“We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.”); see also *Mahanoy*, 594 U.S. at 205-06 (Alito, J., concurring) (“But it is a ‘bedrock principle’ that speech may not be suppressed simply because it expresses ideas that are ‘offensive or disagreeable.’”).

³¹⁰ *Mahanoy*, 594 U.S. at 189.

³¹¹ *Id.* at 190.

³¹² See Lavarias, *supra* note 219, at 578.

³¹³ *Mahanoy*, 594 U.S. at 191.

³¹⁴ See *id.* at 185.

concept, it did so purely because the Court did not explicitly state that the risk of transmission to the school is insufficient when referencing *targeted* speech, which B.L.'s speech was not.³¹⁵ The distinction, thus, falls upon the term "targeted." Merriam-Webster defines "target" as "something or someone to be affected by an action or development."³¹⁶ The keyword is "affected." A student is not affected by a comment she never knew was made. Therefore, a school should discipline a student only when the student made harmful comments online, the comments targeted a specific student, the comments reached that student, and the affected student reported the attacks to the school.

This Comment does not argue that an individual who intended to bully or harass someone should be free from consequences. Indeed, such intentions may also be governed by criminal harassment law, which explicitly states that even behavior not perceived as harassment can still be harassment.³¹⁷ Simply being "mean," however, is non-actionable; thus, making a distinction between meanness and harassment is essential.³¹⁸ In the realm of public schools, where regulation of student speech is a controversial area even while on campus, protecting a student's ability to "express 'unpopular' ideas on public issues" is essential, "even when those ideas are expressed in language that some find 'inappropriate' or 'hurtful . . .'"³¹⁹ Requiring the affected student to be directly informed gives weight to the protection of First Amendment rights.

D. *Factor Four: Whether the Cyberbullying Objectively Interfered with the Bullied Student's Education*

The last factor is whether the reported cyberbullying objectively interfered with the bullied student's education. The findings of Factor One will determine the weight that the factor receives. If Factor One

³¹⁵ See *id.* at 191-92.

³¹⁶ *Target*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/target> (last visited June 3, 2026).

³¹⁷ See Ari Ezra Waldman, *Hostile Educational Environments*, 71 MD. L. REV. 705, 752 (2012) ("Under the Model Penal Code, harassment occurs when, with the intent to harass another, one (a) 'makes a telephone call without purpose of legitimate communication;' (b) 'insults . . . or challenges another in a manner likely to provoke violent or disorderly response;' or (c) 'makes repeated communications anonymously or at extremely inconvenient hours.'").

³¹⁸ See *id.* at 764.

³¹⁹ *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 195 (2021) (Alito, J., concurring).

weighs in favor of the bullied student, emotional harm can reasonably be determined.³²⁰ Further, conduct that causes emotional harm to a student creates a hostile environment for that student at school, even if the conduct occurred off campus.³²¹ If Factor One is less clear, however, because of the range in the subjectivity of emotional harm, then Factor Four may operate as a “tie-breaker.”

As previously noted, public schools must foster a healthy learning environment for students.³²² When students are tormented on the Internet through abusive or harassing speech, they may fall into the exception of the “captive audience.”³²³ The captive-audience exception to the First Amendment suggests that when offensive speech creates a hostile environment that the target cannot avoid, it may be restricted.³²⁴ Victims of cyberbullying are held “captive” by public schools because education is often state-mandated, and public schools are the most available option.³²⁵ The impact of captivity forces students to transfer to different districts,³²⁶ enroll in private schools, or consider homeschooling. Transferring districts or schools, however, comes with a financial burden. According to the 2023 U.S. Census, nearly thirty-seven million people across the United States are impoverished.³²⁷ In addition, the supplemental poverty measure child poverty rate increased by 1.3% to 13.7%.³²⁸ Thus, despite Justice Thomas’s contention that parents can

³²⁰ See *Doe ex rel. Doe v. Hopkinton Pub. Schs.*, 490 F. Supp. 3d 448, 465 (D. Ma. 2020) (finding that the court did not need to explore the hostile environment theory because emotional harm had been established already), *aff’d*, 19 F.4th 493 (1st Cir. 2022).

³²¹ *Doe ex rel. Doe v. Hopkinton Pub. Schs.*, 19 F.4th 493, 511 n.17 (2021) (“Here, the Bullying Report found that Doe’s and Bloggs’s ‘conduct caused emotional harm to [Roe], created a hostile environment for him during school-sponsored events and activities and infringed on his rights at school.’ The School may rely only on these justifications for rationalizing the [off-campus] speech restrictions.”).

³²² See *Virginia G. v. ABC Unified Sch. Dist.*, 19 Cal. Rptr. 2d 671, 674 (Cal. Ct. App. 1993) (“[T]he right of all students to a school environment fit for learning cannot be questioned.”).

³²³ Waldman, *supra* note 317, at 764.

³²⁴ *Id.*

³²⁵ *Id.* at 768; see also Heena Kuwayama & Zeke Perez Jr., *50-State Comparison: Free and Compulsory School Age Requirements*, EDUC. COMM’N OF THE STATES (Oct. 21, 2025), <https://www.ecs.org/50-state-comparison-free-and-compulsory-school-age-requirements-2025/>.

³²⁶ See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446, 452 (7th Cir. 1996) (stating the bullied student transferred twice).

³²⁷ EMILY A. SHRIDER, *POVERTY IN THE UNITED STATES: 2023 1* (2024), <https://www2.census.gov/library/publications/2024/demo/p60-283.pdf>.

³²⁸ *Id.*

freely choose where to educate their children,³²⁹ many people bear a financial burden that may limit their ability to transfer their children to a different district. Students who are victims of cyberbullying are then left to endure the suffering because the economic burden effectively strips them of the will to choose, allowing for potential academic decline.³³⁰

Considering that a hostile environment resulting from cyberbullying can affect a student's academic performance, a school looking to discipline off-campus cyberbullying must be able to point to objective academic inhibitions. This Comment acknowledges that not all students start at the same mental place. Nearly twenty percent of youth aged three to seventeen have a diagnosed mental, emotional, developmental, or behavioral disorder.³³¹ Further, between 2008 and 2020, deaths from suicide increased from 3.7 per 100,000 to 6.3 per 100,000 for youth aged twelve to seventeen, which was worsened by the turn to online dependency during COVID-19.³³² Therefore, the existence of a mental disorder or distress decline alone cannot determine that the particular cyberbullying had a causal connection to the bullied student's educational decline.

Schools have significant avenues to evaluate the impact that bullying has on a student, and there are telltale signs that bullying is connected to a student's decline. A student's educational decline is not limited to a decrease in grades or grade point average. A decline can also be evidenced by inconsistent attendance records, lessened extracurricular participation, and lower standardized test scores.³³³ Studies estimate that ten percent of students skip school during active cyberbullying.³³⁴ The high percentage of students skipping school during active cyberbullying is, in part, because forty-three percent of students who are cyberbullied feel unsafe at school.³³⁵ The effects of missing school continue in a domino effect, as students' grades and

³²⁹ Walton, *supra* note 288, at 478-79.

³³⁰ Waldman, *supra* note 317, at 710.

³³¹ AGENCY HEALTHCARE RSCH. & QUALITY, 2022 NATIONAL HEALTHCARE QUALITY AND DISPARITIES REPORT 73 (2022), https://www.ncbi.nlm.nih.gov/books/NBK587182/pdf/Bookshelf_NBK587182.pdf.

³³² *Id.*

³³³ Dial, *supra* note 185, at 161.

³³⁴ *Id.*

³³⁵ *Id.*

standardized test scores begin to suffer.³³⁶ Students who are distracted by cyberbullying are also more likely to drop their extracurriculars and refuse to “engage in the learning process.”³³⁷

Although the effects on a student’s education may be wholly unrelated in some instances, one failproof way of linking academic decline and cyberbullying occurrences exists: timestamps. Social media accounts contain timestamps, which can tell the school exactly when each instance of cyberbullying occurs. The school can directly use timestamps to compare them with its records tracking a student’s grades, test scores, extracurricular participation, and attendance. If the cyberbullying and declines correlate, a school may infer a connection between them. Through this process, courts can examine the reasonableness of such a connection.

Correlation, however, does not always equal causation. Therefore, the evidence acquired to make the connection should be viewed on a case-by-case basis to determine whether an inference of connection is reasonable. Timestamps alone are insufficient and should be additions to student testimony, potential witness testimony, student records, and student engagement. For example, in *Chen*, Superintendent Valerie Williams first determined when the racially targeted posts were made before listening to reports from students and parents about the inability to study and attend class out of fear.³³⁸ After receiving multiple reports, Superintendent Williams investigated the academic standing of the students who were the subjects of the posts.³³⁹ The investigation revealed that in the period following the posts, several students’ grades decreased, some with an imminent risk of academic failure.³⁴⁰ The timing of the posts, in conjunction with the reports of inability to be present physically and emotionally, readily allowed the inference that the academic decline was linked to the graphic and violent posts.

Although *Chen* is an example of a substantial disruption of the educational process for multiple students, the same premise applies in instances of academic decline in an individual student. Many

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ See *Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 714 (9th Cir. 2022).

³³⁹ *Id.*

³⁴⁰ *Id.*

states, such as Maryland,³⁴¹ California,³⁴² Virginia,³⁴³ and the District of Columbia,³⁴⁴ have laws, regulations, or guidelines that encourage schools to foster a safe learning environment for all students to thrive. Maryland, for example, provides in its educational code that its schools are not only to address breaches of behavioral expectations that negatively impact the well-being of the entire school community but also to “focus[] on accountability for *any* harm done by the problem behavior.”³⁴⁵ The encompassing nature of the phrase “any harm” reinforces the sentiment that harm done in all magnitudes should be addressed, even if only one student is affected. The broad language in Maryland’s law intentionally combats the idea that problem behavior can be addressed only if the harm is significant enough to cause the academic decline of multiple students. Although not all states use this exact verbiage, such laws and regulations intend to ensure that all students are provided a safe and positive learning environment. Where courts only allow for the discipline of students who cyberbully with such intensity as to cause academic decline in many students, they neglect singular instances of academic decline resulting from “serious or severe bullying” and, thus, abandon uniform protections for students.

CONCLUSION

Overall, the current standard for regulating off-campus cyberbullying is too narrow, as “substantial disruption” is a near-impossible standard for modern-day cyberbullying. Further, requiring the cyberbullying to be repeatedly “severe” for schools to act will lead to inadequate protection of minor students both on and off-campus. As society advances, the best interest of American public school students requires government officials and courts to examine possible alternatives to preserve the well-being of minor students subjected to cyberbullying in the developing technological age.

Therefore, courts should adopt a uniform test that balances the interests of a bullied child against the First Amendment interests of the children who bully. First, the court should consider whether the online

³⁴¹ See MD. CODE ANN., EDUC. § 7-306(a)(1)(ii-iii) (West 2025).

³⁴² See CAL. EDUC. CODE § 35183(a)(6) (West 2004).

³⁴³ See VA. CODE ANN. § 22.1-253.13:1 (West 2025).

³⁴⁴ See D.C. CODE ANN. § 38-236.03(a) (West 2018).

³⁴⁵ MD. CODE ANN., EDUC. § 7-306(a)(1)(ii-iii) (West 2025) (emphasis added).

speech constituted an intentionally harmful verbal, textual, or pictorial comment. Second, the court should assess whether the comment was aimed at the school community. Third, the court should find whether the bullied student was personally aware of the comment, regardless of the speaker's expectation of privacy. Fourth, the court should determine whether the comment objectively interfered with the bullied student's education. The outcome of this factor test will determine whether public schools have a compelling interest in regulating off-campus cyberbullying.