

BALANCING STUDENT RIGHTS AND THE NEED FOR SAFE SCHOOLS

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Dedication

This dissertation is dedicated to my family, especially my wife Kari. She sacrificed a great deal during these many years. I also know that someday our boys Jack and Evan will pursue their own academic dreams, and I hope they find some inspiration from my work. I only wish their brothers Chase and Samuel were here to enjoy their dreams with them.

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ABSTRACT

The purpose of this study was to examine if school safety and security can be maximized without reducing student rights and freedoms. A review of school violence literature supports the early research on how schools should respond to school violence. An analysis of court cases that have arisen from legislative and school responses to school violence concludes that student rights continue to be challenged, and that cyber-speech cases are an unsettled and growing area of litigation.

Students today are affected by tragic school shootings and the aftermath of the September 11, 2001 terrorist attacks. School districts face a dilemma as they attempt to balance the issue of school safety and student rights. This study is concerned with school districts' enforcement of new laws and policies written in response to school violence. While it is easy to understand why school officials are obligated to provide student safety, a more subtle and yet impassioned argument exists for the school officials to also be *guardians* of student liberty. As school officials attempt to balance the rights of students with the need for safe schools, they face significant challenges. The implications for school personnel are far-reaching, and administrators should take into consideration the fact that students face violence both at school and away from school.

Analyzing what programs and policies are in place in schools reveals what works and does not work to prevent school violence. Most studies discredit zero tolerance policies, as well as support anti-violence programs that do not diminish student rights. School administrators need guidance that helps them make decisions that protect their students and additional guidance to help them make decisions that respect student rights. The concern of striking the proper balance of school safety and student freedom should be a part of the consideration when implementing

school safety programs. Educators wishing to develop school environments that keep students safe without taking a toll on student freedom have research and resources to turn to.

Chapter 1

Introduction

Generations of American students' school experiences have been shaped by monumental national events. The uprooting of families during the Great Depression, the massive loss of life during World War II, and the uncertainties the country faced during the Cold War certainly impacted students and teachers. What happened at school the day of the assassination of President Kennedy will never be forgotten by those who experienced it. Others may remember their school days paralleled alongside the war in Viet Nam, the civil rights movement, or a myriad of popular cultural or social movements.

Students today are affected by tragic school shootings and the aftermath of the September 11, 2001 terrorist attacks. The tragic shootings of students and teachers at Columbine High School in Littleton, Colorado, on April 20, 1999, became an exclamation point to what seemed to be an increase in school violence. From July 1, 1998 to June 30, 1999, there were 38 school-associated homicides in the United States, with 33 of the deaths school-age children (Dinkes, Kemp, & Baum, 2008). As the psychological effects rippled through schools and communities nationwide, the response to the violence came on a national, state, and local level. School-violence related legislation was passed in all 50 states prior to and after the Columbine incident (National Conference of State Legislatures [NCSL], 2003). The Federal government passed the Gun-Free Schools Act a full five years before Columbine and in its aftermath initiated a joint study by the Secret Service and the Department of Education, entitled "The Safe School Initiative" (Vossekuil, Fien, Reddy, Borum & Modzeleski, 2002). Zero-tolerance laws

mandating permanent expulsion for a single occurrence of weapon or drug possession became a trend in public education (Haft, 2000).

The terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, also serve as a generational marker for students. Many, if not most, of the nation's schools had just begun the 2001-2002 school year when the attacks occurred. Television images of exploding planes, collapsing buildings, dumbfounded onlookers, and grieving families remained a continuous stream. The response of the federal government was swift and far reaching. On a much greater scale when compared to the response to school violence, all citizens are affected in some way by the governmental response to the attacks of September 11, 2001. Among the legislation passed by Congress in 2001 were the U.S.A. Patriot Act and the Aviation and Transportation Security Act. The Federal Department of Homeland Security was created in March, 2003.

The resulting laws, policy changes, and administrative practices that students and the public now face in light of school violence and terrorist attacks have some civil libertarians concerned about the diminishment of civil liberties. All citizens face a loss of certain freedoms that may have once been taken for granted.

School districts face a dilemma as they attempt to balance the issue of school safety and student rights. How restrictive must school officials become to fulfill their obligation to protect students? What if the programs and policies in place actually increase the likelihood for violence to occur? Educators grapple with these questions in the same way our entire nation asks how much freedom must be limited in order to protect the citizenry from the violence of terrorists.

The greatest challenge for school administrators attempting to measure a reasonable response to potential violence against individual student civil liberties is finding the point at

which the proper balance is reached. Where is the safe zone where enough protections are in place to ensure student safety, while still preserving the greatest number of student civil liberties? Phrased differently, the question could be asked “what is the ‘clashing point’ where reasonable measures to protect students meet with reasonable protections of student civil liberties?” To civil libertarians, the real question may be how many student rights must be lost before a school is considered to be safe?

There are also concerns that the responses to violence by educators, legislatures, and others involved with public education may in fact make students less safe. There is obviously a natural response for parents and educators to err on the side of safety---but what if the action taken actually makes everyone less safe?

These questions are not necessarily new to educators, but they have become more pressing due to the severity of school violence. As noted in an educational law textbook, there is a “...tension between the school’s need to maintain an orderly environment and the student’s right as a citizen and human being” (Imber & Van Geel, 1993, p. 151). The complexity of the issue has also been increased, yet has been present for many years. The same authors note that “[M]any of the most difficult questions in education law concern the conflict between individual rights of students and the corporate needs of the school” (Imber & Van Geel, 1993, p. 151).

Origins of Student Civil Liberties

Of most importance to the balancing of student liberty against the obligation of school authorities to provide a safe environment, First Amendment, Fourth Amendment, and Fourteenth Amendment principles apply. Student speech rights, student searches, and the due process required when student discipline is administered have all been shaped by decisions of the United States Supreme Court since the late 1960’s. Prior to that time, the predominant view supported

by the courts was the doctrine of “*in loco parentis*,” a Latin term for “in place of the parent” (American Law and Legal Information, 2009). Most courts did not interfere with disputes between schools and students, particularly when it came to rules and discipline (American Law and Legal Information, 2009). Not until the 1960’s did the doctrine of *in loco parentis* become limited except in a few circumstances. Children and students did not enjoy the Constitutional protections except in a few specialized contexts; only statute and common law restrained the authority of educators (Imber & Van Geel, 2001). Constitutional protections were first recognized for children in 1967 when the United States Supreme Court ruled in the case known as In re Gault.

The first recognition by the United States Supreme Court that First Amendment rights applied to students came in 1943 in West Virginia State School Board v. Barnette. In this case the requirement by school officials that students salute the flag was found to be unconstitutional. “To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind” (West Virginia v. Barnette, 319 U.S. 634, 1943).

Student free expression rights were supported in 1969 with the landmark Tinker v. Des Moines Independent School District decision by the United States Supreme Court. Students do not shed their Constitutional rights at the “schoolhouse gate,” wrote Justice Abe Fortas (Tinker v. Des Moines Independent School District, 393 U.S. 503,506 1969). This famous decision is viewed as the touchstone case supporting students’ First Amendment rights, but has been followed by subsequent decisions that curtailed student rights of expression (Weisenberger, 2000). [See: Bethel School District No. 403 v. Fraser. 478 U.S. 675 (1986); Hazelwood School District v. Kuhlmeier. 484 U.S. 260 (1988); Morse v. Frederick. 551 U.S. 393 (2007).]

The importance of the Tinker decision to the issue of balancing student speech and the responsibility of school officials to create a safe environment rests with what became known as the “Tinker” test. The “Tinker” test says that school officials may only prohibit student speech that causes, or reasonably could be expected to cause, material or substantial disruption of the operation of the school. This test is central to the problem school authorities face in light of increased school violence. Is particular student speech, which during an earlier era may not have been deemed to be disruptive to the operation of the school, now disruptive enough to warrant suppression? If suppressed, given the current public school environment, will the school authorities be supported in the courts?

Student search issues will also arise for school officials in their quest to provide a safe school environment. The controlling United States Supreme Court decision in student searches is New Jersey v. T.L.O. decided in 1985. School officials must have reasonable grounds to believe that a search of a specific individual will produce relevant evidence that the individual has violated a specific school rule or law (Imber & Van Geel, 1993). While subsequent case law has refined *T.L.O.*, school officials are again faced with questions regarding student searches given the present environment. What student search standards, if any, are different in light of increased school violence?

Subsequent findings by the courts have clearly shifted away from student constitutional protections. The First Amendment cases established a protective “substantially interferes” standard, but reduced it to a balancing test followed by a general standard of reasonableness (McKinney, 2001). The Fourth Amendment decisions moved away from individualized suspicion, particularly in light of the drug testing decisions Vernonia School Dist. 47J v. Acton

in 1995, and Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, in 2002.

Punishments for students who break rules must follow due process guidelines established for students in 1975. Goss v. Lopez (1975) determined that the deprivation of a student's liberty or property was a serious enough life event to require due process. A short-term school suspension of ten days or fewer requires notice of the charges to the student and an opportunity to refute them. Lower courts have determined that *Goss*'s focus on suspensions of ten days or less as signaling more due process is required for suspensions of greater length (Imber & Van Geel, 1993).

With the increase in zero-tolerance laws and policies, the issue of due process for accused students arises. Cerrone notes that many civil libertarians are concerned that zero-tolerance laws have the potential to impose strict punishments on students who are not dangerous, and in addition, impose severe punishments to students without the benefit of adequate due process (as cited in Hanks, 2004).

The issues of student speech rights, student searches, and due process have concerned not only educators but legal scholars as well. A small sampling of legal research and commentary reveals titles such as "Learning Locked Down: Evaluating The Treatment of Students' Rights in High Security School Environments" (Bracy 2009); "Shedding Their Rights at the Schoolhouse Gate': Morse v. Frederick and The Student's Right to Free Speech" (Patteson 2009); "Freedom to Hate: Weighing First Amendment Rights Against School Violence---A Case Study" (Kaplan 2007); "On the School Board's Hit List: Community Involvement in Protecting the First and Fourth Amendment Right of Public School Students" (McKinney 2001); "Free Speech and Public Schools in a Post-Columbine World: Check Your Speech Rights at the Schoolhouse

Metal Detector” (Calvert 2000); and “Violence and the Public Schools: Student Rights Have Been Weighed in the Balance and Found Wanting” (Daniel 1998). Cases of student suspensions for wearing black armbands, writing poems or producing artwork, wearing certain items of clothing, revealing private thoughts, creating computer expressions, and turning in objectionable homework projects are appearing nationwide. The concern for civil libertarians is that the legacy created for students by Tinker and Goss is lost and will never be recaptured.

The Obligation to Protect Students

There is no doubt regarding the duty of school districts to provide a safe environment for students. Since students are compelled by law to attend school, the courts usually review very carefully any alleged breach of normally expected duty and standard of care by school officials (Shoop & Dunklee, 1992). School officials have definite responsibilities assigned to them through the doctrine of *in loco parentis*. While the doctrine in a strict sense has been largely abandoned, with this assignment, there is an assumption that while the student is away from home, the safety and welfare of the student is directed by trained teachers and administrators (Shoop & Dunklee, 1992). The “reasonable teacher standard” recognized by courts essentially requires that educators protect students with a higher degree of competency than would be expected of the average reasonable and prudent person.

In 1999, The United States Supreme Court commented on the responsibility of educators to address school violence under state law. In Davis v. Monroe County Board of Education, the Court stated that educators “...have been put on notice that they may be held responsible under state law for their failure to protect students from the tortious acts of third parties” (Davis v. Monroe County Board of Education, 119 S.Ct. 1661, 1671-72, 1999). In a 2002 opinion, Justice Clarence Thomas wrote for the Court in upholding random drug testing for students involved in

extracurricular activities. In his opinion, he quotes Justice Lewis Powell from New Jersey v. T.L.O., where Justice Powell noted that “[A]part from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern” (New Jersey v. T.L.O., 242 F. 3d 1264).

The concern for school districts to avoid a judgment of negligence is a factor in the erosion of student liberties (Hermann & Remley, 2000). School district officials, afraid that their failure to act may be cause for a finding of negligence, are taking extra precautions to ensure that acts by students, some of which may have at one time been considered harmless, are taken seriously. In the aftermath of Columbine, some school districts have moved decisively against students who have either talked about violence or even talked about Columbine (Demerle, 2001).

The Obligation to Protect Civil Liberties

While it is easy to understand why school officials are obligated to protect student safety, a more subtle and yet impassioned argument exists for the school officials to also be *guardians* of student liberty. Educators must balance themselves on a fine line while upholding student rights while at the same time being the authority that challenges students who break rules. While similar to the roles played out by professionals in the criminal justice system, there is a difference. Prosecutors and criminal defense attorneys are enmeshed in an adversary system, with aggressive action taken against lawbreakers while upholding Constitutional protections. Educators, on the other hand, are reluctant participants in such an adversary system. Their role is to teach and model at the same time; teaching not only the students accused of breaking rules, but all of the other students as well.

This relationship has been acknowledged by at least one Justice of the United States Supreme Court. Justice Lewis Powell noted in a concurring opinion in New Jersey v. T.L.O. that a “special relationship” exists between teachers and students.

Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead, there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student’s welfare as well as for his education (New Jersey v. T.L.O. p. 325).

Some proponents of the notion that public schools should protect as much student liberty as possible are those who see the teaching of democracy as a central function of public schools. In his book “*An Aristocracy of Everyone: The Politics of Education and the Future of America*,” Benjamin R. Barber states the fundamental task of education in a democracy is the apprenticeship of liberty---learning to be free (Barber, 1992). “As a consequence, we must learn to be free. That is to say, we must be taught liberty. We are born small, defenseless, unthinking children. We must be taught to be thinking, competent, legal persons and citizens” (Barber, 1992 p.15). Barber eloquently and persuasively supports democracy and public education, and asserts that the public schools are the sole public resource available to shape children to live in a democratic world. He concludes with stating:

The autonomy and the dignity no less than the rights and freedoms of all Americans depend on the survival of democracy; not just democratic government, but a democratic civil society and a democratic civic culture. There is only one road to democracy:

education. And in a democracy, there is only one essential task for the educator: teaching liberty (Barber, 1992, p.15).

There is a growing body of literature that argues what is now occurring in schools is far removed from teaching and practicing liberty. The growing reliance on zero-tolerance responses to misconduct runs directly counter to a fundamental purpose of public education---the purpose of preparing children to live in a democratic society. Is there a danger that the reactions by legislatures and school officials threaten “to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes” (West Virginia v. Barnette, 319 US 624, 637 1943)? Many people feel this is rapidly becoming the case. Practically speaking, ignoring the role of teaching fundamental values such as student liberty, students would receive the implicit message that the development of good students, good athletes, or successful professionals is more important than the development of good people. (Glanzer, 2000).

Anti-violence programs

A final argument against the limitations placed on student freedoms is a practical one. Repression may actually make schools less safe by cutting off avenues for the expression of student anger and frustration. Methods that rely primarily on punishment have not proven effective in reducing school violence (Skiba & Peterson, 2000). Instead, school districts should adopt models designed to foster nonviolent school communities that include alternative strategies to punitive and exclusionary discipline---strategies that run afoul to the teaching of liberty and the safety of the school (Skiba & Peterson, 2000).

Mayer and Leone (2007) note several studies that conclude universal and targeted school violence programs are effective when they are well implemented. School-wide behavioral

expectations taught in several ways and reinforced over time have proven to be increase positive academic and social behaviors. What has been suggested by studies of programs that do not work well are profiling of students, which hurt innocent students. Zero-tolerance policies have done little to prevent or reduce school violence.

Studies have also shown that while weapon carrying may be reduced, school violence levels have not been reduced by the implementation of physical security measures such as metal-detectors (Mayer & Leone, 2007). Repeated suspension and primarily punitive disciplinary approaches are also not very effective at changing student behavior.

As educators develop and implement school policies designed to prevent violence, they must consider if the policies are designed to prevent violence or are simply policies that spell out punishment for offenders. A central question concerns the amount of emphasis placed on punishment being used for violence prevention. To what degree are the policies designed to prevent violence weighed toward punishment as a deterrent? More pointedly, to what degree are school districts relying on their sanctions against students as their primary effort to prevent violence? As school officials attempt to balance the rights of students with the need for safe schools, they face challenges from the laws and regulations that have arisen in the past decade.

Chapter 2

Proposed Study

While there is abundant literature addressing the rights of students in the aftermath of the Columbine tragedy and other school shootings, and a clear legislative record that laws have been changed or enacted as well, there needs to be guidance to develop policy that balances safety for students as well as preservation of student rights and civil liberties. Given the direction of what courts allow and the trends of the courts, educators must keep in mind what is constitutionally permissible as they deal with student policies---how far can schools go to protect students from violence? Furthermore, with the knowledge of what is permissible, what can they do that best keeps students safe while at the same time preserves as many rights and liberties as possible? From a practical standpoint, administrators should be able to determine if their policies make schools safer and if the policies in place make schools safer with the least possible amount of restrictions on student rights.

This study examined the problem school districts face by providing an historical background of the evolution of student rights through relevant court cases, particularly those related to First, Fourth, and Fourteenth Amendment Constitutional issues. In order to understand where we currently stand, we must have a better understanding of how current student rights were formed. In a similar manner, the duty of school districts to provide a safe environment was examined. In the aftermath of the implementation of new laws, policies, and administrative practices, relevant case law is now finding its way through the courts. This study evaluates such case law, particularly those that appear to have a link to the question of balancing safety and

student rights. The review of the case law helps to identify the potential hot spots where a safe environment and student rights may clash.

Having provided the proper historical background, the study evaluates federal, state, and local legislative remedies that have been implemented post-Columbine and post-September 11, 2001. The evaluation focuses on how the remedies address student or public safety and how they appear to affect civil liberties of students or the public.

By looking at studies of violence prevention programs there is a growing body of evidence as to what works and what has shown not to work in the reduction of school violence. This study examines how these effective and ineffective programs relate to the issue of balancing the obligation of schools to keep students safe and protect student's rights at the same time. The history of student rights and how they have evolved over several decades is important to outline.

The study concludes with an analysis of where the issue may be headed as more events happen in schools, more laws are enacted, and more court cases are decided. The analysis will attempt to find similarities in the clashing points where student safety and student rights have become so imbalanced that judicial intervention was required. Given there are always cases within the judicial system that could be accepted for review, the United States Supreme Court will likely at some time further define rulings related to student expression, student searches, and student due process.

Information was put together from all sources to determine what permissible and legal actions work the best while at the same time protect student rights---but perhaps most importantly determine which allowable actions are the most criticized from a civil libertarian viewpoint that experts say do not work anyway.

The main question of the study was to determine where student safety can be maximized without reducing student rights. Does the prescription for student safety require the reduction of student rights, or can a better solution be found without reducing those rights?

Methodology

This study examined written opinions of court decisions, which are available from many sources, including internet data bases from the United States District Courts, the United States Courts of Appeal, and the United States Supreme Court. The literature review also includes articles from law review journals, education journals, education textbooks, and student dissertations.

While some information was gathered from law journals and education journals found in libraries, nearly all such journals are available through internet libraries and databases. Searching terms including “zero-tolerance,” “student rights,” “school violence” and “student civil liberties” produced relevant articles and research from Lexis-Nexis Academic databases, Education Resources Education Center (ERIC) databases, as well as results from Dissertation Abstracts and Education Abstracts. Using the search terms “school violence programs” and “school violence prevention” provided results of programs for purchase, training, websites, and commentary about their effectiveness. The use of law school websites also yielded valuable information that was needed for the study. In particular the Legal Information Institute at Cornell Law School and the Washburn University Law School website provided direction to court cases, legal commentary, and other legal search engines.

The gathered information was used to frame the issue for the study, providing the historical origins of student civil liberties, and the obligation of schools to protect civil liberties.

Analyzing the relevant court decisions and legislative requirements helped to detail the obligation to protect students and keep them safe.

Examining the legislative and executive branch responses to school violence then provided the basis for challenges that have occurred and been litigated. The outcomes of the responses to school violence, particularly with zero tolerance laws, First Amendment issues, and Fourth Amendment issues provided some insight in the direction the courts have taken.

The study is primarily an analysis of the written opinions of court cases that are relevant to the issues of student rights or the obligation of schools to maintain safe environments for students. Analyzing what programs and policies are in place in schools reveals what works and does not work to prevent school violence. Examining the legislative and administrative response to cope with school violence and the resulting case law helps provide the background for the analysis of the issue.

Importance of the study

The ultimate benefit of the study is to provide a better understanding of where the proper balance of school safety verses student freedoms rests; school boards and administrators using that information may be better able to write and enforce policies that achieve both goals. School administrators need guidance that helps them make decisions that protect their students and additional guidance to help them make decisions that respect student rights.

Administrators also need to know what policies do not make anyone safer and serve only to reduce and restrict student liberties. This is an especially important point due to the fact that some of those policies may serve to make things worse by creating an environment that suppresses outlets for student expression. Such an environment may keep school officials from

becoming aware of potential problems that could be addressed, reducing the possibility of violence.

There are dozens of school safety programs in existence, many for purchase, that are available to school districts. The concern of striking the proper balance of school safety and student freedom should be a part of the consideration when implementing school safety programs. This study provides a basis for making a more informed decision regarding such programs.

Finally, the findings of this study will help school administrators enact policy that meets both goals in future policy decisions as they relate to cyber bullying, student use (or abuse) of emerging technologies, or other school safety needs in the future. This may be among the most important findings due to the emergence of social networks and instant communication that is common among the vast majority of students.

The study will begin with a history of the foundation of student rights. The obligation to protect the safety of students as well as the obligation for educators to protect student liberty will then be outlined. The prevalence of violence and the federal, state, and local responses to violence will be outlined. The resulting outcomes of the responses to violence will then be discussed.

The study will examine the literature related to student rights and school violence, and will trace related court cases and will conclude with recommendations for all levels of educators as they attempt to set policy to deal with school violence.

Chapter 3

Framing the Issue

In order to provide a background of the issue, this chapter will begin with a history of the foundation of student rights in public schools, particularly the rights provided by the First, Fourth, and Fourteenth Amendments to the United States Constitution. The legal and moral obligation to ensure student safety will be discussed, followed by a rationale for the need by educators to be guardians and teachers of liberty and democracy. The chapter will also include school violence data, and the federal, state, and local legislative responses to school violence, including the increased use of zero tolerance remedies. The chapter will conclude with a discussion of how the response to school violence has mirrored the response to the terrorist attacks on the United States in 2001.

Evolution of Student Rights in Public Schools

The freedom of expression, the freedom from unreasonable searches, and the right to due process when faced with disciplinary action by school authorities are the student rights most closely related to school safety issues. The United States Supreme Court has ruled on these Constitutional issues and provided the foundation for school authorities to build school safety policies. An historical outline of the Supreme Court rulings will help to better understand this foundation. The First Amendment, Fourth, and Fourteenth Amendments to the United States Constitution form the central core of student rights related to school safety, and while all citizens enjoy these rights, they have a different application in a school setting.

The foundational history of public school student's entitlement to the protections of the United States Constitution reveals a relatively slow process. Early cases filed and litigated prior

to 1960 dealt for the most part with the quality of education, parental rights of decision, and compulsory attendance laws. [See Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Society of Sisters, 268 U.S. 510 (1925)]. Heder (1999) notes that judicial appeals in the interest of students' rights under the Constitution were noticeably absent prior to 1960.

Declaring that students are protected under the Constitution has been proven to be easier than defining the scope of those protections (Heder, 1999.) A brief history of landmark decisions related to public school students' rights is a starting point to the determination of the scope of those protections, and a necessary foundation to the analysis of the possible re-definition of those protections in the future.

The First Amendment and Student Speech Rights

The proposition that the First Amendment protects the freedom of expression of students found early roots in 1943 in West Virginia State School Board v. Barnette. Compulsory flag salutes and the recitation of the Pledge of Allegiance do not appear to be directly related to school safety concerns; however, on the whole the issue is directly related to student freedom of expression. The fundamental principle that students cannot be forced to recite the Pledge has withstood the test of time, but challenges exist whether the words "under God" violate the establishment clause of the Constitution (Hudson, 2009).

First Amendment rights of students became grounded in 1969 when the Court decided Tinker v. Des Moines Independent Community School District. Three students wore black armbands during the holiday season in protest of the war in Viet Nam. School officials "met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused would be suspended until he returned without the armband" (Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 1969, p. 594). In doing so, the students

violated a district regulation adopted and directed specifically at them. When the students were suspended, they filed suit in federal court to enjoin the district from disciplining them. The district court dismissed the suit on the ground that it was reasonable in order to prevent disturbance of school discipline. After the Eighth Circuit Court of Appeals affirmed the district court, the Supreme Court reversed and ruled in favor of the students, holding that the armbands were akin to “pure speech” under the protection of the First Amendment (Tinker v. Des Moines Independent Community School District, 1969, p. 505).

While perhaps the most frequently quoted portion of the opinion of Justice Fortas is students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” (Tinker v. Des Moines Independent Community School District, 1969, p. 503), the most important section related to school safety concerns states “[C]learly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible” (Tinker v. Des Moines Independent Community School District, 1969, p. 504). School officials must now determine what forms of student expression may “materially or substantially interfere with schoolwork or discipline” enough to warrant suppression for the purpose of school safety.

The *Tinker* decision is the bedrock for student speech; absent disruption of the school or interference with the rights of others, a student’s ideological views cannot be suppressed. Subsequent decisions have both affirmed and modified *Tinker*.

The first major deviation from the material-and-substantial disruption standard came in 1986 when the Supreme Court ruled in Bethel School District No. 403 v. Fraser. The Court ruled 7-2 that school officials were right when they suspended a high school student for

delivering a speech that included sexual innuendoes at a school assembly. The student, Matthew Fraser, gave a nominating speech that included references to a student who is "...firm---firm in his pants...who will go to the very end, even the climax, for each and every one of you" (*Bethel School District No. 403 V. Fraser*, 478 U.S. 675 at 677-679, 1986). Fraser objected to his subsequent suspension on the grounds that his free speech rights were violated. While Fraser's position prevailed through the lower courts, Chief Justice Warren Burger stated for the majority that "the First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondents would undermine the school's basic educational mission" (*Bethel School District No. 403 V. Fraser*, 1986, p.685). The Court found that "vulgar and offensive terms" could be prohibited in schools because an essential part of the school's mission is to instruct children in proper values and society.

Chief Justice Burger also stated "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings...the First Amendment gives a high school student in the classroom right to wear Tinker's armband, but not Cohen's jacket" (*Bethel School District No. 403 V. Fraser*, at 682 quoting *Thomas v. Bd. of Education.*, 607 F.2nd1043 1057, 2d Cir. 1979). In 1971 the Supreme Court held in *Cohen v. California* that a person wearing a jacket bearing the words "Fuck the Draft" could not be cited for disturbing the peace. The Court declined to find the expression "obscene" in the context it was used, and had not found it "inherently likely to provoke violent reaction" (*Cohen v. California* 403 U.S. 15 1971, p. 20).

The reference to the decision in *Cohen* is noteworthy as it relates to the study of student rights and the need for safe schools. While the *Bethel* decision clearly allows school officials to determine what is and is not "socially appropriate behavior" (*Bethel School District No. 403 V.*

Fraser, 1986, p. 681), the *Cohen* decision points out that communication encompasses an “emotive function” as distinct from purely “cognitive content,” and that the government must not be permitted to “seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views” (Cohen v. California 1971, p. 26). In the context of balancing student rights and providing safe schools, this becomes a clashing point from which school administrators must work. They must make judgments on a daily basis what words or actions may be deemed “vulgar or offensive”, must also determine if those words have caused or potentially may cause a disruption of the school, and must weigh whether or not the words are permissible as constitutionally protected speech.

The 1988 decision by the Supreme Court in Hazelwood School District v. Kuhlmeier creates additional responsibilities for school district officials to consider when regulating student speech. In *Hazelwood*, the censorship by the principal of two articles from the high school newspaper resulted in a lawsuit brought by three students. The principal censored separate articles that dealt with students’ experiences with pregnancy and with the impact of divorce on students who attended the school. The principal was concerned that the identities of the pregnant students may be discernable, against their wishes, and that the references to sexual activities and birth control may not be appropriate to the younger students at the school. The second censored article contained negative references to the divorced parents of an interviewed student who was identified by name. The principal was concerned by the fact that the parents were not provided an opportunity to respond or to object to its publication.

Justice White’s opinion for the Court defined a second form of student expression in order to be distinguishable from the standard set forth in *Tinker*. Wrote Justice White... “[W]e hold that educators do not offend the First Amendment by exercising editorial control of the style

and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns” (Hazelwood School District v. Kuhlmeier 484 U.S. 260, 1988). While the Court acknowledged *Tinker*, the primary point was to define an operative distinction between student speech school officials must tolerate versus student speech a school must sponsor.

The question whether the First Amendment requires a school to tolerate particular student speech---the question that we addressed in *Tinker*---is different from the question of whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators’ ability to silence a student’s personal expression that happens to occur on the school premises. The latter question concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences. (Hazelwood School District v. Kuhlmeier 484 U.S. 260, 1988)

The Court further stated:

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school (Hazelwood School District v. Kuhlmeier 484 U.S. 260, 1988)

At first glance it may appear that the decision in *Hazelwood* has no major relationship to the balancing of student rights and the need for safe schools. However, the decisions in *Tinker*, *Bethel*, and *Hazelwood* must be balanced together to accurately assess their impact on student rights and student safety. In both *Fraser* and *Hazelwood*, school authorities are given wide latitude to determine what speech is considered vulgar and offensive, and what constitutes a legitimate pedagogical concern when regulating school-sponsored speech. Has the *Tinker* “material and substantial interference” standard been replaced by one allowing school authorities to censor anything remotely related to the school, (school sponsored) or impose “socially appropriate behavior” standards on everything else? In the aftermath of increased school violence and the need to protect students, what is the likelihood student speech rights will be re-defined an additional time, perhaps away from student freedom and weighed in favor of school authorities?

The *Tinker*, *Fraser*, and *Hazelwood* decisions are sometimes referred to as “the trilogy” of Supreme Court precedents regarding student speech. Until recently these decisions were what lower courts relied on to deal with ever-changing issues in schools. In 2007, the United States Supreme Court rendered a student speech decision that reaffirmed student Constitutional rights, while also noting that they do not have the same rights adults have in other settings. In *Morse v. Frederick*, also known as the “Bong Hits 4 Jesus” case, a high school student in Alaska brought suit after being suspended for displaying a sign that stated “Bong Hits 4 Jesus” during a parade that passed by his school.

While the 5-4 decision ultimately found in favor of the school, the decision is important for the analysis of balancing student rights and the obligation of schools to protect students. The Court made it clear that their ruling was based on the right of students to promote a “pro-drug”

message, and did not actually tamper with the standards set in “the trilogy” of previous opinions. Justice Samuel Alito in his concurring opinion, and one that perhaps is the controlling opinion, rejected any standard that attempted to regulate all student speech that interfered with a school’s mission. “The ‘Educational Mission’ argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore strikes at the very heart of the First Amendment” (Morse v. Frederick, 551 U.S. ____ (2007) Alito concurrence slip opinion p. 3). He also commented that *Tinker’s* substantial disruption standard permitted school officials to step in before actual violence erupts. Toward his conclusion he stated “...any argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. The special characteristic that is relevant in this case is the threat to the physical safety of students” (p. 3).

The Fifth Circuit in 2001 offered an approach toward viewpoint-neutral speech that added a fourth test to student speech analysis. In Canady v. Bossier Parish Sch. Bd., 240 F.3d 437 (5th Cir. 2001), the court reasoned that a mandatory school dress code policy did not violate First Amendment freedoms. Under their test, action by a school board is permissible if 1) “it furthers an important or substantial government interest;” 2) “the interest is unrelated to the suppression of student expression;” and 3) “the incidental restrictions in First Amendment activities are no more than [are] necessary to facilitate that interest” (Roberts, 2006, pp. 478-479).

The Fourth Amendment and Student Searches

The United States Supreme Court has also directly addressed the issue of student searches by school authorities. Today students are faced with school officials conducting

searches ranging from traditional “empty pocket” searches, to modern versions using metal detectors and trained dogs. Students in some districts may find themselves subjected to pre-participation drug screening in order to be eligible for school activities. Other students have faced intrusive strip searches of varying degree.

In 1985 the U.S. Supreme Court held that the prohibition against unreasonable searches and seizures applies to searches conducted in schools and during school activities in New Jersey v. T.L.O. (469 U.S. 325, 1985). The Court overturned lower court rulings and decided that the search of a student’s purse was reasonable and held that the provisions of the Fourth Amendment apply to searches conducted by school officials. While the decision itself went against the student, the Court also affirmed Fourth Amendment protections for students.

In this case a 14-year-old girl (T.L.O.) and another student were found smoking in a restroom and were taken to the school office. Though the girl denied smoking, a search of her purse uncovered a package of cigarettes and rolling papers. A thorough subsequent search of the purse then uncovered marijuana and items that associated the girl with possible drug dealing. The confiscated items were later turned over to the police.

Police searches are governed by a “probable cause” standard that must be met in order to conduct a lawful search. T.L.O. sued the school district arguing that the school authorities had neither probable cause nor a warrant to search her purse. The question became whether school authorities must meet the same standard as law enforcement when conducting a student search.

The Supreme Court ruled that school authorities have a lower standard when conducting student searches---based on a “reasonable suspicion” as opposed to a probable cause standard that law enforcement personnel must meet. A student search must be justified at its inception “when there are reasonable grounds for suspecting that the search will turn up evidence that the

student has violated or is violating either the law or rules of the school” (New Jersey v. T.L.O., 1985, p. 342). Once the initiation of the search is justified, it must be reasonable in scope, “when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction” (New Jersey v. T.L.O., 1985, at 346).

T.L.O requires that school officials must have reasonable grounds to believe that the search of a specific individual will produce relevant evidence that a specific rule or law has been violated by the individual (Imber & Van Geel, p. 219. 1993). Searches under a *T.L.O* standard give discretion to school personnel. Their actions must be related to legitimate pedagogical concerns or the reasonable suspicion standard (Daniel, 1998).

The legality of school districts conducting the drug testing of students has also reached the Supreme Court. In 1995 the Court held in Vernonia v. Acton (515 U.S. 646) that the Vernonia, Oregon school district policy requiring the drug testing of students prior to participation in athletics was constitutional under the Fourth and Fourteenth amendments. The case involved a 7th grade student who through his parents sued the school district when he was denied eligibility to participate in football due to his refusal to take a urinalysis test for drugs.

The school district policy requiring pre-participation drug testing was adopted after teachers and administrators noted increases in student behavioral problems and disciplinary incidences over a period of several years, between 1980 and 1990. Based on observations of the faculty, measures were taken to deal with the perceived cause of the problem---drug usage among the students, usage that appeared to be led by those involved with athletics. Measures taken to combat the problem included classes, speakers, and drug-sniffing dogs. None of the measures worked, according to school administrators.

In 1988, after school officials sought input from the public, the district adopted the Drug Testing Policy to be implemented in 1989. The policy required the testing of all student athletes prior to their participation in athletics, with re-testing and options for consequences upon failure of the test. The options included six weeks of drug rehabilitation programs or an automatic suspension for the remainder of the athletic season as well as the suspension from the next athletic season. Subsequent failures called for suspensions of longer duration.

The Court concluded that three factors determine if a similar search is reasonable---the nature of the privacy interest upon which the search intrudes; the character of the intrusion; and the nature and immediacy of the governmental concern and the efficacy of the means to meet it. The reasoning of the Court in upholding the testing program was that while the drug-testing required a Fourth Amendment analysis, the test was reasonable in inception and scope, that a warrant for probable cause was not required, that athletes share only a diminished sense of privacy, and that the governmental interest was substantial in light of the dangerous possibilities (Heder, 1999). Justice Scalia stated “Taking into account all the factors we have considered above-the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search-we conclude Vernonia’s policy is reasonable and hence constitutional” (Vernonia v. Acton, 1995 p. 653).

Within six years the Court allowed the expansion of the scope of student drug testing to include all students who participate in extracurricular activities. In 2002, the Court held in Board of Education of Independent School District No. 92 of Pottawatomie County, et al., v. Lindsay Earls et al., that the requirement that all students who participate in competitive extracurricular activities submit to drug testing “reasonably serves the School District’s important interest in detecting and preventing drug use among its students” and is therefore constitutional (Board of

Education v. Earls et al. (01-332) 242 F.3d 1264, reversed p. 1). In the opinion of the Court, Justice Thomas stated that the privacy interests of students is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. “Given the minimally intrusive nature of the sample collection and limited uses to which the test results are put, we conclude that the invasion of students’ privacy is not significant” (Board of Education v. Earls et al. (01-332) 242 F.3d 1264, reversed p. 1).

The case was the result of School Activities Drug Testing Policy adopted by the school district in Tecumseh, Oklahoma, in 1998. The policy required all middle and high school students to consent to drug testing in order to participate in any extracurricular activities. In practice, the policy applied to activities sanctioned by the Oklahoma Secondary Schools Activities Association, such as the Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, pom pom, cheerleading and athletics. The policy required pre-participation drug testing as well as the willingness to submit to random testing while participating in the activity. After two students brought suit against the school district, the United States District Court for the Western District of Oklahoma granted summary judgment to the school district. The United States Court of Appeals for the Tenth Circuit reversed, holding that the policy violated the Fourth Amendment.

The decision in *Earls* was decided in large measure along the lines of the *Vernonia* decision. Both cases were decided on the constitutionality of the programs in the context of the public school’s custodial responsibilities involving athletics and extracurricular activities. “Evaluating the Policy in this context, we conclude that the drug testing of Tecumseh students who participate in extracurricular activities effectively serves the school District’s interest in

protecting the safety and health of its students” (Board of Education v. Earls et al. (01-332) 242 F.3d 1264, reversed p. 7).

The fact that it is constitutionally permissible to drug test students involved in activities in order to protect the safety of students, a question arises regarding the expansion of testing to all students. A district may attempt a wider scope search in the interest of protecting the health and safety of students if schools could demonstrate the existence of a serious drug problem. Can schools expect the same leeway in their effort to stop school violence as they have toward stopping student drug possession?

While the decisions in *Vernonia* and *Earls* allow for warrantless searches of selected groups of students, the courts have been less willing to allow such searches of all students. In Doe v. Little Rock School District, 380 F.3d 349 (8th Cir. 2004), the 8th Circuit ruled that suspicionless random searches of individual students and their possessions is not permitted. In this case, a student was found in possession of marijuana after a random classroom search. The Court determined that the school failed to demonstrate any needs to justify the search, and “[B]ecause subjecting students to full-scale, suspicionless searches eliminates virtually all of their privacy in their belongings . . . we hold that the search practice is unconstitutional” (Doe v. Little Rock School District 2004, p. 351).

The use of drug dogs presents another issue. The Supreme Court let stand a conviction of an Indiana high school student who was convicted of possession of a firearm found during a canine drug sweep of a school parking lot. In Myers v. Indiana, (2005) the 4th Circuit held that schools could use a reasonableness test over probable cause, and found that the search violated no rights by conducting a dog search. The Court relied on a Supreme Court decision that

concluded that a drug dog could be used to find something no one has the right to possess (Illinois v. Caballes, 543 U.S. 405 2005).

The use of metal detectors has been upheld, and can be used at the point of school entry as well other locations. In Thompson v. Carthage School District the 8th Circuit determined in 1996 that the findings in *Vernonia* applied and allowed the search of all male students after cuts on school bus seats caused concern that weapons were present in the school. The students had to remove jackets, shoes, socks, and empty their pockets. The school officials then conducted a concealed weapon search of all students with a metal detector. Even though the search did not find a weapon, a student was found in possession of crack cocaine and expelled.

As recently as 2009 the Supreme Court in Safford v. Redding, 557 U.S. ____, ruled on a student drug search case that could have dramatically revised the standards set in *T.L.O.* On an 8-1 vote, the Court ruled in favor of a 13-year-old student who was forced to stretch out her underwear as school officials searched for over-the-counter pills. When confronted by an assistant principal, Savanna Redding admitted the student planner he was showing her that contained contraband was one she had lent to another student. He also produced four prescription-strength, and one over-the-counter pain relief pills, all of which were banned under school rules.

She denied knowledge of the pills, but was told by the assistant principal that there was a report by other students that she was supplying the pills to fellow students. She consented to a search of her belongings, which yielded nothing. The assistant principal then directed a female administrative assistant and a female school nurse to search her clothing. In the nurse's office they had her remove her outer clothing, shake out her bra, and pull open her underwear. The search produced no pills.

The Court determined that Arizona school officials fell short of the standards set in T.L.O. Justice David Souter concluded that since the school administrators were acting merely on a student tip that Savanna Redding was in possession of contraband pain relief pills, it was unreasonable to assume she was carrying them on the day of the search. He also concluded that the school's stated rationale of attempting to prevent dangerous overdoses did not justify the level of intrusiveness of the search. "Here, the content of the suspicion failed to match the degree of intrusion" (Safford v. Redding, 557 U.S. ____2009, p.3 of bench opinion). This somewhat surprising ruling has been hailed as a breakthrough by some civil libertarians as finding a point where the Court would rule on the side of the student, nearly a first since the *Tinker* decision (LoMonte, 2009).

In his dissent, (as the only dissenter with respect to the question of the search) Justice Clarence Thomas concluded that the search of Redding was justified at its inception and was reasonable in scope. The majority "imposes a vague and amorphous standard on school administrators. It also grants judges sweeping authority to second-guess the measures that these officials take to maintain discipline in their schools to ensure the health and safety of the students in their charge" (Safford v. Redding, Thomas concurring in part, dissenting in part, slip opinion p. 1).

Justice Thomas further stated "[T]his deep intrusion into the administration of public schools exemplifies why the Court should return to the common-law doctrine of *in loco parentis*...allowing schools and teachers to set and enforce rules and to maintain order (Safford v. Redding, p. 1 slip opinion). Clearly his view of a return to such a practice, combined with his view expressed in Morse v. Frederick, where he stated "...my view is that the standard set forth in *Tinker v. Des Moines*...is without basis in the Constitution" (Morse v. Frederick, 551

U.S.____ 2007, Thomas Concurrence slip opinion p.1), would bring about dramatic changes for student rights should a majority of other Justices agree with his viewpoint.

As school authorities attempt to prevent potential future violence by conducting various student searches, there will likely be challenges to the scope and nature of such searches. Balancing the issue of student searches is perhaps the greatest challenge for school authorities as they consider the rights of students while attempting to keep schools safe. As schools expand searches to include metal detectors, drug and weapon sniffing dogs, and high tech security devices, the standards set by *T.L.O* face a possible re-definition, and school officials must keep themselves aware of the latest standards of law.

The 14th Amendment and the Right to Due Process

School administrators must take actions to keep students safe at the same time they are actively preserving the rights that the Constitution provides them. Additionally, they must have an understanding of what rights students have when they are accused of violating school rules and policies. Students are provided due process when faced with disciplinary actions from school officials. In general, due process is regarded as the right to be heard (Imber& Van Geel., 1993 p.225). The required level of due process increases as the consequences for the behavior increase (Imber & Van Geel., 1993 p.225).

Fourteenth Amendment claims of students accused of violent activity involve allege deprivations of property rights or liberty interests without due process of law (Daniel, 1998). School administrators must find the balancing point of protecting the due process rights of students while at the same time exercise caution protecting the safety of the students and staff. Following proper due process is further complicated and mandated in light of zero-tolerance policies increasingly prevalent in schools as a result of increased school violence (Daniel, 1998).

The landmark Supreme Court decision regarding the right to due process for students is Goss v. Lopez, (419 U.S. 565, 1975). The case was brought forth by nine secondary school students from Columbus, Ohio in 1971. The students claimed that their suspensions were unconstitutional because school administrators deprived them of their right to an education without a hearing of any kind, in violation of the due process clause of the Fourteenth Amendment. During a time of student unrest, six of the students were suspended on account of disruptive or disobedient conduct committed in the presence of the school administrator who ordered the suspension. No students were given a hearing regarding the suspensions but were provided the opportunity to attend a conference, subsequent to the suspension, to discuss their future.

One student, Dwight Lopez, was suspended in connection with a disturbance in the lunchroom that involved some physical damage to school property. While Lopez claimed to have been an innocent bystander, since there was no hearing regarding his suspension there was no official record to conclude otherwise. Another student from a different school was arrested during a school demonstration at a school she did not attend. Upon her return to school the next day, she learned she had been suspended. There was no official record as to why she was suspended, and no suspension hearing for her was ever held.

The Court recognized a student's constitutional property interest in receiving a public education and a liberty interest in protecting their reputation. So long as a deprivation of property or liberty is not *de minimis*, due process protections are triggered (Goss v. Lopez, 419 U.S. 576, 1975). At a minimum, "students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing" (Goss v. Lopez, 1975 p.579). For a suspension of 10 days or less, a student must receive oral or

written notice of the charges against him. If he denies the charges, school officials must explain the evidence and allow the student to present his side of the story. Notice and hearing may be informal, but should normally precede removal of the student from school (Goss v. Lopez, 1975, p.582).

The key for school administrators is the recognition that students facing suspension have a right to be heard and that a higher level of due process is required as proposed consequences increase in severity. The Court recognized that suspension was a “necessary tool” to maintain order, as well as a “valuable educational device” (Goss v. Lopez, 1975, p.581). However, the Court also stated that it “would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done” (Goss v. Lopez, 1975, p. 581). The Court made a clear distinction that they solely addressed suspensions not exceeding ten days, and that longer suspensions require more formal procedures.

School administrators must determine when a student poses a danger or when they pose a threat to disrupt the academic process. “Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school,” provided notice and hearing follow as soon as practicable (Goss v. Lopez, 1975, p. 582). In light of the purpose of this study, this becomes a central question. As administrators attempt to ensure the safety of all students, what circumstances must be present to determine that a student poses a threat of disrupting the academic process?

The Obligation to Protect Students

In light of increased school violence, to what degree have student civil liberties been affected due to school authorities concerns of avoiding civil liability for acts of violence by their students? School authorities cannot guarantee absolute safety and security for students and teachers while at school yet all school employees have a duty to provide reasonable supervision of students, especially since students and teachers are required to be at school. Lindle (2008) notes that there are two specific categories of concern: security and safety. School officials may face liability for actions or inactions that have taken place when injury or other harm occurs.

The legal obligation to protect students is a factor that school districts consider when making decisions on how to prevent school violence. While the moral obligation is clearly to protect students and teachers from harm, certainly the avoidance of legal responsibility is considered by some when determining the direction taken by school districts to prevent school violence.

School authorities have a duty to provide safety to students under their care, and may face legal consequences should they fail to perform that duty, through some action they took or failed to perform. Essex (2002) states that generally school personnel should exercise the same degree of care supervising students that a reasonably prudent parent would perform with their children. School personnel will be liable where they can reasonably expect to foresee potential danger to a student (Essex, 2002). Shoop and Dunklee (1992) define negligence as the failure to exercise the degree of care that a reasonable and prudent person would do in the same circumstances. They also state and negligence may occur in one of three ways---*nonfeasance*, failing to act when there

is a duty to act; *misfeasance*, acting, but improperly; and *malfeasance*, which is acting with a bad motive.

Nonfeasance is an act of omission---where an injury occurs due to a lack of some protection that is expected or required. In the aftermath of school violence, under what circumstances could nonfeasance be claimed by the victims of violence? There is a duty and standard of care expected of school personnel, and the level of care is determined relative to the need and the occasion. Every minute of every day educators engage in activities that have an inherent standard of care as they act *in loco parentis*, act as a teacher, or act as an administrator (Shoop & Dunklee 1992).

As school districts design policy to prevent school violence, they must consider policy that minimizes the risk of civil liability while at the same time maximizes student safety. Civil libertarians are concerned that student rights have been diminished or eliminated by the dual effort to keep students safe as well as shield districts from being accused of not going far enough to prevent violence.

The unique nature of schools has historically created a different path the Supreme Court uses in their constitutional analysis of school decisions (Aviel, 2006). The Court has ruled several times that school officials have a profound custodial responsibility that must be weighed in their decisions (Aviel, 2006). In the *Vernonia* case the force of the school's authority was on both sides of a balancing test: students have few expectations of privacy due to the supervision and control exercised by school officials acting *in loco parentis*; on the other side the school's interest in conducting the search was compelling because of the "special responsibility" for student entrusted to its care (*Vernonia v. Acton*, 1995, p. 653). Justice Scalia noted that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public

schools than elsewhere; the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children” (Vernonia v. Acton., 1995, p. 656).

This view was affirmed in Board of Education v. Earls. “[A] student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety” (Board of Education v. Earls, 2002, p. 830).

Although the Supreme Court has not ruled directly on school liability with regard to school violence, they have issued important decisions related to sexual harassment that could potentially be used in arguments to hold school authorities liable for student violence. The Court held in Gebser v. Lago Vista Independent School District , 524 U.S. 274, (1998) that a school can be liable for monetary damages if a teacher sexually harasses a student, and an official who has authority to address the harassment has actual knowledge of the harassment, and that official is deliberately indifferent responding to the harassment. School authorities were put on notice in 1999 when the Supreme Court ruled in Davis v. Monroe County Board of Education 526 U.S. 639 (1999), that they could face civil liability for student-on-student sexual harassment and the conditions of the decision in Gebser are met (U.S. Department of Education Office for Civil Rights, 2001).

In *Gebser* and *Davis*, the Supreme Court addressed for the first time the standards for determining when a school district is liable for monetary damages under Title IX of the Education Amendments of 1972 regarding sexual harassment (U.S. Department of Education Office for Civil Rights, 2001). In both cases the Court was explicit that the liability standards are limited to private actions for monetary damages (Gebser v. Lago Vista, 524 U.S. 283 (1998) and Davis v. Monroe, 526 U.S. 639 (1999)). School authorities must take measures toward an effective response to sexual harassment, and that effectiveness is measured based on a

reasonableness standard. Schools do not have to know beforehand if their response will be effective, but when they are clearly ineffective, reasonableness may require that they take increasingly escalated steps to stop the harassment (U.S. Department of Education Office for Civil Rights, 2001).

The majority of courts that have addressed student-on-student violence have declined to say compulsory education creates the necessary special relationship needed to impose an affirmative duty on schools to protect students from harm from other students. The Supreme Court determined in DeShaney v. Winnebago County Department of Social Services 489 U.S. 189 (1989), that absent limited exceptions, the State does not have an affirmative duty to protect citizens from harm caused by private actors. Some do not share that belief. Bethel (2004) articulates the position that schools should have an affirmative duty to protect students from harm by others.

Bethel (2004) argues that while the Due Process Clause of the Fourteenth Amendment provides protection for individuals for certain governmental actions, it does not provide a remedy for the individual whose rights are violated. Congress enacted 42 U.S.C. § 1983 to provide a means of redress for individuals harmed by state actors (Bethel, 2004). Unless a state actor causes the harm, Section 1983 is generally not available to individuals harmed by private actors, even when the state has notice of the potential harm, or has notice that an actual harm is occurring (DeShaney v. Winnebago, 1989 p. 197). When a special relationship exists, the state has an affirmative duty to protect individuals from harm, even if the individual causing harm is a private actor. However, most courts have recognized this special relationship in limited situations, such as prisons and state operated residential school (Bethel, 2004). Most courts have

declined to hold that compulsory education laws create the type of special relationship that would require states to protect citizens from harm by private actors.

A minority of courts, however, have placed a limited duty to protect students from harm by other students. Schools must protect students from “foreseeable risks of injury or loss of life” (Lichtler v. County of Orange, 813 F.Supp. 1054, 1056 (S.D.N.Y. 1993) and from behavior that “shocks the conscience” (Hasenfus v. LaJeunesse, 175 F.3d 68, 73 1st Cir. 1999; King ex rel. King v. East St. Louis School District, 189, 496 F.3d 812 7th Circuit, 2007). In Pagano v. Massapequa Public Schools 714 F.Supp 641 (1989), a court held that school officials owed a duty of care to students required to attend school. Since the school took no preventative steps to deal with physical and verbal assaults of a student, the court agreed that the school violated the student’s due process rights. While there are other similar findings by courts, this is a minority view, and most do not create the special relationship requirement (Bethel, 2004).

The Supreme Court has never decided whether compulsory education constitutes the type of restriction on student liberty that gives rise to affirmative duties under the Due Process Clause (Aviel, 2006). Most circuit courts have only concerned a state’s responsibility to protect individuals from acts of third parties, and not the state itself (Aviel, 2006). Aviel (2006) argues that a substantive due process claim could be made that the state should not be able to compel students to attend unsafe school facilities.

The No Child Left Behind Act (NCLB, 2001) signed into law in 2002 addressed the issue of school safety and placed requirements of states and local school districts to take action if their schools are deemed “persistently dangerous” (NCLB, 2001). The Act required that each state develop criteria to determine if a school is “persistently dangerous” and allow students to transfer to another school if their current school does not meet the standard for two consecutive years.

The Unsafe School Choice Option (USCO, 2004) requires that each state receiving federal funds establish and implement a statewide policy. In an indirect way, schools stand to be held “liable” and lose funding should they fail to take corrective action to improve their “persistently dangerous” school.

While school officials take measures to prevent school violence they must also consider the legal requirements to safeguard student confidentiality. Creating a safe environment may require extensive communication between the school, law enforcement agencies, and social service agencies. Student educational, medical, and disciplinary records have legal confidentiality requirements and school authorities must use discretion when they disclose such records. The Family Educational Rights and Privacy Act (FERPA, 1974) in a general sense requires that such records cannot be disclosed without parental consent (van der Kaay, 2002). While some exceptions exist that allow school officials to disclose some records that have legitimate educational interest, the privacy of students is yet another consideration school officials must consider as they make decisions regarding student safety.

School officials do have a degree of protection from liability for civil damages in the event they are sued for actions taken against students in their effort to ensure student safety. The defense of qualified immunity protects “government officials...from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known” (Harlow v. Fitzgerald, 1982 p. 818). The test for qualified immunity requires a two-part analysis: was the law governing the official’s conduct clearly established and could a reasonable official have believed the conduct was lawful?

In 2009 the issue was addressed by the Supreme Court in *Safford* where the Court granted qualified immunity to the school administrators involved in the search. In effect, even

though it was determined that they conducted an illegal search, they were not held liable for any damages as a result of the search (LoMonte 2009). The majority concluded that even though the search was illegal, the law involving student searches was sufficiently unclear and ambiguous that the school administrator should be given protection from liability. Justice Souter, writing for the majority said "...the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted" (Safford v. Redding, 2009, Justice Souter from slip opinion p.12-13).

The Obligation to Protect Civil Liberties

The foundation of the obligation to protect student civil liberties has been endorsed by scholars as well as judges and justices (See: Bethel v. Fraser, 1986, p. 682; Ambach v. Norwick, 1979, p. 76; Dewey, J. 1922). Koliba (2000) summarizes that the purpose of public education can be seen from one of three viewpoints: 1) that education serves to prepare students for the workforce; 2) that schools should provide basic academic skills or knowledge; or 3) that education is a democratizing force that helps students prepare to participate in democratic life and citizenship.

Commenting on the work of John Dewey's Democracy and Education, Maxcy (1991) states "...education is a means for teaching about the value of democracy and perpetuating it as a set of conditions enabling freedom to continue" (Maxcy, 1991, p. 17-18). While schools clearly have rules and policies that do not operate and function in a purely democratic manner, education has been recognized as perhaps the most important function of state and local government (Brown v. Board of Education of Topeka, 1954, p. 493). The value of education would be significantly diminished without the freedom that is fostered in democratic values (Giroux,

2005). Giroux (1989) states that “citizenship and democracy need to be problematized and reconstructed for each generation” (Giroux, 1989. p.6).

For the current generation of students, the climate of zero tolerance provides lessons that demonstrate that many people with authority feel that free speech rights, the right to privacy, due process, and the freedom of academic expression are all worthy of reduction as a trade for safety and security. They experience this in their classrooms and they experience this in their daily lives as they are subjected to increased security checkpoints at airports, ballparks, and their local shopping mall.

Schools that reflect democratic principles in word as well as in deed best teach students the skills to actively participate in a democratic society (Koliba, 2000). L.H. Ehman, in reviewing research literature on education for democratic participation and responsibility, discusses that not only is the curriculum involving courses such as government and civics important, but that the “latent curriculum” is even more important (Ehman, 1980). This includes how classes are taught as well as the conditions of the school climate. Updating Ehman’s work, in 1997 Sheldon Berman stated “...studies demonstrate that participatory and democratic school culture makes a significant difference in some of the key building blocks of social responsibility” (Berman, 1997. p.135).

In his written opinion in Tinker v. Des Moines, Justice Abe Fortas summed up the argument for those who feel schools must be areas where freedom is practiced and protected. “Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says that we must take this risk; and our history says that it is this sort of hazardous freedom---this kind of openness---that is the basis of our national strength and of the independence and vigor of

Americans who grow up and live in this relatively permissive, often disputatious society”
(Tinker v. Des Moines., 1969 p. 509).

The judicial history that established student rights makes it clear that students have constitutional protections. Because school officials are also obligated to ensure the safety of students, there may be tension or conflict between the rights of the students and the policies designed to protect them. This tension is further complicated by the need for educators to be teachers of democracy and liberty.

The Prevalence of Violence in Schools

For school administrators to determine how to respond to the threat of violence in their schools a basic question is raised. How violent is their school? How violent are public schools in general? The answer depends on the type of violence measured, on the source of the data, and to some degree to whom the question is addressed. This study uses data compiled by the National School Safety Center (NSSC), which was established in 1984, and also data compiled by the National Center for Education Statistics (NCES), which is the primary federal entity for collecting data related to education in the United States.

National Center for Education Statistics reveal that during the period from 1992 to 1998, victimization rates at schools dropped from 48 crimes per 1,000 students to 43 per 1,000 (DeVoe et al., 2002). The percentage of students who said they were victims of crimes at school, including theft and violent crimes, decreased between 1995 and 1999 from 10 percent to 8 percent (DeVoe et al., 2002).

After the year 2000, the trend for some violent acts remained steady while the reduction in school violence continued (Dinkes, Kemp, & Baum, 2009). Despite reassuring statistics, however, concern remains high in part due to the fact that crimes and violence among youth have

risen over the past four decades when city and community data is added to the school data (Addington, et al., 2002; Dinkes, et al., 2009).

The disturbing statistic of student deaths while at school remains relatively constant, although the comparison between the overall numbers of 1993 and 2008 show a dramatic decrease, 56 to 3, respectively (National School Safety Center, 2009). When comparing the deaths of students from all causes from 1993 to 2008, there is no significant difference in the numbers before the Columbine shootings and after the shootings. Table 1 provides data indicating the total number of student deaths from various causes and from locations both in school and near a school. 1993-2008.

| School Year | Deaths |
|-------------|--------|
| 1992-1993 | 56 |
| 1993-1994 | 53 |
| 1994-1995 | 21 |
| 1995-1996 | 36 |
| 1996-1997 | 26 |
| 1997-1998 | 44 |
| 1998-1999 | 31 |
| 1999-2000 | 32 |
| 2000-2001 | 23 |
| 2001-2002 | 4 |
| 2002-2003 | 22 |
| 2003-2004 | 42 |
| 2004-2005 | 28 |
| 2005-2006 | 5 |
| 2006-2007 | 20 |
| 2007-2008 | 3 |

Table 1. Student Deaths in Public Schools 1992-2008 All Causes

Source: National School Safety Center’s Report on School Associated Violent Deaths 2009

While student deaths are the most tragic and well publicized, overall levels of violence in schools is perhaps a better measure to examine. The National Center for Education Statistics

(NCES) and the Bureau of Justice Statistics (BJS) published their twelfth in a series of reports since 1998 in December, 2009. *Indicators of School Crime and Safety: 2009* is designed to provide a brief summary of various data sources related to school violence and is made accessible for lawmakers, educators, and parents (Dinkes, Kemp, & Baum, 2009). In this report they note that in the 2007-2008 school year an estimated 55.7 million students were enrolled in pre-kindergarten through grade twelve public schools, and in 2007 there were 1.5 million victims ages 12-18 of nonfatal crimes at school (Dinkes, Kemp, & Baum, 2009). Nearly 75% of public schools recorded one or more violent incidences of crime in 2007-2008 (Dinkes, Kemp, & Baum, 2009). In 2007, rates for theft and violence crime were higher at school than away from school, with 31 reported thefts per 1000 students at school compared to 21 per 1000 away from school, and 26 violent crimes per 1000 students at school compared to 20 violent crimes away from school (Dinkes, Kemp, & Baum, 2009).

Bullying at school is reported in significant numbers, with nearly 63% of all students reporting having been bullied at least once in a school year, 20.7% reporting being bullied at least once a month, and 6.6% reporting being bullied nearly every day (Dinkes, Kemp, & Baum, 2009). The numbers are even higher for students who report being cyber-bullied, with nearly 73% having been victimized at least once during the school year.

Despite the 2007 numbers, other studies suggest that students are safer in schools than they are outside of school. There was an overall decline in victimization rates for students ages 12-18 at school between 1992 and 2007, as well as a decline in the rate of crime for students away from school during that same time period (Dinkes, Kemp, & Baum, 2009). Among the calculations made by the School Violence Resource Center for the University of Arkansas, the probability that a school-age child will die in an automobile accident is 1 in 8000, in a homicide

away from school 1 in 21,000, and yet (only) 1 in 1,700,00 in a homicide at school (School Violence Resource Center, 2009). Crime statistics consistently show that children are more likely to be victimized somewhere other than their school. This fact would be of little solace to those families touched by the violence that did occur in schools, and has done little to change the perception that schools are dangerous places.

There is a difference between actual violence in schools and the perception of the level of violence in schools. In the decade of the 1990's there existed a pervasive perception that violence in schools had increased and worsened, yet studies indicated crime in schools had decreased. In the publication *School House Hype: Two Years Later*, the Justice Policy Institute noted that there was a clear gap between the statistical data of what is happening in the schools, what students think about their schools, and what Americans think is happening in the schools (Brooks, Shiraldi, & Zeidenberg, 2000). They cited a *Washington Post* poll conducted in 1999 that revealed 60% of those surveyed felt that "children in America are no longer safe at their own schools" (Brooks, Shiraldi, & Zeidenberg, 2000, citing *Complete Listing of Worries*, The Washington Post, November 7, 1999).

There are those who feel media coverage and political rhetoric make it difficult for the public to distinguish between the images that schools are basically safe from the one that schools are dangerous and violent places. Irwin Hyman and Pamela Snook studied incidences of violence and the media accounts that followed for their book "*Dangerous Schools---What we can do about the Physical and Emotional Abuse of Our Children.*" They found that data suggests that school violence has not increased since the 1970's, and while any level of violence is unacceptable, there "is hardly an epidemic with a school population of over fifty million students" (Hyman & Snook, 1999 p. 7). In their study of school crime reports from 1960 to 1975

and 1990-1995 in the *New York Times* they discovered that most incidents were greatly outnumbered by the volume of articles about each incident. “Increasing the volume were editorials and quotes from politicians calling for tougher school discipline, more police in the schools, and tougher court sentences for juveniles” (Hyman & Snook, 1999 p. 7).

The expansion of media coverage including 24-hour news networks and the internet brought live coverage of school violence incidences such as those at Columbine High School. Television coverage of the Columbine shootings included worldwide broadcasts of students being shuttled out of the school, SWAT teams entering the school, and horrified students and adults. These images and the saturation of coverage after the shootings have helped make words like “Columbine” and “trench-coat mafia” household terms. Other school shootings have received similar coverage, including those committed in Pearl, Mississippi; Paducah, Kentucky; and Jonesboro, Arkansas. These communities are not alone but have become infamous due to tragedy. The media attention given to each incident has brought a new language to the American lexicon. As one school administrator in New Hampshire stated after a bomb threat in the town school, “had this been a bomb, Nottingham would no longer be the name of a town. It would be the name of an incident” (Bombardieri, 2000).

The overall perception and perhaps misperception about the level of violence in schools may be caused by what Lindle (2008) labels in the aftermath of the media coverage of an incident as moral panic---derived from the publicity perhaps more than from the actual realities of the incident. This moral panic can be used to identify and sensationalize a situation which can then be politicized by legislators, or other authorities (Lindle, 2008). Lindle (2008) also states that despite consistent research and data that emphasize the overall security of students and teachers, concern about school risks remain high.

Educators must be concerned, however, and note that most children are exposed to violence in their daily lives, if not at school certainly outside of school. The National Survey of Children's Exposure to Violence (NatSCEV), sponsored by the Office of Juvenile Justice and Delinquency Prevention, and supported by the Centers for Disease Control and Prevention, was conducted between January and May, 2008. Described as the most comprehensive nationwide survey to date, it found that nearly 60 percent of all children surveyed were either directly or indirectly exposed to violence (Finkelhor, Turner, Ormrod, Hamby, & Kracke, 2008). Nearly one half were assaulted within the past year, and nearly one in ten witnessed a family member being assaulted (Finkelhor, et al. 2008).

Also disturbing is that 1 in 20 witnessed someone being shot, 1 in 200 witnessed a murder, and 1 in 50 was sexually assaulted (Finkelhor, et al. 2008). The study illustrated the cumulative effects on children exposed to multiple incidences of violence, and how exposure to one form of violence may make a child more vulnerable to other forms (Finkelhor, et al. 2008). The implications for school personnel are far-reaching, and administrators should take into consideration the fact that students face violence both at school and away from school.

As school officials grapple with the everyday problems schools face, the specter of violence against staff and students hangs heavily each day. School personnel, school boards, and legislatures on the state and federal level have all participated in the response to the actual and perceived level of violence. The remedies created to prevent violence and to determine the consequences for rule violators are areas where potential clashes occur between protecting student rights and protecting student safety.

Although the scope of this study is related to K-12 public schools, it must be noted that violent tragedies have also occurred on college campuses, and in an alarming way. Since 2002,

there have been at least five college campus shootings resulting in dozens of deaths (The New York Times, 2010). While there are similarities school administrators face at both levels to protect students and preserve student rights, there are also profound differences when dealing with college age students and college campuses.

Response to Acts of School Violence

The United States Constitution does not address education or schools, and although the Constitution has been interpreted as allowing Congress to appropriate education funds and adopt limited legislation affecting schools, the Tenth Amendment clearly places a limit on the federal government role in education. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people” (U.S. Const. amend X). The power to create and operate schools is left to the states. It cannot be said, however, that the federal role in education is minimal. For fiscal year 2009, the U.S. Department of Education budget is nearly \$62 billion, with another \$96.8 billion in federal “stimulus” money (United States Department of Education Budget Office, 2009.) Congress clearly is able to exert great control over education through the allocation of federal funds.

Although not required to do so, all states have adopted a state constitution requiring their legislatures to establish a system of free public school for all children. (Imber & Van Geel, 1993 p. 3) State constitutions may extend individual rights beyond those in the U.S. Constitution but may not contradict the U.S. Constitution. (Imber & Van Geel, 1993 p. 3) As a result, in all states the legislature has the responsibility to establish and maintain their public school system, with many states establishing their own state boards of education and agencies. (Imber & Van Geel, 1993 p. 3)

The effort to deal with the problem of violence in schools has ranged from the passage of federal legislation to the revision of school handbooks. Zero tolerance laws and policies have been adopted in 9 out of 10 schools nationwide (DeVoe et al., 2002). Increased police and security presence has occurred nationwide and the changes within schools have included revised dress codes, the requiring of school uniforms, and the use of metal-detectors (DeVoe et al., 2002). These policies have increased the likelihood that school authorities will place limitations on student expression (Calvert 2000).

The Federal Government Response

Although the focus of this study deals primarily with the response to school violence during the 1990's and beyond, the federal government was not completely silent regarding school violence prior to the 1990's. As early as 1970, with the Comprehensive Drug Abuse Prevention and Control Act, Congress attempted to make schools safer by making it a federal offense to sell drugs near schools (21 U.S.C. § 801). In 1977 Congress commissioned the National Institute of Education's Violent Schools---Safe Schools Study (U.S. National Institute of Education, 1977). This study concluded that crime and violence created serious problems in public schools but also expressed optimism that the problem had peaked. In 1986 the Safe and Drug-Free Schools and Communities Act authorized grants to states and to national programs to provide anti-violence and substance abuse prevention activities. By 1999 the yearly awards for grants under the program totaled over \$100 million dollars in aid to schools to help provide for safer learning environments (Haft 2000).

Congress enacted educational goals when they passed the Goals 2000 Educate America Act in 1994 (P.L. 103-227). The groundwork for the goals began in 1989 during the George H.W. Bush administration and passed during the William J. Clinton administration, and was

intended to be a centerpiece of education reform. Goal Seven stated that by the year 2000 “Every school in the United States will be free of drugs, violence, and the unauthorized presence of firearms and alcohol, and will offer a disciplined environment conducive to learning” (Goals 2000, 2010).

One attempt by Congress to make schools safer was ruled unconstitutional by the Supreme Court in 1994. The Gun-Free School Zones Act of 1990 made it a federal crime for any individual to knowingly possess a firearm in a school zone. Congress rationalized that their broad Commerce Clause powers authorized the enforcement of the law but the Supreme Court ruled that there was not enough relationship to interstate commerce to allow regulation in an area of traditional local control (United States v. Lopez, 514 U.S. 646 1995).

The most significant federal law related to school violence is the Gun-Free Schools Act of 1994 (GFSA) 20 U.S.C. § 8921. The Act prohibits states from receiving federal funds unless they enact and enforce a law requiring students who bring weapons to school to be expelled for not less than one year. The word “weapon” was originally defined as a “firearm” in the act but was later amended to include “a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or it readily capable of, causing death or serious bodily injury, except that such a term does not include a pocket knife with a blade of less than 2 ½ inches in length” (18 U.S.C.A. § 8921). While exceptions to the expulsion requirement may be made on a case-by-case basis, local school districts must have a policy requiring referral of a student who brings a weapon to school to the state’s criminal justice or juvenile delinquency system (Daniel, 1998). As part of the Act, the federal government now tracks student expulsions for weapons possession (Dodd, 2000).

Federal legislation also adds school safety requirements through laws and regulations. The federal No Child Left Behind Act (NCLB, 2001), which became law in 2002, imposes a mandate on states to provide for the designation of certain schools as “persistently dangerous” and to allow students attending such schools to transfer to “safe” schools in the district. Each state sets its own definition of “persistently dangerous.” NCLB incorporates the Safe and Drug-Free Schools and Communities Act (SDFSCA), which outlines criteria for federal funding to support school violence prevention programs. SDFSCA in turn, incorporates the Gun-Free Schools Act, which imposes federal mandates requiring discipline for possession of a firearm at school (Hutton, 2007).

As part of the reauthorization of the Individuals with Disabilities Act in 2004, a significant change was the inclusion of a section relating to the discipline of students with disabilities who violate codes of conduct. Prior to 2004, the term “student code of conduct” was not even mentioned in IDEA (Schoonover, 2007). Students with disabilities who bring weapons to school can be removed from their regular placement up to 45 days at a time, and an impartial hearing officer can order extensions if it is determined that returning to school would substantially likely injure someone (Schoonover, 2007).

State Government Response

An examination of data gathered by the National Conference of State Legislatures reveals a significant amount of school safety enactments between 1994 and 2001. Nearly all states passed legislation connected to some degree with zero tolerance, suspension and expulsion policies, or weapons, and almost a dozen states revised statutes dealing with student searches. Fourteen states funded studies related to school violence, prevention, best practices, or other school related safety issues. Almost half of the states passed legislation aimed at providing

programs targeted to students in an effort to prevent violence. In addition several states placed an emphasis on programs for teachers to assist them in their efforts to deal with student violence. Those programs included training ranging from recognizing warning signs to specialized self-defense measures (National Conference of State Legislatures, 2003).

Two clear trends in the state legislative response are the changes in how juvenile cases are handled in the court system, and the increasing number of mandatory policy changes and programs placed on the schools. Some of the new requirements are related to juveniles and do not necessarily require action by school officials; however, in some way those measures may impact schools. Changes in the juvenile justice system have an impact on schools in some instances due to the obligation of public schools to provide educational services, and in other instances to cooperate with the juvenile justice system to report incidences of violence.

According to the Office of Juvenile Justice and Delinquency Prevention (OJJDP) in Washington, D.C., the level of activity of legislative changes in juvenile justice law in the 1990's was similar to the sweeping changes that occurred at the outset of the juvenile court movement at the turn of the 19th century, following the U.S. Supreme Court *in re: Gault* decision in 1967, and with the enactment of the Juvenile Justice and Delinquency Prevention Act in 1974 (Torbett, 1996). In its analysis, several general trends emerged from the responses of state legislatures. First, more serious and violent juvenile offenders are now being removed from the juvenile justice system in favor of criminal court prosecution. State legislatures experimented with new sentencing options. Additionally, in a move that impacts schools, traditional confidentiality provisions were revised in favor of more open proceedings and records (Torbett, 1996).

The trend in juvenile justice represented a fundamental shift in philosophy from the traditional notion of individualized dispositions based upon the best interest of the juvenile to

interest in punishing criminal behavior. (Torbett, 1996) The trend was to change to offense based rather than offender based, with the goal toward punishment rather than rehabilitation (Torbett, 1996). Two examples illustrate this philosophy very well---in 1999 Arkansas made it possible for children of any age to receive adult sentences for capital murder or first-degree murder, and in 1998 Mississippi made murder perpetrated on school property a capital crime. While the death penalty for minors was found unconstitutional in 2005 in Roper v. Simmons, 543 U.S. 551, the noteworthy aspect is that legislators in at least one state were willing to pass legislation allowing the execution of minors.

A generation ago it would have been a rare sight to have students handcuffed and arrested at school. Students being criminally charged with behavior that took place at school is now common enough to have been given a name, referred to as “the schoolhouse-to-jailhouse track” or the “school-to-prison pipeline” (Schoonover, 2007). Molsbee (2008) also notes that the use of criminal penalties as punishment for misbehavior in schools has increased. The presence of law enforcement in schools has resulted in school personnel delegating what was once a school administrative responsibility to the police. The result has been the criminalizing of minor incidences that would have at one time been handled by the school (Advancement Project, 2010).

In general state legislatures criminalized certain behaviors on school campuses, increased penalties for violators, and took measures specifically aimed at protecting teachers. Many of these laws target verbal threats or assaults on students or staff. (National Conference of State Legislatures, 2003). The Commonwealth of Virginia took a particularly strong stand, where any person who makes an oral or written threat to commit and act of violence on any school property faces conviction of a felony (Virginia Acts H.B. 197 (2001). Virginia also made it an offense to verbally threaten a school employee, and provides for a mandatory period of incarceration of two

days when the object of a battery is a teacher, principal, or guidance counselor (Virginia Acts H.B. 2445, 1999). Colorado has a law that mandates expulsion if a student is suspended three times during a school year for causing a “material and substantial disruption” (Advancement Project, 2010, citing Colorado Rev. Stat. § 22-33-106 (1)(c.5)(II)(2008).)

The philosophy in the legislative actions regarding school policies is similar to the one that occurred with the juvenile justice system. In many states the legislative activity occurred during intense political rhetoric with single events serving as the motivator for change. Regardless of the reasons, legislatures have demanded mandatory policy and program changes in the public schools.

Zero tolerance laws are not aimed solely at weapons violations. In Florida schools are required to adopt zero tolerance policies for victimization of students (Florida Laws H.B. 267, 2001). Other states have adopted similar “victimization laws” including the specific prohibition of “hate crimes.” California, for example, specifies that school crime includes hate crime and require the comprehensive school safety plan to include development of a discrimination and harassment policy, and the development of hate crime reporting procedures (California Statutes S.B. 257, 2001). Florida also requires a one-year expulsion and referral to the juvenile justice system for any student in possession of a firearm or other weapon on school property or for making a threat or false report regarding the safety of school property (Florida Laws S.B. 852, 2000).

Hawaii, Tennessee and Virginia have zero tolerance legislation requiring suspension for drug or alcohol related offenses (National Conference of State Legislatures, 2003). More common are zero tolerance policies targeting assaults, with Michigan passing one of the toughest where districts are required to expel a student in sixth grade or above for up to 180 days for

physically assaulting another student (Michigan Public Acts H.B. 4240 Act 102. 1999) In Mississippi “habitually disruptive” students face required automatic expulsion according to legislation passed in 2001 (Mississippi Laws S.B. 2239 2001).

State expulsion statutes varied considerably before the passage of the GFSA and continue to do so. Some states provide for automatic, or near automatic, suspension and/or expulsion for possessing weapons of various types, controlled substances or alcohol, or attempting or causing serious injury to students or faculty (Dodd, 2000). Terms of expulsion in different states also vary significantly, according to the act committed, from an entire school year to permanent expulsion (Dodd, 2000). The Gun-Free Schools Act prompted zero tolerance legislation, which most states have adopted in varying degrees. Some states have provided that students who are removed for discipline to be placed in alternative education programs while others have no such requirements (Grona 2000).

Suspension and expulsion statutes are linked not only to the zero tolerance weapons laws but with other provisions outlined by the various state legislatures. For example, some states do not allow previously expelled students from re-enrolling in the same school as their victims. Some, including Kansas, allow or require school districts to honor the term of suspension/expulsion of a student from a different district before allowing enrollment. Both the Illinois (2001) and Nebraska (1999) legislatures allowed school districts to require the completion of any suspension or expulsion from any school nationwide before admittance.

In addition to the reporting requirements under the GFSA, at least 30 states have mandated additional reporting by school officials of violent incidences, violent offenders, suspended students, sex-offenders, criminal records, and in at least two states information on suspended students to the Department of Motor Vehicles for driver’s license revocation

(National Conference of State Legislatures, 2003). These reporting requirements may be from within a school district, where school officials may be required to report to superiors incidences of threats, weapons, or violence, or from one school district to another, as in a case of notifying another district of the suspended/expelled status of a student attempting to enroll in a different school district. School officials in some states may also be obligated to report suspensions or incidences of violence to local law enforcement agencies or court systems. Palm Beach County Florida Public Schools have 80 infractions that require out-of-school suspensions or expulsions, with 38 of the infractions requiring reporting the offense to law enforcement (School District of Palm Beach County, 2010). The same school district requires a mandatory 10-day out-of-school suspension for the third tobacco violation and mandates a report to law enforcement for possession or use of prescription medication.

In some states the schools are the recipient of the reported information. In Connecticut, for example, school superintendents are informed by the state when a serious offender is to be released to their school district and if the released student is deemed a risk to self or others (Connecticut Acts, S.B. 1309, Act 247 (1999)). In Illinois, a person knowing that someone possesses a firearm on school grounds is required to notify school officials and law enforcement personnel (Illinois Laws, H.B. 1194. 1999). In Louisiana, the courts are mandated to notify a school within 24 hours after a minor registered in that school has been adjudicated delinquent for a felony offense, and principals are permitted to use such orders in disciplinary actions (Louisiana Acts, H.B. 81, Act 515 (1999)). In Kansas the names of pupils previously expelled, judged a juvenile offender who as an adult would have been convicted of a felony, or have been convicted of a felony, must be given to “school employees who are directly involved or likely to be directly involved in teaching” the pupil (Kansas Statute 72-89b03. 1999).

Two states require that parents are responsible for notifying school districts regarding the history of their children. In 1999 Tennessee began requiring that parents and guardians of a student adjudicated delinquent for an offense involving a violent crime notify the school principal in writing of the nature of the offense when the student enrolls in, resumes attendance at, or changes school within a district (Tennessee Public Acts S.B. 1888. 1999). A Washington law provides that when a student has attended a school district and enrolls in another district, the enrolling school may request the parent and the student to briefly indicate in writing whether the student has a history of violent behavior. The law requires parents to provide the requested information; if withheld, the student may be suspended, transferred, or expelled (Washington Laws, H.B. 2304A. 1999).

A survey of other legislative mandates reveals several states requiring studies or task forces dealing with school safety issues, states mandating the placement of students in alternative education programs, and states requiring that school districts adopt school discipline policies and crisis plans.

The typical directive by the legislatures is to require local school boards or the appropriate state education commission to have disciplinary policies or codes of conduct adopted for every school (National Conference of State Legislatures, 2003). The policies range from student conduct issues to the required due process for violators. Rhode Island has gone as far as requiring each city, town and regional school committee to appoint school safety teams for development of school safety emergency response plans to prepare for emergencies (Rhode Island Public Laws H.B. 5924. 2001).

In 2003, at least 15 states passed some form of anti-bullying legislation, with a “striking” amount of states passing their laws between 2001 and 2003 (Limber & Small, 2003). By 2009,

at least 41 states had passed some form of anti-bully legislation (Health and Human Services, 2009). While not as prevalent as bullying statutes in general, legislation requiring school districts to adopt cyber-bullying policies is growing, and by 2008 at least seven states had laws specific to cyber-bullying (Beckstrom, 2008).

Most states mandated some form of violence prevention, enrichment, after-school, or alternative education programs. Some programs include required detention and/or mental evaluation of identified students (National Conference of State Legislatures, 2003). The response of state legislatures to respond to school violence included zero tolerance mandates, increased use of law enforcement which led to a school-to-jailhouse pipeline, and the increased requirement to use exclusionary punishment.

Local School District Response to Violence

Legislative actions and education department directives require responses from local school boards that in turn make demands upon school administrators working in schools. The response has been that many schools have embraced policies that expel students for behavior that at one time would likely have been tolerated or even ignored (Susswein, 2000). Disciplinary procedures in some schools now resemble the “mandatory minimum” sentencing laws seen in the criminal justice system (Susswein 2000).

Local school boards derive their power and authority from their respective state governments. Local school boards cannot enact rules and regulations that contradict the U.S. Constitution, their state constitution, or court interpretations of constitutional law. They also cannot take actions that bypass state regulations or statutes. They may make policy that goes beyond the required constitutional protections, but their rules are binding upon themselves.

With the exception of the mandatory provisions of the Gun-Free Schools Act, most of the mandates required of school districts allow for latitude in how far reaching the school board must be in their response to violence. The requirement, for example, that school districts must have written policies addressing violence may not have been too burdensome, assuming most school districts already had some form of policy addressing the issue. The assorted parameters school boards must follow when making policy eventually work their way down to the school level in school policy handbooks. School policy cannot contradict school board policy, which as stated earlier, cannot contradict constitutional law, state regulation, policy, or statute. School policy, while following district policy, may oftentimes differ from school to school within a district. For example, school dress codes must follow district guidelines but may be enforced differently from school to school.

These principles bring back the central questions: “how are schools responding to school violence, how are the responses weighed toward punishment, how are the responses jeopardizing student rights, and are schools relying on punishment and civil liberty restrictions as their primary method to prevent violence? According to the National Center for Education Statistics there are over 17,000 public school districts in the United States with over 95,000 schools (Dinkes, Kemp, & Baum. 2009). These numbers point to the natural conclusion that there are hundreds if not thousands of different policy responses to school violence, thousands more teachers and administrators guided by the policies while working in schools, and millions of students covered under the umbrella of the discipline policies of their school and district. Combining the variety of school policy with the human behavior of staff and students, there have inevitably been actions taken against students that have been disputed and contested to the point of one party requesting involvement from the courts.

Yell & Rozalski (2000) describe school district reactions to school violence as tertiary, secondary, or primary prevention procedures. Primary prevention procedures are designed to prevent violence through student education and school-wide student behavior management systems. Student peer mediation and conflict resolution programs would be examples of such procedures.

Secondary prevention procedures are used to prevent violent acts before they can occur by seizing weapons or stopping intruders. The use of metal detectors and surveillance cameras would be examples of secondary prevention procedures (Yell & Rozalski, 2000).

Tertiary prevention procedures are mostly reactive, which occur after a problem has already occurred. Zero tolerance policies are an example; discipline takes place after a student has been caught violating a stated policy. Targeted searches of students suspected of possessing contraband are another example of a tertiary prevention policy (Yell & Rozalski, 2000).

The *Indicators of School Crime and Safety 2009* indicated that various measures taken by schools vary by school level, with the most measures taken by high schools, decreasing among middle schools, and decreasing further still at the elementary level (Dinkes, Kemp, & Baum, 2009). Some of those measures include drug testing of athletes and those involved in extracurricular activities, the use of student ID badges, and the use of metal detectors. During the 2007-2008 school year, nearly 99% of schools required visitors to sign in or check in at schools, and nearly 90% controlled access by locking doors during school hours. Thirty one (31%) percent reported the use of an anonymous threat reporting system (Dinkes, Kemp, & Baum, 2009). Only 1% of public schools require students to pass through metal detectors on a daily basis, and only 5% report the use of random metal detector checks. Only 17% require the wearing of school uniforms (Dinkes, Kemp, & Baum, 2009).

The majority of the various safety measures in place in 1999-2000 did not increase in their usage by 2007-2008. Notable exceptions were the increased use of telephones in the majority of classrooms (44.6% to 71.6%), the use of security cameras used to monitor the school (19.4% to 55%), and two items not present on the survey in 1999---electronic notification systems for school-wide emergencies (42.3% in 2007-2008) and having a structured anonymous threat reporting system (31.2% in 2007-2008) (Dinkes, Kemp, & Baum, 2009).

Nearly 68% of schools in 2005 reported the use of school resource officers (SRO's) or other police presence (Bracy, 2009). School resource officers provide traditional law enforcement functions but also teach in the classroom and act as a liaison between the police and the community (Bracy, 2009).

Increasing the inclusion of law enforcement involvement for school discipline issues by the Palm Beach County School District is by no means isolated. In Ohio as well as Florida, classroom disruption is a criminal offense (Advancement Project, 2010). The Detroit Public Schools allow for suspensions of up to 20 days for insubordination, talking or making noise in class, and even for public displays of affection (Detroit Public Schools, 2009).

In summary, schools are responding to school violence by taking various approaches, from the primary prevention measures such as school-wide behavior management, to the reactionary tertiary methods such as targeted searches and zero tolerance policies. The majority of schools do not use methods such as metal detectors, but there has been clear shift toward the increased use of law enforcement to deal with student discipline issues.

Zero Tolerance Laws

The importance of zero tolerance policies related to student civil liberties merits further explanation. Skiba (2000) notes that zero tolerance policies emerged from federal drug

enforcement policy dating back to the 1980's during the administration of President Ronald Reagan. Zero tolerance policies in schools are an attempt to send anti-violence or anti-drug messages by treating both minor and major incidences severely. And despite controversies surrounding that attempt, zero tolerance is a widely used response to school violence and school disruption. Zero tolerance has been defined as "the policy or practice of not tolerating undesirable behavior, such as violence or illegal drug use, with the automatic imposition of severe penalties even for first offenses" (Potts, Njie, Detch, & Walton, 2003, p. 16).

While conceived in the 1980's, the prevalence of zero tolerance legislation and similar school board policy increased during the decade of the 1990's (Skiba 2000.) Examples of zero tolerance went well beyond the mandates of the federal government, and included a range of offenses---from threats (Bursuk & Murphy, 1999) to swearing in school (Nancrede, 1998.) By the late 1990's, zero tolerance in some form was the norm in public schools (Skiba 2000) and 94% had zero tolerance policies for weapons, 87% for alcohol, and 79% mandated suspension for violence or tobacco (Heaviside, Rowand, Williams, & Farris 1998.) California, Kentucky, and New York were the first states to have zero tolerance policies against drugs, fighting, and gang activity (Richards, 2004).

Even as controversy swirled around zero tolerance in the following decade, there was not a significant nationwide movement or effort to revise zero tolerance polices despite recommendations by some researchers and other parties to do so (APA Zero Tolerance Task Force, 2006.) Molsbee (2008) found that as zero tolerance policies were being phased out in law enforcement, school districts expanded their policies to combat drug use, violence, and gangs. Nearly 91% of schools have some zero tolerance policy for something other than firearms, and it

is common for school districts to have zero tolerance policies for noncompliance and disrespect (Molsbee, 2008).

Richardson (2009) reported, however, that there is a decline in enthusiasm for zero tolerance policies. A few states had moved to relax some zero tolerance policies, and the state legislature of Texas considered a measure in 2008 that allows for school officials to consider “mitigating factors” before punishing students who violate zero tolerance policies (Richardson 2009). Texas mandates that all zero tolerance policies require an investigation by district leadership as to the intent of a student who brings an object to school (Schoonover, 2007).

The cornerstone of most zero tolerance policies is school exclusion, through suspension and expulsion, and the effects of those policies are one aspect of this study. The fact that zero tolerance policies treat both minor and major infractions in a similar manner reaches the heart of the concern of civil libertarians. McCord, Hager, & Mattocks (2007) stated “[U]nfortunately, the congressional intent to limit weapons in schools was diverted by the actions of many state legislatures to address a laundry list of exceptions to acceptable student behavior, including...zero tolerance expulsion policies for excessive absence, defiance of authority, or disruptive or disorderly behavior (p. 3).”

In conclusion, zero tolerance policies have expanded from the original intent of responding to weapons possession to a wide-range of discipline infractions. Because zero tolerance laws are aimed at even first offenders, and the punishment is most often expulsion or suspension, zero tolerance laws are controversial.

Comparison to the Federal Response to 9/11/01 Terrorist Attacks

The legislative and resulting public response to highly publicized school shootings such as Columbine very much parallels the responses to the September 11th, 2001 terrorist attacks on

New York City and Washington, DC. An outcome of the effort to heighten security at airports, public transportation systems, and other public venues, the American public has become accustomed to changes that include more extensive screenings, long delays, and a war-time climate since the attacks. Civil libertarians are most concerned about the resulting loss of freedoms, not dissimilar to those lost by students in the wake of the Columbine shootings.

At the heart of the changes was the passage of the USA Patriot Act, which was passed by Congress just 45 days after the attacks (Hudson, 2006). The law amends at least 15 separate federal laws, including the Foreign Intelligence Surveillance Act of 1978, the Electronic Communication Privacy Act of 1986, the Computer Fraud and Abuse Act and the Family Education Rights and Privacy Act (Hudson, 2006). The law was controversial from its inception, yet passed 357-66 in the House of Representatives and 98-1 in the Senate.

While there are those who support the Patriot Act as necessary to national security, others have expressed concerns that the loss of individual freedoms and liberties was excessive (Hudson, 2006). Levy (2001) noted "...if you are concerned about Fifth Amendment protection of due process, and Fourth Amendment safeguards against unreasonable searches and seizures, then you should be deeply troubled by the looming sacrifice of civil liberties at the altar of national security."

Legal challenges have occurred since the original passage of the law. Privacy concerns connected to allowing the government to secretly gather information about citizens was one of the most controversial portions of the act and was amended in 2006 (Hudson, 2006). Amidst the concerns of the original act, there were several attempts by state and local governments to repudiate it---among them the Freedom to Read Protection Act of 2003, and the Benjamin

Franklin True Patriot Act---along with a failed attempt to widen the Patriot Act with what was known as Patriot II (Hudson, 2006).

In 2002, President George W. Bush proposed the creation of the Department of Homeland security, which would be “...the most significant transformation of the U.S. government in over half-century” (Bush, 2002. p.1). The creation of the department reorganized several federal agencies and functions, with the purpose to “make Americans safer” (Bush, 2002. p.1). The Homeland Security Act of 2002 (Public Law 107-296) established the Department of Homeland Security as a Cabinet-level department, headed by a Secretary of Homeland Security. The department is responsible among other things, for the security of the borders of the United States, and gathering intelligence from multiple sources.

For this study, it is important to reference and draw the connection that the citizens of the nation as a whole continue to experience a re-defining of individual civil liberties for the sake of national security while at the same time students experience a redefinition of their rights as schools attempt to keep students safe and secure. Georgetown law professor David Cole said of the Patriot Act “[T]his provision in effect resurrects the philosophy of McCarthyism, simply substituting 'terrorist' for 'communist' (Cole, 2001).” Looking through the same lens at public schools has the effort to keep students safe substituted ‘potential shooter’ for ‘student?’

Commentary

Papendrea (2008) brought up an interesting point when she asserted that many of the issues and questions regarding students’ rights in school would be easier to resolve if they did not have those rights outside of school. What rights students possess before they walk into the school, how they are re-shaped and re-defined while at school, and what they then get back after they leave for home will continue to be debated and tested.

The concept of *in loco parentis* especially related to the opinions of Justice Thomas are worthy of mention. Such a reversal of decades of practice and law is difficult to imagine. Justice Alito practically said he would have preferred to stay away from *Morse*, for example, but ended up providing the most important language in his concurrence when he discussed the “special characteristics” that exist in schools. He appears to be rejecting the argument put forth by Justice Thomas, and made it very clear the very narrow focus of the *Morse* decision. There is concern that even though Justice Alito tried to make it clear the decision was very narrow and related only to the drug message, he did argue that the drug message was ‘just as serious’ as a threat of violence and therefore worthy of suppression, an opinion that is not shared by many civil libertarians.

Given compulsory education laws, it seems that *in loco parentis* cannot be used as an excuse for educators to trample previously established rights. Fully allowing schools to say that they are acting in place of the parents would pretty much give schools unfettered freedom to suppress just about any speech they wanted.

As student rights continue to evolve, the direction courts will take is unclear. For the most part there has been a slow erosion of the standards set by the *Triology* of speech cases, and the possibility of additional re-definition is likely to occur as cyber-speech cases advance through the courts.

There are still new ways to interpret the language in *Tinker* that stated “conduct by the student, in class or out of it, which for any reason---whether it stems from time, place, or type of behavior---materially disrupts class work or involves substantial disorder or invasion of the rights of others” is not protected speech (*Tinker v. Des Moines.*, 1969 p. 513). “In class or out of it” certainly has a different meaning now than when *Tinker* was decided. And the concern of

protecting the rights of others, even through what some say is “political correctness” breathes different and new life into the “invasion of the rights of others” concept. This seems to be a possible avenue for some to prohibit nearly any type of speech that bothers someone in some way.

The research indicated that the response to student violence in the schools has been the increased use of restrictive policies. If restrictive policies do not impact student freedom and serve to make students safer, educators will not need to be concerned about any negative impact against their obligation to be teachers and guardians of democracy. However, if the trend toward restrictive policies does indeed impact student freedom, the condition exists where educators are not balancing the effort to ensure safety and student rights effectively.

Chapter 4

Outcomes of the Responses to Deal with School Violence

The response to school violence has resulted in student suspensions, arrests, incarcerations, and litigation. This chapter will give examples of cases that have come to the courts as a result of schools taking actions against students who violated zero tolerance policies and school policies.

Just two weeks after Columbine, on May 4th, 1999, a computer screen saver in a keyboarding class at Hoggard High School in New Hanover County North Carolina read “The end is near.” Upon investigation it was determined that the screen saver was created by student Josh Mortimer, who according to detectives had stated he “didn’t mean anything by it. He put it there for meaning the end of the school year or the end of time, or whatever.” The detective testified he knew it was put on the screen as a prank but still charged him with communicating a threat (State v. Mortimer, 142 NC App 321 (00-131) 2001).

After Columbine, rumors had circulated at Hoggard High School that the school was to be bombed on May 4th, 1999. Parents were asked to volunteer to help patrol the halls, yet on that date over 500 students were absent from the 2500 student school. That morning the message was discovered in a keyboarding class. Mortimer was eventually found guilty of criminally communicating a threat (NC v. Mortimer, 2001). An appeals court in North Carolina eventually reversed the decision based on their belief that the state failed to provide evidence to prove that Mortimer actually intended to harm anyone, and that it was not possible to determine the meaning or intent of the statement “the end is near.” Even though Mortimer eventually won in court, the incident typifies reactions throughout the country in the immediate aftermath of the

Columbine shootings, and was likely an experience Mortimer was not anticipating when he wrote the words he later claimed to be a joke referencing concerns about the year 2000 marking the end of the world.

In the early aftermath of Columbine the nation attempted to deal with the tragedy and local officials and parents tried to make their own school safe. Page after page of examples could be given of zero tolerance policy enforcement that from a distance seem like overreaction, or at least a system that lacks common sense. In 2009 a case made national news after first grader Zachary Christie, who was excited about recently joining the Cub Scouts, was suspended and ordered to alternative school after he brought a camping utensil with a fold out knife to school (Urbina, 2009). The camping utensil could be used as a fork or a spoon, but his Delaware school administrators concluded that it could also be a weapon. The Christina School District Code of Conduct has a zero tolerance policy regarding weapons and required suspension “regardless of possessor’s intent” (Urbana, 2009). Perhaps fully due to the national uproar, the school board voted unanimously to change the code of conduct to cover kindergartners and first graders in such a situation, although some board members expressed that the entire code needed revising---noting the same thing could happen to a second grader (NSBA, 2009).

Another recent example occurred in Fairfax County, Virginia when a student faced suspension under her school’s zero tolerance drug policy. Her offense was being observed taking her birth control pill during lunch. Citing liability and safety, school district officials often state they cannot take a chance that a student may be taking something illegal, so they ban virtually everything (Chandler, 2009). This was eight years after Maine ninth grader Tracy Jannicelli asked several students for something for a severe headache she was experiencing, and

after a student gave her two white pills she thought were Tylenol, she was caught and later expelled (Soderstrom v. MSAD No. 61 2001).

A few weeks after the Columbine shootings a middle school student was suspended for nearly three weeks after his name appeared on a list of another student involved in a shoving match (ACLU, 1999). In effect he was suspended because his name appeared on someone else's list. In a case that did not involve a school but surely represents the zero tolerance concerns of civil libertarians and student rights, a 12-year-old girl was arrested in a Washington, D.C., metro station on October 23, 2000 for eating a french fry---which was a violation of the no food policy of the Metro Transit Authority. She was observed by an undercover officer, searched, frisked, interrogated, booked, fingerprinted, and detained for nearly two hours (Hedgepath v. Metro Transit Authority, 2004). In her federal lawsuit the court noted that while no one was happy with the events of the case “[T]he question before us, however, is not whether these policies were a bad idea, but whether they violated the Fourth and Fifth Amendments to the Constitution. Like the district court, we conclude that they did not, and accordingly we affirm” (Hedgepath v. Metro Transit Authority, 2004, p. 1148).

What happened to Jennifer Boccia and her classmates typified the reaction in many schools. Jennifer was one of 10 students who wore black armbands to school in late spring of 1999 to protest the decision of the Allen Independent School District (TX) to restrict student use of backpacks and trench coats, and ban the mention of the Columbine shootings (Hudson, 2003). Initially school officials allowed the students to wear the armbands because they thought they were honoring the students who died at Columbine. After three days it was determined that the armbands were being worn in protest of the new school policy.

Boccia filed suit in federal court after she was suspended for wearing the armbands. In what some declared to be a classic *Tinker* case, school officials eventually relented and agreed to remove discipline records from student files. Diana Phillip, director of the Northern Region of Texas ACLU said “[T]he political statement in this case appears to be even more compelling than in *Tinker*, because the students in *Tinker* were not directly involved in the situation they were protesting. Here, these students were protesting against restrictions of their own rights” (Hudson, 2003, p. 18). The situation was called a “Littleton Backlash” case that reflected in the mind of Phillip a greater problem---“school officials’ underlying fear of young people” (Hudson, 2003, p. 18).

A student in Louisiana also had to convince a judge during the summer of 1999 that her wearing armbands in protest of a school uniform policy was within her rights (Hudson, 2003). While students in both armband cases eventually were successful with their challenges, the fact they had to turn to courts for verification of their rights is troubling to many.

Courts resolve conflicts by applying constitutional provisions, legislation, and regulations to the circumstances and facts presented in the record submitted to the court. (Imber & Van Geel 1993) Even without the additional burden of resolving conflicts arising from the legislative response to school violence, courts must “frequently deal with broad, ambiguous, and even vaguely worded rules of law” (Imber & Van Geel 1993 p.5). They also rule on the constitutionality of laws, policies, and actions taken by those acting with governmental authority--specifically courts would rule on the laws legislatures pass, policies adopted by school boards, and the actions of teachers and administrators. The courts also interpret the U.S. Constitution and state constitutions, statutes, regulations, and common law. The federal system deals with cases involving the U.S. Constitution or federal laws. State courts decide issues surrounding state

constitutional law, state statutes, and common law. Most education cases are decided in state courts because they raise no federal legal question (Imber & Van Geel 1993).

Courts at the federal and state level do not determine the constitutionality of any statute until a party with a stake in the outcome brings the issue to the court. This is an important point to consider. An action by a school official may in fact be in violation of a student's constitutional rights; but if there is no challenge through the court system, the action will stand as though it were constitutional. For example, it is possible, perhaps likely, that a hypothetical student could be searched at school in a manner that does not follow the guidelines for a proper search as outlined by the Supreme Court in *T.L.O.* Extending the example, the student could then be suspended in a manner that does not follow the due process requirements outlined by the court in *Goss v. Lopez*. Finally, it could be possible that school board policy was not followed throughout the procedure. Absent a legal challenge to the search, suspension, or policy, there is really nothing to prevent the same circumstances from repeatedly occurring.

In light of the current environment in schools as authorities take efforts to keep students safe, it is one thing to take actions that might be clear violations of established student rights; it is another thing to take actions legally permissible that are the result of the diminishment of previously established rights. This study is concerned with school districts' enforcement of new laws and policies written in response to school violence. It does not take into account those circumstances where actions were never challenged in court or were settled before any court made a written determination. What is simply tolerated and allowed to happen is separate from the trends courts are taking, with the frequency of such incidences and the reasons for the toleration/inaction possibly the subject of a different study. Having noted that, however, it is

important to give examples of what has happened to students of all ages to provide an awareness of the sometimes extraordinary cases that have occurred the past several years.

In their study of appellate court case trends, Arum and Preiss (2009) found a change in the composition of discipline cases, with an increase of nearly four times more cases surrounding weapons and violence comparing the period of 1975 to 1992 with the period between 1993 and 2002. While the number of overall cases fell in the next five years, school violence and weapons cases still were the most frequent. They also found that during the period of 1968 -1974, nearly 41% of the appellate court rulings were in favor of the student, and that number has dropped during each surveyed time period with only 19% of the rulings in favor of students from 2003-2007 (Arum & Preiss, 2009).

The challenges for school administrators as they attempt to keep students safe require them to respond and take action against students who violate various zero tolerance laws and policies, to be vigilant regarding student threats and maintain knowledge about student speech and symbolic speech issues, to be aware of how cyber threats and bullying even outside of the school must be dealt with, and to conduct student searches within the standards required by the courts. These areas of consideration do not stand alone, distinctly separate from each other. Student speech issues, for example, may also be connected to a threat of some sort, which may have been conveyed from outside of school via a student generated website.

An examination of important lower court cases related to student safety and student rights reveals events that even veteran educators may not associate with school violence. There have been significant legal disputes centering around messages on t-shirts or other clothing, student writing or art projects, and even the display of the Confederate Flag. The use of emerging and widespread use of technology is often directly related to school violence and is an area of

unsettled law that is expanding nearly every week. These cases are important because they represent First Amendment rights and help define the limits of free speech for students. The facts surrounding each case form the basis of the level of school disruption or potential disruption that is required to prohibit forms of student speech. In the aftermath of Columbine and other high profile school shootings, it is the effort to prevent *any* disruption through nearly any means that has created controversy.

On-campus/off-campus...threat or no threat...potential or actual disruption?

Student writing, artwork, essays and spoken words

Throughout the 1990's and 2000's, there were stories nationwide that were the result of zero tolerance policies that seemed to some an overreaction as schools and parents took actions deemed necessary to ensure student safety. Thirteen-year-old Chris Beamon in Ponder, Texas, spent six days in jail in 1999 after he wrote an assigned Halloween story that was to be an imaginary tale about being home alone and hearing voices. In his essay he described himself shooting his teacher and some classmates (Hudson, 2003). The student wrote in his essay a passage where he eventually became angry and "accsedently shot Mrs. Henry" (Hudson, 2003. p. 37). Even though he received an "A" for the essay and extra credit for reading it aloud in class, deputies removed him from the school after concerns were raised by parents. After the case gained national media attention, he was released from detention and was never charged.

Before Columbine but only 2 months after a 1998 school shooting in Oregon, James LaVine of Blaine Washington, wrote a poem that was not a class assignment and showed it to his English teacher, which was something he frequently did. His poem, entitled "Last Words" was about loneliness and desperation, and ended with the shooting of 28 people in a school (LaVine v. Blaine, 2001). Before he brought it to school he showed it to his mother, who advised him

not to take it to school. LaVine said he was “inspired” to write a poem about the “problem of teen violence in schools” (Hudson, 2003. p. 38).

After his teacher became concerned she consulted with other staff. There were many factors that led to decision to “emergency expel” him under a state of Washington law that allowed for school suspension if officials had reason to believe the student could be a continuing threat of substantial disruption (LaVine v. Blaine, 257 F.3d 981 (9th Cir.) 2001). Among the factors considered were that James was very quiet, had at one time confided to an adult that he once contemplated suicide, and had witnessed domestic violence by his father and was allowed by court order to live temporarily outside the home. In addition, school officials learned that he had recently broken up with his girlfriend.

While a federal judge ruled in James’ favor, upon appeal a panel of the Ninth Circuit ruled that the school did not violate his First Amendment rights when he was suspended for the poem (LaVine v. Blaine School District., 257 F.3d 981 (9th Cir. 2001). Judge Raymond C. Fisher recognized the dilemma and noted that in hindsight the school may have overreacted, but emphasized that courts must defer to school officials “in connection with the safety of their students even when freedom of expression is involved. ...school officials have a difficult task in balancing safety concerns against chilling free expression. This case demonstrates how difficult that task can be” (LaVine v. Blaine School District., 2001, p. 992).

LaVine requested an en banc hearing which was denied. In dissent, Judge Andrew Kleinfeld strongly asserted that students had lost their free speech rights. He wrote:

If a teacher, administrator or student finds their art work disturbing, they can be punished, even though they say nothing disruptive, defamatory or indecent and do not intend to threaten or harm anyone. School officials may now subordinate students’

freedom of expression to a policy of making high schools cozy places, like daycare centers, where no one may be made uncomfortable by the knowledge that others have dark thoughts, and all the art is of hearts and smiley faces. The court has adopted a new doctrine in First Amendment law, that high school students may be punished for non-threatening speech that administrators believe may indicate that the speaker is emotionally disturbed and therefore dangerous (LaVine v. Blaine Sch. Dist. 279 F. 3d 719, 720-21. 2001).

In Kansas, Sarah Boman was suspended in 2000 after she displayed what she thought was conceptual art with a drawing that represented the delusions of a madman. The poster she had placed on a classroom door was unsigned and had the word “please” in big red letters in the center. “Please, tell me who killed my dog. I miss him very much. I’ll kill you all! You all killed my dog---you all hated him” (Boman v. Bluestem Unified School District No 205, 2000). Boman was initially suspended for five days but at a suspension hearing she was suspended for the remainder of the school year, which was 81 days.

Upon appeal, a hearing officer determined that based on the evidence presented she should be returned to school, but the school board rejected the finding, and would not allow her to return to school without a psychological review to determine that she was not a threat (Boman v. Bluestem Unified School District No. 205, 2000). Boman filed suit and a Kansas judge ruled in her favor, determining that the poster did not cause enough of a disruption to warrant the long-term suspension. He also determined that forcing her to be subjected to a psychological evaluation would be in violation of her rights.

For schools to prevail in their effort to suspend or expel students for actions considered to be a disruption of the school, they must be able to demonstrate a connection to the behavior and

the school disruption. If a school wishes to take action because of the potential for a disruption, courts have required that they provide compelling evidence that current school climate or recent events have justified the action. Even without disruption, however, schools have been able to suspend students for discussing violence.

In March of 2000, a student at Wilson Elementary School in Sayreville, New Jersey told other students he intended to shoot a teacher. Later in the day in an unrelated incident another student threatened to kill a classmate. Several days later a student said his mother allowed him to bring guns to school. In each case the student was suspended for three days. The principal then met with each class and told them of the seriousness of making statements and threats involving weapons, and sent a letter home stating that immediate disciplinary action would take place when students made statements referring to violence or weapons (S.G. ex rel. A.G. v. Sayreville Board of Education, 333 F.3d 417 cert denied 2003).

A five-year-old student referred to in court records as A.G. was not present that day, and his parents did not receive the letter. On March 15, 2000, A.G. and three other students made statements at recess referring to weapons and shooting each other, while, according to A.G., they were playing cops and robbers. The record indicated a dispute over who may have heard the statements, but A.G. was served three days of suspension, returned to school and had no other problems that year. His parents filed suit claiming that A.G. was denied the right to free speech, procedural due process, and equal protection of law.

While the court determined that the record demonstrated reasonable school concerns to uphold the suspension, an important element of the decision was the conclusion that the rights of elementary school students are not the same as for older students. “For our purposes, it is enough to recognize that a school’s authority to control student speech in an elementary school

setting is undoubtedly greater than in a high school setting” (S.G. ex rel. A.G. v. Sayreville Board of Education., 333 F.3d 417 cert denied 2003). Such reasoning prompted F. Michael Daily, the attorney for S.G. to state that “[I]f elementary schools kids have no constitutional rights, then they shouldn’t be subject to the penalties and discipline imposed on older kids” (Hudson, 2003 p. 79).

Other courts have expressed that elementary school students do not enjoy the even the limited freedoms that older students possess. Rocky Sonkowsky was in 5th grade at a Minnesota elementary school when his class won a trip to visit the Minnesota Vikings practice facility but was not allowed to attend due to his insistence on wearing a Green Bay Packers jersey. Citing their fear he would be disruptive wearing the jersey he was banned and his parents sued the district. A federal court said “it is unlikely that *Tinker* and its progeny apply to public elementary (or preschool) students” (Sonkowsky v. Board of Education for Independent School District No. 721., 2003 p. 677, citing Muller by Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1538 (7th Cir. 1996). The Third Circuit affirmed the district court decision (Sonkowsky v. Board of Education for Independent School District No. 721. 327 F.3d 675 3rd Cir. 2003).

In Walker-Serrano v. Leonard.,(2003) a third-grade student lost her case against a school that prohibited her from collecting signatures protesting her class going to the circus because she felt that circuses hurt animals. When told to stop gathering signatures, the case eventually ended in court.

Controversies have arisen as a result of what students have written even if they never intended someone else to see it. A case that had implications regarding both written threats and the threshold issue of where the reach of the school begins and ends is Doe v. Pulaski County Special School District 306 F.3d 616 (8th Cir. 2002). An *en banc* decision of the 8th Circuit

Court of Appeals reversed an earlier three-judge ruling and determined that an 8th grade student could be expelled from school for a threatening letter he wrote about his former girlfriend even though he never intended to give it to her. Because it was shown to another classmate it was viewed as communicating a threat.

The student wrote two letters about a girl after she broke up with him that talked about raping, sodomizing, and killing her. In one letter he used words such as ‘bitch,’ ‘slut,’ ‘ass,’ and ‘whore’ over 80 times and used the f-word no fewer than 90 times (Doe v. Pulaski County Special School District 306 F.3d 616 (8th Cir. 2002)). He also warned her not to go to sleep because he would be lying under her bed waiting to kill her with a knife.

At his home another student found one of the letters, and initially the writer tried to take it back, but then allowed him to read it. Later the girl found out about the letters and persuaded the student to get them for her, which he did. After the letter was shown to an SRO and the principal, he was suspended for the remainder of the school year. After his parents filed suit, in November of 2000 the U.S. District Court for the Eastern District of Arkansas found that the letter was not a true threat and ordered him reinstated in school. Initially this ruling was upheld under appeal until the full 8th Circuit ruled against him.

The court ruled that since he had allowed another student to read the letter and because he had discussed it with the victim, he intended to communicate the threat. Similar to the ruling in *LaVine*, while this court ruled against the student they also commented “...[H]ad we been sitting as the school board, we might very well have approached the situation differently, for it appears to us that the action taken...was unnecessarily harsh” (Doe v. Pulaski County Special School District, 2002 p. 627). Expressing the view that other options existed that may have protected students as well as aided in the understanding of the inappropriateness of the conduct, the court

nevertheless stated “It is not the role of the federal courts to set aside decision of school administrators which the court may view as lacking a basis in wisdom or compassion. Those judgments are best left to the voters who elect the school board (Doe v. Pulaski County Special School District, 2002, p. 627).

Pulaski involved a unique element respecting the communication of a threat, but there are other cases where violent narratives of some sort have created a clashing point when balancing student rights with protection of students and teachers. As recently as 2008 the 8th Circuit Court of Appeals ruled that a Minnesota high school student’s essay depicting a student’s murder of a teacher and suicide was not protected speech. David Riehm wrote three essays in his creative writing class at Cook County High School in Grand Marais, Minnesota that his teacher found disturbing (Riehm v. Engelking, 2007).

The first essay contained sexually graphic descriptions and the teacher returned it to him, writing comments that she found it offensive and suggested that he change teachers or change his “obsessive focus on sex and potty language” (Taylor, 2008 p. 65). Later Riehm submitted a two-part essay writing that “life is not g-rated...there is violence, language, sexual content everywhere” (Taylor, 2008 p. 65). His essay further went on to criticize a fictitious English teacher named “Mrs. Cuntchenson” whom was described as “narrow minded, uncreative, and paranoid” (Taylor, 2008 p. 65).

The next essay, entitled Bowling for Cuntchenson, the student referred to the teacher as a “bitch...who is way out of line” (Taylor, 2008 p. 65). The story ends with the student getting a gun and shooting the teacher in the eye, and with the narrator fading to a movie theater and discussing the film *Bowling for Columbine*. After being reported to the school principal, Riehm was suspended and the essays were given to law enforcement. The teacher also discussed the

essays with a social worker who then opened a child welfare case that subsequently led to Riehm being removed from his home and placed in protective custody in a psychiatric ward.

The 8th Circuit Court ruled that the essay was not protected speech because it was reasonable to conclude it was a threat. They also concluded that the social worker came to a reasonable conclusion that his welfare was at stake because previous discussions about his essays with his mother were unproductive.

Other federal courts have ruled against students who have written about violence. In Boim v. Fulton County School District No. 494 F.3d 978 (11th Cir. 2007), a student passed a notebook to another student that depicted the first student shooting her math teacher and heading off to class as if nothing happened. Her suspension was upheld because the comments could be reasonably perceived as a threat of violence. Four months later the 5th Circuit in Ponce v. Socorro Independent School District 508 F.3d 765 (5th Cir 2007) considered whether the First Amendment protected student speech that threatened a Columbine-style attack. A sophomore student's notebook contained fictional pseudo-Nazi style group with detailed plans to commit a shooting attack on the student's high school.

The student, E.P., at Montwood High School, Texas, kept a personal journal in which he wrote a first person account of creating a pseudo-Nazi group at his high school and other schools in the district, as well as plans to commit an attack at his school and others. School officials learned of the journal from a concerned student to whom E.P. had shared the contents. Upon questioning E.P. insisted that the writing was fictional and consented to a search of his backpack where the journal was found. He was subsequently suspended for making a "terroristic threat" and was recommended to be placed in an alternative education program (Ponce v. Socorro, 508

F. 3d 765 5th Cir. 2007). After his parents brought suit against the district, a U.S. district court ruled in his favor determining that the school had not proven a disruption would occur.

The Fifth Circuit reversed on appeal, determining that the speech was not constitutionally protected. Relying on the U.S. Supreme Court ruling in Morse v. Frederick, they concluded that “...speech advocating a harm that is demonstrably grave and that derives that gravity from the ‘special danger’ to the physical safety of students arising from the school environment is unprotected” (Ponce v. Socorro, 2007, p. 770). The court stressed that school officials must take threats such as those in E.P.’s journal seriously or they may miss signals that lead to tragedy. They must be able “to react quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance” (Ponce v. Socorro, 2007, p. 772). The court fell short, however, of allowing schools to expel students just because they are loners, wear black, and play video games (Taylor, 2008 p. 67).

In some of the previous cases it was clear who the target of the potential threat was. What was less clear in some cases was whether there was actual intent to carry out the threat. In 2001 a telling case became national news that Hudson (2005) describes as “the epitome of overreaction in the Columbine age (p.1).” Adam Porter was 14 years old in 1999 when he drew a picture of his school, East Ascension High, in Louisiana. His picture depicted his school being attacked by a missile launcher, explosives, and people with weapons. The principal was also a target of the drawing, with derogatory remarks including a racial epithet. He showed the drawing to his mother who later recalled that he told her he was ‘just playing.’ The sketchpad was thrown into a closet in his bedroom where it stayed for two years (Hudson, 2005).

In March 2001, his younger brother Andrew Breen discovered the sketchpad, drew an animal on it, and took it on the bus to school to show his teacher. When he showed it to another student on the bus, the student flipped through the sketchpad and saw the drawing Adam had made two years earlier. The student then showed the drawing to the bus driver.

Andrew received a three day suspension for bringing an inappropriate drawing to Galvez Middle School, and word was sent to the high school where Adam was then attending. Adam was searched by school officials where they found a box cutter that he used for his job at a local market. They also found fake identification, and notebooks that contained references to gangs, drugs, death, and sex (Porter v. Ascension Parish School Board, 393 F.3d at 612). Adam was arrested and spent four nights in jail, and was allowed to re-enroll at an alternative school after his mother waived his right to an expulsion hearing (Hudson, 2005). Adam and his brother filed suit against the school district claiming that school officials violated their First Amendment rights by punishing them for the content of the drawing. At the district court level, it was concluded that the brothers did not have constitutional protection because the drawing represented a true threat, and that the drawing constituted a substantial disruption of the school.

Porter is an important case because it dealt with the issue of First Amendment protection for off-campus student speech, and although it did not deal with off-campus speech brought onto campus through technology, there are elements of the decision relevant to those circumstances. It is also important because the district court established that Columbine and school violence could be a consideration in a First Amendment inquiry (Roberts, 2006).

The district court relied in part on the decision in Doe v. Pulaski, and reasoned that the drawing and its language could reasonably be construed as a serious threat (Roberts, 2006). It was immaterial whether Adam Porter had intended to ever bring the drawing to school, what

mattered was the fact that the drawing did make its way onto the campus (Porter v. Ascension Parish School Board, 393 F.3d at 589).

Upon appeal, the Fifth Circuit supported the district court in upholding the suspension, but they did not agree with the First Amendment analysis. “Adam did not intentionally or knowingly communicate his drawing in a way sufficient to remove it from the protection of the First Amendment...Because Adam’s drawing cannot be considered a true threat as it was not intentionally communicated, the state was without authority to sanction him for the message it contained” (Porter v. Ascension Parish School Board., 393 F.3d at 617).

These cases are important for school administrators to become familiar with as they deal with violent essays and verbal threats and whether they are the cause of enough disruption of the school to be prohibited speech. Administrators must consider what constitutes an actual disruption of the school, as well as the intent of the speaker when dealing with potential threats. Restricting all speech because of a fear of potential disruption would not be permissible. With the widespread common use of technology, administrators must become aware that even more clashing points are created where they must balance student rights and school safety. Learning a background of what legally is a ‘true threat’ and what constitutes ‘on-campus’ speech may help administrators make better decisions as they deal with students and social networks, cell phones, instant messages, and other technologies.

The U.S. Supreme Court in Watts v. United States, (1969) held that a true threat is a type of speech that is not protected by the First Amendment, but did not provide a definition of what would constitute a true threat (Roberts, 2006). A threat must be a realistic, actual threat and not mere hyperbole (Watts v. United States., 1969, p. 708). The court further defined a true threat in Virginia v. Black, (2003) where they defined a true threat as statements “where the speaker

means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals “(Virginia v. Black., 2003 pp. 359-360).

The court stated that the actual intent to carry out the threat was not required. The speaker must intent to convey or communicate the threat, and the lack of intent to communicate the threat makes it protected under the First Amendment (Virginia v. Black., 2003 p. 359).

Lower courts have adopted differing variations of what is considered a true threat, with most circuits adopting a reasonable person standard regarding what is considered a threat; however, circuits are split as to whether the speech should be analyzed from the viewpoint of the speaker or of the recipient (Roberts, 2006). In other words, courts decide if a reasonable person would view the speech as a threat, the difference being some courts take it as a reasonable person standing in the shoes of the speaker, with other courts a reasonable person standing in the shoes of the recipient. An example of a case determined from the viewpoint of the recipient would be Doe v. Pulaski, where the recipient of the message could reasonably conclude it was a threat. The Fourth, Fifth, Eighth, and D.C. Circuits have adopted this approach (Roberts, 2006).

The First, Third, Sixth, Seventh, and Ninth Circuits have adopted an approach from the viewpoint of the speaker---whether a reasonable person would conclude that the statement could be interpreted by someone as a threat (Roberts, 2006). Another approach, adopted by the Second Circuit, uses a reasonable listener test, analyzing whether the listener believed that the threat would be carried out (Roberts, 2006).

The 8th Circuit outlined a list of factors regarding how a reasonable recipient would view a purported threat in United States v. Dinwiddie 76 F.3d 913 (8th Cir.1996). To be considered should be (1) the reaction of those who heard the alleged threat; (2) whether the threat was conditional; (3) whether the person who made the threat communicated it directly to the object of

the threat; (4) whether the speaker had a history of making threats against the person purportedly threatened; (5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence (United States v. Dinwiddie, 1996, p. 925)

It is arguable that in most instances the resulting conclusion would be the same regardless of which approach is applied, but administrators should understand that there are different viewpoints to consider as they gauge what may or may not be a threat. In the *Porter* case, the court ruled that a true threat analysis is not based on whether the speaker intended to carry out the threat, but whether the speaker intended to communicate the threat (Porter v. Ascension Parish School Board., 2004, p. 616).

The *Porter* case not only contained issues regarding free speech and threats, but also the issues of free speech and off-campus/on-campus concerns. In *Porter*, the student did not compose his drawing on campus, nor did he bring his drawing to campus. He did not even show the drawing to anyone except his own mother. Although the drawing was brought to campus, it was not by Adam or even at his direction. When school administrators have time to investigate and move deliberately, consideration should be given to the circumstances and manner of how the speech or message was communicated. This is extremely important in the ‘digital age’ as administrators deal with the increased frequency of cyber related threats.

In establishing how far schools can extend their reach a case from the 1980’s had the chance to perhaps establish a clear rule that conduct occurring outside of the school is off limits for school officials to address. Although the court did not go that far in Klein v. Smith 635 F.Supp. 1440 (D.Me 1986), they did rule that Maine school officials went too far disciplining a student for giving the finger to a teacher in a restaurant parking lot. School policy called for disciplinary action for “vulgar or extremely inappropriate language or conduct directed to a staff

member” (Klein v. Smith., 1986, p. 1441). The student was suspended for ten days but a court felt there was no connection between the act in a parking lot far from the school and the operation of the school.

Even before *Klein* a Second Circuit opinion in Thomas v. Board of Education, Granville Central School District 607 F. 2nd 1043 (2nd Cir.1979) limited the reach of a school district when they attempted to punish students for their involvement with an off-campus publication that was aimed at the school community. The court stated that although school officials should be given “substantial discretion” to execute their responsibilities, their “arm of authority does not reach beyond the schoolhouse gate” (Thomas v. Board of Education, Granville Central School District, 1979 p.1044). In *Thomas* students were suspended for publishing and circulating a magazine off campus that contained sexually graphic material, but none of the magazines made it to campus, a fact that made the conclusion of the court easier to reach.

As far back as 1969 a federal district court in Texas wrote “[S]chool officials may not judge a student’s behavior while he is in his home with his family nor does it seem to this court that they should have jurisdiction over his acts on a public street corner” (Sullivan v. Houston Indep. Sch.Dist 307 F.Supp. 1328 p.1340 (S.D. Tex. 1969). This decision implies that the standard should be that it is parental authority, not school authority that deals with the behavior of a student who is off-campus. When students are off-campus they may best be considered citizens, and only on-campus should they be considered students (Calvert, 2001).

Once speech in any form reaches campus, the line becomes blurred. At what point does off-campus speech become on-campus speech? There has not been a consensus from the courts answering that question. Courts have in some cases determined off-campus speech unprotected if it produces on-campus effects, regardless of whether the student intended to bring the speech

to campus (Calvert, 2001). Unsettled is speech that never makes it to campus but still causes disruption or compromises an educational interest, such as student comments on a social network site or shared information that constitutes cheating of some sort. Ultimately the questions become (1) what factors make speech off-campus and on-campus; (2) what factors are required to reach the conclusion that there was a disruption or what factors are required to conclude the likelihood of a potential disruption; and (3) in the event the speech may be threatening, what factors are required to determine that the speech is a true threat?

Fryman (2009) applies a metaphor for internet speech by saying it is an off-campus conversation in which all students, teachers, parents, and administrators are invited. Internet speech is not private in the way a conversation is private, and just as schools may take action when spoken words are repeated in school over and over, schools should also be able to take action after the spread of word via the internet. The speed and reach of the speech may differ, but they should be treated the same (Fryman, 2009).

In summary, there has been a trail of court cases that concerned issues surrounding the response to school violence. Students have had writings, pictures, and artwork that resulted in severe punishment and eventual litigation. Administrators who attempt to keep students safe by restricting student speech must consider factors such as location of the speech, whether the speech was an actual threat, and the degree of school disruption the speech caused.

On-campus/off-campus...threat or no threat...potential or actual disruption?

Student use of technology

With the rapid increase in the student use of technology, speech issues have expanded into uncharted territory for administrators. Technology changes the nature of the boundaries of the school, and provides new avenues for making threats and bullying others. Technology also

impacts what may be a potential or actual disruption of the school. Several court cases involving these issues are noteworthy for discussion.

A Washington court in Beidler v. North Thurston School District (No. 99-2-00236-6 (Wash. Super. Ct. July 18, 2000) ruled in favor of a student who created a website depicting his assistant principal drinking beer and participating in a Nazi book-burning. The judge predicted the future by stating “schools can and will adjust to the new challenges created by...students and the internet, but not at the expense of the First Amendment” (Calvert, 2001 p. 256). If the court was trying to predict a smooth course of adjustment, it was inaccurate, but it was certainly correct to claim there would be challenges.

In a case that illustrates the overreaction of school officials, a student in Ohio was punished for accessing a website at school that he had created himself at home. An 8th grade student created a website where he posted pictures of himself and friends and called some of his classmates “losers” as well as pictures of himself and others giving “the finger” (Graca & Stadler 2007 p. 125). After the student accessed the website he was subsequently suspended from school for 80 days. Since the student was both the sender of the message as well as the receiver of the message, he was suspended for either “sending a message to himself or receiving a message from himself” (Graca & Stadler, p. 125). Ultimately the student prevailed in court under the *Tinker* standard, but it illustrates the circumstances some schools and students have created (Coy v. North Canton City Schools, 2002).

In the past ten years students had several cases ruled in their favor. In Emmett v. Kent School District (2000) federal district court in Washington ruled that internet speech created off campus is entirely outside of school’s supervision or control. An 18-year-old honor student, Nick Emmett, created a web page from his home entitled the “Unofficial Kent Lake High Home

Page.” The site included a disclaimer stating that the website was for entertaining purposes only (Hudson, 2003). The page contained mock obituaries of his friends, and allowed visitors to vote on who would die next.

After this became a topic of discussion in the school, a television report indicated the website contained a “hit list” of people to be killed. Emmett immediately removed the site but was placed on emergency expulsion for harassment and disruption of the school (Hudson, 2003). The expulsion was later modified to a five-day suspension but Emmett filed suit against the district for violating his First Amendment rights. The district court ruled that there was a lack of evidence that the website fell under any guidelines under *Tinker*, *Bethel*, or *Hazelwood* and ruled in favor of Emmett. Eventually the school district settled the dispute by paying \$1, attorney fees, and removing the suspension from his records (Hudson, 2003).

Another case of a student creating a website that included a ‘disclaimer’ occurred when Michigan middle school student Joshua Mahaffey created a web site that included a list of “people I wish would die” (Mahaffey ex rel. Mahaffey v. Aldrich., 2002 p. 782). Mahaffey’s website, entitled “Satan’s Web Page” included what could be labeled as instructions and disclaimers. “This site has no purpose. It is here to say what is cool, and what sucks. For example, music is cool. School sucks” (Mahaffey v. Aldrich, 2002 p. 782). Going further the website included “SATAN’S MISSION FOR YOU THIS WEEK: Stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face. Killing people is wrong don’t do It [sic]... PS: NOW THAT YOU HAVE READ MY WEB PAGE PLEASE DON’T GO KILLING PEOPLE AND STUFF AND BLAMING IT ON ME. OK?” (Mahaffey v. Aldrich, 2002 p. 782). A

Michigan court ruled ultimately ruled in favor of the student stating that there was no evidence of a school disruption and no true threat from the website.

Increasingly common are websites or comments on social networks critical of schools and school personnel. There have been inconsistent outcomes of these types of cases. In Buessink v. Woodland R-IV School District a 1998 Missouri court stated school officials violated student rights when they suspended him for making a webpage that criticized the principal, teachers, and the school. The fact that the principal was offended by the content of the web site was not legal grounds to suppress the speech. More recently the Second Circuit ruled against a student in Doninger v. Niehoff (2009), regarding a blog criticizing the school principal and other administrators. Avery Doninger was a student council member and junior class secretary at Lewis Mills High School when she became upset over the rescheduling of a student council event.

Doninger set into motion a mass email, blog message, and phone call protest, and in her blog referred to school personnel as “douchebags” and encouraged people to keep contacting the superintendent to “piss her off more” (Doninger v. Niehoff., 2009). When school officials became of aware of her involvement she was banned from running for senior class secretary and she brought suit against the district to force a new election or be installed as an additional class secretary. While the case reached both federal district court and the circuit court twice and was decided in part on qualified immunity concerns, there were some important issues raised. The court would not grant summary judgment for the school district based on *Tinker* because the school district could not reasonably claim school disruption after they waited several weeks to discipline her. They instead disciplined her for her remarks which would be protected under

Tinker. This is an important point for administrators to keep in mind---it is difficult to articulate a case for school disruption if you wait a substantial amount of time to claim it.

Another noteworthy aspect of this case was the discussion regarding the applicability of *Fraser* to off-campus internet speech. The district court concluded that the answer to that question had not clearly been established at the time of the violation. The court opinion stated that the case law *Doninger* cited in support of her claim that it was clearly established that school officials do not have the authority to regulate off-campus speech was decided before internet speech existed. “If the courts and legal scholars cannot discern the contours of First Amendment protections for student internet speech, then it is certainly unreasonable to expect school administrators...to predict where the line between on- and off- campus speech will be drawn in this new digital era (*Doninger v. Niehoff.*, 2009 p. 214).”

The 2nd Circuit noted that it had begun to discuss this issue in their own court the year before in *Wisniewski v. Bd. Of Educ. Of Weedsport Cent. Sch. District* (2007). In this case the suspension of a student who created an instant messaging icon depicting his teacher being shot. The icon was created by an 8th-grade student who sent the message to 15 people, some of whom were classmates. The icon depicted a pistol firing a bullet at a person’s head, with dots representing blood and the words “Kill Mr. VanderMolen”. The discipline of the student was upheld based on the disruption of the school, with the 2nd Circuit holding that it was clear that off-campus conduct could create a substantial disruption of the school.

J.S. v. Bethlehem Area School District (2000) provides many similar issues for analysis. Middle school student J.S. created a website at his home entitled “Teacher Sux” that included comments about his algebra teacher and his principal, both of whom he identified by name. He called the algebra teacher, among other things, a “fat fuck”, a “stupid bitch”, and “fat bitch” (*J.S.*

v Bethlehem, 2000, p. 415). The website also featured a diagram of the teacher with her head cut off and blood dripping from her neck. J.S. then asked why the teacher should die and asked visitors to the site to “give me \$20.00 to help pay for the hitman” (J.S. v Bethlehem, 2000, p. 416). The website also declared that the principal “fucks” another principal from the same district (J.S. v Bethlehem, 2000, p. 416).

After the school learned of the website through a tip from a student, the algebra teacher was caused to suffer physical and mental problems, including headaches, anxiety, stress, and loss of appetite, sleep, and weight (Calvert, 2001). She did not complete the school year and took a medical sabbatical for the next year. Both the principal and the algebra teacher sued J.S. in civil court (Calvert, 2001).

J.S. was originally suspended from school for three days, then ten days, and at the end of the school year was expelled. His parents brought suit against the district, a case that was ultimately decided in the Pennsylvania Supreme Court. The court ruled that although the website was not a true threat, there was evidence that there was a substantial disruption of the school, and that the speech should be considered on-campus speech because of the specific nature of the website. The school district asserted that the website “had a demoralizing impact on the school community... comparable to the effect on the school community for the death of a student or staff member because there was a feeling of helplessness and a plummeting morale” (J.S. v Bethlehem, 2000, p. 417).

Calvert (2001) argues that this equates speech that mentions violence with violence itself. He also notes that the school only claimed the effects on the staff and never suggested that students were disrupted, that students caused disruption, or that their classes were disrupted.

This is a point for administrators to consider---can/should you limit speech by students based solely on the effect of the staff and not the students?

Two precedential cases from the Third Circuit had opinions filed as recently as February, 2010. Layshock v. Hermitage School District (2010) and J.S. v. Blue Mountain School District (2010) are separate cases dealing with the aftermath of a student creating a social network profile of their school principal. In *Layshock*, Justin Layshock was disciplined after he used his grandmother's computer to create a fake MySpace profile of his high school principal, Eric Trosch. In *J.S.*, middle school student J. Snyder was disciplined after creating a MySpace profile of her principal, James McGonigle. While those actions are similar, the cases and outcomes differ.

Justin Layshock was a senior at Hickory High School in Hermitage, Pennsylvania in December of 2005 when during nonschool hours he sat at his grandmother's computer and created a "parody profile" (Layshock v. Hermitage School District 2010 p.7) of his principal. He copied a picture of his principal from the school district website and created a bogus profile. Providing answers to the MySpace profile questions, he included among several things:

Birthday: too drunk to remember

In the past month have you gone skinny dipping: big lake, not big dick

Ever been called a tease: big whore (p.9)

Under "interests" he listed "Transgender, Appreciators of Alcoholic Beverages" (Layshock v. Hermitage School District 2010 p.9). The profile was made available to other students by listing them as "friends" on the MySpace website, and shortly thereafter word spread quickly at school about the profile. Circuit Judge Mckee wrote "[J]ustin later explained that he made the profile to be funny, and did not intend to hurt anyone. However, there was obviously

nothing “funny” about the profile in the eyes of the school administration” (Layshock v. Hermitage School District 2010 p.10).

A few days later three other students also posted profiles of the principal, each more “vulgar and more offensive” (Layshock v. Hermitage School District 2010 p.10) than Justin’s. The principal then learned of the profiles from his daughter who also attended Hickory High School. He believed the profiles to be “degrading,” “demeaning,” “demoralizing,” and “shocking” (Layshock v. Hermitage School District 2010 p.11).

On December 15, Justin accessed the website from a class at school and showed it to other classmates. The next day he accessed the profile from school purportedly to delete it. One teacher briefly saw the profile when he saw a group of giggling students in class huddled around a computer. While the district was able to determine on investigation how many students accessed MySpace before it was disabled, there was no way to determine how many actually viewed the profile.

On December 21, after school officials learned of Justin’s role, Justin and his mother met with administrators. After the meeting and without prompting, Justin apologized to the principal, which the principal later testified he believed to be respectful and sincere (Layshock v. Hermitage School District 2010 p. 14). On January 3rd, 2006, Justin received notice of an informal hearing to determine charges against him, including “[D]isruption of the normal school process; Disrespect; Harassment of a school administrator;...Gross Misbehavior; Computer Policy Violation (use of school pictures without authorization)” (Layshock v. Hermitage School District 2010 p.15).

Justin was given a ten-day out-of-school suspension and was placed in an alternative education program for the remainder of the school year, was banned from extracurricular

activities, and from graduation ceremonies. The circuit court noted that it was ironic that Justin's profile was the least offensive yet he was the only student who was punished. They also remarked that although Justin was in the gifted program and took AP classes, he was placed in an alternative program designed for students who could not function in a classroom without the district detailing their reasoning for his placement in such a program.

The school district asked the court to reject Justin's claim that his speech was protected by asserting his actions created a disruption of the school, and although he created the profile off-campus, he effectively entered the campus when he accessed the district website to copy the picture of the principal. The circuit court rejected that argument because it "equates Justin's act of signing onto a web site with the kind of trespass he would have committed had he broken into the principal's office or a teacher's desk" (Layshock v. Hermitage School District 2010 p. 32). The court used Thomas v. Board of Education (1979) and felt that the relationship between his action and the school was even less than that in *Thomas*. "[W]e will not allow the School District to stretch its authority so far that it reaches Justin while he is sitting in his grandmother's home after school" (Layshock v. Hermitage School District 2010 p.36). The court also distinguished his situation from *Morse* by stating it would be a "dangerous precedent" (Layshock v. Hermitage School District 2010 p.37) to reach into a home the same way they can control behavior at school activities.

Originally the district claimed the speech was not protected due to the disruption of the school and the federal district court denied that position. On appeal they did not dispute that finding. Accordingly, the speech was then protected by *Tinker*, and not related to *Morse*. That left the district to argue the speech fell under *Fraser* standards.

The school district argued that the decisions in Bethel v. Fraser, J.S. v. Bethlehem, Wisniewski v. Bd. Of Educ.of Weedsport Central Sch. Dist., and Doninger v. Niehoff., each applied to their case and they should be allowed to punish Justin under their guidelines. But the court rejected those arguments, stating “[W]e believe the cases relied upon for the District stand for nothing more than the proposition that schools may punish expressive conduct that occurs outside of school as if it occurred inside the “schoolhouse gate,” under certain very limited circumstances, none of which are present here” (Layshock v. Hermitage School District 2010 p. 47). The conclusion reached was that the school district could not punish Justin for creating the profile.

The *Layshock* case has not reached finality as of this writing. The Hermitage School District Board of Education voted in February, 2010, to appeal the three judge panel decision and ask for an *en banc* review from the Third Circuit (Pinchot, 2010). This case has the possibility of becoming precedential in the area of the authority of the school regarding instant communications and rapid advances in student uses of technology.

A different result was reached in J.S. v. Blue Mountain School District, (2010) based on the conclusion that school authorities could reasonably forecast a substantial disruption of the school. In the spring of 2007, J.S. was a middle school student at Blue Mountain Middle School in Orwigsburg, Pennsylvania. Upset over how she was disciplined for a dress code violation J.S. and her friend K.L. created a fake MySpace profile with J.S. at home on her parent’s computer and K.L. at her home. The girls took turns adding to the profile as they messaged each other.

The actual URL for the page was <http://myspace.com/kidsrockmybed>. (J.S. v. Blue Mountain School District, 2010 p.5). Similar to Justin Layshock, they copied a picture of their principal from their school website. They did not identify him by name, school, or location, but

created the page to appear to be a middle school principal named “m-hoe=].” (J.S. v. Blue Mountain School District, 2010 p.5) He was made to be a bisexual forty-year old man living in Alabama with his wife and child. His “interests” section included:

General: detention. being a tightass. riding the frainttrain. spending time with my child (who looks like a gorilla). baseball. my golden pen. fucking in my office. hittin on students and their parents.

Television: almost anything. i mainly watch the playboy channel on directv. OH YEAH BITCH!

Heroes: myself. of course. (p. 6)

The reference to “fraittrain” appeared to be a reference to the principal’s wife Debra Frain who was a counselor at the school. Another section was entitled “About me” that stated:

HELLO CHILDREN

Yes. It’s your oh so wonderful, hairy, expressionless, sex addict , fagass, put on this world with a small dick

PRINCIPAL

I have come to myspace so I can pervert the minds of other principal’s to be just like me. I know, I know, you’re all thrilled

Another reason I came to my space is because – I am keeping an eye on you students (who I care for so much)

For those who want to be my friend, and aren’t in my school I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my

darling wife who looks like a man (who satisfies my needs)

MY FRAINTRAIN

so please, feel free to add me, message me whatever (p.6)

The profile was made accessible for anyone who knew the URL or found it by searching MySpace for a term contained in the profile. The next day at school students approached J.S. to talk about the profile, and after school she went home and made the profile “private” meaning it could only be viewed by those invited by J.S. or K.L. Approximately 22 students were invited, and since MySpace was blocked from access at school, they could only view it from off-campus locations.

The principal first learned of the profile the same day as the students. He was informed of the profile by a student, and requested the student to find out who made the profile. When he could not access it himself, he contacted MySpace, who told him they needed the entire URL. Later that day the student returned with information that J.S. had created the website, and two days later brought him a printed copy.

After investigation and discussion with district administrators, the principal called J.S. and K.L. to his office where they eventually admitted their role. MySpace was contacted with the appropriate information to have the profile removed. Both students were suspended for ten days, and were warned by the police of the seriousness of their actions.

The court record reflects some of the events that occurred at the school both before and after the suspensions. A teacher reported that two students had come to her concerned about some of the comments in the profile. The testing of some students had to be re-scheduled during the investigation. Upon their return to school from their suspensions their school lockers were decorated with construction paper, ribbons, and bows, and words of congratulations. The locker decorations caused the congregation of 20-30 students in the hallway who had to be dispersed.

Additionally at least one teacher had to quiet his class numerous times when students began discussing the profile and suspensions during class time. Later these incidences were described as brief, lasting only a few minutes, and there were only general “rumblings” about the incident (J.S. v. Blue Mountain School District, 2010 p. 11).

The principal later testified that he noticed a deterioration of school discipline after all of the events, and attributed this to a new culture rallying against the administration (J.S. v. Blue Mountain School District, 2010 p. 13). He also stated that he had stress-related health problems as a result of the profile and litigation.

J.S.’s parents filed suit against the district claiming that her free speech rights were violated by suspending her for creating the profile. While district court ruled against J.S. using a *Fraser* standard, the circuit court declined “...to decide whether a school official may discipline a student for her lewd, vulgar, or offensive off-campus speech that has an effect on-campus because we conclude that the profile at issue, though created off-campus, fall within the realm of student speech subject to regulation under *Tinker*” (J.S. v. Blue Mountain School District, (2010) p. 20). The court reasoned that the *Tinker* standard would apply because the school could meet the burden of showing a substantial disruption through evidence of a belief future disruption would occur.

Citing a 6th Circuit ruling that supported a coach for kicking players off the team for circulating a petition against the coach, the 3rd Circuit ruling said “*Tinker* does not require school officials to wait until the horse has left the barn before closing the door...[I]t does not require certainty, only that the forecast of substantial disruption be reasonable” (J.S. v. Blue Mountain School District, 2010 p. 22 citing Lowery v. Euverard., 497 F.3d 584, 591-92, 596 6th Cir. 2007). In fact, the court reasoned that there was no actual disruption of the school from the

MySpace profile and deemed the disruption that did occur as “minor inconveniences” (J.S. v. Blue Mountain School District, 2010 p. 23). But the court found sufficient evidence that had the school not acted swiftly there was a likelihood of future disruption.

The case exemplifies how the internet has changed the nature of what has occurred for generations. School officials are frequently the target of jokes and comments that are free from school punishment, but with the widespread use of technology those jokes and comments can spread rapidly and out of control. The court noted this, holding that off-campus speech that causes or threatens to cause a disruption “need not satisfy any geographical technicality in order to be regulated pursuant to *Tinker*” (J.S. v. Blue Mountain School District, 2010 p. 27). They clarified that in their view this is distinguishable for a potential comment made outside of school because “[we] are expressively not applying *Fraser* to conduct off school grounds, there is no risk that a vulgar comment made outside the school environment will result in school discipline absent a significant risk of a substantial disruption of the school” (J.S. v. Blue Mountain School District, 2010 p.28).

Finally, in a case that is likely not yet final due to potential appeals at the time of this writing, a Florida federal district court has ruled in favor of a student who sued her school principal after she was suspended for creating a Facebook page entitled “Ms. Sarah Phelps is the worst teacher I’ve ever met” (Evans v. Bayer, 2010 p.1). Karen Evans created a Facebook page at home that was not accessed at school, was never observed by the teacher target, and did not disrupt the school. The principal found out about the page after it was taken down. The district court relied on *Layshock*, and determined that the school district should not extend authority to the home of the girl. The court rejected the argument by the school that there was a reasonable expectation of disruption, and also rejected their claim that the speech could be regulated using

Fraser standards. The court did not shield the principal with immunity in part because they felt the speech would be protected even it were on campus speech using the *Tinker* standard, which clearly is an established standard (Evans v. Bayer, 2010).

This is a growing area of school law, and only the beginning of court cases that may ultimately re-define student speech. The *Trilogy* of cases still apply, by establishing whether there was a disruption of the school, by determining that speech was unacceptable and vulgar, or by determining that there was a legitimate educational interest of the school related to the speech. It appears that schools are not being limited by geographic considerations while restricting speech, but they must demonstrate a clear nexus under *Tinker* standards to demonstrate a disruption of the school. There is however, currently a split as to whether *Fraser* applies to off-campus internet speech.

New ‘digital age’ issues to consider

The previously discussed cases certainly do not represent all of the cases that have been litigated, but do represent the major issues school administrators must consider. Some very recent cases at the time of this writing have been decided on similar grounds but stemmed from different technology. These new ‘digital age’ cases may also shed new insight for administrators to consider.

A California Federal District Court ruled for a student in 2009 who was suspended after she and her friends made an off-campus video that contained vulgar and derogatory remarks about another student and posted it on the Web site YouTube. In J.C. v. Beverly Hills Unified School District., (2009) the court found that there was not any actual disruption of the school to justify a suspension, and although it was reasonably foreseeable that the video would make it to campus, it would be unlikely that a jury would conclude there was a risk of substantial

disruption. While the targeted girl was emotionally upset, the video did not contain any threats of violence. It was recognized that punishment against speech that may offend virtually anyone casts too wide of a net allowed under *Tinker*. There will likely be more such litigation revolving around YouTube.

In cases that appear to be privacy issues for students there are instances of students filing suits for reading their emails, social network profiles, and looking at the contents of their cell phones. A Nevada student spent 32 days in jail in 2008 for allegedly making a threat on MySpace. The student asserted that he should have First Amendment protections to communicate with a friend at night from his own home and filed suit in federal court (Hildebrand, 2009).

Two separate cell phone search cases have gained national attention. A student at Owensboro High School in Kentucky filed suit in October of 2009, alleging that school officials illegally searched text messages on his cell phone. The student alleged that his cell phone was confiscated by school officials and then had text messages read by a teacher and administrators resulting in his expulsion (Been, 2009). In Texas an 8th-grade student was placed in an alternative education program after school officials searched her cell phone. The student, Jennifer Mendoza has filed suit against the Klein Independent School District alleging the district violated their own policy. While the details of what constituted the “inappropriate” pictures have not been disclosed, the issue concerns the legality of the search (Langford, 2009).

A Mississippi court will hear the case of a student who challenged whether school officials may legally view student’s private social network accounts. Mandi Jackson and other cheerleaders were required to provide their passwords to Facebook to their cheerleading sponsor who wanted to make sure students were not drinking or participating in illegal behavior. After

the sponsor found an email correspondence containing profanity, Jackson was prohibited from cheering and her Facebook information was sent to school administrators (NSBA, 2009). The case raises several issues and could hinge in some part to the fact it deals with an extracurricular activity, as with *Earls* and *Vernonia*.

Two students filed suit in Indiana in 2009 alleging they were banned from extracurricular activities after their principal viewed MySpace photos of the girls kissing and licking a phallus-shaped lollipop and wearing lingerie decorated with dollar bills (Hull, 2009). The girls, named T.V. and M.K. in their lawsuit, insist the pictures were taken off-campus during the summer and were intended to be humorous. They deny that there was any disruption of the school (Hull, 2009).

In a growing area that will require interpretation and guidelines is the concern around what has been called “sexting” where students have sent images of themselves in various stages of undress to others. In January 2010, the U.S. Court of Appeals for the Third Circuit heard an appeal of a case that has implications for school officials across the nation. In Miller, et al. v. Skumanick (2009) two girls were charged under child pornography laws after school officials learned about photos being circulated on student cell phones. After the school sent the photos to the Wyoming County Pennsylvania District Attorney George Skumanick, Jr, he offered nineteen girls the chance to attend a five-week re-education program he designed regarding responsibilities of being a girl. If they did not agree to the class they would be charged under child pornography laws.

Sixteen of the girls chose the class, but others chose to file suit. None of the pictures included nudity, the girls won an injunction, and the case moved to the court of appeals to

determine if child pornography charges could proceed against the students (Miller, et al. v. Skumanick, 2009)

In summary, some of these cases appear to have been the result of school officials seeking to search student technology, as opposed to those cases where students used technology that became visible to others. If these administrators had not decided to view student social networking sites or searched student cell phones, these cases may not have occurred. This is also a growing and undecided area of law.

Student speech and the Heckler's Veto

The concept known as the "Heckler's Veto" should be recognized by school authorities as they take actions against students where free speech issues are present. The "heckler's veto" takes away the rights of the speaker and gives greater power to anyone whom may be offended by the speech. This is an important concept when administrators attempt to determine if student speech or actions have caused or have the potential to cause a disruption of the school. Is the potential or actual disruption the fault of the speaker or those who are creating the disruption? Student speech cannot be suppressed for the sole reason someone may be offended or create an outburst in response to the speech.

Had there been an actual disruption of the school in *Tinker*, would the result have been different? As administrators try to sort out the incidences that occur in their schools, they must consider both sides of a controversy and whether the "heckler's veto" is relevant to the circumstances. The most common could be related to individual political opinions and religious beliefs (Katz, 2007).

Katz (2007) states that while the courts recognize the difficulty for school authorities as they try to maintain school climate, protected student speech under the *Tinker* standard remains

protected unless there is an actual disruption or there are specific facts that prove a reasonable conclusion that there would be disruption. Such was the case in West v. Derby Unified School District No. 260, (2000) where the court ruled that given the school's history of racially charged fights, a student could be punished for drawing a depiction of the Confederate flag during class.

Speech cannot be suppressed by being labeled disruptive simply because it attracts attention or invites disagreement. In Barber v. Dearborn Public Schools, (2003) there was some concern that Barber's shirt calling President George W. Bush an "International Terrorist" would offend Iraqi students, but no evidence to that effect was presented. In K.D. ex rel. Dibble v. Fillmore Central School District, (2005) school officials were told they could not ban a shirt that said "ABORTION IS HOMOCIDE" until "such time, if ever" they could demonstrate facts that the shirt caused a disruption (Katz, 2007 p. 8). The school district was prohibited from having the student remove, turn inside out, or otherwise cover up her shirt.

School officials must be sensitive to the arguments surrounding the "heckler's veto" concept. For school authorities concerned with potential or actual disruption, in order to side on speech protection, one court offered "the 'heckler's veto' rule does not limit Defendants' authority to maintain order and discipline on school premises or to protect...students and faculty. *Tinker* [is] designed to prevent Defendants from punishing students who express unpopular views instead of punishing the students who react to those views in a disruptive manner" (Boyd v. County High School Gay Straight Alliance v. Board of Education, 258 F. Supp. 667 (E.D. Ky. 2003) p. 690). Similarly, in a vigorous dissent in Harper v. Poway Unified School District, (2006) 9th Circuit Judge Kozinski wrote "I must also mention the incongruity of prohibiting speech because others respond to it with violence...Maybe the right response is to expel students who attack other students on school premises" (Harper v. Poway 2006 p.1195). Further he stated

“[A]ny speech code that has at its heart avoiding offense to others gives anyone with a thin skin a heckler’s veto---something the Supreme Court has not approved in the past” (Harper v. Poway 2006 p.1207).

Calvert (2001) asserts that a heckler’s veto in effect occurred in J.S. v. Bethlehem. The conclusion that J.S. had no protected speech because of the impact on the teacher is “incredibly problematic...not only because the speech that allegedly hindered the educational process originated off-campus...but because it suggests that a single teacher’s arguably thin-skull, personal reaction to commentary posted on an *outside* Web site dictates and controls what constitutes a disruption the educational process *inside* a school. This is tantamount to a heckler’s veto---the speaker’s rights were trampled by the audience’s reaction” (Calvert, p. 249).

These social network and cell phone cases also demonstrate the fact that in their effort to keep students safe, school administrators frequently feel compelled to search students and their possessions. Different facts lead to different types of searches. Suspicion based searches are frequently conducted by school officials either acting alone or in conjunction with law enforcement. Other guidelines exist for searches conducted by school police officers or school resource officers. Administrators may also find themselves participating in searches conducted by police officers independent of the school.

Schools also conduct warrantless searches involving groups of students, such as with school-wide locker searches, or with the use of metal detectors, and drug dogs. The drug screening of groups of students are also warrantless searches. The use of preventive detention also raises Fourth Amendment issues.

Three days after Columbine, city police officers confronted fourteen students at a Texas high school where they frisked, handcuffed, led the students out of the building, and transported

them to the local municipal court. This was triggered by the discovery of a threatening letter in the high school's computer room. Several of the arrested students brought suit alleging violations of their Fourth Amendment rights. In Stockton v. City of Freeport, TX (2002) the 5th Circuit attempted to balance the school's interest against the invasiveness of detaining the students. The court noted "[i]t is difficult to conceive of a scenario in which a greater governmental interest is invoked than the threat of indiscriminate violence at school" (Stockton v. City of Freeport, TX 2002 p. 646). The court held that the school's compelling interest in maintaining a safe place of learning outweighed any Fourth Amendment rights of the students.

Torres & Chen (2006) studied the impact Columbine may have had on case outcomes related to student searches and found that there was no dramatic difference in court decisions related to student searches post-Columbine. Predictably, however, students prevailed in only one in four cases overall.

The foundation for school searches of students most frequently gets challenged and refined surrounding 1) the expectations of privacy a student is afforded; 2) the reasonableness of the search by school officials regarding the inception and/or scope of the search; 3) and searches that include a combination of actors with different roles and requirements---school police and administrators (Wolf & Moriearty, 2007). Courts will likely face increased lawsuits related to the searching of student technology, as measures are taken to deal with the increased prevalence of student "sexting" and the spread of social networks. The issue of searching student cell phones and computers will not escape Fourth Amendment challenges.

What student's choose to wear to school

The final area of discussion arguably does not relate to the issue of school violence but instead the issue of student rights. There are several important cases that were determined based

on the *Tinker* standard of school disruption or on the *Fraser* standard of indecent student speech. A few years before Columbine a federal district court upheld the suspension of a student for wearing a t-shirt that said “Drugs Suck.” The court determined that the word “suck” was vulgar (Broussard v. Sch. Bd. Of the City of Norfolk., 1992). In Boroff v. Van Wert City Board of Education., the 6th Circuit ruled against a student who wore a Marilyn Manson t-shirt that the court found not to express any political or religious viewpoint but promoted “disruptive and demoralizing values which are inconsistent with...education” (Boroff v. Van Wert., 2000 p. 465). Hudson (2003) quotes Kevin O’Shea, publisher of *The First Amendment Rights in Education* newsletter, as saying the decision is dangerous “because its rationale would permit public school officials to restrict any student speech they deem to be offensive. That is plainly not the intent of either *Tinker* or *Fraser*, nor is it consistent with the words or the spirit of the First Amendment” (p. 64).

Student dress code issues are commonplace, sometimes with facts that lead to national news reporting and court action. The results vary from across the nation .The Third Circuit in Canady v. Bossier Parish., (2001) upheld school dress codes and has become a national standard for analyzing content neutral speech. Similarly the Fifth Circuit upheld dress codes in Littlefield v. Forney Independent Sch. Dist. 268 F.3d 275 (2002) because the record indicated the uniform policy was adopted “for other legitimate reasons unrelated to the suppression of free expression (at 286).” The 4th Circuit ruled that a school district policy banning shirts depicting weapons was too broad given no evidence that there was a previous disruption of the school (Newsome v. Albemarle County School Board., 2003). In 2003 a student in Michigan successfully challenged his school district for banning his wearing of a shirt protesting the invasion of Iraq. His shirt

pictured President George W. Bush and labeled him an “International Terrorist” (Barber v. Dearborn Public Schools, 2003).

The United States Supreme Court declined to hear appeals in cases where bans on Confederate Flag displays were upheld. The 11th Circuit held that administrators should have the discretion to determine what expressions may be unsafe for the learning environment (Scott v. School Bd. Of Alachua County, 2003) and ruled against two suspended students, one whom wore a Confederate Flag t-shirt, and the other whom had a Confederate Flag on his car antenna.

In Barr v. Lafon (2008) the U.S. Supreme Court declined to overrule a 6th Circuit decision that upheld the banning of symbols that are racially divisive. The students in this case argued that their display of Confederate Flag clothing should have been allowed because the school allowed other symbols such as foreign flags, and that their shirts were not disruptive. The 6th Circuit held, however, that the policy was content-based rather than viewpoint-based and that past incidences in the school could reasonably lead to the conclusion that the shirts could cause a disruption. The 6th Circuit attempted to note clearly that they were ruling on the potential disruptive nature of the shirt and not that some students would be offended by the shirt.

In Sypniewski v. Warren Hills Regional Board of Education (2002) a number of racially charged incidences led to school officials adopting a policy banning among other items anything that may be racially divisive or causing ill will or hatred. On March 22, 2001, Thomas Sypniewski was a senior at Warren Hills Regional High School in New Jersey when he wore a t-shirt containing words by comedian Jeff Foxworthy that listed “Top 10 Reasons You Might Be a Redneck Sports Fan.” Thomas had worn the shirt several times before the policy was adopted. Even though the shirt also contained sexual innuendo and alcohol references, the school was

primarily concerned that the word “redneck” would be offensive and might lead to violence given the recent history of tension in the school.

After he refused to turn the shirt inside out, he was suspended for three days. The next day his brother wore a similar shirt to his middle school and was told the shirt was not offensive. When the school board upheld Thomas’ suspension they stated that the middle school administrators erred when they did not discipline his brother for wearing the same shirt. The brothers sued in federal court.

In a 2-1 decision, the 3rd Circuit upheld the racial harassment policy but struck down a small portion of the policy by ruling the school district violated the students’ free speech rights. While the court reasoned that no disruption of the school occurred, they noted that there was a good faith effort to prevent violence, but that student speech may be regulated only when they have a compelling and well-founded fear of disruption. The court was concerned that the language of the policy banning those things that cause “ill-will” was too broad (Sipniewski v. Warren Hills Regional Board of Education 2002).

In a case that is related to student disagreement over ideologies, the case of Harper v. Poway Unified School District (2006) provides a range of the issues school administrators face, and provided some evidence of the direction of the regulation of speech in public schools. Poway High School is located in the suburbs of San Diego, California, and in 2003 the school district allowed the Gay-Straight Alliance to hold a Day of Silence as a part of a national movement to promote tolerance of students of all sexual orientations. According to court records during that Day of Silence some students made anti-gay remarks that led to altercations (Harper v. Poway, April 2006, p.1171). Several days later a counter protest called the “Straight-Pride Day” was held where some students wore t-shirts “bearing derogatory remarks about

homosexuals” (Harper v. Poway April 2006, p. 1171). After students were asked to remove their shirts, they were suspended.

The implications of this case as it relates to school violence are somewhat minimal---the disruption of the school and possible violence resulting from disagreement with the message was not how the 9th Circuit decided the case. Instead, they argued that schools can ban speech that is directed at “students who are members of minority groups that have historically been oppressed (at 1178) or causes those minority students “to question their self-worth and their rightful place in society” (at 1178). In dissent concern was raised that school administrators were given the power to decide one side of a debate, and in this case in effect one day allowed students to express one view and then silenced the students on the other side of the debate a few days later.

Mercurio and Morse (2007) argued that the 9th Circuit ruling allowed for substantial censoring of student speech based on the speaker’s viewpoint. Not only would it be easy to muzzle one side of an issue, but it would open the door to muzzle both sides of an issue with school officials worried about the effect of either side on the other. Their view was supported by the U.S. Supreme Court when they vacated the ruling of the court (U.S. Supreme Court Order List, 2007).

Finally, the U.S. Supreme Court recently declined to review the 5th Circuit ruling against a student who was required to remove a t-shirt that said “John Edwards for President ‘08” printed on the front. The circuit court concluded that the policy banning the shirt met the content-neutral requirements of *Canady* (Palmer v. Waxahachie Indep. Sch. Dist., 2009). The student, Paul “Pete” Palmer argued that his speech rights were violated by the dress code policy, and that his case should have been decided on *Tinker* standards. The 5th Circuit, however, used standards set forth in United States v. O’Brien (1968) evaluating restrictions on expressive conduct that

involves both speech and conduct. Using this test, the speech can be regulated if the government interest is unrelated to the suppression of free expression and the restrictions are no more than necessary to further the government interest.

The rejection by the U.S. Supreme Court to hear Palmer's case concerns some civil libertarians who fear the *O'Brien* standard waters down *Tinker* and has no place in schools. The 5th Circuit opinion ruled that "so long as a dress code does not restrict student dress outside of school and provides some means to communicate their speech during school, it passes" the *O'Brien* test (Palmer v. Waxahacie Independent School District 2009 p. 512).

The suspension data

Student discipline data indicate that schools respond to hundreds of thousands of serious disciplinary issues each year (Dinkes, Kemp, & Baum, 2009). For the school year 2007-08, schools reported over 760,000 actions that called for removal of students for the remainder of the school year, or at a minimum a suspension lasting longer than 5 school days (Dinkes, Kemp, & Baum, 2009). The number of total actions went down when comparing 1999-2000 to 2007-2008, but the percentage of students suspended for fighting increased from 28% to 35% during the time period. Perhaps notable in today's zero tolerance environment, the percentage of students suspended for insubordination increased from 21% to 42% of the total during the same time period (Dinkes, Kemp, & Baum, 2009). Those nationwide totals may be affected by data from larger states. One out of five students suspended from school is from California (UCLA/IDEA, 2009), with disruption of school activities or willfully defying the authority of school personnel ranked as the number one offense causing an expulsion (UCLA/IDEA, 2009).

The Advancement Project (2010) argues that the increased level of punitive discipline coincided with the passage of the No Child Left Behind legislation. At the national level, there

were almost 250,000 more students suspended out-of-school in 2006-2007 than there were four years earlier (Advancement Project, 2010). The number of students expelled also increased nearly 15% during that same time period (Advancement Project). Not surprisingly these results are reflected in the specific data---with California increasing suspensions by 85,000 from 2005 to 2007 (California Department of Education, 2010) and Chicago Public Schools increasing their suspensions of 4 to 10 days from 5,486 in 2001-02 to 25,140 in 2007-2008 (Advancement Project, 2010, p. 23).

Commentary

Any review of actions taken in response to student behavior that has the benefit of hindsight does not have the element of the emotions present at the time of the action. There is no way to replicate the mindset or tenor of the time. In other words, it is easy to be second guessed as an administrator by others who do not have to shoulder the responsibilities, gauge the mood at the time, or make sometimes quick decisions during a crisis. There is certainly a degree, however, to many of the cases in this study, to the administrators or school districts having brought some things on to themselves. They have chosen to become involved in the ultimate power struggle with students and parents---litigation.

But such controversy is not always avoidable, and there is much for administrators to have to balance and consider. When school officials attempt to determine how serious a threat is, the perspective of the courts looking at the viewpoints of a reasonable speaker or reasonable recipient may not be completely applicable in a school setting. First of all, the concept of “reasonable teenager” may be difficult to define. Using the reasonable speaker standard, how does one determine the mindset of a teenage speaker? Must students take into account that schools are hyper-sensitive to such speech, in which case may create a chilling-effect on speech

rights? On the other hand, a similar effect may take place using the reasonable recipient standard, with students knowing their writing, comments, or artwork could get them kicked out of school based on the reaction of others---teachers, administrators, parents, and fellow students.

The reasonable recipient standard likely addresses the clashing point of protecting both student rights and safety least satisfactorily. If students know they could be punished based on the *reaction* of others, they will hold back creativity, artistic expression, and possibly worse of all, hold back from possibly revealing warning signs that they are in need of help. In each situation, just because speech makes some uncomfortable, offended, or scared, does not mean it is unprotected speech.

To whom should have James LaVine shown his poem? If schools were to say ‘please only bring us nice, clean, and happy stuff’ to look at, that would seem to be educational malpractice. English teachers would be an obvious choice for students to bring their work for review, especially writing that was voluntary and not a part of an assignment. Of course a student could provide such writing that contained threats or pleas for help, but using the right mechanisms these can be dealt with in a way that still addresses the problem yet protects freedoms.

Ninth Circuit Judge Andrew Kleinfeld dissented to the denial of an *en banc* rehearing for LaVine. He stated that “there is a notion that permeates the record in this case that because of increased violence in the schools, free speech ought to give way to increased security. Both the diagnosis and the cure are probably wrong...” (LaVine v. Blaine, 2002, p. 1187). Going further he said “[M]y purpose is to show that there is not necessarily any trade-off between speech and security. Suppression of speech may reduce security as well as liberty” (LaVine v. Blaine, 2002, p. 1189).

Concern that any spoken word could reach the campus and cause or potentially cause a disruption is high because of awareness of student violence, and today more speech will reach campuses via technology. Outside speech reaching campus has always been a possibility, but only in the current climate could it be reasonable to view that students could actually have their rights diminished---that even what they say in a home on a Saturday could become punishable speech. Only through established on-campus/off-campus standards can this be prevented. It might make things less complicated just to treat all off-campus speech through available civil and criminal recourse.

In this day and age students will perhaps be more likely to voice their opinion against a school or a teacher through the use of the internet. Absent an actual threat of violence, school officials would be wise to grow a thicker skin when they run across such speeches. Calvert (2001) properly predicted the future when he stated in 2001 that “Students create Web sites that give a metaphorical middle finger to teachers and administrators. Just as Jason Klein flipped off a teacher in a parking lot, students today are doing the same in cyberspace” (p. 275).

School officials should ask themselves how much control they really want regarding off-campus student speech or student behavior. There is a trade-off that may not be worth it for educators---the more control they seek the more potential liability they assume. This is why many educators back away from *Hazelwood*, since the more they attach themselves to the content of what a student writes, the more they are responsible for any negative consequences of the content. For example, the more student produced web pages that schools become concerned with, at what point will an assumption be made that they had better control the majority of them? What will those standards be, and what happens if the school is held responsible for not upholding the standards?

There may perhaps be no better example than what has transpired in Lower Merion Township, PA, in February, 2010. On February, 18, 2010, district superintendent Dr. Christopher McGinely released a statement regretting if a “situation caused concern or inconvenience” to anyone in the “LMSD community” (McGinely, 2010). The situation he referred to was the fact that his school district had installed and activated webcams in laptop computers checked out to students. The webcams were installed to help locate laptops that may have been lost or stolen (McGinely, 2010). After an assistant principal confronted a student about what was seen on one webcam, that student filed suit against the district and the story became national news (CBS Evening News, 2010). The district came under fire when it was revealed the district had at least 42 times, without the knowledge or consent of students or parents, activated the webcams. Blake Robbins, with his parents, filed civil action against the district in federal court (Robbins, 2010). A judge ordered the district to shut off the webcams. The involved assistant principal made an emotional statement to the press referring to the allegations as “offensive, abhorrent, and outrageous.” Blake Robbins then issued a response through his attorney entitled a “Robbins Family Press Release” pointing out the assistant principal never denied seeing the picture and only said that she wasn’t the person who turned on the webcam (Magid, 2010).

How could this not have been stopped somewhere along the line? Was there not one person to question this practice? After the assistant principal was shown a webcam image of Blake Robbins allegedly doing drugs in his own bedroom, why was there not someone who questioned if school district spying on students was worse than a kid smoking weed in his own house?

Chapter 5

Anti-violence Programs and Policies for Schools

In 1998 the United States Department of Education published “Early Warning Timely Response---A Guide to Safe Schools.” The guide was designed to be a part of an overall effort to make schools safe. The guide included sections from experts advising educators of potential warning signs of violence, tips for parents, advice for planning for violence prevention, and advice on how to respond to a crisis. In 1993 the SouthEastern Regional Vision for Education (SERVE) published a manual entitled “Reducing School Violence” providing advice on crisis management, strategies to prevent violence, and a host of resources dealing with school violence. The manual contains eight pages of additional resources and organizations dedication to violence prevention (Kadel & Follman, 1993). Based on that publication alone, a person might conclude that school violence prevention was not only a researched topic but a growing industry.

After the Columbine tragedy in 1999, the concentration of effort to prevent or combat school violence grew. Today, a “Google search” of school violence prevention yields initial results of 23,300,000 web documents, and a similar search of school violence programs yields 15,400,000 results. This study concerns the balancing of student rights with the need to keep students safe, and will focus on common strategies to prevent violence, focusing on the practices that achieve the dual goal of protecting student rights as well as student safety. This study is not intended to be a meta-analysis of the vast number of programs available, but instead its purpose is to note significant findings that can be valuable tools for school administrators seeking resources related to school violence.

The relatively early research on school violence regarding school shootings revealed results that subsequent research substantiated. Vossekuil, Reddy, & Fein (2001) reported the results of the U.S. Secret Service Safe School Initiative study providing information useful in developing prevention programs. They found that most school shooting incidences were not impulsive, that prior to most incidences the shooter told someone about it, and that other students were involved in some capacity (Vossekuil, Reddy, & Fein, 2001). Keeping this information in mind is useful when anti-violence programs are developed and implemented.

As early as 2000 some research had already concluded that critics of zero tolerance could use to argue against the practice. Russell Skiba authored a policy research report entitled *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, and raised concerns about the negative effects of the increased use of exclusionary discipline practices (Skiba, 2000). Others shortly after Columbine noted the importance of making schools smaller and becoming committed to the building the necessary relationships students need by building school communities (Raywid & Oshiyama, 2000).

Also useful is recognizing that there is no reliable and accurate profile of a school shooter (Vossekuil, Reddy, & Fein, 2001). Most attackers had previously used guns or had easy access to weapons, most had bullying involved in some capacity, and in most cases the attacker engaged in some form of behavior that caused concern on the part of school authorities. These known factors, researched at the end of the 1990's, are important when developing programs dealing with troubled youth today.

Two years before the Columbine shootings some researchers called for an increase in school violence research (Dusenbury, Falco, Lake, Brannigan, & Bosworth, 1997). At that time

they noted that key elements of school violence prevention may not be enough because schools must have the capacity to sustain them.

Variety of Programs and Organizations

The U.S. Department of Education's *Early Warning Timely Response* guide (Dwyer, Osher, & Warger, 1998) provided characteristics of a school that is safe and responsive to all children. These included the focus on academic achievement, involved families, developed links to the community, and emphasized positive relationships among students and staff. Also listed as important is providing the chance for students to discuss safety issues openly, treating students with equal respect, creating ways for students to express their concerns, and promoting good citizenship and character. The guide also provided principles for identifying the early warning signs of violence, and included this warning---“Unfortunately **there is a real danger that early warning signs will be misinterpreted** (bold emphasis from the guide, at p. 7).” They advise the first and foremost duty would be to get help for a student rather than use the warning signs “as rationale to exclude, isolate, or punish a child (at p. 8).” They also warn that violence and aggression should be understood in context, especially related to the age of the child. School officials should avoid stereotypes, and be aware of false clues based on race, socio-economic status, or academic ability.

There are numerous public and private organizations that provide information and resources to assist schools and parents attempting to prevent school violence. The Center for the Prevention of School Violence was established in 1993, and is a department of the North Carolina Juvenile Justice and Delinquency Program (CPSV, 2010). Established to provide resources for educators and parents, they have devised what they call the “Safe Schools Pyramid” comprised of promising strategies for both intervention and prevention (CPSV, 2010).

S.A.V.E. stands for Students Against Violence Everywhere, and consists of chapters that exist to involve students in school and community anti-violence efforts. Currently there are over 200,000 students in over 1800 chapters nationwide (www.nationalsave.org, 2010).

Another organization, the Center for the Study and Prevention of Violence, has been in existence since 1992 and is a part of a research program at the University of Colorado-Boulder (CSPV, 2010). They evaluate programs that are cost-effective and identify those programs that either don't work, or worse, actually cause harm. Their mission is threefold: (1) to serve as an information clearinghouse to collect research literature on the causes and prevention of violence and make it available to the public; (2) to offer technical assistance with the evaluation and development of violence prevention programs; and (3) to maintain a basic research component through data analysis on the causes of violence and the effectiveness of programs designed to prevent violence (CSPV, 2010). A communication initiative of U.S. Department of Education Office of Safe and Drug Free Schools is *The Challenge*, and is produced by the CSPV through grants. *The Challenge* provides information and resources to assist schools in creating safe and healthy environments.

A research partnership funded by the Centers for Disease Control is the Academic Centers of Excellence on Youth Violence Prevention---ACE. They are unique in that they partner research universities with community educational, judicial, and social work partners to develop plans to prevent school violence. One such program is the Harvard University Harvard Youth Violence Prevention Center which assists with violence prevention efforts in the city of Boston and surrounding communities (HYVPC, 2010).

The National Youth Violence Prevention Resource Center (NYVPRC) grew from the response to the Columbine shootings. With the major emphasis on prevention, the White House

established the Council on Youth Violence in October 1999 to coordinate the youth violence prevention efforts of all federal agencies. The NYVPRC serves to provide information about youth violence and prevention and intervention strategies and provides technical assistance to communities across the country on how to establish effective violence prevention programs. Their mission has evolved and they now serve to provide an online forum to assist with the collaboration between government and community leaders with resources, training, and technical assistance (NYVPRC, 2010). The National School Safety Center (NSSC) is now a private non-profit organization serving schools, law enforcement, and community leaders providing information and resources to create safe schools. Originally the NSSC was established in 1984 through a partnership between the Department of Justice and the Department of Education (NSSC, 2010).

With the expansion of in the internet and the need for guidance for educators, parents, and students, organizations such as The Center for Safe and Responsible Internet Use have emerged. The CSRIU provides research and outreach services to address issues of the safe and responsible use of the Internet (CSRIU, 2010).

The Consortium to Prevent School Violence began in 2006 with the intent to promote school violence prevention practices that are based on research and are proven to prevent and reduce school violence. The Consortium is a volunteer organization that in 2006 created a “position statement” on school shootings based on the collaboration of 20 researchers and practitioners in the field of school violence prevention (Consortium, 2010).

The National Alliance for Safe Schools is an example of a non-profit group that seeks to assist educators and parents in their effort to keep students safe by providing school safety assessments, safe-school plans, and training for teachers (NASS, 2010). According to their

website profile, they have been in existence since 1977 and have trained over 100,000 educators since their founding (NASS, 2010).

Consulting groups are available that focus on school violence and classroom discipline. Consulting firms provide options for school districts as they seek to prevent school violence. One example is the National School Safety and Security Services, which is a fee-based consulting firm that provides security assessments, safety training, and crisis training to school districts and law enforcement personnel (schoolsecurity.org, 2010). Another example is Discipline Associates, LLC, partnered with the Teacher Learning Center. Richard Curwin, Allen Mendler and Brian Mendler, authors of *Discipline With Dignity 3rd Edition: New Challenges, New Solutions*, provide a variety of consulting and training programs in the areas of classroom management, student motivation, and discipline, emphasizing practical, research based strategies.

Current Research of Anti-violence Programs

What Works

Several meta-analyses have concluded that universal and targeted school violence programs are effective when properly implemented (Mayer, 2008). Early intervention programs can greatly reduce future problem behaviors, and school-wide behavioral expectations taught through a variety of methods and reinforced over time help the greatest number of students (Mayer, 2008). Students must be able to practice the proper social behaviors as well.

This supports the findings articulated in the *Fall 2006 School Shootings Position Statement* released by the National Consortium of School Violence Researchers and Practitioners (NCSVPRP, 2006). Their belief statement was made in response to tragic school shootings and stated that they believed research supported four key elements for safer schools---Balance, Communication, Connectedness, and Support (NCSVPRP, 2006, p.1). They stated that a

balanced approach should include well-integrated programs that do not exclusively rely on physical security measures. Schools should regularly conduct audits to assess the physical and procedural aspects of their school from a security and safety standpoint. The position statement articulated that the most effective approach to preventing violence is a balanced one that addresses physical safety, educational practices, and programs that support social, emotional, and physical needs of students.

Research has also found that the most effective way to prevent targeted attacks is to maintain close communication and trust with students and others in the community (NCSVPRP, 2006). Research has shown that the students most at risk for violence are those who feel alienated and isolated from their school and their peers (NCSVPRP, 2006). Schools must reach out to all students, but especially to those students who are left out and marginalized not only from other students but from teachers as well.

Support programs should be offered---research-based programs at the universal (school-wide), targeted (at-risk), and intensive (most seriously at-risk) levels (NCSVPRP, p.1). Schools should have support programs for students who are bullied, and who have displayed signs of mental health concerns such as depression and anxiety.

Also similar in many aspects is the “Safe Schools Pyramid” from the Center for the Prevention of School Violence. The pyramid includes the use of SRO’s, peer mediation and conflict management, law-related education, a program to address violence outside of school, teen court, and an emphasis on the physical design of schools and the use of technologies. Their recommendations for principals are similar to those commonly promoted--- developing working relationships with parents and agencies, ensuring that parents know what to do in a crisis, knowing your own school to make certain the climate allows for students to come forward with

information, and knowing what to do if/when they do come forward (CPSV, 2010). They also stress that schools must be able to respond to incidences that happen in other parts of the country, and have plans on how to deal with the aftermath of their own incident or another school’s incident. There must be a plan in place for healing and moving forward.

The CSPV has created what they call the “Blueprints for Violence Prevention” that are programs they have identified as effective. To date they have evaluated nearly 800 programs, and have named 11 model programs and identified another 19 as the most promising (CSPV, 2010). The Blueprints staff reviews the research on violence and drug prevention programs to determine programs’ effectiveness based on evidence. They evaluate the theoretical rationale, goals and objectives, and outcome data of programs submitted for review. They give the greatest weight to programs that meet three criteria: evidence of deterrent effect with a strong research design; sustained effect; and multiple site replications (CSPV, 2010). Their model programs must meet all three criteria, with the promising programs meeting only the first criterion.

The following chart briefly summarizes the model programs.

| Program Title | Major Focus/Mission |
|-------------------------------------|---|
| Midwestern Prevention Project | Comprehensive drug abuse prevention |
| Big Brothers Big Sisters of America | Provide adult support for youth |
| Functional Family Therapy | Prevention/intervention program for youth with identified behaviors/syndromes |
| Life Skills Training | Drug prevention targeted to middle school age---using self-management and social skills |
| Multisystemic Therapy | Intensive treatment for juvenile offenders |

| | |
|--|--|
| Nurse-Family Partnership | Program for mothers bearing first child |
| Multidimensional Treatment Foster Care | Alternative to residential treatment, incarceration and hospitalization |
| Olweus Bullying Prevention Program | Universal intervention to prevent bully and victim problems |
| Promoting Alternative Thinking Strategies The Incredible Years: Parent, Teacher and Child Training Series | Program for elementary students that promotes emotional and social competencies to reduce aggression |
| Project Toward No Drug Abuse | Drug prevention program that targets high school students |

Source: Center for the Study and Prevention of Violence-CSPV 2010

Other researchers support similar findings. Peterson & Schoonover (2008) stressed that alternatives to zero-tolerance such as school-wide intervention programs such as Positive Behavior Supports have been shown by research to reduce disciplinary problems and violence, and increase student behavior. Bear, Blank, & Smith (2009) cited research that showed common characteristics that are effective in building a positive school climate and preventing school violence. Those characteristics include:

1. Positive relationship building
2. Sense of belonging
3. Positive behavioral supports (emphasis away from punitive techniques)
4. High expectations
5. Social and emotional skills
6. Parent and community involvement

7. Fairness and clarity of rules
8. School safety (the perception that the school is safe)

(CPSV, 2009 #7)

Also important are strong administrative leadership, available educational resources, small school size and student-teacher ratio, low student and faculty turnover, high teacher morale, and higher socio-economic status (Bear, Blank, & Smith, 2009). School climate is usually higher in elementary schools than high schools, as well as higher in rural schools and private schools (Bear, Blank, & Smith, 2009). Effective anti-bullying programs focus on prevention through a positive school-wide climate of mutual respect and positive expectations where the staff is fully trained and made aware of bullying issues (Bear & Blank, 2008).

Some researchers have noted that there is evidence that serious violence incidences may be less important contributors to overall perceptions of school safety than the overall school climate and student social engagement (Skiba, Simmons, Peterson, & Forde, 2006). For educators to have the best information to deal with violence prevention, they need to gather more information than drug and weapon data. Information regarding overall school climate may be more valuable (Skiba, et al. 2006).

The American Psychological Association (APA) Zero Tolerance Task Force was created in 2006 by the APA to examine evidence concerning the effects of zero tolerance policies. The task force examined assumptions underlying zero tolerance policies and used data to test those assumptions (APA, 2006). They examined research pertaining to the effects of zero tolerance with respect to child development, and the relationship to education, juvenile justice, and families. Their final report included recommendations for reforming zero tolerance policies and provided alternatives to zero tolerance practices.

Five key assumptions promoted as reasons to widen zero tolerance in schools were examined by the Task Force. The first assumption, that zero tolerance policies are needed because of rising school violence, was discredited. Studies have concluded that school violence has not been on the increase. The second assumption, that zero tolerance policies provide consistency in discipline actions was also discredited. Even with the wide-spread prevalence of zero tolerance policies evidence strongly suggests that there has not been an increase in consistency of discipline, and that suspension and expulsion rates vary a great deal between school districts (APA, 2006).

Studies have also concluded that the assumption that removing rule violators from school will lead to a better school climate is actually the opposite of what most often occurs. Schools with the highest suspension rates seem to have less satisfactory school climate ratings, and there appears to be a negative relationship between the use of suspension and school-wide achievement (APA, 2006). The fourth assumption, that swift and sure punishment would serve as a deterrent, has also been shown to have the opposite result. High rates of suspension generally predict higher future rates of behavior issues, as well as increased drop-out rates (APA, 2006).

The results are inconclusive whether the fifth assumption, that parents support zero tolerance and students feel safer with zero tolerance, is valid. While parents clearly support efforts to keep kids safe, whether they fully support the widening of zero tolerance is not known (APA, 2006).

The Task Force also noted that zero tolerance policies challenge the developmental stages that adolescents normally experience. While many discipline infractions are due to poor judgment, it is known that a hallmark of adolescence is poor judgment, thus zero tolerance

policies may go against what may better serve students by not calling for education in lieu of exclusion and punishment. When a violated policy does not threaten safety, the Task Force noted it is better to weigh the importance of the particular consequence against the potential long-term negative effects of zero tolerance policies, especially when applied to situations where juveniles may be acting *as juveniles* (emphasis added. APA, 2006).

The Task Force recommended that the use of effective research based programs reduce the risk of violence and school disruption. These include the primary prevention strategies like bullying prevention, secondary prevention measures such as the use of structured team-based threat assessments, and the tertiary methods such as restorative justice (APA, 2006).

As a follow-up to the Safe School Initiative findings in 1999, a study by Pollack, Modzeleski, & Rooney (2008) of the bystanders to student violence found six key findings. They found that there was a variance of the relationships between the bystanders to violence and those who committed violence. That some knew of attacks days and weeks ahead of time, while others only a few hours before the attacks. The bystanders shared their information inconsistently, with some not sharing at all to those who actively told others their information. An important factor is that school climate contributed to whether bystanders came forward with their information. If students felt that coming forward would result in themselves receiving consequences, they were more likely to not reveal their information.

Many bystanders did not believe the information they had and did not report what they knew. Some factors that contributed to the disbelief included that the person said it repeatedly over time, that the threat was so extreme it was not believable, that it was said in such a way it perceived to be a joke, or the threat or statement was believed to have been overheard by school personnel so students did not believe it to be serious (if the school personnel did not believe it

was serious). Bystanders misjudged the likelihood and immediacy of the situation, and felt they had more time to act and contemplate what to do. Finally, parents sometimes influenced the decision to report, with their influence ranging from parental approval to report to telling students to ‘mind their own business’ (Pollack, Modzeleski, & Rooney, 2008).

What does not Work

The CSPV (2010) stresses that many of the “get tough” types of programs do not work or are not cost effective. These included the “scared straight” programs as well as boot camps and home detention with electronic monitoring. Martinez (2009) found that the inherent nature of zero tolerance allows school districts to misuse it and cites studies that demonstrate the frequent use of suspension for behavior that does not threaten other students.

Peterson & Schoonover (2008) and Mayer (2008) summarized research on zero tolerance and noted that there has been little direct research on such policies due to uneven implementation of such policies and a lack of clear and commonly accepted language of zero tolerance definitions. They note there has yet to be a study indentifying a direct correlation between zero tolerance policies and safe schools, although a few studies indicate that zero tolerance policies do not reduce the number of discipline infractions or repeat offenders.

Zero tolerance policies, which most often result in suspension and expulsion, have been shown to have negative consequences for youth---including academic, social, and behavioral (Peterson & Schoonover, 2008). Peterson & Schoonover (2008) argue that research shows that multiple suspensions and expulsions have a negative overall effect on community crime and that the removing of the student denies the chance to provide education and treatment to possibly prevent future violence. Mayer (2008) also stated that repeated suspensions speeds the cycle of academic failure and delinquency, and punitive approaches are not effective in changing student

behavior. Curwin and Mendler (1999) have long argued that treating what may be dissimilar problems with similar disciplinary methods is unfair and destined to fail.

Research has not shown that exclusive reliance on security measures such as metal detectors, cameras, guards, and checkpoints is effective as a long-term strategy (NCSVPRP, 2006). Checklists and profiles of characteristics of students used in the effort to prevent violence are not only ineffective, but also result in misidentifying students who are not dangerous. Earlier research notes how attempts to predict violent behavior is difficult because “for every killer youth there are many others with the same behaviors or attitudes who never come close to killing their classmates” (Mulvey & Cauffman, 2001, p. 797-798).

Principals should also not assume that low discipline referrals rates mean there is a positive climate or that the use of rewards leads to a positive climate (Bear, Blank, & Smith, 2009). Schools should also avoid short term programs and initiatives based on a single factor of school climate.

Lindle (2008) crafted a position that schools have created an unintended consequence of escalating the potential for violence when they cede power to school police and school resource officers. Such practices can inhibit the development of classroom relationships, the very thing that research has shown to be among the most important and effective practices to prevent school violence. This can also create an environment where the sought remedies to prevent violence become simple and pragmatic, which again are the very actions make things worse rather than better.

There are also those who argue that the intense focus on academic progress through increased testing requirements has come at the expense of programs and attention to social development and skills (Honora & Rolle, 2002). In January, 2010, the Advancement Project

published *Test, Punish, and Push Out: How “Zero Tolerance” and High Stakes Testing Funnel Youth into the School-to-Prison Pipeline*. They argued that zero tolerance policies and testing requirements of NCLB are closely related and that they have worked together to cause an increase in student dropouts and student expulsions.

Commentary

What is interesting to note in all of the research is that there is nothing to support the rampant use of exclusionary punishment, nothing to support the increased expansion of zero tolerance policies, and nothing that points to overly broad student rights as the root cause of student violence. Yet, as legislatures, school boards, and school administrators responded to the perception of increased violence, suspension rates have increased, zero tolerance was applied to virtually every section of student behavior codes, and student rights were stripped. The question in many ways lies in attempting to predict when the pendulum will turn. Will the current trend continue or will there be a wider acceptance of the research that says a balanced approach is best? Will there be a determining test case that more fully outlines student speech issues related to internet speech? Absent movement from the courts or legislatures, it is the practitioners in the field, at school, who can do the most to achieve a balanced approach.

A great problem that zero tolerance creates is that schools take a single actor, or make policy due to a single actor, and apply policy and consequences to all students under all circumstances. This practice flies in the face of the educational rhetoric that all students are different, and that instruction should be specialized and individualized. If that is good for instruction, why does it not apply to discipline?

Clearly the warning in *Early Warning/Timely Response* was not heeded and that many ignored their cautionary message to not misinterpret warning signs, and not head too quickly to exclude students who fit some profile. Unfortunately it happens all the time.

In summary, it is clear that there are programs that schools can adopt that have been shown over time and through research that work to increase student safety that do not reduce student rights at the same time. Most studies, including those by the APA, discredit zero tolerance policies. Negative environments created through zero tolerance policies as well as policies that rely on increased use of suspension, are shown to make things worse by driving needed information about students underground. Such environments also impact education by suppressing creativity and other student expression.

Chapter 6

How Schools Can Create an Environment that Protects Student Liberties and Maintains Student Safety

Educators wishing to develop school environments that keep students safe without taking a toll on student freedom have research and resources to turn to. Appendix A is designed to be an internet toolbox for educators where links current in 2010 are listed covering a wide variety of school violence related resources. The purpose of this chapter is to provide some best practices that can be used or further explored to help educators reach the goal of keeping students safe while preserving the most student rights.

Best Practices for Maximum Student Safety and Security

Peterson & Schoonover (2008) recommended that schools should avoid automatic penalties that do not consider mitigating factors. They should not be put into school policy and should be removed if they are in school policy. A wide variety of consequences should be employed and they should be tailored to the specific circumstances and needs of the individual student. They also stated that research supports graduated categories of behavior aligned with categories of consequences being more desirable than specific punishments for each behavior. The use of exclusionary punishment (suspension & expulsion) should be minimized (Peterson & Schoonover, 2008). Most importantly an amnesty clause should be included in policy to eliminate the fear of punishment by allowing students who inadvertently bring banned objects to school or find such objects to give them to a school official (Peterson & Schoonover, 2008).

Curwin and Mendler (1999) acknowledge that zero tolerance policies are difficult to eliminate because they sound tough and appear to set high standards for behavior. But instead

they recommended a “tough as necessary” approach by having the entire school community agree that the school will be safe, that talking out differences is preferable to fighting, that all are responsible for violence prevention, and that everyone respects other’s property and person. Schools should then make rules based on those agreements, and provide a range of consequences instead of a sole consequence.

There is little debate that school officials must have some kind of authority dealing with student speech that is brought onto campus. With the advent of the internet and instant cell phone messages, virtually everything in the cyber world can at some point make it to the campus. So the question is not whether to extend the school authority beyond the school but whether it may make sense to limit that authority to the campus in the first place. Schools should be allowed to restrict some speech and still protect speech that truly has nothing to do with the school.

Should a disgruntled parent make, for example, a non-threatening yet critical speech toward a teacher or a school, there are remedies that exist to deal with such an occurrence. Perhaps the situation would call for civil liabilities or even criminal sanctions. The point, however, is that the school itself would not be allowed to punish the parent. A student under the same circumstances, however, faces the same potential civil and criminal sanctions but faces an additional school sanction as well. Calvert (2008) argues that the outside sanctions should be enough if the speech originated completely off-campus. This would not only draw a bright-line distinction between on and off campus speech, but would also maximize the speech rights of students.

School administrators must not judge all off-campus student expression as on-campus and capable of causing a potential disruption. All off-campus speech has the possibility of being brought to campus by *some* means with or without the knowledge or permission of the speaker.

Yet, if the speech finds its way to campus and the speaker faces punishment for even a *potential* disruption, there is virtually no forum left for the student to speak freely. This is not only educationally unsound, and arguably unconstitutional, it is dangerous to limit expression by keeping things underground that need to be known.

Salgado (2006) believes that the use of adult threat assessments risks missing important details due to the social, academic, and emotional differences adolescents and children have from adults. It would be an error to conclude that what may be a threat by an adult is an actual threat by a student. Useful may be a guide created jointly by The United States Secret Service and the United States Department of Education: *Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates* (Salgado, 2006). Salgado (2006) outlines a two-step process: (1) use of a clear off-campus on-campus standard, and if speech is determined to be on-campus, (2) determine if the student speech actually threatens school safety by using the United States Secret Service Threat Assessment.

The guide is a threat assessment tool that has been modified to be best applicable to school situations and students. There are eleven key questions to use in assessing a threat:

1. What are the student's motives and goals?
2. Have there been any communications suggesting ideas or intent to attack?
3. Has the subject shown inappropriate interest in [school attacks or attackers, weapons, or incidents of mass violence]?
4. Has the student engaged in attack related behaviors?
5. Does the student have the capacity to carry out an act of targeted violence?
6. Is the student experiencing hopelessness, desperation, and/or despair?

7. Does the student have a trusting relationship with at least one responsible adult?
8. Does the student see violence as an acceptable or desirable or the only way to solve problems?
9. Is the student's conversation and "story" consistent with his or her actions?
10. Are other people concerned about the student's potential for violence?
11. What circumstances might affect the likelihood of an attack? (Fein, et al. 2002, p. 63-66)

Schools should ensure a climate where students feel supported and comfortable with reporting threats. Schools should develop policies that address the aspects of threat reporting. Encourage students and staff to report and provide several avenues to report. Let it be known what type of information is shared, to whom it can be shared, and under what conditions it can be shared (Pollack, Modzeleski, & Rooney, 2008).

Everyone should pay attention to specific verbal and physical behaviors of students that serve as warning signs. Students need to feel safe that they can bring concerns to school authorities and must be provided reporting procedures. Schools must do what they can to break the "no snitching" rule students (and many parents) have. Mayer (2008) reported that a structured team-based threat assessment process works the best to identify students at-risk for violent behavior.

Anti-bullying programs should target the factors that increase the likelihood of bullying, including individual risk factors that are characteristics of bullies, such as aggressive and oppositional behavior (Bear & Blank, 2008). Not all bullies have the same characteristics, but good anti-bullying programs place a focus on the perpetrators of bullying (Bear & Blank, 2008).

There should also be focus on the school factors, including proper supervision, and a focus on home factors, such as parenting involvement and parenting skills (Bear & Blank, 2008). Anti-bullying programs should also focus on the victims, with support for students who lack support and are isolated or marginalized due to perceived differences from other students (Bear & Blank, 2008).

The visibility of educators (teachers more than security) provides the largest deterrent to misbehavior on campus (Astor, et al. 1999; Sprick, Howard, Wise, Marcum, & Haykin, 1998, as cited in Lindle, 2008). Similarly if teachers are perceived as personally connected and caring about students they can have a significant impact on school safety (Lindle, 2008). Lindle (2008) also argues that the development of community through the schools, neighborhoods, and all systems surrounding students is a political process needed to end the fear of violence.

Best Practices for Protection of Student Civil Liberty

School administrators seeking to stay within the boundaries of the constitutional rights of students should take the time to learn those boundaries. While there is still a great deal of unsettled case law, especially related to cyber speech issues, there should really be no claim for professional educators to not have known the major points such as *Tinker*. Some points for administrators to consider:

- Recognize that suspension and expulsion are easy and quick but that the more difficult task of teaching pro-social behaviors produces the best results.
- Always gather as much empirical data as possible---what was the actual disruption; what circumstances cause a belief that disruption will occur; what factors lead to conclusion that certain speech is a true threat; what are the effects on students regarding possible cyber-bullying; (and so on.)

- Determine intent. What was the intent of the student regarding a weapon possession? What was the intent of the speech? Did the student intend to bring the speech to campus? Did the student intend for the speech to be heard by the recipient? This is extremely important.
- Create awareness; create a supportive environment that invites people to come forward with threats; have outlets for students in need; provide a level of amnesty for those who self-report when they are in crisis or may have inadvertently brought a banned item to school.
- Block certain websites. This helps with on-campus and off-campus issues when a distinction is made concerning what can and cannot be accessed at school. Don't be over-reaching---have specific criteria as to what is on-campus and what is not. This should be done by a committee.
- Be wary of policy language that is overly broad. Don't reach too far from the school if you do not need to. If you cast a wide net you will always catch someone or something. Is it a good policy to police the social networks students comment on from home?
- Have policy that outlines the threshold question of when to involve law enforcement. It could be school district policy or agreement between the school and law enforcement. Include a list of crimes subject to reporting. Consider the level and circumstances of student confidentiality and what information will be exchanged. Outline who will conduct investigations on campus.
- Traditional legal framework for adults does not apply well to children or adolescents. What may get suppressed and punished may actually be harmless

while at the same time speech that provides warning signs may be ignored because it is not a true threat under an adult analysis.

- Avoid the temptation to label bullies and victims. Don't overlook the harms of cyber bullying which are the same as other forms of bullying. Do not solely focus on punishment of the bully; instead also emphasize replacement behaviors.

Worst Practices for Both

In the absence of clear guidelines, complete suppression of student speech that is unpopular with educators becomes the norm (Salgado, 2006). If students do not have acceptable outlets for frustration, they could suppress those feelings and potentially end up with violence. As the saying goes, it is better to shoot off your mouth than shoot off your gun. A danger known is much safer than a danger that goes unspoken until it is too late (Salgado, 2006, page 1375)

Because of unclear guidelines it may be easier for school officials to classify nearly everything a threat and allow it to be sorted out in court. The thought may be that it is better to err and diminish rights than it would be to err and result in violence. The problem with that approach is that students only have a set number of years in school to sort it out, and students are stripped of their rights until a court gives them back. Then it is too late. The counter argument is that for victims of violence it is also too late. By punishing speech that is not a "true threat" or that does not in actually create a material disruption of the school, not only are First Amendment rights violated, but students are made less safe by silencing the voice of a potentially violent student.

Where schools get into trouble is when they have no school-wide discipline plan and over rely on exclusionary punishments. These types of environments provide little in school safety

but they also minimize student freedoms. The worst possible scenario is created, everyone is actually less safe, and in the process have most limitations on student freedom.

Roles and Obligations of Responsible Groups

The suggestions for the following groups are not limited solely to each respective group. For example, the obligation to keep students safe is not tasked only to principals but is shared by all groups. But each group has their own level of how they contribute to the goal of student safety and student rights preservation.

Legislatures

Just as politics play a role in legislatures regarding other public education issues, school safety is no different. But legislatures should at least help school districts by establishing legal definitions, by providing necessary funding and programs, and by supporting the pro-active programs that prevent violence.

- If schools had a better chance to place their focus on on-campus speech they may be able to put more resources into prevention and less into things that have no bearing on the school. Legislatures could help schools define on-campus and off-campus speech.
- Fund and support alternatives for schools as they seek to work with troubled students. Fund research regarding the implementation of alternatives to zero tolerance (Skiba, et al. 2006). Conduct outcome research of the effectiveness of various school discipline approaches, for families as well as schools (Skiba, et al. 2006).
- Recognizing this is a political argument, legislatures should still consider where to spend their limited resources---prevention, youth, education, and various

helping agencies, or on detention, the court system, and after-the-fact law enforcement?

Boards of Education

The *Early Warning Timely Response* guide states that BOE policies should support training and ongoing consultation (Dwyer, Osher, & Warger, 1998). Boards of Education should put into place making the entire school community aware of warning signs. They should ensure that school leaders encourage others to raise their concerns and report observations to trained staff members. Boards of Education should ensure that teams of qualified personnel are trained to deal with violent or potentially violent situations. School boards should also make certain that clear policies and channels of communication are written into handbooks. Plans of intervention should be included as well as plans for crisis response teams. While that may seem obvious, Boards of Education should write sound and well developed policy that takes into account the advice of school safety and legal experts. They should encourage, develop, and support school-wide disciplinary policy that includes harassment and violence policies and due process requirements. Language should also include what is considered on-campus speech and off-campus speech.

Experts also recommend that discipline policy include a planned continuum of alternatives for students who violate the safety of the school. Zero tolerance policies should be examined, and those that are not directly related to school violence should be removed, or at least revised, to include the consideration of student intent.

Johnson (2009) suggests that research supports that school boards and superintendents rethink what “security” means in schools, and that there should be a re-examination of where resources to prevent violence are allocated. School districts should also develop school policy

that does not allow punishment for student online expression merely because of a disagreement with the content. Policy should instead concentrate on expression that is related to safety and threats (Hudson, 2006).

District Administrators

The responsibilities for district level administrators are similar to school board responsibilities. They should prioritize training for teachers and administrators in classroom management. They should seek to improve communication between schools and outside agencies, including social support and law enforcement (APA, 2006).

Providing on-going training for teachers, administrators, and other staff on how to respond to students who provide them with disturbing information or threats is essential. Training should deal with how to specifically respond to actual threats (Pollack, Modzeleski, & Rooney, 2008). District level administrators are responsible for ensuring that students are ultimately held accountable when they violate policy, but they are also responsible for ensuring that school employees uphold their responsibilities.

Principals

Principals must be concerned about respecting the rights of students as well as ensuring the safety of everyone in their building. Both goals can and should co-exist, but administrators who tend to lean toward the extreme of either position may actually jeopardize safety by allowing too much student freedom, or risk the creation of an environment so stifling that not only are student rights trampled, the school may actually be less safe. There is a risk of missing what might be a true threat if administrators hold the position that students should have complete freedom to express nearly any thought through any available means. But common sense should be practiced by not overreacting to what may be normal everyday actions of students.

The Zero Tolerance Task Force recommends that zero tolerance policies should be applied with greater flexibility, taking context and educator expertise into account (APA, 2006). Teachers and others who have direct contact with students should be the first line of communication with parents regarding discipline infractions. School discipline practices should be evaluated to ensure that the interventions, programs and practices actually work and don't serve to make things worse.

Research suggests that school environment interventions to prevent violence should focus on how students are connected to their school (Johnson, 2009). Relationship building is essential, and the principal should be the leader in developing that culture.

Expanding the number of staff involved with decisions regarding school violence is beneficial. School violence prevention leadership teams should include a wide range of stakeholders---administrators, teachers, parents, social workers, counselors, law enforcement, and support personnel (paras, secretaries, food service, custodial). The group should be charged with the task of developing safety and security procedures.

Principals should collect data such as climate surveys and respond accordingly. School-wide behavior expectations should be taught and reinforced, along with opportunities to practice the desired behaviors. Educators should take advantage of teachable moments related to the school-wide plan. Principals should grow staff buy-in through continuous training.

Hudson (2006) recommends that good practice and policy regarding online concerns involve communication with parents, educating students about the dangers and pitfalls of posting personal information, making sure that internet policies clearly define what is not allowed, and avoidance of a zero tolerance approach to internet related problems.

Some areas of concern that create a clashing point are created by policy and principals must react according to the policy---language on t-shirts, zero tolerance policies, or other rules written in code of conduct policies. Other clashing points may occur at a moment in time when administrators are forced to make a decision---for example when money is missing and a decision is made to conduct a search, or an administrator receives a tip that a student is in possession of weapons or other contraband.

Some best practices for principals include:

1. In order to prevent personal bias from possibly affecting judgment, if time permits, another opinion should be sought regarding artwork, poems, essays, and clothing articles. Just as with due process, where more due process is required as more consequence is considered, principals should follow a rule-of thumb---the higher degree of punishment being considered, the more opinions from others is advisable.
2. Determining if the behavior, language, or incident is something that may have at one time in another context been nearly ignored. This would not be an absolute test, never with bullying or other harassment, but could be a test when a young child on the playground is playing a make believe game.
3. Determine if a message on a shirt (among other things) is prohibited under a sound school policy. It is best to follow the policy, but that doesn't ensure the policy itself is not problematic. In questionable cases, a good practice would be to seek another opinion and not relying solely on one interpretation (or misinterpretation).

4. Define what constitutes a substantial disruption of the school. Is having to do extra work merely a time consuming disruption of the day or is it actually a disruption of the function of the school? Evidence that an actual disruption occurred is important, along with being able to provide evidence that current school climate or events led to a reasonable conclusion that a disruption would occur.
5. Principals should evaluate the actual or potential disruption of the school with issues that were initiated or conducted outside of school, considering the threshold issue of inside/outside of school, and the justification for taking action against students. There may be full justification, but the reasons should be documented.
6. Do not allow student characteristics or personality traits to be turned in to assumptions and predictions of behavior. Principals should get to know as much about students as they can; making sure others on the staff are doing so as well.
7. If a decision is made to conduct a student search, consider the reasonableness of the search---‘does this search make sense’---which must be done before the search begins (inception). For example, is it reasonable to search an entire classroom of students for a missing school supply...or a potential weapon? Once the decision to search has been made, how far is the school willing to go in the search (scope)?
8. If given enough time, principals should consider who should conduct a search, especially if the school has law enforcement present. The manner in which information was received that led to the question whether to search may play a key role in this decision.

9. Assess the credibility of student sources---is the source reliable; does it seem to make sense?
10. Anticipate and plan ahead to know the process of reacting to student created web pages, blogs, or other cyber means. Take threats seriously, but have a general idea in advance the limits the school is willing to place on students and how far to pursue those who break those limits.
11. Know ahead of time how you as a principal plan to handle comments directed at you via websites, instant messages, or other technologies. How far are you willing to take situations that challenge your character? What will you consider when determining typical comments that may be hurtful but not harmful, from comments that are both?
12. Consider the perspective of the intended student audience with the creation of a web page or other social network. There is the perspective of the intended student audience (juveniles) and the unintended audience (adults). School administrators should accept and acknowledge that adolescents are not adults and will not and should not be expected to behave like adults. What they find humorous that principals and teachers do not find humorous does not mean they have the power or authority to punish it.
13. Don't shortcut due process. As principals ensure the rights of students, valuable information in the interest of the school or of the student may be discovered. For example, principals may uncover errors they made that could still be correctable should there be a legal challenge to the suspension, with one error being the short cutting of due process.

Teachers

Good teachers do proper instructional planning and also are pro-active with their discipline. They should be equally pro-active and do some planning ahead of time developing some idea how they will deal with disturbing or threatening essays, pictures, and other student generated writing. Following a school plan is essential, but teachers should take the time to plan how they will react when they are faced with the decision to report such items.

Teachers have a legal mandate to report information they have regarding possible child abuse, and a disturbing essay or drawing could fall under such a requirement. However, a great deal of student generated writing might be worthy of revealing to school counselors or other authorities that does not meet the criteria under mandatory reporting laws. What needs to be remembered is that the more information educators have, the more potential violence can be prevented. At the same time, the reaction of teachers should not be one that drives information underground or that ends up suppressing student emotion or creativity. If students sense they will be punished for producing unpopular or controversial writing, the necessary environment for enhancing school safety will be lacking, and student learning will also suffer in the meantime.

Teacher visibility is also critical to student safety. Teachers should develop strong positive relationships with as many students as possible. If an assessment of a student is needed, the information about a student that is known by a teacher can be the most valuable in making the right decision on how to proceed either for or against a student.

Chapter 7

Summary

The purpose of this study was to determine if student safety can be maximized without reducing student rights. The review of the school violence literature and relevant court cases resulted in the following conclusions.

The *Trilogy* of cases, from *Tinker*, then *Fraser*, to *Hazelwood*, relates to nearly every school speech issue that administrators could face. In the future, these cases will face re-defining as cyber-speech issues are decided, but courts have been able to rely on these cases for several decades to decide student speech issues.

Cyber-speech and other technology related issues are growing, and create a new challenge for school authorities as they deal with issues involving student threats, whether the speech should be considered on-campus or off-campus, and the amount of disruption the speech has caused. This is an undecided area of the law.

Many of the most egregious zero tolerance cases have resulted from school policy that is inflexible or from school authorities who have made decisions that courts have sometimes been critical of. They have also come from decisions that could have been altered to avoid litigation.

Most of the studies discredit zero tolerance policies, and suggest that there are other alternatives available that have proven to be successful without reducing student rights. Many make suggestions that make schools safer without impacting student rights at all, such as Positive Behavior Supports.

It is also clear that negative environments can make schools less safe. Policies of exclusion have been shown to not work and are most prevalent in schools where violence levels do not decrease. In addition, environments that suppress student speech serve to make students

less safe by not allowing staff to become aware of student warning signals that could lead to intervention. Such environments also do not allow for free expression, and creativity in the classroom.

The differentiation of instruction and the acknowledgement of student diversity in the classroom are not consistent with the “one-size-fits-all” approach to student discipline. Zero tolerance policies that treat all students the same regardless of circumstances goes against what research has been shown to work in the classroom.

Administrators should develop dual thinking by considering both student rights and student safety when developing school policy. When both are taken into consideration, there is a greater likelihood that policy will be adopted that will meet both goals.

The movement away from governing a school with administrators using rules toward using law enforcement to enforce laws has seen a dramatic increase in arrests, and students going from the school to jail. Such actions have not proven to make schools safer but have contributed to the loss of student freedoms.

Finally, all stakeholders in education need to spend time focusing on both safety and student rights, with the knowledge that there are options available that ensure both and do not make things worse. For those who believe in the importance of both goals, there are choices that have been proven to work in schools.

Implications for Educators

Educators may best prevent becoming involved in the ultimate power struggle--- litigation---by the avoidance of being hyper-vigilant, overbroad, and personally over-sensitive. The intent of this study was to craft an argument for the need to balance rights and safety, outline the foundation of student legal rights in school, and show how the response to school violence

has challenged that foundation. Educators who feel strongly about the issue are provided resources to take to their schools that can help them achieve the dual goals of protecting student rights while at the same time ensure student safety.

If a school administrator reads this study and attempts to determine the “so what” question---what does any finding really mean---my answer would be that such a person should use the findings as a starting point to aim his or her school in the direction that moves away from a zero tolerance and punishment first approach to one that is balanced and relationship oriented. The “so what” question is answered by advising educators to get themselves informed about the history of student rights, get themselves in tune with the argument that those rights are important, and then seek to find the best research based programs that achieve balance and serve to make their school safer while they preserve student rights.

Research supports the notion that improvement of the school environment also improves educational outcomes (Johnson, 2009). With this in mind, balanced against NCLB and the current quest to meet standards, it only makes sense to create the best environment possible.

On a personal note, I deal with these issues each and every day. But as I examine my overall opinion as a practicing principal dealing with these issues as kids cross my path, I have to ask myself about my feelings about this topic as a whole. Where do I stand---toward the no nonsense and no compromise position of student safety at all cost; or am I somewhere in the middle, always trying to find a balance; or do I stand on the box that promotes student rights above all else? Do I take the position that as long as student safety is nearly guaranteed student rights are secondary, or should I take the position that the scale should balance on the other end of the spectrum? Or should I believe in the middle ground, because after all, my own study has proposed to find the ground where the dual goals could be attained?

Admittedly, it is a tough choice. In my daily life I do everything I can to ensure student safety, but the rights of students is always, with emphasis, on my mind. I must also admit that in practice, an outside observer could perhaps conclude that I side on the preservation of safety. My job duties call for me to be an extension of the state. But a deeper examination would no doubt conclude that in practice, I am constantly ensuring that no student is needlessly stripped of his or her rights. Ultimately, it could be said that my mission is to ensure student safety, but my goal is to help preserve the rights I know students should enjoy.

Suggestions for Further Study

More study is needed in all cyber related issues. As new technologies emerge and existing technologies expand, there is no question further clashing points will emerge as school administrators deal with the student use and misuse of technology.

This study was concerned with student/student violence, not other types of school violence or shootings that occurred at a school but could have happened anywhere. For example, there are incidences of school violence that are similar in nature to what may be termed “office shootings” that bring a different set of concerns.

Similarly, this study did not address the type of school violence seen recently in the city of Chicago, where street violence is common, student death is also tragically common, and studying the differences and similarities to the violence in Chicago to Columbine, for example, may yield some important findings.

This study also did not address the differences in suspension rates between racial groups noted by some researchers and civil libertarians. The over-all effects of zero tolerance broken into demographics of race, gender, and age groups could provide valuable information for educators to consider as they make decisions in training and program implementation.

Finally, research regarding the attitudes of students and faculties regarding the responsibility of balancing student safety and student rights may aid civil libertarians in the effort to stress the importance and value of keeping student rights in the forefront of the discussion when school safety policy is developed and enforced.

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Appendix A

Web Resource Toolbox for Principals

The following is just a small sample of internet resources that may be useful for principals or other educators as they seek information related to school violence or school discipline. The list is intended to be a quick reference, and by no means should be considered a complete source of information, but instead a starting point. All links were verified on 2/20/2010.

Arkansas Safe School Initiative

<http://www.arsafeschools.com/>

National School Safety Center

<http://www.schoolsafety.us/>

Consortium to Prevent School Violence

<http://www.preventschoolviolence.org/index.html>

Students Against Violence Everywhere (SAVE)

<http://www.nationalsave.org/index.php>

Center for Disease Control and Prevention (School Associated)

<http://www.cdc.gov/ncipc/dvp/sch-shooting.htm>

Center for Disease Control Violence Prevention

<http://www.cdc.gov/ViolencePrevention/youthviolence/>

Academic Centers of Excellence on Youth Violence Prevention

<http://www.cdc.gov/violenceprevention/ACE/index.html>

Center for the Study and Prevention of Violence

<http://www.colorado.edu/cspv/>

Blueprints Model Programs

<http://www.colorado.edu/cspv/blueprints/modelprograms.html>

Blueprints Promising Programs

<http://www.colorado.edu/cspv/blueprints/promisingprograms.html>

The Hamilton Fish Institute

<http://www.hamfish.org/>

Positive Behavioral Interventions and Supports

<http://www.pbis.org/>

Journal of School Violence

<http://web.me.com/michaelfurlong/JSV/Home.html>

Office of Juvenile Justice and Delinquency Prevention

<http://ojjdp.ncjrs.gov/>

Office of Safe and Drug-Free Schools

<http://www2.ed.gov/about/offices/list/osdfs/index.html>

Safe and Responsive Schools Framework

<http://www.indiana.edu/~safeschl/index.html>

The Equity Project at Indiana University

<http://www.ceep.indiana.edu/equity/>

Advancement Project

<http://www.advancementproject.org/>

School Health Index

<https://apps.nccd.cdc.gov/shi/default.aspx>

**The National Threat Assessment Center
(Threat Assessment Guide for Schools)**

http://www.secretservice.gov/ntac/ssi_guide.pdf