Sticks, Stones, and Digital Phones: Legal Implications and Policy Considerations of 

K-12 Bullying

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Repeat after me, “Sticks and stones may break my bones, but words will never hurt me.” The origins of this quote cannot authentically be cited because it is a mantra passed down from generation to generation, in response to the age-old problem of schoolyard bullying. However, how are school officials supposed to respond when words do hurt, when words cause an injury requiring medical attention, when words impact self-esteem and have long lasting effects, when words affect a student’s ability to perform well in school or even attend class, when words are inescapable even while in the ‘comfort’ of one’s own home, or when words are internalized to such an extent that a student’s despair results in the taking of his or her life? What used to be an expected and accepted part of growing up, akin to a rite of passage to thicken skin, has now evolved into a national debate about how the issue should be handled and by which authorities.

The purpose of this study was to develop a legal framework based on the judicial treatment of cases involving bullying in K-12. The framework was designed for school districts to use as a guide to better evaluate their bullying policies and procedures. The tricky part is districts have to be prepared for plaintiffs who are both the victim and the aggressor of bullying because both sides often find fault in how a district handles its bullying cases. This study will advance the knowledge of K-12 educators in matters of bullying and litigation by mapping the complex jurisprudence of bullying cases. Most importantly, it will inform school district officials of steps they can take to balance the competing interests of all students. The ultimate objective is to create a safe environment for students and reduce litigation, and this research will guide that process.

Although bullying is nothing new, the courts involvement is. Acts previously handled within school districts and called harassment, are more commonly heard before judges, and increasingly referred to as bullying. These civil cases are analyzed under various tests established to evaluate plaintiffs’ legal theories. There are no U.S. Supreme Court bullying cases, so the use of U.S. Supreme Court cases in this study were limited to issues peripheral to bullying but relevant to the discussion. These cases were selected because they each contributed to the overall understanding of the legal implications of K-12 bullying. Each case was briefed and analyzed. Much of the discussion focused on the courts’ written opinions because they shed light on how and why a case was decided. Above all, the cases below identified unique circumstances, such as when a case established, expanded, or restricted a test used to evaluate
claims. Additionally, these cases also highlight when specific facts of a case were given strong consideration in the courts’ ruling. Special attention was also given to cases when a court ruled in favor of the student plaintiff, so school officials may learn more about how another district’s actions or inactions contributed to the harm of a student and resulted in liability. An analysis of the cases that offered the greatest insight into bullying and how the courts viewed these issues are as follows.

*Tinker v. Des Moines School District (1969).*¹

**Facts:** *Tinker* is arguably the most commonly cited student speech case. In *Tinker*, three students were suspended by school officials who decided the students’ action to wear black armbands in protest of the Vietnam War was in violation of the school’s policy.

**Disposition:** The U.S. Supreme Court ruled 7-2 that the students should not have been suspended for wearing armbands because their actions were a form of symbolic free speech and protected under the First Amendment.

**Rational:** The Court’s opinion was written by Justice Fortas. According to Justice Fortas, the Court’s majority reversed lower court rulings because the Court was unable to identify a link between disruptive conduct, actual or potential, and the wearing of armbands.² Hence, there was no substantial interference because the act was both silent and passive in nature. To reach that conclusion, the Court established a test, which weighed whether the act of wearing armbands materially and substantially interfered with school officials’ ability to operate the school (*Tinker*, 1969). Based on the substantial disruption test, the Court determined that the act of wearing armbands in protest of the war was a passive expression of personal beliefs and a form of speech.³

Furthermore, the district did not demonstrate that the act disturbed the students’ education. Justice Fortas wrote that student expression should not be suppressed unless school officials reasonably believe the speech will materially and substantially disrupt the students’


² *Tinker*, 393 U.S. at 514.

³ *Id.* at 514.
education. It is not enough for a school to silence speech based upon fear of disturbance because, “…it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”

He believed schools should not resemble a totalitarian regime, as school officials do not have complete authority over students. This case also stood for the premise that students do not necessarily shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. Another element of this case that is often overlooked is that school officials did not prohibit other students from wearing symbols of political positions. Some students wore buttons that featured national political campaigns and cross irons, which is associated with Nazism. However, the order prohibiting the black armbands did not extend to all forms of political symbolism. Justice Fortas’s opinion was followed by a concurrence written by Justice White. In the concurring opinion, Justice White cautioned that there was a distinction between verbal communication and communicating by action or conduct. This concept was revisited in subsequent cases.

Justice Black delivered the dissenting opinion. The opinion primarily discussed his concern that the ruling transferred power from school officials to the Supreme Court, and by doing so, encouraged the judiciary’s permissiveness of defiant students. He believed that discipline was a central part of raising children to be good citizens. Children who are not controlled remain the enemy to domestic peace, which is evidenced in crimes committed by youth. According to Justice Black, students were in school for the purpose of learning, not teaching. As such, they did not posses the capacity to form an opinion on complicated matters like Vietnam, let alone attempt to educate their peers and teachers about it.

**Takeaway:** This case established the material and substantial disruption test, which is still used today. The test comes down to: Did the act interfere with school officials’ ability to operate the

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4 *Id.* at 509.

5 *Id.* at 506.

6 *Id.* at 510.

7 *Id.* at 515.

8 *Id.* at 522.
school? It also stood for the premise that students do not shed their constitutional rights at school. There is a distinction between verbal and non-verbal acts of communication. Lastly, school officials must respond in an equitable manner. You cannot silence speech just because you do not agree with it, yet allow other students to exhibit different forms of speech without being able to demonstrate a disruption.

_Bethel School District v. Fraser (1986)._9

_Facts:_ Almost 20 years after _Tinker_, the U.S. Supreme Court heard _Fraser._ This case involved a student who delivered a speech to his peers at a school assembly. During the speech, he used graphic and sexual references. The assembly was a voluntary school event, but it was attended by 600 students, all of whom were approximately 14 years of age.10 The student was suspended from school for two days and prohibited from speaking at commencement. Prior to giving the speech during the assembly, he was advised by teachers not to include the inappropriate content. He alleged that both his First Amendment and Due Process rights were violated.

_Disposition:_ The U.S. Supreme Court reversed the lower courts’ rulings and found for the school district 6-3.

_Holding:_ The Court held that the First Amendment did not prevent school officials from suspending the student based on the content of his speech.

_Rationale:_ The Court determined that it is an important function of public schools to prohibit students from using vulgar and offensive language in public forums (educational settings).11 Further, the student’s due process rights were not violated because he was aware of the student code of conduct, which stated that obscene language could subject a student to sanctions, and he was also warned by two teachers before the speech was given that he should not deliver it with obscene content.

The Court’s opinion was delivered by Justice Burger. In it, the Court ruled that, “…These fundamental values of habits and manners of civility essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the


10 _Fraser_, 478 U.S. at 677.

11 Id. at 685.
views expressed may be unpopular. But these ‘fundamental values’ must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.” 12 Thus, student speech may be limited if it compromises a “basic educational mission.” This case is significant because it holds, “…the First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings.” 13 The Court determined that if the same speech had been delivered in another setting outside of school, the student’s speech would have been protected.

In reaching the holding, the Court gave considerable weight to the role and purpose of American public schools. The Justices reflected on writings by two historians who stated that, “Public education must prepare pupils for citizenship in the Republic…It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.” 14 While citizens should have freedom to support unpopular and sometimes controversial views in schools, there should be a balanced approach so consideration is given to the personal sensibilities of others. The Court recognized that educating students involves more than just books. Schools have the responsibility of teaching values, which the Justices referred to as civilized social order. 15 Ultimately, the Court decided that the First Amendment does not stand in the way of allowing school officials to decide that a particular expression of speech undermined a school’s ‘basic educational mission.’ As was stated in the dissent of Tinker, 16 this Court’s majority found that it was better for school districts and not courts to address this matter because they are in the best position to decide the level of appropriateness for their own students.

12 Id. at 681.

13 Id. at 682.

14 Bethel v. Fraser, 478 U.S. 675, 681 (1986) at 681) (Burger, J., concurring) (quoting C. Beard & M. Beard, New Basic History of the United States 228 (1968)).

15 Id. at 683.

16 Tinker, 393 U.S. at 515.
The Court concluded that school boards have the authority to determine the level of appropriateness.

Justice Marshall wrote the dissent. His opinion was a partial dissent. While he agreed with some of the principles stated in the majority’s opinion, he disagreed with the Court’s ruling because he did not believe the district demonstrated the student’s remarks were disruptive. Justice Stevens also wrote a dissenting opinion. While Justice Stevens concurred with the majority that, “…the school—not the student—must prescribe the rules of conduct in an educational institution,” he disagreed that the student should have lost his ability to speak at the high school’s commencement for three reasons. First, Justice Stevens did not believe the student would have delivered the speech had he known that he was going to be suspended and banned from speaking at the commencement ceremony. Second, the student had a presumption in support of free expression. Third, the Court should defer to the opinions of the district and circuit court judges who are in a better position to evaluate speech in the context of norms because they are closer in proximity to the communities where particular norms exist. Interestingly, two of the Justices, White and Marshall who sat for Tinker, also heard Fraser. Justice White concurred with the majority ruling for the students in Tinker, but he voted with the majority in Fraser against the student. In Tinker, he cautioned that while he joined the Court’s opinion, he recognized a distinction between communicating by words and communicating by actions that compromise valid state interests. Justice Marshall supported student free speech in both cases.

This case is distinguishable from Tinker because the Court ruled that the student’s speech violated values rooted in public education as described above. The Court noted that there was a marked distinction between Tinker and Fraser because the Court in Tinker determined that the wearing of armbands did “not concern speech or action that intrudes upon the work of the schools or the rights of other students,” therefore passing the substantial disruption test. In the present case, the Court leaned towards the level of appropriateness of the speech, rather than

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17 Fraser, 478 U.S. at 692.
18 Fraser, at 696.
19 Bethel v. Fraser, 478 U.S. 675, 678 (1986) (Fortas, J., concurring) (citing Tinker v. Des Moines, 393 U.S. 503 (1969)).
disruption. This case was the first to establish that Tinker’s analysis is not absolute because this Court did not conduct the same test.

_Takeaway:_ Student speech may be limited if it compromises a “basic educational mission,” because the first amendment rights of students are not coextensive with the rights of adults. Thus, school officials were given leeway because the speech occurred on school grounds. School boards have the authority to determine the ‘level of appropriateness’ in student conduct situations because they are in a better position to decide what is and is not acceptable in their district.


_Facts:_ Two years after Fraser, the Court again attempted to further clarify the limitations of student speech. In this case, the students took a journalism class and were responsible for writing and editing the school newspaper.21 The paper was distributed to students, staff, and members of the community. Printing and distribution costs were paid by the Board of Education. One of the articles detailed three Hazelwood high school students’ experience with pregnancy and the impact of their parents’ divorce. The stories used false names to protect the identities of the students interviewed. Three days before the paper was to be published, the journalism instructor took the proofs to the principal of the high school. The principal objected to printing the two pages in which the articles appeared, along with a few other stories that appeared on the same page. The principal contended that the story’s reference to sexual activity and birth control were inappropriate topics for a paper viewed by younger students. He was also concerned about maintaining the confidentiality of the students interviewed. The principal claimed to be equally concerned that the parents of the students interviewed about divorce did not have an opportunity to respond to comments made by their children in the article.22

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21 _Kuhlmeier_, 478 U.S. at 262.

22 _Id._ at 263.
**Holding:** The Court held that the school was not a public forum and the school had a legitimate interest to protect the privacy of those written about in the articles. Thus students’ First Amendment rights were not violated. Consistent with *Fraser*, the Court ruled 5-3 in favor of the school district. The Court found that the principal’s decision not to print two pages of the school newspaper was not in violation of the students’ First Amendment right because the First Amendment does not require schools to support or promote perspectives of student speech.

**Rationale:** The Court’s opinion was written by Justice White. Embedded in his opinion was the idea that, “…the determination of what manner of speech in the classroom or in school assembly is inappropriate and properly rests with the school board.” Thus the Court should not decide these matters because they are best addressed with agents of the state and public schools. With that being said, since the Court did grant certiorari, the primary issue before the Court had to do with whether or not the school is a public forum. The Court held school facilities could only be identified as a public forum when school officials have “by policy or practice” permitted access to the facility for “indiscriminate use by the general public.” If the facilities have been used for intended purposes, then no public forum has been created and school officials may then reasonably restrict speech. The Court determined that, “…educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” Similar to *Fraser*, this case stood for the principle that schools can regulate some student speech even though that same speech may not have been regulated outside of school. It also reconfirms that the *Tinker* analysis is not absolute because there was no “substantial disruption” test applied to the analysis.

**Takeaway:** Student speech can be regulated when it is related to the mission of education.

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DeShaney v. Winnebago (1989).^{26}

**Facts:** A male child was allegedly abused by his birth father. The first documented incident was in 1982 when he was two years of age. During the next two years, he was admitted to the hospital on at least four different occasions with injuries consistent with abuse. Social services was contacted and an investigation was conducted. Although there was insufficient evidence of child abuse for the court to retain custody of Petitioner, the court required that specific measures be taken to further protect him. The father was required to enroll his son in preschool and attend counseling services. The court even assigned a caseworker to make monthly visits, at which time the worker observed visible signs of suspicious injuries. In March 1984, the boy was beaten so bad that he ended up in a coma and sustained brain damage, which caused him to be profoundly retarded. He was expected to spend the remainder of his life in an institution for those with severe handicaps.^^27

**Issue:** Did the department of social services, and individual employees deprive the boy of liberty without due process by not intervening to protect him against foreseeable harm?

**Holding:** The U.S. Supreme Court held that the county agency had no duty under the Fourteenth Amendment to protect the boy from abuse at the hands of a private actor, his father, and the state did not create the danger.

**Rationale:** The Court’s opinion was delivered by Chief Justice Rehnquist. He summarized the facts of the case under the scrutiny of the Fourteenth Amendment, which he described as inconsistent with the purpose of the Amendment. He wrote that the purpose of the Amendment, “…was to protect the people from the State, not to ensure that the State protected them from each other.”^{28} The Act was to prevent an abuse of power and oppression by the government. According to the Justice, the Act does not, 1) impose a duty on the State to protect citizen against

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^{26} DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989).

^{27} DeShaney v. Winnebago, 489 U.S at 192-93.

^{28} Id. at 196.
harm from private actors, 2) constitute a violation if the State fails to protect despite the fact that they may have had knowledge of danger or may have helped at some point because a special relationship is not automatically created, and 3) transform every tort into a constitutional violation. Nothing in the Substantive Due Process Clause mandates that a State must protect a citizen against invasions from private actors. Thus, “In the substantive due process analysis, it is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the “deprivation of liberty” triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.” 29 Chief Justice recognized a claim, which was not raised, though applicable to the facts. The Restatement (Second) of Torts § 323, also known as the Special Relationship Theory, states, “…one who undertakes to render services to another may in some circumstances be liable for doing so in a negligent fashion.” 30 However, even this claim failed to establish liability as the Court determined that not every claim filed under the Due Process Clause of the Fourteenth Amendment can “transform every tort committed by a state actor into a constitutional violation.” 31 Above all, while the Court recognized that the state may have known to some extent the danger the child faced, it did not create the danger, the state did not make him more vulnerable, and the State did not put him in a worse position than the child would have found himself had the State not acted at all. Along those same lines, the Court acknowledged that though it appears the State stood idle and did nothing when suspicious behavior would suggest an intervention, had the State acted more intentionally and swiftly, they would have likely found themselves in the same predicament. Similar to damned if you do, damned if you don’t, the State was likely to have been accused of violating the father’s Due Process rights for improperly removing the child too soon.

29 Id. at 200.

30 DeShaney v. Winnebago, 489 U.S. 189, 202 (1989) (Rehnquist, J., concurring) (quoting Restatement (Second) of Torts § 323 (1965)).

Lastly, the Chief Justice wrote about each state having the freedom to decide their own system of liability based on their values. States, such as the one where this incident took place, who…“prefer a system of liability which would place the State and its officials the responsibility for failure to act in situations…they may create such a system…by changing the tort law…but they should not have it thrust upon them by this Court’s expansion of the Due Process Clause of the Fourteenth Amendment.”

The Court’s dissent was written by Justices Brennan and Blackmun. Justice Brennan focused on how the Due Process was enacted to protect citizens from government abuses of power and oppression. However, from his perspective, the Court fails to consider that inactions can be just as much of an abuse of power as some actions. Further, oppression can occur when a State has a duty to respond and that responsibility is ignored. The state of Wisconsin established a child-welfare system to investigate and respond to situations like child abuse. According to the Justice, they had the ultimate source of power in what was to happen to the child; not law enforcement, schools, parents, etc. Thus, inaction on their part is even more egregious because they were not only in the best position to help the child, they were mandated to do so by state law and the structure of that governmental agency. Justice Blackmun concluded the dissent by speaking to a higher authority, the moral authority. He recounted a passage in a text, which read, “We will make mistakes if we go forward, but doing nothing can be the worst mistake. What is required of us is moral ambition. Until our composite sketch becomes a true portrait of humanity we must live with our uncertainty; we will grope; we will struggle, and our compassion may be our only guide and comfort.”

The primary issue with the dissent comes down to inaction which is in their opinion is tantamount to abuse and oppression. The issue of action vs. inaction foreshadowed how lower courts would struggle with school district responses to future bullying cases that relied on the Fourteenth Amendment.

**Takeaway:** School officials are not liable under the Fourteenth Amendment if they: (a) did not create the danger; (b) make the victim more vulnerable to abuse, or (c) put the victim in an even

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32 *Id.* at 203.

33 *Id.* at 213.
worse off position by taking action. The two exceptions under the Fourteenth Amendment include if school officials have a duty or a special relationship.

*Nabozny v. Podlesny (1996).*  

**Facts:** A seventh grade gay male student was verbally harassed and physically assaulted by his peers. He was regularly called names like ‘faggot’ and spat on. He was also subjected to a mock rape where he was held down. He ran home shortly after the offense and the attack was reported. Numerous complaints were made to school officials and the names of the perpetrators were provided, but nothing was ever done. School officials made comments to him, which suggested that he deserved bad treatment because of his sexuality. Although the district had an anti-harassment policy in place that it enforced on a discretionary basis, it was not enforced for this student because of his gender and sexual orientation. Instead of reprimanding the bullies, school officials advised Nabozny to take time away from school. He was gone for one and a half weeks. The bullying continued into his eighth grade year, during which time he attempted suicide and was hospitalized. Eventually he transferred to a school outside of the district, but he returned in the ninth grade. He was placed in a special education class, but some of his main tormentors were also in the special education class. Attacks which resulted in serious injury and other aggressive acts, continued until the eleventh grade when his family relocated to another state. He was eventually diagnosed with Post Traumatic Stress Disorder.*

**Issues:** Did the district owe a duty to Nabozny under the 14th amendment Due Process Clause to protect him from harassment, and was he fairly treated based on his gender and sexual orientation?

**Holding:** The district violated Nabozny’s 14th amendment equal protection right by discriminating against him based on gender and sexual orientation, but his due process rights were not violated.

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34 *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

35 *Nabozny*, 92 F.3d at 451-52.
Rationale: The court determined that Nabozny was treated differently than other students who experienced harassment because he was able to demonstrate that the discriminatory treatment was motivated by his sexual orientation. The district admitted that they had an anti-bullying policy, which it enforced. Yet, despite years of documented harassment, the school could not provide any evidence of steps they had taken to address bullying other than saying that they had talked to students. Females who were physically assaulted by male students, and females who were harassed and called names such as ‘slut’ had their concerns addressed by school officials and the involved students were reprimanded. The court said, “It is well settled law that departures from established practices may evidence discriminatory intent.” 36 The school officials were not eligible for qualified immunity because the court found that a reasonable school official should have known that his/her actions, given that the law regarding equal protection was established at the time of the offenses, was unlawful. Because school officials had no duty to act, and Nabozny could not show the court how the district placed him in danger or increased the threat of harm by failing to act, his Due Process claim failed.

Takeaway: Districts must enforce their policies and procedures because it suggests discriminatory intent when the policy is not equitably applied. School officials must respond to bullying and student misconduct the same regardless of the gender or sexual orientation of the victim or perpetrator.


Facts: A female high school student had a sexual relationship with her male teacher. No one knew of the relationship until the police caught them in the act and arrested the teacher. The teacher was fired from the district. Prior to the teacher being fired, two parents had complained about the sexual undertones of comments made by the teacher to his students. Their complaints


were not communicated by the principal to the superintendent. The school did not have reporting procedures for sexual harassment in place at the time of these events.\textsuperscript{38}

\textit{Issues:} Can a student be awarded damages under Title IX for the sexual harassment of a student by one of the district’s teachers?

\textit{Holding:} Damages may not be recovered for teacher-student sexual harassment under Title IX unless a school official who is in the position to remedy the situation has actual notice of the conduct and is deliberately indifferent to the misconduct.

\textit{Rationale:} The student sought damages under the legal theories of respondent superior and constructive notice. The U.S. Supreme Court rejected those theories and ruled that, “…an official of the school district who at a minimum has authority to institute corrective measures on the district’s behalf has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.”\textsuperscript{39} In this case, no one knew of the student-teacher sexual relationship until the arrest so the Court deemed it unreasonable for the district to have to pay damages for a teacher’s indiscretion for the sole reason that the teacher was employed by the district.

\textit{Takeaway:} It is important to have a reporting procedure in place and communicate them to staff, students, and students’ guardians.

\textit{Davis v. Monroe County Board of Education (1999).}\textsuperscript{40}

\textit{Facts:} A fifth grade girl was sexually harassed by a fifth grade male student over a five month period. Each incident was reported to teachers and the principal but the aggressor was never disciplined, no effort was made to separate the two students or intervene, and the district did not have a policy on anti-harassment. Other girls complained of the same student’s behavior and he

\textsuperscript{38} \textit{Gesber}, 524 U.S. at 277-78.

\textsuperscript{39} \textit{Id.} at 277.

\textsuperscript{40} \textit{Davis v. Monroe County Bd. of Educ.}, 526 U.S. 629 (1999).
was eventually criminally charged and convicted for his conduct. As a result of the harassment, the victim’s grades declined and she had suicidal thoughts.  

**Issues:** Can private damages be brought against a district for student on student harassment under Title IX?

**Holding:** Funding recipients can be liable for damages when they: 1) are deliberately indifferent to the harassment; 2) have actual knowledge; 3) harassment is severe, pervasive, and objectionably offensive; 4) and it deprives the victim access to educational opportunities or benefits offered by the district.

**Rationale:** The Court’s opinion was delivered by Justice O’Connor. This case established a test to determine liability in Title IX cases. Yet, its applicability extends to similar student conduct cases such as bullying and issues related to students with disabilities. Justice O’Connor wrote in detail about the need for the funding recipient to have some control over the alleged harassment; meaning that before any consideration can be given as to whether or not a district was deliberately indifferent, it must first be established that they had the authority to take remedial action against the harassment. Secondly, in order for the district to be liable for damages, the plaintiff has to establish that the districts deliberate indifference ‘subjects’ students to harassment. Justice O’Connor stated that the level of deliberate indifference must, “cause [student] to undergo” harassment or “make them liable or vulnerable” to it.  

Furthermore, Justice O’Connor recognized that schools and adult workplaces are dissimilar, and children may behave in a manner that would be unacceptable for adults. Because of the difference in age and maturity, she reasoned, “It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments

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41 *Davis*, 526 U.S. at 633-35.

42 *Id.* at 645.
targeted differences in gender.” The harassment has to rise to the level of seriousness where it has a systematic effect of denying the victim equal access to an educational program or activity. Accordingly, it is possible, but difficult to meet this scrutiny based on a single incident of harassment. What is referred to as a ‘potential link’ must also be established to demonstrate how the harassment deprived the student of an education. In this case, the student’s grades did decline, but that alone was not enough evidence to suggest an educational deprivation.

The dissent, written by Justice Kennedy, presented several arguments counter to the concurring opinion. The arguments ranged from describing how children lack capacity to truly understand their actions, to how the ruling violated the Spending Clause. However, a great portion of the dissent discussed how much of a burden the Court’s decision could potentially place on school districts. The dissenters touched on how districts are often required to educate all students, sometimes even when a student has been suspended or expelled. Districts are also responsible for educating students with special needs under IDEA. Due to their disabilities, there are limitations on how a district can reprimand their misconduct. According to Justice Kennedy, when one considers the limited resources most districts have, taken in conjunction with obstacles presented with educating and ensuring the well being of countless students, including those with challenging needs to meet, it is a daunting task. Lastly, the Court recognized a need for Title IX, but cautioned about the unintended impact of school districts striving to conform to state and federal laws. It read, “The prospect of unlimited Title IX liability will, in all likelihood, breed a climate of fear that encourages school administrators to label even the most innocuous of childish conduct sexual harassment. It would appear to be no coincidence that, not long after the DOE issued its proposed policy guidance warning that schools could be liable for peer sexual harassment in the fall of 1996, a 6-year old boy who kissed a female classmate on the cheek for sexual harassment, on the theory that “unwelcome is unwelcome at any age.” Additionally examples were described, by Justice Kennedy when he went on to note that, “A week later, a

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43 Id. at 651-52.

44 Id. at 664.

New York school suspended a second-grader who kissed a classmate and ripped a button off her skirt…The second grader said that he got the idea from his favorite book ‘Corduroy,’ about a bear with a missing button.” These are just two examples of what the dissenting Court believed was a danger of assigning liability for damages under Title IX, for acts committed by immature students.

*Takeaway:* Funding recipients can be liable for damages when they: 1) are deliberately indifferent to the harassment; 2) have actual knowledge; 3) harassment is severe, pervasive, and objectionably offensive; 4) and it deprives the victim access to educational opportunities or benefits offered by the district. Childish behavior such as teasing and pushing do not rise to the level of harassment under Title IX. A ‘potential link’ must also be established to demonstrate the educational deprivation and harassment.

*Manfredi v. Mount Vernon Board of Education (2000).*

*Facts:* A second grade female student was hit, pushed, and harassed by a male classmate. The boy never said anything sexual to her. He did however once touch her in a ‘sexual way’ when he touched her vagina for a second while she was fully clothed. The female student and her parents complained to the school about the boy but they were unsatisfied with how the school handled their complaints. The mother claimed in a letter to school officials that her daughter’s grades had dropped, though the student finished the school year by successfully completing her classes. There is no evidence that she missed school due to the harassment, and she did not see a therapist until after the lawsuit was filed, which was a year and a half after the harassment stopped.

*Issues:* Do the material facts of this case align with Title IX?

*Holding:* The student and her parents were unable to demonstrate any sexual harassment.

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Rationale: The court surmised, “...Davis will inevitably be applied to justify lawsuits over far less heinous behavior—like this one.” 49 This case reflects exactly what Justice Kennedy warned against in his dissent in Davis. He cautioned that the ruling in Davis would open the floodgates of litigation and attempt to hold school districts liable for misconduct of young children whose behavior was more of a reflection of their level of maturity rather than that of sexual deviants. In the present case, the boy ‘teased’ and ‘bothered’ his female classmate. While he did touch her vagina on one occasion, the Court in Davis instructed that an isolated incident of peer sexual harassment is unlikely to deny equal access to an education. This was not how Congress intended Title IX to be used, as most single instances do not rise to the level of sexual harassment. Furthermore, school officials allowed the female student to move to another class as soon as they were informed one of her peers had touched her in an inappropriate manner. Because she did not establish acts of sexual harassment, it was unnecessary for the court to consider whether the school was indifferent, or if the acts were pervasive. This court reasoned similar to the dissent in Davis, and concluded, “…A young girl was subjected to hours of questioning about painful childhood taunts and teasing. And countless hours of school resources (not to mention taxpayer funds) were expended because the floodgates of federal litigation in the classroom and the schoolyard have been opened. Surely, such a use of educational and judicial resources diminishes the real gains in educational opportunities for women and girls that haven been brought about as a result of Title IX.” 50

Takeaway: Isolated incidents and those that reflect childish behavior do not amount to Title IX violations.


Facts: A male student was verbally and physically bullied for eleven years because of his gender and perceived sexual orientation. The acts included a simulated rape, being kicked and

49 Id. at 453.

50 Id. at 456.

punched, inappropriate touching of his buttocks, and he was super glued to a chair. He documented how he was denied an education by not being able to participate in extra curricular activities, eat in the cafeteria with other students, go to the bathroom at school, ride the school bus, and he missed school to avoid his tormentors. The misconduct was reported to several school officials, but with the exception of one incident, the aggressors only received a verbal reprimand. The male student was offered access to school counselors and he was required on a few occasions to attend a group session to discuss harassment with some of the aggressors, which he did not want to attend because it was during the same time as his favorite class. His parents were forced to drive him to school because even though school officials banned the bullies from riding the bus, school officials relented when the parents of the bullies complained about their hardship of getting the kids to school.\textsuperscript{52}

The male student was able to demonstrate that female students who complained of similar harassment had their complaints investigated and students were disciplined. Additionally, the female victims and the parents of the victims were informed of the harassment and notified of what disciplinary actions were taken against their aggressors.\textsuperscript{53} The student transferred to another school after he completed the 10\textsuperscript{th} grade.

\textit{Issues:} Did the school district violate the student’s rights under the 14\textsuperscript{th} Amendment (Due Process and Equal Protection), and Title IX?

\textit{Holding:} Defendant’s motion for summary judgment was denied on all three claims.

\textit{Rationale:} The court determined that he received disparate treatment because students were permitted to assault him on the basis of his sexual orientation. Although there were anti-harassment policies, the policies were inconsistently followed and applied.

\textit{Takeaway:} Policies must be consistently followed and applied. It is not enough to respond in the same manner if you keep getting the same results. If a staff member implemented a plan to minimize harassment, those changes must be enforced and not arbitrarily changed because it

\textsuperscript{52} Montgomery, 109 F. Supp. 2d at 1083-86.

\textsuperscript{53} Id. at 1097.
inconveniences the bully or his/her family. Also, do not implement changes that cause additional harm to the student or deny them of an educational benefit they enjoy such as a certain class.


Facts: A female student in the sixth grade was bullied and sexually harassed almost every day. Students regularly pushed her, called her names, destroyed her property, touched her body and propositioned her for sexual favors. Most, but not all, of the misconduct was reported on numerous occasions and to different officials. School officials talked to the aggressors, but nothing more was ever done. She filed a complaint, which alleged Title IX violations, but no action was taken in response to the complaint. She also spent the last few weeks of the school year at home so that she would not have to encounter her tormentors. No provisions were made to intervene, and the harassment continued when the new school year commenced. At the start of the new year, students heard a presentation about sexual harassment and teachers received training on it. She was eventually diagnosed with depression. Her case was heard in front of a jury and she received damages.

Issues: Did the actions/inactions of the school district amount to a Title IX violation?

Holding: The district was deliberately indifferent to the sexual harassment and bullying to which the student was subjected.

Rationale: Previous cases have explicitly stated that it is insufficient for one incident of harassment to satisfy a Title IX claim. However, this case bucked that standard and the court stated that a single incident could satisfy a claim. For that reason, the student in the present case overcame that burden because she and her mother proffered enough evidence to suggest that the sexual harassment she endured was not only pervasive, it was also severe, thus denying her of an education. The court acknowledged precedent established in Davis, and stated that even

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55 Vance, 231 F.3d, 256-57

56 Id. at 259.
though Title IX does not mandate that a district respond in a certain manner to student harassment, the district must still respond in a reasonable manner. The district’s response was unreasonable because they continued to use the same ineffective strategies in response to her complaints, with the same results. The court held that once a district learns that its methods are inadequate, they are required to take additional steps. This does not mean that districts are expected to remedy sexual harassment, but at a minimum, they are expected to make an effort to investigate and stop the harassment.\(^{57}\) Otherwise, the action or inaction amounts to a deliberate indifference. The judge who wrote the opinion admonished the district because of their inaction. The judge wrote that the district could have disciplined the students, separated the students, or established a sexual harassment policy or procedure, but none of this was done. For these reasons, the district was liable for damages under Title IX.

**Takeaway:** One incident can satisfy a Title IX claim. School officials must take reasonable steps to end harassment.

*J.S. v. Bethlehem Area School District (2002).*\(^ {58}\)

**Facts:** A male eighth grade student created a website that targeted school officials. The site was created on his home computer. The homepage had a disclaimer, which stated that the content of the site was not to be shared with school administrators, and the site’s visitors were not to be adults connected to the school. The webpage contained profane and threatening comments. One of the captions was about why a specific teacher should die, which was followed by a prompt of how to submit a financial contribution to hire a hitman. Administrators and students viewed the site, and the FBI was contacted to help identify the author of the site. The student was identified, but law enforcement declined to press charges. The teacher who was the subject of the hitman request left on medical leave due to fear and anxiety from the webpage. Even after he was identified as the creator of the site, the student remained at school from the time the webpage was created in May through the end of the school year. He also continued to attend fieldtrips and

\(^{57}\) *Id.* at 260.

participated in extra-curricular activities. He was not punished during the academic year and he was not evaluated for psychological issues. However, the student received a letter from the school at the end of July, which stated that he was going to be suspended at the beginning of the school year and expulsion proceedings were also in works.59

Issue: Did the school violate the student’s First Amendment rights by initiating disciplinary proceedings for a website created off campus?

Holding: The district did not violate the student’s First Amendment right to freedom of speech.

Rationale: The court wrote that it decided this case under the pretense that, “…considers and balances both the constitutional rights of the student with the preservation of order and a proper educational environment.”60 The district argued that they did not violate the student’s First Amendment right to freedom of speech because the website constituted a true threat based on the totality of the circumstances, thus it was not protected speech. The court held that even if the speech was not a true threat, his rights might not have been violated if the speech was protected for another reason such as it caused a substantial disruption. Ultimately, the court ruled the speech was not a true threat because, “…it did not reflect a serious intent to inflict harm.”61 The webpage focused on the teacher’s physical attributes. The fact that the student was allowed to remain at school and fully participate even after his identify was discovered further suggests that school officials did not see it as a true threat because no immediate steps were taken to discipline or remove the student. The court empathized with the physical and psychological toll the website had on the teacher, especially in light of school violence like Columbine, but the contents of the webpage did not rise to the level of a true threat. Once the court determined the speech was not a true threat, they evaluated whether or not disciplinary action was still constitutional given the need to protect the school environment.

The trilogy of student first amendment cases were analyzed and the court applied a substantial disruption test. The first consideration given by the court to the facts of the case was

59 Bethlehem, 569 Pa. at 643-47.

60 Id. at 652.

61 Id. at 658.
to decide if the speech was on or off campus. The court ruled that even though the webpage was created off campus, the speech was considered to have occurred on-campus because there was a sufficient nexus between the webpage and the school. It was accessed at school by the site’s creator, shown to students, and the targeted audience (both viewers of the site and people featured on the site) was all from the same school district. Once the location of the speech was identified, the court considered the form of speech, the impact of the speech, the environment the speech was given, and if the speech was school sponsored.\textsuperscript{62} With that in mind, the court concluded that there was a substantial disruption. A teacher left on medical leave, three substitute teachers had to cover her classes, which compromised the quality of education for the students in her classroom, students feared for their safety, morale was low, and parents had complaints and concerns for the safety of their children.

\textit{Takeaway:} If speech is believed to be a true threat, school officials must take immediate action against the student. Off campus speech can be ruled on campus speech if it greatly impacts students and the school community as a whole.

\textit{Lindsley v. Girard School District} (2002).\textsuperscript{63}

\textit{Facts:} A female seventh grade student wore clothing with religious expressions almost daily. She was regularly verbally and physically harassed. She was also threatened with a knife by one of her peers. These incidents were reported to school officials, but according to her, the offenders were not effectively disciplined. Some school officials made comments to her, which suggested that the attention she received by other students was warranted because it was unnecessary for her to declare her Christianity in such a way. The student’s grades declined, she had nightmares of being attacked, and she missed several days of school.\textsuperscript{64}

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\textsuperscript{62} \textit{Id.} at 666.
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\textsuperscript{64} \textit{Lindsley}, 213 F. Supp. 2d at 526-27.
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Issues: Did the school violate her First Amendment rights to freedom of expression by not adequately responding to the treatment she received for wearing clothing with religious messages?

Holding: The student’s freedom of expression was not violated.

Rationale: This case is unique because of the claims, albeit unsuccessful, asserted by the student. While Equal Protection, Due Process, and IDEA were commonly argued in harassment and bullying cases researched for this study, the First Amendment freedom of speech claim was usually only argued in response to discipline taken against a student. However, her claim was unsuccessful because she did not demonstrate that she was prohibited from wearing clothing with religious messages. Nor did she demonstrate that the school’s response to her complaints about mistreatment discourage her from wearing the clothing. Had she proffered evidence in support of that theory, she would have demonstrated a chilling effect on her freedom of expression, thereby, violating her First Amendment. Because she acknowledged that she wore religious clothing everyday, she undermined her First Amendment argument that her freedom of expression was chilled.

Takeaway: School officials have to be mindful of situations when they can lawfully silence speech, but they also have to give equal consideration to how their actions or inactions silence a student’s freedom of expression when he or she does not feel comfortable expressing himself or herself because of ridicule from peers.


Facts: Two students endured anti-gay harassment by their peers for seven years. They were verbally and physically abused. During one incident, one of the two student’s ribs were bruised when he was beaten by six students. He was required to be hospitalized.

65 Id. at 531.

66 Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130 (9th Cir. 2003).
Issues: Did school officials violate the Plaintiff’s Fourteenth Amendment Equal Protection Rights?

Holding: The court did not grant school officials qualified immunity for any of the claims because the law was established at the time of the incidents, and the two students were able to demonstrate that school officials demonstrated a deliberate indifference due to their sexual orientation.

Rationale: One argument asserted by the students was that the school district did not adequately train teachers, staff and students about the District’s anti-harassment policies. Specifically, the training and policy itself focused on sexual harassment, but it did not include a discussion that dealt with issues related to sexual orientation. In light of the fact that the students endured harassment, which was reported for seven years, the District should have done a better job training students, staff, and teachers about this form of discrimination. Because the law was established during the time the students experienced this harassment, the court had an expectation that the district not only have a policy, they should have enforced it, and trained the school community on the issues.

Takeaway: All schools should have a bullying and anti-harassment policy. It also must be enforced and people must be trained on how to identify, respond and prevent it. This is especially the case when harassment has been an issue at a given school.


Facts: A male eighth grade student, who had the intellectual capacity of a third grader, was sodomized by a male peer in the bathroom of their school before the start of the school day. The school entrance was unlocked at 7:00am and the incident occurred about 7:15am. Several students (approximately 90) arrived between 7:15-7:30 everyday for an early morning gym class,

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67 Flores, 324 F.3d at 1133.

68 Id. at 1136.

which began at 7:30. The attacker arrived as early as 6:30am on some mornings. The official school day did not start until 8:30 but the principal and other teachers were well aware of how early some students arrived. Additionally, they were also aware that the student victim arrived at 7:20am every morning. Teachers were not assigned to supervise students or parts of the school, except for the gym program. Students were not confined to one area of the school. After the attack, the student attempted suicide, and he was diagnosed with both posttraumatic stress disorder and major depression. He was awarded a two million dollar settlement.\textsuperscript{70}

\textit{Issues}: Was the school negligent?

\textit{Holding}: The court held that it was the duty of school officials to supervise students, even during non-instructional times because they knowingly allowed students to have access to the building before school hours but without proper supervision.

\textit{Rationale}: It was reasonably foreseeable, actually inevitable, that a student would be seriously harmed given the lack of supervision. Because there were students, such as the victim, with profound special needs, there was an even greater chance that something bad would occur. No adult was responsible for providing supervision, the school did not advise parents not to bring students to school before the designated time, and they did not put parents on notice that the children would not be supervised before official school hours. Lastly, the principal acknowledged that the sexual abuse of special education students was a concern and children with special needs were susceptible to abuse. Despite having this information, the principal allowed students unrestricted access to the school, before school hours and without supervision.

\textit{Takeaway}: If students have access to school before school hours, there must be adequate supervision because a school can be liable for the harassment, abuse, or injury of a student even outside of school hours. One court found that there is, “…no distinction between a physical assault and a sexual assault for purposes of foreseeability…”\textsuperscript{71}

\textsuperscript{70} \textit{Panama}, 110 Cal. App. 4\textsuperscript{th} at 511-16.

\textsuperscript{71} \textit{Id}. at 520.

Facts:  A male student was teased and bullied in elementary and middle school. He and his family repeatedly reported the incidents, but nothing was done to their satisfaction. The student became depressed and his schoolwork suffered tremendously. At the advice of his school psychologist, the student saw a psychiatrist and was diagnosed with depression. Because of the affect his depression had on his ability to perform well at school, he was evaluated and received services in special education. His IEP included provisions for him to do things to avoid problem students such as arrive and depart at times different than his peers, and change in a private room instead of the locker room. He was eventually home schooled for several weeks. His parents identified another school for him, enrolled him, and forwarded the bill to his old school. He thrived academically and socially at his new school.73

Issues: Did the school deny the student FAPE?

Holding: The student was denied a free and appropriate public education.

Rationale: The court determined that the school had in fact denied the student FAPE due to the lack of a school environment free from harassment. The student had, “…legitimate and real fear that the same harassers who had followed P.S. through elementary and middle school would continue to bully him.”74 Thus, the court believed that it was highly improbable that the school was going to do something now that they had not been able to do since the student started in kindergarten. Ultimately the court agreed with the student and his family, and they were persuaded that the harassment would have continued had the parents not removed their son from the school.

Takeaway: It can be considered a denial of FAPE if a student has legitimate fears that he or she will be harassed if they come to school, so they do not attend.

72 Shore Regional High School Bd. of Educ. v. P.S, 381 F.3d 194 (3rd Cir. 2004).

73 Shore Regional, 381 F.3d at 195-97.

74 Id. at 197.
**Doe v. Perry Community School District (2004).**

**Facts:** A high school senior was bullied both verbally and physically for his perceived sexual orientation. He verbally confronted one of his harassers and the harasser allegedly pushed him. He returned the push. The fight was broken up and both students received an out of school suspension, and both students were criminally charged. He eventually quit the wrestling team and became a remote student by completing his studies at home.

**Issues:** Did the school violate his First Amendment, Fourteenth Amendment (Equal Protection and Due Process), and Title IX rights by not doing more to protect him?

**Holding:** His First and Fourteenth Amendment rights were not violated, and the court did not decide on the Title IX claim.

**Rationale:** The court found that the student did not offer enough evidence to prove that school officials attempted to chill his freedom of expression by suspending him and having him arrested. The court noted that both he and his harasser were treated the same during the disciplinary process. As it relates to the Fourteenth Amendment, the court acknowledged that there was an indication that the school official’s response to his complaints, were more different than similar to complaints made by other students. However, per the student’s request for relief, for which he asked that the District fairly enforce its harassment policy, the court determined that the evidence suggested the school had already begun to enforce its policy. Therefore, the court did not need to grant an injunction on the Fourteenth Amendment claim because the school was already fulfilling his request. Lastly, the court did not believe that he demonstrated a Title IX violation, but the court held that, that was a question for another court to decide.

**Takeaway:** What saved the district in this case was that the students were disciplined the same without regard to culpability.

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76 Perry, 316 F Supp. 2d at 827.

Facts: A female sixth grade student was harassed by peers and accused of engaging in sexual acts with other female students. The student eventually withdrew from the school and attended another district.

Issues: Were the student’s Fourteenth Amendment (Equal Protection) and Title IX rights violated?

Holding: Her rights were not violated.

Rationale: The actions by school officials to curb harassment were not unreasonable as they could demonstrate how they investigated each claim and the steps they took to remedy the situation. The court also lamented that they do not believe it was their place to second guess the position of school administrators. They wrote, “Today’s public schools are in the unenviable position of having to carefully tow the line between moral, social, and family issues affecting students while simultaneously meeting the educational demands dictated by both state and federal authorities”

Takeaway: This case reflects the importance of my research because the Assistant Principal, who was also the Title IX coordinator for the school, did not know the reach of his own authority. He wrote a letter to the parents of the student victim and stated that he did not believe he had jurisdiction to respond to the harassment of a student because it occurred off school grounds. Thus, he was unable to discipline the student for those comments but he could address the comments made on school grounds. His beliefs were not grounded in law or precedence.


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78 Moore, 2006 U.S. Dist. Lexis 98928 at 32.

**Facts:** A male student was sexually harassed, both physically and verbally from fourth grade through high school. He withdrew in high school. The offenders’ punishment ranged from a reprimand to suspension. His mother filed a suit against the district on his behalf in state court and asserted a state claim. The plaintiff was awarded damages.

**Issues:** Is the school district liable under the given state statute when students harass due to sexual orientation?

**Holding:** Although Title IX would have been a better claim, the state statute did apply to peer-harassment.

**Rationale:** The court determined that complaints of sexual harassment were not reasonably addressed by the school. This in part was because the District did not reinforce their discrimination policy. While the District had a policy, which was produced in a handbook given to students and their families, the District did not take sufficient steps to educate students on the policy. Reinforcement of the policy could have included holding assembles, writing district wide letters addressed to parents, or any other form of widespread communication.\(^{80}\)

**Takeaway:** It is not enough to have a policy in place. Districts must educate students and families on the policies by taking additional steps and using mass communication to get the message across.

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**Bruning v. Carroll Community School District (2007).**\(^{81}\)

**Facts:** Three girls were students at the same middle school. They were repeatedly sexually harassed, which included groping and sexual comments. The girls complained to school officials, who then reprimanded the male students. The male students’ parents were contacted. However, school officials did not investigate inconsistencies between the two sets of stories; those told by the girls and those told by the male students.

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\(^{80}\) *Toms River*, 189 N.J. at 395.

**Issues:** Did the District’s response amount to a Title IX violation?

**Holding:** Yes, Title IX was violated because the girls demonstrated how each of the three findings violated the claim.

**Rationale:** The court recognized that although school official asked the male students about the sexual harassment allegations, the officials stopped short of investigating inconsistencies between the two parties. The school disciplined the students based on what they admitted to rather than what could have been proven had the school officials conducted a thorough investigation.\(^{82}\)

**Takeaway:** It is not enough to go through the motions of investigating complaints. They need to be investigated thoroughly, otherwise a school can still be found liable for Title IX violations.

**Morse v. Frederick (2007).\(^{83}\)**

**Facts:** This case is often referred to as the ‘Bong for Jesus’ case. During the 2002 Olympics, the torch relay passed through Juneau, Alaska in front of the high school at the center of this case. The principal permitted the staff and students to participate in outdoor festivities during the school day in celebration of the event. Students and staff lined the street as the torch passed through the city. The event was televised by a local television station. A student by the name of Joseph Frederick was among the students who stood across the street from the school. He held a banner, which was easily viewed from across the street by other students as well as the news media, that read “BONG HiTS 4 JESUS”. The school principal asked him to take the sign down, which he refused, so she took it from him and he was subsequently suspended.\(^{84}\)

**Issues:** Did the principal violate the student’s First Amendment rights by preventing him from displaying the banner?

\(^{82}\) *Bruning*, 486 F. Supp. 2d at 916.

\(^{83}\) *Morse v. Frederick*, 551 U.S. 393 (2007).

\(^{84}\) *Morse*, 551 U.S. at 396-98.
Holding: The Court held that school officials did not violate the student’s First Amendment right by taking down the banner and suspending the student.

Rationale: The Court’s opinion was delivered by Chief Justice Roberts. The opinion detailed the evolution of student speech cases, which included Tinker, Fraser and Kuhlmeier. Although the Court has distanced itself from Tinker, Justice Roberts considered the substantial disruption test in his analysis because the banner was a form of speech as it expressed a viewpoint. The Court ruled that a substantial disruption did occur because given, “…the special circumstances of the school environment,” students need to be protected against material deemed to be inappropriate and disruptive. The Court expanded this test by adding a public policy component. Because there is a governmental interest in stopping student drug use, schools have the ability to prohibit some forms of expression. Therefore, schools are in the position to implement policies that safeguard students from speech that encourages behavior, such as illegal drug use, inconsistent with values supported in education.

A second opinion was written in support of the majority holding. Justice Thomas struck down Tinker by referring to it as a case not grounded in the Constitution. He went into great detail about the history of education and public schools as it pertains to the law. Justice Thomas discussed how the legal doctrine of in loco parentis gave schools the right to discipline students, enforce rules, and maintain order in the absence of their parents. This doctrine was grounded in the English common law. It transferred authority to schools from parents so they “…may also delegate part of his parental authority…to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz that of restraint and correction, as may be necessary to answer the purpose for which he is employed.”

Going back as early as 1837, state courts have applied this doctrine to public schools. According to Justice Thomas, Tinker is the only United States Supreme Court decision in which the Court’s reasoning conflicted with the Court’s longstanding position of the judiciary’s role in handling public school cases, which was traditionally limited by in loco

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86 Id. at 413.
parentis. *Morse*, is another example of the Court attempting to right a wrong and distance itself from *Tinker* and allow school officials to take action against any speech that is inconsistent with values supported in education.

The dissent was authored by Justice Stevens. He agreed with the majority that the principal was within her authority to have the banner removed. On the other hand, Justice Stevens believed that it was unreasonable to discipline the student in light of the fact that the sign was ambiguous, it was directed to a television audience and not his classmates, and it was not intended to persuade anyone to do anything illegal. According to Stevens, his argument is supported by the Superintendents own account when the Superintendent acknowledged that the banner was displayed for the benefit of the television audience. This acknowledgement undermined the District’s position of why the banner was removed and why they were within reason to suspend Morse. Justice Stevens wrote that the First Amendment does not protect student speech if the speech violates a rule or expressly advocates illegal and harmful conduct, and neither element was present. It would be a stretch to believe that the silly message on the banner would persuade a student to engage in drug use because, “…most students…do not shed their brains at the school house gate, and most students know dumb advocacy when they see it.”

In this case, the minority admonished the majority and characterized the ruling as, “serious violence to the First Amendment.”

*Takeaway:* The special characteristics of the school environment and governmental interest can override the first amendment. It is okay to censor speech if it violates a public policy that is in the best interest of protecting students from some identified harm.


87 *Id.* at 444.

88 *Id.* at 435.

Facts: A male student was verbally and physically bullied for two years. The bullying was reported, and on at least one occasion, it was observed by school officials. The school had an anti-bullying policy and a progressive discipline plan, but instead of reprimanding the bullies, school officials thought it was easier to move the student victim to another classroom.

Issues: Did the school’s actions amount to a Fourteenth Amendment (Equal Protection) and Title IX violation?

Holding: There is sufficient evidence for a jury to find that the district violated both rights.

Rationale: The District did not follow their own bullying policies, and the school’s inaction gave the bullies a sign of approval that their behavior was acceptable, which caused the bullying to increase in frequency and severity. The court also seemed to take offense that when one of the bullies made good on his threat to harm the student, both the student and the bully received the same reprimand.

Takeaway: It is important to follow policies. It is also unreasonable to reprimand a victim of bullying for his or her role in an altercation, if nothing was done to prevent or respond to complaints of threats and physical assaults.


Facts: A female kindergarten student alleged a third grade male student sexually harassed and bullied her on the school bus. She told her parents who then reported the harasser’s conduct to school officials. School officials interviewed the student victim, the alleged harasser, and other students and staff who observed their interactions. Police also investigated the allegations but they determined there was insufficient evidence to charge the alleged harasser. The school offered to take steps to minimize their contact such as switching buses or assigning seats on the bus. The parents refused.

Issues: Did school officials violate the student’s rights to Title IX?

90 Fitzgerald v. Barnstable Sch. Cmty., 504 F.3d 165 (1st Cir. 2007).
Holding: The school’s actions did not constitute a Title IX violation because they took reasonable steps to separate the students and investigate once they became aware of the alleged conduct.

Rationale: The court concluded that the alleged harasser’s behavior did not amount to sexual harassment. The court held that even if the behavior was construed to be sexual harassment, the school did not act with a deliberate indifference because they promptly investigated the allegations and they offered reasonable remedial measures to protect the young girl. The ruling was based on the standard, “…Title IX does not require educational institutions to take heroic measures, to perform flawless investigations, to craft perfect solutions, or to adopt strategies advocated by parents. The test is objective—whether the institution’s response, evaluated in light of the known circumstances, is so deficient as to be clearly unreasonable.”

Takeaway: Given that the alleged harasser did not admit to the harassment, nor were school officials able to corroborate the accusers story, it was difficult for school officials to discipline him because that would have made them susceptible to violating one of his rights. Instead they tried to do the next best thing, which they determined was to separate the students. It is a good idea to communicate situations like this with all staff who come into contact with the involved students because in this case, the physical education teacher was unaware of the allegations and forced the students to interact with one another.


Facts: A ninth grade female student with profound special needs was bullied into performing sexual acts for several male students. Her parents notified school officials and law enforcement. School officials declined to investigate the claims once the case was referred to police because none of the incidents occurred on school grounds and they all occurred before the students began high school (harassment started in the seventh grade). The student suffered more than one

91 Barnstable, 504 F.3d at 174.

92 Rost v. Steamboat, 511 F.3d 1114 (10th Cir. 2008).
psychotic episode where she was hospitalized. She did not return to school to avoid facing her harassers, and instead, opted for a private tutor.93

**Issues:** Did the school violate her Title IX and Fourteenth Amendment Equal Protection rights?

**Holding:** The school’s response was not unreasonable, therefore, her rights were not violated.

**Rationale:** The response was not unreasonable because school officials reported the allegations to law enforcement and they cooperated with the investigation. The court did acknowledge that school districts should not solely rely on the investigation of law enforcement, nor should they rely on the district attorney’s office to prosecute a sexual harassment case. Rather, as described by the dissent, the district could have disciplined, counseled, and communicated with the parents of the harassers. According to the dissent, the fact that the case was not prosecuted and the mother of the student victim would not give detectives or school officials’ access to interview her daughter, does not absolve school officials from taking remedial measures so that her daughter could return to school. As stated by the dissent, “…a school district’s responsibilities to its students are not coterminous with a prosecutor’s judgments about what cases to bring in court…Student misconduct need not be established beyond a reasonable doubt.”94 Just because a substantial amount of harassment falls short of criminal violations, does not mean a school district should have a hand’s off approach. This case fell on the fact that school officials did not thoroughly investigate claims, thus they had a difficult time determining which acts if any were non-consensual.

**Takeaway:** Although the court found it sufficient for the District to avoid liability by demonstrating that they did enough to respond to the harassment by passing on the case to law enforcement, there was a consensus between the concurring and dissenting opinions that school districts should not solely rely on the outcome of a criminal investigation to determine how they should handle students within their district.

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93 *Steamboat*, 511 F.3d at 1117-18.

94 Id. at 1130.
**Doe v. Hamden Board of Education (2008).**

**Facts:** A female high school student was allegedly raped off campus by a male student from her school. She reported the rape to a therapist, who then alerted her parents, social services, school officials, and law enforcement. Once word of the alleged assault got around the school, students harassed her. School officials made a few accommodations so she could avoid some of her tormentors during transitional times during the school day, but she eventually withdrew from school due to the fact that her alleged rapist was still there. He was never disciplined for the alleged conduct. After withdrawing, she temporarily returned to school but she cut class and left school grounds without permission, which she claimed was to avoid her harassers during periods of the day such as lunch. Due to student conduct violations for that behavior, she was expelled from school.

**Issues:** Did the school violate her Title IX rights?

**Holding:** There is sufficient evidence that her Title IX rights were violated.

**Rationale:** A reasonable jury could find that the presence of her alleged rapist and his friends who harassed her could have deprived the student access to educational opportunities or benefits provided by the school. The school made her more vulnerable to harassment because their response to the situation was unreasonable. The court determined that school officials failed because they allowed her alleged rapist to attend school without any disciplinary action. Nor did they take specific steps to separate the students, which would have minimized her contact with him throughout the remainder of the school year.

**Takeaway:** Police investigations are not enough. Schools should take steps to separate students even if they do not discipline students.

**Doninger v. Niehoff (2008).**

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**Facts:** A female high school junior was on a student committee to plan a large social event. Administrators informed the group that they would have to change either the date or location of the originally scheduled event. The student took to social media to encourage other students to contact school officials and complain about the change in hopes that the event would occur at its original time and location. In the posting, she called school administrators names and requested that students harass them until they changed their minds. The blog was public. The student was asked by school officials to submit a copy of what she wrote on the blog, a letter of apology, and withdraw her candidacy for senior class secretary. She complied with everything except withdrawing her candidacy.97

**Issues:** Did the school violate her First Amendment rights by preventing her from running for class office as a result of her blog post?

**Holding:** The school was within their right to deny her an opportunity to run for office due to her conduct.

**Rationale:** The court determined that the school was within their bounds because the speech was vulgar, offensive, deceptive, and disruptive to students and staff. The posting also violated school policies. Further, the court held that the reprimand matched the offense, as they were reasonably related to each other. When a student fails to adhere to student conduct policies, they lose their privilege to participate in extracurricular activities. However, the court did caution that it, “…[had] no occasion to consider whether a different, more serious consequence than disqualification from student office would raise constitutional concerns.”98

**Takeaway:** If it is foreseeable that speech, in this case a blog, would reach school and create a substantial disruption, then school officials may be within their authority to discipline for off campus conduct.

97 Doninger, 527 F.3d at 44-46.

98 Id. at 53.
**Kowalski v. Berkeley County Schools (2011).**

**Facts:** The high school senior used her home computer to create a MySpace page called Students Against Sluts Herpes, which was dedicated to saying mean things about a classmate. The site was public. Students viewed and posted demeaning messages and pictures of the targeted classmate. School administrators determined the creation of the site violated the student handbook. The creator of the page received a ten-day out of school suspension, which was reduced to five upon her father’s request and a 90-day social suspension. Additionally, she was prohibited from crowing her successor in the following year’s homecoming court, and she was dropped from the cheerleading squad for the rest of the academic year.

**Issues:** Did school officials violate the student’s First Amendment and Fourteenth Amendment Due Process rights by disciplining her for off campus speech?

**Holding:** Her First and 14th Amendment rights were not violated.

**Rationale:** The student’s rights were not violated because (1) there was a nexus between her speech to the school’s interest of protecting the well-being of other students; (2) speech was materially and substantially disruptive; (3) it was foreseeable that the contents of the website would reach the school; (4) the student received notice before the posting that administrators could regulate and punish conduct; and (5) the school was not required to give the student additional space to explain her conduct before rendering a punishment once she admitted to the conduct. The court determined that schools have a responsibility to protect the well-being of their students, which included those who were bullied and harassed. Because the target of the website was a classmate of the site’s author, and students who visited the page were also students at the same school, it was reasonable for the school to intervene. Discipline was appropriate because her speech interfered with the school’s ability to operate without a substantial disruption. Furthermore, schools have to control a wide range of behavior, so their policies do not have to be explicitly detailed. The court also took offense that the student filed a lawsuit when she was the

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100 *Kowalski*, 652 F.3d at 567-69.

101 *Id.* at 574-75.
one who started the problem and exhibited poor behavior. They surmised that she had not taken responsibility and did not understand the gravity of her mean spirited conduct.

**Takeaway:** School officials should ensure that the measures taken to discipline a student are consistent with the actual violation.

*S.J.W. v. Lee’s Summit R-7 School District (2012).*

**Facts:** Twin brothers, both juniors in high school, were suspended for 180 days for creating a website which contained offensive, sexually explicit, and racist content, some of which was directed towards specific students. The site had a foreign domain so it was not easily accessible, but once word spread of the webpage, it was viewed by students at school. Teachers and students complained about distractions supposedly caused by the site, but the content of the webpage only substantially distracted the school environment for one day. The brothers were given the option to attend another school within the district but the brothers maintained that the other school was not a viable option because they would have been prohibited from trying out for band, and the school did not offer ACT prep courses or honors classes, all of which the brothers depended on to gain scholarships to college.

**Issues:** Were the brothers’ First Amendment rights violated when the school disciplined them for the webpage?

**Holding:** The brothers’ rights were not violated.

**Rationale:** School officials were able to demonstrate that the webpage caused a substantial disruption to the school. The court reasoned that the brothers should have known that the existence of the webpage would have reached the school, especially since the targets of the webpage were members of the school community. The court in this case decided that a substantial disruption that lasted one day was sufficient enough to meet the standard established in *Tinker.* Secondly, the court was not persuaded by the argument asserted by the brothers,

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103 *Summit*, 696 F.3d at 773-74.
which they claim caused irreparable harm to their future careers. The court concluded the alleged harm, such as a denial to participate in band, was speculative.

*Takeaway:* One day of unrest may be sufficient to claim a substantial disruption.


**Facts:** A male high school student was bullied and harassed by his peers for almost four years. He and his mom both informed the school of the verbal and physical assaults he endured as a result of his ethnicity. The school sometimes verbally reprimanded the students or administered a suspension. However, the racially insensitive culture was pervasive and nothing effective was done to remedy that. The school had a Title IX coordinator but she did not investigate or respond to the complaints. The local branch of the NAACP offered help, but the district declined. School officials, including the principal, superintendent, and Title IX coordinator met on a weekly basis to discuss important school issues. Despite the fact that they were all aware of the harassment and racial tension, they did not discuss his concerns or create a meaningful plan of action. Instead, they hosted a one-day training on sexual harassment, and not racial discrimination. They also contacted some of the parents of the harassers to meet with the victim student and his mom, but the school failed to inform the victim’s mom of a time or location. No discrimination or diversity programs were implemented during the first half of the time he endured harassment. The victim student was disciplined for punching another student who harassed him and threatened to rape his sister, but the instigator who made the comment was not disciplined.

**Issues:** Did the school violate the student’s Title VI rights?

**Holding:** A reasonable jury could determine that his Title VI rights were violated.

**Rationale:** The student was discriminatorily deprived of educational benefits. He did not receive an education in an environment free of racism and harassment. Rather, he received a less

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105 *Zeno*, 702 F.3d 658-63.
valuable diploma (IEP) instead of the traditional diploma, and he left high school without finishing his education due to the environment. The court found that school officials should have known their remedial measures were ineffective because suspending the harassers did not stop them from harassing the student, the severity of the harassment increased as time went on, the student was subjected to harassment because of his race, and the district did not maximize resources (especially free services offered to them by organizations such as the NAACP who were familiar with addressing issues concerning race and diversity) to improve the discriminatory environment. 106 Although school officials did implement a few programs, it was too little, too late. The programs did not address racial discrimination and attendance was optional. Thus, the students who harassed the student were not present during the training sessions. Lastly, the court held it is reasonable that a jury could have determined that the student’s ability to participate in higher education or enter the workforce was ‘significantly and adversely impaired’ because he received an IEP diploma rather than the standard diploma awarded to traditional students. Despite the speculative nature of this claim, the court gave this a high degree of consideration in its attempt to identify damages, which totaled $1 million dollars.

Takeaway: The court will not accept half-hearted interventions without follow through and it is not enough to suspend individual students when there is clearly a culture of discrimination.


Facts: A male student was verbally and physically bullied by his peers, specifically his teammates on the school’s football team. The school was informed of the bullying. In response, they reprimanded students and held programs on anti-bullying.

Issues: Did the school violate the student’s rights to Title VI and Title IX?

Holding: The school responded reasonably to complaints of bullying, so there was no violation.

106 Id. at 669.

**Rationale:** In this particular case, the court’s written opinion stood out from similar bullying cases because the judge who wrote the court’s opinion used the first few pages to discuss the gravity of bullying. Embedded in his opinion was a caution to other courts that, “…with almost everything in life, this situation is not so cut and dry…In the end, the question of ‘who started it?’ revolves around ‘he said she said’ reports. Those are playground inquiries without a clear answer…Suffice it to say that, while the Court empathizes with N.K., it is reluctant to make a definitive determination that he was, in fact, the victim of bullying…The Court is not required to decide, legally, whether N.K. was bullied. Rather, the Court is called upon to answer only whether St.Mary’s should be liable...due to its failure to stop the alleged bullies’ hateful actions.”

This is one of the few cases reviewed for this study where the judge writes about his reticence in deciding a case such as this because of the perceived victim’s role in bullying. This consideration is similar to the theory behind contributory negligence. Weight is given to the shared responsibility of conduct.

**Takeaway:** The case reflects a shift in how some courts have begun to publicly question the ‘victims’ role in bullying. This is a new consideration.

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**Hendrick Hudson District Board of Education v. Rowley (1982).**

**Facts:** The student was a deaf child with minimal residual hearing. She attended a public school. During her kindergarten year, she attended a regular kindergarten class so she could be evaluated to determine which supplemental services would benefit her education. Her parents requested a sign language interpreter for her first grade school year. School administrators determined that she could remain in the regular class for her grade level. However, she would only be given a hearing aid, which amplified words spoken by the teacher and classmates into a wireless receiver. Following the denial of her request for an interpreter, she brought an action, which alleged that the denial of a sign language interpreter constituted a denial of a “free and appropriate education” guaranteed by the Education of the Handicapped Act.

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108 *St. Mary’s*, 965 F. Supp. 2d at 1027.

**Issues:** Was the student denied a free and appropriate education when she was not given an interpreter?

**Ruling:** She was not denied FAPE because she received an adequate education.

**Holding:** The Court determined that because the student performed well and successfully completed her kindergarten year, she received an adequate education. The Court found that the “basic floor of opportunity” provided by the Act permits access to specialized instruction and services, which support educational benefits. The services do not need to maximize potential, but they do need to offer reasonable opportunities for a student with disabilities to succeed. Therefore she received sufficient services (Rowley, 1982). The United States Supreme Court defined FAPE as...“special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.”110

**Takeaway:** A two-part test was established to determine if a student was provided FAPE. (1) Did the school comply with procedures identified in IDEA, and (2) was the IEP “reasonable calculated to enable the child to receive educational benefits?”111


**Facts:** A high school senior used his grandmother’s computer after school hours to create a MySpace ‘parody’ profile of his school principal. He shared access with a few friends from school. Despite administrators’ attempts to block the site, the profile was still viewed by students at school. The student responsible for the sites creation was suspended for ten days,

110 Rowley, 458 U.S. at 188.

111 Id. at 188.

removed from AP classes, placed in an alternative school for the remainder of the school year, and banned from extracurricular activities and high school graduation.

*Holding:* The court held the student’s First Amendment rights were violated, but school officials did not violate his parents’ 14th amendment claim.

*Rationale:* The school district’s arguments were rejected because the court did not want to establish a dangerous precedent of allowing school officials to reach into the home of a student’s grandmother and control a student’s activity. Because the district conceded that there was no substantial disruption, the court only had to decide whether the student’s use of the website constituted entering the school, which it did not. Secondly, the district argued that the speech occurred on campus since the student retrieved a photo of the principal from the school website, which was school (albeit virtual) property. Thus it was foreseeable that district officials would become aware of the profile. For the second issue, the court determined that the parents did not demonstrate how the district’s punishment interfered with their ability to control their son’s upbringing or education.

*Takeaway:* A substantial disruption has to be established and discipline for misconduct has to be reasonably aligned with the violation.

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**J.S. v. Blue Mountain School District (2010).**

**Facts:** A middle school student created a MySpace profile of her principal, which insinuated that he had a sex addiction and was a child molester, among other things. The profile did not have the principal’s name but his picture was included on the site. The profile was created at home and it was initially set on a public default for anyone to view. After being changed to a private user setting, the profile was shared with other students from her school. Students were not able to access the site using school computers. The student was suspended for ten days.

**Issues:** Was the student’s First Amendment right violated, and were his parents’ Fourteenth Amendment rights violated?

**Holding:** (1) The suspension did not violate the student’s First Amendment; (2) the parents 14th Amendment rights were not violated; (3) state law authorized discipline for out of school

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113 *Layshock*, 593 F.3d, 260 (2010).

conduct; (4) school’s disciplinary policy was not unconstitutionally overbroad; and (5) school’s disciplinary and computer use polices were not unconstitutionally vague.

Rationale: Although the profile did not actually cause a substantial disruption, the court found that it was reasonable for district authorities to forecast a substantial disruption or material interference at the school in light of the profile.115 Thus, because the speech was lewd and vulgar, and had ‘an effect on campus’, the student’s First Amendment rights were not violated. The court gave weight to the fact that the content of the profile was disturbing because it contained language that was offensive and damaging to the career and reputation of the principal. The language was also potentially illegal and compromised the principal’s ability to serve as principal because it undermined his authority. As a result, administrators reasonably believed that a disruption could occur. The court determined that, “…off-campus speech that causes or reasonably threatens to cause a substantial disruption of or material interference with a school need not satisfy any geographical technicality in order to be regulated pursuant to Tinker.”116

Further, the court held the parents’ Fourteenth Amendment substantive due process right to direct the upbringing of their child without inference from government was not violated because in certain circumstances, schools have the ability to regulate their domain in spite of parents’ rights. The court did not interpret the state statute about discipline. Lastly, the policies and procedures in the student code of conduct were not overbroad or overly vague because disciplinary codes do not need to be as detailed as criminal codes. It would be impossible to capture every act or scenario in the student handbook because school officials are responsible for responding to a wide range of challenging behavior.

Takeaway: This case carved another exception to Tinker because it extended the substantial disruption test to include lewd and vulgar speech that “has an effect” on campus. Secondly, the court spoke twice (concurring and dissenting opinion) of how the website was not accessed at school. They believed that this decreased the likelihood of the site posing a substantial disruption because students did not have access to it at school. However, I do not know if that argument can be upheld because numerous students had cell phones in 2010 when the incident

115 Blue Mountain Sch. Dist., 593 F.3d at 298.

116 Id. at 301.
occurred, so it is likely that students may not have accessed the site on school computers, but they certainly had access on their personal electronic devices.


Facts: An eighth grade male student sent an instant message (IM) from his home computer to a few friends, including a few classmates who attended his school. The IM included an icon with a gun firing a bullet at someone’s head, with the words “Kill Mr. VanderMolen”, his teacher. Shortly before this IM was shared, Plaintiff’s school communicated to students that violence and threats would not be tolerated. School officials were made aware of the message and the student was suspended for five days, and then expelled for one semester of school. Police were called to investigate but no charges were filed. The teacher Mr. VanderMolen stopped teaching the class in which the student was enrolled.

Issues: Did school officials violate the student’s First Amendment rights by disciplining him?

Holding: School officials were within their rights to discipline him and no violation occurred.

Rationale: Tinker was the standard applied in this case. The court held that the student’s speech crossed the line of protected speech. It was reasonably foreseeable that the icon would come to the attention of school officials, and the instant message would materially and substantially disrupt the school. The fact that the message was shared by other students at his school and the fact that the content of the message circulated around the school for three weeks made the foreseeability of disruption more likely.

Takeaway: The court gave more weight to the foreseeability factor in the material and substantial test.

117 Wisniewski v. Bd. of Educ., 494 F.3d 34 (2nd Cir. 2007).

118 Wisniewski, 494 F.3d at 39.
Patterson v. Hudson Area Schools (2009).\textsuperscript{119}

Facts: Beginning in the sixth grade, a male student was bullied and sexually harassed by his peers on a regular basis. School officials were aware of the situation. Students were sometimes disciplined and the harassment would usually stop after each student was disciplined (there were no repeat offenders). The problem was that even though school officials responded to incidents that were brought to their attention, the student constantly faced harassment by numerous peers. At one point, the principal allowed the student to meet with him in his office for daily check-ins, but the student opted not to continue to meet because the sessions were also attended by trouble makers, and he did not want to be associated with them. The student was also given access to a resource room that not only served as a study hall, it also gave him the opportunity to take a breather from the harassment. Unfortunately he was denied access to the resource room when he transitioned from middle school to high school.

The student was sexually assaulted by a peer in the school’s locker room before a sporting event. The attacker was allowed to play in a game that occurred after the attack. The attacker was suspended and eventually expelled, but he was allowed to participate in a sports banquet a week after the attack occurred. After the attack, the student victim did not want to remain at school. In the tenth grade, he opted to have teachers from his school tutor him outside of school. However, he claims his teachers were non responsive when he tried to communicate with them through email. For eleventh and twelfth grade, he was permitted to take college courses for high school credit until the school no longer wanted to pay for it. At that time, he was allowed to graduate early.

Issues: Did school officials violate the student’s rights to Title IX?

Holding: A reasonable jury could conclude that school officials violated Title IX.

Rationale: While the court recognized that school officials made efforts to respond to incidents of bullying, their efforts were unsuccessful in preventing continuous harassment. The court was concerned about the perpetual culture of bullying that essentially prevented the student from

\textsuperscript{119} Patterson v. Hudson Area Sch., 551 F.3d 438 (2009).
enjoying the benefits of his education from the sixth grade until he graduated early from high school. The court was struck by the fact that school administrators had a plan to shield him from harassment, which was the resource room, but they removed it as an option. The court believed that it was unreasonable for school officials to recognize that a strategy for preventing harassment worked, yet not replace it with anything that offered the same benefit. Their solution essentially was to remove him from the school environment. The student proffered evidence to suggest that the sexual harassment policy was not explained to every student and teacher. That assertion was further supported by an expert witness who was called to testify. The witness testified that one-time programs were not enough to counter the school’s climate of bullying and harassment.

*Takeaway:* It is not enough to disciple students on an individual basis. If harassment is persistent, especially with the same students, the school needs to come up with a plan to demonstrate how they are trying to change the culture of the school. You cannot put out a forest fire by extinguishing individual campfires. Secondly, if something is found to work, such as a resource room, keep it up. It is unreasonable to take that option away without replacing it with another effective strategy. It is not good enough for the solution to be removal of the student, especially if the student removed is the victim.

*T.K. v. New York City Department of Education (2011).*

*Facts:* A twelve year old girl with special needs was bullied by her peers. She had an IEP, but she was in an inclusive classroom. Her parents repeatedly complained to school officials during IEP meetings and through other forms of communication that she was bullied and ostracized by her peers. Not only did she complain about bullying, her teacher’s aid did as well. School officials were non-responsive to the issue. Her parents withdrew her from school and put her in

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120 *Patterson,* 551 F.3d at 449.

a private school. This suit was filed to recover expenses. The suit alleged that bullying made her educational environment hostile.

**Issues:** What actions are school officials required to take to stop bullying of disabled students? Did school officials violate IDEA?

**Holding:** There is enough evidence to suggest that school officials denied the student FAPE under IDEA.

**Rationale:** The court referenced published and unpublished court opinions from different circuits. The present court concluded that all courts are struggling with whether bullying is grounds for a denial of FAPE. This in part is due to the fact that there is not one legal standard applied to similarly situated cases. For that reason, this court attempted to map out a test to determine a district’s liability for FAPE violations. One problem this court had with previous rulings was that the tests were too rigid and/or too narrow. According to this court, a FAPE claim should not be denied because the student victim could not produce enough evidence to demonstrate that they received no educational benefit. Rather, although a student may achieve academic success, it is possible that had it not been for the harassment, that student may have received even more educational benefits. Even though this seemed speculative, the court placed great weight on that position and concluded, “It is not necessary to show that the bullying prevented all opportunity for an appropriate education, but only that it is likely to affect the opportunity of the student for an appropriate education. The bullying need not be a reaction to or related to a particular disability…To be denied educational benefit, a student need not regress, but need only have her educational benefit adversely affected…Academic growth is not an all-or-nothing proposition.”

The proper standard this court believed should have been applied by lower courts consisted of the following test modified from the standard established in *Davis* to determine a Title IX violation for a student with a disability. 1) Is the Plaintiff a student with disability who was harassed based on his/her disability; 2) was the harassment sufficiently severe or pervasive

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that it altered the condition of his/her education and created an abusive environment; 3) were school officials aware of the harassment; and 4) were school officials were deliberately indifferent to the harassment? Additionally, as a general rule, school officials were encouraged to adhere to guidelines directed by the U.S. Department of Education as it relates to IDEA. The court recommended that two questions constantly run in the back of the minds of school officials who have encountered bullying/harassment incidents, which involved students with disabilities. (1) Did the school investigate a reported incident of harassment, and (2) did we take appropriate measures to prevent its reoccurrence?

*Takeaway:* The court wrote a long opinion about bullying, the impact of it, and social issues related to it to shed light on the importance of the culture of bullying. It is necessary to pay attention to staff that file complaints or discuss incidents of bullying in their school because they may eventually serve as a witness on behalf of a student victim in a lawsuit against a school. The school is required to investigate and take steps to prevent bullying even in the absence of a formal complaint because once the school is made aware of a situation, it may not matter how the information came to them. All that matters is that the school had information about a situation. Thus, it is unnecessary to wait for a complaint to be filed from a student involved in what transpired. This court was among other courts that have begun to stress the need to approach and respond to bullying from a school culture perspective instead of an incident-based perspective.

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123 *Id.* at 314.