I. U.S. SUPREME COURT PRECEDENT

a. The Fourteenth Amendment

The U.S. Supreme Court’s first foray into the realm of student speech rights was predicated not on the First Amendment but, rather, on the due process clause of the Fourteenth Amendment.
These cases, although not directly on point, offer insight into the Court’s early view of students’ relationship to the State.

**Meyer v. Nebraska,** 262 U.S. 390 (1923) – In *Meyer*, a language teacher was convicted under a state law prohibiting the instruction of foreign languages for teaching German to students who had not yet passed the eighth grade. Reversing the Nebraska high court’s affirmation of the conviction, the Supreme Court held that the liberty interest under the due process clause of the Fourteenth Amendment protected the teacher’s right to teach, the students’ right to learn, and the parents’ right to control the education of their children.

**Pierce v. Society of Sisters,** 268 U.S. 510 (1925) – Two years after *Meyer*, the Court in *Pierce* again pointed to the liberty interest of the due process clause of the Fourteenth Amendment in striking down an Oregon law that rendered public education compulsory. In his majority opinion, Justice McReynolds stated that the compulsory public education statute violated students’ liberty interest by disallowing the option to attend schools other than public institutions. In the process, he famously outlined the relationship of the child to the state:

> The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

*Id.* at 535.

b. The First Amendment

**West Virginia State Board of Education v. Barnette,** 319 U.S. 624 (1943) – In *Barnette*, the Court held that a public school cannot force a student to recite the Pledge of Allegiance over the student’s religious objections. Although *Barnette* has been applied mostly in compelled speech cases, the holding supports the broader proposition that officials cannot trample on students’ First Amendment rights in their eagerness to promote a certain idea, even if that idea is civic or patriotic in nature:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

*Id.* at 642. The Court also emphasized that students’ First Amendment rights extend not just to trivialities but also to speech that matters:

> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

*Id.*

**Tinker v. Des Moines School District,** 393 U.S. 503 (1969) – In *Tinker*, the Court addressed a First Amendment claim brought on behalf of students who wore black armbands to school to publicize their objection to the Vietnam War. The students were sent home and suspended pursuant to a ban on armbands that had been adopted two days before expressly in anticipation of
such a show of protest. Writing for the majority, Justice Fortas held that “the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it,” and that the expression was “entitled to comprehensive protection under the First Amendment.” *Id.* at 505-06. In ruling for the students, the Court established a “substantial disruption” standard as the test for justification of State suppression of student speech:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, 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. Certainly where there is no finding and no showing that engaging in the forbidden right would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” the prohibition cannot be sustained.

*Id.* at 509 (quoting *Burnside v. Byers*, 363 F.2d 744, 749 (5th Cir. 1966)); see also *id.* at 514 (because there were not “any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,” or any showing that “disturbances or disorders on the school premises in fact occurred,” suspension was an unconstitutional denial of students’ right of expression of opinion).

Applying the standard, the Court found the student speech in this instance “silent, passive, expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioner’s interference, actual or nascent, with the school’s work or of collision with the rights of other students to be secure and to be let alone.” *Id.* at 508.

More importantly for the question of student speech rights and modern digital media, the Court extended the test to all school spaces during authorized school hours:

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without “materially and substantially interfering with the requirements of appropriate discipline in the operation of the school” and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

*Id.* at 512-13.

*Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) – In *Fraser*, a student was suspended due to his use of sexually explicit language at a student assembly. Chief Justice
Burger, writing for the majority, held that the school district’s sanctions in response to his offensively lewd and indecent speech were entirely within its permissible authority. Moreover, the Court stated that the student had no claim to First Amendment protection and that admonitions of teachers and the school disciplinary rule proscribing obscene language gave adequate warnings to the student that his lewd speech could subject him to sanctions. *Tinker*’s expression of broad student speech rights was thus qualified by *Fraser*.

**Hazelwood School District v. Kuhlmeier**, 484 U.S. 260 (1988) – In *Hazelwood*, the Court ruled that a high school principal, in excising articles concerning teen pregnancy and divorce from a school newspaper, did not violate student speech rights. Establishing that a high school paper published by students in journalism class did not qualify as a public forum, the Court held that school officials retained the right to impose reasonable restrictions on student speech in the paper. The Court distinguished *Tinker* by claiming that the question in that case concerned the ability of an educator to silence students’ personal expression on school premises while the question in *Hazelwood* concerned “educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” *Id.* at 271.

**Morse v. Frederick**, 551 U.S. 393 (2007) – In *Morse*, the suspension of a high school student for his refusal to take down a banner (“BONG HI茨S 4 JESUS”) at a school-sponsored event (the watching of the Olympic Torch Relay) was upheld. The Court ruled not on the grounds that the speech was offensive but, rather, that it was reasonably viewed as promoting illegal drug use. At the outset, the Court rejected the claim that, because the incident happened across the street from the school and not on school grounds, it was not a school speech case. Chief Justice Roberts, writing for the fractured majority, conceded that “[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents . . . , but not on these facts,” *id.* at 401, where the event was during school hours, sanctioned by the principal as an approved social event, and supervised by teachers and administrators. Additionally, the banner was directed at the school and therefore plainly visible to most students.

II. **SEXTING AND CYBERBULLYING**

What follows are summaries of the most recent sexting and cyberbullying cases decided by the federal appellate courts. For a thorough discussion of relevant case law predating the cases below, see, e.g., Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027 (Dec. 2008). And for an interesting recounting of school administrators’ reactions to student speech, including many situations that did not reach the courts, see Seth Berlin & Sinclair Stafford, *Teach Your Children: High School Students and the First Amendment*, COMMUNICATIONS LAWYER, Vol. 25, No. 4 (July 2008), available at http://lskslaw.com/documents/TeachYourChildrenArticle(00377173).PDF.

a. Sexting

**Miller v. Mitchell**, 598 F.3d 139 (3d Cir. 2010) – In *Miller*, the Third Circuit upheld a lower court’s granting of a preliminary injunction against a district attorney who had threatened potential charges against three female minors who had sent sexually suggestive photos of themselves via text message. The District Attorney’s threatened charges were in response to the girls’ stated refusal to attend a mandatory educational program in which they would be forced to write a report “confessing” that their sexting was wrong. The court held that any future prosecution for not attending the program would be an unconstitutional act of “retaliation in
violation of the minors’ First Amendment right to be free from compelled speech, the speech being the education program’s required essay explaining how their actions were wrong.” *Id.* at 148. Additionally, it would constitute “retaliation in violation of the parents’ Fourteenth Amendment substantive due process right to direct their children’s upbringing, the interference being certain items in the education program that fall within the domain of the parents, not the District Attorney.” *Id.*

### b. Cyberbullying

*Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. July 27, 2011), *cert. denied*, --- S. Ct. ----, 2012 WL 117817 (Jan. 17, 2012) – In *Kowalski*, the Fourth Circuit upheld the suspension of a high school senior who had ridiculed another student on her MySpace page, including stating she had herpes and was a “whore.” Rejecting Kowalski’s First Amendment claim, the court argued that “school administrators have some latitude in regulating student speech to further educational objectives,” *id.* at 571:

> [T]he language of *Tinker* supports the conclusion that public schools have a “compelling interest” in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying.

*Id.* at 572. That compelling interest is the protection of students from cyberbullying:

> [S]tudent-on-student bullying is a “major concern” in schools across the country and can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide. . . . Just as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use, schools have a duty to protect their students from harassment and bullying in the school environment.

*Id.* (citation omitted).

The court concluded that “Kowalski’s speech caused the interference and disruption described in *Tinker* as being immune from First Amendment protection.” *Id.* Addressing the fact that the speech took place off school grounds, the court stated, “Kowalski indeed pushed her computer’s keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment.” *Id.* at 573. Her speech encouraged dialogue between the students on school grounds, the court explained, and it created “‘actual or nascent’ substantial disorder and disruption in the school.” *Id.* at 574 (citing *Tinker*, 393 U.S. at 508).

*J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. June 13, 2011), *cert. denied*, --- S. Ct. ----, 2012 WL 117558 (Jan. 17, 2012) – In *Snyder*, the Third Circuit, sitting *en banc*, held in a fractured 8-6 decision that a school district violated a student’s First Amendment rights when it suspended him for creating a fake MySpace profile about his principal that insinuated the principal was a sex addict and pedophile. Assuming without deciding that *Tinker* applies to off-campus speech, the court held that the profile did not cause an actual school disruption and there were not “facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities” because the profile was “so outrageous that no one took its content seriously.” *Id.* at 921, 928. (Five of the eight judges in the majority would have held that the *Tinker* exception for potentially disruptive
speech does not apply to off-campus speech at all.) The court further held that the *Fraser*
exception, which permits schools to regulate obscene speech that “had an effect on the school and
the educational mission,” only applies to on-campus speech. *Id.* at 932. As such, the court ruled
the district had no authority to punish a student for profane or lewd language during non-school
hours. The dissent disagreed with the majority’s holding that districts do not have the power to
regulate off-campus speech and would have affirmed such authority in this case because the
Internet profile undermined the principal’s authority and ability to do his job.

In *Layshock*, the Third Circuit, in a unanimous *en banc* opinion, upheld a lower court’s ruling that
a school district, principal, and other officials had violated a student’s First Amendment rights by
imposing discipline after he had created a “fake” Internet profile of his principal on MySpace.
The fake profile attributed quotes to the principal concerning alleged drug use, criminal behavior,
and sexual innuendo. The court held that the school district did not have authority to punish the
student for his expression outside of the school even though it was lewd and vulgar, and even
though his speech reached inside the school: “*Fraser* does not allow the school district to punish
Justin for expressive conduct which occurred outside of the school context.” *Id.* at 219. (The
court declined to address or apply *Tinker* because the school district did not argue it could
properly punish Justin under the *Tinker* exception.)

*Doninger I*, the court held that a student’s defamatory and vulgar remarks about school
administrators written on her blog were punishable by denying her the privilege of running in a
student election because, under the *Tinker* exception, the remarks could foreseeably create a risk
of substantial disruption within the school environment (even though the conduct occurred off-
campus). The court invoked *Fraser*’s holding that indecent speech can be regulated. In
*Doninger II*, the court rejected the claim that it was clearly established that off-campus speech
could not be the subject of school discipline.