

TINKERING AROUND: CONSTRUCTING THE SCHOOLHOUSE GATES IN TODAY’S VIRTUAL CLASSROOMS

ABSTRACT

The COVID-19 global pandemic fundamentally altered traditional notions of education. Among the many changes stemming from the COVID-19 pandemic, school districts embraced virtual learning as an equitable means to curb learning loss for those students isolating within their homes. In the span of mere months, virtual learning transitioned from theory, to viability, to reality in classrooms across Iowa and the United States. This paradigm shift in education raised new, important questions on appropriate student speech and expression behind the screen of a computer in a virtual classroom. As school districts continue to embrace virtual learning alternatives, these questions remain unanswered.

*Teachers, administrators, educational stakeholders, and students themselves remain in limbo—navigating a legal gray area between fostering a free marketplace of student speech and maintaining a productive virtual learning environment. This Note seeks to offer solutions to those teaching in this gray area, relying on Supreme Court precedent to chart navigable solutions. This Note argues that precedential cases, stemming from *Tinker v. Des Moines Independent Community School District* and its progeny, apply to virtual learning contexts. While ultimate guidance over appropriate student speech in virtual contexts awaits decision from the Supreme Court, teachers and administrators can take additional proactive measures to avoid this legal gray area by building tolerant classrooms.*

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I. INTRODUCTION

On a mid-March afternoon in 2020, students in Iowa classrooms, along with fellow students across the United States, packed their books into backpacks, pushed in their chairs, and said their goodbyes to their favorite teachers. Teachers and building administrators wiped off their dry-erase boards, flipped off their lights, and said their goodbyes to colleagues. Bright-eyed students, teachers, and principals looked forward to a week of relaxation over spring break—a week to recharge and prepare for the final push to get to the end of the school year. But many of these students, teachers, and administrators would not return to their schools and classrooms. Instead, the COVID-19 global pandemic, having reached the United States, fundamentally disrupted in-person learning. Students, teachers, administrators, and indeed most Americans, stayed at home to quarantine and socially distance themselves from one another. Educational stakeholders desperate to ward off learning loss sought solutions and sought them fast.

In the immediate wake of the COVID-19 pandemic, Iowa school district administrators scrambled for solutions involving mandatory and voluntary learning plans.¹ These plans provided students with learning opportunities as districts pulled together resources to provide them with technology capable of online learning.² Yet, the solutions district administrators found in coping with the immediate effects of COVID-19 were quickly overshadowed by still-looming questions of how to approach learning in the 2020–2021 school year. In August of 2020, the Governor of Iowa, Kim Reynolds, issued guidance to school districts across the state to “take all efforts” to resume face-to-face education.³ School

1. *Most Central Iowa Districts Opt for Voluntary Distance Learning; Waukee Requiring High School Students to Do Coursework*, DES MOINES REG. (Apr. 13, 2020, at 16:50 CT), <https://www.desmoinesregister.com/story/news/education/2020/04/10/schools-des-moines-distance-learning-online-classes-covid-19-coronavirus/2970641001/> [https://perma.cc/JT5B-ZQKD].

2. *See id.*

3. Molly Duffy, *Gov. Kim Reynolds Orders Iowa Schools to ‘Take All Efforts’ to Get Kids Back in Classrooms*, THE GAZETTE (July 17, 2020, at 21:19 CT), <https://www.thegazette.com/education/gov-kim-reynolds-orders-iowa-schools-to-take-all-efforts-to-get-kids-back-in-classrooms/> [https://perma.cc/UQ9Q-8FFQ].

districts tentatively welcomed masked students back into school buildings, installing procedures for sanitation and social distancing.⁴ For those students unable to engage in, or uncomfortable with participating in, in-person learning, districts formalized plans for hybrid, virtual learning options.⁵ In December of 2020, school districts continued to advocate for stay-at-home students, pushing for maintained virtual learning opportunities.⁶ Teachers utilized webcams to simultaneously reach students at school and at home.⁷ In turn, students utilized webcams to communicate with their teacher and peers in the classroom.⁸ These students, sitting behind computers in their own homes, with webcams broadcasting their faces and backgrounds to their classmates, innocently opened a Pandora's box of legal questions concerning student speech and expression in virtual classrooms.

In the span of mere months, virtual learning transitioned from theory, to viability, to reality in classrooms across Iowa and the United States. The COVID-19 pandemic effectively turned the notion of traditional schooling on its head. Among these traditional notions were well-established legal relationships, learning environments, and students' rights governing a pupil's in-person learning experience.⁹ However, the introduction of virtual schooling "constitute[d] a paradigm shift from long-standing tradition which dictate[d] that instruction . . . be delivered in a physical space consisting of desks or tables directed toward a podium, chalkboard or lecturer."¹⁰ The ability of a student to sit in their home—or wherever they may choose to learn—and log into class cemented this paradigm shift into the planning and practice of students, teachers, and administrators.¹¹ The *in loco parentis* (in the place of parents) relationship looks vastly different when

4. *See id.*

5. *See id.*

6. *See* Amber Mohmand, *Des Moines School Officials Seeking Virtual Learning Extension Through Dec. 11*, DES MOINES REG. (Nov. 22, 2020, at 17:36 CT), <https://www.desmoinesregister.com/story/news/education/2020/11/22/coronavirus-in-iowa-des-moines-public-school-board-seeks-to-extend-virtual-learning-covid-19/6384902002/> [<https://perma.cc/E5UU-VMLQ>].

7. *See Virtual Learning? Let's Just Call It Learning!*, DES MOINES PUB. SCHS. (Dec. 11, 2020), <https://www.dmschools.org/2020/12/virtual-learning-lets-just-call-it-learning/> [<https://perma.cc/9XCP-5TYN>].

8. *See id.*

9. *See* Joseph O. Oluwole & Preston C. Green III, *Virtual Schools, Student Rights, and the First Amendment: Adjusting the Schoolhouse Gate to the 21st Century*, 17 N.C. J.L. & TECH. 221, 224–25 (2015).

10. *Id.*

11. *See Virtual Learning? Let's Just Call It Learning!*, *supra* note 7 (discussing the practical benefits of students learning from home during the COVID-19 pandemic).

students are no longer in the physical care of their teachers. Maintaining an engaging and productive learning environment proves simultaneously more difficult and decisive behind the screen of a computer. Primarily, the household, a bastion of First and Fourth Amendment rights, becomes an extension of the schoolhouse gates. These factors culminate in unsettled questions of student speech and expression behind the screen of a computer in a virtual classroom.

Teachers stand at the front line of student interaction, be it in-person or virtual, and teachers, through their classroom management practices, bear the headmost onus of navigating a careful balance between fostering student speech and maintaining a productive learning environment. For this reason, many of the unsettled questions stemming from virtual learning fall squarely on the shoulders of teachers. These teachers deserve answers. While supplying answers to localized questions of district and school policy proves beyond the scope of this Note, this Note begins the process of offering much needed guidance. Part II of this Note examines the history of the Supreme Court precedent that forms a foundation for current analysis.¹² Part III of this Note frames current analysis within the new and changed circumstances resulting from the COVID-19 pandemic.¹³ Part IV utilizes Supreme Court precedent to begin the process of guiding teachers and educational stakeholders.¹⁴ Part V of this Note then looks beyond Supreme Court precedent to advocate for student free speech in tolerant, virtual classrooms.¹⁵

II. HISTORY FROM *TINKER* TO *MAHANAY*

An understanding of student speech and expression analysis rests on the foundations of four pivotal U.S. Supreme Court cases.¹⁶ This quartet of cases decided through the decades—though few and far between—establishes a framework for acceptable and clearly unacceptable student speech and expression. While each contributes uniquely to the abundance of student free speech and expression issues, none point definitively toward a resounding rule governing student speech and expression specific to virtual learning contexts. As each decision preceded the COVID-19 pandemic, none of them foresaw the explosion in virtual learning that would occur in the crucial months of lockdowns and

12. See *infra* Part II.

13. See *infra* Part III.

14. See *infra* Part IV.

15. See *infra* Part V.

16. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Morse v. Frederick*, 551 U.S. 393 (2007); *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180 (2021).

sheltering. Nonetheless, a thorough survey of these foundational cases proves necessary in forecasting solutions.

A. Tinker v. Des Moines Independent Community School District

On a December day in 1965, a group of students and adults met to determine how best to outwardly express their objections to the Vietnam War.¹⁷ Among this group were John F. Tinker, Mary Beth Tinker, and Christopher Eckhardt—all students of the Des Moines Independent Community School District (Des Moines Public Schools or DMPS).¹⁸ Members of the group decided to wear black armbands in protest of the war.¹⁹ However, building administrators of DMPS caught wind of the plan to wear these black armbands and passed a policy suspending any student who refused to remove the symbolic armband.²⁰ The students—John F. Tinker, Mary Beth Tinker, and Christopher Eckhardt—were suspended from their respective schools for violating district policy.²¹ Through their fathers, they filed suit.²²

The United States District Court for the Southern District of Iowa dismissed the students' complaint, finding the school authorities' policy a reasonable exercise of school discipline.²³ The Court of Appeals for the Eighth Circuit similarly affirmed without opinion.²⁴ The United States Supreme Court, however, reversed in a paramount opinion finding First Amendment protection applies to student speech.²⁵

The Supreme Court famously introduced the “substantial disruption” test to student free speech and expression.²⁶ This test seeks to balance the interests of teachers and administrators in promoting an orderly, efficient, and effective learning environment against the First Amendment interests of students exhibiting “pure speech” in contributing thoughts, ideologies, and opinions to the

17. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 973 (S.D. Iowa 1966).

24. *Tinker*, 393 U.S. at 505; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 383 F.2d 988 (8th Cir. 1967) (en banc) (per curiam).

25. *Tinker*, 393 U.S. at 506, 514.

26. *Id.* at 514; Meghan K. Lawrence, Note, *Tinker Stays Home: Student Freedom of Expression in Virtual Learning Platforms*, 101 B.U. L. REV. 2249, 2259 (2021).

marketplace of ideas.²⁷ At the heart of the substantial disruption test lies Justice Abe Fortas's assertion: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."²⁸ Yet, Justice Fortas also recognized that, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."²⁹ Herein lies the balance resulting in the substantial disruption test: "[W]here there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."³⁰

This test stands forthright among student speech and expression analysis, but it contains several distinguishable factors. First, this test in its context applies to issues of "pure speech."³¹ This pure speech "does not concern speech or action that intrudes upon the work of the schools or the rights of other students."³² Justice Fortas clarifies,

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure³³

Thus, speech and expression that directly interferes with the work of other students, teachers, and administrators would fail the substantial disruption test.³⁴ Second, while affording students First Amendment protection within the schoolhouse gates, the substantial disruption test grants a great degree of deference to teachers and school officials to determine what constitutes a "substantial disruption."³⁵ Finally, no individual in the 1960s—forward-thinking Supreme Court Justices included—could have accurately predicted the profound paradigm shifts ushered in by virtual learning. Therefore, in light of *Tinker*'s historical contexts, the substantial disruption test cannot be read as fully resolving the

27. See *Tinker*, 393 U.S. at 512–13.

28. *Id.* at 506.

29. *Id.* at 507.

30. *Id.* at 509 (quoting *Burnside v. Byers*, 363 F.2d 744, 749 (5th Cir. 1966)).

31. *Id.* at 508.

32. *Id.*

33. *Id.*

34. See *id.*

35. Lawrence, *supra* note 26, at 2274.

challenges of student speech and expression in contemporary virtual learning contexts.

B. Bethel School District No. 403 v. Fraser

Seventeen years after the events provoking *Tinker*, a student named Matthew N. Fraser instigated another series of events which would result in the first “carveout” to the substantial disruption test, affording school authorities even greater deference in student speech and expression decisions.³⁶ On April 26, 1983, Fraser delivered a speech in front of his fellow students at Bethel High School.³⁷ Under the guise of nominating a fellow student for elective office, Fraser’s speech amounted to an “elaborate, graphic, and explicit sexual metaphor” delivered to peers, including 14-year-olds.³⁸ Fraser stated,

I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most of all, his belief in you, the students of Bethel is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

Jeff is a man who will go to the very end—even the climax, for each and every one of you.

So vote for Jeff for ASB vice-president—he’ll never come between you and the best our high school can be.³⁹

Though he was warned not to deliver the speech, Fraser’s delivery elicited varied student reactions—from hoots and yells to bewilderment and embarrassment.⁴⁰ For his speech, Fraser faced a three-day suspension and removal from a list of candidates for commencement speaker.⁴¹

Fraser, through his father, filed suit with the United States District Court for the Western District of Washington.⁴² The Court found that the school violated

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

37. *Id.*

38. *Id.* at 677–78.

39. Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1357 (9th Cir. 1985).

40. *Bethel Sch. Dist. No. 403*, 478 U.S. at 678.

41. *Id.*

42. *Id.* at 679.

Fraser's freedom of speech.⁴³ The Court of Appeals for the Ninth Circuit affirmed, finding Fraser's speech indistinguishable from the armbands worn by John Tinker, Mary Beth Tinker, and Christopher Eckhardt.⁴⁴ The United States Supreme Court, however, reversed.⁴⁵

Chief Justice Warren E. Burger delivered the opinion of the Court, distinguishing Fraser's speech from the facts at issue in *Tinker*. Chief Justice Burger reasoned, "In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in *Tinker*, [the Supreme Court] was careful to note that the case did 'not concern speech or action that intrudes upon the work of the schools or the rights of other students.'"⁴⁶ Thus, Fraser's speech did not constitute "pure speech" in substantial disruption balancing.⁴⁷ Rather, Chief Justice Burger emphasized, "Unlike the sanctions imposed on students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint."⁴⁸ The language utilized by Fraser amounted to lewd, vulgar, and offensive terms.⁴⁹

Fraser weighs heavily in affording deference to schoolteachers and building administrators in substantial disruption balancing. The Court effectively reins in student speech and expression by reaffirming "that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."⁵⁰ Moreover, the Court carves out an exception to the *Tinker* test.⁵¹ Chief Justice Burger writes, "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."⁵² This *Tinker* carveout for lewd, vulgar, and offensive language stands in line with a school's motivation to "teach by example the shared values of a civilized social order."⁵³

Yet, while *Fraser* offers a clear carveout to *Tinker*, it does not fully grapple with the unique challenges of contemporary virtual learning contexts.

43. *Id.*

44. *Id.* at 679–80.

45. *Id.* at 680.

46. *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

47. *See Tinker*, 393 U.S. at 508.

48. *Bethel Sch. Dist. No. 403*, 478 U.S. at 685.

49. *See id.* at 684–85.

50. *Id.* at 682.

51. *Id.* at 683.

52. *Id.*

53. *Id.*

C. Morse v. Frederick

Another 24 years after Matthew Fraser delivered his speech, the Supreme Court decided *Morse v. Frederick*.⁵⁴ *Morse* rose to the Supreme Court from events in 2002 when the Olympic Torch Relay—heading toward its eventual opening ceremony in Salt Lake City—passed through Juneau, Alaska.⁵⁵ The principal of Juneau-Douglas High School (JDHS), Deborah Morse, permitted her students, in marking the occasion, to witness the Olympic torch pass through Juneau.⁵⁶ Joseph Frederick, a senior student at JDHS, arrived late to the event and unfurled a banner reading “BONG HiTS 4 JESUS.”⁵⁷ Morse suspended Frederick for 10 days for violating school policy that prohibited the encouragement of illegal drug use.⁵⁸

Frederick filed suit.⁵⁹ The District Court granted summary judgment for Morse and the school board.⁶⁰ The court held that neither Morse nor the school board had infringed on Frederick’s First Amendment right to free speech.⁶¹ The Ninth Circuit Court of Appeals reversed.⁶² Relying on *Tinker*’s substantial disruption test, the Court of Appeals found that a school may not censor nondisruptive, off-campus speech during school-authorized activities “because the speech promotes a social message contrary to the one favored by the school.”⁶³ The U.S. Supreme Court then reversed the Court of Appeals, ruling for Morse and the school board.⁶⁴

Chief Justice John Roberts, writing for the majority, reasoned, “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”⁶⁵ In doing so, the Supreme Court crafted another carveout to *Tinker*’s substantial disruption test, weighing against students in free speech balancing. In crafting a carveout for speech and expression that promotes the use of illegal drugs, the Court looked back to *Fraser*, noting that the case “established that the mode of analysis set forth in *Tinker* is not absolute.

54. 551 U.S. 393 (2007).

55. *Id.* at 397.

56. *Id.*

57. *Id.*

58. *Id.* at 398.

59. *Id.* at 399.

60. *Id.*

61. *Frederick v. Morse*, No. J 02–008 CV(JWS), 2003 WL 25274689, at *2 (D. Alaska May 27, 2003).

62. *Frederick v. Morse*, 439 F.3d 1114, 1125 (9th Cir. 2006).

63. *Id.* at 1118.

64. *Morse*, 551 U.S. at 410.

65. *Id.* at 397.

Whatever approach *Fraser* employed, it certainly did not conduct the ‘substantial disruption’ analysis prescribed by *Tinker*.’⁶⁶ Thus, the Court afforded even greater deference to school officials.

Still, while cases preceding *Morse* only tangentially address contemporary virtual learning contexts, *Morse* does a service in establishing the bounds of on-campus and off-campus speech. Notably, the facts leading to *Morse* took place beyond the schoolhouse gates themselves.⁶⁷ Yet, the Court reasoned, “while children assuredly do not ‘shed their constitutional rights . . . at the schoolhouse gate,’ . . . the nature of those rights is what is appropriate for children in school.”⁶⁸ For this reason, though Frederick unfurled a banner outside of the school itself, “Frederick [could not] ‘stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he [was] not at school.’”⁶⁹ This concept of expandable schoolhouse gates proves important in assessing student speech issues in mobile-virtual learning contexts.

D. *Mahanoy Area School District v. B.L.*

The most recent U.S. Supreme Court decision to decide issues of student free speech and expression, *Mahanoy Area School District v. B.L.*, comes closest to addressing pure speech in virtual learning contexts.⁷⁰ This Supreme Court decision came another 14 years after the Court’s decision in *Morse*.

B.L., a freshman student at Mahanoy Area High School tried out for a spot on the school’s varsity cheer squad.⁷¹ When she did not earn a position on the varsity squad, she became agitated by the fact that a different freshman student had earned a position.⁷² B.L. then posted images to her Snapchat story reading, “[f]uck school fuck softball fuck cheer fuck everything” and “[I]ove how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn’t matter to anyone else[.]”⁷³ News of these snapchat posts and their content spread around the school and gossip made its way into class time.⁷⁴ In turn, school administrators and coaches found that B.L. violated rules relating to the use of

66. *Id.* at 405 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969)).

67. *Id.* at 397 (reporting that the events took place across the street from school grounds).

68. *Id.* at 406 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995)).

69. *Id.* at 401 (citation omitted).

70. *See* 594 U.S. 180, 184 (2021).

71. *Id.*

72. *Id.*

73. *Id.* at 184–85.

74. *See id.* at 185.

profanity in connection with an extracurricular activity.⁷⁵ These rules stated in relevant part:

Please have respect for your school, coaches, teachers, other cheerleaders and teams. Remember you are representing your school *when at games, fundraisers, and other events*. Good sportsmanship will be enforced, this includes foul language and inappropriate gestures . . . There will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet.⁷⁶

The school suspended B.L. from participation in the school's junior varsity cheerleading squad.⁷⁷

B.L., through her parents, filed suit. The United States District Court for the Middle District of Pennsylvania ruled in B.L.'s favor.⁷⁸ The District Court analyzed B.L.'s speech under a *Tinker* substantial disruption test and found that the Snapchat posts had not caused a substantial disruption at the school.⁷⁹ The Third Circuit Court of Appeals affirmed the lower court's decision.⁸⁰

The Supreme Court also affirmed, finding that Mahanoy Area High School officials violated B.L.'s First Amendment rights.⁸¹ Justice Stephen Breyer, writing for the majority, reasoned that schools do at times stand *in loco parentis*.⁸² Along these lines, schools may regulate some off campus speech in cases of

severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.⁸³

However, the Court declined to

set forth a broad, highly general First Amendment rule stating just what counts as "off campus" speech and whether or how ordinary First Amendment

75. *Id.*

76. B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 432 (M.D. Pa. 2019) (emphasis added).

77. *Id.* at 433.

78. *Id.* at 445.

79. *Id.* at 443–45.

80. B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 194 (3d Cir. 2020).

81. Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 193–94 (2021).

82. *Id.* at 187.

83. *Id.* at 188.

standards must give way off campus to a school's special need to prevent, e.g., substantial disruption of learning-related activities or the protection of those who make up a school community.⁸⁴

In failing to do so, the Court left unresolved a legal gray area surrounding student speech in virtual learning contexts.

Nevertheless, the Supreme Court established three primary features of off-campus speech that distinguish a school's efforts to regulate student speech.⁸⁵ "First, a school, in relation to off-campus speech, will rarely stand *in loco parentis*."⁸⁶ Second, "regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day."⁸⁷ This creates judicial skepticism of a school's regulation of off-campus speech because it means students may never have an opportunity to engage in unregulated speech.⁸⁸ Finally, "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus."⁸⁹ Schools take up the mantle of preparing U.S. citizens. As such, schools should prepare students to engage in an active "marketplace of ideas."⁹⁰

III. POST-PANDEMIC LEARNING IN IOWA: NEW AND CHANGED CIRCUMSTANCES

Having delineated the foundational case law established in the decades preceding the global COVID-19 pandemic, it proves important to frame these foundations in the realities and lived experiences of local teachers, administrators, and educational stakeholders. Doing so allows for sound conclusions in identifying and prescribing problems and solutions to unsettled questions of student speech and expression in virtual contexts.

In the immediate shadow of the COVID-19 global pandemic, school districts offered mandatory and voluntary virtual learning opportunities to students across the state of Iowa.⁹¹ By the fall of 2020, a portion of Iowa students opted to learn in the safety of their own homes, logging into class through district-provided

84. *Id.* at 189.

85. *See id.* at 189–90.

86. *Id.* at 189.

87. *Id.*

88. *Id.* at 189–90.

89. *Id.* at 190.

90. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969); *see also* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (depicting the first mention of the marketplace of ideas notion).

91. *Most Central Iowa Districts Opt for Voluntary Distance Learning; Waukee Requiring High School Students to Do Coursework*, *supra* note 1.

technology.⁹² Gradually, however, policymakers began to install mandates that would shepherd students back to Iowa classrooms.⁹³ By January of 2021, Iowa's governor signed into law a bill requiring schools to offer 100 percent in-person learning.⁹⁴ While this bill required schools to *offer* in-person learning, many students continued to take advantage of virtual options. For this reason, challenges remained. In August of 2021, Iowa schools faced lasting effects from the COVID-19 global pandemic, resulting in continued virtual learning plans.⁹⁵

At the writing of this Note, however, time has afforded the landscape of the COVID-19 pandemic opportunity to change—now reflecting a gradual decline in infections, hospitalizations, and deaths—as a result of ever-increasing mitigation strategies. Where Iowa students once wore masks through the duration of their school day, students now go to school with little thought to once-required masking procedures. Where Iowa school facilities once struggled to accommodate social-distancing guidelines by spacing out seats in classrooms and cafeterias, students now enjoy proximate learning and social time with their peers. Where Iowa teachers were once required to sanitize classroom surfaces through the school day, custodial staff have returned to standard responsibilities. Yet, despite a seeming return to normal, opt-in virtual learning options persist, and likely will persist, into the future.

In fact, the largest district in the state of Iowa, DMPS—the same party to *Tinker*—follows a national trend by continuing to offer virtual learning alternatives through its Virtual Campus. Virtual Campus, alongside similar alternatives offered by school districts throughout the United States, is designed to offer equitable access to high school students.⁹⁶ Courses taught through Virtual Campus utilize a

92. See Local 5 News, *DMPS Will Stay Virtual Until Winter Break Following Waiver Approval*, WE ARE IOWA (Dec. 11, 2020, at 19:29 CT), <https://www.weareiowa.com/article/news/education/return-to-learn/iowa-school-plans-coronavirus-virtual-learning-positivity-rate-covid-19-update-des-moines-ankeny-johnston-west-des-moines-waukee/524-db231e83-cbc2-42dd-ac5b-d7b4b92a74a7> [https://perma.cc/RF9M-4NU7].

93. See Duffy, *supra* note 3.

94. Ian Richardson, *Iowa Gov. Kim Reynolds Signs Law Requiring Schools to Offer 100% In-Person Learning Option*, DES MOINES REG. (Jan. 29, 2021, at 16:14 CT), <https://www.desmoinesregister.com/story/news/politics/2021/01/29/gov-kim-reynolds-signs-law-requiring-iowa-schools-offer-in-person-classes/4307252001/> [https://perma.cc/P8FF-K6EW].

95. Local 5 News, *Here's How Some Central Iowa Schools Are Navigating Online Learning Options This Year*, WE ARE IOWA (Aug. 6, 2021, at 15:52 CT), <https://www.weareiowa.com/article/news/education/central-iowa-online-learning-at-schools-remote-fall-2021-des-moines-metro-ankeny-waukee-ames-johnston/524-29313254-475e-4195-a808-d06203f9fc2a> [https://perma.cc/GKS4-N3V7].

96. *Virtual Campus Des Moines Public Schools: About Us*, DES MOINES PUB. SCHS., <https://virtualcampus.dmschools.org/about/> [https://perma.cc/5PQM-L52N].

combination of synchronous (live) learning which entails the use of a camera, and asynchronous (student directed) learning which allow students to complete work independently from strict classroom schedules.⁹⁷ Synchronous learning requires attendance in live class sessions with the use of cameras and chat functions directed by instructors.⁹⁸ Despite great progress in returning students to in-person learning, virtual learning alternatives remain viable options.

DMPS's Virtual Campus complies with Iowa Code requirements for online-learning requirements.⁹⁹ This code section traces its origins to 2012 legislation, indicating foresight on behalf of Iowa lawmakers in codifying online-learning requirements approximately a decade ago.¹⁰⁰ The COVID-19 global pandemic propelled students into virtual learning, and cemented its place as a lasting alternative to traditional in-person education.

In the face of a future pandemic, virtual learning stands as a viable solution for Iowa students. Still, virtual learning may be embraced by Iowa school districts to cure other ills in education arising as a result of post-COVID circumstances. Nationally, around 600,000 teachers resigned or otherwise left their positions between January 2020 and February 2022.¹⁰¹ At the start of the 2022–2023 school year, Iowa had 1,000 vacant full-time teaching positions.¹⁰² These vacancies are reflected in core school subjects ranging from mathematics and science to English language arts and social studies.¹⁰³ Decreasing numbers of teachers results in unbalanced teacher-student ratios, further straining those teachers who work in in-person settings. In response, some schools around the United States have begun to rely on virtual learning to rebalance classrooms and fill teacher vacancies.¹⁰⁴ Iowa

97. See *Virtual Campus Des Moines Public Schools: Frequently Asked Questions*, DES MOINES PUB. SCHS., <https://virtualcampus.dmschools.org/about/faq/> [https://perma.cc/DM2S-AFHQ].

98. See *id.*

99. See IOWA CODE § 256.41 (2024).

100. See 2012 Iowa Legis. Serv. §§ 256.24–.27 (West).

101. Amanda Rooker, *One Stayed and One Left: What Iowa Educators Are Saying About the Teacher Shortage*, KCCI (Aug. 26, 2022, at 21:40 CT), <https://www.kcci.com/article/one-stayed-and-one-left-what-educators-are-saying-about-the-teacher-shortage-des-moines-iowa/41004103> [https://perma.cc/D8MU-8N63].

102. *Id.*

103. *Teacher Shortage Areas: 2024–25 Iowa Teacher Shortage Areas*, IOWA DEP'T OF EDUC., <https://educateiowa.gov/pk-12/educator-quality/practitioner-preparation/teacher-shortage-areas> [https://perma.cc/JLK3-HKS5].

104. Alyson Klein, *Using Virtual Teachers to Fill Vacancies: Smart Solution or Big Mistake?*, EDUC. WK. (May 26, 2022), <https://www.edweek.org/leadership/using-virtual-teachers-to-fill-vacancies-smart-solution-or-big-mistake/2022/05> [https://perma.cc/RRG3-X95U].

schools may well embrace this solution and see increased use in programs such as DMPS's Virtual Campus in schools around the state in the near future.¹⁰⁵

IV. APPLYING *TINKER* AND ITS CARVEOUTS TO CURRENT VIRTUAL LEARNING CONTEXTS

Iowa teachers who once embraced, still embrace, or may soon reembrace virtual learning need guidance to teach, encourage, and monitor appropriate student speech in virtual settings. These teachers have an important responsibility in educating and preparing citizens, but must strike a balance so that their physical and virtual classrooms do not turn into dreaded "enclaves of totalitarianism."¹⁰⁶ Standing in the way of easy balancing, however, is a lack of clear parameters. Analyzing instances of student speech and expression in virtual learning contexts places one in a gray area over which the Supreme Court has yet to offer clear guidance.¹⁰⁷ "Indeed, the law has failed to catch up with technology. Nonetheless, according to the Supreme Court, it is indisputable that the First Amendment applies to virtual speech."¹⁰⁸

Of primary concern, one must differentiate between off-campus and on-campus speech, which proves challenging depending upon factors unique to the school environment.¹⁰⁹ These factors include variances in "a student's age, the nature of the school's off-campus activity, [and] the impact upon the school itself."¹¹⁰ The Supreme Court in *Mahanoy* hints at a list of on-campus activities covering virtual learning, including:

all times when the school is responsible for the student; the school's immediate surroundings; travel en route to and from the school; all speech taking place over school laptops or on a school's website; speech taking place during remote learning; activities taken for school credit; and communications to school e-mail accounts or phones.¹¹¹

But in light of the weight assigned to varying factors in this list, the Court declined to state a general rule clearly delineating on-campus and off-campus

105. See *Virtual Campus Des Moines Public Schools: About Us*, *supra* note 96.

106. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

107. See *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 189 (2021) (declining to establish a clear rule governing "off-campus speech").

108. Oluwole & Green III, *supra* note 9, at 248–49.

109. See *id.* at 252 (footnote omitted) ("In virtual schools, it is difficult to determine what constitutes off-campus speech versus on-campus speech. The ubiquity of the Internet makes the distinction between on-campus speech and off-campus speech elusive.").

110. *Mahanoy Area Sch. Dist.*, 594 U.S. at 189.

111. *Id.* at 188.

virtual speech as relevant to a substantial-disruption analysis.¹¹² This seemingly leaves teachers, school administrators, and policy makers to embrace virtual learning in a twilight zone of unsettled law. Looking to embrace the future of virtual learning, some have already charted a path forward, realizing, “[i]n virtual schools, the campus could include the school-provided laptop, [i]nternet access, server, and the learning management system, as well as the video and audio system used for class sessions.”¹¹³ Lacking clear guidance from the Court, these educators seek guidance so that they may strike an appropriate balance between free speech and learning needed in virtual classrooms.

While offering comprehensive guidance to teachers, administrators, and educational stakeholders proves beyond the scope of this Note, several clear examples—by way of common scenarios—can help illuminate the path that educators traverse in the world of virtual learning. These common virtual learning scenarios utilize school resources and time, under the presumption made by many that school-provided technology, access, along with the school’s learning management system constitute a virtual campus within the student’s home. While the Supreme Court has yet to establish concrete rules to the bounds of free speech in virtual learning environments, the Court’s own precedent establishes viable solutions to several common virtual learning scenarios involving student speech and expression. The following scenarios do not qualify as protected speech and expression.

A. A Student Utilizing Videotelephony Software or its Chat Function Makes a Lewd, Inappropriate Comment During the School Day

Seasoned teachers know that students at all ages have different levels of maturity. Developing prefrontal cortices result in questionable decision-making in which students do not always make the best behavioral choice. For some students, learning from the comfort of their own home may influence decision-making in a virtual classroom all the more, causing them to unmute their microphone and make a lewd, inappropriate comment during the school day. Some students may type a lewd, inappropriate comment into the chat function of their learning management system. Still, other students may choose to display lewd, inappropriate imagery in the background of their home learning environment as it appears on the computer’s camera.

These situations do not represent protected speech and expression. Lewd comments and imagery fall under the *Bethel* carveout.¹¹⁴ As such, “[i]t is a highly

112. *Id.*

113. Oluwole & Green III, *supra* note 9, at 253.

114. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”¹¹⁵ Teachers and “schools must teach by example the share values of a civilized social order.”¹¹⁶ Moreover, the use of lewd and vulgar speech and imagery likely implicates the *Tinker* substantial-disruption test. Here, disrupting class time with lewd speech and imagery would materially interfere with the ability of a teacher to maintain an ordered learning environment.¹¹⁷ For this reason, under established precedent, teachers and administrators maintain necessary discretion under *Tinker* and the *Bethel* carveout to control lewd and vulgar speech in virtual classrooms.¹¹⁸

B. A Student Utilizing Videotelephony Software or its Chat Function Makes a Comment During the School Day Promoting the Use of Drugs

Still developing decision-making skills may similarly result in student advocacy for the use of illegal substances. This advocacy may result from a student’s personal beliefs or stem from peer pressure. In a virtual classroom, students may engage in advocating for illegal drug use by unmuting a microphone and making a public comment, typing a statement advocating drug use into the chat function of a school’s learning management system, or displaying imagery advocating the use of illegal drugs in the webcam background.

These situations do not represent protected speech and expression.¹¹⁹ Comments promoting the use of illegal drugs fall under the *Morse* carveout.¹²⁰ Accordingly, “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”¹²¹ Depending on the manner of public comment, statements advocating the use of illegal drugs similarly pose a risk of disrupting the *Tinker* substantial-disruption test as analyzed above.¹²² Supreme Court precedent offers teachers and administrators a great deal of discretion in silencing speech promoting the use of illegal drugs in virtual classrooms.

115. *Id.*

116. *Id.*

117. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

118. *See id.*; *Bethel Sch. Dist. No. 403*, 478 U.S. at 683.

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

120. *See id.* at 410.

121. *Id.* at 397.

122. *See Tinker*, 393 U.S. at 509.

C. A Student Utilizing Videotelephony Software or its Chat Function Makes a Comment During the School Day that Threatens or Bullies Another Individual.

Bullying takes shape in many forms of overt speech and action in classrooms across grade levels. Bullying may also take the shape of covert words and actions not easily discernable to classroom teachers. Bullying, however, takes on a new dimension when channeled through technology that provides students with a wall of anonymity or separates them from immediate consequence. In a virtual classroom, students may make an overt act of unmuting their microphone to make a public, threatening comment to a fellow student. Students may also engage in the more private act of messaging a classmate through the chat function of their learning management system.

These situations do not represent protected speech and expression. Comments used to threaten or bully students fall under the majority holding in *Mahanoy*.¹²³ The Court makes clear that the school's regulatory interests remain in cases of "serious or severe bullying or harassment targeting particular individuals . . . [along with] threats aimed at teachers or other students."¹²⁴ The Supreme Court affords teachers and school administrators authority to silence bullying or threatening comments that occur in the virtual classroom setting.¹²⁵

V. THE CASE FOR STUDENTS: LOOKING BEYOND THE *TINKER* CARVEOUTS

Looking beyond the three aforementioned *Tinker* carveouts, as applied to student free speech and expression in virtual classrooms, a great degree of deference should be afforded to students in virtual learning environments. While the three scenarios in the preceding section involved relatively active forms of speech and expression, speech and expression beyond the carveouts presents as comparatively more passive. Like *Tinker*, speech and expression beyond the carveouts often "does not concern speech or action that intrudes upon the work of the schools or the rights of other students."¹²⁶ For example, students might display affiliation to a certain political party, display religious imagery, or, like *Tinker*, wear an article of clothing in protest while communicating via webcam on a

123. *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 188 (2021).

124. *Id.*; see also Jessica Moy, Note, *Beyond 'The Schoolhouse Gates' and into the Virtual Playground: Moderating Student Cyberbullying and Cyberharassment After Morse v. Frederick*, 37 HASTINGS CONST. L.Q. 565, 583–89 (2010) (discussing the methods the courts could use to not give online bullying Constitutional protections for students).

125. See *Mahanoy Area Sch. Dist.*, 594 U.S. at 188.

126. *Tinker*, 393 U.S. at 508.

school-provided laptop.¹²⁷ These students may not actively interrupt instructional time, but seek to communicate their legitimate points of view.

In these circumstances, courts will necessarily defer to a *Tinker* substantial-disruption test. However, this test proves inherently subjective in weighing a student's speech interest against the perceived disruption to the learning environment.¹²⁸ Two conflicting outcomes pull in opposite directions. On one hand, "*Tinker* heavily defers to schools for on-campus student expression, giving schools the authority to determine dress codes and prohibit certain types of clothing deemed 'disruptive.' *Tinker* has been interpreted to give schools the right to prohibit expression that they subjectively determine as 'vulgar.'"¹²⁹ On the other hand, "When courts choose to apply the material and substantial disruption test, they are more likely to find school censorship of student speech unconstitutional because of the requirement to prove substantial disruption."¹³⁰ Of these two conflicting outcomes, the immediate discretion of school authorities often wins over the prolonged judgment of the court.

The large degree of latitude afforded to teachers in instances of speech beyond those of the *Tinker* carveouts can result in deference that silences student voices yearning to contribute to a productive and balanced marketplace of ideas. As an illustration,

Teachers may observe items in students' physical backgrounds that they find "disruptive" to their class. . . . [I]f a student was drinking coffee out of a mug that had the slogan "Daenerys Targaryen is the rightful queen of Westeros," and the teacher, a staunch supporter of Jon Snow, found this offensive, under a broad application of *Tinker*, he could punish the student for their choice of mug.¹³¹

While this example reads as hyperbole, it does well to capture the discretion and deference that teachers and administrators hold over the immediate consequences stemming from student speech issues.¹³² Though teachers strive to empower the next generation of changemakers, teachers hold significant sway over the viewpoints expressed in class. In a physical environment, this presents

127. Lawrence, *supra* note 26, at 2279.

128. See *Tinker*, 393 U.S. at 509 (requiring a finding that "engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school'" in order for the prohibition to prevail over the student's free speech interest) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

129. Lawrence, *supra* note 26, at 2275.

130. Oluwole & Green III, *supra* note 9, at 249.

131. Lawrence, *supra* note 26, at 2275.

132. See *id.*

problems. In a virtual environment, in which a student expresses themselves from their own home, this is all the more problematic.

Thus, in identifying issues and prescribing solutions, one navigates a delicate balance between the speech rights of students in virtual contexts, and the individual discretion of teachers in maintaining productive online learning environments. Some scholars advocate for the use of “virtual backgrounds” to balance the school’s interest against that of the student.¹³³ The use of such backgrounds would require students to employ either a blur feature or a neutral background, much like a green screen, to hide their physical environment from view.¹³⁴ Some scholars argue that “schools should retain the ability to set rules and guidelines for which virtual backgrounds are allowed—so long as they apply their guidelines in a viewpoint neutral fashion.”¹³⁵ Without consideration of technological inequities and the capacities of a student’s computer to utilize virtual backgrounds, this solution should not be seen as sensible in balancing student speech interests.¹³⁶ This solution significantly stymies student expression. Education, be it in person or virtual, “is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship.”¹³⁷ In training good citizens, it is important that students find meaningful participation within a robust marketplace of ideas.¹³⁸ Requiring the use of virtual backgrounds chills student speech in virtual classrooms by depriving students of a medium to communicate their views—namely, the walls and environments of their own homes.

Moreover, within the balance of student speech and teacher discretion, students bear the brunt of the immediate consequences stemming from school policies used to chill their speech. Affording deference to schools allows administrators to impose near-immediate punishment upon students whose speech is determined disruptive. Accordingly,

Once a school oversteps its bounds and wrongfully punishes a student, how do we undo the harm that case caused the student? It is typically impossible as well as impractical for a student to obtain judicial review and meaningful

133. See, e.g., *id.* at 2283–84.

134. See *Changing Your Virtual Background Image*, ZOOM SUPPORT (Mar. 4, 2025, at 15:15 CT), https://support.zoom.com/hc/en/article?id=zm_kb&sysparm_article=KB0060387 [<https://perma.cc/47JF-JV47>].

135. See, e.g., Lawrence, *supra* note 26, at 2284.

136. *Id.* at 2283.

137. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

138. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

redress prior to being harmed, often irreparably, by a public school's disciplinary decision.¹³⁹

Affording students a greater degree of deference in their speech stands to reduce instances of erroneous punishment for which students face limited opportunity for timely redress.

Rather than use their authority to limit opportunities for student speech in virtual classrooms, teachers and administrators should implement sound classroom procedures to encourage a healthy marketplace of ideas that reduces substantial disruption as a side effect of student viewpoints. This includes teaching the importance of tolerance. It further includes teaching much needed critical-thinking skills so that students can observe another's point of view; analyze and weigh this point of view against their own knowledge, experience, and biases; parse an argument; and come to their own informed judgment. Teachers should strive toward skill sets that build tolerant, inclusive, and equitable classrooms that simultaneously acclimate students to productive, rigorous learning environments. While these skill sets may not come overnight, continued professional development can provide teachers the tools to build tolerant classrooms, both in-person and virtual.

V. CONCLUSION

First Amendment jurisprudence stands as a vast, imposing area of law. Clear-cut answers under free speech analysis prove rare, as ever-changing societal developments spring forth new, unsettled questions of protected speech. Student free speech in virtual contexts falls victim to this issue. Until the law catches up with technological and educational developments, teachers, administrators, and educational stakeholders must navigate a gray area for which there is little concrete guidance. Those in a profession of increasing job responsibilities must account for yet another consideration in effectively teaching students. These teachers, administrators, and district personnel yearn for solutions.

Ultimate guidance, however, must flow from the Supreme Court—a Court that has yet to take up these issues directly. Until then, a patchwork solution charts a path toward answering unsettled questions of student speech and expression behind the screen of a computer in a virtual classroom. Protected speech does not include lewd, inappropriate commentary.¹⁴⁰ Protected speech does not include the

139. Beth A. Norrow & Sommer Ingram Dean, *The Law of Students' Rights to Online Speech: The Impact of Students' Ability to Openly Discuss Public Issues*, 47 HUM. RTS. 17, 18 (2022).

140. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986).

promotion of illegal drug use.¹⁴¹ Protected speech does not include threats or bullying tactics.¹⁴² Beyond this, protected speech does not include speech that would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”¹⁴³

This patchwork solution only sets a foundation—but it sets a foundation, nonetheless. Ever-changing variables unique to individual school districts may limit the solutions this Note can prescribe, but charting proactive solutions to an emerging gray area in the law requires some steps forward, toward an ultimate solution. As educational best practices evolve, this path forward may be further illuminated. Until then, teachers, administrators, educational stakeholders—and their students—must rely on precedent and take meaningful individual steps in building tolerant classrooms.

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

142. *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 188 (2021).

143. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

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