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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

J.C., a minor by and through her) CV 08-03824 SVW (CWx)
guardian ad litem R.C.,)

Plaintiff,)

v.)

BEVERLY HILLS UNIFIED SCHOOL) ORDER GRANTING PLAINTIFF'S
DISTRICT; ERIK WARREN, both in) MOTION FOR SUMMARY ADJUDICATION
his individual capacity and as) AS TO HER FIRST AND SECOND
principal of Beverly Vista) CAUSES OF ACTION FOR VIOLATION
School, CHERRYNE LUE-SANG, both) OF 42 U.S.C. § 1983, AND
in her individual capacity and as) GRANTING INDIVIDUAL DEFENDANTS'
assistant principal of Beverly) MOTION FOR SUMMARY JUDGMENT ON
Vista School; and JANICE HART,) THE ISSUE OF QUALIFIED IMMUNITY
both in her individual capacity) AS TO THE FIRST CAUSE OF ACTION
and as an employee of Beverly) [45][50]
Vista School,)

Defendants.)

I. INTRODUCTION

Plaintiff J.C. brought this action against the Beverly Hills Unified School District, and school administrators Erik Warren, Cherryne Lue-Sang, and Janice Hart ("the individual Defendants"), for the alleged violation of her constitutional rights. Plaintiff seeks injunctive relief, as well as damages against the individual

1 defendants, and nominal damages in the amount of \$1.00 against the
2 School District.

3 The parties have brought cross motions for summary adjudication.
4 Plaintiff J.C. seeks summary adjudication as to her First and Second
5 Causes of Action against the individual Defendants and the District for
6 the alleged violation of her First Amendment rights under 42 U.S.C. §
7 1983. Plaintiff also seeks summary adjudication on her Third Cause of
8 Action for violation of her right of due process, also under section
9 1983.

10 The individual Defendants, Warren, Hart, and Lue-Sang, seek summary
11 adjudication as to the First Cause of action for money damages on the
12 grounds of qualified immunity.

13 For the reasons stated below, the Court GRANTS Plaintiff's motion
14 for summary adjudication as to the First and Second Causes of Action.
15 An order regarding Plaintiff's due process claim, the Third Cause of
16 Action, will follow shortly.

17 The Court also GRANTS the individual Defendants' motion for
18 summary adjudication. The individual Defendants are entitled to
19 qualified immunity on Plaintiff's First Cause of Action for money
20 damages.

21 **II. FACTS**

22 The following material facts are undisputed. Plaintiff J.C. was a
23 student at Beverly Vista High School ("the School") in May 2008.
24 Individual Defendant Erik Warren ("Warren") is, and at all relevant
25 times was, the principal of the School. Individual Defendants Cherryne
26 Lue-Sang ("Lue Sang") and Janice Hart ("Hart") are, and at all relevant
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1 times, were the administrative principal and counselor at the School,
2 respectively.

3 On the afternoon of Tuesday, May 27, 2008, after the students had
4 been dismissed from the School for the day, Plaintiff and several other
5 students gathered at a local restaurant. (Plaintiff's Statement of
6 Undisputed Facts in Support of Motion for Summary Adjudication ["PSUF"]
7 1.) While at the restaurant, Plaintiff recorded a four-minute and
8 thirty-six second video of her friends talking. (PSUF 7.) The video
9 was recorded on Plaintiff's personal video-recording device. (Id.)
10 The video shows Plaintiff's friends talking about a classmate of
11 theirs, C.C. (PSUF 8.) One of Plaintiff's friends, R.S., calls C.C. a
12 "slut," says that C.C. is "spoiled," talks about "boners," and uses
13 profanity during the recording. (Defendants' Statement of
14 Uncontroverted Facts in Support of Defendants' Motion for Summary
15 Adjudication ["DSUF"] 7; Declaration of J.C. in Support of Pl.'s Mot.
16 For Summ. Adjudication ["J.C. Supporting Decl."], Exh. 1 [YouTube
17 video].) R.S. also says that C.C. is "the ugliest piece of shit I've
18 ever seen in my whole life." (J.C. Supporting Decl., Exh. 1 [YouTube
19 video].) During the video, J.C. is heard encouraging R.S. to continue
20 to talk about C.C., telling her to "continue with the Carina rant."
21 (DSUF 9.)

22 In the evening on the same day, Plaintiff posted the video on the
23 website "YouTube" from her home computer. (DSUF 10.) YouTube is a
24 publicly-available website where persons can post video clips for
25 viewing by the general public. While at home that evening, Plaintiff
26 contacted 5 to 10 students from the School and told them to look at the
27 video on YouTube. She also contacted C.C. and informed her of the
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1 video. (DSUF 11-12.) C.C. told Plaintiff that she thought the video
2 was mean. (Declaration of John W. Allen in Opp'n to Pl. Mot. For
3 Summary Judgment ["Allen Opp'n Decl."], Exh. H, [J.C. Depo. at 53:25-
4 54:17].) Plaintiff asked C.C. whether she would like Plaintiff to take
5 the video off the website, but C.C. asked her to keep the video up.
6 (Id. at 53:25-54:17.) C.C.'s mother told C.C. to tell Plaintiff to
7 keep the video on the website so that they could present the video to
8 the School the next day. (DSUF at 17.)

9 Plaintiff estimates that about 15 people saw the video the night
10 it was posted. The video itself received 90 "hits" on the evening of
11 May 27, 2008, many from Plaintiff herself. (DSUF 13-14.)

12 On May 28, 2008, at the start of the school day, Plaintiff
13 overheard 10 students discussing the video on campus. (DSUF 15.) C.C.
14 was very upset about the video and came to the School with her mother
15 on the morning of May 28, 2008 so they could make the School aware of
16 the video. C.C. spoke with school counselor Hart about the video. She
17 was crying and told Hart that she did not want to go to class. (DSUF
18 18, 20.) C.C. said she faced "humiliation" and had "hurt feelings."
19 (PSUF 20.) Hart spent roughly 20-25 minutes counseling C.C. and
20 convincing her to go to class. (DSUF 22.) C.C. did return to class,
21 and the record indicates that she likely missed only part of a single
22 class that morning. (Id.; Declaration of John Allen In Support of
23 Def.'s Mot. For Summary Judgment ["Allen Supporting Decl."], Exh. N
24 [Lue Sang Depo. at 15:4-11] [testifying that she met with C.C. and her
25 mother for, at most, 45 minutes].)

26 School administrators then investigated the making of the video.
27 Lue-Sang viewed the video while on the school campus. (Decl. of S.
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1 Martin Keleti in Support of Pl. Mot. ["Keleti Supporting Decl."], Exh.
2 A ["Lue-Sang Depo. at 95:4-7].) She called Plaintiff to the
3 administrative office to write a statement about the video. (PSUF 13.)
4 Lue-Sang and Hart also demanded that Plaintiff delete the video from
5 YouTube, and from her home computer. (PSUF 17.) School administrators
6 questioned the other students in the video, including R.S., V.G., and
7 A.B., and asked each of them to make a written statement about the
8 video. (DSUF 25.) R.S.'s father came to the School and watched the
9 video with R.S. on campus. (DSUF 23.) He then took R.S. home for the
10 rest of the day. (Id.)

11 Lue-Sang and Hart also contacted principal Warren regarding the
12 video. (PSUF 15.) Warren then contacted Amy Lambert, the Director of
13 Pupil Personnel for the District, regarding whether the School could
14 take disciplinary action against Plaintiff for posting the video on the
15 Internet. (DSUF 37.) Lambert discussed the situation with attorneys
16 and advised Warren that Plaintiff could be suspended. (DSUF 38.)
17 Plaintiff was suspended from school for two days. (PSUF 25.) No
18 disciplinary action was taken against the other students in the video.
19 (PSUF 27.)

20 Plaintiff had a prior history of videotaping teachers at the
21 School. In April 2008, Plaintiff was suspended for secretly
22 videotaping her teachers, and was told not to make further videotapes
23 on campus. (DSUF 43-44.) During the investigation about the YouTube
24 video on May 28, 2008, school administrators also discovered another
25 video posted by Plaintiff on YouTube of two friends talking on campus.
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1 (DSUF 41.) It is unclear when this video was recorded or posted on the
2 Internet, but it clearly was made while J.C. was at School.¹

3 Students at the School cannot access YouTube or other social
4 networking websites on the School's computers, as those websites are
5 blocked by means of a filter. (PSUF 29.) Certain cell phones can
6 access the Internet, including the YouTube website, and allow the user
7 to view videos. (DSUF 35.) However, the School is not aware of how
8 many students have cell phones with that capability. (PSUF 31.)
9 Students at the School are prohibited from using their cell phones on
10 campus in any manner. (PSUF 30.) There is no evidence that any
11 student viewed the YouTube video on his or her cell phone while at
12 School. The only instances the video was viewed on campus, to the
13 parties' knowledge, were during the school administrator's
14 investigation of the video.

15 **III. ANALYSIS**

16 **A. Legal Standard**

17 Rule 56(c) requires summary judgment for the moving party when the
18 evidence, viewed in the light most favorable to the nonmoving party,
19 shows that there is no genuine issue as to any material fact, and that
20 the moving party is entitled to judgment as a matter of law. See Fed.
21 R. Civ. P. 56(c); *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1263
22 (9th Cir. 1997).

23 The moving party bears the initial burden of establishing the
24 absence of a genuine issue of material fact. See *Celotex Corp v.*
25 *Catrett*, 477 U.S. 317, 323-24 (1986). If that party bears the burden
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28 ¹ These videos are not of the same variety of the YouTube video that is the subject
of this lawsuit.

1 of proof at trial, it must affirmatively establish all elements of its
2 legal claim. See Southern Cal. Gas Co. v. City of Santa Ana, 336 F.3d
3 885 (9th Cir. 2003) (per curiam). Otherwise, the moving party may
4 satisfy its Rule 56(c) burden by "'showing' -- that is, pointing out to
5 the district court -- that there is an absence of evidence to support
6 the nonmoving party's case." Celotex, 477 U.S. at 325.

7 Once the moving party has met its initial burden, Rule 56(e)
8 requires the nonmoving party to go beyond the pleadings and identify
9 specific facts that show a genuine issue for trial. See id. at 323-34;
10 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1968). A scintilla
11 of evidence or evidence that is merely colorable or not significantly
12 probative does not present a genuine issue of material fact. Addisu v.
13 Fred Meyer, 198 F.3d 1130, 1134 (9th Cir. 2000). Genuine disputes over
14 facts that might affect the outcome of the suit under the governing law
15 will properly preclude the entry of summary judgment. See Anderson,
16 477 U.S. at 248; see also Aprin v. Santa Clara Valley Transp. Agency,
17 261 F.3d 912, 919 (9th Cir. 2001) (the nonmoving party must identify
18 specific evidence from which a reasonable jury could return a verdict
19 in its favor).

20 Finally, the nonmoving party may show that a genuine issue exists
21 for trial if, although the facts are largely undisputed, reasonable
22 minds could differ as to the ultimate conclusions to be drawn from
23 those facts. Sankovich v. Life Ins. Co. of North America, 638 F. 2d
24 136, 140 (9th Cir. 1981); 49 C.J.S. JUDGMENTS § 301 (2009) (even where
25 court believes the moving party is more likely to prevail at trial,
26 summary judgment must be denied if a reasonable jury could return a
27 verdict for the nonmoving party).

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1 **B. Violation of First Amendment Rights**

2 Plaintiff contends that the School District and the school
3 administrators, Hart, Lue-Sang, and Warren, violated her First
4 Amendment rights by punishing her for making the YouTube video and
5 posting it on the Internet. Plaintiff argues that the School had no
6 authority to discipline her because her conduct took place entirely
7 outside of school. To resolve this issue, the Court must first
8 determine the scope of a school's authority to regulate speech by its
9 students that occurs off campus but has an effect on campus.

10 **1. The Supreme Court Student Speech Precedents**

11 In 1969, The Supreme Court held in Tinker v. DesMoines Independent
12 Community School District that a school may regulate a student's speech
13 or expression if such speech causes or is reasonably likely to cause a
14 "material and substantial" disruption to school activities or to the
15 work of the school. 393 U.S. 503 (1969). In Tinker, two high school
16 students and one junior high school student wore black armbands to
17 school in protest of the Vietnam War. School officials asked them to
18 remove the armbands, and they refused. Pursuant to a school policy
19 adopted just days before in anticipation of a protest, the students
20 were suspended until they would return to school without the armbands.
21 Id. at 504. The lower court upheld the suspension, but the Supreme
22 Court reversed. Id. at 514.

23 In an oft-quoted passage, the Court noted: "It can hardly be
24 argued that either students or teachers shed their constitutional
25 rights to freedom of speech or expression at the schoolhouse gate."
26 Id. at 506. The Court found that the students' expression constituted
27 political speech. Although the issues raised by such speech were
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1 undoubtedly controversial - the propriety of the Vietnam War - the
2 students' conduct was "a silent, passive expression of opinion,
3 unaccompanied by any disorder or disturbance on [their] part." Id. at
4 508. The Court held that a student may express his opinions, even on
5 controversial subjects, so long as doing so does not materially and
6 substantially "interfer[e] with the requirements of appropriate
7 discipline in the operation of the school" or "collid[e] with the
8 rights of others." Id. at 513. Conversely, school discipline is
9 appropriate where the facts "reasonably [lead] school authorities to
10 forecast substantial disruption of or material interference with school
11 activities" as a result of the student's speech. Id. at 514.

12 Applying this test to the facts in Tinker, the Court concluded
13 that no actual disruption occurred and there was no reason to believe
14 that the students' wearing of the armbands would cause a substantial
15 disruption to the school's activities. Thus, the school's disciplinary
16 action violated the students' First Amendment rights. Id.

17 The Supreme Court decided three cases after Tinker that carved out
18 narrow categories of speech that a school may restrict even without
19 establishing the reasonable threat of substantial disruption. First,
20 in Bethel School District v. Fraser, the Court held that there is no
21 First Amendment protection for lewd, vulgar or "patently offensive"
22 speech that occurs in school. 478 U.S. 675, 681 (1986). In Fraser, a
23 high school student gave a speech nominating a fellow student for
24 elective office at an assembly held during school hours. Nearly 600
25 students attended the assembly. Id. at 678. The speech was an
26 "elaborate, graphic, and explicit sexual metaphor." Id. The student
27 was suspended for making the speech. The School argued that the speech
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1 violated a school rule which prohibited "conduct that materially and
2 substantially interferes with the educational process, . . . including
3 the use of obscene, profane language or gestures." Id.

4 The Court upheld the disciplinary action. The Court held that the
5 First Amendment rights "of students in public school are not
6 automatically coextensive with the rights of adults in other settings,"
7 and must be applied "in light of the special characteristics of the
8 school environment." Id. at 682, 687-88. The court reasoned that
9 public schools have an affirmative obligation to instill in students
10 the "fundamental values of 'habits and manners of civility' essential
11 to a democratic society" and to teach students "the boundaries of
12 socially appropriate behavior." Id. at 681. Thus, while Matthew Fraser
13 could have given his salacious speech outside of the school and could
14 not have been "penalized simply because government officials considered
15 his language inappropriate," the same is not true of speech occurring
16 within the school. Id. at 688 and n.1 (Blackmun, J. concurring); see
17 id. at 683 (students have "*the classroom right* to wear Tinker's
18 armband, but not Cohen's jacket) (emphasis added). The Court held that
19 where a student engages in lewd, vulgar, or plainly offensive speech at
20 school, the school may regulate such speech as part of its duty to
21 convey to its students "the essential lessons of civil, mature
22 conduct." Id. at 683. Ultimately, the determination of what manner of
23 speech is inappropriate "in the classroom or at a school assembly"
24 properly rests with the school board. Id.

25 In 1988, the Court carved out another exception from Tinker for
26 school-sponsored speech. Hazelwood School District v. Kuhlmeier, 484
27 U.S. 260 (1988). In Hazelwood, the Court upheld a school principal's
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1 decision to delete two articles discussing teen pregnancy and divorce
2 from the school-sponsored newspaper. The Court held that the school
3 could "exercise editorial content over the style and content of student
4 speech in school-sponsored expressive activities, as long as [doing so
5 is] reasonably related to legitimate pedagogical concerns." Id. at
6 273. Distinguishing Tinker, the Court explained that the issue of
7 whether a school must tolerate particular student speech is different
8 from whether the school must affirmatively promote particular speech.
9 Id. at 270. In sum, "educators are entitled to exercise greater
10 control" over speech that might reasonably be perceived to "bear the
11 imprimatur of the school." Id. at 270-71.

12 Finally, in the Supreme Court's most recent decision addressing
13 student speech, Morse v. Frederick, the Court held that a school may
14 restrict "student speech at a school event, when that speech is
15 reasonably viewed as promoting illegal drug use." 551 U.S. 393. In
16 Morse, a student attending the Olympic Torch Relay that passed on the
17 street in front of his high school unfurled a 14-foot banner that read
18 "BONG HiTS 4 JESUS." Id. at 397. The school principal asked that the
19 student take the banner down, and he refused. The principal
20 confiscated the banner and suspended the student. Id.

21 In reviewing the disciplinary action in Morse, the Court
22 promulgated a narrow holding decidedly restricted to the facts of the
23 case. The Court found that the Torch Relay was a school-sponsored
24 event occurring during school hours, which the principal permitted
25 students and faculty to attend. Id. at 397. Therefore, the court
26 viewed the speech as equivalent to speech occurring in school. Id. at
27 401 (a student "cannot stand in the midst of his fellow students,
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1 during school hours, at a school-sanctioned activity and claim he is
2 not in school") (internal quotations omitted). The Court also found
3 that the student's banner condoned illegal drug use. The Court noted
4 that neither Hazelwood nor Fraser governed its decision, as the
5 student's banner did not bear "the school's imprimatur" nor was it
6 lewd, vulgar, or "plainly offensive." Id. at 405-06, 409. Instead,
7 the Court focused on the special characteristics of the school
8 environment and the "governmental interest in stopping student drug
9 abuse" and concluded that schools may restrict student expression at a
10 school-sponsored event that they reasonably regard as promoting illegal
11 drug use. Id. at 408.²

12 **2. Application of the Student Speech Precedents by Lower** 13 **Courts**

14 The Supreme Court has yet to address the factual situation
15 presented by the case at hand - that is, whether a school can regulate
16 student speech or expression that occurs outside the school gates, and
17 is not connected to a school-sponsored event, but that subsequently
18 makes its way onto campus, either by the speaker or by other means.
19 Several lower courts, including the Ninth Circuit, however, have held
20 that a school may regulate such speech under Tinker, if the speech
21 causes or is reasonably likely to cause a material and substantial
22 disruption of school activities.

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24 ²Justice Thomas, in his concurring opinion, expressed concern about the
25 Court's creation of a third carve-out from the rule in Tinker. Thomas
26 insightfully noted: "[W]e continue to distance ourselves from Tinker, but
27 neither overrule it nor offer an explanation of when it operates and when it
28 does not. I am afraid that our jurisprudence now says that students have a
right to speak in schools except when they don't - a standard continuously
developed through litigation against local schools and their administrators."
551 U.S. at 419. Given the difficulty with which this Court has decided
Plaintiff's motion, and the variety of divergent applications of Tinker in the
lower courts, the Court shares Justice Thomas' concerns.

1 In LaVine v. Blaine School District, the Ninth Circuit upheld a
2 school's emergency expulsion of a student, James, who wrote a graphic
3 and violent poem about killing his classmates. 257 F.3d 981 (9th Cir.
4 2000). The poem was written off-campus, in the evening, and not as
5 part of any school project. Id. at 984, 989. James later brought the
6 poem to campus to show one of his teachers. The teacher was disturbed
7 by the poem and brought it to the school counselor and eventually to
8 the principal. After an investigation regarding the poem and James'
9 history, James was expelled. Id. at 986.

10 The Ninth Circuit analyzed the speech under Tinker, without giving
11 any consideration to the fact that the poem was drafted outside of
12 school and independent of any school activities. The court outlined
13 the following framework for applying the Supreme Court student speech
14 precedents: "(1) vulgar, lewd, obscene and plainly offensive speech is
15 governed by Fraser; (2) school-sponsored speech is governed by
16 Hazelwood; and (3) speech that falls into neither of these categories
17 is governed by Tinker." Id. at 988-89.³ Finding that James's poem
18 clearly fell in the third category, "all other speech," the court
19 applied the substantial disruption test from Tinker. Id. at 989. The
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21 ³ The Ninth Circuit established this framework in the earlier case Chandler v.
22 McMinnville School District, 978 F.2d 524, 529 (9th Cir. 1992). In Chandler,
23 students were punished for wearing buttons and stickers with the word "Scab"
24 printed on them, in protest of the school's hiring of replacement teachers when
25 many of the school's regular teachers went on strike. Id. at 526. The court found
26 that the protest was not lewd or vulgar under Fraser nor was it school-sponsored as
27 in Hazelwood. Thus, the court concluded that Tinker was the governing standard.
28 Id. at 529 ("The third category involves speech that is neither vulgar, lewd,
obscene, or plainly offensive, nor bears the imprimatur of the school. To suppress
speech in this category, school officials must justify their decision by showing
'facts which might reasonably have led school authorities to forecast substantial
disruption of or material interference with school activities.'") (quoting Tinker,
393 U.S. at 514). Chandler, however, did not address student speech originating
off-campus.

The same three-part framework was reiterated after the holding in LaVine, in
the Ninth Circuit case Pinard v. Chatskanie Sch. Dist. 6J, 467 F.3d 755 (9th Cir.
2006).

1 Ninth Circuit ultimately concluded that the school was reasonable to
2 portend a substantial disruption and upheld James's expulsion. Id. at
3 992.

4 Like LaVine, many other courts analyzing off-campus speech that
5 subsequently is brought to campus or to the attention of school
6 authorities apply the substantial disruption test from Tinker without
7 regard to the location where the speech originated (off campus or on
8 campus). See, e.g., Shanley v. Northeast Independent Sch. Dist., 462
9 F.2d 960, 970-71 (5th Cir. 1972) (applying Tinker where student-created
10 underground newspaper was authored and distributed off campus, but some
11 of the newspapers turned up on campus); Boucher v. Sch. Bd. of Sch.
12 Dist. of Greenfield, 134 F.3d 821, 827-28 (7th Cir. 1998) (student
13 disciplined for an article printed in an underground newspaper that was
14 distributed on school campus); Killion v. Franklin Reg'l Sch. Dist.,
15 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (applying Tinker where student
16 was disciplined for composing degrading top-ten list and distributing
17 it off campus to friends via email, and where one recipient
18 subsequently brought the list to campus); Emmett v. Kent Sch. Dist. No.
19 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (applying Tinker to a
20 website created by a student off-campus that contained mock obituaries
21 of some of the author's classmates); Beussink v. Woodland R-IV Sch.
22 Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (applying Tinker to a
23 website created by a student off-campus that contained criticism of
24 school authorities, where another student accessed the website at
25 school and showed it to a teacher); O.Z. v. Board of Trustees of Long
26 Beach Unified Sch. Dist., No. CV 08-5671 ODW, 2008 WL 4396895, *4 (C.D.
27 Cal., Sept. 9, 2008) (student discipline upheld under Tinker where
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1 student created a video off-campus during spring break that depicted a
2 graphic dramatization of a teacher's murder and then posted the video
3 on the Internet); Pangle v. Bend-Lapine Sch. Dist., 10 P.3d 275, 285-86
4 (Ct. App. Or. 2000) (applying Tinker to an underground newsletter
5 distributed on campus).

6 In these cases, the courts have directly applied the Tinker
7 substantial disruption test to determine if a First Amendment violation
8 occurred, without first considering the geographic origin of the
9 speech. As the district court for the Central District of California
10 recently explained in O.Z. v. Board of Trustees: "[T]he fact that
11 plaintiff's creation and transmission of the [speech or expression]
12 occurred away from school property does not necessarily insulate her
13 from school discipline. . . . Off-campus conduct can create a
14 foreseeable risk of substantial disruption within a school." 2008 WL
15 4396895. In sum, the substantial weight of authority indicates that
16 geographic boundaries generally carry little weight in the student-
17 speech analysis. Where the foreseeable risk of a substantial
18 disruption is established, discipline for such speech is permissible.
19 See Killion, 136 F. Supp. 2d at 455 (holding that the court need not
20 consider plaintiff's argument that a heightened standard applies to
21 speech occurring off school grounds because "the overwhelming weight of
22 authority has analyzed student speech (whether on or off campus) in
23 accordance with Tinker").

24 Some courts (primarily the Second Circuit), however, have
25 considered the location of the speech to be an important threshold
26 issue for the court to resolve before applying the Supreme Court's
27 student speech precedents. For example, in a recent case involving
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1 communication over the Internet, the Second Circuit considered the
2 nexus between the speech and the school campus. Wisniewski v. Board of
3 Educ. of the Weedsport Central Sch. Dist., 494 F.3d 34 (2d. Cir. 2007).
4 In Wisniewski, a middle school student, Aaron, was using AOL Instant
5 Messaging ("IM") software on his home computer. Aaron created an icon
6 used to identify himself when sending instant messages to his friends.
7 The icon was a small drawing of a pistol firing a bullet at a man's
8 head above which were dots indicating splattered blood. Beneath the
9 drawing were the words "Kill Mr. Vander-Molen." Mr. Vander-Molen was
10 Aaron's English teacher. Id. at 35-36. Another student printed a copy
11 of the icon and gave it to Mr. Vander-Molen at school, who later
12 brought the matter to the school principal. Id. at 36. After
13 disciplinary hearings, Aaron was suspended.

14 The Second Circuit applied Tinker to the school's decision, but
15 first discussed the nexus between Aaron's icon and the school campus.
16 The court noted that "the panel is divided as to whether it must be
17 shown that it was reasonably foreseeable that Aaron's IM icon would
18 reach the school property or whether the undisputed fact that it did
19 reach the school pretermits any [such] inquiry." Id. at 39.
20 Ultimately, however, the court concluded that the violent nature of the
21 icon and the fact that Aaron transmitted it via the Internet to 15 of
22 his friends over a three week period made it foreseeable that the icon
23 would eventually come to the attention of the school authorities and
24 Mr. Vander-Molen. Id. at 39-40. Thus, Tinker applied.

25 Similarly, in Doninger v. Niehoff, cited by Defendants here, the
26 Second Circuit again considered the location of a student's speech.
27 527 F.3d 41 (2d. Cir. 2008). The student in Doninger, Avery, sent an
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1 email to students and parents affiliated with the school and posted a
2 message on her personal blog criticizing the school for cancelling a
3 school event. Avery's email and blog posting encouraged the recipients
4 to contact the school officials and complain about the cancellation of
5 the event. Id. at 44-46. Applying the rule from Wisniewski to Avery's
6 speech, the court concluded that it was reasonably foreseeable that
7 Avery's message would reach the school campus. Id. at 50. Indeed, the
8 message was purposefully designed to come to campus - it encouraged
9 readers to contact the school and voice their dissatisfaction regarding
10 the cancelled event. Id. Moreover, after the message was posted, the
11 school received numerous calls and emails from persons concerned about
12 the event. Id. at 44. Thus, there was no dispute that the speech had
13 its desired effect. The court concluded that Avery's message was
14 governed by Tinker, and found that the substantial disruption test was
15 met. Id. at 50-52.

16 Finally, in J.S. v. Bethlehem Area School District, the Supreme
17 Court of Pennsylvania analyzed whether J.S. could be disciplined for a
18 website he created, which contained violent and derogatory comments
19 about school officials. 807 A.2d 847 (Pa. 2002). In deciding whether
20 school discipline was appropriate, the court noted that the "location"
21 of the speech is the first inquiry. That is, the court must determine
22 if the speech was on-campus speech subject to Tinker, or purely off-
23 campus speech, "which would arguably be subject to some higher level of
24 First Amendment protection." Id. at 864.

25 Applying the facts of the specific case, the court in Bethlehem
26 concluded that there was "a sufficient nexus" between the website and
27 the school campus to warrant application of the Supreme Court's student
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1 speech precedents. Id. Notably, J.S. had accessed the website during
2 class and informed other students about it. Also, members of the
3 faculty accessed the website at school, and school officials were the
4 subjects of the website. Id. at 865. In light of these facts, "it was
5 inevitable that the contents of the website would pass from students to
6 teachers." Id. The court therefore applied Tinker and found that the
7 website created a substantial disruption. Id. at 869.

8 Plaintiff argues in her motion for summary adjudication that the
9 location of the speech (whether on or off campus) is wholly
10 dispositive. Plaintiff contends that "if the publication of a
11 student's speech does not take place on school grounds, at a school
12 function, or by means of school resources, a school cannot punish the
13 student without violating her First Amendment rights." (Mot. at 8.)
14 Thus, Plaintiff contends that because she made the video and posted it
15 on the Internet while off campus and without using the School's
16 equipment, the School had no authority to regulate her conduct.

17 This argument is not supported by the long line of cases discussed
18 above. See, e.g., Doninger, 527 F.3d at 50 (where off-campus speech
19 creates a foreseeable risk of substantial disruption within a school,
20 "its off-campus character does not necessarily insulate the student
21 from school discipline.") Indeed, even those cases in the Second
22 Circuit that analyze the origin of the speech as a relevant
23 consideration have not gone so far as to hold that speech originating
24 off campus can never be regulated. Nonetheless, the Court will address
25 the authority cited by Plaintiff.

26 In support of her argument, Plaintiff cites the Second Circuit
27 case Thomas v. Board of Educ., 607 F.2d 1043 (2d. Cir. 1979). In
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1 Thomas, several students created an independent non-school-sponsored
2 newspaper modeled after National Lampoon, a publication specializing in
3 sexual satire. The publication was created in the students' homes, off
4 campus, and after school hours. Id. at 1045. However, one teacher was
5 aware of the publication and allowed the students to store copies of
6 the newspaper in a classroom closet. Id. Apart from the storage on-
7 campus, the authors "assiduously endeavored to sever all connections
8 between their publication and the school." Id. They included a
9 disclaimer on the newspaper disclaiming responsibility for copies found
10 on campus. They printed the papers outside the school and sold the
11 papers after school hours at a store away from the school grounds. Id.
12 Despite these efforts, a student brought the paper to school, and the
13 authors were punished for its sexual content. Id. at 1045-46.

14 The Second Circuit found that Tinker was not applicable because
15 "all but an insignificant amount of relevant activity in this case was
16 *deliberately designed* to take place beyond the schoolhouse gate." Id.
17 at 1050 (emphasis added). The court held that, on these facts, the
18 school's authority to punish the speech was governed by the same
19 principals that "bind government officials in the public arena." Id.
20 The court concluded that the "school officials [were] powerless to
21 impose sanctions for expression beyond school property in this case."
22 Id. at 1050.

23 While Thomas undoubtedly supports a threshold consideration of the
24 origin of the speech and its relationship to on-campus activity, the
25 holding does not stretch as far as Plaintiff contends. First, the
26 Thomas court specifically limited its holding to the facts in that case
27 - i.e., where the students took specific efforts to segregate their
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1 speech from campus. Id. at 1049. Second, although the court found
2 that Tinker did not apply given the "de minimis" connections between
3 the speech and the school, the court was careful to note that Tinker
4 could apply in a case "where a group of students incites substantial
5 disruption within the school from some remote locale." Id. at 1052
6 n.17. The court went on to find that no disruption (or foreseeable
7 risk thereof) existed, thus obviating the need for any such analysis.
8 Id. Finally, Thomas was decided in 1979, before schools were
9 confronted by the unique problems presented by student expression
10 conducted over the Internet. Subsequent cases interpreting Thomas find
11 that "territoriality is not necessarily a useful concept in determining
12 the limit of [school administrators'] authority." Doninger, 527 F.3d
13 at 48-49 (citing Thomas, 607 F.2d at 1058 n.13 (Newman, J., concurring
14 in the result)); see Layshock v. Hermitage Sch. Dist. 496 F. Supp. 2d
15 587, 598 (W.D. Penn. 2007) ("It is clear that the test for school
16 authority is not geographical."). This is especially true today where
17 students routinely "participate in expressive activity . . . via blog
18 postings, instant messaging, and other forms of electronic
19 communication." Doninger, 527 F.3d at 49.

20 Plaintiff also cites Porter v. Parish School Board, 393 F.3d 608
21 (5th Cir. 2004), in support of her position. In Porter, a student,
22 Adam, was expelled when his younger brother unwittingly brought to
23 school a drawing Adam had made depicting "the school under a state of
24 siege by a gasoline tanker truck, missile launcher, helicopter, and
25 various armed persons." Id. at 611. Adam made the drawing at home two
26 years earlier, and stored the writing pad containing the drawing in his
27 bedroom closet. His younger brother found the writing pad at some
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1 point and used it to make his own notations, which he then brought to
2 school. When the bus driver saw Adam's drawing on one of the pages in
3 the writing pad, she contacted the school authorities and disciplinary
4 action ensued. Id. at 611-12.

5 The Fifth Circuit held that "given the unique facts of the present
6 case, we decline to find that Adam's drawing constitutes student speech
7 on the school premises." Id. at 615. The court recognized that
8 several courts had applied Tinker to speech originating off campus that
9 was later brought to school, citing LaVine, Boucher, Killion, and
10 Beussink, among others. Id. at 615 n.22. However, the court found
11 that such cases were factually distinguishable from the present case
12 because, unlike in those cases, Adam "never intended [the drawing] to
13 be brought to campus" and "took no action that would increase the
14 chances that his drawing would find its way to school." Id. at 615.
15 Further, the drawing was not "publicized in a way certain to result in
16 its appearance at [the School]". Id. at 620. On these facts, the
17 court concluded that the school's disciplinary action violated Adam's
18 First Amendment rights.⁴

19 Given this background, the Court can draw several general
20 conclusions regarding the application of the Supreme Court's precedents
21 to student expression originating off campus.⁵ First, the majority of
22 courts will apply Tinker where speech originating off campus is brought
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24 ⁴The Fifth Circuit nonetheless found that the school principal was entitled to
25 qualified immunity, "[g]iven the unsettled nature of First Amendment law as
26 applied to off-campus student speech inadvertently brought on campus by
others." Id. at 620.

27 ⁵Notably, even the Supreme Court itself, has expressed some confusion over
28 when its precedents should apply. Morse, 551 U.S. at 401 ("There is some
uncertainty at the outer boundaries as to when courts should apply school-
speech precedents.")

1 to school or to the attention of school authorities, whether by the
2 author himself or some other means. The end result established by
3 these cases is that any speech, regardless of its geographic origin,
4 which causes or is foreseeably likely to cause a substantial disruption
5 of school activities can be regulated by the school. Second, some
6 courts will apply the Supreme Court's student speech precedents,
7 including Tinker, only where there is a sufficient nexus between the
8 off-campus speech and the school. It is unclear, however, when such a
9 nexus exists. The Second Circuit has held that a sufficient nexus
10 exists where it is "reasonably foreseeable" that the speech would reach
11 campus. The mere fact that the speech was brought on campus may or may
12 not be sufficient. Third, in unique cases where the speaker took
13 specific efforts to keep the speech off campus (Thomas), or clearly did
14 not intend the speech to reach campus and publicized it in such a
15 manner that it was unlikely to do so (Porter), the student speech
16 precedents likely should not apply. In these latter scenarios, school
17 officials have no authority, beyond the general principles governing
18 speech in a public arena, to regulate such speech.

19 Applying these principles to the case at hand, the Court finds
20 that Plaintiff's geography-based argument - i.e., that the School could
21 not regulate the YouTube video because it originated off campus -
22 unquestionably fails. First, under the majority rule, and the rule
23 established by the Ninth Circuit in LaVine, the geographic origin of
24 the speech is not material; Tinker applies to both on-campus and off-
25 campus speech.

26 Moreover, even if the Court were to apply the Second Circuit's
27 approach, which requires that some threshold consideration be given to
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1 the location of the speech, the YouTube video clearly has a sufficient
2 connection to the Beverly Vista campus. Here, there is no dispute that
3 the YouTube video actually made its way to the School. The subject of
4 the video, C.C., came to the School with her mother on May 28, 2008
5 specifically to make the School aware of the video. The video was
6 viewed at least two times on the school campus, once by Lue-Sang and
7 once by R.S. and her father in the administration offices. Thus, the
8 speech was brought to campus.

9 Further, it was reasonably foreseeable that Plaintiff's video
10 would make its way to campus. Plaintiff posted her video on the
11 Internet, on a site readily accessible to the general public. Cases
12 considering the relationship between off-campus speech and the school
13 campus more readily find a sufficient nexus exists where speech over
14 the Internet is involved. See Wisniewski, 494 F.3d 34; Doninger, 527
15 F.3d 41. Additionally, Plaintiff posted the video on a week night and
16 deliberately contacted 5 to 10 students from the School and told them
17 to watch the video on YouTube. See Wisniewski, 494 F.3d at 48-49 (the
18 fact that student transmitted his icon to 15 classmates increased the
19 likelihood that it would reach the school campus). Plaintiff also
20 contacted the subject of the video, C.C., and told her to watch the
21 video. Plaintiff knew that C.C. was upset by the video.

22 Finally, the content of the video increases the foreseeability
23 that the video would reach the School. The students in the video make
24 derogatory, sexual, and defamatory statements about a thirteen-year-old
25 classmate. One student calls C.C. "a slut," "spoiled," and an "ugly
26 piece of shit." J.C. specifically encourages the mean-spirited
27 discussion, telling R.S. "to continue with the Carina rant." The
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1 students collectively gang up on C.C. to the point where one of them
2 even asks, "Am I the only one that doesn't hate Carina?" (J.C.
3 Supporting Decl., Exh. A [YouTube video].) Given this commentary, it
4 is not surprising that a parent made aware of the video would be
5 sufficiently upset to bring the matter to the attention of the School.
6

7 Plaintiff argues that it was not foreseeable that the video would
8 come to campus because students are not able to access the YouTube
9 website on the School's computers. (Pl. Mot. for Summ. Judgmt. at 9.)
10 Although some students may be able to access the Internet on their cell
11 phones, it is undisputed that students are also prohibited from using
12 their cell phones while at school. (Id.) Defendants have not produced
13 any evidence that a student accessed the video on his or her cell phone
14 while at school.

15 While these facts certainly are part of the analysis, they are far
16 from dispositive. Plaintiff ignores the fact that school
17 administrators had the ability to access the video at School; thus,
18 once an administrator became aware of the video, it could be played on
19 the school campus. Indeed, this is exactly what happened here. A
20 student was upset about the video and specifically brought it to the
21 school's attention. Several cases have applied Tinker where speech
22 published or transmitted via the Internet subsequently comes to the
23 attention of school administrators, even where there is no evidence
24 that students accessed the speech while at school. See, e.g.,
25 Wisniewski, 494 F.3d 34 (applying Tinker where a friend of plaintiff's
26 printed his violent AOL Instant Message icon off the computer and
27 brought it to a teacher); Killion, 136 F. Supp. 2d at 455 (applying
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1 Tinker where student emailed friends a degrading top ten list and one
2 recipient printed the list and brought it to school); O.Z., 2008 WL
3 4396895 (teacher discovered a violent and disturbing video created by
4 students and posted on the Internet by searching her own name on
5 Google.com, and later brought it to the attention of school
6 authorities). Thus, it is not necessary that students access the
7 speech while at school. Further, the fact that Plaintiff encouraged
8 students to watch the video and specifically alerted C.C. about it,
9 makes it reasonably likely that someone would alert the School
10 officials about the video.

11 Finally, this case is easily distinguishable from Thomas and
12 Porter. The plaintiffs in Thomas made concerted efforts to keep their
13 newspaper off campus. Plaintiff here made no such effort; instead, she
14 deliberately contacted some of her classmates to tell them about the
15 video. This fact alone brings this case outside the ambit of Thomas.
16 Further, in Porter, the plaintiff put his drawing in a closet at home
17 where it remained for over two years before it was inadvertently
18 transported to school by his younger brother. Here, in contrast, it
19 took less than 24 hours for Plaintiff's video to reach the School, a
20 fact weighing in favor of foreseeability. The method of transmission,
21 over the Internet, was also much broader than in Porter and designed in
22 such a manner to reach many persons at once. Finally, because
23 Plaintiff contacted her classmates, it cannot be said that she "took no
24 action that would increase the chances that [the speech] would find its
25 way to school." Porter, 393 F.3d at 615.

26 Thus, the Court concludes that the Supreme Court precedents apply
27 to Plaintiff's YouTube video, and that Tinker governs the present
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1 dispute. Clearly, Hazelwood and Morse do not apply. No one could
2 argue that the YouTube video bore the "imprimatur" of the School, like
3 the school newspaper in Hazelwood. Further, the YouTube video was not
4 made or transmitted in connection with a school-sponsored event and
5 does not condone illegal drug use; thus, Morse does not apply.

6 Fraser is also inapplicable. Although J.C.'s video certainly
7 contains language that is lewd, vulgar, and plainly offensive, the rule
8 in Fraser is limited to speech that occurs in school.⁶ Indeed, the
9 Supreme Court in Hazelwood expressly interpreted the holding in Fraser
10 as follows:

11 A school need not tolerate student speech that is
12 inconsistent with its 'basic educational mission,' even
13 though the government *could not sensor similar speech outside*
14 *the school*. Accordingly, we held in Fraser that a student
15 could be disciplined for having delivered a speech that was
16 'sexually explicit' but not legally obscene at an official
school assembly, because the school was entitled to
'disassociate itself' from the speech in a manner that would
demonstrate to others that such vulgarity is 'wholly
inconsistent with the 'fundamental values' of public school
education.

17 Hazelwood, 484 U.S. at 266-67 (emphasis added); see also Hedges v.
18 Wauconda Community Unit Sch. Dist. No. 118, 9 F.3d 1295, 1300-01 (7th
19 Cir. 1993) (Easterbrook, J.) ("We know from Bethel School District no.
20 403 v. Fraser, that a high school may insist on civility when students
21 speak, even though government has no such power outside school doors.")
22 (internal citation omitted); Saxe v. State College Area Sch. Dist., 240
23 F.3d 200, 213 (3d. Cir. 2001) (Alito, J.) ("According to Fraser, then,
24 there is no First Amendment protection for 'lewd,' 'vulgar,'
25 'indecent,' and 'plainly offensive' speech *in school*.) (emphasis
26 added). The Court is not aware of any authority from the circuit

27 _____
28 ⁶ Neither party argues that Fraser should apply to this case.

1 courts applying Fraser to speech that takes place off campus.⁷
2 Moreover, the reasoning of Fraser, which is anchored in the school's
3 duty to teach norms of civility to its students, does not support
4 extending Fraser to lewd or offensive speech occurring off campus. For
5 these reasons, the Court will not apply Fraser to Plaintiff's YouTube
6 video.

7 In sum, the Court finds that the YouTube video clearly falls into
8 the "all other speech" category, governed by Tinker. See LaVine, 257
9 F.3d at 989. The final issue for the Court to resolve, therefore, is
10 whether J.C.'s speech created, or was reasonably likely to have
11 created, a substantial disruption of school activities.

12 3. Substantial Disruption

13 The Supreme Court in Tinker established that a school can regulate
14 student speech if such speech "materially and substantially disrupt[s]
15 the work and discipline of the school." 393 U.S. at 513. This
16 standard does not require that the school authorities wait until an
17 actual disruption occurs; where school authorities can "reasonably
18 portend disruption" in light of the facts presented to them in the
19 particular situation, regulation of student expression is permissible.
20

21 ⁷ The Court is aware of an unreported case from the Middle District of Pennsylvania
22 that applied Fraser to off-campus speech that was posted on the Internet. J.S. v.
23 Blue Mountain Sch. Dist., No. 3:07cv585, 2008 WL 4279517 (M.D. Pa., Sept. 11, 2008)
24 (discussed further infra section III.B.3.a.). The court in J.S. relied, in part,
25 on a 1976 case from the same district in which the court upheld a student's
26 suspension where the student saw a teacher at a shopping mall on a Sunday afternoon
27 and told a friend "He's [the teacher] a prick." Id. at *7 (discussing Fenton v.
28 Stear, 423 F. Supp. 767 (W.D. Pa. 1976)). This Court finds the reasoning in J.S.
unpersuasive. Furthermore, the holding in Fenton demonstrates the precise danger
of extending Fraser to allow schools to regulate of student speech occurring off
campus simply because it is lewd, vulgar or offensive, and without regard to the
effect that speech has on school activities. This Court does not wish to see
school administrators become censors of students' speech at all times, in all
places, and under all circumstances. See Thomas v. Board of Educ., Granville
Central Sch. Dist., 607 F.2d 1043, 1052 (2d. Cir. 1979). Such broad authority
would clearly intrude upon the rights of parents to "direct the rearing of their
children." Reno v. ACLU, 521 U.S. 844, 865 (1997).

1 Id. at 514; LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir.
2 2001) ("Tinker does not require school officials to wait until
3 disruption actually occurs before they may act."). As the Sixth
4 Circuit recently explained, "[s]chool officials have an affirmative
5 duty to not only ameliorate the harmful effects of disruptions, but to
6 prevent them from happening in the first place." Lowery v. Euverard,
7 497 F.3d 584, 596 (6th Cir. 2007).

8 Although an actual disruption is not required, school officials
9 must have more than an "undifferentiated fear or apprehension of
10 disturbance" to overcome the student's right to freedom of expression.
11 Id. at 508. In other words, the decision to discipline speech must be
12 supported by the existence of specific facts that could reasonably lead
13 school officials to forecast disruption. LaVine, 257 F.3d at 989.
14 Finally, school officials must show that the regulation or prohibition
15 of student speech was caused by something more than "a mere desire to
16 avoid the discomfort and unpleasantness that always accompany an
17 unpopular viewpoint." Tinker, 393 U.S. at 509. As the Supreme Court
18 explained: "Any word spoken in a class, in the lunchroom, or on the
19 campus, that deviates from the views of another person may start an
20 argument or cause a disturbance. But our Constitution says we must
21 take this risk." Id. (citing Terminiello v. Chicago, 337 U.S. 1
22 (1949)).

23 **a. Existing Case Law**

24 The substantial disruption inquiry is highly fact-intensive.
25 Perhaps for that reason, existing case law has not provided clear
26 guidelines as to when a substantial disruption is reasonably
27 foreseeable. There is, for example, no magic number of students or
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1 classrooms that must be affected by the speech. One court has held
2 that a substantial disruption requires something more than "a mild
3 distraction or curiosity created by the speech" but need not rise to
4 the level of "complete chaos." J.S. ex rel. H.S. v. Bethlehem Area
5 Sch. Dist., 807 A.2d 847, 868 (Pa. 2002). Not surprisingly, however,
6 the gulf between those two concepts swallows the vast majority of
7 factual scenarios. Further complicating matters is the fact that the
8 Court has not uncovered any cases, in this Circuit or otherwise, that
9 address speech targeted at a particular student, as is the case here.
10 That being said, the Court has observed from the case law that certain
11 factors are relevant to the substantial disruption analysis.

12 First, the fact that students are discussing the speech at issue
13 is not sufficient to create a substantial disruption, at least where
14 there is no evidence that classroom activities were substantially
15 disrupted. See Tinker, 393 U.S. at 514; Bethlehem Area Sch. Dist., 807
16 A.2d at 868. In Tinker, the Court held that the students' wearing
17 black armbands to school in protest of the Vietnam War did not cause a
18 substantial disruption. Id. The evidence showed that the armbands
19 caused students to make comments, to poke fun at the students wearing
20 the armbands, and caused one student to feel "self-conscious" about
21 attending school with his armband. Id. at 517 (J. Black, dissenting)
22 (discussing facts relating to substantial disruption). One mathematics
23 teacher also had his classroom temporarily "wrecked" by disputes with
24 one student wearing an armband. Id. Nonetheless, the majority
25 concluded that the students wearing armbands "neither interrupted
26 school activities nor sought to intrude in the school affairs or the
27 lives of others." Id. at 514. The Court found: "They caused
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1 discussion outside of the classrooms, but no interference with work and
2 no disorder." Id.

3 In a recent case out of the Middle District of Pennsylvania, J.S.
4 v. Blue Mountain School District, the district court concluded that the
5 substantial disruption test was not met on the basis of general
6 discussion or student comments regarding a student's speech. No.
7 3:07cv585, 2008 WL 4279517 (M.D. Pa., Sept. 11, 2008). In Blue
8 Mountain, a student, K.L., created a fake profile of her school
9 principal, McGonigle, on the website MySpace.com using her home
10 computer. Id. at *1. The profile included McGonigle's picture,
11 described him as a pedophile and a sex addict, and included a message
12 purporting to solicit young children for sexual acts. Id. News of the
13 profile "soon spread to the school," and roughly 5-8 students
14 approached K.L. to discuss it. Id. Discussion of the website
15 "continued through the day, . . . with quite a few people knowing about
16 it." Id. When the profile was brought to the attention of school
17 authorities, the school suspended K.L. for 10 days. Id. at *2.

18 The district court ultimately concluded that K.L.'s fake profile
19 was lewd, offensive, and could have been the basis for criminal
20 charges; thus, the court analyzed K.L.'s speech under Fraser. Id. at
21 *6. Nonetheless, the court found that, had Tinker applied to this
22 case, a substantial disruption did not occur on these facts. Id. at
23 *7. The mere "buzz" about the profile, standing alone, was not
24 sufficient under Tinker to constitute a substantial disruption. See
25 id.; see also, Layshock v. Hermitage School Dist., 496 F. Supp. 2d 587,
26 600 (W.D. Pa. 2007) (on substantially similar facts, the court found
27 that student discussions regarding an unflattering MySpace profile of a
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1 school principal did not cause a substantial disruption where no
2 classes were cancelled and no "widespread disorder" ensued.).

3 Thus, the mere fact that students are discussing the speech,
4 without more, likely will be insufficient to meet the Tinker standard.

5 Where a student's speech is violent or threatening to members of
6 the school, several courts have found that a school can reasonably
7 portend substantial disruption. For example, in Lavine v. Blaine
8 School District, 257 F.3d 981 (2001), the Ninth Circuit found that
9 where a student showed a teacher a violent poem he had written that
10 explicitly described a mass shooting of his classmates and his own
11 suicide, the school was reasonable to forecast substantial disruption.
12 The evidence demonstrated that the student had previously discussed his
13 suicidal tendencies with the school counselor, and the school was aware
14 that he had been involved in a domestic dispute with his father and had
15 to leave his family home. Id. at 984. The school also knew that the
16 student had recently broken up with his girlfriend and had been accused
17 of stalking her. Id. The student had a prior discipline record at the
18 school, including one act of violence. Id. at 989. Finally, the
19 school was aware of several school shootings that had recently occurred
20 at other campuses. Id. Calling this "a close case in retrospect," the
21 Ninth Circuit found on these facts that the school officials were
22 reasonable to portend substantial disruption and possible violence.
23 Id. at 983. Thus, the court upheld the student's emergency expulsion.

24 Similarly, in J.S. v. Bethlehem, J.S. created a website that
25 included violent and threatening comments and images about the school
26 principal and a teacher, Mrs. Fulmer. 807 A.2d 847 (Pa. 2002). One
27 page on J.S.'s website included a drawing of Fulmer with her head cut
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1 off and blood dripping from her neck and was captioned, "Why Should She
2 Die?" Id. at 851. It also solicited readers for money to pay for a
3 hit man to kill Fulmer. Id. When Fulmer learned of the website, she
4 was frightened, suffered anxiety and was unable to teach for the rest
5 of the school year. Id. at 852. Three substitute teachers were
6 retained to teach her class. Id. The school also found that the
7 effect of the website on the students' morale was "comparable to [that
8 of] the death of a student or staff member." Id. Finally, parents
9 also voiced concerns to the school regarding their children's safety
10 and the quality of instruction by the substitute teachers. Id. On the
11 basis of this record, the court concluded that "the web site created
12 disorder and significantly and adversely impacted the delivery of
13 instruction . . . to a magnitude the satisfies the requirements of
14 Tinker." Id. at 869.

15 LaVine and Bethlehem both involved additional factors beyond the
16 violent nature of the speech - e.g., the student's disciplinary past or
17 the teacher's inability to return to school - that supported a finding
18 of substantial disruption. Nonetheless, other courts have found a
19 foreseeable risk of substantial disruption based solely on the violent
20 content of the speech. For example, in O.Z. v. Board of Trustees of
21 the Long Beach Unified School District, a court in this district
22 recently held that it was reasonable for the school to portend
23 substantial disruption where a student created a graphic video-
24 dramatization of her teacher's murder. No. CV 08-5671 ODW (AJWx), 2008
25 WL 4396895 (C.D. Cal., Sept. 9, 2008). The student created the video
26 during the spring break recess from school using her home computer, and
27 posted the video on the YouTube.com website. Id. at *1. The teacher
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1 featured in the video, Rosenlof, came across it while searching her own
2 name on the Internet through "Google." Id. Rosenlof was upset by the
3 video, and informed the principal about the it. The school officials
4 conducted an investigation by contacting O.Z. and her mother. Id.
5 Although there was no evidence that the video had made its way to
6 campus or had caused any actual disruption in school activities, the
7 school decided to transfer O.Z to another school. Id. O.Z.
8 subsequently brought an action seeking a preliminary injunction to
9 require the school to reenroll her at Hughes Middle School. Id. at *2.
10 The court denied the preliminary. Id. at *6.

11 In addressing the likelihood of success of O.Z.'s First Amendment
12 claim, the district court found that "it would appear *reasonable*, given
13 the violent language and unusual photos depicted in the slide show, for
14 school officials to forecast substantial disruption of school
15 activities." Id. at *3. (emphasis in original). The court explained:
16 "If anything had happened to Mrs. Rosenlof at school, either a physical
17 attack by O.Z. or ridicule directed at Mrs. Rosenlof by other students,
18 it would substantially disrupt the school's activities. These are just
19 some of the facts that might reasonably lead school officials to
20 forecast substantial disruption." Id. at *4 (emphasis added).

21 Similarly, in Wisniewski (discussed above), the Second Circuit
22 concluded that, given the violent nature of plaintiff's Internet icon,
23 which depicted a teacher being shot in the head, "[T]here can be no
24 doubt that the icon, once made known to the teacher or other school
25 officials, would foreseeably create a risk of substantial disruption."
26 494 F.3d 34, 40 (2d. Cir. 2007). Id.; but see Mahaffey v. Aldrich, 236
27 F. Supp. 2d 779, 784 (E.D. Mich. 2002) (finding no substantial
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1 disruption where police notified the school of a student-created
2 website that instructed readers to kill a person of their choosing in a
3 specifically-described, gruesome fashion, but there was no evidence
4 that the website was accessed at school, or that it "interfered with
5 the work of the school" or "that any other student's rights were
6 impinged.")

7 O.Z. and Wisniewski support the proposition that the content of
8 the speech alone may be a sufficient basis upon which to reasonably
9 predict a substantial disruption, at least where the speech is violent
10 or threatens harm to a person affiliated with the school.

11 Another factor relevant to the substantial disruption inquiry is
12 whether school administrators are pulled away from their ordinary tasks
13 to respond to or mitigate the effects of a student's speech. For
14 example, in Doninger v. Neihoff (discussed above), the Second Circuit
15 found that Avery's email message and blog posting about a purportedly
16 cancelled school event, "Jamfest," created a substantial disruption
17 because school officials were required to deal with a "deluge of calls
18 and emails" related to the event. 527 F.3d 41, 51 (2d. Cir. 2008).
19 School officials had to quell angry parent and student concerns due to
20 the misinformation contained in Avery's messages, and missed or were
21 late to school-related activities as a result. Id. Further, the court
22 noted that several students who participated in crafting the mass email
23 were pulled out of class to "manage the growing dispute." Id. The
24 students in general were "all riled up" thinking that Jamfest had been
25 cancelled, and there was evidence that "a sit-in was threatened because
26 students believed the event would not be held." Id. The court
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28

1 concluded: "It was foreseeable in this context that school operations
2 might well be disrupted further" Id.

3 Similarly, in Boucher v. School Board of the School District of
4 Greenfield, 134 F.3d 821 (7th Cir. 1998) the fact that school officials
5 had to devote time and energy to the harm created by the student's
6 speech supported a finding of substantial disruption. In Boucher, a
7 student, Justin, distributed an underground newspaper that instructed
8 students as to how to hack into the school's computers and published
9 the school's restricted access codes. Id. at 822. When the school
10 discovered who the author was, they expelled Justin. Id. at 823.
11 Justin subsequently brought an action requesting a preliminary
12 injunction to set aside the expulsion. Id. The district court granted
13 the request, but the Seventh Circuit reversed. Id. at 829.

14 Although the Seventh Circuit's analysis primarily focused on the
15 balance of hardships, it also found that the School Board likely would
16 prevail on the merits of Justin's First Amendment claim. The court
17 noted that, as a response to the article, the school had to call in
18 technology experts to perform four hours of diagnostic tests on the
19 computer system. Id. at 827. The experts noticed some evidence of
20 computer tampering, but could not tie it directly to Justin's article.
21 Id. The school also had to change all the passwords mentioned in the
22 article. Id. The court found that, "this is, at a minimum, *some*
23 evidence of past disruption, which would support an inference of
24 potential future disruption. . . ." Id. Thus, the effort expended by
25 the school to address the article weighed in favor of finding a risk of
26 substantial disruption. Id.; Cf. Layshock v. Hermitage School Dist.,
27 496 F. Supp. 2d 587, 601 (W.D. Pa. 2007) (implying that where the
28

1 school's response itself, as opposed to the underlying student speech,
2 is the cause of substantial disruption, discipline may not be
3 appropriate).⁸

4 Finally, the Court must consider whether the school's decision to
5 discipline is based on evidence or facts indicating a foreseeable risk
6 of disruption, rather than undifferentiated fears or mere disapproval
7 of the speech. In Beussink v. Woodland R-IV School District, the court
8 granted a preliminary injunction in favor of the student on a First
9 Amendment claim, finding that the principal's disciplinary measure was
10 based on his emotional reaction to the speech, rather than any risk of

11

⁸Layschock v. Hermitage School District appears to be somewhat of an outlier.
12 496 F.Supp. 2d 587 (W.D. Pa. 2007). In Layschock, a student named Justin
13 created an unflattering Internet profile of his school principal, Trosh, on
14 the website MySpace.com. Id. at 591. There was evidence that Justin accessed
15 the profile at school on December 15, 2005 and showed it to other students,
16 and that several other students also accessed the profile during a computer
17 class. Id. at 591-92. Trosh learned about Justin's profile the same evening,
18 and also learned of several other unflattering profiles of Trosh on MySpace,
19 which were created by other students. Id. at 591.

20 The next morning, Trosh called a faculty meeting and told the teachers
21 to send any students who were discussing the profiles in class to the
22 principal's office. Roughly twenty students were sent to the office that day.
23 Id. at 592. The school limited computer use from December 16 through December
24 21, which was the last day of school before the holiday recess. Id. at 593.
25 Computer programming classes were cancelled, and several teachers had to make
26 revisions to their lesson plans so as to curb student access to computers in
27 class. Id. at 592-93. The school technology coordinator disabled access to
28 the MySpace website on December 19, and spent roughly 25% of his time that
week on issues relating to the profiles. Id. at 593. On January 3, 2006, the
school suspended Justin. Id.

In a somewhat confusing opinion, the district court concluded both that
"this decision is a close call," but also that "a reasonable jury could not
conclude that the 'substantial disruption' standard could be met on this
record." Id. at 600, 601. Although it was clear that school officials had
devoted a good amount of time and energy to the issue, the Court found that
"the actual disruption was rather minimal-no classes were cancelled, no
widespread disorder occurred, there was no violence or student disciplinary
action." Id. at 600. Further, there was some evidence that the "buzz" and
student discussions were caused by the reaction of the administrators, not the
profile itself. Id. ("Indeed, Plaintiffs point to instances in the record in
which students objected to the investigation, rather than the profile.").

But perhaps the most compelling reason for the court's holding, which
distinguishes it from both Doninger and Boucher, was that three other profiles
of Trosh existed on MySpace.com and were accessed by the students on campus
during the same time frame. Id. This created a causation problem because the
"School District [was] unable to connect the alleged disruption to Justin's
conduct [as opposed to the other profiles]." Id. For these reasons, the
court granted summary judgment to Justin on his First Amendment claim.

1 disruption. 30 F. Supp. 2d 1175 (E.D. Mo. 1998). In Beussink,
2 plaintiff had created a website criticizing the school administration.
3 Id. Another student discovered the website and accessed it at school
4 to show it to a teacher. Id. at 1177-78. The teacher went directly to
5 the principal to inform him of the site, who viewed the website and was
6 upset. Id. at 1178. The principal testified that he made the decision
7 to discipline plaintiff "immediately upon viewing the homepage . . .
8 because he was upset that the homepage's message had been displayed in
9 one of his classrooms." Id. The website was accessed twice more by
10 students that day and some teachers discussed it with students;
11 however, there was no disruption to class work. Id. at 1179.

12 The court concluded that the school disciplined plaintiff because
13 the principal was upset, and "not based on a fear of disruption or
14 interference . . . (reasonable or otherwise)." Id. Thus, the
15 discipline failed to meet the requirements of Tinker. Id.; see also,
16 Killion v. Franklin Regional Sch. Dist., 136 F. Supp. 2d 446 (W.D. Pa.
17 2001) (granting plaintiff summary judgment on First Amendment claim
18 where the only evidence relating to substantial disruption was that two
19 teachers were upset by plaintiff's rude top-ten list, and the list had
20 been on school grounds for nearly a week without any disruption before
21 the discipline was imposed); Saxe v. State College Area Sch. Dist., 240
22 F.3d 200 (3d. Cir. 2001) (Alito, J.) (finding a school's anti-
23 harassment policy overbroad, and stating that "the mere fact that
24 someone might take offense at the content of speech is not sufficient
25 justification for prohibiting it.").

26 In Bowler v. Town of Hudson, the District Court of Massachusetts
27 held that a school's fear of disruption was too attenuated to warrant
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1 student discipline. 514 F. Supp. 2d 168 (D. Mass 2007). In Bowler,
2 plaintiffs created a non-school sponsored club promoting "pro-American,
3 pro-conservative dialogue and speech." Id. at 172. They placed
4 posters advertising the club on school walls and bulletin boards. Id.
5 at 173. The posters listed a website address for an affiliated
6 national club; the website contained links to violent and disturbing
7 images, including "brutal beheadings." Id. When school officials
8 discovered this, they removed all the posters and disabled student
9 access to the website from school grounds. Id. Over the several
10 months that followed, school officials repeatedly told plaintiffs that
11 they could not advertise the website on any posters placed on school
12 grounds, and eventually adopted policies requiring all students to
13 secure prior approval for any posted material and forbidding any web
14 addresses from being listed on posters. Id. at 174-75. Plaintiffs
15 brought an action against the school, the town, and school officials
16 for unlawful censorship under the First Amendment. Id. at 171.

17 Defendants moved for summary judgment, arguing that censorship was
18 permissible under Tinker because the graphic content of the videos on
19 the website "threatened to materially disrupt school operations." Id.
20 at 177. Specifically, the school argued that students who viewed the
21 videos might suffer a negative psychological reaction and "require
22 counseling to cope with their subsequent feelings of helplessness and
23 despair." Id. at 178. The district court rejected this argument as
24 entirely too speculative. Id. The court noted that in order for this
25 predicted parade of horrors to occur students would have to (1) view
26 the posters, (2) access the website outside school, (3) discover the
27 links to the disturbing videos, (4) navigate past an express warning,
28

1 (5) click on the videos, and (6) be disturbed and seek counseling. Id.
2 at 177-78. The court found no evidence that the videos would result in
3 a substantial interference, and the mere risk that student counseling
4 or unplanned classroom discussions may be required was not sufficient.
5 Id. at 178. The school's actions, therefore, could not be justified
6 under Tinker.

7 In contrast, where "a school can point to a well-founded
8 expectation of disruption - especially one based on past incidents
9 arising out of similar speech - the restriction may pass constitutional
10 muster." Saxe, 240 F.3d at 212. For example, in West v. Derby Unified
11 School District No. 260, the Tenth Circuit upheld a student's
12 suspension for drawing a Confederate flag in violation of the school's
13 policy against racial harassment. 206 F.3d 1358 (10th Cir. 2000). In
14 so doing, the Tenth Circuit adopted the following reasoning from the
15 district court:

16 School officials in Derby had evidence from which they could
17 reasonably conclude that possession and display of
18 Confederate flag images, when unconnected with any legitimate
19 educational purpose, would likely lead to a material and
20 substantial disruption of school discipline. The district
21 experienced a series of racial incidents or confrontations in
22 1995, some of which were related to the Confederate flag.
The incidents included hostile confrontations between a group
of white and black students at school and at least one fight
at a high school football game. . . . The history of racial
tension in the district had made administrators' and parents'
concerns about future substantial disruptions from possession
of Confederate flag symbols at school reasonable.

23 Id. at 1366; Cf. Chalifoux v. New Caney Independent Sch. Dist., 976 F.
24 Supp. 659 (S.D. Tex. 1997) (school violated First Amendment by
25 prohibiting devout Catholic students from wearing rosaries in violation
26 of a dress code prohibiting gang-related apparel where there was no
27 evidence that plaintiffs were misidentified as gang members or that
28

1 they attracted the attention from other students because of the
2 rosaries). Thus, where the school can demonstrate a prior history of
3 disruptions caused by the type of speech at issue, this weighs strongly
4 in favor of finding that the school's prediction of disruption was
5 reasonable.

6 **b. Application to the Current Record on Summary**
7 **Judgment**

8 Based on the undisputed facts, and viewing all reasonable
9 inferences in favor of the Defendants, the Court finds that no
10 reasonable jury could conclude that J.C.'s YouTube video caused a
11 substantial disruption to school activities, or that there was a
12 reasonably foreseeable risk of substantial disruption as a result of
13 the YouTube video.

14 **i. Actual Disruption**

15 First, what the Defendants contend was an actual disruption is
16 entirely too *de minimis* as a matter of law to constitute a substantial
17 disruption. Interpreting the facts in the most favorable light for
18 Defendants, at most, the record shows that the School had to address
19 the concerns of an upset parent and a student who temporarily refused
20 to go to class, and that five students missed some undetermined portion
21 of their classes on May 28, 2008. This does not rise to the level of a
22 substantial disruption.

23 Unlike in the many cases in which courts have found a substantial
24 disruption (LaVine, Wisniewski, O.Z., and Bethlehem) J.C.'s video was
25 not violent or threatening. There was no reason for the School to
26 believe that C.C.'s safety was in jeopardy or that any student would
27 try to harm C.C. as a result of the video. Certainly, C.C. never
28

1 testified that she feared any type of physical attack as a result of
2 the video. Instead, C.C. felt embarrassed, her feelings were hurt, and
3 she temporarily did not want to go to class. These concerns cannot,
4 without more, warrant school discipline. The Court does not take issue
5 with Defendants' argument that young students often say hurtful things
6 to each other, and that students with limited maturity may have
7 emotional conflicts over even minor comments. However, to allow the
8 School to cast this wide a net and suspend a student simply because
9 another student takes offense to their speech, without any evidence
10 that such speech caused a substantial disruption of the school's
11 activities, runs afoul of Tinker.

12 Moreover, the evidence demonstrates that C.C.'s hurt feelings did
13 not cause any type of school disruption. C.C. did not confront J.C. or
14 any of the other students involved in the video, either verbally or
15 physically, while at school, nor did she indicate any intention to do
16 so. Further, while C.C. was undoubtedly upset, it took the school
17 counselor, at most, 20-25 minutes to calm C.C. down and convince her to
18 go to class. (Def. ACF 10.) Although the time line is not entirely
19 clear, C.C. likely missed no more than a single class on the morning of
20 May 27, 2008. (Allen Supporting Decl., Exh. N [Lue Sang Depo. at 15:4-
21 11].)

22 Other students also missed some of their classes on May 28, 2008
23 as a result of the School's investigation of the YouTube video.
24 However, there is no evidence that the school's investigation had any
25 ripple effects on class activities or the work of the School. For
26 example, it appears that the students involved in the video simply left
27 class when asked, quietly and without incident. Hart testified that
28

1 the entire investigation was resolved and all the students returned to
2 class before the lunch recess on May 28, 2008. (Declaration of John
3 Allen In Support of Def.'s Mot. For Summary Judgment ["Allen Supporting
4 Decl."], Exh. Q. [Hart Depo. at 20:14-23] [testifying that J.C. was
5 called the administrative office between 9:30 a.m. and 10:15 a.m., and
6 the whole incident relating to the video was over before lunch that
7 day].) Further, there appears to have been no classroom disruption
8 upon these students returning to class.

9 There is also no evidence that the video itself had any effect on
10 classroom activities. No widespread whispering campaign was sparked by
11 the video; no students were found gossiping about C.C. or about the
12 video while in class. As far as the record demonstrates, not a single
13 student watched the video while at school. Moreover, while J.C.
14 testified that she saw 5 to 10 students talking about the video on
15 campus on the morning of May 28, there is no evidence that this
16 discussion occurred during class or that it otherwise disrupted school
17 work. More importantly, the record is silent as to whether the
18 individual Defendants, or even C.C., were aware of the discussion among
19 those 5 to 10 students on May 28, 2008; thus, the discussion could not
20 have informed the School's decision to suspend J.C.

21 It appears that the most significant effects of the video were
22 that J.C. and R.S. were sent home from school, and that J.C. was
23 suspended for two days.⁹ Clearly, however, the School cannot point to
24 the discipline itself as a substantial disruption.

25
26 ⁹ Defendants contend that it was R.S.'s father who took her out of school for the
27 day as a result of the video. (Def.'s ACF 12.) However, Lue-Sang's testimony
28 establishes that she asked R.S.'s father to take R.S. out of school for the day.
(Allen Supporting Decl., Exh. P [Lue Sang Depo. at 79:2-22].) Thus, although no
formal disciplinary action was taken against R.S., the record is clear that she was
taken out of school at Defendants' request.

1 Defendants argue, in part, that a substantial disruption occurred,
2 as in Doninger, because the three individual defendants "were taken
3 away from other tasks in order to deal with the disruption created by
4 Plaintiff's conduct." (Opp'n at 9.) The Court disagrees. Doninger is
5 readily distinguishable from the present case because, in Doninger, the
6 school officials introduced evidence that, over the course of two days,
7 they had to miss or arrive late to several other school events to deal
8 with the controversy caused by Avery's speech. 527 F.3d at 51. For
9 several days, the school officials had to respond to "a deluge" of
10 calls and emails from angry students and parents and had to take action
11 to quell a threatened "sit-in" by the students. Id. Thus, the
12 disruption created in Doninger was highly out of the ordinary, not a
13 response to the every day emotional conflicts that students often get
14 into.¹⁰

15 Here, in contrast, Defendants have presented no evidence that they
16 missed or were late to any other school activities, nor have Defendants
17 shown that the actions they took to resolve the situation created by
18 the video were outside the realm of ordinary school activities.
19 Instead, the record demonstrates that Hart and Lue-Sang took steps to
20 investigate the nature of the conflict between J.C. and C.C., to
21 counsel C.C. when she was upset, and to decide, along with Warren's
22 input, whether to impose discipline. That is what school
23 administrators do. As long as students have attended school, some get
24 sent to the principal's office for possible discipline, some seek
25 counseling from the school counselors, and upset parents on occasion

26
27 ¹⁰ This is also true in Boucher, 134 F.3d 821, (discussed above). There, the school
28 had to call in technology experts to perform diagnostic tests on the school
computers and change all the access codes. Id. at 827-28. Clearly, this is not
within the realm of normal, every-day school activities.

1 voice concerns to the school, whether it be about a child's poor
2 grades, a student-teacher personality conflict, or otherwise. There is
3 nothing in the record to demonstrate that J.C.'s conduct presented an
4 unusual or extraordinary situation like that in Doninger, or even in
5 Boucher.¹¹

6 In sum, Defendants have not presented any evidence demonstrating
7 that they were pulled away from their ordinary activities as a result
8 of the YouTube video.

9 For the Tinker test to have any reasonable limits, the word
10 "substantial" must equate to something more than the ordinary
11 personality conflicts among middle school students that may leave one
12 student feeling hurt or insecure. Likewise, the Court finds that the
13 mere fact that a handful of students are pulled out of class for a few
14 hours at most, without more, cannot be sufficient. Tinker establishes
15 that a material and substantial disruption is one that affects "the
16 work of the school" or "school activities" in general. See Tinker, 393
17 U.S. at 509, 514. Thus, while the precise scope of the substantial
18 disruption test is still being sketched by lower courts, where
19 discipline is based on actual disruption (as opposed to a fear of
20 pending disruption), the School's decision must be anchored in
21 something greater than one individual student's difficult day (or hour)
22 on campus. See, e.g., J.S. v. Bethlehem, 807 A.2d at 854 (the effect
23 of the website on the morale of the students and staff in general were
24

25 ¹¹ Defendant Hart is a perfect illustration. Hart is the school counselor at
26 Beverly Vista Middle School. Presumably, her primary obligation is to counsel
27 students who are upset or who may be subject to school discipline. It cannot be
28 said, therefore, that Hart was torn away from her regular activities on May 28,
2008, when in fact, her very purpose at Beverly Vista is to counsel the student
body. The same can be said of Lue-Sang. No reasonable jury could conclude that an
administrative principal was pulled away from her usual tasks by consulting with
the principal to decide whether to discipline a child.

1 comparable to the death of a student or staff member); Doninger, 527
2 F.3d at 51 (plaintiffs' speech had the entire school all "riled-up" and
3 students were threatening a protest). The record on summary judgment
4 does not present a disruption of sufficient magnitude to satisfy
5 Tinker.

6 **ii. Foreseeable Risk of Future Substantial**
7 **Disruption**

8 Defendants also argue that their decision to discipline J.C. was
9 based on a reasonable belief that the YouTube video was likely to cause
10 a substantial disruption in the future. In support, Defendants present
11 the testimony of Lue-Sang, the administrative principal. Lue-Sang
12 testified that she believed classes would be disrupted by the video as
13 a result of students "gossip[ing]" and "passing notes" in class instead
14 of focusing on the lesson, and "children worr[ying] about whether or
15 not something she had said had been videotaped and whether or not that
16 would show up on line." (Allen Supporting Decl., Exh. S [Lue-Sang
17 Depo. at 99:13-21].)

18 There appears to be some factual support for Lue-Sang's
19 prediction. For example, although Lue-Sang did not state why she
20 thought the vide would lead to gossip or passing notes during class,
21 individual Defendant Hart testified that the YouTube video had 100
22 "hits" or "views" by the time she watched it on the morning of May 28,
23 2008. (Allen Supporting Decl., Exh. N [Hart Depo. at 29:5-20].) Hart
24 also testified that C.C. told her that C.C. had been contacted by other
25 students about the video, and that Hart believed, based on this
26 conversation, that about half the eighth grade class had seen the
27 video. Id. Thus, there is some evidence that Hart believed a
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1 sufficient number of students had already seen the video, and in turn,
2 likely would discuss it. It is not clear, however, if Hart relayed
3 this information to Lue-Sang. That said, given Hart and Lue-Sang's
4 joint involvement in the investigation, and construing all reasonable
5 inferences in favor of Defendants, the Court can reasonably infer that
6 Hart shared this information with Lue-Sang.

7 Nonetheless, even assuming that Lue-Sang's prediction is
8 reasonable and is supported by sufficient evidence, the fear that
9 students would "gossip" or "pass notes" in class simply does rise to
10 the level of a substantial disruption. As noted above, several cases,
11 including Tinker, have found that a general "buzz" about a student's
12 speech fails to meet the substantial disruption test. Tinker, 393 U.S.
13 at 514, Bethlehem Area Sch. Dist., 807 A.2d at 868; Blue Mountain Sch.
14 Dist., 2008 WL 4279517, at *7. Moreover, the speech must create
15 something more than a "mild distraction or curiosity" in order to past
16 muster under Tinker. Thus, the School's fear that thirteen-year-old
17 students might pass notes in class and worry about their reputation
18 while in school cannot support the School's decision to discipline J.C.

19 Lue-Sang also testified that she feared that the video would lead
20 to students taking sides and possible violence among classmates. (Def.
21 Statement of Genuine Issues, Additional Controverted Fact ["Def. ACF"]
22 14; Allen Opp'n Decl., Exh. Q [Lue-Sang Depo. at 102:6-14].) Lue-Sang
23 based this belief on: "Past experience. I base that on human nature.
24 I base that on children who are not that mature, they have to take a
25 breath and take a step back and think things through." (Id.) Further,
26 Defendants argue that there was "a possibility that C.C. had no clique
27 and, therefore, felt she was being ganged up on by the posting of the
28

1 video and the dissemination of that fact to other students." (Opp'n at
2 10.)

3 The Court finds that Lue-Sang's concern is too attenuated from the
4 facts, and appears to be based largely on speculation. Here, for
5 example, Lue-Sang admitted that none of the students involved in the
6 YouTube video had a history of violence. (Allen Opp'n Decl., Exh. Q
7 [Lue-Sang Depo. at 102:6-14].) There is also no evidence regarding the
8 prior relationship between C.C. and the other students involved in the
9 making of the video that would support a prediction that a verbal or
10 physical confrontation was likely to occur. Had Defendants established
11 that, for example, C.C. and R.S. had engaged in a verbal dispute during
12 class over similar comments in the past, or that J.C. and C.C. often
13 were disciplined for arguing with each other during school, that would
14 certainly be relevant to the analysis. No such evidence exists here.
15 Also absent from the record is any evidence of C.C.'s social history;
16 certainly there is no basis upon which the fact-finder could conclude
17 that "C.C. had no clique," as Defendants' surmise.

18 Even in the absence of specific evidence about these particular
19 students, Defendants could have supported their fear of a future
20 substantial disruption with evidence that student speech similar to the
21 YouTube video had resulted in violence or near violence at Beverly
22 Vista in the past.¹² See e.g., West v. Derby Unified, 206 F.3d 1358
23 (images of the confederate flag and other racially-charged symbols had

24 ¹² The Court recognizes that the School need not prove that violence was likely to
25 result from the YouTube video. There may be other types of disruption caused by a
26 student's speech that exceed the mere "buzz" around campus, but fall short of
27 violence. See e.g., Doninger, 527 F.3d 41 (substantial disruption found where
28 school officials had to respond to complaints, and students were "all riled-up" and
threatened a sit-in). However, the Court has limited its discussion to the reasons
proffered by Defendants for having believed a substantial disruption would occur -
i.e., that the video would lead to gossip and distractions (buzz) or that it might
lead to violence. For the reasons explained above, both these arguments fail.

1 caused verbal and physical confrontations among students in the past).
2 However, the record is silent in this regard as well.¹³

3 A comparison of this case to the record LaVine helps illustrate
4 the Defendants' evidentiary shortcomings. In LaVine, the student,
5 James, wrote a violent, gruesome and graphically-described poem about
6 killing himself and shooting a large number of his classmates at
7 school. Not only were the contents of the speech clearly disturbing,
8 to say the least, the school also knew that James had a documented
9 history of suicidal ideations, a lengthy school discipline record
10 (including an act of violence), problems at home (including domestic
11 violence with his father), and had been accused of stalking his ex-
12 girlfriend. Further, the school was aware of several other recent mass
13 school shootings in other schools that were similar to those described
14 in James' poem. Although the Ninth Circuit upheld the school's
15 decision to expel James, the court expressly held that "this is a close
16 case in retrospect." 257 F.2d at 983.

17 Clearly, the record here falls far short of the evidence
18 supporting the school's decision in LaVine. Here, without any evidence
19

20 ¹³ The Court notes that there is some evidence that J.C. had a history of
21 videotaping while at school. (Def.'s ACF 14.) She had been suspended earlier that
22 same year for videotaping a teacher, and had posted another video on YouTube of her
23 friends talking at school. (DSUF 41, 43.) However, these facts are not relevant
24 to the substantial disruption analysis. J.C.'s prior discipline was not based on
25 speech or expression. Instead, J.C. had been disciplined for violating a school
26 rule that prohibited students from videotaping others while in class. (Declaration
27 of Erik Warren in Support of Def.'s Mot. For Summary Judgment ¶ 10 and Exh. A, pg.
28 9, ¶ 14; Allen Supporting Decl., Exh. EE [J.C. Depo. at 23:4-19.]) Thus, J.C. was
disciplined for conduct, not speech. J.C.'s prior suspension does not implicate
the First Amendment.

Further, to the extent that the Defendants argue that J.C. was suspended not
only for the YouTube video, but also on the basis of her prior acts, this argument
fails. Having concluded that J.C.'s YouTube video did not cause, or was not
reasonably likely to cause, a substantial disruption under Tinker, the school had
no right to regulate such speech. Thus, the YouTube should not have formed any
basis for the suspension, regardless of whether J.C. had a prior disciplinary
record.

1 of a history of disruptive verbal or physical altercations between the
2 students involved in the video, or of similar student speech causing
3 any type of disruption to school activity in the past, no reasonable
4 fact finder could conclude that the YouTube video was reasonably likely
5 to cause the type of future substantial disruption recognized in
6 LaVine.

7 Defendants, however, implore the Court to consider the age of the
8 children involved in this dispute. Defendants repeatedly stress that
9 C.C. and her classmates were only 13 years old, and that their
10 emotional maturity is clearly limited. Defendants contend that it is
11 not unusual for thirteen-year-olds to "form cliques, nor for
12 disagreements between such cliques to erupt in violence." (Opp'n at
13 10.) Thus, the School contends that it should be accorded some
14 deference to decide how best to protect the emotional well-being of its
15 young students. The Court in large part agrees. Indeed, no one could
16 seriously challenge that thirteen-year-olds often say mean-spirited
17 things about one another, or that a teenager likely will weather a
18 verbal attack less ably than an adult. The Court accepts that C.C. was
19 upset, even hysterical, about the YouTube video, and that the School's
20 only goal was to console C.C. and to resolve the situation as quickly
21 as possible.

22 Unfortunately for the School, good intentions do not suffice here.
23 Defendants have failed to present sufficient evidence that the YouTube
24 video caused a substantial disruption to school activity on May 28,
25 2008. Further, Defendants' fear that a substantial disruption was
26 likely to occur simply is not supported by the facts. The Court cannot
27 uphold school discipline of student speech simply because young persons
28

1 are unpredictable or immature, or because, in general, teenagers are
2 emotionally fragile and may often fight over hurtful comments. To
3 create a genuine issue for trial, Defendants must tie those conclusions
4 to the situation presented to them on May 28, 2008. On this record,
5 they have failed to do so.

6 In sum, the Court finds that, based on the undisputed facts,
7 Plaintiff is entitled to judgment as a matter of law on her First
8 Amendment claims. Plaintiff's motion for summary judgment as to the
9 First and Second causes of action is therefore GRANTED.

10 **3. Speech that Impinges On the Rights of Others**

11 Before moving on to address the defense of qualified
12 immunity, the Court will briefly address one additional school
13 speech argument that appears to be raised by Defendants here. In
14 addition to the substantial disruption test, Tinker held that a school
15 may regulate student speech that interferes with the "the school's work
16 or [collides] with the rights of other students to be secure and be let
17 alone." 393 U.S. at 508. Thus, it appears that speech that
18 "impinge[s] upon the rights of other students" may be prohibited even
19 if a substantial disruption to school activities is not reasonably
20 foreseeable. Id. at 509. That said, the precise scope of Tinker's
21 "interference with the rights of others" language is unclear, as the
22 Court's analysis in Tinker focused primarily on whether a substantial
23 disruption was reasonably foreseeable. Moreover, lower courts have
24 not often applied the "rights of others" prong from Tinker.

25 Defendants rely, in part, on Ninth Circuit case interpreting the
26 Tinker rights of others prong, Harper v. Poway Unified School District.
27 (Mot. at 10-11.) In Harper, the Ninth Circuit held that a student's
28

1 decision to wear a T-shirt with a religious message condemning
2 homosexuality during the school's "Day of Silence" impinged upon the
3 rights of other students under Tinker. 445 F.3d 1166 (9th Cir. 2006).¹⁴
4 The Day of Silence was intended to "teach tolerance of others,
5 particularly those of a different sexual orientation." Id. at 1172
6 (internal citations to the record omitted). On that day (and the day
7 after), student Tyler Harper came to school wearing a T-shirt on which
8 the words "Homosexuality is Shameful" were handwritten. Id. Harper
9 was sent to the administrative offices and was not permitted to return
10 to class for the rest of the day. Id. at 1172-73. Shortly thereafter,
11 Harper brought suit against the School District, alleging (among other
12 things) a violation of his First Amendment rights. Id. at 1173.

13 The district court denied Harper's request for a preliminary
14 injunction, and the Ninth Circuit affirmed. Analyzing the case under
15 the rights of others prong from Tinker, the Ninth Circuit found that
16 the speech constituted a "verbal assault [to public school students] on
17 the basis of a core identifying characteristic such as race, religion,
18 or sexual orientation." Id. at 1178. The court found that: "It is
19 simply not a novel [or disputed] concept, however, that such attacks on
20 minority students can be harmful to their self-esteem and to their
21 ability to learn." Id. at 1180. Thus, the court held that student
22 speech that attacks "particularly vulnerable" students on the grounds
23 of "a core characteristic" - namely, race, religion, and sexual
24 orientation - impinged on the rights of others and could be regulated

25 ¹⁴ This decision was vacated as moot by Harper v. Poway Unified Sch. Dist., 549 U.S.
26 1262 (2007). By the time the case reached the Supreme Court on certiorari, the
27 district court had entered final judgment dismissing plaintiff's claims for
28 injunctive relief as moot. The Court vacated the prior judgment denying the
preliminary injunction "to clear the path for future relitigation of the issues
between the parties and to eliminate a judgment, review of which was prevented by
happenstance." Id. at *1.

1 under Tinker. Id. at 1183. The court, however, expressly limited its
2 holding to speech attacking students on those three grounds, and even
3 declined to extend its holding to remarks based on gender.¹⁵

4 Defendants argue that Harper demonstrates that "California schools
5 have an obligation to protect students from psychological assaults that
6 cause them to question their self worth." (Mot. at 11.) This is
7 undoubtedly true; however, California schools cannot exercise this
8 obligation in a manner that infringes upon other student's First
9 Amendment rights. The task for this Court is not to assess whether the
10 School's intentions were noble; no one could dispute that the School
11 was attempting to protect C.C. from psychological harm. That said, the
12 Court is not aware of any authority, including Harper, that extends the
13 Tinker rights of others prong so far as to hold that a school may
14 regulate any speech that may cause some emotional harm to a student.
15 This Court declines to be the first.

16 In sum, the Court finds that the rights of others test from Tinker
17 is not applicable to the present case.

18 For the reasons stated, Plaintiff's Motion for Summary
19 Adjudication on the First and Second causes of action for violation of
20 the First Amendment under § 1983 is GRANTED.

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22
23 ¹⁵ Harper has not often been cited by other courts for the proposition that
24 speech attacking students on the basis of race, religion or sexual orientation
25 may be regulated under the "rights of others" standard in Tinker. Further,
26 those cases that do cite to Harper decline to extend its holding to other
27 types of speech. See, e.g., Bowler v. Town of Hudson, 514 F. Supp. 2d 168 (D.
28 Mass. 2007) (discussed above) (distinguishing students' posters that included
a reference to a website with links to violent content from "derogatory or
injurious remarks directed at student's minority status," and rejecting
defendants' argument that Harper applied); Zamecnik v. Indian Prairie Sch.
Dist. No. 204 Board of Education, 619 F. Supp. 2d. 517, 523 (N.D. Ill. 2007)
(citing Harper for the proposition that "derogatory and statements about
homosexuality tend to harm homosexual high school students by lowering their
self esteem").

1 **C. Qualified Immunity**

2 The individual Defendants, Erik Warren, Cherryne Lue-Sang, and
3 Janice Hart, seek summary adjudication as to Plaintiff's First Cause of
4 Action, on the ground that they are entitled to qualified immunity.
5 For the reasons stated below, the individual Defendants' motion is
6 GRANTED.

7 The doctrine of qualified immunity shields public officials sued
8 in their individual capacity from monetary damages, unless their
9 conduct is violates "clearly established" law of which a reasonable
10 public officer would have known. Saucier v. Katz, 533 U.S. 194, 199
11 (2001); Anderson v. Creighton, 483 U.S. 635, 638 (1987) (officials
12 should be shielded from damages "as long as their actions could
13 reasonably have been thought consistent with the rights they are
14 alleged to have violated"). The defense "gives ample room for mistaken
15 judgments by protecting all but the plainly incompetent and those who
16 knowingly violate the law." Hunter v. Bryant, 502 U.S. 224 (1991).

17 The court must make a two-step inquiry in deciding the issue of
18 qualified immunity. Saucier, 533 U.S. at 200. First, the court must
19 determine whether, under the facts alleged, taken in the light most
20 favorable to the plaintiff, a violation of a constitutional right
21 occurred. Id. If so, the court must then ask whether the
22 constitutional right was clearly established at the time of the
23 violation. Id. "A right is 'clearly established' for purposes of
24 qualified immunity when its contours are sufficiently clear that
25 reasonable officials would know that their actions violated that
26 right." Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 603
27 (W.D. Pa. 2007); Trevino v. Gates, 99 F.3d 911, 917 (9th Cir. 1996).

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1 Initially, the Supreme Court in Saucier held that these two
2 inquiries must be decided in rigid order. Saucier, 533 U.S. at 200.
3 That is, a district court had to resolve whether a violation of a
4 constitutional right occurred before it could evaluate whether the
5 right was clearly established. Recognizing, however, that "there are
6 cases in which it is plain that a constitutional right is not clearly
7 established but far from obvious whether in fact there is such a
8 right," the Supreme Court recently relaxed the order of analysis. In
9 Pearson v. Callahan, the Court held that the Saucier analysis may be
10 addressed in either order if the second step is clearly dispositive and
11 can address the matter efficiently. 129 S. Ct. 808, 821 (2009).

12 Here, although the Court has found that a violation of J.C.'s
13 First Amendment rights has occurred, the second Saucier step
14 unequivocally resolves the issue of qualified immunity in Defendants'
15 favor.

16 Plaintiff has the burden of proving that the right allegedly
17 violated was clearly established at the time of the defendant's
18 conduct. Trevino v. Gates, 99 F.3d 911, 916-17 (9th Cir. 1996). To
19 determine whether a law is clearly established, the court "survey[s]
20 the legal landscape" and examines those cases that are "most like" the
21 present case. Id. at 917 (quoting Figueroa v. United States, 7 F.3d
22 1405, 1409 (9th Cir. 1993)). In the Ninth Circuit, specific binding
23 precedent is not required to show that a right is clearly established
24 for purposes of the qualified immunity analysis. Maraziti v. First
25 Int'l Bank of Calif., 953 F.2d 520, 525 (9th Cir. 1992) (quoting Brady
26 v. Gebbie, 859 F.2d 1543, 1557 (9th Cir. 1988)). In the absence of
27 binding precedent, district courts should look to "all available
28 decisional law including the decisions of state courts, other circuits,
and district courts to determine whether the right was clearly
established." Id. Where the specific factual scenario presented has
not been previously litigated and decided, the court may nonetheless
find clearly established law if "a general constitutional rule already
identified in the decisional law [applies] with obvious clarity to the
specific conduct in question." United States v. Lanier, 520 U.S. 259,
271 (1997).

1 Here, there is no binding Supreme Court precedent that governs
2 J.C.'s conduct. The Supreme Court has yet to address whether off-
3 campus speech posted on the Internet, which subsequently makes its way
4 to campus either by the speaker or by any other means, may be regulated
5 by school officials. Tinker only addressed student speech originating
6 on campus. Further, each of the three Supreme Court cases decided
7 after Tinker carved out specific enclaves in which student speech is
8 subject to discipline - i.e., lewd speech, speech bearing the
9 imprimatur of the school, or speech taking place at a school-sponsored
10 event and relating to illegal drug use. None of those factual settings
11 are present here.

12 Plaintiff nonetheless argues that "there is a long line of
13 precedents stretching back almost 40 years which provides geographical
14 limitations on a school's power to punish students for what they say,
15 making this an obvious case of school officials violating a student's
16 First Amendment rights." (Opp'n at 2.) (emphasis added). This
17 argument clearly misinterprets the existing law. As discussed in
18 detail above, a number of district and circuit courts, including the
19 Ninth Circuit, have applied Tinker directly to speech that somehow
20 makes its way to campus, regardless of where the speech originated, and
21 regardless of whether the speaker himself or someone else was
22 responsible for bringing it to campus. Further, the only Ninth Circuit
23 authority the Court is aware of which addressed speech that originated
24 off-campus, without any connection to a school project and without the
25 use of school resources, **upheld the School's regulation of the speech.**
26 LaVine v. Blaine School District , 257 F.3d 981 (9th Cir. 2001). As
27 far back as 30 years ago, a distinguished panel of the Second Circuit
28 recognized that "territoriality is not necessarily a useful concept in
determining the limit of [the school's authority to discipline],"
Thomas v. Bd. of Educ., 607 F.2d 1043, 1058 n.13 (Newman, J.,
concurring), and that students can "incite substantial disruption
within the school from some remote locale." Id. at 1052 n.17
(Kaufman, J., majority).

The one district court case cited by Plaintiff, Emmett v. Kent
Sch. Dist. No. 415, does not provide otherwise. 92 F. Supp. 2d 1088
(2000). First, contrary to Plaintiff's contention, Emmett **did not hold**

1 that "speech on the Internet, having nothing to do with school and not
2 accessed at school, cannot be regulated." (Opp'n at 11.) In fact,
3 Emmett did not decide the issue at all, merely holding that plaintiff
4 had shown a sufficient likelihood of success on his First Amendment
5 claim to support a preliminary injunction. Id. at 1090. Further, the
6 Emmett court expressly based its holding on the application of Tinker -
7 thereby implicitly accepting that speech created off campus and posted
8 on the Internet *could be* regulated provided that the substantial
9 disruption test was met. Id.¹⁶ Plaintiff has not cited, and the Court
10 has not found, any case holding that a student's speech that actually
11 caused a substantial disruption on campus, or was reasonably likely to
12 do so, was outside of the realm of school discipline simply because it
13 originated off campus.

14 Additionally, while numerous recent cases have applied the Supreme
15 Court's student speech precedents to cases involving student speech
16 over the Internet, see Beussink, Emmett, Killion, O.Z., Wisniewski,
17 Doninger, and Bethlehem, none have done so in a factually analogous
18 setting. The Court has yet to find a student-speech case addressing
19 hurtful and embarrassing speech directed at a student's classmate,
20 which emanated outside the school grounds.

21 Less than a year before J.C. created the YouTube video, the
22 Supreme Court in Morse pointedly recognized the "uncertainty as to the
23 boundaries of the school speech precedents" and the "necessity for
24 school administrators to react decisively to unexpected events."
25 Layshock, 496 F. Supp. 2d at 604 (citing Morse, 551 U.S. 393). While
26 the five separate opinions in Morse aptly illustrate the "plethora of
27 approaches that may be taken in this murky area of the law," (id.), the
28 Justices were unanimous in at least one respect - all agreed that the
principal was entitled to qualified immunity. Morse, 551 U.S. at 409.
The same conclusion is obvious here. Certainly, the contours of a
student's First Amendment right to make a potentially defamatory and
degrading video about a classmate, which is almost immediately

¹⁶ In Emmett, the student's website never made it to campus at all, and there was no
evidence that any student brought it to the School's attention or that any
disturbance whatsoever had occurred; rather, the School became aware of the website
merely because it had been featured on the local news. 92 F. Supp. 2d. at 1089-90.
Thus, no substantial disruption could be established on these facts. See id. at
1090.

1 thereafter brought to the School's attention, are not clearly
2 established.

3 In sum, Hart, Lue-Sang, and Warren are clearly entitled to
4 qualified immunity in this case.

4 **IV. CONCLUSION**

5 For the reasons stated above, Plaintiff's Motion for Summary
6 Adjudication as to her First and Second causes of action for violation
7 of section 1983 is GRANTED.

8 The individual Defendants, Hart, Lue-Sang, and Warren's Motion for
9 Summary Adjudication on the issue of qualified immunity as to the First
10 Cause of Action is GRANTED.

11 An order regarding Plaintiff's Motion for Summary Adjudication as
12 to the due process claim will follow shortly.

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15 IT IS SO ORDERED.

16 DATED: November 16, 2009



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18 STEPHEN V. WILSON
19 UNITED STATES DISTRICT JUDGE
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