No. 11-

IN THE

Supreme Court of the United States

KARA KOWALSKI,

Petitioner,

v.

BERKELEY COUNTY SCHOOLS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), this Court held that the First Amendment permits a public school to discipline a student for on-campus speech otherwise protected by the First Amendment when the speech will "materially and substantially disrupt the work and discipline of the school." *Id.* at 506. Since *Tinker*, this Court has never approved public school discipline for student speech not occurring on school grounds or at a school-sponsored activity. The courts of appeals, however, are divided on the question of whether *Tinker* governs student speech that occurs off school grounds and that is not directed at the school. Moreover, courts applying *Tinker*'s "substantial disruption" standard have reached wildly disparate results, with the Fourth Circuit's decision below directly conflicting with a recent *en banc* Third Circuit decision. The questions presented are:

1. Whether the First Amendment permits a public school to discipline a student for speech that occurs off-campus and not at a school-sponsored event, and that is not directed at the school.

2. Whether off-campus student speech not directed at the school satisfies *Tinker*'s "material and substantial disruption" test merely because a single student missed one day of school and because school officials speculated that the off-campus speech might lead to "copycat" behavior on school grounds.

PARTIES TO THE PROCEEDING

The following were the parties to the proceeding before the United States Court of Appeals for the Fourth Circuit:

1. Kara Kowalski;

2. Berkeley County Schools;

3. Manny P. Arvon, II, Superintendent of Berkeley County Schools, in his official capacity;

4. Ronald Stephens, Principal of Musselman High School, individually and in his official capacity;

5. Becky J. Harden, Vice Principal of Musselman High School, individually and in her official capacity;

6. Buffy Ashcraft, Cheerleading Coach, individually and in her official capacity;

7. Rick Deuell, Assistant Superintendent of Berkeley County Schools, in his official capacity.

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Petitioner Kara Kowalski respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit (App. 1a-25a) will be reported but is currently available only at 2011 WL 3132523. The orders of the United States District Court for the Northern District of West Virginia dated December 22, 2009 (App. 26a-79a), December 16, 2009 (App. 80a-90a), and December 20, 2008 (App. 91a-109a) are not reported.

JURISDICTION

The Fourth Circuit rendered its decision on July 27, 2011. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution (as applied to the States via the Fourteenth Amendment) provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech.

INTRODUCTION

On December 1, 2005, Petitioner Kara Kowalski, then a high school senior, created a MySpace.com "discussion

group" webpage where her friends posted comments and pictures suggesting that a fellow student had herpes. It is undisputed that Kara created the webpage on her home computer after school hours, that she never discussed the webpage or its contents at school, and that she never encouraged other students to access the webpage during school hours. Nevertheless, when the principal of Musselman High School learned about the webpage the next day, he suspended Kara for violating a school harassment policy.

Kara sued, alleging that the school district and five of its officials violated her First Amendment rights. The district court entered summary judgment in favor of Respondents. The Fourth Circuit affirmed on the ground that Kara's webpage was not protected speech under this Court's decision in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). First, the court held that "the School District was authorized by *Tinker* to discipline [Kara], regardless of where her speech originated." (App. 17a.) Second, the court speculated that, although Kara's actions occurred entirely off school grounds and were not directed at the school, her actions could "have a snowballing effect, in some cases resulting in 'copycat' efforts by other students" and therefore "created 'actual or nascent' substantial disorder and disruption in the school." (App. 18a.)

The Fourth Circuit's decision deepens a growing divide in the circuits regarding whether the First Amendment permits school officials to punish student speech that takes place off school grounds and is not directed at the school. Published decisions of the Second and Fifth Circuits hold that *Tinker*'s "substantial disruption" test does not apply to speech occurring wholly outside the school and

that is not directed at the school. Five judges of the *en banc* Third Circuit also advanced this view in a recent concurring opinion. By contrast, the Fourth Circuit in this case held that *Tinker* applies to off-campus speech that is not directed at the school because of the speculative possibility—not supported by any record evidence—that it might cause "copycat" behavior on school grounds. Moreover, within the last year, the Second, Third, and Fourth Circuits have reached markedly different holdings on analogous facts in cases applying the *Tinker* "substantial disruption" test to off-campus speech.

This Court has never addressed the appropriate First Amendment test for student speech that occurs entirely off school premises, and it has not addressed the scope of *Tinker*'s "substantial disruption" test since deciding *Tinker* over forty years ago. Today, largely as a result of the internet, school officials have much greater access to the out-of-school speech of students. This, in turn, has caused school officials to discipline students more frequently for off-campus, after-school speech that those officials dislike or of which they disapprove. The courts of appeals widely disagree about whether and when punishing that off-campus student speech is constitutionally permissible. Legal scholars and commentators have "attributed the plethora of lower court cases and inconsistent results to a lack of direction" from this Court. Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 Fla. L. Rev. 395, 396 (2011). This case presents an appropriate vehicle to address those inconsistent lower court decisions and provide badly-needed guidance on the First Amendment protections afforded to student speech that takes place away from school grounds.

STATEMENT

a. Factual background

In 2005, Kara Kowalski was a high school senior at Musselman High School in West Virginia. (JA 112, 115, 132.)[1] Kara was an active member of her high school cheerleading squad and the reigning "charm queen" for her high school. (JA 79-80, 250-51.) On December 1, 2005, after returning home from school, Kara used her home computer to create a MySpace.com "discussion group" webpage. MySpace is a social networking website in which users create personalized webpages that display biographic information, pictures, music, and other content on virtually any topic. MySpace users can also create "discussion group" pages that focus on a particular discussion topic. These discussion pages can be accessible to anyone or can be limited only to particular invitees. Visitors to a discussion group webpage can post their own comments, pictures, and other content. (App. 3a-4a.)

Kara's MySpace discussion group webpage began with the heading "S.A.S.H." and beneath that read "No No Herpes, We don't want no Herpes." Kara testified that "S.A.S.H." was an acronym for "Students Against Sluts' Herpes." A school official testified that other students may have assumed it meant "Students Against Shay's Herpes." (App. 3a.) Shay N. was another Musselman High School student. (App. 3a.) The slogan beneath the S.A.S.H. title paraphrased song lyrics popular at the time. (JA 50-60.)

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1. Citations denoted "JA" are to portions of the trial record included in the Joint Appendix filed in the Fourth Circuit.

After creating the MySpace page, Kara invited approximately 100 people from her MySpace "friends" list to join the discussion group. Some of the invitees posted comments or pictures referencing Shay. For example, one of Kara's friends, Ray Parsons, posted a picture of himself and another friend holding their noses and pointing to a sign that read "Shay Has Herpes." Ray also posted a picture of Shay with red dots drawn on her face and the words "Warning: Enter at your own risk" with an arrow pointing to Shay's pelvic area. Kara, like many other people in the discussion group, commented on Ray's pictures with statements including "Ray you are soo funny!=)" and "the best picture i've seen on myspace so far! ! ! !" (App. 4a-5a.)

Shay was not invited to the discussion group and therefore could not access the page through her own MySpace account. However, only a few hours after Kara created the page, Shay and her parents learned about the page second-hand. Shay's father angrily called Ray and demanded that he take down the pictures he posted on the discussion group page. Ray called Kara and relayed what Shay's father had told him. Kara then changed the heading of the discussion group webpage from "S.A.S.H." to "Students Against Angry People." (App. 5a.)

The next morning, Shay and her parents reported the incident to Respondent Ronald Stephens, who was the principal of Musselman High School, and to the police. (App. 5a.) Principal Stephens filled out a harassment complaint against Kara indicating that a "hate website was created against the victim where students posted comments and pictures of the student that were altered to portray that the victim had herpes. The violator created

the chat room then sent invitations through the internet to get other students to join." (JA 849; App. 6a.)

As reflected in the Fourth Circuit's opinion, the following critical facts are undisputed: Kara created the MySpace discussion group at home on her personal computer after the school day had ended. She did not discuss the webpage at school and she did not encourage students to access the webpage on school property or during school hours. Between the time Kara created the webpage on the evening of December 1 and the time the school suspended her on December 2, the school was open and classes operated normally. One student accessed the MySpace page from a school computer while at an after-school program, but school officials did not learn that fact until they began investigating the webpage following complaints from Shay's parents.[2] Finally, Shay voluntarily returned home with her parents after filing the complaint against Kara on December 2, thus causing Shay to miss one day of school. (App. 3a-5a.)

In response to the complaint from Shay and her parents, Principal Stephens summarily suspended Kara for ten days and placed her on a ninety-day social probation, meaning she could not attend any after-school events. (App. 6a.) Kara's father attempted to speak with Principal Stephens by phone numerous times after the suspension. Eventually, Principal Stephens informed Kara's father that he could not reduce the suspension and referred him

2. School districts can easily block access to social networking websites like MySpace on school computers, and many schools elect to do so. *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 929 (3d Cir. 2011). Musselman High School did not. (App. 4a.)

to Respondent Rick Deuell, assistant superintendent of the Berkeley County Public Schools. Superintendent Deuell agreed to arrange for the suspension to be reduced to five days but refused to remove the social probation. (JA 72-80, 226.) Kara and her parents then set up a meeting with Principal Stephens to explain her side of the story, but when they arrived for the meeting, Mr. Stephens was unavailable and an assistant principal who knew nothing of the matter handled the meeting. In order to receive the reduction in her suspension to five days, Kara was forced to sign a contract agreeing that she would be expelled if she had any further disciplinary referrals. (JA 104-07.)

While on suspension, Respondent Buffy Ashcraft, Kara's cheerleading coach, contacted Kara and informed her that she was kicked off the cheerleading squad as a result of the suspension. (JA 79-80.) Kara's friends consisted largely of the other cheerleaders, and after being removed from the squad Kara was left socially isolated. (JA 81-82.) The school also prohibited her from participating in the ceremonies to crown the new "charm queen," although traditionally the reigning charm queen, which Kara was, always passed the crown to the new queen. (JA 250-51.) The combination of having a suspension on her permanent school record, being kicked off the cheerleading squad, and being disconnected from her central group of high school friends left Kara deeply depressed and needing antidepressant medication. (JA 111-12, 118.)

b. Procedural history

In November 2007, Kara sued Respondent Berkeley County School and the school officials involved in her

suspension, alleging violations of her First Amendment free speech rights and her Fourteenth Amendment due process rights. The district court initially granted Respondents' motion to dismiss the First Amendment claim for lack of standing, holding that Kara "has consistently maintained that she had no part in the posting of the altered photograph, did not comment on the posting, and was not disciplined for any comment she made." (App. 98a.) Thus, the district court held that Kara "failed to allege an invasion of her legally protected interest in speech protected by the First Amendment." (*Id.*) The district court denied Kara's motion for reconsideration, but changed its basis for the dismissal, holding that Kara's speech in creating the discussion group caused a substantial disruption and thus was not protected by the First Amendment. (App. 89a.) The district court addressed Kara's First Amendment claim again, along with Kara's separate due process claim, in its summary judgment order and entered summary judgment in favor of Respondents on both claims. Kara appealed from all three rulings.

On appeal, the Fourth Circuit found that the district court had addressed both the First Amendment and due process claims on the merits at summary judgment and affirmed the summary judgment ruling. On the First Amendment claim, the court held that "the School District was authorized by *Tinker* to discipline Kowalski, regardless of where her speech originated, because the speech was materially and substantially disruptive in that it 'interfer[ed] . . . with the schools' work [and] colli[ded] with the rights of other students to be secure and to be let alone.'" (App. 17a) (brackets and ellipses in original). Thus, the court concluded that "[g]iven the targeted,

defamatory nature of [Kara's] speech, aimed at a fellow classmate, it created 'actual or nascent' substantial disorder and disruption in the school." (App. 18a.) The Fourth Circuit explained: "First, the creation of the 'S.A.S.H.' group forced Shay N. to miss school in order to avoid further abuse. Moreover, had the school not intervened, the potential for continuing and more serious harassment of Shay N. as well as other students was real. Experience suggests that unpunished misbehavior can have a snowballing effect, in some cases resulting in 'copycat' efforts by other students or in retaliation for the initial harassment." (*Id.*)

REASONS FOR GRANTING THE PETITION

The petition should be granted for two reasons. *First*, the Fourth Circuit's decision deepens a circuit split concerning whether *Tinker*'s "substantial disruption" test applies at all to speech that occurs outside the school, and that is not directed at the school. Although this case involved speech on the internet, the Fourth Circuit's decision to apply *Tinker* to off-campus speech applies to *all* speech, not merely speech on the internet. Thus, controversial or offensive speech by a student in her home, at the mall, or at a political rally—although not directed at the school—could be subject to school discipline in the Fourth Circuit. But in other circuits, off-campus student speech not directed at the school, no matter how controversial or offensive, is not subject to regulation by school officials. Five judges of the Third Circuit, in a recent *en banc* concurrence, outlined this circuit split and indicated that they too would hold that *Tinker* does not apply to off-campus student speech not directed at the school. The Court should step in to resolve

this disagreement among the circuits and confirm that students are entitled to full First Amendment protection when they engage in speech beyond the schoolhouse gate that is not directed at the school itself.

Second, the Fourth Circuit's decision departed from *Tinker*'s "substantial disruption" standard and directly conflicts with the recent *en banc* decision of the Third Circuit. Here, the Fourth Circuit held that Kara's discussion group website satisfied the "substantial disruption" test, and therefore was not protected by the First Amendment, because it could "have a snowballing effect, in some cases resulting in 'copycat' efforts by other students" and therefore "created 'actual or nascent' substantial disorder and disruption in the school." (App. 18a.) But that attenuated and wholly speculative risk of disruption is far less than the *actual* disruption at school caused by the speech in *Tinker*, which this Court held was not a material and substantial disruption and therefore was constitutionally protected. And in the recent *en banc* Third Circuit decision, a student created a website attacking a school official with vulgar and offensive language that was far worse than that posted on Kara's webpage, and that created far greater disruption at school, but the court held that the webpage speech was protected under *Tinker*. These conflicting decisions create substantial uncertainty for students, parents, and school officials concerning the types of out-of-school speech that properly may be the subject of school discipline. Moreover, the Fourth Circuit's holding sets a dangerous precedent: virtually any controversial or offensive speech *might* conceivably cause "copycat" speech or a "snowballing effect" in school at some point in the future. Thus, under the Fourth Circuit's holding, school officials have carte

blanche to punish any off-campus speech based solely on the speculative belief that similar speech might be repeated on school grounds. Given the flood of similar school discipline cases making their way through the lower courts, this Court's guidance is badly needed.

I. THE COURT SHOULD CLARIFY WHETHER THE *TINKER* "SUBSTANTIAL DISRUPTION" TEST APPLIES TO SPEECH MADE OFF SCHOOL GROUNDS AND NOT DIRECTED AT THE SCHOOL.

In the forty years since this Court decided *Tinker*, lower courts have struggled to resolve the unanswered question of whether schools can discipline students for speech that occurs entirely off school grounds (and away from any school-sponsored functions) under the same "substantial disruption" test that this Court applied to student speech on school grounds.

In *Tinker*, the Court addressed whether student speech on school grounds was protected by the First Amendment. 393 U.S. at 503. The case began when a public school disciplined students for wearing black armbands in silent protest of the Vietnam War. *Id.* The Court recognized that students maintain broad First Amendment rights at school, remarking that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. The Court held that, to suppress or punish student speech on school grounds, school officials must show the speech would "materially and substantially interfere" with the work of the school. *Id.* at 509. The Court emphasized that its holding did not embrace "merely the

classroom hours," but also speech in the cafeteria or the playground. *Id.* at 512-13. But the Court's holding was equally clear in permitting school discipline only when the speech occurred on school grounds; the Court did not address speech by a student after school hours at home or elsewhere in the community. *Id.*

Since *Tinker*, the Court has never squarely addressed the unanswered question of whether its holding can be applied to speech made off school grounds and not at a school event. In *Morse v. Frederick*, 551 U.S. 393 (2007), this Court addressed whether a student could be disciplined for displaying a banner reading "BONG HiTS 4 JESUS" during a school-sponsored trip to watch the Olympic Torch Relay. *Id.* at 396-97. The Court held that student speech promoting illegal drug use "at a school event, in the presence of school administrators and teachers," could be suppressed regardless of whether it satisfied the *Tinker* substantial disruption test. *Id.* at 408-09. Importantly, the Court in *Morse* emphasized that its holding applied only because attendance at the Olympic Torch Relay was a "school event." *Id.* at 405.

Moreover, the Court in *Morse* discussed another student free speech decision, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), where the Court held that vulgar and offensive speech on school grounds could be punished regardless of whether it caused a substantial disruption. *Morse*, 551 U.S. at 404-05; *Fraser*, 478 U.S. at 685. *Fraser* involved a high school student's on-campus speech supporting a fellow student body candidate. The speech was filled with sexual language and innuendo. Discussing the *Fraser* holding, the Court in *Morse* explained that "[h]ad Fraser delivered the same speech

in a public forum outside the school context, it would have been protected." 551 U.S. at 405. "In school, however, Fraser's First Amendment rights were circumscribed in light of the special characteristics of the school environment." *Id.* (internal quotation marks omitted). Thus, it is clear after *Morse* that vulgar, offensive student speech (and perhaps even speech advocating illegal drug use) is entitled to full First Amendment protection when that speech occurs away from school grounds and not at a school-sponsored function. This is true even though the *Fraser* speech was directed at other students and involved a school-related topic. *See Fraser*, 478 U.S. at 677-78. But the Court in *Morse* did not address whether *Tinker* similarly is limited to on-campus speech. As explained below, the circuit courts are firmly split on that important constitutional question.

A. Several circuits have held that *Tinker* does not apply to off-campus speech.

A decade after *Tinker*, the Second Circuit held that a school official's "arm of authority does not reach beyond the schoolhouse gate. When an educator seeks to extend his dominion beyond these bounds, therefore, he must answer to the same constitutional commands that bind all other institutions of government." *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1044-45 (2d Cir. 1979). In *Thomas*, a group of high school students created a satirical newspaper that addressed everything from school lunches to masturbation. *Id.* at 1045. The newspaper was "conceived, executed, and distributed outside the school" and "no copies were sold on school grounds." *Id.* at 1050. School officials discovered the paper, were "[s]hocked and offended" by its contents, and disciplined

the students. *Id.* at 1046. On appeal, the Second Circuit held that the school violated the students' First Amendment rights because "school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith." *Id.* at 1050. The court emphasized that a student "is free to speak his mind when the school day ends." *Id.* at 1052.

The Fifth Circuit adopted the same approach in *Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004). There, Adam Porter, a high school student, sketched a drawing in his bedroom "depicting the school under a state of siege by a gasoline tanker truck, missile launcher, helicopter, and various armed persons." *Id.* at 611. The sketch also contained profanity and a picture of a brick being hurled at the school principal. *Id.* Porter showed the drawing to his mother, brother, and a close friend, and then put the private drawing in his bedroom closet. *Id.* Two years later, Porter's younger brother found the sketchpad, took it with him on the school bus, and showed it to a fellow middle school student who then told the bus driver, "look, they're going to blow up [the school]." *Id.* School administrators disciplined Porter and, under threat of expulsion, he transferred to another school. *Id.* at 612.

On appeal, the Fifth Circuit held that *Tinker*'s "substantial disruption" test did not apply because that test applies only to "student expression 'that happens to occur on the school premises.'" *Id.* at 615. The court explained that the student "took no action that would increase the chances that his drawing would find its way to school; he simply stored it in a closet where it remained until, by chance, it was unwittingly taken [to school] by

his brother." *Id.* The court distinguished the case from a lengthy list of cases involving student writings or underground newspapers that were distributed by the author on school grounds. *Id.* at 615 n.22. The court held that "[o]ur analysis today is not in conflict with this body of case law; rather, the fact that [the student's] drawing was composed off-campus and remained off-campus for two years until it was unintentionally taken to school by his younger brother takes the present case outside the scope of these precedents." *Id.* Thus, the court declined to apply the *Tinker* test because the drawing was not "student speech on the school premises." *Id.* at 615.

Finally, five judges of the *en banc* Third Circuit advanced this view several months ago in a concurring opinion in *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d. 915 (3d Cir. 2011), a case remarkably similar to the case at bar. In *J.S.*, school officials suspended a middle school student for "creating, on a weekend and on her home computer, a MySpace profile . . . making fun of her middle school principal." *Id.* at 920. On appeal, the Third Circuit held that J.S.'s First Amendment rights were violated because the webpage did not create a "substantial disruption" and therefore, under *Tinker*, the suspension violated the First Amendment. *Id.* at 931. The eight-judge majority declined to address J.S.'s argument that *Tinker*'s exception to ordinary First Amendment principles did not apply because she created the webpage after school on her home computer. "While this argument has some appeal, we need not address it to hold that the School District violated J.S.'s First Amendment free speech rights." *Id.* at 927 n.3.

Five judges separately concurred with the eight-judge majority but explained that the court should have gone further and held that *Tinker* categorically does not apply to off-campus speech. The concurrence noted that this Court has never squarely addressed that question and that "[l]ower courts . . . are divided on whether *Tinker*'s substantial disruption test governs students' off-campus expression." *Id.* at 937 (Smith, J., concurring) (citing, *inter alia*, *Thomas* and *Porter*). The concurrence also explained that "speech intentionally directed towards a school is properly considered on-campus speech." *Id.* at 940. But speech occurring entirely off-campus and not directed at the school, like J.S.'s fictional MySpace profile, should not be subject to *Tinker*. "Applying *Tinker* to off-campus speech would create a precedent with ominous implications. Doing so would empower schools to regulate students' expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes a substantial disruption to school. . . . That cannot be, nor is it, the law."[3] *Id.* at 939.

3. The School District in *J.S.* filed an application for an extension of time to file a petition for a writ of certiorari, and its petition is presently due on October 27, 2011. *See Blue Mountain Sch. Dist. v. J.S.*, No. 11A200. However, this case presents a better vehicle to address these important constitutional questions because, unlike the MySpace page in *J.S.*, Kara's MySpace page was not directed at a school official and thus squarely presents the primary question of whether off-campus speech not directed at the school properly can be subject to the *Tinker* standard at all, as well as the secondary question of how the *Tinker* standard should be applied to that speech.

B. Other circuits, including the Fourth Circuit below, have held that *Tinker* applies to off-campus speech.

In this case, the Fourth Circuit departed from the authority discussed above and rejected the argument that *Tinker* does not apply to off-campus speech. The court held that "the School District was authorized by *Tinker* to discipline [Kara], *regardless of where her speech originated*, because the speech was materially and substantially disruptive in that it 'interfer[ed] . . . with the schools' work [and] colli[ded] with the rights of other students to be secure and to be let alone.'" (App. 17a) (citing *Tinker*, 393 U.S. at 508, 513) (emphasis added) (brackets and ellipses in original). The court's decision to apply *Tinker* to off-campus speech contained no further analysis, and did not cite any authority except for *Tinker* itself. (App. 17a.)

No other circuit court has agreed with the Fourth Circuit's extraordinary holding that *Tinker* applies to *all* off-campus speech, even speech that, like Kara's webpage, was not directed at the school in some way. However, several recent decisions have held that off-campus speech that *is* directed at the school is governed by *Tinker*. Most recently, in *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011), *petition for cert. filed*, No. 11-113 (July 25, 2011), the Second Circuit held that school officials who disciplined a high school student for comments on an internet blog were entitled to qualified immunity because it was not clearly established that "off-campus speech-related conduct may never be the basis for discipline by school officials." *Id.* at 347.

In that case, Avery Doninger, a high school student, became upset when school officials cancelled "Jamfest," a popular student band event. *Id.* at 339. Doninger used a school computer to send a mass email asking students and parents to contact school officials and oppose the decision to cancel Jamfest. *Id.* at 339-40. After school officials "received an influx of telephone calls and emails regarding Jamfest," they criticized Doninger for sending emails from school grounds and asked her to send another email correcting "misinformation" in her original email, but took no disciplinary action. *Id.* at 340. Later that day, Doninger posted on her internet blog a critique of the school's decision that referred to school officials as "douchebags" and again encouraged students and parents to call or write to school officials to complain about the decision. *Id.* at 340-41. Doninger also spoke to the media about the school's decision. *Id.* at 342. School officials learned about the blog post several weeks later and, in response to the blog post, disciplined Doninger. *Id.*

The Second Circuit held that school officials were entitled to qualified immunity in Doninger's First Amendment lawsuit. *Id.* at 346. The Court explained that its earlier decision in *Thomas* did not establish "that off-campus speech-related conduct may never be the basis for discipline by school officials." *Id.* at 347. The court relied on a footnote in *Thomas* in which the court stated that it could "envision a case in which a group of students incites substantial disruption within the school from some remote locale." *Id.* (citing *Thomas*, 607 F.2d at 1052 n.17). The court also relied on a more recent Second Circuit decision, *Wisniewski v. Board of Education of Weedsport Central School District*, 494 F.3d 34 (2d Cir. 2007), which upheld school officials' decision to discipline a student for creating

an AOL instant messaging icon on his home computer that portrayed a bullet being fired at a person's head with the words "Kill Mr. VanderMolen" written beneath it. The *Doninger* court held that, in light of *Wisniewski*, it was not clearly established that school officials could not discipline students for speech that occurred entirely off-campus.[4] 642 F.3d at 347.

Finally, the Pennsylvania Supreme Court applied *Tinker* to a student-created web-site that included disparaging comments about teachers, including a photograph of a teacher with the caption "Why Should She Die?" and a request that viewers "Take a look at the diagram and the reasons I gave, then give me $20 to help pay for the hitman." *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 851 (Pa. 2002). The court held that the website was not a "true threat" under the First Amendment and thus considered whether *Tinker* applied because of the potential for disruption resulting from the website's content. *Id.* at 860. The court analyzed the conflicting federal court decisions involving off-campus

4. The student in *Doninger* filed a petition for writ of certiorari with this Court, and that petition is under review. *See Doninger v. Niehoff*, No. 11-113. However, this case presents a more appropriate vehicle to address the question. First, *Doninger* did not squarely address the First Amendment issue, instead holding that, even if *Tinker* does not apply to off-campus speech, that constitutional principle was not clearly established under Second Circuit case law. Second, *Doninger* involved speech that was plainly directed at the school, unlike Kara's website in this case, thus eliminating the central issue of whether speech not directed at the school can be governed by *Tinker*. Third, Justice Sotomayor sat on the panel that issued an earlier student speech decision in the *Doninger* case, *see Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008), and would be recused.

student speech and determined that the federal courts "have differed in their conclusions." *Id.* at 864-65. The court ultimately held that "where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech."[5] *Id.*

C. The Court should grant this petition and hold that student speech occurring entirely off school grounds and not directed at the school is not governed by *Tinker*.

The Court should resolve this split of authority concerning *Tinker*'s application to off-campus speech by holding that off-campus speech not directed at the school is entitled to ordinary First Amendment protection. Under the Fourth Circuit's holding, any off-campus student speech that is sufficiently controversial or offensive to

5. In circuits that have not yet addressed whether *Tinker* applies to off-campus speech, federal district courts are similarly split. For example, in *J.C. v. Beverly Hills Unified School District*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010), the court applied *Tinker* to a high school student's YouTube video, filmed at a local restaurant and posted on the internet, that included profanity and disparaging statements about a fellow student. The court reasoned that "school administrators had the ability to access the video at school; thus, once an administrator became aware of the video, it could be played on the school campus" and was thus equivalent to on-campus speech. *Id.* at 1098. But in *Emmett v. Kent School District No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000), the court declined to apply *Tinker* to a student-created and publicly-accessible website with mock obituaries of fellow students because "although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school's supervision or control." *Id.* at 1089.

cause disruption in school can be disciplined, even if that speech was not directed at the school itself. This includes speech on the internet, like Kara's private MySpace discussion group, but also countless other forms of speech that may later cause disruptions in school.

For example, a high school could punish a student for speaking at an anti-war protest and accusing U.S. soldiers of war crimes simply because it resulted in a disruption when a fellow student who lost family members in Iraq or Afghanistan learned of the speech at school. Similarly, the school could discipline an Evangelical Christian student who, at the mall or the movie theater, urged a lesbian classmate to change her sexuality or face damnation, simply because those controversial views later caused disruption in school. Or, as the five-judge concurrence in *J.S.* explained: "Suppose a high school student, while at home after school hours, were to write a blog entry defending gay marriage. Suppose further that several of the student's classmates got wind of the entry, took issue with it, and caused a significant disturbance at school. While the school could clearly punish the students who acted disruptively, if *Tinker* were held to apply to off-campus speech, the school could also punish the student whose blog entry brought about the disruption. That cannot be, nor is it, the law."

In sum, this Court has never suggested that speech by a student at her home, at the mall, at a sleepover with friends, or at a political rally could be subject to school discipline simply because it is so controversial or offensive that it could later lead to disruption in school. To the contrary, *Tinker* is grounded in the proposition that student free speech "is not a right that is given only to

be so circumscribed that it exists in principle but not in fact." 393 U.S. at 513. Here, Kara created her MySpace page from her own home computer. (App. 3a.) She never accessed the webpage at school, never encouraged other students to access the webpage at school, and never discussed the webpage at school. (App. 3a-5a.) The Fourth Circuit's decision to apply *Tinker* to Kara's speech "regardless of where her speech originated" (App. 17a) is erroneous. The Court should step in to resolve the circuit split on this issue and confirm that the off-campus speech of students like Kara is entitled to full First Amendment protection.

II. THE COURT SHOULD CLARIFY THE MEANING OF "MATERIAL OR SUBSTANTIAL DISRUPTION."

Even setting aside the circuit split regarding *Tinker*'s applicability to off-campus speech, the Fourth Circuit's holding on the meaning of "substantial disruption" dramatically departs from this Court's holding in *Tinker* and directly conflicts with a recent *en banc* Third Circuit decision on analogous facts. If allowed to stand, the Fourth Circuit's holding will eviscerate *Tinker*'s carefully-drawn boundaries and permit school officials in the Fourth Circuit to discipline students for virtually any off-campus speech that other students may find offensive.

As explained above, the Fourth Circuit held that Kara's MySpace discussion group satisfied *Tinker*'s "substantial disruption" test because, although there was no evidence that Kara would make similar comments about Shay at school, there was "the potential" for others to do so:

> Given the targeted, defamatory nature of [Kara's] speech, aimed at a fellow classmate, it created "actual or nascent" substantial disorder and disruption in the school. . . . First, the creation of the "S.A.S.H." group forced Shay N. to miss school in order to avoid further abuse. Moreover, had the school not intervened, the potential for continuing and more serious harassment of Shay N. as well as other students was real. Experience suggests that unpunished misbehavior can have a snowballing effect, in some cases resulting in "copycat" efforts by other students or in retaliation for the initial harassment.

(App. 18a.)

This reasoning is flatly inconsistent with *Tinker*'s substantial disruption test. Indeed, the in-school disruption that *actually* occurred in *Tinker* was far more substantial than the purely theoretical disruption hypothesized by the Fourth Circuit below, but the *Tinker* Court held that the student speech there was protected. For example, there was evidence in *Tinker* that the students' black armbands, worn at school, "caused comments, warning by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone." 393 U.S. at 517 (Black, J., dissenting). One mathematics teacher's class was "practically 'wrecked' by [Tinker] who wore her armband for her 'demonstration.'" *Id.* Moreover, the district court in *Tinker* found that school officials had reasonable fears that the armbands would lead to further disturbances. 393 U.S. at 509. But this Court held that

those concerns were insufficient: "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. . . . Any word spoken in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk." *Id.* at 508.

In short, the *actual* disruption present, as well as the fears of a "snowballing effect" or "copycat" behavior, were far greater in *Tinker* than in this case. Indeed, the speculative concern that particular student speech might lead students to engage in separate behavior that is disruptive is precisely the sort of rationale this Court held was "not enough to overcome the right to freedom of expression." *Id.* Thus, the Fourth Circuit's holding that mere fear of a "snowballing effect" or "copycat" behavior is sufficient to show the potential for substantial disruption is inconsistent with *Tinker*.

Moreover, the Fourth Circuit's conclusion that Kara's MySpace discussion group satisfies the "material and substantial disruption" test directly conflicts with the Third Circuit's decision in *J.S.*, discussed above. In that case, J.S. created a fake MySpace profile for her school principal, using the principal's actual school website photograph. 650 F.3d at 920. The MySpace profile contained "crude content and vulgar language," including statements that the principal was bisexual and a pedophile, that the principal's son resembled a gorilla, and that the principal's wife looked like a man. *Id.* at 921. After the principal learned about the MySpace website, he suspended J.S. *Id.* at 922. The school justified the suspension because, after J.S. created the webpage,

there were "rumblings" throughout the school, including a discussion of the website that disrupted a middle school math teacher's classroom. *Id.* In addition, the school had to cancel some student counseling sessions because a counselor had to assist the principal in meetings with J.S. *Id.* at 923.

The Third Circuit held that the webpage did not create a "material and substantial disruption" as required by *Tinker*. The court noted that "J.S. created the profile as a joke, and she took steps to make it 'private' so that access was limited to her and her friends." *Id.* at 10. The court then concluded that "[i]f *Tinker*'s black armbands—an ostentatious reminder of the highly emotional and controversial subject of the Vietnam war—could not 'reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,' neither can J.S.'s profile, despite the unfortunate humiliation it caused for [the principal]." *Id.* at 929-30 (citations omitted).

J.S.'s MySpace webpage was substantially more offensive than Kara's MySpace discussion group and, unlike Kara's webpage, created an actual disruption at school. Nonetheless, the Third Circuit found that *Tinker*'s substantial disruption test was not satisfied, whereas the Fourth Circuit found a substantial disruption in this case. Thus, the Third Circuit and Fourth Circuit decisions directly conflict on their application of *Tinker*. As a result, school officials in the Fourth Circuit have tremendously greater control over the off-campus speech of students than do those in the Third Circuit. Moreover, the Fourth Circuit's holding renders the "material and substantial disruption" test essentially meaningless. Almost any

controversial or offensive speech by students after school hours has the possibility of creating a "snowballing effect" or leading to "copycat" behavior by other students in school. *Tinker*, of course, permits the school to punish that "snowballing" or "copycat" speech that occurs on school grounds, if it is sufficiently disruptive. *See* 393 U.S. 508-09. But nothing in *Tinker*'s carefully drawn holding indicates that a school official can "extend his dominion" beyond the schoolhouse gate to punish controversial or offensive student speech simply because that speech may later spark separate, disruptive speech by students on school grounds. *Thomas*, 607 F.2d at 1045. The Court should grant this petition to resolve the circuit split and correct the Fourth Circuit's erroneous reading of the *Tinker* "substantial disruption" test.[6]

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6. Federal district courts in other circuits also have reached conflicting results when applying *Tinker* to off-campus speech. For example, in *O.Z. v. Board of Trustees of the Long Beach Unified School District*, No. 08-5671, 2008 WL 4396895 (C.D. Cal. Sept. 9, 2008), a student posted a video slideshow on the internet that depicted him dressed in a costume resembling his teacher with a knife coming toward him. Months later, the teacher decided to "Google" herself, discovered the video, and "was allegedly upset by the video, became ill, and was unable to sleep for several nights." *Id.* at *1. The court held that "it would appear *reasonable*, given the violent language and unusual photos depicted in the slide show, for school officials to forecast substantial disruption of school activities" as a result of the video, although it was unclear whether other students or teachers at school were even aware of the video's existence. *Id.* at *3. By contrast, in *J.C.*, 711 F. Supp. 2d at 1121-22, the court held that a student's YouTube video featuring disparaging comments about a fellow student, which was widely discussed by other students at school and caused the targeted student to miss school and receive counseling, did not satisfy the substantial disruption standard.

III. CASES INVOLVING OFF-CAMPUS STUDENT SPEECH ARE FLOODING THE LOWER COURTS AND FIRST AMENDMENT SCHOLARS UNIFORMLY AGREE THAT THIS COURT'S GUIDANCE IS NEEDED.

Musselman High School's decision to punish Kara for creating a discussion group webpage that hosted offensive remarks about a fellow student is by no means unique. Students are increasingly using social networking websites and similar social media, and this, in turn, has given school officials unprecedented access to the after-school thoughts and speech of their students. As a result, the number of cases in which school officials discipline students for off-campus speech or expression, even speech having nothing to do with the school itself, has risen dramatically in the last few years.

For example, a First Amendment lawsuit is pending in Indiana concerning two high school students who were punished for posting photographs on Facebook that featured the students in suggestive poses with "phallic-shaped" lollipops, even though the pictures had nothing to do with school. *See T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, No. 1:09-CV-290-PPS, 2011 WL 3501698, at *1-*2 (N.D. Ind. Aug. 10, 2011). In *J.C.*, 711 F. Supp. 2d at 1098, discussed above, a high school student was suspended for posting on YouTube, from her home computer, a video recording of her friends using profanity and making disparaging comments about a fellow student while at a local restaurant. In *Emmett*, 92 F. Supp. 2d at 1089, a high school student was suspended for creating a website that included "tongue-in-cheek" mock obituaries for fellow students and that permitted visitors to vote

on which student would "die" next and receive the next mock obituary. Indeed, news articles reveal a substantial number of similar cases of school discipline for off-campus speech. *See, e.g.*, Jan Hoffman, *Online Bullies Pull Schools Into the Fray*, N.Y. Times, June 27, 2010, at A1, *available at* http://www.nytimes.com/2010/06/28/style/28bully.html; Amy Benfer, *Cyber Slammed: Kids Are Getting Arrested for Raunchy Online Bullying. It's Definitely Offensive, but Is It Against the Law?*, Salon.com, July 3, 2001, *available at* http://www.salon.com/life/feature/2001/07/03/cyber_bullies/.

Moreover, in light of concerns about bullying and other bad behavior by students away from school grounds, both the U.S. government and the States have been encouraging school districts to punish off-campus student speech. The U.S. Department of Education issued a "Dear Colleague Letter" in 2010 suggesting that school officials should police speech among students such as "verbal acts and name-calling" and "graphic and written statements, which may include use of cell phones or the Internet," regardless of where that speech occurs. *See* Russlynn Ali, Asst. Sec'y for Civil Rights, U.S. Dep't of Educ., *Dear Colleague Letter: Harassment and Bullying*, at 2 (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html. Likewise, some states, such as California, have enacted statutes authorizing school districts to punish students for speech made through "electronic" means such as text messages or internet posts, even if the speech occurs while the students are going to or coming from school. *See* Cal. Educ. Code §§ 32261, 48900.

In a letter to the U.S. Commission on Civil Rights, one First Amendment scholar cautioned against these government laws and policies because, among other reasons, "[t]here are special constitutional difficulties in policies that restrict off-campus speech." Eugene Volokh, Professor, Letter to U.S. Comm'n on Civil Rights, at 3-4, (May 13, 2011), *available at* http://www.eusccr.com/27.%20Eugene%20Volokh,%20UCLA%20School%20of%20Law.pdf. These types of "anti-harassment" policies, which extend school authority to off-campus speech, would permit school officials to "discipline a student for displaying a Confederate flag at a political event off-campus (or on his Web page that he maintains off-campus), or harshly criticizing Christianity or homosexuality, or speaking out off-campus against the war or against our soldiers." *Id.* at 4.

In response to the increasing use of school discipline to punish off-campus speech, the corresponding lawsuits, and the lack of clarity in the lower court case law, legal commentators repeatedly have recognized that this Court's guidance is needed. Student speech cases are "among the most commonly litigated cases under the First Amendment" and commentators "have attributed the plethora of lower court cases and inconsistent results to a lack of direction from the Supreme Court." Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 Fla. L. Rev. 395, 396 (2011). Over the last few decades "lower courts have disagreed on how to interpret and reconcile" *Tinker* and its progeny. Abby Marie Mollen, Comment, *In Defense of the "Hazardous Freedom" of Controversial Student Speech*, 102 Nw. U. L. Rev. 1501, 1510 (2008). "When the Court finally spoke again in *Morse* in 2007, not only did it

fail to resolve these areas of confusion, it added additional uncertainty to the scope of students' free speech rights." *Id.* "The uncertainty and confusion sown by [*Morse*] are especially apparent with respect to *Tinker*'s substantial disruption standard." Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 Sup. Ct. Rev. 205, 219 (2007). As two commentators recently explained, "[u]nfortunately, *Morse*'s self-conscious minimalism raises more questions than it answers, especially for student cyberspeech." Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 Hastings Const. L.Q. 835, 837 (2008).

While there is a lack of guidance from this Court, there is no lack of scholarly debate about the need for more guidance. The proper application of student speech principles to off-campus speech or internet speech, and the lack of clarity in this Court's jurisprudence, have been addressed in at least twelve recent scholarly articles. *See* Goldman, *supra*, at 396; Emily K. Kerkhof, Note, *MySpace, Yourspace, Ourspace: Student Cyberspeech, Bullying and Their Impact on School Discipline*, 2009 U. Ill. L. Rev. 1623, 1649-50 (2009); Mollen, *supra*, at 1510; Denning & Taylor, *supra*, at 837; Justin P. Markey, *Enough Tinkering with Students' Rights: The Need for an Enhanced First Amendment Standard To Protect Off-Campus Student Internet Speech*, 36 Cap. U. L. Rev. 129, 150 (2007); Schauer, *supra*, at 219; Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 Geo. Wash. L. Rev. 439, 441 (2006); Thomas E. Wheeler II, *Lessons From* The Lord of the Flies*: Protecting Students from Internet Threats and Cyber Hate Speech*, 10 J. Internet L. 3, 4-5 (2006); Richard Salgado, Comment, *Protecting*

Student Speech Rights While Increasing School Safety: School Jurisdiction and the Search for Warning Signs in a Post-Columbine/Red Lake Environment, 2005 BYU L. Rev. 1371, 1376 (2005); Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 Willamette L. Rev. 93, 140-43 (2003); Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. Sci. & Tech. L. 243, 285 (2001); Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 Tex. L. Rev. 1129, 1159 (1999).

In sum, the lack of clear guidance from this Court, and the conflicting decisions in the lower courts, make it impossible for students, parents, teachers, and school administrators to understand the scope of student speech rights—in effect, leaving the public to conclude "that students have a right to speak . . . except when they don't." *Morse*, 551 U.S. at 418 (Thomas, J., concurring). The First Amendment requires more. As this Court explained in *Tinker*, "[t]he Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says." 393 U.S. at 513. The Court should grant certiorari in this case to provide badly needed guidance to the lower courts—and to students and school officials—regarding the First Amendment right of students to speak their minds when not in school.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED JULY 27, 2011

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-1098

KARA KOWALSKI,

Plaintiff-Appellant,

v.

BERKELEY COUNTY SCHOOLS, a public school district; MANNY P. ARVON, II, Superintendent, in his official capacity; RONALD STEPHENS, Principal, in his official capacity and individually; BECKY J. HARDEN, Vice Principal, in her official capacity and individually; BUFFY ASHCRAFT, cheerleading coach, in her official capacity and individually; RICK DEUELL, Assistant Superintendent, in his official capacity,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of West Virginia, at Martinsburg.
John Preston Bailey, Chief District Judge.
(3:07-cv-00147-JPB)

Appendix A

Argued: March 25, 2011

Decided: July 27, 2011

Before NIEMEYER, DUNCAN, and AGEE,
Circuit Judges.

OPINION

NIEMEYER, Circuit Judge:

When Kara Kowalski was a senior at Musselman High School in Berkeley County, West Virginia, school administrators suspended her from school for five days for creating and posting to a MySpace.com webpage called "S.A.S.H.," which Kowalski claims stood for "Students Against Sluts Herpes" and which was largely dedicated to ridiculing a fellow student. Kowalski commenced this action, under 42 U.S.C. § 1983, against the Berkeley County School District and five of its officers, contending that in disciplining her, the defendants violated her free speech and due process rights under the First and Fourteenth Amendments. She alleges, among other things, that the School District was not justified in regulating her speech because it did not occur during a "school-related activity," but rather was "private out-of-school speech."

The district court entered summary judgment in favor of the defendants, concluding that they were authorized to punish Kowalski because her webpage was "created for the purpose of inviting others to indulge in disruptive and hateful conduct," which caused an "in-school disruption."

Appendix A

Reviewing the summary judgment record *de novo*, we conclude that in the circumstances of this case, the School District's imposition of sanctions was permissible. Kowalski used the Internet to orchestrate a targeted attack on a classmate, and did so in a manner that was sufficiently connected to the school environment as to implicate the School District's recognized authority to discipline speech which "materially and substantially interfere[es] with the requirements of appropriate discipline in the operation of the school and collid[es] with the rights of others." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 513 (1969) (internal quotation marks omitted). Accordingly, we affirm.

I

On December 1, 2005, Kara Kowalski, who was then a 12th grade student at Musselman High School in the Berkeley County School District, returned home from school and, using her home computer, created a discussion group webpage on MySpace.com with the heading "S.A.S.H." Under the webpage's title, she posted the statement, "No No Herpes, We don't want no herpes." Kowalski claimed in her deposition that "S.A.S.H." was an acronym for "Students Against Sluts Herpes," but a classmate, Ray Parsons, stated that it was an acronym for "Students Against Shay's Herpes," referring to another Musselman High School Student, Shay N., who was the main subject of discussion on the webpage.

After creating the group, Kowalski invited approximately 100 people on her MySpace "friends"

list to join the group. MySpace discussion groups allow registered users to post and respond to text, comments, and photographs in an interactive fashion. Approximately two dozen Musselman High School students responded and ultimately joined the group. Kowalski later explained that she had hoped that the group would "make other students actively aware of STDs," which were a "hot topic" at her school.

Ray Parsons responded to the MySpace invitation at 3:40 p.m. and was the first to join the group, doing so from a school computer during an after hours class at Musselman High School. Parsons uploaded a photograph of himself and a friend holding their noses while displaying a sign that read, "Shay Has Herpes," referring to Shay N. The record of the webpage shows that Kowalski promptly responded, stating, "Ray you are soo funny!=)" It shows that shortly thereafter, she posted another response to the photograph, stating that it was "the best picture [I]'ve seen on myspace so far! ! ! !" Several other students posted similar replies. Parsons also uploaded to the "S.A.S.H." webpage two additional photographs of Shay N., which he edited. In the first, he had drawn red dots on Shay N.'s face to simulate herpes and added a sign near her pelvic region, that read, "Warning: Enter at your own risk." In the second photograph, he captioned Shay N.'s face with a sign that read, "portrait of a whore."

The commentary posted on the "S.A.S.H." webpage mostly focused on Shay N. The first five comments were posted by other Musselman High School students and ridiculed the pictures of Shay N. One student stated that

"shay knows about the sign" and then stated, "wait til she sees the page lol." (The abbreviation "lol" means "laugh out loud" or "laughing out loud.") The next comment replied, "Haha.. screw her" and repeatedly stated, "This is great." After expressing her approval of the postings, this student noted the "Shay has herpes sign" and stated, "Kara sent me a few interesting pics. . . Would you be interested in seeing them Ray?" One student posted, "Kara= My Hero," and another said, "your so awesome kara...i never thought u would mastermind a group that hates [someone] tho, lol." A few of the posts assumed that Kowalski had posted the photographs of Shay N., but Parsons later clarified that it was he who had posted the photographs.

A few hours after the photographs and comments had been posted to the MySpace.com page, Shay N.'s father called Parsons on the telephone and expressed his anger over the photographs. Parsons then called Kowalski, who unsuccessfully attempted to delete the "S.A.S.H." group and to remove the photographs. Unable to do so, she renamed the group "Students Against Angry People."

The next morning, Shay N.'s parents, together with Shay, went to Musselman High School and filed a harassment complaint with Vice Principal Becky Harden regarding the discussion group, and they provided Harden with a printout of the "S.A.S.H." webpage. Shay thereafter left the school with her parents, as she did not want to attend classes that day, feeling uncomfortable about sitting in class with students who had posted comments about her on the MySpace webpage.

Appendix A

After receiving Shay N.'s complaint, Principal Ronald Stephens contacted the central school board office to determine whether the issue was one that should be addressed with school discipline. A school board official indicated that discipline was appropriate. Principal Stephens then conducted an investigation into the matter, during which he and Vice Principal Harden interviewed the students who had joined the "S.A.S.H." group to determine who posted the photographs and comments. As part of the investigation, Principal Stephens and Vice Principal Harden questioned Parsons, who admitted that he had posted the photographs. Vice Principal Harden met with Kowalski, who admitted that she had created the "S.A.S.H." group but denied that she posted any of the photographs or disparaging remarks.

School administrators concluded that Kowalski had created a "hate website," in violation of the school policy against "harassment, bullying, and intimidation." For punishment, they suspended Kowalski from school for 10 days and issued her a 90-day "social suspension," which prevented her from attending school events in which she was not a direct participant. Kowalski was also prevented from crowning the next "Queen of Charm" in that year's Charm Review, having been elected "Queen" herself the previous year. In addition, she was not allowed to participate on the cheerleading squad for the remainder of the year. After Kowalski's father asked school administrators to reduce or revoke the suspension, Assistant Superintendent Rick Deuell reduced Kowalski's out-of-school suspension to 5 days, but retained the 90-day social suspension.

Kowalski claims that, as a result of her punishment, she became socially isolated from her peers and received cold treatment from teachers and administrators. She stated that she became depressed and began taking prescription medication for her depression.

Kowalski acknowledged that at the beginning of each school year, including her senior year, she had received a Student Handbook which included the School District's Harassment, Bullying, and Intimidation Policy, as well as the Student Code of Conduct. The Harassment, Bullying, and Intimidation Policy prohibited "any form of . . . sexual . . . harassment . . . or any bullying or intimidation by any student . . . during any school-related activity or during any education-sponsored event, whether in a building or other property owned, use[d] or operated by the Berkeley Board of Education." The Policy defined "Bullying, Harassment and/or Intimidation" as "any intentional gesture, or any intentional written, verbal or physical act that"

1. A reasonable person under the circumstances should know will have the effect of:

   a. Harming a student or staff member;

   * * *

2. Is sufficiently inappropriate, severe, persistent, or pervasive that it creates an intimidating, threatening or abusive educational environment for a student.

The policy also provided that violators would be suspended and that disciplinary actions could be appealed.

The Student Code of Conduct provided, "All students enrolled in Berkeley County public schools shall behave in a safe manner that promotes a school environment that is nurturing, orderly, safe, and conducive to learning and personal-social development." It also committed students to "help create an atmosphere free from bullying, intimidation and harassment" and to "treat others with respect" and "demonstrate compassion and caring." The Code classified "Bullying/Harassment/Intimidation" as a "Level III Violation" with possible consequences including an out-of-school suspension up to 10 days; signing a behavioral contract; being denied participation in class and/or school activities; and a social suspension of up to one semester. Before punishing a student under the Student Code of Conduct, a principal was required to "immediately undertake or authorize an investigation" of the incident and complaint, including "personal interviews with the complain[an]t, the individual(s) against whom the complaint is filed, and others who may have knowledge of the alleged incident(s) or circumstances giving rise to the complaint."

The school administrators' meetings with Kowalski and the other students involved in the "S.A.S.H." webpage were intended to fulfill the procedures described in the Student Handbook.

Kowalski commenced this action in November 2007 against the Berkeley County School District,

Superintendent Manny Arvon (in his official capacity), Principal Ronald Stephens (in his official and individual capacities), Vice Principal Becky Harden (in her official and individual capacities), cheerleading coach Buffy Ashcraft (in her official and individual capacities), and Assistant Superintendent Rick Deuell (in his official capacity), alleging free speech violations under the First Amendment, due process violations under the Fifth Amendment (which Kowalski has acknowledged should have been under the Fourteenth Amendment), cruel and unusual punishment under the Eighth Amendment, and equal protection violations under the Fourteenth Amendment. The complaint also alleged violations of corresponding provisions of the West Virginia Constitution and a state law claim for intentional or negligent infliction of emotional distress. In addition to damages, Kowalski sought a declaratory judgment that the School District's harassment policy was unconstitutionally vague or overbroad and an injunction requiring the school to expunge any record of her discipline.

On the defendants' motion to dismiss the complaint, the district court dismissed Kowalski's free speech claim for lack of standing, concluding that she failed to allege that she had been disciplined under the School District's policy for engaging in speech protected by the First Amendment. In a later ruling denying Kowalski's motion for reconsideration, however, the district court recognized that Kowalski had engaged in speech. Nonetheless, it held that Kowalski lacked standing because her injury would "not be redressed by a favorable decision." Despite this ruling, the district court revisited the merits of Kowalski's

free speech claim when it denied her subsequent motion for reconsideration and again when it considered the defendants' motion for summary judgment on Kowalski's remaining claims. In ruling on the summary judgment motion, the court concluded that "the defendants could legitimately take action for [Kowalski's] vulgar and offensive speech and her encouragement of other students to follow suit." The district court also dismissed Kowalski's cruel and unusual punishment claim.

In granting summary judgment to the defendants, in addition to ruling against Kowalski on her free speech claim, the district court denied Kowalski's due process claim, concluding (1) that Kowalski was on notice that she could be punished for her off-campus behavior and (2) that she was provided with an opportunity to be heard prior to her suspension. The court also denied Kowalski's state law claims and her equal protection claim, with regard to which she had failed to produce any evidence. Finally, the court denied Kowalski's motion for reconsideration.

Kowalski appealed the district court's rulings on her free speech and due process claims under the U.S. Constitution and her state law claim for intentional or negligent infliction of emotional distress. At oral argument, she stipulated that we should treat the district court's judgment as granting summary judgment (rather than a motion to dismiss) on the issues appealed. We review the district court's rulings *de novo*. *See Stone v. Liberty Mut. Ins. Co.*, 105 F.3d 188, 191 (4th Cir. 1997).

II

Kowalski contends first that the school administrators violated her free speech rights under the First Amendment by punishing her for speech that occurred outside the school. She argues that because this case involved "off-campus, non-school related speech," school administrators had no power to discipline her. As she asserts, "The [Supreme] Court has been consistently careful to limit intrusions on students' rights to conduct taking place on school property, at school functions, or while engaged in school-sponsored or school-sanctioned activity." She maintains that "no Supreme Court case addressing student speech has held that a school may punish students for speech away from school—indeed every Supreme Court case addressing student speech has taken pains to emphasize that, were the speech in question to occur away from school, it would be protected."

The Berkeley County School District and its administrators contend that school officials "may regulate off-campus behavior insofar as the off-campus behavior creates a foreseeable risk of reaching school property and causing a substantial disruption to the work and discipline of the school," citing *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008). Relying on *Doninger*, the defendants note that Kowalski created a webpage that singled out Shay N. for harassment, bullying and intimidation; that it was foreseeable that the off-campus conduct would reach the school; and that it was foreseeable that the off-campus conduct would "create a substantial disruption in the school."

The question thus presented is whether Kowalski's activity fell within the outer boundaries of the high school's legitimate interest in maintaining order in the school and protecting the well-being and educational rights of its students.

The First Amendment prohibits Congress and, through the Fourteenth Amendment, the States from "abridging the freedom of speech." U.S. Const. amend. I; *Gitlow v. New York*, 268 U.S. 652 (1925). It is a "bedrock principle" of the First Amendment that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

While students retain significant First Amendment rights in the school context, their rights are not coextensive with those of adults. *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). Because of the "special characteristics of the school environment," *id.* at 505, school administrators have some latitude in regulating student speech to further educational objectives. Thus in *Tinker*, the Court held that student speech, consisting of wearing armbands in political protest against the Vietnam War, was protected because it did not "'materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school' [or] collid[e] with the rights of others," *id.* at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)), and thus did not "materially disrupt[ ] classwork or involve[ ] substantial disorder or invasion of the rights of others," *id.* Student speech also

may be regulated if it is otherwise "vulgar and lewd." *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986). Finally, the Supreme Court has held that school administrators are free to regulate and punish student speech that encourages the use of illegal drugs. *Morse v. Frederick*, 551 U.S. 393 (2007).

Although the Supreme Court has not dealt specifically with a factual circumstance where student speech targeted classmates for verbal abuse, in *Tinker* it recognized the need for regulation of speech that interfered with the school's work and discipline, describing that interference as speech that "disrupts classwork," creates "substantial disorder," or "collid[es] with" or "inva[des]" "the rights of others." *Tinker*, 393 U.S. at 513.

In *Tinker*, the Court pointed out at length how wearing black armbands in protest against the Vietnam War was passive and did not create "disorder or disturbance" and therefore did not interfere with the school's work or collide with other students' rights "to be secure and to be let alone." 393 U.S. at 508. Of course, a mere desire to avoid "discomfort and unpleasantness" was an insufficient basis to regulate the speech; there had to be disruption in the sense that the speech "would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id.* at 509 (quoting *Burnside*, 363 F.2d at 749). The Court amplified the nature of the disruption it had in mind when it stated:

> [C]onduct by [a] student, in class or out of it, which for any reason—whether it stems from

> time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Id. at 513.

The *Tinker* Court referred to this amplified statement of its test later in its opinion in shorthand when it concluded that the regulation of armbands "would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt *the work and discipline of the school*." *Id.* (emphasis added). Because, in *Tinker*, the students' wearing of the armbands "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others," there was "no interference with work and no disorder" to justify regulation of the speech. *Id.* at 514.

Thus, the language of *Tinker* supports the conclusion that public schools have a "compelling interest" in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying. *See DeJohn v. Temple Univ.*, 537 F.3d 301, 319-20 (3d Cir. 2008).

According to a federal government initiative, student-on-student bullying is a "major concern" in schools across the country and can cause victims to become depressed and anxious, to be afraid to go to school, and to have

thoughts of suicide. *See* StopBullying.gov, available at www.stopbullying.gov (follow "Recognize the Warning Signs" hyperlink). Just as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use, *see Morse*, 551 U.S. 393, schools have a duty to protect their students from harassment and bullying in the school environment, *cf. Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007) ("School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place"). Far from being a situation where school authorities "suppress speech on political and social issues based on disagreement with the viewpoint expressed," *Morse*, 551 U.S. at 423 (Alito, J., concurring), school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning.

We are confident that Kowalski's speech caused the interference and disruption described in *Tinker* as being immune from First Amendment protection. The "S.A.S.H." webpage functioned as a platform for Kowalski and her friends to direct verbal attacks towards classmate Shay N. The webpage contained comments accusing Shay N. of having herpes and being a "slut," as well as photographs reinforcing those defamatory accusations by depicting a sign across her pelvic area, which stated, "Warning: Enter at your own risk" and labeling her portrait as that of a "whore." One student's posting dismissed any concern for Shay N.'s reaction with a comment that said, "screw her." This is not the conduct and speech that our educational system is required to tolerate, as schools attempt to

educate students about "habits and manners of civility" or the "fundamental values necessary to the maintenance of a democratic political system." *Fraser*, 478 U.S. at 681 (internal quotation marks and citations omitted).

While Kowalski does not seriously dispute the harassing character of the speech on the "S.A.S.H." webpage, she argues mainly that her conduct took place at home after school and that the forum she created was therefore subject to the full protection of the First Amendment. This argument, however, raises the metaphysical question of where her speech occurred when she used the Internet as the medium. Kowalski indeed pushed her computer's keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment. She also knew that the dialogue would and did take place among Musselman High School students whom she invited to join the "S.A.S.H." group and that the fallout from her conduct and the speech within the group would be felt in the school itself. Indeed, the group's name was "*Students* Against Sluts Herpes" and a vast majority of its members were Musselman students. As one commentator on the webpage observed, "wait til [Shay N.] sees the page lol." Moreover, as Kowalski could anticipate, Shay N. and her parents took the attack as having been made in the school context, as they went to the high school to lodge their complaint.

There is surely a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the

schoolhouse gate. But we need not fully define that limit here, as we are satisfied that the nexus of Kowalski's speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being.

Of course, had Kowalski created the "S.A.S.H." group during school hours, using a school-provided computer and Internet connection, this case would be more clear-cut, as the question of where speech that was transmitted by the Internet "occurred" would not come into play. To be sure, a court could determine that speech originating outside of the school-house gate but directed at persons in school and received by and acted on by them was in fact in-school speech. In that case, because it was determined to be in-school speech, its regulation would be permissible not only under *Tinker* but also, as vulgar and lewd in-school speech, under *Fraser*. *See Fraser*, 478 U.S. at 685. *But cf. Layshock v. Hermitage Sch. Dist.*, No. 07-4465, ____ F.3d ____, 2011 WL 2305970 (3d Cir. 2011) (en banc) (holding that a school could not punish a student for online speech merely because the speech was vulgar and reached the school). We need not resolve, however, whether this was in-school speech and therefore whether *Fraser* could apply because the School District was authorized by *Tinker* to discipline Kowalski, regardless of where her speech originated, because the speech was materially and substantially disruptive in that it "interfer[ed] . . . with the schools' work [and] colli[ded] with the rights of other students to be secure and to be let alone." *See Tinker*, 393 U.S. at 508, 513.

Given the targeted, defamatory nature of Kowalski's speech, aimed at a fellow classmate, it created "actual or nascent" substantial disorder and disruption in the school. *See Tinker*, 393 U.S. at 508, 513; *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 257 (3d Cir. 2002) (indicating that administrators may regulate student speech any time they have a "particular and concrete basis" for forecasting future substantial disruption). First, the creation of the "S.A.S.H." group forced Shay N. to miss school in order to avoid further abuse. Moreover, had the school not intervened, the potential for continuing and more serious harassment of Shay N. as well as other students was real. Experience suggests that unpunished misbehavior can have a snowballing effect, in some cases resulting in "copycat" efforts by other students or in retaliation for the initial harassment.

Other courts have similarly concluded that school administrators' authority to regulate student speech extends, in the appropriate circumstances, to speech that does not originate at the school itself, so long as the speech eventually makes its way to the school in a meaningful way. For example, in *Boucher v. School Board of School District of Greenfield*, 134 F.3d 821, 829 (7th Cir. 1998), the Seventh Circuit held that a student was not entitled to a preliminary injunction prohibiting his punishment when the student wrote articles for an independent newspaper that was distributed at school. And again in *Doninger*, the Second Circuit concluded, after a student applied for a preliminary injunction in a factual circumstance not unlike the one at hand, that a school could discipline a student for an out-of-school blog post that included vulgar language

and misleading information about school administrators, as long as it was reasonably foreseeable that the post would reach the school and create a substantial disruption there. *See Doninger*, 527 F.3d at 48-49. The court explained, "a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach campus." *Id.* at 48 (quoting *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007)). *Cf. J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, No. 08-4138, ____ F.3d ____, 2011 WL 2305973 (3d Cir. 2011) (en banc) (divided court assuming without deciding that the *Tinker* substantial disruption test applies to online speech harassing a school administrator).

Thus, even though Kowalski was not physically at the school when she operated her computer to create the webpage and form the "S.A.S.H." MySpace group and to post comments there, other circuits have applied *Tinker* to such circumstances. To be sure, it was foreseeable in this case that Kowalski's conduct would reach the school via computers, smartphones, and other electronic devices, given that most of the "S.A.S.H." group's members and the target of the group's harassment were Musselman High School students. Indeed, the "S.A.S.H." webpage did make its way into the school and was accessed first by Musselman student Ray Parsons at 3:40 p.m., from a school computer during an after hours class. Furthermore, as we have noted, it created a reasonably foreseeable substantial disruption there.

At bottom, we conclude that the school was authorized to discipline Kowalski because her speech interfered with the work and discipline of the school. *See Tinker*, 393 U.S. at 513; *Doninger*, 527 F.3d at 51-52.

III

Kowalski next contends that she was denied due process because she "was afforded neither adequate notice nor a meaningful opportunity to be heard before she was deprived of her right to an education and her right to free speech." She argues that "no language" in the Harassment, Bullying and Intimidation Policy puts students on notice that they "could be subjected to discipline at school for behavior outside of school" and that the school "did not provide the due process required by [its] own policy."

The defendants contend that Kowalski acknowledged receiving copies of the Student Handbook at the beginning of each school year and that the Student Handbook put Kowalski on notice of the Harassment, Bullying and Intimidation Policy, as well as the Student Code of Conduct, both of which prohibit harassment and bullying. They argue, moreover, that "it was reasonably foreseeable [to Kowalski] that [her] chat room could, and in fact did, reach the school premises and cause a substantial disruption" there. The defendants also assert that Kowalski was told about Shay N.'s complaint and allowed to respond before being punished and that "an appeal process was available, and used on her behalf."

While schools are required to provide students with some level of due process, "'maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.'" *Fraser*, 478 U.S. at 686 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985)). Moreover, schools require this flexibility because they "need . . . to control such a wide range of disruptive behavior." *Sypniewski*, 307 F.3d at 266. In other words, "the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." *Fraser*, 478 U.S. at 686.

We are satisfied that the Musselman High School Harassment, Bullying and Intimidation Policy, in conjunction with the Student Code of Conduct, adequately put Kowalski on notice of the type of behavior that could be punished by school authorities. The Policy prohibits "any form of racial, sexual, religious/ethnic and disability harassment or violence or any bullying or intimidation by any student . . . during any school-related activity or during any school-sponsored event," and the separate Student Code of Conduct "sets the requirements for the conduct of students in Berkeley County Schools in order to assure a nurturing and orderly, safe, drug-free, violence and harassment-free learning environment that supports student academic achievement and personal-social development." The Code provides explicitly that "a student will not bully/intimidate or harass another student."

Although the prohibitions against harassment and bullying applied in a "school-related" context, both the

Harassment, Bullying and Intimidation Policy and the Student Code of Conduct applied when conduct could adversely affect the school environment. Thus, while the prohibited conduct had to be related to the school, this is not to say that volatile conduct was only punishable if it physically originated in a school building or during the school day. Rather, the prohibitions are designed to regulate student behavior that would *affect* the school's learning environment. Because the Internet-based bullying and harassment in this case could reasonably be expected to interfere with the rights of a student at Musselman High School and thus disrupt the school learning environment, Kowalski was indeed on notice that Musselman High School administrators could regulate and punish the conduct at issue here.

With respect to Kowalski's claim that she did not receive an adequate opportunity to be heard, due process in this context only requires, "in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against [her] and, if [she] denies them, an explanation of the evidence the authorities have and an opportunity to present [her] side of the story." *Goss v. Lopez*, 419 U.S. 565, 585 (1975). Here, these requirements were satisfied. Vice Principal Harden called Kowalski into her office, informed her of the harassment and bullying charge, discussed the "S.A.S.H." group with her, and, after Kowalski acknowledged her role, imposed a 10-day suspension. Because Kowalski admitted her conduct, the administrators were not required to provide a more extensive opportunity to allow her to justify her conduct.

Kowalski's argument that school administrators did not follow their own policies was not demonstrated in the record and also has no legal merit. Violations of state laws or school procedures "are insufficient by themselves to implicate the interests that trigger a [federal] due process claim." *Wofford v. Evans*, 390 F.3d 318, 325 (4th Cir. 2004); *Weller v. Dept. of Soc. Servs.*, 901 F.2d 387, 392 (4th Cir. 1990).

IV

Finally, Kowalski challenges the district court's dismissal of her claim for intentional or negligent infliction of emotional distress. The district court observed that the claim for negligent infliction of emotional distress had no merit because the defendants' conduct did not endanger Kowalski's safety or cause her to fear for her safety, as required by West Virginia law. *Brown v. City of Fairmont*, 655 S.E.2d 563, 569 (W. Va. 2007). The court also concluded that the defendants' actions could not be characterized as "extreme and outrageous," as required under *Brown*, *id.* at 569. Finding no error in the court's analysis of these claims, we affirm the district court's dismissal of them.

V

Kowalski's role in the "S.A.S.H." webpage, which was used to ridicule and demean a fellow student, was particularly mean-spirited and hateful. The webpage called on classmates, in a pack, to target Shay N., knowing that it would be hurtful and damaging to her ability to sit

with other students in class at Musselman High School and have a suitable learning experience. While each student in the "S.A.S.H." group might later attempt to minimize his or her role, at bottom, the conduct was indisputably harassing and bullying, in violation of Musselman High School's regulations prohibiting such conduct.

Kowalski asserts that the protections of free speech and due process somehow insulate her activities from school discipline because her activity was not sufficiently school-related to be subject to school discipline. Yet, every aspect of the webpage's design and implementation was school-related. Kowalski designed the website for "students," perhaps even against Shay N.; she sent it to students inviting them to join; and those who joined were mostly students, with Kowalski encouraging the commentary. The victim understood the attack as school-related, filing her complaint with school authorities. Ray Parsons, who provided the vulgar and lewd—indeed, defamatory—photographs understood that the object of the attack was Shay N., and he participated from a school computer during class, to the cheering of Kowalski and her fellow classmates, whom she invited to the affair.

Rather than respond constructively to the school's efforts to bring order and provide a lesson following the incident, Kowalski has rejected those efforts and sued school authorities for damages and other relief. Regretfully, she yet fails to see that such harassment and bullying is inappropriate and hurtful and that it must be taken seriously by school administrators in order to preserve an appropriate pedagogical environment.

Indeed, school administrators *are* becoming increasingly alarmed by the phenomenon, and the events in this case are but one example of such bullying and school administrators' efforts to contain it. Suffice it to hold here that, where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem.

The judgment of the district court is

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, MARTINSBURG, FILED DECEMBER 22, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA
MARTINSBURG

Civil Action No. 3:07-CV-147 (Judge Bailey)

KARA KOWALSKI,

Plaintiff,

v.

BERKELEY COUNTY PUBLIC SCHOOLS, and MANNY P. ARVON, II, Superintendent, in his official capacity, RONALD STEPHENS, Principal, in his official capacity and individually, BECKY J. HARDEN, Vice Principal, in her official capacity and individually, BUFFY ASHCROFT, Cheerleading Coach, in her official capacity and individually, and RICK DEUELL, Assistant Superintendent, in his official capacity.

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ISSUE OF VIOLATION OF DUE PROCESS RIGHTS

Appendix B

I. *INTRODUCTION*

On this day, the above-styled civil action came before this Court upon Defendants, the Berkeley County Board of Education ("the Board"), Manny P. Arvon, II, Ronald Stephens, Becky J. Harden, Buffy Ashcroft and Rick Deuell's ("Defendants") Motion for Summary Judgment [Doc. 104], Plaintiff's Response thereto [Doc. 122], Defendants' Reply [Doc. 136], and Plaintiff Kara Kowalski's ("Plaintiff") Motion for Summary Judgment on Issue of Violation of Due Process Rights [Doc. 105] and Defendants' Response thereto [Doc. 113]. This Court has reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that the Defendants' Motion for Summary Judgment [Doc. 104] should be **GRANTED**, and the Plaintiff's Motion for Summary Judgment on Issue of Violation of Due Process Rights [Doc. 105] should be **DENIED**.

II. *BACKGROUND*

This case arises out of events which took place on December 1 and 2, 2005. On December 1, 2005, the plaintiff, then a Mussellman High School senior, created a MySpace page from her home computer in which she invited approximately one hundred (100) people to join. The forum was entitled "S.A.S.H.," an acronym which stood for "Students Against Sluts Herpes." The MySpace page singled out another Mussellman High School ("Mussellman") student, S.N.,[1] for ridicule and scorn.

1. To protect the identity of the student portrayed on Plaintiff's S.A.S.H. Website, this Court will refer to her only as "S.N." or "Ms. N."

Several comments and altered photographs of Ms. N. were uploaded by the invitees to the plaintiff's MySpace page. Ms. N. and her parents became aware of the plaintiff's MySpace page, and the next day, during school hours, Ms. N. and her parents came to Mussellman to file a complaint against the plaintiff and the other Mussellman students involved in posting derogatory comments and pictures of Ms. N. to the plaintiff's MySpace page. The plaintiff and several of her MySpace page invitees were called to the office and given an opportunity to explain their sides of the stories. Importantly, the plaintiff admitted that she created the website. As a result of her conduct, the plaintiff received a disciplinary referral form describing her offense and imposing as discipline a ten (10) day school suspension and ninety (90) day social suspension. This "social suspension" precluded her from participating in "Charm Review" and cheerleading, both of which this Court addressed and disposed of in its Order dismissing the portions relating thereto [Doc. 55]. The plaintiff's father contacted a Board of Education employee and requested a reduction in the plaintiff's suspension. As a result of these efforts, the plaintiff's suspension was reduced by half.

III. *PROCEDURAL HISTORY*

The Plaintiff initiated this litigation by filing her original complaint in this Court on November 9, 2007 [Doc. 1]. Plaintiff sought to file an Amended Complaint and, on June 10, 2008, this Court granted her leave to file an Amended Complaint. [Doc. 34]. The Amended Complaint was served on or about June 11, 2008, and expanded the

original Complaint, which had contained four counts for relief, to include seven counts for relief [Doc. 35].

The Amended Complaint contained seven claims: four claims arising under 42 U.S.C. § 1983 alleging State and Federal Constitutional violations; one count sought a declaratory judgment that the Berkeley County Board of Education Harassment, Bullying, and Intimidation Policy is unconstitutionally overbroad and/or ambiguous; one count sought an injunction to force Defendant School Board to expunge Plaintiff's disciplinary referral, notation of suspension, and any other documents related to the discipline and suspension from her school record and to send corrected copies to any third parties to whom transcripts or school records containing references to the discipline or school suspension were sent; and the final count alleged negligent, wanton, reckless and malicious infliction of emotional distress. On June 25, 2008, Defendants filed a motion to dismiss Plaintiff's Amended Complaint.

By Order dated October 20, 2008, this Court granted in part and denied in part the Defendants' Motion to Dismiss the Plaintiff's Amended Complaint [Doc. 55]. This Court dismissed the plaintiff's claims for violations of her 1st Amendment rights, the plaintiff's 5th Amendment Due Process claim regarding her suspension from extracurricular activities, the plaintiff's 8th Amendment cruel and unusual punishment claim, the plaintiff's claim for declaratory judgment, and the plaintiff's claims for negligent and intentional infliction of emotional distress.

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IV. *UNDISPUTED MATERIAL FACTS*

The Undisputed Material Facts, taken in the light most favorable to the plaintiff, are as follows:

A. The 2005-2006 Berkeley County Schools Student Handbook

1) At the beginning of each of the plaintiff's four school years at Musselman High School, she received a copy of the Berkeley County Schools Student Handbook ("the Handbook"). See Excerpts Deposition of Kara Kowalski [Doc. 104-2] at 23.

2) According to § III of the Student Code of Conduct contained in the Handbook for the 2005-2006 school year, "Students will help create an atmosphere free from bullying, intimidation, and harassment." See Affidavit of Becky J. Harden and Student Handbook [Doc. 104-3] at 63.

3) The significant section of the Student Code of Conduct is highlighted by the "Harassment, Bullying, and Intimidation Policy" (the "Policy"). Id. at 84-91.

4) The Policy fairly informs students of actions that may subject them to punishment under the Policy:

> Bullying, Harassment, and/or Intimidation is any intentional gesture, or any intentional written, verbal or physical act that:

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> 1. A reasonable person under the circumstances should know will have the effect of:
>
>   a. Harming a student or a staff member; . . .
>
> 2. Is sufficiently inappropriate, severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for a student.

Id. at 86.

5) The Policy also informs students that violation of the policy can result in, *inter alia*, suspension. Id. at 88.

6) Finally, the Policy outlines the right to appeal any disciplinary action taken pursuant to the Policy. Id.

B. Events leading up to Plaintiff's Suspension

7) The plaintiff, Kara Kowalski, was enrolled as a student at Musselman High School during the 2005-2006 academic year. [Doc. 104-2] at 22-23.

8) The plaintiff created a webpage on MySpace.com from her home computer on or about December 1, 2005, entitled "S.A.S.H.", which, according to the plaintiff, stands for "Students Against Sluts Herpes." Id. at 29-30.

9) The plaintiff identified herself as the moderator under her username "Rising Fame." Id. at 55.

10) Once the plaintiff completed her website, she sent invitations to visit her website to approximately one hundred of her MySpace contacts, many of whom were students at Musselman. Id. at 33.

11) Despite its generic appellation, the "S.A.S.H." webpage singled out one particular Mussellman student, S. N. See Exhibit No. 2 to the Deposition of Becky J. Harden, Printouts from the "S.A.S.H." Webpage. [Doc. 104-4].

12) One picture posted to the chat room depicts two members of S.A.S.H. holding up a sign that states, "[S.N.] HAS HERPES." Id.

13) Plaintiff Kowalski a/k/a "Rising Fame" responded to the picture by stating, "This is the best picture I've seen on myspace so far! ! !"[2] Id.

14) Other postings from the plaintiff's invitees followed. One invitee, under the name "You can Hate Me Now,"[3] stated, "[Sic] hey danielle and amy S. knows about the sign cus tj told me she knows and I was like wait til she sees the page lol".[4] Id.

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2. While the plaintiff has no specific memory of posting this message, she was admittedly aware of the posting and took no action to identify the author or to remove or correct the statement.

3. "You can Hate Me Now" is the username of Ray Parsons.

4. "lol" is a shorthand expression for "laugh out loud."

15) In response, another invitee, under the name "A-my,"[5] stated, "[Sic] Haha.. screw her. . . . This is great This is f--king great lol This is f--king great lol". Id.

16) Yet another invitee, under the name "We all live in a yellow submarine," wrote, "[Sic] ha this group is funny…. your (sic) so awesome kara [the Plaintiff herein]…i never thought u would mastermind a group that hates sum1 tho, lol….you just seem like the quiet nice type, lol". Id.

17) Ray Parsons, one of the plaintiff's invitees to the chat room, posted two pictures of Ms. N. under the "Pictures of S.A.S.H." section of the plaintiff's webpage. [Doc. 104-2] at 70-71.

18) Mr. Parsons altered the first picture by adding red dots around Ms. N.'s mouth to create the appearance that Ms. N. had herpes. See [Doc. 104-2] at 39 and [Doc. 104-4].

19) Additionally, Mr. Parsons added a banner across Ms. N.'s pelvic area that reads, "Warning: Enter at your own risk" [Doc. 104-4].

20) Mr. Parsons placed a banner in the lower right hand corner of a second picture of Ms. N. that reads, "portrait of a whore." Id.

21) Mr. Parsons admittedly made these postings to the plaintiff's MySpace page while he was sitting in night school. Id.

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5. "A-my" is the username of Amy Mason.

C. In-School Disruption

22) Soon after the plaintiff created her chat room, Mr. Parsons informed the plaintiff he received a call from Ms. N.'s father demanding that the pictures be removed. [Doc. 104-2] at 37-38.

23) The following day, which was a school day, Ms. N. and her parents came to Musselman to submit a harassment complaint against the plaintiff for creating and hosting and the chat room. See Excerpts from the Deposition of Becky Harden [Doc. 104-5] at 15.

24) Ms. N.'s parents met with Mr. Stephens, the school's principal, and he asked Ms. Harden, the vice-principal, to pull the proper forms and bring them to the main office. Id.

25) Ms. N.'s parents completed the complaint forms and returned them to Ms. Harden. Id. at 17.

26) Ms. N. then left the school with her parents because she did not feel comfortable sitting in class with the very people who had posted messages to the plaintiff's chat room. Id. at 62-63.

27) After the forms were submitted, Ms. Harden met with Mr. Stephens to determine the proper procedure to follow. Id. at 23.

28) Mr. Stephens and Ms. Harden then contacted the Board Office to determine whether or not the plaintiff's

conduct constituted a school issue, and a decision was made to continue with the disciplinary process. Id. at 37-40.

29) Ms. Harden then began interviewing the students involved with the plaintiff's chat room. Id. at 23-24.

30) In order to accomplish each of these interviews, students were required to be called from class to present their side of the story to the school. Id. at 29.

31) Ms. Harden recalled interviewing Ms. Kowlaski, Mr. Parsons, and Ms. Mason. Id. at 41.

D. Disciplinary Action

32) The plaintiff met with Ms. Harden and was informed that she was being punished for her Myspace webpage. [Doc. 104-2] at 86.

33) Importantly, during this meeting, the plaintiff admitted that she created the MySpace webpage. Id. at 87-88.

34) Ms. Harden then called the plaintiff's mother and informed her that her daughter was being sent home. Id. at 86.

35) The plaintiff also was informed that she would be suspended from school for ten (10) days and receive a ninety (90) day social suspension. Id. at 86-87.

36) The plaintiff was provided with a Student Disciplinary Referral Form that specified the offense for which she was being suspended, "harassment / bullying / intimidation / hate- creating a hate chat room against another student." [Doc. 104-6].

37) The plaintiff signed the form and went home. [Doc. 104-2] at 87.

38) Several other students who posted messages on the plaintiff's chat room also received three (3) day suspensions. Id. at 91.

39) Ray Parsons, the student who altered and posted the pictures regarding Ms. N., was transferred to transitional school, which is a harsher punishment than that given to the plaintiff. Id. at 91-92.

E. Appeal of Disciplinary Action

40) Shortly after the plaintiff's meeting with Ms. Harden, her father made several phone calls to school officials in an effort to reduce the plaintiff's suspension. Id. at 95.

41) After receiving repeated calls from the plaintiff's father, her suspension was reduced by half. Id. at 100-101.

Appendix B

V. *SUMMARY JUDGMENT STANDARD*

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[1] A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party."[2] Thus, the Court must conduct "the threshold inquiry of determining whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[3]

The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts."[4] That is, once the movant has met its burden to show absence of material fact, the party opposing summary judgment must then come forward with affidavits or other evidence demonstrating there is indeed a genuine issue for trial.[5] "If the evidence

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1. Fed. R. Civ. P. 56(c); *see* ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322 (1986).

2. ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 250 (1986).

3. ***Anderson***, 477 U.S. at 250.

4. ***Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.***, 475 U.S. 574, 586 (1986).

5. Fed. R. Civ. P. 56(c); ***Celotex Corp.***, 477 U.S. at 323-25; ***Anderson***, 477 U.S. at 248.

is merely colorable, or is not significantly probative, summary judgment may be granted."[6]

Finally, "a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." ***Anderson***, 477 U.S. at 256.

VI. *CONCLUSIONS OF LAW*

A. Plaintiff failed to present a genuine issue of material fact with regard to her Due Process claims under the 5th Amendment to the United States Constitution or Article III, § 10 of the West Virginia Constitution because the plaintiff was on notice that her conduct could be punished, and she was provided with an opportunity to be heard prior to her suspension.

1) The plaintiff claims that Defendants violated her right to Due Process under both the United States and West Virginia Constitutions in two different ways.

2) First, the plaintiff claims that she had no notice that she could be disciplined for her private, out of school use of the Internet.

3) Second, the plaintiff claims that she was not provided with an opportunity to appeal her suspension.

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6. ***Anderson***, 477 U.S. at 249 (citations omitted).

Appendix B

1. The Plaintiff was on notice that she could be punished for her off-campus behavior based on the foreseeability that her chat room could cause a disruption at school.

4) From the outset, it is significant to note that, "[g]iven the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." ***Bethel School Dist. No. 403 v. Fraser***, 478 U.S. 675, 685, 106 S.Ct. 3159, 3166 (1986). Further, one of the distinctions between adults and children stressed by the Supreme Court was the legitimacy of protecting minors from exposure to vulgar language. These twin decisional rules, i.e., the validation of the school's role in teaching civilized behavior and the lesser First Amendment rights of minors, caused the Court to conclude that "schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct." ***Fraser***, 478 U.S. at 683.

5) In an effort to provide students with adequate notice of proscribed behaviors, each student receives a copy of the Berkeley County Schools Student Handbook ("Handbook").

6) The plaintiff testified in her deposition that she received a copy of the Handbook each of the four years that she attended Musselman.

7) The plaintiff also testified that she signed an acknowledgment of receipt for the Handbook each year.

8) The 2005-2006 Handbook contains an entire section outlining the policy prohibiting the bullying, intimidation, and harassment of students.

9) Despite her admitted receipt of official school policy prohibiting the bullying, intimidation, and harassment of other students, the plaintiff argues that her conduct occurred outside of school and she therefore did not know that the defendants could punish her for her actions.

10) The plaintiff's subjective knowledge, however, does not measure boundaries of the defendants' ability to regulate student behavior. School officials may regulate off-campus behavior insofar as the off-campus behavior creates a foreseeable risk of reaching school property and causing a substantial disruption to the work and discipline of the school. *See* ***Doninger v. Niehoff***, 527 F.3d 41 (2nd Cir. 2008).

11) The Second Circuit Court of Appeals reached this conclusion in ***Doninger v. Niehoff***, 527 F.3d 41:

> We begin with some basic principles. It is axiomatic that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." ***Tinker v. Des Moines Indep. Cmty. Sch. Dist.***, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). It is equally the case that the constitutional rights of

> students in public school "are not automatically coextensive with the rights of adults in other settings," ***Bethel Sch. Dist. No. 403 v. Fraser***, 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), but must instead be applied in a manner consistent with the "special characteristics of the school environment," ***Tinker***, 393 U.S. at 506, 89 S.Ct. 733. **Thus, school administrators may prohibit student expression that will "materially and substantially disrupt the work and discipline of the school**." ***Id***. at 513, 89 S.Ct. 733. **Vulgar or offensive speech-speech** that an adult making a political point might have a constitutional right to employ-**may legitimately give rise to disciplinary action by a school, given the school's responsibility for "teaching students the boundaries of socially appropriate behavior**." ***Fraser***, 478 U.S. at 681, 106 S.Ct. 3159.

Doninger, 527 F.3d at 48 (emphasis added).

12) The Second Circuit then considered the applicability of the foregoing precedent to instances of off-campus behavior:

> ***Tinker*** provides that school administrators may prohibit student expression that will "materially and substantially disrupt the work and discipline of the school." ***Tinker***, 393 U.S. at 513, 89 S.Ct. 733. In ***Wisniewski***, we applied this standard to an eighth grader's

> off-campus creation and Internet transmission to some fifteen friends of a crudely drawn icon that "depict[ed] and call[ed] for the killing of his teacher." 494 F.3d at 38. **We recognized that off-campus conduct of this sort "can create a foreseeable risk of substantial disruption within a school" and that, in such circumstances, its off-campus character does not necessarily insulate the student from school discipline**. ***Id***. at 39. **We determined that school discipline was permissible because it was reasonably foreseeable that the icon would come to the attention of school authorities and that it would create a risk of substantial disruption**. *See* ***id***. at 39-40.

Id. at 50 (emphasis added).

13) After applying this framework to the student council member's off-campus blog posting, the Second Circuit affirmed the district court's ruling and concluded that it was reasonably foreseeable that the posting would reach school property. In relation to the disruptive nature of the message, the Second Circuit noted:

> As the Sixth Circuit recently elaborated, "[s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place." ***Lowery v. Euverard***, 497 F.3d 584, 596 (6th Cir. 2007); *see also* ***LaVine v. Blaine Sch. Dist.***, 257 F.3d 981, 989 (9th Cir.

> 2001) ("***Tinker*** does not require school officials to wait until disruption actually occurs before they may act."). **The question is not whether there has been actual disruption, but whether school officials "might reasonably portend disruption" from the student expression at issue.** ***LaVine***, 257 F.3d at 989; *see also* ***Nuxoll v. Indian Prairie Sch. Dist. # 204***, 523 F.3d 668, 673 (7th Cir. 2008).

Id. at 51 (emphasis added).

14) As noted in ***Doninger***, the United States Supreme Court recognizes that schools have a responsibility for teaching students the boundaries of socially appropriate behavior. *See* ***Fraser***, 478 U.S. at 681.

15) Thus, schools may legitimately take disciplinary action against a student for vulgar or offensive speech. *See* ***id***. at 683.

16) In the present case, the plaintiff created a chat room the purpose of which she claims was to raise awareness regarding sexually transmitted diseases. The website, however, provides absolutely no educational value; rather, its end result served to accomplish no more than to harass Ms. N.. Regardless of whether it was apparent at the time Ms. Kowalski created this webpage that its purpose was not to raise legitimate STD awareness, she most certainly became aware when the pictures and postings were uploaded, and she made no efforts to stop them. Rather, Ms. Kowalski actually praised the

harassment of her fellow classmate when she posted the comment "this is the best picture I've seen on MySpace so far ! !"

Although the plaintiff maintains the webpage contained nothing that incited or encouraged anyone to do anything, this Court finds this contention completely without merit. Indeed, this Court needs to look no further than to the name Ms. Kowalski entitled the website; that is, "Students Against Sluts Herpes," to determine its true purpose. A webpage with this title can only be deemed to have been created for the purpose of inviting others to indulge in disruptive and hateful conduct. Needless to say, the ultimate result of the webpage was in fact the singling out of S. N., one of the plaintiff's classmates, for bullying harassment, and intimidation by portraying her as a "slut" with "herpes."

17) The plaintiff's chat room included pictures and postings claiming that Ms. N. had herpes and was a whore.

18) Based on ***Fraser***, *supra*, the defendants could legitimately take action for the plaintiff's vulgar and offensive speech and her encouragement of other students to follow suit.

19) The next step in the ***Doninger*** analysis requires an assessment of the foreseeablilty that the off-campus conduct would reach the school.

20) In the present case, it was more than reasonably foreseeable that invitations to the plaintiff's chat room and

the chat room itself would find their way into Musselman High School; based on the proliferation of personal electronic devices with web browsing capabilities such as laptops, cell phones, and personal data assistants, it was inevitable.

21) This conclusion is reinforced by the fact that the majority of the plaintiff's invitations to participate in the webpage were sent to the plaintiff's classmates.

22) In fact, Ray Parsons, one of the plaintiff's classmates, made several postings to the plaintiff's chat room from class.

23) The last step in the ***Doninger*** analysis requires an assessment of the foreseeablilty that the off-campus conduct would create a substantial disruption in the school.

24) In the present case, it was more than reasonably foreseeable that the plaintiff's chat room would create a risk of substantial disruption within the school. In fact, this behavior did create a substantial disruption within the school. To name a few, the principal, vice-principal, several teachers, and the Board of Education expended their time and resources sorting out this matter. Additionally, Ms. N.'s parents had to file a complaint and come to the school. Of course, several phone calls were made by the plaintiff's father, which resulted in a reduction of the plaintiff's suspension. Several, if not all, of the twelve or so students involved in the pictures and/or postings were called into the principal's office to be interviewed. Finally, Ms. N. felt she had to leave school due to the embarrassment

she endured as a result of this very serious attack on her reputation.

25) Although the plaintiff created her chat room at her home, the chat room was accessible from anywhere in the world that provides either internet connectivity or cell phone service, including Musselman High School.

26) Additionally, the plaintiff sent out over one hundred (100) invitations to her MySpace contacts, many of whom were fellow students at Musselman High School.

27) Based on the cruel and mean-spirited content on the plaintiff's chat room, it was reasonably foreseeable that the plaintiff and/or her MySpace group would harass, bully, and/or intimidate Ms. N. during school.

28) A single comment or reference to the plaintiff's chat room during school or any school related activity could foreseeably create a substantial disruption.

29) Such a conclusion is inescapable in light of the fact that Ms. N. was so embarrassed and intimidated by the plaintiff's chat room and the comments and pictures contained therein, that she had to go home for the rest of the day once she made her formal complaint.

30) For these reasons, the plaintiff failed to present a genuine issue of material fact with regard to her claim that she was denied Due Process because she was not on notice that her off-campus conduct could lead to the disciplinary action ultimately imposed by the defendants.

See ***Doninger***, *supra*. Therefore, this Court hereby **GRANTS** the defendants summary judgment on this claim.

2. The plaintiff received a higher degree of due process than that required by the 14th Amendment to the United States Constitution.

31) The United States Supreme Court examined the extent of a student's procedural Due Process guarantees under the 14th Amendment in the context of suspensions in ***Goss v. Lopez***, 419 U.S. 565, 95 S.Ct. 729 (1975).

32) In that case, the Supreme Court examined an Ohio statute that allowed for the suspension of a student for up to ten (10) days without an opportunity to be heard. After affirming that students facing a suspension of ten (10) days or less have interests within the purview of the Due Process Clause, the Supreme Court provided a detailed explanation of procedural Due Process requirements:

> We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency. Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and **due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them,**

an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

There need be no delay between the time 'notice' is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, **in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is.**

. . . .

We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. **To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational**

> **effectiveness.** Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

Goss, 419 U.S. at 583 (emphasis added).

33) In the case at bar, the plaintiff admits that she was called to the office the day after she created her chat room and given oral notice of the charges against her.

34) The vice principal informed the plaintiff that she was going to be suspended for the creation of the plaintiff's chat room, thereby fulfilling the ***Goss*** requirement that she be afforded an explanation of what she was accused of doing and the basis of that accusation.

35) The plaintiff then admitted that she had created the chat room, thereby giving up her opportunity to present her side of the story, which the plaintiff so desperately seeks to do. ***Id***. This Court further notes that Ms. Kowalski has had ample opportunity to explain exactly what her side of the story was throughout the course of this litigation; however, finds the record devoid of any account of the events which would change this Court's findings.

36) The defendants provided the plaintiff with, and the plaintiff signed, a Student Disciplinary Referral Form, which specified the conduct for which the plaintiff was being punished.

37) The punishment levied against plaintiff was a ten (10) day suspension. Based on ***Goss***, *supra*, the plaintiff received all the process she was due under the United States Constitution. As noted above, ***Goss*** held that all due process requires is "that the student be given **oral** . . . notice of the charges against h[er] . . ." (emphasis added). This, the plaintiff received.

38) Similarly, ***Goss*** further adds that "an explanation of the evidence the authorities have and an opportunity to present h[er] side of the story" exist only "if [s]he denies [the charges]." ***Id***. at 741. It is well established that Ms. Kowalski admitted to having created the webpage. Thus, any argument regarding her lack of a formal hearing is moot as she had no entitlement to the same.

39) But the plaintiff's Due Process options did not end there. Although not required by the United States Constitution, the Harassment, Bullying, and Intimidation Policy contains an appeal provision.

40) Despite this fact, neither the plaintiff nor her parents inquired about or invoked the formal appeal provision, which was clearly contained within the Handbook.

41) Instead, the plaintiff's parents contacted the Berkeley County School Board's office in an effort to reduce or eliminate the plaintiff's suspension. Based on this contact, the plaintiff's suspension was, in fact, reduced by half.

42) It was more than reasonable for the school board to forgo further investigation given Kowalski's waiver of the same when she admitted the charges. Whether a student "admitted the charges" against her is "relevant in determining substantial prejudice or harm." ***Keough***, 748 F.2d at 1083. Simply put, once a student has admitted h[er] guilt, the need for a hearing is substantially lessened. *See* ***Watson v. Beckel***, 242 F.3d 1237 (10th Cir. 2001)(adopting the reasoning of ***Keough*** in holding that a student who was expelled without being afforded sufficient process was not prejudiced because he admitted his guilt); *see also* ***Black Coalition v. Portland Sch. Dist. No. 1***, 484 F.2d 1040, 1045 (9th Cir. 1973) (student not entitled to relief on due process claim because he "admitted all the essential facts which it is the purpose of a Due Process hearing to establish").

43) Because the plaintiff was notified of the basis for her punishment and given an opportunity to explain her side of the story prior to receiving her ten (10) day suspension, she received all the Due Process guaranteed to school students by the United States Constitution. *See* ***Goss***, *supra*.

44) Moreover, the defendants went above and beyond Constitutional mandates and provided the plaintiff both a formal and an informal opportunity to appeal her suspension.

45) As a result of an informal appeal by the plaintiff's parents, this suspension was reduced by half.

46) Thus, the plaintiff fails to present a genuine issue of material fact with regard to her 14th Amendment

procedural Due Process claim. Accordingly, this Court **GRANTS** the defendants summary judgment on this claim and **DENIES** the plaintiff summary judgment.

3. The degree of Due Process afforded to the plaintiff satisfies Article III, § 10 of the West Virginia Constitution.

47) The West Virginia Supreme Court of Appeals examined the scope of the procedural Due Process guaranteed by Article III, § 10 of the West Virginia Constitution in ***State ex rel. Jeanette H. v. Pancake***, 207 W.Va. 154, 529 S.E.2d 865 (2000):

> Applicable standards for procedural due process, outside the criminal area, may depend upon the particular circumstances of a given case. However, there are certain fundamental principles in regard to procedural due process embodied in Article III, Section 10 of the West Virginia Constitution, which are; First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.

Id. at Syl. Pt. 9 (internal citation omitted).

48) Although the West Virginia Supreme Court of Appeals has yet to define the scope of procedural Due Process with regard to a public school student's suspension, the Court has "consistently held that the West Virginia Constitution is at least as solicitous of individual rights as its federal counterpart . . ." ***Weaver v. Shaffer,*** 170 W.Va. 107, 111, 290 S.E.2d 244, 248 (1980) (internal citations omitted).

49) In ***Schupbach v. Newbrough***, 173 W.Va. 156, 158, 313 S.E.2d 432, 435 (1984), the West Virginia Supreme Court of Appeals noted that, "[t]he due process clauses of our State and Federal Constitutions afford parties the procedural rights of **notice and opportunity to be heard**." (emphasis added) (internal citations omitted).

50) Because the procedural Due Process requirements under the 14th Amendment to the United States Constitution set forth in ***Goss***, *supra*, are entirely consistent with the procedural Due Process framework under Article III, § 10 of the West Virginia Constitution enunciated in ***Pancake*** and ***Schupbach***, *supra*, the plaintiff received all the process she was due under the West Virginia Constitution.

51) Thus, the plaintiff fails to present a genuine issue of material fact with regard to her Article III, § 10 procedural Due Process claim. Accordingly, this Court **GRANTS** the defendants summary judgment and **DENIES** the plaintiff summary judgment as to this claim.

B. Plaintiff failed to present a genuine issue of material fact with regard to her Equal Protection claims under the 14th Amendment to the United States Constitution or Article III, § 10 of the West Virginia Constitution because the plaintiff failed to come forward with any evidence that she was treated differently than others similarly situated.

52) The plaintiff claims that Defendants violated her Equal Protection rights under both the United States and West Virginia Constitutions.

53) Specifically, the plaintiff claims that the defendants, through their disciplinary action against her, treated her differently than other students who committed similar transgressions and thus is essentially asserting a "class of one" Equal Protection claim under both the United States and West Virginia Constitutions.

1. The plaintiff failed to produce any evidence with regard to the elements of a "class of one" equal protection claim under the 14th Amendment to the United States Constitution.

54) In ***Willis v. Town of Marshall, N.C.***, 426 F.3d 251 (4th Cir. 2005), the Fourth Circuit Court of Appeals, citing ***Village of Willowbrook v. Olech***, 528 U.S. 562, 564, 120 S.Ct. 1073 (2000), stated:

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> [t]he Supreme Court has recognized the validity of "class of one" Equal Protection claims, "where the plaintiff alleges that she has been **intentionally treated differently** from **others similarly situated** and that there is **no rational basis for the difference** in treatment."

Willis, 426 F.3d at 263, (internal citation omitted) (emphasis added). Thus, there are four elements to a "class of one" Equal Protection claim: (1) treatment that is intentionally; (2) different; (3) from others similarly situated; (4) without a rational basis for the difference. ***Id***.

55) In the case at bar, the plaintiff failed to present a genuine issue of material fact with regard to any of the elements required to sustain a cause of action for a "class of one" Equal Protection claim.

56) First, the plaintiff neither alleged nor produced any evidence whatsoever that the defendants *intentionally* treated her differently from anyone. *See* ***id***.

57) Second, the plaintiff failed to present any evidence that she was treated *differently* from anyone else. *See* ***id***.

58) Third, the plaintiff failed to provide any evidence that there were other students that were treated differently under circumstances similar to hers. *See* ***id***.

59) Specifically, the plaintiff was required to show that at least one other student created a publicly accessible chat room that singled out another student for bullying,

harassment, and intimidation, and encouraged others to join the group but received a less severe punishment than the plaintiff or no punishment at all.

60) Although the plaintiff claims to recall one occasion where one student insulted another on MySpace, and the defendants allegedly declined to punish the offending student, the plaintiff could not remember even the name of the student that purportedly made the derogatory comment. [Doc. 104-2] at 197.

61) The plaintiff's incomplete and questionable memory of a situation where one student may have made a negative comment to another student on MySpace falls far short of demonstrating any similarity between that occasion and the plaintiff's acts of creating a chat room and inviting others to join in her contempt for and derision of another classmate, whom was portrayed as a "slut" with herpes.

62) Fourth, even if the Court were to accept plaintiff's questionable recollection of an unpunished incident of student name calling on MySpace, the plaintiff failed to present any admissible evidence that there was no rational basis for the difference in treatment. *See* ***id***.

63) Because the plaintiff failed to present any admissible evidence to support a single element of her "class of one" Equal Protection claim, her claim fails as a matter of law. *See* ***Willis***, *supra*. Accordingly, this Court hereby **GRANTS** the defendants summary judgment on the plaintiff's 14th Amendment Equal Protection claim.

2. The plaintiff failed to produce any evidence with regard to the elements of a "class of one" Equal Protection claim under Article III, § 10 of the West Virginia Constitution.

64) The West Virginia Supreme Court of Appeals examined the scope of Equal Protection guaranteed by Article III, § 10 of the West Virginia Constitution in ***Robertson v. Goldman***, 179 W.Va. 453, 369 S.E.2d 888 (1988). "The concept of equal protection of the laws is inherent in article three, section ten of the West Virginia Constitution, and the scope and application of this protection is coextensive or broader than that of the Fourteenth Amendment to the United States Constitution." ***Id***. at Syl. Pt. 3.

65) The West Virginia Supreme Court of Appeals has yet to address a "class of one" Equal Protection claim; however, there are no indications that the Equal Protection Clause of Article III, § 10 of the West Virginia Constitution would be construed more broadly than its Federal counterpart.

66) In fact, in ***Marcus v. Holley***, 217 W.Va. 508, 618 S.E.2d 517 (2005), the West Virginia Supreme Court of Appeals provided the following overview of Equal Protection analysis under Article III, § 10 of the West Virginia Constitution:

> In ***Lewis***, this Court explained the three types of equal protection analyses. "First,

> when a suspect classification, such as race, or a fundamental, constitutional right, such as speech, is involved, the legislation must survive 'strict scrutiny,' that is, the legislative classification must be necessary to obtain a compelling state interest. ***Deeds v. Lindsey***, 179 W.Va. 674, 677, 371 S.E.2d 602, 605 (1988)." 185 W.Va. at 691, 408 S.E.2d at 641. In the second type of analysis, "a so-called intermediate level of protection is accorded certain legislative classifications, such as those which are gender-based, and the classifications must serve an important governmental objective and must be substantially related to the achievement of that objective." ***Id.***, 408 S.E.2d at 641. "Third, all other legislative classifications, including those which involve economic rights, are subjected to the least level of scrutiny, the traditional equal protection concept that the legislative classification will be upheld if it is reasonably related to the achievement of a legitimate state purpose." ***Id.***, 408 S.E.2d at 641.

Marcus, 217 W.Va. at 523.

67) Federal Equal Protection jurisprudence is nearly identical to the framework described in ***Marcus***. *See* ***Massachusetts Bd. of Retirement v. Murgia***, 427 U.S. 307, 96 S.Ct. 2562 (1976) (strict scrutiny applies only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class); ***Tuan Anh Nguyen v. I.N.S.***, 533 U.S. 53, 121 S.Ct. 2053 (2001) (intermediate

standard applied to gender-based classification); and ***F.C.C. v. Beach Communications, Inc.***, 508 U.S. 307, 113 S.Ct. 2096 (1993) (rational basis standard applied to social and economic policy).

68) Due to the high degree of similarity in Equal Protection jurisprudence between Article III, § 10 of the West Virginia Constitution and the 14th Amendment to the United States Constitution, the failure of the plaintiff's Federal Equal Protection claim forecloses her West Virginia Equal Protection claim. Accordingly, the Court hereby **GRANTS** the defendants summary judgment on said claim.

C. Plaintiff failed to present a genuine issue of material fact with regard to her Equal Protection under the 14th Amendment to the United States Constitution or Article III, § 10 of the West Virginia Constitution against the defendants, in their official capacity, because she failed to produce any evidence to support the elements of an official capacity claim.

69) In suing Berkeley County Public Schools, which the plaintiff also refers to in her Amended Complaint as the "Defendant School Board," the plaintiff is suing a political subdivision. *See* ***Bender v. Glendenning***, 632 S.E.2d 330, 219 W.Va. 174 (2006) (noting that school boards are political subdivisions).

70) The United States Supreme Court has unambiguously stated "that official-capacity suits 'generally represent only another way of pleading an

action against an entity of which an officer is an agent.'" ***Hafer v. Melo***, 502 U.S. 21, 25, 112 S.Ct. 358, 361 (1991) (quoting ***Kentucky v. Graham***, 473 U.S. 159, 165, 105 S.Ct. 3099, 3104 (1985)).

71) In other words, a suit against a government official in his or her official capacity is tantamount to a claim against the governmental entity itself. Thus, the plaintiff's official capacity claims against each of the defendants who are natural persons are also claims against Defendant Berkeley County Public Schools.

72) In ***Monell v. Dept. of Social Services***, 436 U.S. 658 (1978), the United States Supreme Court stated:

> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when **execution of a government's policy or custom**, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, **inflicts the injury that the government as an entity is responsible under § 1983**.

Monell, 436 U.S. at 694 (emphasis added).

73) Thus, for the plaintiff to succeed on her official capacity claims, she must demonstrate that Defendant Berkeley County Public Schools had a policy or custom that caused her alleged constitutional injury.

74) As noted above in §§ A(1)-(3) and B(1)-(2), none of the plaintiff's rights under either the United States or the West Virginia Constitutions were violated. Therefore, the plaintiff presents no genuine issue of material fact regarding her claim that Defendant Berkeley County Public Schools had a policy or custom that caused her alleged constitutional injury. Accordingly, this Court hereby **GRANTS** the defendants summary judgment as to this claim.

D. Plaintiff failed to present a genuine issue of material fact with regard to her supervisory liability claim against Defendants Manny P. Arvon, II, and Rick Deuell, in their official capacity, because there is no such cause of action under either state or federal law.

75) The plaintiff's claim for supervisory liability against Defendants Manny P. Arvon, II, and Rick Deuell fails as a matter of law because there is no such cause of action under either state or federal law.

76) This issue was recently considered by the West Virginia Supreme Court on certified question in ***Robinson v. Pack***, 223 W.Va. 828, 679 S.E.2d 660 (2009). In determining that no cause of action existed for supervisory liability under the 42 U.S.C. § 1983, the Court stated:

> In the recent decision of in ***Ashcroft v. Iqbal***, --- U.S. ----, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), a case filed by a Pakistani Muslim

in connection with his arrest and detention following the September 11, 2001, attacks, the United States Supreme Court addressed the issue of supervisory liability in the federal analog to a section 1983 case, otherwise known as a ***Bivens*** case. Addressing the issue of vicarious liability, the high court stated:

> [R]espondent correctly concedes that Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*.... **Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.**

--- U.S. at ----, 129 S.Ct. at 1948.

The Supreme Court expressly rejected the contention that "'knowledge and acquiescence [by supervisors] in their subordinates' use of discriminatory criteria to make classification decisions among detainees'" was sufficient to find that the supervisors had committed a constitutional violation. *Iqbal*, --- U.S. at ---, 129 S.Ct. at 1949. Concluding that "the term 'supervisory liability' is a misnomer" in a section 1983 suit or a ***Bivens*** suit, the high court determined:

> Absent vicarious liability, each Governmental official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose ***Bivens*** liability on the subordinate for unconstitutional discrimination; **the same holds true for an official charged with violations arising from his or her superintendent responsibilities**.

Id. at ----, 129 S.Ct. at 1949.

. . . .

> **As it stands today, the issue of supervisory liability in connection with an alleged civil rights violation is clear: there is none**. Under the holding of ***Ashcroft v. Iqbal***, --- U.S. ----, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), a supervising police officer may not be held liable for the wrongful actions of his or her subordinate officers in connection with an alleged civil rights violation because a supervising police officer is only liable for his or her own conduct and not that of his/her subordinates.

Robinson, 679 S.E.2d at 668 (emphasis added).

77) Based on the unequivocal rejection of supervisory liability in civil rights cases by both the United States Supreme Court and the West Virginia Supreme Court of Appeals, the plaintiff's § 1983 supervisory liability claim fails as matter of law. Accordingly, this Court hereby **GRANTS** the defendants summary judgment on this claim.

E. Defendants, in their individual capacity, are entitled to statutory immunity under 20 U.S.C. § 6301, *et seq*., the Elementary and Secondary Education Act, from the Federal claims asserted against them.

78) In January of 2002, 20 U.S.C. § 6301, the Elementary and Secondary Education Act, commonly referred to as the "No Child Left Behind" law ("Education Act"), took effect.

79) The Education Act applies to teachers, officers (including school board members), and employees of the school district. Sections 6731-6738 of the Education Act contain the Paul D. Coverdell Teacher Protection Act of 2001 ("Protection Act").

80) The term "Teacher" is defined in § 6733(6):

> The term "teacher" means--
>
> (A) a teacher, instructor, principal, or administrator;

(B) another educational professional who works in a school;

(C) a professional or nonprofessional employee who—

(i) works in a school; and

(ii)(I) in the employee's job, maintains discipline or ensures safety; or

(II) in an emergency, is called on to maintain discipline or ensure safety; or

(D) an individual member of a school board (as distinct from the board).

81) Section 6736 defines the limitations on the liability of teachers:

(a) Liability protection for teachers

Except as provided in subsection (b) of this section, no teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school if--

(1) the teacher was acting within the scope of the teacher's employment or responsibilities to a school or governmental entity;

(2) the actions of the teacher were carried out in conformity with Federal, State, and local laws (including rules and regulations) in furtherance of efforts to control, discipline, expel, or suspend a student or maintain order or control in the classroom or school;

(3) if appropriate or required, the teacher was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice involved in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the teacher's responsibilities;

(4) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher; and

(5) the harm was not caused by the teacher operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to--

(A) possess an operator's license; or

(B) maintain insurance.

82) In the present case, each of the natural persons named as Defendants meet the definition of "Teacher" under the Protection Act and, therefore, qualify for protection thereunder.

83) First, the plaintiff has made no allegations that the defendants were acting outside of the scope of their employment or responsibilities.

84) Second, as noted above in §§ A(1)-(3) and B(1)-(2), the defendants' actions were in conformity with federal and state laws in furtherance of efforts to control, discipline, and suspend the plaintiff and maintain order and control in the classroom or school.

85) Third, the plaintiff has produced no evidence whatsoever that the defendants imposed her suspension through willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the plaintiff's rights.

86) Because the defendants are entitled to the liability protection afforded to teachers under 20 U.S.C. §§ 6731-6738, the plaintiff's Federal claims against the defendants, in their individual capacity, fail as a matter of law. Accordingly, this Court hereby **GRANTS** the defendants summary judgment as to this claim. *See* ***C.B. v. Sonora School Dist.***, --- F.Supp.2d ----, 2009 WL 3077989 (E.D. Cal. 2009) (finding that school defendants were entitled to statutory immunity under 20 U.S.C. § 6731, *et seq*., from the plaintiff's claim for intentional infliction of emotional distress).

F. The defendants are entitled to common law qualified immunity from the Federal claims asserted against them.

87) The plaintiff claims that the defendants violated their 5th and 14th Amendment rights under the United States Constitution.

88) Thus, the federal qualified immunity standard applies to Plaintiff's federal constitutional claims. Because the plaintiff failed to present a genuine issue of material fact regarding her claims that the defendants violated the plaintiff's 5th and 14th Amendment rights under the United States Constitution, this Court hereby **GRANTS** the defendants summary judgment as to the plaintiff's Federal claims.

1. Federal Qualified Immunity Standard

89) When a plaintiff sues a member of a board of education or school official in that person's individual capacity for alleged civil rights violations, the plaintiff seeks money damages directly from that person.

90) If sued "individually," a member of a board of education or school official may raise an affirmative defense of qualified immunity. *See* ***Wood v. Strickland***, 420 U.S. 308, 95 S.Ct. 992 (1975) and ***Meeker v. Edmundson***, 415 F.3d 317 (4th Cir. 2005).

91) The test for qualified immunity was announced by the Supreme Court in ***Harlow v. Fitzgerald***, 457 U.S. 800, 102 S.Ct. 2727 (1982):

Appendix B

> Government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id., 457 U.S. at 818.

92) The qualified immunity test is one of objective legal reasonableness, without regard to whether the Government official involved acted with subjective good faith. Courts look to whether a reasonable official could have believed his or her conduct to be lawful in light of "clearly established" law and the information possessed by the official at the time the conduct occurred. ***Swint v. City of Wadley, Ala.***, 51 F.3d 988, 995 (11th Cir. 1995).

93) Even if this Court finds that the right was "clearly established" at the time of the alleged violation, which it does not, a defendant will still be entitled to qualified immunity if the defendant's conduct was "objectively reasonable in light of 'clearly established' law at the time of the violation." ***Chiu v. Plano Indep. Sch. Dist.***, 339 F.3d 273, 279 (5th Cir. 2003)(quoting ***Siegert v. Gilley***, 500 U.S. 226, 231-32, 111 S.Ct. 1789 (1991).

94) The Fifth Circuit Court of Appeals has analyzed immunity as it applies to school officials. "[A] reasonable school official facing this question for the first time would find no "pre-existing" body of law from which he could draw clear guidance and certain conclusions. Rather, a

reasonable school official would encounter a body of case law sending inconsistent signals as to how far school authority to regulate student speech reaches beyond the confines of the campus. Given the unsettled nature of First Amendment law as applied to off-campus student speech inadvertently brought on campus by others, the contours of [Ms. Kowalski's] right to First Amendment protection in the present case cannot be deemed 'clearly established' such that it would be clear to a reasonable [Mussellman High School] official that sanctioning [Ms. Kowalski] based on the content of [the webpage] was unlawful under the circumstances. Thus, the [defendants] are entitled to qualified immunity." ***Porter v. Ascension Parish School Board***, 393 F.3d 608, 620 (5th Cir. 2004); *see also* ***Morse v. Frederick***, 551 U.S. 393, 127 S.Ct. 2618 (2007)(landmark United States Supreme Court decision affording qualified immunity to school principal for quick decision which forced students to take down banner reading "BONG HITS 4 JESUS" at a school sponsored function).

95) Under ***Porter***, because a reasonable school official might find the webpage subject to a ***Tinker*** analysis, to deny any measure of immunity in these circumstances would serve not to contribute to principled and fearless decision-making on behalf of school officials, but rather lead to intimidation in the face of uncertainty. *See* ***Wood v. Strickland***, 420 U.S. 308, 319, 95 S.Ct. 992 (1975).

96) "Thus, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" ***Swint***, 51 F.3d at 995.

97) Furthermore, the contours of a right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. ***Id***.

2. Immunity is properly determined pre-trial.

98) In ***Saucier v. Katz***, 533 U.S. 194, 121 S.Ct. 2151 (2001), the United States Supreme Court highlighted the need to determine the question of immunity before trial, emphasizing that "immunity is an entitlement not to stand trial" rather than a defense from liability. The Court noted the importance of curtailing the burden of responding to frivolous suits:

> [N]ot all such suits are meritorious. Many are marginal and some are frivolous. Yet even when the risk of ultimate liability is negligible, the burden of defending such lawsuits is substantial. . . . This diversion of officials from their normal duties and the inevitable expense of defending even unjust claims is distinctly not in the public interest.

Id. *See also* ***Town of Newton v. Rumery***, 480 U.S. 386, 396 (1987) and ***Pritchett v. Alford***, 973 F.2d 307, 313 (4th Cir. 1992).

3. The defendants are entitled to qualified immunity from the plaintiff's Federal claims.

99) The defendants are entitled to qualified immunity from the plaintiff's claims under the United States

Constitution. As discussed above in §§ A(1)-(2) and B(1), the plaintiff failed to present a genuine issue of material fact regarding the alleged violation of her 5th and 14th Amendment rights under the United States Constitution. *See* ***Harlow***, *supra*. Accordingly, the Court hereby **FINDS** that the defendants are entitled to qualified immunity from the plaintiff's claims under the United States Constitution.

G. The defendants are entitled to statutory immunity under West Virginia Code § 29-12A-1, *et seq*., the Governmental Tort Claims and Insurance Reform Act, from the state claims asserted against them.

100) In 1986, the West Virginia Legislature enacted *The Governmental Tort Claims and Insurance Reform Act* ("The Act"), the stated purposes of which are "to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs of insurance available to political subdivisions for such liability." W.Va. Code § 29-12A-1.

101) A political subdivision includes "any public body charged by law with the performance of a governmental function . . .." W.Va. Code § 29-12A-3(c). The defendants in the case at bar are each employed by the Berkeley County Board of Education and, therefore, immunity for political subdivisions extends to them.

102) Justice Cleckley, writing for a unanimous Court in ***Hutchison***, *supra*, clearly expressed the judicial policy supporting dismissal of claims asserted against the employees of a political subdivision. "The public interest is

that the official conduct of the officer is not to be impaired by constant concern about personal liability." ***Hutchison***, 479 S.E.2d at 658.

103) "The policy considerations driving such a rule are straightforward: public servants exercising their official discretion in the discharge of their duties cannot live in constant fear of lawsuits, with the concomitant costs to the public servant and society." ***Id***.

104) The Act expressly prohibits a direct claim of personal liability from being asserted against an employee of a political subdivision unless at least one of three exceptions apply. West Virginia Code § 29-12A-5(b)(2) states:

> An employee of a political subdivision is immune from liability unless one of the following applies:
>
> (1) his or her acts or omissions are manifestly outside the scope of employment or official responsibilities;
>
> (2) his or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner or;
>
> (3) liability is expressly imposed upon the employee by a provision of this Code.

105) In the case at bar, the plaintiff has made no argument that the defendants were acting in any capacity other than as school officials, and there is no argument

that an express provision under the Act imposes liability. This leaves only exception: (2).

106) The plaintiff submitted no evidence to support a claim that the defendants acted maliciously, in bad faith, or in a wanton and reckless manner when they disciplined the plaintiff.

107) Conversely, the evidence clearly demonstrates that the plaintiff was legitimately punished for her own malicious, wanton, and reckless conduct. The plaintiff admittedly created a chat room that singled out another student for bullying, harassment, and intimidation; the plaintiff was on notice that her conduct could lead to disciplinary action; and the plaintiff received notice, an opportunity to be heard prior to her suspension, and an opportunity to appeal her suspension.

108) These factors clearly demonstrate that the defendants' actions were not taken maliciously, wantonly, recklessly, or in bad faith. For these reasons, this Court hereby **FINDS** that the defendants are entitled to statutory immunity from the plaintiff's state claims. *See* W.Va. Code § 29-12A-5(b)(2).

H. The defendants are entitled to common law qualified immunity from the state claims asserted against them.

109) The plaintiff claims that the defendants violated her Due Process Rights and Equal Protection rights under the West Virginia Constitution.

110) Thus, the West Virginia qualified immunity standard applies to plaintiff's state constitutional claims.

111) Because the plaintiff failed to present a genuine issue of material fact regarding her claim that the defendants violated any of the plaintiff's rights under the West Virginia Constitution, this Court hereby **GRANTS** the defendants summary judgment on the plaintiff's state claims.

1. State Qualified Immunity Standard

112) West Virginia's qualified immunity standard is modeled after its federal counterpart. In Syllabus Point 3 of ***Robinson v. Pack***, 223 W.Va. 828, 679 S.E.2d 660 (2009), the West Virginia Supreme Court stated, "Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

2. Immunity is properly determined pre-trial.

113) The West Virginia Supreme Court of Appeals endorses the United States Supreme Court's jurisprudence regarding the early determination of entitlement to qualified immunity. In ***Hutchison v. City of Huntington***, 198 W.Va. 139, 479 S.E.2d 649 (1996), Justice Cleckley wrote:

> Immunities under West Virginia law are more than a defense to a suit in that they grant

> governmental bodies and public officials the right not to be subject to the burden of trial at all. The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry into the merits of the case. *See* ***Swint v. Chambers County Commission***, 514 U.S. 35, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). . . .

Id. at 658.

114) Like the United States Supreme Court, the West Virginia Supreme Court of Appeals has noted the importance of curtailing the burden of responding to frivolous suits:

> The policy considerations driving such a rule are straightforward: public servants exercising their official discretion in the discharge of their duties cannot live in constant fear of lawsuits, with the concomitant costs to the public servant and society. Such fear will stymie the work of state government, and will "dampen the ardor of all but the most resolute, or the most irresponsible, [public officials] in the unflinching discharge of their duties." ("The public interest is that the official conduct of the officer is not to be impaired by constant concern about personal liability"). The doctrine of qualified and statutory immunity was created to "avoid excessive disruption of government and permit

> the resolution of many insubstantial claims on summary judgment.

Id. (Internal citations omitted.)

3. The defendants are entitled to qualified immunity from the plaintiff's state claims.

115) The defendants are entitled to qualified immunity from the plaintiff's claims under the West Virginia Constitution. As discussed above in §§ A(3) and B(2), the plaintiff failed to present a genuine issue of material fact regarding the alleged violation of her Article III, § 10 rights under the West Virginia Constitution. *See* ***Robinson***, *supra*. Accordingly, this Court hereby **FINDS** that the defendants are entitled to qualified immunity from the plaintiff's claims under the West Virginia Constitution.

I. Plaintiff failed to present a genuine issue of material fact with regard to her claim for injunction because the defendants have not and do not forward disciplinary records to other institutions.

116) The plaintiff claims that she is entitled to an injunction requiring the defendants to expunge the disciplinary action at issue in this case from her school record and to send corrected records to any third parties who may have received any information regarding the disciplinary action at issue in this case.

117) The plaintiff's suspension was a valid exercise of the defendants' authority to enforce is policy prohibiting the bullying, harassment, and intimidation of students.

118) The plaintiff admitted to creating the chat room at issue in this case and signed a Student Disciplinary Referral Form associated therewith.

119) Because the plaintiff was legitimately punished pursuant to established school policy, she is not entitled to have her disciplinary record expunged.

120) Additionally, Brenda Christian, who was employed as the Guidance Secretary/Registrar for Musselman High School at all times relevant to the plaintiff's claims, provided an affidavit which explains that only the plaintiff or her parents can authorize the release of her disciplinary records. See Affidavit of Brenda Christian [Document 104-7] at ¶ 6.

121) Ms. Christian also reviewed records maintained by Musselman High School concerning the release to the plaintiff's records and confirmed that the only record released was the transcript of the plaintiff's grades, which was sent to Shepherd University on June 16, 2006. See id. at ¶10.

122) Because the plaintiff's punishment was legitimately imposed and because her disciplinary records have never been released and can only be released by her own authorization, the plaintiff's claim for injunction fails as a matter of law. Therefore, this Court hereby **GRANTS** the defendants summary judgment regarding this claim.

VII. *CONCLUSION*

Based on the foregoing reasoning, this Court finds that the Defendants' Motion for Summary Judgment **[Doc. 104]** should be, and hereby is, **GRANTED**. The Court also finds that the Plaintiff's Motion for Summary Judgment on Issue of Violation of Due Process Rights **[Doc. 105]** should be, and hereby is, **DENIED**. As such, it is **ORDERED** that the plaintiff's remaining claims be **DISMISSED with prejudice**, and the above-styled case be **STRICKEN** from the active docket of this Court.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: December 22, 2009.

/s/_____
JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER DENYING MOTION FOR RECONSIDERATION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, MARTINSBURG, FILED DECEMBER 16, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST
VIRGINIA MARTINSBURG

Civil Action No. 3:07CV147 (BAILEY)

KARA KOWALSKI,

Plaintiff,

v.

BERKELEY COUNTY PUBLIC SCHOOLS, et al.,

Defendants.

ORDER DENYING MOTION FOR RECONSIDERATION

I. Introduction

This matter comes before the Court for consideration of the Plaintiff's Motion for Reconsideration of the Dismissal of Plaintiff's First Amendment Claim [Doc. 91] and the Defendants' Response in Opposition thereto [Doc. 101]. For the reasons stated below, the plaintiff's motion is **DENIED**.

Appendix C

II. Factual Background

This case concerns civil rights claims brought by a former highschool student against her former school, school officials, and cheerleading coach for disciplinary action she received as a student for her role as moderator in a MySpace group. The underlying facts of that disciplinary action are as follows.

In December of 2005, the plaintiff, using her home computer, created a chat group through MySpace.com, a social networking cite, and invited over 100 friends, including classmates, to join. In doing so, group members received access to post comments and other information on a group page. In addition, group members were free to post comments and information without the permission of other group members or the creator of the group, who MySpace labels "group moderator."

Subsequently, a group member posted an altered picture of a fellow student on the group page, which portrayed her as having a sexually transmitted disease. As a result, the depicted student complained to school personnel, and the posting was removed. Until recently, and for the past two years, the plaintiff had claimed that she was unaware of the posting, did not take part in the posting, and did not comment on the posting, which was viewable on the group page for less than one day. As a result of this incident, Plaintiff received a 10-day school suspension with a 90-day social suspension for creating a "hate chat room against another student" in violation of the school's Harassment, Bullying and Intimidation Policy.

Following the pronouncement of this punishment, Plaintiff's father spoke to Assistant Superintendent Rick Deuell, who reduced the plaintiff's school suspension from 10 days to 5 days. In addition to school and social suspension, the plaintiff claims that she was prevented, by her Cheerleading Coach, Buffy Ashcraft, and Principal, Ronald Stevens, from participating in cheerleading and "charm review activities," of which plaintiff was the "reigning Queen of Charm." See Doc. 35.

Through the discovery process, it has now come to light that the plaintiff did, in fact, post two comments on the Webpage, which she hosted.

III. Procedural Background

On June 11, 2008, plaintiff filed her Amended Complaint [Doc. 35]. Therein, Plaintiff alleged seven counts, all but three of which were dismissed per this Court's October 20, 2008, Order Granting in Part and Denying in Part Defendants' Motion to Dismiss [Doc. 55]. The remaining claims are currently pending this Court's ruling on cross motions for summary judgment. The dismissed count at issue, Count 1, which the plaintiff seeks to reinstate, alleges violations of her right to free speech under the United States and West Virginia Constitutions for punishment received under the School Board's Policy. Plaintiff alleged these violations of her First Amendment rights to free speech on two independent grounds. First, plaintiff contended that the application of the School Board's Policy violated her rights to free speech. Second, the plaintiff generally alleged that she was chilled from

engaging in otherwise protected speech for fear that she would be disciplined under the School Board's Policy.

In regard to the plaintiff's claim that application of the School Board's Policy violated her First Amendment rights to free speech, this Court had previously determined that claim failed to satisfy the constitutional requirements for standing mandated by Article III. *See* ***Lujan v. Defenders of Wildlife***, 504 U.S. 555, 560 (1992). This Court held that because the plaintiff had consistently maintained that she had no part in the posting of the altered photograph, did not comment on the posting, and was not disciplined for any comment she made, she failed to satisfy ***Lujan's*** first prong by her failure to show an invasion of her legally protected interest in speech protected by the First Amendment and, therefore, did not plead a claim capable of sustaining relief.

Similarly, this Court dismissed plaintiff's First Amendment claim predicated on the chill rationale. In that opinion, this Court noted that the plaintiff's sole allegation was that the School Board's Policy "had a chilling effect on Plaintiff's right to free speech for the remainder of her time in the public school." [Doc. 35, p. 9]. However, "[i]n the First Amendment context, allegations of 'subjective chill' of free speech rights will not suffice to satisfy the injury-in-fact requirement. ***Laird v. Tatum***, 408 U.S. 1, 13-14 (1972). Rather, a plaintiff must demonstrate some specific present or future objective harm that the challenged regulation has inflicted by deterring h[er] from engaging in protected activity." ***Brooklyn Legal Services Corp. v. Legal Services Corp.***, 462 F.3d 219, 226

(2d Cir. 2006). Therefore, because the plaintiff failed to specifically identify a present or future harm resulting from the alleged chill, the plaintiff failed to plead a viable First Amendment claim under the chill rationale.

Approximately one year later, this Court is asked to reconsider the above ruling based on the newly-discovered evidence that the plaintiff did engage in speech by posting two comments on this webpage.

IV. Legal Standard

The Fourth Circuit has recognized that "there are three grounds for amending an earlier judgment:"

> (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. *See* [***EEOC v.***] ***Lockheed Martin Corp.***, 116 F.3d at 112; ***Hutchinson v. Staton***, 994 F.2d 1076, 1081 (4th Cir. 1993). Thus, the rule permits a district court to correct its own errors, "sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." ***Russell v. Delco Remy Div. of Gen. Motors Corp.***, 51 F.3d 746, 749 (7th Cir. 1995). Rule 59(e) motions may not be used, however, to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance.

> *See* ***Russell,*** 51 F.3d at 749; ***Concordia College Corp. v. W.R. Grace & Co.,*** 999 F.2d 326, 330 (8th Cir. 1993); ***FDIC v. World Univ., Inc.,*** 978 F.2d 10, 16 (1st Cir. 1992); ***Simon v. United States,*** 891 F.2d 1154, 1159 (5th Cir. 1990); *see also* ***In re: Reese,*** 91 F.3d 37, 39 (7th Cir. 1996) ("A motion under Rule 59(e) is not authorized 'to enable a party to complete presenting h[er] case after the court has ruled against h[er].'") (quoting ***Frietsch v. Refco, Inc.,*** 56 F.3d 825, 828 (7th Cir. 1995)); 11 Wright et al., ***Federal Practice and Procedure*** § 2810.1, at 127-28 (2d ed. 1995) ("The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment."). Similarly, if a party relies on newly discovered evidence in its Rule 59(e) motion, the party "must produce a 'legitimate justification for not presenting' the evidence during the earlier proceeding." ***Small v. Hunt,*** 98 F.3d 789, 798 (4th Cir. 1996) (quoting ***RGI, Inc. v. Unified Indus., Inc.,*** 963 F.2d 658, 662 (4th Cir. 1992)). In general, "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." Wright et al., *supra,* § 2810.1, at 124.

Pacific Ins. Co. v. American Nat. Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998).

Additionally, it again becomes important for this Court to revisit the United States Supreme Court's

standing requirements outlined in ***Lujan v. Defenders of Wildlife***, 504 U.S. 555, 560:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact–an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury alleged and the conduct complained of–the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. **Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision**. (Emphasis added).

V. Discussion

In her Motion for Reconsideration, the plaintiff attempts to convince this Court to afford greater weight, and to consider in a vacuum, a statement which this Court itself authored. Specifically, Plaintiff brings to this Court's attention that "it appears from the Court's reasoning in its October 20, 2009, Order . . . that the only issue of Plaintiff's standing to bring an action for a violation of her First Amendment Right of Free Speech . . . is whether or not there was any 'speech.'" This Court assumes its statement to which the plaintiff refers is "[t]he Court in dismissing the First Amendment claim . . . relies solely on the United

States Supreme Court's analysis of standing as contained in the case of ***Lujan v. Defenders of Wildlife***." (citation omitted). At that stage in litigation, the above statement was scrutinized under a Rule 12(b)(6) standard; therefore, it was asked to rule under a different set of facts as well as a different standard of review. Simply put, at the time of dismissal, this Court had no reason to reach the validity of the First Amendment claim because at that time it was absolutely clear that the plaintiff lacked standing to bring such claim under ***Lujan's*** first prong. That decision, however, does not bar this Court from completing its analysis of that same claim based upon the new facts now before this Court. Given these new circumstances, this Court now finds it appropriate to conduct this further examination.

In its initial Order dismissing the First Amendment claim, this Court found it unnecessary to look past the first prong of ***Lujan's*** standing requirements, which states that "First, the plaintiff must have suffered an injury in fact–an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." Under that very first prong, this Court dismissed the claim because it was under the false impression that no legally protected interest had been alleged because Plaintiff admitted she engaged in no protected speech. Recognizing now that "speech" was present, this Court may now address that matter as it is before it, and proceed under the remaining ***Lujan*** prongs. As previously noted, the United States Supreme Court decision in ***Lujan***, 504 U.S. at 560, states, in relevant part, that **"Third, it must be likely, as opposed**

to merely speculative, that the injury will be redressed by a favorable decision." (Emphasis added). Here, this Court finds that any alleged injury will not be redressed by a favorable decision as to this Count. This Court has previously held that the plaintiff was disciplined for being the moderator of the content-based group on the social networking website. Thus, with or without comments posted by the plaintiff, this Court's ruling stands.

Despite the above, the plaintiff asks this Court to grant relief based on her own logic that because twelve other students were suspended for posting comments on the webpage, "it must be *assumed* that the plaintiff was suspended from school, at least in part, due to her comments on the webpage." (Emphasis added). To the extent that the plaintiff makes this assertion, this Court will refrain from indulging in guesswork as to whether, and to what extent, Plaintiff's suspensions were premised upon the plaintiff's two comments as opposed to being the "group moderator." Given that this litigation has proceeded for two years under the impression that the plaintiff had not made any comments, it is apparent that the suspension would have existed based solely upon Plaintiff's role as "group moderator."

At the time this Court dismissed the plaintiff's First Amendment claim, this Court took as true the allegations set forth in her Amended Complaint in making its ruling. In general, "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." Wright et al., supra § 2810.1, at 124. While new evidence has come to light, this Court is not persuaded that justice so requires that it alter that judgment.

While it is true that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate' . . . it is equally the case that the constitutional rights of students in public school 'are not automatically coextensive with the rights of adults in other settings,' but must instead be applied in a manner consistent with the 'special characteristics of the school environment.' Thus, school administrators may prohibit student expression that will 'materially and substantially disrupt the work and discipline of the school.' Vulgar or offensive speech . . . may legitimately give rise to disciplinary action by a school, given the school's responsibility for 'teaching students the boundaries of socially appropriate behavior.' ***Bethel School Dist. No. 403 v. Fraser***, 478 U.S. 675, 681 (1986)." ***Donninger v. Niehoff***, 527 F.3d 41 (2nd Cir. 2008) (internal citations omitted).

Furthermore, case law supports this application to "off-campus" behavior which "materially and substantially disrupts the work and discipline of the school." *See* ***Id***. at 38 (holding that off-campus conduct "can create a foreseeable risk of substantial disruption within a school . . . [and] does not necessarily insulate the student from school discipline); *see also* ***Lowery v. Euverard***, 497 F.3d 584, 596 (6th Cir. 2007). It is clear in this case that such a disruption did in fact occur, as several of the postings on the webpage were actually made from classrooms, and the victim of the webpage left school after filing her school complaint because she was so embarrassed.

As a final note, this Court finds more than enough support for its ruling without undertaking a full analysis

of the subject matter of the speech the plaintiff seeks to protect.

VI. Conclusion

For the foregoing reasons, the Court is of the opinion that **Plaintiff's Motion for Reconsideration of the Dismissal of Plaintiff's First Amendment Claim [Doc. 91]** should be, and the same hereby is, **ORDERED DENIED.**

It is so **ORDERED**.

The Clerk is hereby directed to transmit copies of this Order to all counsel of record herein.

DATED: December 16, 2009.

/s/_____
JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, MARTINSBURG, FILED OCTOBER 20, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, MARTINSBURG

Civil Action No. 3:07CV147 (BAILEY)

KARA KOWALSKI,

Plaintiff,

v.

BERKELEY COUNTY PUBLIC SCHOOLS, et al.,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

I. Introduction

This matter comes before the Court for consideration of Defendants' Motion to Dismiss Amended Complaint (Doc.40), the Plaintiff's Response (Doc. 48), and the Defendants' Reply (Doc. 50). As indicated in the motion, defendants seek dismissal of all seven counts

of the Amended Complaint on a number of independent grounds. For the reasons and to the extent stated below, **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **GRANTED IN PART AND DENIED IN PART**.

II. Factual Background

This case concerns civil rights claims brought by a former highschool student against her former school, school officials, and cheerleading coach for disciplinary action she received as a student for her role as moderator in a MySpace group. The underlying facts of that disciplinary action are as follows.

In December of 2005, plaintiff, using her home computer, created a chat group through MySpace.com, a social networking cite, and invited a number of friends to join. In doing so, group members received access to post comments and other information on a group page. In addition, group members were free to post comments and information without the permission of other group members or the creator of the group, who MySpace labels "group moderator."

Subsequently, an unnamed group member posted an altered picture of a fellow student on the group page. As a result, the depicted student complained to school personnel and the posting was removed. Ultimately, the plaintiff claims that she was unaware of the posting, did not take part in the posting, and did not comment on the posting, which was viewable on the group page for less

than one day. However, as a result of this incident, plaintiff received a 10-day school suspension with a 90-day social suspension for creating a "hate chat room against another student" in violation of the school's Harassment, Bullying and Intimidation Policy ("the School Board's Policy").

Following the pronouncement of this punishment, plaintiff's father spoke to Assistant Superintendent Rick Deuell, who reduced plaintiff's school suspension from 10 days to 5 days. In addition to school and social suspension, the plaintiff claims that she was prevented, by her Cheerleading Coach, Buffy Ashcraft, and Principal, Ronald Stevens, from participating in cheerleading and "charm review activities," of which plaintiff was the "reigning Queen of Charm." (Doc. 35, p. 4).

III. Procedural Background

As a result of the foregoing, on June 11, 2008, plaintiff filed her Amended Complaint (Doc. 35). There, plaintiff alleges the following claims: (1) violation of her right to free speech under the United States and West Virginia Constitutions for punishment received under the School Board's Policy; (2) violation of her due process rights under the United States and West Virginia Constitutions due to the failure of the School Board's Policy to provide sufficient notice of the conduct prohibited and due to the School Board's failure to provide a sufficient appeal process for the disciplinary action; (3) violation of her right to equal protection under the United States and West Virginia Constitutions resulting from the School Board's decision not to suspend or discipline other students maintaining

similar pages on social networking cites; and (4) violation of her right to be free from cruel and unusual punishments as provided for by the 8th Amendment to the United States Constitution and West Virginia Constitution. Moreover, Count 7 of the Amended Complaint alleges claims for negligent and intentional infliction of emotional distress against plaintiff's former Assistant Superintendent, Principal, Vice-principal, and Cheerleading Coach for their conduct in connection with the disciplinary process.

In addition to the preceding causes of action, plaintiff's Amended Complaint contains requests for both declaratory and injunctive relief. As noted in Count 5, plaintiff seeks a declaratory judgment finding the School Board's Policy unconstitutionally overbroad and/or vague. Similarly, Count 6 of the Amended Complaint requests an injunction requiring the School Board to expunge the discipline referral and notation of suspension from plaintiff's school records and requiring the School Board to send corrected copies of plaintiff's records to any third parties that previously received transcripts.

In response to the above, the defendants filed their Motion to Dismiss Amended Complaint (Doc. 40) on June 25, 2008. There, the defendants argue that they are entitled to immunity under the provisions of the Secondary Education Act and under the protections afforded to political subdivisions and their employees in defending actions brought under 42 U.S.C. § 1983 under federal and state law. In regard to plaintiff's remaining claims, the defendants assert that the due process challenges are misplaced because participation

in extracurricular activities is not a constitutionally protected liberty interest, because the plaintiff received fair notice of the School Board's Policy and the appeals process in the student handbook, and because plaintiff's father successfully sought a reduction in the suspension's duration from the Assistant Superintendent. Moreover, the defendants argue the plaintiff's claim under the 8th Amendment must fail because the prohibition against cruel and unusual punishments arises solely in the application of criminal law. Additionally, the defendants contend that dismissal of plaintiff's equal protection claim is warranted because plaintiff failed to show that others similarly situated received different treatment. Furthermore, defendants allege that plaintiff's challenge to the School Board's Policy on vagueness and overbreadth grounds is moot, as the plaintiff is no longer subject to the policy. Finally, the defendants contend that plaintiff is not entitled to injunctive relief on the face of her Complaint and that plaintiff has failed to allege sufficient injury and conduct to establish claims for negligent and intentional infliction of emotional distress under West Virginia law.

IV. Legal Standard

"A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of [the subject] claim." ***McNair v. Lend Lease Trucks, Inc.***, 95 F.3d 325, 328 (4th Cir. 1996) (citing ***Rogers v. Jefferson-Pilot Life Ins. Co.***, 883 F.2d 324, 325 (4th Cir. 1989). When reviewing a motion to dismiss pursuant to Rule 12(b)(6) of the

Federal Rules of Civil Procedure, the Court must assume all of the allegations to be true, must resolve all doubts and inferences in favor of the plaintiff, and must view the allegations in a light most favorable to the plaintiff. ***Edwards v. City of Goldsboro****,* 178 F.3d 231, 243-44 (4th Cir. 1999). When rendering its decision, the Court should consider only the allegations contained in the complaint, the exhibits to the complaint, matters of public record, and other similar materials that are subject to judicial notice. ***Anheuser-Busch, Inc. v. Schmoke****,* 63 F.3d 1305, 1312 (4th Cir. 1995).

V. Discussion

As an initial matter, the Court finds defendants' arguments for dismissal predicated on immunity to be improper in the context of a motion to dismiss under Fed. R. Civ. P. 12(b)(6). This Court notes that immunity is a defense to an otherwise viable claim and not an indictment of the underlying claim's viability. ***Gomez v. Toledo***, 446 U.S. 635, 640 (1980) (stating that "this Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question")). Therefore, the Court finds that defendants' arguments in favor of immunity are outside of the scope of this inquiry. As such, **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **DENIED IN PART**, to the extent of the immunity rationales contained therein.

Conversely, the Court finds that dismissal of Count 1 of the Amended Complaint, charging a deprivation of plaintiff's First Amendment rights to free speech, is

justified. In Count 1 of her Amended Complaint, plaintiff alleges a violation of her First Amendment rights to free speech on two independent grounds. First, plaintiff contends that the application of the School Board's Policy violated her rights to free speech. Secondly, the plaintiff generally alleges that she was chilled from engaging in otherwise protected speech for fear that she would be disciplined under the School Board's Policy. Because the rationales supporting dismissal of each theory of recovery are distinct, each will be dealt with in turn.

In regard to plaintiff's claim that application of the School Board's Policy violated her First Amendment rights to free speech, the plaintiff has failed to satisfy the constitutional requirements for standing mandated by Article III. As noted by the United States Supreme Court:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact–an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury alleged and the conduct complained of–the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations omitted). In the case at bar, plaintiff has failed to allege that she was disciplined under the School Board's Policy for engaging in speech protected by the First Amendment. To the contrary, the plaintiff has consistently maintained that she had no part in the posting of the altered photograph, did not comment on the posting, and was not disciplined for any comment she made. As such, the plaintiff has failed to allege an invasion of her legally protected interest in speech protected by the First Amendment and, therefore, has not pled a claim capable of sustaining relief.

Similarly, dismissal of plaintiff's First Amendment claim predicated on the chill rationale is appropriate. Here, plaintiff's sole allegation is that the School Board's Policy "had a chilling effect on Plaintiff's right to free speech for the remainder of her time in the public school." (Doc. 35, p. 9). However, "[i]n the First Amendment context, allegations of 'subjective chill' of free speech rights will not suffice to satisfy the injury-in-fact requirement. ***Laird v. Tatum***, 408 U.S. 1, 13-14 (1972). Rather, a plaintiff must demonstrate some specific present or future objective harm that the challenged regulation has inflicted by deterring him from engaging in protected activity." ***Brooklyn Legal Services Corp. v. Legal Services Corp.***, 462 F.3d 219, 226 (2d Cir. 2006). Therefore, because the plaintiff has failed to specifically identify a present or future harm resulting from the alleged chill, the plaintiff has failed to plead a viable First Amendment claim under the chill rationale. Accordingly, **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **GRANTED IN**

PART, as it relates to Count 1 of the Amended Complaint (Doc. 35).

Turning next to Count 2 of the Amended Complaint (Doc. 35), the plaintiff maintains that her due process rights were violated in three ways. Initially, the plaintiff contends that the School Board's Policy did not offer her sufficient notice that her conduct, which did not occur on school grounds or at a school-related function, was proscribed. Secondly, the plaintiff argues that the School Board failed to follow its own appeal process in disciplining the plaintiff or that the appeals process provided was insufficient. Thirdly, plaintiff claims that her due process rights were violated when she was prevented from cheerleading and Charm Review without notice or a hearing.

After review, the Court finds that the defendants have failed to make the necessary showing to warrant dismissal of plaintiff's due process challenge predicated on a lack of notice. This Court notes that the challenged School Board's Policy reads as follows:

> The Berkeley County Board of Education prohibits any form of racial, sexual, religious/ethnic and disability harassment or violence or any bullying or intimidation by any student, school employee or member of the public, during any school-related activity or during any education-sponsored event, whether in a building or other property owned, use [sic] or operated by the Berkeley County Board of Education.

(Doc. 35, p. 4). In addition, the law is well-settled that "[a] municipality cannot be held liable under § 1983 on a *respondeat superior* theory." ***Monell v. Department of Social Services of City of New York***, 436 U.S. 658, 691 (1978). Rather, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is reasonable under § 1983." ***Id.*** at 694.

In recognition of the above, the Court finds that after accepting all allegations of the plaintiff's claim as true, the defendants have failed to show that plaintiff is incapable of securing relief. Here, because application of the School Board's Policy to students engaged in conduct not on school grounds or at school functions could clearly be considered a policy or custom, the plaintiff has pled a viable due process claim based on lack of notice.

Likewise, dismissal of plaintiff's due process challenge to the sufficiency of the appeal process is improper at this time. Here, plaintiff alleges that she was denied a sufficient appeal process or that the appeal process provided did not comport with the standards outlined in the student handbook. In response, the defendants contend that the plaintiff was given notice of the appeals process in the student handbook, and further that plaintiff's father successfully appealed the decision resulting in the reduction of plaintiff's suspension from 10 to 5 days. However, because the defendants' contentions require consideration of matters outside the Complaint, the exhibits to the Complaint, matters of public record,

and other similar materials that are subject to judicial notice, they are more properly the subject of a motion for summary judgment. *See* ***Anheuser-Busch***, 63 F.3d at 1312. Thus, because the plaintiff has pled a facially viable cause of action regarding the deprivation of her due process rights in connection with the appeal process, dismissal under Fed. R. Civ. P. 12(b)(6) is improper.

Alternatively, dismissal of plaintiff's due process challenge based on her exclusion from cheerleading and Charm Review is warranted. To this end, the law is well-settled that "[b]ecause participation in interscholastic athletics or other nonacademic extracurricular activities does not rise to the level of a constitutionally protected property or liberty interest, there is no entitlement to any procedural due process protections." ***Truby v. Broadwater***, 175 W. Va. 270, 287 (1985); *see also* ***Farver v. Board of Educ. of Carrol County***, 40 F. Supp. 2d 323, 324 (D. Md. 1999) (noting that, "the Due Process Clause, under authority from both the Fourth Circuit and other courts, has clearly been held not to protect the interest of a child in participating in extracurricular activities (including sports)").

In support of her claim, the plaintiff argues that "Cheerleading and Charm Review are more than extracurricular activities" because "[i]nclusion in both of these activities were [sic] earned and are [sic] tied to academic achievement and standards of conduct set by the school." (Doc. 48, p. 13). However, the same can be said for virtually all extracurricular activities and, thus, plaintiff has failed to meaningfully distinguish cheerleading and

Charm Review from the host of extracurricular activities deemed insufficient to serve as a constitutionally protected liberty or property interest. Therefore, the plaintiff has failed to state a claim under this theory of recovery, and **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **GRANTED IN PART**, as it relates to plaintiff's due process challenge predicated on exclusion from cheerleading and Charm Review as contained in Count 2 of the Amended Complaint (Doc. 35) and **DENIED IN PART**, as it relates to plaintiff's due process challenges based on lack of notice and sufficiency of appeal.

Concerning Count 3 of the Amended Complaint (Doc. 35), the plaintiff asserts a "class-of-one" equal protection claim alleging that she was treated "differently in an irrational manner from other Berkeley County Board of Education Students who were similarly situated, i.e. who initiated and maintained MySpace web pages or web pages on other social networking sites on the Internet, and who were not suspended or disciplined under the Harassment, Bullying and Intimidation Policy." (Doc. 35, p. 11). In response, the defendants argue that dismissal is proper because the plaintiff has failed to allege that she was treated differently from other similarly situated persons because she failed to allege that "other students' web pages contained materials similar to those found on her own website, nor that anyone complained about those web pages." (Doc. 41, p. 26).

"[T]he Supreme Court has recognized the validity of 'class of one' Equal Protection claims, 'where the plaintiff alleges that she has been irrationally treated differently

from others similarly situated and that there is no rational basis for the difference in treatment.'" ***Willis v. Town of Marshall***, 426 F.3d 251, 263 (4th Cir. 2005) (quoting ***Vill. Of Willowbrook v. Olech***, 528 U.S. 562, 564 (2000)). Moreover, in light of recent Fourth Circuit precedent, this Court is not prepared to find plaintiff's failure to allege that others similarly situated received complaints about their web pages dispositive in the context of a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *See* ***Willis***, 426 F.3d at 263 (noting that "[e]ven assuming that the absence of complaints about others would establish that Willis was not similarly situated to other patrons, *an issue we need not decide today*, we conclude that the granting of summary judgment was premature") (emphasis added)). Thus, while such considerations may be sufficient within the context of a properly supported motion for summary judgment, they are insufficient to sustain dismissal under Fed. R. Civ. P. 12(b)(6). Accordingly, **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **DENIED IN PART**, as it relates to plaintiff's class-of-one equal protection claim contained in Count 3 of the Amended Complaint (Doc. 35).

As indicated in Count 4 of the Amended Complaint (Doc. 35), plaintiff alleges that the individual defendants inflicted cruel and unusual punishments by excluding the plaintiff "in her senior year of highschool, from privileges she had earned through her efforts and academic achievement." (Doc. 35, p. 12). However, in ***Ingraham v. Wright*** the United States Supreme Court held that the 8th Amendment's prohibition against cruel and unusual punishments did not bar the use of corporal punishment

in public schools. ***Ingraham v. Wright***, 430 U.S. 651, 667 (1977). In doing so, the Court defined the Cruel and Unusual Punishments Clause as follows:

> [T]he Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes . . . second, it proscribes punishment grossly disproportionate to the severity of the crime . . . third, it imposes substantive limits on what can be made criminal and punished as such . . . The primary purpose of (the Cruel and Unusual Punishments Clause) has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes.

Ingraham, 430 U.S. at 667. In addition, case law interpreting the parallel provision of the West Virginia Constitution also views the Cruel and Unusual Punishments Clause as being directed at the criminal process. *See* ***Smith v. W. Va. Board of Education***, 170 W. Va. 593, 295 S.E.2d 680 (1982). Therefore, Count 4 of the Amended Complaint (Doc. 35) fails to state a claim upon which relief may be granted under existing law. As such, **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **GRANTED IN PART**, as it relates to Count 4 of the Amended Complaint.

Similarly, dismissal is also proper for Count 5 of the Amended Complaint seeking a declaratory judgment finding the School Board's Policy to be unconstitutionally

overbroad and/or vague. As a general matter, "once a student graduates, he no longer has a live case or controversy justifying declaratory or injunctive relief against a school board's action or policy." ***Cole v. Oroville Union High School Dist.***, 228 F.3d 1092, 1098 (9th Cir. 2000). However, there exists an exception to the mootness doctrine for harms capable of repetition yet evading review. Under this exception, a plaintiff who no longer presents a live case or controversy may still maintain suit where "(1) the challenged action is too short in duration to be fully litigated before cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." ***Cole***, 228 F.3d at 1098 (citing ***Spencer v. Kemma***, 523 U.S. 1, 17 (1998)). Here, plaintiff has failed to show that there is a reasonable possibility that as a former student she will be subject to the School Board's Policy again. Thus, plaintiff has failed to meet the requirements for this exception to the mootness doctrine, and as such, has failed to plead a claim upon which relief may be granted. Therefore, **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **GRANTED IN PART**, as it relates to Count 5 of the Amended Complaint (Doc. 35).

Conversely, plaintiff's claim for injunctive relief survives the 12(b)(6) inquiry. As indicated in Count 6 of the Amended Complaint (Doc. 35), plaintiff seeks an injunction "requiring the Defendant School Board to expunge the discipline referral, notation of suspension, and any other documents related to the discipline and suspension from her school record and to send corrected copies to any third parties to whom transcripts or school records containing

reference to the discipline or suspension were sent." (Doc. 35, p. 13). Moreover, while post-graduate claims for injunctive relief by former students challenging school board actions are generally moot, the continuing nature of the harm alleged is sufficient to present a live case and controversy within the meaning of Article III. Here, after accepting all the allegations of plaintiff's Complaint as true, the presence of such documents in plaintiff's permanent file would rightly be considered a continuing harm to the extent that plaintiff might be required to submit such transcripts to third parties in the future. As a result, the defendants have failed to make the requisite showing to warrant dismissal of plaintiff's claim for injunctive relief under Fed. R. Civ. P. 12(b)(6). Therefore, **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **DENIED IN PART**, as it relates to Count 6 of the Amended Complaint (Doc. 35).

As a final matter, the Court finds that dismissal is proper with regard to Count 7 of the Amended Complaint (Doc. 35) charging both negligent and intentional infliction of emotional distress. As stated in Count 7, the plaintiff alleges that as a result of the individual defendants' negligent and/or intentional actions, she has suffered "damage to her reputation, loss of enjoyment of life, severe emotional distress, depression, embarrassment, humiliation, and physical injury all resulting in conscious pain and suffering." (Doc. 35, p. 14). Further, the plaintiff contends that "at graduation practice for the 2005-2006 school year, Defendant Stevens without warning and against her will, hugged Plaintiff and whispered in her ear in front of other students maliciously, and with wanton

and reckless disregard, causing her extreme humiliation, embarrassment and emotional distress." ***Id.***

Under West Virginia law, "[a]lthough physical injury is no longer a necessary element of a negligent infliction of emotional distress claim, such a cause of action generally must be premised on conduct that unreasonably endangers the plaintiffs [sic] physical safety or causes the plaintiff to fear for his or her physical safety." ***Brown v. City of Fairmont***, 221 W. Va. 541, 547, 655 S.E.2d 563, 569 (2007) (citations omitted). Here, the sole allegations aimed at the individual defendants concern improper discipline rendered under the School Board's Policy and an improper hug by one defendant at plaintiff's graduation ceremony. As such, the plaintiff has failed to allege conduct of a sufficient nature to entitle her to relief for negligent infliction of emotion distress under West Virginia law.

Similarly, plaintiff has failed to state a claim for intentional infliction of emotional distress. As noted by the Supreme Court of Appeals of West Virginia:

> In order for a plaintiff to prevail on a claim for intentional or reckless infliction of emotional distress four elements must be established: (1) that the defendant's conduct was so atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotion distress would result from his conduct; (3) that

> the actions of the defendant caused the plaintiff to suffer emotional distress; and, (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it."

Brown, 655 S.E.2d at 569. After review of the Amended Complaint (Doc. 35), the Court cannot say that the alleged actions of the defendants were "so atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency." *See* ***id***. While plaintiff does allege that the defendants improperly subjected her to discipline under the School Board's Policy, the Court finds that such conduct does not rise to the level of that necessary to sustain a cause of action for intentional infliction of emotional distress under West Virginia law. As such, **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **GRANTED IN PART**, as it relates to Count 7 of the Amended Complaint (Doc. 35).

VI. Conclusion

For the foregoing reasons, the Court hereby **ORDERS** as follows:

1. That **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **DENIED IN PART, to the extent of the immunity rationales** contained therein;

2. That **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **GRANTED IN PART, as**

it relates to Count 1 of the Amended Complaint (Doc. 35);

3. That **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **GRANTED IN PART, as it relates to plaintiff's due process challenge predicated on exclusion from cheerleading and Charm Review contained in Count 2** of the Amended Complaint (Doc. 35);

4. That **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **DENIED IN PART, as it relates to plaintiff's due process challenges based on lack of notice and sufficiency of appeal contained in Count 2** of the Amended Complaint (Doc. 35);

5. That **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **DENIED IN PART, as it relates to plaintiff's class-of-one equal protection claim contained in Count 3** of the Amended Complaint (Doc. 35);

6. That **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **GRANTED IN PART, as it relates to Count 4** of the Amended Complaint (Doc. 35).

7. That **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **GRANTED IN PART, as it relates to Count 5** of the Amended Complaint (Doc. 35);

8. That **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **DENIED IN PART, as it relates to Count 6** of the Amended Complaint (Doc. 35); and

9. That **Defendants' Motion to Dismiss Amended Complaint (Doc. 40)** is **GRANTED IN PART, as it relates to Count 7** of the Amended Complaint (Doc. 35).

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record.

Dated: October 20, 2008.

/s/
JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE