647 F.3d 754
United States Court of Appeals,
Eighth Circuit.

D.J.M., a minor child, by next friend, D.M.; D.M., Father of D.J.M.; J.M., Mother of D.J.M., Plaintiffs–Appellants,
v.
HANNIBAL PUBLIC SCHOOL DISTRICT # 60; Jill Janes, Defendants–Appellees.
D.J.M., a minor child, by next friend, D.M.; D.M., Father of D.J.M.; J.M., Mother of D.J.M., Plaintiffs–Appellees,
v.
Hannibal Public School District # 60, Defendant–Appellant,
Jill Janes, Defendant.

Nos. 10–1428, 10–1579.
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Submitted: Jan. 12, 2011.
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Filed: Aug. 1, 2011.

MURPHY, Circuit Judge.

D.J.M., a student in the Hannibal Public School District # 60 (the District), sent instant messages from his home to a classmate in which he talked about getting a gun and shooting some other students at school. The alarmed recipient and a trusted adult she had consulted contacted the school principal about their concerns. School authorities decided they must notify the police, who took a statement from ***757** D.J.M. that evening and then placed him in juvenile detention. D.J.M. was subsequently suspended for ten days and later for the remainder of the school year. His parents later brought this action under 42 U.S.C. § 1983, alleging that the District violated D.J.M.'s First Amendment rights. . . .

The transcript of the retained portion of the instant message conversation begins with D.J.M. discussing his frustration at having recently been spurned by "L.," a romantic interest.[4] C.M. asks D.J.M. "what kidna gun did your friend have again?" D.J.M. responds "357 magnum." C.M. then replies, "haha would you shoot [L.] or let her live?" D.J.M. answers, "i still like her so i would say let her live." C.M. follows up by asking, "well who would you shoot then lol," to which D.J.M. responds "everyone else." D.J.M. then named specific students who he would "have to get rid of," including a particular boy along with his older brother and some individual members of groups he did not like, namely "midget[s]," "fags," and "negro bitches." Some of them "would go" or "would be going." C.M. later forwarded most of these statements to Allen by email.[5]

[4] Unless otherwise noted, all of D.J.M.'s statements to C.M. in this portion of their conversation were forwarded by email to either Leigh Allen or Principal Powell.

[5] Only D.J.M.'s statement that he would "have to get rid of a few negro bitches" was not sent to Allen.

Throughout the conversation, D.J.M. and C.M. used forms of online shorthand. At several points they expressed amusement at the prospect of shooting particular individuals or groups by saying things like, "haha," "YAYAYYAY," and "lol." The record reflects that "lol" means the speaker is "laughing out loud." The conversation also touched on other topics including their music preferences, TV shows, body piercings, masturbation, and school classes. From time to time each person left the conversation to do other things.

C.M. became increasingly concerned about the threatening nature of many of D.J.M.'s messages, and without his knowledge she sent instant messages about them to Leigh Allen, an adult friend. C.M. told Allen she needed to talk about "something serious" because D.J.M. had been "talking about taking a gun to school" to "shoot everyone he hates [and] then shoot himself." C.M. also told Allen that D.J.M. "want[ed] to go to school and shoot up the kids he doesnt like and [who] are 'fags.' " C.M. explained that D.J.M. said he "want [ed] hannibal to be known for something" and that D.J.M. had been hospitalized and was "on all sorts of meds."

C.M. confided to Allen that she was "kinda scared" and that D.J.M. had "talked to a friend ... [who] said he would give him a gun." Allen responded, "that's some serious stuff, [C.M.], you have to tell." C.M. told Allen that she did not know whether or not D.J.M. was "just depressed for one day" and was "just saying that cuz hes down." Allen asked C.M. to talk to D.J.M. again and determine "if he is serious or not." In Allen's words, "if the kid is bluffing that's one thing, but how would we feel if he isn't?" She was concerned enough herself to contact Principal Powell about the situation and later emailed Powell transcripts of her instant message conversation with C.M.

After reinitiating their online conversation, C.M. asked D.J.M. whether his nervousness "might have been the reason for what.. you wanting to like go shoot everyone? ?" D.J.M. responded: "wtf how did me shooting people at school come up into that [conversation]?" He then elaborated, "i still like [L.] and i don't want to do anything hurting or wrong to her." D.J.M. later commented that if he had a gun, a particular named classmate "would be the first to die," but then said, "anyways I'm not going to do that[.] not anytime ***759** soon I feel better than I did earlier today." C.M. and D.J.M. continued to converse on other subjects. Meanwhile, C.M. returned to her conversation with Allen. After reading D.J.M.'s statements, Allen told C.M. that

D.J.M. "sounds serious to me" and warned her to "watch what you say to him."

C.M. subsequently emailed Principal Powell excerpts of her conversation with D.J.M. In addition to forwarding portions of their online conversation, C.M. wrote:

> [D.J.M.] had told me earlier before I started saving the messages that he had a friend who had a gun that he could get. A revolver I think he said. He told me he wanted Hannibal to be known for something and that after he shot the people he didnt like he would shoot himself.... I asked him if he had a way to buy a gun and I asked if he had anyone old enough to get one for him and he said someone who was 21 could get one but he doesnt think he would buy it for him....

After seeing the emails from Allen and C.M., Powell immediately called Jill Janes, the district superintendent. Janes and Powell agreed they should call the police and they did.

Police went to D.J.M.'s house on the same evening, October 24, interviewed him, and took him into custody. After he gave a voluntary statement, he was placed in juvenile detention that night and then referred by juvenile court to Lakeland Regional Hospital for a psychiatric examination. Subsequently he was evaluated at Hawthorn Psychiatric Hospital where he admitted he had contemplated suicide. When he was discharged from the hospital on November 28, he was returned to juvenile detention.

On October 31, one week after D.J.M. had been placed in juvenile detention, Powell and assistant principal Ryan Sharkey decided to suspend him for ten days.

The Supreme Court has decided four leading cases involving student speech and the First Amendment, and their guidance is instructive even though the cases all arose either at school or at a school sponsored event. . . .

In none of these cases was the Court faced with a situation where the First Amendment question arose from school discipline exercised in response to student threats of violence or for conduct outside of school or a school sanctioned event. Such cases have been brought in the lower courts, however, and the courts of appeal have taken differing approaches in resolving them. One line of cases centers on the concept of "true threats" derived from *Watts v. United States,* 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (per curiam), where a criminal conviction for threatening the President was reversed because the defendant's statement was found not to have been a true threat. The other line focuses on the substantial disruption issue identified in *Tinker.* And recently courts have been asked to apply First Amendment principles to situations arising from out of school instant messaging by students.

B.

The leading case in the Eighth Circuit dealing with a student threat arose from a letter written by a student outside of school. *See Doe v. Pulaski Cnty. Special Sch. Dist.,* 306 F.3d 616 (8th Cir.2002) (en banc). A friend who had seen the letter told the girl to whom the letter was addressed about its contents and later took it to her in school where she read it during a gym class. The author of the letter was a fellow student and former boyfriend who expressed in his letter a "pronounced, contemptuous and depraved hate" for her and referred to her as a " 'bitch,' 'slut,' 'ass,' and a 'whore.' " *Id.* at 625. The letter used graphic language and spoke about his desire "to sodomize, rape, and kill" her. *Id.* A student present while the girl read the letter immediately reported it to a school resource officer who went back to the gym where he found the girl "frightened and crying." *Id.* at 620. After a school administrator learned about the letter, its author was suspended. "[I]n the wake of Columbine and Jonesboro," our court found it "untenable" that school officials learning about the letter "would not have taken some action based on its violent and disturbing content." *Id.* at 626 n. 4. Since the letter contained true threats, expulsion of the student did not violate the First Amendment.

***762** [1] *Doe* defined a true threat as a "statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another." *Doe,* 306 F.3d at 624. The speaker must in addition have intended to communicate his statement to another. *Id.* That element of a true threat is satisfied if the "speaker communicates the statement to the object of the purported threat *or to a third party.*" *Id.* (emphasis added). . . .

The record here does not reveal any genuine dispute of material fact on the controlling question presented: whether a "reasonable recipient would have interpreted [D.J.M.'s statements] as a serious expression of an intent to harm or cause injury to another." *Doe,* 306 F.3d at 624. D.J.M.'s references to targeted classmates as "midget[s]," "fags," and "negro bitches" are hate filled comments. His statements that five specific named individuals "would go" or "would be the first to die" were real cause for alarm, especially since he talked about using a 357 magnum that could be borrowed from a friend. The reaction of those who read his messages is evidence that his statements were understood as true threats. C.M. contacted Allen, a trusted adult, to discuss what in her words was "something serious." When Allen saw D.J.M.'s messages, she wrote that this was "serious stuff," that D.J.M. "sounds serious to me," and contacted Powell. After Powell and superintendent Janes learned of the statements, they were concerned enough to contact the police. Despite D.J.M.'s assertion that his instant messages were intended as a joke, a juvenile court judge

thought the situation serious enough to order him admitted to Lakeland Regional Hospital for psychiatric evaluation. The record does not reveal that any person who became aware of D.J.M.'s speech thought he was joking.

True threats are not protected under the First Amendment, and here the District was given enough information that it reasonably feared D.J.M. had access to a handgun and was thinking about shooting specific classmates at the high school. In light of the District's obligation to ensure the safety of its students and reasonable concerns created by shooting deaths at other schools such as Columbine and the Red Lake Reservation school, the district court did not err in concluding that the District did not violate the First Amendment by notifying the police about D.J.M.'s threatening instant messages and subsequently suspending him after he was placed in juvenile detention. . . .

C.

In addition to the line of school cases which used a true threat analysis to decide the First Amendment issues raised, there is another line which uses a substantial disruption analysis based on the Supreme Court's *Tinker* decision. Of particular interest here is *Wisniewski v. Weedsport Central School District,* 494 F.3d 34, 36 (2d Cir.2007), which like the instant case involved student instant messaging outside of school which threatened deadly acts inside it. The widespread use of instant messaging by students in and out of school presents new First Amendment challenges for school officials. Instant messaging enables student messages to be rapidly communicated widely in school and out. School officials cannot constitutionally reach out to discover, monitor, or punish any type of out of school speech. When a report is brought to them about a student threatening to shoot specific students at school, however, they have a "difficult" and "important" choice to make about how to react consistent with the First Amendment. *See Morse,* 551 U.S. at 409, 127 S.Ct. 2618.

[5] The Court in *Tinker* explained that "in class *or out of it,*" 393 U.S. at 513, 89 S.Ct. 733 (emphasis added), conduct by a student which "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities" is not "immunized by the First Amendment." *Id.* at 514, 89 S.Ct. 733. Since student armbands expressing opposition to the Vietnam War were not disruptive to the school environment there, they were protected by the First Amendment. The Court has subsequently described its holding in *Tinker* as prohibiting school officials from suppressing student speech without reasonably concluding that the speech "materially and substantially disrupt[s] the work and discipline of the school." *Morse,* 551 U.S. at 404, 127 S.Ct. 2618.

In *Wisniewski,* a student sent outside of school an instant message to some friends, portraying an icon with a pistol shooting a bullet and text about killing his English teacher. Another student discovered it and took it to the English teacher. School authorities notified the police, suspended the student, and proposed a long term suspension. *See Wisniewski,* 494 F.3d at 37–38. In deciding whether the student's ***766** First Amendment rights had been violated the Second Circuit chose not to "pause to resolve" whether the student's internet transmission was a true threat, for it considered the *Tinker* standard to be the more appropriate test. *Id.* at 36. There was no dispute that the messages had in fact reached the school and the panel unanimously agreed that it had been "reasonably foreseeable that the [instant messaging] icon would come to the attention of the school authorities and the teacher" and that it would "create a risk of substantial disruption within the school environment." *Id.* at 39–40 & n. 4. The First Amendment claim had therefore been properly dismissed.

The Eleventh Circuit also used the *Tinker* standard to decide *Boim v. Fulton County School District,* 494 F.3d 978 (11th Cir.2007), a case involving a student essay which described a dream about shooting her math teacher. It was discovered at school where she was seen passing it to another student. In deciding her family's First Amendment claims the court ruled that the student had "clearly caused ... a material and substantial disruption" to the school. *Id.* at 983. It commended the school authorities for "acting quickly to prevent violence on school property" since it could "only imagine what would have happened if the school officials ... did nothing about it and the next day [the student] did in fact come to school with a gun and shoot and kill" her intended target, drawing an analogy from *Morse. Id.* at 984. Judge Black wrote in concurring that the appropriate phrasing of the test was whether the facts "would cause school officials to reasonably anticipate substantial disruption of or material interference with" the work of the school. *Id.* at 985, citing *Tinker,* 393 U.S. at 509, 89 S.Ct. 733.

[6] In D.J.M.'s case, the District's alternative argument before the district court was also based on *Tinker.* It argued that its actions had not violated the First Amendment because D.J.M.'s instant messages had caused substantial disruption in the school. Parents and students had notified school authorities expressing concerns about student safety and asking what measures the school was taking to protect them. They asked about a rumored "hit list" and who had been targeted. School officials had to spend considerable time dealing with these concerns and ensuring that appropriate safety measures were in place. The district court concluded that the school had been "substantially disrupted because of Plaintiff's threats," citing *Tinker,* and granted summary judgment to the District on this basis also. After thoroughly reviewing the record, we agree with that conclusion. Here, it was reasonably foreseeable that D.J.M.'s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment.

D.

One of the primary missions of schools is to encourage student creativity and to develop student ability to express ideas, but neither can flourish if violence threatens the school environment. School authorities as well as the courts are called on to protect free expression under the First Amendment in a variety of circumstances. While the Supreme Court recently struck down a law restraining the sale or rental of violent video games to minors on First Amendment grounds, *see Brown v. Entm't Merch. Ass'n,* —— U.S. ——, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011), it has acted more cautiously in First Amendment school cases, as evidenced by its policy concerns about avoiding any substantial disruption to the school environment (*Tinker*), lewd and offensive student ***767** speech (*Fraser*), and student speech supporting illegal drugs (*Morse*). The Court has not yet had occasion to deal with a school case involving student threats or one requiring it to decide what degree of foreseeability or disruption to the school environment must be shown to limit speech by students. These cases present difficult issues for courts required to protect First Amendment values while they must also be sensitive to the need for a safe school environment. . . .

For the foregoing reasons, the judgment of the district court is affirmed.

All Citations

647 F.3d 754, 270 Ed. Law Rep. 465