2012 WL 3023937 (C.A.5) (Appellate Brief)
United States Court of Appeals, Fifth Circuit.

Taylor BELL and Dora Bell, Individually and as Mother of Taylor Bell Plaintiff/Appellant,
v.
ITAWAMBA COUNTY SCHOOL BOARD, Teresa McNeece, Superintendent of Education for Itawamba County, Individually and in her Official Capacity, and Trae Wiygul, Principal of Itawamba Agricultural High School, Individually and in his Official Capacity Defendants/Appellees.

No. 12-60264.
July 13, 2012.

On Appeal from the United States District Court for the Northern District of Mississippi, Eastern Division

Brief of Appellees

Michele Floyd, Msb #9574, Itawamba County, School District, 605 South Cummings Street, Fulton, MS 38843, (662) 862-2159, Benjamin E. Griffith, Msb #5026, Michael Carr, Msb #102138, Griffith & Griffith, 123 S. Court Street, Post Office Box 1680, Cleveland, Mississippi 38732, (662) 843-6100, Attorneys for Itawamba County, Mississippi; Teresa McNeece in Her Individual and Official Capacity; Trae Wiygul in His Individual and Official Capacity.

ORAL ARGUMENT REQUESTED

***IV STATEMENT REGARDING ORAL ARGUMENT**

Oral argument is requested.

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CASES

*1 I. STATEMENT OF JURISDICTION

Jurisdiction and venue over the subject matter herein lie with the United States District Court for the Northern District of Mississippi, Eastern Division. Plaintiff/Appellant appealed to the Fifth Circuit Court of Appeals as a result of the District Court granting Defendants/Appellees' Motion for Summary Judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331, §1332 and §1343.

II. STANDARD OF REVIEW

In this appeal challenging the granting of summary judgment in favor of the Appellees, this Court should review the District Court Judge's findings of fact and conclusions of law *de novo*.

*2 III. STATEMENT OF THE ISSUES

1. Whether "The Song" caused a material and substantial disruption at Itawamba Agricultural High School or was reasonably foreseeable to cause a material and substantial disruption at IAHS and is therefore not protected speech in the school environment under the First Amendment?

2. Whether Bell intended to publish to the public the content of his song, and, if so, was it reasonably foreseeable that "The Song" would reach Itawamba?

3. Whether speech which allows a student to knowingly make comments, oral or written, which can reasonably be perceived as a threat of school violence, should be protected by the First Amendment?

4. Whether the individual claim of Plaintiff Dora Bell fails, as (1) Appellant failed to address this issue in his Brief and it is therefore waived and (2) the evidence does not establish a violation of a right secured by the Constitution or laws of the United States?

5. Whether the claims against individual Defendants, Teresa McNeece and Trae Wiygul fail as (1) Appellant failed to address individual claims in his Brief and they are therefore waived and (2) if there was a violation of Constitutional rights by the individual Defendants, were those rights clearly established?

6. Whether Bell has standing to assert a violation on a Constitutional right under 42. U.S.C. §1983?

IV. STATEMENT OF THE CASE

This appeal is about school discipline for off-campus speech via online social media that school officials reasonably forecast would cause material and substantial disruption at school and which foreseeably came to the attention of school authorities ***3** and disrupted school work and activities. At the time of the incident, Taylor Bell was a senior at Itawamba Agricultural High School. Bell wrote, sang, and published in two public forums via the Internet (Facebook and YouTube) a rap song which specifically targeted two Itawamba employees. The lyrics of "The Song" state that Coach Wildmon is "a dirty ass nigger", is "fucking with the whites and now fucking with the blacks", is a "pussy nigger" and "fucking with the students he just had a baby", "fucking around cause his wife ain't got no titties", that Coach Wildmon tells students they "are sexy", and the reason that Plaintiff quit the basketball team is because Coach Wildmon "is a pervert". The lyrics go on to say that Coach Rainey is another Bobby Hill, [1] is a "pervert", that he is "fucking with juveniles", that Coach Rainey came to football practice "high", and that he is 30 years old and is "fucking with students at the school" and that Bell is going to "hit ya with my Ruger." [2] "The Song" goes on to state that one of the coaches is "kissing" a student and "looking down girl's shirts, drool running down your mouth" and turning the lights off while girls are in the locker room. The last two verses include the phrases "*Fucking with* ***4** *the wrong one gonna' get a pistol down your mouth*" and "*middle fingers up if you wanna cap that nigga*". [3]

1 Bobby Hill was an Itawamba Agricultural High School assistant football coach who was arrested and accused of sending sexually explicit material to a minor via text message in 2009.

2 **[R. 651].**

3 **[R. 428-29].**

Once this song came to the attention of school officials after being posted in the two separate public domains of Facebook and YouTube, the Disciplinary Committee of the Itawamba County School Board heard the issue. The Committee found the conduct of Plaintiff constituted "harassment and intimidation of teachers and possible threats against teachers". [4] Bell appealed the finding of the Disciplinary Committee to the Itawamba County School Board. The School Board, acting through its minutes, again found that Bell "threatened, harassed, and intimidated school employees". [5] The attorney for Defendant Itawamba County School Board, Michele Floyd, sent a letter dated February 11, 2010, to Plaintiff Dora Bell, mother of Plaintiff Taylor Bell, memorializing the findings of the School Board, specifically: (1) that Taylor Bell's seven day out-of-school suspension be upheld; (2) beginning January 27, 2011, Bell will be placed in the Itawamba County Alternative School for the remainder of the current nine week grading period; (3) while in Alternative School, ***5** Bell will not be allowed to attend any school functions and will be subject to all rules imposed by the Alternative School; and (4) Bell will be given time to make up any work missed while suspended or otherwise receive a "0", pursuant to school policy. [6]

4 **[R. 430]**.

5 **[R. 435]**.

6 **[R. 450]**.

Bell and his mother subsequently filed their Complaint on February 24, 2011, alleging (1) placement in Alternative School violated Taylor Bell's First Amendment rights, (2) punishment for Taylor's speech violated Dora's parental rights under the 14th Amendment, (3) that the speech was a matter of public concern, and (4) punishment for Taylor's speech violates Mississippi law. [7]

7 **[R. 8-14]**.

The School District answered on March 4, 2011. [8] A Preliminary Injunction Hearing was held on March 10, 2011, during which the Plaintiffs and Defendants presented testimony and introduced exhibits. [9] The Case Management Conference was held on May 9, 2011, during which all parties agreed that there were no remaining factual disputes and that this issue was ripe for summary judgment. As a result, the District Court was charged with the task of determining which party was ***6** entitled to a judgment "as a matter of law". [10] On March 15, 2012, the District Court granted summary judgment for Itawamba and school officials and denied it for Bell and his mother based on evidence and testimony that Bell's song (1) was intended to reach the school, [11] (2) caused an actual disruption at school, [12] (3) was reasonably foreseeable to cause disruption, [13] (4) that even if of a matter of public concern, Bell failed to demonstrate that his speech overrides the well-established *Tinker* test in matters of public school speech by children, (5) that individual Defendants are entitled to qualified immunity, and (6) that Dora Bell's 14th Amendment claim fails.

8 **[R. 44-53]**.

9 **[R. 59]**.

10 **[R. 770]**.

11 **[R. 771]**.

12 **[R. 775-76]**.

13 **[R. 775-76]**.

V. SUMMARY OF THE ARGUMENT

It was reasonably foreseeable that Bell's song would cause a material and substantial disruption at school or would be reasonably foreseeable to cause a material and substantial disruption at school. Speech that would receive full Constitutional protection if used by an adult in public discourse may, consistent with the First Amendment, give rise to disciplinary action by a school. Itawamba had ***7** notice that Bell's speech caused an immediate material and substantial disruption and acted reasonably by suspending Bell for seven days and placing him into alternative school for the rest of the grading period. Schools have a duty to be proactive, not reactive. There have been three separate evidentiary findings that Bell's speech caused a material and substantial disruption. Bell named his teachers, particular students, and used the school's logo as the thumbnail on his Facebook page. Bell made no efforts at disassociation from Itawamba in his speech. Bell admits that a song accusing coaches of inappropriate conduct with vulgar language would certainly impact the operations of the school. That is exactly what the song did, thus the ruling of the District Court should be affirmed.

It was reasonably foreseeable that "The Song" would reach Itawamba Agricultural High School. Bell posted the song in two public places and used the school logo as the link tag. He admitted he knew once he put it on Facebook and YouTube that it was open to the public. Bell cannot in good faith argue that he did not realize that the song would make it onto campus in this electronic age. Though he made the song off campus using his personal equipment, Bell's geography-based argument unquestionably fails. *Tinker* applies to on-campus and off-campus speech.

***8** Student speech which can reasonably be perceived as a threat of school violence can and should be regulated by schools. It is untenable in the wake of Columbine and Jonesboro that any reasonable school official who came into possession of Bell's song would not have taken some action based on its violent and disturbing content. Bell's alternative argument that his speech should receive heightened protection because it was about a "matter of public concern" fails because Bell admits he never attempted to inform anyone about his allegations of sexual misconduct, refused to cooperate as part of any investigation, and states that it was meant as "hyperbole and metaphor". The *Tinker* test is an objective one, focusing on the reasonableness of the school administration's response, not on the intent of the student. Itawamba's response was reasonable, and consistent with Bell's constitutional rights.

The individual claim of Plaintiff Dora Bell fails, as Bell failed to address these arguments in his Brief, and it is therefore waived. Further the evidence does not establish a violation of a right secured by the Constitution or laws of the United States with regard to Dora Bell.

Individual Defendants, Teresa McNeece and Trae Wiygul are entitled to ***9** qualified immunity as Bell failed to address these arguments in his Brief, and they are therefore waived. Further, there is no evidence that the conduct of McNeece and Wiygul violated a clearly established constitutional right.

Finally, Bell has no standing because assignment to an alternative education program is not a violation of 42 U.S.C. §1983.

VI. ARGUMENT

A. It is reasonably foreseeable that a public high school student's song (1) that levies charges of serious sexual misconduct against two teachers using vulgar and threatening language which (2) is published on Facebook.com to at least 1,300 "friends," many of whom are fellow students, and the unlimited Internet audience on YouTube.com, could cause a material and substantial disruption at school.

While 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), 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). Instead, these rights must be applied in a manner consistent with the "special characteristics of the school environment." *Tinker* at 506. Thus, school administrators can prohibit student speech where there ***10** is a reasonably foreseeable risk that such speech may "materially and substantially disrupt the work and discipline of the school." *Id*. at 513. Because schools have a responsibility of "teaching students the boundaries of socially appropriate behavior," *Fraser*, 478 U.S. at 681, offensive speech that would receive full Constitutional protection if used by an adult in public discourse may, consistent with the First Amendment, give rise to disciplinary action by a school. *Id*. at 682. The Supreme Court has recognized that schools have a "compelling interest in having an undisrupted school session conducive to the students' learning." *Grayned v. City of Rockford*, 408 U.S. 104, 119, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972).

1. Contrary to Bell's position, disruption was argued and shown at the District level.

Bell argues that Itawamba did not claim the speech caused a material and substantial disruption until after it was challenged by Bell. This is not the case. The fact that Bell had to go before a Disciplinary Committee and the School Board in a very short period of time after Bell published and distributed "The Song" shows that the school had notice it caused an immediate material and substantial disruption. In fact, Michele H. Floyd, Attorney for the School District, testified at the Preliminary Injunction Hearing that the Disciplinary Committee discussed the potential for ***11** disruption [14] and that the School Board questioned Bell about the fact that the threats contained in "The Song" could cause a disruption. [15] Furthermore, the infraction of "harassing, intimidating or threatening" a teacher is classified in Itawamba County School District policy as a "severe disruption". [16]

14 **[R. 191]**.

15 **[R. 177]**.

16 **[R. 439-444].**

2. It was reasonably foreseeable that a material and substantial disruption would occur at Itawamba Agricultural High School.

Although the burden is on school authorities to meet *Tinker's* requirements to abridge student First Amendment rights, a School District need not prove with absolute certainty that substantial disruption will occur. *Cuff v. Valley Cent. Sch. Dist.*, 677 F. 3d 109 (2nd Cir. 2012)(focus is on reasonableness of response, not intent of student); *Doninger v. Niehoff*, 527 F. 3d 41, 51 (2nd Cir. 2008) (holding that *Tinker* does not require "actual disruption to justify a restraint on student speech"); *Lowery v. Euverard*, 497 F. 3d 584, 591-92 (6th Cir. 2007) ("*Tinker* does not require school officials to wait until the horse has left the barn before closing the door.... [It] does not require certainty, only that the forecast of substantial disruption be reasonable."); *LaVine v. Blaine Sch. Dist.*, 257 F. 3d 981, 989 (9th Cir. 2001) ***12** ("*Tinker* does not require school officials to wait until disruption actually occurs before they may act."). *Tinker* does not prescribe a uniform, "one size fits all" analysis. The Court must consider the content and context of the speech, and the nature of the school's response.

Bell published his song for over 1,300 "friends" on Facebook.com, many of whom were fellow students, and for an unlimited audience on Youtube.com. [17] This song continually made vulgar, disparaging remarks against two Itawamba County School District employees, but most importantly it stated "looking down girls' shirts/drool running down your mouth/messing with wrong one/going to get a pistol down your mouth - pow" and "middle fingers up if you can't stand that nigga/middle fingers up if you want to cap that nigga." [18] As shown above, the Disciplinary Committee and the School Board felt that it was reasonably foreseeable that the song would cause a material and substantial disruption in the school if not dealt with immediately. Furthermore, Superintendent Teresa McNeece testified at the Preliminary Injunction Hearing that her job as Superintendent was

to supervise, be proactive, and to foresee if there could be a possible disruption or danger at schools ***13** within the Itawamba County School District. She further testified that she felt that a seven day suspension and placement into alternative school was a response the School District needed to have, and that by virtue of this song, there was a foreseeable danger of substantial disruption at the Itawamba Schools. [19]

17 **[R. 767]**.

18 **[R. 428-29]; [R. 767]**.

19 **[R. 619]**.

3. There were actual material and substantial disruptions at Itawamba Agricultural High School.

Coach Rainey, one of the two coaches referenced in the song, testified that there are many things he does different since the song came out. In order to be an effective coach, he has to get physically close to students and have them trust him. He doesn't feel like he can do that anymore. He feels like he can no longer be a parent figure to a student and that he can no longer place his hands on students during practice. [20] Further, Rainey testified that since the song came out, students have started to mingle in the gym. Because the song references Coach Rainey and Coach Wildmon engaging in inappropriate activity in the gym, Coach Rainey believes it is possible that students have changed behavior in order to find an excuse to gather there. [21] Principal Wiygul even had to admonish a teacher to keep the students in the ***14** classroom instead of coming into the gym. [22]

20 **[R. 626-27]; [R. 634]**.

21 **[R. 628]**.

22 **[R. 253]**.

Coach Wildmon, the other target of “The Song”, testified he first heard about the song while at school after receiving a text message from his wife. A friend of Coach Wildmon's had heard the song on one of the student's Facebook pages and had told Coach Wildmon's wife. [23] Wildmon testified he was at school, and there were three seniors sitting beside him. Wildmon asked them if they knew anything about it. They said yes, and one of them got out his phone and let Wildmon listen to the Song. [24] Wildmon testified that he was angry at first after hearing the song, and that it was going to affect his life. He went straight to Principal Wiygul. [25] Wildmon testified that it has negatively affected his teaching. Specifically, every time he is teaching, he has to be careful that someone may interpret something that he is doing as inappropriate. [26] Coach Wildmon also testified he had a parent contact him and told him she had heard about it, but she did not believe it was true. [27] Specifically, he is ***15** concerned how the kids view him, and that he tries not to look in one area too long. He does not want to be accused of staring at a girl or anything of that matter. [28] He does not touch any students any more, even as an athletic coach, because he does not want anything to be taken the wrong way. [29] Most importantly, Coach Wildmon testified that after he heard the song, referencing him, disparaging his wife, and referencing killing him, he took it literally. [30] Coach Wildmon testified that in today's society what somebody means and how they mean it is hard to determine. He stated that he was actually scared. [31]

23 **[R. 631]**.

24 **[R. 632]**.

25 **[R. 632]**.

26 **[R. 633]**.

27 **[R. 633]**.

28 **[R. 633]**.

29 **[R. 634]**.

30 **[R. 634]**.

31 **[R. 634-35]**.

4. Schools can regulate student speech which causes a material and substantial disruption, even if the speech was made off campus.

Bell relies on *J.S. v. Blue Mt. Sch. Dist.*, 650 F. 3d 915, 930 (3d Cir. 2011), cert. denied, 132 S. Ct. 1097, 181 L. Ed. 2d 978 (2012), to support his argument that "a school official cannot transform off-campus speech into school speech; otherwise schools could regulate speech anytime, anywhere, as long as a person, including a ***16** student, brings it to the school's attention." [32] Upon a closer reading of *J.S.*, the Court makes this statement in dicta in analyzing whether the *Fraser* [33] standard regarding lewd and offensive speech should control off-campus student speech in addition to *Tinker*. [34] The Third Circuit determined that if *Fraser's* "lewd and offensive" standard was held to off-campus speech, it would vest school officials with dangerously overbroad censorship discretion. [35] In fact, the Third Circuit states "[n]either the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event *and that caused no substantial disruption* at school." [36] *Tinker* is the proper test to apply. In *J.S.* there was no testimony of substantial disruption. Here, there is.

32 Brief of Appellant at 39 citing *J.S.* at 933-934.

33 *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986)(lewd, vulgar, and offensive on-campus speech can be regulated)

34 *J.S.* at 933-934.

35 *J.S.* at 933.

36 *J.S.* at 933; see also *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998)(student homepage using vulgar language critical of teachers did not cause material and substantial disruption).

Bell analogizes his case to *Thomas v. Bd. of Educ.*, 607 F. 2d 1043 (2nd Cir. 1979), where First Amendment protection was extended to an underground humor ***17** magazine. There the Second Circuit noted that the students produced the publication on their own time and with their own money, and importantly that the magazine "assiduously endeavored to sever all connections between their publication and the school." *Id*. at 1045. Bell did not do this. He named his teachers, he named particular students, and he used the school's logo as the thumbnail on his Facebook page. [37] Bell's speech made no efforts at disassociation.

37 **[R. 437].**

5. There is no threshold requirement for a disruption to be "substantial" or "material".

Bell argues that even if there was disruption at Itawamba, "The Song" wasn't out long enough for the disruption to be "substantial" or the effect wasn't "substantial enough". [38] Bell is essentially arguing that Itawamba should have sat back and let the song affect more students and more of the day-to-day operations of the school before administering discipline. [39] Bell

makes the unfounded argument that Wildmon's request to hear the song while on campus or his repeated complaint to Principal Wiygul regarding "The Song" after hearing it caused disruptions.[40] This Court ***18** should not be called upon to determine the "appropriate" level of material and substantial disruption before a school can regulate speech. The definition is axiomatic - if it is determined to be material and/or substantial, it has risen to whatever level it need be to justify regulation. Schools have a duty to be proactive, not reactive. *Lowery v. Euverard*, 497 F. 3d 584, 591-92 (6th Cir. 2007).

38 Brief of Appellant at 40.

39 Brief of Appellant at 36-42.

40 B rief of Appellant at 38.

In *Boim v. Fulton County School District*, 494 F. 3d 978 (11th Cir. 2007), a student wrote a story in her notebook about a dream she had of shooting her teacher and then gave the notebook to another student while at school. Her teacher, the target of the story, gained possession of the story while in class and discussed it with a school administrator shortly after school. On the next day, the teacher brought the story to the administrator who then consulted the school's police officer. The school pulled the student from class and called her parents. At the meeting, the student denied the story was serious, and her parents supported her. The school sent the student home. The principal continued the investigation out of concerns of prior violence in other schools such as Columbine. During this investigation, the teacher was shown the narrative and said he felt threatened. The school suspended the student for ten days and then expelled her. The district superintendent, however, overturned the expulsion but upheld the suspension. *Id*. at 983.

***19** The facts in *Boim* and the instant case are strikingly similar. The Eleventh Circuit in *Boim* observed that there is "no First Amendment right allowing a student to knowingly make comments, whether oral or written, that reasonably could be perceived as a threat of school violence, whether general or specific, while on school property during the school day." *Boim*, supra at 984.

Thus, in *Boim*, the substantial or material disruption was that the content of the student's speech reached the school, at least one other student, and ultimately the threatened teacher and school officials. No evidence was cited by the Court in *Boim* of any further disruption at school, e.g., panic among students or teachers, calls by parents, closing of school, etc. Itawamba has a duty to protect its students and teachers, and as in *Boim*, it had no duty to allow a material or substantial disruption to further develop before administering discipline.

6. *School officials have no duty to avert their eyes or ears to on-campus or off-campus student speech which concerns their school and causes a material or substantial disruption.*

Finally, Bell argues that, similar to the student protesters in *Tinker*, he is not asking permission to share his song with anyone other than the people who voluntarily choose to listen to it, akin to a line of reasoning drawn from Justice ***20** Harlan's majority opinion in *Cohen v. California*,[41] that Wildmon should have "averted" his eyes or ears.[42] Following that line of reasoning, Bell advances the flawed argument that since Wildmon voluntarily chose to listen to it, he cannot claim that the song was a threat. *Tinker* involved speech on national issues not directed specifically at any teacher, administrator, or person in a position of authority over a student. *Tinker* found that wearing black armbands did not cause a substantial or material disruption at school. Bell's song, on the other hand, references "capping" and putting a pistol done the mouth of teachers - who work at Itawamba and specifically teach and coach Bell. The subject matter and audience is extremely different. The reaction is extremely different. The District Court found that a material and substantial disruption did occur and that it was foreseeable to a reasonable person that it would occur.[43] Bell even admits in his brief that "a song accusing coaches of inappropriate conduct with vulgar language would certainly ***21** impact the operations of the school."[44] That is exactly what the song did. The ruling of the District Court should be affirmed.

41 *Cohen v. California*, 403 U.S. 15 (1971)(With respect to Cohen's "Fuck the Draft" message emblazoned on his jacket, "[t]hose in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes.") (Harlan, J.).

42 Brief of Appellant at 45.

43 **[R. 776]**.

44 Brief of Appellant at 45-46.

B. By placing "The Song" in two public forums (Facebook and Youtube), coupled with the testimony of Bell that he published the song with the intention that people would listen to it, it was reasonably foreseeable that "The Song" would reach Itawamba County Agricultural High School.

With today's tech-savvy students and the constant accessibility of cell phones and the Internet, the distinction between on- and off-campus speech only continues to blur. [45] The once-certain "schoolhouse gate" in *Tinker* is virtually nonexistent in the age of the Internet, and indeed, "the internet has become a school's bathroom wall," [46] Other courts analyzing off-campus speech subsequently brought to campus or to the attention of school authorities have applied *Tinker*'s substantial disruption test without regard to the geographic location where the speech originated, whether off campus or on campus. [47]

45 Karl Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Cyberbullying*, 13 Barry L. Rev. 103, 131 n. 230 (Fall 2009).

46 Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers and Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 First Amend. L. Rev. 210, 217 n. 31 (Spring 2009); Carolyn Joyce Mattus, *Is It Really My Space? Public Schools and Student Speech on the Internet After Layshock v. Hermitage School District and Snyder v. Blue Mountain School District*, 16 B.U.J. Sci. & Tech. L. 318, 335 (Spring 2010)

47 *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (applying *Tinker* to a website created by a student off campus that contained mock obituaries of some of the author's classmates); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (applying *Tinker* to a website created by a student off campus that contained criticism of school authorities, where another student accessed the website at school and showed it to a teacher); *O.Z. v. Board of Trustees of Long Beach Unified Sch. Dist.*, 2008 U.S. Dist. LEXIS 110409, 2008 WL 4396895, *4 (C.D. Cal. 2008) (student discipline upheld under *Tinker* where student created a video off campus during spring break that depicted a graphic dramatization of a teacher's murder and then posted the video on the Internet).

22** ***1. Bell brought the speech to campus by specifically naming the school, its teachers, its students, and knowingly posting it in a public forum.

Bell argues that one of the involved coaches "brought" the speech to campus by asking that a student play it for him on a cell phone (which having one was against the rules of the school). [48] This argument focuses on the wrong issue. It was reasonable for Bell to believe that his speech, despite being made off campus and not using school materials, would reach its targets at Itawamba. Bell "brought" the speech to campus by naming the coaches, the school, and specific students in the song. He posted it in two public places and used the school logo as the link tag. He admits that he knew once he put it on Facebook and YouTube that it was open to the public. [49] He admittedly knew students were going to hear it. [50]

48 Brief of Appellant at 8.

49 Audio Recording of Disciplinary Committee Hearing, Defendant Exhibit 10, Preliminary Hearing held on February 7, 2011, at 30:30.

50 Audio Recording of Disciplinary Committee Hearing, Defendant Exhibit 10, Preliminary Hearing held on February 7, 2011, at 33:57.

Bell's reliance on ***23** *J.S. v. Blue Mt. Sch. Dist.*, 650 F. 3d 915, 930 (3d Cir. 2011), cert. denied, 132 S. Ct. 1097, 181 L. Ed. 2d 978 (2012), to support his argument that online speech with friends, even if they are classmates, is not evidence of a desire for speech to reach the school, is misplaced. [51] In *J.S.*, the student made lewd and obscene comments about her high school principal on an Internet "profile." The Third Circuit found the profile was so "outrageous" that no one took it seriously. The song published by Bell was not "outrageous", however, but was taken seriously. Further, the Court in *J.S.* found that since the student took specific steps to make the profile "private", only her friends could access it. [52] Bell, on the other hand, posted it publicly on his Facebook wall as well as on YouTube. Bell cannot in good faith argue that he did not realize that the song would make it onto campus in this electronic age. Of course it made it onto campus, and it only took one day. [53]

51 Brief of Appellant at 36.

52 *J.S.* at 930.

53 Bell testified that he published the song on a Wednesday and that he was questioned by school officials that Friday **[R. 215]**. Mrs. McNeece testified that school officials heard about the song on Thursday but that Bell had already gone home and was not questioned until Friday **[R. 240-41]**.

2. Consistent with recent holdings in social media student speech cases, Bell's geography-based argument fails.

In ***24** *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010), J.C. and several other students gathered at a local restaurant after school. While at the restaurant, J.C. recorded a four-minute and thirty-six second video of her friends talking about a classmate, C.C. The video was recorded on J.C.'s personal video-recording device. One of J.C.'s friends, R.S., calls C.C. a "slut," says that C.C. is "spoiled," talks about "boners," and uses profanity during the recording. R.S. also says that C.C. is "the ugliest piece of shit I've ever seen in my whole life." In the evening on the same day, Plaintiff posted the video on YouTube from her home computer. The subject of the video, C.C., saw it and came to the School with her mother on May 28, 2008, specifically to make the School aware of the video. The video was viewed at least two times on the school campus, once by a teacher and once by R.S. and her father in the administration offices. The Court found that J.C.'s geography-based argument - i.e., that the School could not regulate the YouTube video because it originated off campus - unquestionably failed. *Id*. at 1108. First, under the majority rule, and the rule established by the Ninth Circuit in *LaVine v. Blaine Sch. Dist.*, 257 F. 3d 981, 989 (9th Cir. 2001), the geographic origin of the speech is not material; *Tinker* applies to both on-campus and off-campus speech. *Id*. Bell's speech was brought to campus in the exact same fashion - via social media.

In *Kowalski v. Berkeley County Schools*, 652 F. 3d 565 (4th Cir. 2011), cert. ***25** denied, 2012 W.L. 117817 (U.S. Jan. 17, 2012), Kara Kowalski, a senior at Musselman High School in Berkeley County, West Virginia, was suspended 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 was placed in out-of-school suspension for 10 days (later reduced to 5 at the pleading of her parents) and was prohibited from participating in any other school activities. Kowalski filed suit, claiming that in disciplining her, the school violated her free speech and due process rights under the First and Fourteenth Amendments. She alleged, 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." *Id*. Bell argues the same in the current case.

The District Court found that the School District was authorized to punish Kowalski because her web page was "created for the purpose of inviting others to indulge in disruptive and hateful conduct," which caused an "in-school disruption." The Fourth Circuit agreed, finding that School District's imposition of sanctions was permissible. *Id*. at 567. The Fourth Circuit's analysis is relevant to this case, in which Taylor Bell also attempts to hide behind the argument that his Facebook page and ***26** 'The Song" were not created "during a school related activity" but rather was "private out of school speech".

While Kowalski argued 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, the Fourth Circuit noted that her argument raised 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 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. *Kowalski*, supra at 573. As the Fourth Circuit noted:

> "[E]ven 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 ***27** 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. ...[I]t 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*."

Kowalski, supra at 574.

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." *Id*. at 567. Bell's manner of speech and resulting discipline are no different.

The Eighth Circuit also recently addressed this issue in *D.J.M. v. Hannibal Pub. Sch. Dist.*, 647 F. 3d 754 (8th Cir. 2011) where a student 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 Eighth Circuit found the student's actions constituted both a "true threat" under *Watts* as well as material and substantial ***28** disruption under *Tinker*. The District Court concluded that D.J.M. "had the requisite intent to communicate his threat because he communicated his statements to another student at the school" and that he "should have reasonably foreseen that his statements would have been communicated to his alleged victims" since a reasonable person should be aware that electronic communications can now be easily forwarded. *Id*. at 762. Although D.J.M. did not communicate any threatening statements to the teenagers targeted in his messages, he intentionally communicated them to C.M., a third party. Since C.M. was a classmate of the targeted students, the Eighth Circuit found that D.J.M. knew or at least should have known that the classmates he referenced could be told about his statements. *Id*. The Eighth Circuit found that the School 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. The opinion noted that 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 did not violate the First Amendment by suspending the student under a "true threat" analysis for speech made off campus. *Id*. at 764. The Eighth Circuit did not stop there.

The *D.J.M* opinion also conducted a *Tinker* analysis as to whether it was ***29** 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. *Id*. at 766. The Eighth Circuit reiterated that the First Amendment does not require the District to wait and see whether D.J.M.'s talk about taking a gun to school and shooting certain students would be carried out. *Id*. at 764. The suspension and placement of D.J.M. in alternative school was upheld on this basis as well. [54]

54 See also *Boucher v. School Board of School District of Greenfield*, 134 F. 3d 821, 829 (7th Cir. 1998)(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).

In *Doninger v. Niehoff*, 642 F. 3d 334 (2nd Cir. 2011), 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 *Doninger* court explained, "a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct ***30** '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." [55] Bell's conduct clearly meets this standard.

55 *Id*. at 48 (quoting *Wisniewski v. Bd. of Educ.*, 494 F. 3d 34, 40 (2nd Cir. 2007)) see also *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F. 3d 915 (3d Cir. 2011) (en banc) (divided court assuming without deciding that the Tinker substantial disruption test applies to online speech harassing a school administrator).

Taylor Bell's song (1) named two specific teachers at Itawamba and directly referenced the school; (2) a vast majority of "likes" and "comments" on Bell's Facebook page were from students; and, (3) he used the school logo as an icon to click on to hear his song. As in *Kowalski*, Bell used the Internet to orchestrate a targeted attack, not on one student, but on two teachers, threatening to kill one of them and encouraging others to join him; and he did this in a manner sufficiently connected to the school environment as to allow the School District to discipline the speech. Coach Wildmon testified he was scared after hearing the song. [56] Coach Rainey testified that students' patterns of interaction in and around the gym changed. [57] If "The Song" continued to spread and Bell was not disciplined for these direct threats to teachers, the foreseeable and actual material and substantial ***31** interference with the operation of the school would continue to occur.

56 **[R 634-35].**

57 **[R. 619; 627-28; 631-35].**

C. Student speech which can reasonably be perceived as a threat of school violence cannot be protected by the First Amendment.

Since *Tinker*, many circuits have found that off-campus student speech which can reasonably be perceived as a threat of school violence can be regulated by a School District. [58]

58 *Kowalski v. Berkeley County Schools*, 652 F. 3d 565 (4th Cir. 2011), cert. denied, 2012 WL 117817 (Jan. 17, 2012)(off campus blog about another student's sexual activity caused material and substantial disruption); *Doninger v. Niehoff*, 527 F. 3d 41 (2nd Cir. 2008)(vulgar and misleading blog); *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F. 3d 34 (2nd Cir. 2007)(instant messaging on the Internet at home a picture displaying a drawing of a pistol firing a bullet at a person's head and beneath was the word "kill" followed by the name of the student's English teacher); *Boim v. Fulton County School District*, 494 F. 3d 978, 983 (11th Cir. 2007)(Student wrote a story about killing her teacher in her notebook, took to school, and gave the notebook to another student while at school - teacher felt threatened); *D.J.M. ex rel D.M. v. Hannibal Public School District No. 60*, 647 F. 3d 754 (8th Cir. 2011) (high school student communicated threats against fellow students to a friend via internet instant messaging).

In *Ponce v. Socorro Independent School Dist.*, 508 F. 3d 765 (5th Cir. 2007), this Court upheld a student's transfer to alternative school based on the content of his journal, which threatened a Columbine-style shooting attack on school. The student's speech posed a direct threat to the physical safety of the school population and was therefore unprotected. *Id*. The student in *Ponce*

kept an extended notebook diary, written in the first-person perspective, in which he detailed the "author's" creation of ***32** a pseudo-Nazi group on the Montwood High School Campus, and at other schools in the district. *Id*. The notebook described several incidents involving the pseudo-Nazi group, including one in which the author ordered his group "to brutally injure two homosexuals and seven colored" people and another in which the author described punishing another student by setting his house on fire and "brutally murder[ing]" his dog. *Id*. At several points in the journal, the author expressed the feeling that his "anger has the best of [him]" and that "it will get to the point where [he] will no longer have control." This Court stated "we therefore find it untenable in the wake of Columbine and Jonesboro that any reasonable school official who came into possession of [student's diary] would not have taken some action based on its violent and disturbing content." *Id*.

1. It is not sound public policy to allow these lyrics to be brushed aside as simply "hyperbole and metaphor".

Bell attempts to hide behind a "hip-hop culture" argument, taking the position that "hip hop, in fact, has a history of confrontational and colorful lyrics....this practice has resulted in the regular use of profanity and threatening language, including references to guns and violence." [59] Many courts have been confronted with ***33** this similar argument of "I didn't mean it literally." [60]

59 Brief of Appellant at 12.

60 See *Wisniewski*, 494 F. 3d at 36, 40 (affirming summary judgment in favor of school administrators for regulating student's speech even though the student protested that his creation of the "buddy icon" was only meant as a joke); see also *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F. 3d 616 (8th Cir. 2002) ("In determining whether a statement amounts to an unprotected threat [under the First Amendment], there is no requirement that . . . the speaker was capable of carrying out the purported threat of violence.").

The intent of the speaker is immaterial. In *Cuff v. Valley Cent. Sch. Dist.*, 677 F. 3d 109, 114 (2nd Cir. 2012), the Second Circuit upheld a minor student's six day suspension after he created a drawing that depicted an astronaut and expressed a desire to blow up the school with the teachers in it. The Second Circuit found that whether the minor intended his "wish" as a joke or never intended to carry out the threat is irrelevant, as was the minor's lack of capacity to carry out the threat expressed in the drawing. *Id*. at 113.

Bell cites *Latour v. Riverside Beaver Sch. Dist.*, 2005 U.S. Dist. LEXIS 35919 (W.D. Pa. 2005) to illustrate his argument that his rap song lyrics are hyperbole and symbolism. [61] While the Court for the Western District of Pennsylvania did find at a preliminary injunction hearing that the rap songs created by the high school student in that case were "just rhymes", more importantly the Court also found that (1) students who were targets of the song all testified they *did not* feel threatened so no ***34** "true threat" existed and (2) school officials testified that there was *no evidence* that classroom instruction was disrupted, therefore no material or substantial disruption occurred. *Id*. at *5. This was not the case at Itawamba as reflected in the testimony above. One of the teachers who was targeted by the song in the case at hand testified he was scared; [62] and there was a noted change in student activity and the teaching style of both teachers involved. [63]

61 Brief of Appellant at 32.

62 **[R. 634-35].**

63 **[R. 619; 626-27; 631-35]**.

Bell admitted during the disciplinary hearing that non-School District personnel approached his mother less than a month after the song came out and told her that the phrase "gonna get a pistol down your mouth" was a direct threat. [64] Whether a song is in the genre of "hip hop" or "country western", if the speech creates or is reasonably foreseeable to create a material or substantial disruption, *Tinker* still applies. Bell focuses on the wrong issue in his hyperbole/symbolism/metaphor argument. The

Tinker standard is an objective one, focusing on the reasonableness of the school administration's response, not on the intent of the student. ***35** *Cuff v. Valley Cent. Sch. Dist.*, 677 F. 3d 109, 113 (2nd Cir. 2012).[65] The teacher,[66] the Disciplinary Committee,[67] and the School Board[68] all found these lyrics were intimidation, harassment, threats, or possible threats. Their response in disciplining Bell was reasonable.

64 Audio Recording of Disciplinary Committee Hearing, Defendant Exhibit 10, Preliminary Hearing held on February 7, 2011, at 16:30.

65 See *Tinker*, 393 U.S. at 514 (holding that the objective reasonableness of the school administrator's response, not the student's intentions, is relevant); *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F. 3d 34, 40 (2nd Cir. 2007) (holding that a student's generation and transmission of an internet "buddy icon" from his parent's home computer supports a reasonable probability of substantial disruption at the school and permitting school discipline "whether or not [the student] intended [the speech] to be communicated to school authorities or, if communicated, to cause a substantial disruption"); *Ponce v. Socorro Indep. Sch. Dist.*, 508 F. 3d 765, 767, 772 (5th Cir. 2007) (holding that a high-school student's violent story depicting a school shooting was not constitutionally protected, despite the student's claim that he meant it as a work of fiction and not a threat); *Boim v. Fulton Cnty. Sch. Dist.*, 494 F. 3d 978, 981, 984-85 (11th Cir. 2007) (same).

66 **[R. 634-35].**

67 **[R. 430-31].**

68 **[R. 435].**

2. Bell's alternative argument that the speech was a "matter of public concern" also fails.

Public school students have free speech rights under the First Amendment, but not to the same extent as adults. Students' free speech rights are tempered by the school's legitimate interest in maintaining order. After spending the majority of his brief arguing that the speech was never intended to reach the school, was not made with school equipment, and consisted of only hyperbole and metaphor, Bell takes the contradictory position that the content of the song was suddenly a matter of "public ***36** concern" and therefore should receive heightened protection.[69] Bell relies on *Pickering v. Bd. of Educ.*, 391 U.S. 563 (U.S. 1968) to support his argument that his speech must be protected. *Pickering* involved an adult teacher speaking publicly about a recent effort to increase tax revenue for schools. The Court held that statements by public officials on matters of public concern must be accorded First Amendment protection.

69 Appellant Brief at 47-51.

The facts in this case are completely dissimmilar. Here Bell made a lewd and violent "rap song" (1) referencing completely unfounded criminal allegations (2) against his own teachers (3) who interpreted the song as a threat to their health and safety. Bell admits that he never attempted to go to anyone about these allegations.[70] Bell was pulled out of class, asked about the truth of the song by Principal Wiygul, Superintendent McNeece, and Board Attorney Floyd, and Bell responded he "didn't ***37** want to talk about it."[71] Despite arguing that the song was never intended to come to campus and was only hyperbole and metaphor, Bell cannot now also hide behind the cloak of "public safety" to allow him to make this type of speech.

70 Audio Recording of Disciplinary Committee Hearing, Defendant Exhibit 10, Preliminary Hearing held on February 7, 2011, at 11:53:
"Did you ever go to anyone and talk to them about things that you felt were going wrong, or things that you felt were wrong?"
"You mean like come to a teacher or something?"
"Yeah, principal or ...."
"Naw, no sir.".

71 Audio Recording of Disciplinary Committee Hearing, Defendant Exhibit 10, Preliminary Hearing held on February 7, 2011 at 2:00.

3. School administrators are in the best position to assess the potential for harm and act accordingly.

It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. *Wisniewski*, 494 F. 3d at 40 (quoting *Wood v. Strickland*, 420 U.S. 308, 326, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975)); see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986) ("[I]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse" and "[t]he determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board."). The Constitution does not compel "school officials to surrender control of the American public school system to public school students." *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 686, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986)(quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)).

***38** The limitation on students' First Amendment rights derives from the mission of the public school system. "The primary duty of school officials and teachers . . . is the education and training of young people. . . . Without first establishing discipline and maintaining order, teachers cannot begin to educate their students." *New Jersey v. T. L.O.*, 469 U.S. 325, 350, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (Powell, J., concurring). Public schools are necessarily not run as a democracy. Schools exist to provide a forum whereby those with wisdom and experience (the teachers) impart knowledge to those who lack wisdom and experience (the students). Unlike our system of government, the authority structure is not bottom-up, but top-down. The authority of school officials does not depend upon the consent of the students. To threaten this structure is to threaten the mission of the public school system. *Lowery v. Euverard*, 497 F. 3d 584, 588-89 (6th Cir. 2007).

Itawamba reacted reasonably when faced with the violent and disturbing content of "The Song", which includes the phrases "*Fucking with the wrong one gonna' get a pistol down your mouth*" and "*middle fingers up if you wanna cap that nigga*", directed at specific school employees. Its reaction is a prime example of the scenario Justice Alito envisioned in his concurrence in *Morse.*

While schools are required to provide students with some level of due process, ***39** "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." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. at 686 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985)). Moreover, schools require this flexibility because they "need... to control such a wide range of disruptive behavior." *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F. 3d 243 (3d Cir. 2002). 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.

To find that Bell has the First Amendment right to make these statements in the form and manner in which he did would threaten the mission of the public school system. The District Court found that Bell failed to demonstrate as a matter of law that such heightened protection (regarding a matter of "public concern") overrides the well-established *Tinker* test in matters of public school student speech as opposed to adults. [72] The finding of the District Court should be upheld.

72 **[R. 776].**

4. Courts have allowed wide leeway to school administrators disciplining students for writings or other conduct threatening violence.

***40** School administrators must be permitted to react quickly and decisively to address a threat of physical violence against their students or staff, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance. See, e.g., *Boim*, 494 F. 3d at 981, 984 (finding that school officials did not violate a student's First Amendment rights when they suspended her for writing a narrative depicting her shooting her math teacher); *Ponce*, 508 F. 3d at 772 (applying the analytical standard of *Morse v. Frederick*, 551 U.S. 393, 127 S.

Ct. 2618, 168 L. Ed. 2d 290 (2007) to a student's speech threatening a "Columbine shooting attack" on a school, and finding that "such specific threatening speech to a school or its population is unprotected by the First Amendment"); *Pulaski Cnty. Special Sch. Dist.*, 306 F. 3d 616, 626 n.4 (8th Cir. 2002)(finding it "untenable in the wake of Columbine and Jonesboro that any reasonable school official who came into possession of [the student's letter in which he described how he would rape and murder a classmate] would not have taken some action based on its violent and disturbing content," and holding that the letter constituted a "true threat" under *Watts v. United States*, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)); *LaVine v. Blaine Sch. Dist.*, 257 F. 3d 981, 983-92 (9th Cir. 2001) (evaluating "the recent spate of school shootings," ***41** the "potential for school violence," and the "care when evaluating a student's First Amendment right of free expression against school officials' need to provide a safe school environment," the court held the school did not violate a student's First Amendment's rights when it expelled him for his poem filled with imagery of violent death and suicide and shooting of fellow students).

Bell's threat of substantial disruption was in real time, aggravated by Bell's sharing of his ralling cry with fellow students on Facebook, yelling "*middle fingers up if you want to cap that nigga*", and Bell admittedly knew students were going to hear it.[73] Bell admitted that it was open to the public once he put it on Facebook and YouTube.[74] School administrators might reasonably fear that, if permitted, other students might well be tempted to copy, or escalate, Bell's conduct. This might then have led to a substantial decrease in discipline, an increase in behavior distracting students and teachers from the educational mission, and tendencies to violent acts. Such a chain of events would be difficult to control because the failure to discipline ***42** Bell would give other students engaging in such behavior an Equal Protection argument to add to their First Amendment contentions. This cannot be precedent.

73 Audio Recording of Disciplinary Committee Hearing, Defendant Exhibit 10, Preliminary Hearing held on February 7, 2011 at 33:57.

74 Audio Recording of Disciplinary Committee Hearing, Defendant Exhibit 10, Preliminary Hearing held on February 7, 2011 at 30:20: "*You knew that once you put it on Facebook and Youtube that it was open to the public." "Mmmhmmm" (affirmative).*

School administrators also have to be concerned about the confidence of parents in a school system's ability to shield their children from frightening behavior and to provide for the safety of their children while in school. Bell's "The Song", being known by many students, could easily have become known to a number of parents who could reasonably view it as something other than a contribution to the marketplace of ideas. In fact, Coach Wildmon testified that a parent contacted him about "The Song" as well.[75] While parents do not have the right to monitor student speech, they could reasonably be concerned about the safety of their children in the present circumstances. A failure of Itawamba to respond forcefully to "The Song" might have led to a decline of parental confidence in school safety with many negative effects, including, e.g., the need to hire security personnel and even a decline in enrollment. The appropriate degree of punishment is of course a matter in which courts show the greatest deference to school authorities. *Wood v. Strickland*, 420 U.S. 308, 326 (1975). Itawamba's decision to suspend Bell and place him in alternative school should be upheld as constitutional.

75 **[R. 633].**

43** ***5. Bell's speech cannot be analyzed by the standard of an adult expressing dissatisfaction about a public figure, but rather analyzed in the secondary education context in a "post-Columbine" environment.

Bell argues that his speech is similar to that in *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), wherein the Supreme Court found that a threat to kill the President made by a man who had been recently drafted into the Army could only be reasonably viewed as hyperbole to express dissatisfaction with the Vietnam War.[76] Bell also equates his speech with the well known cases of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Time, Inc. v. Hill*, 385 U.S. 374 (1967),[77] which involved public speech by adults regarding public figures. None of these cases included direct threats of violence made by students against specific, named teachers in the secondary school context.

76 Brief of Appellant at 30.

77 **[R. 681].**

As Justice Alito said in his concurring opinion in *Morse v. Frederick*, 127 S. Ct. 2618, 2638 (2007):
[A]ny argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. *The special characteristic that is relevant in this case is the threat to the physical safety of students*.

***44** School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate. Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. *Experience shows that schools can be places of special danger*.

Id. at 2638 (emphasis added)

D. The individual claim of Plaintiff Dora Bell fails, as both (1) Appellant and *Amici* failed to address this issue in either Brief, and it is therefore waived and (2) the evidence does not establish a violation of a right secured by the Constitution or laws of the United States.

The briefs of Bell and Amici fail to cite any authorities or refer to the record in support of the individual claim of Dora Bell as required by F.R.A.P. 28(a)(9)(A). Issues not raised or argued in the brief of Appellant may be considered waived and thus will not be noticed or entertained by Court of Appeals. *In re Texas Mortg. Services Corp.*, 761 F. 2d 1068 (5th Cir. 1985). The Court should not consider this issue.

***45** Should the Court still decide to consider the individual claim of Dora Bell, Defendants are entitled to judgment as a matter of law, and the decision of the District Court must be affirmed. While Dora asserts that the Defendants, by disciplining Taylor, unconstitutionally "interfered" with her right "to determine how best to raise, nurture, discipline and educate their children", [78] there is no record evidence or case law supporting such claims. In this case, Dora Bell cannot establish a §1983 claim against the Itawamba Defendants because the conduct of which she complains, *i.e.*, the School District disciplining Taylor, is not a constitutional violation. *West v. Atkins*, 487 U.S. 42, 48 (1988) (a plaintiff seeking to establish a claim under §1983 must allege that the defendants, while acting under color of state law, deprived her of a right secured by the Constitution or the laws of the United States); *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1988)(the first step in any §1983 action is to "identify the exact contours of the underlying right said to have been violated." *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1988).

78 **[R. 13].**

"The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law." *Goss v. Lopez*, 419 U.S. 565, 572 (1975).

46** ***1. Dora Bell received notice and a hearing on three separate occasions.

Dora Bell testified at the Preliminary Injunction hearing that she received a notice of the upcoming disciplinary hearing concerning her son Taylor. [79] Dora Bell requested that the hearing be postponed until she could attend, and the school

conceded.[80] Dora Bell did attend the hearing.[81] At the hearing the Disciplinary Committee listened to the song, and Taylor was questioned about the lyrics in the song.[82] Dora Bell received a subsequent letter informing her of the Disciplinary Committee's recommendation for a seven day suspension and placement in an alternative school for five weeks, and she was advised of her of her right to appeal to the School Board.[83] On February 11, 2011, Ms. Bell received a letter from the School Board stating that the Board had found on February 7, 2011, that Taylor Bell "did threaten, harass, and intimidate school employees" in violation of School Board ***47** policy and Mississippi State Law.[84] The Board upheld the seven day out-of-school suspension, and Taylor was placed in alternative school for five weeks.

79 **[R. 534]; [R. 445-448]**.

80 **[R. 534].**

81 **[R. 534].**

82 **[R. 535].**

83 **[R. 449].**

84 **[R. 450].**

2. *Transfer to alternative school is not a due process violation.*

A student's transfer to an alternative education program with stricter discipline does not deny access to public education and does not violate a federally protected property or liberty interest. *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 111 F. 3d 25 (5th Cir. 997). Taylor Bell's transfer to alternative school does not violate his right to a public education and does not violate his mother's right to raise her child.

3. Seven day out-of-school suspension is not a violation of due process.

Taylor's short suspension prior to the alternative school transfer requires a slightly different analysis. The *Goss* Court outlined a two-step inquiry to determine whether procedural due process is implicated in school suspension cases. First, the court must examine the severity of the deprivation to determine if process applies. *Id*. at 576. Second, the court determines what process was required by the Constitution. *Id*. "In deciding the severity of the deprivation, the Court defined a 'temporary suspension' as a suspension of ten days or less." *Id*. at 581. The *Goss* Court found that [s]tudents facing temporary suspension have interests qualifying for protection ***48** 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. *Id*. The Court further held that the Due Process Clause in short suspension cases does not require hearings that "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." *Id*. at 584.

Taylor Bell's suspension was only seven days and falls into the "temporary suspension" category as defined in *Goss v. Lopez*, 419 U.S. 565, 572 (1975). Taylor's mother was informed of the charges against Taylor. Taylor had a disciplinary hearing at which counsel was present. Taylor appealed the findings of this Disciplinary Committee and went before the School Board. He was afforded an adequate opportunity to respond in each forum. Defendants have met the due process requirements set forth in *Goss*, and Plaintiffs' due process claim must fail.

E. Individual Defendants, Teresa McNeece and Trae Wiygul are entitled to qualified immunity.

The Briefs of Bell and Amici fail to include any citations to authorities ***49** or reference to the record in support of claims against individual Defendants McNeece and Wiygul as required by F.R.A.P. 28(a)(9)(A). Issues not raised or argued in the brief of Appellant may be considered waived and thus will not be noticed or entertained by Court of Appeals. *In re Texas Mortg. Services Corp.*, 761 F. 2d 1068 (5th Cir. Tex. 1985). The Court should not consider this issue.

In the event this Court does address this issue, it is established that qualified immunity is an entitlement not to stand trial or face the other burdens of litigation, and its applicability in this case was correctly determined. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

1. The regulation of Bell's speech by Superintendent McNeece and Principal Wiygul was objectively reasonable.

Qualified immunity should be recognized if officials "of reasonable competence could disagree on [whether a particular action is lawful]." *Hope v. Pelzer*, 536 U.S. 730, 752, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). Qualified immunity broadly protects "all but the plainly incompetent or those who knowingly violate the law." *Id.*, quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In *Porter v. Ascension Parish School Bd.*, 393 F. 3d 608 (5th Cir. 2004), this Court, while finding that a student drawing composed off campus, displayed only to ***50** members of his own household, stored off campus, and not purposefully taken by him to school or publicized in a way certain to result in its appearance at the school was protected by the First Amendment, still found that 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, this Court held that a reasonable school official would encounter a body of case law concerning First Amendment protection of student speech that sends inconsistent signals on how far school authority to regulate student speech reaches beyond the confines of the campus. *Id*. at 620.

Porter made it clear that even if the student's rights were clearly established at the time of his expulsion, the principal's determination that the drawing was not entitled to First Amendment protection was objectively reasonable. Even when a particular legal doctrine is clearly established, "[i]t is sometimes difficult for an [official] to determine how the relevant legal doctrine ... will apply to the factual situation the [official] confronts." *Id.*, citing *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

Porter shows that even when student speech is deemed protected by the First Amendment, school officials can still be granted qualified immunity. Superintendent ***51** Teresa McNeece testified at the Preliminary Injunction Hearing that her job as Superintendent is to supervise and to be proactive and to foresee if there could be a possible disruption or danger at schools within the Itawamba County School District. [85] Instead of being reactive, Superintendent McNeece testified she has to be proactive as to how staff handles these situations. [86] She further testified that she felt that a seven day suspension and placement into alternative school was a response the School District needed to have, [87] and that by virtue of this song, there was a foreseeable danger of substantial disruption at the Itawamba Schools. [88]

85 **[R. 619].**

86 **[R. 619].**

87 **[R. 619].**

88 **[R. 619].**

2. No federal court of appeals has ever denied qualified immunity to an educator in this First Amendment context.

In *Morgan v. Swanson*, [89] a qualified immunity appeal involving the question of whether Defendant school principals violated clearly established law when they restricted an elementary student from distributing written religious materials while at school, this Court noted:

89 *Morgan v. Swanson*, 659 F. 3d 359 (5th Cir. 2011) (*en banc*), cert. denied, 2012 U.S. LEXIS 4361 (U.S. June 11, 2012).

***52** We hold today that the principals are entitled to qualified immunity because clearly established law did not put the constitutionality of their actions beyond debate. When educators encounter student religious speech in schools, they must balance broad constitutional imperatives from three areas of First Amendment jurisprudence: the Supreme Court's school-speech precedents, the general prohibition on viewpoint discrimination, and the murky waters of the Establishment Clause. They must maintain the delicate constitutional balance between student's free-speech rights and the Establishment Clause imperative to avoid endorsing religion. "The many cases and the large body of literature on this set of issues" demonstrate a "lack of adequate guidance," [90] which is why *no federal court of appeals has ever denied qualified immunity to an educator in this area*. We decline the plaintiff's request to become the first. [91] (emphasis added)

90 *Pounds v. Katy Indep. Sch. Dist.*, 730 F. Supp. 2d 636, 638 (S.D. Tex. 2010); see also *Nurre v. Whitehead*, 580 F. 3d 1087, 1090 (9th Cir. 2009) ("There exists a delicate balance between protecting a student's right to speak freely and necessary actions taken by school administrators to avoid collision with the Establishment Clause.")

91 659 F. 3d at 371.

While Defendants do not concede that Bell's song regarding "capping" a teacher and putting a "pistol down your mouth" is protected speech, given the unsettled nature of First Amendment law as applied to off-campus student speech, [92] ***53** the contours of Taylor Bell's right to First Amendment protection in this case cannot be deemed "clearly established" such that it would be clear to a reasonable Itawamba official that suspending Bell and placing him in alternative school based on the content of his song was unlawful under the circumstances. As stated by this Court in *Morgan*, no federal court of appeals has ever denied qualified immunity to an educator in this area. Superintendent McNeece and Principal Wiygul are entitled to qualified immunity.

92 *Doninger v. Niehoff*, 642 F. 3d 334, 346 (2nd Cir. 2011) ("It is thus incorrect to urge ... that Supreme Court precedent necessarily insulates students from discipline for speech-related activity occurring away from school property, no matter its relation to school affairs or its likelihood of having effects - even substantial and disruptive effects - in school.")

F. Bell has no standing because assignment to an alternative education program is not a violation of 42 USC §1983.

Bell argues that neither the record nor precedent support the District Court's finding that his song caused a material and substantial disruption pursuant to *Tinker*. On the contrary, there have been *three separate findings* that Bell's speech caused a material and substantial disruption in the school. The Disciplinary Committee found that Bell's statements constitute harassment and intimidation of teachers and possible threats against teachers. [93] The School Board, after meeting in executive session and taking evidence and argument, unanimously found that Bell ***54** threatened, harassed, and intimidated school employees. The Board further found that Plaintiff's seven day out-of-school suspension as recommended by the Disciplinary Committee be upheld, that he be allowed to make up any work missed while suspended, and that Plaintiff be placed in alternative school for the remainder of the nine week grading period. [94] The District Court found that Bell's speech materially and substantially disrupted the school *and* it was reasonably foreseeable that the song would do so. [95]

93 **[R. 430-31].**

94 **[R. 432-36].**

95 **[R. 775-76].**

These disciplinary actions were taken pursuant to school policy and were not the most severe of approved punishments. [96] As this Court has acknowledged, the role of the Court is to enforce constitutional rights, not "to set aside decisions of the school administrators which [we] may view as lacking a basis in wisdom or compassion." *Ponce v. Socorro Independent School Dist.*, 508 F. 3d 765 (5th Cir. 2007). Bell has not suffered irreparable injury and has not been denied access to public education by being placed in an alternative school program, He has been given the opportunity to make up any missed work while suspended. No protected interest ***55** is implicated in the decision by the School Board to enforce its own disciplinary policy. Plaintiff's action is governed by §1983, [97] and this claim should be dismissed on the ground that he suffered no injury.

96 **[R. 432-36]; [R. 439-444].**

97 **[R. 8].**

VII. CONCLUSION

In a post-*Tinker* world, the concept of the "schoolhouse gate" has given way to the pervasive impact of the Internet on student speech and schools. Yet the essence of the *Tinker* standard that authorizes school disciplinary action based on the content and effect of student speech remains. Schools can regulate student speech which causes a material and substantial disruption, or that school officials can reasonably forecast will result in such disruption, even if the speech was made off campus. Consistent with recent holdings in social media student speech cases, Itawamba did not violate any of Bell's constitutional rights in administering discipline consistent with School District policy. The omnipresence of online social media dictates that a realistic assessment of student speech originating off-campus - and the propriety of school discipline triggered by disruptive effects of such speech - be based on more than geography, property lines or physical boundaries. Here there was a substantial nexus between Bell's off-campus "speech" and the foreseeable ***56** disruption that ensued on campus. In all three evidentiary hearings Bell was afforded regarding "The Song", it was found *not* to be protected speech. School administrators are in the best position to assess the potential for harm and act accordingly. They did so here. Courts have allowed wide leeway to school administrators disciplining students for writings or other conduct threatening violence. Affirmance of the District Court's decision would be consistent with the case precedent of this circuit and others around the nation involving student speech that causes a material and substantial disruption in school.

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