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A 'SUBSTANTIAL AND MATERIAL' REFINEMENT OF *TINKER*

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INTRODUCTION

On January 29, 2010, students belonging to Relentless, a non-school affiliated religious youth group, passed out 2-inch, realistic rubber-fetus dolls to their peers at Goddard High School and Roswell High School.[1] Attached to each doll was a card that contained the Relentless logo, a statement that the doll was a realistic depiction of a 12 week-old fetus, information about the county pregnancy center, and a Bible verse.[2] Relentless did not obtain pre-approval for distribution.[3] Members of Relentless offered a doll to each student they encountered.[4] Students who chose not to accept a doll at either school were not bothered or forced to do so.

On prior occasions, Relentless had passed out items at school without pre-approval and had never been sanctioned.[5] Yet on January 29, 2010, Roswell Independent School District[6] ("District") stopped the group's distribution and confiscated every doll.[7] Administrators[8] stated that Relentless' distribution was speech that "[w]ould cause a *substantial disruption or a material interference*[9] with the normal operation of the school or school activities."[10]

Members of Relentless filed suit against the District, arguing that their First Amendment rights had been violated.[11] Faced with a First Amendment challenge,

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* University of New Mexico School of Law J.D. Candidate 2016. First, I would like to thank my parents for their constant and unconditional support of my academic, professional and personal endeavors. I also want to extend my gratitude to Professor Sidhu for his kind feedback and guidance on how to transition my thoughts into persuasive legal arguments. Finally, a sincere thank you to Judge Bustamante and Michael Jasso for their insight and constructive edits.

1. Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 29–30 (10th Cir. 2013). Goddard High School and Roswell High School are located in Roswell, New Mexico.

2. *Id.* at 30 (The verse read, "For you formed my inward parts; You wove me in my mother[']s womb. I will give thanks to You, for I am fearfully and wonderfully made; Wonderful are your works, And my soul knows it very well. Psalms 139:13–14.").

3. *Id.* at 30.

4. *Id.*

5. *Id.* at 29.

6. Both Roswell High School and Goddard High School are part of Roswell Independent School District, also referred to as "District."

7. *Taylor*, 713 F.3d at 31.

8. Administrators are classified as superintendents, principals, and vice-principals.

9. (emphasis added).

10. *Taylor*, 713 F.3d at 32–33; Roswell Independent School District, 5000 Pupil Personnel: Q. Distribution of Non School Sponsored Literature §2(a) 48 (2014).

11. *Taylor*, 713 F.3d at 33.

administrators were unable to articulate a coherent standard of what constituted a "substantial disruption or a material interference."[12] Despite the District's use of an unspecified and inconsistently applied standard, the magistrate judge held in favor of the schools. On appeal, the Tenth Circuit upheld the magistrate. [13] In doing so, the Circuit affirmed that a significant amount of deference is given to administrative judgment to accurately determine a substantial and material disruption.[14]

As *Taylor* exemplifies, the substantial and material disruption standard is problematic. It is ill-defined, vague, and open to wide interpretation.[15] Courts using this standard have routinely remained silent on specific criteria that constitute a substantial disruption.[16] Instead, courts rely on schools to decide what will negatively affect their environments and cause disruption.[17]

The lack of delineated criteria frustrates students' First Amendment rights and permits obscure school policies. Allowing administrators to determine what constitutes a substantial and material disruption without distinct and pre-set guidance promotes subjective and inconsistent application. First Amendment rights are constitutional liberties that should not be subjected to arbitrary criteria that fluctuate with different administrators. A clear and succinct policy would lead to less controversy and fewer lawsuits against school districts, allowing administrators to devote more time, attention, and money to other issues.

This note proposes that the substantial disruption and material interference standard be narrowed and specified for consistent and predictable applicability. The analysis focuses on disruptive student school speech generally and does not differentiate between prior restraint and subsequent punishment.[18] This note does not address all of the Tenth Circuit's holdings in *Taylor*.[19] The analysis is limited to the

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12. Appellants' Opening Brief at 29–32; Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25 (10th Cir. 2013) (No. 11–2242) (Administrators stated that policies were left vague to allow "wiggle room". When asked what "non-school sponsored literature" covered, Goddard Assistant Principal Edgett, Superintendent Gottlieb, and Roswell Assistant Principal Kakusa each provided different and distinct definitions.); (The "substantial disruption and material interference" standard was set forth by the Supreme Court in *Tinker v. Des Moines Independent Community School District*, as an attempt to balance student free speech with schools' need for order and discipline.) Tinker v. Des Moines Indep. Com. Sch. Dist., 393 U.S. 503 (1969). ("Substantial disruption or material interference" will also be referred to as the "substantial and material disruption standard").

13. *Taylor*, 713 F.3d at 29, 36–39.

14. *See* Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966); *see also* Terry B. Light, *Constitutional Law – Right of Free Speech – Tinker v. Independent Community School District, 89 S.Ct. 733 (1969)*, 11 WM. & MARY L. REV. 275, 276–277 (1969).

15. Allison G. Kort, *An Imminent Substantial Disruption: Towards A Uniform Standard For Balancing the Rights of Students to Speak and the Rights of Administrators to Discipline*, __ DARTMOUTH L.J. __ (2014, forthcoming).

16. *Id.* at 2; Light, *supra*, note 14, at 276.

17. *See* Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 267–268 (3rd Cir. 2002); *see also*, Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1247 (11th Cir. 2003); Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 1194, (4th ed. 2011); Light, *supra*, note 14 at 276.

18. This note does not discuss internet-based speech or speech that originates off campus and is brought onto campus by a third party. Speech that falls under the *Fraser*, *Hazelwood* or *Morse* is also excluded from this analysis.

19. The Tenth Circuit held in *Taylor* that "1) students' claims were not moot; 2) officials did not violate students' free speech rights; 3) district's pre-approval policy did not violate students' free rights

Circuit's use and reasoning of *Tinker* as applied to substantial and material disruption.

Part I of this note discusses the substantial and material disruption standard set forth in *Tinker* and how the Tenth Circuit applied that standard in *Taylor*. Part II examines how lower courts have broadened the threshold for restriction based on *Tinker* by relying on past incidents of disruptive speech in schools or by applying an unpredictable ad hoc analysis. This section also discusses how the Tenth Circuit in *Taylor* misapplied and conflated the broadened *Tinker* standard. Part III proposes refining the substantial disruption and material interference standard to be predictable and more beneficial to both students and schools. The proposal suggests a balancing test of four factors: 1) speech intended to isolate, 2) magnitude of peer reaction, 3) location of speech, and 4) duration (of disruption). Part IV applies the proposed standard to the facts of *Taylor* to demonstrate how well-defined criteria would have affected the New Mexico magistrate and Tenth Circuit's holding.

I. BACKGROUND

A. Statement of the Case

Relentless in Roswell ("Relentless")[20] was a youth group associated with a local Roswell church, Church on the Move.[21] Plaintiffs were members of the group and students at Roswell High School and Goddard High School who frequently expressed religious ideas at school.[22] In late 2009, Relentless began a program to "put God back into the schools."[23] Each week, group members would distribute items at Goddard and Roswell.[24] The first two distributions were food[25] and drink[26] that were not explicitly linked to religion.[27] Later distributions of candy canes and "affirmation rocks" were explicitly associated with religious sentiment.[28] On all of these occasions, Relentless did not obtain school permission for their distributions,[29] nor did administrators confiscate the items or reprimand the students.[30] However, on January 29, 2010, the District halted Relentless' distribution and confiscated the group's possessions based on policies that had previously been unenforced.[31]

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under Free Speech Clause . . . 5) officials did not violate students' rights under Free Exercise Clause; and 6) officials did not violate students' equal protection rights. *Taylor*, 713 F.3d at 26.

20. Appellants' Opening Brief at 2; Taylor v. Roswell Indep. Sch. Dist, 713 F.3d 25 (10th Cir. 2013) (No. 11–2242).

21. *Taylor*, 713 F.3d at 29.

22. *Id.*; Goddard High School is also referred to as "Goddard." Roswell High School is also referred to as "Roswell."

23. *Id.* at 29.

24. *Id.*

25. *Id.* at 30 (220 chicken salad sandwiches for faculty).

26. *Id.* (Hot chocolate for both faculty and students).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 29–31.

Before classes commenced on January 29, 2010, members of Relentless passed out 2-inch, realistic looking rubber fetus dolls at their respective schools.[32] Goddard's Assistant Principal, Brian Luck, arrived at school and upon noticing the dolls, asked other administrators if Relentless had permission for the distribution.[33] Another Assistant Principal, Michelle Edgett, responded that there was no pre-approval for the distribution and that the dolls should be confiscated.[34] While Mr. Luck was on his way to stop the distribution, he observed several students destroying and throwing the dolls in the hallway.[35] A group of female students also stopped him to voice their exasperation.[36] Mr. Luck subsequently notified Relentless that the distribution was being stopped and he confiscated the remaining dolls.[37] As the morning progressed, incidents of class disruption and student misconduct with the dolls were observed.[38] Reports indicated that students were throwing doll heads at their peers, sticking the heads to the ceilings of classrooms and lighting the heads on fire.[39] The administration announced over the school speaker system that non-school related items were not to be distributed and all dolls should be confiscated.[40] An administrator from Goddard then called Roswell's principal, Ruben Bolaños, to inquire if similar events had occurred.[41]

The Goddard administrator's phone call ignited the Roswell administration's attention to Relentless' doll distribution.[42] Principal Bolaños was not on campus when he received the phone call, but immediately instructed the on-duty security guards at Roswell to confiscate the dolls if they were a "disruption to the educational process."[43] Confiscation later began when a security guard observed several instances of doll heads being ripped off, thrown around, and repurposed.[44] In response to the observed disruption, a teacher at Roswell held the remaining, undistributed dolls in her classroom until it was determined whether the distribution could continue.[45] Administrators at both schools justified the censorship by stating

32. *Id.* at 30.

33. *Id.*

34. *Id.*

35. *Id.* at 30–31.

36. *Id.* at 31.

37. *Id.*

38. Appellees Roswell Independent School District and Superintendent Michael Gottlieb's Answer Brief, at 12–13; Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25 (10th Cir. 2013) (No. 11–2242).

39. *Id.* at 13.

40. *Id.* at 13–14.

41. *Taylor*, 713 F.3d at 31.

42. Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, at ¶ 56, Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25 (10th Cir. 2013) (No. 11–2242).

43. *Taylor*, 713 F.3d at 31.

44. Appellees Roswell Independent School District and Superintendent Michael Gottlieb's Answer Brief, at 14, Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25 (10th Cir. 2013) (No. 11–2242) (Students used the plastic doll parts in a variety of ways including as projectiles, pencil toppers and a student attaching a head to his groin area.).

45. Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, at ¶ 57, Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25 (10th Cir. 2013) (No. 11–2242).

that Relentless' actions were creating substantial disruptions in violation of District policy.[46]

When Relentless began weekly distributions at Roswell and Goddard, the school district had two policies requiring pre-approval for non-school related distribution.[47] The first policy, Policy 7110, was a formal, written policy, that "reserves the right" for a school to examine and approve promotional materials seeking to be distributed on school property or at school affiliated events.[48] The second pre-approval policy was unwritten and required students to seek prior approval on distribution of more than 10 copies of all non-school affiliated materials.[49] Four months after the doll distribution, the unwritten policy was formalized as Policy 5195.[50] Section 2(a) of Policy 5195 states that non-school related material may be denied distribution if it is determined that doing so "[w]ould cause a substantial disruption of or a material interference with the normal operation of the school or school activities."[51] Policy 5195 also contains an appeal process by which students denied distribution may have their materials reconsidered.[52]

Seeking injunctive relief, the student plaintiffs brought three counts against Roswell Independent School District.[53] The first count contained two claims: a) a facial challenge against the constitutionality of the policies regarding prior restraint, vagueness, and overbreadth, and b) violation of free speech.[54] The second count was a hybrid claim alleging that the censorship of the doll distribution was a violation of free speech.[55] The third count claimed a violation of the Equal Protection Clause.[56] Both parties filed for summary judgment.[57] The magistrate judge granted summary judgment for the District on all claims.[58]

B. Rationale

The Tenth Circuit reviewed the lower court's grant of summary judgment de novo.[59] Except for the hybrid aspect of claim two, each argument raised in the lower court was appealed.[60] Acknowledging that Mr. Luck's initial reasoning for

46. *Id.* at 34.

47. *Id.* at 30.

48. Roswell Independent School District, 7000 School Community Relations: A. Advertising; Distribution of Printed Material 2 (2014).

49. *Taylor*, 713 F.3d at 32.

50. *Id.*

51. Roswell Independent School District, 5000 Pupil Personnel: I. General: Q. Distribution of Non School Sponsored Literature 48 (2014).

52. *Id.*

53. *Taylor*, 713 F.3d at 33.

54. *Id.*

55. *Id.* (the hybrid theory was later taken out of the plaintiff's free exercise argument).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 34.

60. *Id.* at 33–34.

halting distribution was vague,[61] the Circuit upheld the magistrate's ruling of summary judgment for the District on all claims.[62]

C. Legal Background

1. Categorization of Speech Under the First Amendment

The First Amendment of the United States Constitution provides the right to freedom of speech.[63] Speech that occurs on government property is categorized into three groups based on the type of location: a public forum, a limited public forum, or a nonpublic forum.[64] A public forum is an area that is customarily available for public use.[65] A limited public forum is not usually available to the public, but may temporarily be open for public use.[66] A non-public forum is generally not open to public expression.[67] Public schools are classified as a non-public forum.[68] Regulations in a nonpublic-forum are permissible under three conditions:[69]1) content-neutral time, place, or manner restrictions, 2) if the speech falls into a narrowly-defined category that was created in response to a compelling interest, or 3) if the regulation is reasonable and viewpoint neutral.[70] The government may not restrict speech because of disagreement with a particular viewpoint.[71]

2. Schools as a Unique Public Forum

"It can hardly be argued that either students or teachers shed their constitutional right to freedom of speech or expression at the schoolhouse gate."[72] This oft-cited quote from *Tinker v. Des Moines Independent School District* highlights the proposition that school speech should not and cannot be fully regulated by school administrators.[73] The impossibility of the Court to consider every individual school's unique characteristics and mission makes it difficult to create a uniform speech regulation for administrators to most effectively run their schools.[74]

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61. *Id.* at 38–39.

62. *Id.* at 54.

63. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

64. John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW, 1262 § 16.1(f) (8th ed. 2010).

65. Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1981–1982 (2011); *See*, Nowak, *supra*, note 64 at 1262 § 16.1(f) (e.g. city street).

66. *See* 16A AM. JUR. 2D CONSTITUTIONAL LAW, § 542; *see also*, Nowak, *supra*, note 64 at 1262 § 16.1(f) (e.g. a university meeting hall).

67. *See* CONSTITUTIONAL LAW, *supra*, note 66 at § 543; *see also*, Nowak, *supra*, note 64 at 1263 § 16.1(f).

68. Nowak, *supra*, note 64 at 1263 § 16.1(f).

69. *Id.*

70. *Id.*

71. Nowak, *supra*, note 64 at 1263 § 16.1(f).

72. Tinker v. Des Moines Indep. Com. Sch. Dist., 393 U.S. 503, 506 (1969).

73. *Id.* at 511.

74. *See* Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 671 (7th Cir. 2008).

Functioning *in loco parentis*,[75] a school must be able to correct for an array of problems.[76] If negative conduct and speech remains undisciplined, schools lose their ability to effectively educate pupils.[77] Administrators need to provide discipline and keep an orderly environment conducive to learning.[78] Speech may solicit reactions from other students, creating a tension filled environment.[79] School officials emphasize the need to impose discipline for inappropriate student speech to minimize commotion that causes disturbance to class instruction, takes away the focus of pupils, and disrupts the purpose of the institution.[80]

Equally, students retain a right of proper notice regarding the realm of acceptable speech and should not be subject to arbitrary discipline.[81] Schools serve to educate the nation's youth to become productive, industrious, and *freethinking citizens*.[82] "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[83]

Schools need to educate their students and maintain authority while simultaneously respecting their students' constitutional rights.[84] Balancing these two interests at issue should be reasonable and "contribute[] to the maintenance of order and decorum within the educational system."[85]

3. Establishment of Tinker's "Substantial and Material Disruption"

In early December 1965, the Des Moines school administration became aware of students' plans to protest the Vietnam War by wearing black armbands to school.[86] In response, on December 14, 1965, the school enacted a policy prohibiting the armband display.[87] Despite the regulation, three students wore protest armbands to school.[88] A few students made adverse remarks in the school hallways to the three armband clad students, but no violence resulted and there was no sign of classroom

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75. BLACK'S LAW DICTIONARY 385 (4th ed. 2011) (defined as, "Of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent.").

76. Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 684–686 (1986).

77. *Nuxoll*, 523 F.3d at 672.

78. *Fraser*, 478 U.S. at 690 (Marshall, J., dissenting); Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1247 (11th Cir. 2003).

79. Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749, 751–752 (5th Cir. 1966).

80. *See* Burnside v. Byars, 363 F.2d 744, 746–747 (5th Cir. 1966); *see also* Terry B. Light, *Constitutional Law – Right of Free Speech – Tinker v. Independent Community School District, 89 S.Ct. 733 (1969)*, 11 WM. & MARY L. REV. 275, 275–276 (1969).

81. *Fraser*, 478 U.S. at. 691 (Stevens, J., dissenting).

82. Tinker v. Des Moines Indep. Com. Sch. Dist., 393 U.S. 503, 507 (1969) (emphasis added) (*quoting* West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)).

83. *Tinker*, 393 U.S. at 512 (*quoting* Shelton v. Tucker, 364 U.S. 479, 487 (1960)); *see* Terry B. Light, *Constitutional Law – Right of Free Speech – Tinker v. Independent Community School District, 89 S.Ct. 733 (1969)*, 11 WM. & MARY L. REV. 275, 278 (1969) (indicating that children's right to free speech may not be equal to an adult's right to free speech).

84. *Tinker*, 393 U.S. at 507.

85. *Burnside*, 363 F.2d at 748.

86. *Tinker*, 393 U.S. at 504.

87. *Id.*

88. *Id.*

disruption.[89] Referring to the standard delineated in *Burnside v. Byars*,[90] the United States District Court dismissed the complaint.[91] On appeal, the Eighth Circuit heard the case en banc and affirmed.[92] However, the United States Supreme Court emphasized that conduct which "materially disrupts classwork or involves substantial disorder or invasion to the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."[93] The Court further reasoned that a regulation of students is unconstitutional unless it could be shown that "the students' activities would materially and substantially disrupt the work and discipline of the school."[94] Mere fear of disturbance is not enough, but a specific reason to anticipate the interference must be present.[95]

Courts later expanded *Tinker* to provide that in determining the likelihood of a material and substantial disruption, schools may consider foreseeability of disruption by looking at previous school disturbances arising out of similar speech or conduct.[96] A well-founded and explicit connection between the prior speech and present speech must be established to justify fear of a material and substantial disruption or interference with the rights of others.[97] A distinction is not drawn between disruption caused directly by those creating the speech and disruption caused by the conduct of third parties reacting to the speech.[98]

The United States has developed three exceptions to the "substantial and material disruption" standard post-*Tinker*.[99] The first exception to *Tinker* was *Bethel School District v. Fraser* which involved a student government election speech with sexual double entendre.[100] The Court reasoned that lewd and vulgar student speech threatened to undermine the school and may be subject to sanction by administrators.[101] In the second case, *Hazelwood School District v. Kuhlmeier*, students brought an action alleging a violation of their First Amendment rights when a school principal vetoed and deleted two pages from a student-run, school-sponsored newspaper.[102] The Court held that administrators may regulate school-sponsored student speech.[103] Most recently, in *Morse v. Frederick*, a student unfurled a banner reading "BONG HiTS 4 JESUS" at a school sponsored event and the Court

89. *Id.* at 508.

90. Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966) (holding that schools can not infringe on student speech if the speech does not "materially and substantially" interfere with operation of the school).

91. *Tinker*, 393 U.S. at 504.

92. *Id.* at 505.

93. *Id.* at 513.

94. *Id.*; *see* Terry B. Light, *Constitutional Law – Right of Free Speech – Tinker v. Independent Community School District, 89 S.Ct. 733 (1969)*, 11 WM. & MARY L. REV. 275, 277 (1969).

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

96. Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 255 (3rd Cir. 2002).

97. *Id.* at 257; *cf.* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3rd Cir. 2001).

98. *See* Jews for Jesus v. Mass. Bay Transp. Auth., 984 F.2d 1319, 1324–1325 (1st Cir. 1993).

99. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393 (2007).

100. *Fraser*, 478 U.S. at 677–678.

101. *Id.* at 685–686.

102. *Hazelwood*, 484 U.S. at 262.

103. *Id.* at 273.

held that student speech advocating illegal drug use is improper and subject to sanction.[104]

4. Summary of the Opinion

In *Taylor*, the Tenth Circuit used the *Tinker* substantial and material disruption standard to analyze Relentless' distribution.[105] The Circuit ruled that there was a greater possibility of disturbance with rubber figurines than the possibility of disturbance due to armbands.[106] When student speech is active, rather than passive,[107] restrictions are more likely to be appropriate.[108] Emphasizing the series of disturbances made at the two high schools, the Circuit stated the District had a special interest in protecting students and the educational purpose of the school.[109]

Although Mr. Luck[110] may have stopped distribution before a substantial and material disruption took place, the Circuit reasoned that a small period of unjustified censorship did not outweigh a reasonable forecast of substantial disruption since disturbances eventually transpired.[111] As for the confiscation at Roswell, the dolls were appropriately confiscated only when the school security guard identified disturbances.[112]

The Tenth Circuit further held that the language in Policy 5195, section 2(a), limits school discretion to objective reasonableness.[113] The school policy in this case, was equal to the U.S. Supreme Court's promulgated standard in *Tinker*, where speech can be constitutionally censored if it is reasonably forecast to cause a substantial and material disruption.[114] Furthermore, Policy 5195 contained sufficient procedural safeguards to protect student rights and guard against complete administrative control.[115]

II. ARGUMENT

Ironically, because disruption did not occur in *Tinker*, the opinion fails to identify specific criteria that constitute a substantial and material disruption.[116] Continued lack of guidance for applicability of the standard has led lower courts to give greater deference to school judgment while still avoiding specifying and narrowing the standard.

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104. *Morse*, 551 U.S. at 396–397, 410.

105. Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 36 (10th Cir. 2013); *supra*, note 18.

106. *Id.* at 38; *see*, Tinker v. Des Moines Indep. Com. Sch. Dist., 393 U.S. 503 (1969).

107. Passive speech is defined by the court silent expression. Inferring the counter principal, active speech is encompasses verbal or physical statements.

108. *Taylor*, 713 F.3d at 37.

109. *Id.* at 38.

110. Mr. Luck is Goddard High School's Assistant Principal.

111. *Taylor*, 713 F.3d at 39.

112. *Id.*

113. *Id.* at 45–46.

114. *Id.* at 46.

115. *Id.* at 47.

116. Tinker v. Des Moines Indep. Com. Sch. Dist., 393 U.S. 503, 514 (1969); Karp v. Becken, 477 F.2d 171, 174 (9th Cir. 1973).

A. Foreseeability of Disruption

In giving schools greater ability to control their environments, courts have read *Tinker* to implicitly allow restrictions before speech has occurred.[117] Therefore, when disruption in the schools setting is reasonably foreseeable, administrations may take preventative action.[118] Restricted speech and the anticipated disruption must be explicitly linked[119] and sufficiently similar to past events.[120] To demonstrate this connection, administrators must indicate that the category of speech has caused disruption in the past,[121] that speech may incite students to rebel against the function of a school,[122] or that it may lead to student violence.[123]

In *Taylor*, the Tenth Circuit misapplied the standards for disruptive student speech by using a hybrid of foreseeability and substantial and material disruption. The Circuit reasoned that a variety of situational factors,[124] allowed for a reasonable forecast of disruption. [125] This approach is a gross deviation from the established practice of foreseeability analysis. The court failed to demonstrate previous history of disruptive incidents, fear of violence, or the potential of the school losing its functional purpose. The Circuit did not attempt to make a lesser connection of similarity between Relentless' distributions and previous disruptive conduct. Instead, the analysis reasons that a disruption was foreseeable because disruptive events eventually transpired.[126] This argument is flawed as it ignores the prerequisite that a demonstration of reason to censor speech needs to be shown *before* the speech is restricted.[127] The Circuit's reasoning embraces exactly what *Tinker* warned against: regulation based on an "undifferentiated fear or apprehension of disturbance."[128]

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117. McAllum v. Cash, 585 F.3d 214, 223 (5th Cir. 2009) (citing Tinker, 393 U.S. 503, at 514 (1969)); Lowery v. Euverard, 497 F.3d 584, 593 (6th Cir. 2007).

118. *McAllum*, 585 F.3d at 223.

119. *Id.*; Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 257 (3rd Cir. 2002).

120. *Sypniewski*, 307 F.3d at 256 (holding that the term "redneck" was not sufficiently related to both the term "hick" and the Confederate flag which had caused previous disruptive incidents).

121. *See McAllum*, 585 F.3d at 222; *see also*, Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1249 (11th Cir. 2003); Defoe ex. rel Defoe v. Spiva, 625 F.3d 324, 327 (6th Cir. 2010); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1362 (10th Cir. 2000); *Sypniewski*, 307 F.3d at 256, 247 (holding that without a history of past disruption, restrictions are invalid).

122. Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 674 (7th Cir. 2008) ("[I]f there is reason to think that a particular type of speech will lead to . . . other symptoms of a sick school--symptoms therefore of a substantial disruption--the school can forbid the speech.").

123. Karp v. Becken, 477 F.2d 171, 176 (9th Cir. 1973).

124. The Tenth Circuit relied on five factors to indicate a reasonably forecast of disruption: 1) The speech by Relentless was not silent or passive, 2) items remained in the hands of students throughout the day, 3) number of items created the potential for substantial disruption, 4) the dolls were made of rubber, which could be pulled apart, and the 5) small size of the dolls. Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 38 (10th Cir. 2013).

125. *Id.*

126. *Id.* at 39.

127. There must be a valid reason to censor speech before restrictions are implemented. Without a pre-requisite reason, speech is restricted without cause, creating an explicit and apparent violation of the First Amendment right to free speech.

128. Tinker v. Des Moines Indep. Com. Sch. Dist., 393 U.S. 503, 508 (1969).

B. Materialization of Disruption

When disruption has progressed past foreseeability and materialized, the court relies on fact-specific scenarios.[129] The purpose of fact-specific analysis is to give administrations the capability to deal with a wide-array of situations or potential problems.[130] The result of this analysis is an ad-hoc standard that fluctuates with circumstances. With fact-dependent analysis, teachers are unable to uniformly agree on what constitutes a disruption, as evidenced by *Taylor*.[131] This impreciseness creates uncertainty amongst students as to the breadth of tolerable free speech. In effect, a fickle standard exists, allowing teachers to freely regulate anything they feel is improper.

The substantial and material disruption standard has been criticized as insufficient when terms are undefined[132] or ill-defined, leading to inconsistent interpretation. Just as foreseeable disruption requires substantive and actual reasoning to restrict speech, actual disruption should be held to the same level of scrutiny. The Tenth Circuit has confirmed that regulation of speech must be based on concrete evidence on definitive criteria.[133] Lack of definitive reason for restriction goes beyond the standard articulated in *Tinker*.[134] The failure to illustrate how to interpret substantial disruption or material interference makes it difficult for an administrator to reasonably analyze a situation for disruption.[135] Unclear restrictions create problems instead of fixing them.[136]

The Tenth Circuit court briefly addresses the actual disruptions that took place in the school environment in *Taylor* as a result of the doll distribution, "including substantial disruption to classroom instruction, damage to school property . . . and risks to student safety . . . ."[137] Using the identified disruptions, the court held that the instances were enough to meet the threshold of material and substantial.[138] However, a close look at the record reveals that the administration itself was unable to articulate a specific standard to determine when speech would be prohibited.[139] Without a recognizable standard, the possibility that students' rights will be greatly

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129. *See* LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001); *see also* Pinard v. Clatskanie Sch. Dist., 467 F.3d 755, 770 (9th Cir. 2006) ("[T]he First Amendment is properly read to permit a school district's 'reasonable regulation of speech connected activities in carefully restricted circumstances.'") (citing Tinker v. Des Moines Indep. Com. Sch. Dist., 393 U.S. 503 (1969)).

130. Baker v. Downey City Bd. of Educ., 307 F.Supp. 517, 527–528 (C.D. Ca. 1969); *see* Nuxoll, 523 F.3d at 675 ("But context is vital.").

131. Appellants' Opening Brief at 18, Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25 (10th Cir. 2013) (No. 11–2242).

132. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3rd Cir. 2001).

133. *Id.* at 212 (citing West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000) (*West* held that history of tension provided reason to anticipate disruption).

134. *Id.* at 217.

135. Nitzberg v. Parks, 525 F.2d 378, 383 (4th Cir. 1975).

136. *Id.* at 384.

137. Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 38 (10th Cir. 2013).

138. *Id.* at 39.

139. Appellants' Opening Brief at 29–30, Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25 (10th Cir. 2013) (No. 11–2242).

inhibited is valid. Students who are afraid of being reprimanded for possibly unprotected speech might become restricted and confined in their thinking.[140]

The court addresses the possibility that vice-principal Luck may have stopped the distributions without justification.[141] However, the court characterizes the potential administrative mistake as short term, lasting between a few minutes and two hours.[142] What the court fails to address is that improper speech restriction, regardless of duration, is a violation of students' First Amendment rights.

The court rests their opinion on the notion that because disruptive incidents eventually transpired, restrictions against Relentless were justifiable. In doing so, the court looks at the final result rather than the steps taken to reach that point of restriction. By taking this approach, the court ignores the protections that should be afforded to student speech. Although distribution policies were in place, they remained unenforced and there was no way for Relentless to predict when the school would alter their enforcement decision.

In their analysis, the Circuit confuses the purpose of the *Tinker*. Foreseeability and the substantial and material disruption standard are distinct and cannot be combined. Furthermore, the substantial and material disruption standard should not be applied as a subjective ad hoc analysis. In applying a situational analysis, students remain unclear on prohibited speech.

C. Court Guidance for Clarifying *Tinker*

Several opinions have offered criteria that, if adopted, would assist in clarifying the meaning of material and substantial disruption.[143] These propositions contemplate a standard that is narrow enough to give students adequate notice and promote freethinking,[144] while maintaining flexibility for administrators to address a wide array of potential situations. These suggestions include whether previous negative incidents regarding the speech have occurred[145] and the magnitude of peer reaction.[146]

The use of prior negative experiences to regulate student speech would require administrators to provide concrete and substantive evidence of similar incidents as support for their restrictive regulations.[147] This criterion has the added benefit of notice: if the school has imposed discipline for past speech, students have been explicitly warned of potential consequences.

Administrators, in effect, measure disruption on the basis of peer reaction. If there is no reaction, then speech cannot be classified as disruptive, but may simply be inappropriate. Even if there is disruption, administrators should consider the

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140. *Cf.*, Bethel School Dist. No. 403 v. Fraser, 478 U.S. at 690 (1986) (Marshall, J., dissenting).

141. *Taylor*, 713 F.3d at 39.

142. *Id.*

143. *See* Westfield High Sch. L.I.F.E. Club v. City of Westfield, 249 F.Supp.2d 98, 124–125 (D. Mass. 2003); *see also* Defoe ex. rel Defoe v. Spiva, 625 F.3d 327 (6th Cir. 2010) (discussing the importance of *series* of past events that include racial violence, threats and tension); Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 256 (3rd Cir. 2002).

144. Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966).

145. *Westfield High Sch. L.I.F.E. Club*, 249 F.Supp.2d at 111.

146. *Defoe ex. rel Defoe*, 625 F.3d at 333.

147. *Sypniewski*, 307 F.3d at 256.

factual circumstances of the situation. Students may react differently depending on a variety of factors, including the identity of the speaker, location of speech, time of day of speech, and any potential incentives to accept or reject the speech. These factors properly contextualize the magnitude of peer reaction. These suggestions are a starting point, but the Court should consider several additional factors, with the ultimate goal of upholding the spirit of *Tinker*: "specificity and concreteness."[148]

III. EXAMPLES

The refinement proposed in this note is derived from 1) explicit guidance given by various courts in free speech cases and 2) by extracting the factors which courts use to analyze the nature of disruptive conduct.

Foreseeability of disruption can be refined in order to broaden applicability. If student speech has a history of causing disruption or inciting violence, administrators can censor sufficiently similar speech. To substantiate a history, a school should be able to show a pattern[149] of speech as disruptive. A pattern must require more than one incident at the same school. On a larger scale, a district can use the similarity analysis[150] between schools under its purview to forecast disruption.[151] For this application, a higher standard must be met – more than one school within a district must have a pattern of incidents to broaden restrictions on another school. When violence resulting from speech is anticipated, the administration is not required to adhere to the previous incidents requirement.[152]

For a proper restriction, speech that does not fall under the foreseeability standard must be evaluated under substantial and material disruption. Under the latter standard, speech cannot be censored before it materializes. Once a negative reaction to the speech manifests, the administration may determine if it may properly restrict speech by applying the substantial and material disruption standard.[153]

The substantial and material disruption standard should be turned into a balancing test of several factors. The four proposed factors are derived from guidance of the court and areas of contention that arise in school speech cases: 1) speech intended to isolate, 2) magnitude of peer reaction, 3) location of speech, and 4) duration. The factors will take on different significance depending on the situation at hand. Therefore, the importance of each factor can be adjusted. In some instances, a factor may be inapplicable. Once the applicability of factors is determined,

148. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3rd Cir. 2001) (citing West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000)).

149. Pattern is defined as "The regular and repeated way in which something happens or is done." MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2008).

150. *Supra*, II.A.

151. Districts are limited to using the similarity analysis between schools within their control. If the similarity analysis is broadened to schools in neighboring districts or states, the foreseeability standard risks becoming nebulous. Administrators could search across the nation for speech that fits the similarity analysis in order to censor their students. This potential problem would negate the need for a history or pattern of disruptive incidents.

152. Speech indicative of materializing violence can be immediately censored, since not doing so may result in dire and irreversible consequences.

153. If violent speech is present, administrators reserve the right to censor speech without any analysis and the substantial and material disruption standard should be disregarded.

administrators should balance the factors against one another to determine a proper resolution. This balancing test allows for students to be aware of the disciplinary standard while simultaneously giving administrators flexibility to maintain discipline.

A. Speech Intended to Isolate

Administrators should assess student speech to determine if it discriminates or has the practical effect of singling out a certain individual or subset of individuals. Schools have the duty to protect students from abuse or harm while providing an environment that is conducive to learning.[154] Speech not directed at the entirety of a population has the potential effect of making students feel targeted and unsafe, leading to distress and a lack of focus on academics.

B. Magnitude of Peer Reaction

The intensity of acrimony felt by the student body quantifies the *substantial* portion of the standard. Administrators should appraise the magnitude of peer reaction to student speech. Disruption can be caused either in an explicit or in a subtle manner. Explicitly disruptive speech will have an apparent and easily identifiable disruptive effect on the student body, causing many students to become agitated.[155] Speech with more subtle disruptive effects, such as speech that has the tendency to incite[156] or be objectively provocative, may seem to reach a small number of students, but because of its character, will later cause considerable disruption.[157]

C. Location of Speech

Materiality of the disruption should account for location.[158] Student speech that takes place in a formal teaching and learning environment should be regarded as more readily disruptive than that which takes place elsewhere.[159] When student speech takes place during a time where learning is explicit, [160] it may more readily interfere with the school's mission and its ability to effectively teach pupils. If the

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154. *Supra*, I.C.ii.

155. Explicit disruption would occur if someone dressed in Ku Klux Klan attire walked down the middle of a hallway at a school where racial tensions existed.

156. *See* Brandenburg v. Ohio, 395 U.S. 444, 447–449 (holding that speech which incites or is likely to incite is punishable); *see also* Price v. State, 873 P.2d 1049 (Okla. Crim. App. 1994); Noto v. United States, 367 U.S. 291, 297 (1961); David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 11–14 (1994) (discussing the modern test for analyzing and punishing speech causing incitement).

157. For example, speech actively encouraging a small group of students to wear Ku Klux Klan attire and begin promoting the division in races at school would later have a likely drastic effect on the school's population.

158. Administrators should consider if the speech takes place a classroom, hallway, lunchroom, parking lot, et cetera.

159. *See* Nicole Santa Cruz, Lauren Williams & Mike Anton, *'Irvine 11': 10 students sentenced to probation, no jail time*, LOS ANGELES TIMES BLOG (Sept. 23, 2011, 2:37 PM), http://latimesblogs.latimes.com/lanow/2011/09/irvine-11-sentenced-probation-no-jail-time.html (last visited Nov. 16, 2014).

160. Explicit learning is when material is taught, such as a presentation, assembly or class.

speech is outside of a formal teaching environment, it may interfere with the peaceful atmosphere of the school, but does not necessarily infringe on the school's academic mission.

D. Duration

The duration of disruption should be considered in accord with the location where the disruption took place. Disruptive speech that occurs during an explicit learning time should have a short durational requirement. The classroom is a formal environment and the time when a school performs its most direct and relevant function – education.[161] Except for the teacher, the educational atmosphere is likely quiet, making any likelihood of distraction by student speech high. Speech that takes place outside the formal learning environment should have more lenient durational requirements. Outside of class, students often engage without the constraints imposed in a learning environment. Students engage in conversation about topics unrelated to school and are not under the immediate watch of administrators. When not confined to the learning environment, students have the ability to move locations and remove themselves from disturbing situations. There is also outside of class for tension-filled situations to diffuse before resuming learning time. Disruptive speech outside of the formal learning environment should be given greater leeway.

These factors do not purport to solve every possible situation of school disruption caused by student speech that has not been pre-approved. These balancing factors do solve the problem of an unpredictable ad hoc analysis by providing students with an awareness of restrictions. These factors are not fixed, but exist as a continuum to serve a wide array of applicability and utility. It is possible that students will devise ways to get around the rules. When a situation arises that does not fit into the balancing test, schools should assess those situations independently. Importantly, schools must consistently apply this regulatory scheme to each incident that arises.[162] When factors are equally balanced, the court should look to previous court rulings and guidance on school speech. This clarification to the substantial and material disruption standard provides substantive and delineated criteria for the courts, schools, and students to use.

IV. APPLICATION OF THE NEW STANDARD TO THE FACTS OF *TAYLOR*

Applying the balancing factors of the substantial and material disruption standard to the actual occurrences in Roswell, New Mexico, both the magistrate and Tenth Circuit courts' analyses should have been reasoned differently. Foreseeability is inapplicable to those facts because there was no history of similarly disruptive incidents, nor did Relentless' speech threaten to cause violence.

161. *Supra*, I.C.ii.

162. In *Taylor*, students were punished when the administration used policies that had previously gone unenforced. Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 29–33 (10th Cir. 2013).

A. Application to Goddard High School

Applying the refined standard to the occurrences at Goddard, the administration was justified in restricting Relentless' speech. At Goddard, Relentless' speech was not intended to isolate a particular group of people. The group's message advocated pro-life beliefs, but dolls were not discriminately distributed, nor was the speech targeted at students believing in pro-choice.[163] Peer reaction and reporting began when a group of girls approached vice-principal Luck to voice their agitation.[164] According to the record, these girls were the only people to express their agitation to an administrator before the confiscation began.[165] In addition to the reporting, Mr. Luck observed several students dismembering and tossing around the dolls, but classroom disruption had not been reported.[166] Peer reaction is characterized by scarce reporting and Mr. Luck's observation of student behavior. These occurrences do not raise Relentless' speech to a high level of peer reaction.[167] Furthermore, the group's speech was not intended to incite.[168] The disruption observed by Mr. Luck took place in a hallway, not during an explicit learning time.[169] The duration of the disruption in the hallway is unclear – assuming the dismantling of dolls started when or before Mr. Luck arrived and continued while he inquired with other administrators and conversed with the upset girls, the disruption likely lasted ten minutes or more.[170] Although disruptions took place throughout the day, the disruption analysis looks at the situational factors as they were prior to imposed restraint.[171]

Prior to Relentless' censorship, no group was singled out by the student speech, there was a lack of peer reaction, and the disruption took place in the hallway for a significant amount of time. Here, the factors seem to be equally balanced. The balancing test would have clearly weighed in Goddard's favor if the level of peer reaction at the time of restriction were greater. The factors are equally weighed, so the court should look at prior rulings and court statements about school speech to decide if restriction was appropriate. In this instance, the court has stated that active student speech is more likely to be restricted than passive speech.[172] Therefore, Goddard administration was correct in restricting Relentless' doll distribution.

B. Application to Roswell High School

In contrast, application of the refined standard to the occurrences at Roswell reveals that the administration was unjustified to restrict Relentless' speech. Roswell was put on alert regarding disruption from Goddard.[173] However, Roswell could not

163. *But see*, *supra*, III.A.
164. Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 31 (10th Cir. 2013).
165. *Id.*
166. *Id.* at 30–31.
167. *But see*, *supra*, III.B.
168. *But see*, *supra*, note 155.
169. Taylor v. Roswell Indep. Sch. Dist., 713 F.3d at 30–31; *see*, *supra* III.C.
170. *See supra*, III.D.
171. *See supra*, note 126.
172. *Supra*, I.C.iv.
173. Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 31 (10th Cir. 2013).

use the disruption at Goddard as foreseeably disruptive because Goddard 1) had no previous problems with Relentless and 2) had not experienced any previously disruptive incidents that would allow for restriction based on similarity. The incidents at Roswell therefore need to be analyzed as a novel incident of disruption.

Relentless' speech was not directed at a distinct group or disseminated with the intent of student isolation.[174] Rather, Relentless members aimed to reach the entire student body by giving a doll to each student they encountered. There were no complaints of disruption voiced by students and the record lacks references to teachers' being upset over disruptive classroom conduct resulting from the dolls.[175] Rather, an absent principal instructed a security guard to confiscate the dolls when he believed the distribution was causing a disruption to the educational process.[176] Although distribution occurred outside of the classroom,[177] the record indicates that the security guard observed disruptive conduct occurring inside the classroom.[178] Once he saw this, he immediately confiscated the dolls.[179]

A key problem with the situation at Roswell was that a security guard, not an administrator, was delegated the task of assessing the situation and imposing restrictions. Relentless' speech was not intended to isolate and the magnitude of peer reaction was minimal. Although there was disruption in the classroom, the dolls were confiscated immediately and not after a short duration. First, administrators should have been in charge of restrictions, since they are in a position to determine when education is being disrupted. Second, the confiscation should not have taken place immediately, but given a short span of time to determine if the problem would correct itself. These factors as applied to the occurrences at Roswell weigh in favor of Relentless. Roswell administrators did not act reasonably or correctly when they censored Relentless' speech.

C. How to Reach an Opposite Conclusion at Goddard High School

The facts in *Taylor* can be altered to demonstrate how the court would arrive at a conclusion opposite from what was previously discussed. At Goddard, assume that Relentless' speech remained untargeted at a specific audience and that peer reaction was minimal.[180] If Relentless had distributed dolls during lunch[181] and students took the dolls back to their lockers, or threw them away, the possibility of disrupting class[182] would be minimal and speech would not fall under appropriate restriction. The safest way for Relentless to distribute their items without causing a disruption to the educational process would be to distribute the dolls after school ended. This would safeguard against the possibility of disruption to the learning

174. *But see*, *supra*, III.A.
175. *But see*, *supra*, III.B.
176. Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 31 (10th Cir. 2013).
177. *See supra*, III.C.
178. Castro Dep. 4: 8–13, March 2, 2011; TR–1; *see*, *supra*, III.C.
179. Castro Dep. 29: 17–24, March 2, 2011; TR–29; *but see*, *supra*, III.D.
180. *But see*, *supra*, III.A; *but cf*., *supra*, III.B.
181. *But see*, *supra*, III.C.
182. *See supra*, III.C; *but see*, *supra*, III.D.

environment later that day. Under these hypothetical circumstances, which limit possibility of disruption, Goddard would have no basis to restrict student speech.

D. How to Reach an Opposite Conclusion at Roswell High School

At Roswell, administrators should have waited longer before commencing the doll confiscation. Assume that the Relentless' speech remained untargeted.[183] However, if the time lapse was more significant[184] in either a classroom or a non-learning environment,[185] peer reaction could have risen to a higher level[186] allowing for a likely materialization of full disruption. Although not imperative to the outcome of the case, an administrator should have been implementing the balancing disruption test, rather than using the discretion of a staff member.[187] These factual changes would lead the court to conclude that Roswell appropriately restricted its students' speech.

New Mexico courts and the Tenth Circuit should apply the balancing test version of the substantial and material disruption standard. Once schools and courts establish consistency in applying the standard, there will be a reduction in school speech cases because the clear standard will minimize disputes.

V. COUNTERARGUMENTS

A. Schools Do Not Have A Singular Purpose

The balancing factors serve to primarily prohibit disruptive speech in explicit learning environments. However, education is not the sole purpose of a school environment. Schools also serve to build well-rounded individuals. Traits that contribute to forming a balanced individual are not solely found in the classroom.[188] Many experiences that students have in the hallways, cafeteria, and parking lot are also important for student growth.

The factors place a lower threshold for disruption in an explicit learning environment since education is the main reason for attending school.[189] It can be argued that an individual cannot gain the proper benefits of an education if not exposed to explicit learning environments. Character traits that are manifested outside of explicit learning can be gained in other arenas – such as club sports, music lessons, and camp. Explicit learning is a fragile and unique entity whose benefits cannot be found elsewhere.

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183. *But see*, *supra*, III.A.

184. *See supra*, III.D.

185. *See supra*, III.C.

186. *See supra*, III.B.

187. Administrators hold a distinguished role as supervisor and leader of the school. As part of these duties, administrators are trusted to carry out the mission of the school and are most qualified to evaluate when that is or is not being done.

188. *See* Sweatt v. Painter, 339 U.S. 629, 633–634 (1950) (discussing the qualities of a school that make for a high quality experience, including size of student body and traditions).

189. *See supra*, III.D.

B. Students Will Bypass the Standard

Students may look at the proposed factors and attempt to devise ways to avoid their applicability. The factors attempt to use measurements that cannot be easily manipulated. For example, peer reaction[190] will be hard for a student or group of students to control. Students will likely be unable to predict the reaction of each student in the school population. It is also challenging to anticipate how long a disruption will last.[191] Speakers may limit the duration of their message, but they will not be able to place limits on how their speech is received or on the length of others' reactions. Importantly, this is the first in-depth clarification of the substantial and material disruption standard. As it is applied, courts may find the need to adjust accordingly by altering, adding, or deleting factors from the balancing test.

C. Smaller Numbers Suffer in Favor of the Masses

The peer reaction factor requires that a significant number of students be affected by the disruptive speech. If a small group of people or individuals are bothered, they will not be able to use this component to their benefit. A potential solution may be found under the "speech intended to isolate" factor.[192] However, if this factor does not apply to the disruptive speech, then the small group may not be able to find a resolution to their acrimony. It is important to note that the very essence of this standard is meant to address *substantial* disruptions. If a bothersome situation is unable to fit into this framework to meet the "substantial" criteria, then other avenues for resolution need to be pursued.

VI. CONCLUSION

This note recognizes the lack of clarity surrounding the *Tinker* substantial and material disruption standard for school speech. In *Tinker*, there was no disruptive conduct. There, the court failed to delineate criteria to analyze future school disruptions. Subsequent courts have taken the vague standard and implemented it as an unpredictable ad hoc analysis. This lack of clarity frustrates students' First Amendment rights.

Courts are wary of overstepping the judiciary boundary and interfering with schools. This caution causes courts to defer to school administrative judgment, reasoning that administrators know the school intimately and are in the best position to determine what will cause disorder. Often, as in *Taylor*, administrators are unable to articulate a coherent and consistent standard of what should be classified as a disruption. This unspecified ad hoc standard does not provide students with an adequate notion of what is or what is not prohibited. Rather, permissible speech is to be decided on a whim.

This note suggests that the substantial and material disruption standard be refined to a four-factor balancing test: 1) speech intended to isolate, 2) magnitude of peer reaction, 3) location of speech, and 4) duration. These factors have been identified based on explicit guidance given by various courts dealing with school

190. *See supra*, III.B.
191. *See supra*, III.D.
192. *See supra*, III.A.

speech and 2) by extracting factors which are used to analyze the nature of disruptive conduct.

This proposal provides a clear and succinct way to analyze disruptive school speech. Through the use of this proposal, students retain their First Amendment rights and become aware of what types of speech are prohibited. Administrators will also benefit by saving resources (time, attention, etc.) and dealing with less controversy.

In particular, the Tenth Circuit should take notice of the confusion posed by the current *Tinker* standard. It is clear through the conflated analysis used in *Taylor*, that even the court has a tendency to confuse the standard when attempting to apply it. This proposal does not purport to be effective for every instance of disruptive school conduct. However, this is the first academic attempt to clarify and refine *Tinker*.