Is a webpage created off campus constitutionally protected student speech? In 2007, a high school student brought a § 1983 suit against her school district after she was suspended for creating a webpage that derided a fellow classmate.[1] The plaintiff argued that the suspension violated her constitutional rights of free speech and due process under the First and Fourteenth Amendments.[2] The district court granted summary judgment to the school district,[3] and the Fourth Circuit Court of Appeals affirmed this decision, holding that "the school was authorized to discipline" the student, and that the school had not violated the student's right to free speech and due process.[4]

The Internet is inescapable. Social networking has become part of our social culture.[5] Schools now face the difficulty of determining if and when speech that is created entirely off-campus is constitutionally protected or punishable by administration. In *Kowalski v. Berkeley County Schools,* the Fourth Circuit Court of Appeals added a new element to the analysis of that question, and school boards across the country should pay attention.

I. THE FOURTH CIRCUIT OPINION

A three-judge panel consisting of Judge Niemeyer, Judge Duncan, and Judge Agee affirmed the decision of the district court.[6] Much of Judge Niemeyer's opinion explained the reasoning behind the court's conclusion that the school was authorized to discipline Kara for her off-campus speech.[7] The remainder of the opinion clarified the court's agreement that there was no due process violation nor was there any evidence of infliction of emotional distress.[8]

A. Background

Kara Kowalski was a high school student at Musselman High School in West Virginia.[9] She was elected "Queen of Charm" in her junior year and was a member of the cheerleading squad.[10] She came home from school on December

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1. Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 567 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).
2. *Id.*
3. *Id.*
4. *See id.* at 574, 576.
5. Eric Edge & Jamie Bernheim, *Social Media Explosion: Americans Are Redefining Their Lives Online and Offline With Social Media Tools*, PRNEWSWIRE, (Nov. 19, 2012), http://www.prnewswire.com/news-releases/social-media-explosion-americans-are-redefining-their-lives-online-and-offline-with-social-media-tools-70471552.html.
6. *Kowalski*, 652 F.3d at 567.
7. *See id.* at 570–75.
8. *See id.* at 575–76.
9. *Id.* at 567.
10. *Id.* at 569.

1, 2005, and logged onto the social network site MySpace.[11] While on the site, she created a new webpage with the heading "S.A.S.H." and which stated "No No Herpes, We don't want no herpes."[12] She claimed it was to make other students aware of sexually transmitted diseases, and "S.A.S.H." stood for "Students Against Sluts Herpes."[13] Approximately 100 people, all Kara's friends, were invited to join the page.[14] The comments and postings by students soon indicated that the page was not an informational site, but was created to make fun of a fellow classmate named Shay.[15]

The first posting was a picture by Ray Parsons, another student at Musselman High School.[16] The picture was of Ray and another student holding their noses and displaying a sign reading "Shay Has Herpes."[17] Kara responded with a comment of approval, and other students soon joined her.[18] Ray responded by posting two edited photographs of Shay.[19] In the first photograph, Ray drew "red dots on Shay N.'s face to simulate herpes and added a sign near her pelvic region, that read, 'Warning: Enter at your own risk.'"[20] "In the second photograph, he captioned Shay N.'s face with a sign that read, 'portrait of a whore.'"[21] Comments from other students soon followed, such as "lol,"[22] "screw her," "this is great," "your [sic] so awesome kara," and "Kara = My Hero."[23]

Shay's father called Ray a few hours after the webpage was created, expressing his anger.[24] Ray called Kara, who tried to disable the webpage but was unsuccessful.[25] The following day, Shay and her parents went to the school and filed a harassment complaint.[26] Shay left with her parents and did not attend school that day because she felt uncomfortable remaining in the school.[27] The administration investigated the incident and eventually learned that Kara had been the creator of the incendiary webpage.[28]

The Student Handbook, which Kara received at the beginning of the school year, included a "Harassment, Bullying, and Intimidation Policy" (Policy),

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11. *Id.* at 567.
12. *Id.*
13. *Id.*
14. *Id.*
15. *See id.* at 568. The first student to join the group stated that the acronym stood for "Students Against Shay's Herpes." *Id.* at 567.
16. *Id.* at 568.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. "lol" is an abbreviation for "laugh out loud."
23. *Id.*
24. *Id.*
25. *Id*
26. *Id.*
27. *Id.*
28. *See id.*

which "prohibited 'any form of . . . sexual . . . harassment . . . or any bullying or intimidation by any student . . . during any school-related activity or during any education-sponsored event, whether in a building or other property owned, use[d] or operated by the Berkeley Board of Education.'"[29] Bullying was defined as:

> [A]ny intentional gesture, or any intentional written, verbal or physical act that
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> 1. A reasonable person under the circumstances should know will have the effect of:
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> a. Harming a student or staff member;
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> . . .
>
> 2. Is sufficiently inappropriate, severe, persistent, or pervasive that it creates an intimidating, threatening or abusive educational environment for a student.[30]

Violations of the Policy result in suspension; however, disciplinary actions could be appealed.[31]

Kara was suspended from school for ten days and received a ninety-day "social suspension."[32] Kara's father intervened and the administration reduced the out-of-school suspension by half.[33] In November 2007, Kara brought suit against the Berkeley County School District and others involved in the decision-making process, alleging First Amendment free speech violations, Fifth Amendment due process violations (which were later clarified as Fourteenth Amendment due process violations), Eighth Amendment violations for cruel and unusual punishment, and Fourteenth Amendment equal protection violations.[34] Kara also alleged violations under the West Virginia Constitution and state law claims of intentional or negligent infliction of emotional distress and sought damages, a declaratory judgment that the policy at issue was unconstitutionally vague or overbroad, and an injunction to clear her discipline record.[35]

II. DISTRICT COURT DECISION

The defendants' filed a motion to dismiss the complaint and a motion for summary judgment.[36] The district court dismissed the free speech and cruel and

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29. *Id.* at 569 (alteration in original).
30. *Id.*
31. *Id.* This policy was also incorporated into the school's Student Code of Conduct (Code) which Kara also received at the beginning of the school year. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 570.
35. *Id.*
36. *Id.*

unusual punishment claims, though they revisited the free speech claim when considering summary judgment.[37] The district court granted summary judgment to the defendants, explaining that Kara had notice and an opportunity to be heard before she was suspended.[38] The court denied her equal protection claim, infliction of emotional distress claim, and motion for reconsideration.[39]

III. FOURTH CIRCUIT DECISION

On appeal, Kara began her argument to the Fourth Circuit by claiming "that the school administrators violated her free speech rights under the First Amendment by punishing her for speech that occurred outside the school. She argue[d] that because this case involved 'off-campus, non-school related speech,' school administrators had no power to discipline her."[40] Indeed, the Supreme Court has yet to address the boundaries of school discipline as it is applied to this type of speech. Therefore, the defendants' argument relied on other circuit courts' decisions, such as the Second Circuit's decision in *Doninger v. Niehoff*:[41] "a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach campus."[42] The issue for the court became a balancing of the school's interest in maintaining order and protecting students from harassment with Kara's right to create a demeaning webpage, and whether Kara could reasonably foresee that her off-campus speech might reach inside the school's authority to discipline.[43]

The court began its analysis by elucidating the seminal case dealing with disruption of schools: *Tinker v. Des Moines Independent Community School District*,[44] where students wore armbands in protest of the Vietnam War.[45] The United States Supreme Court held that students are free to express their opinions, as long as that expression does not substantially interfere with the daily operation

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37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 570–71.
41. 527 F.3d 41 (2d Cir. 2008).
42. *Id.* at 48 (quoting Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007)). This foreseeability element has been used for off-campus behavior by students that is considered threatening. *See* J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 426 (Pa. Commw. Ct. 2000) (Friedman, J., dissenting) ("[T]he proper test for determining whether Student's web site constitutes a 'true threat' is whether a reasonable person in Student's position would foresee that viewers of the web site would interpret it as a serious expression of intent to harm."); *see also*, Benjamin L. Ellison, Note, *More Connection, Less Protection? Off-Campus Speech with On-Campus Impact*, 85 NOTRE DAME L. REV. 809, 825–27 (2010) (discussing the critical treatment of the "reasonable foreseeability" test by some courts).
43. *See Kowalski*, 652 F.3d at 571.
44. 393 U.S. 503 (1969).
45. *Id.* at 504.

of the school or with other students' rights,[46] because students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[47] This "substantial disruption" test establishes that student speech may be punished if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[48] The court also cited to other cases that indicate that speech offending a school's character development message is not protected. In *Bethel School District No. 403 v. Fraser*,[49] the Supreme Court saw a "marked distinction between the political 'message' of [the student speech] in *Tinker*" and the student speech in *Fraser*, which involved a student campaign speech filled with sexual innuendo.[50] The Court held that schools could punish "vulgar and lewd [on campus] speech" if it was contrary to the school's basic mission.[51] The Supreme Court held similarly in *Morse v. Frederick*.[52] Here, a banner posted by a student away from school property was "reasonably viewed as promoting illegal drug use," and adverse to school policy.[53] Therefore, the student's speech was not constitutionally protected.[54]

The Fourth Circuit focused specifically on the *Tinker* disruption standard.[55] The court reasoned that "the language of *Tinker* supports the conclusion that public schools have a 'compelling interest' in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying."[56] Bullying, especially bullying on the Internet, is a major concern across the country.[57] In *Lowery v. Euverard*,[58] the Sixth Circuit held that schools have an affirmative duty to protect students from bullying and harassment,[59] and the Fourth Circuit agreed with that reasoning, stating that "administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning."[60] The court made clear that Kara's speech was substantially disruptive under the *Tinker* standard, and that it was reasonable for her to expect that the speech

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46. *See id.* at 514.
47. *Id.* at 506.
48. *Id.* at 513.
49. 478 U.S. 675 (1986).
50. *Id.* at 677–78, 680.
51. *Id.* at 685–86.
52. 551 U.S. 393 (2007).
53. *See id.* at 409–10.
54. *Id.* at 410.
55. Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 572 (4th Cir. 2011) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 504 U.S. 503, 513 (1969)), *cert. denied*, 132 S. Ct. 1095 (2012).
56. *Id.*
57. *See generally*, Danah Boyd & Alice Marwick, *Bullying as True Drama,* N.Y. TIMES Sept. 22, 2011, at A35, *available at* http://www.nytimes.com/2011/09/23/opinion/why-cyberbullying-rhetoric-misses-the-mark.html.
58. 497 F.3d 584 (6th Cir. 2007).
59. *Id.* at 596 ("School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place.").
60. *Kowalski*, 652 F.3d at 572.

would reach the school and affect the environment of the school.[61] They reasoned that because she invited primarily Mussleman High School students to join the page and encouraged targeted, harassing, and vulgar postings, her actions fell under the school's regulation authority.[62] Therefore, there was no First Amendment violation because the school was authorized to discipline Kara for speech that interfered with the workings of the school.[63]

Kara also claimed that her due process rights were violated because she lacked sufficient notice that her speech could be regulated by the school, and because she did not have an opportunity to be heard.[64] The court held that the Policy and Code presented Kara with adequate notice that "a student will not bully/intimidate or harass another student."[65] The fact that the Policy limits the prohibition to bullying "during any school-related activity or during any school-sponsored event" does not prevent the court from construing the anti-bullying policy broadly.[66] The court reasoned that the Policy and Code applied whenever "conduct could adversely affect the school environment."[67] Because it was reasonably foreseeable that the webpage would disrupt the school, the court held that Kara was on notice that her conduct could be regulated.[68] The court also held that the requirements of *Goss v. Lopez*[69] were met, and Kara's due process rights were not violated.[70] Finally, the court upheld the district court's dismissal of the state law claim of emotional distress, since Kara did not prove the elements required under West Virginia law.[71]

The court ended the unanimous opinion with a strong scolding of Kara Kowalski, Ray Parsons, and the other participants' behavior, calling the webpage "particularly mean-spirited and hateful."[72] Though the other participants may not have as much responsibility as Kara and Ray, the court still stated that their "conduct was indisputably harassing and bullying."[73] The court reiterated that Kara knew that the webpage would reach the school atmosphere, and that she

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61. *Id.* at 574.
62. *See id.*
63. *Id.*
64. *Id.* at 575.
65. *Id.* (internal quotation marks omitted).
66. *See id.* at 575–76.
67. *Id.* at 575.
68. *Id.* at 575–76.
69. 419 U.S. 565 (1975) (seminal case defining administrative "notice and hearing" required under due process).
70. *Kowalski*, 652 F.3d at 576 (quoting *Goss*, 419 U.S. at 581).

> In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is.

Goss, 419 U.S. at 582.
71. *See Kowalski*, 652 F.3d at 576.
72. *Id.*
73. *Id.*

cannot expect her activities to be insulated by claiming constitutional protection.[74] The court lamented that Kara chose to sue the school rather than learn from the experience: "she yet fails to see that such harassment and bullying is inappropriate and hurtful and must be taken seriously by school administrators in order to preserve an appropriate pedagogical environment."[75] The court concluded by holding that as long as there is a sufficient nexus between speech and the school environment, administrators may regulate student speech.[76]

IV. PETITION FOR WRIT OF CERTIORARI

Kara Kowalski filed a petition for writ of certiorari with the Supreme Court on October 11, 2011.[77] The Court denied the petition on January 17, 2012.[78]

V. CONCLUSION

The lower courts had already begun to add significant factors to the *Tinker* test in response to the growing use of the Internet. One factor is a "sufficient nexus approach," examining whether there is a significant relation between the speech and the school.[79] If there is no such nexus, then more stringent First Amendment principles would apply to the speech.[80] Another factor added by the Second Circuit is that there must be a foreseeable risk that there will be a substantial disruption *and* that it is reasonably foreseeable that the speech will arrive on campus.[81] In the *Kowalski* opinion, the Fourth Circuit joined the Second Circuit in adding a foreseeability element to the analysis.[82] However, the Fourth Circuit did not address both prongs of the *Doninger* analysis. The court stated that, "We are confident that Kowalski's speech caused the interference and disruption described in *Tinker*."[83] The court did not analyze the specific consequences of having reasonable foreseeability that the speech would *reach* campus. The court held that the school was authorized to discipline Kara because the speech actually caused disruption, and because it was reasonably foreseeable that it would reach campus.[84] However, it remains unclear whether

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74. *Id.*
75. *Id.* at 577.
76. *Id.*
77. *Kowalski*, 652 F.3d 565, *petition for cert filed*, (U.S. Oct. 11, 2011) (No. 11-461), 2011 WL 4874091.
78. Kowalski v. Berkeley Cnty. Sch., 132 S. Ct. 1095 (2012).
79. *See* Harriet A. Hoder, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction over Students' Online Activity*, 50 B.C. L. REV. 1563, 1583 (2009).
80. *Id.*
81. *See* Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008) (quoting Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007)).
82. *See Kowalski*, 652 F.3d at 574.
83. *Id.* at 572.
84. *Id.* at 574.

speech that is foreseeably disruptive and that has not yet reached campus but is likely to do so is subject to regulation, but the Fourth Circuit did not discount that possibility.[85]

Notably, the Third Circuit reached a different conclusion in a case very similar to *Kowalski*. In *Layshock ex rel. Layshock v. Hermitage School District*,[86] a student created a webpage that poked fun of the principal.[87] The webpage was accessed and viewed on campus by students who had been asked to become "friends" of the webpage.[88] During a school investigation about the webpage, a student admitted he had created it and verbally apologized to the principal.[89] The Third Circuit agreed with the district court that the school did not establish a sufficient nexus between a substantial disruption and the student's speech.[90] In fact, the school conceded that there was no substantial disruption at all, only that it was reasonably foreseeable that the speech would reach campus.[91] The court held that because there was no substantial disruption, the "District [was] not empowered to punish his out of school expressive conduct."[92]

Certiorari was denied for *Layschock* as well.[93] Francisco M. Negrón Jr., general counsel of the National School Boards Association, was frustrated at the denials: "We've missed an opportunity to really clarify for school districts what their responsibility and authority is."[94] His frustration is joined by other commentators, two of which wrote a review illustrating the lack of consensus among the circuits: "[T]his review adds a voice to the chorus of interested parties insisting that the Supreme Court step in and articulate a realistic roadmap for educators."[95] The petition for certiorari for *Kowalski* stated that:

> [T]he lack of clear guidance from this Court, and the conflicting decisions in the lower courts, make it impossible for students, parents, teachers, and school administrators to understand the scope of student

85. *See id.*

86. 650 F.3d 205 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

87. *Id.* at 207.

88. *Id.* at 208–09. Students also accessed Kara's website via school computers. *Kowalski*, 652 F.3d at 568.

89. *Layshock*, 650 F.3d at 209.

90. *Id.* at 216.

91. *Id*.

92. *Id.* at 219.

93. Layshock *ex. rel* Layshock v. Hermitage Sch. Dist., 132 S. Ct. 1097, 1097 (2012).

94. *Supreme Court declines to hear student Internet speech cases,* NBSA LEGAL CLIPS (Jan. 19, 2012), http://legalclips.nsba.org/?p=11474.

95. Philip T. K. Daniel & Scott Greytak, *A Need to Sharpen the First Amendment Contours of Off-Campus Student Speech*, 273 ED. LAW REP. 21, 22 (2011).

> speech rights—in effect, leaving the public to conclude "that students have a right to speak . . . except when they don't."[96]

One area that may make a difference in a student's right to speak is the object of their speech. In the Fourth Circuit case, the target of the speech was a fellow student, so bullying regulation was implicated. In the Third Circuit, a principal was the brunt of the joke.[97]

However, the most important element in the *Layshock* and *Kowalski* opinions is in the substantial disruption and foreseeablility argument. In both opinions, the courts based their final conclusion on whether or not a substantial disruption of the school environment had occurred. In *Layshock,* the school district avoids the "actual" school disruption argument. The school district argued that following *Tinker*, a student can be punished because it was reasonably foreseeable that the speech would reach campus.[98] The court, however, disagreed. The Third Circuit held that because there was no *actual* disruption, the student could not be punished, rejecting the notion that foreseeability can be the only element considered.[99] This is actually contrary to the holding in *Tinker*, in which the Court states that speech or behavior only needs to "reasonably have led school authorities to *forecast* substantial disruption of or material interference with school activities" for regulation to be appropriate.[100]

The Fourth Circuit in *Kowalski*, on the other hand, did not dismiss the possibility that the foreseeablility argument may be enough in future cases. The court emphasized that "even though Kowalski was not physically at the school when she operated her computer to create the webpage . . . it was foreseeable in this case that Kowalski's conduct would reach the school . . . [and] it [in fact did] create[] a reasonably foreseeable substantial disruption there."[101] The court based its conclusion on the actual interference: "At bottom, we conclude that the school was authorized to discipline Kowalski because her speech interfered with the work and discipline of the school."[102] The courts seem to agree that if a

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96. Petition for Writ of Certiorari at 31, Kowalski v. Berkeley County Sch., 132 S. Ct. 1095 (2012) (No. 11-461), 2011 WL 4874091, at *31 (quoting Morse v. Frederick, 551 U.S. 393, 418 (2007)).

97. Adding more confusion is the Pennsylvania state court opinion in *J.S. ex rel. H.S.* There, the court held that a student could be disciplined for off-campus internet speech that targeted a teacher because there was a substantial school disruption that resulted. *See* J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist. 757 A.2d 412, 421–22 (Pa. Commw. Ct. 2000).

98. *See Layshock*, 650 F.3d at 216.

99. *Id.* at 219.

100. Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 514 (1969) (emphasis added). "[R]equiring school officials to wait until disruption actually occur[s] before investigating would cripple the officials' ability to maintain order." Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007).

101. Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 574 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).

102. *Id.*

substantial disruption is actually caused by the internet speech, the student may be punished. Disagreement abounds as to whether Internet-based speech, created off campus, can be regulated if there is only a reasonable foreseeability as to whether the speech will cause a substantial disruption on campus. Some commentators suggest a higher evidentiary standard for reasonable foreseeability:

> School officials must be able to point to specific and particularized facts that support why they foresee a substantial disruption . . . not mere apprehension of a possible disruption. . . . The response should be to prevent an imminent foreseeable substantial disruption or interference—not after the fact because a disruption could possibly have occurred, but did not.[103]

Another commentator is concerned that the lack of consensus risks chilling student speech, stating "[b]ecause the internet blurs the line between students' school and home lives, there is a significant risk that lower protections for on-campus speech might seep into all areas of students' lives, with significant potential consequences for their First Amendment rights."[104]

The Fourth Circuit seems to have adopted an "either/or" analysis, which is consistent with the holding in *Tinker*. Until the Supreme Court decides to address the issue, the standard of foreseeability in student Internet-speech cases remains unresolved. Until then, the "reasonably foreseeable" or "substantial disruption" tests based on *Tinker*, and endorsed by the Fourth Circuit, yields to school administrators' greater authority to combat harassment and bullying in the form of off-campus Internet speech.

Margaret A. Hazel

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103. Nancy Willard, *School Response to Cyberbullying and Sexting: The Legal Challenges*, 2011 B.Y.U. EDUC. & L.J. 75, 108.

104. *First Amendment—Student Speech—Third Circuit Applies* Tinker *to Off-Campus Student Speech.*—J.S. *ex rel.* Snyder v. Blue Mountain School District, 650 F.3d 915 (3d Cir. 2011) (en banc), 125 HARV. L. REV. 1064, 1068 (2012).

> Because the determination of a substantial disruption depends almost entirely on the facts of the case at issue, students will often have almost no basis on which to predict whether their speech would fall within *Tinker's* ambit. These concerns apply a fortiori to cases where the school official need only show a reasonable fear of substantial disruption, rather than its actual occurrence.

Id. at 1070.