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Comments

The Right To Write? Free Expression Rights of Pennsylvania's Creative Students After Columbine

Barbara J. Brunner*

I. Introduction

Incidents of violence have become an unfortunate element of the atmosphere in which students in the twenty-first century attend school. In the late 1990s, a series of school shootings led educators to take a hard look at their discipline and security policies and to develop new systems and procedures designed to protect students and teachers from potentially dangerous members of the school community.¹ Among those measures are zero tolerance policies that require official school responses to weapons possession and violent behavior.²

Following the tragic shootings at Columbine High School in Littleton, Colorado, it was discovered that the shooters had written for their English classes creative works that contained images of graphic

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1. See *infra* notes 20-21 and accompanying text.

2. See *infra* notes 20-21 and accompanying text.

violence but that had led to no formal disciplinary repercussion or other official intervention.³ That discovery led schools nationwide to focus on such forms of writing as possible indicators of potentially dangerous students.⁴ As a result, some students' First Amendment rights to free speech have been abridged as educators have singled out purely fictional, creative works containing images of violence and have disciplined or censured their authors. It remains unsettled in the courts as to when threats made in students' creative writing assignments are to be protected as exercises of free speech and when they are to be considered true threats meriting intervention by authorities.

This comment analyzes the current state of students' free speech rights in the context of creative writing assignments and examines potential First Amendment applications to the Pennsylvania System of School Assessment (PSSA), a statewide, mandatory, standards-based exam administered to Pennsylvania public school students. The PSSA, which currently contains a writing assessment for students in sixth, ninth, and eleventh grades requiring students to write essays in response to prompts, is scored anonymously by private entities under contract with the Pennsylvania Department of Education.⁵ Those private subcontractors have "red-flagging" procedures in place to identify essays containing imagery or themes that indicate imminent threats of harm to the writer or to others.⁶ Red-flagged essays are matched with the name of the writer and are sent to local school officials.⁷ This comment examines the red-flagging procedure and offers suggestions for ensuring that students, teachers, administrators, and parents are made aware of how the education system in general and PSSA officials in particular are attempting to protect not only the safety of the community but also students' rights of creativity and free expression.

II. Background: Students' Free Speech Rights and Schools' "Duty to Protect"

A. History

In the landmark 1969 decision *Tinker v. Des Moines Independent Community School District*,⁸ which allowed students to wear black armbands at school in protest of the Vietnam War, the United States

3. See *infra* text accompanying notes 32-34.

4. See *infra* notes 29-32 and accompanying text.

5. See *infra* text accompanying note 45.

6. See *infra* text accompanying notes 81-82.

7. See *infra* text accompanying note 89.

8. 393 U.S. 503 (1969).

Supreme Court affirmed that students do not shed their constitutional rights to freedom of expression at the schoolhouse gate.⁹ The Court has held since, however, that students' free speech rights in the school setting are not automatically equivalent to the rights of adults in public, and that schools can regulate student speech that forms part of official educational activities.¹⁰

In a separate line of cases, federal courts have consistently held that schools do not have an affirmative constitutional duty to protect students from harm by third parties.¹¹ In recent years, however, much attention has focused on the measures educators and school officials can or should take in identifying potentially violent students and preventing them from causing harm to themselves or others.¹² Parental pressure has increased for schools to "do something" about known threats and potentially violent students, particularly following the discovery that the students responsible for the shootings at Columbine High School had written, without official response from the school, poems in their English classes containing extremely violent imagery.¹³ The ultimately disastrous effects of Columbine's failure to respond to those poems has fueled parental impetus to impose liability on teachers and school officials who have notice, through students' creative writing, of what are now considered warning signs of violent intentions.¹⁴

Some commentators see nothing wrong with limiting student speech in the interest of protecting the school community. According to this view, Justice Fortas's opinion in *Tinker* represents not a victory for students' First Amendment rights but rather the starting point for the unrestrained, disrespectful behavior of students in modern American schools that has led to incidents such as Columbine.¹⁵ Under this theory, *Tinker* ushered in a two-decade period of "teacher de-authorization," during which teachers came to fear their students and opted not to report disciplinary infractions unless they had witnesses and evidence to support their claims. Proponents of this theory assert that, during the

9. *Id.* at 506.

10. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

11. *See, e.g., D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364 (3d Cir. 1992); *Oldham v. Cincinnati Pub. Sch.*, 118 F. Supp. 2d 867 (S.D. Ohio 2000); *Marcolongo v. Sch. Dist. of Phila.*, No. 99-1830, 1999 U.S. Dist. LEXIS 17417, at *1 n.1 (E.D. Pa. Nov. 9, 1999).

12. *See infra* notes 20-21 and accompanying text.

13. *See infra* text accompanying notes 33-34.

14. *See infra* text accompanying notes 33-34.

15. *See, e.g., Kay S. Hymowitz, Tinker and the Lessons from the Slippery Slope*, 48 *DRAKE L. REV.* 547, 550 (2000). Justice Fortas wrote: "State-operated schools may not be enclaves of totalitarianism; school officials do not possess absolute authority over their students." *Tinker*, 393 U.S. at 511.

1960s and 1970s, children, supported by their parents, became increasingly aware that they were empowered with rights,¹⁶ and exercised those rights so as to become equals with their teachers. As a result, teachers were no longer considered to have the authority to silence irrelevant or distracting student opinions in the interest of rational, democratic debate.¹⁷ Instead, the fear of free speech lawsuits left teachers unsure of the distinction between teaching the norms of civil language and violating free speech rights, and virtually all student expression was uncensored.¹⁸ In this new environment, students who openly challenged teachers' attempts to smooth the inevitable rough edges of adolescent speech or behavior were hailed by their peers as heroes of the Constitution, leading to the development of an educational system in which "anything goes" in the name of student's rights of free expression.¹⁹

B. Modern Developments

Just as the analysis presented above exaggerates in defining as chaotic the results of increased student freedom of speech in American schools in the 1960s and 1970s, responses developed in the late 1990s appear to exaggerate equally in the other direction. The security frenzy that followed the Columbine tragedy and several other incidents of gun-related school violence has led some school districts to implement zero tolerance policies, not only for weapons possession but also for threatening or violent behavior.²⁰ Those policies circumscribe students' constitutional rights in the interest of protecting the greater school community from potentially dangerous individuals.²¹ The atmosphere created by the series of shootings and violent incidents across the nation since Columbine has led to the extension of zero tolerance policies to

16. Hymowitz, *supra* note 15, at 558.

17. *Id.*

18. *Id.*

19. *Id.* at 563.

20. Lynda Hils, *Chalk Talk: Zero Tolerance for Free Speech*, 30 J.L. & EDUC. 365 (2001).

21. *Id.* Privacy rights of student records have also been subject to renewed attention after Columbine. For example, school officials have advocated for law enforcement exception amendments to privacy rights bills, which would allow schools and law enforcement or juvenile justice agencies to share confidential information about students' criminal histories without prior consent from the student or a parent: At least one school guidance counselor attributes this movement directly to Columbine. Tony Spilde, *Bill Would Help Open Up Records*, BISMARCK TRIB., Jan. 21, 2001, available at <http://www.ndonline.com/tribwebpage/news/jan2991/122200162206.html>; see also Shannon McMinimee, *LaVine v. Blaine School District: Fear Silences Student Speech in the Ninth Circuit*, 77 WASH. L. REV. 545, 556-57 (2002).

include threatening speech.²² Under zero tolerance, even expression that amounts to less than a constitutional “true threat” may be censored.²³ Some courts have supported zero tolerance for student speech by considering an increase in school violence as a significant element of the circumstances test by which a true threat is evaluated.²⁴ Under zero tolerance, therefore, students who complete purely fictional creative writing assignments that contain violent imagery or threatening content may be subject to automatic disciplinary measures or mandatory counseling simply because of the modern national circumstance of increased school violence. In such an atmosphere, even where no zero tolerance policy is officially in place, disciplinary responses may substantially threaten students’ free speech rights.

C. General Contemporary Implications

In such an atmosphere, teachers and school personnel must walk a very thin line between ensuring that student expression is not unconstitutionally stifled, particularly in the creative arts,²⁵ and responding appropriately to signals that may indicate an intent to cause harm. School officials may find themselves facing liability actions if a true threat is missed and students subsequently harm another or themselves, but they may also find themselves in court if students are wrongly disciplined for exercising their free speech rights in a creative context.²⁶

22. See Hils, *supra* note 20.

23. See *id.* Significantly, the newly enacted amendments to the Elementary and Secondary Education Act (ESEA), 20 U.S.C. §§ 6301-6514 (2001), known as the “No Child Left Behind Act of 2001” (NCLB) and signed into law by President George W. Bush on January 8, 2002, include funding provisions to assist states in empowering teachers to remove violent or persistently disruptive students from the classroom; in order to receive funds under this program, states must adopt a zero tolerance policy for such students. GEORGE W. BUSH, NO CHILD LEFT BEHIND 20-21 (2001), available at <http://www.ed.gov/inits/proposal.pdf>.

24. See, e.g., *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1996); see also Anne Dunton Lam, *Student Threats and the First Amendment*, SCH. L. BULL., Spring 2002, at 8-9.

25. Not only writing is being scrutinized. Other forms of creative expression, such as visual art, are also undergoing careful review by school officials for violent or threatening content. See, e.g., *Boman v. Bluestem Unified Sch. Dist.*, No. 00-1034-WEB, 2000 U.S. Dist. LEXIS 5389, at *1 n.1 (Kan. Jan. 28, 2000).

26. As reported in one school safety publication, the threat of lawsuits complicates schools’ attempts at evaluating student expression. *Resources*, SAFETY ZONE (Nat’l Res. Ctr. for Safe Sch. Portland, Or.), Fall 1999, at 4, available at www.safetyzone.org/publications/zone3_story2.html [hereinafter *Resources*, SAFETY ZONE]. Teachers have been sued for suspending students for violent content in essays that the students defend as pure fiction. Teachers have also been sued “if they did not come forward when students produced violent writing and the students later acted out real violence.” *Id.*

Although a school's duty to protect may not rise to a constitutional level, in practical terms students and parents feel entitled to receive notice of known threats among members of the student population. Questions of duty become even more complex when one seeks to determine precisely who should bear responsibility for providing such notice. Are only teachers, school administrators, and other student-contact school personnel morally, if not legally, obligated to warn of students' potential to harm themselves or others? Or does such liability extend to superintendents or school boards as well, even when they have little or no contact with students on a daily basis? Could liability extend as far as to the state itself (the state department of education or board of education, for example) if legislators or officials have enacted no statutes or regulations establishing mandatory procedures for the identification and discipline of dangerous students? The recent creation in Pennsylvania of a "Safe Schools Advocate" for Philadelphia leads to even more unanswered questions with regard to the legal effect of the existence of such an advocate on that district's responsibility to victims and their parents for appropriate responses to incidents of violence.²⁷

The answers to these questions must remain purely speculative until the courts are given the opportunity to address them. The courts' future responses may depend in part on the measure of success schools actually attain in preventing acts of violence in the near future and the relationship of that success to limitations on free speech. Additionally, in the current pro-safety atmosphere, parents, and even students themselves, may accept limited abridgement of students' expressive rights if it can be shown that, with knowledge now available to school officials, warning signs are being correctly interpreted at least most of the time and intervention is generally successful. Under such circumstances, however, mistakes may also prove less acceptable, and courts may be willing to impose broader liability on a larger segment of the educational system when free speech limitations are wrongly imposed or not imposed when warranted. Without judicial standards clearly delineating the extent to which educators may impinge on students' speech rights in the name of security, any individual school's response to violent student speech has the potential to generate conflict

27. Section 13-1310-A of Title 24 of the Pennsylvania Statutes, enacted in November 2000, creates the position of safe schools advocate for Pennsylvania school districts of the first class. PA. STAT. ANN. tit. 24, § 13-1310-A (West 2002). Currently, Philadelphia is the only school district of the first class in the state. *See id.* § 2-202. The duties of the safe schools advocate include monitoring the district's compliance with state reporting and mandatory expulsion laws and providing information to parents of student victims of violence regarding the disciplinary process and actions taken against the students accused of committing those acts. *Id.* § 13-1310-A.

rising to a national level of interest.

D. Implications for Creative Writing

Tension between students' First Amendment free speech rights and post-Columbine schools' intensified sense of security responsibility becomes particularly acute when students produce works with threatening or violent content in response to creative writing or other artistic assignments in school. In the narrow contexts of creative writing, fiction, and artistic expression, courts traditionally have protected student speech, provided that such expression does not contain elements that may reasonably be interpreted as true threats under the circumstances.²⁸

In determining the circumstances surrounding threatening expression, courts until recently have tended to weigh heavily students' own defenses of their work as pure fiction. Largely as a result of the Columbine tragedy and subsequent school shootings across the country, however, education officials now possess a heightened awareness of the risk signs of dangerous or troubled youth,²⁹ and student writing and artistic production is now coming under more intense and better-informed scrutiny. And, as they have become more knowledgeable of the warning signals of troubled youngsters, school authorities simultaneously have become more vulnerable to victims' claims that they knew or should have known that a particular student posed a true threat, even if violent imagery appeared in a form of expression defended by the accused student as "just a story."

Civil rights advocates such as the American Civil Liberties Union are attempting to monitor education officials who may need reminders to

28. See, e.g., *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001); *Boman*, 2000 U.S. Dist. LEXIS 5389, at *1 n.1; *In re Douglas D.*, 626 N.W.2d 725 (Wis. 2001).

29. The Federal Bureau of Investigation has issued a list of "risk factors" for identifying a troubled child, as a result of a two-year study of school shootings. Among the questions for educators to ask about a troubled child is whether the child has "talked or written about" committing violent acts. MARY ELLEN O'TOOLE, FED. BUREAU OF INVESTIGATION, *THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 7-8* (2000). Also, in K. DWYER ET AL., U.S. DEP'T OF EDUC., *EARLY WARNING, TIMELY RESPONSE: A GUIDE TO SAFE SCHOOLS* (1998), a list of sixteen early warning signs includes "expression of violence in writings and drawings." *Id.* Additionally, the National School Safety Center (NSSC) has developed a profile based on students who have caused violent death. Nat'l Sch. Safety Ctr., *Checklist of Characteristics of Youth Who Have Caused School-Associated Violent Deaths*, at <http://nsscl.org/reporter/checklist.htm> (last visited Mar. 17, 2003). NSSC's warning signs include students' expressions of "anger, frustration, and the dark side of life in school essays or writing projects." *Id.* Moreover, a very recent incident in which an "intelligent, articulate" fifteen-year-old student flew a small plane into a Florida high-rise building rekindled speculation about the "loner" personality and privileged background as risk factors of "underlying rage against the system." Martha Irvine, *Latest Case Raises Questions About 'Teen Loners'*, CARLISLE SENTINEL, Jan. 8, 2002, at A6.

keep “Columbine-type incidents in perspective.”³⁰ Such groups cite dramatic anecdotes of young students being sent to juvenile detention centers for writing horror stories or drawing pictures depicting acts of violence against their teachers.³¹ Parent advocacy groups and counseling professionals caution that they encourage creative writing as a means for students to release frustrations associated with acts of violence by members of their school community, and that as a result graphically violent fictional pieces may represent a healthy emotional outlet rather than a cry for help. Nonetheless, schools in some areas are still encouraging teachers, and even compelling them in some instances, to “err on the side of caution” when they read students’ creative works.³²

Since the details of the Columbine shooters’ creative writings have been released, creative writing teachers are feeling increased pressure to police student work for signs of potential violent behavior. Reports such as that of Cheryl Lucas, the shooters’ English teacher at Columbine, have fueled parental demands for more careful responses to student creative works.³³ Ms. Lucas reported that, after having expressed concern to school officials about the “horribly, graphically violent” content of stories written by the shooters, she was told that the pieces “did not violate any school policies” and were “harmless.”³⁴ In the few years that have followed the tragedy at Columbine, new zero tolerance policies in many districts require school response to any such work, and a student’s defense of the work as being “just a story” no longer affords protection against disciplinary sanctions, mandatory counseling, or other official school responses.

III. The Pennsylvania System of School Assessment (PSSA)

A. *History and Background*

In October 1998, the Pennsylvania State Board of Education adopted the final regulations for Chapter 4 of the School Code.³⁵ The

30. Press Release, ACLU, ACLU Urges Boston School To Annul Suspension of Creative Student (Apr. 27, 2000), *available at* <http://www.aclu.org/news/2000/n042700a.html>.

31. See, e.g., Posting of efw@psulias.psu.edu (Jan. 16, 2001), *at* <http://www.mrcranky.com/movies/obrotherwherearthou/26.html>; see also Brian Barber, *Parents Sue Union over Alleged “Witch Hunt” of Daughter* (May 26, 1999), *at* <http://www.familyeducation.com/article/0,1120.1-7052-00.html>.

32. Kathleen Kennedy Manzo, *Shootings Spur Move To Police Students’ Work* (May 26, 1999), *at* www.edweek.org/ew/vol-18/37write.h18.

33. *Id.*

34. *Id.*

35. 22 Pa. Code § 4.51 (1999).

Chapter 4 regulations mandate annual assessment of all of Pennsylvania's public school students, based on state-determined standards of performance in academic subject matters and skills.³⁶ The express purposes of the tests, known as the Pennsylvania System of School Assessment (PSSA), include, *inter alia*, providing students, parents, educators, and citizens with an understanding of student and school performance, determining the degree to which school programs enable students to attain proficiency of state-set standards, and providing results to school districts for consideration in developing strategic plans.³⁷

As of the 2002-2003 school year, the PSSA assesses student performance in mathematics, reading, and writing.³⁸ Standards for speaking and listening skills were also included in the appendix to Chapter 4.³⁹ Since 1999, mathematics and reading have been assessed at grades five, eight, and eleven, and writing has been tested at grades six, nine, and eleven.⁴⁰ All public school districts participate in the reading and mathematics assessments each year.⁴¹ Participation in the writing assessment occurs before a district's six-year planning cycle begins, after three years, and at the end of the planning cycle, although districts may participate off-cycle on a voluntary basis.⁴²

Advisory committees of Pennsylvania educators choose the concepts on which the assessments are based and either write the test questions, tasks, and writing prompts themselves or choose them from outside examples created specially for Pennsylvania students.⁴³ The advisory committees consist of teachers, supervisors, curriculum directors, and college specialists.⁴⁴ The Department of Education contracts with Data Recognition Corporation (DRC), a Minnesota-based

36. *Id.*

37. *Id.* § 4.51(a)(1)-(3). The other express purposes of the PSSA are providing information to state policymakers on how effective schools are in promoting and demonstrating student proficiency on academic standards, providing information to the general public on school performance, and providing results to school districts, based upon the aggregate performance of all students, for students with and without individual education programs (IEPs). *Id.* § 4.51(a)(4)-(6).

38. See Pa. Dep't of Educ., *Calendar of PSSA Testing and Results*, at www.pde.state.pa.us/a_and_t/cwp/view.asp?A=106&Q=52524 (last visited Mar. 18, 2003).

39. 22 Pa. Code ch. 4 app. A § 1.6 (1999).

40. See Pa. Dep't of Educ., *Assessment and Testing*, at www.pde.state.pa.us/a_and_t/site/default.asp (last visited Mar. 18, 2003).

41. *Id.*

42. Pa. Dep't of Educ., *PSSA Classroom Connections: Overview of the PSSA*, at <http://www.pasd.com/PSSA/WRITING/WRIHAND/overv1.htm> (last visited Mar. 17, 2003).

43. *Id.*

44. *Id.*

independent enterprise, for scoring of the PSSA. DRC currently conducts educational testing and assessment projects in Pennsylvania and several other states.⁴⁵

Chapter 4 mandates that information regarding student performance include student names to ensure that such information “is available to parents and teachers.”⁴⁶ The regulations clarify that “individual [PSSA] results shall be used in planning instruction only by parents, teachers, administrators and guidance counselors with a need to know based upon local board policy on testing and in reporting academic progress.”⁴⁷ The regulations also state that the Department of Education is prohibited from collecting individual student test scores, and may collect school and district scores only in aggregate form.⁴⁸ Students not achieving the proficient level in the grade eleven assessments may be given another chance to demonstrate proficiency in grade twelve.⁴⁹ The regulations also provide for disciplinary action against students or employees who are found to have “cheated” in some way with respect to the assessment.⁵⁰

The regulations do not specify what consequences may result from an individual student’s failure to demonstrate grade-level proficiency or from a school’s overall poor achievement. However, the Pennsylvania Education Empowerment Act of 2000 requires that school districts in which fewer than fifty percent of students attain minimum proficiency levels in reading and math file with the Department of Education an approved improvement plan.⁵¹ Failure to follow that plan or to raise PSSA scores in subsequent years can have serious consequences (including state takeover), but struggling districts become eligible under the Act for special grants and other state assistance designed to help them improve (including the opportunity to petition the state for relief from state mandates, if the district believes that the waiver will allow them to operate more effectively, efficiently, or economically).⁵² Assessment of academic achievement in mathematics and language arts is required of all states by federal law.⁵³

45. In 2001, DRC had contracts with the departments of education in Alabama, Arkansas, California, Kentucky, Louisiana, North Carolina, Pennsylvania, South Carolina, and Virginia. Data Recognition Corp., *Education Division: Our Clients*, at <http://www.drc-mn.com/education/clients.html> (last visited Mar. 17, 2003).

46. 22 Pa. Code § 4.51(c) (1999).

47. *Id.*

48. *Id.*

49. *Id.* § 4.51(e).

50. *Id.* § 4.51(g)(1)-(3).

51. PA. DEP’T OF EDUC., *THE EDUCATION EMPOWERMENT ACT: A GUIDE FOR PENNSYLVANIA SCHOOL DISTRICTS 4* (2000).

52. *Id.* at 12.

53. Elementary and Secondary Education Act (ESEA), 20 U.S.C. §§ 6301-6514

B. *The Writing Assessment*

Pennsylvania's assessment regulations state that student performance on PSSA writing tests shall be demonstrated by "the quality of students' written compositions on a variety of topics and modes of writing."⁵⁴ The Pennsylvania writing assessment was developed by the Writing Assessment Advisory Committee (WAAC), which is composed of over sixty education professionals from across the state.⁵⁵ WAAC identified three types of writing—informational, narrative, and persuasive—that it deemed most appropriate for state assessment because they are "among the most important in school and life."⁵⁶ WAAC also has developed guidelines for the scoring of the essays and provides assistance in aligning the items within the assessment to meet state writing standards.⁵⁷ Among its other responsibilities, WAAC also is required to attend scoring sessions with the independent entities with which it contracts to score the PSSA writing assessment.⁵⁸

The Division of Evaluation and Reports of the Pennsylvania Department of Education publishes annually the *Writing Assessment Handbook*, which provides an overview of the test and its administration and gives detailed examples of how each standard is measured (by providing sample evaluations of actual student essays from past years' assessments).⁵⁹ The *Handbook* contains WAAC's "Domain Scoring Guide," which is designed to assess five characteristics ("domains") of effective writing: focus, content, organization, style, and conventions (including grammar, mechanics, spelling, usage, and sentence formation).⁶⁰ Each domain is scored separately on a scale of one to four to indicate the writer's level of competence; scores of three and four characterize "acceptable writing."⁶¹ The *Handbook* is accompanied by individual supplements for the sixth, ninth, and eleventh grade assessments. WAAC trains professional scorers from DRC to use the Pennsylvania scoring guide.⁶²

(2001). In the January 8, 2002, reauthorization of the 1965 ESEA (the No Child Left Behind Act of 2001), Congress added the requirement that students also be assessed in science beginning no later than the 2007-2008 school year. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1445 (codified as amended at 20 U.S.C. § 6311).

54. 22 Pa. Code § 4.51(b)(3).

55. DIV. OF EVALUATION & REPORTS, PA. DEP'T OF EDUC., WRITING ASSESSMENT HANDBOOK 2, 20-22 (2001) [hereinafter WRITING ASSESSMENT HANDBOOK].

56. *Id.* at 8.

57. *Id.* at 2.

58. *Id.*

59. *Id.*

60. *Id.* at 14-15.

61. *Id.* at 14.

62. *Id.* at 17.

Each student who takes the writing assessment receives a report of his or her individual scores.⁶³ The reports include separate scores for each domain, along with a total score.⁶⁴ Each school district receives individual student scores and school summary reports containing school, district, and state data.⁶⁵

The supplements to the *Writing Assessment Handbook* provide sample prompts of the kind for which students at each grade level are required to write their responses. Each prompt is designed to elicit a narrative, an informative, or a persuasive essay. A sample narrative writing prompt sheet from the sixth grade assessment in the fall of 2000 includes the following instructions to the student: "You will have one class period (but no more than 60 minutes if your class is longer) to plan, write and proofread your responses, making any necessary corrections."⁶⁶ The instructions also give students a few guidelines on how to plan and organize the essay and then provide the prompt itself: "At different times in their lives people face situations in which they need to be brave. Write about a time when someone needed to be brave and why bravery was needed."⁶⁷ A similar narrative prompt from the February 2001 eleventh grade assessments reads as follows:

Many times in life we avoid experiences because we are afraid to do them or dread the thought of a negative experience. Other times we have no choice and must do what we dread the most. In some instances our worst fears are realized, but more often we learn that our fears were unjustified. Write about an experience you dreaded but discovered was not nearly as bad as you had expected.⁶⁸

Notable in both of these examples is the absence of an instruction requiring that the student write a truthful, non-fiction narration. By their nature, these prompts could easily inspire a student to produce a creative writing piece instead of an autobiographical account. In fact, several of the sixth grade sample student essays in the supplement clearly constitute "stories" that are either completely or partially fictionalized. For example, one sample essay begins: "Once upon a time a young boy . . .

63. *Id.*

64. *Id.*

65. *Id.*

66. DIV. OF EVALUATION & REPORTS, PA. DEP'T OF EDUC., WRITING ASSESSMENT HANDBOOK 12 (Supp. grade 6 2001) [hereinafter WRITING ASSESSMENT HANDBOOK SUPPLEMENT - GRADE 6].

67. *Id.*

68. DIV. OF EVALUATION & REPORTS, PA. DEP'T OF EDUC., WRITING ASSESSMENT HANDBOOK 3 (Supp. grade 11 2001) [hereinafter WRITING ASSESSMENT HANDBOOK SUPPLEMENT - GRADE 11].

lived in a little shabby house.”⁶⁹ Another begins: “There was a boy”; and a third opens: “The sun was hot and a boy . . . was camping in the mountains.”⁷⁰ As a result, although the PSSA has no creative writing component per se, it is clear that at least some prompts, particularly those designed to elicit narrative essays, are worded so as to allow—or even to encourage—students to respond by producing works of creative fiction.

Through 2001, before a prompt was included in the PSSA, it went through a field-testing phase, carried out by another independent entity, Vantage Technologies. Vantage was contracted and trained by the Department of Education in much the same way as DRC.⁷¹ In the field-testing process for each year’s PSSA, Vantage field-tested proposed writing prompts on approximately 30,000 students from over 300 schools, and sent the responses to DRC for determinations of validity and reliability.⁷²

WAAC discussed each prompt individually once it had been field-tested and DRC verified its reliability.⁷³ Very few prompts survived this rigorous scrutiny, which included review for cultural and economic bias as well as careful analysis to ensure that the prompt elicited the domains targeted for assessment.⁷⁴ Those prompts that did survive the process were included in the appropriate section (narrative, persuasive, or informational) of the PSSA. WAAC also rated each prompt for the level of writing skill that the prompt was designed to elicit (intermediate, mid, or high). Prompts were also classified according to their subject matter (social studies, language arts, health, science, and geography).⁷⁵ As noted above, most prompts that are finally approved do not include specific instructions indicating that the student should write a non-fiction essay.⁷⁶ In fact, most of the prompts that PSSA currently provides to

69. WRITING ASSESSMENT HANDBOOK SUPPLEMENT - GRADE 6, *supra* note 66, at 18.

70. *Id.*

71. Interview with Andrea Martine, Educational Assessment Specialist, Division of Evaluation and Reports, Pennsylvania Department of Education, in Harrisburg, Pennsylvania (Nov. 9, 2001).

72. *Id.*

73. *Id.*

74. *Id.*

75. Div. of Evaluation & Reports, Pa. Dep’t of Educ., *Writing: Narrative/Imaginative Prompts*, at <http://www.pasd.com/PSSA/WRITING/wri251.htm> (last visited Mar. 19, 2003) [hereinafter *Narrative/Imaginative Prompts*].

76. A few of the sample prompts examined do make it clear that students are being asked to write non-fictional, autobiographical accounts: “Tell a friend about an experience you had involving an animal. It might be an experience with your pet, someone else’s pet, or even a wild animal. Be sure to tell the story in a way that shows why this experience was memorable to you.” Or: “Think about either your first day or last day of school. Write a story to a friend telling about that day. Be sure to describe the atmosphere and tell what impressed you most about the experience.” *Id.* Even prompts such as these, however, might elicit a fictional account without more direct instructions to

schools as teaching aids to prepare students for the test involve imaginary settings or situations that clearly indicate to the child that the story should be fictional.⁷⁷

Despite WAAC's careful and sensitive screening of the numerous proposed prompts that it considers each year, it is inevitable that some prompts admitted into the exam will evoke graphic scenes of violence in the minds of contemporary children. For example, a prompt such as the following may easily bring to mind images of physical harm, violence, or destruction: "Imagine you are a reporter covering the Revolutionary War. You find yourself pinned down by a wave of enemy troops. Write a newspaper story telling readers what your experience is like."⁷⁸ Other prompts may less directly invite children to include scenes of violence or threats of harm to others: "To tell a story, we often take photographs or create paintings. Imagine yourself dropped into a scene represented by this [shown] painting/photograph/image. Write a story for a younger student that stars you as a character in the painting/photograph/image."⁷⁹ Those students who are focused on causing harm, have themselves experienced or witnessed acts of violence, harbor anger, or fantasize about hurting others may find opportunity in even the most innocuous prompt to externalize violent thoughts or issue threats.

School officials administering the PSSA do not instruct students taking the exam that essays containing violent imagery or threats will be singled out by the scorers for reporting to school authorities.⁸⁰ This, coupled with a prompt's express or implied invitation to write fiction, may cause some students to feel comfortable expressing themselves without restriction, in what they may consider an impersonal, standardized test in which their responses have little or no disciplinary consequence.

C. *Red-Flagging of PSSA Essays*

Although DRC's scorers are not instructed to look specifically for disturbingly violent or threatening language or content in PSSA writing assessment essays, there is a red-flagging procedure in place to be used

the student to write a truthful narration.

77. Fictional responses are clearly invited, for example, by prompts such as: "Imagine that you find a page torn from a short story that only has two lines: 'That's how I became known as the Captain. THE END.' For a friend, create another story that could still end with this page." Fictionalized narrative is also suggested by such prompts as: "Suppose you wake up one morning to find that everyone had disappeared. Write an account for future generations of what life is like with this sudden change." *Id.*

78. *Id.*

79. *Id.*

80. Interview with Andrea Martine, *supra* note 71.

when a scorer discovers such an essay.⁸¹ DRC does not red-flag essays automatically for all the states that it services, but the procedure has been specifically requested by Pennsylvania and several other states.⁸²

DRC views the red-flagging procedure as a drastic intervention. An essay is red-flagged only if it indicates that a student's life is obviously in danger at the present time and that the child is taking advantage of the anonymity of the test to announce imminent harm. DRC policy specifically states that only essays that "mention suicide, abuse—any type of response that indicates that the child may be in danger" will be red-flagged.⁸³ Additionally, if an essay indicates that a student is planning a crime in which bodily harm has been or will be done to another individual, that paper is red-flagged.⁸⁴ Readers make every attempt to respect the creative element of a student's writing and single out an essay only when, in their opinion, heightened attention from school officials is absolutely warranted.⁸⁵

DRC scorers fill out an alert sheet when they see language or imagery in an anonymous essay that they feel indicates imminent danger to a student.⁸⁶ Most of DRC's writing assessment scorers are former educators, who use their years of experience with children and their "gut instincts" to make the initial determination as to whether an essay merits such attention.⁸⁷ Alert sheets are passed on to the scoring director, who then reviews the essay with the project manager. If both the scoring director and the project manager believe that the school should be notified, the scoring director requests the student's name to be matched to the anonymous test number.⁸⁸ The scoring director then sends a letter indicating the red flag, along with a copy of the essay and the name of the student, to the superintendent of the student's school.⁸⁹

The scoring director and the superintendent are the only individuals in the red-flagging process to see the student author's name matched with the signaled essay.⁹⁰ Before DRC scorers receive the essays, students' demographic information is separated from the response and stored in DRC's warehouse, away from the scoring center.⁹¹

81. Telephone Interview with Sue Drexler, Scoring Director for PSSA, Data Recognition Corporation (Nov. 6, 2001).

82. *Id.*

83. Memorandum from DRC to the Division of Evaluation and Reports of the Pennsylvania Department of Education (n.d.) (on file with the author).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

When the scoring director and project manager at DRC cannot make a definitive determination of whether an essay indicates that harm to a student is imminent, the essay is not red-flagged. Any indication in the essay that a troubled student is “coping” with the problems described in the essay will suffice to allow it to pass without notice to school officials. Additionally, essays are not red-flagged if students state that they have broken the law by committing such offenses as shoplifting or smoking marijuana.⁹² As a result of this policy, DRC does not red-flag many essays in any given year.⁹³ DRC reports to the Department of Education the number of papers it alerts each year, at the request of the Department. This information is archived in the Department but is presently used only for “awareness” purposes.⁹⁴

Vantage Technologies’ “IntelliMetric” computer scoring system for PSSA field-testing and assessment also had a red-flagging mechanism in place to signal essays that included references to weapons, threats, or obscenity.⁹⁵ That system took into account such factors as the distance between violent words or the content of surrounding words before issuing a red flag.⁹⁶ During the course of its contract with the Department of Education, Vantage sent author-identified, red-flagged essays to school officials only, and, if requested, also sent information regarding the number of essays it red-flagged in each round of scoring to the Division of Evaluation and Reports of the Department of Education.⁹⁷

92. *Id.*

93. Telephone Interview with Sue Drexler, *supra* note 81. In 2001, DRC sent a total of twenty-two letters to school districts for alerted papers. Eight alerts were from the eleventh grade writing assessment in the spring, and fourteen were from the ninth grade writing assessments in the fall. No essays from the sixth grade assessment in the fall of 2001 received red flags. E-mail from Sue Drexler, Scoring Director for PSSA, Data Recognition Corporation, to Lee Plempel, Chief, Division of Evaluation and Reports, Bureau of Curriculum and Academic Services, Pennsylvania Department of Education (Jan. 18, 2002, 2:13 pm EST) (on file with the author). Of the 2002 PSSA essays that had been scored at the time of this comment’s publication, there were eleven alerts. Those included “1 for suicide, 7 for abuse and 3 for violent/disturbing content.” E-mail from Sue Drexler, Scoring Director for PSSA, Data Recognition Corporation, to the author (Mar. 3, 2003, 4:10 pm EST) (on file with the author).

94. E-mail from Lee Plempel, Chief, Division of Evaluation and Reports, Bureau of Curriculum and Academic Services, Pennsylvania Department of Education, to the author (Jan. 23, 2002, 4:58 pm EST) (on file with the author).

95. Telephone Interview with Dr. Kate Darlington, Vantage Technologies (Jan. 17, 2002). Dr. Darlington gives the example of an essay that includes the assertion, “I might kill the draft of this essay,” as one that Vantage’s computer scoring system would *not* red-flag. The Pennsylvania Department of Education’s three-year pilot test with Vantage’s computer scoring system ended in 2001. For more information regarding the pilot program, see Andrew Trotter, *States Testing Computer-Scored Essays*, EDUC. WK., May 29, 2002, at 1.

96. Telephone Interview with Dr. Kate Darlington, *supra* note 95.

97. *Id.*

IV. Potential Legal Consequences of Violent or Threatening Creative Essays

A. General First Amendment Implications

Caselaw is sparse on the particular issue of potential violation of First Amendment free speech rights when schools discipline students for producing violent or threatening creative writing projects. Courts have generally protected those rights when students are facing criminal charges such as disorderly conduct or delinquency.⁹⁸ Moreover, although school districts have usually been permitted to discipline students who write threatening, vulgar, or violent essays for violating school policies or rules, at least one court has placed limits on the disciplinary records that schools may keep regarding cases involving creative works.⁹⁹

When creative depictions have been found to constitute “true threats,” however, courts have routinely suspended protection of student speech and have even upheld adjudications of delinquency.¹⁰⁰ Most cases regarding student true threats, however, have dealt with speech produced in non-written form,¹⁰¹ writings that were not produced in response to school-related assignments,¹⁰² or writings or graphics that were created in formats located away from school property, such as on students’ personal Internet web pages.¹⁰³

A recent Wisconsin case, however, has reinforced the assumption that courts are generally willing to protect student speech in the context

98. See, e.g., *In re Douglas D.*, 626 N.W.2d 725 (Wis. 2001).

99. See *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001).

100. See, e.g., *Commonwealth v. Milo M.*, 740 N.E.2d 967 (Mass. 2001); *In re A.S.*, 626 N.W.2d 712 (Wis. 2001); see also *McMinimee*, *supra* note 21, at 550.

101. See, e.g., *A.S.*, 626 N.W.2d 712 (involving student who made several verbal statements to other students regarding intent to “kill everyone at the middle school” and upholding student’s adjudication as delinquent for disorderly conduct because speech found to constitute true threat under the circumstances).

102. See, e.g., *John Doe v. Pulaski County Special Sch. Dist.*, 263 F.3d 833 (8th Cir. 2001) (involving student who wrote violent letter containing references to killing ex-girlfriend and who was suspended after another student showed letter to school officials); *LaVine*, 257 F.3d 981 (involving student’s poem, composed as spontaneous creative expression, depicting shooting into classroom and killing twenty-eight students and himself that led to student’s expulsion after it was shown to teachers and holding that maintaining negative documentation in student’s file went beyond school’s legitimate needs).

103. See, e.g., *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446 (W.D. Pa. 2001) (involving student who compiled list of derogatory statements about school personnel on home computer after school hours and e-mailed list to other students who brought list onto school grounds and holding that student’s suspension was in violation of First Amendment because there was no evidence of substantial disruption as required by *Tinker*).

of creative writing assignments. In *In re Douglas D.*,¹⁰⁴ an eighth grade student, in response to an English class assignment, handed in a short essay that included the lines: “The next morning Dick came to class & in his coat he conseled a machedy. When the teacher told him to shut up he whipped it out & cut her head off.”¹⁰⁵ The story caused the English teacher to fear that the student actually intended to harm her, as the essay was written after the teacher had disciplined the student in class.¹⁰⁶ When called by the assistant principal to discuss the story, the student apologized and stated that he did not intend the story to be interpreted as a threat.¹⁰⁷ The student was nonetheless suspended, and police later petitioned him as delinquent for having submitted a death threat in violation of the state’s disorderly conduct statute.¹⁰⁸ Both the circuit court and the Wisconsin Court of Appeals upheld the juvenile conviction.¹⁰⁹

In finding that the essay contained no true threat to the English teacher, the Wisconsin Supreme Court focused on the fact that the student had produced the essay in the context of an assignment to write a work of fiction.¹¹⁰ The court reasoned that the story clearly constituted fiction entitled to First Amendment protection because it contained literary devices such as “hyperbole and attempts at jest.”¹¹¹ The court also believed that the student could reasonably have expected another student to complete the story, which the teacher had assigned as a collaborative writing project, as a dream or an imagined event.¹¹² Although the court shared the public’s concern regarding threats of school violence and found the story “repugnant and insulting,” it refused to succumb to public pressure in deciding issues of constitutional rights.¹¹³

The dissenting judge in *Douglas D.*, however, did not see the context of the case as a classroom fiction assignment. Rather, the dissent described the context of the essay as the “educational atmosphere” created by school shootings and other violent incidents, and referred to it as “a disturbing backdrop of school violence.”¹¹⁴ Relying on sources

104. 626 N.W.2d 725 (Wis. 2001).

105. *Id.* at 731.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 731-32.

110. *Id.* at 741.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 749 (Prosser, J., dissenting).

such as the FBI's profile of school shooters,¹¹⁵ the dissenting opinion emphasized the school's obligation to protect students and teachers,¹¹⁶ and considered aspects of the accused student's life in finding that the essay did indeed contain a true threat against the English teacher.¹¹⁷ The dissent also minimized the majority's reliance on the student's alleged use of literary devices, noting that even in fiction a writer is capable of conveying true threats.¹¹⁸

The dissenting opinion in *Douglas D.* also emphasized the uncertainty of the future application of the majority's proposition that student speech is protected against some state actions but not against others, depending upon who is seeking to punish the speech or how severe the punishment might be.¹¹⁹ Likening student threats in creative writing projects to passengers at airports who joke about hijacking planes or patrons shouting "fire" in a theater, the dissent concluded that in the current educational atmosphere threats are incendiary per se when they are made in school and should not be afforded any First Amendment protection.¹²⁰

The philosophical differences separating the majority and the dissent in *Douglas D.* represent the state of the law regarding creative students' free speech in post-Columbine America. The debate concerning how far courts should extend First Amendment protection in the context of the classroom has created two dramatically opposed viewpoints, represented by the differing opinions in *Douglas D.* The view represented by the majority emphasizes that, although public opinion and changing social circumstances may appropriately be considered by the legislature, they should not sway a court's decision on issues of constitutional dimension.¹²¹ This philosophy places primary emphasis on the duty to protect students' free speech rights. On the other hand, according to the viewpoint represented by the dissent, when the exercise of a constitutional right such as free speech is to be judged in its context, the context must include social realities such as the new realization that it is unwise to assume that any school is "immune from danger."¹²² This philosophy places primary emphasis on schools' responsibility to protect students' safety.

The strongly defended differences of opinion in *Douglas D.*

115. O'TOOLE, *supra* note 29.

116. *Douglas D.*, 626 N.W.2d at 750 (Prosser, J., dissenting).

117. *Id.* at 751 (Prosser, J., dissenting).

118. *Id.* at 756-57 (Prosser, J., dissenting).

119. *Id.* at 758-59 (Prosser, J., dissenting).

120. *Id.* at 762 (Prosser, J., dissenting).

121. *Id.* at 742.

122. *Id.* at 750 (Prosser, J., dissenting).

illustrate that the issue is still far from resolution. Although several years have passed since the Columbine shootings, their aftermath is still being felt,¹²³ and public pressure for strong reaction to violent student writing is still influencing at least some judges to consider further suspensions of students' free speech rights for the sake of school safety.

The United States Supreme Court has not heard a case involving student free speech in the creative writing context since the Columbine tragedy. Moreover, there are still too few state and lower federal court decisions on the precise issue to indicate a general judicial trend. Schools in the meantime must attempt to achieve the delicate balance between protecting the safety and well-being of students and respecting those same students' constitutional rights.¹²⁴

B. Possible Implications for the PSSA

At first glance, the concept of red-flagging student essays in the context of the PSSA appears to focus on the philosophy expounded by the dissent in *Douglas D.*—that the duty to protect students from harm should trump First Amendment concerns.¹²⁵ Upon closer examination, however, it appears that the Pennsylvania Department of Education and DRC have attempted to strike the best possible balance between the duty to protect students' speech and the duty to protect their safety. Student anonymity is meticulously respected at the initial scoring level. Borderline essays are given the benefit of the doubt and are not red-flagged. Only when an anonymous essay is red-flagged does anyone match the writing with the name of its author, and even then only the scoring director and the school superintendent have access to the matched essay and name.¹²⁶

But does red-flagging any essay, even one with clearly threatening content, violate First Amendment free speech rights when it is clear that a PSSA prompt has asked for a fictionalized account or when a student chooses to produce a piece of fiction in response to a neutral prompt? DRC's policy is that an essay is red-flagged only when a student's life is in imminent danger.¹²⁷ But, without any information beyond the essay

123. As of this writing, students across the country are still being influenced by the Columbine incident. For example, in November 2001, three students from Massachusetts were charged with planning an assault on their high school that in their words would have been "bigger than Columbine." Megan Tench & David Abel, *N. Bedford School Assault Plot Foiled*, BOSTON GLOBE, Nov. 25, 2001, at A1. The atmosphere of fear created by the events at Columbine may be becoming a permanent part of American public school life, as evidenced by the presence of metal detectors at many school doors.

124. *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001).

125. See *supra* text accompanying note 113.

126. See *supra* text accompanying note 90.

127. See *supra* text accompanying notes 83-85.

itself, how clear can it really be to a scorer in Minnesota that an anonymous student's life is in imminent danger in Pennsylvania? When teachers who have daily contact with students in the classroom have difficulty identifying a true threat in a creative writing context, how accurate can DRC scorers or administrators (or Vantage's computers, when they were being utilized in field-testing) be expected to be?

The red-flagging process takes into account such concerns by relying on local school superintendents for a final determination of the need to intervene. Because DRC's scorers are so far removed from the students who compose the essays, a local superintendent who receives a red-flagged essay should carefully review the essay and evaluate the scorers' concerns in the context of his or her personal knowledge of the student, or in consultation with those school officials who do, before taking action in response to a red flag. There is real danger in misdiagnosing a possible sign of violence, and, for this reason, experts urge that officials should not overreact to single signs, words, or actions, but rather should seek the opinion of a qualified psychologist, counselor, or mental health specialist to determine the meaning of such a signal within the student's social context and developmental level.¹²⁸ The experts also caution that early warning signs should not be used to isolate, stereotype, label, or punish a child, and that a referral to an outside agency based on such signs must be done with absolute confidentiality unless there is parental consent.¹²⁹

Despite the importance of school officials' reactions to red flags, it appears that there is little, if any, monitoring of this process. A district is not obligated, for example, to report the red flag as an "act of violence" on its required "Annual Report on School Violence and Weapons Possession."¹³⁰ Each district "determines its own threshold for reporting incidents of violence,"¹³¹ although standardized sheets that schools use to report incidents of violence list "threatening school official," "malicious harassment/racial intimidation/hate crimes," and "terrorist threats" among types of reportable misconduct.¹³² The Department of Education defines a "reportable act of violence" as "any deliberate act, serving no legitimate purpose, which causes injury or which could reasonably be expected to cause injury to another person."¹³³ The same threshold for

128. DWYER ET AL., *supra* note 29, at 13.

129. *Id.*

130. OFFICE OF SAFE SCH., PA DEP'T OF EDUC., VIOLENCE AND WEAPONS POSSESSION IN PENNSYLVANIA'S SCHOOLS: 2000-2001 SCHOOL YEAR 5 (2002).

131. *Id.*

132. Pa. Dep't of Educ., *Individual Incident Reporting Form*, http://www.safeschools.state.pa.us/docs/Individual_incident_report.pdf (last visited Mar. 17, 2003).

133. *Id.*; see also PA. DEP'T OF EDUC., BASIC EDUCATION CIRCULAR 24 P.S. § 13-1317.2, SAFE SCHOOLS AND POSSESSION OF WEAPONS (2002).

reporting incidents of violence appears to apply to school districts' reporting obligations with respect to local law enforcement agencies.¹³⁴ Because only local officials receive information matching red-flagged essays with their student authors, and because there is no requirement that districts specifically report red flags to the state in their violent incident accounts, there appears to be no mechanism in place to determine how (or whether) a district has followed up on, or even acknowledged, a PSSA red flag.

Questions of liability potentially arise not only when red flags are placed on essays and students are disciplined or otherwise singled out, but also when they are not. A superintendent receiving a red-flagged essay must take care to guard the student's rights of privacy and due process as well as determine whether it is appropriate to respond in a way that may abridge the student's free expression rights. An unwarranted overreaction can prove costly, particularly in the litigious atmosphere described by those who believe that *Tinker* opened the door to student control of schools and parental support for challenges of school authority.¹³⁵ In an era characterized by heightened public sensitivity towards privacy rights, parents and students have become keenly aware of the possibility of suing school districts if red-flagged students are ultimately determined not to constitute a threat to themselves or to the community. Similar suits, as well as actions alleging breach of the duty to protect, may arise from victims and their families if students who do ultimately cause harm are somehow found to have indicated such intent in an essay that escaped red-flagging. Although the scoring procedures for the essays appear adequate to protect the latter situation from occurring, the potential exists that students who admit to or boast of having written threats in an essay on the PSSA have waived anonymity and the assessment's red-flagging procedures may formally be brought into question in a lawsuit.

Further, in their search for deep pockets to sue, plaintiffs may not stop with local officials, who represent, in fact, the end of the line of those responsible for the red-flagging process. Questions remain as to whether courts might recognize liability on the part of private entities such as DRC or Vantage, and whether even the Department of Education, which contracts PSSA scoring and red-flagging responsibility to those private entities, might also ultimately be vulnerable to lawsuits.

V. Recommendations

The Department of Education and its scorers have already

134. Pa. Dep't of Educ., *supra* note 132.

135. *See, e.g.,* Hymowitz, *supra* note 15.

incorporated into the PSSA red-flagging procedures several effective mechanisms for preventing students from being personally identified by anyone other than local school officials.¹³⁶ The Department's contracted scoring entities appear to have in place sufficient, clear procedures for identifying essays to be red-flagged, maintaining students' anonymity, and notifying school officials when necessary.¹³⁷

Additionally, the scoring entities appear to have developed, in cooperation with WAAC, internal guidelines for defining and distinguishing language and content in PSSA essays that indicate when a red flag may be warranted.¹³⁸ Although DRC admits that it relies on somewhat subjective interpretations of what constitutes threatening language, DRC's system allows for several scorers and supervisors, who have many years of experience as educators, to express opinions on the still-anonymous essay's content before the essay is matched with a student's name and a red flag is sent to school officials.¹³⁹ It may appear that Vantage's computer-based scoring system would have been less able to identify actual threats; however, the "IntelliMetric" system was carefully designed to check threatening, violent, or obscene vocabulary in context before a red flag was attached to an essay.¹⁴⁰ In short, the Department of Education and its scorers have focused much attention on the red-flagging procedure and have attempted to respect as much as possible students' anonymity and creative freedom while at the same time protecting their safety.

WAAC's carefully designed strategies and tests for identifying elements in essays that warrant red flags should be shared with school officials and teachers. This information, including examples of the kind of language or content that has been red-flagged in recent years as well as the kind that has narrowly survived red-flagging procedures, should be included in the handbooks that PSSA makes available to educators for the purpose of helping them prepare students at various grade levels for the writing assessment. By having such examples available, teachers may be able to better identify warning signs in their own students as they practice writing assessment essays in the classroom. Because teachers have daily contact with their students, it is at this level that intervention may be most effective to protect students' safety.

Moreover, in practice sessions, teachers who see that students are including violent or threatening language in their essays similar to that which has been red-flagged by PSSA scorers in the past may be able to

136. See *supra* text accompanying notes 88-90.

137. See *supra* text accompanying notes 88-90.

138. See *supra* text accompanying notes 83-97.

139. See *supra* text accompanying notes 87-89.

140. See *supra* text accompanying notes 95-97.

discuss with students the potential responses such language may generate when the essays are scored in a completely impersonal setting by outside—or even computerized—readers. This procedure may be especially useful to help students who use such language in a purely creative way without intending a true threat of any kind to avoid any embarrassment or disciplinary measures resulting from misplaced red flags. WAAC has worked with DRC and Vantage to develop guidelines for red-flagging;¹⁴¹ those same guidelines and the combined expertise of scorers following those entities' red-flagging policies may be beneficial for classroom teachers as well, not only in the administration of the PSSA but also in developing the kind of "gut reaction" discretion on which DRC scorers, for example, rely.

WAAC and its scorers have expertise that many teachers may find useful in identifying true threats in essays. WAAC, or another component of the Department of Education's Division of Evaluation and Reports, therefore, should consider offering workshops, training, or other resources to help teachers and school officials develop skill in this area.

As part of the effort to ensure that no student's free expression is needlessly curtailed, any such training should always include information that will help teachers to understand the consequences of overreacting to violent or threatening speech in creative assignments. Teachers must, of course, be cautioned to use discretion if they advise students to eliminate certain kinds of expression from their essays in order to avoid red flags. If examples of red-flagged language are made available to teachers from such sources as PSSA's "Classroom Connections" or writing assessment handbooks, they should be accompanied by information regarding the limitations of their use and the importance of allowing free expression when students do not pose true threats to themselves or the school community.

Although every attempt should continue to be made to allow students to respond to PSSA writing prompts in their own manner, prompts designed to elicit personal narrations should specify clearly that students are expected to write non-fiction accounts. This instruction cannot, of course, eliminate the possibility that students will still fictionalize their essays, but it may limit the veracity of the argument that a student was being "creative" in producing an essay containing violent or threatening expression, making the red-flagging decision somewhat easier.

Students and parents should also be made aware that such expression on the PSSA may bring attention to an essay and may eventually lead to elimination of the student's anonymity. This

141. Interview with Andrea Martine, *supra* note 71.

information could be included in any general PSSA information brochure or packet sent to parents through the Department of Education or local districts.¹⁴²

The Department of Education currently uses data that it receives from its scorers regarding the number of essays red-flagged each year only for “awareness” purposes.¹⁴³ An additional way in which such information could be used is to identify which prompts were involved when essays were red-flagged. Those prompts could then be carefully reviewed and compared over several years in an attempt to discover whether particular characteristics of prompts are more likely to elicit violent or threatening responses in test-takers.

It is not clear whether DRC’s or Vantage’s contracts with the Department of Education have included clauses that legally limit or release the scorers’ or the companies’ potential liability to victims, schools, or the Department should a victim file a lawsuit based upon red-flagging procedures. Red-flagging represents the first step in what may be a long line of reactions to violent or threatening PSSA essays. Given the contemporary atmosphere, in which victims may attempt to attach liability to any entity that may have gained knowledge of a student’s violent tendencies through his or her writings, contracts such as those with DRC and Vantage should include a liability release for the private entity.

First Amendment training also could prove useful in certification and professional development courses for public school administrators, and for teachers at both the elementary and secondary levels, in fields in which such expression is most likely to occur, such as English and foreign languages. Teachers should be aware of the full disciplinary and counseling procedures available in their districts, so that they may make informed decisions about whether or not to bring creative work to the attention of school officials. School districts should provide such information to all parents, and, particularly at the secondary level, to students themselves so that they may use their own discretion and make informed choices regarding the vocabulary and content of their creative works.

In addition, school officials—particularly superintendents, who are the designated recipients of red-flagged PSSA essays—in consultation with teachers, counselors, parents, and district solicitors, should develop

142. Some teachers of creative subjects have already begun informing students of the consequences of violent or threatening content or language in assignments. One writing teacher explained, for example: “I tell students in advance that I may have to inform guidance counselors if their writing raises concerns about serious issues, including violence.” *Resources*, SAFETY ZONE, *supra* note 26.

143. See *supra* text accompanying note 94.

a carefully designed set of guidelines that they will follow in dealing with students whose essays are red-flagged. As in all responses relating to creative works with violent or threatening content, such guidelines such be developed with caution. The goals of any responsive procedure should include not only striking an acceptable balance between free speech rights and safety concerns, but also maintaining the necessary sensitivity to help, not merely to punish, students who write suspect essays. Not all red-flagged PSSA essays will require disciplinary action. Procedures designed to respond to such essays must involve an evaluation of the whole context in each case before any official action is taken. In most cases, this will involve interviewing the student and his or her parents, along with teachers or other school personnel who have regular close contact with the student. Regardless of the procedure adopted, it should be carefully communicated to teachers, school officials, and parents in information shared with them regarding disciplinary codes or creative projects in general, or the PSSA in particular.¹⁴⁴

Contrary to the beliefs of those who claim that the free speech rights guaranteed to students after *Tinker* opened the door to student-dominated disciplinary chaos in America's schools, providing students with information regarding their First Amendment rights and when those rights may be abridged for the sake of safety may actually instill in them a renewed sense of respect for school officials. This may be true especially when they are permitted to participate in the designing of response policies. Even where such direct participation is not practical, however, communication of district-made policies can go a long way towards gaining community cooperation and respect, particularly when parents and students believe that administrators will follow through on those policies as they are written. Providing students with the tools to make informed decisions with regard to the exercise of free expression, and informing them of the consequences, both constitutional and personal, of those decisions, may cause them to have faith that school officials fully intend to honor their constitutional rights whenever possible while simultaneously fulfilling their responsibility of protecting the school community. This realization alone may be enough to satisfy some who, in the new American educational context created by

144. The authors of *Early Warning, Timely Response* urge that, because there is a real danger of misdiagnosis, "it is important to seek the guidance of a qualified professional such as a school psychologist, counselor, or other mental health specialist" to determine in context the meaning of warning signs such as violent themes in student work. DWYER ET AL., *supra* note 29. As the independent scorers do not have the benefit of such assistance when red-flagging an essay, it is imperative that this step be included at the local level when a red-flagged essay is received by a superintendent.

Columbine and its aftermath, feel obliged to demand that the education system “do something.”

VI. Conclusion

Since *Tinker*, courts have sought to balance students’ recognized free expression rights with the need to maintain a safe atmosphere conducive to the accomplishment of the educational goals of America’s schools.¹⁴⁵ In the 1990s this already delicate balance was further disturbed by a series of highly publicized violent incidents, the most deadly of which occurred in 1999 at Columbine High School.¹⁴⁶

Columbine, and subsequent incidents of deadly student violence that have occurred across the nation, have become symbols for the educational system’s failure to recognize signs of potential violence in students who are have been marginalized by their peers.¹⁴⁷ As the post-Columbine era has increased school officials’ awareness of the warning signs of troubled students, victims and their families have simultaneously sought to impose more legal liability on schools for failing to respond appropriately to known dangers.¹⁴⁸

In such an atmosphere, however, students’ free speech rights are also in peril. In *Douglas D.*, the majority opinion reflected the tendency in American courts to protect creative works that contain clear indications of a student’s intent to produce a “story,” that is, a work of pure fiction.¹⁴⁹ The majority reasoned that fiction is the dominant context in which violent creative works should be tested for the presence of true threats.¹⁵⁰ The dissent in *Douglas D.*, on the other hand, suggested that the context in which such works should be judged is the atmosphere of increased violence in America’s schools, and urged that, in such an atmosphere, all threats contained in student schoolwork, whether or not claimed as fiction, must be considered “true.”¹⁵¹

The Pennsylvania Department of Education and its scoring subcontractors have been careful to protect as much as possible students’ “right to write” creatively on the PSSA writing component.¹⁵² While respecting that right, the red-flagging process that has been developed for PSSA scoring also protects local school communities as much as possible from students who make clear threats in their PSSA essays. A

145. See *supra* text accompanying notes 8-12.

146. See *supra* text accompanying notes 13-14.

147. See *supra* text accompanying notes 29-30.

148. See *supra* text accompanying notes 29-32.

149. See *supra* text accompanying notes 111-13.

150. See *supra* text accompanying notes 111-13.

151. See *supra* text accompanying notes 114-17, 122.

152. See *supra* text accompanying notes 86-91, 136.

few additional procedures may further enhance this already carefully designed protective system, such as sharing independent scoring entities' criteria for red-flagging with teachers, administrators, parents, and students, and ensuring that each writing assessment prompt contains clear instructions informing students when they are expected to write non-fiction essays. In addition, after several years of collecting data, WAAC should examine the prompts that have generated red flags to determine any common characteristics of those prompts, which may then be revised to limit the chance of eliciting creative, and possibly violent, responses.

Teachers, parents, and students should also be given full access to local districts' policies regarding follow-up procedures for red-flagged essays. Districts must carefully design these procedures to ensure that responses match the actual context in which each student produces such an essay, not only to protect innocent creative students' rights to free expression but also to enable officials and counselors to ensure that those students who do represent true threats receive the help that they need.