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Free Speech and the Off-Campus Use of Social Networking by Students.

The Third Circuit Court of Appeals recently issued two important rulings regarding a public school's authority to discipline students for off-campus speech. The decisions by the full Court held that two Pennsylvania school districts violated the First Amendment right to free speech when they punished two students who created "vulgar and defamatory" "parody profiles" of their principals on the social networking site "MySpace.com" while off campus.

In *Layshock v. Hermitage School District*, a high-school student used his grandmother's computer to create a fake "parody" profile of his principal using a photograph of the principal taken from the school district's website. The profile used offensive language to describe the principal and claimed, among other things, that the principal used marijuana and kept beer at his desk. The student accessed the profile at school and showed it to other students in the school's computer lab. He also allowed students to access the profile by listing them as "friends" on his MySpace account. The student ultimately admitted his responsibility for the profile and apologized to the principal.

The school district charged the student with violating the school district's discipline code for disruption of normal school process, including, among other things, disrespect, harassment of a school administrator via computer, and computer policy violations (i.e. use of school pictures without authorization). The student was ultimately found guilty of all of the charges. The school district suspended the student for ten days, placed him in an alternative-education program for problem students, banned him from extracurricular activities, and prohibited him from participating in his graduation ceremony. The student was eventually permitted to attend classes and to graduate.

The Court unanimously ruled that the school

district could not punish the student's out of school "expressive conduct" where the off-campus conduct did not disrupt the school and was not related to any school-sponsored event. The Court refrained from determining when a school district can discipline a student for off-campus conduct.

The *Layshock* Court cited *Tinker v. Des Moines Independent Community School District* which sets forth the prevailing standard for when schools can impose discipline for off-campus speech. In *Tinker*, the U.S. Supreme Court held that when off-campus speech causes a material and substantial disruption of the school environment, the school can impose discipline. Otherwise, off-campus speech would receive full First Amendment free speech protections, unless it was a threat. The *Layshock* Court found that Hermitage School District failed to meet this "substantial disruption" standard.

The *Layshock* Court noted, however, that the school district was not claiming there was a "substantial disruption." Instead, the school district argued that there was a "sufficient nexus" between the profile and the school district to allow the school district to regulate the conduct. The Court rejected this argument and held:

[B]ecause the School District concedes that Justin's profile did not cause disruption in the school, we do not think that the First Amendment can tolerate the School District stretching its authority into Justin's grandmother's home and reaching Justin while he is sitting at her computer after school in order to punish him for the expressive conduct that he engaged in there...

It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there

to the same extent that it can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in while at his grandmother's house using his grandmother's computer would create just such a precedent, and we therefore conclude that the district court correctly ruled that the District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression.

In *J.S. v. Blue Mountain School District*, an eighth grade student used her home computer to create a parody profile of her school's principal. The profile did not identify the principal's name, but posted his official school district picture and accused him of, among other things, being a pedophile. The profile was originally made public, but the day after she created the profile, the student limited access to twenty-two friends. The school district claimed that the conduct disrupted school business by channeling teacher and administrative resources to handle the issue. Additionally, student discussions about regarding the profile required teacher attention. The student was suspended for ten days.

In an 8-6 decision, the Court held that the "School District violated the student's First Amendment free speech rights when it suspended her for speech that caused no substantial disruption in school and that could not reasonably have led school officials to forecast substantial disruption in school." The Court agreed, however, that an actual substantial disruption is not required, but that a reasonable forecast of a substantial disruption would have been sufficient to impose discipline. The Court held, "[a]lthough the burden is on school authorities to meet *Tinker's* requirements to abridge student First Amendment rights, the School District need not prove with absolute certainty that substantial disruption will occur," noting that "*Tinker* does not require school officials to wait until disruption actually occurs before they may act."

Several judges dissented, concluding that the student's profile did cause a substantial disruption:

Today's holding severely undermines schools' authority to regulate students who "materially and substantially disrupt the work and discipline of the school. . . . Broadcasting a personal attack against a school official and his family online to the school community not only causes psychological harm to the targeted individuals but also undermines the authority of the school. It was permissible for the School District to discipline J.S. because substantial disruption was reasonably foreseeable.

The dissent focused on the references to sexual misconduct in the profile, including pedophilia, noting that such accusations interfere with the educational process by undermining the authority of school officials to perform their jobs.

While independent schools do not face the same limitations as public schools with respect to disciplining conduct and speech that violates school policy, including off-campus behavior, these cases present a current perspective on the impact of social networking sites on school communities and stress the need that independent schools implement clear policies that squarely address tolerated and unacceptable behavior and the resultant consequences.

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