

## School Cyberlaw Update Supplement February 23, 2010

### **Student Free Speech: Third Circuit Court of Appeals issues two student free speech "MySpace" decisions on same day, but with opposite legal outcomes.**

Two different panels of judges on the United States Third Circuit Court of Appeals handed down two separate - but seemingly conflicting - opinions on the same day. Both cases arose from separate Pennsylvania school districts, involved students posting lewd and derogatory MySpace parodies about their school principals. Each MySpace profile included a picture of the principal copied from the district's website and contained "biographical" statements appearing to indicate the principal's interests in such things as elicit sex, pedophilia, illegal drug use, and promiscuous, lewd and inappropriate behavior. In one case, the court ruled that the student did have a free speech right to post the page. In the other case, the court ruled the student did not have a freespeech right to post the page.

In cases involving off-campus speech, the courts typically apply one or more Free Speech "tests." The predominant test is based on the 1969 U.S. Supreme Court case of **Tinker v. Des Moines**, which established the rule that school officials may restrict speech that causes or is likely to cause a "**substantial disruption**" to school operations. In that case, the Court held that school officials could not prohibit students from wearing black armbands at school in silent, non-disruptive protest of the Vietnam War. In the 1986 case of **Bethel v. Fraser**, the Court held that school officials have the authority to restrict "**on-campus**" **speech that is lewd, vulgar, or profane** because schools play a role in promoting civil conduct. In that case, school officials disciplined a high school student who gave a campaign speech laced with sexual innuendo on behalf of a friend running for school office at a mandatory school assembly.

#### **Case #1: Layshock v. Hermitage School District, 2010 U.S. App. LEXIS 2384 (3rd Cir. Feb. 4, 2010).**

In the court's words, "It all began when Justin Layshock used his grandmother's computer to access [MySpace] to create a fake internet "profile" of his high school principal..." Justin created "bogus answers" to the site's survey questions, applying a theme of "big" because the principal was, apparently, a large man. Some of these answers included numerous self-designating and demeaning statements: "big steroid freak," smoking a "big blunt" (marijuana), "big pills," "skinny dipping," getting drunk a "big number of times," "big whore," and "big fag." Interests included references like "Transgender, Appreciators [sic] of Alcoholic Beverages..."

News of the site "spread like wildfire" at the school. Some students, including the principal's daughter (also a high school student), alerted the principal to the site's existence. After investigating, the principal determined the profile to be "degrading," "demeaning," "demoralizing," and "shocking." He then filed a complaint with the police and threatened criminal action against Justin and his parents. The school system eventually suspended Justin for ten days and imposed other discipline. Justin and his parents sued the school system, the superintendent, and the principal.

The court upheld the trial court's ruling in favor of the Layslocks under the First Amendment. There was no sufficient evidence that the off-campus profile substantially disrupted the school under the Supreme Court's *Tinker v. Des Moines* decision. (The school district itself acknowledged this.) The court then rejected the district's argument that the profile became "on-campus" speech that could be restricted when Justin opened the website on a school computer (to show his classmates) and because he copied a picture of the principal from a school webpage. Consequently, Justin could not be disciplined under *Bethel v. Fraser*, which allows school officials to discipline students for on-campus speech that is lewd or vulgar. According to the court, "we will not allow the School District to stretch its authority so far that it reaches Justin while he is sitting in his grandmother's home after school."

**Case #2: J.S. v. Blue Mtn. Sch. Dist., 2010 U.S. App. LEXIS 2388 (3rd Cir. Feb. 4, 2010).**

J.S. and her friend created a fictitious MySpace profile of their middle school principal to get back at him for a prior disciplinary action. Although the profile did not include the principal's name, it included a picture of him, copied from the district's website. The profile was laced with statements that insinuated that the principal was a sex addict and pedophile. For example his "interests" included "hitting on students and their parents," "watching the playboy channel," and having "sex in his office." The "About Me" section included statements like using MySpace to "pervert the minds of middle school students." The profile was initially "public" but J.S. later made it private so only "invited" friends could view it. Numerous students saw the profile and it "created quite a buzz" at the school. No one, however, considered the content to be true or suspected the principal of any of the activities indicated. The principal, after investigating, threatened criminal action against the student and her parents and successfully requested MySpace to remove the site. In addition, school officials eventually suspended J.S. for ten days based on the school conduct code prohibiting false accusations against staff members, and based on the acceptable use policy (AUP) prohibiting unauthorized use of copyrighted material without permission (due to the fact that J.S. copied the principal's photo from the district website).

The court determined that this case was strictly governed only by the *Tinker v. Des Moines* "Substantial Disruption" standard. Thus the court focused on whether the off-campus personal profile caused or was likely to cause a substantial disruption to the school's operations. The court noted that the site caused some actual disruption at the school due to time spent investigating and the need to alter some meetings and to quiet students in classrooms who were discussing the site. The court viewed these, however, as minor, not "substantial" disruptions. Most important to the court was its conclusion about the "potential" for disruption due to the extensively lewd and vulgar content. If more students and parents were to see the profile, reasoned the court, they would be likely to question the principal's character and ability to lead the school. Had the principal not taken prompt preventative actions, reasoned the court, additional disruption was reasonably foreseeable.

Distinguishing its decision and rationale from the Layshock case in a footnote, the J.S. court stated,

[W]e find the two cases distinguishable. Unlike the instant [J.S.] case, the school district in Layshock did not argue on appeal that there was, under Tinker ... a substantial disruption of the school environment.... Rather, the Layshock panel held that the school district failed to establish that ... that the student's speech [could be characterized as] "on-campus" speech just because it was targeted at the Principal and other members of the school community and it was reasonably foreseeable that school district and Principal would learn about the MySpace profile.

**Editor's Note.** In sum, each of these two cases, J.S. and Layshock, was decided under two different Supreme Court Free Speech standards: J.S. under Tinker's "substantial disruption" standard and Layshock under Fraser's "on-campus," "lewd speech" standard. Specifically, the school district, in Layshock, made no attempt to prove there was a substantial disruption. In J.S., the school district argued and the court applied the Tinker standard and found there to be a likelihood of disruption.

Some experts might argue that the J.S. case was not properly decided: that J.S., like Layshock, also had the right to post her profile. This was the position taken by the dissenting judge in the J.S. case in opposing the decision of his majority colleagues. In essence, that judge reasoned that the majority holding in J.S. relied, improperly, on speculative determinations rather than any evidence, to rule that a substantial disruption was "foreseeable."

**Student Speech: Florida federal district court upholds student's right to pursue free speech claim involving Facebook complaints about her teacher.** *Evans v. Bayer*, 2010 U.S. Dist. LEXIS 12560 (S.D.Fla. Feb. 12, 2010).

A court ruled in favor of a high school student who created a Facebook page so she and her could post criticisms about her teacher. The teacher never saw the page and there was no evidence that it disrupted school activities. The student took down the page within two days after posting it. The principal learned of it only after the fact. The student was suspended for three days under the system's "Bullying/ CyberBullying/Harrassment" and "Disruptive Behavior" policies. She was also required to transfer out of her Advanced Placement classes to lower-weighted honors classes.

She sued the principal in his individual capacity alleging First and Fourteenth Amendment violations, seeking an injunction to revoke the suspension. The court ruled that she must amend her complaint to name the proper parties as defendants because she could not sue the principal in his individual capacity because he was acting in his official position. The court determined, in part, that "speech ... aimed at a particular audience at the school is [not] enough by itself to label the speech on-campus speech." In this instances, the speech was made off-campus, never accessed at the school, and was not accessible by the time the principal learned of it. The court also noted that this case was very similar to the case of *Layshock v. Hermitage School District*

[summarized above] because the off-campus speech had little connection to the school. The court also rejected the principal's contention that there was a foreseeable likelihood of substantial disruption or that the discipline was warranted because of potential defamation or that it was not protected speech because it was defamatory.

**Student Privacy: Philadelphia-area school district sued for taking remote pictures of students in their homes via built-in webcams on school-issued laptops.** Robbins v. Lower Merion School District (E.D.Pa Feb. 16, 2010).

A school district that issued laptops to all students and allegedly activated, in some instances, built-in laptop cameras to take snapshot in some students' homes. According to district officials, the cameras were activated only in instances involving certain laptops thought to be lost or stolen as a way to locate them.

**California student has free speech right to publish non-disruptive YouTube video containing vulgar, derogatory and upsetting comments about a fellow student. School policy which failed to clearly notify students of potential discipline for off-campus speech violated student's due process rights.** J.C. v. Beverly Hills Unified Sch. Dist., No. 08-03824 (C.D. Cal. Nov. 16 and Dec. 9, 2009).

A high school student videotaped a conversation among her friends when gathered at a restaurant after school. On the video they made profane, crude and derogatory comments about a 13-year-old fellow student, referring to her as "a slut," "spoiled," and talking about "boners." The plaintiff student is heard telling her friends to "continue with the Carina rant." She then posted the video *YouTube* that evening and told her friends to watch it. She also told the victimized student, who decided not to ask her to take it down so she could show it to school officials. Approximately fifteen people saw the video that night. The student claimed she heard 5 to 10 students talk about it at school the next day. When the student victim and her mother complained, school officials investigated.

The district court granted summary judgment in favor of the plaintiff student, ruling there was no substantial disruption or a reasonable likelihood thereof. This was despite the fact that the video caused the victimized student to be initially upset, humiliated, have her feelings hurt, miss a short portion of a class, and spend 20-30 minutes with the school counselor to be persuaded to return to class. School administrators spent the morning investigating the matter and a handful of students talked about the video while at school. There was no evidence that any student accessed the site on any school computer or that the victim was affected in her learning. Furthermore, the court found that school officials' fear of gossip or note passing was, at best, based only on speculative and unsubstantiated fears, not any actual evidence proving a likely disruption. The court also rejected the notion of foreseeable disruption simply because of speech that "may cause some emotional harm to a student."

In a subsequent order in the same case, the court also ruled that the school district's student conduct code was unconstitutionally vague. One school rule stated,

*a student may be suspended if the principal of the school determines that the student “disrupted school activities or otherwise willfully defied the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties.”*

In addition, the student handbook contained two related restrictions:

*To refrain from behavior which disrupts school activities. I understand that actions such as inappropriate classroom conduct, profanity, lack of respect for classmates and adults, are unacceptable behaviors that may result in suspension and/or expulsion.*

*To respect the dignity and rights of every student and adult. I will refrain from making racial slurs or using vulgar, obscene or insulting language. I understand that violation of the District Sexual Harassment Policy will result in disciplinary action. The policy prohibits verbal, written, or physical sexual harassment. I understand that I am responsible for conducting myself responsibly with regard to the rights and safety of others and the importance of mutual respect and understanding*

The court ruled that these provisions failed, under the Due Process Clause, to provide the student with clear, specific and advanced notice that off-campus behavior was subject to discipline.

*[T]he School’s disciplinary policies are unconstitutionally vague because such policies appear, on their face, to limit the School’s authority to discipline students for activities occurring at school, while the students are on the way to or from school, or at a school-sponsored event. Although the School can, within the bounds of the constitution, regulate off-campus speech that causes a material and substantial disruption to school activities under Tinker, it must put students on notice of such authority so that they can modify their conduct in conformity with the school rules. The School’s current written policies do not put students on notice that off-campus speech or conduct, which cause a disruption to school activities, may subject them to discipline.*

**E-Rate: Federal Communications Commission seeks comments on proposed regulations implementing new federal law requiring internet safety training for students.** 75 Fed. Reg. 2,836 (Jan. 19, 2010).

**E-Rate: Court upholds conviction for wire fraud by teacher/E-Rate consultant.** U.S. v. Green, No. 08-10149 (9th Cir. Jan. 22, 2010).

A federal court upheld an E-rate consultant’s conviction based, in part, on witnesses who testified, among other things, that the consultant promised districts they could be reimbursed for her consulting fees entirely from e-Rate funds. This and other required information, however, was not disclosed in the E-rate application process.

**Operations - Open Meetings: The Massachusetts Supreme Court rules that e-mail between school board members before an open board meeting violated the state's open meetings law.** Northern Dist. v. School Comm. of Wayland, No. 10406 (MA, Dec. 31, 2009).

A Massachusetts school board committee exchanged several e-mails regarding the superintendent's performance in an effort to prepare the superintendent's evaluation. Two members sent comments directly to the committee chairman and another sent comments to the whole committee. A newspaper eventually sought copies of the records and challenged the committee's refusal to make them available. In a lawsuit initiated by a district attorney, the court ruled that the e-mail messages were distributed in violation of state open meetings law because, "while some of [them] were not between a quorum of members, and therefore were not strictly a 'deliberation,' they had the effect of circumventing the ... law...[and represented] an improper attempt to avoid a public discussion of the superintendent's professional competence in an open meeting...."

**Operations - Public Records: Teacher union e-mails are not public records under Michigan law.**

Howell Educ. Ass'n v. Howell Bd. of Educ., 2010 Mich. App. LEXIS 143 (Mich App., Jan. 26, 2010).

A private citizen requested, from a Michigan school system, e-mails of teachers belonging to the local teacher union. The union sued to enjoin the school system from making the e-mails public. The trial court ruled that "any emails generated through the [district's] email system...[are] public records..." and, therefore, must be disclosed. The appellate court reversed noting that the statute was drafted before much of modern society's "ubiquitous email technology," noting that "[e]mails have in essence replaced mailboxes and paper memos in government offices."

The court also noted that public records, under state public records act, must relate to an "**official function**" [emphasis added]. It determined, in this instance, that "[t]here is nothing about the personal emails given that, by their very definition, they have nothing to do with the operation of the schools, which indicates that they are required for the operation of an educational institution." The court further remarked,

schools have traditionally, as part of their function, provided teachers with mailboxes in the school's main office. However, we have never held nor has it even been suggested that during the time those letters are "retained" in those school mailboxes that they are automatically [public records subject to disclosure].

Such reasoning, according to the court, was "consistent with federal cases interpreting whether an item is an 'agency record' under the federal [Freedom of Information Act]." It further concluded that personal emails are not transformed into public records merely by use of a government-owned network to send, receive or backup emails. In addition, said the court, an Acceptable Use Policy (AUP) indicating that personal emails were subject to public records requests did not transform such e-mails into public records by mere policy declaration.

Although the ... policy certainly gives notice to the users that school officials may look at their email, and that the documents could be released pursuant to a subpoena, it in no way indicates that users' emails may be viewed by any member of the public who simply asks for them... "[T]he public employees' agreement to this acceptable use policy did not render their personal emails subject to [the Act]... [T]he fact that the communication is sent in violation of the [AUP] militates in favor of the conclusion that the email is not a public record because it falls expressly outside the performance of an official function, i.e. the furtherance of the instructional goals of the district. Source: NSBA, "Legal Clips"

**Third Circuit Court of Appeals to decide if teenagers may be charged with child pornography for "sexting."**

Parties have presented oral arguments to the U.S. Third Circuit Court of Appeals in a case involving threatened criminal prosecution of several adult teenagers for child pornography for transmitting sexually provocative pictures of themselves via their cell phones. Teachers in the Tunkhannock School District notified the District Attorney when they discovered the transfer of photos. He threatened to prosecute the teens for transmitting child pornography unless they remedial classes and wrote essays on the dangers of sexting. Three such students sought and were granted injunctions against the district attorney from a federal trial judge. Source: NSBA "Legal Clips."