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Third Circuit Court of Appeals Issues Student Speech Decisions

On June 13, 2011, the United States Third Circuit Court of Appeals held, in two separate decisions with similar facts, that absent a substantial disruption of the school environment or the reasonable forecast of such disruption, public school students in Pennsylvania may not be disciplined for “off-campus” speech. The Appeals Court’s decisions in *Layshock v. Hermitage School District* and *J.S. v. Blue Mountain School District* hold that the school districts violated the First Amendment rights of the students involved when they disciplined them for content posted on the Internet outside of school, even where such content targeted school officials and may have created minor disruption within the school environment.

With these decisions, the Third Circuit becomes the highest court in the nation to establish a clear line regarding the limits on public school districts’ power to discipline students for vulgar, offensive and lewd student expression on the Internet. Holdings from the Third Circuit are binding precedent in the states of Pennsylvania, New Jersey and Delaware.

In *Layshock*, a student used an off-campus computer to create a parody MySpace profile of a high school principal. In the profile, the student wrote that the principal used marijuana, shoplifted, took steroids and was a drunk. Other than a photograph of the principal that the student downloaded from the school district’s publicly accessible website, all content on the phony MySpace profile was unrelated to official school programs and was posted to the site using a privately owned computer off of school grounds. After an investigation into the postings by school district officials, the student was suspended for 10 days and placed in an alternative-education program.

In *Blue Mountain*, student J.S. was initially disciplined for a dress code violation. Shortly thereafter, J.S. along with another student met at J.S.’s home and created a phony MySpace profile using an image of a principal taken from the district’s website. The profile included lewd and sexually explicit comments and mock references regarding the principal’s past, and described him as a pedophile. The profile also included abusive comments about the principal’s wife, who is also a teacher in the district, and his young child. Initially, the profile could be viewed by anyone who knew the URL or who

otherwise found the profile by searching MySpace. However, no student within the school was ever able to view the profile from school property due to the district's filtering software, which blocked access to MySpace. In addition, J.S. changed the privacy settings on the web page limiting access to the profile to MySpace "friends".

In both cases the students filed suit in the United States District Court challenging the discipline imposed and asserting violations of their First Amendment right to free speech. In *Blue Mountain*, the district court upheld the school district's disciplinary action taken against the student. In *Layshock*, however, the district court held that the school district's disciplinary action was unconstitutional. On appeal to the Third Circuit, the lawyers representing the two school districts relied on different United States Supreme Court rulings involving student speech and advanced different arguments to support their respective positions on the discipline.¹ Two Third Circuit panels affirmed the lower court decisions in each case creating a conflict within the Circuit with respect to this important issue. Due to the inconsistent opinions issued in the cases, the full Third Circuit ordered that both cases be reheard *en banc* by the entire 14-judge Third Circuit panel.

In *Layshock*, all 14 appeals court judges agreed that the school district violated the student's right to free speech by suspending him for his off-campus Internet postings. The opinion states that "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 or her actions there to the same extent that it can control that child when he/she participates in school-sponsored activities. Allowing the [school] 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 . . ." *Layshock v. Hermitage School District*, 2011 WL 2305970 at 27 (June 13, 2011). The Court chose not to opine on the "precise parameters of when [a school district's] arm of authority can reach beyond the schoolhouse gate to discipline for speech that is disruptive of school activities. *Id.*, at 34.

In *Blue Mountain*, the *en banc* panel split 8-6 in holding that the discipline imposed by the school district violated the student's First Amendment right to free speech. The majority opinion states that the school district failed to demonstrate that

¹ In *Layshock*, counsel for the school district did not challenge on appeal the district court's finding that it had not established a sufficient nexus between the student's speech and a substantial disruption of the school environment required under the *Tinker* standard. Instead, the school district argued that a sufficient nexus existed between the student's creation and distribution of vulgar and defamatory speech and the school environment to permit the district to regulate his conduct based on the fact that 1) the speech was aimed at the school district community; 2) the student misappropriated school property by utilizing a picture from the district's website; and 3) it was reasonably foreseeable that the speech would come to the attention of the school district community.

In *Blue Mountain*, counsel conceded that a "substantial disruption" of school activities did not result from the speech at issue, but argued that a forecast of substantial disruption was reasonable. The school district argued, in the alternative, that the Court should apply the U.S. Supreme Court's decision in *Fraser*, which provides an exception to the *Tinker* standard for "lewd, vulgar, and offensive speech" that has an effect on the school and the district's educational mission. The Court rejected this argument based on its determination that *Fraser* cannot be applied to off-campus speech.

J.S.'s speech created a "substantial disruption" under the U.S. Supreme Court's *Tinker* standard. Because the school district's filtering software prevented students from accessing MySpace and due to the fact that it was the district's own investigation that resulted in a copy of the profile eventually being brought onto school property, the Court concluded that J.S.'s speech could not be deemed to have created substantial disruption in the school.

The *Blue Mountain* opinion also includes discussion of the applicability of the U.S. Supreme Court's decision in *Bethel School District v. Fraser* to "off-campus speech." In *Fraser*, the Supreme Court held that a school did not violate a student's First Amendment rights after it suspended him for making an in-school, public speech that included sexual innuendo. However, the Third Circuit determined that applying *Fraser* to the circumstances presented in *Blue Mountain*, "would be to adopt a rule that allows school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is about the school or a school official, is brought to the attention of a school official and is deemed 'offensive' by the prevailing authority . . . Accordingly, we conclude that the *Fraser* decision did not give the school district the authority to punish J.S. for her off-campus speech." *J.S. v. Blue Mountain School District*, 2011 WL 2305973 at 24 (June 13, 2011).

The six dissenting justices in *Blue Mountain* disagreed with the majority's application of the *Tinker* standard to the facts of record in the case. The minority opinion focuses on the "serious nature of the allegations of sexual misconduct" included in the mock profile of the principal and the degree to which the broadcast of such unfounded allegations to the school community online can undermine the authority of the school. The dissent notes that the Supreme Court has never directly examined the issue of whether a school district can regulate off-campus student speech.

Because neither of the factual scenarios in these cases presented off-campus speech that created a direct disruption of the educational program or educational environment, neither holding specifically addresses what standard would apply to "off campus" speech. The majority in both cases assumed that if *Tinker* did apply, its standard had not been satisfied because the record did not establish substantial disruption existed under *Tinker*. So, to some degree, the issue of whether *Tinker* governs all off-campus speech remains unresolved. The clear rule that emerges from *Layshock* and *Blue Mountain* is that the ability of public school districts to discipline students for off-campus speech is very limited.