

Free Speech Rights of Students Present "Cyber-Troubles"

May 4, 2010

[Jason S. Long](#)

The United State Supreme Court, in the 1969 decision of *Tinker v. DeMoines Independent Community School District*, recognized that children have a 1st Amendment right to free speech in the school environment. In *Tinker*, the Court held that three high school students had the constitutional right to express their disagreement with the Vietnam War by wearing black armbands to class. The Court ruled that the speech was passive, political speech, and essentially victimless. Accordingly the 1st Amendment protects student speech, as long as students did not *materially and substantial interrupt the educational process* or invade the rights of others.

Since *Tinker*, school systems have been faced with much more complex issues. Student now uses social media such as MySpace and Facebook, daily to gossip with fellow classmates or meet new people. Some students even generate their own websites and host discussion blogs or post web content online. Obviously, the cyber world creates "cyber-troubles" for school districts. Unfortunately, schools find an increasing amount of student internet content offensive or even threatening to other students and school staff. **So, what can districts do to combat the emerging world of student cyber-troubles?**

The Courts have consistently restricted school authority to on-campus speech. The right of free speech is not absolute and may be restricted by reasonable regulations as to time, place and manner. A school may categorically prohibit lewd, vulgar or profane language on the school property and a school may regulate school sponsored speech on the basis of any legitimate pedagogical concern. Speech, however, falling outside these categories is still subject to *Tinker's* general rule: ***it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others.***

The recent case of *Layshock v. Hermitage School District*, 2007 WL 3120192 (W.D. Pa., 2007) provides helpful guidance to school systems.

Facts

1. A Pennsylvania district court overturned a school district's decision to assign an honor roll student to alternative curriculum education and suspend the student from participating in school activities after the student posted a derogatory parody profile of his principal on the internet.
2. The student created a mock profile of his principal from his grandmother's computer at home. He used a picture from the school website.
3. The website contained comments depicting the principal to keep a "big blunt" and keg behind the desk to characterize the principal's behaviors. Comments were also posted that the principal was too drunk to remember his birthday.
4. There was evidence that the student accessed the profile from a school computer and that other students also accessed the site from school.
5. The district restricted computer access by students as a result and also attempted to block the site.
6. The district's disciplinary code section explicitly stated that it "pertain[s] to school functions, home or away, school buses, or any other time students are representing their school." Likewise, the

"abusive conduct by students" provision specifically referred to "athletic and co-curricular events" and the "student responsibilities" provision referred to the "school climate." Furthermore, the district's Student Agenda Book referenced in its "Abusive Conduct by Students" section a provision that students will be disciplined for disrespectful behavior "either on or away from school property". However, the book also included a limiting construction- i.e., that "away from school property" refers to "athletic and co-curricular events" held at other schools.

Court's Ruling

1. The district court held that although the speech was lewd and sexually explicit, the school did not have the authority to punish the student because the speech occurred off campus and was not sufficiently disruptive to trigger action.
2. The court indicated that schools need not wait until a substantial disruption occurs, but may act on a specific and significant fear of disruption.
3. Also, the school wrongly based disciplinary action on speech outside of school, and not on the fact that the student accessed the website while in school (a violation of the Student Code of Conduct).
4. Lastly, the policy itself did not support the action as it did not give the district the ability to address off-campus conduct, such as the student's conduct at issue.

So, what can a school system do, if anything?

Schools may take several actions to address offensive or threatening internet postings generated by students:

Schools may always request that a website like MySpace.com remove offensive or threatening content from the site without violating the 1st Amendment. In fact, the Communications Decency Act provides website content managers with virtually limitless discretion to remove any information posted to the site by another party without facing the threat of liability. For instance, MySpace has created a procedure that administrators may use to remove a false or offensive MySpace page. The administrator must send an email to schoolcare@myspace.com with the web site's address, a brief explanation verifying the profile is false or offensive, the name and title of the administrator, and contact information.

Schools may discipline students that generate offensive internet content off school premises as long as the school proves that the content materially disrupted the educational process or school operations, or presented a reasonable risk of disruption. Again, this is a **high standard to meet**. Document everything.

Schools may discipline students that post true threats against either students or staff provided that the school has a reasonable belief the student will act upon the threat. A "true threat" is defined as "those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals." Most courts agree that students have a 1st Amendment right to post even unpleasant or critical comments on the internet as long as the publication originates off school grounds and is not directly threatening or obscene. Therefore, schools must usually prove a significant level of threat in order to justify discipline and prevent violations of the 1st Amendment.

Districts should require all students to sign acceptable use policies ("AUP") that limit internet activities on school grounds. By definition, an AUP is a written agreement in the form of guidelines, signed by students, their parents and/or their teachers, outlining the terms and conditions of Internet-use. It should include definitions of acceptable online behavior and access privileges. Internet use in schools should be for educational purposes only. Keep in mind... school computer use is a privilege, NOT A RIGHT. AUP's should include a statement that students have NO expectation of privacy when using school computers or a school computer account. AUP should also include potential discipline for its violation. The AUP's should be signed by students/parents on a yearly basis. Regular assessment of the educational use of the Internet and student/staff misuse is essential. Reliance upon filtering and blocking is not enough.

District administrators should contact parents if threatening material about their students is brought to the attention of administrators. Inform parents that they may contact the police to report any threatening or harassing behavior that targets their children.

Should you have any questions on this issue or any issues please feel free to contact a member of Dinsmore & Shohl's [Education Law Practice Group](#).