

CASES IN POINT CASES IN POINT CASES IN POINT

Split Decisions

When one court rules differently on two seemingly similar cases, conclusions can be difficult to draw.

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On February 18, 2010, the U.S. Court of Appeals for the 3rd Circuit (covering Pennsylvania, New Jersey, Delaware, and Virgin Islands) handed down rulings in two different cases involving regulation of student speech when that speech takes place online and off campus. The rulings—one that favored the school district defendant and the other that favored the student plaintiff—have added to existing confusion over whether schools may legally regulate student speech when such speech takes place online, but off campus.

Dangerous Precedent?

In 2005, using his grandmother's computer during nonschool hours, a high school student created a fake Internet profile of his principal on the social networking site MySpace. The parody, which contained a real photo of the principal that the student copied from his school's Web site, contained answers to profile questions that were written by the student in such a way as to mock the principal.

According to the court, "word of the profile spread like wildfire" and soon reached almost the entire student body at the high school (*Layshock v. Hermitage School District*, 2010). It wasn't long before other students posted more degrading and vulgar parody profiles of the same principal on MySpace.

Later that year during an investigation, the student admitted to creating the profile and apologized to school officials both verbally and in a letter. Later, following a hearing, the student was found guilty of an array of infractions including violating the school district's discipline code; disrupting the normal school process; showing disrespect; harassing a

school administrator over the Internet; exhibiting gross misbehavior; using school pictures without authorization; and using obscene, vulgar, and profane language.

The student received a 10-day suspension from school and was placed in an in-school alternative education program for the remainder of the school year. The student was also banned from all extracurricular activities and was not allowed to participate in graduation. That was his punishment despite that fact that, according to court papers, the student created "the least vulgar/offensive profile...was the only student to apologize for his behavior, [and] was...the only student punished for the MySpace profiles." Consequently, the student's parents filed suit against the school district alleging, among other things, violation of their son's constitutional right to free speech.

In ruling in favor of the student, the federal district court reasoned that school officials have less authority to regulate speech and expression that takes place off campus than speech that occurs on school grounds. The court also relied on the well-known case *Tinker v. Des Moines Independent Community School District* (1969), believing that the school district did not satisfy the *Tinker* standard (requiring a strong connection between the regulated speech and the likelihood of a substantial disruption of the school environment). In addition, the district court declined to apply *Bethel School District No. 403 v. Fraser* (1986)—which allows schools to regulate lewd and profane student speech—finding that case inapplicable to off-campus speech.

On appeal by the school district, a three-judge panel for the 3rd Circuit

unanimously affirmed the ruling of the federal district court. In doing so, the panel considered whether the school district could punish a student for expressive conduct that originated outside of the classroom when that conduct did not disturb the school environment and was not related to any school sponsored event. In answering no to that question, the court expressed concern over the slippery slope of allowing a school to regulate student activities that take place at home on a personal computer to the same extent they are permitted to regulate similar activities that take place during school-sponsored activities.

The court believed that allowing such reach by school officials would set a dangerous, unconstitutional precedent, saying, “We have found no authority that would support punishment for creating such a profile unless it results in foreseeable and substantial disruption of school.”

In addition, because the panel did not believe the student’s speech could be classified as on-campus speech, the panel distinguished other similar cases where school officials were found to have justifiably regulated off-campus speech that created a substantial disruption in the school environment: “We believe the cases relied upon [by the defendant]...stand for nothing more than the proposition that schools may punish expressive conduct that occurs outside of school as if it occurred inside the ‘school-house gate,’ under certain very limited circumstances, none of which are present here.”

Because the district court found that the student’s conduct did not disrupt the school and that use of the school district’s Web site (to copy the principal’s photo) did not constitute

entering the school (for purposes of making his conduct on campus), the court held that the school district could not punish the student’s off-campus expressive conduct.

An Opposite Result

On the same day as the *Layschock* decision, a three-judge panel also in the 3rd Circuit handed down a 2-1 ruling in favor of a school district that had disciplined a student for off-campus, online speech. In the case, *J. S. v. Blue Mountain School District* (2010), a middle school student was suspended from school for 10 days after eventually admitting that she used her home computer to create a phony MySpace profile that was designed to mock her school’s principal. Similarly to *Layschock*, the student in this case included a legitimate photograph of the school’s principal on the profile page—which was taken from the school district’s Web site—accompanied by “profanity-laced statements insinuating that [the principal] was a sex addict and pedophile.”

Following the suspension, the student’s parents filed suit, arguing that the school district violated the Constitution when it punished the student for out-of-school conduct that did not cause a disruption of classes. The district court granted summary judgment in favor of the school district. They found that although the student created the profile off campus and her behavior did not cause a substantial and material disruption of the school environment, the school district did not violate the student’s First Amendment rights by disciplining the student because of “the facts of the case and because the lewd and vulgar off-campus speech [on the profile] had an effect on-campus.”



On appeal by the student’s parents, a split three-judge panel for the 3rd Circuit Court of Appeals affirmed the district court’s ruling. In doing so, the court supported school officials’ “reasonable forecast” (a notion supported by *Tinker*) of a substantial disruption of school activities as a result of the MySpace page. Overall, the court reasoned that *Tinker* applies to student speech—whether such speech is on or off campus—that causes or threatens a substantial or material disruption of school activities.

The court found that the student’s profile posed such a threat, although the actual disruption of school activities was minimal. (That is, “(1) two teachers...had to quiet their classes while students talked about the profile; (2) a guidance counselor had to proctor a test so another administrator could sit in on the meetings [with those involved]; and (3) two students decorated [the punished students’] lockers to welcome them back upon



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their return to school following the suspension.” The school also noted “a severe deterioration in discipline in the Middle School...following the creation of the profile,” which the principal “attributed...to a new culture of students rallying against the administration.”

Standing firm in its affirmation of the lower court, the panel noted the difficulty faced by school officials who must make decisions and bear the responsibility of educating children. It then deemed it constitutional for a school official to regulate speech that “reaches beyond mere criticism to significantly undermine a school official’s authority in challenging [that official’s] fitness to hold his position by means of baseless, lewd, vulgar, and offensive language.”

Interestingly, the lone dissenting

judge on the panel for this case believed that the facts did “not support the conclusion that the school district could have reasonably forecasted a substantial disruption of, or material interference with the school as a result of [the false] profile.” The dissenting judge also expressed concern over the notion that the “potential impact of the profile’s language alone is enough to satisfy the *Tinker* substantial disruption test.” As a result, that judge believed that the school district had, in fact, violated the student’s first amendment right to free speech.

What Now?

As you’ve seen, these two cases—seemingly similar on their facts—led to two very different rulings by panels of judges from a single federal circuit. Usually, we talk about splits between circuits on key legal questions. Here, however, it seems that there is much debate to be had over whether the ability to regulate lewd and profane student speech under *Fraser* applies to off-campus speech and about what type of disruption is significant enough to justify school official’s regulation of off-campus student speech. Clearly these rulings show that it’s very difficult to say. Consequently, school administrators should continue to tread carefully in these matters and, as always, stay tuned. **PL**

REFERENCES

- Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).
- J. S. v. Blue Mountain School District, No. 08-4138 (3d Cir. February 4, 2010).
- Layshock v. Hermitage School District, No. 07-4465 (3d Cir. February 4, 2010).
- Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).