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## STUDENT SPEECH ON THE INTERNET

The Third Circuit Court of Appeals issued two significant en banc decisions on June 13, 2011 which help to define the legal boundaries where school officials can discipline students for offensive online speech that takes place outside of the school day and off of school property. In both cases, the court sided with students, ruling that the school district had overstepped the students' First Amendment rights when the students were punished for off-campus internet speech.

In *J.S. v. Blue Mountain School District*,<sup>1</sup> the student created a MySpace profile mocking her middle school principal while at home, on a weekend, using her own computer. The profile contained crude language and sexually explicit content. Among other things, the profile alleged that the Principal slept with students in his office and that his son "looks like a Gorilla." The profile contained the Principal's photograph, which was taken from the official District website. Access to MySpace was blocked on school property, so the profile could not be accessed from school. The student was suspended for 10 days for making a false accusation about an administrator and for violating the District's computer use policy by utilizing the Principal's photograph without authorization.

In *Layshock v. Hermitage School District*, the student, a high school senior, also created a MySpace profile purporting to be of the school's Principal. The parody profile also contained the Principal's real photograph taken from the District's website, and the content of the profile, in general, mocked the Principal for being a large man. Word of the profile spread like wildfire reaching nearly every student. In this case, the profile was able to be accessed from school. Nonetheless, school officials admit that despite having to limit computer use for about a week, the disruption to school activities in general was minimal. The student was suspended for 10 days, sent to an alternative school for the remainder of the school year, and prohibited from participating in graduation ceremonies.

In both cases, the court looked to existing Supreme Court precedent for on-campus student speech and applied that standard to the off-campus speech. In *J.S.*, the court cited the landmark decision in *Tinker v. Des Moines Indep. Comm. Sch. Dist* (1969) as the most applicable controlling precedent. In *Tinker*, the U.S. Supreme Court ruled that school officials cannot regulate student speech, even if the speech is unpopular or unpleasant, unless the speech causes or is likely to cause a material and substantial disruption to the work and discipline of the school. In *Layshock*, court looked to regulating crude and offensive speech pursuant to *Bethel Sch. Dist. v. Fraser* (1986) and found that the school could not punish the student for crude and offensive speech because *Fraser* is limited only to on-campus speech. Consequently, in both cases, the students' punishments were overturned based upon the students' First Amendment rights to freedom of speech and freedom of expression.

School officials must utilize extra caution when internet speech can plausibly be interpreted to be commenting on a social or political issue. In *B.H. ex rel. Hawk v. Easton Area School District* (2013), the 3rd Circuit Court of Appeals found that the school district overstepped its authority by punishing middle school students for wearing breast cancer awareness bracelets in school with the phrase "I (heart) boobies! (KEEP A BREAST)". The court held that schools may not punish students for speech that could be interpreted as commenting on a social or political issue pursuant to *Fraser*. However, the court noted, a school maintains

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authority to regulate speech under Tinker where student speech causes or is likely to cause a material and substantial disruption to the orderly operation of the school. In B.H., there was no such disruption.

School officials must take great care when investigating and disciplining students for online and other off-campus speech so that students' constitutional rights are not unduly impinged. While these cases emphasize the limitations on school officials in responding to cyber-bullying and other off-campus harassment, they also represent a victory for schools because off-campus speech may in fact be regulated if it causes or is likely to cause a material and substantial disruption to the educational environment.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.

1. Sweet, Stevens, Katz & Williams LLP represented Blue Mountain School District in this case.

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