

Free Speech and Public School Students – A Thumbnail Summary as of April 2011

The US Supreme Court has addressed the free speech rights of students in public schools repeatedly. But, to date, it has not issued a decision on cyberspeech or expression. The lower federal courts and state courts have been grappling with the challenge of applying an offline speech standard to digital speech. The US Supreme Court decisions have established the following basic rules relating to the legal authority of public schools to discipline student speech and expression:

- Student speech that causes, or is reasonably anticipated to cause, a material and substantial disruption of the school environment or interferes with the rights of others may be disciplined or restricted by the public school. (*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).
- In addition to the *Tinker* “disruption” test and its “interference with the rights of others” test, a public school may also:
 - punish lewd, vulgar, or offensive student speech. (*Bethel Sch. Dist. No. 403 v. Fraser*, 479 U.S. 675, 678 (1986).)
 - restrict student speech and expression based on “legitimate pedagogical concerns,” when the student speech is school-sponsored (such as a school newspaper) or if it could be reasonably inferred that the speech bears the school’s “imprimatur” (*Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260, 271-273 (1988).)
 - discipline and regulate off-campus speech, at a school sponsored event, when the speech or expression can be reasonably viewed as promoting illegal drug use. (*Morse v. Frederick*, 551 U.S. 393 (2007).)

Because of the lack of clear Supreme Court guidance on the off-campus cyberspeech issues, the lower-court decisions have varied considerably and frequently conflict. This is particularly clear with two conflicting decisions (*Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249 (3d Cir. 2010) and *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010)) rendered by two panels of the 3rd Circuit Court of Appeals on the same day in February 2010.

The facts of each case are very similar. In each, the students created the offending profiles off-campus, using non-school equipment, after-hours and offended their principals. The key difference was the type of reputational attack used by the students in each case. In *Layshock*, the student made overweight-centric attacks against the principal. In *J.S. vs Blue Mountain*, the student described the principal as a pedophile and sex addict.

In *Layshock v. Hermitage*, the court found for the student and held that school officials could not suspend a student for creating a derogatory fake Internet profile of his principal. Even though the student had taken the principal’s image from the school website and had accessed the offending profile during school hours from school equipment, the 3rd Circuit panel held that there was insufficient nexus between the off-campus speech and any possible disruption of the school environment. But, in *J.S. v. Blue Mountain*, a 3rd Circuit panel ruled for the school officials, holding that the nature of the off-campus speech could reasonably cause a significant disruption of the school environment.

Although the only real difference between these two cases is the nature of the attack (overweight barbs vs allegations of pedophilia) , each initial Third Circuit panel decision was decided using the *Tinker*

standard, and weighed the likelihood of substantial disruption. While Blue Mountain found the substantial disruption test was satisfied, the Layshock panel found it was not. They then weighed whether a sufficient nexus existed between the off-campus activities and the school itself and found it lacking. This resulted in two opposite holdings. Ultimately, the Blue Mountain case was reversed and remanded by the Third Circuit *en banc*, concluding that (as in the Layshock case), the actions taken by the student being disciplined did not meet the “substantial disruption” test, and the school officials exceeded their legal authority and violated the student’s rights.

The 2nd Circuit Court of Appeals followed *Tinker*, along the lines of Blue Mountain and ruled for the school officials based on what they saw as reasonably foreseeable disruption of the school environment. (*Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007).) And a well-thought-out recent New Jersey District Court decision cited to the 3rd Circuit’s continued adherence to the *Tinker* standard in student cyberspeech cases.

While the law is still evolving, there are general guidelines that schools can follow. As a general rule, if the speech was created and distributed using school equipment, during school hours and/or on campus, schools may discipline students for inappropriate expression subject to the *Tinker* standard. The guidelines set out in *Tinker* are that public schools can punish student speech only when it causes, or is reasonably anticipated to cause, a material and substantial disruption of the school environment or if it interferes with the rights of others.

On the other hand, if the activity occurred using the student’s own computer or mobile device, outside of school hours, not related to a school-sponsored activity, which does not give the appearance of being condoned by the school while at the same time being off campus, schools have very limited authority to regulate or seriously discipline that activity. Such expression is generally constitutionally and statutorily protected from school regulation.

But just because school officials may not be able to regulate the speech, it may still be subject to other criminal laws or be actionable under civil law. This is far more likely if the speech is harassing under state law or poses a true threat or involves wiretapping violations or digital intrusions under state or federal law or, under the federal Cyberstalking Act, if it is anonymous and intended to annoy the victim. As Parry Aftab recommends, break each incident of cyberbullying into its elements. In most cases, criminal activities that are independent of the First Amendment can be identified.