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RESULTS MATTER

THE DBYD DIFFERENCE – EDUCATION LAW
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**Shocked and appalled by students' online shenanigans?
The Third Circuit lays out the rules for responding to off-campus expression.**

**Our Complete Analysis of *Layshock v. Hermitage School District*
and *J.S. v. Blue Mountain School District***

PART II – *J.S. v. Blue Mountain School District*

“It’s the same old song, but with a different meaning since you’ve been gone.”
– The Four Tops

This is the second part of a two-part school law newsletter. Before going any further, we encourage you to read part one, which examined *Layshock v. Hermitage School District*. There, we have a rundown of the cases that will crop up in this part of the newsletter. In this part, we will look at *J.S. v. Blue Mountain School District*. Factually, these cases are very similar, but their outcomes couldn’t be further apart. In *J.S.*, the discipline imposed by the school district did not violate the student’s rights under the First Amendment. A careful look at the differences between these cases is instructive.

It should be noted that both *J.S.* and *Layshock* are precedential Third Circuit cases. The cases were, however, decided by different three-judge panels. The *Layshock* decision was unanimous but the *J.S.* decision came down two-to-one with a strong dissent by Judge Chagares. For purposes of this newsletter, we will ignore that dissent – although it is worth a read. We’ve linked to both cases from our website, www.DBYD.com.

Nearly Identical Facts

J.S. was an eighth-grade honors student in the Blue Mountain School District. One night, after school, *J.S.* made a fake MySpace profile of her principal, James McGonigle. While individual sensibilities may vary, this profile was about as offensive as the profile that Justin Layshock made for his principal. Also, like Layshock, *J.S.* copied a photo of her principal from Blue Mountain’s website and used it in the profile.

As expected, news of the profile started to spread in school, and at least 20 other students sent friend requests to the fake profile. None of these requests came during the school

day because Blue Mountain had blocked access to MySpace in advance of this incident. J.S. accepted those requests. Eventually, news of the profile reached McGonigle. After an investigation, J.S. confessed to making the profile. As punishment, McGonigle imposed a ten-day suspension. The profile caused minimal in-school disruption. Teachers had to quiet down some students who were discussing the profile in class, investigating the incident created some staffing issues, and other students decorated J.S.'s locker upon her return from suspension.

Differences in the School District's Argument

As discussed in the first part of this newsletter, the school district in the *Layshock* case did not argue that there was a nexus between the student's speech and a substantial disruption of the school environment. The *J.S.* case stands in sharp contrast. In *J.S.*, the school district not only argued that a disruption actually occurred, but that the discipline was permissible because the off-campus conduct created a reasonable likelihood of substantial disruption.

The court did not agree with the school district's contention that the actual disruption caused by the profile was substantial. To the contrary, the in-school impact of the profile amounted to "minor inconveniences" in the eyes of the court. Also, the court acknowledged that some of the disruption was created by McGonigle's investigation, not the profile itself. The court was, however, receptive to the school district's "foreseeable risk" argument and agreed that the profile created a reasonably foreseeable risk of substantial disruption. The court said: "we are sufficiently persuaded that the profile presented a reasonable possibility of a future disruption, which was preempted only by McGonigle's expeditious investigation of the profile, which secured its quick removal, and his swift punishment of its creators." In other words, the court determined that there was no serious disruption *because* the school district disciplined J.S.

A Focus on *Tinker*

The *J.S.* panel looked at all of the same cases that the *Layshock* panel examined to determine if the discipline violated the student's First Amendment rights. Both panels started with the *Tinker* case. Under the Supreme Court's decision in *Tinker*, schools can regulate student speech (and expression) if the speech creates a reasonably foreseeable likelihood of a substantial disruption of or material interference with school activities. *Tinker* did not address off-campus or online speech. Nevertheless, the court explicitly extended *Tinker* to cover the facts of *J.S.* The court did this bluntly:

We conclude that the profile at issue, though created off-campus, falls within the realm of student speech subject to regulation under *Tinker*. ... we hold that off-campus speech that causes or reasonably threatens to cause a substantial disruption of or material interference with a school need not satisfy any geographical technicality in order to be regulated pursuant to *Tinker*. ... We hold that *Tinker* applies to student speech, whether on- or off-campus, that causes or threatens to cause a substantial

disruption of or material interference with school or invades the rights of other members of the school community.

Fundamentally, the court's analysis begins and ends with *Tinker*. The court reasoned that *Tinker* allows school districts to regulate student speech to prevent substantial in-school disruptions, no matter where or how that speech occurs.

Reach of School District Authority

The court took pains to emphasize that *J.S.* does not stand for a dramatic expansion of school districts' authority to police out-of-school conduct. Recognizing that *Fraser* allowed schools to regulate vulgar in-school speech, the court clearly indicated that it was not extending *Fraser* beyond the schoolhouse gate. Even under *J.S.*, school districts may not regulate out-of-school speech simply because it is obscene. It is not the level of vulgarity that counts. Rather, it is the likelihood that the speech will create a serious in-school disruption.

Despite this limitation, the court seemed to give the school district considerable leeway to argue in favor of potential in-school disruptions. The court was concerned that parents and students might view the profile and then question McGonigle's character and fitness to be a school principal (the fake profile suggested that McGonigle was a pedophile). The dissenting judge felt that any reasonable person viewing the profile would understand that McGonigle did not create it. That did not matter to the majority, which concluded that it would have taken time for McGonigle to address concerned members of the school community and that time would have constituted a disruption.

In the end, the *J.S.* court held that school districts may regulate off-campus online speech if that speech reasonably may result in a serious in-school disruption. But, offensive off-campus online speech cannot be regulated simply because it is offensive.

Resolved and Unresolved Issues

Despite the decisions in *J.S.* and *Layshock*, this area of education law is not well-resolved. Again, we urge school districts to tread lightly. Only a handful of issues are well-resolved: It is clear that schools have discretion to censor speech in school-related publications and impose discipline when students are patently vulgar in school. Also, it is safe to say that schools can regulate student speech off-campus during school-sponsored events – especially when the speech favors drug use. Finally, schools may not regulate off-campus student speech simply for vulgarity or offensiveness.

On the other hand, it is not at all clear what schools must show to prove that a risk is "reasonably foreseeable." In *Layshock*, the school essentially conceded that the fake profile did not reach this standard. In *J.S.*, the school argued that nearly identical facts did create a foreseeable risk. In addition, there is a strong indication that the level of punishment may trigger Constitutional issues. The actions a school district may take to prevent a risk may be quite different as compared to the actions a school district may take

to punish a student. Along the same lines, it is not clear what speech is “student speech.” In the *J.S.* case, it seems that the speech was “student speech” because it was made by a student and tied to the school community. In *Layshock*, the school district used a similar argument to advance its position that the speech could be treated as in-school speech – and lost.

Finally, when *J.S.* and *Layshock* are taken together, it seems that schools may regulate out-of-school online student speech when the speech creates a reasonably foreseeable risk of in-school disruption. Too often, this is code for school violence. As we noted in the beginning of Part I, we urge school districts to do whatever is necessary to maintain the safety and well-being of their students. We urge this action even though the courts have not determined when a risk becomes “foreseeable” or where preventative actions end and punitive discipline begins.

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