LAW OFFICES OF

DISCHELL | BARTLE | YANOFF | DOOLEY

RESULTS MATTER

THE DBYD DIFFERENCE – EDUCATION LAW
FEBRUARY 12, 2010

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 I - *Layshock v. Hermitage School District*

"Hey teacher, leave them kids alone." – Pink Floyd

For over a year, we have been making references to *Layshock v. Hermitage School District* and *J.S. v. Blue Mountain School District* in these newsletters. The central issue of both cases is whether a school district can discipline a student for things that happen outside of school. On February 4, 2010, the United States Court of Appeals for the Third Circuit issued decisions in both cases. In general, these cases stand for the proposition that schools may impose discipline for out-of-school speech, but only under very limited circumstances. Although the facts of these cases are almost identical (a student makes a fake, offensive MySpace profile of the school principal), their results are very different. Much can be learned by looking at the differences between these cases.

We strongly encourage you to read both cases. We've linked to them from our website, www.DBYD.com. They are written in plain English and are easy to follow, regardless of your legal background.

Useable Advice

As usual, we will begin by giving useable advice to school districts: First, when you believe that a student must face discipline for something that he or she did at home or online, call your solicitor first. Your solicitor will help you apply what seems to be the general rule that flows from these cases: off campus speech – even online posting – is not subject to school rules unless it is reasonably foreseeable to result in a serious in-school disruption.

We hasten to note that it is not clear what type of speech gives rise to a "reasonably foreseeable" risk, and it is not clear what kind of "serious disruption" the courts have in

mind. For instance, a significant distraction that occupies a huge amount of a principal's time might be a serious disruption, but the courts have not said so explicitly. Also, the punishment must fit the crime. There is a difference between name calling and threats of violence; there should be a difference between the consequences for those actions too.

We urge school district to keep careful records. If the speech is online, consult your IT department to create records. Log telephone calls, keep emails and track meetings. When schools choose to impose discipline, they must be able to demonstrate how the off-campus conduct had an in-school impact.

It should go without saying that when it comes to threats of violence, choose safety first. Do what is necessary to assess the threat and protect the wellbeing of students and teachers. Some of the cases discussed below involve disciplining the threat-maker. None of the cases below prevent a school district from taking action to prevent school violence.

Just the Facts

To recap the facts, Justin Layshock made a "parody" profile of his high school principal, Eric Trosch, on MySpace. Layshock did this after school at his grandmother's house using his grandmother's computer. The profile, which was fantastically disrespectful, insulting and demeaning, used a photo of Trosch that was copied from the school district's website. The profile that Layshock made was one of several parody profiles of Trosch that started circulating through the high school. Eventually, Layshock was caught and charged with violating provisions of Hermitage's school code that prohibit disruption of the normal school process, harassment of a school administrator via the internet; gross misbehavior; obscene, vulgar and profane language; and use of school pictures without authorization. Layshock was found guilty of these violations and, consequently, was suspended, moved to an alternative placement for students with behavior problems and barred from extra curricular activities. Before this, Layshock was an honors student who took AP classes, won academic competitions and served as a French tutor to middle school students.

Free Speech for Students – In School and Online

Layshock argued that Hermitage violated his his First Amendment right to free speech when it imposed discipline. In this case, Layshock's "speech" was the creation and distribution of the MySpace profile. As such, the Third Circuit started by examining exactly what a student's right to free speech actually is. The answer lies in the 41-year history of Supreme Court cases examining the First Amendment in the school setting. The court took note of these cases:

- *Tinker v. Des Moines* - 1969:
    - A school could not discipline students for wearing armbands protesting the Vietnam War. Schools may not suppress non-violent political speech unless school officials reasonably conclude that it will

"materially and substantially disrupt the work and discipline of the school."

  - The Supreme Court famously said that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

- *Bethel v. Fraser* - 1986:
  - A school was permitted to suspend a student for making an "an elaborate, graphic, and explicit sexual metaphor" during a school assembly.
  - Even though students are protected by the First Amendment, school boards can 1) ban lewd, offensive or indecent speech; 2) determine what type of speech is inappropriate and 3) discipline students for using inappropriate speech in school.

- *Hazelwood v. Kuhlmeier* – 1988:
  - A school could delete articles about teen pregnancy from the school newspaper because the newspaper was not a public forum.
  - The court recognized a difference between what students say on their own behalf (i.e. *Tinker*) and what they say in publications that bear the imprimatur of the school.

- *Morse v. Frederick* – 2007:
  - School could discipline a student for displaying a banner reading "BONG HiTS 4 JESUS" during a school-sponsored event, even though the action took place off of school property.
  - The Supreme Court determined that students could be subject to school rules and discipline during school-sponsored off-campus events and field trips. Moreover, schools could restrict speech that promoted drug use even if that speech was otherwise decent (going a step further than *Bethel v. Fraser)*.

Although *Morse v. Frederick* is the only Supreme Court case that carefully examines a schools right to impose discipline for off-campus speech, the *Layshock* court also examined the growing body of law in the lower courts that directly address online conduct:

- *J.S. v. Bethlehem* – 2002: *Don't confuse this with J.S. v. Blue Mountain!*
  - In this Pennsylvania Supreme Court case, a school was allowed to punish a student for making a threatening website explaining why a teacher should die and requesting money to "help pay for the hitman."
  - The discipline was acceptable even though the website was created in the student's home because the website caused a *major disturbance* in

school. Other students were frightened and the teacher was so upset she had to take a leave of absence.

- *Wisniewski v. Weedsport* – 2007:
  - This is a Second Circuit case in which a student created a computer image of a gun shooting a teacher in the head with the caption "Kill Mr. VanderMolen" and posted the image online.
  - The court said that suspension was appropriate even though the image was not made or distributed in school because 1) this type of expression is not protected by the First Amendment and 2) the expression "pose[d] a reasonably foreseeable risk [of] materially and *substantially disrupting* the work and discipline of the school."

- *Doninger v. Niehoff* – 2008:
  - This is another Second Circuit case. This time a student was banned from running for student counsel because she referred to school administrators as "douchebags" on her blog. The student also threatened a sit-in and, through her blog, asked other students to contact the central office to "piss [the superintendent] off more".
  - Again, the discipline was permissible because the speech, "created a foreseeable risk of substantial disruption" to the work and discipline of the school. However, the court thought it was important that the punishment fit the crime. The court noted that more serious punishment might have "raised constitutional concerns."

A few common threads can be pulled from these cases. Students have First Amendment rights in school – especially when their speech is non-violent and political. First Amendment rights in school are not, however, absolute. Schools may determine what kind of speech is inappropriate, and prohibit that speech in school. Schools may also censor student speech in school publications. These rules extend off campus during school sponsored events and trips. Nevertheless, schools may not impose discipline for what students say online unless there is a reasonable risk that the speech will create a substantial in-school disruption. Even then, the discipline must be relative to the seriousness of the infraction (suspension for violent websites; a ban from student counsel for calling names).

Why *Layshock* Matters

The *Layshock* case is different from the previous cases. By the time the case reached the Third Circuit, Hermitage all but admitted that the fake MySpace profile did *not* create any significant in-school disruption. The trial court determined that there was no sufficient nexus between Layshock's speech and a substantial disruption to the school environment. Hermitage did not appeal that finding. This means that Hermitage did not base its ability to discipline Layshock on any in-school disruption that the profile actually caused.

Instead, Hermitage argued that a sufficient nexus exists between Layshock's speech and the District itself to permit the District to regulate Layshock's conduct. Basically, Hermitage's position was that it could treat Layshock's speech as if it occurred on-campus. This was a two-part argument. First, according to Hermitage, Layshock "entered school property, the School District website, and misappropriated a picture of the Principal." Therefore, Hermitage alleged Layshock's speech started on school property. Second, Hermitage argued that the speech "was aimed at the School District community" and accessed by Layshock in school. Therefore, in Hermitage's opinion, the speech reached inside the school and could be treated as if it came from inside the school.

Regarding Hermitage's first argument – that Layshock's speech started in school – the Third Circuit said: "The School District's attempt to forge a nexus between the school and Justin's profile by relying upon his "entering" the District's web site to "take" the District's photo of Trosch is unpersuasive at best. The argument equates Justin's act of signing onto a web site with the kind of trespass he would have committed had he broken into the principal's office or a teacher's desk; and we reject it."

Drawing analogies to another Second Circuit case, *Thomas v. Board of Education*, the Third Circuit said that it did not matter if a small part of Layshock's speech conceivably may have involved a photo that belonged to the district. The court was far more concerned about creating a slippery slope that would (to mix metaphors) pave the way for a huge expansion of school districts' authority. The court said:

> It would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child's home and control his/her actions there to the same extent that they can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in using his grandmother's computer while at his grandmother's house would create just such a precedent and we therefore conclude that the district court correctly ruled that the District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression.

Clearly, the first part of Hermitage's argument fell flat in the Third Circuit. Still, the court addressed Hermitage's claim that the speech reached inside school and, therefore, was subject to school regulations on vulgar speech. The court telegraphed its impressions of this argument in a section of the decision titled "The District Can Not Punish Justin Merely Because His Speech Reached Inside the School."

The court recognized that the *Fraser* case allows schools to regulate vulgar speech in school. The Third Circuit refused, however, to extend the logic of *Fraser* beyond the schoolhouse gate to speech directed to the school community. In a foot note, the court said "we reject out of hand any suggestion that schools can police students' out-of-school speech by patrolling the public discourse." With this critical eye, the court adopted its version of the jurisprudence suggested in the prior online speech cases. The Third Circuit reasoned that the prior cases "stand for nothing more than the proposition that schools

may punish expressive conduct that occurs outside of school as if it occurred inside the "schoolhouse gate," under certain very limited circumstances, none of which are present here.

But Wait, There's More!

The Third Circuit never exactly says what the "very limited circumstances" are that would enable a school district to treat off-campus online speech as an in-school utterance. Clearly, the court paid attention to the actual in-school result of Layshock's speech, and compared that to other cases in which online postings had more dramatic effects on school operations. However, almost all of the prior cases reference a *foreseeable* risk of substantial in-school disruption. Fortunately, the Third Circuit addressed this issue in the next case we will look at, *J.S. v. Blue Mountain.* Stay tuned…

The DBYD Difference is published by Dischell Bartle Yanoff & Dooley, P.C. It does not, and is not intended to, constitute legal advice. Your receipt of this publication does not create or constitute an attorney-client relationship. You should not consider this publication to be an invitation for an attorney-client relationship, you should not rely on the information provided in this publication without first obtaining separate legal advice, and you should always seek the advice of competent legal counsel in your own state. This publication should not be viewed as an offer to perform legal services in any jurisdiction other than those in which DBYD's attorneys are licensed to practice. DO NOT send DBYD any information concerning a potential legal representation until you have spoken with one of DBYD's attorneys and obtained authorization to send that information.