

LEGAL UPDATE

IS IT REALLY MY SPACE?: PUBLIC SCHOOLS AND STUDENT SPEECH ON THE INTERNET AFTER *LAYSHOCK V. HERMITAGE SCHOOL DISTRICT* AND *SNYDER V. BLUE MOUNTAIN SCHOOL DISTRICT*

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I. INTRODUCTION

On February 4, 2010, two panels of the Third Circuit Court of Appeals reached divergent rulings on two cases with exceptionally similar facts. In response, the Third Circuit ordered that both opinions be vacated and heard by the full court on June 3, 2010.² In *Layshock v. Hermitage School District* and *Snyder v. Blue Mountain School District*, the defendant public schools punished students for creating MySpace profiles of their schools' respective principals. Both students created the profiles off-campus, using non-school computers, during non-school hours. These are two more cases in a long line of inconsistent and unpredictable decisions in both federal and state courts that

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² See Katie Maloney, *Conflicting Online Speech Rulings Vacated, Will be Heard by Full Third Circuit*, STUDENT PRESS LAW CENTER, Apr. 13, 2010, <https://www.splc.org/newsflash.asp?id=2066>.

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should compel the Supreme Court to define the contours of First Amendment protection for student speech on the Internet – specifically where that speech, though occurring off-campus and during non-school hours, reaches the school environment.

In *Layshock v. Hermitage School District*, a unanimous three-judge panel held that a student’s punishment violated the First Amendment.³ The court based its holding on an insufficient nexus between the student’s off-campus speech and any alleged disruption of the school environment.⁴ By contrast, in *Snyder v. Blue Mountain School District*, a three-judge panel ruled 2-1 that a student’s punishment did not violate the First Amendment.⁵ The court found that school administrators reasonably forecasted a substantial disruption of the school environment as a result of the profile. Notably, the court attributed the school officials’ reasonable prediction of disruption to the profile’s level of vulgarity.⁶

Subject to a few exceptions, 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.⁷ Students’ increased access to the Internet both on and off campus complicates the inquiry of whether a student is in fact speaking within a school environment and constitutionally subject to the school’s authority, or speaking as a citizen, in which case the student’s speech would be afforded full First Amendment protection.

This Update first reviews the Supreme Court’s First Amendment jurisprudence on student speech in public schools and then provides information about MySpace.com. Next, the Update discusses *Layshock*’s and *Snyder*’s lower court decisions and then analyzes the appellate court opinions. The Update concludes by looking at possible reasons for the divergent results and explains why the Third Circuit will likely rule in the students’ favor.

II. SUPREME COURT PRECEDENTS

In *Tinker v. Des Moines Independent Community School District*, the Supreme Court defined the limits of First Amendment protection for student speech in the public school setting.⁸ In *Tinker*, three students were suspended

³ *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, *vacated*, 2010 BL 80169 (3d Cir. 2010).

⁴ *Id.* at 259.

⁵ *Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, *vacated*, 2010 BL 80170 (3d Cir. 2010).

⁶ *Id.* at 302 n.10.

⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

⁸ *Id.* at 504.

for wearing black armbands to school in protest of the Vietnam War.⁹ In a 7-2 ruling, the Court held that the punishment violated the First Amendment.¹⁰ Writing for the majority, Justice Abe Fortas stated that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” but also recognized the “comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools.”¹¹ *Tinker* established that to justify punishing a student for his or her speech, a school must show that the speech would “materially and substantially interfere”¹² with the school environment or that school authorities had reason to anticipate that the speech would cause such a result.¹³ Additionally, the Court stated that “conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invades the rights of others” is not protected by the First Amendment.¹⁴

The Court has never actually applied this standard in subsequent cases. Instead, the Court has developed several exceptions, which were dictated by the circumstances in which the student made the speech. In *Bethel School District No. 403 v. Fraser*, the Supreme Court held that a school could punish lewd, vulgar, or offensive student speech in school because it was the school’s function to teach students how to behave in a civil, mature manner essential to citizenship.¹⁵ There, a school punished a student for delivering a speech at a school assembly nominating another student for office in which he continually referred to the candidate in “elaborate, graphic, and explicit sexual metaphor.”¹⁶

Two years after *Fraser*, the Supreme Court held in *Hazelwood School District v. Kuhlmeier* that a school’s editorial control over the style and content of a student newspaper did not violate the First Amendment as long as its actions were “reasonably related to legitimate pedagogical concerns.”¹⁷ The

⁹ *Id.*

¹⁰ *Id.* at 514.

¹¹ *Id.* at 506-07.

¹² *Id.* at 509.

¹³ *Id.* at 509.

¹⁴ *Id.* at 513.

¹⁵ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 678 (1986) (“The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers – and indeed the older students – demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment *in and out of class*. . . . The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent or offensive speech and conduct.” (emphasis added)).

¹⁶ *Id.*

¹⁷ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

Court distinguished *Kuhlmeier* from *Tinker*, stating that a school could regulate student speech that is part of the school's curriculum when others may reasonably believe that the speech bears the school's imprimatur.¹⁸

The Supreme Court's most recent ruling – and the only case involving student speech made off-campus – is *Morse v. Frederick* in 2007.¹⁹ In *Morse*, the Supreme Court held that a school does not violate a student's First Amendment rights when it “restrict[s] student speech at a school event, when [it] is reasonably viewed as promoting illegal drug use.”²⁰ The school had suspended a student for unfurling a banner that read “BONG HiTS 4 JESUS” during a school trip to watch the Olympic Torch Relay proceed along a street in front of the school during school hours.²¹ The plurality stated that despite the fact that the speech occurred off-campus, it was still school speech because it occurred during normal school hours at a school trip, when teachers and administrators were present, and the school band and cheerleaders performed.²² In addition, the student directed his banner towards the school so that it was plainly visible to most students.²³ In reaching its decision, the Court noted that precedent demonstrated that the *Tinker* analysis did not apply to all cases of student speech and relied heavily on the proposition that deterring children from using drugs is an “important – indeed, perhaps compelling interest.”²⁴

The Supreme Court has not granted certiorari to a case involving student speech in public schools since *Morse* and has not provided further guidance on how to correctly apply *Tinker*. In fact, the Court has not applied the *Tinker* test to any case since *Tinker* itself. Today, lower courts are struggling to apply pre-Internet legal standards to student speech on the Internet because of substantial doubt as to how far school administrators' authority extends – or should extend – over student speech made off-campus that reaches the school environment.²⁵

¹⁸ *Id.* at 271.

¹⁹ *Morse v. Frederick*, 551 U.S. 393 (2007).

²⁰ *Id.* at 403.

²¹ *Id.* at 397.

²² *Id.* at 400-01.

²³ *Id.*

²⁴ *Id.* at 406-07.

²⁵ *See, e.g.,* *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008) (upholding punishment of student who, on her publicly accessible blog using her home computer, called school officials “douchebags” and urged students and parents to call the school to complain about canceling a music festival); *Wisniewski v. Bd. of Educ.* 494 F.3d 34 (2d Cir. 2007), *cert. denied* 128 S.Ct. 1741 (2008) (upholding suspension of student who, on his home computer, created an AOL Instant Messenger icon of his English teacher being shot in the head accompanied by the words “Kill Mr. VanderMolen”); *M.K. v. Three Rivers Local Sch. Dist.*, No. 1:07CV1011 (S.D. Ohio 2007) (granting preliminary injunction to students who were punished for creating a parody profile of their teacher on Facebook.com); *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272 (W.D.Wa. 2007) (rejecting student's motion

III. BACKGROUND ON MYSPACE.COM

MySpace.com (“MySpace”) is a social networking website that anyone can join.²⁶ Users can create personal profiles; post content such as links, pictures, music, and videos; and connect with other users or friends by “friending” them.²⁷ Users can make their profiles public so that all users, regardless of whether they are “friends” on MySpace, can see their content.²⁸ Alternatively, they can set their profiles to be private so only those they have “friended” can see them.²⁹ To complete their profiles, users must answer different questions (e.g., “About Me,” “Interests,” etc.), but they can also customize certain fields by altering the HTML code.³⁰

IV. CASE DISCUSSION

A. Layshock v. Hermitage School District

1. The Facts

Plaintiff Justin Layshock (“Layshock”) was a seventeen-year-old senior at Hickory High School in the Hermitage School District (“Hermitage”).³¹ Using his grandmother’s home computer during non-school hours, Layshock created and posted a MySpace.com “parody profile” of Defendant Eric Trosch (“Trosch”), the principal of Hickory High School, on or about December 10, 2005.³² Layshock copied a picture of Trosch from the school’s website and pasted it onto the MySpace profile, but did not use any other school

for a temporary injunction enjoining his school from suspending him for posting a video about his teacher on YouTube.com); *J.S. ex. rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 947 (Pa. 2002) (upholding school’s expulsion of student who created a website titled “Teacher Sux” on his home computer during non-school hours).

²⁶ DOUGLAS DOWNING ET AL., *DICTIONARY OF COMPUTER AND INTERNET TERMS* 321 (10th ed. 2009).

²⁷ See MySpace.com, MySpace Quick Tour: MySpace is Your Space, <http://www.myspace.com/index.cfm?fuseaction=userTour.yourSpace> (last visited Apr. 18, 2010); MySpace.com, MySpace Quick Tour: MySpace is A Place for Friends, <http://www.myspace.com/index.cfm?fuseaction=userTour.friends> (last visited Apr. 18, 2010).

²⁸ See Illinois State University Computer Helpdesk, MySpace Privacy Settings and Safer Social Networking, <http://www.helpdesk.ilstu.edu/kb/index.phtml?kbid=1320> (last visited Apr. 18, 2010).

²⁹ *Id.*

³⁰ eHow.com, How to Customize MySpace, http://www.ehow.com/how_2030998_customize-myspace.html (last visited Apr. 18, 2010).

³¹ Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 590-91 (W.D. Pa. 2007).

³² *Id.* at 591.

resources.³³

Layshock made it appear as if Trosch had created the profile himself.³⁴ A theme of “big” ran throughout the profile, and the information about Trosch ranged from “non-sensical answers to silly questions on the one hand, to crude juvenile language on the other.”³⁵ Layshock sent the profile to other students in the school district by adding them as “friends” to the profile.³⁶ Most of the other students that Layshock did not add as a “friend” to the profile heard about it through word-of-mouth.³⁷

On December 15, 2005, Layshock accessed the MySpace profile from a school computer while in class.³⁸ He showed it to other students, but he did not tell them he created it.³⁹ One student stated that the Spanish teacher did not know they were on MySpace.com during class.⁴⁰ On December 16, 2005, Layshock tried to access the profile from a school computer again, claiming that he had been trying to delete it.⁴¹ School administrators did not know Layshock tried to access the profile in school until they conducted their investigation into the profile.⁴² Other students also viewed the profile from school during school hours without any assistance or prompting from Layshock.⁴³ Teacher Craig Antush saw students gathering and giggling around a computer in his computer lab class, saw the profile on the computer, and told the students to “shut it down.”⁴⁴ The school’s co-principal Chris Gill did not witness any disturbances related to the profile, but five teachers told him that students wanted to talk about it during class.⁴⁵

Notably, three other MySpace profiles of Trosch were created and viewed by students at school around the same time that Layshock created his parody

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* (“For example, in response to the question ‘in the past month have you smoked?’, the profile says ‘big blunt.’ In response to a question regarding alcohol use, the profile says ‘big keg behind my desk.’ In response to the question, ‘ever been beaten up?’ the profile says ‘big fag.’ The answer to the question ‘in the past month have you gone on a date?’ is ‘big hard-on.’”).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 592.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* Antush did not report the incident to administrators. *Id.*

⁴⁵ *Id.*

profile.⁴⁶ All three profiles were more vulgar and offensive than Layshock's.⁴⁷ While Trosch thought all of the profiles were "degrading," "demeaning," and "demoralizing," he was not concerned for his safety, but rather for his reputation.⁴⁸ Hermitage admitted that it could not "directly attribute which profile caused the disruption" because it could not determine how many students accessed each Trosch profile, including Layshock's profile.⁴⁹

On the morning of December 16, 2005, Trosch called a teachers meeting, during which he became "very emotional and could not continue."⁵⁰ Gill told the staff that there had been a "disruption"⁵¹ and also told them not to discuss the profiles during class.⁵² Trosch contacted MySpace directly and had the profiles disabled.⁵³ The school limited computer use from December 16, 2005 to December 21, 2005.⁵⁴ Computer programming classes were cancelled, and several teachers revised their lesson plans so that students would not need the computers to do assignments.⁵⁵ Teacher Allisa Sgro stated that there was a "buzz" in the school, but that it was directed specifically towards Trosch's son, who attended the school.⁵⁶ Sgro testified that the comments did not prevent her from teaching.⁵⁷ On December 19, 2005, Technology Director Frank Gingras disabled access to MySpace from the school computers.⁵⁸

During a meeting with Superintendent Iota and Gill on December 21, 2005, Layshock admitted that he created the profile.⁵⁹ The school suspended

⁴⁶ *Id.*

⁴⁷ *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 253 (3d Cir. 2010). The District Court found that the other profiles caused the disruption in school. *Layshock*, 496 F. Supp. 2d at 593. Antush considered shutting down the computer lab after students interfered with class by huddling around a computer screen trying to see one of the more vulgar profiles, which was not Layshock's profile. *Id.*

⁴⁸ *Layshock*, 593 F.3d at 253.

⁴⁹ *Layshock*, 496 F. Supp. 2d at 593 (quoting from Defendants' Response to Plaintiffs' Statement of Material Facts).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* The administration also sent an email to teachers on the afternoon of December 16, 2005 telling them to prohibit students from using any computers in the classrooms, and that any students who needed to do so for class purposes must be supervised. *Id.*

⁵⁵ *Id.* at 593.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* Gingras stated that disabling access to MySpace took time away from putting an electronic grade book website online, but that it did not otherwise prevent him from completing his normal duties. *Id.*

⁵⁹ *Id.*

Layshock for ten days, banned him from attending or participating in any school-sponsored events, and banned him from participating in his high school graduation ceremony.⁶⁰

2. The District Court Opinion

The District Court for the Western District of Pennsylvania granted summary judgment in favor of Layshock, holding that his punishment violated the First Amendment.⁶¹ The court found that: (1) *Fraser* did not apply to Layshock's profile; (2) the Hermitage School District failed to establish a sufficient nexus between Layshock's speech and a substantial disruption of the school environment; and (3) a reasonable jury could not conclude that a substantial disruption occurred under *Tinker*.⁶²

In cases involving speech that occurred off-campus, the court said that schools must demonstrate an "appropriate nexus" between the speech and substantial disruption at school.⁶³ The court began with the premise that students' ability to access the Internet at school does not permit school administrators to become "censors of the world-wide web."⁶⁴ Consequently, although school administrators can create an environment where the educational process can continue without disruption during school hours, students can express themselves freely when the school day ends.⁶⁵ However, while a school's authority over student speech is limited, that authority is not confined to the school's physical property – it may extend to school-sponsored activities.⁶⁶

Turning to the specific facts of the case, the court found four main reasons for granting Layshock's summary judgment motion. First, the court stated that although Layshock's profile was lewd, profane, and sexually inappropriate, *Fraser* did not apply because the profile was off-campus speech.⁶⁷ Second, the

⁶⁰ *Id.* at 594. Layshock was also placed in the high school Alternative Curriculum Education program for the remainder of the academic year. *Id.* Layshock's alleged violations were described as follows: "Disruption of the normal school process;" "Disrespect;" "Harassment of a school administrator via computer/internet with remarks that have demeaning implications;" "Gross misbehavior;" "Obscene, vulgar and profane language;" "Computer policy violation." *Id.* at 593.

⁶¹ *Id.* at 601.

⁶² *Id.* The Court also held that Layshock's speech did not constitute a true threat, obscenity, or slander such that it could be regulated under another standard. This part of the opinion, however, is beyond the scope of this Legal Update.

⁶³ *Id.* at 599.

⁶⁴ *Id.* at 597.

⁶⁵ *Id.*

⁶⁶ *Id.* at 598.

⁶⁷ *Id.* at 597. ("In effect, the rule in *Fraser* may be viewed as a subset of the more

court found that the school failed to establish a sufficient nexus between Layshock's profile and substantial disruption of the school environment.⁶⁸ Specifically, the school failed to demonstrate that the profile, rather than the school's investigation, caused any disruption.⁶⁹ Third, the court stated even if it had found a sufficient nexus that no reasonable jury would find that a substantial disruption occurred – which is required to justify punishment under *Tinker*.⁷⁰ Comparing it to the “far more boisterous and hostile environment” found in *Tinker*, the court found that the actual disruption here was minimal.⁷¹

Finally, the court stated that the school's actual charges against Layshock were directed at his off-campus actions, namely the creation of the profile at his grandmother's house on her computer, instead of anything he did at the school.⁷² The court also noted that even if the school had tried to justify the punishment based on a “fear of future disturbances,” it would not be able to satisfy *Tinker*'s substantial disruption test based on the record.⁷³

B. Snyder v. Blue Mountain School District

1. The Facts

On March 18, 2007, J.S., a fourteen-year old eighth grade student at Blue Mountain Middle School (“Blue Mountain”), and her friend K.L., also a student, created and posted a profile on MySpace.com that appeared to be created by and about James McGonigle, principal of Blue Mountain.⁷⁴ The students created the profile using J.S.'s parents' home computer during non-school hours.⁷⁵ The profile did not state McGonigle's name, but it did identify him as the principal and included a picture of him that the students obtained from the school district's website.⁷⁶ The profile described McGonigle as a

generalized principle in *Tinker*, i.e., that lewd, sexually provocative student speech may be banned without the need to prove that it would cause a substantial disruption to the school learning environment.”).

⁶⁸ *Id.* at 600.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* Specifically, the court rejected Hermitage's argument that the computer teacher threatening to shut down the computer system amounted to substantial disruption because order was restored and Layshock's profile did not trigger the situation. *Id.*

⁷² *Id.* at 601.

⁷³ *Id.* (“The school was shut down for the holiday and Justin was suspended immediately upon the resumption of classes. Moreover, all the MySpace related sites had been successfully blocked.”).

⁷⁴ Snyder v. Blue Mountain Sch. Dist., No. 07-585, 2008 WL 4279517, at *1 (M.D. Pa. Sept. 11, 2008).

⁷⁵ *Id.*

⁷⁶ *Id.*

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“forty year old, married bisexual man living in Alabama.”⁷⁷ The answers to the questionnaire indicated that he was a pedophile and a sex addict.⁷⁸ The profile’s web address, or URL, also included the phrase “kids rock my bed.”⁷⁹

J.S. stated that a day after she created it, she set the profile to “private” so that only MySpace “friends” could see it.⁸⁰ J.S. then “friended” twenty-two people on MySpace.com so that they could see the profile.⁸¹ About a day after they created the profile, news of it spread to the school.⁸² K.L. told a few students, and there was a general “buzz” about the profile in school on March 19, 2007.⁸³ Students could not access the profile at school because the school computers blocked the website.⁸⁴

McGonigle learned about the profile on March 19, 2007.⁸⁵ On March 20, 2007, a teacher told McGonigle that students were discussing the profile during class.⁸⁶ Upon McGonigle’s request, a student brought him a printed copy of the profile.⁸⁷ McGonigle learned J.S. and K.L. created the profile and questioned them on March 22, 2007.⁸⁸ J.S. initially denied creating the profile, but she eventually admitted that she created it with K.L.⁸⁹ McGonigle contacted MySpace to remove the profile.⁹⁰ McGonigle determined that by creating the profile, J.S. had violated the school discipline code because she had made false accusations against him and used his photo on the school

⁷⁷ *Id.*

⁷⁸ *Id.* at *1. This statement was under the heading “HELLO CHILDREN:”

I have come to myspace [sic] so I can pervert the minds of other principals to be just like me. I know, I know, you’re all thrilled. Another reason I came to myspace [sic] is because I am keeping an eye on you students who I care for so much) For those who want to be my friend, and aren’t in my school, I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head and last but not least my darling wife who looks like a man (who satisfies my needs)

Id.

⁷⁹ *Id.*

⁸⁰ *Id.* at *2.

⁸¹ *Id.*

⁸² *Id.* at *1.

⁸³ *Id.*

⁸⁴ *Id.* at *2.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 292 (3d Cir. 2010).

⁸⁸ *Snyder v. Blue Mountain Sch. Dist.*, No. 07-585, 2008 WL 4279517, at *2 (M.D. Pa. Sept. 11, 2008).

⁸⁹ *Id.*

⁹⁰ *Id.*

website without the school district's permission.⁹¹ The school suspended J.S. for ten days.⁹²

2. The District Court Opinions

The District Court for the Middle District of Pennsylvania ultimately determined that J.S.'s punishment did not violate the First Amendment and granted Blue Mountain summary judgment for three reasons.

First, the court said that *Tinker* did not apply to the case because *Tinker* involved political speech whereas J.S.'s profile was a "vulgar and offensive statement ascribed to the school principal."⁹³ The court noted that *Tinker*'s substantial disruption test was not absolute because the Supreme Court did not apply it in *Fraser*.⁹⁴ Therefore, the court said it had to look further into the case law to determine the appropriate standard to apply.⁹⁵

Second, the court determined that the speech at issue was more like the lewd and vulgar speech in *Fraser*.⁹⁶ J.S.'s profile was also like the speech in *Morse* because McGonigle could have used it to file criminal charges against J.S.⁹⁷ Therefore, even though the profile did not cause a substantial disruption, the school did not violate J.S.'s First Amendment rights because J.S.'s profile was "vulgar, lewd, and potentially illegal speech that had an effect on campus."⁹⁸

Third, the court rejected J.S.'s argument that she could not be punished for the profile because she created it off-campus during non-school hours.⁹⁹ Notwithstanding a footnote in which the court acknowledged that "the line between on-campus and off-campus speech is blurred with increased use of the internet and the ability of students to access the internet at school, on their own personal computers [and] school computers,"¹⁰⁰ the court found a sufficient nexus between J.S.'s off-campus action and its on-campus effect. The website addressed McGonigle, its intended audience was students at the school,

⁹¹ *Id.* The School Disciplinary Code prohibits "the making of false accusations against school staff members" and the school district's computer use policy, which tells students that they cannot use copyrighted material without permission from the website on which the material is located. *Id.*

⁹² *Id.*

⁹³ *Id.* at *4.

⁹⁴ *Id.* at *6.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at *7.

¹⁰⁰ *Id.* n.5 ("As technology allows such access, it requires school administrators to be more concerned about speech created off-campus – which almost inevitably leaks onto campus – than they would have been in years past.").

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students discussed the website in school, J.S. took the picture on the profile from the school district’s website, and J.S. created the profile because she was angry at McGonigle.¹⁰¹ Furthermore, the court determined that some disruption had occurred.¹⁰²

Notably, the court acknowledged that the facts of this case were very similar to *Layshock*. However, it said that because the profile in this case was more vulgar and offensive than Layshock’s profile, the court “came out on the other side of what the [*Layshock*] court deemed to be a ‘close call.’”¹⁰³

C. *Layshock and Snyder on Appeal*

1. Defendants’ Arguments on Appeal

On appeal in *Layshock*, Hermitage did not challenge the district court’s finding that no substantial disruption occurred and that the school did not “establish[] a sufficient nexus between Layshock’s speech and a substantial disruption of the school environment”¹⁰⁴ under *Tinker*.¹⁰⁵ Instead, Hermitage asserted that a sufficient nexus existed between the profile and the school such that Layshock’s speech could be regulated because he “entered” the school district website – which it characterized as school property – and “misappropriated” Trosch’s picture for the profile.¹⁰⁶ Second, Hermitage argued that the profile was on campus speech because Layshock accessed the profile at school and that it was aimed at Trosch and the school community such that it was reasonably foreseeable that it would reach the school.¹⁰⁷

In *Snyder*, J.S. based her appeal on three grounds. First, she argued that Blue Mountain could not punish her for speech made off-campus.¹⁰⁸ Second, J.S. asserted that the District Court erred by applying *Fraser* because it was limited to speech made inside the school.¹⁰⁹ Finally, she argued that even if Blue Mountain had the authority to punish her for off-campus speech, her punishment would still be unconstitutional because the school failed to satisfy

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Layshock v. Hermitage Sch. Dist.*, 593 F.3d,249, 258 (3d Cir. 2010).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Hermitage argued that going to the school’s website and removing the photo constituted on-campus conduct because “a school website is now as much a part of a campus as is an elementary school building. . . . The modern school house encompasses the school web site.” Brief of Appellant-Cross Appellee at 14 n.10, *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249 (3d Cir. Mar. 27, 2008) (No. 07-04465).

¹⁰⁷ *Layshock*, 593 F.3d at 258.

¹⁰⁸ Brief of Appellant-Cross Appellee, *supra* note 106, at 25.

¹⁰⁹ *Id.* at 28.

Tinker.¹¹⁰

2. The Appellate Opinions

Arguably, the key rationale behind the Third Circuit's divergent rulings were: (1) in the face of an already weak causal chain in *Layshock*, Hermitage failed to challenge the district court's finding that no substantial disruption occurred and that there was an insufficient nexus between the speech and any substantial disruption of the school; (2) J.S. was unable to overcome the district court's finding that a sufficient nexus existed between the profile and its effect on the school; and (3) J.S.'s speech was particularly vulgar. Notably, the *Snyder* court acknowledged that the two cases were distinguishable because *Snyder*'s holding was based on the nexus between the student speech and a substantial disruption of the school environment whereas *Layshock* was not.¹¹¹

Writing for the *Layshock* panel, Judge Theodore McKee rejected Hermitage's argument that there was a nexus between the school and the profile because Layshock "entered" the school's website to "take" Trosch's photo.¹¹² The relationship between Layshock's completely off-campus creation of the profile and the school was too attenuated and the court would not permit the school to "stretch its authority so far that it reaches [Layshock] while he is sitting in his grandmother's home after school."¹¹³

Judge McKee also rejected the argument that the punishment could be upheld under *Fraser*.¹¹⁴ While he acknowledged that some cases stand for 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,¹¹⁵ those circumstances did not exist here.¹¹⁶ He disagreed with the proposition that the First Amendment does not protect a student's off-campus speech.¹¹⁷ However, Judge McKee did not define "the

¹¹⁰ *Id.* at 29.

¹¹¹ *Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 302 n.11 (3d Cir. 2010).

¹¹² *Layshock*, 593 F.3d at 259.

¹¹³ *Id.* at 260 ("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."). The court also relied on *Morse* where the Supreme Court stated that school authorities' reach is limited in a "public forum outside the school context." *Id.* at 261.

¹¹⁴ *Id.* at 263. The court did not consider whether Layshock's profile was in fact lewd, offensive speech nor did it cite *Fraser* to stand for the validity of regulating such speech even when it does not occur on campus. *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

precise parameters of when the arm of authority can reach beyond the schoolhouse gate.”¹¹⁸

Writing for the majority in *Snyder*, Judge Michael Fisher refused to decide whether *Fraser* applied in a situation when a student makes lewd, offensive, or vulgar off-campus speech that has an on-campus effect because Fisher concluded that the profile could be punished under *Tinker*.¹¹⁹ While he concluded that there was no actual substantial disruption, Judge Fisher held 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*.”¹²⁰ Judge Fisher found that the profile’s “particularly disturbing content”¹²¹ created a “reasonably foreseeable possibility of future disruption”¹²² such that the school did not violate J.S.’s First Amendment rights when it punished her.¹²³

The profile’s content and J.S.’s use of the Internet played a large role in the decision. Judge Fisher was especially concerned with the profile’s allegations of sexual misconduct, stating that it was likely that students and parents would question McGonigle’s personality, conduct, and fitness to work with children.¹²⁴ He found that the profile was so “undoubtedly offensive, potentially very damaging, and possibly illegal” that held the “potential impact of the profile’s language alone [was] enough to satisfy the *Tinker* substantial disruption test.”¹²⁵ That the profile was on the Internet exacerbated the content’s effect because the Internet had the “inherent potential . . . to allow rapid dissemination of information.”¹²⁶ The court was convinced that J.S. used the Internet because she wanted other people to see the profile, thereby targeting McGonigle.¹²⁷

¹¹⁸ *Id.*

¹¹⁹ *Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 298 (3d Cir. 2010).

¹²⁰ *Id.* at 301.

¹²¹ *Id.* at 300.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 302.

¹²⁵ *Id.*

¹²⁶ *Id.* at 301 (“We thus cannot overlook the context of the lewd and vulgar language contained in the profile, especially in light of the inherent potential of the Internet to allow rapid dissemination of information.”).

¹²⁷ *Id.* at 303. (“They created the profile not as a personal, private, or anonymous expression of frustration or anger, but as a public means of humiliating McGonigle before those who knew him in the context of his role as Middle School principal.”).

3. The *Snyder* Dissent

In *Snyder*, Judge Michael Chagares dissented with respect to the First Amendment issue, stating that J.S.’s punishment violated the First Amendment pursuant to *Tinker*.¹²⁸ First, Judge Chagares stated that *Tinker* is the general rule for regulating student speech in public schools, but that it is subject to several narrow exceptions established by *Fraser*, *Kuhlemeier*, and *Morse*.¹²⁹ He argued that, under *Tinker*, J.S.’s profile did not cause a substantial disruption of the school environment.¹³⁰ Specifically, there was no reasonably foreseeable disruption because the profile was so outrageous that nobody could have taken it seriously – and no one did.¹³¹ In addition, J.S. took steps to prevent the speech from reaching the school by setting it to “private.”¹³² He was particularly disturbed by the fact that the majority seemed to be more concerned with the vulgarity of J.S.’s profile rather than its potential impact on the school.¹³³ Second, Judge Chagares stated that the district court’s application of *Fraser* was erroneous because it does not apply to off-campus student speech.¹³⁴ Using *Fraser* to uphold the punishment would grant the school too much authority over off-campus student speech.¹³⁵

¹²⁸ *Id.* at 308 (“Neither the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored and that caused no substantial disruption at school.”).

¹²⁹ *Id.* at 312. Notably, Justice Alito’s concurrence in *Morse* emphasized the narrowness of the Court’s holding, stressing that *Morse* “stand[s] at the far reaches of what the First Amendment permits.” *Id.* (citing *Morse v. Frederick*, 551 U.S. 393, 425 (2007)); see *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001) (stating that *Fraser* prohibits “‘lewd,’ ‘vulgar,’ ‘indecent,’ and ‘plainly offensive speech’ *in school*” (emphasis added)).

¹³⁰ *Snyder*, 593 F.3d at 313. Judge Chagares stated that much of the testimony on which the majority relied to demonstrate a disruption occurred was irrelevant because the disruptions arose out of the school’s response to the profile and the litigation, not the profile itself. *Id.* at 310. Also, in comparison to the highly emotional and controversial Vietnam War in *Tinker*, McGonigle’s “unfortunate humiliation” could not have led school authorities to forecast a reasonable disruption of the school environment. *Id.* at 317.

¹³¹ *Id.* at 316. Judge Chagares compared the profile to *Doninger* in which the students deliberately caused Internet speech to come on campus. See *Doninger v. Niehoff*, 527 F.3d 41, 50-51 (2d Cir. 2008) (upholding punishment under *Tinker* where student’s blog encouraged students to contact the administration).

¹³² *Snyder*, 593 F.3d at 316.

¹³³ *Id.* at 317 (“[T]o focus on the vulgarity of the language [in the profile] is to allow the *Fraser* exception to swallow the *Tinker* rule.”).

¹³⁴ *Id.* (“[I]n *Morse*, Chief Justice Roberts, writing for the majority, emphasized that ‘[h]ad *Fraser* delivered the same speech in a public forum outside the school context, it would have been protected.’”).

¹³⁵ *Id.* (“[T]o apply the *Fraser* standard . . . is to adopt a rule that allows school officials

V. CONCLUSION – IMPLICATIONS FOR STUDENT SPEECH ON THE INTERNET

Given that *Layshock* and *Snyder* have been vacated and will be reheard by the full Third Circuit, it is clear that their factual similarities and disparate holdings caused confusion over which student Internet speech the First Amendment protects. The opinions demonstrate the difficulty with which pre-Internet standards are applied to situations in which students express themselves on the Internet away from school. They also reveal the importance of winning student speech cases on the facts.

First, *Layshock* demonstrated that to win, schools must prove that a sufficient nexus exists between the speech and its on campus effect. Hermitage could not determine which of the several MySpace profiles actually caused any disturbances at school. Had Layshock's profile been the only profile at that time, the court may have found a stronger, direct causal connection between his speech and any disruption and upheld the punishment under *Tinker*. Second, the case demonstrated that schools must argue that a substantial disruption occurred pursuant to *Tinker*. Hermitage made concessions on both of these points, revealing that an argument under *Tinker* in the Internet age is still the strongest argument a school can make. Arguments that Internet speech somehow constitutes on-campus speech that the school can regulate are insufficient.

In addition, *Snyder* indicates courts' willingness to defer to a school's judgment that student speech, regardless of where it is made, may be punished merely because it is vulgar.¹³⁶ At the very least, the *Snyder* court seemed to infer a sufficient nexus between the off-campus speech and any substantial disruption or reasonably foreseeable disruption of the school environment based on the argument that vulgar speech is likely to cause a disruption. However, the Supreme Court has never held that schools can punish off-campus student speech based solely on its vulgarity or offensiveness. In fact, the Third Circuit has said that student speech cannot be punished based solely on the "emotive impact that its offensive content may have on a speaker."¹³⁷ It

to punish any speech by a student that takes place anywhere, at any time, as long as it is *about* the school or a school official, is brought to the attention of a school official, and is deemed 'offensive' by the prevailing authority.").

¹³⁶ It is important to note that this creates tension with *Tinker*, where the Supreme Court did not defer to the school's judgment. Instead, the *Tinker* Court placed the burden on the school to demonstrate that a substantial disruption of the school environment had occurred. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, *it must be able to show* that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.") (emphasis added). The Supreme Court's exceptions to *Tinker*, however, do defer to the school's judgment in certain circumstances. *See supra* Part II.

¹³⁷ *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir. 2001); *see also*

is not surprising that a student would want to complain about a teacher on the Internet, even in an offensive way. However, it does not immediately follow that *Fraser* should be used to punish the student just because that speech is vulgar and may have an effect on the school. In fact, the speech will inevitably reach the school by virtue of the fact that the speaker is a student with friends who are also students at the same school.

It is likely that the Third Circuit will rule in favor of the students in both *Layshock* and *Snyder* after it takes a close look at how the *Fraser* exception affects *Tinker*'s general rule and *Morse*'s limited holding. Both the *Layshock* and *Snyder* panels relied heavily on *Tinker* and interpretations thereof, yet still reached divergent results, indicating that the Third Circuit will likely re-examine the original underpinnings of *Tinker*'s general rule and subsequent interpretations. The original justification for the *Tinker* standard was to balance schools' ability to create and maintain an environment in which learning could continue uninterrupted with the acknowledgement that children do not lose their constitutional rights by virtue of being students.¹³⁸ The Court put the burden on schools to prove that a substantial and material disruption had occurred or was reasonably foreseen to occur.¹³⁹ When schools fail this test and a court finds no actual or reasonably foreseeable material or substantial disruption, there should be no reason to uphold a student's punishment for speech made on or off campus. The facts of *Layshock* and *Snyder* do not indicate the level of disruption, actual or foreseeable, contemplated by *Tinker* to be sufficient to justify student punishment.

In addition, the Third Circuit will probably determine that *Fraser* cannot be used to uphold punishments for vulgar student speech on the Internet made off-campus. *Fraser* held that a school's function is to teach students how to behave like good citizens.¹⁴⁰ In light of this function, schools can punish lewd, vulgar, or offensive speech because it adds nothing to students' education on proper behavior in a democratic society.¹⁴¹ It would be stretching *Fraser*, however, to say that a school's authority to teach students how to be good citizens extended into students' homes outside of school hours. The line must be drawn somewhere. It is only natural for students to vent their frustration to other students, especially when outside of the confines of the school. Courts and schools should resist the urge to assume, based on the content of the student's speech alone, that the student intended for the speech to reach the school and to create a disruption of the school environment. In fact, both the

Morse v. Frederick, 551 U.S. 393, 409 (2007). (“[*Fraser*] should not be read to encompass any speech that could fit under some definition of ‘offensive.’”).

¹³⁸ See *supra* Part II.

¹³⁹ See *supra* Part II.

¹⁴⁰ See *supra* Part II.

¹⁴¹ See *supra* Part II.

Layshock and *Snyder* panels seemed uneasy using *Fraser* to punish vulgar student speech made off-campus, indicating that they knew that they may have been stretching the exception.¹⁴²

Finally, the Third Circuit will likely rule in the students' favor in light of Justice Samuel Alito's concurrence in *Morse*. Justice Alito joined the majority's opinion with the understanding that public schools' authority to ban student speech "advocating illegal drug use"¹⁴³ stood "at the far reaches of what the First Amendment permits."¹⁴⁴ Therefore, the *Morse* holding arguably did not alter existing free speech rules. Justice Alito stated that schools have authority to regulate and punish student speech due to the special characteristics of the school setting.¹⁴⁵ He rejected the argument that schools' authority to punish student speech is based on parents' delegation of authority to public school officials to control what their children say.¹⁴⁶ Considering that *Morse* is the only Supreme Court case about off-campus student speech and that its holding can be limited to its facts, the Third Circuit may see *Morse* as a sign that school officials' authority to punish off-campus student speech like that in *Layshock* and *Snyder* is – or should be – very limited.

The Third Circuit could uphold both of the lower court decisions, despite their seemingly conflicting holdings, based on a reluctance to overturn findings of fact. The two cases reached different outcomes partly because in *Layshock*, Hermitage failed to argue that a substantial disruption under *Tinker* had in fact occurred. Conversely, the *Snyder* panel found that the school reasonably foresaw that a substantial disruption could in fact occur due to the profile. However, since the Third Circuit found that these cases warranted a hearing by the full court – and because the question is largely about the appropriate legal standard – it is likely that the Third Circuit ruling will resolve the disparate results reached by the lower courts. Regardless of how it rules, at the very least, the Third Circuit should clarify the standard that applies to student speech on the Internet that occurs off-campus that nevertheless reaches and affects the school environment. *Layshock* and *Snyder* demonstrate that the issue is not whether the Internet is accessed at school, but whether a student

¹⁴² See *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 261 n.16 (3d Cir. 2010) (limiting *Fraser*'s holding to vulgar, offensive student speech in school); *Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 302 n.10 (3d Cir. 2010) (noting that the focus on the profile's vulgarity did not indicate that the majority was basing any part of its holding on *Fraser*); *id.* at 298 (refusing to decide whether *Fraser* gave school officials the authority to punish a student for vulgar, offensive, or lewd off-campus speech that had an effect on campus).

¹⁴³ *Morse v. Frederick*, 551 U.S. 393, 425 (2007).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 424.

¹⁴⁶ *Id.*

made any comment about anything related to the school on the Internet from any computer. A student does not and should not lose his or her personal constitutional rights by virtue of his or her student status. Therefore, *Tinker* and its progeny are not well adapted to today's technological world where the once-certain schoolhouse gate is virtually nonexistent.