

**IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT
DOCKET NOS. 07-4465; 07-4555**

JUSTIN LAYSHOCK, a minor, by and through his parents, **DONALD
LAYSHOCK** and **CHERYL LAYSHOCK**

Appellees,

v.

THE HERMITAGE SCHOOL DISTRICT; KAREN IONTA, in her
official capacity as Superintendent; **HICKORY HIGH SCHOOL, ERIC
W. TROSCH**, in his official capacity as Principal; **HICKORY HIGH
SCHOOL, CHRIS GILL**, in his official capacity as Co-Principal

Appellants.

Appeal from the Opinion and Orders of the Honorable Terrence F. McVerry of the
United States District Court for the Western District of Pennsylvania, of July 10, 2007
published in *Layshock v. Hermitage School District*, 496 F. Supp.2d 587 (W.D. PA
2007). Third Circuit Docket Nos. 07-4465; 07-4555

BRIEF OF AMICUS CURIAE
PENNSYLVANIA SCHOOL BOARDS ASSOCIATION
Filed in support of Appellants

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CONCISE STATEMENT OF INTEREST OF *AMICUS CURIAE*.

Your *amicus curiae*, the Pennsylvania School Boards Association (“PSBA”), files this brief in support of Appellant/Cross-Appellee, Hermitage School District (“herein the District”), pursuant to FRAP 29(a). PSBA represents to this Honorable Court that all parties have consented to the filing of this brief in accordance with FRAP 29. PSBA is a voluntary association representing the 501 local school districts of Pennsylvania and the members of the school boards of those school districts. PSBA was organized in 1895 and was the first such association in the nation. The mission of PSBA is to promote excellence in school board governance through leadership, service and advocacy for public education.

PSBA files this brief for the purpose of providing this Honorable Court with the perspective of public school districts in Pennsylvania. This case involves the unique issue of a school district’s authority to discipline a student for the creation of a mock MySpace profile that misused a school administrator’s likeness; used lewd and offensive language; and was targeted to the school community in a manner that undermined the educational mission of the school district. Due to the proliferation of technology in the current school environment, it is important that public schools maintain their traditionally recognized authority.

The inability of public schools to discipline a student for improper conduct involving speech or expression simply because the expression was created off campus would seriously hamper a school's efforts to advance the educational mission of teaching children about exercising personal responsibility in preparation for participation in our democratic civil society. The authority of school districts to discipline members of the school community for expressions intruding upon the rights of others is crucial to preserving the safety of students and school employees. Moreover, the discipline of a student who improperly uses the likeness of an administrator to create a profile that is lewd, offensive, profane, or defamatory is not shielded by the First Amendment. Therefore, PSBA respectfully asks this Honorable Court to articulate a test that maintains the school district's authority and reverses the decision of the lower court.

Because the Pennsylvania Supreme Court has adopted a test applicable to the current case that recognizes the new challenges of technology while upholding the precedents set by the U.S. Supreme Court in previous student expression cases, this Court should adopt that test as the standard for the 3rd Circuit.

SUMMARY OF ARGUMENT.

PSBA, your *amicus curiae*, asserts that the lower court erred in rendering a judgment in favor of Appellee-Cross Appellant, Justin Layshock. The lower court misapplied the *Tinker* case concluding that Layshock's creation of a mock profile that improperly used a photograph of an administrator, subjected the administrator to ridicule by using lewd and offensive comments, was directed at the school community, and accessed by Layshock at school could not be the subject of discipline of Hermitage School District without violating the First Amendment of the U.S. Constitution. Because this case presents an issue of first impression, PSBA requests that this Honorable Court adopt the test set forth by the Pennsylvania Supreme Court in *J.S. v. Bethlehem School District*, 569 Pa. 638 (Pa. 2002).

The Court in *J.S.* developed a test that would subject speech to discipline if there is a significant nexus or connection between speech created off campus but directed to the school community. *Id.* at 667. The *J.S.* case stands for the proposition that even absent a substantial and material disruption to the educational process, student speech might still be regulated if it is determined the speech is lewd, offensive, or profane. Such a standard not only takes into account the difficulty of administering

discipline in light of the availability of technology, but is also consistent with current First Amendment jurisprudence.

Public schools have traditionally exercised their authority to advance their educational mission to prepare students to participate in our civil society and pursue their chosen careers. Such preparation must include teaching children about the exercise of individual rights within the boundaries of civic responsibility.

The lower court also erred in concluding that the profile created by Layshock is protected speech. Because school students do not have the same rights as adults to express ideas that are lewd, offensive or profane, the Layshock profile does not enjoy the same protections as the kind of passive political speech at issue in previous cases. Layshock's use of offensive terms to ridicule the principal is not protected by the veil of the First Amendment.

Finally, part of a school's educational mission is to protect both students and teachers as part of the education community. In advancing this objective, public schools must have the ability to exercise the authority to discipline a student for directing a communication toward the school community subjecting an educator or student to harassment in the form of demeaning or defamatory comments. Fortunately, this case does not involve

a student victim. However, in order for school districts to have the ability to deal with harassment or cyber-bullying, the District must exercise its traditional authority of disciplining a student who invades the rights of others by misusing a person's likeness, making defamatory remarks, or harassing a member of the school community by using the internet.

ARGUMENT.

A. THE LOWER COURT ERRONEOUSLY CONCLUDED THE SCHOOL DISTRICT VIOLATED THE FIRST AMENDMENT BY DISCIPLINING LAYSHOCK FOR SPEECH THAT VIOLATED THE SCHOOL DISTRICT'S DISCIPLINARY POLICIES.

PSBA respectfully asks this Honorable Court to reverse the decision of the lower court granting summary judgment in favor of Appellee, Justin Layshock "Layshock." In considering this case, the public education community in Pennsylvania must navigate uncharted waters due to the current absence of jurisprudence on this matter since the U.S. Supreme Court has not considered a case involving the issue of the First Amendment and student expression in cyberspace. Therefore, it is important for this Court to adopt a test that establishes a clear rule of law addressing a school district's authority to discipline students for speech that is created in cyberspace.

Although the U.S. Supreme Court has never specifically addressed student speech cases involving online speech or speech originating at an off campus location, current First Amendment jurisprudence is a starting point for analyzing this case. The *Tinker* case established the principle that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school. *Tinker v. Des Moines Independent Community*

School District, 393 U.S. 503, 513 (U.S. 1969). Although *Tinker* instructs the school community that a student's constitutional rights do not end at the schoolhouse gate, the Court has subsequently stated that "the constitutional rights of students in public school are not automatically coextensive with rights of adults in other settings." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (U.S. 1986).

Because this case presents an issue of first impression, your *amicus curiae* asks this Court to adopt the standard set forth by the Pennsylvania Supreme Court in *J.S. v. Bethlehem Area School District* because proper application of the test in *J.S.* would not violate the First Amendment and would enable public school districts to discipline students for cyber speech¹ characterized by specific factors. In the *J.S.* case, the Court was confronted with the issue of whether the school district violated a student's right to free speech under the First Amendment of the U.S. Constitution for disciplining a student for creating a website about school officials that was directed at the school community. In *J.S.*, the student created a website at home called "Teacher Sux" that referred to a teacher's physical characteristics, contained graphics depicting the teacher morphing into Hitler and decapitating the

¹ When referring to speech or expression using the internet as the forum or method of delivery, your *amicus curiae* will use the term "cyber speech."

teacher. The website also suggested the student wanted to hire a hit man to kill the teacher. *J.S.*, 569 Pa. at 644-645.

The *J.S.* case is essential to an analysis of the current case because the Court analyzed discipline for cyber speech created off campus in the context of the First Amendment. The Court acknowledged the difficulty of applying *Tinker* and *Fraser* to current forms of speech stating, "Indeed, *Tinker*'s simple armband, worn silently and brought into a Des Moines, Iowa classroom, has been replaced by *J.S.*'s complex multi-media web site, accessible to fellow students, teachers, and the world." *Id.* at 665. Under the standard developed in *J.S.*, if it is determined that speech is on-campus, other factors must be considered including the form of the speech, the setting in which the speech is communicated, and whether the speech is part of a school sponsored activity. *Id.*

The Court ultimately held the school district's expulsion of the student for creating the website had a sufficient nexus to on-campus activity and did not violate the First Amendment. *Id.* at 675. The Court examined the issue of the website being created off campus in the context of determining whether there was a sufficient nexus between the creation of the website and on campus activity sufficient to permit the district to discipline the expression as on campus speech. Although the website was created off

campus, the communication was targeted to the school community, other students were informed of the existence of the website, and the site was actually accessed by the student at school. *Id.* at 668.

The *J.S.* court acknowledged significant differences between *Tinker*, *Fraser*, and *J.S.* The case did not involve the kind of political speech present in *Tinker* and was distinguishable from *Fraser* because the speech did not take place at a school assembly. However, the Court opined that an application of either *Tinker* or *Fraser* would result in upholding the school district's authority to discipline J.S. for his speech communicated through the website. *Id.* The content of the "Teacher Sux" website was no less lewd, vulgar or plainly offensive than the speech expressed at the school assembly in *Fraser*. *Id.* In applying *Tinker*, the Court concluded the website created disorder and significantly impacted the delivery of instruction. Therefore, the Court opined that J.S.'s website created an actual and substantial interference with the work of the school sufficient to satisfy the requirements of *Tinker*. *Id.* at 673.

Although the lower court in the current matter declined to adopt the approach of the Pennsylvania Supreme Court in the *J.S.* case, your *amicus curiae* asserts there are compelling reasons for this Court to adopt the *J.S.* standard. *J.S.* provides a workable test that is not a departure from *Tinker* or

Fraser. Conduct or speech by the student, “in class or out of it, which for any reason-whether it stems from time, place or type of behavior-materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.” *Tinker*. 393 U.S. at 513. Moreover, the *J.S.* test recognizes the unique characteristics of cyber speech. Traditional boundaries that were applied in cases involving student speech before the revolutionary impact of the internet are no longer useful due to the proliferation of new technology and the impact of that technology on the school environment.

A school district’s authority to discipline or regulate student conduct has never been strictly confined to the boundaries of the school yard. For example, under the Pennsylvania School Code of 1949, school districts have the right to exercise the same authority as to conduct and behavior over the pupils attending the school during the time required in going to and from their homes as parents or guardians. 24 P.S. §5-510, 24 P.S. §13-1317.

“Through the doctrine of *in loco parentis* courts upheld the right of schools to discipline students, to enforce rules, and to maintain order.” *Morse v. Frederick*, 127 St. Ct. 2618, 2631 (2007) (Thomas, J., concurring). This authority also extends to things like grading homework and disciplining

students by excluding them from extracurricular activities for conduct that occurs when students are not being supervised by the school district. School districts even have authority over home schooled students in the verification of academic requirements pursuant to the compulsory education requirements in the School Code. 24 P.S. §13-1327.1.

Other federal courts that have addressed the issue of student cyber speech and the First Amendment have taken an approach that is similar to *J.S.* In *Donninger v. Niehoff*, 514 F.Supp. 2d 199, 216 (D. Conn. 2007), a district court upheld a student's discipline for a blog entry in which she condemned the school's decision to postpone an on-campus rock concert and referred to the administration as "douchebags." The Court concluded the blog entry constituted on-campus speech, explaining that, "the content of the blog was related to school issues, and it was reasonably foreseeable that other . . . students would view the blog and that school administrators would become aware of it." *Id.* at 217. The Court held that the school could punish the student for offensive speech on the blog that "interfered with the school's 'highly appropriate function . . . to prohibit the use of vulgar and offensive terms in public discourse,' and to encourage the values of civility and cooperation within the school community, by removing her from the ballot for Senior Class Secretary." *Id.* (quoting *Fraser*, 478 U.S. at 683).

In *Wisniewski v. Board of Education of the Weedsport Central School District*, 494 F.3d 34 (2d Cir. 2007), the Court upheld the suspension of an eighth-grade student for using AOL Instant Messaging software on his parents' home computer to transmit a buddy icon consisting of a crude drawing depicting the shooting of a named teacher. The student sent instant messages, displaying the icon to classmates but not to the teacher or any other school official. *Id.* at 36. The Court analyzed the case based on whether it was "reasonably foreseeable "that the icon would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school'" *Id.* at 38-39(quoting *Tinker*, 393 U.S. at 513).

In the case *sub judice*, a student entered the school district's website, misappropriated a picture of an administrator, and used that likeness to improperly create a MySpace profile that was targeted to the school community and accessed by students at school including Layshock. Because the profile was targeted to fellow students, it was very likely the profile would come to the attention of school officials. Moreover, the misappropriation of the principal's likeness and the offensive language accompanying the misuse of that likeness brought Layshock's expression within the context of on campus speech. Therefore, there was a sufficient

nexus between Layshock's speech and on campus activity making the speech subject to the disciplinary authority of the school district.

When looking at the traditional authority of school districts as well as the new methods of student communication, it is important to focus on the destination and the effect of the speech rather than the origin of the speech. For all of the aforementioned reasons, the origin of the mock profile is not the sole factor in addressing the question of whether the District had the authority to discipline the speech consistent with the First Amendment. Cyber speech is asymmetrical communication without clear geographical boundaries or time constraints. Students regularly create, send, and access communications using multiple methods including email, text messaging, chat rooms, and cell phones from limitless locations. On this electronic frontier where an individual student has the ability to broadcast a message in a way that only traditional media had access to in the past, public schools struggle to fulfill their duty to prepare children to become responsible citizens to fully participate in civil society as well as maintaining the order that is crucial in the school environment.

Public schools play a critical role in the advancement of civil society that goes well beyond the confines of reading, writing, and arithmetic.

While the *Tinker* court recognized that students do not shed their

constitutional rights at the schoolhouse gate, it has also long been recognized that the educational mission of our schools does not end at that same schoolhouse gate.

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. Inescapably, like parents, they are role models. 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 such as that indulged in by this confused boy. *Bethel School District v. Fraser*, 478 U.S. 675, 683, 106 S.Ct. 3159 (1986).

It would be short sighted to view the creation of Layshock's profile and the discipline that followed using the simple rubric of a governmental entity restricting the speech of a private citizen. The importance of the educational mission of public schools has been articulated previously by the Supreme Court stating:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S. Ct. 686, 691, 98 L.Ed. 873, 880(1954).

Because part of the educational mission of schools is to prepare its student's to become full participants in our society, it is vitally important for our schools to teach children about observing boundaries and exercising responsible judgment.

As they traverse along life's path, students like Layshock will work and study in a variety of environments that will require sound judgment and responsibility in the way personal opinions are expressed. For example, St. John's University like a number of other colleges, prohibits members of the university community from engaging in, "Forms of discrimination related to harassment including but not limited to . . . Repeated sexual innuendos, racial or sexual epithets, derogatory slurs, off-color jokes, propositions, threats or suggestive or insulting sounds . . ."² If after college, Layshock pursues a career in the law, he would be required to refrain from making comments that would have a ". . .substantial likelihood of materially prejudicing an adjudicative proceeding . . ."³ If Justin chooses to become a public school teacher, he would be required to "exhibit acceptable and professional language and communication skills . . . reflecting, sensitivity to the fundamental human rights of dignity, privacy and respect"⁴. Finally, if

² St. John's University Policy Against Discrimination, Discrimination-Related Harassment, Sexual Harassment Related Complaint Procedure.

³ See the Pennsylvania Rules of Professional Conduct at 204 *Pa. Code Rule 3.6(a)*.

⁴ See the Pennsylvania Code of Professional Practice and Conduct for Educators at 235 *Pa. Code 235.4(7)*.

Justin decides to serve his country by joining the United States military he would be prohibited from, “ . . . participation in organizations that espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force or violence; or otherwise engage in efforts to deprive individuals of their civil rights⁵.”

The aforementioned examples illustrate the need for public schools to prepare students for life after graduation. That preparation must include a well-rounded education emphasizing not only individual rights but civic duty and the importance of observing boundaries. If our public schools taught a child that the First Amendment permits them to express the kinds of things Justin expressed without consequences regardless of the context of the speech, that student would learn a false lesson. Such a lesson is not only inconsistent with First Amendment jurisprudence; it does not prepare a student to function within the real boundaries of a civil society including full participation in the educational, employment and political life of our nation.

**B. THE LOWER COURT INCORRECTLY TREATED LAYSHOCK'S
PROFILE AS PROTECTED SPEECH UNDER THE FIRST
AMENDMENT OF THE U.S. CONSTITUTION.**

⁵ See U.S. Department of Defense Directive Number 1225.6 3.5.8.

It is a well-established principal of constitutional jurisprudence that certain forms of speech are not subject to the protections of the First Amendment. In the school context, speech that is lewd, obscene or profane is not protected speech. In *Fraser*, the Court upheld the suspension of a student making a speech nominating a classmate for student government with sexual innuendo. *Fraser*, 478 U.S. 675, 685 (U.S. 1986). In upholding *Fraser*'s discipline, the Court recognized the importance of prohibiting the use of vulgar and offensive terms in public discourse concluding the First Amendment does not prevent school officials from determining that to permit obscene, profane or plainly offensive speech would undermine the school's basic educational mission. *Id.* The kind of speech Layshock used in creating the MySpace profile is the class of speech that public schools have traditionally disciplined students for without breaching the boundaries of protected speech under the First Amendment.

Layshock's characterizations of Principal Trosch strike a tone that is patently more offensive than the comments used in *Fraser*. Layshock's use of terms such as, "big hard-on," "big dick," and "big whore" amount to speech that is "wholly inconsistent with the 'fundamental values' of public education." *Id.* at 685-686. Although unlike the facts of *Fraser*, Layshock's audience was not a captive audience, the school community was

the target audience of the profile. Because of the nexus between the profile and the school community, Justin's speech was subject to the disciplinary policies of the District.

There is a wide chasm between the political expression of students who passively demonstrate opposition to a war or thoughtfully criticize a school's disciplinary policy and Layshock's profile. Layshock's profile does not provide any commentary or political statement on the management of the school district or the conduct of Eric Trosch as a school administrator. It is simply a crass attempt to ridicule a school official through the use of language devoid of any social or political value. Restrictions on the content of speech are permissible in areas which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 760 (U.S. 1942).

Even assuming *arguendo* that Layshock's speech was not obscene, profane or plainly offensive, the impact of the profile did create a substantial and material disruption to the educational process sufficient to satisfy the requirements of *Tinker* and its progeny. *Tinker* does not stand for the proposition that students have free reign to openly insult teachers and

administrators using offensive language by smearing an administrator by using mean-spirited epithets.

Layshock's profile promotes illegal drug and alcohol abuse at the expense of an authority figure contrary to the school's educational mission of promoting personal responsibility. Applying the rights of a student "in light of the special characteristics of the school environment," means balancing the student's interest in the right to free speech against the school's interest in promoting the well-being of the students by maintaining an atmosphere of discipline and respect of self and others. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (U.S. 1988) (quoting *Tinker, supra*, at 506). In *Morse v. Frederick*, 127 S. Ct. 2628, 2622 (U.S. 2007), the U.S. Supreme Court held that schools have the authority to regulate speech that can reasonably be regarded as encouraging illegal drug use. The message in the *Morse* case was simply, "BONG HITS 4 JESUS." Layhock's profile depicts Trosch as a user of "steroids", "pills", and "blunts". Therefore, the speech suggests that a school authority figure uses illegal drugs in the form of steroids and marijuana. Even if other students in the school community were aware the profile was created by another student who did not intend to promote drug use, the message is one that is within the school district's authority to regulate.

In addition to the pedagogical concerns of teaching students about civility and taking responsibility for respecting boundaries, public schools must be mindful of protecting the rights of the members of the school community who may fall prey to statements that are defamatory or constitute unlawful harassment. Layshock's speech is not protected under the First Amendment because it invades the rights of others. The *Tinker* court reasoned that conduct or speech by a student involving, "substantial disorder or *invasion of the rights of others*" is not immunized by the First Amendment. *Tinker* 393 U.S. at 513 (altered for emphasis).

In addition to First Amendment jurisprudence, the Pennsylvania State Board of Education regulations acknowledge recognized legal boundaries of student speech. "Students have a responsibility to obey laws governing libel and obscenity and to be aware of the full meaning of their expression." 22 *Pa. Code* §12.9(c)(1). Therefore, Pennsylvania's regulations prohibit a student from expressing speech that is defamatory. A communication is defamatory if it "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from association or dealing with him." (Restatement §559). The Supreme Court has stated that to be libelous, a statement does not necessarily have to be universally regarded as such, or even regarded as such by a majority of people in the

community. It is enough to be considered libel if the statement hurts the party alluded to "in the estimation of an important and respectable part of the community." *Peck v. Tribune Co.*, 214 U.S. 185, 190 (U.S. 1909).

In Pennsylvania in an action for defamation the plaintiff must prove:

1.) The defamatory character of the communication; 2.) Its publication by the defendant; 3.) Its application to the plaintiff; 4.) The understanding by the recipient of its defamatory meaning; 5.) The understanding by the recipient of it as intended to be applied to the plaintiff; 6.) Special harm resulting from its publication; and 7.) Abuse of a conditionally privileged occasion. 42 *Pa.C.S.* §8343.

Defamation injures the reputation and diminishes the esteem, respect, goodwill or confidence the plaintiff held, or to excite adverse, derogatory or unpleasant feelings or opinions against him. *Zartman v. Lehigh County Humane Society*, 482 A.2d 266, 268 (Pa. Super. 1984).

The impact of Layshock's profile goes well beyond the juvenile ridicule that students traditionally communicated among the student community in paper notes passed among students. The answers in the profile have a real capacity to undermine Trosch's authority and standing in the Hermitage School District community, as well as an endless list of potential viewers in cyberspace that may include other education professionals and prospective employers.

Layshock's comments and the forum he used to express those comments have the capacity to damage Trosch's reputation as well as create a school atmosphere where students may insult, offend, defame or harass administrators, teachers, and students with impunity. "The Supreme Court has "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. *Tinker*, 393 U.S. at 507, 89 S.Ct. at 737. "Without first establishing discipline and maintaining order, teachers cannot begin to educate their students." *New Jersey v. T.L.O.*, 469 U.S. 325, 350, 105 S.Ct. 733, 747, (1985) (Powell, J. concurring), cited by *Boucher v. School District of Greenfield*, 134 F.3d 821, 827 (1998).

It would be myopic to view Layshock's profile as a silly joke confined to the relatively small confines of Hermitage School District. Although the profile was directed at the school community, Layshock became a publisher of content without geographical boundaries when the profile was posted on MySpace. The tone and impact of Layshock's comments must be considered within the context of the educational mission of the school. Part of that educational mission includes protecting the rights of students as well as school employees. Fortunately, Layshock did not subject a fellow student

to the ugly characterizations aimed at Trosch. This is the context for public schools exercising responsible discipline to teach children boundaries as well as to protect others.

Current news headlines illustrate the challenges facing the school community. At Parkland High School, at least two students took nude pictures of themselves which were passed by students around the school on camera⁶. In Philadelphia, a camera phone captured an attack of a disabled child while a group of students watched laughing. The video was then posted to the assaulted student's MySpace page against his will⁷. In another tragic case, a thirteen year-old student hanged herself in her bedroom closet after a cruel cyber hoax involving another student and the student's mother⁸. The kind of conduct Justin engaged in did not target other students. However, the examples illustrate the importance of the ability of public schools to discipline in instances where students go beyond the boundaries of protected speech by intruding upon the rights of others.

From a public policy perspective it would be untenable for this Honorable Court to articulate a rule permitting a student to direct speech at the school community in a manner that invades the rights of others. Such a

⁶ See Brian Callaway, *Parkland porn has been seen by many; Students say cell phone images of naked girls, pair having sex were sent far and wide months ago*, MORNING CALL (Allentown, Pennsylvania), Jan. 25, 2008 at A1.

⁷ See Dana DiFilippo, *Bully's taped attack on Web; Disabled Logan youth was beaten in school; mom infuriated*, PHILADELPHIA DAILY NEWS, Jan. 25, 2008, at Local Pg. 04.

⁸ See *20/20: The Hoax; MySpace Suicide* (ABC television broadcast, Dec. 7, 2007).

rule would undermine the ability of public school districts to provide an environment where both students and teachers feel secure enough to advance the goals of the school community. Therefore, your *amicus curiae* respectfully request that this Honorable Court reverse the decision of the lower court.

CONCLUSION

For the foregoing reasons, the PSBA respectfully asks this Court to reverse the July 10, 2007 decision of the Honorable Terrence F. McVerry, as reported in *Layshock v. Hermitage School District*, 496 F.Supp. 2d 587 (W.D. Pa. 2007).

Respectfully Submitted,

By:

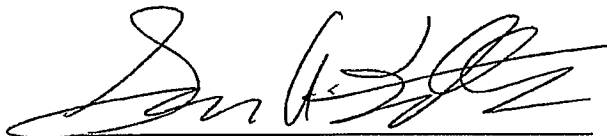


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April 4, 2008

CERTIFICATE OF BAR MEMBERSHIP

I, Sean A. Fields, attorney for *Amicus Curiae*, certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

A handwritten signature in black ink, appearing to read 'Sean A. Fields', written over a horizontal line.

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a) AND L.A.R. 31.1(c)

1. *Amicus Curiae* Brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B) because *Amicus Curiae* Brief contains 5,312 words.
2. *Amicus Curiae* Brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because *Amicus Curiae* Brief has been prepared in a proportionally spaced typeface using Microsoft Word in font size 14, Times New Roman style.
3. The text of *Amicus Curiae* Brief in electronic form is identical to the text in paper copies.
4. Attorney for *Amicus Curiae* has run a virus detention program (Symantec AntiVirus Corporate Edition) and detected no virus on the electronic version of *Amicus Curiae* Brief.



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CERTIFICATE OF SERVICE

I, Sean A. Fields, certify that on April 4, 2008, I caused to be filed ten copies of the foregoing *Amicus Curiae* Brief with the Clerk's Office of the United States Court of Appeals for the Third Circuit, by first-class mail, postage prepaid, and I further certify that I served two copies of the *Amicus Curiae* Brief by first-class mail, postage prepaid, to counsel for the Parties at the address indicated below:

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