UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 07-4465 & 07-4555

JUSTIN LAYSHOCK, a minor by and through his parents,
DONALD LAYSHOCK AND CHERYL LAYSHOCK,
individually and on behalf of their son,
Plaintiffs-Appellee/Cross-Appellants,

v.

HERMITAGE SCHOOL DISTRICT, KAREN IONTA, District Superintendent,
ERIC W. TROSCH, Principal Hickory High School, CHRIS GILL, Co-Principal
Hickory High School, all in their official and individual capacities,
Defendants-Appellants/Cross-Appellees.

On Appeal From The Judgment Of The United States District Court
for The Western District of Pennsylvania Dated November 14, 2007
At Civil Action No. 06-00116

SECOND-STEP BRIEF OF APPELLEE AND CROSS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW ON APPEAL AND STATEMENT OF ISSUE PRESENTED FOR REVIEW ON CROSS-APPEAL

Whether the district court correctly concluded that the School District violated student Justin Layshock's First Amendment free-speech rights when it punished him for a parody profile of his principal that he created and posted on the Internet while at his grandmother's house during non-school hours?

Whether the district court committed legal error in concluding that the School District's punishment of student Justin Layshock for a parody profile that he created in the family's home violated his parents' fundamental right to direct the upbringing of their children?

SCOPE AND STANDARD OF REVIEW

In cases involving First Amendment challenges to government action, the burden of proof and persuasion rests on the government to demonstrate the constitutionality of its action.[1] This burden allocation applies with equal force to challenges to regulation of student expression in the school context.[2] This appeal involves the district court's summary judgment rulings — and the issues raised are legal ones. This Court's review of a district court's legal conclusion is plenary.[3]

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1 *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816-17 (2000); *Phillips v. Borough of Keyport*, 107 F.3d 164, 172-73 (3d Cir.), *cert. denied*, 522 U.S. 932 (1997).

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

3 *Olson v. Gen. Elec. Astrospace*, 101 F.3d 947, 951 (3d Cir. 1996). When reviewing a district court's conclusion that no First Amendment violation had occurred, the appellate court must "make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (citations and internal quotations omitted). This Court has never squarely addressed whether *Bose* applies to the factual findings on a summary judgment decision that favors a First Amendment claimant. Other circuits are split on this issue. *See United States v. Friday*, ___ F.3d ___, No. 06-8093, 2008 WL 1971504, at *8 (10th Cir. May 8, 2008) ("*Bose* opinion does not make clear whether its more searching review — whose purpose was to avoid a forbidden intrusion on First Amendment rights — applies symmetrically to district court findings that favor as well as disfavor the First Amendment claimant" and "circuits have long been split on this issue") (citing *Don's Porta Signs, Inc. v. City of Clearwater*, 485 U.S. 981 (1988) (White, J.) (noting split and dissenting from denial of certiorari)). This Court, however, need not resolve the matter here, as the principal issues on this appeal are legal ones and the district court's fact findings survive review under either standard.

COUNTERSTATEMENT OF THE CASE

A. JUSTIN LAYSHOCK CREATES A PARODY PROFILE OF PRINCIPAL TROSCH ON MYSPACE USING A COMPUTER AT HIS GRANDMOTHER'S HOME

In December 2005, Plaintiff Justin Layshock was a seventeen-year-old senior at Hickory High School in the Hermitage School District. He lived with his mother and father, Plaintiffs Donald and Cheryl Layshock ("Layshock parents"), and three younger siblings. A. 408-09 (TRO Tr.); A. 460 (Cheryl Layshock ("CL") Dep.).[4] Justin had attended the District's schools since Kindergarten. A. 409 (TRO Tr.). He was classified as a "gifted student," was enrolled in advanced-placement classes, won awards for the school at interscholastic-academic competitions, and was considered by his teachers to be particularly gifted in foreign languages. A. 391-92, 405, 408-14, 430 (TRO Tr.); A. 753 (Leeds Dep.).

Sometime between December 12 and 14, 2005,[5] while Justin was at his grandmother's house during non-school hours, he used her computer to post on the Internet a parody profile of his Hickory High School principal, Eric Trosch. A. 416 (TRO Tr.); *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp.2d 587, 591 (W.D. Pa. 2007); A. 897-900 (Justin's profile). Justin did not use school computers or class time to create the profile. *See id.*; A. 451-52 (JL Dep.).

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4 Justin graduated in 2006 and is attending St. John's University in New York City. A. 440 (Justin Layshock ("JL") Dep.).

5 The evidence about precisely when Justin created the profile is inconsistent, but as the district court noted, the discrepancy is immaterial. 496 F. Supp.2d at 591 n.1.

Justin posted the profile on an Internet website known as MySpace (http://myspace.com), which is a popular social-networking website. *See* http://en.wikipedia.org/wiki/MySpace. The website

> allows its members to create online "profiles," which are individual web pages on which members post photographs, videos, and information about their lives and interests. The idea of online social networking is that members will use their online profiles to become part of an online community of people with common interests. Once a member has created a profile, she can extend "friend invitations" to other members and communicate with her friends over the MySpace.com platform via e-mail, instant messaging, or blogs.

Doe v. MySpace, Inc., 474 F. Supp.2d 843, 845-46 (W.D. Tex. 2007). As of 2007, MySpace was "the most visited web site in the United States." *Id.* at 845. The website is especially popular among young people, including Hermitage students. A. 415, 428-29 (TRO Tr.).[6] Anyone with access to the Internet can load information onto Myspace or view the site, though the system allows profile creators to restrict access to pre-identified "friends." For instance, a student could post or view information about school officials on the Internet from any computer at a coffee shop, library, business, or home located in Honolulu, Helsinki, or Hiroshima. Justin happened to use a home computer in Hermitage, Pennsylvania, to post the Trosch profile.

The creation of the profile was straightforward. Justin first used a MySpace template, which includes background information such as age and place

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[6] A 2005 report noted that 87% of teenagers aged 12-17 accessed and used the Internet, a number that has likely increased. *See* Amanda Lenhart & Mary Madden, *Teen Content Creators and Consumers*, Washington: D.C: Pew Internet and American Life Project (2005) (*available at* http://www.pewinternet.org/pdfs/PIP_Teens_Content_Creation.pdf).

of birth. A. 416-17 (TRO Tr.); A. 441-46 (JL Dep.). He then imported another website's template for a survey, which included questions about favorite shoes, weaknesses, fears, perfect pizza, bedtime, etc. A. 447-48 (JL Dep.); A. 897-900 (Justin's Profile). Since Trosch is a large man (physique, not girth), Justin used the theme "big" to answer the questions. A. 897-900 (Justin's Profile); A. 422 (TRO Tr.). "The answers ranged from nonsensical answers to silly questions on the one hand, to crude juvenile language on the other." *Layshock*, 496 F. Supp.2d at 591. Answers to the survey questions included phrases such as "big hard ass," "big faggot," "big dick," or just "big." For the question, "what did you do on your last birthday," the profile said, "too drunk to remember." A. 897-900. Justin also copied Trosch's picture from the school's website "by performing a simple 'copy and paste' operation with his mouse." 496 F. Supp.2d at 591.[7] Justin did not post Trosch's actual email address on the profile, but rather "made one up." A. 418-19 (TRO Tr.). Justin explained that he made the profile to be funny, and did not intend to hurt anybody. A. 415-16, 419-20 (TRO Tr.).

B. PRINCIPAL TROSCH DISCOVERS SEVERAL PARODY PROFILES AND TAKES STEPS TO BLOCK STUDENTS FROM VIEWING THEM AND TO IDENTIFY THE AUTHORS

The School District did not learn of Justin's profile because of anything that had happened in school. Instead, over the course of one week in December 2005, Principal Trosch discovered four parody profiles of himself on MySpace (the second of which was Justin's) while at his home. A. 468-70, 492-97, 502, 922 (Trosch Dep.). He discovered the first profile on Sunday, December

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[7] Although images on websites can be posted to prevent viewers from copying them, the School District apparently did not employ such precautions; nor did it display any warning to indicate that content should not be copied. *See* A. 417 (TRO Tr.)

11, A. 468-70; A. 894-95 (Profile 1); Justin's profile and a third one on Thursday evening, December 15, A. 492-97, A. 902-06 (Profile 3); and a fourth one on Sunday, December 18, A. 502, 522, A. 908-14 (Profile 4).

In the School District's view, the three other profiles, *i.e.,* the ones *not* created by Justin, "contained more vulgar and offensive statements." 496 F. Supp.2d at 591; *compare* A. 897-900 (Justin's profile) *with* A. 894-95 (Profile 1), A. 902-06 (Profile 3), and A. 908915 (Profile 4). Trosch did not think Justin's profile was physically threatening. A. 498, 501 (Trosch Dep.). He viewed them all to be "degrading," "demeaning," "demoralizing," and "shocking." A. 471, 476, 498, 501.

The School District's response to the profiles was never focused on quelling disruption — there was none. Rather, Trosch's aversion to the profiles drove the School District's actions — and its response to the profiles was geared towards preventing students from seeing them, and later towards uncovering the authors' identities. The School District's technology coordinator, Frank Gingras, worked with MySpace staff and an outside computer consultant to disable and remove all four profiles from the Internet within hours of their discovery. *See* A. 258-59, 607-12, 618-24, 636 (Gingras Dep.); A. 477-78, 499-501 (Trosch Dep.). At Trosch's request, Gingras successfully installed a firewall, which since December 19 has effectively blocked access to any MySpace page from school computers. A. 621-24 (Gingras Dep.).

Trosch's overriding concern about his reputation also was reflected in his complaints to the police. He contacted the police, not to complain about his safety or disruption at school, but rather to press charges about what he characterized as a "forged" profile and to discuss whether the first profile (not Justin's) might constitute harassment, defamation, or slander. A. 479-82, 489,

503-05 (Trosch Dep.). The police never brought charges against Justin or the other students later identified as the profile authors.

The School District's other actions likewise reflected a concern over minimizing students' knowledge about the profiles and identifying their authors — not a concern about any disturbance. Before classes began on Friday morning, December 16, Trosch and Co-Principal Chris Gill convened a meeting of the high school teachers to discuss the MySpace profiles. A. 407 (Trosch Dep.). Before that meeting, teachers had not been aware of the Trosch profiles — and no teacher had complained about the profiles or any disruption caused by them.[8] After telling the teachers about the profiles, Gill "asked [them] not to discuss it with students during class," 496 F. Supp.2d at 592, because they "did not want to draw more attention to it." A. 653-54 (Ionta Dep.); *see also* A. 569 (Gill Dep.); A. 517-521 (Trosch Dep.). Consequently, Hickory High School students were never expressly told that they could not access *MySpace* generally, or the Trosch profiles specifically. A. 517-21 (Trosch Dep.); A. 653-54 (Ionta Dep.); *see also* A. 567-68 (Gill Dep.).

School District officials also focused their efforts on identifying the profile authors. At the Friday morning meeting, "teachers were directed to send all students who might have information about the profiles to the office." 496 F. Supp.2d at 592. Gill subsequently talked to several teachers, and students referred by them, "in an effort to find out who had created the profiles...." *Id.*; *see also*

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[8] Gill testified that teachers had complained, but he was unable to identify them or recall specifics. A. 549-52 (Gill Dep.). Moreover, none of the fourteen teachers identified by the School District as trial witnesses testified to even being aware of the profiles before the December 16 meeting. *See* A. 661, 674, 692-93, 704, 719; 731, 737, 745-46, 755, 767,774-75, 786, 795, 810, 821.

A. 554-55 (Gill Dep.). These students were sent to Gill not for disciplinary reasons, but to help investigate who created the Trosch profiles. 496 F. Supp.2d at 592; A. 554-55 (Gill Dep.). Though Gill claimed that these students "disrupted" class by asking "off topic" questions, he admitted that they did nothing "improper" or that would warrant disciplinary action. A. 556-58.

Trosch and Gill decided to restrict all students' access to school computers even though they had not received any complaints from teachers related to the profiles, A. 510 (Trosch Dep.); had no information that students had accessed the Trosch profiles from school computers, A. 535 (Trosch Dep.), A. 560-61 (Gill Dep.); had not punished any students for viewing the profiles, A. 561-62 (Gill Dep.); had not witnessed students disrupting class during the week, A652-54 (Ionta Dep.), A. 570-73 (Gill Dep.);[9] and were aware that all of the Trosch profiles had been disabled and rendered inaccessible. At about 1:30 p.m. on Friday, December 16, Trosch and Gill sent an e-mail message, A. 917, to all teachers instructing them not to let students use computers unless supervised. 496 F. Supp.2d at 592; A. 512-15 (Trosch Dep.). Student access to computers in Hickory High School was restricted for approximately three school days from mid-day Friday, December 16, to Wednesday, December 21 (only a half-day of school), in order to investigate who was accessing the profiles from school computers. A. 431 (TRO Tr.). During this time, students were permitted to use computers for regularly scheduled classes in the computer lab, A. 726-27 (Dye Dep.), and

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[9] During discovery, one teacher testified that he had seen students looking at a MySpace Trosch profile in his computer lab, but did not report it to the administration because he quickly stopped the students' activity and "it wasn't anything that [he] felt was serious." A. 674-81.

teachers were permitted to let students use in-class computers so long as they were supervised. A. 515-16 (Trosch Dep.).[10]

In sum, from December 11, when Trosch discovered the first profile, until the holiday vacation began on December 21, in a school of 803 students,[11] not a single student was disciplined for disrupting the school. A. 538-44 (Trosch Dep.). No teacher experienced any disruption in the classroom that they felt needed to be reported to the administration. *See* A. 720, 723-25, 811-1, 661-64, 675-78, 684-87, 694, 705-07, 731-32, 738-40, 746-48, 753-57,768-69, 776-77, 787-90, 798-800 (teachers' depositions). Computers did not crash or run slowly. *See* A. 607-09, 611-14, 621-23, 634-35 (Gingras Dep.); A. 834-43 (Plaintiffs' Expert Dep.); A. 851-75 (Plaintiffs' Expert Report). And no classes were cancelled. *See* A. 512, 526-27, 535 (Trosch Dep.). In the district court's words, "The actual disruption was rather minimal ...." 496 F. Supp.2d at 600.[12]

Meanwhile, school officials continued to hunt for the profiles' authors. At Trosch's directive, Gingras investigated and found that there were about nineteen searches for or "attempts to find" a Trosch profile during the

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10 *See* 496 F. Supp.2d at 592-93 for discussion of computer use during these days.

11 *Enrollment Projections, Hermitage Sch. Dist.* (Sept. 2005) (*available at* http://www.pde.state.pa.us/k12statistics/lib/k12statistics/HermitageSD09_05.pdf.).

12 We have not included much evidence from the record showing that Justin's profile caused no disruption because the School District has all but abandoned its primary argument in the district court, namely that Justin's speech caused a material and substantial disruption to the school day. On appeal, the School District's central argument is that schools have the authority to punish students for off-campus speech, regardless of any disruption.

preceding week, and two of those involved teachers. A. 637-45 (Gingras Dep.). Gingras remembered only five students actually accessing a profile. One of the students who accessed a profile was Justin. A. 642-45 (Gingras Dep).

Justin did not dispute attempting to access his profile on December 16; he did so in order to delete it. A. 421-22 (TRO Tr.); A. 449-50 (JL Dep.). But he never actually accessed the profile because Gingras had already deleted it, and only undecipherable fragments remained. *Id.* There is conflicting testimony about whether Justin accessed his profile at school on December 15. *See* 496 F. Supp.2d at 591 n.2. Justin denies doing so. A. 213-15 (JL Dep.). The district court deemed the discrepancy "not material," since there is no evidence that Justin engaged in any lewd or profane speech while in school, 496 F. Supp.2d at 599-600, and because "there is no evidence that school administrators even knew that Justin had accessed the profile" when they decided to punish him. *Id.* at 592, 601.

C. JUSTIN ADMITS TO CREATING ONE PROFILE, APOLOGIZES, AND IS PUNISHED

School District officials first learned on December 21 that Justin might have authored one of the Trosch profiles posted on MySpace. A. 575-76 (Gill Dep.). Superintendant Karen Ionta and Gill summoned Justin and his mother to a meeting, at which time Justin admitted creating one of the profiles. A. 393-96, 423 (TRO Tr.). After the meeting, without prompting from anyone, Justin went to Trosch's office and apologized for creating the profile. A. 424-25 (TRO Tr.). Trosch found Justin's apology respectful and sincere. A. 525 (Trosch Dep.). Justin followed up with a letter of apology on January 4, 2006. A. 426-27 (TRO Tr.).

Justin's parents were upset over his behavior. A. 396 (TRO Tr.). They discussed the matter with him, expressed their extreme disappointment,

grounded him, and banned him from using the computer. A. 396 (TRO Tr.). Justin was contrite. *See* A. 424-27 (TRO Tr.).

On January 3, 2006, Gill called Mrs. Layshock to tell her that Justin was suspended and should not return to school on January 4, the first day of classes following the winter break. A. 398 (TRO Tr.). At a January 6 informal hearing, the Layshocks were given, for the first time, a letter dated January 3, 2006, which purported to serve as written notice of the hearing and listed Justin's alleged violations of the District's discipline code. A. 919 (letter); A. 398 (TRO Tr.). The offenses charged were:

> 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 (use of school pictures without authorization).

A. 919. The suspension notice found Justin guilty of all charges based on the fact that he "admitted prior to the informal hearing that he *created* a profile about Mr. Trosch," not based on anything he did in school. A. 921 (emphasis added).

The School District issued Justin a ten-day, out-of-school suspension, which lasted from January 4 through 18. *Id.*; A. 399 (TRO Tr.). The District's punishment of Justin also included (a) placing him in the alternative education program ("the ACE Program") at the high school for the remainder of the 2005-2006 school year;[13] (b) banning his attendance or participation in any extra-curricular activities, including Academic Games and foreign-language tutoring;

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[13] ACE, which is Hickory High School's alternative education program, includes only three, as compared to the usual seven, instructional hours per school day. A. 400 (TRO Tr.). Students are given assignments from their regular teachers, but may not attend class. *Id.*

and (c) forbidding his attendance at the June 2 graduation ceremony. A. 399-403 (TRO Tr.); A. 921. Ionta also advised the Layshocks that the District was considering expelling Justin for the profile. A. 401-02 (TRO Tr.).

After all was said and done, Justin, who created the least "vulgar and offensive profile," 496 F. Supp.2d at 591, and who was the only student to apologize for his behavior, was the only student punished for the MySpace controversy.

D. THE LAWSUIT

On January 27, 2006, the Layshocks filed this action, asserting claims for violations of Justin's First Amendment free-speech rights and his parents' due process rights. A. 57-75 (Verified Complaint). The Layshocks also filed a Motion for Temporary Restraining Order and/or Preliminary Injunction. A. 45 (Docket). On January 30, the district court held a hearing on the Layshocks' TRO request. By Order dated January 31, 2006, the court denied the motion. *Layshock v. Hermitage Sch. Dist.*, 412 F. Supp.2d 502, 508 (W.D. Pa. 2006).

On February 8, the court mediated a resolution of the Layshocks' outstanding preliminary injunction motion. In exchange for the School District's agreement to remove Justin from the ACE program and reinstate him to his regular classes and allow him to participate in Academic Games and attend his anticipated graduation, the Layshocks agreed to withdraw their preliminary injunction motion. 496 F. Supp.2d at 594.

On March 31, 2006, the district court denied the School District's motion to dismiss the Layshock parents' claims, recognizing that parents may assert a claim on their *own* behalf for a violation of their due process right to "raise, nurture, discipline and educate their children" based on a school district's

punishment of their child for speech the child uttered in the family home. *See* A. 84-99 (March 31, 2006 Order).

After discovery, both parties moved for summary judgment. A. 100-102 (Layshocks' Motion); A. 145-147 (School District's Motion). The district court entered summary judgment in favor of Justin on his First Amendment claim and in favor of the School District on the Layshock parents' due process claim. By way of background, in three earlier cases involving out-of-school student speech, the United States District Court for the Western District of Pennsylvania had not reached the threshold question of whether a school district has authority to punish or regulate off-campus speech because the school districts could not even meet their burden under *Tinker*.[14] The district court here followed suit in part. Although it framed the issue as "whether the school administration was authorized to punish Justin for creating the profile," 496 F. Supp.2d at 597, and found that the School District violated Justin's First Amendment rights by exceeding school authority to punish Justin for off-campus speech, *id.*, the district court also addressed whether Justin's profile caused substantial disruption to the school and concluded that it did not. *Id.* at 599-603.[15]

On the Layshock parents' claims, in contrast with its earlier recognition that parents may assert a claim on their own behalf for violation of

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14 *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp.2d 446, 455 (W.D. Pa. 2001); *Flaherty v. Keystone Oaks Sch. Dist.*, Civil Action No. 01-586, Ruling on Preliminary Injunction (A. 939-47); *Latour v. Riverside Beaver Sch. Dist.*, 2005 WL 2106562 (W.D. Pa. August 24, 2005).

15 Addressing its earlier ruling on the TRO motion, district court noted that "[t]he more fully developed summary judgment record now before the Court demonstrates that the disruption of school operations was not substantial." 496 F. Supp.2d at 594.

their due process right to raise their children free from government intervention, the district court granted summary judgment for the School District, finding that the Layshock parents had no constitutional due process claim independent from Justin's First Amendment claim. *Id.* at 606.

The School District timely appealed from the district court's decision to grant summary judgment in favor of Justin on his First Amendment claims. Thereafter, the Layshock parents filed a timely cross-appeal from the district court's entry of judgment against them on their due process claim.

SUMMARY OF ARGUMENT

The School District suspended Justin Layshock for ten days and relegated him to an academically inferior educational program because he mocked his high-school principal's "big" physique in an Internet posting made while sitting at his grandmother's home computer. The specific issues in this case are whether, by punishing Justin for speech he published at home, the School District violated Justin's First Amendment free-speech rights and his parents' Fourteenth Amendment due process rights to direct and control their child's upbringing. But this case also raises a more fundamental question: Does the considerable authority granted to school officials to censor students' speech while in school extend beyond the schoolhouse gate into the home and community?

Nearly forty years ago, the United States Supreme Court famously proclaimed in *Tinker v. Des Moines Independent Community School District* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." While steadfastly reaffirming this seminal holding, most recently in *Morse v. Frederick*, the Court nonetheless has justified curtailing students' free-speech rights to "facilitate education and maintain order" in school. Although the Supreme Court has never squarely decided where school authority stops — and parental authority begins — inherent in the Supreme Court's and this Court's student-speech cases is the elemental proposition that, when exiting the schoolhouse gates, students regain whatever rights they shed upon entry. The rationales that justify curtailing students' rights in school disappear when students return to the community and to the control of their parents.

The School District and its *amicus curiae*, the Pennsylvania School Boards Association ("PSBA"), leap-frog this threshold issue about school officials' authority over students' *out-of-school* speech and advance an unprecedented and

radical assertion that schools' substantial authority over students' in-school expression extends into the larger community and even students' homes. They justify the need for this far-reaching authority by pointing to school districts' responsibility for "imparting upon students lessons of civilized behavior" and "prepar[ing] students for life after graduation." But the future that the School District and PSBA seek to prepare students for is one in which they unquestioningly accept government censorship and restrictions on their constitutional rights. Instead of recognizing school districts' obligation to teach students the importance of exercising their free-speech rights, PSBA focuses on, for example, schools' need to prepare students to submit to restrictive environments, such as the military, in which their rights may be sharply circumscribed. While preparing students for life after graduation is certainly within school districts' authority, giving school officials power to limit students' rights consonant with military service, and especially to do so outside the schoolhouse, is inimical to the traditions of a free society. The School District and PSBA seek to empower school officials to engage in content, and even viewpoint, censorship that would be unconstitutional if employed by any other state actor.

The School District and PSBA claim that school officials need this far-reaching authority to combat the expansive reach of the Internet. But giving the School District the power it seeks would, in the district court's words, "authorize school officials to become censors of the world-wide web." It would also infringe the significant First Amendment protection that minors enjoy outside of school and contradict Pennsylvania law, which limits school officials' authority over students to "such time as they are under the supervision of the board of school directors and teachers." Further, according such expansive authority to school districts would usurp parents' Fourteenth Amendment right to direct and control their children's upbringing, making it possible for school officials to override the

right and authority of parents to inculcate in their children the most personal and important moral, political, and religious values.

Because the School District had no authority to punish Justin for the constitutionally protected speech he created and published in his grandmother's home, this Court should affirm the district court's decision concluding that the School District violated Justin's First Amendment rights. The result should be the same even if Justin's Internet profile were subject to *Tinker*'s in-school-speech standard. There is no basis to disturb the district's court's factual finding that Justin's profile did not cause sufficient disruption to meet *Tinker's* material and substantial disruption test. That conclusion is entitled to deference — and the School District does little, if anything, to challenge that finding on this appeal.

Finally, this Court should reverse the district court's holding that the School District did not violate the Layshock parents' Fourteenth Amendment rights. The School District's punishment of Justin for his conduct in the family home after school hours — when he was not under the supervision of the School District — violated the well-established right of parents to raise their children without undue state interference.

ARGUMENT OF APPELLEE JUSTIN LAYSHOCK

I. STUDENT SPEECH THAT OCCURS OUTSIDE OF SCHOOL IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION

This case involves speech by a student uttered ***outside*** the schoolhouse gate. It is not a case involving student speech at all, but rather speech by a minor who also happens to be a public-school student. Contrary to the School District's argument, the United States Supreme Court's rationales for upholding certain limitations on student speech made in the school setting are inapplicable to this case. Accordingly, the School District was without authority to punish Justin Layshock for a parody profile he created at home.

A. RESTRICTIONS ON MINORS' SPEECH OUTSIDE OF SCHOOL ARE SUBJECT TO STRICT SCRUTINY

The School District contends that it should have the same authority to punish students' speech *outside* of school as it has *inside* the school.[16] But expanding school officials' authority to discipline student speech to those times when students are not under school supervision would usurp the rights of their parents to direct their children's upbringing and would impose the more restrictive in-school standards on students' out-of-school speech. The School District here is not simply asking that it be permitted to punish students for engaging in out-of-school speech that is not constitutionally protected, such as fighting words or true threats. It is insisting that it be given the unprecedented authority to punish students for speech, such as profanity, that otherwise would be constitutionally protected. That argument contravenes well-established precedent holding that, outside the school environment, minors have substantial free-speech rights that

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16 *See* Sch. Dist. Br. at 8-9.

sharply limit all government officials, including school administrators, from engaging in the type of censorship the School District advocates.

"Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[17] Specifically, "minors are entitled to a significant measure of First Amendment protection."[18] That protection is not only for the individual minor's benefit; it is also "a necessary means of allowing her to become a fully enfranchised member of democratic society" — and consequently "[w]e not only permit but expect youths to exercise those liberties — to learn to think for themselves, to give voice to their opinions, to hear and evaluate competing points of view — so that they might attain the right to vote at age eighteen with the tools to exercise that right." [19]

Accordingly, any content- or viewpoint-based restrictions on minors' First Amendment rights are subject to the same standard as such restrictions on adults' First Amendment rights: strict scrutiny.[20] Under that standard, the

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17 *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (overruled in part by *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)); *accord Anspach ex rel. Anspach v. City of Philadelphia, Dept. of Pub. Health*, 503 F.3d 256, 261 (3d Cir. 2007); *see also Tinker*, 393 U.S. at 511 ("Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect[.]").

18 *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975); *see also Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001) ("Children have First Amendment rights.").

19 *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1055-56 (7th Cir. 2004).

20 *See, e.g., Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 329 F.3d 954, 958-59 (8th Cir. 2003); *Kendrick*, 244 F.3d at 576-80; *Eclipse*

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government can restrict minors' First Amendment free-speech rights only if the limitation imposed is narrowly tailored to further a compelling governmental interest.[21] To be sure, courts apply a lesser standard of review to restrictions on the free-speech rights of students when they are in school.[22] But outside of school, any restriction on the First Amendment rights of minors must survive strict scrutiny.

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Enterprises, Inc. v. Gulotta, 134 F.3d 63, 67-68 (2d Cir. 1997); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992). Although courts have recognized that the government may have an interest that is sufficiently compelling to restrict the constitutional rights of children but not the rights of adults, and the Supreme Court has articulated three factors that might warrant differential treatment of a minor's speech, none of those factors are present here. *See Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (factors that might warrant differential analysis of constitutional rights of minors and adults are (1) peculiar vulnerability of children; (2) their inability to make critical decisions in informed, mature manner; and (3) importance of parental role in child rearing); *see also Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (government has compelling interest in protecting physical and psychological well-being of minors). Indeed, the third factor militates against the School District's argument that it can punish a student's speech in his home — where parents have authority over their children. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 864-65 (1997) (noting "consistent recognition of the principle that 'the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.'") (citation omitted); Section IV, *infra* (parents' rights claim).

21 *See, e.g., Interactive Digital Software*, 329 F.3d at 958-59.

22 *See, e.g., Morse v. Frederick*, ___ U.S. ___, 127 S. Ct. 2618, 2626-27 (2007) (students' free-speech rights can be circumscribed in light of special characteristics of school environment).

The School District's view — that it has authority over speech uttered by a student outside the schoolhouse gates and that minors' free-speech rights should be subject to the same limitations outside of school as they are in school — fails to acknowledge the significant First Amendment protection to which minors are entitled. Adoption of the District's approach would severely curtail the free-speech rights of minors based solely on their status as public-school students and create a two-tiered system of rights under which public-school students enjoy fewer First Amendment rights when they are not in school than do private and home-schooled students. The Constitution — and the Supreme Court's consistent reaffirmation of minors' rights — forbid this result.

B. SCHOOL OFFICIALS' AUTHORITY TO RESTRICT STUDENTS' FREE-SPEECH RIGHTS IS LIMITED TO EXPRESSION UTTERED IN SCHOOL

The School District's contention that school officials have the same authority to punish student speech outside of school as they do inside of school not only discounts the First Amendment rights of minors, but it also does not comport with the Supreme Court's reasoning in its student-speech cases. The School District ignores the Supreme Court's requirement that there be a connection between any limitations on students' in-school free-speech rights and the special characteristics of the school environment, and instead insists that it is school officials, not parents, who have authority to "protect[] minors from vulgar language and impart[] upon students lessons of civilized behavior" when students are not in school.[23] That argument directly contradicts the Court's admonition in *Morse v. Frederick* that school officials cannot punish vulgar or profane speech

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[23] Sch. Dist. Br. at 11.

outside the school context and is at odds with Pennsylvania law, which expressly limits school officials' authority over students' conduct to acts that occur in school.

1. The Supreme Court Has Justified Restrictions On Students' Free-Speech Rights While In School Based On The Special Characteristics Of The School Environment

Because this case involves student speech uttered outside the schoolhouse gate, it is different from every one of the United States Supreme Court cases involving student-speech rights. From the Court's first student-speech decision almost forty years ago holding that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[24] to the Court's decision last term reaffirming this core principle,[25] each of the Court's four student-speech cases has focused on school officials' control over *in-school* speech. And in each of these cases, the Supreme Court justified limits on students' in-school-speech rights based specifically on the special characteristics of the school environment.[26] The Court has never sanctioned any limitation on students' free-speech rights outside of the school environment.[27]

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24 *Tinker*, 393 U.S. at 506, 511.

25 *Morse*, 127 S.Ct. at 2622.

26 In upholding a school's punishment of a student for unfurling a banner advocating drug use during a school-sponsored field trip, the *Morse* Court recognized that "the rights of students must be applied in light of the special characteristics of the school environment." 127 S.Ct. at 2622 (citations and quotations omitted). In upholding censorship of school-sponsored student newspapers, the Court noted that "[t]he determination of what manner of speech *in the classroom or in school assembly* is inappropriate properly rests with the school board"). *Hazelwood Sch. Dist. v. Kuhlmeier* 484 U.S. 260, 267 (1988) (emphasis added). In *Bethel School District. No. 403 v. Fraser*, 478 U.S. 675 (1986), the Court held that lewd and profane speech "has no place" in a "high school assembly or classroom." *Id.* at 686-87. And *Tinker's* holding that schools can prohibit students from engaging in speech

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Thus, even though the United States Supreme Court has not specifically addressed whether school officials have the authority to punish off-campus student speech,[28] nothing in *Tinker* and its progeny even remotely suggests that they do or that the limitations on student-speech rights authorized in those cases extend outside the schoolhouse gates. Rather, *Tinker* and its progeny reflect a careful balancing of student-speech rights and the needs of the "public school setting." Those cases grant school officials the limited authority to punish speech under certain circumstances — even if that speech otherwise would be constitutionally protected — because of the need to "facilitate education and to maintain order" in a school environment.[29] This rationale is not implicated when a

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at school if it will cause a material and substantial disruption to the school day recognized school officials' "comprehensive authority ... to prescribe and control conduct *in the schools*." 393 U.S. at 508 (emphasis added).

27 PSBA suggests that *Tinker* provides authority for schools to punish off-campus speech — and relies on the Court's statement that speech "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" for that proposition. PSBA Br. at 10 (quoting *Tinker*, 393 U.S. at 513). PSBA's argument ignores entirely the context of the Court's statement. When read in context, the Court's reference to "in class or out of it" plainly refers to time in or out of the classroom, but still *during school*. *See Tinker*, 393 U.S. 512-13.

28 *See Morse*, 127 S.Ct. at 2624 ("There is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents.") (citing *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004)).

29 *See Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 253 (3d Cir. 2002).

student expresses himself in the family home — far from the public-school setting and during a time when the child is not under school officials' supervision.

Justice Alito's concurrence in *Morse* reinforces the point that the Court's student-speech-rights jurisprudence is necessarily based on the characteristics of the school environment:

> The public schools are invaluable and beneficent institutions, but they are, after all, organs of the State. When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents. ... Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing in loco parentis. *For these reasons, any argument of altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on the special characteristics of the school setting.*[30]

This Court, too, has underscored the link between school officials' authority to regulate student speech and the need to maintain order in the school environment, explaining that "students retain the protections of the First Amendment, but the shape of these rights *in the public school setting* may not always mirror the contours of constitutional protections afforded in other contexts."[31] Indeed, this Court has expressed serious doubt about whether school officials have any authority over student speech beyond the schoolhouse doors.[32]

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30 *Morse*, 127 S.Ct. at 2637-38 (Alito, J., concurring) (emphasis added).

31 *Sypniewski*, 307 F.3d at 253 (emphasis added) (citation omitted).

32 *See Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 216 n.11 (3d Cir. 2001) (explaining in dicta that application of restrictions on student speech "to cover conduct occurring outside of school premises . . . would raise

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The School District nonetheless wants the authority to punish student speech wherever it occurs, but does not even attempt to explain how the "special circumstances of the school environment" rationale could be invoked to justify restrictions on students' out-of-school speech. Instead, the District quotes from the Supreme Court's exposition in *Fraser* that schools "must inculcate the habits and manners of civility" and from this Court's opinion in *Sypniewski* that "[s]chools are not prevented by the First Amendment from encouraging fundamental values of habits and manners of civility by insisting that certain modes of expression are inappropriate and subject to sanctions" to defend its punishment of Justin for engaging in so-called vulgar speech outside of school.[33] But the School District omits the crucial component of those decisions that limits schools' authority to expression that takes place ***in school.***[34] So while school officials may discuss with the student how the out-of-school expression offended or affected others or inform the student's parents of their concerns about the speech, they cannot use their state-conferred authority as school officials to punish students for expression outside the

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additional constitutional questions" and noting with approval cases holding that "school officials' authority over off-campus expression is much more limited than it is over expression on school grounds") (internal citations and quotations omitted).

33 Sch. Dist. Br. at 11 (internal citations omitted).

34 *See Fraser*, 478 U.S. at 683 (giving schools authority to determine "what manner of speech *in the classroom or in school assembly* is inappropriate") (emphasis added); *Sypniewski*, 307 F.3d at 253 ("We have interpreted *Fraser* as establishing that 'there is no First Amendment protection for 'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech *in school.*'") (quoting *Saxe*, 240 F.3d at 213) (emphasis added).

schoolhouse gates. It is a student's parents (and "other, equally vital, institutions such as families, churches, community organizations and the judicial system"), not school officials, who are responsible for imparting lessons of civilized behavior once their child has exited the schoolhouse gate.[35]

2. The Supreme Court's Recent Decision In *Morse* Forecloses Application Of The *Fraser* Standard To Students' Out-Of-School Speech

The School District and its supporting amicus, PSBA, claim that "vulgar speech is not protected by the First Amendment" even when uttered by students outside of school.[36] But that contention is foreclosed by the Supreme Court's recognition in *Morse* that such speech is protected when made outside of school.

The *Morse* Court noted that *Fraser* drew an explicit distinction between in-school and out-of-school speech, and the Court emphasized the strict limits on a school district's authority to punish a student under *Fraser's* rationale: "Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, Fraser's First Amendment rights were circumscribed 'in light of the special characteristics of the school environment.'"[37] The Court recognized that lewd and vulgar speech — which can be proscribed in school — is constitutionally protected outside the

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35 *Layshock*, 496 F. Supp.2d at 597.

36 Sch. Dist. Br. at 8-9; *see* PSBA Br. at 17.

37 *Morse*, 127 S.Ct. at 2626-27 (quoting *Tinker*, 393 U.S. at 506). *Morse* also noted that *Kuhlmeier* drew the same in- and out-of-school-speech distinction. *See Morse*, 127 S.Ct. at 2627 ("*Kuhlmeier* acknowledged that schools may regulate some speech '*even though the government could not censor similar speech outside the school.*'") (quoting *Kuhlmeier*, 484 U.S. at 266) (emphasis added).

school setting.[38] Consequently, the district court's conclusion that the School District had no authority to punish Justin for a "lewd and profane" profile he created at home and distributed to a few friends, but did not distribute in school, simply follows *Morse*.[39]

Morse also refutes the School District's contention that it was authorized to punish Justin's off-campus speech because it was "offensive" and contrary to the school's mission. Indeed, *Morse* rejected that rationale to justify punishment even for in-school speech. Chief Justice Roberts' plurality opinion declined to adopt the "broader rule [urged by the school district] that Frederick's speech is proscribable because it is plainly 'offensive' as that term is used in *Fraser*," concluding that "this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.'"[40] Again, this is entirely consonant with black-letter First Amendment law, which protects "offensive" speech.[41] Justice Alito's concurrence in *Morse* also

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38 *See Cohen v. California*, 403 U.S. 24 (1971); *Johnson v. Campbell*, 332 F.3d 199, 212 (3d Cir. 2003).

39 *Layshock*, 496 F. Supp.2d at 599 ("This Court has no difficulty concluding, and will assume arguendo, that Justin's profile is lewd, profane and sexually inappropriate. Nevertheless, *Fraser* does not give the school district authority to punish him for creating it. ... [B]ecause Fraser involved speech expressed during an in-school assembly, it does not expand the authority of schools to punish lewd and profane off-campus speech. There is no evidence that Justin engaged in any lewd or profane speech while in school. In sum, the *Fraser* test does not justify the Defendants' disciplinary actions.").

40 *Morse*, 127 S.Ct. at 2629.

41 *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Saxe*, 240 F.3d at

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emphasized that "[t]he opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.' This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs."[42]

3. Pennsylvania Law Does Not Give School Officials Authority To Punish Students For Out-Of-School Speech

The School District's view that it has authority over students' out-of-school speech is foreclosed not just by the students' and parents' constitutional rights, but also by Pennsylvania law. State law limits school officials' power to discipline students to times when they are in school, on the way to school, and when they are participating in off-campus school-sponsored activities.

As the district court correctly observed, a school district's authority "is limited to that which is expressly or by necessary implication granted by the General Assembly."[43] Under Pennsylvania law, school districts are authorized to

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206. The School District's reliance on *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), is misplaced. *Pacifica's* holding was based on the fact that an unwitting listener could turn on the radio and "accidentally" encounter undesired or offensive speech. *Id.* at 748-49. The Supreme Court, moreover, has distinguished Internet communications — which "do not 'invade' an individual's home or appear on one's computer screen unbidden [and which] [u]sers seldom encounter ... by accident" — from speech on the radio. *Reno*, 521 U.S. at 869 (citations and internal quotations omitted).

42 *Morse*, 127 S.Ct. at 2637 (Alito, J., concurring).

43 *Layshock*, 496 F. Supp.2d at 598 (citing *D.O.F. v. Lewisburg Area Sch. Dist. Bd. of Sch. Dirs.*, 868 A.2d 28, 33 (Pa. Commw. 2004)). In *D.O.F.*, the court overturned the school's punishment of a student who "smoked or attempted to smoke" marijuana on a school playground an hour and a half

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punish students only when they are "under the district's supervision at the time of the incident."[44] Thus, Pennsylvania school law makes PSBA's invocation of schools' "traditionally recognized authority" — which it never really defines — a non-starter.[45]

The School District latches on to the district court's observation that "the test for school authority is not geographical," but the District misunderstands the court's point.[46] A school's authority extends beyond the campus to encompass school-sponsored activities, like field trips and athletic competitions.[47] The dispositive point here is not a geographic one, but rather that schools' authority is

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after leaving a school function because he was no longer under the school's supervision. *D.O.F.*, 868 A.2d at 30. Even though that student engaged in illegal conduct — in contrast with Justin's constitutionally protected speech — the school district was not authorized to punish the student because his misconduct was outside of school.

44 *D.O.F.*, 868 A.2d at 35; *Hoke ex rel. Reidenbach v. Elizabethtown Area Sch. Dist.*, 833 A.2d 304, 313 (Pa. Commw. 2003). These court decisions merely reflect the Pennsylvania's Public School Code. *See* 24 P.S. § 5-510 ("any school district may ... enforce such reasonable rules and regulations ... regarding the conduct and deportment of all pupils ... during such time as they are under the supervision of the board of school directors and teachers"); 24 P.S. § 13-1317 (authorizing teachers and other school officials to control students' conduct and behavior "during the time they are in attendance"). The authority extends to "the time necessarily spent in coming to and returning from school." *Id.*

45 *See* PSBA Br. at 1.

46 *See* Sch. Dist. Br. at 13 (citing *Layshock*, 496 F. Supp.2d at 598).

47 *Layshock*, 496 F. Supp.2d at 598; *see also Tinker*, 393 U.S. at 512-513.

limited to "such times as [students] are under the supervision of the board of school directors and teachers."[48]

Justin was not "under the supervision" of school officials when he created his profile — he was at his grandparents' home during non-school hours. Consequently, the School District had no authority to punish him as a matter not just of constitutional law, but also as a matter of Pennsylvania statutory law.

II. JUSTIN'S SPEECH IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION BECAUSE IT WAS CREATED OFF-CAMPUS

The School District and PSBA have no choice but to advocate a dramatic expansion of school officials' authority over students' out-of-school speech because they recognize that Justin's parody profile is not in-school speech under any of the Supreme Court's or this Court's precedents. The School District and PSBA nevertheless attempt to camouflage this fact by characterizing Justin's speech as "school-related" or, alternatively, "directed at the school." Both efforts fail. Allowing school officials to impose content-based restrictions by censoring off-campus student speech that is related to or directed at the school violates the well-established First Amendment rights of minors.[49]

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48 24 P.S. § 5-510.

49 *See* Section IA, *supra*. Even if that content-based restriction could survive strict scrutiny (which it could not), it would nevertheless create a substantial risk of viewpoint discrimination by "invit[ing] school officials 'to seize upon the censorship of particular words as a convenient guise for barring the expression of unpopular views.'" *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1053 n.18 (quoting *Cohen*, 403 U.S. at 26).

A. THE SCHOOL DISTRICT DOES NOT HAVE AUTHORITY TO CENSOR STUDENTS' OFF-CAMPUS SPEECH EVEN IF IT IS POSTED ON THE INTERNET AND IS THEREBY ACCESSIBLE FROM SCHOOL COMPUTERS

As an initial matter, the School District's and PSBA's assertion that school officials should be granted authority to punish off-campus school-related or school-directed speech that is posted by students on the Internet because of that medium's expansive reach is wrong on the law. Contrary to the School District's suggestion, the "proliferation and prevalence of the internet"[50] do not diminish the constitutional protection for online expression.[51]

In *Reno v. American Civil Liberties Union*, the Supreme Court explained that the factors justifying expanded governmental regulation of broadcast media, *i.e.*, the history of extensive government regulation of the broadcast medium, the scarcity of available frequencies at its inception, and its "invasive" nature, are not present in cyberspace. Thus, in contrast with some speech uttered in certain other mediums, speech made on the Internet receives *unqualified* First Amendment protection.[52]

The School District and PSBA, however, try to twist the Court's emphasis on the reach and availability of the Internet — which was an important factor in the *Reno* Court's decision to strike down federal regulation of Internet speech[53] — into a rationale for allowing school districts to censor students'

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50 Sch. Dist. Br. at 13.

51 *See Reno*, 521 U.S. 844.

52 *See id.* at 870.

53 The *Reno* Court recognized the Internet's "relatively unlimited, low-cost capacity for communication of all kinds" with which "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox." *Id.* at 870.

Internet speech.[54] But the First Amendment does not permit the government to regulate a particular medium of speech solely because that medium is *more effective* than others. Indeed, courts turn a wary eye to government regulations that force a speaker to use a less effective medium of expression.[55]

The Supreme Court has also rejected the School District's argument that the potential for damage inflicted by Internet speech — due to its availability to "a global audience beyond the school community" — justifies giving government officials greater authority to censor online speech.[56] And although the School District and PSBA warn of the dangers of allowing students to express themselves online without fear of school district discipline,[57] "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."[58]

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54 *See* Sch. Dist. Br. at 18-19.

55 *See City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (residential sign ordinance violated First Amendment with regard to noncommercial speech because it restricted speaker's audience, restricted effectiveness of speech, and relegated speakers to far more expensive means of communication); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981) (reduced effectiveness of message was important factor in deciding that content-neutral regulation failed to leave open ample alternative avenues for speech); *cf. Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 88 (1st Cir. 2004) (decision to allow less effective message rather than speaker's chosen message can indicate viewpoint discrimination).

56 *See Smith v. Doe*, 538 U.S. 84, 99 (2003) (upholding Internet posting of sex-offender-conviction information despite Internet's geographic reach that "is greater than anything which could have been designed in colonial times").

57 *See* Sch. Dist. Br. at 18-19; PSBA Br. at 23.

58 *Reno*, 521 U.S. at 885.

Finally, the School District's attempt to equate students' rights to engage in off-campus Internet speech with those of off-hours public employees is entirely without legal support. Relying on a United States Supreme Court decision upholding the discharge of a police officer who sold pornographic videos of himself in a police uniform over the Internet,[59] the School District compares its interests in limiting students' Internet speech to those of the police department in *Roe*.[60] But those interests are not analogous. At the outset, students are subject to compulsory school-attendance laws. Unlike the police officer in *Roe*, students cannot simply quit school if they are unhappy with the burdens placed on their out-of-school speech due to their status as public-school students.[61] And unlike public employees, students have a First Amendment right — both inside and outside of school — to speak on matters that are not of public concern.[62] It is thus of no consequence that Justin's parody was not speech on a matter of public concern. Nor does it matter that Justin "deliberately took steps to link his off-site internet activity to his school."[63] Unlike police officers, students are not agents of their

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59 *See City of San Diego v. Roe*, 543 U.S. 77, 78 (2004).

60 Sch. Dist. Br. at 20-22.

61 *See Morse*, 127 S. Ct. at 2637-38 (Alito, J., concurring) (recognizing that "[m]ost parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school").

62 *Pinard v. Clatskanie Sch. Dist.*, 467 F.3d 755, 66 (9th Cir. 2006) ("Although *Connick*'s personal matter/public concern distinction is the appropriate mechanism for determining the parameters of a public employer's need to regulate the workplace, neither we, the Supreme Court nor any other federal court of appeals has held such a distinction applicable in student speech cases").

63 Sch. Dist. Br. at 21.

schools. No reasonable person who saw Justin's parody profile would believe that it was created by Trosch,[64] and Justin had no responsibility, as a student, to maintain the reputation of the School District when engaging in off-campus expression.

B. THE SCHOOL DISTRICT DOES NOT HAVE AUTHORITY TO PUNISH JUSTIN'S OFF-CAMPUS SPEECH BECAUSE IT IS "SCHOOL-RELATED" OR "SCHOOL-DIRECTED"

The School District and PSBA contend that the District had authority to punish Justin for the profile he created off-campus because the profile was "school-related." They claim that the fact the profile was about the principal was enough to establish a "sufficient nexus" between Justin's off-campus speech and on-campus activity.[65] But "school-related" speech is not a construct embodied in the Supreme Court's student-speech-rights jurisprudence — and the Court has never held that schools have authority over out-of-school speech because it is "school-related," whatever that may mean.[66] Rather, the Court consistently has spoken of "in-school" speech or "school-sponsored" speech and then has relied upon the "special characteristics of the school environment" to explain why school

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64 *See* Section IIIB, *infra*.

65 Sch. Dist. Br. at 14-15; PSBA Br. at 12-13.

66 The School District appears to define "school-related" as speech that is aimed at the School District community. Sch. Dist. Br. at 9. Thus, under the School District's broad conception of "school-related" speech, a student's letter to the editor of the local newspaper criticizing school officials or a petition circulated in the community condemning a teacher's behavior could be characterized as "school-related" and could thus be subject to punishment by the School District.

officials may punish certain in-school or school-sponsored speech that otherwise would be protected outside of the schoolhouse gates.[67]

Nothing in *Tinker*, *Fraser*, *Kuhlmeier*, or *Morse* authorizes the expansion of a school district's authority over student speech uttered outside of the schoolhouse gates simply because it is "about" the school. And, contrary to the School District's assertions, *Fraser* and *Morse* do not permit schools to punish off-campus speech merely because it is "school-related."[68] *Fraser* addressed "the level of First Amendment protection accorded to [a student's] utterances and actions *before an official high school assembly attended by 600 students*."[69] The Court's holding therefore related to the "manner of speech *in the classroom or in school assembly*."[70] The crucial fact was not that the speech was "school-related," but that it occurred during school. As *Morse* explained, "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected."[71] *Morse* thus confirms that schools cannot punish out-of-school speech, regardless of whether it is lewd, profane, or "school-related."

The School District and PSBA recognize that there is nothing in the United States Supreme Court's or this Court's precedents supporting their assertion that the School District can censor out-of-school speech that is school-related, and they therefore urge this Court to adopt the Pennsylvania Supreme Court's standard

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67 *See* Section IB, *supra*.

68 Sch. Dist. Br. at 10-11.

69 478 U.S. at 681 (emphasis added).

70 *Id.* at 683 (emphasis added).

71 127 S.Ct. at 2626.

in *J.S. v. Bethlehem Area School District*[72] for punishing students' out-of-school Internet speech.[73] But that case does not support the School District's punishment of Justin, and is wrongly decided in any event, as it extends school officials' authority beyond that permitted by United States Supreme Court precedent or Pennsylvania law.

First, the School District and PSBA read the Pennsylvania Supreme Court's decision in *J.S.* too broadly. PSBA claims that *J.S.* authorizes a school district to punish a student for lewd and profane speech off-campus whenever there is a "significant nexus or connection between the speech created off campus but directed to the school community."[74] It does not.

The Pennsylvania Supreme Court held in *J.S.* that, "where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech."[75] Thus, under *J.S.*, the initial question to resolve in determining if school officials have authority to punish student speech is whether that speech is on or off campus.[76] The *J.S.* court determined that a website created by a student at home, but accessed and shared with other students at school, was in-school speech because there was "a sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus."[77] But the Pennsylvania Supreme

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72 807 A.2d 847 (Pa. 2002).

73 *See* Sch. Dist. Br. at 15-16; PSBA Br. at 3-4.

74 *Id.*

75 807 A.2d at 865.

76 *Id.* at 864.

77 *Id.* at 865.

Court upheld the school district's decision to punish J.S. not only because the website had a sufficient "nexus" to the school to be considered on-campus speech, but also because the website caused a material and substantial disruption to the school, disrupting the "entire school community" and causing a teacher to take a leave of absence requiring the employment of substitute teachers.[78]

Although PSBA suggests that *J.S.* authorized schools to punish "lewd, offensive, or profane" off-campus speech,[79] the court expressly declined to decide whether *Fraser* actually applied to the on-campus speech at issue.[80] The court noted that, unlike the speech in *Fraser*, a student's off-campus website is "not ... expressed at any official school event or even during class, subjecting unsuspecting listeners to offensive language."[81] The court further explained that "questions exist as to the applicability of *Fraser* to the factual scenario."[82] Indeed, there is not a single federal court decision upholding a school district's punishment of a student for out-of-school speech under *Fraser*.[83] More importantly, to the extent

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78 *Id.* at 868-69.

79 PSBA Br. at 3.

80 *See J.S.*, 807 A.2d at 867-68.

81 *Id.* at 866.

82 *Id.* at 868.

83 *See Thomas*, 607 F.2d 1043 (discussed *supra*); *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960, 964 (5th Cir. 1972) (in striking down a pre-distribution review requirement for student newspapers produced off-campus, the court stated: "It should have come as a shock to the parents of five high school seniors in the Northeast Independent School District of San Antonio, Texas, that their elected school board had assumed suzerainty over their children before and after school, off school grounds, and with regard to their children's rights of expressing their thoughts. We trust that it will come as no shock whatsoever to the school board that their assumption of

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J.S. could be read as authorizing punishment for lewd and profane speech outside of school, such an interpretation would contravene *Morse*, which held that Fraser's lewd speech would have been protected if he delivered it "in a public forum outside the school context."[84]

Accordingly, even if this Court adopted the *J.S.* standard for punishing off-campus speech that is accessed or brought onto school grounds by its originator, the School District's punishment of Justin for engaging in vulgar off-campus speech still would be unconstitutional. Justin used his grandmother's computer to post a parody profile of his principal, which was created off-campus, on MySpace.[85] Justin was punished by school officials for creating the profile, not

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authority is an unconstitutional usurpation of the First Amendment."); *Bowler v. Town of Hudson*, 514 F. Supp.2d 168, 179 (D. Mass. 2007) ("because the [students'] graphic and arguably 'offensive' speech was not actually displayed at school, *Fraser* does not support the school's censorship"); *Coy v. Bd. of Educ. of N. Canton City Sch.*, 205 F. Supp.2d 791, 799-800 (N.D. Ohio 2002) (school may not discipline student under *Fraser* for vulgar and offensive content posted on student website and accessed at school); *Klein v. Smith*, 635 F. Supp. 1440, 1442 (D. Me. 1986) (reversing suspension of student who gave "the finger" to teacher while off of school grounds and not during any school sponsored activity); *see also Saxe*, 240 F.3d at 216 n.11 (citing *Klein* with approval); *but see Doninger v. Niehoff*, F. Supp.2d 199 (D. Conn. 2007) (upholding school's revocation of student's participation in voluntary extracurricular activities for posting vulgar blog about school officials on Internet).

84 *Morse*, 127 S.Ct. at 2626 (citation omitted); *see also Coy*, 205 F. Supp.2d at 799-800. Even if Justin had accessed the profile during Spanish class, a fact that is disputed, there is no evidence that school officials even knew about it at the time, which precludes transforming this case into one involving in-school speech.

85 *See* Counterstatement of the Case, *supra*.

for accessing it at school or showing it to other students at school. And the profile caused no disruption in the school.[86] So while it is doubtful whether Justin's profile would even be considered in-school speech under *J.S.*, it is plain that it cannot be punished on the basis of its alleged vulgarity alone, even under *J.S.*

There is a second reason why this Court should not adopt the *J.S.* standard in this case: It extends school authority to punish off-campus student speech far beyond its permissible bounds. As discussed above, school officials in Pennsylvania are limited by both state law and the First Amendment when they seek to punish students for off-campus speech. When Justin posted the Trosch profile off of school grounds and during non-school hours, the School District had no authority over him and, thus, his expression was entitled to the same constitutional protection enjoyed by any other citizen.

The district court, therefore, correctly determined that the School District did not have authority to punish Justin for his off-campus speech. The court first noted that "[t]he mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web. Public schools are vital institutions, but their reach is not unlimited."[87] Then, the court relied on *Thomas*, to explain "[t]he purpose of this boundary on school authority":

> When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant

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86 *See* Section IIIA, *infra*.

87 *Layshock*, 496 F. Supp.2d at 597.

> school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.[88]

The district court's reliance on *Thomas* was particularly apt. In that case, the Second Circuit held that a school district violated the First Amendment free-speech rights of students who were punished for distributing an independent newspaper off of school grounds.[89] The court ruled that the school district had no authority to punish the students for speech that occurred off campus — "where the freedom accorded expression is at its zenith" — because any punishment of students for conduct outside of school "could only have been decreed and implemented by an independent, impartial decisionmaker."[90] Any other conclusion, the court warned, would give school officials "discretion to suspend a student who purchases an issue of National Lampoon ... and lends it to a school friend" or to "consign a student to a segregated study hall because he and a classmate watched an X-rated film on his living room cable television."[91] Indeed, it is not difficult to imagine that school officials, if given authority to do so, would punish students for marching in a gay rights parade or for expressing anti-homosexual messages outside of school.[92] Placing that sort of power in the hands

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88 *Id.* at 597-98 (quoting *Thomas*, 607 F.2d at 1052).

89 *See Thomas*, 607 F.2d 1043.

90 *Id.* at 1050.

91 *Id.* at 1051.

92 *See, e.g., Nuxoll v. Indian Prairie Sch. Dist.*, ___ F.3d ___, No. 08-1050, 2008 WL 1813137 (7th Cir. April 23, 2008) (stating that rule banning derogatory comments in school about peoples' sexual orientation appeared to satisfy First Amendment).

of school officials would harm not only the First Amendment rights of public-school students, but the rights of their parents as well:

> While these activities are certainly the proper subjects of parental discipline, the First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon. Parents still have their role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of Parens patriae.[93]

For these reasons, school officials are barred from punishing students' off-campus speech. Any other rule would subject students who engage in controversial speech outside of school to punishment by school officials. But that does not mean that school districts are foreclosed from taking any action in response to inappropriate, hurtful, or disruptive student speech. School officials can punish those students who actually cause disruption in school; they can inform students' parents if they have concerns about the students' off-campus speech; and they can even contact police if they believe that the expression constitutes harassment or a terroristic threat. But school officials' authority to use their state-conferred authority to punish ends when students exit the schoolhouse gate.

C. JUSTIN'S PROFILE IS NOT ON-CAMPUS SPEECH AND, IN FACT, THE SCHOOL DISTRICT DID NOT PUNISH HIM FOR ANYTHING HE DID ON CAMPUS

The School District's attempt to convince this Court that Justin's speech was subject to the School District's authority because Justin accessed the profile in school is not supported by the record. As a threshold matter, the School

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93 *Thomas*, 607 F.2d at 1051.

District did not punish Justin for any on-campus behavior, but rather for his off-campus conduct of creating the profile. As the district court concluded:

> [T]he actual charges made by the School District were directed only at Justin's off-campus conduct. On this record, there is no evidence that the school administrators even knew that Justin had accessed the profile while in school prior to the disciplinary proceedings.[94]

But even if the School District had known that Justin had accessed the profile at school, this *de minimis* on-campus activity would not justify the School District's actions.[95] The district court found that "[t]he only 'in-school' conduct in which Justin engaged was showing the profile to other students in the Spanish classroom" and noted that, "[i]n *Thomas*, the Second Circuit deemed more substantial on-campus activity to be 'de minimis.'"[96]

Nor does Justin's parody profile become "in-school" speech because he copied Trosch's picture from the School District's website and used it in the profile.[97] That act cannot transform the parody profile into on-campus speech. Justin obtained publicly available information — a photo of Trosch — from the School District's website for use in the profile he created. That is no more an act

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94 *Layshock*, 496 F. Supp.2d at 601 (citing *Thomas*).

95 *See Thomas*, 607 F.2d at 1050 ("all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate" and the on-campus activity was so "de minimis" that school officials did not have authority to punish students for it"); *see also Coy*, 205 F. Supp.2d at 800-801 (school officials could not discipline student for website created at home even if the student accessed the website in school).

96 496 F. Supp.2d at 600-01.

97 *See* Sch. Dist. Br. at 14 n.10 ("[v]isiting the [school] web site and removing the picture from the web site constituted on-campus behavior ...").

of "on-campus" speech than going to the local library and photocopying a picture of the principal from an old yearbook or scanning into a computer a photo of the principal in a school newsletter that is delivered to one's home.[98] Indeed, under the School District's logic, a student who downloads the school lunch menu from the School District's website and describes the items to be served in an off-campus publication has engaged in on-campus speech.

III. JUSTIN'S SPEECH IS PROTECTED BY THE FIRST AMENDMENT EVEN IF IT IS CONSIDERED IN-SCHOOL SPEECH

Because Justin's expression occurred outside of school and was not part of any school-sponsored activity, school officials could not use their authority to punish him. But even if the School District had some authority to punish Justin for his off-campus speech based on the Supreme Court's in-school-student-speech-rights precedents, the District's actions still could not be justified.

A. JUSTIN'S SPEECH IS PROTECTED UNDER *TINKER* BECAUSE IT CAUSED NO DISRUPTION

Even under the lesser First Amendment protection accorded to public-school students' on-campus speech, the School District's punishment of Justin for creating a parody profile violated his free-speech rights. As explained above, *Fraser* — which is limited to lewd and vulgar remarks made to a captive audience

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98 The School District accuses Justin of "misappropriat[ing]" Trosch's photo. Sch. Dist. Br. at 2, 14. It is not clear whether the School District believes Justin to have committed the tort of misappropriation or a copyright violation when he posted Trosch's photo on the parody profile. Either way, the School District does not have authority to sanction a person solely because it believes that his use of a photo that is available on the District's public website has violated the District's or an administrator's rights. The District or Trosch must file an action in state or federal court to enforce those rights.

at a school-sponsored event — did not provide a basis for the School District to punish Justin.[99] *Kuhlmeier* — which addressed school-sponsored speech that might be "attributed to the school" — does not apply here.[100] *Morse* likewise provides no justification for the School District's actions because that case controls only speech reasonably viewed as promoting illegal drug use at a "school-sanctioned and school-supervised event."[101]

Nor can the School District justify its punishment of Justin under the *Tinker* standard, which holds that, to overcome a student's right to free expression, school officials must meet their burden to prove that the speech caused a material and substantial disruption to the school day.[102] As the district court correctly concluded based on a fully developed evidentiary record, Justin's speech caused no disruption to the school — let alone a material and substantial one.[103] Instead, the evidence demonstrated that the School District's real reason for punishing Justin was its view that the parody profile of Trosch was demeaning.[104] The First Amendment, however, forbids a school from punishing student speech simply because school officials found the speech offensive, embarrassing, or demeaning.[105]

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99 *See Fraser*, 478 U.S. at 685.

100 *Kuhlmeier*, 484 U.S. at 271.

101 *Morse*, 127 S.Ct. at 2622, 2625.

102 *See Tinker*, 393 U.S. at 509.

103 *Layshock*, 496 F. Supp.2d at 601.

104 *See* A. 501 (Trosch Dep.); *see also Layshock*, 496 F. Supp.2d at 593.

105 *See Morse*, 127 S.Ct. at 2629 (school officials may not punish speech that they find "plainly offensive"); *Tinker*, 393 U.S. at 509 (school districts cannot base restrictions on speech on the "mere desire to avoid discomfort

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The School District ignores these precedents and instead relies on the Second Circuit's decision in *Wisniewski v. Board of Education of the Weedsport Central School District.*[106] That decision, however, is difficult to reconcile with controlling precedent. In *Wisniewski*, the Second Circuit affirmed the dismissal of a student's First Amendment challenge to a school district's decision to punish him for creating at home and distributing via the Internet a "small drawing crudely, but clearly, suggesting that a named teacher should be shot and killed."[107] The Second Circuit did not base its decision on a finding that the drawing amounted to a true threat under *Watts v. United States*,[108] but instead purported to apply *Tinker* and reasoned that the school district could satisfy *Tinker's* standard based on a showing that there was a "reasonably foreseeable risk that the [drawing] would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school.'"[109]

The Second Circuit's "reasonably foreseeable" approach is inconsistent with both *Tinker* and this Court's decisions. *Tinker* does not sanction

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and unpleasantness"); *Saxe*, 240 F.3d at 215 ("The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.") (citations omitted).

106 494 F.3d 34 (2d Cir. 2007).

107 *Id.* at 35.

108 394 U.S. 705 (1969).

109 *Wisniewski*, 494 F.3d at 38-39 (citations omitted). The student's drawing did in fact disrupt the normal operation of the school, as the teacher targeted by it asked and was allowed to stop teaching the student's class.

the "reasonable foreseeability" test fashioned by the Second Circuit. Rather, *Tinker* requires proof of much more — proof of either an actual substantial and material disruption or a concrete and particularized reason to anticipate that disruption would result from the student speech that is punished.[110]

In faithfully applying *Tinker*, this Court has explained that a school district must be able to point to a "*particularized reason* as to why it anticipates substantial disruption [resulting from the speech it intends to prohibit or punish]."[111] Even when a school seeks to justify regulation of student speech based on a claim that the expression sought to be suppressed is related to past expressions that have caused disruption, "it must do more than simply point to a general association. It must point to a *particular and concrete basis* for concluding that the association is strong enough to give rise to *well-founded fear of genuine disruption in the form of substantially interfering with school operations* or with the rights of others."[112]

In the end, while the profile undoubtedly was upsetting to Trosch, the School District's recourse was to discuss the matter with Justin, which they did (and Justin apologized), or with his parents, which they also did.[113] What the School District could not do was use its power as an agent of the State to punish

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110 *See Tinker*, 393 U.S. at 508 ("undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"); *see also Morse*, 127 S.Ct. at 2637 (Alito, J. concurring) (*Tinker* "permits the regulation of student speech that threatens a concrete and 'substantial disruption'") (quoting *Tinker*, 393 U.S. at 514).

111 *Saxe*, 240 F.3d at 217 (emphasis added); *see also Sypniewski*, 307 F.3d at 253 ("*Tinker* requires a specific and significant fear of disruption").

112 *Sypniewski*, 307 F.3d at 257 (emphasis added).

113 *See* A. 393-96, 243-25 (TRO Tr.).

Justin for his out-of-school speech poking fun at the principal, which caused no material and substantial disruption.

B. JUSTIN'S WEBSITE CONSTITUTES FIRST AMENDMENT PROTECTED SPEECH

The School District apparently recognizes that it cannot satisfy *Tinker*'s substantial and material disruption test because it devotes a considerable portion of its brief to various arguments that Justin's speech falls entirely outside of the First Amendment. These arguments are legally unsupportable.

1. The First Amendment Protects Profane, Vulgar, And Offensive Speech

The School District and PSBA repeatedly contend that the First Amendment does not protect "lewd," "profane," "vulgar," "offensive" and "mean-spirited" speech.[114] But such speech is fully protected by the First Amendment, even when uttered by minors.[115]

2. The First Amendment Protects Parodies

The School District argues that Justin's profile is entirely outside the protections of the First Amendment because it constitutes defamation.[116] Not so.

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114 *See e.g.* Sch. Dist. Br. at 29; PSBA B. at 17-19.

115 *See* note 41, *supra*.

116 Whether a statement is capable of defamatory meaning is a legal question to be resolved by a court. *See Beverly Enters. v. Trump*, 182 F.3d 183, 187 (3d Cir. 1999) (citing *MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050, 1053 (Pa. 1996)). School districts are hardly equipped to make this legal determination. *Cf. Layshock*, 496 F. Supp.2d at 603 ("The School cannot usurp the judicial system's role in resolving tort actions for alleged slander occurring outside of school."); *Thomas*, 607 F.2d at 1051 (school officials "are generally unversed in difficult constitutional concepts such libel and obscenity").

As a matter of law, Justin's speech *is* parody — and it is settled law that parodies are protected speech under the First Amendment.[117]

One reason why parodies and satire are constitutionally protected and cannot form the basis of a defamation claim is because such expression "cannot 'reasonably [be] interpreted as stating actual facts' about an individual."[118] When determining whether speech reasonably can be construed as stating actual facts, the context of the speech must be considered.[119]

In *Falwell*, Hustler Magazine published a parody advertisement that included the Reverend Jerry Falwell's image and name. The parody included a mock interview with Falwell that suggested he had an incestuous relationship with his mother, portrayed Falwell and his mother as drunk and immoral, and suggested that he was a hypocrite who preached only when drunk.[120] Falwell sued Hustler Magazine for libel, invasion of privacy and intentional infliction of emotional

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117 *See Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

118 *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (quoting *Hustler*, 485 U.S. at 50).

119 *See, e.g., Greenbelt Coop. Pub. Ass'n. v. Bresler*, 398 U.S. 6, 13-14 (1970) (finding use of the word "blackmail" in context of city council debate protected by First Amendment because it was "no more than rhetorical hyperbole, a vigorous epithet" that nobody would believe to be an accusation of committing the crime of blackmail); *Beverly Enters*, 182 F.3d at 188 (finding no defamation for insulting speech during an argument that included the statement that certain people were "all criminals"; reasonable listener would interpret this as "a vigorous and hyperbolic rebuke, but not a specific allegation of criminal wrongdoing"); *Remick v. Manfredy*, 238 F.3d 248, 261 (3d Cir. 2001) (allegedly defamatory statements must be "[v]iew[ed] ... in their appropriate contexts); *Thomas Merton Center v. Rockwell Int'l Corp.*, 442 A.2d 213, 216 (Pa. 1981) (same).

120 *Falwell*, 485 U.S. at 48.

distress. The Supreme Court held that speech that "could not reasonably have been interpreted as stating actual facts" is protected by the First Amendment, even if the speech "is patently offensive and is intended to inflict emotional injury."[121] Hence, the Falwell parody could not form the basis of claims for libel, invasion of privacy, or intentional infliction of emotional distress.[122]

As explained, a defamation claim can succeed only if a reasonable person would believe the allegedly defamatory statement to be a serious assertion

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121 *Id.* at 50. Lower courts have followed Hustler to conclude that satire and jest — when viewed in context — constitute protected speech and cannot be characterized as defamatory. *See, e.g., Knievel v. ESPN*, 393 F.3d 1068 (9th Cir. 2005) (webpage that included picture of Evel Knievel with his wife and another young woman with caption "Evel Knievel proves that you're never too old to be a pimp" was constitutionally protected speech); *DiMeo v. Max*, 433 F. Supp.2d 523, 526-27 (E.D. Pa. 2006) (mean, vulgarity-laden comments posted on Internet bulletin board about host of wild New Year's eve party are, when viewed in context, not serious and thus not defamatory); *Busch v. Viacom Int'l, Inc.*, 477 F. Supp.2d 764, 775-76 (N.D. Tex. 2007) (product endorsement in satirical television show could not reasonably be interpreted as containing assertions of fact).

122 *Falwell*, 485 U.S. at 57. Although *Falwell* involved speech offensive to a public figure, its core holding regarding the constitutional protection afforded to speech that cannot be reasonably understood as describing actual facts extends to speech about non-public figures and applies with equal force here. *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 442 (10th Cir. 1982) (rejecting argument that "this constitutional doctrine should apply only to public figures" because "there is no such limitation"). Thus, whether Trosch, as a high school principal, is a "public figure" is irrelevant to the inquiry here. Further, there is no requirement that speech must pertain to political or social issues in order to be entitled to First Amendment protection. *See e.g. Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

of fact. That is the standard under both Pennsylvania and federal law.[123] The Trosch profile is absurd on its face. A. 897-900. The first words, at the top of the web page next to Trosch's picture, read: "I...AM...SUCH...A...BIG...HARD-ASS!!!!!" The theme of "big" virtually jumps off the page. No one could possibly believe that Trosch's eye color, hair, height, handedness, heritage, achievement goal, overused phrase, first waking thoughts, bedtime, favorite foods and drinks, and everything else about him is "big" or some variation of the word. It is simply nonsensical. Consequently, no reasonable person could possibly believe these statements were made by Trosch or that they were truthful statements about Trosch.

ARGUMENT OF CROSS-APPELLANTS CHERYL AND DONALD LAYSHOCK

IV. THE SCHOOL DISTRICT VIOLATED THE LAYSHOCK PARENTS' DUE PROCESS RIGHTS WHEN IT PUNISHED JUSTIN FOR HIS CONDUCT IN THE FAMILY'S HOME

The School District's punishment of Justin for his conduct in the Layshock family home after school hours — when Justin was *not* under the supervision of the School District — not only violated Justin's First Amendment rights, but also violated his parents' constitutional right to direct the upbringing of their children free from government intervention. The district court erred in concluding otherwise.

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123 *See Greenbelt Coop. Pub. Ass'n.*, 398 U.S. at 13-14; *Pring*, 695 F.2d at 442; *Savitsky v. Shenandoah Valley Pub. Corp.*, 566 A.2d 901, 905 (Pa. Super. 1989).

A. PARENTS HAVE A CONSTITUTIONAL RIGHT TO DIRECT THE UPBRINGING OF THEIR CHILDREN WITHOUT GOVERNMENT INTERFERENCE

"The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[124] The United States Supreme Court has consistently affirmed parents' fundamental right to direct the upbringing of their children free from government intervention. As the Court most recently explained in *Troxel v. Granville*:[125] "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[126] This Court likewise has emphasized that "[t]he right of parents to raise their children without undue state interference is well established."[127]

An essential component of parents' right to raise their children is the recognition that "it is the parents' responsibility to inculcate moral standards,

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124 *Pierce v. Soc'y of the Sisters of the Holy Name of Jesus and Mary*, 268 U.S. 510, 535 (1925).

125 530 U.S. 57 (2000).

126 *Id.* at 66; *see also id* at 65 ("the liberty interest . . . of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by this Court") (citing cases).

127 *Gruenke v. Seip*, 225 F.3d 290, 303 (3d Cir. 2000); *see also Anspach*, 503 F.3d at 261 ("The Supreme Court has long recognized that the right of parents to care for and guide their children is a protected fundamental liberty interest. ... That constitutional protection is deeply rooted in this Nation's history and tradition.") (citations and internal quotations omitted).

religious beliefs, and elements of good citizenship."[128] Parents' control over their children's moral education is at its zenith in the family home: Indeed, "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."[129] So while school officials may have the authority to discipline students for inappropriate behavior during the school day, they must yield to parental decision-making authority regarding out-of-school conduct and matters involving private family affairs. As this Court explained, a school's authority over children is limited to "*some* portions of the day [when] children are in the compulsory custody of state-operated school systems. In that setting, the state's power is 'custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[130] But it is only "*[d]uring this custodial time*, in order to maintain order and the proper

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128 *Gruenke*, 225 F.3d at 307 (citations and internal quotations omitted).

129 *Reno*, 521 U.S. at 865 (1997) (citation and internal quotations omitted); *see also Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children").

130 *Gruenke*, 225 F.3d at 304 (emphasis added) (quotation marks and citations omitted). This Court further explained that "[f]or *some* purposes, then, school authorities act *in loco parentis*", but also admonished that "[p]ublic schools must not forget that '*in loco parentis*' does not mean 'displace parents.'" *Id.* at 304, 307; *cf. Thomas*, 607 F.2d at 1051 ("Parents still have their role to play in bringing up their children, and school officials are not empowered to assume the character of Parens patriae"). Although the district court may have been correct to conclude that "schools act *in loco parentis* and have the authority to impose discipline on students," that principle has no bearing here, where the speech occurred in the home. *See Layshock*, 496 F. Supp.2d at 606.

educational atmosphere, at times, [that school] authorities 'may impose standards of conduct that differ from those approved of by some parents.'"[131]

Accordingly, once the child has exited the schoolhouse gates, school officials are forbidden from exercising their state-conferred power over that child to intervene in a matter properly under the jurisdiction of the parents. Such interference amounts to an "arrogation of the parental role" and violates a parent's constitutional rights.[132]

B. THE SCHOOL DISTRICT'S PUNISHMENT OF JUSTIN UNCONSTITUTIONALLY INTERFERED WITH THE LAYSHOCK PARENTS' RIGHT TO REGULATE THEIR CHILD'S OUT-OF-SCHOOL CONDUCT

Justin created and posted the parody profile on the Internet after school hours at his grandmother's home. The Layshock parents thus had a constitutionally protected "right to choose the proper method of resolution" in responding to Justin's creation and posting of the profile.[133] The School District, on the other hand, had no authority to interfere with the Layshock parents' rights by punishing Justin for his off-campus, after-school conduct. Its decision to do so

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131 *Anspach*, 503 F.3d at 266 (quoting *Gruenke*, 225 F.3d at 304) (emphasis added).

132 *Gruenke*, 225 F.3d at 306. In *Gruenke*, this Court held that a parent's contention that "the management of this teenage pregnancy was a family crisis in which the State . . . had no right to obstruct the parental right to choose the proper method of resolution" and that her daughter's swim coach had interfered with that right by insisting that the girl take a pregnancy test alleged a violation of parental due process rights. *Id.*

133 *Id.* at 306.

amounted to an unconstitutional intrusion into the private affairs of the Layshock household and a usurpation of the authority reserved to the Layshock parents.[134]

Although the district court recognized that parents have a protected liberty interest in the upbringing of their children, it dismissed the Layshock parents' claim because of its flawed understanding of parents' fundamental rights. First, the court failed to recognize the Layshock parents' challenge to the School District's punishment as a Fourteenth Amendment substantive due process challenge, and second, the court wrongly held that the School District did not usurp the Layshock parents' rights because the School District's punishment did not prevent Justin's parents from imposing their own discipline.

First, the district court incorrectly construed the Layshock parents' claim as an action to vindicate Justin's First Amendment rights.[135] But Justin's First Amendment free-speech rights and his parent's due process rights are separate and independent constitutional rights, and there is no authority to support the district court's view that the School District's actions could not give rise to two separate and independent constitutional violations. Indeed, in denying the School District's motion to dismiss the Layshock parents' claim, the district court recognized that parents may assert a claim on their *own* behalf for a violation of their due process right to "raise, nurture, discipline and educate their children"

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134 *Id.* at 303-04 ("[C]hoices about ... family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard or disrespect.'") (quoting *M.L.B v. S.L.J.*, 519 U.S. 102, 116 (1996)).

135 *See Layshock*, 496 F. Supp.2d at 606 ("the parents have no valid independent right of recovery which is not merely duplicative of Justin's First Amendment claim").

based on a school district's punishment of their child for out-of-school speech.[136] That is the correct approach. Because it is uncontroverted that the School District punished Justin for out-of-school speech and not for anything he did while in school, the Layshock parents have established that the District interfered with their fundamental right to parent.

Second, in concluding that the Layshock parents "were unable to articulate how the school's action interfered with their parental discipline of Justin," [137] the district court mistakenly imposed on the Layshock parents the burden to show that the School District's punishment prevented them from imposing their own discipline. Nothing in the Supreme Court's or this Court's parental-due-process jurisprudence required the Layshock parents to show that their efforts were hindered by the School District's decision to punish Justin. Instead, the Layshock parents were only required to show that the School District's punishment of Justin for out-of-school speech conflicted with their fundamental right to raise and nurture their child.[138] By suspending Justin and exiling him to

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136 *See* A. 84-99 (March 31, 2006 Order) (adopting Chief Judge Ambrose's opinion in *Flaherty v. Keystone Oaks Sch. Dist.*, Civ. A. No. 01-586, at 4-5 (W.D. Pa. April 22, 2002)).

137 *Layshock*, 496 F. Supp.2d at 606.

138 *See Gruenke*, 225 F.3d at 305 (when "school's policies might come into conflict with the fundamental right of parents to raise and nurture their child ..., the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest"). The gravamen of the constitutional violation in *Gruenke* was not that the parents were deprived of their ability to make a decision that their daughter would *not* take a pregnancy test, but rather that the swim coach had no right to involve himself in that private family matter at all. That same reasoning applies to this case

alternative education for a profile he created at home, the School District sent the message to Justin that his conduct in creating and posting the profile was so depraved that he was not entitled to participate in his normal classes and activities. While the School District may have authority to send that message to students who engage in "lewd, vulgar and plainly offensive speech" in school, it is the parents who decide whether their children may engage in such speech at home.[139] The School District usurped the Layshock parents' right to decide whether to condone Justin's out-of-school conduct, and in doing so, violated their fundamental right to control Justin's upbringing.[140]

The district court's reliance on *C.N. v. Ridgewood Board of Education*[141] — which involved a claim by parents that an in-school survey on

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139 *Cf. Ginsburg v. New York*, 390 U.S. 629, 639 (1968) (noting that state law prohibiting sale of pornographic materials to minors did not conflict with "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society" because prohibition against sales to minors did not bar parents who so desired from purchasing materials for their children).

140 That Justin's parents disapproved of the profile and grounded him is of no consequence. It was their right, not the School District's, to determine what message to send to Justin concerning his conduct. Indeed, a contrary result would allow school officials to usurp parents' authority and punish students for using vulgar language outside of school if their parents happened to disapprove of such language but forbid school officials to do the same if the student's parents condoned the language. Moreover, the Layshock parents remained "powerless to erase their child's suspension" and placement in alternative education. *See Thomas*, 607 F.2d at 1053 n.18 (explaining that school suspension of students for off-campus speech interferes with "proper role of parents"; for example, "a parent who believed [an off-campus publication] was a harmless prank is powerless to erase his child's suspension.").

141 430 F.3d 15 (3d Cir. 2005).

topics such as drug and alcohol use, sexual activity, and personal relationships interfered with their fundamental right to parent — was misplaced. *C.N.* involved a school district's actions during the school day, which is a time when school officials have some authority to teach students about sexuality and drug use, as well as standards of civility.[142] In contrast, the School District's decision to reach outside of the schoolhouse gates and into the private affairs of the Layshock home "strike[s] at the heart of parental decision-making authority."[143] Moreover, as this Court clarified in *Anspach*, a dispositive question in assessing a parental due process claim is whether the School District's actions involved "constraint or compulsion."[144] Here, there can be no doubt that the School District's actions — suspending Justin, placing him in alternative education program, and prohibiting him from participating in the school's standard curriculum and school activities — amounted to compulsion, constraint, and coercion.

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142 *See Gruenke*, 225 F.3d at 304 ("for some portions of the day, children are in the compulsory custody of state-operated school systems. In that setting, the state's power is 'custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.' For some purposes, then, 'school authorities act[ ] *in loco parentis*.'") (quoting *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 655 (1995); *see also Fraser*, 478 U.S. at 684.

143 *C.N.*, 430 F.3d at 184.

144 *Anspach*, 503 F.3d at 264. In that case, this Court found that a public health clinic did not violate a parent's constitutional rights when it provided emergency contraceptives without parental permission to a minor who requested them. This Court distinguished *Gruenke*, explaining that the swim coach in *Gruenke* "took action in tandem with his authority as the minor's swim coach" and acted against the minor's express wishes. *Id.* at 266. The health clinic in *Anspach*, by contrast, had no authority over the minor and the health clinic's actions failed to suggest that the minor "was in any way compelled, constrained or coerced into a course of action she objected to." *Id.* at 266.

The district court's denial of the Layshock parents' motion for summary judgment and grant of the School District's motion for summary judgment on the issue of the Layshock parents' parental due process rights should therefore be reversed.

CONCLUSION

For all of the foregoing reasons, the district court's judgment for Justin Layshock on his First Amendment claim should be affirmed, and the judgment for the School District on the Layshock parents' Fourteenth Amendment claim should be reversed.

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Dated: May 22, 2008

Tab A

the power to apply the "exceptional reasons" provision of § 3145(c).

Thus, in summary, to modify the conditions of bail initially imposed upon him, Lieberman must show: (1) "clearly," that there are exceptional reasons why such conditions would not be appropriate; and (2) by clear and convincing evidence, that he is not likely to flee or pose a danger to the safety of any other person or the community if released. Finally, if release is warranted, it must be subject to appropriate conditions.

B. *Application*

Lieberman's proffered exceptional reasons for removing the condition that his travel be restricted is that he is a paraplegic and there is a potential treatment for him in the People's Republic of China. It is not entirely clear that Lieberman can not benefit now, or will not benefit in the future, from treatment available in the United States. Nor is it clear that Lieberman is likely to benefit from treatment in The People's Republic of China. Therefore, Lieberman has not "clearly" shown that there are "exceptional reasons" to extend his release so that he may travel to the People's Republic of China to receive medical treatment.

Moreover, as the Government has pointed out, while Lieberman has expressed an intent to return to the United States upon the completion of his treatment, he would be beyond the reach of the Court if he chose not to return, since the United States does not have an extradition treaty with the People's Republic of China. *See Lui Kin-Hong v. United States,* 520 U.S. 1206, 117 S.Ct. 1491, 137 L.Ed.2d 816 (1997). The likelihood of flight for a defendant who is facing a maximum sentence of life imprisonment would substantially increase if he was allowed to travel to a foreign country, all the more so when the United States does not have an extradition treaty with the country. Therefore, Lieberman has not shown by clear and convincing evidence that he is not a risk of flight if he were allowed to travel the People's Republic of China.

C. *Conclusion*

For these reasons, Lieberman's motion to modify the conditions of his bail will be denied. An appropriate order follows.

ORDER

AND NOW, this **27th** day of **July, 2007,** it is hereby **ORDERED** that Defendant Vitaly Lieberman's motion to modify bail (doc. no. 143) is **DENIED.**

AND IT IS SO ORDERED.

Justin LAYSHOCK, a minor, by and through his parents, Donald Layshock and Cheryl Layshock, individually and on behalf of their son, Plaintiffs,

v.

HERMITAGE SCHOOL DISTRICT, Karen Ionta, District Superintendent, Eric W. Trosch, principal of Hickory High School, Chris Gill, Co-Principal of Hickory High School, all in their official and individual capacities, Defendants.

No. 2:06-cv-116.

United States District Court,
W.D. Pennsylvania.

July 10, 2007.

Background: Parents of high school student sued school district, superintendent, principal, and co-principal, alleging that

they violated student's speech rights by disciplining him for creating internet parody of principal. Parties filed cross-motions for summary judgment.

Holdings: The District Court, McVerry, J., held that:

(1) discipline violated student's speech rights, since no nexus existed between creation of parody of principal and substantial disruption of school environment;

(2) superintendent and co-principal were qualifiedly immune from student's speech claim; and

(3) school policies, requiring students, inter alia, to express their ideas in respectful manner, maintain respect, and refrain from verbal abuse, were not overbroad.

Motions granted in part and denied in part.

1. Constitutional Law ⇐1978

To comply with free speech guarantees, school administrators need not wait until a substantial disruption has already occurred prior to taking disciplinary action against students; rather, school administrators may preempt problems if they have a specific and significant fear of disruption. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⇐1977

A mere desire to avoid discomfort or unpleasantness will not suffice to justify a school's discipline of a student in the face of a free speech challenge. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐1977

The test for school authority, for purposes of determining whether discipline of a student violates his or her free speech rights, is not geographical; reach of school administrators is not strictly limited to the school's physical property, but, on the other hand, the mere presence of a student on school property does not trigger the school's authority. U.S.C.A. Const. Amend. 1.

4. Constitutional Law ⇐1977

In a student's action alleging a free speech violation, it is incumbent upon the school to establish that it had the authority to punish the student. U.S.C.A. Const. Amend. 1.

5. Constitutional Law ⇐1977, 1978

In most cases in which a student alleges a free speech violation, it will be a simple and straight-forward exercise for a school to establish that it had the authority to punish the student, but in cases involving off-campus speech, the school must demonstrate an appropriate nexus between the speech and a substantial disruption of the school environment, and on this threshold "jurisdictional" question the District Court will not defer to the conclusions of school administrators. U.S.C.A. Const. Amend. 1.

6. Constitutional Law ⇐2153
Schools ⇐177

No nexus existed between student's creation of internet parody of principal and a substantial disruption of school environment, and school's suspension of student thus violated his free speech rights, where no classes were canceled, no widespread disorder occurred, the only in-school conduct in which student engaged in relation to parody was showing it to other students in classroom, and actual charges made by district were directed only at student's off-campus conduct. U.S.C.A. Const.Amend. 1.

7. Constitutional Law ⇐1978

The "substantial disruption" standard for determining whether student discipline violates free speech guarantees cannot be met through fear of future disturbances. U.S.C.A. Const.Amend. 1.

8. Civil Rights ⚖1356

Principal was not liable to student for violation of speech rights which occurred when student was disciplined for creating internet parody of principal, where principal was not involved with student's discipline. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

9. Constitutional Law ⚖2153
Schools ⚖169

Popular internet site where users could share photos, journals, and personal interests with other internet users was not outside free speech protections under fighting words doctrine, for purposes of student's free speech action challenging his discipline at school for creating internet parody, inasmuch as there was no in-person confrontation in cyberspace such that physical violence was likely to be instigated. U.S.C.A. Const.Amend. 1.

10. Schools ⚖89

The qualified immunity doctrine does not apply to municipal entities such as a school district.

11. Civil Rights ⚖1376(2)

Pre-existing, binding precedent is not required for a right to be clearly established for purposes of qualified immunity.

12. Civil Rights ⚖1376(2)

A party seeking to show that a right is clearly established for purposes of qualified immunity must define the right at the appropriate level of specificity.

13. Civil Rights ⚖1376(2)

Although district court opinions are entitled to consideration in determining whether a right is clearly established for purposes of qualified immunity, they cannot by themselves signify that a right has been clearly established.

14. Civil Rights ⚖1376(5)

Student's right not to be disciplined for creating internet parody of principal was not clearly established, and school superintendent and co-principal thus were qualifiedly immune from student's free speech claim, inasmuch as neither Supreme Court nor Third Circuit had decided what standard was applicable to out-of-school-student speech, and Pennsylvania Supreme Court case provided substantial justification for the officials' actions. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

15. Constitutional Law ⚖862

Parents had standing to bring free speech challenge to school policies even though their son, who had been disciplined under the policies, had graduated, where parents had minor children still attending school in district. U.S.C.A. Const.Amend. 1.

16. Constitutional Law ⚖1976
Schools ⚖172

School policies, requiring students, inter alia, to express their ideas in respectful manner, to maintain respect, and to refrain from verbal abuse and insubordination were not overbroad in violation of free speech rights, in that policies had appropriate geographic limitations, and introduction to student handbook acknowledged students' right to expression and incorporated limitations imposed by law. U.S.C.A. Const.Amend. 1.

17. Constitutional Law ⚖1965

A school policy will be struck down as overbroad if it reaches too much expression that is protected by the Constitution and will inhibit such expression to a substantial extent. U.S.C.A. Const.Amend. 1.

18. Constitutional Law ⚖1164

A regulation will not be held in violation of the First Amendment unless the overbreadth is real and substantial, in relationship to its legitimate reach. U.S.C.A. Const.Amend. 1.

19. Constitutional Law ⇐1520, 1965

Every reasonable construction must be resorted to, in order to save a policy restricting speech from unconstitutionality due to overbreadth, and the overbreadth doctrine warrants an even more hesitant application in the school setting. U.S.C.A. Const.Amend. 1.

20. Constitutional Law ⇐1976

A school policy affecting speech will be void for vagueness if it fails to give a student adequate warning that his conduct is unlawful or if it fails to set adequate standards of enforcement such that it represents an unrestricted delegation of power to school officials. U.S.C.A. Const. Amend. 1.

21. Constitutional Law ⇐1977

For purposes of a vagueness challenge to a school policy affecting speech, determining the appropriate level of detail for school discipline is left to school officials. U.S.C.A. Const.Amend. 1.

22. Constitutional Law ⇐1977

School disciplinary rules affecting student speech will be struck down for vagueness only when the vagueness is especially problematic. U.S.C.A. Const.Amend. 1.

23. Constitutional Law ⇐1976
Schools ⇐172

School policies, requiring students, inter alia, to express their ideas in respectful manner, maintain respect, and refrain from verbal abuse and insubordination, were not void for vagueness in violation of free speech rights, in that they provided students with appropriate warning of types of conduct which were prohibited and set out adequate enforcement standards and parameters for school administrators. U.S.C.A. Const.Amend. 1.

24. Constitutional Law ⇐4209(3), 4391
Parent and Child ⇐2.5
Schools ⇐177

School district's conduct of suspending student for creating internet parody of principal did not violate student's parents' Fourteenth Amendment right to discipline their child, where father testified that the parents did discipline child by grounding him. U.S.C.A. Const.Amend. 14.

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MEMORANDUM OPINION AND ORDER

McVERRY, District Court Judge.

Before the Court for consideration and disposition are cross-motions for summary judgment, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT *(Document No. 44)* and DEFENDANTS' MOTION FOR SUMMARY JUDGMENT *(Document No. 49)*, with memoranda in support *(Document Nos. 45, 50)*. Each side has also filed a brief in opposition to the other side's motion *(Document Nos. 54, 56)*, and statements of undisputed fact. At the Court's invitation, the parties have also filed briefs on the issue of qualified immunity. *(Document Nos. 60, 62)*. Both parties have also filed memoranda on Supplemental Authority *(Document Nos. 64, 67)*. The motions are ripe for resolution.

Background

At the time of the events at issue, Plaintiff Justin Layshock ("Justin") was a seventeen-year old senior at Hickory High

School in the Hermitage School District. While Justin was generally an academic success, his out-of-school conduct led to in-school punishment by Defendants. On or about December 10, 2005,[1] Justin created that which he characterized as a parody profile (the "profile") of defendant Eric Trosch ("Trosch"), the Principal of Hickory High School. The profile was created on a website called "MySpace.com" (www.myspace.com) ("MySpace"), which is a very popular Internet site where users can share photos, journals, personal interests and the like with other users of the Internet. As early as October 2005, the school district attempted to block access to MySpace from the school computers.

MySpace has a template for user profiles, which allows website users to fill in background information and include answers to specific questions. Justin created his profile of Trosch by using his grandmother's computer, at her home, during non-school hours. No school resources were used to create the profile but for a photograph of Trosch that Justin copied from the school's website by performing a simple "copy and paste" operation with his mouse. Justin's answers to the questions, which appeared to be by and about Trosch, centered on the theme of "big." The answers ranged from nonsensical answers to silly questions on the one hand, to crude juvenile language on the other. 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." The profile also refers to Trosch as a "big steroid freak" and "big whore." The profile also reflected that Trosch was "too drunk to remember" the date of his birthday. *Id.* Justin sent the profile to other students in the district by adding "friends" to the profile on the MySpace website, and eventually word of the profile soon reached most, if not all, of the student body of Hickory High School.

During the mid-December 2005 time period, there were three other unflattering profiles of Principal Trosch on MySpace, which contained more vulgar and offensive statements. *Compare* Plaintiffs' Exhibits 3–6. Trosch first learned of the existence of a profile, which was not the one created by Justin, on Sunday, December 11, 2005 from his daughter, an 11th grade student in the district. On Monday, December 12, 2005, Trosch told co-principal Chris Gill and Superintendent Karen Ionta about the profile and asked Technology Director Frank Gingras to disable it. Gingras also blocked access to www.myspace.com. However, this action was ineffective because the MySpace site has other web addresses and students found other ways to access the profiles. Trosch became aware of the existence of two other profiles, including the one created by Justin, on the evening of Thursday, December 15, 2005.

Justin engaged in some limited conduct related to the profile while in school. He accessed his profile from a computer in the Spanish classroom on December 15. Justin showed the profile to other classmates, although he did not claim authorship of the profile at that time.[2] One of the students

1. Plaintiffs state that the profile was created on or about December 14, 2005, but neither side disputed the other's date.

2. There are some minor discrepancies in the record as to whether Justin was actually operating the computer or was standing behind the other students, but the Court finds these to be immaterial. *Compare* Justin Layshock Deposition at 36–38 *with* Statements of A. Rader and T. Watts.

explained that the teacher was unaware of their activity. Another student explained that after viewing the profile, the students logged off of MySpace.com. Justin attempted to access his profile from school again on the 16th, assertedly to delete it. School administrators were unaware of Justin's in-school attempts to access MySpace until their investigation during the following week.

There is also evidence in the record that the profile created by Justin had been viewed in-school by other students beginning on Thursday, December 15, 2005. Teacher Craig Antush observed students congregating and giggling in his computer lab class, glimpsed Justin's profile on the computer, and told the students to shut it down. Antush Deposition at 11. Antush did not report this incident to school administrators. Antush Deposition at 12–13, 16. Co-principal Chris Gill did not personally witness any disruptive behavior in the school but he testified that approximately five teachers called him on December 15 to report that students wanted to discuss the profiles during class. In addition, more than five students were referred by teachers to speak to Gill about the profiles so that he could investigate their authorship.[3]

On Friday morning, December 16, 2005, Trosch convened a teachers meeting. Teacher Susan MacElroy had not been aware of the MySpace profiles controversy prior to this meeting. During the meeting, Trosch became very emotional and could not continue. Gill then took over, explained to the staff that there was a disruption, and asked the teachers not to discuss it with students during class. Instead, teachers were directed to send all students who might have information about the profiles to the office. Gill spent most of the morning on the 16th talking to approximately twenty students who were referred to the office because "they had made conversation, made a joke, made a disruption in class, that the teacher had to redirect." Gill Deposition at 84. Gill interviewed the students in an effort to find out who had created the profiles and cautioned the students not to discuss the topic in class. Gill also talked to ten teachers.

The school administrators sought to completely block students from accessing MySpace. However, the technology coordinator, Frank Gingras, was on vacation on the 16th and not at the school. Gill and Trosch spoke to Gingras at his home about shutting down the computers but learned that it was not feasible. Trosch and Ionta then contacted MySpace directly and succeeded in having the profiles disabled. In addition, administrators sent an email on Friday afternoon at 1:34 P.M. (Plaintiffs' Exhibit 7), stating:

> Please do not allow any students to use your personal desktop computer or any computer in your classroom. If they need to use it the computer [sic] for Cognitive Tutoring or research, they can use it with supervision in the labs or library.[4]

Computer use was limited from December 16 through Wednesday, December 21, which was the last day of school before the Christmas recess. During these four days, students were permitted to use computers for regularly scheduled classes in the computer lab. Computer programming classes were cancelled. Two or

3. The record reflects that none of the teachers identified as witnesses recalls talking to Gill until Friday, December 16. However, this discrepancy is not material.

4. Gingras testified at the TRO Hearing that "All student computers were locked down." Transcript at 174. However, Gingras was not at school on the 16th and his testimony is inconsistent with the guidelines set forth in the email and the deposition testimony of teachers.

three teachers asked if computers could be used for certain classroom purposes and Trosch informed them that computer use was permissible if under teacher supervision. Plaintiffs' Statement of Material Facts ¶ 49. Several teachers made revisions to their lesson plans, for example, printing out web pages rather than permitting student access, converting an in-class assignment requiring internet access to a home assignment and changing an internet research lesson into a class discussion. Teacher Allissa Sgro testified about a "buzz" of comments, but these were specifically directed at Trosch's son, who was a student in the class, and the comments did not prevent Ms. Sgro from teaching. Sgro Deposition at 17–19.

On Monday, December 19, Frank Gingras, working with a specialist from the intermediate unit, disabled access to the entire MySpace.com website. As of December 19, students could no longer access any MySpace page or Trosch profile from school computers and there were no further incidents. Plaintiffs' Statement of Material Facts ¶ 52. Gingras spent approximately 25% of his time that week on issues related to the profiles. Gingras testified at the TRO Hearing that his efforts regarding MySpace took time away from making an electronic grade book website operational, but did not otherwise prevent him from being able to complete his tasks. Transcript at 173–174.

The School District admits that it "cannot directly attribute which profile caused the disruption." Defendants' Response to Plaintiffs' Statement of Material Facts ¶ 66. Some of the in-school disruption was caused by other profiles. For example, in an email dated January 29, 2006, Antush explained that he became firm with students because they were huddling around one or two computers trying to see a profile of Trosch, which interfered with the class. There was a moment when he considered shutting down power to the computer lab, but that did not become necessary. This incident involved the more vulgar profile. Antush Deposition at 18. As another example, teacher Tricia Dye described a one to two minute conversation between students when a student came into class late and bragged about being questioned by police about a profile that was created by someone other than Justin. Dye Deposition at 15–17. Although the school's investigation shows how many students accessed MySpace.com during the period, the school could not determine how many students accessed any of the Trosch profiles, or the specific profile Justin created. Some of the student discussion related not to the profiles themselves, but to the administration's investigation and punishment of Justin. Plaintiffs' Statement of Facts ¶ 71.

On December 21, 2005, Justin and his mother, Plaintiff Cheryl Layshock, were summoned to a meeting with Superintendent Ionta and Co–Principal Gill. At the meeting, Justin admitted to having created one MySpace profile of Trosch. No disciplinary action was taken against Justin at that time. By letter dated January 3, 2006, Justin and his parents were advised that he was suspended and that an informal hearing would be held at the school on January 6, 2006 to consider disciplinary action. The alleged violations of the Hermitage School District's disciplinary codes 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; (use of school pictures without authorization). Verified Complaint, exh. 1. At the January 6, 2006 hearing, Justin received a ten-day out-of-school suspension. Additional discipline imposed on Justin included 1) placing him in the high school Alternative Curricu-

lum Education program for the remainder of the 2005–2006 school year; 2) banning him from attendance or participation in any events sponsored by or participated in by the Hermitage School District, including Academic Games and tutoring in which Justin had regularly participated, and 3) prohibiting him from participating in the June 2, 2006 high school graduation ceremony.

On January 27, 2006 Plaintiff filed a three-count Verified Complaint pursuant to 42 U.S.C. § 1983, as well as a Motion for Temporary Restraining Order and/or Preliminary Injunction pursuant to Federal Rule of Civil Procedure 65. Count I alleges that "Defendant's (*sic*) punishment of Justin Layshock for his parody website of Head Principal Trosch violates his rights under the First Amendment to the United States Constitution ..." Verified Complaint at ¶ 57. Count II alleges that "Defendants' policies and rules are unconstitutionally vague and/or overbroad, both on their face and as applied to Justin Layshock, and thus violate the First Amendment to the United States Constitution" ... *Id.* at ¶ 58. Count III alleges that "Defendants' punishment of Justin Layshock for constitutionally protected speech in his own home interfered with, and continues to interfere with, Mr. and Mrs. Layshock's rights as parents to determine how best to raise, nurture, discipline and educate their children in violation of their rights under the Fourteenth Amendment to the U.S. Constitution ..." *Id.* at ¶ 59.

After a hearing, the Court denied Plaintiffs' motion for a temporary restraining order (TRO). At the TRO hearing, Defendants presented evidence that Justin's profile of Trosch caused actual disruption of the day-to-day operations of Hickory High School from December 12 through December 21, 2005. As a result, the Court concluded that "[u]nder these circumstances Plaintiffs' actions appear to have substantially disrupted school operations and interfered with the rights of others, which, along with his apparent violations of school rules, would provide a sufficient legal basis for Defendants' actions." Memorandum Opinion dated January 31, 2006. The more fully developed summary judgment record now before the Court demonstrates that the disruption of school operations was not substantial.

At a status conference with the Court on February 8, 2006, the parties were encouraged to discuss amicable resolution of some or all of the disputed issues framed in the litigation. After the conference, the disciplinary measures imposed upon Justin were eased somewhat. He was thereafter phased out of the Alternative Curriculum Education program and back into regular class attendance, permitted to participate in Academic Games and attend the graduation ceremony. Unfortunately, complete resolution of all disputed issues was not achievable.

Standard of Review

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Thus, the Court's task is not to resolve disputed issues of fact, but to determine whether there exist any factual issues to be tried. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The non-moving party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion. *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir.1989) (*citing Liberty Lobby*, 477 U.S. at 249, 106 S.Ct. 2505). Further, the non-moving par-

ty cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. *Id.* (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Distilled to its essence, the summary judgment standard requires the non-moving party to create a "sufficient disagreement to require submission [of the evidence] to a jury." *Liberty Lobby*, 477 U.S. at 251–52, 106 S.Ct. 2505.

Discussion

This is an important and difficult case, in which the Court must balance the freedom of expression of a student with the right and responsibility of a public school to maintain an environment conducive to learning. This case began with purely out-of-school conduct which subsequently carried over into the school setting. Several recent cases in this District have concluded that a school district may not punish a student for out-of school speech. *See Killion v. Franklin Regional School Dist.*, 136 F.Supp.2d 446 (W.D.Pa.2001) (school could not punish student for list disparaging athletic director); *Flaherty v. Keystone Oaks School Dist.*, 247 F.Supp.2d 698 (W.D.Pa.2003) (school could not punish student for "trash talk" about volleyball game); *Latour v. Riverside Beaver School Dist.*, No. 05–1076, 2005 WL 2106562 (W.D.Pa. Aug.24, 2005) (enjoining school from punishing student for rap song lyrics). An equally well-reasoned opinion from the Pennsylvania Supreme Court, *J.S. v. Bethlehem Area School District*, 569 Pa. 638, 807 A.2d 847 (2002) (involving a student-created website about school staff), upheld the school's disciplinary authority.

On June 25, 2007, the United States Supreme Court issued its decision in the case of *Morse v. Frederick*, —— U.S. ——, 127 S.Ct. 2618, —— L.Ed.2d ——, (2007), which involved a First Amendment challenge by a student who was punished for unfurling a banner which proclaimed: "Bong HiTS 4 Jesus" during a time when students were released from school to go across the street to view the Olympic torch relay. The five separate opinions in *Morse* illustrate the complexity and diversity of approaches to this evolving area of law.[5] Unfortunately, because the Justices unanimously agreed that *Morse* involved school-related speech, *Morse* is not controlling of the instant matter. Indeed, *Morse* acknowledged that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents." *Id.*, 127 S.Ct. at 2623–24.

A. Count I: Justin Layshock's First Amendment Claim

1. General First Amendment Principles

The parties have identified the basic legal tests that govern student expression and this Court's Memorandum Opinion of January 31, 2006, outlined the applicable legal framework. The difficulty is in articulating the appropriate constitutional boundaries as to the breadth of public school disciplinary authority in this particular factual scenario. The United States

5. Chief Justice Roberts' majority opinion held that school officials did not violate the student's First Amendment rights by confiscating his pro-drug banner. Justice Thomas opined in his concurrence that the First Amendment does not protect student speech in public schools. Justice Alito emphasized his view that the Court's decision in *Morse* was at "the far reaches of what the First Amendment permits." Justice Breyer would have decided the case solely on qualified immunity grounds. Justice Stevens' dissent concluded that the student's conduct was protected by the First Amendment, although he agreed that some viewpoint discrimination may be permissible in schools and the principal should not be liable for pulling down the banner.

Court of Appeals for the Third Circuit provided the following overview of the First Amendment rights of students in the school setting in *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243, 252 (3d Cir.2002) (enjoining enforcement of a school anti-harassment policy):

> The public school setting demands a special approach to First Amendment disputes. Most students are minors, and school administrators must have authority to provide and facilitate education and to maintain order. 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 v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). On the other hand, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506, 89 S.Ct. 733. Thus, students retain the protections of the First Amendment, but the shape of these rights in the public school setting may not always mirror the contours of constitutional protections afforded in other contexts.

Sypniewski, 307 F.3d at 252–53 (some citations omitted). *Morse* reaffirmed these principles. 127 S.Ct. at 2621, 2636–37.

The *Killion* court summarized the relationship between *Tinker* and the Supreme Court's other major student-speech cases:

> These decisions reveal that, under [*Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986)], a school may categorically prohibit lewd, vulgar or profane language on school property. Under *Hazelwood [School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988)], a school may regulate schools-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern. "Speech falling outside of these categories is subject to *Tinker's* general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir.2001) (citations omitted).

Killion, 136 F.Supp.2d. at 453. The *Killion* court also observed that "courts considering speech that occurs off school grounds have concluded (relying on Supreme Court decisions) that school officials' authority over off-campus expression is much more limited than expression on school grounds," but have declined to apply a heightened standard of review because "[t]he overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*." *Id.* at 454–55. *See also Porter v. Ascension Parish School Bd.*, 393 F.3d 608, 615 (5th Cir.2004) (listing cases, but holding that the student artwork at issue was protected by the First Amendment because it was not created on-campus or directed at campus).

Morse has not changed this basic framework. The majority opinion distilled two fundamental principles from *Fraser*. First, the constitutional rights of public school students are not co-extensive with those of adults in other settings. 127 S.Ct. at 2627. Thus, student speech cases must be resolved "in light of the special characteristics of the school environment." *Id.* Second, although the mode of analysis employed in *Fraser* is "unclear," it certainly did not employ the "substantial disruption" test set forth in *Tinker*. However, the *Morse* Court refused to read *Fraser* ex-

pansively for the proposition that speech may be proscribed simply because it is "offensive." *Id.* at 2628–29.

[1] An important part of the *Tinker* test is the recognition that courts must defer to school administrators' determinations regarding whether student behavior within their supervision merits punishment. 393 U.S. at 507, 89 S.Ct. 733; *Accord J.S. v. Bethlehem,* 807 A.2d at 868 n. 13 (noting that "great deference" should be given by courts to school disciplinary decisions); *Morse* (Thomas, J., concurring) (arguing that school punishment should not be subject to judicial oversight). It is clear that school administrators need not wait until a "substantial disruption" has already occurred prior to taking action. Rather, school administrators may preempt problems if they have a "specific and significant fear of disruption." *Saxe,* 240 F.3d at 211. *See also Boucher v. School Board of School District of Greenfield,* 134 F.3d 821, 827–28 (7th Cir.1998) (rejecting argument that school must show "actual harm" in cases where the publication had occurred and upholding expulsion of student who published article about hacking into school computer).

[2] On the other hand, a mere desire to avoid discomfort or unpleasantness will not suffice. In *Saxe,* now-Justice Alito explained that a bedrock principle underlying the First Amendment is that expression may not be prohibited simply because society finds the idea offensive or disagreeable. 240 F.3d at 209. The *Saxe* Court went on to explain that government may not prohibit student speech based solely on the emotive impact that its offensive content may have on a listener. *Id.* Rather, a school must point to a "well-founded expectation of disruption," such as past incidents arising out of similar speech. *Id.* at 212. In *Klein v. Smith,* 635 F.Supp. 1440 (D.Me.1986), the Court rejected the argument that a student's disrespect to a teacher off-campus would weaken the resolve of the teaching staff to enforce school discipline, such that the student's conduct created a substantial disruption. The Court aptly commented that educators' professional integrity, resolve and character "are not going to dissolve, willy nilly, in the face of the digital posturing of this splenetic, bad-mannered little boy." *Id.* at 1442.

2. The Boundaries of Hermitage School District's Authority

The threshold, and most difficult, inquiry is whether the school administration was authorized to punish Justin for creating the profile. The mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web. Public schools are vital institutions, but their reach is not unlimited. Schools have an undoubted right to control conduct within the scope of their activities, but they must share the supervision of children with other, equally vital, institutions such as families, churches, community organizations and the judicial system.

The purpose of this boundary on school authority was explained in *Thomas v. Board of Education, Granville Central School District,* 607 F.2d 1043, 1052 (2d Cir.1979):

> When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement

of that power within the metes and bounds of the school itself.

Thomas involved students suspended for printing a sexually explicit magazine. Some of the initial preparation and composition of articles for publication occurred after school hours in a classroom and copies were stored in a classroom closet. The publication surfaced when a teacher confiscated a copy from another student on campus. The Second Circuit found that the magazine was deliberately designed to take place outside of school and that these on-campus contacts were "de minimis." *Id.* at 1050. The Court then explained that "because school officials ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena." *Id.* The Court concluded that although it condoned "an added increment of chilling effect when school officials punish strictly limited categories of speech within the school, we reject the imposition of such sanctions for off-campus expression." *Id.* at 1051. Thus, the student expression was protected by the First Amendment even though administrators could reasonably foresee that the magazine would be distributed in school. *Id.* at 1053. The *Thomas* Court noted that it was not addressing the scenario in which a group of students incited a substantial disruption within the school from a remote location. *Id.* at 1052 n. 17.

[3] It is clear that the test for school authority is not geographical. The reach of school administrators is not strictly limited to the school's physical property. For example, schools have an undoubted ability to govern student conduct at school-sponsored field trips, sporting events, academic competitions and during transit to and from such activities. On the other hand, the mere presence of a student on school property does not trigger the school's authority. In *D.O.F. v. Lewisburg Area School Dist. Bd. of School Directors,* 868 A.2d 28 (Pa.Commw.2004), the school expelled a student who was found smoking marijuana on a school playground at 10:30 p.m., approximately 90 minutes after a school band concert. The Court noted that school boards have broad discretion to determine school disciplinary policy, and that courts should not act as a "super school board" in substituting their judgment for that of the school district. However, the Court noted that school districts do not have inherent power to implement policies in the name of school safety. Rather, "a school district's rulemaking authority is limited to that which is expressly or by necessary implication granted by the General Assembly." *Id.* at 33. When schools act outside their authority, courts can intervene. *Id.* The Court then explained that an express limitation on schools' authority is that they "can discipline only those students who are enrolled in the district and under the district's supervision at the time of the incident." *Id.* at 34–35 (citation omitted). Stated somewhat differently, the Court recognized that it is well within a school board's discretion to punish inappropriate behavior to maintain the discipline and welfare of students, but only where those students are "in the district's charge at school functions." *Id.* at 36. Thus, the Court adopted a "functional" test. Applying this test, the Court concluded that the student could not be punished by the school because there was no connection between the student's drug use at night on the school playground and any school function.

Pennsylvania's Public School Code defines a "temporal" test of school authority in 24 P.S. § 5–510, which states:

> The board of school directors in any school district may adopt and enforce such reasonable rules and regulations as it may deem necessary and proper ...

> regarding the conduct and deportment of all pupils attending the public schools in the district, during such time as they are under the supervision of the board of school directors and teachers, including the time necessarily spent in coming to and returning from school.

Similarly, the School Code defines a time period in which school authorities act *in loco parentis* over their students, as set forth in 24 P.S. § 13–1317:

> Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

In *Tinker*, the Supreme Court articulated an operational test, explaining that student First Amendment rights do not embrace merely the classroom hours, but also extend to the cafeteria, the playing fields and on-campus conduct during authorized hours. 393 U.S. at 512–13, 89 S.Ct. 733. However, the Court then added: "But conduct 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 classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513, 89 S.Ct. 733. The Supreme Court in *Morse* recited a litany of contextual factors in determining that the speech was school-related: it occurred during normal school hours, at a sanctioned school event, in the presence of teachers and administrators charged with supervising students, the school band and cheerleaders performed, and the message was directed at most of the student body. 127 S.Ct. at 2623–24.

[4, 5] Regardless of whether the source of the school's authority is based on timing, function, context or interference with its operations, it is incumbent upon the school to establish that it had the authority to punish the student. In most cases, this will be a simple and straightforward exercise. However, in cases involving off-campus speech, such as this one, the school must demonstrate an appropriate nexus. As the case law demonstrates, on this threshold "jurisdictional" question the Court will not defer to the conclusions of school administrators.

3. Application to this Record

[6] Defendants seek to justify their punishment of Justin under either the *Tinker* or *Fraser* tests. In upholding the school's ability to prohibit a lewd, sexually inappropriate speech, the *Fraser* Court noted that schools may punish student speech that "would undermine the school's basic educational mission." 478 U.S. at 685, 106 S.Ct. 3159. However, Justice Alito's concurrence in *Morse* clarifies that *Morse* does not permit school officials unfettered latitude to censor student speech under the rubric of "interference with the educational mission" because that term can be easily manipulated. This Court has no difficulty concluding, and will assume arguendo, that Justin's profile is lewd, profane and sexually inappropriate. Nevertheless, *Fraser* does not give the school district authority to punish him for creating it. In effect, the rule in *Fraser* may be viewed as a subset of the more 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. However, because *Fraser* involved speech expressed during an in-school assembly, it does not expand the authority of schools to punish lewd and profane off-campus speech. There is no

evidence that Justin engaged in any lewd or profane speech while in school. In sum, the *Fraser* test does not justify the Defendants' disciplinary actions.

As to the *Tinker* test, the Court concludes that, even construing the evidence in a light most favorable to Defendants, they have not established a sufficient nexus between Justin's speech and a substantial disruption of the school environment. There are several gaps in the causation link between Justin's off-campus conduct and any material and substantial disruption of operations in the school. Most notably, the School District is unable to connect the alleged disruption to Justin's conduct insofar as there were three other profiles of Trosch that were available on myspace.com during the same timeframe. Moreover, the School has not demonstrated that the "buzz" or discussions were caused by Justin's profile as opposed to the reaction of administrators. *See Latour*, 2005 WL 2106562 at *2 (distinguishing between disruption caused by student's lyrics and that caused by student reaction to administrators' decision to punish student). Indeed, Plaintiffs point to instances in the record in which students objected to the investigation, rather than the profile.

In addition, a reasonable jury could not conclude that the "substantial disruption" standard could be met on this record.[6] The actual disruption was rather minimal—no classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action. A primary piece of evidence on which Defendants rely is that one computer teacher threatened to shut down the system, but that teacher testified that he was able to restore order to his classroom and that the incident was triggered by a profile other than Justin's. The profiles were accessible for less than one week before being disabled immediately prior to the Christmas vacation. There were some student comments about the profiles. However, in *Tinker* the Supreme Court held that the far more boisterous and hostile environment sparked by the children wearing anti-Vietnam war armbands, *see* 393 U.S. at 517–18, 89 S.Ct. 733 (Black, J., dissenting) (describing factual record in *Tinker*), did not give school officials a reasonable fear of disturbance sufficient to overcome their right to freedom of expression.

The Court's analysis in *Killion* is also instructive. In *Killion*, 136 F.Supp.2d at 455, this Court addressed a similar situation involving a Top 10 list about the athletic director that a student created on his home computer. Former Chief Judge Ziegler concluded that there was no evidence that teachers were incapable of teaching or controlling their classes because of the list and that it had been circulating within the school for several days before adminstrators became aware of its existence and took action. As in *Killion*, the record in this case reflects that the first profile was discovered on December 11, 2005 and circulated for several days before administrators took any action. Although the list in *Killion* was rude and demeaning, and its intended audience "was undoubtedly connected" to the school, the lack of substantial disruption led the Court to conclude that the suspension of the student was improper. The Court rejected the school's contention that the standard was met because the athletic director and librarian (the victim of a similar list) were upset, and that the list impaired administrators' ability to discipline students.

The only "in-school" conduct in which Justin engaged was showing the profile to other students in the Spanish classroom. While this conduct, in theory, might sup-

6. The Court need not reach Plaintiffs' argument that the post-hoc teacher statements should not be admissible. *See In re Bressman*, 327 F.3d 229, 237–38 (3d Cir.2003).

port the punishment issued by the administration, there is no evidence from which a reasonable jury could conclude that this incident caused a material and substantial disruption of school operations. Indeed, the statements of the other students indicate that the teacher was not even aware of what was going on, and that after viewing the profile the students promptly logged off of myspace.com. In *Thomas*, the Second Circuit deemed more substantial on-campus activity to be "de minimis."

In addition, the actual charges made by the School District were directed only at Justin's off-campus conduct. On this record, there is no evidence that the school administrators even knew that Justin had accessed the profile while in school prior to the disciplinary proceedings. In *Thomas*, 607 F.2d at 1050 n. 12, the Second Circuit rejected the school's effort to discipline the students for insubordination due to their on-campus activities because the suspension letter sent to parents clearly indicated that the discipline was premised on the publication of the offensive, indecent magazine. *Accord D.O.F. v. Lewisburg*, 868 A.2d at 37 (school's allegations based solely on drug use rather than possible on-campus purchase of drugs).

[7] Nor can the "substantial disruption" standard be met through a fear of future disturbances. 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. Indeed, Defendants have never attempted to justify their action based on a fear of future disruption. In sum, the School District has failed to demonstrate a sufficient causal nexus between Justin's conduct and any substantial disruption of school operations. Accordingly, the School's right to maintain an environment conducive to learning does not trump Justin's First Amendment right to freedom of expression based on the evidentiary record in this case.

[8] Count I of the Complaint asserts a First Amendment claim on behalf of Justin under Section 1983. Plaintiffs ask the Court to declare that the disciplinary action imposed upon Justin for posting the profile of Mr. Trosch on the internet violated his rights under the First Amendment. In addition, Plaintiffs seek compensatory damages and counsel fees. In this case, it is undisputed that Trosch was not involved with the discipline of Justin. *See* Defendants' Statement of Material Facts ¶ 55. Thus, Trosch is entitled to summary judgment on all counts. Further, as explained below, Ionta and Gill are entitled to summary judgment on the basis of qualified immunity. In *Irene B. v. Philadelphia Academy Charter School*, 2003 WL 24052009 (E.D.Pa.2003), the Court sua sponte dismissed claims against a school administrator in his official capacity as duplicative of claims against the school. *Id.* at *9 (citing *Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991)). Thus, Justin will be granted summary judgment as to liability on Count I against the Hermitage School District only and the school district's cross-motion for summary judgment on Count I will be denied. The Court notes that a trial will be necessary to determine compensatory damages.

4. Defendants' Arguments

Although the Court concludes that the school administration lacked authority to punish Justin for his off-campus creation of a Trosch profile, the Court acknowledges that this decision is a close call and Defendants' reaction to the unflattering profile was understandable. Most compellingly, Defendants cite to an analogous case from the Pennsylvania Supreme Court.

In *J.S. v. Bethlehem Area School District*, 569 Pa. 638, 807 A.2d 847 (2002), the Pennsylvania Supreme Court addressed a situation involving a student website, created at home, that contained threatening and derogatory comments about a teacher and principal.[7] As in this case, the student told other students about the website and showed it to another student at school. The student remained in school for the remainder of the year without punishment. In July, the school suspended the student for three days and after a hearing, extended the suspension to ten days—effective at the beginning of the next year. After an expulsion hearing, the school district voted to expel the student. However, the parents had already enrolled him in another school. The Court concluded that the website did not constitute a "true threat." In the next step of its analysis, the Court found that "there is a sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus." The Court relied on the facts that the student had accessed the site at school and shown it to another student and that "the web site was aimed not at a random audience, but at the specific audience of students and others connected with this particular School District." *Id.* at 865. The Court then held that it would uphold the school's action under the *Fraser* test. It cautioned that "it is for school districts to determine what is vulgar, lewd or plainly offensive, at least in the first instance" and that "great deference" should be given by the courts to the school official's determination. *Id.* at 868 n. 13. Turning to the *Tinker* standard, the *J.S.* Court rejected the parents' argument that the disruption was minimal. The Court explained that "while there must be more than some mild distraction or curiosity created by the speech, complete chaos is not required." *Id.* (citation omitted). The Court also rejected the argument that it was the faculty's reaction, rather than the site itself, that caused the disruption. Accordingly, the Court held that the School did not violate the First Amendment rights of the student.[8] The content of the website, and its impact on school personnel, was much more extreme in *J.S.* than in this case, although the Court concluded that it did not rise to the level of a "true threat."[9] *Id.* at 857–60. The Court also relied heavily on testimony that the site had dramatically affected morale in the school. Nevertheless, the case is on point and this Court respectfully reaches a slightly different balance between student expression and school authority.

[9] Defendants also contend that Justin's speech was not protected by the First Amendment at all, for several legal reasons which will be briefly addressed seriatim. Defendants claim that Justin's speech constituted "fighting words." This argument is without merit. A "MySpace" internet page is not outside of the protections of the First Amendment under the fighting words doctrine because there is simply no in-person confrontation in cyberspace such that physical violence is likely to be instigated. The case on which De-

7. The site contained a page captioned "Why Should [the teacher] Die?" and solicited contributions of $20 to help pay for a hitman. The site also had a picture in which the teacher's face morphed into that of Adolf Hitler and accused the principal of having sexual relations with an administrator in another building in the district. Upon seeing the site, the teacher suffered severe anxiety and was unable to finish the school year.

8. This case gave the individual defendants a reasonable belief that their punishment of Justin was lawful.

9. This Court would have little difficulty concluding that a school district may properly discipline a student who directs a true threat at the school from a remote location or through the Internet.

fendant relies, *Gilles v. Davis*, 427 F.3d 197 (3d Cir.2005) (involving a campus evangelist who insulted a crowd of students), is easily distinguishable on the facts. In addition, Defendants claim that Justin's website is "obscene." While the profile is certainly juvenile and lacks serious value, it does not appeal to a prurient interest or portray sexual conduct in a patently offensive way so as to rise to the level of obscenity as defined in *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Finally, Defendants contend that the profile constitutes slander per se, in that it imputes to Trosch a criminal offense and conduct incompatible with his office. Plaintiffs contend that the profile is a parody and thus cannot constitute defamation. The Court does not resolve this dispute because it is irrelevant to the decision. On one hand, even assuming arguendo that the profile was slanderous, the dispositive question here is whether the School District had authority to impose its own punishment on Justin.[10] The School cannot usurp the judicial system's role in resolving tort actions for alleged slander occurring outside of school. On the other hand, the School District need not demonstrate that the profile was slanderous if it created a substantial disruption in school operations.

5. Qualified Immunity

[10] The parties briefed the issue of qualified immunity at the Court's invitation. *See Alexander v. Tangipahoa Parish Sheriff Dept.*, 2006 WL 4017825 *5 (E.D.La.2006) (majority rule is that courts may raise issue of qualified immunity sua sponte). Plaintiffs point out, correctly, that the doctrine does not apply to municipal entities such as the school district. Plaintiffs further contend that the Court should deny qualified immunity to the individually-named Defendants because the relevant law is clearly established.

[11, 12] Pursuant to *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), the Court must make a two-step inquiry. It must first determine if the facts alleged, taken in the light most favorable to Plaintiffs, show a violation of a constitutional right. If so, the Court must then consider whether that right was "clearly established." A right is "clearly established" for purposes of qualified immunity when its contours are sufficiently clear that reasonable officials would know that their actions violated that right. *Williams v. Bitner*, 455 F.3d 186, 191 (3d Cir.2006). Pre-existing, binding precedent is not required. *Id.* The right allegedly violated must be defined at "the appropriate level of specificity." *Id.*

[13] In *Doe v. Delie*, 257 F.3d 309 (3d Cir.2001), the Court noted a variety of approaches as to whether district court opinions should be considered in the qualified immunity analysis. *Id.* at 321 n. 10. In this circuit, unlike several other circuits, district court opinions are entitled to consideration. However, district court opinions, by themselves, cannot signify that a right has been "clearly established." Most circuits do accord weight to opinions of the state's highest court in the qualified immunity analysis. *Id.*

[14] For the reasons set forth above, the Court concludes that the actions of Ionta and Gill violated Justin's First Amendment rights. However, the Court concludes that his First Amendment right was not clearly established under the factual circumstances of this case. Plaintiffs' brief does an excellent job of reciting the broad principles that govern student speech. However, all of the Supreme Court's major cases have occurred in on-

10. The Court is aware that Trosch has filed a private civil lawsuit in state court.

campus contexts. The cases from the United States Court of Appeals for the Third Circuit, and the other courts of appeals, have applied this First Amendment jurisprudence, but not in a factually analogous setting. Indeed, Plaintiffs recognize that "neither the Supreme Court nor the Third Circuit have decided what standard is applicable to out-of-school-student speech." Plaintiffs' Memorandum of Law on Qualified Immunity at 5. This Court recognizes the several other district court opinions from this circuit cited above.

In *Morse,* the Justices unanimously agreed that the principal in that case was entitled to qualified immunity. The majority opinion in *Morse* identified the uncertainty as to the boundaries of school-speech precedents and recognized the necessity for school administrators to react decisively to unexpected events. The five separate opinions in *Morse* illustrate the plethora of approaches that may be taken in this murky area of law. Moreover, as explained above, the *J.S. v. Bethlehem* case from the Pennsylvania Supreme Court provided substantial justification for the administrators' actions. Certainly, the contours of the First Amendment right to make a disparaging profile of a school principal are not "clearly established." In sum, Ionta and Gill are clearly entitled to qualified immunity in this case.[11]

B. Count II: Were the Policies of the School District Vague and/or Overbroad?

[15, 16] Although Justin has graduated, the Layshocks have minor children that still attend school in the district. Accordingly, they have standing and the Court must address their facial challenge to the school policies as vague and/or overbroad. As set forth in their brief, the specific policies challenged by Plaintiffs state:

> **Student Responsibilities ... Students should express their ideas and opinions in a respectful manner.**
>
> **Disciplinary Code ... Respect and decency will prevail at Hickory High School.**
>
> **Major Infractions ... (5) verbal abuse ... (12) Insubordination ... (21) Harassment ... repeated remarks to a person with ... demeaning implications.**
>
> **Abusive Action By Students/Bullying By Students ... (3) Disrespect/Harassment—disrespect to teachers, students or other school employees will not be tolerated. Students will be disciplined for being disrespectful to school employees or their peers at any time either on or away from school property. Any form of harassment including ... name-calling, belittlement, etc. are all considered forms of disrespect/harassment to others....**

The School District points out that several other aspects of its Student Agenda Book must also be considered to provide a full and complete context of the Policies. In addition, Plaintiffs have omitted relevant portions of the provisions quoted above:

> **Introduction ... This code of conduct is developed in conjunction with and concurring with the Commonwealth of Pennsylvania State Board of Education Regulations regarding student rights and responsibilities, the Hermitage School District Official School Board Policy, and all local, state and federal regulations.**
>
> **Student Rights ... Students have legal rights as persons and citizens.**

11. Trosch is entitled to summary judgment because it is undisputed that he was not involved with the disciplinary decision. *See* Defendants' Statement of Material Facts ¶ 55.

This includes ... the right to express their opinions....

Student Responsibilities ... Students share with the school administration and staff the responsibility to develop a school climate conducive to learning and wholesome living....

Disciplinary Code. The disciplinary procedures herein pertain to school functions, home or away, school buses, or any other time students are representing their school. Not all acts of misconduct can be itemized, however, appropriate and reasonable disciplinary action will be taken for offenses not necessarily specified in this section. Respect and decency will prevail at Hickory High School....

Abusive Action By Students/Bullying By Students ... Hickory High School students are reminded that taunting, verbally/physically, at athletic and co-curricular events will not be tolerated. Students are expected to be respectful of their peers and competitors at all athletic and co-curricular activities.

[17–19] A policy will be struck down as overbroad if it reaches too much expression that is protected by the Constitution and will inhibit such expression to a substantial extent. *Sypniewski,* 307 F.3d at 258–59 (describing doctrine as strong medicine of last resort). A regulation will not be held unconstitutional unless the overbreadth is real and substantial, in relationship to its legitimate reach. *Saxe,* 240 F.3d at 214. In *Saxe,* the Court of Appeals explained that courts must consider whether the regulation is susceptible to a reasonable limiting construction before holding it to be unconstitutional. 240 F.3d at 215. Indeed, every reasonable construction must be resorted to, in order to save a policy from unconstitutionality. *Id.* Overbreadth doctrine warrants an even more hesitant application in the school setting. *Sypniewski,* 307 F.3d at 259.

In *Saxe, Killion* and *Flaherty,* the primary basis for finding the school policies at issue to be overbroad was their lack of a "geographical limitation." In other words, the policies at issue in those cases lacked language to limit the school's authority "to discipline expressions that occur on school premises or at school related activities, thus providing unrestricted power to school officials." *Flaherty,* 247 F.Supp.2d at 705.

A review of the entire text of the provisions cited by Plaintiffs demonstrates that unlike the policies struck down in *Saxe, Killion* and *Flaherty,* each provision has an appropriate geographic limitation. The Disciplinary Code section explicitly states that it "pertain[s] to school functions, home or away, school buses, or any other time students are representing their school." Likewise, the Abusive Conduct by Students provision specifically refers to "athletic and co-curricular events" and the Student Responsibilities provision refers to the "school climate." The most troubling language in the Student Agenda Book is the reference in the Abusive Conduct by Students provision that students will be disciplined for disrespectful behavior "either on or away from school property." However, the School District offers a limiting construction—i.e., that "away from school property" refers to "athletic and co-curricular events" held at other schools. Given the context of the provisions as a whole, and the explicit reference in that provision to athletic and co-curricular events, the School's limiting construction is reasonable. Moreover, the Introduction to the handbook acknowledges students' right to expression and incorporates the limitations imposed by law, including the *Tinker, Fraser* and *Hazelwood* standards.

[20–23] A policy will be void for vagueness if it fails to give a student adequate warning that his conduct is unlawful or if it fails to set adequate standards of enforcement such that it represents an unrestricted delegation of power to school officials. *Sypniewski*, 307 F.3d at 258; *Killion*, 136 F.Supp.2d at 459. Determining the appropriate level of detail for school discipline is left to school officials. *Id.* at 260. The Supreme Court further explained that given schools' need to impose discipline for a wide range of unanticipated conduct, "school disciplinary rules need not be as detailed as a criminal code." *Fraser*, 478 U.S. at 686, 106 S.Ct. 3159. Accordingly, school disciplinary rules will be struck down only "when the vagueness is especially problematic." *Sypniewski*, 307 F.3d at 266. The Court finds that the policies at issue provide students with appropriate warning of the type(s) of conduct which are prohibited and set out adequate enforcement standards and parameters for school administrators.

In sum, the Court concludes that the policies themselves are not vague nor overbroad, even though the administration misapplied them in this case. Accordingly, summary judgment will be granted to Defendants on Count II.

C. *Count III: Claims Asserted by the Parents*

[24] Justin's parents allege that the School District's conduct violated their own parental right to discipline their child. This claim is without merit. It is well-established that schools act in loco parentis and have the authority to impose discipline on students. *See, e.g., J.S. v. Bethlehem*, 807 A.2d at 860. Mr. and Mrs. Layshock explained in their depositions that this claim was brought because the parents "didn't feel that the school had a right to punish [Justin] for something that wasn't done at school." This, of course, is the gravamen of Count I. When pressed, the parents were unable to articulate how the school's action interfered with their parental discipline of Justin. In fact, Mr. Layshock testified that the parents ***did*** discipline Justin by grounding him. In *C.N. v. Ridgewood Board of Education*, 430 F.3d 159, 184 (3d Cir.2005), the Court of Appeals explained that a constitutional violation occurs only where the school's action deprives parents of their right to make a decision concerning their child, not where the school's conduct complicates the parental decision-making and implementation. Thus, it is clear that the parents have no valid independent right of recovery which is not merely duplicative of Justin's First Amendment claim. Defendants are entitled to summary judgment on Count III.

Conclusion

The parties' cross-motions for summary judgment will be granted in part and denied in part. The Court concludes that Plaintiff Justin Layshock is entitled to summary judgment on his First Amendment claim in Count I against Hermitage School District. Trosch is entitled to summary judgment on all counts, as he was not involved in the discipline. Ionta and Gill are entitled to summary judgment on Count I on the basis of qualified immunity. All Defendants are entitled to summary judgment as to the vagueness/overbreadth challenge to the policies of the school district and the claims of the parents in Counts II and III.

An appropriate order follows.

ORDER OF COURT

AND NOW, this 10th day of July, 2007, in accordance with the foregoing Memorandum Opinion it is hereby ORDERED, ADJUDGED and DECREED that PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT *(Document No. 44)* is **GRANTED IN PART AND DENIED**

IN PART and DEFENDANTS' MOTION FOR SUMMARY JUDGMENT *(Document No. 49)* is **GRANTED IN PART AND DENIED IN PART.** Justin Layshock is entitled to summary judgment against Hermitage School District as to liability on Count I of Plaintiffs' complaint. Defendants Trosch, Ionta and Gill are entitled to summary judgment on all counts and they are dismissed as parties in this case. Defendant Hermitage School District is also entitled to summary judgment on Counts II and III. In all other respects, the motions are denied.

A jury trial will be necessary to determine compensatory damages on Count I. Accordingly, the remaining Plaintiff, Justin Layshock, through his parents, shall file a pretrial statement on or before July 30, 2007. The remaining Defendant, Hermitage School District, shall file a pretrial statement on or before August 20, 2007. A pretrial conference shall be held in Courtroom 6C before the undersigned on September 6, 2007 at 9:30 a.m.

Christine Mensah AYENU, Plaintiff,

v.

CHEVY CHASE BANK, F.S.B., Defendant.

Civil No. RWT 06-CV-1434.

United States District Court, D. Maryland.

July 31, 2007.

Background: United States citizen living abroad in Ghana brought suit against Maryland bank for making unauthorized wire transfers from her account. Citizen moved to dismiss without prejudice for lack of subject matter jurisdiction.

Holdings: The District Court, Titus, J., held that:

(1) federal subject matter jurisdiction did not exists over state law claims;

(2) plaintiff was not a citizen of "any state" as required for diversity jurisdiction; and

(3) as U.S. citizen living abroad who had not renounced her U.S. citizenship, plaintiff did not qualify for alienage jurisdiction.

Dismissed without prejudice.

1. Federal Courts ⇐34

Defendant, as non-moving party, had burden of demonstrating facts to support subject matter jurisdiction when plaintiff moved to dismiss without prejudice for lack of jurisdiction. Fed.Rules Civ.Proc. Rule 12(b)(1), 28 U.S.C.A.

2. Federal Courts ⇐243

Reference in complaint to Uniform Commercial Code, as adopted and incorporated by Federal Reserve Board Regulation, did not confer federal subject matter jurisdiction over claims of customer against bank that arose under state law. 28 U.S.C.A. § 1331; 12 C.F.R. § 210.55 et seq.

3. Federal Courts ⇐282

United States citizen who lived abroad was not a citizen of any state, as required for diversity jurisdiction over her suit against Maryland bank, as she was not domiciled in the United States. 28 U.S.C.A. § 1332.

4. Federal Courts ⇐275

Naturalized American citizen living abroad who had not renounced her citizenship was not a "subject of a foreign state" and thus there is no alienage jurisdiction over her suit against Maryland bank. 28 U.S.C.A. § 1332(a)(2).

See publication Words and Phrases for other judicial constructions and definitions.

CERTIFICATES

Kim M. Watterson, one of the attorneys for Appellee and Cross-Appellants, hereby certifies that:

1. I caused two true and correct copies of the foregoing Second-Step Brief of Appellee And Cross-Appellants to be served upon the following counsel of record this 22nd day of May, 2008, by UPS Next Day Air: Anthony G. Sanchez, Esquire, Andrews & Price, 1500 Ardmore Boulevard, Suite 506, Pittsburgh, PA 15221; Sean A. Fields, Esquire, Pennsylvania School Boards Association, 400 Bent Creek Boulevard, P.O. Box 2042, Mechanicsburg, PA 17055; and John W. Whitehead, The Rutherford Institute, 1440 Sachem Place, Charlottesville, VA 22901.

2. The Second-Step Brief of Appellee And Cross-Appellants was filed with the Court by UPS Next Day Air on May 22, 2008, in accordance with Rule 25(a)(2)(B) of the Federal Rules of Appellate Procedure.

3. I am admitted to the bar of the Third Circuit.

4. This Brief complies with the type/volume limitation contained in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and the limitations governing second-step briefs. The brief contains 16,359 words, excluding the Cover Page, Table of Contents, Table of Authorities, and the Certifications.

5. The printed Second-Step Brief of Appellee And Cross-Appellants filed with the Court is identical to the text in the electronic version of the Brief filed with the Court.

6. The electronic version of the Second-Step Brief of Appellee And Cross-Appellants filed with the Court was virus checked using Trend Micro OfficeScan, version 7.3 on May 22, 2008, and was found to have no viruses.

Kim M. Watterson