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J.S. v. Blue Mountain School Dist.
M.D.Pa.,2007.
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United States District Court,M.D. Pennsylvania.
J.S., a minor, by and through her parents, Terry Snyder and Steven Snyder, individually and on behalf of their daughter, Plaintiffs
v.
BLUE MOUNTAIN SCHOOL DISTRICT; Dr. Joyce E. Romberger, Superintendent Blue Mountain School District; and James S. McGonigle, Principal Blue Mountain Middle School, both in their official and individual capacities, Defendants.
**No. 307cv585.**

March 29, 2007.

Mary Catherine Roper, American Civil Liberties Union of Pennsylvania, Philadelphia, PA, for Plaintiffs.
Ellis H. Katz, Sweet, Stevens, Tucker, & Katz, LLP, New Britain, PA, for Defendants.

***MEMORANDUM***
JAMES M. MUNLEY, United States District Judge.
***1** Before the court for disposition is the plaintiffs' motion for temporary restraining order and preliminary injunction in this case asserting a middle school student's right to freedom of speech. A hearing on this matter was held on March 29, 2007, and it is ripe for disposition.[FN1]

FN1. This memorandum memorializes the verbal denial of the order 1 at the end of the hearing.

**Background**

Plaintiff J.S. is a fourteen-year-old eighth grade student at Blue Mountain Middle School located in Orwigsburg, Pennsylvania. (Compl.¶ 3). Defendant James S. McGonigle is the principal of the middle school. (Compl.¶ 7).

On or about March 18, 2007, Plaintiff J.S. and a fellow student created a profile for Defendant McGonigle on a website called "MySpace.com." (Compl.¶ 14). MySpace is a popular website among young people where they can create profiles for themselves and share, *inter alia,* photos, journals and interests.(*Id.*). In the profile they created for Defendant McGonigle, the students indicated that he is a married, bisexual man whose interests include "fucking in [his] office" and "hitting on" students and their parents." (Pl.Ex.3). It also indicates that he is a "sex addict" who loves children and any kind of sex. (*Id.*). The profile also makes disparaging comments regarding McGonigle's wife and children.[FN2]The profile contained Defendant McGonigle's photograph, which the students copied off of the school district's website. (Compl.¶ 16). The profile was located at URL *www.MySpace.com/kidsrockmybed.* (Comp. ¶ 21 & Pl.Ex. 3).

FN2. There is no indication in the complaint, and no testimony at the hearing, that the students believed this information to be true.

Word of the fake profile spread, and students at the school eventually told McGonigle about it. After a brief investigation, McGonigle determined that Plaintiff J.S. and another student were responsible for the profile. As he found the content of the profile very upsetting, the principal suspended Plaintiff J.S. from school for ten (10) days.[FN3]

FN3. The record is not clear as to what punishment, if any, the other student received.

Plaintiffs then instituted the instant case. They assert that the First Amendment precludes the school district from excluding a student from classes for two weeks for the profile which is non-threatening, non-obscene and a parody. They claim that the Constitution prohibits the school district from disciplining a student's out-of-school conduct that does not cause a disruption of classes or school administration. They further allege that the defendants' actions violate Plaintiff Terry and Steven Snyder'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 United States Constitution. The plaintiffs bring suit pursuant to the Civil Rights

Statute of 1964, 42 U.S.C. § 1983. Upon filing the complaint plaintiffs also filed the instant motion for temporary restraining order and preliminary injunction.

**Jurisdiction**

As this case is brought pursuant to 42 U.S.C. § 1983 for constitutional violations we have jurisdiction under 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

**Discussion**

***2** The Third Circuit Court of Appeals has outlined four factors that a court ruling on a motion for a preliminary injunction must consider: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest. *Crissman v. Dover Downs Entertainment Inc.*, 239 F.3d 357, 364 (3d Cir.2001). These same factors are used to determine a motion for a temporary restraining order. *Bieros v. Nicola*, 857 F.Supp. 445, 446 (E.D.Pa.1994).

An injunction is "an extraordinary remedy, which should be granted only in limited circumstances."*Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck*, 290 F.3d 578, 586 (3d Cir .2002). The injunction should issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief. *Duraco Products, Inc. v. Joy Plastic Enterprises, Ltd.*, 40 F.3d 1431, 1438 (3d Cir.1994). We will address each injunction factor separately.

1. Likelihood of success on the merits:

Plaintiffs brings this claim under the First Amendment asserting that she was improperly punished for out of school conduct/speech.

The Defendant may regulate this speech if it substantially disrupts school operations or interferes with the rights of others. *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir.2001)*citing Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 507 (1969).

In making our decision on the temporary restraining order, we bear in mind that the federal courts do not sit as a super-school board. It is not our task to micromanage the school's disciplinary procedures. 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(1969).

The plaintiffs have not established a likelihood of success on the merits. Questions exist as to the extent that the internet posting disrupted school operations. Testimony at the hearing indicated that at least some disruption occurred in that the principal had to take time to investigate the issue, and had to take a guidance counselor away from her duties to sit in on meetings with the plaintiffs.

The defendants argue that the punishment is constitutional as the speech at issue was injurious to the rights of others, in particular the principal. His reputation and employment could have been affected by the profile.

Moreover, issues are present as to whether the speech at issue is protected under the First Amendment. Defendants assert that the speech is defamatory and not protected. Plaintiffs on the other hand assert that it is acceptable parody.

***3** A period of discovery may help to develop these issues. As the issues stand presently, however, we cannot find that the plaintiff has established a likelihood of success on the merits.

2. Irreparable harm:

The next factor to consider is whether plaintiffs will suffer an irreparable injury if a temporary restraining order is not issued. *Crissman v. Dover Downs Entertainment Inc.*, 239 F.3d 357, 364 (3d Cir.2001). According to the United States Supreme Court "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."*Elrod v. Burns*, 427 U.S. 347, 373 (1976). At this point, however, we cannot conclude that a constitutional violation has occurred. Additionally, the plaintiffs speech has ended, and it is

merely her punishment that she challenges now. While the suspension is certainly a burden on the plaintiff, it is only for ten days. She has already served six days of this suspension, and the school district indicates that all her school work is being sent home to her. If we ultimately find that her punishment was unconstitutional, we can order her school record expunged. Accordingly, we find that plaintiffs have not demonstrated irreparable harm will occur if the temporary restraining order does not issue.

3. Will granting the preliminary relief result in even greater harm to defendants?

The third factor for us to examine is whether granting preliminary relief will result in greater harm to the defendants. *Crissman v. Dover Downs Entertainment Inc.,* 239 F.3d 357, 364 (3d Cir.2001). We find that this factor is neutral. Granting preliminary relief would not likely harm the defendant.

4. Does public interest favor the issuance of a temporary restraining order?

The final factor to consider is whether the public interest favors the issuance of preliminary relief. *Crissman v. Dover Downs Entertainment* Inc., 239 F.3d 357, 364 (3d Cir.2001). If we found that the plaintiff had a likelihood of success on the merits, public interest would favor the issuance of preliminary relief. We find, however, that at this juncture, it is in the public interest to allow the school the ability to discipline its students.

For the aforementioned reasons, we find that the plaintiffs' motion for temporary restraining order and preliminary injunction should be denied. See *Layshock v. Hermitage Sch. Dist.,* 412 F.Supp.2d 502 (W.D.Pa.2006) (denying a temporary restraining order on similar facts).

***ORDER***

AND NOW, to wit, this 29th day of March 2007, the plaintiffs' motion for temporary restraining order and preliminary injunction (Doc. 2) is hereby DENIED.

M.D.Pa.,2007.
J.S. v. Blue Mountain School Dist.
Slip Copy, 2007 WL 954245 (M.D.Pa.)

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Latour v. Riverside Beaver School Dist.
W.D.Pa.,2005.
Only the Westlaw citation is currently available.
United States District Court,W.D. Pennsylvania.
Anthony LATOUR, a minor, John A. Latour, and Denise Latour, as parents and natural guardians of Anthony Latour and in their individual capacity,
Plaintiffs,
v.
RIVERSIDE BEAVER SCHOOL DISTRICT,
Defendant.
**No. Civ.A. 05-1076.**

Aug. 24, 2005.

Kim M. Watterson, Reed Smith, Witold J. Walczak, ACLF of PA, Pittsburgh, PA, for Plaintiffs.
Anthony G. Sanchez, Andrews & Price, Pittsburgh, PA, for Defendant.

*MEMORANDUM OPINION*

AMBROSE, Chief J.

***1** This action arises out of the disciplinary action taken against Anthony Latour ("Anthony"), a student at Riverside Beaver Middle School. On May 5, 2005, Defendant, Riverside Beaver School District, suspended Anthony from school, and then on May 17, 2005, expelled him for two years because of four rap songs that he wrote and recorded in his home over a two-year period. None of these songs and recordings were brought to school by Anthony. *Id.* at ¶ 14.The four songs consist of the following:
1. A song written in 2003 that mentions another middle school student (Jane Smith);
2. The first track on a CD recorded in November 2004, titled "Murder, He Wrote";
3. A battle rap song with John Doe titled "Massacre"; and
4. Another battle rap song he wrote and uploaded onto his personal internet website titled "Actin Fast ft. Grimey."

On July 17, 2005, Defendant's School Board ratified the expulsion decision.

Anthony Latour and his parents (collectively referred to as "Plaintiffs") filed a Motion for Preliminary Injunction seeking an order from this Court enjoining Defendant from expelling Anthony, restraining Defendant from banning Anthony from attending school sponsored events and from being present on school grounds after hours, and enjoining Defendant from imposing any other sanctions against Anthony for expressions, or as retaliation for his expressions. (Docket No. 2). A hearing on the Motion for Preliminary Injunction was held on August 18, 2005. The issue is now ripe for review.

The following factors must be weighed in determining the propriety of a preliminary injunction:
a. The likelihood of success on the merits;
b. The possibility of harm to the non-moving party if relief were granted;
c. The probability of irreparable injury to the moving party in the absence of relief; and
d. The public interest.

*Alessi v. Commonwealth of Pennsylvania Dept. of Public Welfare,* 893 F.2d 1444, 1447 (3d Cir.1990). In First Amendment cases, the key element is the first element: the likelihood of success on the merits. *Sypniewski v. Warren Hills Regional Bd. of Educ.,* 307 F.3d 243, 252 (3d Cir.2002). With regard to the first element, the likelihood of success on the merits, the burden is on Defendant to show that its action in expelling Anthony based on the four songs was constitutional. At the hearing, Defendant attempted to meet this burden by showing that the songs were either "true threats" or that the songs caused a material and substantial disruption to the school day.

"True threats" are "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals...." To determine if a statement is a true threat, I will consider the speaker's intent, how the intended victim reacted to the alleged threat, whether it was communicated directly to its victim, whether the threat was conditional, and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence. *Virginia v. Black,* 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); *J.S. ex rel. H.S. v. Bethlehem Area School Dist.,* 569 Pa. 638, 807 A.2d 847, 858 (Pa.2002). In considering these factors, I must examine them in context. *Black,* 538 U.S. at 359;*Watts v. United States,* 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969).

***2** The evidence at the hearing shows that Anthony's songs were written in the rap genre and that rap songs are "just rhymes" and are metaphors. Thus, while some rap songs contain violent language, it is violent imagery and no actual violence is intended. (Preliminary Injunction Hearing testimony of Bakari Kitwana; Expulsion hearing testimony of John Doe).

Furthermore, there is no evidence that Anthony communicated these songs directly to Jane Smith, John Doe, or Defendant. Rather, they were published on the internet or sold in the community.

There is no evidence from Jane Smith, herself, that she felt threatened. Mrs. Smith, Jane's mother, did not testify that Jane was threatened by the song, but rather that she was humiliated and broken hearted. (Defendant's Ex. A, Ex. A, pp. 138-140). Furthermore, I find that John Doe was not threatened by "Massacre." As he admitted, he did not think Anthony's song was a threat, but that it was just a "bluff" and "a question of, you know, flexing your lyrical muscle...." (Defendant's Ex. A, Ex. A, pp. 152-153).

Moreover, there is no evidence that Anthony had a history of violence.

Additionally, I find Defendant's argument that the songs were true threats is weakened by the fact that it failed to do any type of its own investigation, regardless of the police involvement, from the end of March of 2005, until the time of the expulsion hearing on May 17, 2005. Defendant claims that it feared Anthony might cause imminent harm to Jane Doe, John Smith, and or the school, in general. Yet, it did not search Anthony's locker to determine whether he had any types of weapons, did not refer Anthony to counseling, did not talk to Anthony or his parents, did not remove John Doe from school, and did not talk to Jane Smith. Therefore, based on the testimony at the hearing and the exhibits presented, I find that there is a likelihood that Plaintiffs will prevail on the issue of whether the songs were true threats.

I next turn to whether the songs caused a material and substantial disruption to the school day or whether there was a specific fear of substantial disruption. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508-09, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Mr. Girting testified that Anthony's songs did not cause any disruptions prior to his expulsion. (Defendant's Ex. A, Ex. A, pp. 126-132). There was no evidence that copies of the songs were sold in school or otherwise distributed in school, no fights in the hallways about the songs, and no evidence that the classroom instruction was disrupted. The only argument Defendant has is that the disruption consists of (1) withdrawal of students, and (2) wearing of t-shirts. I find that Defendant's argument that it fears that it may lose up to three students (Jane Smith and the two Doe boys) due to Anthony's songs without merit. With regard to Jane Smith, Anthony's song was merely "the straw that broke the camel's back."*Id.* at p. 141.There obviously were a multitude of issues involving Jane Smith and why she decided to leave the District. *Id.* at pp. 141-42.John Doe was kept out of school by his mother, but not after she read Anthony's song. Rather, John Doe was kept out of school because of the fear that her son might be hurt in school as a result of Anthony's arrest, and "everything else." *Id.* at p. 95.Additionally, students wearing t-shirts stating "Free Accident" and students talking about Anthony's expulsion, are not because of Anthony's songs, but a result of the punishment by Defendant, and even if they were a result of the songs, these incidents do not rise to the level of a substantial disruption. Thus, based on the testimony at the hearing and the exhibits presented, I find that there is also a likelihood that Plaintiffs will prevail on the issue of whether the songs caused a material and substantial disruption or whether there was a specific fear of substantial disruption.

***3** Because Defendant has not demonstrated that the songs constituted true threats or caused a material and substantial disruption, Plaintiffs have prevailed in demonstrating a likelihood of success on the merits. Consequently, I find that the first factor weighs in favor of granting the preliminary injunction.

With regard to the second factor, the possibility of harm to Defendant, I find that there were no true threats and that the disruptions (or feared disruptions) identified by Defendant were not substantial and not attributable to Anthony's songs. (Defendant's Ex. A, Ex. A, pp. 126-132). Consequently, this factor weighs in favor of granting the preliminary injunction

As to the third and fourth elements, the probability of irreparable injury and the public interest, unquestionably, the loss of First Amendment freedoms, even for a minimal amount of time, constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Furthermore, there is a strong public interest in protecting First Amendment rights guaranteed by the United States Constitution. Thus, the third and fourth factors weigh in favor of granting a preliminary injunction.

As a result, I find that the requirements for the issuance of a preliminary injunction have been met.

*ORDER OF COURT*

AND NOW, this 23rd day of August, 2005, after a Preliminary Injunction Hearing and for the reasons set forth above, it is ORDERED that Defendant, Riverside Beaver School District are enjoined and restrained as follows:
1. From expelling Anthony; and
2. From banning Anthony from attending school sponsored events and from being present on school grounds after hours.

W.D.Pa.,2005.
Latour v. Riverside Beaver School Dist.
Not Reported in F.Supp.2d, 2005 WL 2106562 (W.D.Pa.)

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