

Students can speak up, too

Off campus, students shouldn't be censored by school officials

Kids being kids, they often use the Internet to mock and disparage their principals and teachers.

The problem is that the U.S. Supreme Court hasn't decided how far the First Amendment free-speech rights of students extend into cyberspace and how far public schools can go in punishing them for what they say or write off campus.

So, on the same day earlier this month, two different panels of federal judges in Philadelphia issued rulings on these precise issues based on nearly identical facts — and reached nearly opposite conclusions.

Both disputes involved Pennsylvania students who created fake MySpace profiles on their home computers and on their own time that harshly ridiculed their principals. One student prevailed and the other lost.

In Layshock v. Hermitage School District, the more favorable decision for student rights, three judges of the U.S. Third Circuit Court of Appeals dodged the tricky questions left unresolved by the Supreme Court.

"We need not now define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate," Judge Theodore McKee wrote for all three judges.

The court could escape this task because the school district didn't dispute that it could not prove that the fake profile caused a substantial and material disruption of the educational atmosphere.

Such a disruption is required to justify censorship of on-campus student speech under the Supreme Court's 1969 decision in Tinker v. Des Moines Independent Community School District. In that case, the high court upheld the speech rights of students who wore black armbands to school to protest the war in Vietnam, famously noting that minors don't shed their speech rights "at the schoolhouse gate."

Judge McKee in Layshock was unambiguous that "the reach of school authorities is not without limits," emphasizing there are only "very limited circumstances" under which on-campus punishment for off-campus speech is permissible.

"It would be an unseemly and dangerous precedent to

allow the state in the guise of school authorities to reach into a child's home and control his/her actions there to the same extent that they can control that child when he/she participates in school sponsored activities," Judge McKee wrote.

But in J.S. v. Blue Mountain School District, a different panel of Third Circuit judges took parallel facts and twisted the Tinker standard to favor school officials.

Two middle school students in Blue Mountain created an unflattering, "profanity-laced" MySpace profile of their principal, James McGonigle. They limited access to only about 22 students who were granted "friend" status.

When minors are off campus, they should be treated like citizens. If a principal is defamed by a student on an off-campus website, he can sue for libel.

As Judge D. Michael Fisher wrote for the majority in Blue Mountain, the friends who read it said "they found it funny."

But Principal McGonigle found nothing amusing after one "friend" ratted out the profile's creators. He asked the turncoat student to print a copy of the profile and bring it to him, which means it reached campus only because of the principal's request.

A trial court earlier concluded that the profile created no material disruption at school. The Third Circuit agreed that the level of disruption "certainly did not rise to a substantial one." It even said it would be "difficult to separate the effects that the profile itself had on the school from the effects attributable to Mr. McGonigle's investigation of the profile and subsequent punishment" of the profile's creators.

But then two of the judges started speculating about the future.

Praising the principal's "quick corrective action to curb" the profile's effect on campus, the majority hypothesized that had

he not tried to head off problems, there was "a reasonable possibility of a future disruption" that justified his "swift punishment of its creators."

Drawing on Tinker, the court found that "school authorities need not wait until a substantial disruption actually occurs in order to curb offending speech if they can 'demonstrate any facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities.'"

Dissenting, Judge Michael Chagares observed that the ruling "significantly broadens school districts' authority over student speech" and "vests school officials with dangerously overbroad censorship discretion."

So where does that leave the off-campus, online student speech rights of public school students? Nearly as muddled as they were before the Third Circuit rulings on Feb. 4. And that's why a national standard articulated by the Supreme Court is needed. Without one, a patchwork of inconsistent decisions across the country surely will flow from the Layshock and Blue Mountain cases.

The court needs to pick up where the Layshock decision left off by limiting the reach of school authorities to school and school-sponsored activities, like field trips and sporting events.

When minors are off campus, they should be treated like citizens. If a principal is defamed by a student on an off-campus website, he can sue for libel. Indeed, the principal in the Layshock case did sue the student who created the fake MySpace profile.

Only when a student causes a substantial disruption of school operations should a school be able to abrogate that student's free-speech rights.

The Supreme Court is more inclined to review an issue when lower appeals courts disagree. Here, the split is between judges on the same appeals court!

The high court must decide the issue.

Robert D. Richards is the John & Ann Curley professor of First Amendment studies at Penn State University and Clay Calvert is professor and Brechner eminent scholar in mass communications at the University of Florida.