UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-4138

J.S., a minor, by and through her parents, TERRY SNYDER and STEVEN SNYDER, individually and on behalf of their daughter,
Plaintiffs-Appellants,

v.

BLUE MOUNTAIN SCHOOL DISTRICT,
Defendant-Appellee.

On Appeal From The Judgment Of The United States District Court
for The Middle District of Pennsylvania Dated September 11, 2008
At Civil Action No. 3:07cv585

BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

This is an appeal from a final Order and Judgment in the United States District Court for the Middle District of Pennsylvania that disposed of all parties' claims. Plaintiffs J.S. and her parents, Terry and Steven Snyder, claimed that Defendant Blue Mountain School District violated J.S.'s First Amendment and due process rights, acted outside the limits of its authority under Pennsylvania statutory law and violated the Snyders' due process rights.

The district court had subject matter jurisdiction over Plaintiffs' Complaint pursuant to 28 U.S.C. § 1331 and § 1343(a)(3) and (4). It entered summary judgment against Plaintiffs by Order dated September 11, 2008, and Plaintiffs timely filed their Notice of Appeal on October 6, 2008. *See* Fed. R. App. P. 4(a)(1). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW ON APPEAL

I. Whether the district court erred in concluding that the School District did not violate J.S.'s First Amendment rights when it reached into her home to punish her for creating and posting, on her home computer and during non-school hours, an "offensive and crude" parody of her principal. (Raised at A441-457 and ruled upon at A20).

II. Whether the district court erred in finding that the Snyders' due process rights were not violated when the School District interfered with these parents' exclusive right to direct the upbringing of their child and regulate their child's out-of-school conduct free from government interference by reaching out to punish J.S. for her conduct in the family's home. (Raised at A460-463 and ruled upon at A22).

III. Whether the district court erred in finding that Pennsylvania permitted the School District to discipline J.S. for her conduct outside of school. (Raised at A460-461 and ruled upon at A22).

IV. Whether the district court erred in concluding that the School District's discipline and computer use policies, which are not (1) confined to school grounds and school-related activities or (2) confined to punishing speech that creates a substantial and material disruption, are not unconstitutionally overbroad and vague. (Raised at A457-460 and ruled upon at A21).

STATEMENT OF RELATED CASES AND PROCEEDINGS

This Appeal raises issues substantially similar to those raised in *Layshock, et al. v. Hermitage School District, et al.,* Nos. 07-4465 & 07-44555 (3d Cir. 2008). *Layshock* was argued before the Honorable Judges Theodore A. McKee, D. Brooks Smith, and Jane R. Roth on December 10, 2008.

SCOPE AND STANDARD OF REVIEW

This First Amendment case challenges a state imposed sanction on Internet speech. It comes to this Court after the district court resolved all claims on summary judgment against the Plaintiffs. The Court's review of the district court's decision is, therefore, plenary. *Olson v. Gen. Elec. Astrospace*, 101 F.3d 947, 951 (3d Cir. 1996). Because the Court is reviewing a lower court decision upholding a school district's decision to punish student speech, the Court's plenary review requires it to "make an independent examination of the whole record to ensure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 486 (1984). The burden of proof and persuasion rests on the government to demonstrate the constitutionality of its actions. *United States v. Playboy Entm't 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). This burden remains the same even though J.S. is a public school student in Pennsylvania who was disciplined by the School District. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

Appellants also appeal the district court's summary judgment against them on their due process and state law claims. This Court's review of those

claims, like the First Amendment claim, is plenary. *Olson v. Gen. Elec. Astrospace*, 101 F.3d at 951.

STATEMENT OF THE CASE

On March 28, 2007, Appellants/Plaintiffs J.S. and her parents filed this action after Appellee/Defendant Blue Mountain School District suspended J.S. for creating, on a weekend and on her home computer, a MySpace profile making fun of Blue Mountain Middle School Principal James McGonigle. A72-93 (Verified Complaint). Plaintiffs' Complaint asserted, among other things, First and Fourteenth Amendment violations.

After discovery, both parties moved for summary judgment. A421-465 (Plaintiffs' Motion); A466-507 (Defendants' Motion). On September 11, 2008, the Honorable James M. Munley denied Plaintiffs' motion for summary judgment and entered summary judgment in favor of the School District on J.S.'s First Amendment claim, her claim that the school regulations under which she was punished were unconstitutionally vague and overbroad and the Snyders' due process claim. A22. J.S. and the Snyders timely appealed from the district court's entry of summary judgment in favor of the School District and from its decision to deny their motion for summary judgment. A1 (Notice of Appeal).

STATEMENT OF FACTS

A. J.S. CREATES A PARODY PROFILE OF PRINCIPAL MCGONIGLE AT HOME DURING NON-SCHOOL HOURS

In 2007, Plaintiff J.S. was a fourteen-year-old eighth grade student at Blue Mountain Middle School in the Blue Mountain School District. She lived with her mother and father, Plaintiffs Terry and Steven Snyder, and brother in Orwigsburg, Pennsylvania. J.S. had been attending the School District's schools for nine years, consistently made the Honor Roll, and sometimes received Distinguished Honors. A178 (Defendants' Answer). J.S. had never been disciplined at school until December 2006 and February 2007 when she was twice disciplined for dress code violations by her middle school principal, James McGonigle. A197 (J.S. Dep.).

On Sunday March 18, 2007, J.S. and her friend K.L., another eighth grade student at the Blue Mountain Middle School, created a "Profile" parodying Principal McGonigle, which they posted on MySpace, a social networking website A190 (J.S. Dep.). J. S. testified that the purpose of the profile was to make other students laugh. *Id.* The parody did not identify McGonigle by name, school, or location. Rather, it was presented as an alleged self-portrayal of a middle school principal named "M-Hoe" working in Alabama. The only thing that associated the profile with McGonigle was his photo, which the girls copied from the Blue Mountain School District website and pasted into the MySpace profile. The other

information on the profile ranged from nonsense and juvenile humor to profanity and personal attack.[1] "M-Hoe" described himself as a bisexual 40 year old man, a Virgo and a "proud parent," who lived in Alabama with his wife and child. His "interests" were described as:

> General: detention. being a tight ass. riding the fraintrain.[2] spending time with my child (who looks like a gorilla). baseball. my golden pen. fucking in my office. hitting on students and their parents.
>
> Music: i love all kinds. favorite is techno.
>
> Television: almost anything. i mainly watch- the playboy channel on directv. OH YEAH BITCH!
>
> Heroes: myself. ofcourse [sic].

A38 (MySpace.com Profile).

The profile also included a statement "About Me," which likewise ranged from silly to profane:

> HELLO CHILDREN
> yes, it's your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick
> PRINCIPAL
> I have come to myspace so I [sic] can pervert the minds of other principal's [sic] to be just like me. I know, I know, you're all

---

[1] The profile was located at the URL www.MySpace.com/kidsrockmybed.

[2] Presumably, this was an allusion to Debra Frain, McGonigle's spouse, who worked as a counselor at Blue Mountain Middle School.

thrilled
Another reason I came to myspace is because- I am
keeping an eye on you students
(who I [sic] care for so much)
For those who want to be my friend, and aren't in my school
I love children, sex (any kind), dogs, long walks on the
beach, tv, being a dick head, and last but not least my
darling wife who looks like a man (who satisfies my needs)
MY FRAINTRAIN
so please, feel free to add me, message me whatever

A38 (MySpace.com Profile) (emphasis in original).

B. J.S.'S AND K.L.'S FRIENDS LEARN ABOUT THE PROFILE

After completing the "M-Hoe" profile, and over that same Sunday evening, J.S. and K.L. told some of their friends about the profile and where to find it. Initially, J.S. and K.L. made the profile "public," so that it could be viewed in full by anyone who knew the URL or who otherwise found the profile by searching on MySpace for a term it contained. A192 (J.S. Dep.). The next day, however, J.S. made the profile "private," so that it could be viewed only by those people whom she and K.L. "invited" to be a MySpace "friend" of "M-Hoe." A194 (J.S. Dep.). After J.S. made the profile private, she and K.L granted "friend" status to about twenty-two Blue Mountain School District students. A194 (J.S. Dep.).

When J.S. attended school on Monday, several students approached J.S. about the profile, generally to say they thought it was funny. A194 (J.S. Dep.). Because the Blue Mountain Middle School computers block access to MySpace,

these students could have only viewed the profile from computers located outside of school. A328 (McGonigle Dep.).

C. PRINCIPAL MCGONIGLE LEARNS OF THE PROFILE, ATTEMPTS TO GET A COPY, ATTEMPTS TO IDENTIFY THE AUTHOR AND DECIDES THE AUTHOR MUST BE PUNISHED

Principal McGonigle learned about the "M-Hoe" profile on Tuesday morning, March 20, 2007, from a student who was in his office to discuss an unrelated incident on the school bus. McGonigle asked this student to try to find out who had created the profile. He also attempted to find the profile himself on his office computer (which did not block MySpace access) by searching MySpace for his name. When that search produced no results, he contacted MySpace, which advised him that MySpace could not direct him to the profile without the URL. A321 (McGonigle Dep.).

At the end of the school day on Tuesday, the student who had initially told McGonigle about the profile reported to him that it had been created by J.S. A323 (McGonigle Dep.). McGonigle asked this student to bring him a printout of the profile to school the next day, which she did. A320-321, 324 (McGonigle Dep.). This was the only copy of the MySpace profile brought into the school at any time. A328 (McGonigle Dep.).

McGonigle showed the profile to Superintendent Joyce Romberger and Director of Technology, Susan Schneider-Morgan. A324 (McGonigle Dep.). The three met for about fifteen minutes to discuss the profile. A410 (Schneider-Morgan Dep.). Romberger and Schneider-Morgan both immediately recognized the "M-Hoe" profile solely as a parody – something intended to mock its subject and not intended to be true.[3] Neither asked McGonigle if any of the statements in the profile were true. A299 (Romberger Dep.).

McGonigle next showed the profile to two guidance counselors, Michelle Guers and Debra Frain. A325 (McGonigle Dep.). McGonigle also contacted MySpace again, this time in an attempt to discover what computer had been used to create the profile. The MySpace representative told McGonigle that he could not give out personal information without a court order. A325 (McGonigle Dep.).

By the end of the day, McGonigle had decided that the creation of the MySpace profile was a Level Four Infraction under the School's Disciplinary Code of Blue Mountain Middle School, Student-Parent Handbook, dated 2006-2007 (A65-66), as a false accusation about a staff member of the school, and he was

[3] Romberger said she thought the profile was "a lie," A300 (Romberger Dep.), and never believed the allegations about McGonigle's conduct in the profile. If she had, her job duties would have required her immediately to investigate the situation because of the comments in the profile regarding sexual conduct between a student and a principal. A297, A307 (Romberger Dep.).

determined to discipline the student responsible for its creation. A327 (McGonigle Dep.). However McGonigle understood the "M-Hoe" profile to be a fictionalized parody rather than a false accusation. When asked in his deposition whether "they were accusing you as opposed to saying things that were untrue about you?" McGonigle replied: "No. They weren't accusing me. They were pretending they were me." A327 (McGonigle Dep.).

D. J.S. APOLOGIZES AND IS PUNISHED

J.S. was absent from school on the Wednesday that McGonigle obtained his copy of the "M-Hoe" profile. A330 (McGonigle Dep.). When she returned to school on Thursday, March 22, McGonigle summoned J.S. and K.L. to his office to meet with him and Guidance Counselor Guers. A330-331 (McGonigle Dep.). J.S. initially denied creating the parody but then admitted her role. McGonigle told J.S. and K.L. that he "was very upset and very angry, hurt and didn't understand why [they] did this to [him] and [his] family." A333 (McGonigle Dep.). He threatened the children and their families with legal action. A333-334 (McGonigle Dep.).

Following this meeting, J.S. and K.L. remained in McGonigle's office while he contacted their parents and waited for them to come to the school. A338 (McGonigle Dep.). McGonigle met with J.S. and her mother Terry Snyder and showed Mrs. Snyder the profile. He told them that J.S. and K.L. would receive ten

days out-of-school suspension, which prohibited attendance at school dances. He again threatened to take legal action. A340 (McGonigle Dep.). J.S. and her mother both apologized to McGonigle. A221 (Terry Snyder Dep.). J.S. also wrote a subsequent letter of apology to McGonigle and his wife. A225 (Terry Snyder Dep.)

McGonigle next contacted MySpace, provided the URL for the profile and requested that it be removed, which was done. A354 (McGonigle Dep.). McGonigle also contacted Superintendent Romberger to inform her of his decision regarding J.S. and K.L.'s punishment. Although Romberger had authority to overrule McGonigle's decision to discipline a student, she agreed with McGonigle's punishment of J.S. and K.L. A301 (Romberger Dep.).

On Friday, March 23, McGonigle sent J.S.'s parents a disciplinary notice, which stated that J.S. had been suspended for ten days. A70 (Blue Mountain School District Disciplinary Notice). The following week, Romberger declined Terry Snyder's request that she overrule the suspension. A305 (Romberger Dep.).

E. MCGONIGLE CALLS THE POLICE

On the same day that McGonigle met with J.S. and her mother, he contacted the local police and asked about the possibility of pressing criminal charges against the students. A334-335 (McGonigle Dep.). The local police

referred McGonigle to the State Police and McGonigle invited a State Police officer to come to the school to look at the profile. A336 (McGonigle Dep.). That officer told McGonigle that he could press harassment charges, but that the charges would likely be dropped. McGonigle told the officer that he would not press charges. A337 (McGonigle Dep.). The officer completed a formal report and asked McGonigle if he wanted the State Police to call the students and their parents to the police station to "let them know how serious [the situation] was." A353 (McGonigle Dep.). McGonigle asked the officer to do this and on Friday, March 23, J.S. and K.L. and their mothers were summoned to the state police station to discuss the posting of the MySpace profile. A203-204 (J.S. Dep.).

F. THE EVIDENCE (OR LACK THEREOF) THAT J.S.'S PROFILE CAUSED ANY IN-SCHOOL DISRUPTION

The School District asserted that the "M-Hoe" profile had disrupted school in the following ways: two teachers – Mr. Nunemacher and Ms. Werner – had to quiet their classes when students were talking about the profile; one guidance counselor had to supervise student testing so another administrator could sit in on McGonigle's disciplinary meetings with J.S. and K.L.; and when J.S. and K.L. returned to school after serving their suspensions, two students decorated the girls' lockers to welcome them back and other students congregated in the hallways as part of the same "welcome back" event.

All of these "disruptions" were of a very short duration and the School District offered no evidence that the supposed disruptions were prompted by the parody itself rather than students' reaction to McGonigle's efforts to locate and view the parody or to the discipline imposed on J.S. and K.L. Although the two students who decorated J.S. and K.L.'s lockers were disciplined, no Blue Mountain Middle School students were punished for disruptive behavior related to the "M-Hoe" profile. The evidence relating to each disruption follows:

Teacher Nunemacher's Testimony: Mr. Nunemacher testified that on the Thursday when J.S. was called into Principal McGonigle's office and disciplined, a group of six or seven students were talking during the unstructured classroom work portion of his second period eighth grade Algebra I class. A366 (Nunemacher Dep.). Mr. Nunemacher quieted the students by telling them three times to stop talking and by raising his voice on the third occasion. The entire exchange between Mr. Nunemacher and the students lasted no more than five or six minutes. A368-372 (Nunemacher Dep.).

Mr. Nunemacher also testified that he heard two students talking about the profile in his class on another day, but they stopped when he told them to get back to work. *Id.* Neither incident was unique: Nunemacher had to tell his

eighth grade Algebra students to stop talking about various topics on a weekly basis.[4]

Teacher Werner's Testimony: Ms. Werner testified that a group of eighth grade girls approached her at the end of her Skills for Adolescents courses, after class instruction had ended, to report the MySpace profile. A415-416 (Werner Dep.). Ms. Werner said that this did not disrupt her class. The girls spoke with her during the portion of the class when students were permitted to work independently at their desks on other things, such as reading or homework. *Id.*

Alleged Disruption to Counselor Frain's Job Activities: Ms. Frain, one of the guidance counselors, canceled a small number of student counseling appointments in order to supervise student testing on the morning that McGonigle met with J.S., K.L., and their parents. Ms. Guers was originally scheduled to supervise the student testing but was asked by McGonigle to sit in on the meetings. Accordingly, Ms. Guers asked Ms. Frain to cover her job during the 25-30 minutes she spent sitting in on McGonigle's meetings with J.S., K.L., and their parents A338, A339, A341, A351-353 (McGonigle Dep.). There is no evidence that Ms. Frain was unable to reschedule the canceled student appointments, and the students

[4] Mr. Nunemacher did report "rumblings" at other points during the week, but could not recollect whether the "rumblings" involved the MySpace profile. A375-376 (Nunemacher Dep.).

who were to meet with her remained in their regular classes. A352 (McGonigle Dep. 161).

The Locker Decoration Disruption And Alleged Decline in Student Conduct: Two students decorated J.S.'s and K.L.'s lockers to welcome them back to school after their suspensions. A teacher allegedly had to tell students to stop congregating in the hall around the decorated lockers. A349-350 (McGonigle Dep.). The students who decorated the lockers were disciplined; the students congregating in the hall were not. A350 (McGonigle Dep.).

McGonigle testified that there was a general decline in student behavior after J.S. and K.L. were punished. He offered no supporting evidence to back this claim, and he attributes the decline to this litigation, rather than to the "M-Hoe" parody or gossip relating thereto in school.[5] He believed, admittedly without any evidence, that J.S.'s effort to vindicate her constitutional rights made students feel they could misbehave at will and get out of trouble by filing suit. A350-351 (McGonigle Dep.).

G. THE LAWSUIT

On March 28, 2007, J.S. and the Snyders filed this action, asserting that the School District violated J.S.'s First Amendment free-speech rights, due

[5] McGonigle also attributes his alleged stress-related health problems after the incident to the litigation. A354, 356 (McGonigle Dep.).

process rights, her rights under state law, and her parents' Fourteenth Amendment Substantive Due Process rights. A72-93 (Verified Complaint). J.S. and the Snyders also filed a Motion for Temporary Restraining Order and/or Preliminary Injunction, A33 (Docket), which the district court denied by Order dated March 29, 2007. *J.S. v. Blue Mountain Sch. Dist.*, No. 2007 WL 954245 (M.D. Pa. Mar. 29, 2007).

After discovery, both parties moved for summary judgment. A421-465 (Plaintiffs' Motion); A466-507 (Defendants' Motion). On September 11, 2008, the district court entered summary judgment for the School District and denied J.S.'s and the Snyders' motion for summary judgment. A4-23 (Opinion).

The district court recognized that J.S. had prepared the "M-Hoe" profile from her home and concluded that the profile had not caused disruption at the school. Nonetheless, the district court held that the School District could, consistent with state law, the First Amendment, and the Snyders' rights as J.S.'s parents, discipline J.S. for the profile just as if it had been created and posted on MySpace while J.S. was in school, using school computers. At least in part, the district court based its decision on its conclusion that the School District could punish J.S. for her speech outside the schoolhouse gate because the "M-Hoe" profile was "vulgar and offensive." A17-20 (Opinion). The district court then held

that the failure of J.S.'s First Amendment claim defeated all other claims in the case. A22 (Opinion). This appeal followed. A1 (Notice of Appeal).

SUMMARY OF ARGUMENT

This case involves speech by a student outside of school. It thus does not involve student speech at all, but rather speech by a girl who happens to be a public-school student. However, neither the U.S. Supreme Court nor this Court has ever held that a public school may punish, limit, or control a student's speech in her own home during non-school hours. At that time and place, J.S. enjoyed the same right to be free of government interference with her expression as is enjoyed by all persons under our Constitution.

To be sure, both this Court and the Supreme Court have recognized that, under certain circumstances, some school officials can punish student speech *in school.* The Supreme Court has held that, when it comes to in-school speech, school officials have the authority to punish speech that creates a risk of material and substantial disruption,[6] is offensively lewd and indecent,[7] is school-sponsored,[8] or advocates illegal drug use.[9] The predicate for the Court's decisions in all of these cases was a recognition that the student speech at issue occurred in the school, or at a school-sponsored event – contexts where the interests of school

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

7 *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

8 *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

9 *See Morse v. Frederick,* 127 S. Ct. 2618, 2624 (2007).

officials in creating an environment appropriate for educating students might sometimes justify allowing greater restrictions on some kinds of student speech.

Neither this Court nor the Supreme Court has ever ruled that school officials have the authority to punish student speech when it occurs wholly outside the schoolhouse gate. In fact, the Supreme Court's most recent student-speech decision, *Morse v. Frederick*, reiterated that school officials ***do not*** have authority to punish students for lewd and indecent speech when the expression takes place outside of school. *Id.* at 2626. The *Morse* decision controls this case. The district court, however, in upholding J.S.'s punishment, ignored *Morse* (not to mention several other decisions from the Supreme Court and this Court) and decided that school officials did not violate J.S.'s First Amendment free-speech rights when they punished her for speech they found offensive even though her speech occurred outside of school. The district court's decision must be reversed.

The district court also erred in entering summary judgment for the School District on the other claims brought by J.S. and her parents. The School District reached into the Snyders' home in order to punish their daughter for her conduct while in their home. By so doing, it violated the Snyder parents' Fourteenth Amendment Due Process right to direct the upbringing of their daughter, free from government intervention. The School District's action also violated Pennsylvania law, which limits the School District's disciplinary authority

to times when a student is "under the supervision of the board of school directors and teachers, ..." 24 P.S. § 5-510. And, because the School District's policies permitted the unlawful discipline, those policies are unconstitutionally overbroad.

ARGUMENT OF APPELLANTS

I. J.S. ENJOYS THE SAME ROBUST FIRST AMENDMENT RIGHTS AS NON-STUDENTS WHEN SHE SPEAKS OUTSIDE OF SCHOOL

This case involves J.S.'s speech ***outside*** the schoolhouse gate; ***outside*** the school day and school week; and ***inside*** her own home. Consequently, even though the Supreme Court has approved certain limitations on student speech when it takes place on campus, the time and place of J.S.'s speech here make clear beyond peradventure that the rationales for those limitations in the school setting simply do not apply. Indeed, the only basis upon which the School District can assert an interest in regulating J.S.'s off-campus speech is its desire to control allegedly lewd or off-color student speech outside of school. The First Amendment, however, abhors any attempt by the state to reach into the home to punish speech based on its content, and this principle should not be altered merely because J.S.'s speech involved a parody of a school official.

A. THE DISTRICT COURT SHOULD HAVE STRICTLY SCRUTINIZED THE SCHOOL DISTRICT'S RESTRICTION ON J.S.'S SPEECH

The district court erred in deciding that J.S.'s off-campus speech could be sanctioned by the School District because it was "vulgar" and "offensive" speech about a school official. Government restrictions on speech are presumptively invalid and will not be sustained unless the government carries its heavy burden to justify such restrictions. *Playboy Entm't Group, Inc.*, 529 U.S. at

816-17. Moreover, content-based or viewpoint-based restrictions on free-speech rights are subject to the most exacting scrutiny: they are valid only if the limitation imposed is narrowly tailored to further a compelling governmental interest. *Id.* at 813.

J.S.'s status as a student does not alter her constitutional free-speech rights outside of school. *See 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[.]"). In its most recent student speech decision, the Supreme Court again emphasized that ***in-school*** restrictions on student speech are permissible only because of the "special characteristics of the school environment." *Morse,* 127 S. Ct. at 2622 (citations and quotations omitted)*; see also Hazelwood*, 484 U.S. at 267 ("The determination of what manner of speech *in the classroom or in school assembly* is inappropriate properly rests with the school board") (emphasis added); *Fraser*, 478 U.S. at 685 (holding that a "high school assembly or classroom is no place for" lewd and profane speech); *Tinker*, 393 U.S. at 507 (holding that schools can prohibit students from engaging in speech at school that will cause a material and substantial disruption because of school officials' "comprehensive authority … to prescribe and control conduct *in the schools*.") (emphasis added).

The "special characteristics of the school environment" that allow government officials, in the guise of school administrators, to impose time, place, manner, and content restrictions on student speech simply do not exist when students, like J.S., engage in protected conduct from their homes. Indeed, the line drawn by the Supreme Court limiting school official's ability to sanction student speech to the schoolhouse itself is reasonably clear – and is essential to the preservation of students' First Amendment rights. The district court's willingness here to ignore that line seriously undermines those rights. If J.S. can be punished by the state for her "M-Hoe" parody – something written at home, on an Internet site that could only be accessed by other students on off-campus computers and which was brought to school only because McGonigle himself asked a student to bring it in – there will remain no principled limitation on school officials' ability to punish off-campus speech, other than their own subjective sense of what expression is appropriate for students to engage in. Neither this Court nor the Supreme Court has ever bequeathed to government officials such vague and overbroad powers to regulate expression.

Similarly, J.S.'s status as a minor does not create some special, compelling state interest here that justifies school officials' punishment of J.S.'s at-home speech. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority." *Planned Parenthood of*

Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) (overruled in part by *Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833 (1992); *accord Am. Amusement Mach. Ass'n v. Kendrick,* 244 F.3d 572, 576 (7th Cir. 2001)("Children have First Amendment rights."); *Anspach ex rel. Anspach v. City of Phila., Dept. of Pub. Health,* 503 F.3d 256, 261 (3d Cir. 2007)(holding that children are protected by the Constitution and have Constitutional rights).[10]

J.S.'s "M-Hoe" parody was speech protected by the First Amendment. The speech occurred in her home while she was not under the actual or constructive authority of the School District. The district court should have, but did not, strictly scrutinize the School District's alleged justifications for J.S.'s punishment to see whether they advanced a compelling state interest. If the School District's conduct had been strictly scrutinized, J.S.'s suspension would have been deemed a violation of her free-speech rights. The School District had no legitimate justification – much less the compelling justification required – for its decision to suspend J.S. for her speech. The district court erred when it entered summary judgment in favor of the School District on J.S.'s First Amendment claim.

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[10] The Supreme Court in *Bellotti v. Baird,* 443 U.S. 622 (1979), articulated three factors that might, in the right case, warrant a different constitutional treatment of a minor's speech under the First Amendment. *Id*. at 634. However, none of these factors, which relate to the peculiar vulnerability of children and the role of parents, would apply here.

B. THE DISTRICT COURT ERRED IN APPLYING THE *FRASER* STANDARD TO THIS CASE.

The district court concluded that the School District could constitutionally punish J.S. for her speech because her "M-Hoe" profile was vulgar and offensive. But the district court incorrectly treated J.S.'s speech – which was *about* school – as if it had occurred *in* school. In doing so, it ignored the reasoning in the Supreme Court's student-speech cases that any limitations on student speech by school officials must be related to the special characteristics of the school environment and disregarded the Court's admonition in *Morse v. Frederick* that school officials cannot punish vulgar or profane speech outside the school context. *Morse,* 127 S. Ct. at 2622.

The principal flaw in the district court's decision was its application of the Supreme Court's decision in *Fraser,* 478 U.S. at 683, to J.S.'s out-of-school speech. In *Fraser*, the Court approved a school district's decision to punish a student who gave a sexually explicit speech to approximately 600 students, some as young as fourteen years old, during a school assembly. The Court ruled that sexually inappropriate speech, which might otherwise be protected from government sanction by the First Amendment, can be forbidden inside of a public school because its content is inconsistent with the school's educational mission. In such cases, school officials may punish the speech, even if the speech poses no risk of disruption to school activities. *Id*. at 685.

Fraser, of course, involved speech inside the schoolhouse gate. Neither the Court's reasoning nor the facts of the case suggest that the Supreme Court would permit a school district to punish student speech outside of school, even if that speech might include content which could be punished if it occurred on campus. To the contrary, the opposite conclusion must be drawn. As Justice Blackmun noted in his *Fraser* concurrence, if the student "had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate." *Id*. at 688 (Blackmun, J., concurring) (citing *Cohen v. California*, 403 U.S. 15 (1971)).[11]

Justice Blackmun's assessment was subsequently endorsed by the Court in *Morse*, which explained, "Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected." *Morse*, 127 S. Ct. at 2626.

The facts of this case are far more similar to the example of protected speech cited in *Morse* than those before the Court in *Fraser*. *Fraser* involved a student who exposed large numbers of other students to sexually explicit speech during a school-sponsored assembly that took place at school during the school

[11] *See also Saxe v. State College Area Sch. Dist.*, 240 F.3d 212, 216, n.11 (3d Cir. 2001) (in which this court noted that allowing school officials to apply restrictions on student speech to "conduct occurring outside of school premises . . . would raise additional constitutional questions").

day. This case involves a student who created what the district court deemed a vulgar and offensive parody using her home computer which she posted on a website from home and made accessible to a small number of people who, if they chose to access the parody, could only do so from computers located outside of school. The *Fraser* standard does not apply to J.S.'s off-campus speech, a precept crystallized by *Morse*, and the district court thus erred in upholding the School District's punishment.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE SCHOOL DISTRICT DID NOT VIOLATE J.S.'S FIRST AMENDMENT RIGHTS

Although the district court found that J.S.'s out-of-school speech did not cause a substantial disruption of the school, it upheld the school's punishment of J.S. because the parody was "vulgar, lewd, and potentially illegal speech that had an effect on campus." A15. That is the wrong standard. As explained above, school officials' authority to prohibit vulgar and lewd speech is limited to expression that occurs in school. And even if school officials have authority to punish students for out-of-school speech that causes a disruption at school, they must have reason to believe that the speech creates a significant fear of a substantial disruption, not that it will have some "effect" on the school. *See Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 257 (3d Cir. 2002);

Saxe, 240 F.3d at 210. Finally, J.S.'s speech, even if vulgar and lewd, was entitled to First Amendment protection.

A. THE SCHOOL DISTRICT'S PUNISHMENT OF J.S.'S SPEECH WAS NOT BASED ON A WELL-GROUNDED FEAR OF SUBSTANTIAL SCHOOL DISRUPTION

Based on its review of the summary-judgment record, the district court concluded that J.S.'s "M-Hoe" parody created no real disruption to school operations. Indeed, this conclusion was inevitable: as discussed earlier, all of the purported disruptions at the school identified by the School District resulted from McGonigle's search for the author of the parody and his punishment of J.S. rather than from the parody itself. As a result, even if this Court were to conclude that the School District had authority over J.S.'s off-campus speech, its punishment violated J.S.'s rights because the School District failed to carry its burden of showing that J.S.'s speech "substantially disrupt[ed] or interfere[d] with the work of the school or the rights of other students." *Saxe*, 240 F.3d at 211.

The district court nonetheless held that the School District had authority to punish J.S. for her parody because of the "connection between the off-campus action and on-campus effect." A17 (Opinion at 14). The district court concluded that J.S.'s speech caused on-campus effects because:

(1) "The website addresses the principal of the school."

(2) "Its intended audience is students at the school."

(3) "A paper copy of the website was brought into school, and the website was discussed in school."

(4) "The picture on the profile was appropriated from the school district's website."

(5) "Plaintiff crafted the profile out of anger at the principal for punishment the plaintiff had received at school for violating the dress code."

(6) "J.S. lied in school to the principal about the creation of the imposter profile."

(7) ". . . although a substantial disruption so as to fall under Tinker did not occur, as discussed above, there was in fact some disruption during school hours."

(8) ". . . the profile was viewed at least by the principal at school and a paper copy of the profile was brought into school."

A17 (Opinion at 14 (citation omitted)).

None of the factors identified by the district court as creating a connection between J.S.'s out-of-school speech and the school can fairly be described as a "*particular and concrete basis"* for concluding that the association between the speech and its impact on the school is 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." *Sypniewski*, 307 F.3d at 257

(emphasis added). First, none of the factors serve to distinguish J.S.'s off-campus speech from any other form of student criticism or parody about school officials that is later reported to school officials. The district court opinion thus invites school officials to chill student speech outside the schoolhouse gate that is critical of school districts or school officials. Second, the factors also include things J.S. was not disciplined for and that are irrelevant to determining whether the speech created a significant fear of a substantial disruption, such as J.S.'s initial concealment of her involvement with the parody when confronted by Principal McGonigle.

Third, the district court erroneously considered the School District's own actions in bringing the parody onto the school campus in calculating the effects of J.S.'s speech on the school, such as the *principal's* decision to ask an unnamed student to print the "M-Hoe" profile on her home computer and bring a copy of it to school, to view the profile from school, and to show it to other school officials. None of these actions, or the consequences thereof, are attributable to the acts of J.S. herself.

Finally, the district court's attempt to justify its decision by pointing to the fact that the website addresses the principal of the school, that its intended audience is students at the school, and that J.S. crafted the profile out of anger at the principal for punishment she had received for violating the dress code,

essentially gives school officials authority to censor students' out-of-school speech if that speech is about the school or its officials.[12]

However, the First Amendment does not permit a rule that turns on the personal outrage of a government official. *See Ashcroft v. Free Speech Coal.*, 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 206. Because school officials are more likely to punish students for speech that is critical of the school than speech that is complimentary, the district court's opinion opens the door to viewpoint discrimination. Worse, it disregards the fundamental concept that the First Amendment is intended to protect citizens most when they engage in speech that might outrage, upset, or offend public officials. Indeed, most recently in *Morse*, the majority opinion makes clear that school officials are not entitled to proscribe speech *in school* merely because they find the speech "offensive." Justice Roberts noted that the Court's *Fraser* decision could not be stretched to allow school officials to ban any kind of student speech that they may find "could fit under some definition of 'offensive.'" *Morse*, 127 S. Ct. at 2629.

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[12] Even the U.S. Court of Appeals for the Second Circuit, which has upheld school districts' punishment of students' out-of-school speech, requires, at a minimum, a showing that the speech caused disruption of the school. *See Doninger v. Niehoff,* 527 F.3d 41 (2d Cir. 2008); *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39 (2d Cir. 2007).

In this case, the district court should have acknowledged J.S.'s right to be free from school discipline for her out-of-school speech. Failing that, it should have applied the *Tinker* standard to see if the speech either caused, or threatened to cause, a substantial disruption to school operations. Instead, the district court traveled far beyond any other court in holding that *Fraser* may be applied to out-of-school speech that has a "connection" with the school.

Unless reversed, the decision below will work a profound change in the rights of minors who happen to be public school students, subjecting them to unbounded surveillance and retribution from school officials for "offensive" speech. That has never been and should not be the law.

B. BECAUSE IT IS NOT PROSCRIBABLE UNDER *FRASER* OR *TINKER*, J.S.'S SPEECH IS ENTITLED TO FIRST AMENDMENT PROTECTION

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

The district court distinguishes the speech at issue in this case from decisions by other courts that extended First Amendment protection to lewd and vulgar off-campus speech by saying that J.S.'s speech was more lewd and vulgar than the speech in those cases. This is not a proper distinguishing factor. Vulgar, lewd, and offensive speech — regardless of degree — is fully protected by the First Amendment, even when uttered by minors. *See Ashcroft*, 535 U.S. at 244;

Simon & Schuster, 502 U.S. at 118; *Johnson*, 491 U.S. at 414; *Saxe*, 240 F.3d at 206.

2. J.S.'s "M-Hoe" Profile Did Not Defame Principal McGonigle And Thus Remains Protected By The First Amendment

Blue Mountain has argued that the "M-Hoe" profile was defamatory and, therefore, not entitled to any First Amendment protection. The district court did not address this argument but, in the event it is raised here, it must be rejected outright.

J.S.'s portrayal of McGonigle as "M-Hoe," purports to be a profile posted by "M-Hoe" himself in which he claims to be a school principal living in Alabama and a hairy, expressionless, sex addict who has sexual relationships with students, a child who looks like a gorilla, and relishes his hobby of "being a tight ass." No one did or could conclude that this profile contained statements of fact about McGonigle. Even the most cursory review of the profile would lead the reader to the conclusion that it was either pure fiction or, in the event the reader recognized McGonigle's photograph, an attempt by someone other than McGonigle to make fun of him. The profile thus fails to meet the necessary prerequisite to any determination that the statements in the profile were defamatory – e.g., the publication of false statements of fact that are understood by third parties to be about the person claiming defamation. *See Hustler Magazine v. Falwell*, 485

U.S. 46, 48-49 (1988)(there could be no libel where there was no "*false* statement of fact . . . made with actual malice" in a Magazine's satirical and *faux* interview with Reverend Jerry Falwell in which he purportedly described a drunken incestuous rendezvous with his mother in an outhouse).

The record below established that no student, parent, school official or other person believed that McGonigle actually created the profile or that the statements in the profile were either facts or intended to be taken seriously. Each and every person who saw the profile recognized it as a parody J.S. testified that none of the students she spoke with took the statements in the profile literally. A194-195 (J.S. Dep.). No one ever asked McGonigle if the statements in the profile were true. A353 (McGonigle Dep.). No School District official thought, even for a second, that any statement in the profile was accurate – indeed, if they had, an investigation would have been required, given the suggestions in the profile that "M-Hoe" had sexual commerce with minors. A297-298, A300 (Romberger Dep.).[13] Consequently, the profile does not lose its protection under

[13] The Court's analysis of the MySpace parody should not be different because of a finding that the parody was not very funny or was profane. Admittedly, the profile constitutes the ramblings of a fourteen-year-old girl and contains silly sexual references that were offensive to Principal McGonigle. However, even parodies based on lewdness and scatological humor are entitled to protection. *Buttons v. Nat'l Broad. Co.,* 858 F. Supp. 1025, 1028 (C.D. Cal. 1994)("It is not for the court to evaluate the parody as to whether it went 'too far.' As long as it is recognizable to the average reader as a joke, it must be protected or [] parody [] must cease to exist."); s*ee also Burnett v. Twentieth Century Fox Film Corp.,* 491

the First Amendment because of its alleged defamatory nature.

3. J.S.'s "M-Hoe" Profile Was Not Illegal Harassment And Thus Remains Protected By The First Amendment

The district court found that J.S.'s speech was "vulgar, lewd, and potentially illegal." A15 (Opinion at 12). The court also stated that the speech could have been the basis for criminal harassment charges. A15 (Opinion at 12).

The district court is wrong on this point. J.S.'s Internet parody was clearly not criminal harassment under Pennsylvania law.

In Pennsylvania, criminal harassment requires that the actor either physically contact or threaten physical conduct with the victim (which did not occur here), that the actor follow the victim around in public places (which did not occur here) or that the actor undertake undefined repeated acts for no legitimate purpose (which did not occur here). 18 Pa. C.S.A. § 2709(a)(1)-(3). Pennsylvania also recognizes as a misdemeanor the offense of harassment by communication. 18 Pa. C.S.A. § 2709(c)(2). Again, however, J.S. could not be prosecuted for this misdemeanor offense. An actor commits harassment by communication if, with an

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F. Supp. 2d 962, 969 (C.D. Cal. 2007); *DuPuis v. City of Hamtramck*, 502 F. Supp. 2d 654, 658 (E.D. Mich. 2007)("If an illustration is not 'reasonably believable' and is clearly exaggerated to enhance the humor or contribute to the parody, there is no defamation.")(citation omitted).

intent to harass another, the actor communicates to or about such other person any "lewd, lascivious, threatening or obscene words, language, drawings or caricatures" or "communicates repeatedly in an anonymous manner [or] at extremely inconvenient hours." 18 Pa. C.S.A. § 2709(a)(4)-(6). Assuming that the harassment by communication statute could constitutionally be applied here to J.S.'s conduct, the discovery record is clear that J.S. did not write her parody with any intent to harass Principal McGonigle. To the contrary, J.S. had no intent that McGonigle see, read or be harassed by the parody.

This Court has established that "there is no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive . . ." *Saxe*, 240 F.3d at 206; *accord Sypniewski*, 307 F.3d at 264-65. While Principal McGonigle may have been offended by J.S.'s "M-Hoe" profile, J.S. could not have been successfully prosecuted for her speech.

III. THE DISTRICT COURT ERRED IN RULING THAT THE SCHOOL DISTRICT DID NOT VIOLATE THE SNYDER PARENTS' DUE PROCESS RIGHTS OR ACT OUTSIDE ITS STATUTORY AUTHORITY

The School District's punishment of J.S. for her conduct in the Snyder family home after school hours — when J.S. was not under the supervision of the School District — not only violated J.S.'s First Amendment rights, but also violated her parents' Fourteenth Amendment Substantive Due Process right to

direct the upbringing of their child free from government intervention. It also went well beyond the School District's statutory authority over student conduct. The district court's decision to the contrary should be reversed and summary judgment entered for Appellants on both claims.

A. THE SNYDERS HAVE A CONSTITUTIONAL RIGHT TO RAISE THEIR CHILDREN WITHOUT GOVERNMENT INTERFERENCE

The United States Supreme Court has consistently affirmed the fundamental rights of parents under the Fourteenth Amendment's Due Process Clause to direct the upbringing of their children free from government intervention. As the Court most recently explained, the right to direct the raising of one's children is "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *accord Gruenke v. Seip*, 225 F.3d 290, 303 (3d Cir. 2000); *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.") (citations and internal quotations omitted).[14] The state may interfere with those rights only upon

[14] *See also Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) (the due process "liberty" includes the right of parents to "establish a home and bring up children" and "to control the education of their own"); *Pierce v. Soc'y of the Sisters of the Holy Name of Jesus and Mary*, 268 U.S. 510, 534-35 (1925) (parents have the right "to direct the upbringing and education of children under their control"); *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1051 (2d Cir.

a showing of a compelling state interest, which, plainly, has not been made in this case.

The School District's authority over J.S. and her speech was 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." *Gruenke*, 225 F.3d at 304 (emphasis added) (internal quotations omitted). Moreover, even when a school is permitted to act *in loco parentis*, it is only "*[d]uring this custodial time*, in order to maintain order and the proper educational atmosphere, at times, [that school] authorities 'may impose standards of conduct that differ from those approved of by some parents.'" *Anspach*, 503 F.3d at 265-66 (quoting *Gruenke*, 225 F.3d at 304) (emphasis added).

The district court accordingly erred in its finding that, as long as the School District's discipline did not offend J.S.'s First Amendment rights, it could not have violated Terry and Steven Snyder's parental rights. A22 (Opinion). J.S.'s First Amendment free-speech rights and her parents' due process rights are separate and independent constitutional rights and the School District's actions

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1979) (". . . 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.").

could, and did, give rise to two separate and independent constitutional violations. As in *Anspach* and *Gruenke*, those rights must also be afforded separate and independent analysis. *Anspach*, 503 F.3d 256; *Gruenke*, 225 F.3d 290.

The School District investigated, and then punished, J.S. for conduct that occurred in her parents' home, using her parents' computer, and during the weekend hours when she was not in school. However, the Snyders' right to make decisions regarding the discipline of their children, including their moral education, is at its zenith in the home, regardless of whether the School District simultaneously violated J.S.'s First Amendment rights.

The decision of when, whether, how, and why to punish J.S. for her MySpace parody, therefore, rested entirely with her parents. The School District's decision to inject itself into the home, and to decide that the Snyders' daughter needed to be disciplined for conduct she engaged in while in their home, is a clear violation of the Snyders' due process rights that cannot (and has not) been justified by any countervailing state interest. To be sure, no such interest arises because J.S.'s parody targeted a school administrator, upset school administrators, was conduct that would cause most adults to punish their teenage daughters or conduct that caused the Snyders' themselves to punish their daughter.

Unquestionably, Principal McGonigle acted to punish J.S. because he was deeply upset by the profile and its content. He considered filing suit against

J.S. and her parents; he contacted the state and local police; he gave J.S. a harsh, ten day suspension and then punished the girls who, by decorating her locker upon her return to Blue Mountain Middle School, welcomed her back too exuberantly.

While McGonigle's temptation to use the power of his office to respond to J.S.'s insult might be understandable, it is a form of government punishment forbidden under our Constitution. Likewise, while McGonigle's temptation to use the power of his office to reach into the Snyder home and ensure that their daughter was properly punished for her conduct might be understandable, it is equally forbidden under our Constitution. Neither J.S.'s rights under the First Amendment or the Snyders' due process rights as parents can rise or fall on the personal reaction of a school official. Indeed, limiting the power of government officials when dealing with other citizens is probably the most important purpose of the Bill of Rights.

This is not to say that the School District and McGonigle were without recourse – it is only to say that their recourse here was the same as the recourse of any citizen upset at a parody about them written by another. The School District (and McGonigle) could, and did, express their disappointment to J.S. They could, and did, report it to her parents. They could and did, expect the Snyders to deal, as parents, with J.S.'s conduct. A340 (McGonigle Dep.).

McGonigle could, and did, explore his rights as a private citizen under Pennsylvania's criminal or civil laws against J.S. for her conduct.

What the School District could not do was usurp the Snyders' parental authority and punish J.S. for speech that occurred in the family home, especially when that speech caused no material and substantial disruption to the school. The district court's decision should be reversed and summary judgment granted for the Snyders on their Fourteenth Amendment Substantive Due Process claim.

B. PENNSYLVANIA LAW PERMITS THE SCHOOL DISTRICT TO DISCIPLINE STUDENTS ONLY FOR THEIR IN-SCHOOL SPEECH

Pennsylvania law strictly limits the authority of schools to discipline student conduct. Indeed, Pennsylvania law makes clear that J.S.'s in-home conduct and any discipline relating thereto was a matter to be addressed by her parents.

Under Pennsylvania law, the School District may:

> adopt and enforce such reasonable rules and regulations . . . 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.*

24 P.S. § 5-510 (emphasis added). Pennsylvania's Commonwealth Court has interpreted this provision to prohibit the School District from punishing students for any conduct – even criminal conduct – occurring outside of school hours.

D.O.F. v. Lewisburg Area Sch. Dist. Bd. of Sch. Dirs., 868 A.2d 28, 35-36 (Pa. Commw. Ct. 2005); *see also Hoke v. Elizabethtown Area Sch. Dist.*, 833 A.2d 304, 310-11 (Pa. Commw. Ct. 2003), *appeal denied*, 847 A.2d 59 (Pa. 2004) (considering 24 P.S. § 5-510 in concluding that School District could not punish student for acts committed while not enrolled in the School District).

In *D.O.F.*, for example, the Commonwealth Court determined that a school could not expel a student caught smoking marijuana on school property ninety minutes after a school concert. *Id.* at 30-31. Applying 24 P.S. § 5-510, the court found that, even though the student was on school property, the concert had long ended and he was not under school supervision at the time of the incident. *Id.* at 35-36. Accordingly, he could not be punished.

J.S., like the student in *D.O.F.*, was not under the supervision of the school district when she created the "M-Hoe" MySpace page. In fact, the conduct punished here by the School District was even more removed from school than the marijuana smoking at issue in *D.O.F.* J.S. was at home, on a family computer, on a Sunday. In *D.O.F.,* a student was discovered smoking marijuana on school grounds after he attended a school sponsored event. If state law prohibited *D.O.F.*'s punishment, it plainly would bar the School District here from punishing J.S. for her off-campus speech, regardless of whether the School District's conduct is independently offensive under the First Amendment.

IV. THE DISTRICT COURT ERRED IN RULING THAT THE SCHOOL DISTRICT'S DISCIPLINE AND COMPUTER USE POLICIES ARE NOT UNCONSTITUTIONALLY OVERBROAD AND VAGUE

The district court erred in finding that, because it had concluded that the School District's discipline did not violate the First Amendment, the District's policies could not be vague or overbroad. A21 (Opinion). Here, again, the rights involved are distinct and there is no logic, much less authority, for the conclusion that school districts may sanction children using unconstitutionally overbroad and vague policies, as long as the sanction does not violate First Amendment rights.

An overbroad statute is "one that is designed to punish activities that are not constitutionally protected, but which prohibits [a substantial amount of constitutionally] protected activities as well." *Killion*, 136 F. Supp. 2d at 458 (citing *City of Houston v. Hill*, 482 U.S. 451, 458 (1987)). Under the 'void for vagueness' doctrine, "a government regulation must be declared void if it fails to give a person adequate warning that his conduct is prohibited or if it fails to set out adequate standards to prevent arbitrary and discriminatory enforcement." *Id.* at 459 (citing *Chicago v. Morales*, 527 U.S. 41, 56 (1999) and *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). The factual record in this case shows that the School District's regulations and policies used to punish J.S. here run afoul of both doctrines.

The School District argued below that neither the Blue Mountain Student/Parent Handbook ("Handbook") nor the Acceptable Use Of the Computers, Network, Internet, Electronic Communications System and Information Policy ("AUP") is unconstitutionally overbroad or vague because that Handbook states that "maintenance of order applies during those times when students are under the direct control and supervision of the school district officials," thus providing sufficient geographic limitations to the reach of the policy and adequate notice to students of prohibited conduct. A58 (Blue Mountain Middle School Student-Parent Handbook, dated 2006-2007). However, the actions of the School District in punishing J.S. for her creation of the MySpace profile when she was not under the "direct control and supervision" of school officials demonstrate the vagueness of the School District's policy and its impermissible overbreadth in allowing the sweeping in of constitutionally protected out-of-school speech.

Moreover, the testimony of McGonigle and Superintendant Romberger further underscore the overbreadth and vagueness of the policies. McGonigle testified that he believes the School's discipline code permits him to punish *any* off-campus student speech that is reported or even discussed at school

by other students.[15] A329 (McGonigle Dep.). Romberger also indicated that she believes the AUP governs what students may do from their home computers. A308-309 (Romberger Dep.). Accordingly, the Handbook language limiting School District authority over children to occasions when children are under their custody and control, cannot be said to, and in fact does not, limit the scope of the policies, which are, empirically, overbroad.[16]

The fact is that neither the Handbook nor the AUP contains limiting language (1) confining the policy to school grounds and school-related activities,

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[15] McGonigle testified that he could have disciplined J.S. under the school's disciplinary code if she had made the same statements as appeared on the MySpace profile to a crowd at a professional baseball game. A329 (McGonigle Dep.). McGonigle further testified that if the newspaper reported that a student said those things in a public park and someone saw the newspaper at school, then the school could discipline her. A329 (McGonigle Dep.).

[16] In *Flaherty v. Keystone Oaks School District*, 247 F. Supp. 2d 698, 702 (W.D. Pa. 2003), and *Killion*, 136 F. Supp. 2d at 459, the U.S. District Court for the Western District of Pennsylvania struck down school policies as unconstitutionally overbroad and vague where the policies failed to contain limiting language confining the policy to school grounds or school related activities. In *Flaherty*, the court struck down school policies that "allow[ed] for punishment of speech that school officials deem to be 'inappropriate, harassing, offensive or abusive' without defining those terms or limiting them in relation to geographic boundaries (at school or school sponsored events)." *Flaherty,* 247 F. Supp. 2d at 702. Likewise in *Killion*, the court held facially unconstitutional a policy that prohibited "verbal/written abuse of a staff member" because there was no geographic limitation to the policy and it could be interpreted to prohibit protected speech." *Killion*, 136 F. Supp. 2d at 459; *cf. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 605 (W.D. Pa. 2007)(finding sufficient "geographic limitation" to the school's disciplinary code not found in *Flaherty* or *Killion*).

or (2) confining punishment to speech creating a substantial and material disruption in violation of *Tinker*. The Handbook and the AUP fail to distinguish between out-of-school speech and in-school expression. Because they were applied to punish J.S. for non-disruptive, out-of-school speech, the Blue Mountain Handbook and the AUP should be declared unconstitutionally overbroad and vague on their face.

The district court's grant of the School District's motion for summary judgment on the issue of the validity of the policies should be reversed and summary judgment entered for Appellants on that claim.

CONCLUSION

For all of the foregoing reasons, the district court's judgment for the School District on Appellants' First Amendment free-speech claim, their First Amendment overbreadth and vagueness claim, their Fourteenth Amendment Substantive Due Process claim, and their claim under Pennsylvania state law should be reversed and the district court should be directed to enter judgment on all counts for Appellants.

/s/ Mary Catherine Roper

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CERTIFICATES

Mary E. Kohart, one of the attorneys for Appellants, hereby certifies that:

1. I caused two true and correct copies of the foregoing Brief of Appellants to be served upon the following counsel of record this 19th day of February, 2009, by UPS Next Day Air: Jonathan P. Riba, Esquire, Sweet, Stevens, Katz & Williams LLP, 331 Butler Avenue, P.O. Box 5069, New Britain, PA 18901.

2. The Brief of Appellants was filed with the Court by hand delivery on February 19, 2009, 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 10,247 words, excluding the Cover Page, Table of Contents, Table of Authorities, and the Certifications.

5. The printed Brief of 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 Brief of Appellants filed with the Court was virus checked using Symantec Endpoint Protection, version 11.0.3001.2224 on February 19, 2009, and was found to have no viruses.

/s/ Mary E. Kohart
Mary E. Kohart