IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 07-4465 AND 07-4555

JUSTIN LAYSHOCK, a minor, by and through his parents; DONALD LAYSHOCK; CHERYL LAYSHOCK, individually and on behalf of their son,

Appellee/Cross-Appellant,

v.

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

Appellant/Cross-Appellee.

BRIEF OF APPELLANT/CROSS-APPELLEE

Appeal from the judgment and the Order of the United States District Court for the Western District of Pennsylvania dated November 14, 2007 at Docket No. 06-cv-00116

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STATEMENT OF SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION

This is an appeal from a final Order and Judgment in the United States District Court for the Western District of Pennsylvania. The case involves claims of violations of the First Amendment and due process rights under the Fourteenth Amendment of the Constitution.

A claim was also presented concerning whether the Hermitage School District's policies were unconstitutionally vague and/or overbroad. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. §1331(a) and §1343(a)(3) and (4). This Court has jurisdiction pursuant to 28 U.S.C. §1291. The Notice of Appeal was filed within 30 days of the District Court's Order as provided by F.R.A.P. 4(a)(1).

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF JUSTIN LAYSHOCK CONCERNING HIS FIRST AMENDMENT CLAIM?

STATEMENT OF THE CASE

The present case involves allegations of violations of the First Amendment of the Constitution and the due process clause of the Fourteenth Amendment of the Constitution. There were also allegations the School District's policies were unconstitutionally vague and/or overbroad. Following extensive discovery, the

District Court granted the School District's Motion for Summary Judgment in part on July 10, 2007, dismissing the Layshock's claims for an alleged violation of due process rights under the Fourteenth Amendment of the Constitution as well as their claim that the School District's policies were unconstitutionally vague and/or overbroad. The District Court also granted Justin Layshock's Motion for Summary Judgment in part, finding a violation of the First Amendment.

On or around November 13, 2007, the parties filed a Motion to Stipulate to Damages and requested the entry of a final judgment. On November 14th, the District Court entered a consent judgment. The School District filed this timely appeal.

STATEMENT OF THE FACTS

In December of 2005, Justin Layshock, a high school student in the School District, went onto the School District's web site and misappropriated a picture of High School Principal Eric Trosch ("Trosch") (A.181-A.182). He then created an unauthorized profile of Trosch on an internet web site called "MySpace.com."

MySpace.com is "a web site where you make a profile of yourself. You can put pictures on it and your interests, just little, like, things about yourself." (A.179). The profile was created to appear to be created by and about Trosch.

(A.185).[1] At the time he created the profile, Justin sent the profile to some School District students by adding "friends" to the profile. (A.224-A.225).

Myspace.com was popular with students in the School District. (A.179). This is not surprising: MySpace.com is the most visited web site in the United States. Doe, 474 F.Supp.2d at 845. According to Justin, "students use it to exchange messages and network and things like that." Justin was no stranger to the web site or its popularity – his own profile was on MySpace.com. (A.180).

The Trosch profile is vulgar, libelous, and plainly offensive. Under a section entitled "tell me about yourself – the survey," Justin provided the following answers for Trosch:

> Birthday: too drunk to remember
>
> Are you a health freak: big steroid freak
>
> In the past month have you smoked: big blunt[2]
>
> In the past month have you been on drugs: big pills
>
> In the past month have you gone Skinny Dipping: big lake, not big dick
>
> In the past month have you Stolen Anything: big keg

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[1] "MySpace.com is a 'social networking web site' that allows its members to create online 'profiles,' which are individual web pages on which members post photographs, videos, and information about their lives and interests. The idea of online social networking is that members will use their online profiles to become part of an online community of people with common interests." Doe v. MySpace, Inc., 474 F.Supp.2d 843, 845-846 (W.D. Tex. 2007).

[2] Justin explained that a "blunt" was a marijuana cigarette. (A.184).

Ever been Drunk: big number of times

Ever been called a Tease: big whore

Ever been Beaten up: big fag

Ever Shoplifted: big bag of kmart

Number of Drugs I have taken: big

(A.323-A.326). Under Trosch's Interests, Justin lists "Transgender, Appreciators of Alcoholic Beverages." Under his schools, Justin lists "Steroids International" as a club. (A.323-A.326).

Trosch became aware of a first MySpace profile of himself on or around December 10th. (A.232-A.235).[3] On December 12th, he told Co-Principal Chris Gill and Superintendent Karen Ionta about the profile. (A.236-A.238). Technical Director Frank Gingras disabled the web site with Trosch. (A.258-A.259). He also attempted to block the MySpace web site on school computers. (A.189).

Gingras's attempt to block the web site proved fruitless. Students found other ways to access the web site. (A.189-A.191). On December 15th, five teachers informed Gill about conversations in their classrooms concerning profiles. (A.264-A.265). He also spoke with five students about MySpace. (A.266-A.267). Students were viewing the profiles in class prior to December 16th – teacher Craig Antush saw students viewing and talking about a Trosch web site and told them to

[3] He would later become aware that more than one unauthorized Trosch profile was created. (A.239, A.241).

"shut it down." (A.306). On the 15th, Antush threatened to shut down the computer lab "because the temptation to view the profile remained strong." (A.361).

Justin was among the students that viewed his profile of Trosch on December 15th. (A.185; A.213-A.215; A.353; A.355). In fact, he may have told other students to view his Trosch profile. (A.215).

Trosch became aware of the additional profiles on the 15th. (A.239, A.241). His daughter, a student in the District, had come home and told her mother that students at school had asked her if she had seen the profile. (A.239-A.240). Trosch identified Justin's profile as one of the profiles he first saw on the 15th. (A.241).

Not surprisingly, Trosch felt degraded, demeaned, demoralized and shocked when he saw the profile created by Justin. (A.242). During the evening of the 15th, Trosch telephoned Ionta to inform her about the profiles. (A.243-A.245).

On the morning of December 16th, Trosch attempted to meet with teachers in the high school before classes commenced to talk about the forged profiles. (A.246-A.249). When he was overcome with emotion and could not continue, Gill entered the meeting and spoke with the teachers. (A.246-A.249; A.268-A.272). Gill explained that the school had been experiencing some disruption and that students had been sent to him regarding the same. He asked the teachers to notify

him regarding any conversations about the profiles but instructed them to refrain from discussing the profiles with the students. (A.274).

Gill spent most of the morning of December 16th dealing with students that were sent to his office because of making conversations, jokes or disruptions in class relating to the profiles. (A.208; A.275-A.276). He also talked to ten teachers. (A.277-A.278). Among the students reviewing the profile at the school during school time on December 16th was Justin. (A.186-A.188; A.194-A.205; A.216-A.218).

Gill and Trosch then spoke with Gingras by phone about shutting down the computers. (A.260-A.261; A.280-A.281). Because shutting down the computers was not feasible, an e-mail was sent to teachers, asking them to restrict the computers in their rooms and monitor usage very closely. (A.281-A.282). Gingras had already spent 25 percent of his time – conservatively – trying to resolve the access issue. (A.191). This took Gingras away from several other important duties during that time period. (A.191-A.192; A.289). This was a time when administrators needed to focus on the School District's budget, professional development, and teacher observations. In all, the School District was required to invest money and a significant amount of time. (A.290-A.291).

Computer access was limited from December 16th through December 21st, which was the last day of school before Christmas break. (A.193). This caused

the cancellation of computer programming classes as well as usage of computers for research for class projects. Labs were also shut down. (A.192-A.193).

On December 21st, Gill and Ionta met with Justin and his mother, Cheryl Layshock. (A.283-A.284; A.293-A.294).[4] A student had told Gill that Justin admitted to making the Trosch profile. (A.293). The School District's solicitor joined the meeting in progress. (A.285). Justin admitted that he had created a profile. (A.284; A.294-A.295;A.297-A.299). He also admitted to accessing the profile at school. (A.295; A.298). The meeting concluded with the Superintendent informing the Layshocks that the School District would take some time to "sort things out" over the winter break and would be back in touch near the end of the break. (A.286; A.295-A.296).

On January 3rd, Gill contacted Justin's mother about scheduling an informal hearing. (A.296). On January 6th, Donald Layshock (Justin's father), Cheryl, and Justin attended an informal hearing with Ionta and Gill. In a letter dated the same date, the Layshocks were informed that Justin would receive a ten-day out of school suspension and would be placed in the Alternative Education Program upon his return to the high school. (A.328). Justin had violated the District Discipline Code: disruption of the normal school process; disrespect; harassment of a school administrator via computer/internet with remarks that have demeaning

[4] Because Trosch was the victim, he was not involved with the discipline of Justin. (A.253).

implications; gross misbehavior; obscene, vulgar and profane language; and, computer policy violation (use of school pictures without authorization). (A.328).

The discipline was not detrimental to Justin's educational future: he received an academic scholarship to St. John's University. (A.440).

STATEMENT OF RELATED CASES AND PROCEEDINGS

A cross-appeal filed by the Layshocks at Docket No. 07-4555 is also currently before this Court.

STATEMENT OF THE STANDARD OF REVIEW

The standard of review of an order granting summary judgment is plenary, and this Court applies the same test the District Court applies. Olson v. General Electric Astrospace, 101 F.3d 947, 951 (3d Cir. 1996). Summary judgment may be granted if, drawing all inferences in favor of the non-moving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material facts and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

SUMMARY OF THE ARGUMENT

The District Court erred in granting Justin's Motion for Summary Judgment and finding a violation of the First Amendment. The School District did not violate the First Amendment by punishing Justin for engaging in vulgar, defamatory and plainly offensive school-related speech. The vulgar speech is not

protected by the First Amendment.

A sufficient nexus exists between Justin's creation and distribution of the vulgar and defamatory profile of Prinicpal Trosch and the School District to permit the School District to regulate this conduct. The "speech" initially began on-campus: Justin entered school property, the School District web site, and misappropriated a picture of the Principal. The "speech" was aimed at the School District community and the Principal and was accessed on campus by Justin. It was reasonably foreseeable that the profile would come to the attention of the School District and the Principal.

Additionally, the School District did not violate the First Amendment by disciplining Justin because his action violated established school policy by promoting illegal drug use, harassment of a school administrator via computer/internet and use of school pictures without authorization.

Alternatively, the School District did not violate the First Amendment by punishing Justin because his "speech" was not protected. The "speech" constituted slander *per se* and imputed to the principal a criminal offense and matters incompatible to his profession. Finally, the School District did not violate the First Amendment because the student was not deprived of a constitutional right: his lewd, vulgar and plainly offensive speech was not protected by the First Amendment.

ARGUMENT

I. The District Court erred in granting Justin's Motion for Summary Judgment and finding a violation of the First Amendment.

A. The School District did not violate the First Amendment by punishing Justin for engaging in conduct which interfered with the School District's "highly appropriate function . . . to prohibit the use of vulgar and offensive terms in public discourse."

In Morse v. Frederick, ___ U.S. ___, ___, 127 S.Ct. 2618, 2626-2627 (2007), the United States Supreme Court reiterated that the First Amendment permits school districts to regulate lewd, vulgar and plainly offensive school-related speech. In doing so, the Court in Morse reviewed two seminal school speech cases: Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) and Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

"Fraser established that the mode of analysis set forth in Tinker is not absolute." Morse, 127 S.Ct. at 2627. While Tinker is applicable to political speech, Fraser remains applicable to vulgar, lewd and obscene speech. There is "no First Amendment protection for 'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech in schools." Saxe v. State College Area School Dist., 240 F.3d 200, 213 (3d Cir. 2001).[5] A school district may punish a student for speech which

[5] This make sense as the prevention and punishment of lewd, profane, obscene, libelous, and insulting utterances have "never been thought to raise any Constitutional problem." Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571-572 (1942). "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social

interferes with the school's "highly appropriate function . . . to prohibit the use of vulgar and offensive terms in public discourse." Fraser, 478 U.S. at 683.

The School District is charged with the responsibility of protecting minors from vulgar language and imparting upon students lessons of civilized behavior. The basis for this responsibility being thrust on schools is clear. "Public education must prepare pupils for citizenship in the Republic . . . [i]t must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation". Fraser, 478 U.S. at 681 (citations omitted). Hence, "[s]chools are not prevented by the First Amendment from encouraging fundamental values of habits and manners of civility by insisting that certain modes of expression are inappropriate and subject to sanctions." Sypniewski v. Warren Hills Regional Bd. of Educ, 307 F.3d 243, 254 (3d Cir. 2002)(citations and quotation marks omitted).

Review of the facts reveals that Fraser is controlling: this is a case involving lewd, vulgar and plainly offensive school-related speech. Justin's "speech" – his unauthorized MySpace profile of Principal Eric W. Trosch – is unquestionably vulgar, lewd, and plainly offensive. In response to a question about "skinny dipping," the profile indicates that Trosch wrote "big lake, not big

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interest in order and morality." Id. at 572. See also F.C.C. v. Pacifica Foundation, 328 U.S. 726, 746 (1978)(vulgar language); Garrison v. State of La., 379 U.S. 64, 75 (1964)(calculated falsehoods).

dick." This degrading description is vulgar and not protected by the First Amendment. See F.C.C. v. Pacifica Foundation, 328 U.S. at 732 (words that "depicted sexual and excretory activities in a patently offensive manner" constituted non-protected vulgar language). Unfortunately, the vulgarities and mean-spirited language does not end there. The profile also indicates Trosch wrote that he is "too drunk to remember," a "big steroid freak," a "big whore," and a "big fag." It also indicates he acknowledged using marijuana ("big blunt")[6], taking drugs ("big pills")[7], drinking alcohol in excess ("big number of times"), being promiscuous ("big whore") and engaging in theft (stolen – "big keg" and shoplifted – "big bag of kmart"). "Transgender, Appreciators of Alcoholic Beverages" are listed as the Principal's interests and "Steroids International" as one of his schools.

Moreover, this is not a Tinker–type cases that involves political speech. Justin creates the impression that the Principal wrote that he is an alcoholic, a steroid user, a drug user, sexually permissive, a homosexual (by way of a slur), and a person interested in transgender individuals. The profile does not contain a political message. Also, this "speech" is not an essential part of any exposition of ideas, and is of no social value as a step to the truth. Justin did not present any disapproval or critique of Trosch's performance as a Principal. The "speech" is

[6] Justin explained that a "blunt" was a marijuana cigarette. (A.184).
[7] Also, see number of drugs taken: big. (A.323-A.326).

mean-spirited and defamatory, let alone vulgar and plainly offensive, and not protected by the First Amendment.[8] "Resort to epithets for personal abuse is not in any proper sense communication of information or opinions safeguarded by the Constitution . . . ." Beauharnais v. People of State of Ill., 343 U.S. 250, 257 (1952)(citation omitted).

The District Court erred in failing to find a sufficient nexus between the creation and distribution of the profile and the school community to conclude that the School District's regulation of Justin's conduct did not run afoul of the First Amendment. Despite acknowledging "the test for school authority is not geographical," the District Court ignored the proliferation and prevalence of the internet and erroneously applied a strict territorial approach to the School District's ability to regulate student conduct.[9]

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[8] The language used by Justin was actually far more vulgar than the language used by the student in Fraser. In Fraser, the student made remarks that a fellow student candidate was "firm in his pants" and would "go to the very end-even climax." Fraser, 478 U.S. at 687 (Blackmun, J, concurring). Justin's characterization of Trosch is far more vulgar and humiliating. He indicates that the Principal wrote that he has a "not big dick" and is a "big steroid freak," a "big whore," a "big fag," a shoplifter, and sexually promiscuous. Moreover, the speech in Fraser arguably involved a political viewpoint – it involved a speech nominating a student for a student elective office. Fraser, 478 U.S. at 676. Justin's statements were not made pursuant to a political view or public discourse.

[9] School districts have always had to address student conduct whose genesis was outside of the school campus. In Shaw v. Corry Area School District, No. 10795-95, School Law Information Exchange, Vol. 32, No. 95 (C.C.P. Erie Co. 1995), (See Appendix at A.964-A.967) for example, the Erie County Court of Common Pleas upheld a school board's expulsion of several students for throwing eggs at a

Initially, it is important to recognize that the "speech" actually began on-campus: Justin entered School District property, the School District's web site, and misappropriated a picture of Principal Trosch. He then used the picture and created an unauthorized MySpace profile of Trosch. This unquestionably constituted a violation of the School District's computer policy – use of school pictures without authorization.[10] Justin sent the profile to School District students at the time of the profile's creation, accessed the profile at school at least twice, and may have told other students (while in school) to view the profile.

Other courts have acknowledged the impact of off-site internet use directed about and/or towards the school community and have found sufficient nexus under

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teacher's house outside of the normal school hours. "What is determinative is whether the School District vandalism policy as applied is reasonably related to the school's mission to foster an atmosphere conducive to learning." Id. at 3. See also Giles v. Brookville Area School District, 669 A.2d 1070 (Pa. Cmwlth. 1995), *appeal denied*, 544 Pa. 686, 679 A.2d 231 (1996) (wherein the Commonwealth Court of Pennsylvania upheld a student's expulsion from school for selling drugs even though the actual transfer of drugs and money occurred off the school grounds).

[10] Ultimately, any inquiry about whether Justin was authorized to take the picture from the web site is irrelevant with regard to determining whether his initial conduct occurred on-campus. Visiting the web site and removing the picture from the web site constituted on-campus behavior, regardless of whether he was authorized to remove the picture or not. A school web site is now as much a part of a campus as is an elementary school building. School districts commonly provide policies, class assignments and even grades on-line. Detailed information concerning administrators and other personnel is often provided. Many students attend school on-line. The modern school house encompasses the school web site. To find otherwise is to ignore the technological advancement of the educational process.

similar circumstances. In J.S. v. Bethlehem Area School District, 569 Pa. 638, 807 A.2d 847 (2002), an eighth grade student created a web site on his home computer and posted it on the internet. The web site, entitled "Teacher Sux," consisted of a number of web pages that made derogatory, profane, offensive, and threatening comments, primarily about the student's algebra teacher and the middle school principal. 569 Pa. at 643. The school informed the student's parents that it intended to suspend the student for three days. Id. at 647. J.S. then filed a First Amendment action.

The Pennsylvania Supreme Court rejected the student's First Amendment challenge in J.S. The J.S. Court found "a sufficient nexus between the web site and the school campus to consider the speech occurring on-campus." Id. at 667. The Court noted that the student: (1) accessed the web site on a school computer in a classroom, showing the site to another student and informing other students at school of the existence of the web site; (2) aimed the web site not at a random audience but a specific audience of students and others connected with the school; and, (3) made a school principal and a teacher the subjects of the site. "Thus, it was inevitable that the contents of the web site would pass from students to teachers, inspiring circulation of the web page on school property." Hence, the Court in J.S. concluded "where speech that is aimed at a specific school and/or its

personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech." Id. at 668.

In Wisniewski v. Board of Educ. of Weedsport Cent. School Dist., 494 F.3d 34 (2d Cir. 2007), the United States Court of Appeals for the Second Circuit undertook a similar analysis, also taking into account today's technological advances in relation to student communications directed to the school community. In Wisniewski, a student created an instant messaging ("IM") icon on his home computer. The icon suggested that a named teacher at the school should be shot and killed. He shared his icon with fifteen of his friends, including fellow classmates. The student was suspended by the school district and brought a First Amendment challenge to the discipline. Id. at 39-40.

In finding that the discipline did not violate the First Amendment, the Court in Wisniewski explained that "[t]he fact that [the student's] creation and transmission of the IM icon occurred away from the school property does not necessarily insulate him from school discipline." Id. at 39-40. The Court in Wisniewski held "it was reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot . . . [a]nd there could be no doubt that the icon, once made known to the

teacher and other school officials, would foreseeably create a risk of substantial disruption in the classroom." Id.[11]

There is actually a stronger nexus between Justin's conduct and the School District than was present in the J.S. case or the Wisniewski case. Justin, unlike the other students, initiated his "speech" by going onto school property and misappropriating a picture of Trosch. Like the student in J.S., he aimed the web site not at a random audience but at a specific audience of students, accessed the web site on a school computer in a classroom, and made a principal the subject of the site. Like the student in Wisniewski, Justin shared the profile with students of the School District at the time of its creation. (He also may have done so during school). Thus, as was the case in J.S., it was inevitable that the contents of the web site would pass from students to teachers. Moreover, as in Wisniewski, it was

[11] At least one federal district court has already recognized that a student's use of the internet at home can create on-campus speech and has applied the teachings of Wisniewski to a Fraser-type (vulgar and offensive speech) case. In Donninger v. Niehoff, 514 F.Supp.2d 199, 216 (D.Conn. 2007), the United States District Court for Connecticut found that a school district's discipline of a student for the creation of a blog entry at home did not violate the First Amendment. The blog entry was written by the student concerning a principal's actions (or non-actions) regarding the scheduling of an on-campus rock concert. In doing so, she referred to school administrators as "douchebags." The student was barred from running for class office as discipline for writing the offensive blog. Relying on the Second Circuit Court of Appeals decision in Wisniewski, the Donninger court found that the student's blog entry could be considered on-campus speech. 514 F.Supp.2d at 217.

reasonably foreseeable that the profile would come to the attention of school officials.[12]

Both the Pennsylvania Supreme Court in J.S. and the Second Circuit Court of Appeals in Wisniewski correctly concluded that a school district can regulate student conduct in situations wherein a student utilizes the instantaneous and global reach of the internet to direct "speech" to a school district community. The advent, growth and popularity of the internet have blurred what once was a bright line distinction between on-campus and off-campus behavior applicable at the time of the Tinker decision (1969) and the Fraser (1986) decision. A student can now use the internet from home to direct communications to the school community in a

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[12] A review of the facts of Morse reveals that the Supreme Court is not mired in a geographical or territorial approach for determining whether a school can regulate student conduct. In Morse, students were released from school so that they could watch an Olympic torch pass through town on its way to the winter games in Salt Lake City. Frederick v. Morse, 439 F.3d 1114, 1115 (7th Cir. 2006). Frederick, a senior at the school district high school, never attended school on that date, but made it to the sidewalk across from the school where the torch would pass by. Id. He and some friends waited until television cameras were present to unfurl a banner that read "Bong Hits 4 Jesus." Id. The school district Principal (Morse) then crossed the street to take the banner and suspended Frederick for a week. Id. Subsequently, Frederick claimed that this action violated his First Amendment rights.

The Supreme Court in Morse rejected the student's contention that this was not a school speech case because he had not attended school on the date of the central event. While acknowledging that there "is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents," the Court found on campus school speech precedents applicable in Morse. Morse, 127 S.Ct. at 2624. Such is also the case here.

more efficient manner. As noted by Justin, "students use [MySpace] to exchange messages and network and things like that." Unfortunately, the potential damage inflicted by the internet speech is substantially magnified, as the speech is open to a global audience beyond the school community and available for a longer, possibly permanent, duration.

The internet is both a regular mode of communication for students and a relied upon source for school related information for students. Students can instantaneously reach more members of the school community and impact the school community, via the internet, than in any other fashion, such as engaging in conversations in school. As our Supreme Court acknowledged, the internet now allows anyone with a phone line to "become a town crier with a voice that resonates farther than it could from any soapbox." Reno v. ACLU, 521 U.S. 844, 870 (1997). Accordingly, it was foreseeable - actually inevitable - that the profile would come to the attention of School District officials and students and ultimately make its way on-campus. [13]

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[13] The absurdity of taking a strict territorial or geographical approach to determining whether a school district should be permitted to regulate student conduct is apparent when one considers the possible scenarios. For instance, a student could leave a school building and, in a building across the street, access the school's web site, take a copy of a picture of a principal, create a vulgar profile of the principal and send the profile by email - in one click - to more students and other members of the school community than would be possible if he tried to distribute a written copy of the profile in the school building. If such a student could engage in this behavior with impunity, the school district would

The United States Supreme Court has already acknowledged the impact of off-site internet use in a First Amendment case arising in the public employment context. In City of San Diego v. Roe, 543 U.S. 521, 522 (2004), the Supreme Court upheld the discharge of a police officer who used the internet at home to sell homemade videos of himself stripping off a generic police uniform and masturbating. While acknowledging that "the activity took place outside the workplace and purported to be about subjects not related to his employment," the Court in Roe nonetheless found that the employer demonstrated "legitimate and substantial interests of its own that were compromised by his speech," justifying the discharge. "Far from confining his activities to speech unrelated to his employment, Roe took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer." Id. at 524. Moreover, in attempting to balance the rights of the employee to comment upon matters of public concern and the interest of the public employer in promoting the efficiency of the pubic performance it serves through its employees, the Court in Roe found that the "speech" did not even qualify as a matter of public concern and merited no protection. Id. at 525-526.

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unquestionably be failing to "prepare pupils for citizenship in the Republic . . . and inculcat[e] the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." Fraser, 478 U.S. at 681 (citations omitted).

While Roe was decided under a different type of First Amendment analysis, review of the analysis and policy considerations underlying the decision reveals more reasons why this Court must also go beyond territorial or geographical limitations in the school setting. Just as the employee in Roe took deliberate steps to link his off-site internet activity to his public employer by using a police uniform (though not his official police uniform) and listing himself as in the field of law enforcement, Justin deliberately took steps to link his off-site internet activity to his school by using a picture of a high school Principal and creating a web site that was made to appear to be created by the Principal. Just as the "debased parody" of an officer performing indecent acts while in the course of his official duties in Roe brought the mission of the public employer and the professionalism of its officers into question, Justin's slanderous and "debased parody" of the Principal brought the mission of the School District and professionalism of School District administrators into question. Finally, just as the employee's on-line sale of the vulgar video in Roe was detrimental to the public employer, Justin's on-line presentation of the vulgar and unauthorized profile of Trosch was detrimental to the School District.

Consideration of the Supreme Court's analysis of the balancing of interests in Roe is also revealing. In finding that the employee did not meet the threshold test of demonstrating that his expression qualified as a matter of public concern

that merited First Amendment protection, the Supreme Court in Roe explained that the employee's activities did not concern "something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." Id. at 525-526. Justin's expression also does not concern something of legitimate news interest. As noted throughout this Brief, Justin's expression is of no redeeming value and void of any potential benefit to society: the expression is not an essential part of any exposition of ideas, and is of no social value as a step to the truth.

It is imperative that school districts have the authority to maintain an atmosphere that is conducive to learning. Had Principal Trosch created such a profile about Justin, the School District could have terminated him from employment without risk of violating the First Amendment under Roe. This makes sense; such an action would inherently involve the school community and would bring the mission and professionalism of the School District into question. The Principal's creation and distribution of such a profile to the school district community would run contrary to the school's mission of "encouraging fundamental values of habits and manners of civility by insisting that certain modes of expression are inappropriate and subject to sanctions." Sypnewski, supra. Failing to address the harassment of a member of the school community as well as the use of such language – by a student or an administrator - would be

detrimental to maintaining an atmosphere that is conductive to learning. "The punishment for lewd, vulgar and plainly offensive language, including the personal attacks . . . fit easily within Fraser's upholding of discipline for speech that undermines the basic function of a public school." J.S., 569 Pa. at 672.

An application of the teachings of the Supreme Court's decision in Morse also supports a determination that the School District's actions did not violate the First Amendment. In Morse, the Supreme Court found that a school principal did not violate the First Amendment by disciplining a student because the student's action "promoted illegal drug use - in violation of established school policy." Morse, 127 S.Ct. at 2629. Just as a student presenting a banner exclaiming "Bong Hits 4 Jesus" to a crowd of people (including students) on a day that he did not attend school promotes illegal drug use in violation of established school policy, the posting on the internet of an unauthorized profile of a high school Principal from home that indicates the Principal consumes marijuana, steroids, pills and alcohol in excess also promotes illegal drug use in violation of established school policy. Both were directed to the school community and neither merits First Amendment protection.

Justin also violated the School District's policies concerning disrespect, harassment, gross misbehavior and the use of vulgar language. The enforcement of these policies is imperative for the School District to "inculcate the habits and

manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation" and "prohibit the use of vulgar and offensive terms in public discourse." Fraser, 478 U.S. at 681 and 683. Hence, this violation undermined School District policies and promoted the disregard of the School District's mandate to inculcate the values of civility and good citizenship.

For all of the reasons outlined above, the School District did not violate the First Amendment by punishing Justin for "speech" that originated on campus and which interfered with the School District's "highly appropriate function . . . to prohibit the use of vulgar and offensive terms in public discourse." Fraser, 478 U.S. at 683.[14]

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[14] Review of other cases also supports the conclusion that Justin engaged in behavior that could be punishable by the School District. In M.T. v. Central York School District, 937 A.2d 538, 542-543 (Pa.Cmwlth.Ct. 2007), for instance, the Commonwealth Court of Pennsylvania upheld the expulsion of a student for a violation of the school district's computer use policy because he had helped another student in accessing sensitive and private information on a school district's computer system. The primary role of the student was cracking an encrypted code and supplying that information to another student who then disrupted service to the school district. Id. at 540. He also provided user names to the other student who used that information to enter non-student areas of the computer system.

While the M.T. decision did not involve a constitutional challenge, review of the case still reveals considerations that are also important here. The focus of the Commonwealth Court in M.T. was not on the location of the student when he cracked the encrypted code and provided the code and other information to another student. This makes sense – the student's presence on the school district's system constituted on-campus behavior, wherever he was at the time of the misbehavior.

B. Alternatively, the School District did not violate the First Amendment by punishing Justin because his defamatory speech was not protected by the First Amendment.

To establish a claim under Section 1983, Justin must allege that the School District, while acting under the color of law, deprived him of a right secured by the Constitution or the laws of the United States. West v. Atkins, 487 U.S. 42, 48 (1988). "[I]n any action under Section 1983, the first step is to identify the exact contours of the underlying right said to have been violated." County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1988). Section 1983 creates no substantive law: it merely provides a procedural "vehicle by which certain provisions of the Constitution and other federal laws may be judicially enforced." Felder v. Casey, 487 U.S. 131, 158 (1981).

The District Court erred in failing to dismiss Justin's Section 1983 claim: the claim was not viable because the student could not demonstration that he was deprived of the protection from a provision of the Constitution or other federal law. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problems." Beauharnais, 343 U.S. at 255-256. Defamation is one of these classes of speech. Id.

Such is also the case here. Not only did Justin create "speech" directed at the school district community, he initiated that speech while on-campus by misappropriating the Principal's picture.

Justin's speech constituted slander *per se* and merited no First Amendment protection. "Statements by a defendant imputing to the plaintiff a criminal offense, punishable by imprisonment or conduct incompatible with the plaintiff's business constitute slander *per se*." Brinich v. Jencka, 757 A.2d 388, 397 (Pa. Super. 2000)(citing to Restatement (Second) Torts §§570, 571 and 573). One who publishes a matter defamatory to another in such a manner as to make the publication a slander is subject to liability to the other although no special harm results if the publication imputes to the other: (a) a criminal offense; (b) a loathsome disease; (c) a matter incompatible with his business, trade, profession or office; or, (d) a serious sexual misconduct. Restatement (Second) of Torts, §570. See also Walker v. Grand Cent. Sanitation, Inc., 430 Pa. Super. 236, 242, 534 A.2d 237, 247 (1993)(slander *per se* is actionable without proof of special damage). Such is the case here.

1. The "speech" imputes to the Principal a criminal offense.

Justin's MySpace profile of Principal Trosch indicates that Trosch has used marijuana and drugs. It also indicates that he has engaged in theft. Section 571 of the Restatement (Second) of Torts provides that "[o]ne who publishes a slander that imputes to another conduct constituting criminal offenses is subject to liability to the other without proof of special harm that the offense imputed is of a type which, if committed in place of the publication, would be (a) punishable by

imprisonment in a state or federal institution or (b) regarded by public opinion as involving moral turpitude." Restatement (Second) Torts §571; Brinich, supra. The use of illegal drugs and theft are punishable by imprisonment in Pennsylvania. Moreover, both are regarded by public opinion as involving moral turpitude. The indication that the Principal is a "big whore" also implicates moral turpitude. Hence, Justin's speech is defamatory and not protected by the First Amendment.

2. The "speech" imputes to Principal Trosch a matter incompatible with his business, trade, profession, or office.

Section 573 of the Restatement (Second) of Torts provides that "[o]ne who publishes a slander that ascribes to another conduct, characteristics, or a condition that would adversely affect his fitness for the proper conduct of his lawful profession, trade or profession, or his public or private office, whether honorary or for profit, is subject to liability without proof of special harm." Restatement (Second) Torts §573; Brinich, supra. Such is the case here.

Justin created a profile that indicates that Principal Trosch smoked marijuana, took illegal drugs, and engaged in theft. These are all characteristics that would adversely affect the Principal's fitness for the proper conduct of his lawful business; being Principal of a public high school. The Pennsylvania School Code specifically provides for discipline, including termination, for such

immorality. 24 P.S. §11-1122(a). In light of this analysis, Justin's speech is defamatory and not protected by the First Amendment.

Justin's Section 1983 claim must be dismissed because he was not deprived of a right secured by the Constitution or the laws of the United States. West, supra. For the reasons outlined above, his "speech" constituted defamation, which merits no constitutional protection. The "[r]esort to epithets for personal abuse is not in any proper sense communication of information or opinions safeguarded by the Constitution . . . ." Beauharnais, 343 U.S. at 257. As noted above, Section 1983 creates no substantive law: it merely provides a "vehicle by which certain provisions of the Constitution and other federal laws may be judicially enforced." Felder, 487 U.S. at 158. Hence, the District Court erred in not dismissing Justin's Section 1983 claim.

C. Alternatively, Justin is unable to present a viable Section 1983 claim because Section 1983 is a procedural vehicle and he is unable to demonstrate that he was deprived of a protected right or law.

As noted above, Section 1983 merely provides a procedural "vehicle by which certain provisions of the Constitution and other federal laws may be judicially enforced." Felder, 487 U.S. at 158. Justin's Section 1983 claim must be dismissed because he is unable to demonstrate that he was deprived of the protection from a provision of the Constitution or other federal law.

The punishment of lewd, vulgar, profane, obscene, libelous and insulting utterances has "never been thought to raise any Constitutional problem." Chaplinsky, 315 U.S. at 571-572; Beauharnais, 343 U.S. at 255-256; F.C.C., 328 U.S. at 746. "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky, 315 U.S. at 572.

Justin's Section 1983 claim must be dismissed because his lewd, vulgar and plainly offensive speech does not merit First Amendment protection. None of the factors that render speech being deemed worthy of protection are present here. The profile does not contain a political message. Moreover, this "speech" is not an essential part of any exposition of ideas, and is of no social value as a step to the truth. Justin did not present any disapproval or critique of Trosch's performance as a Principal. No public issue is raised. Simply put, this is a mean spirited, abusive and personal attack on a well meaning and innocent School District administrator. The punishment does not raise a constitutional issue. See United States v. Keller, 259 F.2d 54, 56 (3d Cir. 1958)(statute that punished the mailing of postal cards containing "language of an indecent character" did not violate the First Amendment because such language "does not fall within the protection of the First Amendment").

CONCLUSION

For all of the foregoing reasons, the Appellant/Cross-Appellee Hermitage School District respectfully asks this Court to reverse the determination of the District Court.

Respectfully submitted,

ANDREWS & PRICE

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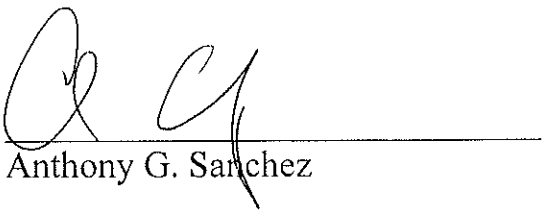

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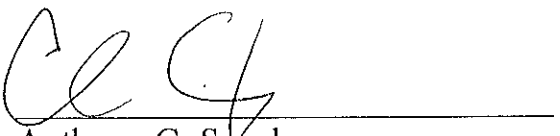

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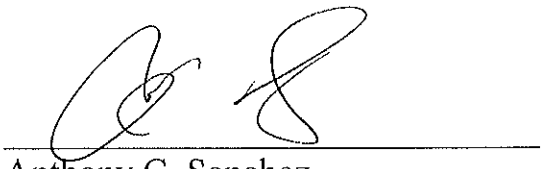

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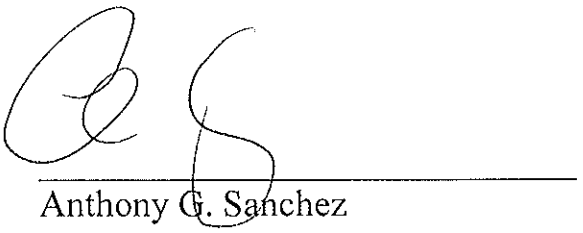

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I, the undersigned, hereby certify that two true and correct copies of the foregoing BRIEF OF APPELLANT/CROSS-APPELLEE was served on the 26th day of March, 2008, by First-Class U.S. Mail, postage prepaid, upon counsel listed below:

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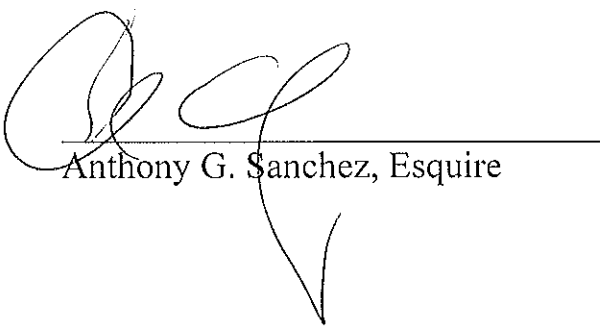

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