First Amendment rights and Schools - By Victoria Brown

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Schools are not public forums unless there is a special event for open public debate, see *Busch v. Marple Newtown School District, No. 07-2967* (3rd Cir. 6/1/2009) where the court stated that "Unlike parks, streets, and other traditional public fora, elementary school classrooms are not places for unlimited debate on issues of public importance. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988). Most of the time, school classrooms are "reserved for teaching students in a structured environment, *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.,* 342 F.3d 271, 275-76 *(3*d Cir. 2003*)*". This need for a structured environment to teach certain basic skills and behaviors weighed more heavily as a government interest that full First Amendment rights in schools.

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In *Evans v Bayer*, 684 FSupp2d 1365 (S.D.Fla 2010) the student, Evans, was punished by principal Bayer for comments made on an internet blog about a teacher which was not created from a school computer and not created on school grounds. In this case the court held that i) the speech was "off campus" speech, ii) there were insufficient contacts on campus regarding the speech iii) even though the speech did target the school

audience, the speech itself was insufficiently disruptive of the school activities and school purpose, and iv) the language was mere opinion, and as such, protected speech. Thus, Principal Bayer had violated Evan's first amendment rights of free speech when he temporarily suspended Evans. When so sued by Evans, Bayer claimed qualified immunity of a public official.

The court noted that any school official has *qualified immunity* in their official capacity if the action occurred in their official capacity and the function was discretionary. Once this is established, the burden then shifts to the plaintiff to prove that such qualified immunity should be set aside (see 684 F.Supp2d 1369).

A qualified immunity is lost when there is a violation of a clearly established constitutional right. Principal Bayer in the *Evans* case, supra, argued that he should not lose his qualified immunity quoting *Doninger v Niehoff*, 594 F Supp 2d 211, 224 (D. Conn 2009) at page 1375:

If courts and legal scholars cannot discern the contours of First Amendment protections for student internet speech, then it is certainly unreasonable to expect school administrators, such as Defendants, to predict where the line between on and off-campus speech will be drawn in this new digital era.

The *Evans* court however, found that it would not dismiss Evans claim against Bayer because on the pleadings themselves, there were insufficient facts plead to sustain his claim of qualified immunity because the pleadings did not set forth sufficient facts of any disruption to the school or its activities caused by the off campus speech. Further, this off campus speech was not unprotected speech (not being lewd, vulgar, defamatory, promoting violence or drug use). (Distinguishing *Layshock v Hermitage School District,* 593 F3d 249 (3d Cir 2010), where the court found that it was yet unclear what test would be used for off-campus internet speech). The *Evans* court noted that the exercise of the Principal's discretion must not violate a clear constitutional right, and found that Evan's First Amendment rights to free speech were a clear constitutional right that had been violated.

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Traditionally, to qualify as "fighting words" the words must involve an actual confrontation. In the case of *Layshock ex rel Layshock v Hermitage School*, 496 F. Supp 2d 587 (W.D. Pa 2007) at p 602, the court noted that "because there is simply no in-person confrontation in cyberspace such that a physical violence is likely to be instigated" the words used by a student in a website parodying a principal would not be considered "fighting words".

But threats of violence on the internet were held to be unprotected speech in the case of *D.C. v. R.R*. B207869 (Ca. App 3/15/2010] the threats were made on the internet. In this California case students threatened to murder D.C., a minor, for his perceived sexual orientation stating “Faggot, I’m going to kill you”. His parents had him taken out of the school and brought a lawsuit. The defendant countered that it was just a “goof” and not a hate crime or a threat because one of his favorite relatives is openly homosexual. The court noted that the test in determining a true threat is an objective standard, that is, “whether a reasonable person would foresee that the statement would be interpreted by those whom the maker communicates the statement as a serious expression of intent to harm or assault.” However, the court noted that “Federal courts are divided on whether the applicable standard should be objective or subjective….This split of authority is attributable to the Supreme Court’s decision in *Virginia v Black*, supra, 538 U.S. 343..”.

The court in the *D.C.* case, supra, then went on to apply both tests, quoting again*, Virginia v Black*, 538 US 343, 123 S.Ct 1536, 155 Led2d 535 (2003). Objectively it found that the words were threats. Subjectively it noted that it is “irrelevant, for First Amendment purposes, that R.R. may not have intended to carry out his threat.(See *Virginia v Black*,

supra, 538 U.S. at pp.359-360).", and continued, "Under the subjective standard, we inquire into whether R.R. intended that his message be interpreted as a threat (See Fogel v Collins, supra, 531 Fed at pp 831-833; U.S. v Parr, supra, 545 F3d atpp 498-502)". The court held that the R.R.'s speech was in fact a threat and thus unprotected speech.

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CyberBullying

Cyberbullying is "'on line bullying …[and] happens when teens use the Internet, cell phones, or other devices to send or post text or images intended to hurt or embarrass another person…. Cyberbullying is usually not a one time communication, unless it involves a death threat or a credible threat of serious bodily harm'. Quoted from Stop Bullying Now <http:www.stopcyberbullying.org/what_is_cyberbullying_exactly.html> [as of Mar.15,2010]" quoting *D.C. v R.R.*, B207869 (Cal App 3/15/2010).

In New Jersey there is the "Anti-Bullying Bill of Rights Act", C.18A:37-13.2 to –C.18A:37-32, 2002, to control bullying by students which was modified in Jan. 2011 to include students in institutions of higher education in the State, such as Rutgers University. The statute requires each school district to post its anti-bullying policy on its website and distribute

it annually to parents. The statute requires teachers to be trained in harassment, intimidation and bullying and report all offenses even if in an “electronic communication” which is described in C.18A:37-14 as a “a communication transmitted by means of electronic device, including but not limited to, a telephone, cellular phone, computer or pager”. Harassment, intimidation or bullying are defined in section C18A:37-14 as follows:

> ..any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
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> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student’s property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property
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The statute requires that each school have policies and procedures in place, distributed and well publicized and that

teachers have training in recognizing instances of such abuse. Under C.18A:37-15 b.(6)(f), a complaint may be filed within 180 days of the occurrence with the Division of Civil Rights for any cyberbullying against a member of a protected group as enumerated in the "Law Against Discrimination," P.L.1945, c 169 (C.10:5-1 et seq.) eg. race, color, creed, gender.

More and more cases are arising to challenge the ability of school administrators to censor speech of students. School policies have a right to limit unprotected speech. In *Matter of Board of Edu of the City School Dist of The City of NY v Campbell*, 2010 NY Slip Op, 31129(U), NY Sup Ct 4/14/2010, a school policy prohibiting students the right to "access material that is profane or obscene" hateful or violent was upheld.

The questions to be asked of any proposed statute, including a cyberbullying statute, are whether a) it is necessary or do legal protections already exist and b) it is constitutional and not a violation of the First Amendment.

New York State has similar laws. See NYS Education Law §2801[4] and 8 NYCRR §100.2[l][2][iii][b]). Codes of Conduct (COCs) are often posted on the districts', BOCES' and CVEEBs' websites. NYS law requires that all COCs be reviewed annually and updated if necessary (see, Education Law §2801[5] and 8 NYCRR §100.2[l][2][iii][a]).

In the case of *Layshock ex rel Layshock v Hermitage School*, 496 F. Supp 2d 587 (W.D. Pa 2007). The court went into depth in analyzing the rights of students to free speech and the rights of schools to control that speech. In this case, supra, the student, Justin Layshock, created a website off school premises that made a parody of the school principal, and was vulgar in parts. The school principal was highly offended and school disciplinary action was taken against Justin. The *Layshock* court employed two tests to determine whether or not the school had a right to take action against the free speech rights of this student. First, it used the *Fraser* test, from *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986)], that provides that a school may punish student speech that "would undermine the school's basic educational mission." 478 U.S. at 685, 106 S. Ct 3159, which would include lewd and profane speech. The *Fraser* case involved "in-school speech" so the court in *Layshock* required a second test because the speech in this case was not in-school speech. This second test is the "Tinker test" from *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 507, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) which requires[1], per the *Laystock* court, "a

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sufficient nexus between Justin's speech [a student's speech] and a substantial disruption of the school environment." (496 F. Supp2d at 600). In the *Laystock* case the court found that the material was lewd but the school could not punish Justin for it because there was insufficient evidence that the speech created an actual in-school disruption, noting that "..no classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action…The profiles were accessible for less than one week." The *Laystock* court noted that there were only *deminimus* in-school conduct regarding the website in question. 496 F. Supp2d at 600). The case concluded in favor or Justin Laystock.

The *Laystock* court did distinguish the case of *J.S. v Bethlehem Area Schoool District*, 569 Pa 638, 807 A2d 847 (2002) which involved a student creating a website at home that contained threatening and derogatory comments about a teacher and a principal. In that case there were more in-school situations creating a nexus to the school. For instance, the website had been shown to students in school creating a gathering and, according to the court, more than deminiums disruption. The *Laystock* court, supra, made it clear that a

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Conduct by the student, in class or out of it, which for any reason-whether it stems from time, place, or type of behavior- materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

case by case determination must be made balancing student expression against the need for school authority. (496 F. Supp2d at 602).

A. **ON CAMPUS VS OFF CAMPUS SPEECH**

Students are given less rights than those who are not in the school system. Notably, students are given less freedom of speech and less privacy rights than the average citizen.

> The speech clause of the First Amendment protects two rights: 1) the right to freedom of expression and 2) the right to be free from compelled expression. Holloman 370 43d at 1264. But while these rights exist in public schools, they [684 F supp.2d 1370] they are curtailed. 'The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.' Morse v Frederick, 551 U.S. 393, 396-97, 127 S.Ct. 2618, 168 L.Ed2d 290 (2007)(quoting Bethel School Dist No 403 v Fraser, 478 U.S. 675, 682, 106 S. Ct 3159, 92 L.Ed2d 549 (1986)

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> The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.

The courts, including *Bethel*, supra, are all in agreement that school activities and discipline maintained by a school are of paramount public interest in teaching students acceptable

behavior in society. In *Doninger v Niehoff*, 527 F3d 41 (2d Cir 2008) students that used the internet to get other students to telephone the superintendent because of an unpopular decision to "piss him off" was behavior "disruptive" to the school and thus not protected speech for a student.

A very good analysis of whether or not speech by a student is cyberbullying or impermissible student speech is found in the federal case of *Evans v Bayer*, 684 FSupp2d 1365 (S.D.Fla 2010) which examines recent Supreme Court cases and other cases of cyberbullying. In this case the student, Evans, was suspended and taken out of advanced classes by the principal, Bayer, because she started a "group on Facebook, a social networking website, entitled, "Ms Sarah Phelps is the worst teacher I've ever met". The group's purpose was to express "your feelings of hatred." The postings were taken down before the teacher saw them.

Because students speech is limited, it is important to first determine whether or not the speech was "on-campus" speech. See *Evans v Bayer*, 684 FSupp2d 1365 (S.D.Fla 2010). If the speech was made on campus, then the school has a right to discipline such speech particularly if the school policy prohibits such speech. However, as stated above, even speech made off campus would lose its exemption status if:

a) there were sufficient on-campus contacts with the speech (eg. pamphlets published off campus were distributed on-campus, class disruption caused by students grouping to see a bullying website at school during school hours) or, if not, b) the speech targeted a school audience (see J.*S. v Bethlehem Area School District*, 569 Pa 638, 807 A.2d 847 (2002) AND caused disruption in the school.

Unprotected on-campus (on in-school) speech would extend to speech which a) undermines the 'fundamental value' of a school education and is disruptive to the school. (Evans at 684 F Supp2d 1374) or b) has a foreseeable disruptive effect, on the school for the school to discipline the speaker. In the *Evans* case, supra, the court held that the posting was from Evan's home computer and not on campus, nor were there sufficient on-campus contacts. It was also found that though the speech targeted a school audience, it was not sufficiently disruptive to the school to lose the exemption of "off campus speech". The Evans case cited *Layshock v Hermitage School District,* 593 F3d 249 (3d Cir 2010), as using these same tests.

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In comparing cases, it appears that the more offensive the remarks the less school contact is required. Compare the holdings in J.*S. v Bethlehem Area School District*, 569 Pa 638, 807 A.2d 847 (2002) with *Layshock v Hermitage School District* where the statements in the former case were found to be derogatory, profane, offensive and threatening, and in the later case, although offensive, more of a parody.

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> ..any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school

sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:

a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property

b. has the effect of insulting or demeaning any student or group of students; or

c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotion harm to the student

The statute requires that each school have policies and procedures in place, distributed and well publicized and that teachers have training in recognizing instances of such abuse. Under C.18A:37-15 b.(6)(f), a complaint may be filed within 180 days of the occurrence with the Division of Civil Rights for any cyberbullying against a member of a protected group as enumerated in the "Law Against Discrimination," P.L.1945, c 169 (C.10:5-1 et seq.) eg. race, color, creed, gender.

More and more cases are arising to challenge the ability of school administrators to censor speech of students. School policies have a right to limit unprotected speech. In *Matter of Board of Edu of the City School Dist of The City of NY v Campbell*, 2010 NY Slip Op, 31129(U), NY Sup Ct 4/14/2010, a

school policy prohibiting students the right to “access material that is profane or obscene” hateful or violent was upheld.

The questions to be asked of any proposed statute, including a cyberbullying statute, are whether a) it is necessary or do legal protections already exist and b) it is constitutional and not a violation of the First Amendment.

New York State has similar laws. See NYS Education Law §2801[4] and 8 NYCRR §100.2[l][2][iii][b]). Codes of Conduct (COCs) are often posted on the districts’, BOCES’ and CVEEBs’ websites. NYS law requires that all COCs be reviewed annually and updated if necessary (see, Education Law §2801[5] and 8 NYCRR §100.2[l][2][iii][a]).

In the case of *Layshock ex rel Layshock v Hermitage School*, 496 F. Supp 2d 587 (W.D. Pa 2007). The court went into depth in analyzing the rights of students to free speech and the rights of schools to control that speech. In this case, supra, the student, Justin Layshock, created a website off school premises that made a parody of the school principal, and was vulgar in parts. The school principal was highly offended and school disciplinary action was taken against Justin. The *Layshock* court employed two tests to determine whether or not the school had a right to take action against the free speech rights of this student. First, it used the *Fraser* test, from *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92

L.Ed.2d 549 (1986)], that provides that a school may punish student speech that "would undermine the school's basic educational mission." 478 U.S. at 685, 106 S. Ct 3159, which would include lewd and profane speech. The *Fraser* case involved "in-school speech" so the court in *Layshock* required a second test because the speech in this case was not in-school speech. This second test is the "Tinker test" from *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 507, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) which requires[3], per the *Laystock* court, "a sufficient nexus between Justin's speech [a student's speech] and a substantial disruption of the school environment." (496 F. Supp2d at 600). In the *Laystock* case the court found that the material was lewd but the school could not punish Justin for it because there was insufficient evidence that the speech created an actual in-school disruption, noting that "..no classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action…The profiles were accessible for less than one week." The *Laystock* court noted that there were only *deminimus* in-school conduct regarding the

[3] The classic case establishing the school disruption standard is *Tinker v Des Moines Independent Community School Dist*, 393 US 503, 89 S.Ct 733, 21 L.Ed2d 731 (1969)in which the court stated at p 733:

> Conduct by the student, in class or out of it, which for any reason-whether it stems from time, place, or type of behavior- materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

website in question. 496 F. Supp2d at 600). The case concluded in favor or Justin Laystock.

The *Laystock* court did distinguish the case of *J.S. v Bethlehem Area Schoool District*, 569 Pa 638, 807 A2d 847 (2002) which involved a student creating a website at home that contained threatening and derogatory comments about a teacher and a principal. In that case there were more in-school situations creating a nexus to the school. For instance, the website had been shown to students in school creating a gathering and, according to the court, more than deminiums disruption. The *Laystock* court, supra, made it clear that a case by case determination must be made balancing student expression against the need for school authority. (496 F. Supp2d at 602).

A. **ON CAMPUS VS OFF CAMPUS SPEECH**

Students are given less rights than those who are not in the school system. Notably, students are given less freedom of speech and less privacy rights than the average citizen.

> The speech clause of the First Amendment protects two rights: 1) the right to freedom of expression and 2) the right to be free from compelled expression. Holloman 370 43d at 1264. But while these rights exist in public schools, they [684 F supp.2d 1370] they are curtailed. 'The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.' Morse v Frederick, 551 U.S. 393, 396-97, 127 S.Ct. 2618, 168 L.Ed2d 290 (2007)(quoting Bethel School Dist No 403 v Fraser, 478 U.S. 675, 682, 106 S. Ct 3159, 92 L.Ed2d 549 (1986)

Quoted from *Evans v Bayer*, 684 FSupp2d 1365 (S.D.Fla 2010)at p. 1369-70.

In *Bethel School Dist. No 403 v Fraser*, 478 U.S. 675 at 681, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) the court stated:

> The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.

The courts, including *Bethel*, supra, are all in agreement that school activities and discipline maintained by a school are of paramount public interest in teaching students acceptable behavior in society. In *Doninger v Niehoff*, 527 F3d 41 (2d Cir 2008) students that used the internet to get other students to telephone the superintendent because of an unpopular decision to "piss him off" was behavior "disruptive" to the school and thus not protected speech for a student.

A very good analysis of whether or not speech by a student is cyberbullying or impermissible student speech is found in the federal case of *Evans v Bayer*, 684 FSupp2d 1365 (S.D.Fla 2010) which examines recent Supreme Court cases and other cases of cyberbullying. In this case the student, Evans, was suspended and taken out of advanced classes by the principal, Bayer, because she started a "group on Facebook, a social networking

website, entitled, “Ms Sarah Phelps is the worst teacher I’ve ever met”. The group’s purpose was to express “your feelings of hatred.” The postings were taken down before the teacher saw them.

Because students speech is limited, it is important to first determine whether or not the speech was “on-campus” speech. See *Evans v Bayer*, 684 FSupp2d 1365 (S.D.Fla 2010). If the speech was made on campus, then the school has a right to discipline such speech particularly if the school policy prohibits such speech. However, as stated above, even speech made off campus would lose its exemption status if:
a) there were sufficient on-campus contacts with the speech (eg. pamphlets published off campus were distributed on-campus, class disruption caused by students grouping to see a bullying website at school during school hours) or, if not, b) the speech targeted a school audience (see J.*S. v Bethlehem Area School District*, 569 Pa 638, 807 A.2d 847 (2002) AND caused disruption in the school.

Unprotected on-campus (on in-school) speech would extend to speech which a) undermines the ‘fundamental value’ of a school education and is disruptive to the school. (Evans at 684 F Supp2d 1374) or b) has a foreseeable disruptive effect, on the school for the school to discipline the speaker. In the *Evans* case, supra, the court held that the posting was from Evan’s

home computer and not on campus, nor were there sufficient on-campus contacts. It was also found that though the speech targeted a school audience, it was not sufficiently disruptive to the school to lose the exemption of "off campus speech". The Evans case cited *Layshock v Hermitage School District,* 593 F3d 249 (3d Cir 2010), as using these same tests.

It is notable that the courts are all in agreement that off campus speech during a school sponsored activity such as a rally, is considered on-campus speech. See *Morse V Frederick*, 552 U.S. 393, 127 S.Ct 2618, 168 L.Ed2d 290 (2007) where the court held that a student's banner stating "Bong Hits 4 Jesus" was not protected speech because it was at a school sponsored Olympic event and because the speech itself could reasonably be viewed as promoting illegal drugs.

In comparing cases, it appears that the more offensive the remarks the less school contact is required. Compare the holdings in J*.S. v Bethlehem Area School District*, 569 Pa 638, 807 A.2d 847 (2002) with *Layshock v Hermitage School District* where the statements in the former case were found to be derogatory, profane, offensive and threatening, and in the later case, although offensive, more of a parody.

B. **STUDENT SPEECH**

Whether speech is made by a student or a citizen, certain types of speech are unprotected speech. Thus even if the speech

of a student was found to be “off campus” speech, it still may be actionable because it is unprotected speech. Types of unprotected speech are fighting words, defamation and obscenity. See *Evans v Bayer*, 684 FSupp2d 1365 (S.D.Fla 2010) at p. 1372-73. (see proceeding Section).

As noted above, students have less rights to protected speech than adults. However, the court will consider and take note of any adult defenses of “protected speech” such as opinions and parody as was done in both the *Evans v Bayer* , supra, and *Layshock v Hermitage School District, supra.* Thus, for students protected speech defenses are not absolute defenses as they would be for adults, but are duly noted, particularly when a court finds for a student.