

2009 NATIONAL HIGH SCHOOL MOOT COURT COMPETITION PROBLEM

LAKE BARTOW COUNTY PUBLIC SCHOOL DISTRICT,
AND JOHN MCALLISTER,
IN HIS OFFICIAL CAPACITY AS PRINCIPAL OF LAKE BARTOW HIGH SCHOOL,

Petitioners,

v.

KIERSTEN AARONSON

Respondent.

networking sites that criticize school administrators and teachers. In the last two years, fourteen of Lake Bartow County's 5,500 high schools students have been disciplined for the use of obscene, profane, or violent language online against school administrators and other students.

Lake Bartow High School ("LBHS") does not have a written policy concerning "cyberbullying," but the school does have a written computer use policy that includes a prohibition against "accessing, producing, posting, sending or displaying material that is offensive by nature; harassing, insulting or attacking others; posting personal or private information about you or other people on the Internet; posting information that could be disruptive, could cause damage, or endanger students or staff; and posting false or defamatory information about a person or organization." Students who engage in any of the aforementioned activities will have access privileges taken away for use of computers at school, and other disciplinary measures may also result.

In an effort to decrease the instances of "cyberbullying" among students, John McAllister ("Mr. McAllister"), LBHS's principal, issued a notice to parents and students that included the school's computer use policy. He asked parents to monitor their children's computer use at home to prevent cyberbullying and other inappropriate uses of the internet that may have an effect at school.

Kiersten Aaronson ("Ms. Aaronson") is a junior at LBHS—a public high school—and is founder and president of a school organization named Computer/Information Technology for Youth ("CITY"). She is also the Marketing and Design Editor for the school's newspaper, and regularly contributes articles about issues affecting students.

On September 10, 2008, Ms. Aaronson created a blog in her advanced computer science class that was saved on the school server. Her blog consisted mainly of her complaints about

teachers and students at the school. When her computer science teacher found out about the criticisms, the teacher instructed Ms. Aaronson to remove the complaints about teachers and students from the blog. Ms. Aaronson refused because she claimed that she had a right to voice her opinions. As a result, she was removed from the class and suspended on September 17 for two days.

Using the school newspaper e-mail system, on September 25th Ms. Aaronson sent the student body a profanity-laced message against the school and its administrators over her suspension. Specifically, the e-mail message called the computer science teacher “an incompetent b****” and called Mr. McAllister “an old fart.” While the e-mail produced little noticeable reaction at school, the parents of several students complained about the language. Ms. Aaronson was suspended for five days for sending the email, her computer use privileges were revoked for the remainder of the semester, and she was ejected from her position on the school newspaper for abusing her e-mail access privilege.

At home and on her own computer, Ms. Aaronson created a blog on her FaceSpace profile that addressed her complaints with the school’s administrators. When she returned to school, she told a few friends about it, and made occasional updates to it during study hall. She also continued her bi-weekly column on issues concerning students, just as she did when she was on the school’s newspaper staff. In an October 6th post, Ms. Aaronson complained about preferential treatment given to athletes and cheerleaders by certain teachers at LBHS. She named and cited examples of bad behavior or sub-standard academic performance that were given a pass by teachers. She argued that the school emphasized athletics to an unhealthy degree at the expense of what she argued are other worthwhile extracurricular activities, like CITY.

After a story about the blog appeared in the school newspaper, it became popular among the students. As a result, the teachers and athletes named in the blog complained to the school administrators. The principal ordered Ms. Aaronson to remove her blog because the blog had become a “distraction,” “harmed school morale,” and was disruptive. When Ms. Aaronson refused, Mr. McAllister suspended her for another ten days. Students who learned of Ms. Aaronson’s suspension circulated a petition calling for the reversal of her suspension, and approximately one-third of students at LBHS signed the petition. The petition was presented to Mr. McAllister.

On October 15th, Ms. Aaronson used her personal computer and personal e-mail account to send a profanity-laced e-mail to her friend Ashley Thomas’ personal e-mail account. Ms. Aaronson expressed her discontent with the school and the administrators over the suspensions and having to take down her computer science class blog. She used the same derogatory language to describe Mr. McAllister and her computer science teacher. In addition, Ms. Aaronson attached a link to a clip of a Halloween episode of a popular cartoon show in which all of the teachers turned into zombies and were subsequently killed by students. The statement, “Wouldn’t that be nice” appeared at the end of the clip. After Ms. Aaronson and Ms. Thomas had a falling out, Ms. Thomas posted the message on her FaceSpace page and forwarded the message to the teacher and to Mr. McAllister. The teacher complained to Mr. McAllister and demanded that Ms. Aaronson be expelled, citing concerns about the safety of the teachers and administrators at the school. When Ms. Aaronson did not apologize, Mr. McAllister added another ten days to her suspension and initiated expulsion proceedings.

Kiersten Aaronson filed this action claiming that the principal, and other school administrators, violated her First Amendment right to free speech. Parties filed cross-motions for summary judgment.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIHOMA**

KIERSTEN AARONSON)	
)	
Plaintiff,)	
)	
v.)	CV-07151985
)	
LAKE BARTOW COUNTY)	
PUBLIC SCHOOL DISTRICT, and)	
JOHN MCALLISTER, in his official capacity as)	
Vice Principal of Lake Bartow High School,)	
)	
Defendants.)	
)	

MEMORANDUM AND ORDER

November 17, 2008

BROWN, District Judge

The plaintiff, Kiersten Aaronson, brings this action asserting that the disciplinary actions undertaken by the school district and its administrators violated her First Amendment right to free speech. Plaintiff seeks injunctive relief. She asks that the court invalidate the suspensions stemming from the email to her friend and her blog article, and halt the expulsion proceedings. There is no dispute as to any material facts. The Court considers the parties' cross-motions for summary judgment and finds that plaintiff's motion must fail and defendant's motion is **GRANTED**.

The First Amendment of the Constitution states that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The United States Supreme Court has decided three principal

cases that establish the framework for evaluating the First Amendment claims of public school students. In order to justify prohibition of a particular expression of opinion, school officials must show that the expression would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 509 (1969). A school may categorically prohibit "the use of vulgar and offensive" language on school property. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986). Finally, school officials may regulate school-sponsored speech "so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

Tinker is usually considered the starting point for any analysis of student speech

rights. In that case, the Court held that the prohibition of students wearing armbands to school in protest of the Vietnam War was an unconstitutional denial of students' First Amendment right of expression of opinion. In the absence of any facts which might reasonably have led school authorities to predict substantial disruption of, or material interference with, school activities, or any showing that disturbances occurred on school premises when students wore black armbands on their sleeves, the Court held that students are entitled to freedom of expression in their views. 393 U.S. at 514.

Almost twenty years later, in *Fraser*, the Court set more restrictive limits on student speech. *Fraser* was suspended for giving a risqué nominating speech to a high school assembly. Reversing the Ninth Circuit Court of Appeals, the Court acknowledged that *Tinker* controlled, but found that the school district acted within its permissible authority in sanctioning *Fraser* for his offensively lewd and indecent speech. It did not, however, alter or add to *Tinker's* inquiry. 478 U.S. at 686.

In *Hazelwood*, decided just two years after *Fraser*, the Court ruled that the school could exercise editorial control over the contents of the school newspaper because it was part of the school's journalism curriculum. The Court held that when speech is school-sponsored, the school can regulate the speech on the basis of any legitimate pedagogical or academic concern. 484 U.S. at 273.

More recently, the Supreme Court addressed student speech again in *Morse v. Frederick*, 127 S. Ct. 2618 (2006). In that case, a high school student brought an action against the principal of his school and the school board, alleging that his First Amendment rights had been violated. The student was suspended

for ten days for waving a banner reading "BONG HiTS 4 JESUS" during a school-sanctioned and school-supervised event. The Olympic Torch Relay passed through Juneau, Alaska on its way to the winter games in Salt Lake City, Utah. Because the torch-bearers were to proceed along a street in front of Juneau-Douglas High School, Principal Morse decided to permit staff and students to participate in the Torch Relay as an approved social event or class trip. The Supreme Court held that the principal did not violate the student's right to free speech by confiscating the banner because it was reasonable for her to conclude that the banner promoted drug-use, which was in violation of established school policy. *Morse*, 127 S. Ct. at 2629. However, *Morse* does not apply to this case because the speech in that case was considered "on-campus speech" due to the fact that the speech occurred during a school-sanctioned and -supervised event. In this case, the speech is not "on-campus speech," but it is subject to school authority for reasons we will address.

First Amendment rights are different in public schools than elsewhere. *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 829-830 (2002). The Supreme Court has made clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. But, the Court has also held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Fraser*, 478 U.S. at 682, and that the rights of students "must be applied in light of the special characteristics of the school environment." *Hazelwood*, 484 U.S. at 266.

The threshold, and most difficult inquiry, is whether the school administration was authorized to punish Ms. Aaronson for speech initiated, and largely maintained, off-campus. While Ms. Aaronson does not challenge the school's actions regarding the suspensions resulting from the computer science class blog or the suspension resulting from the mass e-mail, she does challenge the suspensions resulting from her email to a friend and her blog on FaceSpace. Defendants argue that their actions are justified under *Tinker*. We agree.

The school asserts that, for safety concerns, it disciplined Ms. Aaronson for the video clip of teachers being killed—albeit zombie teachers—by students. Considering the impact of the school shootings at Columbine and Virginia Tech, the school district had reason to impose a strict punishment to deter jokes about committing violence at school or against school administrators. The fact that the video was included in an email to a friend does not protect Ms. Aaronson under the First Amendment. Under *Tinker*, the school was authorized to suspend Ms. Aaronson because the video clip “materially and substantially interfered with the requirements of appropriate discipline in the operation of the school.” Moreover, this video clip “poses a reasonably foreseeable risk” that it would come to the attention of school authorities. *See Wisniewski v. Bd. of Ed. of the Weedsport Central Sch. Dist.*, 494 F.3d 34, 38 (2007) (holding that a student’s suspension for sending instant messages displaying violence to classmates did not violate the First Amendment).

Likewise, under *Tinker*, the school was authorized to suspend Ms. Aaronson for her FaceSpace blog because of its disruption on-campus. The school sought to prevent distractions and this speech hurt school morale. Even though the blog was created

off-campus, this Court finds that the blog violates the school policy discouraging “cyberbullying.” As a student leader—and founder of Computer/Information Technology for Youth—Ms. Aaronson had a particular responsibility to uphold the school’s policy of responsible computer use.

For the foregoing reasons, we **GRANT** the defendant’s motion for summary judgment and **DENY** the plaintiff’s motion for summary judgment.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT**

KIERSTEN AARONSON)	
)	
Petitioner,)	
)	
v.)	CV-07151985
)	
LAKE BARTOW COUNTY)	
PUBLIC SCHOOL DISTRICT, and)	
JOHN MCALLISTER, in his official capacity as)	
Principal of Lake Bartow High School,)	
)	
Respondents.)	
)	

MEMORANDUM AND ORDER

January 6, 2009

BEFORE: KALU, Chief Judge,
PERRY, SMITH, Circuit Judges

KALU, J. delivered the Opinion of the Court

The Petitioner, a student attending Lake Bartow High School, appeals the district court’s decision granting defendant school district’s motion for summary judgment. There are no disputed issues of fact, and we review the district’s decision *de novo*.

The District Court held that Ms. Aaronson’s private email to her friend and her blog article on a social networking site was subject to the school’s authority under *Tinker*. We disagree and hold that (1) Ms. Aaronson’s email message to her friend was off-campus speech, and thus, not subject to school regulation; (2) there was no evidence that Ms. Aaronson’s blog article materially disrupted classwork or involved substantial

disorder or invasion of the right of others; and, (3) the blog article is more akin to political speech, thus protected under the First Amendment.

The District Court’s granting of Appellant’s summary judgment is therefore **REVERSED**.

I. The First Amendment

The First Amendment of the Constitution states that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I. The First Amendment protects the “freedom of speech” from arbitrary governmental interference, but it has “never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances

that he chooses.” *Cohen v. California*, 403 U.S. 15, 19 (1971).

First Amendment rights are different in public schools than elsewhere. *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 829-830 (2002). The Supreme Court has made it clear that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969). But, the Supreme Court also held that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,” *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986), and that the rights of students “must be applied in light of the special characteristics of the school environment.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

Concerning student Internet speech, or “cyberspeech,” there have only been a handful of reported cases. Of those cases, many of them involve similar facts where students create websites at home that contain remarks about their school, their teachers, other students, or administrators that were found objectionable. School officials often disciplined these students with suspensions or expulsions (or both). Many cases involved the overreaction of school administrators, and closer cases involved postings that were misconstrued or misperceived by others as threats. Nonetheless, the nature of the Internet poses special difficulties when attempting to ascertain whether or not speech occurred “in” school or “on” school property and how “disruptive” that speech had to be, assuming that it was subject to the regulation of school officials.

We will begin our analysis by examining jurisprudence regarding student speech as it relates to speech “off” or “on” campus, and then we will examine jurisprudence regarding what speech poses a “material and substantial” disruption to school operations. There is inconsistency among the lower courts because the Supreme Court has not ruled definitively on either issue.

II. “Off-Campus” vs. “On-Campus” Speech

A. “Off-Campus”

Case law demonstrates different approaches taken by courts regarding “off-campus” speech. One approach is to hold that speech off-campus is beyond the reach of school officials, which is a location-centered approach that has the advantage of being easy to apply. If the speech does not occur within the walls of the school, then any content-based regulation of speech would have to survive a very high standard. In *Fraser*, Justice Brennan suggested that if Fraser had given his speech “outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate . . .” 478 U.S. at 688 (Brennan, J., concurring). Lower courts have agreed, holding that schools had no right to discipline students for off-campus expressive activity. *See Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002) (“Defendants’ regulation of Plaintiff’s speech on the website without any proof of disruption to the school *or on campus activity in the creation of the website* was a violation of Plaintiff’s First Amendment rights.”(emphasis added); *see also Coy ex rel. Cox v. Bd. Educ.*, 205 F. Supp. 2d 791, 799 (N.D. Ohio 2002) (reversing suspension and expulsion of

student for content on student's website and noting that student "simply accessed his own website, a website he created on his own time and with his own equipment").

In a number of post-*Tinker* cases, many of which concerned "underground" high school newspapers, courts adopted a similar approach, expressing skepticism of school officials' claims of authority over students' activities when the allegedly disruptive activities took place off campus. *See, e.g., Thomas v. Bd. Educ.*, 607 F.3d 1043, 1051 (2d Cir. 1979) ("We may not permit school administrators to seek approval of the community-at-large by punishing students for expression that took place off school property."); *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960, 974-75 (5th Cir. 1972).

The problem with this approach is its formalism. *Tinker* was concerned with balancing the rights of student speakers against the right of their fellow students to attend school and receive education in a safe, orderly atmosphere. Some lower courts have concluded that where the speech originates is not outcome determinative; actual impact, too, should be considered. *See Thomas*, 607 F.2d at 1058 n.13 (Newman, C.J., concurring). Courts almost inevitably turn to the question of *impact* on the school, in some cases, as a way to avoid the more difficult off-campus/on-campus question. If the speech was not disruptive, then the location question need not be resolved. The issue of off-campus speech becomes particularly difficult with advances in technology, especially because the Internet has no true boundaries.

B. "On-Campus"

Lower courts have disagreed as to whether a website, created by a student at home, on his or her time, using his or her equipment, can ever be "on-campus" speech. On the one

hand, courts have held that if no part of the website was created or maintained using school equipment, and the student did not show the website to other students, and/or that the speech was entirely out of the school's supervision or control, then the speech is not "on-campus" speech. *See, e.g., Mahaffey*, 236 F. Supp. 2d 779; *Coy*, 205 F. Supp. 2d 791.

On the other hand, other courts have regarded speech that finds its way into the school—however that happens—as "on-campus" speech. In a recent case, *Layshock v. Hermitage School District*, a judge denied a temporary restraining order to a student subjected to a ten-day suspension for creating a MySpace parody site for his high school principal that was, admittedly, crude and likely embarrassing to the principal. 412 F. Supp. 2d 502, 504 (W.D. Pa. 2006). Layshock "created the parody by using his grandmother's computer during non-school hours; no school resources were used to create the parody," except for a photo cropped from the school's official website. *Id.* at 505. Layshock told a few friends and eventually word of the parody reached most, if not all, of the student body. The court held that "this case began with purely out-of-school conduct which subsequently carried over into the school setting." *Id.* at 507.

Similarly, in *J.S. v. Bethlehem Area School District*, the fact that a student website was accessed (though not to the degree that Layshock's was) at school, even though it was not created there, prompted the Pennsylvania Supreme Court to regard the website as on-campus speech. 807 A.2d 847 (Pa. 2007). The website was comprised of a number of pages that made derogatory, profane, offensive, and threatening comments. The Pennsylvania Supreme Court first recognized that "a threshold issue

regarding the ‘location’ of the speech at issue must be resolved to determine if the unique concerns regarding the school environment are even implicated, i.e., is it on-campus or purely off-campus speech?” *Id.* at 864. Because the website was about specific teachers and, the court concluded, it was “inevitable that the contents of the website would pass from students to teachers, inspiring circulation of the website on school property,” it was on-campus speech. *Id.* The court held that where speech (1) that is aimed at a specific school and/or its personnel is (2) brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech. *Id.*

While Ms. Aaronson’s email to her friend contained derogatory and profane language about her computer science teacher and Mr. McAllister, we hold that the school had no authority to punish her for a private email message. Ms. Aaronson sent the message from her private email account on her computer at home to her friend’s private email account, and there is no evidence that she meant for anyone else to read that email message.

However, concerning the blog article, we are persuaded by the Pennsylvania Supreme Court’s holding in *J.S.* that “a threshold issue regarding the ‘location’ of the speech at issue must be resolved to determine if the unique concerns regarding the school environment are even implicated.” 807 A.2d 847, 864. Ms. Aaronson’s blog article concerned a unique issue at school and can be seen as “on-campus” speech. But, as we discuss later, we find her blog article to be more akin to political speech protected by the First Amendment. Further, her blog article was not disruptive, so the district court erred in finding that her blog article

was subject to school regulation under *Tinker*.

III. “Disruptive” Cyberspeech

Even in cases in which a court seems disposed to limit schools’ authority over off-campus speech, the court makes an inquiry into the disruptive nature of the speech. Lacking guidance on the off-campus/on-campus question, a natural response is to look at whether the speech was actually disruptive to the school. If not, then even under *Tinker* it cannot be sanctioned. But here, too, courts’ definition of “disruptive” cyberspeech varies.

In two cases in which courts did uphold school regulation of student speech, the courts tended to sidestep the off-campus/on-campus speech question either by broadly defining on-campus speech, or by assuming First Amendment protection and then looking at disruptive effects. The results reached by these courts indicate that substantial differences of opinion can exist with regard to what constitutes “disruption.”

A. Cyberspeech not “disruptive”

In *Mahaffey*, the student’s speech was deemed beyond the control of the school officials, even assuming it was on-campus speech, because there was “no evidence that the website interfered with the work of the school or that any other student’s rights were impinged.” 236 F. Supp. 2d at 784. Regulation of the student’s speech “without any proof of disruption to the school or on campus activity in the creation of the website” was a violation of his First Amendment rights. *Id.* at 786.

In *Coy*, while the court denied summary judgment because of disputed facts

surrounding the reason for Coy's suspension, the judge noted that "the extent of Jon Coy's expressive activity was the private viewing of his own website." 205 F. Supp. at 799. Distinguishing cases like *Fraser* and *Kuhlmeier*, the court noted that Coy's "activity was not even akin to putting up a poster in a school hallway." *Id.* at 800. The access of his own website at school was, by design, furtive and concealed. *Id.* Specifically, "no evidence suggests that Coy's acts in accessing the website had any effect upon the school district's ability to maintain discipline in the school." *Id.* at 801.

B. Cyberspeech was "disruptive"

In *J.S.*, the webpage mocking an algebra teacher, Mrs. Fulmer, and Principal Kartotis, was held to constitute substantial disruption because of its effects on Mrs. Fulmer. The principal informed Mrs. Fulmer of the contents of the site, which included a list of reasons why Mrs. Fulmer should die, and mock solicitation of donations for a hit man. 807 A.2d at 851. Even though law enforcement officials concluded that no laws were broken and that Mrs. Fulmer was in no danger, she testified that she was frightened, fearing someone would try to kill her. She suffered from stress, anxiety, loss of appetite, loss of sleep, loss of weight, and a general sense of loss of well being as a result of viewing the website. Furthermore, Mrs. Fulmer was unable to return to school to finish the school year and three substitute teachers were required to be utilized, which disrupted the educational process of the students. *Id.* at 852. The court also found that "the website also has a demoralizing impact of the school community." *Id.*

In *Layshock*, the court assumed that the MySpace parody was expressive activity and was governed by *Tinker*, because the website was available to and was accessed

by other students at school. The court there, too, found that the parody caused a substantial disruption. Both Layshock's parody and the other parodies he did not create (which were apparently more vulgar) "were accessed incessantly by students" at the high school, resulting "in the school [shutting] down its computer system to student use" for five days. 412 F. Supp. 2d at 508. "The lack of access . . . caused the cancellation of several classes and interfered with students' ability to use the computers for their school-intended purposes." *Id.* The court held that Layshock's actions "appear[ed] to have substantially disrupted school operations and interfered with the right of others." *Id.*

We are more persuaded by *Mahaffey* and *Coy*, and we therefore hold that Ms. Aaronson's speech was not disruptive under *Tinker*, or any other authority. There is no evidence that the email or the blog article "materially and substantially" interfered with the requirements of appropriate discipline, as articulated in *Tinker*. 393 U.S. 503, 509. Further, we are compelled to point out that *Tinker* requires that the State show more than "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* There is no finding or showing that Ms. Aaronson's blog caused anything more than discomfort from those persons mentioned in the blog article. In fact, Ms. Aaronson's speech is closer to the "core" political speech of *Tinker*. Though it may seem like a stretch to compare a debate over athletics to core political speech, it is probably more important to a high school student than national political debates. If particular students or teachers feel as if Ms. Aaronson's allegations are actionable, it is better to use private law mechanisms, like a suit for libel, than to resort to state-sponsored censorship.

Concerning the video clip attached to the email, we reject the district court's and defendants' argument that the video posed a "foreseeable risk". The video itself is ambiguous and does not constitute a "true threat" as articulated by the Supreme Court in *Virginia v. Black*, 538 U.S. 343 (2003). The Supreme Court held that "'true threats' encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or groups of individuals." *Id.* at 359. We are not ignoring the need for heightened concern regarding violent speech or expression made by students toward other students and school administrators, especially in light of the recent school shootings at Virginia Tech University. In this case, however, the video clip was a cartoon attached to a private email. Ms. Aaronson did not mean for anyone else to view the video clip, and even if others received it, one cannot reasonably infer that she intended to harm anyone.

IV. Conclusion

For these reasons we conclude that the district court erred in its application of *Tinker*, and hold that (1) Ms. Aaronson's email message to her friend was off-campus speech, and thus, not subject to school regulation; (2) there was no evidence that Ms. Aaronson's blog article materially disrupted classwork or involved substantial disorder or invasion of the right of others; and (3) the blog article is more akin to political speech, thus protected under the First Amendment.

The District Court's order granting Appellant's motion for summary judgment is therefore **REVERSED**.

Oral Argument Requested: March 21, 2009

RECORD NO. CV-07151985

Supreme Court of the United States

LAKE BARTOW COUNTY PUBLIC SCHOOL DISTRICT,
and JOHN MCALLISTER,
in his official capacity as Principal of Lake Bartow High School,

Petitioners,

v.

KIERSTEN AARONSON

Respondent.

ON APPEAL FROM A FINAL ORDER OF
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

BRIEF FOR PETITIONERS,
LAKE BARTOW COUNTY PUBLIC SCHOOL DISTRICT,
and JOHN MCALLISTER

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PRELIMINARY STATEMENT

Lake Bartow High School took a proactive stance in decreasing the instances of “cyberbullying” by re-affirming its computer use policy and by asking parents to monitor their child’s computer use at home. Respondent Kiersten Aaronson challenged the disciplinary actions of Lake Bartow High School’s principal, and the Lake Bartow County Public School District, in a suit in district court. Cross motions for summary judgment were filed. The District Court granted the school district’s motion for summary judgment. Kiersten Aaronson appealed to the Fifteenth Circuit Court of Appeals, which reversed the decision of the District Court. The school district and principal now appeal to the Supreme Court of the United States. This brief argues that speech made by a student, whether it is on-campus or off-campus, is not protected speech if it is disruptive and antithetical to the mission of the school.

QUESTIONS PRESENTED

1. Under the First Amendment, may a school regulate student speech when the speech is initiated and maintained on the Internet, but the speech is related to school issues and it is reasonably foreseeable that other students and administrators would view or become aware of the speech?
2. May a school regulate student speech that is initiated and maintained on the Internet when the speech is profane and violent, and specifically targets school administrators?

STATEMENT OF THE CASE

In the past decade, there has been a rise in violent acts at public schools around the country. Tragedies such as those at Columbine High School and Virginia Tech University, as

well as a handful of other attacks planned but not carried out, initiated a wave of tough policies concerning threats made by students against the school, teachers, or other students.

During the past decade, there also has been a rise in the use of technology among school-age students. Cell phones with web access and text messaging capabilities, social websites such as Facebook and MySpace, and other forms of online communication have created an entirely new set of concerns for students, parents, and school administrators. The rise in such means of communication originally raised concerns of child predators. While these concerns still exist, the new concern is protecting children from their peers, and from “cyberbullying.”

“Cyberbullying” can mean anything from rude comments left on Facebook or MySpace pages, to harassing e-mail messages, or the wide dissemination of private information. Other common examples include students posting comments to personal webpages or social networking sites that criticize school administrators and teachers. In the last two years, fourteen of Lake Bartow County’s 5,500 high schools students have been disciplined for the use of obscene, profane, or violent, language online against school administrators and other students.

Lake Bartow High School (“LBHS”) does not have a written policy concerning “cyberbullying,” but the school does have a written computer use policy that includes a prohibition against “accessing, producing, posting, sending or displaying material that is offensive by nature; harassing, insulting or attacking others; posting personal or private information about you or other people on the Internet; posting information that could be disruptive, could cause damage, or endanger students or staff; and posting false or defamatory information about a person or organization.” Students who engage in any of the aforementioned activities will have access privileges taken away for use of computers at school, and other disciplinary measures may also result.

In an effort to decrease the instances of “cyberbullying” among students, John McAllister (“Mr. McAllister”), LBHS’s principal, issued a notice to parents and students that included the school’s computer use policy. He asked parents to monitor their children’s computer use at home to prevent cyberbullying and other inappropriate uses of the internet that may have an effect at school.

Kiersten Aaronson (“Ms. Aaronson”) is a junior at LBHS—a public high school—and is founder and president of a school organization named Computer/Information Technology for Youth (“CITY”). She is also the Marketing and Design Editor for the school’s newspaper, and regularly contributes articles about issues affecting students.

On September 10, 2008, Ms. Aaronson created a blog in her advanced computer science class that was saved on the school server. Her blog consisted mainly of her complaints about teachers and students at the school. When her computer science teacher found out about the criticisms, the teacher instructed Ms. Aaronson to remove the complaints about teachers and students from the blog. Ms. Aaronson refused because she claimed that she had a right to voice her opinions. As a result, she was removed from the class and suspended on September 17th for two days.

Using the school newspaper e-mail system, on September 25th Ms. Aaronson sent the student body a profanity-laced message against the school and its administrators over her suspension. Specifically, the e-mail message called the computer science teacher “an incompetent b*****” and called Mr. McAllister “an old fart.” While the e-mail produced little noticeable reaction at school, the parents of several students complained about the language. Ms. Aaronson was suspended for five days for sending the email, her computer use privileges were

revoked for the remainder of the semester, and she was ejected from her position on the school newspaper for abusing her e-mail access privilege.

At home and on her own computer, Ms. Aaronson created a blog on her FaceSpace profile that addressed her complaints with the school's administrators. When she returned to school, she told a few friends about it, and made occasional updates to it during study hall. She also continued her bi-weekly column on issues concerning students, just as she did when she was on the school's newspaper staff. In an October 6th post, Ms. Aaronson complained about preferential treatment given to athletes and cheerleaders by certain teachers at LBHS. She named and cited examples of bad behavior or sub-standard academic performance that were given a pass by teachers. She argued that the school emphasized athletics to an unhealthy degree at the expense of what she argued are other worthwhile extracurricular activities, like CITY.

After a story about the blog appeared in the school newspaper, it became popular among the students. As a result, the teachers and athletes named in the blog complained to the school administrators. The principal ordered Ms. Aaronson to remove her blog because the blog had become a "distraction," "harmed school morale," and was disruptive. When Ms. Aaronson refused, Mr. McAllister suspended her for another ten days. Students who learned of Ms. Aaronson's suspension circulated a petition calling for the reversal of her suspension, and approximately one-third of students at LBHS signed the petition. The petition was presented to Mr. McAllister.

On October 15th, Ms. Aaronson used her personal computer and personal e-mail account to send a profanity-laced e-mail to her friend Ashley Thomas' personal e-mail account. Ms. Aaronson expressed her discontent with the school and the administrators over the suspensions and having to take down her computer science class blog. She used the same derogatory

language to describe Mr. McAllister and her computer science teacher. In addition, Ms. Aaronson attached a link to a clip of a Halloween episode of a popular cartoon show in which all of the teachers turned into zombies and were subsequently killed by students. The statement, “Wouldn’t that be nice” appeared at the end of the clip. After Ms. Aaronson and Ms. Thomas had a falling out, Ms. Thomas posted the message on her FaceSpace page and forwarded the message to the teacher and to Mr. McAllister. The teacher complained to Mr. McAllister and demanded that Ms. Aaronson be expelled, citing concerns about the safety of the teachers and administrators at the school. When Ms. Aaronson did not apologize, Mr. McAllister added another ten days to her suspension and initiated expulsion proceedings.

Kiersten Aaronson filed this action claiming that the principal, and other school administrators, violated her First Amendment right to free speech. Parties filed cross-motions for summary judgment.

ARGUMENT

I. IT WAS REASONABLE FOR MR. MCALLISTER TO BELIEVE THAT THE SPEECH AT ISSUE WOULD CAUSE DISRUPTION.

The U.S. Supreme Court has held that the First Amendment rights of students in the public schools “are not automatically coextensive with the rights of adults in other settings” *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), and must be “applied in light of the special circumstances of the school environment.” *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 506 (1969). The Supreme Court has observed that “maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures.” *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). The Eighth Circuit wrote, given the flexibility afforded schools in the area of discipline, we must “enter the realm of school

discipline with caution.” *Stephenson v. Davenport Cmty. School Dist.*, 110 F.3d 1303, 1306 (8th Cir. 1997). The *Woodis* court indicated that courts must exercise “care and restraint” in reviewing a school district’s discretionary decision to expel a student. *Woodis v. Westark Cmty. College*, 160 F.3d 435, 438 (8th Cir. 1998).

In this case, Ms. Aaronson’s blog article and the e-mail to her friend originally contained off-campus speech because Ms. Aaronson used her own equipment. Nevertheless, Ms. Aaronson thereafter accessed her blog at school using a school computer, and she told friends about her blog. The speech within Ms. Aaronson’s e-mail to her friend contained threats and profanity directed towards Mr. McAllister, her computer science teacher, and other school administrators. For these reasons, Ms. Aaronson’s speech is not constitutionally protected speech and the actions of the school administrators did not violate her First Amendment right to free speech.

a. Students may not engage in conduct that materially and substantially disrupts the school environment whether the conduct occurs on-campus or off-campus.

Ms. Aaronson’s speech had the potential to cause, and did in fact cause, significant disruption within the school. In *Tinker v. Des Moines Independent Community School District*, the Supreme Court found the following: “Conduct by student, *in class or out of it*, which for any reason, *whether it stems from time, place or place of behavior*, materially disrupts classwork or *involves the substantial disorder or invasion of rights of others* is not immunized by constitutional guaranty of freedom of speech.” 393 U.S. at 513 (emphasis added).

The speech at issue in *Tinker* was students wearing black armbands on their sleeves to show their disapproval of the Vietnam War. *Id.* at 514. The Supreme Court ruled that this type of passive and symbolic speech was protected because it, “neither interrupted school activities, nor sought to intrude in the school affairs or the lives of others.” *Id.* *Tinker* does not require

certainty of a disruption, only that it was reasonable for school officials “to forecast a substantial disruption of, or material interference with, school activities.” *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001).

Following the test set out in *Tinker*, both state and federal courts have repeatedly held that the First Amendment does not immunize students from school disciplinary proceedings where their underlying speech substantially or materially disrupts the school environment, undermines the educational mission of the school or offends the sensibilities of others. In *Donovan v. Ritchie*, 68 F.3d 14 (1st Cir. 1995), the First Circuit upheld a student’s suspension from school for distributing a document which made derogatory comments about the character, behavior and sexuality of other students. In *Boucher v. School Board of School District of Greenfield*, 134 F.3d 821 (7th Cir. 1988), the Seventh Circuit permitted a school to expel a student for publishing an underground newspaper containing an article on how to “hack” into the school’s computer. *Id.* at 828-29.

In applying *Tinker* in the aforementioned cases, the courts made a factual analysis to determine whether the students’ speech created either a risk of or an actual disruption to the school environment or whether it fell within the confines of constitutional protection. In each of those cases, the respective court concluded that the speech in question was not protected. When the *Tinker* test is applied to the facts of this case, it is clear that Mr. McAllister acted properly when he suspended and initiated expulsion proceedings against Ms. Aaronson.

Ms. Aaronson’s e-mail to her friend contained profanity and violence directed towards Mr. McAllister, her computer science teacher, and other school administrators. More strikingly, however, the e-mail contained a video of teachers being killed by students followed by the statement, “Wouldn’t that be nice?” Ms. Aaronson argues it is the school’s response to her e-

mail, and not the speech contained within, that is the true cause of the disruption in school. Given the recent history of school violence in the United States, it is absurd to suggest that Mr. McAllister and the school should ignore or down play the threatening contents of the e-mail. Even if the video was a joke, as Ms. Aaronson argues, the district court found that “the school district had reason to impose a strict punishment to deter jokes about committing violence at school or against school administrators.” It is irrelevant if Mr. McAllister’s actions had an effect on the disruption caused by the e-mail. Pursuant to his obligations as a principal, Mr. McAllister acted to further the best interest of the school, its faculty, and its students.

b. The speech at issue did not deal with a matter of public concern and is therefore not constitutionally protected speech.

The rule of *Tinker*, that a decision to infringe upon student speech must be justified by facts that might reasonably have led a school administrator to forecast substantial disruption of or material interference with school activities, is a “flexible one, and in applying it, we should look at the totality of the relevant facts, including not only the students’ actions, but all of the circumstances confronting the school officials at the time.” *Pinard v. Clatskanie Sch. Dist.*, 446 F.3d 964, 976 (9th Cir. 2006).

Given the circumstances surrounding Ms. Aaronson’s prior suspensions, Mr. McAllister had cause to believe that Ms. Aaronson’s speech would cause a substantial disruption with school activities. The speech contained in both the mass e-mail to the student body, and the speech contained within the e-mail to her friend, related to a private grievance that Ms. Aaronson had with school administrators regarding her suspensions.

In *Lowery v. Euverard*, high school students brought an action against their school principal, football coach, and school board, claiming that their removal from the school football

team violated their First Amendment right to free speech. The students circulated a petition that included the statement, “I hate Coach Euvard and I don’t want to play for him.” The Sixth Circuit correctly held that the defendants “were not obligated to wait until the petition circulated by the players disrupted the team before acting, nor are they now required to demonstrate that it was certain that the petition would substantially disrupt the team. Rather, the defendants must show that it was reasonable for them to forecast that the petition would disrupt the team.” 497 F.3d 584, 593 (6th Cir. 2007). Mr. McAllister and the school district did not have to wait until the blog article substantially disrupted school operations, although it did. Students circulated a petition, presumably during school hours, and it was reasonable for Mr. McAllister to believe that the blog article was a distraction from classwork and a disruption of school activity.

II. MR. JOHN MCALLISTER AND THE LAKE BARTOW COUNTY SCHOOL DISTRICT DID NOT VIOLATE MS. AARONSON’S RIGHT TO FREE SPEECH BECAUSE THE SPEECH AT ISSUE WAS PROFANE AND ANTITHETICAL TO THE MISSION OF THE SCHOOL.

As demonstrated in both the Computer Use Policy and the letter Mr. McAllister sent to parents, LBHS has a policy prohibiting students from “posting information that could be disruptive, could cause damage, or endanger students or staff,” and from “posting false or defamatory information about a person or organization.” Ms. Aaronson’s speech in the e-mail to her friend was plainly profane and promoted violence against school administrators, and the blog article included defamatory information attacking the integrity of students and teachers. Ms. Aaronson was in no way expressing any non-disruptive deeply held political beliefs as was the case in *Tinker*.

The speech included in the e-mail and the blog article is antithetical to school policy. As the Supreme Court noted in *Tinker*, there is a “need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools.” 393 U.S. at

507. In addition, the Supreme Court ruled that the First Amendment does not require schools to tolerate speech that is in violation of established school policy. *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007). In *Morse*, the Supreme Court ruled that when Frederick unfurled his banner that read “Bong Hits for Jesus,” it was not in violation of the First Amendment to take actions against the speech because, “it promoted illegal drug use in violation of established school policy.” *Id.* Similarly, in this case, Ms. Aaronson acted in violation of established school computer use policy. Therefore, Mr. McAllister’s actions toward Ms. Aaronson were not in violation of the First Amendment because they were taken in furtherance of established school policy.

CONCLUSION

Mr. McAllister and the Lake Bartow County Public School District respectfully requests that this Court reverse the circuit court’s decision and find that Ms. Aaronson’s First Amendment rights were not violated by the suspensions for the profane and violent speech contained in the email, and the defamatory language in the blog article. Mr. McAllister legitimately punished Ms. Aaronson for her clear violation of the Lake Bartow High School Computer Use Policy.

Respectfully Submitted,

Melissa Eugene, Esq.
Counsel for the Appellant

Oral Argument Requested: March 21, 2009

RECORD NO. CV-07151985

Supreme Court of the United States

LAKE BARTOW COUNTY PUBLIC SCHOOL DISTRICT,
and JOHN MCALLISTER,
in his official capacity as Principal of Lake Bartow High School,

Petitioners,

v.

KIERSTEN AARONSON

Respondent.

ON APPEAL FROM A FINAL ORDER OF
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

BRIEF FOR RESPONDENT,
KIERSTEN AARONSON

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QUESTIONS PRESENTED

1. Do the personal and satirical views of a public high school student about school faculty, administration and policies, expressed through a private e-mail and a personal blog on a social networking site and written on personal time, constitute on-campus or off-campus speech for the purposes of school regulation and discipline?
2. Do the personal and satirical views of a public high school student about school faculty, administration and policies, expressed through a private e-mail and a personal blog on a social networking site and not intended for mass distribution, constitute harmless political speech or “disruptive cyberspeech” justifying disciplinary action?

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PRELIMINARY STATEMENT

Plaintiff/Respondent, Kiersten Aaronson, filed a suit pursuant to 42 U.S.C. § 1983 against Defendant/Petitioner Lake Bartow County Public School District and John McAllister in his official capacity as Principal of Lake Bartow High School, in the United States District Court for the Eastern District of Calihoma. The complaint alleged violation of Respondent's First Amendment rights by suspending her and threatening expulsion in response to her controversial Internet speech. Both parties filed cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The district court denied Respondent's motion and granted Petitioner's.

Respondent subsequently appealed to the United States Circuit Court for the Fifteenth Circuit. Reviewing the district court's holding *de novo*, the circuit court reversed, denying Petitioner's motion while simultaneously granting Respondent's.

Petitioner subsequently filed for a writ of *certiorari* with the United States Supreme Court. The Supreme Court granted the writ.

STATEMENT OF THE CASE

Kiersten Aaronson ("Ms. Aaronson") is a junior at Lake Bartow High School ("LBHS" or "the school"), a large public high school in the Lake Bartow County School District. Ms. Aaronson is an active and involved member of the LBHS student community. The vocal Ms. Aaronson is not only the former Marketing & Design Editor for the school's student newspaper, she is also founder and president of Computer/Information Technology for Youths ("CITY"), a student group dedicated to promoting cyber-citizenship among young people.

In September 2008, Ms. Aaronson composed a blog in her advanced computer science class critical of school policy and culture. When asked to remove such criticism, Ms. Aaronson

refused on the grounds that she had a First Amendment right to voice her opinions. The school subsequently suspended her for two days, after which Ms. Aaronson sent out an e-mail over the school newspaper listserv again challenging school policies. She was suspended for five days for the e-mail.

Ms. Aaronson opted to continue her criticism of the school in more private Internet fora. On October 6, Ms. Aaronson created a blog on her FaceSpace profile criticizing the school's alleged favoritism for athletics over other student programming. It also decried the preferential treatment that athletes and cheerleaders seemed to receive from the faculty and administration. The school newspaper caught wind of the blog and published an article citing its contents. The administration, citing concerns over "harmed school morale", suspended Ms. Aaronson again. This time, however, one-third of the student body signed a petition calling for reversal of Ms. Aaronson's suspension. Frustrated by what she perceived to be the overly harsh actions of the teachers, Ms. Aaronson privately sent a Halloween cartoon clip to her friend, Ashley Thomas, depicting students battling teachers-turned-zombies with the cathartic phrase, "Wouldn't that be nice?" attached to the end. After a falling out, Ms. Thomas leaked the contents of the private e-mail to students and at least one school administrator. Principal John McAllister tacked on another ten-day suspension and initiated expulsion proceedings against Ms. Aaronson.

ARGUMENT

The First Amendment to the United States Constitution declares that "Congress shall make no law...abridging the freedom of speech..." U.S. CONST. amend. I. The central purpose of this provision is to protect the free exchange of political ideas, cultural views, and social commentary without fear of government reprisal. Its protections extend to every unit of government, federal, state, or local, and even to students in taxpayer-funded public schools. *See*

generally *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503 (1969). If our schools are to serve as cradles of democracy in the twenty-first century, then it is imperative that they promote the most basic democratic value of free speech.

While it is true that the rights of public school students to free speech are not “automatically coextensive” to the rights of adults in other settings, this does nothing to diminish its core applicability. *See Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007). In the first instance, it must be noted that while a school may supervise a student in a parental capacity during school hours and/or at school facilities, it may not extend its disciplinary reach into speech or conduct in areas where a teenager reasonably expects her speech and conduct to be private. *See, e.g., Thomas v. Bd. of Educ.*, 607 F.3d 1043, 1051 (2d. Cir. 1979). In the context of “cyberspeech”, where a student engages in speech that originates off-campus, intended for a limited audience, and expressive of political opinion, it is protected by the First Amendment against school regulation.

I. MS. AARONSON’ SPEECH CONSTITUTED OFF-CAMPUS SPEECH BECAUSE IT ORIGINATED OFF-CAMPUS AND WAS NOT INTENDED FOR ON-CAMPUS DISTRIBUTION.

A. The Court should adopt the location-centered approach to determine what constitutes “on-campus” cyberspeech because it is more consistent with recent First Amendment jurisprudence and general notions of fair play and due process.

The growth of the Internet as a popular medium for interpersonal communication has created a whole host of new First Amendment issues pertaining to its regulation. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997) (deciding in a case of first impression that First Amendment rights extend into cyberspace). Perhaps the most difficult question it raises is with regard to the physical and geographical boundaries of cyberspeech. Regulation of student cyberspeech creates a number of due process burdens on young people whose freedom of expression in the form of a

blog, an e-mail, or a posting on a community message board, may be chilled by the prospect that its universal accessibility may result in school discipline. As such, considerations of fundamental fairness require a clear, unified standard that draws a clear, bright line where the distinction between a student's school and personal lives is otherwise blurred.

The location-centered approach adopted by the Fifth Circuit in *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960, 974-75 (5th Cir. 1972), provides the best and most fair standard for when cyberspeech is considered to be "on-campus", for two reasons. First, it creates a clear standard, understandable to students, parents, faculty, and administrators, and is easily manageable by the courts. Second, any "mixed" approach that allows for the punishment of students for off-campus cyber speech that is vaguely "directed at" or "intended for" a school audience is a slippery slope that would effectively chill the rights of students to freely comment on their academic experiences online.

In *Shanley*, the Fifth Circuit held that a public school could not discipline students who distributed for on-campus consumption a private student newspaper that was printed off-campus during non-school hours. *Id.* The court reasoned that the school board in that case was attempting to enlarge its authority over students beyond which its inherent powers permitted. *Id.* A public school may act *in loco parentis* (i.e., where the school acts in a parental supervisory role) while a student is within the schoolhouse doors, thereby constraining the exercise of a student's First Amendment rights; it may not, however, act as a censor over its students at all hours of day and night and in any place where a student may speak. *See Thomas*, 607 F.3d at 1051.

If such a clear line between on- and off-campus speech applies to print media, then it surely should apply to a blog on a social networking web site. The Court has generally applied

the same First Amendment principles to both traditional modes of communication and so-called cyberspeech. To refuse to extend the *Shanley* bright line in this case would be a peculiar anomaly. In response to an advance in communications technology, the Court would be rolling back the ability of teenagers to freely use that technology. The civic lesson enmeshed in that rule is that a student should not count on the sounding of the school bell as an indication that she may now freely exercise her First Amendment rights. To allow schools to regulate cyberspeech conducted on a student's personal time with their own personal equipment would be the equivalent of allowing a school to shut down a printing press in a student's basement.

Furthermore, alternative rules that allow for the regulation of off-campus speech that is "intended for" or "directed at" school audiences and carry some sort of "impact" create a blurry, subjective standard that does not provide students with sufficient notice as to when their cyberspeech will be regulated. *See J.S. v. Bethlehem Area School Dist.*, 807 A.2d 847, 847 (Pa. 2007). Depending on the facts of a particular case, blog contents that reach a school audience could be considered "purely out-of-school conduct which subsequently carried over into the school setting" accidentally, or one could say that such speech was "aimed" at a school audience. *Cf. Layshock v. Hermitage School Dist.*, 412 F. Supp. 2d 502, 507 (W.D. Pa. 2006). Discerning the intended audience of a teenager who posts on a social networking site would be a tricky proposition for the courts.

The intent rule proposed by the Petitioners also effectively creates a double standard for printed speech and cyberspeech. Though the student newspaper in *Shanley* was undoubtedly intended for a school audience, its on-campus distribution was irrelevant to this Court's determination that because the speech originated off-campus, such speech was beyond the reach of school discipline. *See Shanley*, 462 F.2d. at 974-75. It makes no sense to provide First

Amendment protection for off-campus printed speech intentionally distributed on-campus while simultaneously denying such protection for off-campus cyberspeech the court determines is generically “aimed” at a school audience without intentional advertising or distribution. Such would effectively be the outcome if this Court overturns the Circuit Court’s decision.

B. Ms. Aaronson’s e-mail and FaceSpace blog constitute off-campus speech because they were created on her own personal time with her own personal computer and, alternatively, were not intended for school-wide consumption.

The Court should apply the location-centered approach to Ms. Aaronson’s e-mail and FaceSpace blog and hold that they both constitute off-campus speech and are beyond the reach of school regulation. *Cf. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002); and *Coy ex rel. Cox. v. Bd. of Educ.*, 205 F. Supp. 2d 791, 799 (N.D. Ohio 2002). Alternatively, even if this Court rules that some instances of off-campus cyberspeech may be regulated, Ms. Aaronson’s speech would still be beyond regulation because it was not intended for a school-wide audience.

Both parties have stipulated that the two particular instances of cyberspeech at issue in this case – her October 6th blog and October 15th personal e-mail – originated on Ms. Aaronson’s personal computer and were created on her own personal time. If the Court consistently applies the location-centered approach that extends the *Shanley* line from print speech to cyberspeech, it is unquestionable that Ms. Aaronson’s speech should be deemed “off-campus” and, therefore, off-limits to any school regulation.

The facts also clearly indicate that Ms. Aaronson did not intend for the speech to be brought on-campus for the purposes of the intent-centered approach. Ms. Aaronson did not post the October 6th blog on a school or community message board where it was intended to be accessed by a school audience. Rather, Ms. Aaronson posted the blog on a social networking

site, FaceSpace. Generally speaking, blogs on social networking sites are written for a limited audience often consisting only of friends and associates with whom the author has chosen to associate with online. Thus, the original target audience for the blog was not the school at-large, but only for Ms. Aaronson's friends and for the purposes of venting frustration over school policies with regard to athletics funding. The blog only reached a wider audience at Lake Bartow High School after the school newspaper wrote an article drawing attention to it.

Ms. Aaronson's October 15th e-mail to Ashley Thomas merits even greater protection than her blog. The e-mail was neither aimed at school personnel nor brought on campus by its original author. Ms. Aaronson addressed the e-mail to Ms. Thomas from her private account. It was Ms. Thomas who posted the clip on her FaceSpace page and forwarded it to school administrators. Thus, even under the rule proposed by the Pennsylvania Supreme Court in *Bethlehem*, the e-mail would not be subject to regulation under the First Amendment. *Cf. id.* at 847.

II. MS. AARONSON SHOULD NOT BE SUBJECT TO SCHOOL DISCIPLINE FOR CYBERSPEECH THAT IS POLITICAL OR SATIRICAL IN NATURE AND WHICH HAS NOT CAUSED ANY MATERIAL DISRUPTION TO THE SCHOOL.

A. The content of Ms. Aaronson's FaceSpace blog is political in nature and, therefore, is entitled to broad First Amendment protection.

Even assuming that Ms. Aaronson's cyberspeech is deemed to be on-campus speech for the purposes of school regulation, it is still entitled to protection on the basis of the substance of its content. Specifically, her FaceSpace blog criticizing Lake Bartow High School for alleged favoritism toward athletics over other extracurricular programs falls under the category of political speech that goes to the heart of the First Amendment.

The core purpose of the First Amendment is to protect the free flow and exchange of ideas about issues of general concern to the community. *Cf. Virginia v. Black*, 538 U.S. 343, 365 (2003). Open debate over public policy is vital to the preservation of an active democratic society. As this Court noted in *Tinker*, while the constitutional rights of students in public schools do not extend to the same outer limits as those of adults in other settings, the core function of those rights is preserved. *See id.* at 511. The right to debate any issue is not discarded once a student enters through the schoolhouse door. *Id.* at 506. Indeed, if the civic mission of schools is to produce democratic citizens, it is antithetical to that mission to restrict criticism of school policies. *Id.* at 511. Just as the armbands worn by students in *Tinker* could not be censored simply because they disagreed with official government policy, neither can Ms. Aaronson's blog subject her to punishment simply because it disagrees with official school policy.

B. Ms. Aaronson's private e-mail attachment featuring a Halloween cartoon clip is satirical in nature and did not cause a material disruption to the school's activities.

Under the *Tinker* standard, public schools may restrict the First Amendment rights of students where speech causes a material disruption to school activities. *Id.* at 509. An example of such speech might be the promotion of an illegal activity, such as the use of illicit drugs. *See generally Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007). The purpose of the material disruption standard is to prevent students from specifically inciting incendiary reactions from a school's faculty, administration, and student body. Material disruption does not encompass speech that is merely controversial or offensive. *Tinker*, 393 U.S. at 509. Such an application serves as a means of defeating the core purpose of the First Amendment rather than providing a reasonable delimitation thereof.

A clip from a Halloween episode of a popular cartoon in which students shoot and kill teachers-turned-to-zombies is simply too fictionalized to be viewed as a serious threat equivalent to real material disruption, on three primary grounds. First, a reasonable person would not view the clip as a real threat to teachers, even with the editorialized comment, “Wouldn’t that be nice?” attached at the end. Given the context of Ms. Aaronson’s embattled relationship with the school administration, a reasonable person would view it as merely a means of “venting” or airing grievances to a friend. Second, any alleged threats to be found within the clip would be so thickly veiled by the format as to be meaningless. Ms. Aaronson selected a cartoon depicting a fantastic scenario more akin to *Shaun of the Dead* than a realistic depiction of horrific shootings at Columbine High School or Virginia Tech. The analysis might be different if Ms. Aaronson had actually articulated a threat to a faculty member or administrator. *See, e.g., Wisniewski v. Bd. of Educ. of the Weedsports Cent. School Dist.*, 494 F.3d 34, 38 (2d Cir. 2007). In this case, however, she clearly did not. Third, it is difficult to envision how one e-mail sent to a friend and subsequently passed on to a limited audience could truly be materially disruptive of the academic process.

CONCLUSION

For the foregoing reasons, Respondent Kiersten Aaronson respectfully requests that this Court uphold the decision of the Fifteenth Circuit and sustain her First Amendment rights.

Respectfully Submitted,

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