



Suspension for Student's Facebook/Youtube Rap Video Does Not Violate First Amendment

March 25, 2012

Can a school official discipline a student who, while off-campus, creates a rap video depicting a school official in a vulgar and offensive manner? As both the internet and technology expand, the issue of whether school officials may discipline students for off-campus conduct is being presented in more and more schools and courtrooms across the country.

A federal district court in Mississippi is the most recent court to grapple with this issue. In ***Bell v. Itawamba Cnty. Sch. Bd.***, 11-00056 (N.D. Miss. Mar. 15, 2012), Taylor Bell was disciplined by Itawamba Agricultural School officials after he posted a rap video on both Facebook and YouTube. Notably, Bell's song "was produced off school property, without using school resources, never played or performed at the school, not performed at a school sponsored event, and never accessed by students on school property." However, the video criticized two coaches at the school, alluded to their improper conduct with female students and featured lyrics such as "looking down girls' shirts / drool running down your mouth / messing with wrong one / going to get a pistol down your mouth." After school officials suspended Bell for seven days and transferred him to an alternative school, Bell's mother, Dora Bell, filed a lawsuit on behalf of her son and asserted that school officials violated her son's First Amendment rights.

In agreeing with the school district, U.S. District Court Judge Neal Biggers held that the student's free speech claims were governed by *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). In *Tinker*, the U.S. Supreme Court ruled that school officials can constitutionally restrict student speech if the student speech causes a material or substantial disruption of school activities. In support of extending *Tinker* to apply to off-campus conduct, Judge Biggers held that "it is reasonably foreseeable that a public high school student's song (1) that levies charges of serious sexual misconduct against two teachers using vulgar and threatening language and (2) is published on Facebook.com to at least 1,300 friends, many of whom are fellow students, and the unlimited Internet audience on YouTube.com, would cause a material and substantial disruption at school."

In light of these facts, opponents argue that Judge Biggers misunderstood the standard set forth in *Tinker*. While the Supreme Court has expressly recognized that the First Amendment does not protect material and substantially disruptive conduct in the classroom, opponents note that nowhere in the *Tinker* opinion does the Supreme Court make reference or explicitly state that a school official may regulate *off-campus conduct or speech* as well. In fact, some courts agree with these opponents and have refused to extend *Tinker* to apply to off-campus conduct. For example, in *Blue Mountain and Layshock v. Hermitage School District*, 650 F.3d 915 (3d Cir.

2011), the court held that a Pennsylvania middle school student could not be disciplined by school officials for her MySpace post, which depicted her principal as a sex addict and pedophile. Even though the MySpace post was damaging to the principal's reputation, the court held that the student could NOT be punished by school authorities because the speech was created off campus and did not "substantially disrupt" school as per *Tinker*.

If *Tinker* does in fact extend to off-campus conduct, does this now mean a teacher can discipline a student any time the student says something critical about a school official, while either on or off school grounds? While courts across the country are addressing this issue, the definite answer is unknown. If your institution has questions or concerns about this topic and you would like further information, please email Jim Ryan at jryan@cullenanddykman.com or call him at 516-357-3750. *A special thanks to Hayley Dryer, a third-year law student at Benjamin N. Cardozo School of Law, for helping with this post.