# SCHOOL LAW **UPDATE**

## RECENT SCHOOL LAW DECISIONS

- SEARCHES OF STUDENTS' VEHICLES PARKED ON SCHOOL GROUNDS
- DISCIPLINE OF STUDENTS FOR STATEMENTS MADE ON INTERNET SOCIAL NETWORKING SITES
- NONRENEWAL OF NONTENURED EMPLOYEES

### *State v. Best*
New Jersey Supreme Court, February 3, 2010

**The New Jersey Supreme Court has extended the rule of *In re T.L.O.*, the U.S. Supreme Court case regarding searches of students' property, to allow searches of students' cars parked on school grounds.**

The U.S. Supreme Court, in its 1977 decision *In re T.L.O.*, ruled that a search of a student's property is permissible if it satisfies two tests: (1) it is prompted by a "reasonable suspicion" that the student has engaged in conduct violating the law or school rules, and (2) the "measures adopted" for the search are "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." The New Jersey Supreme Court, in *State v. Best*, now has ruled that students' cars parked on school grounds may be searched to the same extent as their purses, book bags and lockers.

*State v. Best* involved drug charges brought against Thomas Best, an 18-year-old student at Egg Harbor Township High School, and a motion to suppress evidence offered in support of the charges. The evidence, according to the Court's decision, was "a liquid-filled syringe, a fake cigarette with a hole in it that could be used as a pipe, a wallet, a bottle of pills …, a bag of suspected marijuana, a bag containing a white powdery substance, and a vial," all found by an assistant principal during a search of the student's car, which had been parked on school grounds with the permission of the school administration in order for it to be worked on in the school's auto shop. The administrator had conducted the search after receiving a report by another student (suspected of being under the influence of drugs at school) that Thomas had sold him a "green pill." Thomas denied any wrongdoing. The administrator searched him and found three white capsules but no green pills there; he then searched his locker and found no pills; he then searched the car

*Continued on next page*

If you have any questions about the issues discussed in this newsletter, please contact Lance J. Kalik, Esq. or Brenda C. Liss, Esq. of our School Law Group. We send these newsletters to our clients and friends, free of charge, to share our thoughts on new developments in the law. Nothing in this newsletter should be relied upon as legal advice in any particular matter. 

MARCH 2010

***Inside***



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(ignoring Thomas's request that he call his father first).

The Court reviewed *T.L.O.*, which had weighed students' privacy rights against the duty of school officials to "maintain order, safety and discipline." It also reviewed its own 2003 decision in *Joye v. Hunterdon Central Regional H.S. Dist. Bd. of Ed.*, which upheld a random drug testing program for students who wished to park on school grounds; the 2009 U.S. Supreme Court decision in *Safford United Sch. Dist. #1 v. Redding*, which reaffirmed *T.L.O.* (and ruled that a strip-search of a middle school girl suspected of possessing prescription-strength Advil was excessively intrusive and not reasonably related to the objective of the search); and decisions of other courts applying the *T.L.O.* standard to searches of students' vehicles on school grounds. Agreeing with those decisions and rejecting the argument that students have a greater expectation of privacy in their cars than their purses or lockers, the Court stated:

> [T]he need for school officials to maintain safety, order and discipline is necessary whether school officials are addressing concerns inside the school building or on the school parking lot.

Applying the *T.L.O.* standard to the facts presented, the Court concluded that the other student's report that Thomas had given him a green pill was sufficient to warrant interviewing Thomas and searching his clothing for contraband, and given his statements and the results of the initial search, it was reasonable to search his car:

> It was reasonable for the vice principal to believe that defendant may have additional contraband in all areas accessible to him on school property, including his locker and his car.

Notably, the Court did not base its decision on the fact that the car was on school grounds for a specific educational purpose, work in the auto shop, and the decision does not appear to be limited to that circumstance. Based on the Court's ruling, it seems clear that any car belonging to a student, parked on school grounds with permission (and probably those parked without permission), may be subject to a search that is reasonable in inception and in scope. The rule established in *T.L.O.* 33 years ago remains viable, and applies to searches of all areas accessible to students on school grounds, including their private vehicles.

## *Layshock v. Hermitage School District*
Third Circuit Court of Appeals, February 4, 2010

## *J.S. v. Blue Mountain School District*
Third Circuit Court of Appeals, February 4, 2010

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**In two decisions issued the same day by two different panels of the same court, the Third Circuit Court of Appeals has issued seemingly conflicting rulings regarding discipline of students for out-of-school activity on internet social networking sites.**

With these decisions, it is clear that statements made during non-school hours on home computers may be protected by the First Amendment, and students may be disciplined for such statements only if they "cause or threaten to cause a substantial disruption of or material interference with school or [invade] the rights of other members of the school community." Less clear is how strong the evidence of a threat of disruption or interference must be to support disciplinary action imposed on a student for constitutionally protected activity occurring off school grounds.

**Similar Facts:**

In *Layshock v. Hermitage School District*, a high school senior used his grandmother's home computer to create a parody MySpace profile of his principal, using vulgarity and offensive language and portraying the principal in an unflattering manner. The principal was not named, but his picture appeared, having been copied from the school district's website. The student gave other students access to the profile by listing them as his MySpace "friends," and as a result, word of the profile "spread like wildfire" at school. The principal learned of the profile from his eleventh-grade daughter, and found it "degrading," "demeaning," "demoralizing" and "shocking." In the few days before school officials could reliably remove access to MySpace on school computers, computer use was limited to labs and the library where it could be supervised, and computer programming classes were canceled. Layshock was suspended, put in an alternative education program and excluded from extracurricular activities and graduation ceremonies.

Similarly, in *J.S. v. Blue Mountain School District*, two middle school students created a parody MySpace profile of their

principal from a home computer. Like the profile in *Layshock*, this one included no name, but showed the principal's picture, copied from the district website, as well as "profanity-laced statements insinuating that he was a sex addict and a pedophile." The site was designated "public" for one day, and then limited to about 22 students given "friend" status. MySpace was not available on school computers. Another student informed the principal about the site and its "disturbing comments," and at the principal's request that student brought him a printout of the profile. The principal then viewed the profile online, the only time it was accessed at school. He met with the students who created the site and their parents, and each was suspended for ten days. Word spread; two teachers had to "quiet their classes" while students talked about the profile, and students decorated the profile creators' lockers when they returned from their suspensions, causing others to congregate in the hallway. The principal noticed a "severe deterioration in discipline" after publication of the profile and the suspensions. Also, one guidance counselor was required to postpone counseling sessions to proctor a test while another attended meetings with the suspended students.

**Different Rulings:**

Both panels said the cases were governed by the "material and substantial disruption" rule of *Tinker v. Des Moines Indep. Sch. Dist.*, but they applied that rule differently and reached different conclusions. The *Layshock* panel ruled that schools may punish expressive conduct occurring outside of school "only under certain very limited circumstances" involving disruption of school activity. The trial court had found that the conduct had not disrupted the school - that the effects described above had not amounted to disruption - and the school district had not appealed that finding (arguing instead that school officials may punish offensive out-of-school conduct without evidence of substantial disruption, which the court rejected). Therefore, while the Court declined to "define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate," it ruled that the school district was "not empowered to punish [the student's] out of school expressive conduct under the circumstances here."

In *J.S.*, the trial court also had found that the effects of the students' conduct had not amounted to substantial disruption. The appellate panel agreed, but the panel's majority said it was "sufficiently persuaded that the profile presented a reasonable probability of future disruption." It acknowledged that students have "made distasteful jokes about school officials ... since the advent of our modern educational system," but said it could not "overlook the context of the lewd and vulgar language contained in the profile, especially in light of the potential of the Internet to allow rapid dissemination of information." It found it "reasonable to infer" that if not preempted by the suspensions, students and parents "would have begun to question [the principal's] demeanor and conduct at school, the scope and nature of his personal interests, and his character and fitness to occupy a position of trust with adolescent children, on account of the profile's contents." It concluded,

> We simply cannot agree that a principal may not regulate student speech rising to this level of vulgarity and containing such reckless and damaging information so as to undermine the principal's authority within the school, and potentially arouse suspicions among the school community about his character.

A dissenting judge sharply disagreed. In his view, the inference that the profile would arouse suspicion was not supported by the record, as "the profile was so outrageous that no one could have taken it seriously, and no one did." He also was "particularly troubled" by the majority's holding that the "potential impact" of the profile was enough to satisfy the *Tinker* substantial disruption test. The majority's holding, he stated, "significantly broadens school districts' authority over student speech" and "vests school officials with dangerously overbroad censorship discretion."

Thus, all six appellate judges deciding these cases found insufficient evidence of actual disruption to support disciplinary action; the three in *Layshock* ruled that that ended the inquiry. Two judges in *J.S.* believed the evidence of potential disruption also supported disciplinary action, but one disagreed. Given

*Continued on page 4*

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these differing opinions, how a court would rule on a case presenting similar facts in the future - where there is little or no solid evidence of acutal distruption - remains uncertain.

The school district in *Layshock* reportedly is seeking review by the full membership of the Third Circuit Court of Appeals.

### *Lenape Regional H.S. Dist. Bd. of Ed. v. Lenape Dist. Support Staff Ass'n*
New Jersey Superior Court, Appellate Division, February 16, 2010 (unpublished)

### *El-Hewie v. Bd. of Ed. Bergen Cty. Vocational Sch. Dist.*
New Jersey Superior Court, Appellate Division, December 24, 2009 (unpublished)

**Two recent unpublished decisions of the New Jersey Superior Court, Appellate Division, reinforcing school districts' broad discretion to refuse to renew nontenured employees' employment contracts, are worth noting during the upcoming employment renewal season.**

In *Lenape Regional H.S. Dist. Bd. of Ed. v. Lenape Dist. Support Staff Ass'n,* the Court upheld a district's refusal to submit to arbitration on its decision not to renew the contract of a nontenured custodian. The parties' collective agreement stated that dismissal would occur only after a series of "progressive stages aimed at allowing the employee to improve performance." It also provided for arbitration of grievances, except for certain excluded matters, including those that "involve the sole and unlimited discretion of the Board" or "are by law beyond the scope of the Board's authority." The Court first distinguished nonrenewal from termination, finding the provision regarding dismissal inapplicable to nonrenewal of a nontenured employee. It then ruled that N.J.S.A. 18A:27-4.1, providing that an employee "shall be deemed nonrenewed" if he is not recommended for renewal, gives boards discretion to override superintendents' nonrenewal recommendations (but not to do so arbitrarily or capriciously); and that nonrenewal, as a discretionary act, is not grievable.

In *El-Hewie v. Bd. of Ed. Bergen Cty. Vocational Sch. Dist.*, a nontenured teacher challenged his nonrenewal on the ground, among others, that the board of education had failed to mentor and evaluate him in accordance with requirements applicable to alternate route candidates. The Court rejected the challenge, citing *Leang v. Jersey City Bd. of Ed.*, a 2009 New Jersey Supreme Court case reiterating that a board has no obligation to renew the employment of a nontenured employee, and *Dore v. Bedminster Bd. of Ed.*, the 1982 Appellate Division decision stating that a board's "lack of strict compliance" with statutory requirements does not require reinstatement of a nontenured teacher.

Neither of these decisions can provide assurance to boards that their nonrenewal decisions will not be challenged by disappointed employees. They offer some comfort, however, that procedural errors and provisions of collective agreements probably will not provide sufficient basis for overriding their broad discretionary authority in this area.